

The Rule of Law and the Implied Freedom of Communication in Australia



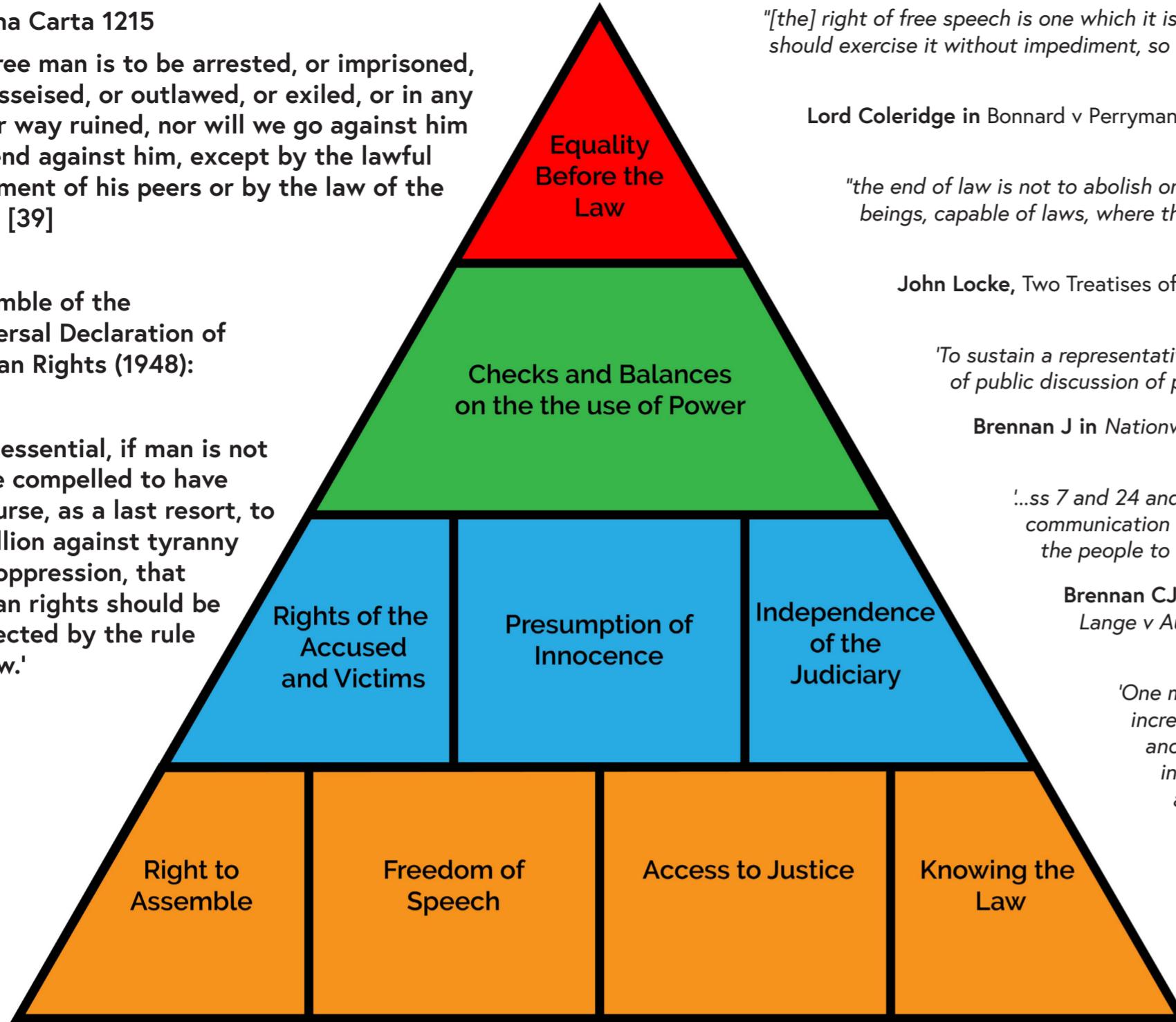
AUSTRALIA'S MAGNA CARTA INSTITUTE
RULE OF LAW EDUCATION

Magna Carta 1215

No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land. [39]

Preamble of the Universal Declaration of Human Rights (1948):

'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.'



"[the] right of free speech is one which it is for the public interest that individuals should possess, and indeed that they should exercise it without impediment, so long as no wrongful act is done."

Lord Coleridge in Bonnard v Perryman [1891] 2 Ch 269, 284)

"the end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings, capable of laws, where there is no law there is no freedom."

John Locke, Two Treatises of Government (1689)

'To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential'

Brennan J in Nationwide News Pty Ltd v Wills [1992] HCA 46

'...ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.'

Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ in Lange v Australian Broadcasting Corporation [1997] HCA 25

'One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion[229]. They are part and parcel of the struggle of ideas.'

Kirby J at 239 in Coleman v Power [2004] HCA 39

'The implied freedom of political communication has never been clear. If there were a federal bill of rights, the implied freedom of communication about government and political matters would be listed. "Bills of rights are not moral or even political philosophies. They are, at best, bullet points from such philosophies."^[222]

Heydon J at 244 in Monis v the Queen [2013] HCA 4

International Agreements and Australian Law

Freedom of speech allows an individual to express their opinion publicly without being punished for it. It is one of the most important, and most debated, freedoms in many societies.

People have been debating freedom of speech, and what, if any, limits should be placed on it, for thousands of years. Over that time, many different approaches have come about.

One of the most well known laws which protects free speech is the First Amendment to the United States Constitution. However, this law has no effect outside the borders of the United States of America.

A number of international agreements such as the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* (ICCPR) provide broad protections for freedom of expression.

"1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Article 20, ICCPR (1966)

However, international law does not provide protections for freedom of expression – as we know international law is not enforceable except when a national parliament, such as Australia, passes a law that explicitly protects freedom of expression.

The Implied Freedom of Political Communication in Australia

Freedom of speech or expression is not explicitly mentioned in the Australian Constitution. However, beginning in the early 1990s, the High Court developed the idea of the 'implied freedom of political communication,' which they said was a constitutional right that limited the power of government and protected political communications.

The implied freedom of political communication is narrower than the freedom of expression described by the ICCPR, and relates to the requirement in the Australian Constitution that the Federal Parliament be elected:

'To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential'

Brennan J in Nationwide News Pty Ltd v Wills [1992] HCA 46

The freedom of political communication is one of the few constitutional rights found in the Australian Constitution.

A legal test called the McCloy Test has been developed to make decisions about whether a law or decision of government is incompatible with the Australian Constitution because it burdens political communication. For more on the McCloy test and the case law see over the page.

The Rule of Law, Accountability and the Use of Power

The rule of law requires that power is used according lawfully. Those who have power, like governments, are accountable for how they use it.

The freedom to speak out publicly about the use of power, or the law, and the freedom of the media are essential principles that support the rule of law in Australia.

The rule of law is strong in a country where people can participate in a debate about legislation and the decisions of those in power openly, and in public. People should not be afraid of the government and its officials: judges, politicians, police, and other government officers.

Appropriate checks and balances on the power of officials ensure that an individual does not feel fearful of being persecuted if they criticise someone who has power.

The Separation of Powers and Freedom of Speech

The separation of powers in Australia can be seen in action when the courts decide cases about the freedom of political communication. In these cases the courts are interpreting the Australian Constitution and considering whether the Parliament has passed laws that are compatible with the Constitution. If the law is found to be incompatible by the courts then the Parliament is required to either strike out or read down the law as instructed by the court.

The Importance of Journalists

Australian society often relies on journalists to investigate the actions of those in power. Freedom of the media is an essential part of maintaining the rule of law.

While many journalists are fearless in trying to expose issues where abuse of power occurs, this can raise difficult legal questions about where journalists get their information.

If a whistle-blower gives confidential government information to a journalist, they may be guilty of a criminal offence, and the journalist may be guilty of an offence if they publish that information publicly. Many journalists feel that increased surveillance and coercive powers of police and law enforcement, as well as a lack of legal protections for journalists and their sources have a 'chilling effect' on the freedom of the media in Australia.

It is important for the rule of law in Australia that press freedom is protected.

Glossary

Representative government - that the Australian Constitution requires the people of Australia elect people to the Parliament to represent them.

Responsible government - that members of the executive (who run the country) are held to account by the legislature (who make the laws).

Struck down - where a law is found to be invalid (unconstitutional) and is declared to no longer be a law.

Read down - where the court decides that words in a law have a more specific or narrower meaning.

The Australian Constitution - the supreme law of Australia which outlines the structure and powers of government

Constitutional right - a right that is found in the Constitution.

Implied right/freedom - a right or freedom found by a judge(s) to exist because the law suggests it does.

Freedom of Political Communication - an implied freedom found in legal cases that limits the power of government to make laws or decisions which burden communicating about political issues. The Australian Constitution suggests it exists because it requires a system of representative democracy.

Coercive powers - These are powers given to law enforcement and intelligence agencies that allow them to compel people to provide information, either oral or documentary, to them when asked. If people refuse to provide the requested information they can be jailed in some circumstances.

Impugned Law - A law whose operation/wording is being challenged in a case. In implied freedom of political communication cases the law a party is arguing that the law burdens the implied freedom (removes or limits it)

The McCloy Test

The McCloy Test was first outlined as the Lange Test in *Lange v Australian Broadcasting Corporation [1997] HCA 25* and then refined in *McCloy v NSW [2015] HCA 34*.

This legal test determines how a Court decides whether a law burdens the freedom of political communication. The test is only concerned with the text and operation of the relevant law, it is not concerned with the actions/speech of the individual subject to the law.

If person wishes to challenge a law by arguing that their freedom of political communication has been compromised, the Court may apply the McCloy Test to decide whether or not a law is invalid. Laws found to be invalid can be struck out, or read down (see the glossary for definitions of these terms)

The McCloy Test has developed and expanded over time and now contains three questions with five key elements that the Court has to address.

The below diagram gives examples of what each question in the test mean and how it has been applied using case law.

However, it does not cover all the intricacies which judges deal with in their full judgments.

The McCloy Test Questions as defined by the High Court

1. Does the law effectively burden the implied freedom in its terms, operation or effect?
2. If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

The third step of the McCloy test is assisted by a proportionality analysis which asks whether the impugned law is "suitable", in the sense that it has a rational connection to the purpose of the law, and "necessary", in the sense that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom. If both these questions are answered in the affirmative, the question is then whether the challenged law is "adequate in its balance". This last criterion requires a judgment, consistently with the limits of the judicial function, as to the balance between the importance of the purpose served by the law and the extent of the restriction it imposes on the implied freedom

McCloy v New South Wales (2015) 257 CLR 178 at 193-195 [2]-[3]

Does this law burden political communication?	YES	Is the law compatible with the Australian Constitution?	YES	Is the law "suitable" and "necessary"?
<p>What does limiting political communication mean? A law which burdens political communication would stop or restrict a person from communicating or publishing comments about politics, and the actions or policies of the government.</p> <p>What does it look like? In <i>Coleman v Power</i> the High Court decided that the freedom of political communication included the freedom to criticise the police, and that a law punishing insulting language burdened the freedom of political communication.</p>		<p>What does compatible with the Australian Constitution mean? If the "purpose" and "means" of a law does not undermine the system of representative and responsible government it is compatible with the Australian Constitution.</p> <p>What does it look like? In the <i>Street Preachers</i> case, the High Court decided that a council by-law which burdened political communication had a purpose and means that were compatible with the Constitution because a law to protect public safety and thoroughfares in public spaces, did not undermine representative and responsible government.</p>		<p>Suitable - there is a rational connection between the purpose of the law and the way it achieves that purpose <i>In Chief of the Defence Force v Gaynor</i> the ADF's response was found to be suitable because dismissing Gaynor was a rational way of maintaining 'discipline, obedience to orders and adherence to standards'.</p> <p>Necessary - there is no alternative way to achieve the purpose of the law in a way which is less of a burden to political communication <i>In Chief of the Defence Force</i> the law was seen as necessary because there was no other way the ADF could deal with someone who was "defiant and intractable".</p> <p>Adequate in Balance - whether the law's purpose is important enough to be worth the restriction placed on political communication <i>In Chief of the Defence Force</i> the regulation used to dismiss Mr Gaynor was found to be adequate in balance because of the importance of the law's purpose, maintaining conduct and behaviour compliant with ADF policy among Army Reservists, and because the court found that its purpose did not concern the holding, expression, and communication of a political opinion, in public or otherwise.</p> <p>In <i>Clubb v Edwards; Preston v Avery</i> the High Court held that the Victorian and Tasmanian laws being challenged were suitable, necessary and had a legitimate purpose in protecting the dignity and well-being of people accessing a lawful medical service.</p>

Coleman v Power [2004] HCA 39

Patrick Coleman was charged and convicted for using insulting words under the *Vagrants Gaming and Other Offences Act 1931 (Qld)* for handing out leaflets in Townsville Mall stating "Get to know your corrupt type coppers" and identifying local police officer Constable Brendan Power as one of the "slimy lying bastards". He was also convicted of assaulting and obstructing a police officer after a scuffle with Constable Power.

The High Court applied the Lange Test and found that criticising police was protected by the freedom of political communication and dismissed the charge. The High Court read down the *Vagrants Act* so that it did not apply to political communication. This meant that the "insulting words" offence remained law, but established a precedent which all lower courts in Queensland would be required to follow in cases similar to *Coleman v Power*.

The High Court did not review Mr Coleman's conviction for assault and obstructing police.

Attorney-General for the State of South Australia v Corporation of the City of Adelaide [2013] HCA 3 - "The Street Preachers Case"

The Street Preachers case concerned two brothers who were preachers of the "Street Church", Caleb and Samuel Corneloup, who preached their religion in the middle of Rundle Mall in the centre of Adelaide.

They were fined for breaching a by-law of the Adelaide City Council which prohibited people from haranguing, canvassing or preaching on a road without a permit or distributing printed matter on any road to passers-by. The same by-law also prohibited using roads to repair vehicles, collect donations, leading or driving livestock and erecting structures such as fences, hoardings, ladders and trestles.

The by-law was challenged in the High Court as being invalid because it interfered with the freedom of political communication. Applying the Lange Test, a majority of the Court found that while the by-law did burden the freedom of communication, its purpose was to prevent roads being obstructed and to ensure safety. This, according to the majority of the court, was a legitimate purpose for the by-law and it was therefore compatible with the freedom of political communication found in the Australian Constitution.

Monis v the Queen [2013] HCA 4

The Monis case dealt with whether a criminal offence, under s471.12 of the *Criminal Code Act 1995 (Cth)* *Using a postal or similar service to menace, harass or cause offence*, was invalid under the Australian Constitution.

The case was first heard in the NSW District Court and they were tried for sending offensive letters to the relatives of Australian soldiers killed in Afghanistan. They argued in the High Court that the offence itself was invalid because it interfered with the freedom of political communication in the Australian Constitution.

The court applied the Lange Test and did not come to an agreement about whether the law had a legitimate purpose. Three justices found that the offence was compatible with the Constitution, three found that it was not. A critical issue was the extent to which freedom of political communication protects offensive communications.

When the High Court is divided in opinion the decision of the lower court stands. The decision of the NSW Criminal Court of Appeal to reject their appeal stood and the District Court heard the case. Monis and Droudis plead guilty and were each sentenced to 300 hours community service in September 2013.

Unions NSW v New South Wales [2013] HCA 58

In the Unions Case, the High Court determined whether a law of NSW which restricted people or organisations not on the electoral roll from donating money to political parties, and limited the amount of money a political party could spend on electioneering was valid.

The Court found that the law limited the flow of political communication because there was a link between the amount of money a political party could get and the amount of advertising it could afford. If the law limited the amount of money and spending a political party could get, then this limited its ability to put across its political ideas through advertising and other means.

The Court then considered if these were reasonable and proportionate limits to political communication given their stated purpose: to prevent corruption. The High Court found that restricting people not on the electoral roll from donating to political parties, as well as limiting the money that a political party could spend on electioneering would not fulfill the purpose of an anti-corruption law.

The court declared the laws were invalid. The Unions case was the first time since 1992 that a law was struck down by the High Court for interfering with the freedom of political communication.

McCloy v NSW [2015] HCA 34

Jeff McCloy, a property developer, challenged the law of NSW as burdening the freedom of political communication because it prevented property developers from donating money to political parties.

McCloy's case was unsuccessful, the High Court finding that the laws which placed a cap on political donations, and those which specifically prevented property developers 'not only do not impede the system of representative government provided for by the Constitution, but enhance it.'

The Lange Test was refined in McCloy and a three stage proportionality test which asked if the law was justified was applied in this case. The court found that the laws about donating money to political parties were suitable, necessary and adequate in balance.

Chief of Defence Force v Gaynor [2017] FCAFC 41

Bernard Gaynor was dismissed from his position in the Army Reserve for publicly expressing his opinion via social media and on his website about Australian Defence Force (ADF) Members who participated in the Sydney Gay and Lesbian Mardi Gras. Gaynor also made comments objecting to ADF policies supporting trans-gender people. Gaynor's comments were found to be against ADF policies and after a process of review he was dismissed.

Gaynor in *Gaynor v Chief of the Defence Force (No 3) [2015]* challenged the ADF regulations that gave the Chief of the Defence Force the power to dismiss him. He argued that the decision to dismiss him was contrary to the implied freedom of political communication in the Australian Constitution.

Justice Buchanan of the Federal Court considered the ADF regulations according to the Lange Test, and whether Gaynor's dismissal had a legitimate purpose.

Buchanan J ordered that Gaynor should be reinstated.

The Chief of the Defence Force appealed this decision to the Full Bench of the Federal Court in *Chief of the Defence v Gaynor [2017]*. Justices Perram, Mortimer and Gleeson disagreed with Buchanan J and held that Gaynor's dismissal was lawful.

The implied freedom is concerned with law and not rights, any assessment of whether the implied freedom is limited by the law not whether someone's personal rights have been effected. The Full Bench found that "the implied freedom does not involve, nor does it recognise or confer, any personal rights on individuals..." [48].

Clubb v Edwards; Preston v Avery [2019] HCA 11

Mrs Clubb and Mr Preston challenged the laws in Victoria and Tasmania respectively, that restrict the ability of protesters to approach within 150 metres of a medical clinic that provides abortion services. They argued that they were engaged in political communication. The High Court by majority dismissed their appeals.

The majority, Kiefel CJ, Bell J, Keane J, Nettle J, applied the McCloy Test and found that:

The restriction on communications resulting from the legislation may create a burden on the implied freedom of political communication to the degree that both the appellants were not stopped from expressing their anti-abortion sentiments if indeed they are considered political views, they were just required to stand 150 metres from the abortion clinics.

The laws in question had a legitimate purpose in ensuring the safety and wellbeing of, and the preservation of the privacy and dignity of, persons accessing lawful medical services.

The laws were not manifestly disproportionate in their impact.

In respect of Mr Preston's appeal, Kiefel CJ, Bell and Keane JJ determined that the Tasmanian legislation was more likely to be intrusive on the implied freedom as the Act directed at "protests" and unlike the Victorian legislation there was no object the provision was not limited by a requirement that the protest be reasonably likely to cause distress or anxiety.

The High Court unanimously found safe access zones around reproductive health clinics to be constitutionally valid and dismissed both appeals