

# Civil Liberties and the Internet

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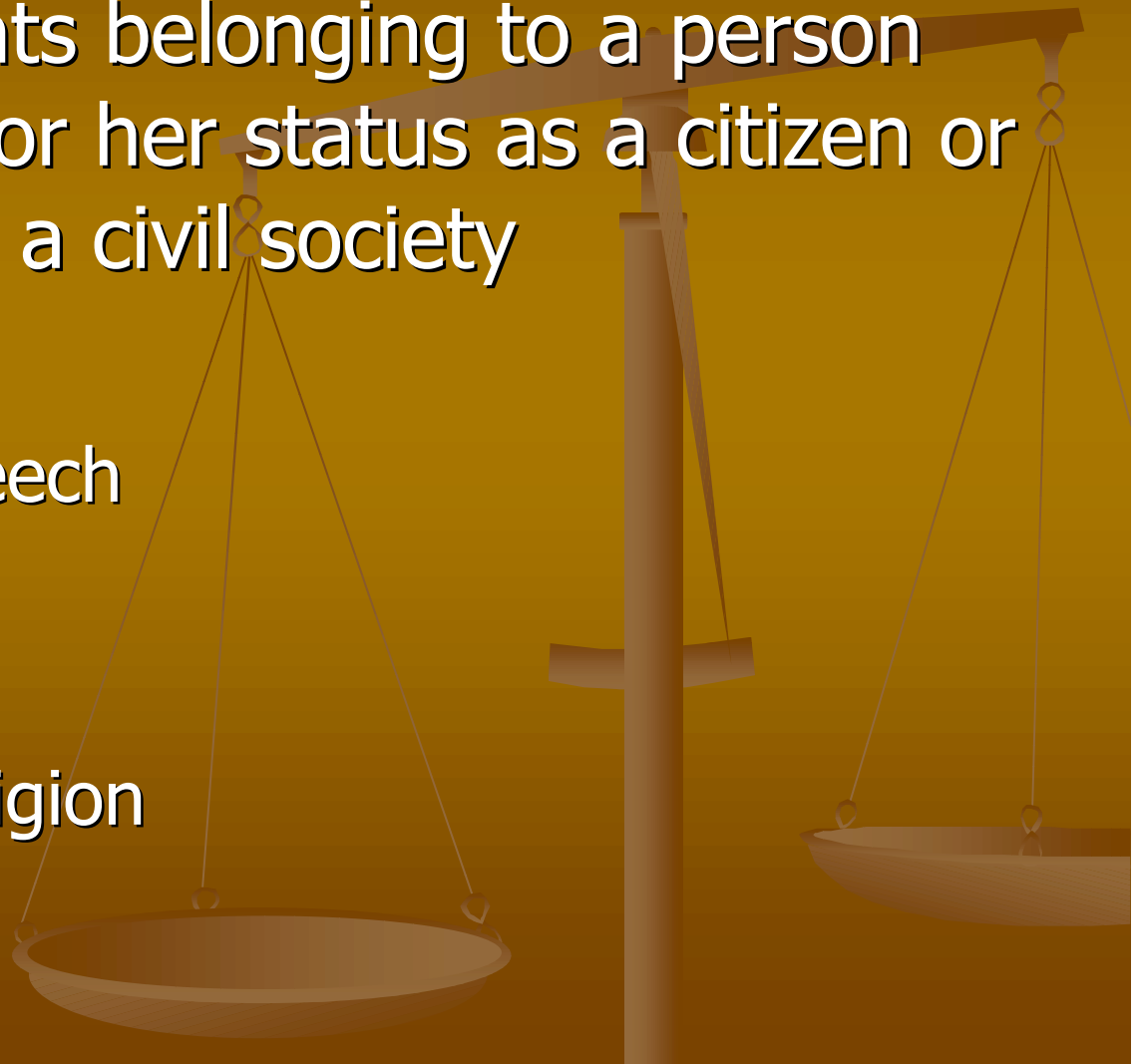
# Ground Rules

- No Pride of Professorship
  - Article I, Section 8 (my area)
- Equal Coverage
  - What is
  - What should be
- Questions/Comments Welcome
- At the End
  - If you liked it, thank you.
  - If not, Max put me up to it.



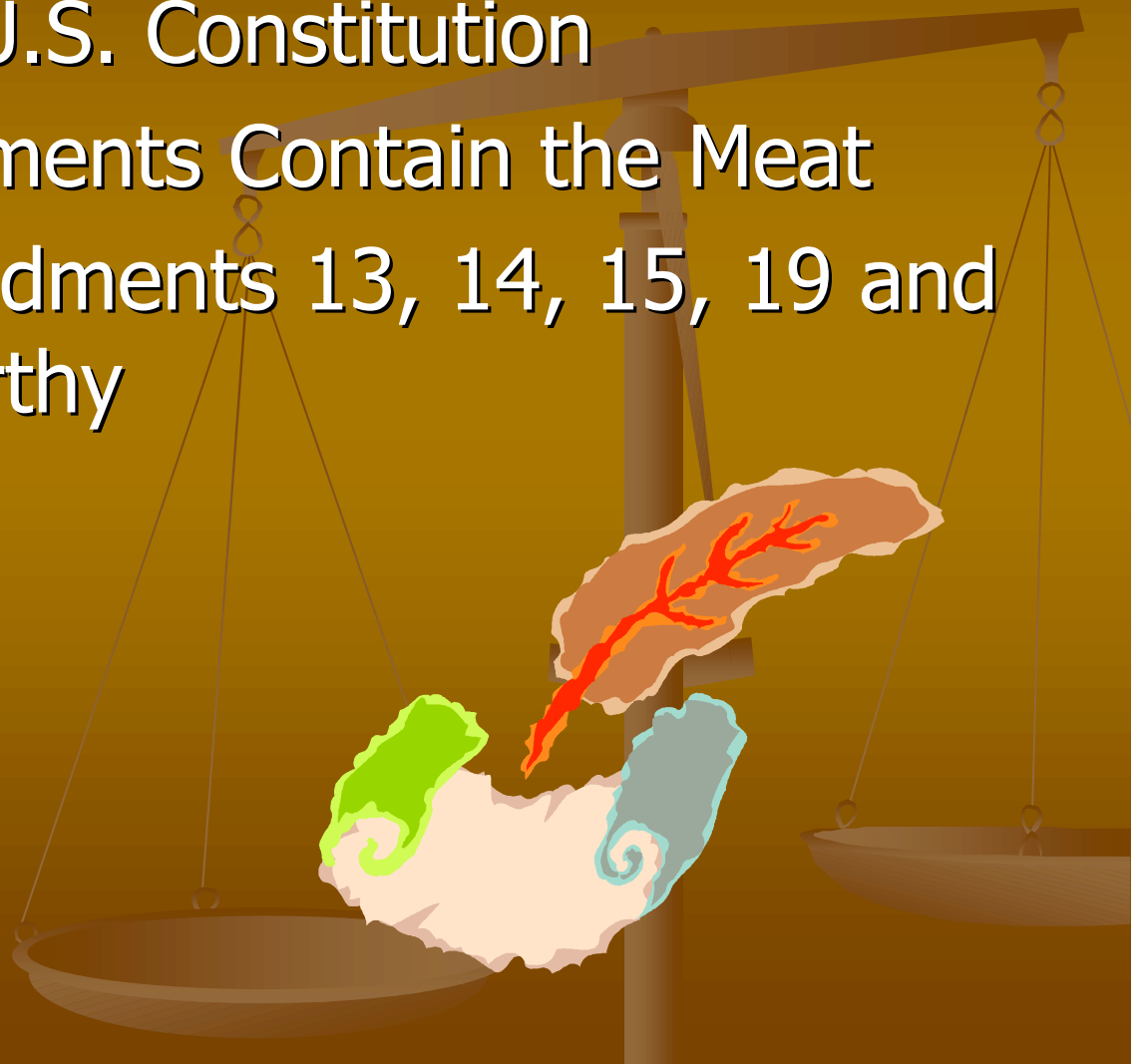
# Overview of Civil Rights

- Definition: Rights belonging to a person by virtue of his or her status as a citizen or as a member of a civil society
- Examples:
  - Freedom of Speech
  - Privacy
  - Right to Vote
  - Freedom of Religion



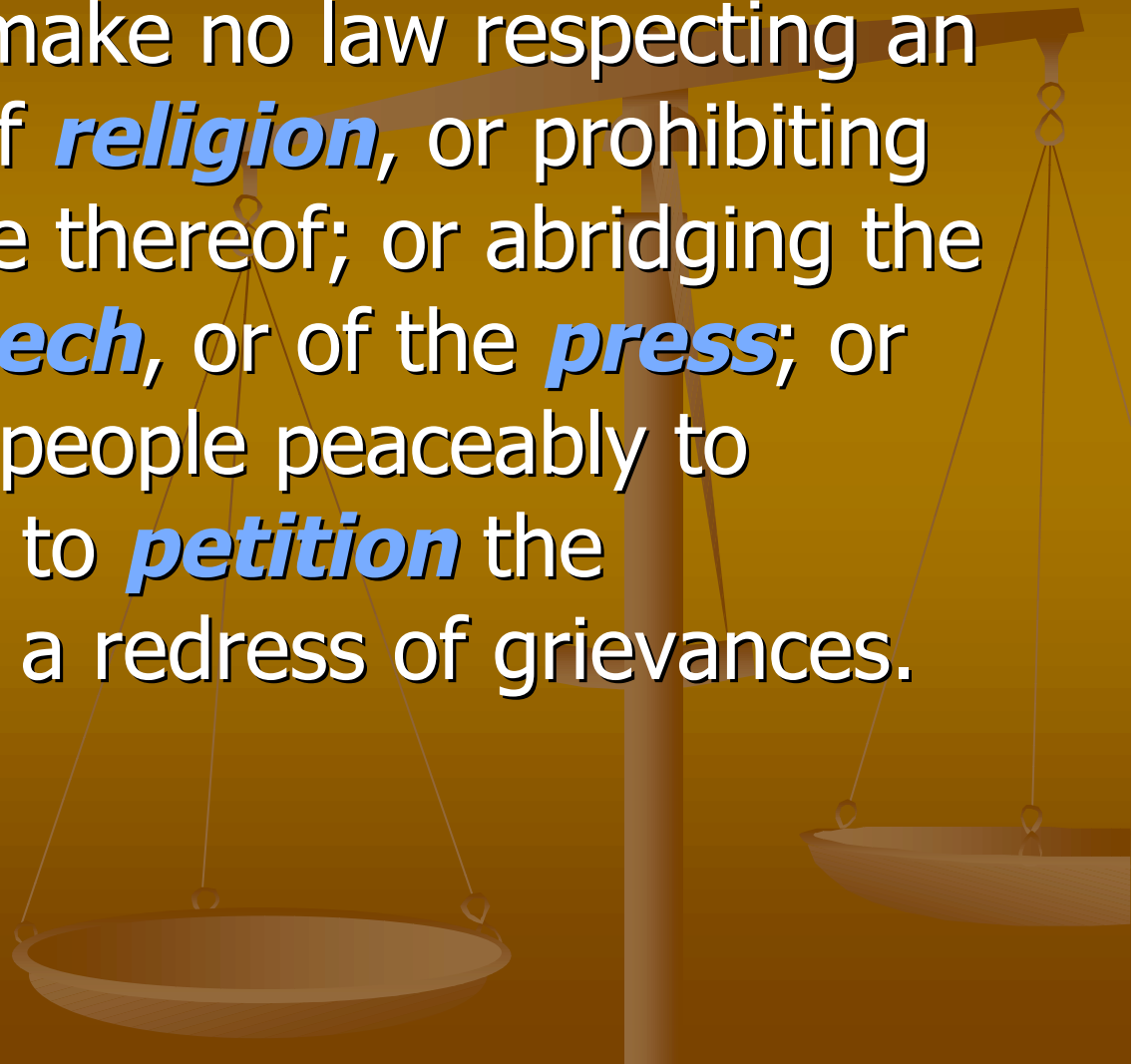
# U.S. Bill of Rights

- Nothing in the U.S. Constitution
- First 10 Amendments Contain the Meat
- However, Amendments 13, 14, 15, 19 and 21 also noteworthy



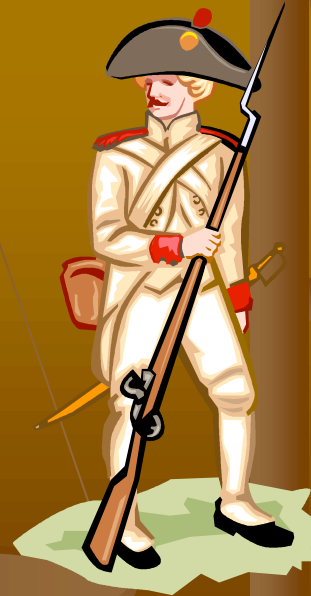
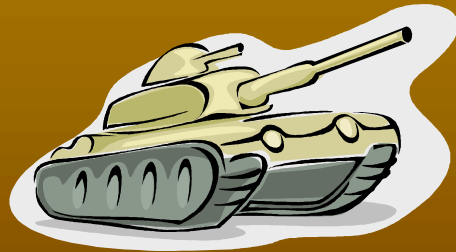
# 1<sup>st</sup> Amendment

- Congress shall make no law respecting an establishment of **religion**, or prohibiting the free exercise thereof; or abridging the freedom of **speech**, or of the **press**; or the right of the people peaceably to **assemble**, and to **petition** the Government for a redress of grievances.



# 2<sup>nd</sup> Amendment

- A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and ***bear Arms***, shall not be infringed.



# 4<sup>th</sup> Amendment

- The right of the people to be secure in their persons, houses, papers, and effects, against ***unreasonable searches and seizures***, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

# 5<sup>th</sup> Amendment

- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a **Grand Jury**, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the **same offence to be twice put in jeopardy** of life or limb; nor shall be compelled in any criminal case to be a **witness against himself**, nor be deprived of life, liberty, or property, without **due process** of law; nor shall **private property** be taken for public use, without just compensation.

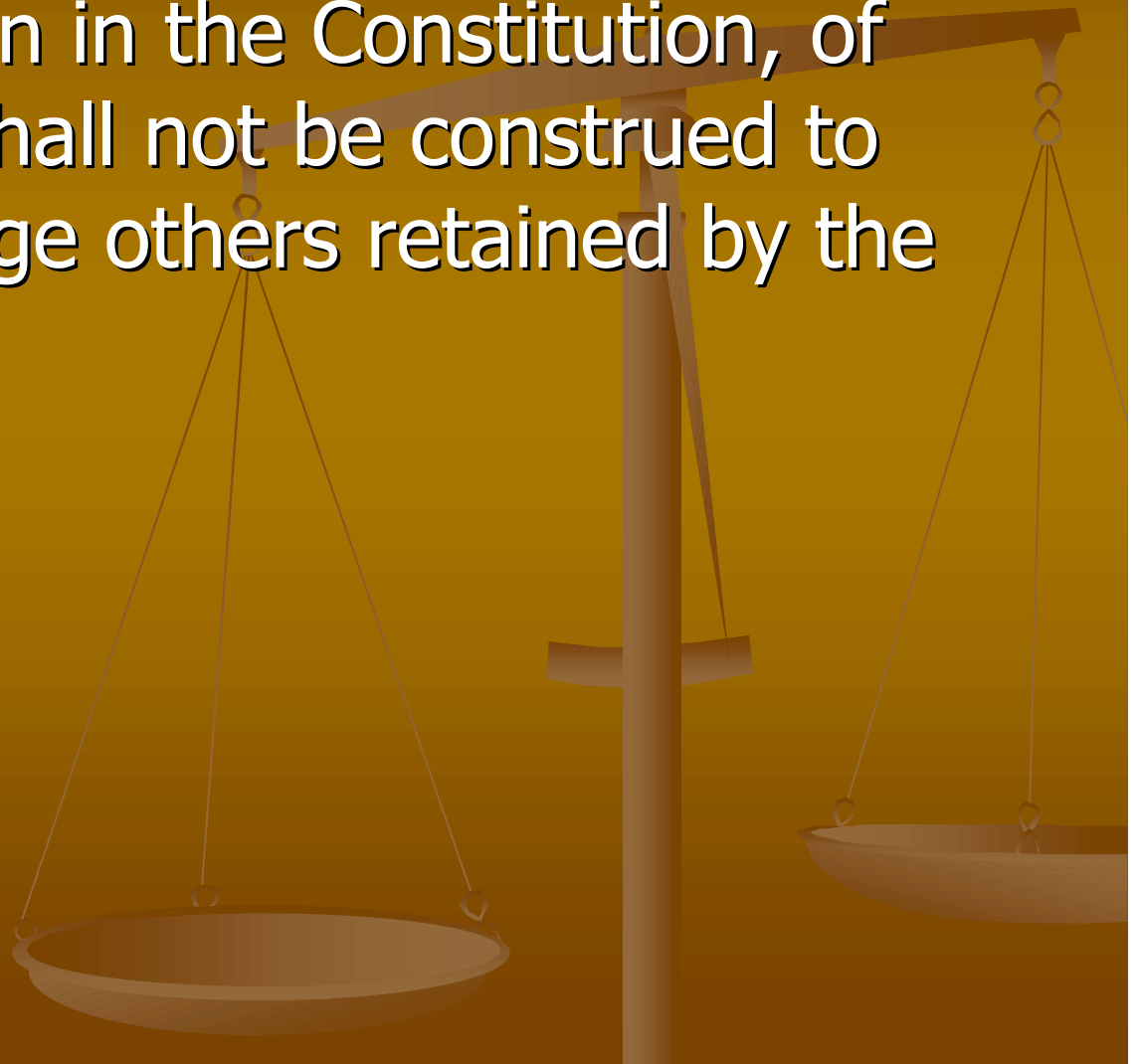


# 6<sup>th</sup> Amendment

- In all criminal prosecutions, the accused shall enjoy the right to a **speedy** and **public trial**, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be **informed** of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for **obtaining witnesses** in his favor, and to have the **Assistance of Counsel** for his defense.

# 9<sup>th</sup> Amendment

- The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.



# 10<sup>th</sup> Amendment

- The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.



# 13<sup>th</sup> Amendment

- (Abolition of Slavery)

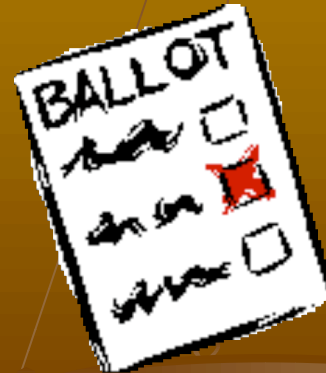


# 14<sup>th</sup> Amendment

- Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any **State** deprive any person of life, liberty, or property, without **due process** of law; nor deny to any person within its jurisdiction the **equal protection** of the laws.

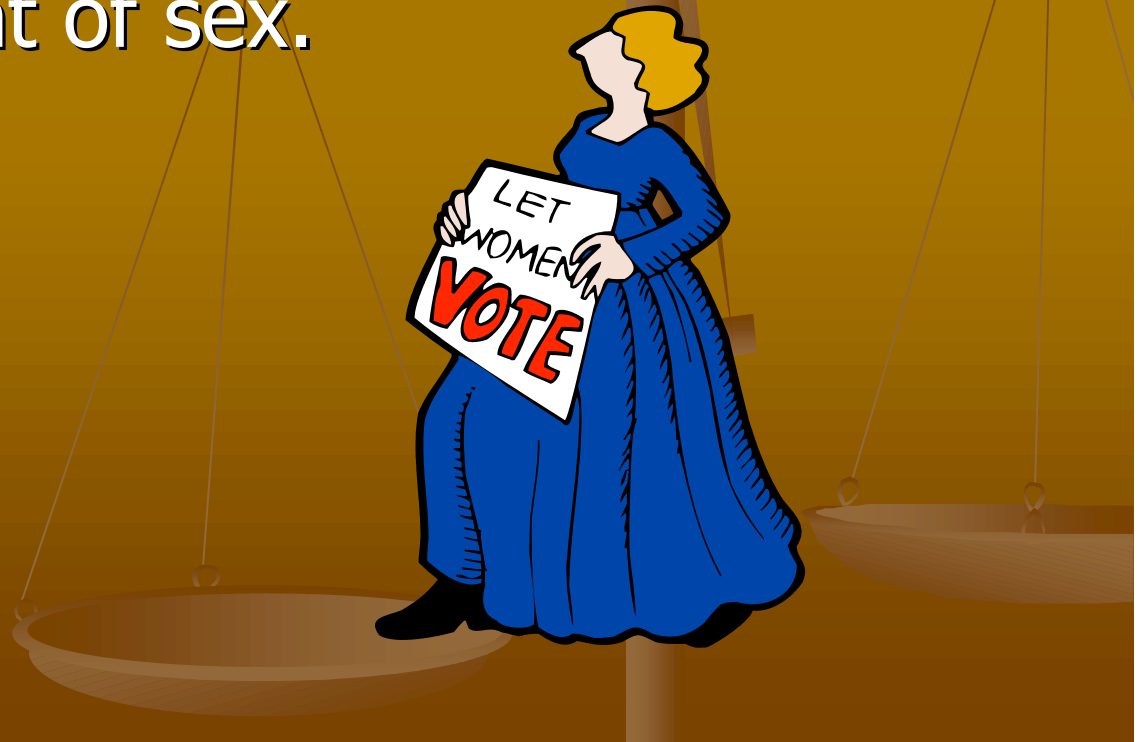
# 15<sup>th</sup> Amendment

- Section. 1. The right of citizens of the United States to **vote** shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.



# 19<sup>th</sup> Amendment

- Section 1. The right of the citizens of the United States to **vote** shall not be denied or abridged by the United States or by any State on account of sex.



# 21<sup>st</sup> Amendment

- Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
- (A little Constitutional humor)





# What is Missing?



- Privacy

- Been implicated in the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 9<sup>th</sup> Amendments
- Primarily a function of S.Ct. law

- Equal Protection/Federal

- Not been an issue
- Would likely be imputed into the 9<sup>th</sup> Amendment

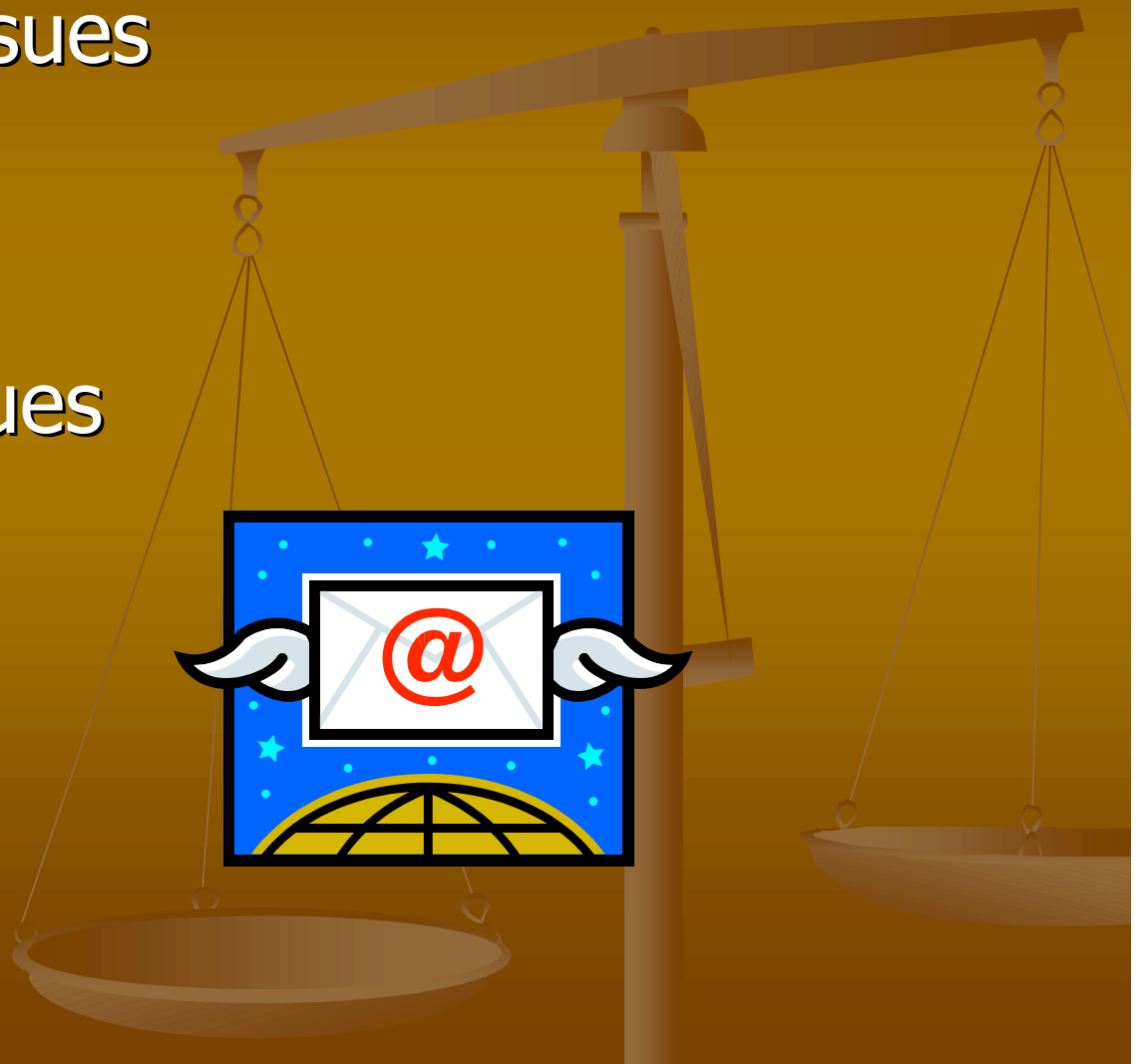
# International Twists



- United Nations
  - Universal Declaration of Human Rights (1948)
- Treaties
  - International Covenant on Civil and Political Rights (1966)
  - International Convention on the Elimination of All Forms of Racial Discrimination (1969)
  - Convention on the Elimination of All Forms of Discrimination Against Women (1981)

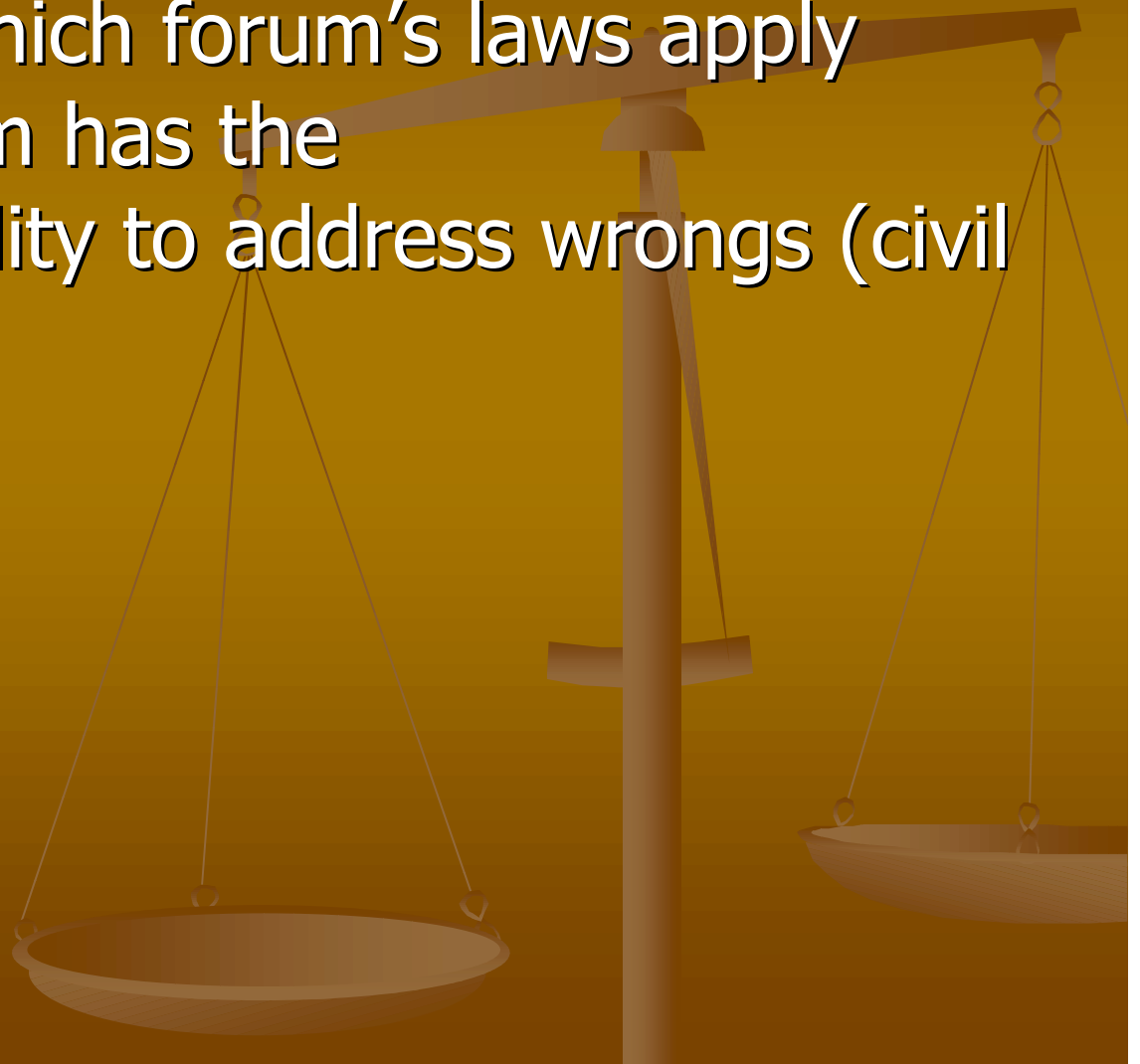
# Internet Topics

- Jurisdictional Issues
- Access Issues
- Content Issues
- Prosecution Issues



# Internet Jurisdiction

- Jurisdiction: Which forum's laws apply and which forum has the right/responsibility to address wrongs (civil and criminal)?



# Federalism

- 10<sup>th</sup> Amendment reserves rights to states
- If federal jurisdiction applies, does that violate states' rights
- If several states are involved, how does each state preserve its rights?
- What about taxes?



# International Implications

- All the foregoing questions as to Federalism apply
- Additionally, what about the effects of:
  - Embargo
  - War
  - Treaties between 3<sup>rd</sup> nations



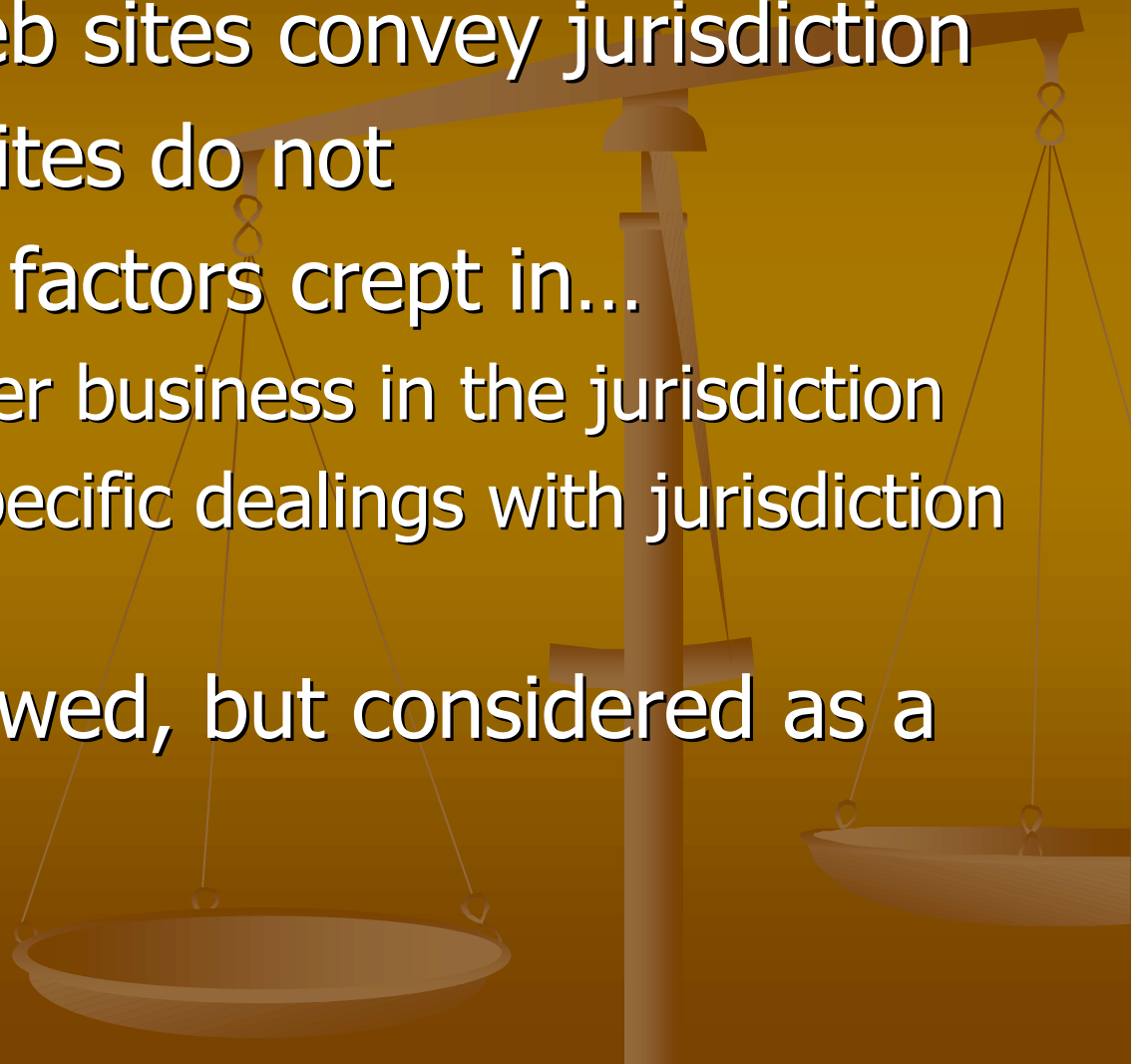
# Traditional Jurisdiction

- Due process concerns of the 14<sup>th</sup> Amendment
- General rule in jurisdiction was that it be exercised so as to “not offend the traditional notions of fair play and substantial justice” *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)



# Passive/Active Test

- “Interactive” web sites convey jurisdiction
- “Passive” web sites do not
- However, other factors crept in...
  - Conducting other business in the jurisdiction
  - Entering into specific dealings with jurisdiction residents
- Not largely followed, but considered as a factor





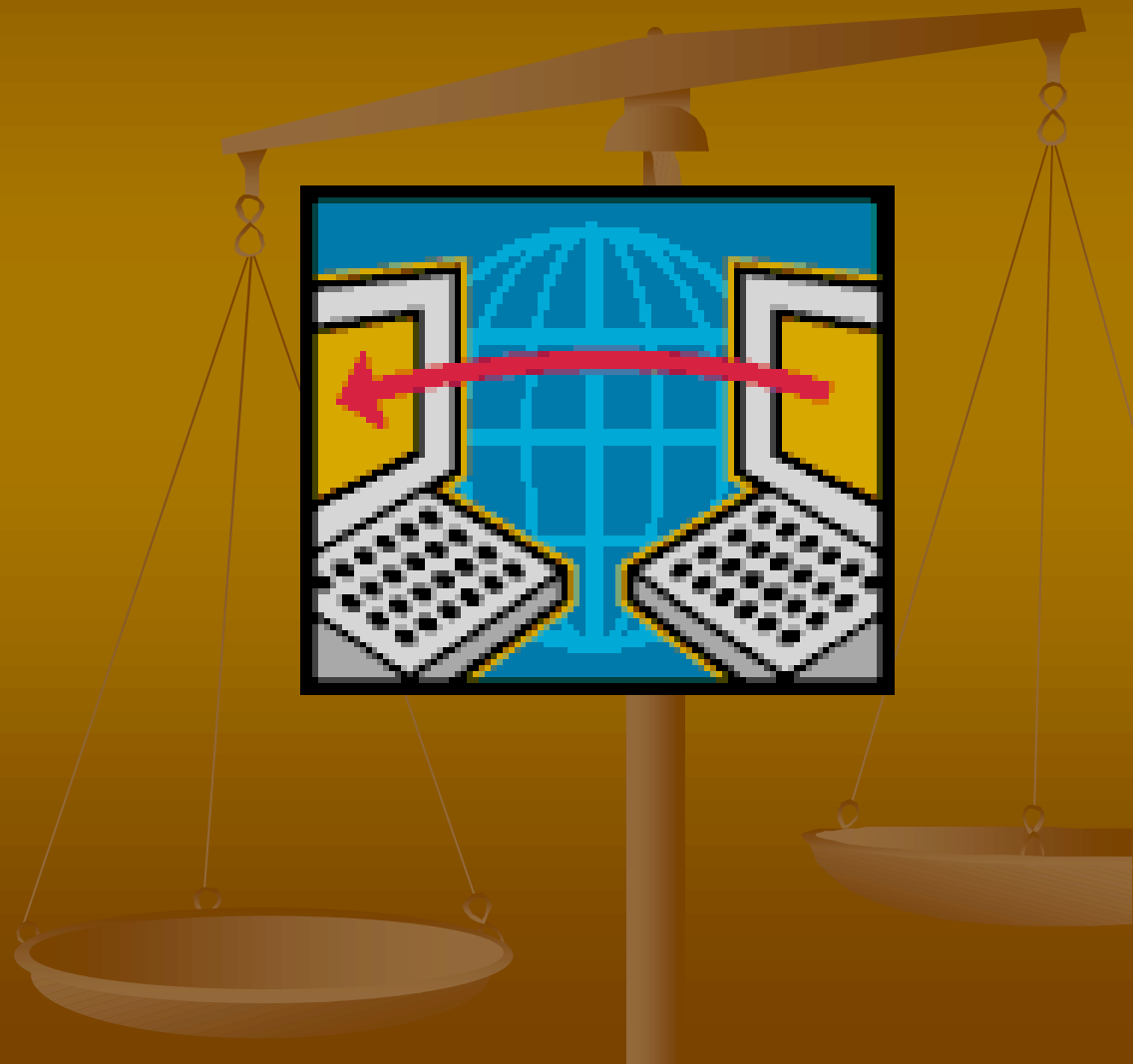
# Modern Day Jurisdiction

- Essentially, the same as the traditional model pre-Internet
- Weigh all of the contacts and factors to reach a fair, equitable decision



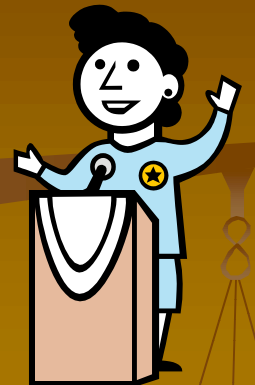
# Internet Access

- Public Access
- Wiretapping
- Sniffing



# Public Forum

- Provides freedom of speech from 1<sup>st</sup> Amendment
- Reviewed under “strict scrutiny”
- In order to restrict, government must show “compelling interest”
- Restriction must be narrowly tailored to further the interests
- Government burden to show potential alternatives would not be as effective



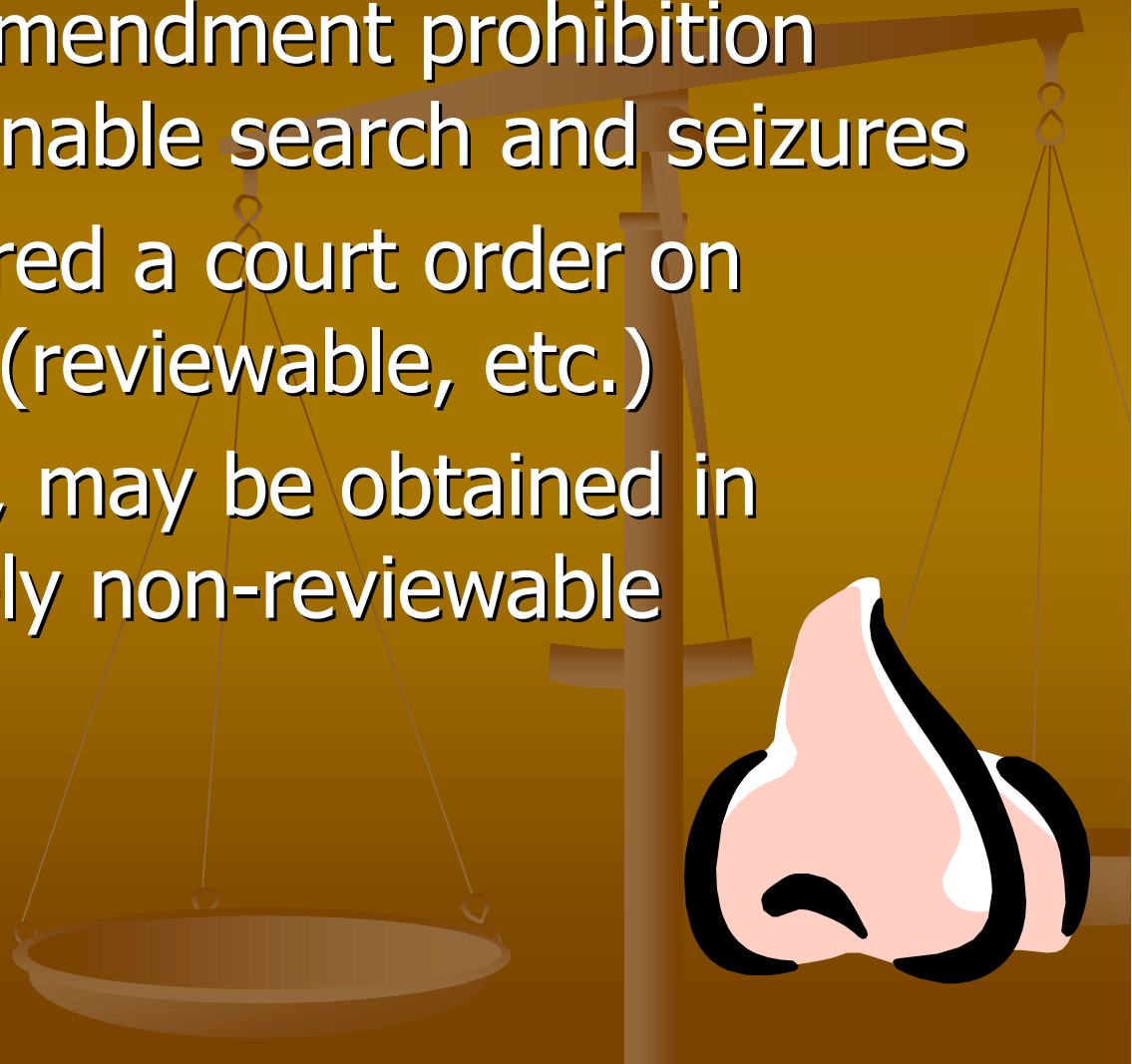
# Public Libraries



- U.S. v. American Library Assn.
  - Plurality holds that “Internet access in public libraries is neither ‘traditional’ nor a ‘designated’ public forum.” Op. at 8. Breyer concurs (for a total of 5).
  - Therefore, restrictions must be rationally-based (plurality of 4)
- Often held that placement on the Internet is placement in the public domain.
- Question: If not at public libraries, where does the public have access?

# Wiretaps/Sniffing

- Implicates 4<sup>th</sup> Amendment prohibition against unreasonable search and seizures
- Pre-2001, required a court order on probable cause (reviewable, etc.)
- Post-Patriot Act, may be obtained in secret, effectively non-reviewable



# Privacy Policies



- “Privacy” Constitutionally must involve state actor
- Private party “privacy policies” enforced by FTC as contracts
  - *FTC v. Gateway Learning Corp.* (settled July 7, 2004)
  - Hooked on Phonics maker sold list of customers after changing privacy policy
  - Didn’t get agreement from “old” customers

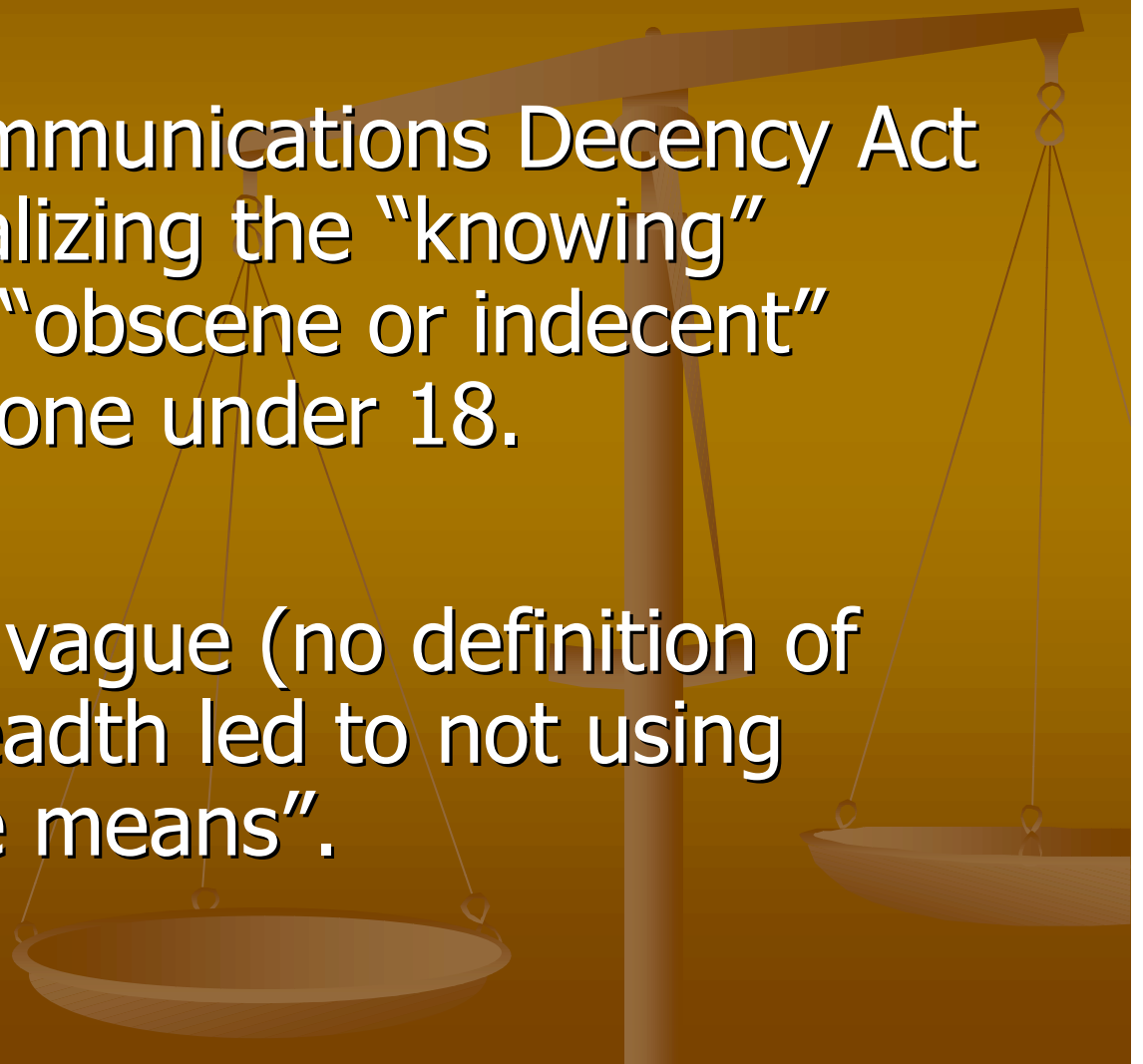
# “Indecent” Materials

- *ACLU v. Reno*, 521 U.S. 844 (1997).
- *U.S. v. American Library Assn.*, 539 US \_\_\_\_\_, No. 02-361, June 23, 2003
- *Ashcroft v. ACLU*, No. 03-218, June 29, 2004.



# ACLU v. Reno

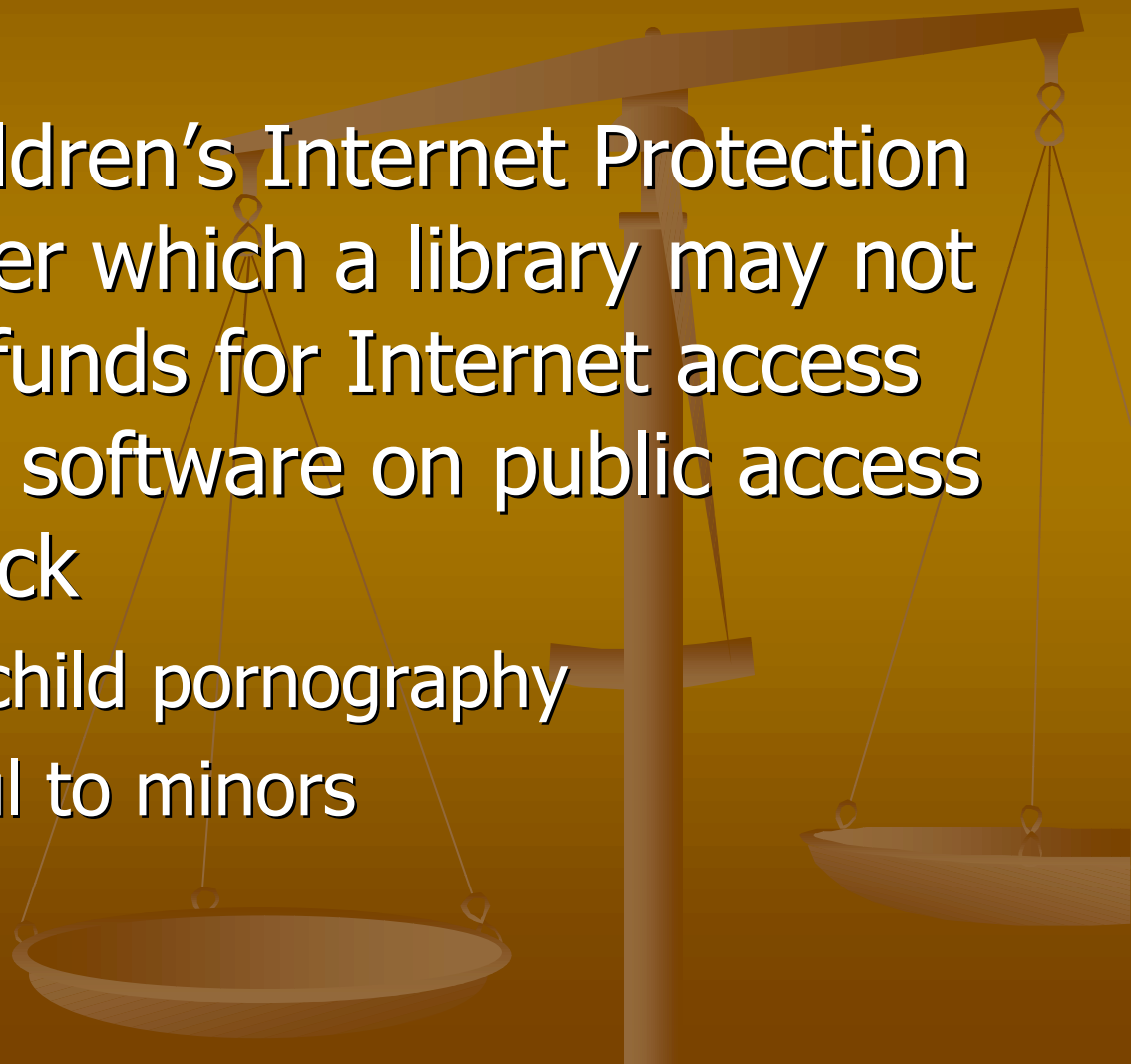
- Facts:
- At issue the Communications Decency Act of 1996, criminalizing the “knowing” transmission of “obscene or indecent” message to anyone under 18.
- Holding:
- Struck down as vague (no definition of “indecent”); breadth led to not using “least restrictive means”.



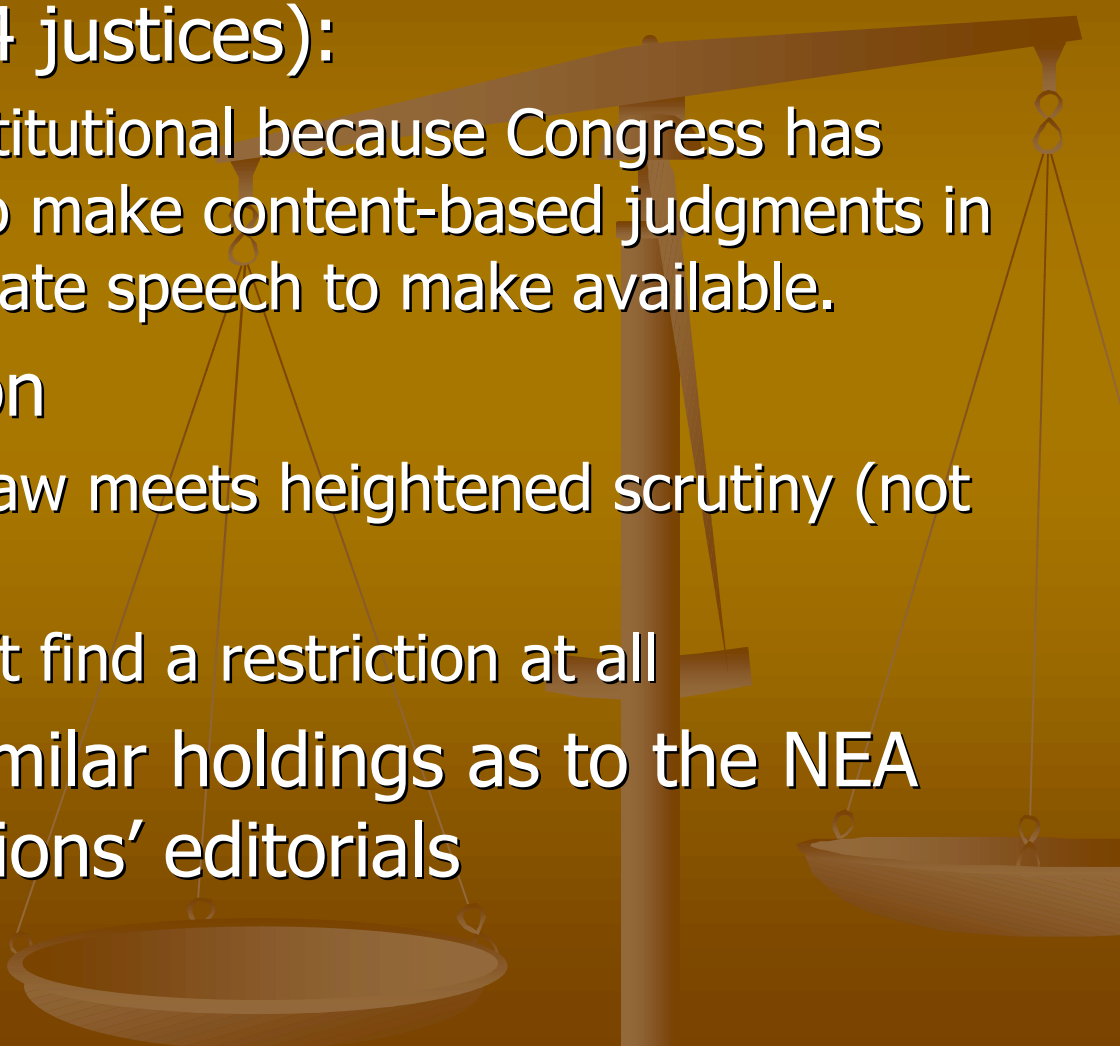


# U.S. v. American Library Assn.

- Facts:
- At issue the Children's Internet Protection Act (CIPA), under which a library may not receive federal funds for Internet access unless it installs software on public access machines to block
  - Obscenity and child pornography
  - Material harmful to minors

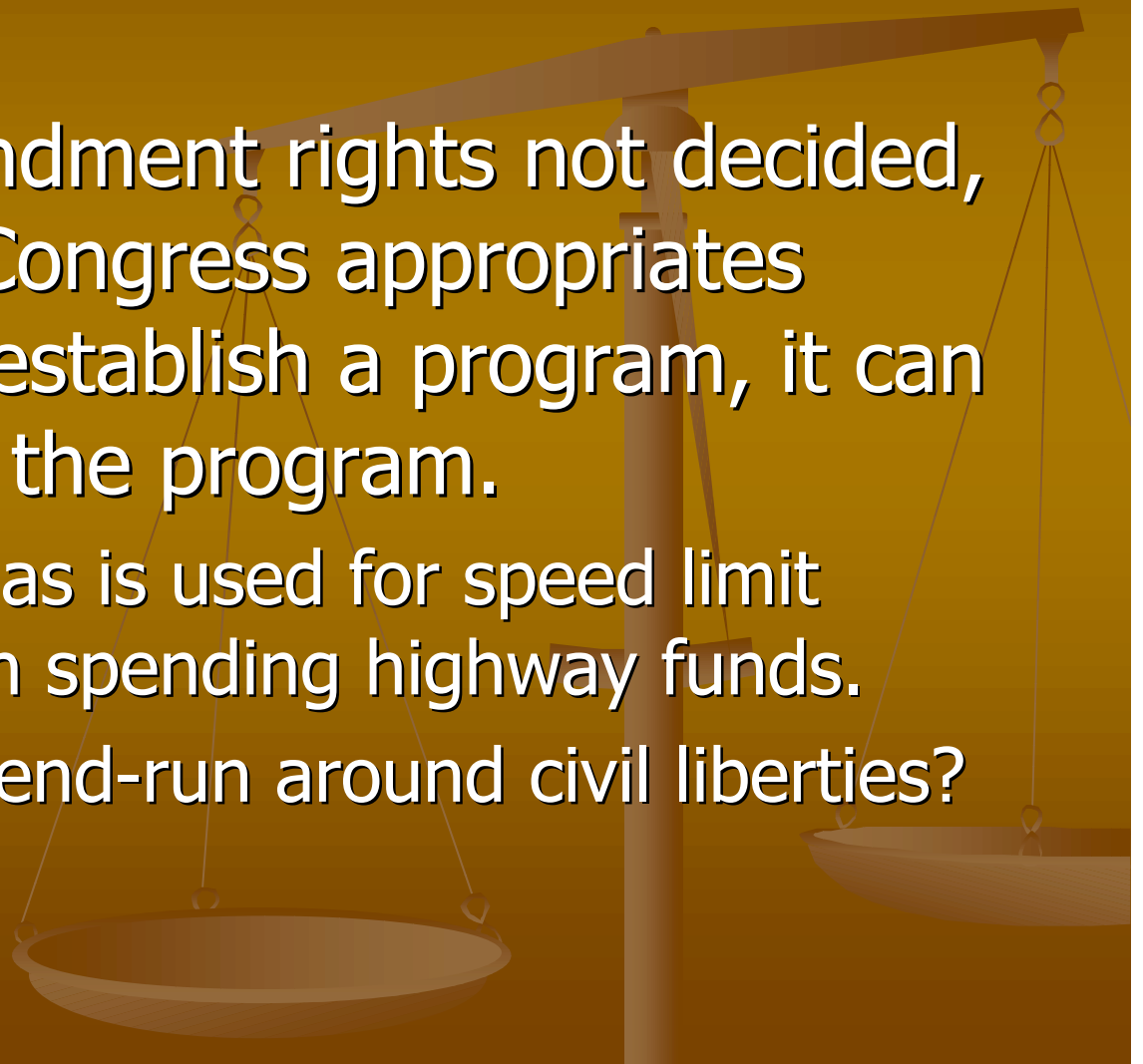


# U.S. v. American Library Assn.


- Plurality holding (4 justices):
    - Law is not unconstitutional because Congress has broad discretion to make content-based judgments in deciding what private speech to make available.
  - 6-3 Overall decision
    - One justice finds law meets heightened scrutiny (not strict)
    - One justice doesn't find a restriction at all
  - Plurality follows similar holdings as to the NEA and public TV stations' editorials
- 

# U.S. v. American Library Assn.

- Notable:
- Library 1<sup>st</sup> Amendment rights not decided, because when Congress appropriates public funds to establish a program, it can set the limits of the program.
  - Same rationale as is used for speed limit limitations when spending highway funds.
  - Possible future end-run around civil liberties?

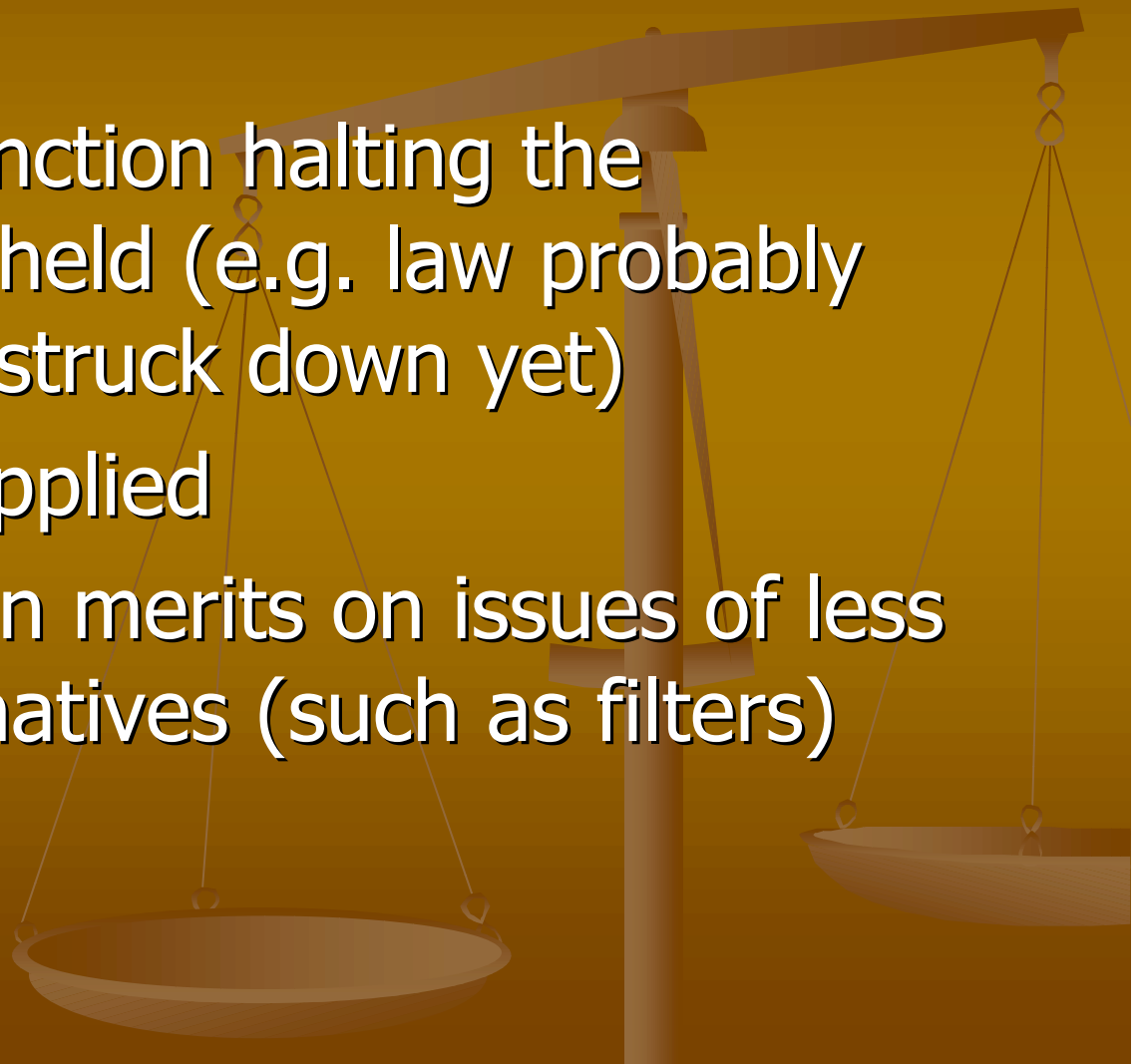


# Ashcroft v. ACLU

- Facts:
  - At issue the Child Online Protection Act (COPA), under which fines and prison time were mandated for the posting, for “commercial purposes”, WWW content that was “harmful to minors”.
  - Affirmative defense if access restricted via credit card
- 

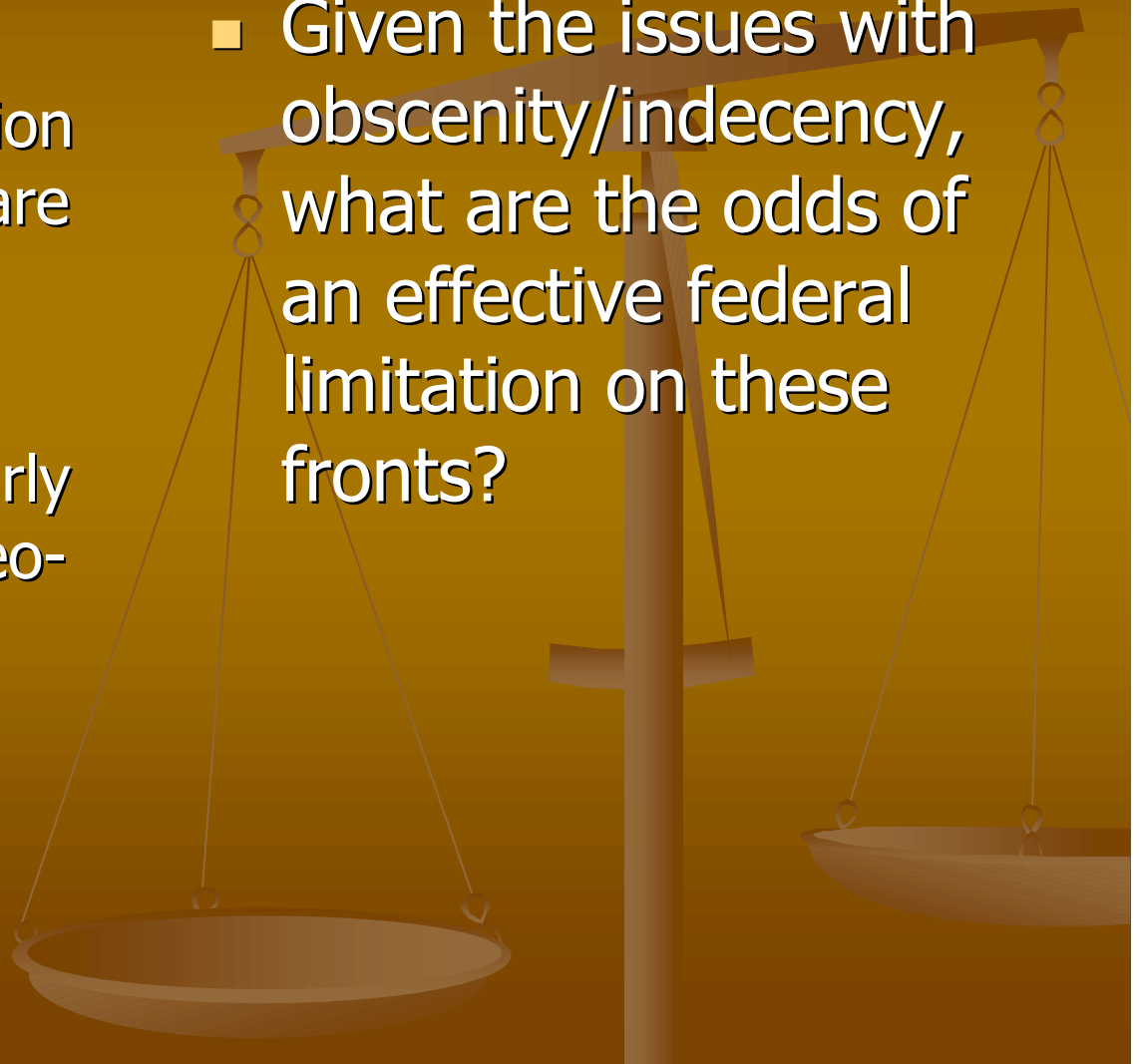
# Ashcroft v. ACLU

- Held:
- Preliminary injunction halting the enforcement upheld (e.g. law probably invalid, but not struck down yet)
- Strict scrutiny applied
- Likely success on merits on issues of less restrictive alternatives (such as filters)



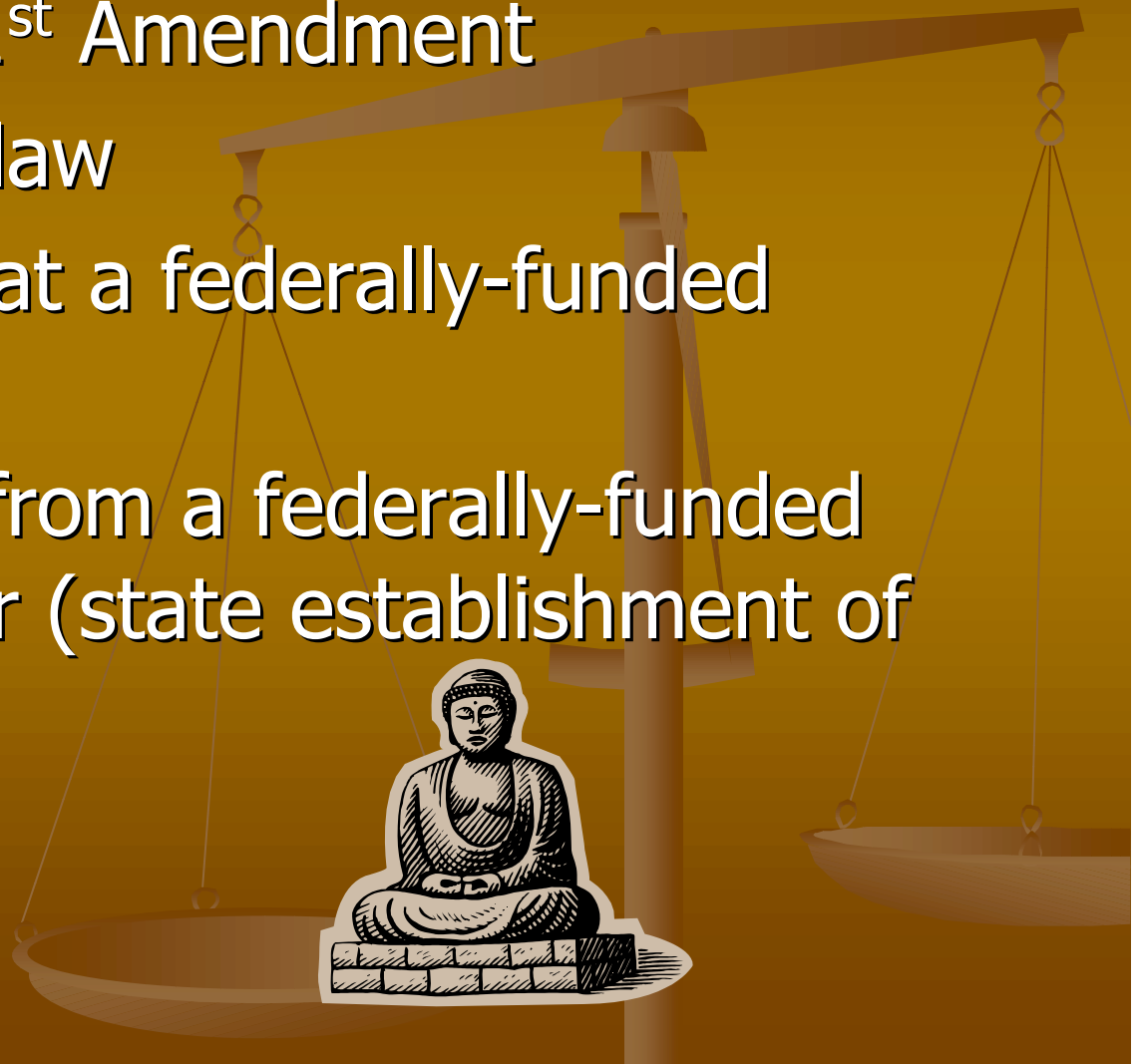
# Other Offensive Items

- Defamation
  - Civil causes of action for libel/slander are available
- Hate Materials
  - Germany particularly restrictive as to neo-Nazi items
- Given the issues with obscenity/indecency, what are the odds of an effective federal limitation on these fronts?



# Religious Materials

- Implicates the 1<sup>st</sup> Amendment
- Not much case law
- What if viewed at a federally-funded library?
- What if posted from a federally-funded library computer (state establishment of religion)?



# Spam

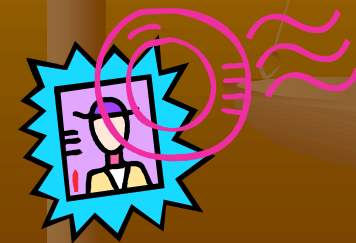
- May contain offensive material
  - Drug advertisements
  - Pornographic advertisements
- Content notwithstanding, large implication on the costs to those who use the Internet
  - Some estimates are upwards of 70% of all e-mail is spam
- However, why restrict the advertising speech (1<sup>st</sup> Amendment)?





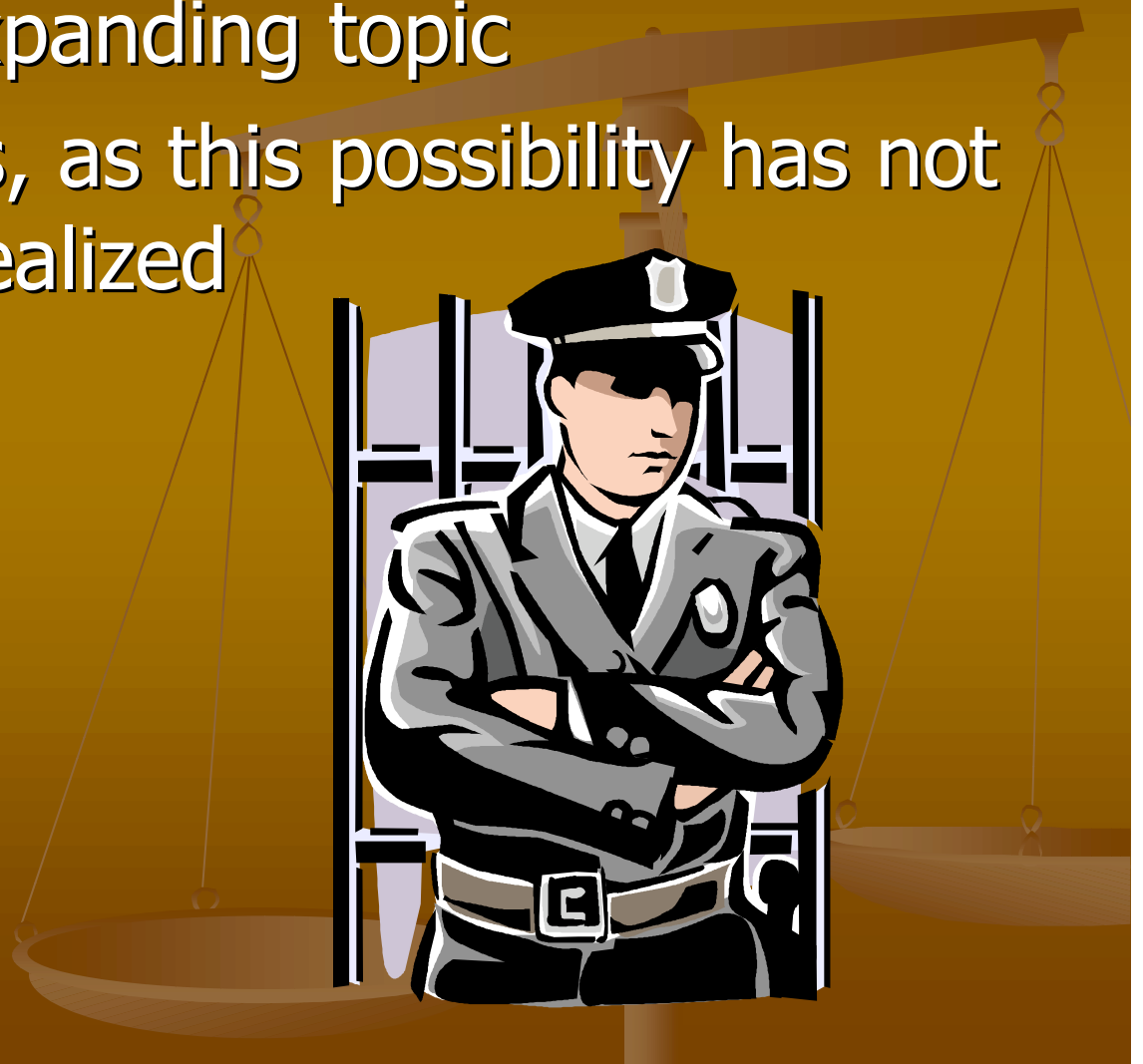
# Spam Solutions

- Proposal – Identification of sender
  - New protocol to require ID within the header that is traceable back to the source machine or unique sender ID
  - Would allow tracking worst offenders
- Proposal – ePostage
  - Nominal eStamp would be very nominal for individuals/most businesses
  - Would curtail mass spammers



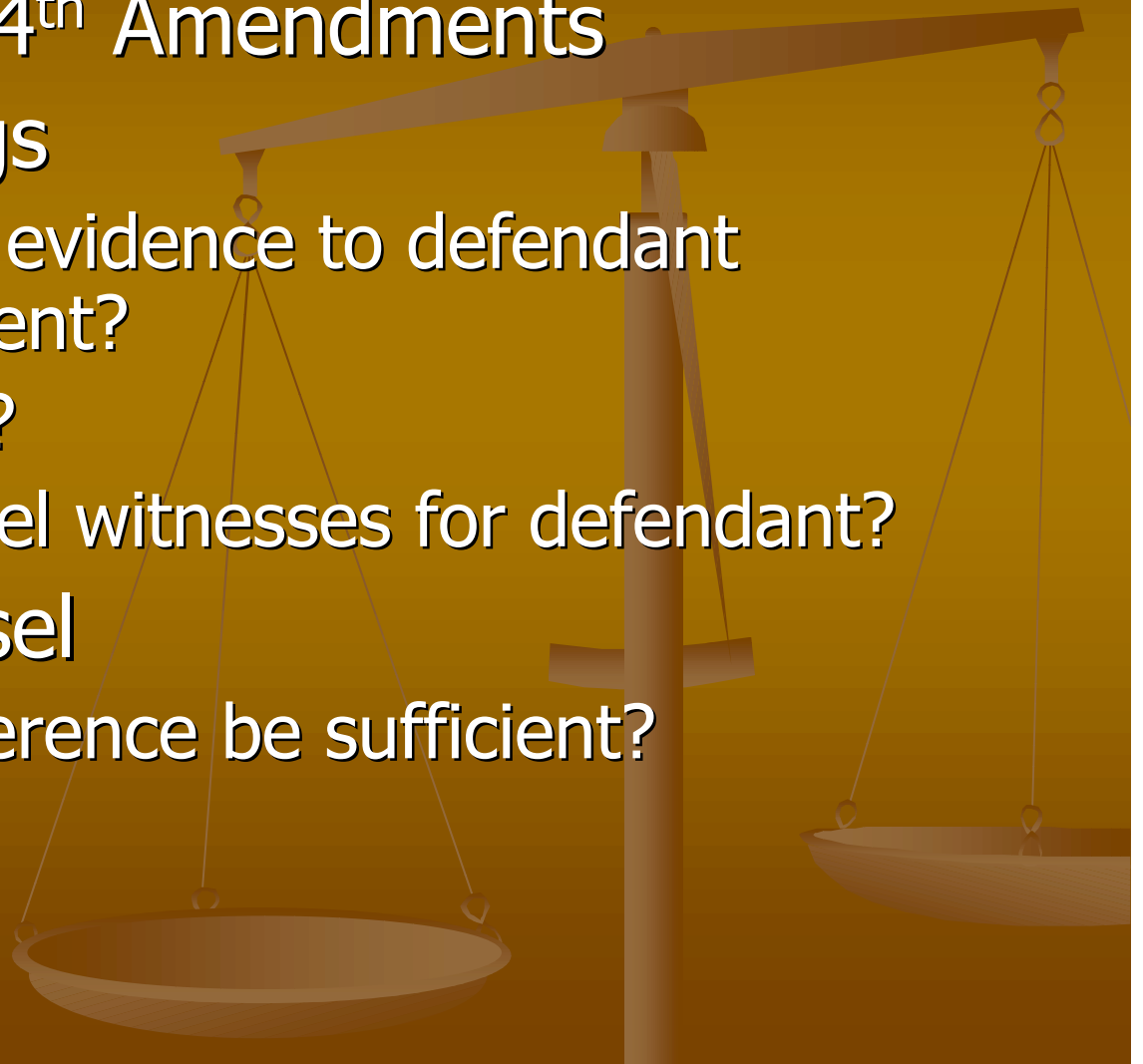
# Internet Prosecution Issues

- A neat, mind-expanding topic
- No real answers, as this possibility has not yet been fully realized



# Due Process in Internet Prosecution

- Implicates 5<sup>th</sup>/14<sup>th</sup> Amendments
- Remote Hearings
  - Presentation of evidence to defendant remotely sufficient?
  - Remote rulings?
  - Remotely compel witnesses for defendant?
- Access to Counsel
  - Would teleconference be sufficient?
  - E-mail?



# Internet Punishments

- Restricting access to the Internet
- Implicates 8<sup>th</sup> Amendment
  - Cruel and unusual punishment



# Closing Argument

- Oft argued that the law follows about 50 years behind technology
- Current cases demonstrate law is catching up, but not by much
- Clarity certain to be lacking for a while
  - Electronic voting
- Will require vigilance



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