Texas Law Review Online

Volume 101

Article

The Internet and the Dormant Commerce Clause: A Reply to Goldsmith and Volokh

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Introduction

In *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*,[1] Jack Goldsmith and Eugene Volokh pose the following question: "When does the Dormant Commerce Clause preclude states from regulating internet activity . . . ?"[2]

Their answer:

> [T]he constitutionality of such state regulation should generally turn on the feasibility of *geolocation*—the extent to which websites or other internet services can determine, reliably and inexpensively, which states users are coming from, so that the sites can then apply the proper state law to each user (or, if need be, choose not to allow access to users from certain states).[3]

Because "[i]n recent years, geolocation has become feasible and is routinely used by major websites for ordinary business purposes," there is now "more constitutional room for state regulation of internet services, including social media platforms, than often believed."[4]

I believe they're wrong. As I will try to demonstrate below, geolocation technology does not solve the problem of applying local law to internet activity—it accentuates and intensifies it.

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1. Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 TEXAS L. REV. 1083 (2023).
2. *Id.* at 1083.
3. *Id.* (emphasis added).
4. *Id.*

I. The Dormant Commerce Clause: Basic Principles

The Goldsmith and Volokh argument begins with a description of the "[t]wo principal tests [that] govern Dormant Commerce Clause analysis."[5]

First, "state regulations cannot *discriminate* against interstate commerce" (which, "[i]n practice . . . usually means that state regulations cannot favor in-state over out-of-state firms").[6]

Second, "neutral"—i.e., nondiscriminatory—"state regulations cannot *unduly burden* interstate commerce."[7] State statutes that "regulate[] evenhandedly to effectuate a legitimate local public interest," with effects on interstate commerce that are "only incidental," will survive Dormant Commerce Clause scrutiny "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[8] This calls for a balancing test—the so-called *Pike* test, after the decision in which it was first set forth[9]—whereby courts "balance the costs and benefits of a state regulation, striking down only those that impose costs on out-of-staters that clearly exceed the benefits they bring to in-staters."[10]

Goldsmith and Volokh reject the view that the Dormant Commerce Clause has a third, independent, "extraterritoriality" test. While they acknowledge that the Supreme Court has, on occasion, hinted that the Dormant Commerce Clause prohibits state regulation of commerce that "takes place wholly outside of the State's borders," as well as state laws whose "practical effect . . . is to control conduct beyond the boundaries of the State,"[11] they point out that the Court "has not applied the extraterritoriality test . . . in recent decades."[12] Moreover, they note that states "regularly and lawfully"[13] adopt regulatory measures whose "practical effect . . . is to control conduct beyond the boundaries of the State"[14]:

> People and firms operating in "real space" must take steps to learn and comply with state law in places they visit or do business, or must avoid visiting or doing business in those states—and that often means that the "practical effect of the regulation is to control conduct beyond the boundaries of the State." McDonald's can (and must) craft different franchise contracts to comply with different state franchise laws, even if most of the conduct involved in creating and implementing such

5. *Id.* at 1088.
6. *Id.* (emphasis added).
7. *Id.* (emphasis added).
8. *Id.* (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).
9. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
10. Goldsmith & Volokh, *supra* note 1, at 1089.
11. *Id.* at 1090 (quoting Healy v. Beer Inst., 491 U.S. 324, 336 (1989)).
12. *Id.* at 1089.
13. *Id.* at 1091.
14. *Id.* at 1090 (quoting *Healy*, 491 U.S. at 336).

> contracts would likely take place in the state in which McDonald's is headquartered. Walmart's data collection at checkout in its thousands of stores must conform to the potentially different privacy laws in all fifty states. Conagra can label its cooking oil "100% Natural," but may need to include different disclaimers in different states, to the extent that the label is seen as potentially misleading.[15]

The notion that the Dormant Commerce Clause forbids states from enacting laws whose "practical effect" is to control conduct extraterritorially "cannot be taken seriously,"[16] inasmuch as it would "require a dramatic rethinking of state authority"[17] and would "invalidate wide swaths of standard conflict-of-laws decision-making."[18]

Thus, they side with those "commentators and lower courts [who] have doubted whether [the extraterritoriality test has] much practical contemporary relevance beyond what the two standard Dormant Commerce Clause prohibitions—on discrimination and undue burdens—cover."[19] The extraterritoriality principle, in short, is "just a special case of one or both of the standard Dormant Commerce Clause tests,"[20] and the extraterritoriality cases "are best read"[21] as invalidating *only* state laws that either (1) discriminate against out-of-state rivals or consumers or (2) fail the *Pike* balancing test.

II. Geolocation, the Dormant Commerce Clause, and the Internet

Accepting—at least for argument's sake[22]—that formulation of the basic legal framework, we can proceed to Goldsmith and Volokh's main argument: that the burdens, measured under the *Pike* balancing test,

15. *Id.* at 1090–91 (footnote omitted) (quoting *Healy*, 491 U.S. at 336).
16. *Id.* at 1090.
17. *Id.*
18. *Id.* at 1091.
19. *Id.* at 1089.
20. *Id.* at 1092.
21. *Id.* at 1091–92.
22. Just by way of clarification, I would note that Goldsmith and Volokh are not suggesting that the Constitution permits states to regulate conduct that "takes place wholly outside of the state's borders," Healy v. Beer Inst., 491 U.S. 324, 336 (1989), only that such regulation is not invalid under the *Dormant Commerce Clause*. The Due Process Clause, though, continues to limit a state's ability to apply its laws to such conduct, requiring some "nexus" between the regulation and the regulating state. Although the Court has held that an individual or a corporation need not be "physically present" within a state to satisfy the requirements of due process, *see* Quill Corp. v. North Dakota, 504 U.S. 298, 308 (1992), or the requirements of the Dormant Commerce Clause, *see* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018), it has consistently reaffirmed the principle that "the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him." *Quill,* 504 U.S. at 312; *see also Wayfair*, 138 S. Ct. at 2085 (same) (citing Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954).

associated with the application of local law to internet businesses have, generally speaking, decreased substantially as a result of the widespread availability of geolocation software and systems. Given that online providers can now, "relatively reliably, determine the state in which a user is located" and "act differently depending on which state is involved,"[23] it is less burdensome to require them to treat Iowans as Iowa law requires them to be treated, Floridians as Florida law requires, etc. Thus, many state regulatory efforts that might have been deemed unconstitutionally burdensome twenty-five years ago, before such geolocation tools were widely available, should survive Dormant Commerce Clause scrutiny now that user location can be relatively easily determined.

It seems plausible enough. To take an example that Goldsmith and Volokh discuss in some detail, New York's internet indecency law was deemed unconstitutionally burdensome under the Dormant Commerce Clause in 1997 in large part because "internet operators, unlike real-space actors, couldn't control the distribution of services and content by geography and thus couldn't conform their practices" to the requirements of New York law (or other similar state laws).[24] In 2023, widely available geolocation tools allow internet operators to do exactly that, i.e., to control the distribution of their services and content by geography. This reduces—substantially—the burdens that this law (and by extension, other "local" laws that might apply to internet activities) places on internet operations.[25] Lowering the burdens associated with the application of local law to internet activity, in turn, should alter, in many cases, the outcome of the *Pike* interstate-burdens-versus-local-benefits balancing test for determining whether the Dormant Commerce Clause allows the application of that local law to those activities.

Plausible, but ultimately unsatisfactory and misguided, to my eye. Here are my objections, in ascending order of abstraction and generality:

A. Goldsmith and Volokh greatly underestimate the burdens imposed by their multijurisdictional compliance scheme. Determining where users are located is the easy part of the problem; the hard part is figuring out what the laws of the various jurisdictions require in any specific

23. Goldsmith & Volokh, *supra* note 1, at 1086.

24. Goldsmith & Volokh, *supra* note 1, at 1103, citing Am. Librs. Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997). *See discussion infra,* at [8-9].

25. Those burdens don't disappear, of course. But the ability to geolocate brings them into line with the burdens routinely placed on real-space, multistate operations, which "must take steps to learn and comply with state law in places they visit or do business, or must avoid visiting or doing business in those states." *Id.* at 1090.

instance.

There are, to begin with, tens of thousands of law-making jurisdictions at the state, county, township, and municipal levels in the U.S.,[26] each of which may have its own public accommodation antidiscrimination law:

> Ann Arbor categorically bans such discrimination based on arrest record. Madison, Urbana, and Champaign do the same as to arrest record or conviction record. Connecticut bans discrimination based on expunged criminal records. New Jersey bans discrimination based on criminal history involving possession, distribution, or manufacturing of marijuana or hashish. Illinois, Hawaii, New York, and Wisconsin also ban such discrimination in employment, so it's easy to imagine one of those states extending the ban to public accommodations.[27]

Not to mention that each state may have its own consumer protection laws, its own laws regarding the display of indecent material to minors, licensure of financial advisors, business libel/disparagement, publicity rights, contractual unconscionability, disclosures required/prohibited in real estate transactions, food labeling, etc.

As Goldsmith and Volokh put it: "[W]elcome to the American federal system,"[28] where firms "doing multistate business must bear the cost of discovering and complying with state laws—tort laws, tax laws, franchise laws, health laws, privacy laws, and much more—everywhere it does business."[29] Our federal system operates within a framework of "territorialist pluralism,"[30] which "presumptively preserves traditional state power to control what happens 'in' or what is sent 'into' states, and to protect state residents from what the state perceives as harms."[31] If you want to do business in or send messages into and receive messages from Madison, Wisconsin, you have to comply with the laws of Madison, Wisconsin. If that's burdensome, that's just a burden that the American federal system requires *all* businesses doing business in Madison, Wisconsin to bear.

That may all be true. But notice: *Geolocation doesn't solve the problem of burdensome local legislation; on the contrary, it highlights it.*

Consider a simple example, of the kind that arises literally millions of times each day on the global network. User 1 posts a "Help Wanted" notice

26. The Census Department estimates that as of 2017 there were 3,031 county governments, 19,495 municipal governments, and 16,253 township governments in the United States. *See 2017 Census of Governments—Organization*, U.S. CENSUS BUREAU (2017), https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html (choose "Table 2" to download ZIP file and then open the "COG2017_CG1700ORG02_Data" file).

27. Goldsmith & Volokh, *supra* note 1, at 1113 (footnotes omitted).

28. *Id.* at 1116.

29. *Id.* at 1090.

30. *Id.* at 1086.

31. *Id.* at 1085.

on "SafeBook," a social media platform headquartered in Kansas. The posting contains some idiosyncratic and possibly objectionable content—a reference, say, to salary "based on age and experience," a request that applicants send in a current photograph, disparaging comments about Elon Musk and Elvis Presley, and a statement that "Scientologists need not apply."

What are SafeBook's legal obligations in regard to this posting? Specifically, may SafeBook lawfully display the posting to User 2 when User 2 logs on to the service?

Knowing that User 1 is in, say, Bethesda, Maryland and User 2 is in Petaluma, California does not provide an answer to the question; it merely gives the inquiry a starting point. Geolocation tells SafeBook where to look for the answer: in the laws of Maryland (as well as Montgomery County and the incorporated township of Bethesda) and the laws of California (including Petaluma and Santa Rosa County). Answering the question, though, requires—obviously—a great deal more than that. The answer requires information regarding the relevant laws in each of those jurisdictions and information about the way those laws might apply to User 1's posting.

That is, it goes without saying, *not* something that widely-available geolocation software and systems provide.

B. Indeed, the Goldsmith and Volokh argument gets the analysis of the burdens imposed by local laws entirely backward; the effect of the availability of geolocation tools is not to reduce the burdens of requiring out-of-state businesses to comply with local law, but rather to substantially increase them.

Take another example, one that Goldsmith and Volokh discuss in detail. Suppose Wisconsin enacts a law banning discrimination in "public accommodation" on the basis of arrest/conviction record and further that Wisconsin courts "conclude that the Wisconsin law applies to social media networks."[32] SafeBook, a social media platform, does not allow any users who have conviction/arrest records for specified offenses, *wherever* they may live (including Wisconsin), to post messages in certain designated areas of SafeBook's site (e.g., areas devoted to children's entertainment) or to communicate with certain SafeBook users (e.g., minors).[33]

Goldsmith and Volokh's position is that, given SafeBook's "access to geographical identification tools at a reasonable cost that can determine whether a user and the users with whom he is corresponding are in Wisconsin,"[34] Wisconsin may enforce its law against SafeBook and require

32. *Id.* at 1113.
33. *Id.*
34. *Id.* at 1115.

it to cease its discrimination against users with arrest/conviction records, without running afoul of the Dormant Commerce Clause.[35]

This is "especially clear," they suggest, if the hypothetical Wisconsin law "only protects the right of users in Wisconsin to interact with other users in Wisconsin."[36] Under this version of the Wisconsin law (which Goldsmith/Volokh call "Option 1"),[37] it is not unduly burdensome to require SafeBook to comply with the Wisconsin law because geolocation tools give it the capability to let *Wisconsin* users (with arrest/conviction records) communicate with *other Wisconsin users* while continuing to block them from communicating with Iowans or Floridians:

> Just as a theme park in Wisconsin can't exclude visitors with a criminal record, SafeBook can't keep a Wisconsinite from logging on and having online conversations with other Wisconsinites who have criminal records.
>
> . . . .
>
> . . . SafeBook can still maintain its criminal-offender-free experience for users in other states. It could just hide any Wisconsin criminal-offender users so users in other states can't correspond with them, but still show the Wisconsin criminal-offender users to their fellow Wisconsinites.[38]

Under what they call "Option 2," Wisconsin law protects not only the right of Wisconsin users, regardless of their criminal records, to communicate with other Wisconsinites but also their right to "have conversations with *all users on the platform* (including by implication those from other states such as, say, Iowa)."[39] This, Goldsmith and Volokh acknowledge, raises a "harder question."[40] Unlike Option 1, where the effects of requiring SafeBook's compliance with the Wisconsin law are felt entirely by users in Wisconsin,

35. *Id.* at 1114.

36. *Id.*

37. *Id.* Option 1 strikes me as a red herring. It imagines a Wisconsin public accommodation law that tells Wisconsin businesses that they may not discriminate *against Wisconsinites* based on their prior arrest/conviction records, while they may continue to discriminate on that basis against Iowans, Californians, or Floridians: "It is hereby unlawful to discriminate in the conduct of your business against individuals based on their arrest/conviction record *if (and only if) those individuals are from Wisconsin*." No public accommodation law I am aware of is structured in this manner, nor do Goldsmith and Volokh cite any examples of such; if that is an "option" for legislators, it's one that seems never to have been chosen, and I see no particular reason to assume that Wisconsin would choose it here. The demonstration that a law like *that* would survive Dormant Commerce Clause scrutiny does not, I think, speak to the general question of how the analysis would proceed in any actual, real-world context.

38. *Id.* at 1115 (footnotes omitted).

39. *Id.* at 1117 (emphasis added).

40. *Id.*

Option 2 "can also be viewed as requiring SafeBook to provide a certain form of online experience *in Iowa* that SafeBook wouldn't otherwise provide."[41]

They nonetheless conclude that, as with Option 1, the Dormant Commerce Clause does not stand in the way of enforcing the Wisconsin law against SafeBook:

> [Because Option 2] can also be viewed as requiring SafeBook to provide a certain form of online experience in Iowa that SafeBook wouldn't otherwise provide . . . . [It] moves in the direction of the Supreme Court's price-affirmation cases, which struck down state price-affirmation laws basically because they mandated certain behavior in other states.
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> But, as noted above, the continuing validity of these cases is in question; and the argument that Option 2 is consistent with the Dormant Commerce Clause is powerful. Wisconsin has an interest in making sure that Wisconsinites are treated equally by places of public accommodation without regard to arrest or conviction records. That suggests that someone using SafeBook in his home in Madison should be entitled to have the same online experience—including the same conversations with out-of-staters—regardless of whether he has, say, a marijuana conviction on his record. Wisconsin would be regulating the experience that SafeBook is providing for people who are visiting SafeBook from Wisconsin, even though in the process it would incidentally also affect the experience of SafeBook visitors from outside Wisconsin.[42]

In short: requiring SafeBook to comply with the Wisconsin public accommodation law may impose a burden on it (and, by extension, on interstate commerce), but it is not the kind of *undue* burden that the Dormant Commerce Clause protects against. SafeBook's compliance burden is not great, requiring it to install and use one of the widely available geolocation tools to pinpoint the location of its users and to redesign its communications platform to treat communications to/from Wisconsin users differently than it treats communications to/from users in other locations. To the extent it does constitute a burden, that is just the price that internet businesses, like all businesses, must pay for operating within a federal system in which Wisconsin gets to set many of the ground rules for conduct occurring in Wisconsin.

But of course, if SafeBook must comply with the public accommodation law of *Wisconsin* (as to its users located in Wisconsin), that means that it must also comply with the public accommodation laws of Maryland (as to its

41. *Id.* at 1117–18 (emphasis added).

42. *Id.* (footnote omitted).

users in Maryland); Austin, TX, (as to its users in Austin, TX); Nebraska (as to its users in Nebraska); etc.

And if it must comply with Maryland, Austin, and Nebraska's *public accommodation* laws (as to its users in Maryland, Austin, and Nebraska, respectively), so too must it comply with Maryland, Austin, and Nebraska's laws governing consumer protection, employment, the intentional infliction of emotional distress, privacy, business libel, etc., as to its users in Maryland, Austin, and Nebraska.

And if SafeBook has to bear this burden, so, too does any internet site transmitting content into and out of Maryland, Austin, Nebraska, etc.

Thus, under Goldsmith and Volokh's perspective of "territorialist pluralism," the availability of geolocation leads to a rule that *all* internet sites are legally obligated to comply—or at least to make reasonable efforts to comply[43]—with *all* relevant laws in *all* jurisdictions from within which the sites can be accessed.

This rule, aggregated across the many hundreds of millions of internet websites out there, strikes me as a rather substantial burden to impose on internet commerce.

Moreover, I find it difficult to characterize this development as somehow having *lessened* the burden imposed on interstate commerce arising from the application of local laws to internet activities. As Goldsmith and Volokh point out, "a quarter-century ago, the internet seemed to make [the territorialist pluralism] vision impossible to preserve."[44] The influential 1997 decision in *American Libraries Association v. Pataki*[45] is a case in point. In *Pataki,* the court struck down, on Dormant Commerce Clause grounds, a New York law banning the intentional use of the internet "to initiate or engage" in certain communications deemed to be "harmful to minors."[46] In the court's words, given the state of existing internet technology in 1997, it was "impossible to restrict the effects of the New York Act to conduct occurring within New York."[47] In 1997, the internet was "wholly insensitive

43. *See* Goldsmith & Volokh, *supra* note 1, at 1112 ("Dormant Commerce Clause concerns are significantly reduced if state law provides a defense for reasonable efforts to keep forbidden internet content out of the state. And the Supreme Court has said that a state's efforts to minimize the interstate impact of a regulation, including through compliance software, is relevant to the discrimination and undue burden analyses.").

44. *Id.* at 1086.

45. 969 F. Supp. 160 (S.D.N.Y. 1997).

46. *Id.* at 167, 169 (quoting N.Y. PENAL L. § 235.21(3)).

47. *Pataki,* 969 F. Supp. at 177; *see also id.* at 171 (New York anti-pornography law "cannot effectively be limited to purely intrastate communications over the Internet because no such communications exist"); *id.* ("[N]o user could avoid liability under the New York Act simply by directing his or her communications elsewhere, given that there is no feasible way to preclude New Yorkers from accessing a Web site, receiving a mail exploder message or a newsgroup posting, or participating in a chat room.").

to geographic distinctions"[48]; once something was posted on the internet (circa 1997), "it is available to all other internet users worldwide"[49] because "no aspect of the Internet can feasibly be closed off to users from another state."[50] The burdens imposed by the application of the NY law would therefore be "extreme" because the law affected internet users everywhere, far outweighing the "limited" local benefits the law would provide to New Yorkers.[51]

In 1997, then, an internet business like SafeBook, operating in Kansas without any reliable and reasonably inexpensive way to determine user location, had no need to consult and conform to New York's indecency law—or, by extension, Tennessee's consumer protection law, Texas' food labeling law, Colorado's privacy law, and the like—in managing its online presence.

Fast forward to 2023. Conditions have indeed changed. Geolocation technology has made the seemingly impossible, possible. SafeBook now *does* have a means to determine, reasonably accurately and at reasonable cost, user location.[52]

This, from the perspective of Goldsmith and Volokh's territorialist pluralism, means, in effect, that it *must* use these tools, to either (a) conform its activities to those local laws, as required, treating New Yorkers as New York law demands that they be treated, Tennesseans as Tennessee law requires, etc., or (b) screen out users from New York, Tennessee, Texas, Colorado, etc.

Whatever else one might say about this requirement, I find it very difficult to characterize it as demonstrating that geolocation technology has *reduced* the aggregate burden on internet businesses under the *Pike* balancing test.

C. *The legal fiction that SafeBook is doing business "in Wisconsin" whenever it transmits information from or to users in Wisconsin is neither necessary nor useful.*

In connection with the hypothetical Wisconsin public accommodation statute discussed above, Goldsmith and Volokh write:

> *Just as a theme park in Wisconsin* can't exclude visitors with a criminal record, SafeBook can't keep a Wisconsinite from logging on and having online conversations with other Wisconsinites who have criminal records. . . . . Indeed, such a nondiscrimination law *would be similar to a normal public accommodation law* that bans brick-and-

48. *Id.* at 170.
49. *Id.* at 167 (quoting ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).
50. *Id.* at 171.
51. *Id.* at 177–80.
52. Goldsmith & Volokh, *supra* note 1, at 1115.

> mortar public accommodations—such as bars or stadiums— from excluding people based on their 'political ideology,' including political speech.
>
> . . . [*I*]*t's clear that a state can indeed impose such rules on businesses within it. Likewise, a state can impose similar rules with regard to communications that are sent and received from that state.*[53]

Not so fast.

It is of course true that a theme park *in Wisconsin* must comply with Wisconsin law—in this hypothetical case, allowing visitors with a criminal record to enter. But it is also true that a theme park in Missouri or Texas need *not* comply with Wisconsin's law, *even as to visitors from Wisconsin, and even if the theme park can "geolocate,"* i.e., determine which visitors are from Wisconsin (from their drivers' licenses, or from their headgear) and which are not.

So which is it? Is SafeBook "in Wisconsin," like the brick-and-mortar theme park, at least as to its users who are "in Wisconsin," and thereby subject to Wisconsin law as to those users? Or is it somewhere else—in Kansas, perhaps, where it is headquartered, and where, even if it has the capability to "geolocate" its visitors, Wisconsin law cannot compel it to use that capability so as to treat *Wisconsin* visitors as Wisconsin law requires?[54]

Goldsmith and Volokh adopt the first alternative: SafeBook is "in Wisconsin," just as the brick-and-mortar theme park is "in Wisconsin," because its "communications . . . are sent and received from that state."[55]

It is true that SafeBook sends and receives information to and from individuals in Wisconsin—but so do Disney World and Busch Gardens, in real-space. Surely neither Disney World, which is "in Florida," nor Busch Gardens (Missouri), have to comply with Wisconsin public accommodation law—do they? So why does SafeBook?

Not only is it not obvious that SafeBook is "in Wisconsin," but declaring it to be so runs entirely counter to the ordinary perceptions and linguistic usage of the vast majority of ordinary reasonable internet users—*vox populi,* if you will. If your friend in Milwaukee were to tell you that she particularly enjoys the time she spends on SafeBook, and you say to her "I'm not familiar

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53. *Id.* at 1114, 1121–22 (emphasis added) (footnotes omitted).

54. Or is it somewhere else? I (and others) have long suggested that the legal system will need, at some point, to accommodate the notion that interactions on SafeBook between Wisconsin users and Florida users and Colorado users occur in a different "place"—on the network, which is not locatable in Wisconsin or Florida or Colorado. *See generally* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace,* 48 STAN. L. REV. 1367 (1996); DAVID POST, IN SEARCH OF JEFFERSON'S MOOSE: NOTES ON THE STATE OF CYBERSPACE (Oxford Univ. Press 2009); Julie E. Cohen, *Cyberspace As/And Place,* 107 COLUM. L. REV. 210 (2007). But that is a debate for another day.

55. Goldsmith & Volokh, *supra* note 1, at 1122.

with SafeBook—where is it?," she's probably not going to say "It's here, in Wisconsin." She will undoubtedly say something along the lines of "It's on the internet," or "It's at www.safebook.com," or "It's in cyberspace," or the equivalent.

That is not, of course, dispositive; our legal system employs any number of "fictions" that run counter to ordinary perceptions and understandings of how the world works—e.g., that corporations are "persons" (at least for some purposes), that employers are the "author" of copyrightable works produced by their employees, that individuals can give birth throughout their lifetime, and so on.[56] Some are reasonable and useful; some are not. The one that Goldsmith/Volokh employ—that events and interactions taking place *on the network* should be deemed to be taking place "in" every jurisdiction in which the event can be accessed or the interacting parties may be located—may well be in the former category. But they offer nothing by way of explanation or defense of that fiction, and the rather serious consequences of its adoption (see points A & B above) should surely give us reason to demand some sort of justification for it. Why, one might ask, does it make more sense to declare that SafeBook is "in Wisconsin" when its applications are accessed by a user in Wisconsin than to declare that Wisconsin-based users are "going to" Kansas, where SafeBook is headquartered, when they log on to the service?

D. Goldsmith and Volokh's argument relies in large measure on a false equivalence between internet and real-space commerce.

"[T]he distinction between internet and real-space operations," Goldsmith and Volokh suggest, "is increasingly fictional."[57]

This view underlies much of their article, throughout which they rely on a straightforward analogy: Just as businesses that "deal[] with customers all over the country through brick-and-mortar stores . . . have to comply with the laws of those places where [they] operate[],"[58] so, too, businesses that deal with customers from all over the country over the internet must comply with the laws of all of those places where *they* operate. For instance:

- To be sure, Wisconsin's [hypothetical public accommodations] law would have extraterritorial effects: if SafeBook is headquartered in, for instance, Kansas, presumably SafeBook will have to do many things in Kansas to comply. But of course, *any corporation that deals with customers all over the country through brick-and-mortar stores would have to comply with the laws of*

56. *See generally* LON L. FULLER, LEGAL FICTIONS (Stanford Univ. Press 1967); Eben Moglen, *Legal Fictions and Common Law Legal Theory: Some Historical Reflections*, 10 TEL AVIV UNIV. STUD. IN L. (1990) 33 (1990).

57. Goldsmith & Volokh, *supra* note 1, at 1108.

58. *Id.* at 1115.

those places where it operates. Likewise, any corporation that mails material to customers or deals with them through phone calls would have to comply with the laws of those places (for instance, in deciding what it must do to legally record phone calls with customers).[59]

- *A hotel in Los Angeles* can't refuse to host same-sex weddings or pagan weddings . . . . Likewise, a social media company—whether the California-based Facebook or Twitter or the Tennessee-based Parler—operating a page used by Californians to talk to Californians couldn't refuse to let Californians use that page to convey similar religious views.[60]
- *Just as a theme park in Wisconsin* can't exclude visitors with a criminal record, SafeBook can't keep a Wisconsinite from logging on and having online conversations with other Wisconsinites who have criminal records. . . . Indeed, such a nondiscrimination law would be similar to a normal public accommodation law that bans brick-and-mortar public accommodations—such as bars or stadiums—from excluding people based on their 'political ideology,' including political speech.[61]
- [W]elcome to the American federal system, *where companies that do business with people who are in multiple states must comply with the laws of those multiple states.* Mail-order retailers, for instance, have to comply with the often byzantine tax rules of many states, even though "[s]tate taxes differ, not only in the rate imposed but also in the categories of goods that are taxed and, sometimes, the relevant date of purchase." Yet that by itself doesn't immunize the retailers from complying with state laws via readily available tools, including geolocation and other software tools.[62]

By describing the distinctions between internet and real-space entities as "fictional," or declaring that SafeBook is "just like" a hotel in Los Angeles or a theme park in Wisconsin, Goldsmith and Volokh are of course not suggesting that there are *no* significant differences between SafeBook and a real-space hotel or theme park. Such a claim would clearly be unsustainable, given the dozens of differences in the conditions facing the two businesses, from their dependence on software in their daily operations, their vulnerability to extreme weather events, their ability to offer food to their customers, their need for personal injury liability insurance, their capability

59. *Id.* at 1114–15 (emphasis added).

60. *Id.* at 1120 (emphasis added).

61. *Id.* at 1114, 1121–22 (emphasis added) (footnotes omitted).

62. *Id.* at 1116 (emphasis added) (footnote omitted) (quoting South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098 (2018)).

to verify the identity of visitors, their susceptibility to denial-of-service attacks, their need for access to the global domain name system, the precautions they take to avoid COVID-19 retransmission, and so on.

Goldsmith and Volokh's claim is not that there are no significant differences between internet and real-space businesses; it is the (more reasonable) claim that none of those differences are relevant to the specific question at hand, which is: When does the Dormant Commerce Clause preclude states from regulating internet activity? For the purpose of addressing *this* question, they ask, why should we treat SafeBook and the brick-and-mortar theme park differently?

Here's why: Because there is a difference between SafeBook and a theme park that clearly matters for purposes of the Dormant Commerce Clause burdens-vs-benefits analysis.

Consider "Little Dorothy's Lemonade Stand" (LDLS), a brick-and-mortar business in Brookline, MA. LDLS does business only "in Massachusetts"; that is, it sells its goods only to people physically present at its storefront in Massachusetts. As a consequence, without taking any special steps or incurring additional costs—by default, as it were—it need only comply with the law of that place. If LDLS wants to reap the benefits of interstate operation, it can of course expand its operations to sell to people "in" other states—by opening additional storefronts in New Hampshire and Connecticut, perhaps, or by setting up a mail-order operation and sending catalogs offering goods for sale to persons living outside of Massachusetts.

It will incur additional costs if it takes that route: the additional cost(s) of discovering and complying with the laws of the other states where it now conducts its business. Pay-to-play, as it were. It's a kind of "federalism tax" that must be borne if the company wants to exercise its privilege of doing business "in" other jurisdictions and get the benefits of operating in those new markets. It gives LDLS a choice: expand and pay this "federalism tax," or remain in the default state, foregoing the possible benefits of interstate operation while also avoiding the costs attendant upon doing so.

The internet inverts this default condition, thereby inverting the choice that businesses face. When Dorothy's brother (Aaron) sets up his website at AaronsLemonade.com, his operation is, by default, available everywhere. AaronsLemonade.com will have to incur additional costs if it chooses *not* to engage in interstate commerce: the additional costs of implementing some sort of geolocation system that will exclude users from outside Massachusetts. This, too, is a kind of "federalism tax," but in reverse; AaronsLemonade.com has to incur these costs in order to *not* subject itself to the additional costs of discovering and complying with the laws of Connecticut and New Hampshire. Pay-*not*-to-play.

This strikes me as a rather fundamental difference between the two spheres of operation, and one that, one would think, must be taken into

account in any assessment under the Dormant Commerce Clause of the "burdens" that the legal system imposes on internet businesses. There is a certain logic to requiring businesses that choose to reap the benefits of the interstate market to pay for the privilege of doing so; requiring businesses that are *not* taking advantage of the interstate system to pay for the privilege of *not* doing so strikes me as considerably less logical.

III. Conclusion

Goldsmith and Volokh envision a world in which internet businesses face a new kind of federalism tax, one requiring them to either (a) incur the costs of discovering and complying with local law in all jurisdictions (if they wish to reap the benefits of internet universality), or (b) incur the costs of implementing a geolocation system of some kind that screens out non-local users (and foregoing those benefits). They would impose that tax on internet commerce in order to "preserve, at least to a large extent, [the] traditional territorialist-pluralist vision" and "[o]ur nation's commitment to federalism, both as a means of preserving local political decision-making and of fostering experimentation, [which] remains important despite changing technology."[63]

One has to wonder if the game is worth the candle in an environment that, while perhaps not entirely "borderless,"[64] is surely inhospitable to the kind of territorial thinking that underlies the "territorial pluralist" vision in the first place. One of the marvels of the internet, and one that was instrumental in its emergence as *the* global communications platform, has been its ability to link users together irrespective of their geographical location. As Goldsmith and Volokh point out, large for-profit entities have for years been chipping away at this universality for their own commercial purposes; I am not persuaded that the federal courts should participate in the effort to complete the job.

63. *Id.* at 1124.

64. *Cf. id.* at 1111 ("[T]he internet is not a borderless medium. All major firms operating on the internet, and many smaller ones, collect and use location data about consumers and users, and shape content by geography. The technology that supports these practices is quickly growing more pervasive, more accurate, and less expensive.").