THE ULTIMATE COMPANY TOWN: WADING IN THE DIGITAL *MARSH* OF SECOND LIFE

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> Hiro is approaching the Street. It is the Broadway, the Champs Élysées of the Metaverse. It is the brilliantly lit boulevard that can be seen, miniaturized and backward, reflected in the lenses of his goggles. It does not really exist. But right now, millions of people are walking up and down it.[1]

INTRODUCTION

Second Life[2] has become the Internet's preeminent "virtual world," a nearly perfect, early implementation of the Metaverse, as imagined by Neal Stephenson fifteen years ago in his science fiction classic, *Snow Crash*.[3] Second Life's 10.2 million citizens[4] interact via digital representations, called avatars, in a persistent, constantly expanding computerized landscape (currently covering more than 65,000 acres).[5] Second Lifers create and own virtual property and goods, exchanging currency—Linden dollars—that has value in the "real world" and which is traded via a public exchange called the LindeX.[6] As of October 20, 2007, the Linden dollar (L$) was selling

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1 NEAL STEPHENSON, SNOW CRASH 23 (Bantam Books 2000) (1992).

2 http://www.secondlife.com. *See generally* MICHAEL RYMASZEWSKI ET AL., SECOND LIFE: THE OFFICIAL GUIDE (2007) (providing a comprehensive overview of Second Life, including its history, architecture, and culture, along with tips for joining the community).

3 STEPHENSON, *supra* note 1.

4 Second Life, Economic Statistics, http://secondlife.com/whatis/economy_stats.php (last visited Oct. 21, 2007) (reflecting Second Life statistics as of midnight on Oct. 20, 2007).

5 Second Life, The World, http://secondlife.com/whatis/world.php (last visited Oct. 21, 2007).

6 Second Life, Terms of Service, General Provisions, http://secondlife.com/corporate/tos.php (last visited Nov. 16, 2007). Note that Second Life changed its Terms of Service to make arbitration optional after a federal court recently held a previous mandatory arbitration clause to be unconscionable. *See infra* text accompanying note 90.

at an exchange rate of L$266 to one U.S. dollar (US$), and the equivalent of more than US$1 million worth of transactions per day were taking place in Second Life.[7] This robust economy has attracted the attention of Congress, which has begun to examine the tax consequences of income earned in Second Life and other virtual worlds.[8] But it has also gained the attention of entrepreneurs, politicians, educators, entertainers, and individuals of all varieties around the world, who seek to capitalize on the limitless opportunities that exist in a virtual world.

Second Life has residents,[9] an economy, and a geography (and topography). Citizens have property rights[10] (a feature that sets it apart from other virtual worlds), and now that people have begun to "make a living" there, it can be said that people have begun *living* in Second Life, with some investing far more time and energy in their virtual lives than in their physical ones.[11] The extent to which Second Life becomes a true lived-in community will only increase as technology improves and more activities traditionally reserved for the physical world take place there.

Because Second Life is housed on servers based in San Francisco, the question then arises whether its citizens are entitled to core rights

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7 Second Life, Economic Statistics: Graphs, http://secondlife.com/whatis/economy-graphs.php (last visited October 21, 2007) (providing a daily LindeX market history); Second Life, *supra* note 2 ("$US Spent Last 24h: $1,199, 488.").

8 *See* Adam Pasick, *Virtual Economies Attract Real-World Tax Attention*, REUTERS (London), Oct. 16, 2006, *reprinted in* eWEEK, *available at* 2006 WLNR 18033251 (describing interest taken by the Joint Economic Committee of the U.S. Congress in virtual economies); *see also* Jonathan V. Last, *Dungeons, Dragons, and Taxes; The IRS Is Eyeing Your Hard-Earned Virtual Gold*, WKLY. STANDARD, Jan. 8, 2007, at 15 (noting that the Joint Economic Committee began researching virtual economies in October 2006 and "is expected to issue a report early in 2007"). As of October 2007, the committee has yet to issue any report.

9 Second Life refers to its participants as "residents." *See supra* note 2 ("Second Life is a 3D online digital world imagined and created by its residents[.]").

10 Note that according to the Terms of Service, discussed *infra* note 39, residents have *intellectual* property rights to the things they create in Second Life; whether they have rights in any actual data or the assets of their accounts is still uncertain. *See also* Second Life, IP Rights, http://secondlife.com/whatis/ip_rights.php (last visited October 21, 2007) ("Linden Lab's Terms of Service agreement recognizes Residents' right to retain full intellectual property protection for the digital content they create in Second Life, including avatar characters, clothing, scripts, textures, objects and designs. This right is enforceable and applicable both in-world and offline, both for non-profit and commercial ventures. You create it, you own it—and it's yours to do with as you please.").

11 *See* Jack M. Balkin & Beth Simone Noveck, *Introduction* to THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS 3, 3 (Jack M. Balkin & Beth Simone Noveck eds.) (2006) ("[M]any of the 20 to 30 million regular participants [in virtual worlds] now spend more time in virtual environments than they do at their real-world jobs or engaged with their real-world communities . . . .").

guaranteed under the California or U.S. Constitutions, to the same extent as residents of privately owned towns or common interest communities.

Only "state actors" are required to provide for rights guaranteed by the U.S. Constitution, and although the landmark case of *Marsh v. Alabama*[12] established that a privately owned "company town" could be considered a state actor, the definition of state actor has been narrowly construed over the ensuing years.

In this Comment, I will argue that Second Life should be required to guarantee its residents protections guaranteed by the United States Constitution. First, I will describe Second Life and the extent to which it truly represents a municipality for its residents, and how, at the very least, it represents a true common interest community. I will show that Second Life is perhaps the quintessential company town for its citizens, providing for "substantially all of the functions of government"[13] that would be offered by a municipality, so that *Marsh* should apply. Second, I will show that even if Second Life does not qualify as a state actor, it should be required to provide for rights guaranteed by the California Constitution, because recent decisions hold that common interest communities do not necessarily need to be state actors to be covered under state constitutions.[14] Finally, I will offer recommendations for operators and residents of virtual communities, emphasizing that those who operate virtual worlds which seek to mimic the real world and have a real economy should be prepared to provide certain constitutional rights to their citizens, including those citizens who do not physically reside in the United States.

I. WELCOME TO THE METAVERSE: A VISIT TO SECOND LIFE

Second Life is a virtual world. Unlike the massively multiplayer online role-playing games (MMORPGs) that are its progenitors, Second Life is not typically portrayed as a game or pastime.[15] There are

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12 326 U.S. 501 (1946).

13 N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 769 (N.J. 1994).

14 *See id.* at 769 (noting that California's free speech clause protects citizens from both state and private action (citing Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980))).

15 *See* Danny Bradbury, *Whole New World Awaits on the Web: Visitors to Second Life Can Walk, Fly, Dress Up, Play Music, Visit Clubs and Make Real Money*, TORONTO STAR, Dec. 7, 2006, at S10 ("[D]on't call Second Life a game, warn executives of Linden Labs [sic], the company behind the system. They argue that while you can play games in Second Life, calling the environment itself a game is misleading.").

no points, objectives, or quests. Instead, it is an alternate reality where people may assume new identities, trade in real and personal property, and interact with others without any boundaries. To be sure, there are recreational activities in Second Life (e.g., casinos and competitions), but for others it is simply a place to accumulate wealth, establish social relationships, or just explore and experience new sights and sounds. It is an immersive world that resembles our day-to-day experience, but it is an artificial construction. Second Life currency may be spent on virtual goods and property, or exchanged for money that is usable outside of Second Life.[16] In some ways, it sounds a lot like Las Vegas—but instead of being located in the desert sands of Nevada, Second Life sits on a set of servers in California, home of Linden Lab, Second Life's developers and proprietors.[17]

Briefly stated, Second Life and other virtual worlds are merely the latest iteration of the multi-user domains (MUDs) that were first developed in the late 1970s.[18] The earliest MUDs were text-based adventures that could be experienced by users logged into workstations at multiple locations on a computer network. Through a series of commands, a user might direct his or her character to walk into a room, whereupon the user would be presented with a written description of the room, which might note that another user's character was present. At that point, the users could have a text-based conversation (through their alter-ego characters), interact with elements in the room, or move to an adjacent location, all synchronously (in real-time). As Internet access speed increased and computer-processing

16 *See* RYMASZEWSKI ET AL., *supra* note 2, at 212–49 (presenting a lengthy discussion of how Second Life residents may go about making real-world money).

17 *See Wired Travel Guide: Second Life*, WIRED, Oct. 2006, at 184 ("Location: 3,000-plus servers at a data center in San Francisco"); *see also* Open . . ., Interview with Second Life's Philip Rosedale, Part II, http://opendotdotdot.blogspot.com/2006/11/interview-with-second-lifes-philip_28.html (Nov. 28, 2006, 13:28 EST) ("The second question, about laws reflecting where servers are based, we just don't know. We're trying to be pretty smart about it, but the company's here in the United States right now. Yeah, the servers could be in another country, maybe that'll make the local laws apply differently on those servers . . . ." (quoting Linden Lab CEO Philip Rosedale)); Daniel Terdiman, *'Second Life': Don't Worry, We Can Scale*, CNET NEWS.COM, June 6, 2006, http://news.com.com/2102-1043_3-6080186.html ("'Second Life' currently runs on 2,579 servers that use the dual-core Opteron chip produced by AMD. Each server is responsible for an individual 'sim,' or 16 acres of virtual 'Second Life' land.").

18 *See, e.g.*, Beth Simone Noveck, *The State of Play*, 49 N.Y.L. SCH. L. REV. 1, 6–11 (2004) (describing the evolution and development of virtual worlds); *see also* F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 14 (2004) (commenting on how the idea of moving through an abstract, spatial representation is an ancient one, found in any map or game or spoken myth).

power improved over the subsequent fifteen to twenty years, allowing for more complicated graphics, the basic MUD evolved into sophisticated MMORPGS—complex, persistent environments that were depicted with stunning 3-D visuals. Not only could one read about the character in front of him (operated by a stranger across the globe), but one could *see* the character as well, whether he was gathering resources, exploring, or killing monsters. Sony Online Entertainment's *EverQuest* was one of the earliest examples of such a 3-D fantasy realm,[19] and similar fantasy games remain popular today (e.g., *World of Warcraft*).[20] Eventually, some developers realized that this technology could be broadened to create a virtual world that was not simply a game to be played, but rather, a place in which people could interact, work, and *live.* Enter *Second Life,* which first opened to the public in 2003.[21]

Second Life, although not the only virtual world, is the one that has gained the most traction in both the media and business worlds and is one virtual world likely to endure.[22] The principle reason for this may be that, unlike the other MMORPG "games" mentioned above, Second Life requires no software purchase or monthly fees.[23] Although many of the concepts discussed here may also be applicable to these other virtual communities, I will limit the discussion to Second Life as a case example.

Just how much traction does Second Life have? Consider:

- Politicians have made appearances in Second Life to interact with their constituents;[24]

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19 *See* Noveck, *supra* note 18, at 7–8 (noting that Everquest "launched in 1999 with a three-dimensional perspective" and had nearly half a million subscribers in the U.S. by 2004).

20 *See* Press Release, Blizzard Entertainment, Inc., World of Warcraft Surpasses 9 Million Subscribers Worldwide (July 24, 2007), *available at* http://www.blizzard.com/press/070724.shtml.

21 Second Life, What Is Second Life?, http://secondlife.com/whatis/ (last visited Oct. 9, 2007); *see also* RYMASZEWSKI ET AL., *supra* note 2, at 6 (providing a history of Second Life's conception and launch).

22 *See, e.g.*, Bill Werde, *Philip Rosedale: The Virtual World He Created with Second Life Is Making Real Dollars—And Forever Changing Entertainment,* BILLBOARD, Jan. 6, 2007, at 26 (noting, in Billboard's "Best Bets 2007" issue, Second Life's profitability and exponential growth, with the number of users doubling every seven months).

23 Although a monthly rent is charged to owners of virtual real estate, there is no fee to maintain an identity in Second Life.

24 *See, e.g.*, Dana Milbank, *Do You Have a Question, Pixeleen Minstral?,* WASH. POST, Sept. I, 2006, at A2 (discussing a visit to Second Life by Mark Warner, presidential candidate and former governor of Virginia); Jonathan Mummolo, *Politics: Pelosi in Pixels?,* NEWSWEEK, Jan. 29 2007, at 16 ("Rep. George Miller of California appeared [in Second Life], fielding questions via his avatar, which he described to *Newsweek* as having 'a big mop of gray hair.'"); Kim Willsher, *Volley of Exploding Pigs Launches Presidential Race in Cyber Space,*

- The Reuters news agency has a full-time correspondent in Second Life;[25]
- Popular musical artists, like Duran Duran and Suzanne Vega, have held concerts in Second Life;[26]
- Harvard Law School held an entire course in Second Life, which was open to the public;[27]
- Judge Richard Posner of the Seventh U.S. Circuit Court of Appeals recently visited Second Life to discuss his new book;[28]
- One Second Life resident is reported to have transformed "$US9.95 into virtual assets worth at least $US1 million in real money";[29]
- Major corporations have established storefronts and promoted products in Second Life;[30] and

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SUNDAY TELEGRAPH (London), Jan. 28, 2007, at 35, *available at* 2007 WLNR 1655505 (describing Second Life as "a virtual battleground in the French presidential election, with two of the main parties setting up headquarters"); The Social Web, John Edwards' Campaign Enters Second Life, http://blogs.zdnet.com/social/?p=91 (Feb. 14, 2007, 7:10 PST) (reporting on the establishment of a virtual campaign headquarters for presidential candidate John Edwards).

25 Andrew Adam Newman, *The Reporter Is Real, but the World He Covers Isn't*, N.Y. TIMES, Oct. 16, 2006, at C6 (describing how Adam Pasick, a Reuters technology reporter, will head up Reuters' first virtual news bureau, filing articles "strictly about—and addressed to—" Second Life players, via his Adam Reuters avatar).

26 Robert Andrews, *Second Life Rocks (Literally)*, WIRED.COM, Aug. 15, 2006, http://www.wired.com/techbiz/it/news/2006/08/71593.

27 CyberOne: Law in the Court of Public Opinion, http://blogs.law.harvard.edu/cyberone/ (last visited Oct. 9, 2007) (featuring a fascinating trailer video and mentioning how enrollment in the course is open to the public via the "Harvard Extension School" in Second Life).

28 Stephanie Francis Ward, *Fantasy Life, Real Law: Travel into Second Life—The Virtual World Where Lawyers Are Having Fun, Exploring Legal Theory and Even Generating New Business*, A.B.A. J., Mar. 2007, at 42 (reporting on lawyers who are entering Second Life to explore legal theories or generate business, including Judge Posner, who views Second Life as a "kind of laborator[y] for studying the emergence of rules").

29 Stephen Hutcheon, *Virtual Property Queen Says Thanks a Million*, SYDNEY MORNING HERALD, Nov. 27, 2006, *available at* http://www.smh.com.au/news/biztech/virtual-property-queen-reaps-the-rewards/2006/11/27/1164476080388.html (discussing a Chinese language teacher's experience in becoming the first "Virtual World Millionaire").

30 *See, e.g.*, *IBM, Sears Unveil Virtual Store*, INVESTREND, Jan. 9, 2007, *available at* 2007 WLNR 369717 (announcing the unveiling of the "Sears Virtual Home Prototype" on IBM's private island in Second Life, as well as noting the virtual showrooms of such other retailers as Dell and Toyota); *see also Living a Second Life*, ECONOMIST, Sept. 30, 2006, at 77 (discussing the Second Life forays of Toyota, the BBC, Sun Microsystems, Wells Fargo, and Starwood Hotels and Resorts); Linda Zimmer, *How Viable Is Virtual Commerce? Businesses that Understand the Potential of Second Life Are Finding Real-World Commercial Opportunities in the Virtual Space*, OPTIMIZE, Jan. 1, 2007, at 44, *available at* 2007 WLNR 54238 (highlighting additional Second Life ventures by MTV, American Apparel, and Nissan).

- Some companies, including Microsoft, Hewlett-Packard, and Verizon, have begun to conduct job interviews in Second Life.[31]

Although Second Life's "residents" still have a corporeal existence and need to eat, sleep, pay their rent, et cetera, it has become apparent that nearly all of one's non-physical activities have the potential to be conducted in this virtual community. Some individuals work full time in Second Life, selling virtual real estate (oxymoronic as that may sound) or virtual personal goods (e.g., clothing, accessories, tools, vehicles, hairstyles, even anatomical parts) for Linden dollars, which are then exchanged on the LindeX for currency that may be used to support the individual's physical needs.[32] Although only a relative few are living this sort of existence today (entirely dependent upon Second Life activities), such arrangements are bound to increase as technology improves and more people realize the opportunities available in Second Life, opportunities tbat they may not have with traditional work-life models. It may feel like science fiction, and be distasteful to those of us who are used to our traditional lifestyles, but it is not difficult to imagine a near future where much of our lives are lived in virtual worlds. Why commute to an office when we can simply strap on goggles and (once graphics and responsiveness improve somewhat), "be" in the office?[33] The same goes for attending a movie, browsing the law library stacks, going to the mall, or even having a romantic date.

Further evidence that Second Life is more like real life and less like a game to its inhabitants may be seen in a lawsuit that recently arose from an incident that occurred in the virtual world.[34] A Pennsylvania lawyer sued Linden Lab for $8,000 in restitution when the company "unilaterally shut down his Second Life account, cutting off

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31 Anjali Athavaley, *A Job Interview You Don't Have to Show Up for—Microsoft, Verizon, Others Use Virtual Worlds to Recruit*, WALL ST. J., June 20, 2007, at D1.

32 *See, e.g.*, Julian Dibbell, *The Life of the Chinese Gold Farmer*, N.Y. TIMES, June 17, 2007, § 6 (Magazine), at 36 (chronicling the "$1.8 billion worldwide trade in virtual items").

33 *See Meet Me in My Avatar's Office*, CANBERRA TIMES, Jan. 29, 2007, *available at* 2007 WLNR 1668429 ("Employees of tomorrow will inhabit virtual worlds like Second Life to hold live weekly meetings with co-workers, catch up over lunch with financial advisers and join friends on virtual shopping excursions after work.").

34 Alan Sipress, *In the Digital World, Rights Can Be Tenuous*, SAN JOSE MERCURY NEWS, Jan. 1 2007, at 4 ("U.S. courts have heard several cases involving virtual-world property rights but have yet to set a clear precedent clarifying whether people own the electronic goods they make, buy or accumulate in Second Life and other online landscapes.").

his access to a substantial portfolio of real estate and currency in the virtual world."[35] In his complaint, the plaintiff states that:

> Defendants' computer code was designed and intended to act like real world property that requires the payment of U.S. Dollars to buy, own, and sell that property and to allow for the conveyance of title and ownership rights in that property separate and apart from the code itself, and as such, Plaintiff's rights in the virtual property should be regulated and protected like real world property.[36]

So what makes Second Life so special? Why did it merit the first lawsuit over virtual property and present a constitutional question, when no other virtual worlds posed such issues previously?

There are "two key, unique differences" between Second Life and other MMORPGs.[37] First, it allows for complete creativity.[38] Second, it grants property ownership rights to its residents.[39] These two features create the magical formula that raises constitutional questions

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35 Kathleen Craig, *Second Life Land Deal Goes Sour*, WIRED.COM, May 18, 2006, http://www.wired.com/gaming/virtualworlds/news/2006/05/70909; *see also* Complaint, Bragg v. Linden Research, Inc., No. 06-08711 (Pa. Ct. Com. Pl. filed Oct. 4, 2006), http://lawy-ers.com/BraggvLinden_Complaint.pdf; Miriam Hill, *Real Suit over Virtual Property: An Online World Confiscated His Empire*, PHILA. INQUIRER, Oct. 20, 2006, at A1 (summarizing Second Life and the *Bragg* case). The case was removed to federal court where it withstood a motion by Linden to compel arbitration under the Terms of Service Agreement, and to dismiss for lack of personal jurisdiction. Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 (E.D. Pa. 2007). *See also* The Second Life Insider, http://www.secondlifeinsider.com/tag/BraggVsLindenLab (last visited Nov. 16, 2007) (chronicling the lawsuit). Ultimately, the case settled for an undisclosed sum. Technollama, http://technollama.blogspot.com/2007/10/bragg-v-linden-labs.html (Oct. 19, 2007, 09:17 EST) (noting the settlement and presenting another point of view on the case). Pleadings are also available for download at http://secondlife.typepad.com/.

36 Complaint, *supra* note 35, at 2.

37 Second Life: Frequently Asked Questions, http://secondlife.com/whatis/faq.php (last visited Oct. 9, 2007).

38 *See id.* ("This world really is whatever you make it, and your experience is what you want out of it.").

39 *See id.* (noting that users can "own" virtual land and "retain IP rights over their in-world creations"); *see also* Second Life: Terms of Service § 3.2, http://secondlife.com/corporate/tos.php (last visited Oct. 9, 2007) ("You retain copyright and other intellectual property rights with respect to Content you create in Second Life, to the extent that you have such rights under applicable law. However, you must make certain representations and warranties, and provide certain license rights, forbearances and indemnification, to Linden Lab and to other users of Second Life."). Although formal Second Life documents generally couch the rights as "intellectual property rights," which Linden is likely to argue are restricted to traditional rights in copyright (reproduction, distribution, et cetera), Second Life's CEO, Philip Rosedale, has made public statements noting that residents can "own land" and have "a real piece of the future." *Bragg*, 487 F. Supp. 2d at 596. The Terms of Service, however, also state that "Linden Lab retains ownership of the account and related data, regardless of intellectual property rights [the resident] may have in content [the resident] create[s] or otherwise own[s]." Second Life: Terms of Service § 3.3, *supra*.

about Second Life, because, in many ways, those are two of the central features characterizing the development of our country. Complete creativity in a free market is, in essence, freedom to live. The right to property and to the fruits of one's labor is one of the fundamental principles in the Lockean form of government that underpins our Constitution.[40] In fact, it has been said that property rights are the bedrock of all of the civil liberties guaranteed by the Constitution.[41]

Thus, there appears to be at least a theoretical basis for applying such constitutional rights as the Freedom of Speech, Due Process, and Equal Protection to residents of (and visitors to) Second Life. But is Second Life "real" enough for its residents to qualify for the protection of such rights? We must examine the circumstances under which such rights have been deemed to apply (or not) to analogous enterprises. Is Second Life like a privately owned town? Like a common interest community? Or is it more like a shopping mall? Does it matter? In the next Section, I will discuss how the Constitution applies to such entities.

II. STATE ACTION AND PUBLIC FUNCTION

In this Section, I summarize the current law regarding the state action requirement and the public function doctrine, which determines when the Constitution may apply to private communities, like Second Life, and other private forums (i.e., those not operated by a government) where proprietors may seek to limit civil rights.

In general, the Constitution defines the relationship between citizens and their government, not the relationships among private citizens, or between citizens and private companies.[42] In some cases,

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40 *See* James S. Burling, *Protecting Property Rights in Aquatic Resources After* Lucas, *in* INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY 137, 139 (ALI-ABA Course of Study, Sept. 30, 1993), *available at* C872 ALI-ABA 137 (Westlaw) (discussing "the close connection between property rights and all of our other liberties").

41 *See* Shelley v. Kraemer, 334 U.S. 1, 10 (1948) ("It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteentb Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.").

42 *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991) ("With a few exceptions . . . constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities."); The Civil Rights Cases, 109 U.S. 3, 17 (1883) ("[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be im-

however, companies can act like governments, either (a) due to the extent of their control over private citizens, or (b) because of the nature of the services they provide.[43] These two features establish the need for a doctrine to determine what constitutes "state action."[44] Typically, this discussion arises in the context of the civil rights that should be available to private citizens who are under the control of, or in contract with, other private entities that have control over them and seek to restrict those rights.

In the seminal case of *Marsh v. Alabama*, a woman was charged with criminal trespass for distributing religious materials in Chickasaw, Alabama, a suburb of Mobile that was entirely owned by the Gulf Shipbuilding Corporation.[45] Although this restriction on speech and religion would clearly be unconstitutional under the First and Fourteenth Amendments if Chickasaw were a municipality, the defendants argued that in this situation the Constitution should not apply because the town was company owned. Ultimately, the Supreme Court was unpersuaded[46]:

> Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. . . . [T]he town of Chickasaw *does not function differently from any other town.* The "business block" serves as the community shopping center and is *freely accessible and open to the people* in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.[47]

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paired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings.").

43 *See generally* JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 562–83 (5th ed. 2003) (reviewing the state action doctrine).

44 Because it is the most relevant to Second Life, I will focus my discussion on the "public function" analysis of state action, but it is important to note that there are two other lines of state action jurisprudence: the "significant involvement/joint participation" approach of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 725 (1961), wherein the state is interdependent with the offending private entity; and the "encouragement, authorization and approval" approach of *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982), wherein a state has had a direct or indirect role in promoting the private entity's actions.

45 326 U.S. 501, 502 (1946).

46 *Id.* at 509 ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.").

47 *Id.* at 507–08 (emphasis added).

Thus, a company-owned town is bound by the Fourteenth Amendment when: (1) it functions as any other town, and (2) when it is open to the public.

Like Chickasaw, Second Life is free and open to the public,[48] and although it is not a town that one can drive through, it is fast becoming the country's leading virtual destination. A business trip or professional conference may soon be equally likely to require a visit to Second Life as to New York or Toledo (and may even be safer and more enjoyable). Furthermore, Second Life's proprietors provide virtually all of the functions that a municipality would provide for a typical town: it maintains the infrastructure, provides for security, et cetera. In sum, it is arguable that *Marsh* should apply to Second Life. I will return to this argument in Section IV.

On the other hand, state action jurisprudence has been appreciably curtailed over the years since *Marsh*, raising questions as to its applicability to Second Life. Constitutional rights may be more limited when the private entity is more commercial and less municipal in nature. For example, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, the Supreme Court held that picketers protesting the staffing of non-union employees at a shopping mall were protected by the First Amendment.[49] The Court held the mall was the "functional equivalent" of the Chickasaw business district in *Marsh* because "[t]he general public ha[d] unrestricted access to the mall property."[50] However, in *Lloyd Corp. v. Tanner*, the Court found that there was no speech protection for Vietnam War protesters at a shopping mall because, unlike in *Logan Valley*, the war protest was unrelated to the shopping center, and protesters had the opportunity to take their protest elsewhere and still reach their intended audience.[51] Thereafter, in *Hudgens v. NLRB*, the Court clarified that *Lloyd* had overruled *Logan Valley*, and held that it was irrelevant whether the

48 As mentioned elsewhere in this Article, there is no charge to download the Second Life software, initiate a basic membership, enter Second Life, or create and maintain an identity there, although there is a monthly fee for landowners. *See* RYMASZEWSKI ET AL., *supra* note 2, at 20–21 (describing the Second Life fee structure); *id.* at 37–38. (outlining land-use costs).

49 391 U.S. 308, 311–12 (1968).

50 *Id.* at 318, 325 ("'The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.' Logan Valley Mall is the functional equivalent of a 'business block' and for First Amendment purposes must be treated in substantially the same manner." (quoting *Marsh*, 326 U.S. at 506)).

51 407 U.S. 551, 561–67 (1972).

protected activity was related to the shopping center.[52] The only thing that matters, it appeared, was whether the private entity is the "functional equivalent" of a municipality, and self-contained shopping centers are not.[53] Hence, if Second Life were merely a "virtual shopping center," it should not be considered a state actor and its residents need not be afforded constitutional rights. It is readily arguable, however, that Second Life leans more toward the municipality side of the commercial-municipal continuum because, unlike a shopping mall, it does not exist for the sole, express purpose of selling goods. Rather, Second Life has the same purpose as any municipality: to be a place where people can live, work, and exchange ideas and property. Second Life's proprietors "st[an]d in the shoes of the State," and "perform[] the full spectrum of municipal powers" for its residents.[54]

The Supreme Court had earlier added another contour to the state action doctrine in *Jackson v. Metropolitan Edison Co.*, wherein it explained that state action is only present when a private entity exercises "powers traditionally exclusively reserved to the State."[55] The Court found that operation of a public utility or other business regulated by the state did not in itself qualify as a traditional public function, and refused to expand the definition of state action to include any private actor operating for the public good.[56] Nevertheless, company towns still qualify as state actors and *Marsh* is still good law.[57] Thus, if a private entity is deemed a state actor by virtue of its functions (functionally equivalent to the business district of a town, or traditionally and exclusively provided by government), it will be prohibited from abridging liberties guaranteed to individuals by the United States Constitution.

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52 424 U.S. 507, 518 (1976).

53 *Id.* at 519–20 (reasoning that, "[i]f a large self-contained shopping center *is* the functional equivalent of a municipality, as *Logan Valley* held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content," and because *Lloyd* did permit the control of speech, a shopping center must not be the functional equivalent of a municipality).

54 *Id.* at 519.

55 419 U.S. 345, 352 (1974).

56 *Id.* at 354 ("Doctors, optometrists, lawyers, Metropolitan [Edison], and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State.").

57 *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621 (1991) (citing *Marsh* as exemplifying performance of a traditional government function); *see also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 313 (2001) (Thomas, J., dissenting) (citing *Marsh* as an example of a public facility "giv[ing] rise to a finding of state action").

But what if the entity does not rise to the level of "state actor" under federal law? The private actor might still be legally restricted from abridging liberties guaranteed to those over whom it has control under the relevant *state* constitution.[58] Many state courts follow the federal approach to state action,[59] but some[60] have held, without objection from the U.S. Supreme Court, that constitutional liberties may apply even if a private entity would not be considered a state actor under the federal approach.[61] For example, in *PruneYard Shopping Center v. Robins*, the U.S. Supreme Court affirmed the California Supreme Court's ruling that a privately owned shopping mall was in fact required to allow the reasonable exercise of free speech by mall visitors under California's Constitution.[62]

It is readily arguable that Second Life exists within California territory, given that the servers are housed there and Second Life residents must "travel" to this location on a server in California every

58 *See generally* David Pickle, Comment, *State Court Approaches to the State Action Requirement: Private Rights, Public Values, and Constitutional Choices*, 39 U. KAN. L. REV. 495 (1991) (reviewing differences between federal and state approaches to the state action requirement).

59 *See, e.g.*, State v. Wicklund, 589 N.W.2d 793, 801 (Minn. 1999) (holding that the protections of the Minnesota constitution "are triggered only by state action" and no affirmative rights are accorded to citizens against each other).

60 *See, e.g.*, Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980) (concluding that sections 2 and 3 of article 1 of the California Constitution protect "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned"); N.J. Coal. Against War in the Middle E. v. J.M.B. Realty, 650 A.2d 757, 770 (N.J. 1994) (noting that "the New Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment" and holding that private shopping malls must allow leafletting and related, nondisruptive exercises of free speech rights guaranteed under the New Jersey Constitution); W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins., 485 A.2d 1, 5 (Pa. Super. Ct. 1984) (holding that "the [free expression] provisions of Article I, section 7 [of the Pennsylvania Constitution] do not reach the acts of *purely* private actors").

61 DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 239 (3d ed. 2003) ("[I]n several states . . . state constitutional protections have been held applicable to what the U.S. Supreme Court would consider private controversies.").

62 447 U.S. 74, 80 (holding that such a requirement did not violate the shopping center owner's due process rights). The Court quoted article 1, section 2 and article 1, section 3 of the California Constitution. *Id.* at 79–80 n.2. "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. 1, § 2. "[P]eople have the right to . . . petition government for redress of grievances . . . " CAL. CONST. art. 1, § 3.

time they enter the grid. If that is the case, then Linden Lab may not abridge rights granted under the California Constitution.[63]

In sum, protection for civil liberties granted by the Federal Constitution is generally only mandated when the forum is a "state actor," an entity that provides a public function, traditionally and exclusively reserved to the government. A privately owned and operated town (or a private entity that is the equivalent to the business district of a town) qualifies as a state actor, but a privately owned shopping center does not. I contend that Second Life qualifies as a state actor because, to its residents, it is at least as much of a municipality as Chickasaw was in *Marsh*. Consider Justice Black's discussion in his *Logan Valley* dissent of why *Marsh* was a state actor (compared with a shopping mall): "*Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town."[64] Linden Lab provides the infrastructure of *every* aspect of the Second Life community that is not created by the residents themselves.

Nevertheless, even if the forum is not a state actor, it may still be required to afford rights to patrons that exist under the relevant state constitution. In this case, if it can be said that the Second Life com-

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63 Of course, with regard to a private actor like Second Life there will be an additional analysis here as to what state would have proper jurisdiction. Jurisdiction for virtual communities has been addressed by other authors, and is certainly unresolved, but, in any event, lies beyond the scope of this Article. *See, e.g.*, Lastowka & Hunter, *supra* note 18, at 68–72 (discussing the notion of a separate jurisdiction for cyberspace). It is worth noting that the Second Life Terms of Service specify that California Law will apply in any disputes. *See* Second Life: Terms of Service, *supra* note 39, § 7.1 ("This Agreement and the relationship between you and Linden Lab shall be governed in all respects by the laws of the State of California without regard to conflict of law principles or the United Nations Convention on the International Sale of Goods."); *id.* General Provisions ("The rights and obligations of the parties under this Agreement shall not be governed by the U.N. Convention on Contracts for the International Sale of Goods; rather such rights and obligations shall be governed by and construed under the laws of the State of California, including its Uniform Commercial Code, without reference to conflict of laws principles.").

64 391 U.S. at 330–31 (Black, J., dissenting). *See also* Nat'l League of Cities v. Usery, 426 U.S. 833, 851 (1976) (listing some examples of traditional public functions, including "fire prevention, police protection, sanitation, public health, and parks and recreation"), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Second Life doesn't exactly have fires, but there have been other disasters in which the company has taken the role of state actor and intervened to prevent public calamity, either by banning so-called "griefers" (users who try to create chaos on the grid) or by altering the architecture of the system to prevent "malware" attacks. *See, e.g.*, Glyn Moody, *The Duplicitous Inhabitants of Second Life*, GUARDIAN (London), Nov. 23, 2006, at 5 (Technology Pages) (discussing the "gray goo" attack on Second Life and Linden Lab's plan to address the problem).

munity is located in California, then its residents are due the protections afforded to them by the California Constitution.

III. THE CONSTITUTION, COMMON INTEREST, AND THE LIMITS OF CONTRACT

Although (like a mall or town) Second Life is free to visit,[65] Second Lifers are required to agree to Terms of Service and to abide by a set of "Community Standards"[66] before being allowed to live, work, and play in the virtual world. This Section will address the extent to which contracts imposed on closed communities may limit the civil liberties of parties to those agreements. Can Second Lifers sign away their civil rights? What actions, though acceptable under the Terms, would be held unconstitutional as a matter of federal or California state law?

Second Life's Terms of Service specify that California law applies.[67] Among other provisions, the Terms also specify that:

- "Linden Lab may suspend or terminate your account at any time, without refund or obligation to you."[68]
- "Linden Lab retains ownership of the account and related data, regardless of intellectual property rights you may have in content you create or otherwise own."[69]

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65 There are no costs to register or to download the Second Life software.

66 In "Community Standards," Linden sets out a list of six intolerable behaviors (the "Big Six") "that will result in suspension or, with repeated violations, expulsion from the Second Life Community." They fall under the general headings of intolerance, harassment, assault, disclosure, indecency, and disturbing the peace, and are the sorts of things that would subject one to criminal or civil sanctions in most traditional physical-world societies. *See* Second Life, Community Standards, http://secondlife.com/corporate/cs.php (last visited Oct. 9, 2007). In fact, Second Life is remarkably tolerant, probably more than most municipalities, as it provides specific "mature" areas where virtually anything goes. In those areas, residents may even engage in explicit sexual behavior without any fear of reprisal from Second Life's proprietors. The community as a whole is intended for adults, and a separate Second Life "grid" is available for teens (13 to 18), where there are no "mature" areas and a somewhat more restrictive set of community standards. *See* Teen Second Life, http://teen.secondlife.com; Teen Second Life Community Standards, http://teen.secondlife.com/footer/cs/.

67 Second Life, Terms of Service, *supra* note 39, General Provisions. Note that Second Life changed its TOS to make arbitration optional after a federal court recently held a previous mandatory arbitration clause to be unconscionable. *See infra* text accompanying note 90.

68 Second Life, Terms of Service, *supra* note 39, § 2.6.

69 *Id.* § 3.3.

- "You agree to abide by certain rules of conduct, including the Community Standards and other rules prohibiting illegal and other practices that Linden Lab deems harmful."[70]
- "All data on Linden Lab's servers are subject to deletion, alteration or transfer."[71]

Taken together, the provisions above suggest that, from Linden's perspective, the company can seize any virtual assets acquired by Second Life residents and may expel anyone, for any reason, at any time—essentially take one's virtual property without compensation or due process of law. This has provoked disputes like the one in the case of *Bragg v. Linden* discussed earlier.[72]

In the physical world, disputes over restrictive residential association rules have arisen over, *inter alia*, the ability of homeowners to display political signs[73] and the American flag.[74] In the absence of state legislation explicitly limiting homeowners' association agreements,[75] the analysis generally takes the same form as that for private towns and shopping centers discussed above.

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70 *Id.* § 4.1.

71 *Id.* § 5.3. This provision also notes that:

> When using the Service, you may accumulate Content, Currency, objects, items, scripts, equipment, or other value or status indicators that reside as data on Linden Lab's servers. THESE DATA, AND ANY OTHER DATA, ACCOUNT HISTORY AND ACCOUNT NAMES RESIDING ON LINDEN LAB'S SERVERS, MAY BE DELETED, ALTERED, MOVED OR TRANSFERRED AT ANY TIME FOR ANY REASON IN LINDEN LAB'S SOLE DISCRETION. YOU ACKNOWLEDGE THAT, NOTWITHSTANDING ANY COPYRIGHT OR OTHER RIGHTS YOU MAY HAVE WITH RESPECT TO ITEMS YOU CREATE USING THE SERVICE, AND NOTWITHSTANDING ANY VALUE ATTRIBUTED TO SUCH CONTENT OR OTHER DATA BY YOU OR ANY THIRD PARTY, LINDEN LAB DOES NOT PROVIDE OR GUARANTEE, AND EXPRESSLY DISCLAIMS (SUBJECT TO ANY UNDERLYING INTELLECTUAL PROPERTY RIGHTS IN THE CONTENT), ANY VALUE, CASH OR OTHERWISE, ATTRIBUTED TO ANY DATA RESIDING ON LINDEN LAB'S SERVERS. YOU UNDERSTAND AND AGREE THAT LINDEN LAB HAS THE RIGHT, BUT NOT THE OBLIGATION, TO REMOVE ANY CONTENT (INCLUDING YOUR CONTENT) IN WHOLE OR IN PART AT ANY TIME FOR ANY REASON OR NO REASON, WITH OR WITHOUT NOTICE AND WITH NO LIABILITY OF ANY KIND.

Id.

72 *Supra* note 35 and accompanying text.

73 *See generally* Lisa J. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENVTL. L. 233, 240 (2006) (considering whether, given the prevalence and proliferation of common interest developments, "restrictions on political speech in [homeowners associations] constitute an infringement of First Amendment free speech rights").

74 *See generally* Elizabeth F. Grussenmeyer, *The Right to Display the American Flag in Common Interest Developments: Restrictions by Homeowners' Associations Not Tolerated*, 34 MCGEORGE L. REV. 516 (2003) (reviewing rights and legislation addressing the display of the flag).

75 *See, e.g.*, CAL. GOV'T CODE § 434.5(b)(1) (West 2007) ("No person, private entity, or governmental agency shall adopt any rule, regulation, or ordinance, or enter into any

Where there is state action, there can be no abridgement of constitutional rights. Of course, community associations, though private, may take on the properties of a state actor.[76] "The size and the character of a common interest community can blur the distinction between public and private. So too can the association's roles and responsibilities."[77] Furthermore, even if the association is not considered a state actor, unconstitutional rules may not be upheld in litigation because the *court* is a state actor.[78]

There is no reason to believe Linden Lab would keep people from exercising their free speech rights. There have been documented protest activities, as in July 2003 when residents objected to "Linden Lab's policy of taxing residents for objects they create."[79] Second Lifers "dress[ed] in colonial garb and cover[ed] the land with giant tea crates and defiant signs that read 'Born free: Taxed to Death.'"[80] The tax was abolished in November 2003 and Linden Lab granted intellectual property rights to residents for their creations. Nevertheless, it is hard to predict whether policies might change in the future with an influx of less-tolerant residents and major commercial interests that will undoubtedly press for limits on expression that threatens their business.

The biggest problem for Second Life at the moment seems to be the concern about due process. If a resident is expelled from Second Life, his or her virtual property is subject to confiscation without

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agreement or covenant, that prevents any person or private entity that would otherwise have the legal right to display a Flag of the United States on private property from exercising that right, unless it is used as, or in conjunction with, an advertising display." (emphasis omitted)).

76 *See* Verna v. Links at Valleybrook Neighborhood Ass'n, 852 A.2d 202, 214 (N.J. Super. Ct. App. Div. 2004) ("For many Californians, the homeowners association functions as a second municipal government." (citation omitted)); David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 764, 787–89 (1995) (discussing the public function test in the context of residential associations, concluding that there is "little consensus" among state courts as to whether the associations are state actors, and arguing that "[i]f residential associations are able to exercise the powers associated with serving a public function, they must also shoulder the responsibilities").

77 WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 61 (3d ed. 2000).

78 *See* Shelley v. Kraemer, 334 U.S. 1, 18 (1948) (refusing to allow state agents to enforce restrictive covenants based on race).

79 *Wired Travel Guide*, *supra* note 17 (presenting some notable events in the history of Second Life).

80 *Id.*

compensation.[81] This would clearly abridge the Fourteenth Amendment were Second Life to be considered a state actor.

Naturally this would never pass muster in the physical world. Imagine an analogous, pitiable family who is kicked out of their residential community for having a dog weighing more than 25 pounds. Upon coming home one day, the security guard refuses to open the palatial gate and informs them that their house and all the property within it has been seized, with no mind to the investment that has been made in its development and upkeep. Clearly a municipality would not be able to do such a thing because it would be a state actor, and such a deprivation of property without due process violates the Fourteenth Amendment.[82]

Linden Lab has asserted that Second Life is "owned by its residents."[83] So what happens when the property is seized by Second Life or others without due process? A number of observers have questioned the effectiveness of End-User Licensing Agreements (EULAs) like Second Life's "Terms of Service" agreement. "It is not clear to anyone outside the legal system whether the EULAs, as currently written, will be robust to the challenges that will likely ensue."[84] One of the prime arguments is that EULAs apply a double standard where virtual property has real-world value but cannot be affected by real-world laws related to theft, taxation, or civil rights.[85]

Beyond that, such expansive EULAs may be invalid as a matter of contract law.[86] More consideration by the courts will be necessary to

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81 *See* Terms of Service, *supra* note 39, 67–71 and accompanying text. This is what allegedly happened in the pending *Bragg v. Linden Research* case, *supra* note 35.

82 U.S. CONST. amend. XIV, § 1 ("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.").

83 What is Second Life?, http://secondlife.com/whatis/ (last visited July 16, 2007). Note that although language suggesting ownership beyond intellectual property rights has since been removed from the Second Life site, Linden Lab's representatives are well documented as stating that Second Life residents "own" their property. Furthermore, language regarding ownership on the Second Life site is not restricted to discussions of copyrights and trademarks. *See, e.g.*, Second Life, Own Virtual Land, http://secondlife.com/whatis/land.php (last visited Oct. 24, 2007) ("Owning land in Second Life allows you to build, display, and store your virtual creations, as well as host events and business.").

84 Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185, 196 (2004).

85 *See id.* at 198 (citing Lastowka & Hunter, *supra* note 18).

86 *See* David P. Sheldon, Comment, *Claiming Ownership, but Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods*, 54 UCLA L. REV. 751, 776–82 (2007) (reviewing ways that virtual-world participants might "protect their interests in virtual items

determine just how far user agreements may go. Although waiver of First Amendment rights is well established,[87] a contract may nevertheless be void for other reasons. Waiver of rights must be "knowing, voluntary, and intelligent."[88] A contract may also be void if it involves one party violating the law, or if it is contrary to public policy.[89] Arguably, any non-negotiable agreement that pressures users to forfeit any virtual property they may own at the whim of Second Life's proprietors is antithetical to property protections (and related liberties) assured by the Constitution. In fact, a federal court has already deemed Second Life's Terms of Service a "contract of adhesion," finding the arbitration clause (at least) procedurally and substantively unconscionable (and thus unenforceable).[90]

In sum, it is by no means certain that Second Life would be immune from any constitutional claims simply because it was not classified as a company-town-style state actor. A private common interest community still has important obligations to its residents and certain terms in EULAs may be unenforceable or void as a matter of contract law.

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by attacking the terms of the EULAs under contract theories" such as unconscionability or reliance/promissory estoppel).

87 Peter S. Jenkins, *The Virtual World as a Company Town—Freedom of Speech in Massively Multiple On-Line Role Playing Games*, 8 J. OF INTERNET LAW 1, 10 (2004) (noting that typical users may not be sufficiently knowledgeable to waive their rights by clicking '1 agree' on a virtual-world EULA).

88 *Id.* (citing D.H. Overmyer v. Frick Co., 405 U.S. 174 (1972)).

89 *See* WILLISTON ON CONTRACTS § 12:1 (discussing illegal bargains and agreements void as against public policy); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 178 ("When a Term is Unenforceable on Grounds of Public Policy.").

90 Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 606–11 (E.D. Pa. 2007). With regard to procedural unconscionability, the court explained that

> although the TOS are ubiquitous throughout Second Life, Linden buried the TOS's arbitration provision in a lengthy paragraph under the benign heading 'GENERAL PROVISIONS.' Linden also failed to make available the costs and rules of arbitration in the ICC by either setting them forth in the TOS or by providing a hyperlink to another page or website where they are available.

Id. at 606–07 (citations omitted). As for substantive unconscionability, the court noted that "a number of the TOS's elements" led to that conclusion, including "lack of mutuality," one-sidedness of the costs involved, unreasonable arbitration venue and confidentiality provisions, and an insufficient "legitimate business realities" justification for the TOS's one-sidedness. *Id.* at 607–11. Linden has since modified its Terms of Service Agreement, providing a section clearly marked "Dispute Resolution" above the "General Provisions" section. The new section provides for governing law (California), forum for disputes (San Francisco, California), optional arbitration (giving claimants the choice of arbitration when seeking awards less than $10,000), and "improperly filed claims" (allowing recovery of attorneys' fees for claims bought contrary to the dispute resolution section). Terms of Service, *supra* note 39.

IV. VIRTUAL WORLDS AS STATE ACTORS (OR NOT)

Should citizens of virtual worlds expect to have rights? Relatively few legal scholars have examined the role of law in virtual communities and those who have have adopted varying opinions as to the general availability of civil rights for citizens of those communities.

As an initial matter, we must first address the common objection to the legitimacy of granting rights to arguably fictional identities. It is easy enough to argue that commodification of virtual communities has made it clear that Second Life is not merely "a game." But a more difficult challenge to surmount is the problem that the Constitution protects "people," not fictitious representations of people. Identities established in Second Life or other virtual communities are not "real," so how can they be entitled to civil liberties? One response might be that each virtual identity is simply an extension of the person who has directed its development. But one human could have several virtual identities—or, for that matter, one virtual identity could have been developed and transferred among various human operators. Whose rights should be protected? An alternative response is to point to the corporation, another fictitious entity that has been recognized by the law and accorded rights for nearly four centuries.[91] Similarly, the jurisdictional concept of "domicile" has been raised to suggest that an individual may be legitimately seen as "living" in a place he or she does not physically occupy.[92] "If a corporation, which has no physical body . . . can be said to be domiciled in a certain location, then certainly [one] who is directly manifested in the [virtual world] by his avatar, can be said to be domiciled in the [virtual world], especially if the player operating the avatar spends more time in the [virtual world] than anywhere else."[93] Thus, there appears to be no *prima facie* reason why a fictional entity should not be entitled to rights.[94] Let us return, then, to the question of whether

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91 *See* Castronova, *supra* note 84, at 188 ("There was a moment some 400 years ago when this set of fantastical rules—defining who or what could be a fictional person and how that fictional person would be treated—seemed sensible to large numbers of serious people. Since then, few have been troubled by this collective fantasy.").

92 Jenkins, *supra* note 87.

93 *Id.*

94 If the question of whether the law recognizes virtual persons requires some argument, the analogous question of whether the law recognizes intangible "virtual property" appears well settled by disputes over many varieties of abstract property interests, from financial securities to intellectual property to frequent-flyer miles. *See, e.g.*, Martin v. Martin, 52 P.3d 724, 731 (Alaska 2002) (holding that Alaska Airlines miles, despite being non-transferable, constituted marital property subject to valuation for purposes of property

Second Life should be considered a state actor that is prohibited from denying the rights due to such fictitious entities.

There is no consensus in the scholarly literature whether virtual world residents should be entitled to rights, or whether they (and their virtual property) exist purely at the whim of virtual world proprietors. Authors who favor limiting the rights of virtual world residents in favor of stronger proprietor control have typically argued that the Constitution simply does not apply to virtual worlds because they do not qualify as state actors. They go on to either argue that the law should not get involved with what is essentially a private "game,"[95] or that because of the property rights involved, the law *will* get involved, but not on the basis of any constitutional mandate.[96] Others contend that users' rights should be protected, but by self-imposed rules developed by virtual world proprietors.[97] A few believe that it probably makes sense to find state action in virtual worlds.[98] I agree with this latter group, and suggest that the Constitution (either state or federal) clearly does apply, or clearly will apply before too long as usage expands and technology improves. I take the position that Second Life should be considered a state actor under the public function doctrine, that the rationale for this continues to strengthen with Second Life's success, and thus Second Life must offer constitutional rights to its citizens, as would any virtual world that aims to mimic a municipality or common-interest community. Furthermore,

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division); *see also* Bragg v. Linden Research, Inc., 487 F. Supp. 2d at 593 (raising no question as to the legitimacy of the plaintiff's virtual property). It is unnecessary to review disputes over the applicability of the Takings Clause to revocation of flight miles or credit card points because, contrary to the thesis of this Comment, there can be little argument that card issuers or airlines are "state actors."

95 *See* Richard A. Bartle, *Virtual Worldliness: What the Imaginary Asks of the Real*, 49 N.Y.L. SCH. L. REV. 19, 42–44 (2004) (opining that if courts were to grant property rights to game players uninvited by the administrators, it would "ultimately lead[] to [the game's] strangulation").

96 *See* Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 N.Y.L. SCH. L. REV. 63 (2004) [hereinafter Balkin, *Law and Liberty*] (noting that although "the right of players to play in virtual worlds and the right of game designers to create and maintain these worlds overlap in important respects with the constitutional rights of freedom of speech, expression, and association," they are not within the scope of the First Amendment because the First Amendment only protects against state action).

97 *See* Castronova, *supra* note 84, at 209 (stating that in closed virtual worlds the presence of an End User Licensing Agreement is enough to protect the rights of players).

98 *See, e.g.*, Jenkins, *supra* note 87 (agreeing with the proposition that constitutional speech protections will be granted to residents of virtual worlds); Lastowka & Hunter, *supra* note 18, at 60–61 (noting the likelihood of increased agitation for application of the state action doctrine to virtual worlds).

I suggest that the more "life-like" the virtual community is, the more those rights should apply.

One advocate of strong rights for virtual world proprietors (and not for virtual world residents) is Richard Bartle, a professor of Electronic Systems Engineering, and a developer of the original "*MUD* ("Multi-User Dungeon") . . . the world's first virtual world."[99] He contends that virtual world proprietors must be able to develop the rule of virtual worlds, and that they "have carte blanche to change the virtual world however they deem appropriate, regardless of the will of the players . . . ."[100] This is necessary, he argues, in order for the administrators to "protect the game conceit."[101] Bartle also believes the commodification of virtual worlds—the application of "real-world" value to virtual objects and property—poses a risk to virtual worlds because it invites the legal system to limit the power of game administrators.[102] Although he gives lip service to the idea that virtual worlds continue to develop, and that "[t]hey're not games, they're places,"[103] it appears that Bartle is conceptualizing virtual worlds as nothing more than pure constructions of game developers for the sole purpose of entertainment.[104] Not being a legal scholar, he appears wary of the involvement of courts and the need to establish property rights. Unfortunately, this denies the true potential of the seed he helped to plant and favors the rights of virtual world administrators over the lives that now exist in MUD's progenies. As Bartle says, "the more virtual worlds there are, the better,"[105] and there may be room for authoritarian virtual communities where property can be seized at will and disfavored speech may be summarily silenced. This sort of virtual society, however, is not the one embodied by Second Life, and to the extent a virtual community styles itself as "free," it should be distinguished from the "games" whose conceit Bartle is so interested in protecting.

Eric Goldman also argues against providing speech rights for residents of virtual worlds, suggesting that they are no different from

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99 Bartle, *supra* note 95, at 20. Note that the MUD acronym was later explained to stand for "Multi-User *Domain*" when use of the nascent virtual world technology expanded beyond the fantasy gaming context.

100 *Id.* at 34.

101 *Id.*

102 *See id.* at 36 (observing that when a judge modifies the power of the administrator in a virtual world, it changes that world in a fundamental way).

103 *Id.* at 44.

104 *Id.* at 43–44 (describing the integral nature of characteristics such as game conceits, levels, and achievement structures to virtual worlds).

105 *Id.* at 43.

other online providers, like CompuServe and America Online, which "courts so far have unanimously held . . . are not state actors for First Amendment purposes."[106] Goldman examines the arguments in favor of distinguishing virtual communities from other online providers (immersion, commoditization, and investment/switching costs), and dismisses them.[107] Rather, he argues, virtual communities simply encourage participants to fantasize that their online lives are "real," that virtual assets are governed by contract law under the terms of the community's EULA, and that investment in virtual property is a bad thing that makes it difficult for newcomers to enter a community.[108] Goldman's strongest argument is that deeming virtual communities state actors would unintentionally limit free speech because virtual community proprietors would then have more responsibilities and less incentive to invest.[109] A counterargument is that plenty of businesses are still financially attractive to investors despite the fact that they must respect freedom of speech mandates. Goldman compares virtual communities to earlier online service providers (e.g., Prodigy) that were given blanket protection by the Communications Decency Act (CDA).[110] Although it is true that services like Second Life should be protected under the CDA for anything residents may say (e.g., defamatory speech), it does not address whether a virtual community should be considered a state actor, forbidden from abridging rights to which its citizens are entitled. To be sure, early online communities like AOL, CompuServe, and Prodigy shared features with Second Life, in that people used the service to communicate with other people and established online relationships and identities in "communities" revolving around chat rooms and bulletin board forums. How-

106 Eric Goldman, *Speech Showdowns at the Virtual Corral*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 845 (2005) (evaluating the censorship outcry after a *Sims Online* user's account was terminated for publicly exposing an online "cyber-prostitution" ring in the virtual community); *see, e.g.*, CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1025–27 (S.D. Ohio 1997) (holding that CompuServe was not a public utility and thus Cyber Promotions enjoyed no special privilege to use CompuServe's proprietary computer system); Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 441, 444–45 (E.D. Pa. 1996) (bolding that America Online was a private company and was not performing an exclusive public function, was not acting in concert with state officials, and was not a joint participant with the state).

107 Goldman, *supra* note 106, at 848–51.

108 *Id.* Of course, one could argue that the challenge to newcomers in going up against heavily invested incumbents is in fact quite similar to the physical world we all live in.

109 *Id.* at 851.

110 *See id.* at 852 (describing section 230 of the Communications Decency Act, 47 U.S.C. § 230 (2000), as "grant[ing] online providers a near-blanket immunity from liability for their users' content").

ever, these early communities were simply forums for communication, not virtual spaces with freedom to create, own, and transfer property. Even the earliest avatar-based forums, like The Palace,[111] were simply fora for synchronous online interaction—nothing like the rich simulacra of life embodied by the virtual worlds of today. No one would argue that a collection of chat rooms amounted to public functions traditionally reserved exclusively for government. AOL never called its users "residents." But Second Life offers everything that one would expect to find in a real town—and more.

Jack Balkin takes a more pragmatic approach to virtual communities, suggesting that virtual worlds like Second Life may or may not be seen as "company-town" state actors, but that ultimately the law will get involved either way because of commodification (attaching real-world value to virtual goods).[112] He has posited that there are three kinds of virtual liberty: (1) the freedom of "players" to participate and interact in the virtual world; (2) the freedom of the platform owner to design (plan, construct, and maintain) the virtual world; and (3) "the collective right of the designers and the players to build and enhance the game space together."[113] Balkin's primary arguments are: (1) that the First Amendment should protect against the government's intrusion into activities of players and game designers;[114] (2) that tort law may be applicable to activity in virtual worlds;[115] and (3) that "courts, legislatures, and administrative agencies [may] start treating virtual items as property," to the extent that platform owners "encourage people . . . to treat virtual items like property, and allow sale and purchase of these assets as if they were

111 The Palace was an interactive computer service established in 1996 where users could log into chat rooms and interact by moving small pictures (avatars) around. Typed text would appear in comic-book-like bubbles near their avatars. *See* Wikipedia, The Palace, http://en.wikipedia.org/wiki/The_Palace_%28computer_program%29 (discussing the history of the Palace).

112 *See* Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2046–47 (2004) [hereinafter Balkin, *Virtual Liberty*] (asserting that when "game owners encourage people to treat elements in the virtual world like real-world property, and allow purchase of those assets in real-world markets," the First Amendment should not shield them from government regulation).

113 *See* Balkin, *Law and Liberty*, *supra* note 96, at 64.

114 *Id.* at 71 ("Both platform owners and players can assert First Amendment rights against state interference with rights to design and play.").

115 *Id.* at 73–76 (including trademark violations, defamation, misrepresentation, and intentional infliction of emotional distress).

property."[116] Most importantly for the purposes of the present discussion, Balkin maintains, "First Amendment law does not protect the interests of the game players against the actions of the platform owner or game designer because the platform owner is not a state actor."[117] Although he acknowledges that a virtual world could be seen as a *Marsh*-style "company town," he distinguishes the virtual community in that: (1) unlike *Marsh*, virtual community residents may still communicate with one another outside the virtual world; (2) unlike *Marsh*, virtual world residents do not have to live in the company town in order to make a living; and (3) not all virtual worlds are the same, or uniformly created for the purpose of "creat[ing] channels for general public communication."[118] In the two years since Balkin wrote, his anticipated objections to the company town analogy have (as he anticipated) grown weaker. People *are* conducting important activities and establishing occupations in virtual worlds. We are approaching a time where one will not have the choice to avoid participating in Second Life (or something like it) any more than we can decide not to participate in the Internet. Students enrolled in Harvard Law's *CyberOne* course[119] were required to appear in Second Life, and organizers of more important meetings (business, government, social, et cetera) are selecting Second Life as the locale of choice.[120] The increasing number of Second Life residents who depend on it to make a living are not required to be there any less than the *Marsh* employees were (they could have moved and found different jobs). Finally, *Second Life* is a perfect example of the sort of community that *is* intended to be a channel for open communication. Although communication among Second Life residents is *possible* outside Second Life, the *Marsh* standard is not set so high (after all, Chickasaw's residents *could* have communicated by other means, had they wished).

Edward Castronova takes another pragmatic perspective. He presumes that EULAs are probably not enforceable under the law but that new "Laws of Interration" should be enacted to facilitate the creation of *closed* "play spaces," that would have limited sovereignty

116 *Id.* at 78 (arguing that platform owners "cannot have it both ways . . . simultaneously encourag[ing] the purchase and sale of virtual items and then writ[ing] the EULA so that all virtual items remain the property of the platform owner").

117 Balkin, *Virtual Liberty*, *supra* note 112, at 2074–75.

118 *Id.* at 2078–79.

119 *See supra* note 27.

120 *See, e.g.*, Athavaley, *supra* note 31 (discussing job interviews held in Second Life).

and be completely self regulated.[121] Closed worlds would be required to adhere to strict rules (as are corporations) to ensure their proper separation as play spaces.[122] For example, assets in closed worlds would be restricted from commodification.[123] *Open* virtual spaces, by contrast, would have a "completely porous" border with the real world. All real-world laws would apply and conflicts would be resolved in traditional courts.[124] Presumably, Second Life would continue to operate as the showcase "open" world that it has become under Castronova's scheme.

In perhaps the most pragmatic and prescient article, from a developmental standpoint, F. Gregory Lastowka and Dan Hunter have predicted that finding state action in virtual worlds will be resisted at first, but that the public will continue to argue for it, given the increasing investment in aspects of our lives that are carried out in virtual spaces.[125] Thus, they suggest, it is only a matter of time before citizens expect the same liberties that they have in privately owned towns and shopping malls.[126]

> As people increasingly come to live and work in these worlds, the domination of legal property issues by EULAs and practices of "wizardly fiat" may appear one-sided and unjust. If corporate wizards continue to assert complete ownership over virtual lives, cyborg inhabitants will bring their concerns to real-world courts to prevent certain fundamental rights from being contracted away. If constitutional speech protections extend to company towns like Chickasaw, Alabama, it seems likely that such rights

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121 *See* Castronova, *supra* note 84, at 201–02 (envisioning closed worlds where the interests and conditions of users are regulated by the terms of the EULA and where Earth courts and legislatures have no powers).

122 *Id.* at 204 (noting also that "lack of good faith efforts to maintain the space as a *play* space could lead to the revocation of the charter").

123 *See id.* at 204 n.25 (discussing the need to ban certain eBay transactions for virtual goods). Note also that eBay eventually did ban real-money trading in January 2007, "citing, among other concerns, the customer-service issues involved in facilitating transactions that are prohibited by the gaming companies." Dibbell, *supra* note 32, at 38. However, by the time eBay banned such sales, the bulk of such transactions were being facilitated through "high-volume online specialty sites like the virtual-money superstores IGE, Bro-Game and Massive Online Gaming Sales . . . the Wal-Marts and Targets of this decidedly gray market . . . ." *Id.*

124 *See* Castronova, *supra* note 84, at 202 (discussing open worlds where "[t]he interests and conditions of users are regulated by applicable real-world law in whatever jurisdiction the users and world-servers find themselves").

125 *See* Lastowka & Hunter, *supra* note 18, at 60–62.

126 *See id.* at 61 (posing the question, "if members of our society are uncomfortable with limitations upon speech in company towns and shopping malls, how will we feel about speech limitations placed on entire (virtual) worlds?").

will be asserted by, and eventually granted to those who live in virtual worlds.[127]

Lastowka and Hunter's conclusion has been echoed by Peter S. Jenkins.[128] Jenkins extends the state action argument by focusing on the lived experiences of participants in virtual worlds and taking a closer look at the "informed citizen" rationale in *Marsh*.[129] One of the considerations in *Marsh* was that even though Chickasaw was a private town, it needed to allow for free speech because its residents had no other outlet to receive diverse viewpoints.[130] Jenkins considers the notion that *Marsh* does not apply because virtual citizens have other outlets for receiving information, and by virtue of the Internet, have even *more* access to diverse, uncensored viewpoints than usual.[131] He notes that recent scholarship acknowledges that the Internet, and the availability of an unlimited amount of information, has led, not to more diversity, but less, because individuals "sort themselves into digital deliberative enclaves together with those who share the same viewpoints (cyberbalkanization), often with the result that the group arrives at a more extreme conclusion than the majority of its members each individually held prior to joining the group."[132] Thus, Jenkins argues, virtual citizens in fact need *more* assurance of free speech because they are *not* likely to receive diverse viewpoints on their own. Jenkins goes on to distinguish virtual worlds from *Marsh* progeny cases like *Hudgens v. NLRB*, noting (as I did above) that virtual worlds are more like towns than shopping malls given the extent to which they are "lived in" by their "residents."[133] It is further irrelevant, he notes, that unlike Second Lifers and other virtual community citizens,

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127 *Id.* at 72.

128 *See* Jenkins, *supra* note 87 ("Although I do not agree with all of [Lastowka and Hunter's] reasoning, I certainly do agree with their conclusion.").

129 *Id.* at 11–13.

130 *See* Marsh v. Alabama, 326 U.S. 501, 508–09 (1946) ("Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.").

131 Jenkins, *supra* note 87, at 11.

132 *Id.* (citing the work of Cass Sunstein at the University of Chicago). Another Chicago faculty member, Judge Richard Posner, expressed a similar argument in a recent article evaluating increasing polarization in the news media. *See* Richard A. Posner, *Bad News*, N.Y. TIMES, July 31, 2005, at 1 (book review) (arguing that competition and the rise of blogs has led to political polarization across all news media).

133 Jenkins, *supra* note 87, at 12.

the residents in *Marsh* were employed by the owner of their town, Gulf Shipbuilding. What mattered to the Supreme Court was not who employed the citizens, but the public function provided by the proprietors and the ability of citizens to access information without censorship.[134]

The past two to three years since the burst of virtual world legal scholarship, which emerged from the first State of Play conference in 2003,[135] have only seen an increase in virtual world usage, and a mainstreaming of the field, with a high level of attention in the popular media. Technology continues to improve, and Second Life has emerged as a prototypical virtual world that aims to be about as "real" as one can get. Take the wizards and ogres out of the system, add a legitimate currency exchange, and you end up with something that looks like the quintessential company town. This does not seem to faze Linden Lab CEO Philip Rosedale, who acknowledges the increasing role that real-world law will play in his creation.[136]

I agree with those who suggest that virtual worlds will bring the *Marsh* decision back into the forefront of state action jurisprudence. Although federal law has restricted the doctrine over the years, requiring the private actor to control functions traditionally provided exclusively by the government, the federal courts will again need to confront state action and company towns because virtual worlds are so ripe for diversity of citizenship litigation (parties generally being from different parts of the country—or the world). As discussed above, the initial rulings may come from California where state action is not necessary to provide liberties under the state constitution. But once it has been established that a virtual world must provide some constitutional freedoms, it will be a short step to find that the same freedoms apply under our Federal Constitution as well.

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134 *See id.* at 14 (discussing the importance of forum classification in deciding First Amendment cases).

135 *See* Noveck, *supra* note 18, at 4 ("This special Symposium issue of the *New York Law School Law Review* grows out of the first annual State of Play Conference, held at New York Law School from November 13–15, 2003. The State of Play, organized by the Information Society Project at Yale Law School and the Institute for Information Law and Policy at New York Law School, brought together leading legal scholars and practitioners with game designers and software industry professionals, as well as cognitive psychologists, communications experts, computer scientists, visual artists, and game players to explore the new frontier of cyberspace: the virtual world."). The conference continues today. *See* State of Play IV: Building the Global Metaverse, http://www.nyls.edu/pages/2396.asp (last visited Oct. 9, 2007).

136 *See supra* notes 17, 39.

What is most certain is that the issue will arise in greater force, with a flood of litigation as more businesses and private individuals begin to interact in places like Second Life. Practically speaking, it may be wise to consider Castronova's suggestion that government get involved sooner rather than later and have Congress fashion laws that will establish "closed" virtual worlds where the law cannot apply and "open" virtual worlds (like Second Life) where the law affirmatively *does* apply.[137] Although gamers and virtual world proprietors might flock to the former, enterprise will flock to the latter, where the rules are affirmatively clear, as will consumers looking for more than a good time. Such individuals are likely to prefer an environment where their financial investments—and rights—will be protected.[138] Fortunately, Congress has taken the first steps in examining the tax consequences of virtual property transactions.[139] Once it establishes guidelines for property (as it must), then the foundation will be laid for addressing civil liberties.

V. THE RIGHTS AND RESPONSIBILITIES OF VIRTUAL TOWNS AND VIRTUAL CITIZENS

If, as a matter of law, Second Life must not abridge the rights and privileges of its residents that are protected under the Federal Constitution (as a state actor), or California's Constitution (even if not a state actor), and if the Terms of Service are only enforceable to the extent that they do not violate these rights, then what are the implications for Second Life residents and their landlord, Linden Lab?

Second Life citizens and anyone considering "moving to" a virtual world should be informed as to the rights they may or may not have. Moreover, just as Second Life residents must be aware of their rights, Linden Lab needs to be aware of the limits of its authority.

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137 Castronova, *supra* note 84, at 200–07. Such efforts might not be limited to the federal legislature. Enterprising states might consider developing a comprehensive set of fair laws to govern virtual worlds incorporated there (becoming the "Delaware" of virtual worlds, so to speak). Personal Conversation with Theodore Ruger, Professor, University of Pennsylvania Law School, in Philadelphia, Pa. (June 18, 2007).

138 In the absence of an official legal determination that real-world rights are due to virtual world citizens, they may simply demand them. *See, e.g.*, Ralph Koster, *Declaring the Rights of Players*, *in* THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS, *supra* note 11, at 55, 56–61 (offering a hypothetical "Declaration of the Rights of Avatars").

139 *See* Luis Salazar, *The Virtual Taxman Cometh? Congress Is Examining Whether Gains Made Playing Online Games Should Be Taxed*, eCOM. L. & STRATEGY, Dec. 2006, at 1 (noting that the Joint Economic Committee of Congress has begun to examine tax issues regarding virtual economies).

In some ways Linden Lab is a victim of its own success. The free virtual society it has created has been so good at mimicking the important aspects of world we know that it has become a real *part* of the world we know—and thus subject to the laws that society has created to manage the world as we know it. Just as the Constitution created a society where it was possible to dream up and create such an enterprise, the decision to house a virtual world on servers located in the U.S. makes the residents of a particularly life-like world susceptible to life-like rules. In becoming aware of the rights it must preserve, Linden Lab can ensure that its Terms of Service are in line with the law. Furthermore, it can adjust its software architecture to ensure that such freedoms are protected.[140]

The likely applicability of the Federal and California Constitutions make Second Life a better, freer place for its residents and visitors. Knowing that property is protected against seizure without due process will encourage investment in virtual worlds. Knowing that speech is protected in virtual worlds will encourage the free flow of communication and transmission of ideas. Furthermore, because constitutional liberties are guaranteed to visiting non-citizens,[141] a virtual world whose servers are housed in the United States will be a place where individuals from "less-free" places may participate in the American experiment,[142] learning firsthand the benefits (and challenges) of our way of life. Conversely, American citizens who participate in virtual worlds operated from other nations should not assume

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140 As Lawrence Lessig has written, "code is law." *See generally* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999) (illustrating ways in which the architecture of cyberspace can promote or hinder the fundamental values of a society). It may be possible, for example, to automatically disable user-created scripts that would violate constitutional mandates.

141 *See* Matthews v. Diaz, 426 U.S. 67, 77 (1976) (noting that "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to . . . constitutional protection" from "deprivation of life, liberty, or property without due process of law").

142 Some Second Life citizens have established zones where they are experimenting with other forms of government as well. *See* RYMASZEWSKI ET AL., *supra* note 2, at 34–36 (discussing, *inter alia*, the Neualtenburg Projekt, "a democratic republican government with three branches and a constitution"). It is unclear how the application of constitutional liberties will affect such sub-communities in Second Life, but there is no apparent reason why they could not continue to thrive—analogous to the experimental living communities in the United States today. *See also* Caroline Bradley & A. Michael Froomkin, *Virtual Worlds, Real Rules: Using Virtual Worlds to Test Legal Rules*, *in* THE STATE OF PLAY: LAWS, GAMES, AND VIRTUAL WORLDS, *supra* note 11, at 227 (suggesting that virtual worlds may also serve as a proving ground for new legal principles, testing the effects of new approaches to areas like tort law, taxes, and dispute resolution).

that they are protected under the constitutional freedoms they take for granted. This may be a learning experience for them as well.

Why buy wheels when you have wings? The author visits the Second Life Scion Dealership.