THE ROLE OF THE RULE OF LAW IN VIRTUAL COMMUNITIES

Nicolas Suzor[†]

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I. INTRODUCTION

As the Internet continues to develop and people become more invested in social networks and virtual communities, the role of private entities in governing these spaces becomes more important. Current cyberlaw theory and doctrine, however, is not particularly well-suited for analyzing the legitimacy of private governance. There is, accordingly, a substantial risk that emerging tensions in virtual communities will not be adequately recognized or addressed. This Article proposes a framework based upon rule of law theory through which to better conceptualize virtual community governance and suggest appropriate regulatory responses. The rule of law, as a discourse that highlights the potential for abuse of power and the legitimacy of governance, provides a particularly useful tool for examining the exercise of private power in virtual communities.

This project follows partially from A. V. Dicey's argument that in the absence of a substantive, written constitution, rule of law principles in the United Kingdom were protected by the evolution of private law doctrines that secured the substantive rights of citizens.[1] This work also builds upon Paul Berman's and Brian Fitzgerald's recognitions that public constitutional values are threatened by unrestrained private governance.[2] Essentially, this Article argues that if private law rules are used to regulate the governance of virtual communities, then those private rules should be influenced by public governance principles—specifically, those of the rule of law, which provide the most appropriate discourse on the regulation of governance power.

Part II of this Article examines the development of cyberlaw theory over the last two decades and argues that there is a severe tendency to delegitimize state intervention in private governance. In the mid-nineties, this delegitimization was accomplished predominantly by cyberspace exceptionalists, who argued that the Internet was so different from physical space that state laws should not apply. Gradually, this exceptionalism has given way to a recognition that while the Internet is regulable, the best mode

1. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 187–88 (10th ed. 1959).

2. *See* Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to Private Regulation*, 71 U. COLO. L. REV. 1263, 1269 (2000); Brian F. Fitzgerald, *Software as Discourse: The Power of Intellectual Property in Digital Architecture*, 18 CARDOZO ARTS & ENT. L.J. 337, 384 (2000).

of regulation is generally to create and enforce strong property rights in internet resources in order to enable self-regulation. This Article argues that while autonomy is critical in virtual communities, both of these types of deterministic reasoning about governance are dangerous. By creating a false dichotomy between regulation and liberty, much of the current cyberlaw discourse risks misunderstanding the tensions that revolve around the legitimacy of governance in virtual communities.

In Part III, this Article examines substantive conceptions of the rule of law as they relate to the governance of virtual communities. As a first step, rule of law ideals suggest that we ought to be wary of claims that providers require absolute control and absolute discretion over a community. One of the oldest strands of the rule of law requires legal authorization for the exercise of power. Incorporating this insight into cyberspace self-governance implies that the contracts that underpin participation in virtual communities ought to be enforceable against the providers of those communities as well as the participants. This proposition highlights some shortcomings in the ways that these contracts are drafted. Namely, they are drafted overwhelmingly in favor of the providers, grant wide discretionary powers, and greatly limit any potential liability to the providers. If a restraint on the arbitrary exercise of power is warranted, there should be concern about the enforcement of such agreements as written.

Part III also considers the role of substantive external values in limiting the scope of cyberspace self-rule. This Part argues that the private law that is used to regulate private governance should be informed by public governance principles and that these substantive values should aid in determining appropriate limits to self-rule. This analysis canvasses a small number of substantive values: equality, freedom of speech, freedom of peaceful assembly, the right to privacy, protection of property, and rights of legal enforcement. While not all public governance principles should be directly applicable to virtual communities, rule of law ideals suggest that these principles should at least be taken into account when attempting to resolve tensions between participants and providers.

Part IV contrasts the modern liberal conceptions of the rule of law that revolve around formal legality with the uncertainties of governance in virtual communities. These modern ideals of the rule of law require that laws be clear, consistent, general, equal, and certain—characteristics that private contractual governance in virtual communities do not generally possess. Accordingly, Part IV argues that in communities where predictability is important, it may be desirable, at least in some circumstances, for territorial

courts not to defer to rules that fail to live up to these ideals. This Part also considers the role of due process and procedural fairness in the administration of virtual communities and suggests that states may be able to encourage more legitimate internal governance mechanisms by examining the exercise of discretion in exceptional circumstances.

Part V considers the role of consent in the governance of virtual communities. Since the theory supporting self-governance relies upon the consent of the participants in virtual communities to create better rules, we should be suspicious of contractual interpretations that conflict with internal norms. Where there is no conflict with substantive or formal values of the broader society, we ought to defer to the internal norms of the community in evaluating regulatory disputes. However, in cases where there is a conflict between internal consensual norms and a strict literal interpretation of the contractual terms of service, it may sometimes be appropriate for courts to refuse to uphold the contractual terms as written. This Part argues that if self-governance is encouraged for the creation of consensual rule sets, then providers may find themselves bound by the norms of the community they help to create, notwithstanding contractual provisions to the contrary.

This Article concludes that the rule of law discourse highlights important tensions in virtual communities that standard legal liberal contractual doctrine is unable to adequately address. As the role of private virtual community governance becomes greater in the lives of its participants, reliance on standard contractual doctrine risks marginalizing public governance values. In evaluating responses to disputes between participants and providers of virtual communities, it is desirable to read governance principles into the private law that bounds cyberspace self-rule. In doing so, significant care must be taken to ensure that no harm is unduly done to the autonomy of virtual communities. Any legal framework must be sensitive to the real needs of the participants and providers of virtual communities and should avoid regulatory solutions that diminish the value and potential of the community. As these governance issues are contextually sensitive, a significant degree of flexibility is required in determining appropriate legal responses. States should not, however, allow private governance to override core governance values in ways that are detrimental to the interests of their citizens.

II. THE DETERMINISTIC TREND IN CYBERLAW THEORY

The legitimacy of governance within virtual communities is not easily assessable within the framework of current cyberlaw theory. Over the last

two decades, the cyberlaw discourse has greatly evolved, but a deterministic trend remains that tends to delegitimize state interference in the governance of virtual communities. While this trend is most visible in the early cyber libertarian approaches, it persists as a set of flawed assumptions in the later anti-separatist theory. Section II.A traces the development of cyberlaw theory to highlight these deterministic tendencies and the false dichotomy that has emerged between regulation and autonomy. Section II.B then introduces the rule of law as a useful framework for evaluating regulatory approaches in a way that is sensitive both to the legitimacy of private governance and the importance of autonomy in the development of online communities.

A. THE DEVELOPMENT OF CYBERLAW THEORETICAL DISCOURSE

The early cyber libertarians argued that cyberspace was a new, different space—one devoid of scarcity, whose boundless possibilities would provide better rules than any state-made law.[3] This utopian vision delegitimized the role of state law in regulating cyberspace and asserted that self-rule of autonomous virtual communities was both freer and more legitimate than any law imposed by the territorial state. This is best understood as a recognition of the malleability of cyberspace—the seductive opportunity to shape these brave new worlds into ideal communities.[4] In 1996, John Perry Barlow famously declared the independence of cyberspace, calling it "the new home of Mind."[5] David Johnson and David Post followed in the legal literature, making the argument in their 1996 article, *Law and Borders*, that "the fundamental principle" of internet governance should be that

> [i]f the sysops and users who collectively inhabit and control a particular area of the Net want to establish special rules to govern conduct there, and if that rule set does not fundamentally impinge upon the vital interests of others who never visit this new space, then the law of sovereigns in the physical world should defer to this new form of self-government.[6]

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3. *See* David R. Johnson & David G. Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1995) [hereinafter Johnson & Post, *Law and Borders*]; David G. Post, *The Unsettled Paradox: The Internet, the State, and the Consent of the Governed*, 5 IND. J. GLOBAL LEGAL STUD. 521 (1997) [hereinafter Post, *Unsettled Paradox*]; John Perry Barlow, *A Declaration of the Independence of Cyberspace* (Feb. 8, 1996), http://homes.eff.org/~barlow/Declaration-Final.html; David G. Post & David R. Johnson, *The Great Debate*, 11 FIRST MONDAY (Feb. 2006), http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/viewArticle/1311/1231 [hereinafter Post & Johnson, *The Great Debate*].

4. Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210, 217 (2007).

5. Barlow, *supra* note 3.

6. Johnson & Post, *Law and Borders*, *supra* note 3, at 1393.

In this ideal world, whenever the rules that govern participation in any given community become undesirable, a user has a practically unfettered ability to move to another community with a different rule set, or to create and grow a new community.[7] The ability to easily move in and out of virtual communities will create a market for rule sets, resulting in rules that are more responsive to the demands of participants. This allows participants to self-select into communities whose rule sets more closely reflect their needs and desires.[8] The lack of scarcity and ease of exit in virtual communities provides "a more legitimate 'selection mechanism' by which differing rule sets will evolve over time."[9]

This exceptionalist treatment of cyberspace as completely separate from physical space gave way, largely, to the recognition that cyberspace was subject to the same regulatory forces as physical space, and indeed, was no different from physical space.[10] It became clear that the utopian libertarian dream was premised not on self-governance and the delegitimization of the state but upon the creation and maintenance of state-granted property rights.[11] Closer analysis of the software code through which communication was mediated showed not only that the architecture of cyberspace had a regulatory function,[12] but that it could, and in some cases should, be bent to the will of the state.[13] The recognition that cyberspace was already regulated

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7. *Id.* at 1383, 1398–99.

8. *See* Post, *Unsettled Paradox*, *supra* note 3, at 539 (arguing that the decentralized generation of law online is made by "the aggregate of the choices made by individual system operators about what rules to impose, and by individual users about which online communities to join").

9. Johnson & Post, *Law and Borders*, *supra* note 3, at 1398–99.

10. *See* James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 178 (1997); Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998) (challenging both normative and descriptive claims against public regulation of cyberspace); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999) (explaining four modalities of regulation of cyberspace); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295 (1998) (pointing out that self-governance in cyberspace is always reliant on background legal rules); Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163 (1999) (discussing public and private regulation of internet applications).

11. *See* Radin & Wagner, *supra* note 10, at 1296–97.

12. *See* Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 676 (1998) [hereinafter Lessig, *The New Chicago School*]; *see also* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999) [hereinafter LESSIG, CODE] (describing the interaction of code, norms, the market, and the law in the regulation of cyberspace).

13. *See* Graham Greenleaf, *An Endnote on Regulating Cyberspace: Architecture vs. Law*, 21 U. NEW S. WALES L.J. 593 (1998); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 557 (1998).

and always regulable struck a blow to the utopian vision and severely damaged the project to isolate cyberspace from the interference of the territorial state.

In the place of a utopian technological determinism, however, rose a determinism of market rule—a suggestion that cyberspace could be best regulated through the creation and enforcement of strong and clear property rights.[14] The exceptionalist nature of cyberspace had disappeared, but the end result was very similar: state interference in the governance of cyberspace was delegitimized in the name of autonomy and innovation.[15] Judge Frank Easterbrook signalled the beginnings of this change, in a famous exhortation to cyberlaw scholars in 1996, when he argued that the risk of legal error in regulating cyberspace meant that the best regulatory approach would be to create new property rights, allowing for efficient bargaining between users.[16] For Easterbrook, if rules are clear, if strong property rights exist, and if institutions can be created to facilitate bargaining, then Coasean determinism will prevail and an efficient result will emerge irrespective of the initial allocation of entitlements.[17] If society could just let "the world of cyberspace evolve as it will," everyone could simply "enjoy the benefits."[18]

Allowing virtual communities to determine their own rules is intuitively appealing to the liberal ideal of autonomy and self-determination. The claim is that "cyberspace self-governance more fully embodies the liberal democratic goals of individual liberty, popular sovereignty, and the consent of the governed than does the top-down administration of even the most democratic nation states."[19] In an ideal world, individuals will be able to self-select into communities that reflect their needs and desires, thus allowing a

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14. *See* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 212 (1996); Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803, 818–19 (2001); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 236 (1996).

15. *See* F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 72–73 (2004) (concluding that while virtual worlds are subject to legal regulation, courts should "recognize that virtual worlds are jurisdictions separate from our own" in order to allow internal governance to develop); *see also* R. Polk Wagner, *On Software Regulation*, 78 S. CAL. L. REV. 457 (2004) (arguing that creating strong property rights supports the desirable development of cyberspace self-regulation).

16. Easterbrook, *supra* note 14, at 212.

17. *Id.* at 212–13 (citing R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 212 (1959)).

18. *Id.* at 216.

19. Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CALIF. L. REV. 395, 402 (2000).

range of diverse communities to cater to each individual taste.[20] In this ideal world, the norms that develop in virtual communities are generally *better* than any law that could be imposed by the state because they can be tailored for and by the participants themselves.[21] Johnson and Post argued that individuals are "more likely to be in possession of the relevant information regarding . . . their own welfare" than will elected officials.[22] Therefore, individuals can use their ability to enter and exit virtual communities to reflect their needs and desires, potentially resulting in rule sets that can react faster and more flexibly to changing environments and externalities imposed by other communities.[23]

This emphasis on self-determination has been taken up in the virtual worlds literature, particularly by Lastowka and Hunter.[24] Their arguments express the concern that "the complexity of ascertaining a virtual world's emerging legal rules and balancing them" with participant and provider interests will result in bad decisions by real-world courts on virtual disputes.[25] As virtual communities develop their own rules, "[c]ourts will need to recognize that virtual worlds are jurisdictions separate from our own, with their own distinctive community norms, laws, and rights."[26] As these ("cyborg") communities develop, the role of territorial law will fade: "If these attempts by cyborg communities to formulate the laws of virtual worlds go well, there may be no need for real-world courts to participate in this process. Instead, the residents of virtual worlds will live and love and law for themselves."[27]

Other academics have noted that allowing providers to create expressive or entertaining spaces requires substantial autonomy to determine internal

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20. Johnson & Post, *Law and Borders*, *supra* note 3, at 1398; Post, *Unsettled Paradox*, *supra* note 3, at 539; Post & Johnson, *The Great Debate*, *supra* note 3.

21. Post & Johnson, *The Great Debate*, *supra* note 3.

22. David G. Post & David R. Johnson, *Chaos Prevailing on Every Continent: Towards a New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI.-KENT L. REV. 1055, 1087–88 (1997).

23. *See id.*

24. Lastowka and Hunter were careful to distinguish Johnson and Post's "precyberskeptic ambitious thinking about 'cyberspaces' as a separate jurisdiction" on the basis that the Internet, more broadly, "never became an independent community." For Lastowka and Hunter, law and self-rule would only evolve where there was a real community, and the best example of new communities forming was in virtual worlds, which meant that "the emergence of virtual law within those worlds [was] much more likely." Lastowka & Hunter, *supra* note 15, at 69.

25. *Id.* at 71.

26. *Id.* at 73.

27. *Id.*

norms.[28] This approach has also found favor in law and economics discourse. Richard Epstein makes the argument that an absolute right to exclude, which centralizes the power in the hands of the provider, forms the basis for the development of private rules and that "private voluntary arrangements will outperform forced interactions in the long run."[29]

Each of these arguments shares a common thread, specifically that governance by the local virtual community is likely to be better than rules imposed from external sources. Many of these arguments for self-governance are based upon ideal world assumptions where there is little to no scarcity, where participants can come and go without friction, where new communities can quickly and cheaply be established when existing rule sets are no longer appropriate, and where participants are empowered to choose communities whose rules suit their needs and desires. In a non-ideal world, these assumptions are all suspect; there are significant limits to self-governance that must be addressed in any regulatory framework.[30]

1. The Flawed Assumptions in the Development of Cyberlaw Theoretical Discourse

First is the problem of exit. Fundamentally, the assumption that a marketplace for norms will emerge is severely limited if participants are not able to easily leave one community for another.[31] Providers of virtual communities, however, have an incentive to make the community difficult to leave.[32] Subscription and ad-supported communities earn more revenue for each participant and most communities benefit from the network effects of

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28. *See* Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2046 (2004) (discussing the freedom to design); Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185, 196 (2004).

29. Epstein, *supra* note 14, at 819; *see also* Richard A. Epstein, Intel v. Hamidi*: The Role of Self-Help in Cyberspace*, 1 J.L. ECON. & POL'Y 147, 157 (2005) (arguing that supporting self-help through strong property rights provides more efficient outcomes than state regulation of speech).

30. *See* Niva Elkin-Koren, *Copyrights in Cyberspace—Rights Without Laws*, 73 CHI.-KENT L. REV. 1155, 1166 (1997) (critiquing the technologically deterministic economic predictions that self-rule will result in better norms); Netanel, *supra* note 19 (arguing that cyberspace self-rule should be limited to enhance liberal values).

31. *See* Dan L. Burk, *Virtual Exit in the Global Information Economy*, 73 CHI.-KENT L. REV. 943 (1997); Netanel, *supra* note 19, at 426.

32. *See* Sal Humphreys, *"You're In Our World Now" Ownership and Access in the Proprietary Community of an MMOG*, *in* INFORMATION COMMUNICATION TECHNOLOGIES AND EMERGING BUSINESS STRATEGIES 76, 85 (Shenja Van Der Graaf & Yuichi Washida eds., 2007) (arguing that "[t]he stronger the ties, the longer the engagement, and the longer the monthly subscription rolls in for the publisher").

having more participants. As such, the total utility increases significantly with each additional connected individual.[33]

Thus, exit is nowhere near frictionless. A participant's ability to leave a community is constrained by the social connections she has developed or strengthened with other people, with whom she would lose an important point of contact, context, and common interest.[34] Any investment she has made in social capital, reputation, or virtual property within the community, none of which is easily transferable to other communities, makes it harder for her to leave. Further, and this hints at the next problem, exit is constrained by the availability of other communities that offer reasonably substitutable experiences.

The second problem is the considerable barriers to the creation of new communities. When Johnson and Post were first writing in the mid-nineties, barriers to the establishment of new communities were reasonably low, as it was relatively trivial to create a new channel or new server for Internet Relay Chat, a new Usenet newsgroup, or a new text-based virtual world.[35] The ease with which new services could be offered suggested that any harm caused by poor governance could readily be overcome by joining or creating a new community. Modern virtual communities, however, are much less readily created. Millions of dollars of investment in coding, artwork, testing, and marketing go into the creation of large-scale virtual worlds. Even where communities can be built on relatively simple technology, they will often fail to reach or maintain the critical mass required to sustain a large-scale community. Small-scale communities may still be created relatively trivially, but the importance of network effects generally ensures that these

33. Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985) (defining network externalities); S. J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, 8 J. ECON. PERSP. 133 (1994) (explaining network externalities with respect to software and computer networks); *see also* danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 218 (2008) (explaining that most, but not all, social networking sites aim for exponential growth).

34. T. L. TAYLOR, PLAY BETWEEN WORLDS: EXPLORING ONLINE GAME CULTURE 135 (2006) (explaining that despite participants' opposition to structures of technological systems, it is not easy to refrain from participating); Sal Humphreys, *Ruling the Virtual World: Governance in Massively Multiplayer Online Games*, 11 EUR. J. CULTURAL STUD. 149, 163 (2008).

35. Johnson & Post, *Law and Borders*, *supra* note 3, at 1395 ("The ease with which internal borders, consisting entirely of software protocols, can be constructed is one of Cyberspace's most remarkable and salient characteristics; setting up a new Usenet newsgroup, or a 'listserver' discussion group, requires little more than a few lines of code.").

communities remain at the fringes, rarely attracting enough participants to seriously compete with larger communities.[36]

The third major problem with the ideal of a marketplace of norms is that it does not exist. Firms that provide virtual communities tend to draft contracts that are not designed to be easily read or understood by subscribers.[37] These contracts are typically dense, long, full of legalese, and presented in a way that discourages readers from actually reading the contract.[38] Individual subscribers are at a significant disadvantage compared to the providers, who have the ability to amortize the high costs of understanding, drafting, and changing these agreements over a very large number of transactions.[39] Finally, perhaps because subscribers are discouraged from reading and understanding the terms of service, there is very little competition in the market. Consequently, there is a high degree of homogeneity in the terms of service available from the various providers of virtual communities.[40]

These factors illustrate the assumption that cyberspace self-governance will always provide better results than externally imposed regulation is deeply flawed. It may be that virtual communities will develop legitimate rules for themselves.[41] Nevertheless, there can be no guarantee that providing strong property and contract rights and allowing communities to govern themselves will necessarily lead to desirable outcomes.[42] Indeed, legitimate self-

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36. TAYLOR, *supra* note 34, at 135 ("We might also consider the ways participating in particular forms or places always are tied up with questions of power. Separate does not mean equal, and sometimes we can see quite clearly the benefits that come from being in *particular* spaces.").

37. *See* Dale Clapperton & Stephen Corones, *Unfair Terms in "Clickwrap" and Other Electronic Contracts*, 35 AUSTL. BUS. L. REV. 152 (2007).

38. *See* Margaret Jane Radin, *Regulation by Contract, Regulation by Machine*, 160 J. INSTITUTIONAL & THEORETICAL ECON. 142 (2004); *see also* Humphreys, *supra* note 34, at 165 ("Many players never read the EULA or Terms of Service, lengthy documents written in legal discourse impenetrable to most of the world outside the legal profession.").

39. Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J.L. & ECON. 461, 483–85 (1974); *see also* Clapperton & Corones, *supra* note 37; Andrew Robertson, *The Limits of Voluntariness in Contract*, 29 MELB. U. L. REV. 179, 194 (2005) (explaining the imbalanced bargaining power between the consumer and the provider).

40. Andrew Jankowich, *EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds*, 8 TUL. J. TECH. & INTELL. PROP. 1, 49 (2006); Radin & Wagner, *supra* note 10, at 1311–12.

41. Johnson & Post, *Law and Borders*, *supra* note 3, at 1388 (arguing that providers and subscribers "have begun explicitly to recognize that formulating and enforcing such rules should be a matter for principled discussion, not an act of will by whoever has control of the power switch").

42. Netanel concludes:

governance is an extremely difficult ongoing process.[43] Theorists have demonstrated that of the four modalities of regulation identified by Lessig (code, law, the market, and social norms),[44] none are value neutral, and none can be relied upon to provide utopian results.[45]

While the assumptions that underpin both the technological determinism of the exceptionalists and the Coasean market determinism of the law and economics scholars have not gone unchallenged,[46] there remains some conceptual difficulty that surrounds the autonomy of online communities. The normative claim that online communities can develop better norms for interaction than state-imposed rules[47] still holds some weight. Autonomy continues to be regarded as crucially important from a number of perspectives: that there is a fundamental right to design communities and to immerse oneself in spaces where the normal rules of the corporeal world do

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> An untrammeled cyberspace would ultimately be inimical to liberal democratic principles. It would free majorities to trample upon minorities and would serve as a breeding ground for invidious status discrimination, narrowcasting and mainstreaming content selection, systematic invasions of privacy, and gross inequalities in the distribution of basic requisites for netizenship and citizenship in the information age.

Netanel, *supra* note 19, at 498.

43. *See* A. Michael Froomkin, *Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003) (demonstrating that the effort required to create a legitimate consensual governance regime was substantial, leading to an inference that not all communities will invest in the normative discourse required to create a workable and fair system).

44. Lessig, *The New Chicago School*, *supra* note 12, at 662–63.

45. *See generally* Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1292 (1997) (expressing concern about the legitimacy and lack of restraint on those enforcing non-legal norms); Netanel, *supra* note 19 (highlighting the inescapable inefficiencies and the substantial imbalances of power in the market); Radin & Wagner, *supra* note 10 (explaining that the legal property and contractual rights that underpin self-governance claims entrench particular decisions about the definition and allocation of entitlements); *see also* Cohen, *supra* note 4, at 255 ("Many important questions have tended to slip between the cracks in an analytical universe that seeks to unpack 'code' while taking 'law,' 'norms,' and 'the market' for granted.").

46. *See* LESSIG, CODE, *supra* note 12; Julie E. Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998); Elkin-Koren, *supra* note 30; William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203 (1998); F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293 (2004); Lemley, *supra* note 45; Jonathan F. Fanton, *Rights and Responsibilities Online: A Paradox for Our Times*, 13 FIRST MONDAY (Aug. 9, 2008), http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2196.

47. *See generally* Johnson & Post, *Law and Borders*, *supra* note 3 (arguing that new rules will arise in virtual communities that differ from territorial, state-based rules, and that these rules should govern in virtual spaces).

not apply,[48] that individuals with similar interests should be able to bargain for their own rules of association,[49] that vibrant communities need regulatory freedom to create their own interesting norms,[50] and that flexibility to determine rules is of paramount necessity for "maintaining and improving the environment for innovation, experimentation, and entrepreneurship."[51]

This emphasis on autonomy is balanced, to an extent, by a recognition that internal governance should be limited in certain circumstances. What exactly these circumstances are is equally varied. Some form of property right in virtual assets is often thought to be worth protecting by territorial states.[52] At other times, theorists have suggested that limits on the ability of providers to control speech may be appropriate, at least where the borders (particularly the economic borders) between actions in the community and the real world are porous.[53] There have also been suggestions that the consent expressed by the contractual rules that bind participants should be procedurally protected from anti-competitive behavior[54] and "force and fraud."[55] Unfortunately, however, no easy way to reconcile the need for autonomy with the disparate legitimate interests of participants has emerged.

This tension between autonomy and regulation has led to the emergence of a false dichotomy. It seems to be generally understood that states can (and sometimes should) impose their will on the providers of virtual communities, but that doing so is likely to limit the ability of communities to develop consensual norms and cause harm to the diversity and vibrancy of online spaces that makes them particularly attractive in the first place. The result is

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48. Balkin, *supra* note 28, at 2043, 2062; Castronova, *supra* note 28, at 202.

49. Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73, 81 (2003); Epstein, *supra* note 14.

50. Lastowka & Hunter, *supra* note 15, at 61, 72–73; *see also* Richard A. Bartle, *Virtual Worldliness: What the Imaginary Asks of the Real*, 49 N.Y.L. SCH. L. REV. 19, 22 (2004) (arguing that freedom to design and regulate is fundamentally important in virtual communities).

51. Wagner, *supra* note 15, at 506.

52. *See generally* Joshua A. T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047 (2005) (arguing that creating property rights in virtual assets can help prevent anticommons that arise from fragmentation of rights to exclude); Andrew E. Jankowich, *Property and Democracy in Virtual Worlds*, 11 B.U. J. SCI. & TECH. L. 173 (2005) (arguing that creating enforceable property rights in virtual assets is necessary to help structure relationships and resolve disputes between participants and providers in virtual worlds); Lastowka & Hunter, *supra* note 15 (arguing that property theory generally supports creating property rights in virtual assets).

53. Balkin, *supra* note 28, at 2090; Castronova, *supra* note 28, at 204 (arguing for a strong legal distinction between play worlds and worlds with a porous economy).

54. Epstein, *supra* note 14, at 819.

55. Joshua A. T. Fairfield, *Anti-Social Contracts: The Contractual Governance of Virtual Worlds*, 53 MCGILL L.J. 427, 468 (2008).

that state intervention in online community governance continues to be delegitimized, even as the harm caused to participants in examples of bad governance becomes more visible.

2. Situating Cyberspace in Order to Overcome the Dichotomy Between Regulation and Autonomy

A theoretical approach that is more sensitive to the ways in which different sources of regulatory power interact in online communities should be adopted in order to move beyond the dichotomy between regulation and autonomy. A key problem with the current cyberlaw governance discourse is that it has been largely "predicated on a teleology of disembodiment"[56] that isolates participation in cyberspace from the remainder of lived experience. Much of current cyberlaw discourse positions law and the market as bounding forces that structure isolated zones of liberal self-governance. This discourse is flawed because it tends to focus on the existence and operation of rights to exclude based on property or contract law as the borders of acceptable regulation, particularly between public regulation and private governance.

This is particularly true in debates that center around cyberproperty and cybertrespass, where the analysis generally focuses on whether an enforceable right to exclude exists, but rarely considers the effect of such a right on community governance. There is a tendency to characterize such rights as absolutes, notwithstanding that their offline analogs are highly contextually sensitive and contain numerous complicated exceptions.[57] The mere existence of a right to exclude tells very little about any limitations that may be imposed on the exercise of such a right.[58]

The cyberproperty debate is not, however, the only part of cyberlaw theory that maintains a relatively sharp dichotomy between regulated and unregulated zones of self-governance. These distinctions are also quite popular in the virtual worlds discourse where theorists often try to separate

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56. Cohen, *supra* note 4, at 255.

57. Michael A. Carrier & Greg Lastowka, *Against Cyberproperty*, 22 BERKELEY TECH. L.J. 1485, 1498 (2007) [hereinafter Carrier & Lastowka, *Against Cyberproperty*]; *see also* F. Gregory Lastowka, *Decoding Cyberproperty*, 40 IND. L. REV. 23, 46–47 (2007) [hereinafter Lastowka, *Decoding Cyberproperty*] (questioning the assumption that private property rights in "cyberspace" is the best means of promoting the public good).

58. Carrier & Lastowka, *Against Cyberproperty*, *supra* note 57, at 1508–09 (arguing that limits are fundamentally important to property, but conceptions of cyberproperty tend not to include limits).

games and expressive spaces from more quotidian platforms.[59] In these conceptions, social spaces that allow property or cross-border real-money trades are typically treated as regulable, whereas "play" spaces are held to remain free from state interference.[60] The desire to protect the integrity of play or expressive spaces is understandable; there is clearly a threat that an overly limited capacity to mold the community experience will greatly jeopardize the enjoyableness or expressiveness of the spaces.[61] While these concerns are significant, however, it does not necessarily follow that the providers of all such spaces require absolute power over the community. Some tensions will obviously be less relevant in play and expressive spaces, but there are still legitimate concerns about other potential abuses of private power.[62]

Perhaps the most pronounced example of this disembodied dichotomy is the tendency to resort to contractual doctrine as a model for evaluating disputes in virtual communities.[63] While recognizing that contractual limits do exist and apply, this model obviates the need to evaluate internal governance within those boundaries. So long as the contractual documents that purport to govern participation are upheld, then regulating governance becomes a simple matter of contractual interpretation. Unfortunately, a predominantly private contractual model of governance imports all the familiar baggage of liberal contract theory and does a poor job of structuring the potentially conflicting interests of providers and participants in virtual

59. *See* Balkin, *supra* note 28, at 2072; Castronova, *supra* note 28, at 204; Lastowka & Hunter, *supra* note 15, at 70–72 (contrasting cyberspace in general with the claims for autonomy made by virtual communities); James Grimmelmann, *Virtual World Feudalism*, YALE L.J. POCKET PART (Jan. 18, 2009), http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/property-law/virtual-world-feudalism/.

60. *See generally* Joshua A. T. Fairfield, *The Magic Circle*, 11 VAND. J. ENT. & TECH. L. 823 (2008) (explaining and critiquing the concept of the "magic circle," a metaphor used to isolate play spaces from the "real world").

61. *See* Bartle, *supra* note 50, at 27; Castronova, *supra* note 28, at 202.

62. *See* TAYLOR, *supra* note 34, at 19 ("In much the same way we now see the relationship between on- and offline life as not a bounded one, in many ways a game/not-game dichotomy does not hold.").

63. Fairfield, *supra* note 55, at 435 (noting that in virtual worlds, "questions of property law, tort law, and even criminal law are uniformly construed by the courts as contract disputes"). Fairfield hints at the inadequacy of reducing governance to a contractual framework by arguing that private contract law is unable to provide the stable default rules that societies need to govern interaction between participants. Fairfield's analysis, however, focuses on the horizontal relationships between participants, and does not consider the relationship between participants and providers in any great detail. Fairfield does consider vertical relationships, but mainly notes that contractual law makes it much more difficult to define clear ownership rights in virtual property than does property law itself. *Id.* at 454–57.

communities. This model makes problematic assumptions about the way that individual participants bargain and contract to enter communities: rationally evaluating risk and retaining at all times the consumer sovereignty of being able to simply leave a community whose governance structure becomes objectionable. It imposes an assumption of market determinism that participants will express their demand for certain rule sets and this demand will be satisfied through standard economic forces, as long as property and contract rights are sufficiently well-defined and easily transferable.[64] Most importantly, perhaps, it reduces community participation to simple consumer transactions, which tends to downplay or ignore the set of tensions that revolve around the legitimacy of governance.[65]

The critical insight here is that the dichotomy between absolute self-rule and a complete lack of autonomy is false. The borders of regulation are much more complex and interesting than is typically recognized,[66] and "[t]o admit only dreams of total freedom or total control seems too limiting."[67] By continuing to conceptualize cyberspace governance as isolated zones of liberal self-rule, simply bounded by contractual doctrine, the tensions that revolve around private governance risk being misunderstood. Julie Cohen, drawing from science and technology studies, argues:

> [T]he processes that construct power in networked space] are social and emergent, and have consequences both spatial and material. They operate in what Saskia Sassen terms "analytic borderlands": between public and private, between technical and social, and between network and body. Mapping these borderlands requires descriptive and analytical tools that do not simply reduce them to borders.[68]

This argument appears to be fundamentally correct. The relationships of power within virtual communities are important because the people within those communities "are real people, not simply disembodied virtual users."[69] The contested interplay between the various forces at work, the borderlands of regulation, is of primary importance to the construction of power in

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64. *See* Easterbrook, *supra* note 14, at 209–16; Epstein, *supra* note 14; Hardy, *supra* note 14, at 219, 236–58 (discussing transaction costs and costs of drawing boundary lines).

65. *See* Nicolas Suzor, *On the (Partially) Inalienable Rights of Participants in Virtual Communities*, 130 MEDIA INT'L AUSTL. 90 (2009).

66. *See* Radin & Wagner, *supra* note 10, at 1297.

67. Cohen, *supra* note 4, at 224.

68. *Id.* at 251 (citing SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES 379–86 (2006)).

69. *Id.* at 221.

cyberspace.[70] These borderlands are the sites of the power struggles that directly affect the interests of the real people who participate in these communities, and "[t]he emergent geographies of power within networked space shape the conditions of possibility, the conditions of participation, and the conditions of material existence."[71]

These emergent geographies of power in networked space need a different approach than the liberal framework through which the law typically views power relations. The core problem with the traditional legal liberal approach is that it tends to ignore the existence and flow of power in the private sphere. Brian Fitzgerald explains:

> Traditionally, constitutionalism (which means the regulation of power) has focused on regulating or limiting the vertical exercise of government or public power over the citizen. On the other hand, the horizontal exercise of power between citizens has occurred in the private sphere and has been rarely analyzed in terms of power or constitutionalism, although the (largely common) law has played a mediating role.[72]

Fitzgerald concludes that "[p]ower relations in the private sphere . . . are fundamental constitutional issues that should be informed by fundamental constitutional principles."[73] This notion, also known as "constitutive constitutionalism" allows society to grapple with constitutional values that are otherwise marginalized by the public-private divide.[74] These public community values are sometimes threatened by the private exercise of power in cyberspace (and elsewhere), and these concerns should be explicit:

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70. However, Epstein argues that we should address "the . . . basic outlines" of property rules first, rather than the details:

> The success and the glory of any legal system is not how it resolves hard marginal cases, but rather how it sets out the rules that allow most routine transactions to go from cradle to grave without so much as a hint of litigation. . . . All the while, we must remember that even if sound legal principles do not eliminate every anomaly or answer every single question of system design, they can help us avoid major errors that could carry with them disastrous social consequences. We can live with gray areas, so long as we have black and white, but we cannot live with fundamental flaws in system design.

Epstein, *supra* note 14, at 827; *see also* Easterbrook, *supra* note 14, at 211 (arguing that the risk of legal error justifies the granting of property rights that are easy to reverse in private transactions, rather than attempting to determine the optimal allocation of entitlements).

71. Cohen, *supra* note 4, at 255.

72. Fitzgerald, *supra* note 2, at 382.

73. *Id.* at 384.

74. Berman, *supra* note 2, at 1269.

> [I]f it is true that we already think of the Constitution as embodying such constitutive values of our society, it may seem quite natural to use the Constitution as a touchstone for evaluating a broader range of social interaction. Moreover, an argument based on constitutive constitutionalism may also be particularly persuasive in the context of debating online regulation, because in cyberspace it is perhaps easier to see how private entities can threaten cherished constitutional norms.[75]

The point is not to directly extend constitutional regulation to the governance of virtual communities, as there are of course many important respects in which a virtual community is not like a real state and should not be regulated as one. What is important is the direct confrontation of constitutional values, while considering how they can inform the current regulatory discourse. It is these public values that are most under threat by private governance, and it certainly seems desirable to examine much more closely what effects marginalizing these values have on the people who participate in these spaces.

The attractiveness of cyberspace, its seductive appeal, is largely based upon the explicit promise of malleability—the largely unbounded choices that shape the world to be inhabited. The important question has been "what kinds of alternate social orderings do we imagine and seek to enable?"[76] Julie Cohen, however, makes explicit the second part of this question: "[w]hich attributes of real space do we seek to perfect and harness in the service of utopian ambitions?"[77] Cyberspace is neither wholly distinct nor wholly similar to regular space.[78] Answering these questions requires direct consideration of the constitutive limits that shape power relations in cyberspace, with the explicit goal of determining whether they are appropriate for the spaces society is trying to construct. One glaring omission in current regulatory approaches is the limitation of the exercise of power, leading to the fear expressed by a number of theorists about the potential for the rampant abuse of "private" power in a system that predicates legitimacy on a sharp distinction between public and private spheres.[79]

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75. *Id.* at 1270.

76. Cohen, *supra* note 4, at 222; *see also* Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439, 443–44 (2003); Johnson & Post, *Law and Borders*, *supra* note 3, at 1378–79.

77. Cohen, *supra* note 4, at 222.

78. *Id.* at 219–21.

79. *See* LAWRENCE LESSIG, CODE VERSION 2.0, at 285–93 (2006) (contrasting the emergence of private norms with public governance and the potential tensions where those

The constitutional discourse serves to highlight some of what may be lacking in virtual governance. Contrasting the values believed to be important in corporeal states with the way in which virtual communities are governed can help to identify potentially desirable regulatory approaches.[80] In looking at virtual communities experientially to see both how they are different from real spaces and how they are the same, one of the striking realizations is that limitations on the exercise of power are conspicuously absent. Thus, as the use of virtual communities grows in importance in all aspects of a citizen's life, the public law of the state is slowly replaced by the private "law" of the provider.[81] There is substantial danger in a world where contractual regimes promulgated by firms are enforced as written by the courts and largely accepted as effective by both participants and providers:

> If we continue assuming . . . that the mass-market contractual regime is efficacious, then it is obvious that for a large subset of the social order . . . the law of the state . . . has been superseded by the promulgated contractual regime, the "law" of the firm. In the limiting case . . . the official constitutional/legislative/judicial regime is completely irrelevant. In situations short of the limiting case, but in which large numbers of people are subject to these superseding regimes, the official constitutional/legislative/judicial regime is severely eroded or marginalized.[82]

As this process continues, important constitutional principles may begin to fade in relevance, to our collective detriment. In these cases, it may be more desirable to attempt to read these values into the regulatory framework that bounds self-governance in virtual communities.

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norms are not just); Elkin-Koren, *supra* note 30, at 1186–87; Netanel, *supra* note 19, at 482–83; Radin, *supra* note 38, at 146–47.

80. *See* JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 174 (2008) (arguing that we need discussion and "lawyers who can help translate the principles of fairness and due process that have been the subject of analysis for liberal democracies into a new space where private parties and groups come together with varying degrees of hierarchy to try to solve the problems . . . in the digital space"); *see also* Fanton, *supra* note 46 (analyzing the "Internet's democratic promise and lack of democratic protections").

81. *See* Cohen, *supra* note 4, at 221 (arguing that as cyberspaces "increasingly replace (or displace) their real-space analogues, the rules governing them become increasingly important"); Humphreys, *supra* note 34, at 166 (arguing that "[a]s people with access to these technologies come to live more of their social lives (and work lives) in online environments, and to construct both their identities and communities in proprietary spaces, the terms under which they do so will become increasingly important"); Radin, *supra* note 38.

82. Radin, *supra* note 38, at 6 (using the extended propertization of copyright as an example).

B. USING THE RULE OF LAW TO BETTER CONCEPTUALIZE PRIVATE GOVERNANCE POWER

One of the most concerning characteristics of private governance in virtual communities is that it is very seldom transparent, clear, or predictable, and providers often purport to have absolute discretion on the exercise of their power to eject participants under both contract and property law.[83] If the absolute discretion of the provider tends to be upheld, participants are likely to be exposed to a lack of certainty and stability in their communities and will be potentially vulnerable to the arbitrary and malicious exercise of power by the providers. Private governance, understood in this absolutist sense, offers none of the safeguards of corporeal public governance.

In order to better conceptualize these issues, it is useful to analyze the power of providers through the constitutional lens of the ideals of the rule of law, which operates in Western democratic theory as a fundamentally important limitation on the abuse of public power. The rule of law is a contested set of ideals that consists of a number of different strands, none of which can be universally or directly applied to the governance of virtual communities, but each of which serves to highlight potential shortcomings in private governance. These strands include restraints on discretionary power,[84] substantive limits based upon individual rights,[85] formal limits on the creation and implementation of laws,[86] procedural safeguards and due process,[87] and an emphasis on consensual governance.[88] The rule of law discourse provides a rich set of theoretical critiques about the legitimacy of governance and, as such, provides an appropriate framework through which to evaluate the legitimacy of governance in virtual communities and the legal limits that could be imposed on the exercise of private governance power.

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83. Jankowich, *supra* note 40, at 20 (arguing that the interpretation of contractual rules by proprietors "is more likely to be and appear arbitrary" than under the common law); *see also id.* at 45 (noting that three-quarters of virtual world contracts surveyed "allowed the proprietor to delete a player account at the proprietor's discretion").

84. *See* DICEY, *supra* note 1, at 187–88.

85. *See* T. R. S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW 27 (2001); RONALD DWORKIN, LAW'S EMPIRE 93 (1986).

86. *See* LON L. FULLER, THE MORALITY OF LAW (2nd ed. 1969); FRIEDRICH A. VON HAYEK, THE ROAD TO SERFDOM (50th anv. ed. 1994); Joseph Raz, *The Rule of Law and Its Virtue*, 93 L.Q. REV. 195 (1977).

87. *See* ALLAN, *supra* note 85, at 121; JOHN RAWLS, A THEORY OF JUSTICE 239 (9th ed. 1972); Raz, *supra* note 86, at 201–02.

88. *See* JURGEN HABERMAS, BETWEEN FACTS AND NORMS: TOWARD A DISCOURSE THEORY OF LAW AND DEMOCRACY 449 (William Rehg trans., 1996); John Locke, *Second Treatise*, *in* TWO TREATISES OF GOVERNMENT § 95 (Peter Laslett ed., Cambridge Univ. Press 3d ed. 1988) (1690).

If contractual governance is viewed as a purely private and autonomous enterprise and the creation and enforcement of internal norms is wholly deferred to providers, the role of law in shaping the lives of those within virtual communities becomes marginalized.[89] If law is not merely restrictive or wholly subject to the interests of the powerful, but can and does play a useful role in restraining the raw exercise of power,[90] then reducing the role of law poses a risk in that power within virtual communities is not subject to the rule of law. The rule of law provides a framework through which it is possible to contrast the ideals of governance in a liberal democracy with the reality of everyday private governance in virtual communities. As virtual communities grow in importance and become more central to the lives of a rapidly increasing number of users, the idea that governance is unimportant in these spaces because they are *private* is not just archaic, but dangerous. While the rule of law is often thought of as solely relevant to public law, this is not necessarily the case. A. V. Dicey argued that the rule of law "pervades" the English common law, as the "general principles of the constitution . . . are . . . the result of judicial decisions determining the rights of private persons in particular cases brought before the courts."[91] This point remains as important today as it was a century ago:

> [T]he division between public and private law, though important, can never be safely invoked without reference to the specific context . . . . [T]here can be no clear-cut distinction between the state and other "quasi-public" bodies, or even private associations that exercise significant power over their own members. As the problems of abuse of power by non-governmental bodies becomes more clearly recognized, the common law is capable of generating appropriate requirements of fairness and rationality in private law.[92]

The values of the rule of law have important ramifications for private law and private relationships, although the "countervailing public interest in protecting people's constitutional freedom to define the terms of their own association as they see fit" must be recognized.[93] While rule of law values cannot provide a wholly determinative answer, they do provide an important

89. Radin, *supra* note 38, at 147.

90. E. P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 266 (1990).

91. DICEY, *supra* note 1, at 195.

92. ALLAN, *supra* note 85, at 11; *see also* T. R. S. ALLAN, LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM 4 (1993) ("[T]he ideas and values of which the rule of law consists are reflected and embedded in the ordinary common law.").

93. ALLAN, *supra* note 85, at 12.

normative framework through which to conceptualize and evaluate tensions about private governance in virtual communities. By exposing the underlying tensions and presenting a framework that is sensitive to both legitimacy and autonomy, rule of law values can provide guidance for desirable outcomes when disputes arise around governance in virtual communities.

Because they provide an established discourse about the legitimate exercise of governance power, rule of law values form the most important component of the constitutional discourse that ought to inform the continued development of cyberspace governance and regulation.[94] Rule of law values are particularly useful in that they provide a framework that is much more familiar with the tensions of legitimate governance than is the contractual doctrine generally used to evaluate private governance disputes. A governance framework is required to evaluate tensions in virtual worlds (and virtual communities more broadly):

> In virtual worlds, the relationship between platform owners and players is not simply one between producers and consumers. Rather, it is often a relationship of governors to citizens. Virtual worlds form communities that grow and develop in ways that the platform owners do not foresee and cannot fully control. Virtual worlds quickly become joint projects between platform owners and players. The correct model is thus not the protection of the players' interests solely as consumers, but a model of joint governance.[95]

Mark Zuckerberg, founder of *Facebook*, expressed a similar point of view in early 2009 when *Facebook* decided to seek user input on its Terms of Service.[96] Zuckerberg explicitly recognizes the tension between contractual and governance discourses where the Terms of Service are used in a way that governs participation:

> Our terms aren't just a document that protect our rights; it's the governing document for how the service is used by everyone across the world. Given its importance, we need to make sure the terms reflect the principles and values of the people using the service.
>
> Our next version will be a substantial revision from where we are now. It will reflect . . . how people share and control their information, and it will be written clearly in language everyone can understand. Since this will be the governing document that we'll all

94. *See* Berman, *supra* note 2; Fitzgerald, *supra* note 2.

95. Balkin, *supra* note 28, at 2082.

96. *See* Caroline McCarthy, *Facebook's About-face: Change We can Believe In?*, SOCIAL (Feb. 18, 2009), http://news.cnet.com/8301-13577_3-10166663-36.html.

> live by, Facebook users will have a lot of input in crafting these terms.[97]

Because contractual terms of service play a constitutive role in virtual communities, it makes sense to use constitutional discourse to examine their effect on private governance. Historically, rule of law ideals, in particular, have pervasively shaped the evaluation of territorial governments. At least in Western liberal democracies, these ideals form a large part of what it means to have good governance.[98] The vocabulary of the rule of law seems to fit reasonably comfortably with emerging tensions in the governance of virtual communities. The concern that the law of the firm is superseding the law of the state means that the new regime "is not subject to democratic input and debate,"[99] and that the exercise of power is not "subject to continuing rebalancing and checking by the courts."[100] As the importance of private rules increases in all aspects of social life, the lack of restraint on the abuse of private power threatens the practical ideals of the rule of law.[101] Using a rule of law framework highlights these tensions and directly confronts the issues that arise from private governance.

The remainder of this Article will canvass three main themes that emerge from rule of law discourse: the proposition that governance ought to be

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97. Mark Zuckerberg, *Update on Terms*, FACEBOOK (Feb. 17, 2009), http://blog.facebook.com/blog.php?post=54746167130.

98. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 1–3 (2004).

99. Radin, *supra* note 38, at 6.

100. *Id.*

101. Nikolas Rose explains that the dichotomy between public and private exercises of power is false and highlights the lack of legal and constitutional restraints on the exercise of power:

> The strategies of regulation that have made up our modern experience of "power" formulate complex dependencies between the forces and institutions deemed "political" and instances, sites and apparatuses which shape and manage individual and collective conduct in relation to norms and objectives, but yet are constituted as "non-political." They do not have law and constitutionality as their governing principle, but entail diverse ways in which legal mechanisms, agents, codes and sanctions are called upon and activated in different contexts. The lines between public and private, compulsory and voluntary, law and norm operate as *internal* elements within each of these complexes, as each links the regulation of public conduct with the subjective emotional and intellectual capacities and techniques of individuals, and the ethical regimes through which they govern their lives.

Nikolas S. Rose, *Government, Authority and Expertise in Advanced Liberalism*, 22 ECON. & SOC'Y 283, 286–87 (1993).

limited by law;[102] the liberal emphasis on predictability and formal legality;[103] and the importance placed upon consent and democracy as a source for legitimacy in pluralistic communities.[104] Each of these themes draws out different concerns and tensions about private governance that are somewhat difficult to recognize under a classical contractual framework.

The extent to which each of these three themes is important is highly sensitive to the particular community context. Another recent attempt to evaluate the existence of the rule of law within virtual worlds concluded that virtual worlds exhibit few of the indicators of the rule of law.[105] This framework focused on predictability and formal legality, rule by law, as key drivers for business investment in virtual worlds, rather than tackling substantive conceptions.[106] The normative aspects of the rule of law are more difficult to apply to virtual worlds for four main reasons: that games do not lend themselves to freedoms; that requirements of democracy and legitimacy are difficult to reconcile with provider rule by fiat; that liberty is limited by technical constraints as participants are not able to easily leave the community; and that "to the extent that the rule of law fosters investment by setting expectations, liberal ideals are less important."[107]

Concerns about the applicability of substantive rule of law values reflect the concerns that virtual communities ought to be able to consensually develop in ways that do not reflect liberal values and that, from a business perspective, liberal values are less important than a stable framework for the enforcement of known rules. This view is correct in that it is difficult to map substantive rule of law values for virtual communities, but these issues are nonetheless worth examining. That a particular virtual community does not embrace certain rule of law values may not be a concern for the territorial regulation of virtual communities, but legitimacy is a key issue. The values of the rule of law are not universal within virtual communities. The promise of diverse communities includes the ability to participate by rule sets that are arbitrary, unpredictable, oppressive, or not reflective of liberal, democratic values. This promise, however, is conditioned upon the consent of those who participate within these spaces.[108] Where rule of law values are

102. *See infra* Part III.

103. *See infra* Part IV.

104. *See infra* Part V.

105. Michael Risch, *Virtual Rule of Law*, 112 W. VA. L. REV. 1, 50 (2009).

106. *Id.* at 12 (discussing "the positive, rather than normative, aspects of the rule of law in virtual worlds").

107. *Id.* at 20–22.

108. *Id.* at 22 (noting that "subscribers democratically choose to have their avatars be subject to dictatorial laws").

potentially impugned by community norms, territorial states may use consent and legitimacy as a primary indicator of whether or not those norms are harmful and, and if so, whether they ought to be constrained.

In this rule of law analysis, it is not always necessary to identify the sovereign source of law with precision. Regulation comes in a number of different forms, each of which affects participants.[109] Regulation also comes from a number of different sources: the moral force of the community, the imposed rule of the provider, and the laws of territorial states. Some tensions are best illustrated from a position internal to the rules and norms of the virtual community, while others are clearer from an external position.[110] There are overlapping constraints from multiple sources, but "[w]hat matters is the cumulative effect of the law on its subjects."[111] The interplay between internal and external perspectives and sources of regulation constructs the experience of participants, who are subject to all these forces at once.[112] This Article will proceed on the basis that rule of law values highlight tensions that can be located in different sources of regulation in virtual communities and provide insights that may be relevant to a number of different forms of governance.

A final caution is necessary before embarking on a normative account of the rule of law and the applicability of these values to virtual communities. It is important to remember that the ideals of the rule of law are deeply contested and are certainly not universal. This is particularly so for those rule of law values that exist primarily as Western liberal ideals, such as the emphasis on formality or the set of substantive rights familiar to Western constitutionalism.[113] Much of the argument that follows will proceed from

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109. Lessig, *The New Chicago School*, *supra* note 12, at 662–63.

110. *See generally* Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357 (2003) (arguing that the problem of perspective pervades internet law); Jonathon W. Penney, *Privacy and the New Virtualism*, 10 YALE J.L. & TECH. 194 (2007) (discussing the "new virtualism" approach that blends internal and external perspectives to address emerging issues in cyberspace regulation); James Grimmelmann, *Virtual Borders: The Interdependence of Real and Virtual Worlds*, 11 FIRST MONDAY (Feb. 2006), *available at* http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1312/1232 (explaining virtual world tensions from internal and external perspectives).

111. Risch, *supra* note 105, at 25.

112. *See* Cohen, *supra* note 4, at 215.

113. There is an argument that the more basic form of the rule of law, as a constraint on the exercise of government power, is universal. *See* TAMANAHA, *supra* note 98, at 137; THOMPSON, *supra* note 90, at 266. Nevertheless, even this basic limitation cannot be universal in the context of virtual communities, where those communities, like some games, for which arbitrary governance is part of the appeal, must be protected. *See* Bartle, *supra* note

the basis of Western liberal understandings of the rule of law and deal with the impact that these understandings ought to have on the regulation of virtual communities by Western states. This frame unfortunately excludes the rapidly developing jurisprudence of many countries that are struggling with similar issues, particularly South Korea, whose familiarity with tensions arising out of virtual communities in many cases far surpasses that of Western countries,[114] and for whom the Western liberal ideals of the rule of law do not have the same resonance. While the constitutional discourse and set of fundamental values may be different, however, future comparative work may show very similar struggles around legitimacy that extend beyond the Western framework.[115]

III. GOVERNANCE LIMITED BY LAW

As noted above, the rule of law discourse contains a number of separate and contested ideals. One of the primary clusters of values of the rule of law requires that governance operates within the limiting framework of the law. This means that those in positions of power must abide by the law and that the law should only be changed by appropriate procedures within appropriate limits.[116] It is in this sense that the rule of law has been called a "universal human good," as all societies benefit from restraints on the arbitrary or malicious exercise of power.[117]

Measuring governance within virtual communities against the principles of this conception of the rule of law highlights some interesting shortcomings in cyberspace self-governance. Most notably, the power of providers in virtual communities is not often restrained to acting in accordance with the rules. Additionally, however, these values suggest some

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50 (arguing that creators of play spaces sometimes need absolute control over the environments in order to make them attractive).

114. See particularly the works of Judge Ung-Gi Yoon: Ung-Gi Yoon, *A Quest for the Legal Identity of MMORPGs—From a Computer Game, Back to a Play Association*, 10 J. GAME INDUSTRY & CULTURE (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=905748; Ung-Gi Yoon, *Real Money Trading in MMORPG Items from a Legal and Policy Perspective*, 1 J. KOR. JUDICATURE 418 (2008) [hereinafter Yoon, *Real Money Trading in MMORPG*].

115. *See* Ung-Gi Yoon, Connecting East and West, Presentation at the State of Play V: Building the Global Metaverse Conference (Aug. 20, 2007) (video *available at* http://origin.eastbaymedia.com/embed/player.swf?height=350&width=500&streamer=rtmp://fms.ebmcdn.net/8004B6/origin.eastbaymedia.com&file=streamer=rtmp://fms.ebmcdn.net/8004B6/origin.eastbaymedia.com&file=nyls/flash/SOP/03_SOP_DVD_03/SOP_5/200807_04.flv).

116. TAMANAHA, *supra* note 98, at 115.

117. *Id.* at 137; THOMPSON, *supra* note 90, at 266.

substantive limits that may be appropriate to impose on virtual governance in order to safeguard the interests of participants.

A. RULE OF LAW LIMITATIONS ON ARBITRARY PUNISHMENT

The first conception of the rule of law is a prohibition on arbitrary governance, a requirement that power is exercised according to the law. This was famously set out by A. V. Dicey, whose "first and main articulation"[118] of the rule of law was:

> [N]o man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[119]

A limitation on the arbitrary exercise of power immediately raises questions about the power of providers in virtual communities. Essentially, providers have control over the code that creates the platform, allowing them to exercise absolute power within the community itself.[120] Any feature of the community can be changed at will by altering the code in some way. A provider accordingly has an unlimited technical ability to alter the virtual landscape—changing entitlements to virtual property, limiting the ability of participants to express themselves or communicate with others, or imposing punishments and excluding participants from the community altogether. These abilities can be exercised programmatically upon certain defined triggering conditions or ad-hoc by the direct intervention of a provider's representative.

A provider's technical ability to alter the virtual landscape is limited by a number of sources generalizable to the market, norms, and law.[121] If internal governance is successful, sufficiently legitimate internal norms will develop to respond to the needs of the community.[122] Alternatively, should internal norms fail, participants may vote with their feet, or wallets, and move to another community, thus allowing the market to efficiently regulate.[123]

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118. TAMANAHA, *supra* note 98, at 63.

119. DICEY, *supra* note 1, at 188.

120. *See* Bartle, *supra* note 50, at 27.

121. Lessig, *The New Chicago School*, *supra* note 12, at 662–63.

122. *See* David G. Post, *Governing Cyberspace: Law*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 883, 911–12 (2007).

123. *See* Elkin-Koren, *supra* note 30, at 1180–85; Epstein, *supra* note 14, at 17–18; Post, *supra* note 122, at 170.

Assuming, however, that neither of these forces provides a satisfactory guarantee, the law is expected to impose some limits on the absolute discretion of a provider where appropriate.

The most immediate legal limits on a provider's discretion usually lie in the contractual terms of service that purport to govern most communities. First, providers are expected to act in accordance with the terms of service since these contractual documents ought to be enforceable against providers and not merely for the benefit of providers.[124] This leads to some serious problems, particularly as most terms of service are drafted in a manner that greatly favors the interests of the provider.

Most importantly, terms of service generally include clauses that reserve a wide discretion to the provider.[125] In communities where the value of the rule of law against arbitrary power is significant, clauses that allow absolute discretion should be regarded suspiciously. Take, for example, the *Facebook* Terms of Use, as they were before they were updated due to user protest in May 2009.[126] The former terms provided that:

> [Facebook] may terminate your membership, delete your profile and any content or information that you have posted on the Site . . . and/or prohibit you from using or accessing the Service or the Site . . . for any reason, or no reason, at any time in its sole discretion, with or without notice.[127]

Facebook is an interesting example, as it eventually decided to create less harsh terms of service in response to user protest.[128] Assuming *Facebook* had not modified its terms, however, this conception of the rule of law may suggest that such broad discretionary powers ought to be restrained in appropriate cases. If a *Facebook* subscriber had her account terminated for no apparent reason, or for expressing criticism of *Facebook*, for example, could

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124. *See* Risch, *supra* note 105, at 27–28.

125. *See* Jankowich, *supra* note 40, at 20.

126. Protest over a proposed change to the *Facebook* Terms of Use led *Facebook* to completely revise its terms in a manner that invites public input. *See* Zuckerberg, *supra* note 97; *see also* McCarthy, *supra* note 96 (explaining the controversy created by *Facebook*'s changed terms).

127. Facebook Terms of Use, TOSBACK (Feb. 24, 2009), http://www.tosback.org/version.php?vid=156 (Sept. 23, 2008 revision).

128. It is important to note, however, that under the new terms of service, while absolute discretionary power is not explicitly claimed, any award for damages for breach is limited so tightly as to effectively close off the threat of contractual breach as a limit on discretion. *See* Statement of Rights and Responsibilities, FACEBOOK, § 15(3) (Oct. 4, 2010), http://www.facebook.com/terms.php (limiting damages to the greater of $100 or the amount the subscriber has paid *Facebook* in the last twelve months, which is generally zero).

Facebook rely on the broad discretionary clause in the Terms of Service to avoid any potential liability?

The answer, of course, must be: "it depends." There are competing tensions at stake, and it is possible that some communities rely on the ability to act arbitrarily and that participants in those communities may not always be harmed (at least in a way that ought to be legally recognizable) by the exercise of broad discretionary powers.[129] This conception of the rule of law, accordingly, does not seem to be universal, at least not with regard to the exercise of private virtual governance. However, there may be some communities where the existence of such a broad discretionary power is harmful to the point where it should be restricted.

Throughout history, this conception of the rule of law has been seen as important to help ward off tyrannical governance, and is a project that "will never be obsolete."[130] This concern, if it is accurate, is not likely to dissipate simply because the loci of certain governance tensions move online to private virtual communities. Thus, the arbitrary or malicious exercise of power by the providers and their delegates ought to be cause for concern, at least for some communities. In a paradigmatic case, not only will the discretion of a provider be limited to that provided under the contract, but a contractual clause that claims absolute discretionary power may not be enforceable. To the extent that contractual documents are used to govern behavior in virtual communities, it is reasonable that providers be similarly bound by the same "law," at least where doing so would not unduly harm the community.

B. PROTECTION OF SUBSTANTIVE INTERESTS

A requirement that governance be limited by law is somewhat empty if there are no substantive limits on the ability to create and modify the law.[131] It follows for some rule of law theorists that if the exercise of power ought to be authorized by law, then the lawmaking power of the government

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129. *See* Bartle, *supra* note 50 at 26–27 (explaining the arbitrary powers of some game administrators and game rules); *see also* Vili Lehdonvirta, *The Efficient Level of RMT in MMORPGs*, VIRTUAL ECON. RES. NETWORK (Aug. 23, 2007), http://virtual-economy.org/blog/the_efficient_level_of_rmt_in_ (arguing that people can react differently to varying levels of RMT in online gaming communities).

130. TAMANAHA, *supra* note 98, at 138–39.

131. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 225 (2d ed. 1861) ("[T]he power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of *legal* limitation."); Brian Tierney, *"The Prince Is Not Bound by the Laws." Accursius and the Origins of the Modern State*, *in* 5 COMP. STUDS. SOC'Y & HIST. 378, 385 (1963) (arguing that "[i]n constitutional states the eliciting of a consensus is just as important as the exclusion of caprice").

should be limited over certain subject matter. Historically, these substantive limits come from a variety of sources such as natural law, divine law, custom, human rights, civil and political rights, and positive instruments like bills of rights.[132] In this way, "the legality of a person's treatment, at the hands of the state, depends on its being shown to serve a defensible view of the common good."[133] The limits on the ability to create rules in virtual communities also come from a variety of sources, both legal and non-legal. Focusing only on legal limits, the constitutive limits are drawn not only from contract and property law but from the sum of all law that can potentially structure the relationship between participants and providers.

Dicey, writing at the turn of the twentieth century, was particularly concerned with showing how the constitutional values and rights of English citizens were protected by the general law without the need or existence of a written constitution.[134] While Dicey recognized that whether substantive rights were protected under a written constitution or by the common law was "a merely formal difference,"[135] he argued that the English approach was more useful than that of the French Constitution because it focused on remedies available to enforce rights rather than potentially empty declarations of the existence of rights.[136] Accordingly, values such as individual liberty, property, and freedom of speech are all protected by the operation of general law.[137] For example, "the right to express one's opinion on all matters," is protected by the common law, "subject to the liability to pay compensation for libellous or to suffer punishment for seditious or blasphemous statements."[138]

Dicey's approach is of some assistance because there is no written constitution that governs virtual communities.[139] Assuming that public values are being displaced by private governance regimes,[140] then it may be desirable

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132. TAMANAHA, *supra* note 98, at 118–19 (explaining that the applicable limits on legislative power come from a number of sources, but that "[t]he key . . . is simply a pervasive belief, on the part of the populace and officials," that such limits exist).

133. ALLAN, *supra* note 85, at 2.

134. DICEY, *supra* note 1, at 187–88.

135. *Id.* at 198.

136. *Id.* at 198–99.

137. *Id.* at 201–02.

138. *Id.* at 201.

139. Raph Koster proposed a hypothetical Bill of Rights as a thought experiment in 2000. *See* Raph Koster, *Declaring the Rights of Players* (Aug. 7, 2000), http://www.raphkoster.com/gaming/playerrights.shtml (including *A Declaration of the Rights of Avatars*).

140. *See* Radin, *supra* note 38.

to address these concerns by ensuring that public values are read into the private law doctrines that regulate private governance.

Evolved as they have in the paradigm of freedom to contract and the sovereignty of private property, private contract and property doctrines do not currently reflect the needs or desires of participants in virtual communities. As a result, participants in virtual communities are unable to frame their interests in a manner that is recognizable in the legal system. As more cases are brought where participants seek to assert substantive rights, however, reading protection for certain interests into the regulatory framework of virtual communities may help to reduce the alienating effect of using private law rules to govern those communities.

Take, for example, the case of Peter Ludlow, who wrote a virtual newspaper called *The Alphaville Herald* about events in Electronic Arts' ("EA") virtual world, *The Sims Online*. Ludlow wrote some scathing commentary about EA's management and the lack of an appropriate response to "cyber-prostitution," and posted the story on an external website. After he posted a link to *The Alphaville Herald* on his in-world profile, EA subsequently ejected him from *The Sims* for a technical breach of the rules, which prohibit linking to external sites.[141] Ludlow's concerns are free speech concerns. Viewed as a purely contractual dispute, however, the core issue here, the free speech argument, is not legally recognizable. The abstract way in which the legal system construes contractual disputes means that EA had absolute discretion in determining whether to accept Ludlow's breach of the Terms of Service or to terminate Ludlow's account.

This abstraction requires that Ludlow frame his concern in terms of a contractual argument, rather than being able to express his true concerns: that participants in a community ought to be able to express their dissatisfaction about how the community is governed. As critical legal scholars recognized, the imposition of reified legal categories alienates the real needs and desires of citizens by presenting legal abstractions rather than the underlying tensions.[142] A better answer recognizes that contractual doctrine has a constitutive effect and that the limits imposed on the exercise

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141. PETER LUDLOW & MARK WALLACE, THE SECOND LIFE HERALD: THE VIRTUAL TABLOID THAT WITNESSED THE DAWN OF THE METAVERSE 145–48 (2007).

142. *See* Peter Gabel, *Reification in Legal Reasoning*, 3 RES. L. & SOC. 25, 30–32 (1980) (discussing the abstraction of fact situations in the first stage of legal decision making); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1980) (arguing that under-analyzed choices made at the interpretive stage in legal arguments substantially affect the rational resolution of disputes).

of a technical right to terminate shape the boundaries of acceptable governance within the virtual community.

This is not to say that the process is in any way determinative. EA's interest in protecting the image and reputation of the community, and the value of its subscription fees, may outweigh any interest that Ludlow has in expressing his concerns about the in-world governance structures. At least, however, this conclusion will be reached with full knowledge of the values that are at stake, rather than ignoring the underlying tensions through the rote application of abstract doctrine. By expanding the frame of reference and considering the effects and by explicitly reading substantive values into legal doctrine, more appropriate outcomes can be achieved.

The Ludlow example shows that the task of confronting and evaluating substantive governance values is a fundamentally pragmatic exercise. Jettisoning universal natural law principles in favor of the subjectivity of value systems leaves the familiar liberal autonomy problem: the great difficulty of determining appropriate substantive normative limits in a pluralistic society. Several theorists have attempted to suggest some appropriate starting points by addressing the particular tensions that they perceive in cyberspace self-rule. One approach introduces "blanket non-waivability for certain well-defined exceptional categories of entitlements"[143] in order to allow a general regime of private bargaining to operate. As a "preliminary pass" to identifying some potential exceptions, this approach suggests "three categories for our attention: (1) rights related to legal enforcement; (2) human rights; [and] (3) rights that are politically weak."[144] Other theorists suggest different sets of substantive limits such as: the free speech rights of developers and players;[145] the encouragement of liberal democratic association;[146] property rights, personal and dignitary interests, and limiting fraud;[147] and anti-competitive barriers that would hinder the development of a marketplace of norms.[148]

These are some of the governance values that form the substantive constitutional limits on the exercise of government power in Western democracies. Raph Koster drew many of these together as a thought experiment in 2000, when he proposed a hypothetical *Declaration of the Rights*

143. Radin, *supra* note 38, at 149–50.
144. *Id.* at 150.
145. Balkin, *supra* note 28.
146. *See* Netanel, *supra* note 19, at 455.
147. Fairfield, *supra* note 55, at 468.
148. Epstein, *supra* note 14, at 819.

of Avatars,[149] modelled on the French *Declaration of the Rights of Man and the Citizen*[150] and the U.S. Bill of Rights.[151] Several substantive rights are claimed for participants in virtual communities, including equality,[152] "liberty, property, security, . . . resistance to oppression,"[153] the right to contribute to the shaping of the internal rules,[154] freedom of speech,[155] freedom of assembly,[156] and privacy.[157] While certainly not exhaustive or authoritative, Koster's list illustrates the range of substantive issues that, for various reasons, certain societies prohibit their citizens from opting out of, or at least enforce higher than normal thresholds of consent for their modification.[158]

It is important to avoid a substantive construction of the rule of law that is so broad that it loses its potency.[159] While many of these constitutional values fit within a rule of law framework because they are said to be prerequisites for legitimate governance, there is no easy claim to universality. These are some of the values that constrain the autonomy of governance in Western liberal democracies, but in working through the list provided by Koster and the concerns raised by other theorists, it is evident that the application of any substantive values as limits to autonomy is heavily context-dependent. The type and extent of desirable substantive limits is, accordingly, likely to differ by territorial state, community, and time.

In the remainder of this Part, four core groups of substantive interests are examined: the interests that revolve around speech, discrimination, and protest; the recognition of property rights; the right to privacy; and the rights

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149. Koster, *supra* note 139. Balkin reminds us that "the rights at stake are not really the rights of the avatars themselves. They are the rights of the players who take on particular (and possibly multiple) identities within the virtual communities." Balkin, *supra* note 28, at 2083.

150. DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN (Fr. 1789), *translated in The Avalon Project: Documents in Law, History, and Diplomacy*, YALE LAW SCHOOL—LILLIAN GOLDMAN LAW LIBRARY, http://avalon.law.yale.edu/18th_century/rightsof.asp (last visited Nov. 11, 2010).

151. U.S. CONST. amends. I–X.

152. Koster, *supra* note 139, at art. 1.

153. *Id.* at art. 2.

154. *Id.* at art. 6.

155. *Id.* at art. 11.

156. *Id.* at art. 17.

157. *Id.* at art. 18.

158. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1986) (discussing partial inalienability as a method to restrain harmful commodification but simultaneously allow beneficial trades or avoid causing further harm).

159. TAMANAHA, *supra* note 98, at 113 ("The rule of law cannot be about everything good that people desire from government. The persistent temptation to read it this way is a testament to the symbolic power of the rule of law, but it should not be indulged.").

of legal enforcement. These limits are examples of the types of limits that states may choose to impose on autonomy in virtual communities and have attracted substantial academic interest. This list represents some of the core values that are important to western liberal conceptions of the rule of law. It cannot be either universal or exhaustive, but it is useful in providing an overview of how such interests can be thought of as constitutive limits to cyberspace self-governance and how malleable any such approach must be in order to take into account conflicting social interests.

1. Freedom of Expression Concerns: Discrimination, Speech, and Protest

Anti-discrimination law provides a useful example in highlighting the way in which a legislated protection of certain interests can shape the internal rules of a community. It also provides an example of the tailoring that occurs in trading off potential harms against the benefits of allowing communities some degree of autonomy. Take two examples of sexual discrimination in virtual communities: Blizzard threatening Sara Andrews with disconnection from *World of Warcraft*[160] for advertising a LGBT-friendly guild,[161] and Microsoft banning Xbox Live[162] players whose names included the word "gay."[163] Both of these examples highlight reactions by some participants to communities that they find somewhat threatening—in these cases,

160. *World of Warcraft* is an extremely successful massively multiplayer online roleplaying game ("MMORPG") by Blizzard Entertainment. Blizzard reports that the game currently has over twelve million active subscribers. *See* Press Release, Blizzard Entm't, World Of Warcraft Subscriber Base Reaches 12 Million Worldwide (Oct. 7, 2010), http://us.blizzard.com/en-us/company/press/pressreleases.html?101007. *But see* Daeity, *Blizzard's "Active Subscriptions" vs "Real Players,"* DIGITAL CASTRATION (Aug. 9, 2010), http://daeity.blogspot.com/2010/08/blizzards-active-subscription-numbers.html (arguing that the active subscriber figure is inflated due to Blizzard's practice of banning approximately 100,000 accounts per month).

161. Brian Ashcraft, *Blizzard's Reaction to Gay Guilds an "Unfortunate Mistake,"* KOTAKU (Mar. 9, 2006, 5:24 PM), http://kotaku.com/159536/blizzards-reaction-to-gay-guilds-an-unfortunate-mistake; Mark Ward, *Gay Rights Win in Warcraft World*, BBC NEWS (Feb. 13, 2006, 8:42 PM), http://news.bbc.co.uk/2/hi/technology/4700754.stm.

162. Xbox Live is Microsoft's online gaming service. Microsoft claims the service reached twenty-three million subscribers in February 2010. *See* Marc Whitten, *An Open Letter from Xbox LIVE General Manager Marc Whitten*, XBOX.COM (Feb. 5, 2010), http://www.xbox.com/en-US/press/2010/0205-whittenletter.htm.

163. Luke Plunkett, *Xbox Live "Gay" Crackdown MIGHT Be Getting A Little Out Of Hand*, KOTAKU (May 21, 2008), http://kotaku.com/392304/xbox-live-gay-crackdown-might-be-getting-a-little-out-of-hand; Jay Slatkin, *"Gay" Player Name Banned By Xbox Live*, CONSUMERIST (May 14, 2008), http://consumerist.com/5008908/gay-player-name-banned-by-xbox-live.

prominent homophobia from other participants.[164] In order to minimize perceived conflict, the provider has in each case threatened to ban minority group participants for overtly expressing their sexuality in a way that could trigger negative reactions from other participants.[165]

Under the Terms of Service, both Blizzard and Microsoft reserve a broad right to terminate access to participants.[166] These contractual clauses may, however, come into conflict with anti-discrimination laws.[167] Many territorial states already provide limits on discrimination for sexual orientation within private groups.[168] In the United States, anti-discrimination laws generally prohibit discrimination on protected grounds in "places of public accommodation."[169] To date, courts have been reluctant to find that online communities are "places of public accommodation."[170] As the importance of

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164. *See* Justin Cole, *Op/Ed: The Impact Of Homophobia in Virtual Communities*, KOTAKU (July 11, 2009), http://www.kotaku.com.au/2009/07/oped-the-impact-of-homophobia-in-virtual-communities/ (arguing that virtual communities express a widespread, normalized homophobia).

165. *See* Sara Andrews, Posting to *World of Warcraft Not Gaymer Friendly*, GAMERS EXPERIMENTATIONS (Jan. 16, 2006, 6:12 PM), http://web.archive.org/web/20060221231447/http://gamers.experimentations.org/forums/index.php?showtopic=6852 (Internet Archive copy); *MS XBL Gay Equals Sex?*, LESBIAN GAMERS (May 23, 2008), http://lesbiangamers.com/2008/05/ms-xbl-gay-equals-sex/; PixelPoet, *Xbox Live Gaywood Drama Update Gay Gamer*, GAYGAMER (2008), http://gaygamer.net/2008/05/xbox_live_gaywood_drama_update.html.

166. *See World of Warcraft: Terms of Use Agreement*, WORLD OF WARCRAFT.COM, § 6 (Oct. 29, 2010), http://www.worldofwarcraft.com/legal/termsofuse.html ("BLIZZARD MAY SUSPEND, TERMINATE, MODIFY, OR DELETE ANY BNET ACCOUNT OR WORLD OF WARCRAFT ACCOUNT AT ANY TIME FOR ANY REASON OR FOR NO REASON, WITH OR WITHOUT NOTICE TO YOU."); Xbox *LIVE and Games for Windows LIVE Terms of Use*, XBOX.COM, § 16 (Oct. 2010), http://www.xbox.com/en-us/legal/livetou.htm ("We may cancel or suspend your Service at any time. Our cancellation or suspension may be without cause and without notice.").

167. Dagmar Schiek, *Freedom of Contract and a Non-Discrimination Principle: Irreconcilable Antonyms?*, *in* NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES 85–88 (Titia Loenen & Peter Rodrigues eds., 1999) (arguing for non-discrimination as a general principle of contract law).

168. *Id.* at 77–78.

169. *See, e.g.*, 42 U.S.C. § 2000a(b) (2006) (defining public accommodations for the purpose of the 1964 Civil Rights Act); 42 U.S.C. § 12181(7) (2006) (defining public accommodations for the purposes of the Americans With Disabilities Act).

170. *See* Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 544 (E.D. Va. 2004), *aff'd*, No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004) (holding that because they lack physicality, "AOL's online chat rooms cannot be construed as 'places of public accommodation' " for the purposes of the Americans With Disabilities Act); In Chambers — Court Order, Stern v. Sony Corp., No. 09-CV-7710 (C.D. Cal. Feb. 8, 2010), ECF No. 18, *available at* http://www.scribd.com/doc/28950515/Stern-v-Sony-MTD-Order

participation in online communities increases, however, the significance of being excluded on an unacceptable basis similarly becomes greater; if extended, such laws could prevent providers from discriminating as to who can join and remain in a community.[171] To the extent that these rules are effective, they become constitutive limits by limiting the ways in which communities and groups can choose to discriminate.

The law in this area continues to develop. It seems likely that some form of rights to non-discriminatory access will be recognized in the future, at least for some communities, particularly those that have a more public character. In developing these rules, courts and legislatures should be particularly mindful of when certain forms of discrimination are tolerable for specific purposes and when such behavior crosses the line into impermissible discrimination or even vilification. Some level of discrimination is often beneficial where that discrimination goes to the heart of the community's purpose.[172] The proper evaluation of whether discrimination is desirable must be determined by a thorough examination of the circumstances and social structure of the particular community.

This principle holds for other potential substantive limits; the relative importance of social values is contingent on the purpose and use of the community. For example, the importance placed on freedom of speech of participants needs to be weighed against the speech interests of the providers in virtual communities.[173] These freedoms can conflict at times and the developer's free speech rights to create an expressive game or other platform may outweigh any concerns about the legitimate interests of participants.

(holding that Sony's online games were not "places of public accommodation" for the purposes of the ADA).

171. *See* Balkin, *supra* note 28, at 2084–85; Colin Crawford, *Cyberplace: Defining a Right to Internet Access Through Public Accommodation Law*, 76 TEMP. L. REV. 225 (2003) (arguing that rules of public accommodation ought to be extended to virtual communities); Netanel, *supra* note 19, at 456 (arguing that "Cyberfora and networks that are generally open to the public should similarly be seen as 'places of public accommodation,' whether by statutory construction or legislative extension"); Joshua Newton, *Virtually Enabled: How Title III of the Americans with Disabilities Act Might Be Applied to Online Virtual Worlds*, 62 FED. COMM. L.J. 183 (2010) (arguing that virtual worlds should be treated as places of public accommodation and analyzed separately from websites).

172. Netanel argues that discrimination should be acceptable in circumstances where it is necessary in order to conduce meaningful and effective expression: "Some conversations lose their essential purpose and meaning unless limited to persons of a particular group. In such instances, the participants' interest in discriminating (and the allied public interest in promoting discursive expression and association) should prevail over the interest in preventing invidious status discrimination." Netanel, *supra* note 19, at 459–60.

173. Balkin, *supra* note 28.

However, sometimes the free speech rights of individual participants may be so important as to warrant regulatory protection.[174]

The private nature of virtual communities, by placing the power to regulate speech in the hands of private property owners, has the capacity to significantly interfere with the liberty of individual citizens, particularly as online fora become more important to expression.[175] A purely negative reading of the First Amendment that does not extend in any way to private restrictions on speech in virtual communities substantially undercuts the protection historically afforded to speech, as there are few virtual spaces analogous to the protected corporeal public forums that exist to provide a platform for citizens to speak or be heard freely.[176] Harm can occur where a provider has absolute discretion over the content of communications within a virtual community, thus leading to a suggestion that at least for the more "public" types of communities, territorial states may have a legitimate interest in limiting the ability of the provider to regulate participant speech.[177]

While it certainly seems desirable to protect participant speech, there is a significant difficulty in determining when private restraints on speech ought to be acceptable and when they should not. Limits on private restraints could be considered justified in "[i]nternet forums that are generally open to the public for free speech purposes,"[178] but this standard excludes the majority of virtual communities, which generally do not explicitly hold themselves out as free speech zones. Other approaches, on the other hand, suggest that regulatory boundaries can be drawn along the distinctions between commodified and non-commodified communities and the distinction between communities that encourage the free exchange of ideas and those that are developed to "realize the artistic or ideological vision of the platform owner."[179] Balkin sets up a tension between state regulation and the free speech interests of virtual community providers, arguing that:

> Regulating the platform owner's right to design in order to protect the participants' right to play is most justifiable when the virtual world serves as a public space for commerce, and when it is held open as a public space for the exchange of ideas. These two distinctions may not be perfectly clear in all cases; but they point

174. *Id.* at 2084.

175. Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1121–23 (2005).

176. *Id.* at 1117–18.

177. Balkin, *supra* note 28, at 2090; Nunziato, *supra* note 175, at 1161, 1167.

178. Nunziato, *supra* note 175, at 1166.

179. Balkin, *supra* note 28, at 2090.

> the way to the boundaries of permissible state regulation on the one hand, and the free speech rights of platform owners on the other.[180]

Accordingly, free speech interests of participants will be most important to recognize in virtual communities that act like a marketplace, and secondly, in communities that are "offered as a space for the free exchange of ideas."[181]

The example of Peter Ludlow's exile from *The Sims Online* highlights that any claim must be evaluated on the purposes for which the community was created and the way it was used.[182] This seems to be fundamentally correct; no two communities can be treated alike,[183] and the free speech interests of participants need to be weighed against the free speech interests of the providers.[184] Nevertheless, in appropriate cases, providers may incur some responsibilities to allow dissenting voices, a claim that is somewhat stronger in more general use platforms.

In weighing the competing speech interests of providers and participants, it is desirable to avoid a strict dichotomy between communities that are, or are held out to be, free speech zones and those that are not. Such a distinction is likely to allow the majority of providers to exclude themselves from potential responsibility by simply disclaiming any participant interests. It is much more desirable to examine whether particular limits are appropriate for particular communities than to attempt a blanket determination of whether or not a community is exempt from all speech responsibilities. So, for example, EA could be required to tolerate an external link to a news article that is critical of its governance procedures but not an external link that exposes their users to unsolicited commercial communications. The purpose and use of a community will always be relevant to the types of speech restrictions that territorial states may consider appropriate for the provider to impose. If such speech concerns are serious enough to warrant territorial intervention, it is desirable to adopt a more subtle and critical method of evaluation, rather than attempting to rely on a binary classification of a community as either allowing free communication or not.

The analysis becomes more complicated if, in addition to the competing speech interests, the interests of the provider in the stability of the servers or

180. *Id.*
181. *Id.*
182. *Id.* at 2093.
183. *Id.* at 2084.
184. *Id.* at 2080.

network are considered. The interests of participants to peaceful assembly and protest,[185] for example, can sometimes directly conflict with the ability of other participants to enjoy the community and the interests of the provider in maintaining order and community uptime. The task of managing participants is a very complicated exercise for a provider, on which the fate of the entire community often rests.[186] Participants have a very large range of different motivations and interests in the community, and they contribute to the community in many ways. Passionate participants will often manifest their displeasure and, just as displeased citizens in territorial states, will seek to make their voices heard within the community. Virtual worlds have provided fertile platforms for protests over at least the last decade, with some protests about issues specific to the community and others that reflect external political struggles.[187]

Individual or small-scale manifestations of dissent are speech concerns, but larger scale virtual protests raise interesting new tensions. Protests are often disruptive by their nature and design, and this is no different in virtual communities. The presence of a large number of people protesting in a virtual world, for example, can potentially prevent others from enjoying the world and can strain the platform.[188] The concentrated presence of a large number of participants in a small area can sometimes impose a severe load on the provider's network and software, which is sufficient to crash the platform and disable the community for a few hours. In addition to other reasons for suppressing dissent, providers accordingly often have a technical incentive to disband in-world protests.

By relying on a clause in the terms of service that prohibits disruptive behavior, providers may respond to protests by threatening to disconnect, suspend, or ban users if they do not disband. If a provider could be required to tolerate dissenting speech from individual subscribers, could it also be

185. *See* ALLAN, *supra* note 85, at 93–94 (arguing that the rule of law requires freedom to protest against injustice); Locke, *supra* note 88, § 149 (discussing the fundamental power of citizens to replace the government); JOHN STUART MILL, ON LIBERTY 76 (1863) (discussing the necessity of freedom of opinion).

186. *See* John Banks, *Co-Creative Expertise: Auran Games and Fury—A Case Study*, 130 MEDIA INT'L AUSTL. 77 (2009) (highlighting the different interests of distinct player groups and developers that shape the development of computer games and their commercial success).

187. *See* Bridget M. Blodgett, *And the Ringleaders Were Banned: An Examination of Protest in Virtual Worlds*, *in* PROCEEDINGS OF THE FOURTH INTERNATIONAL CONFERENCE ON COMMUNITIES AND TECHNOLOGIES 135, 135–36 (2009).

188. *See, e.g.*, *id.* at 143 (providing examples of protests that resulted in strained platforms).

required to permit disruptive dissent that threatens the stability of the servers and the enjoyment of other members of the community? The tensions at play here are not only those involving speech, but also the provider's interest in the functioning of the platform and in maintaining a harmonious community.

2. Property Rights

Many of the speech tensions above are also reflected in the continuing debate about the ownership of virtual objects. In communities where participants are able to create or acquire virtual objects, participants may feel a sense of entitlement to those virtual objects.[189] There may be no descriptive or normative impediment to recognizing such virtual objects as legal property because not only are virtual objects indistinguishable from real world property interests, but the theoretical justifications for recognizing excludable property rights can be extended to virtual environments.[190]

One model of virtual property argues that one of the most significant sources of substantive limits on self-governance ought to come from property law.[191] Where participants create or acquire virtual property, the law may come to recognize their interests as the owner of that property.[192] Property rights recognized in this manner would impose limits on the ability of providers to unilaterally exercise power over participants. The *Bragg* case, where Marc Bragg sued Linden Lab for terminating his *Second Life* account and confiscating his virtual property, provides an example of possible limits.[193] Linden alleged that Bragg cheated by purchasing land that was not technically for sale, at significantly under market value. Bragg maintained that he did not cheat and that, at any rate, the punishment was excessive, as it extended beyond the contested land to the remainder of his virtual assets.

Setting aside the circumstances of the dispute for the moment, it is arguable that "[b]ecause courts have not defined the relationship between EULAs and virtual property, the parties were not able to clearly articulate the deal they wished to make."[194] If Bragg's property rights in his virtual land, objects, and Linden Dollars were recognized, Linden Lab would be unable to

189. Lastowka & Hunter, *supra* note 15, at 37.

190. *Id.* at 49–50.

191. *See generally* Fairfield, *supra* note 52 (arguing that property rights can help to better structure the vertical relationship between participants and providers).

192. Fairfield limits his argument to virtual assets that are rivalrous, persistent, and interconnected. *See id.* at 1053.

193. Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 (E.D. Pa. 2007).

194. Fairfield, *supra* note 52, at 465.

unilaterally terminate his account without being required to pay compensation—or at least, the parties would be able to negotiate over appropriate rule sets.[195]

Some version of property rights ought to be recognized within *Second Life* in particular. The "virtual" economy in *Second Life* is fluidly convertible to "real" currencies, like the U.S. dollar, and participants feel a sense of entitlement to their virtual property and currency. Linden Lab clearly encourages this behavior; its slogan is "Your world. Your imagination," and its promotional materials refer to the possibility of "owning" virtual land and generally stresses the liquidity of the market.[196] Linden Lab encourages investment in virtual resources and substantially profits from that investment. In a press release announcing changes to the Terms of Service that vested intellectual property rights of in-world creations in subscribers, Linden claimed:

> [O]ur new policy recognizes the fact that persistent world users are making significant contributions to building these worlds and should be able to both own the content they create and share in the value that is created. The preservation of users' property rights is a necessary step toward the emergence of genuinely real online worlds.[197]

Judge Robreno, in the *Bragg* case, noted this press release and other hype about the ownership of virtual property and land in *Second Life* and quoted the CEO of Linden Lab as boasting that "[t]he idea of land ownership and the ease with which you can own land and do something with it . . . is intoxicating. . . . Land ownership feels important and tangible. It's a real piece of the future."[198]

Given these and other comments, it is hardly surprising that a participant such as Bragg would feel aggrieved if Linden Lab were to confiscate his virtual property and wealth. If a similar case were to proceed to final

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195. *Id.* at 465.

196. At least until August 22, 2008, Linden Lab proudly proclaimed that residents could "Own Virtual Land" as part of the marketing material on their website. The page has since been removed. *Own Virtual Land Second Life*, LINDEN LAB, http://web.archive.org/web/20080822144829/http://secondlife.com/whatis/land.php (Internet Archive copy).

197. *Bragg*, 487 F. Supp. 2d at 596 (quoting Press Release, Linden Lab, Second Life Residents To Own Digital Creations: Linden Lab Preserves Real World Intellectual Property Rights of Users of its Second Life Online Service (Nov. 14, 2003), *available at* http://lindenlab.com/pressroom/releases/03_11_14).

198. *Id.* at 596 (quoting Philip Rosedale *in* Michael Learmonth, *Virtual Real Estate Boom Draws Real Dollars*, USA TODAY, June 3, 2004).

judgment,[199] it would not be difficult for a court to recognize that Linden Lab created an environment where participants derive some form of property rights in their virtual assets. While the appropriate scope of virtual property rights is not clear, they could prevent Linden Lab from destroying the property, or at least the value of the virtual property, whose creation Linden Lab encouraged.[200]

This principle, however, is not necessarily extendible to other environments. It is possible that a fantasy environment can be created where virtual objects exist and are possessed by participants but no legal property rights should be enforceable.[201] Because virtual communities are diverse, creating property rights may not be justified in every community. Not every instance of virtual property should be recognized as legal property, and there may be many valid reasons why both participants and providers would not benefit from the recognition of property rights.[202] The unfettered ability of the provider to control the community, including the ability to expel a participant and destroy her property, can be fundamentally necessary in order to create a community that is interesting, fun, or useful to its participants.[203] Accordingly, there is a fundamental tension between the interests of participants in having a protected entitlement to what they see as their property and the ability of providers to regulate and develop the community.

Here, too, some distinctions based upon the level of commodification and purpose of a community may be useful.[204] Perhaps, the more commodified a virtual community is and the more the provider encourages

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199. The *Bragg* case settled on undisclosed terms after the decision in *Bragg*. 487 F. Supp. 2d 593.

200. BENJAMIN DURANSKE, VIRTUAL LAW: NAVIGATING THE LEGAL LANDSCAPE OF VIRTUAL WORLDS 39–40 (2008).

201. Nevertheless, Fairfield argues that property rights should be recognized first and that communal ownership schemes can be created on top of these rights: "[A]n overarching system of private property does permit communal property groups to continue to exist, if the community is able to make its social controls stick. The contrary is not true: the elimination of private property leaves, by definition, no room for private property." *See* Fairfield, *supra* note 52, at 1101.

202. *See* Bartle, *supra* note 50, at 35–37 (arguing that administrators of game worlds need absolute power to prevent commodification in order to protect the game conceit); *see also* Lehdonvirta, *supra* note 129 (arguing that there are positive and negative effects of allowing trade in virtual goods which vary depending on the community).

203. Bartle, *supra* note 50, at 26–27. Balkin gives the example of *The Gulag Online*, a fictional game where participants experience a simulation of a Soviet-era prison camp; participants could not, in such a simulation, assert any virtual property or due process rights. *See* Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 N.Y.L. SCH. L. REV. 63, 65 (2004).

204. Balkin, *supra* note 28, at 2090 (arguing that worlds that are more commodified should be subject to higher regulation to protect speech).

the creation and trade in virtual property, then the more likely it is that property rights in the virtual property ought to be enforceable. On the other hand, the more the provider is successful in genuine efforts to avoid commodification and the less porous the borders are in allowing real money trades, the more acceptable the provider's argument that the virtual property and virtual currency should not create real world entitlements. This approach allows for a more subtle and tailored examination of property interests. For the types of communities where the developer requires absolute control, and the participants understand this need, then enforceable property rights may have little relevance. Where participants have come to expect a sense of stability in their virtual possessions, however, the absolute ability of the provider to destroy those possessions may need to be curtailed.

One objection to this distinction is that it predicates property interests primarily on corporeal exchange value, ignoring, to an extent, the personal attachment that participants may develop to their virtual possessions and creations. The rise of user-generated content provides a prime example. There is an increasing trend in software development to create a bare platform and encourage the participants to create the assets—the objects and landscape that define the virtual environment.[205] Even where this content is not commodified, participants attach particular value to their creations and possessions and may accordingly be entitled to some form of legal recognition for that attachment, either as the objects of their labor[206] or as manifestations and expressions of their selves.[207]

Recognizing the interests of participants in virtual goods or expression may not necessarily require recognizing fully excludable property rights. There may be other approaches that are more suitable to dealing with the complex relationship between participants and providers. For example, recognizing participants' property interests in virtual items could be analogous to goodwill, which allows providers to modify environments while

205. *See* John Banks & Sal Humphreys, *The Labour of User Co-Creators: Emergent Social Network Markets?*, 14 CONVERGENCE 401, 402 (2008).

206. *See* Locke, *supra* note 88, § 31.

207. *See* GEORGE WILHELM FRIEDRICH HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 39, 41, 43 (Allen W. Wood ed., Hugh Barr Nisbet trans., 1991); *see also* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 20 (1994) (discussing the influence of Kantian's and Hegelian's perspectives on authorship on continental intellectual property law).

giving some level of security to participants.[208] In other circumstances, particularly where participants are contributing heavily to the value of the platform by creating content, there may be a real harm when participants are directly brought into the value chain and are thereafter treated unfairly by the provider. For example, unjust enrichment could be an appropriate remedy or, in jurisdictions where they are available, moral rights of attribution and integrity for virtual creations may be enforced. Possibly the most useful approach would be rooted in contractual doctrine and its limitations on the exercise of discretionary powers, such as the requirement of good faith.[209] If these remedies prove unsuitable or inappropriate, it may be possible to recognize new interests that prevent a participant from being alienated from her creations, as would happen when a provider terminates a participant's access to a community but continues to use her in-world assets. There may even be situations where it would be desirable to allow a participant-author to enforce a right akin to the French moral right of withdrawal, allowing her to prohibit further uses of the material she creates after she has left a community.[210]

Fundamentally there is unlikely to be a single solution that addresses property-type interests in virtual communities. The level of protection that a participant ought to be entitled to, if any, will be highly dependent on the particular circumstances of the community. The recognition of property rights may be detrimental in some communities, particularly where it would be prohibitively expensive for the community to develop comprehensive procedures to regulate property disputes or in a community where limiting the discretion of the provider to deal with virtual assets would greatly undermine the value and essential qualities of the community. Nevertheless, territorial states have a legitimate interest in articulating a set of entitlements that participants in particular types of virtual communities have in their virtual items or creations and in limiting the corresponding autonomy of

208. In this conception, a trade does not transfer title to the virtual object itself, but to the value of the participant's labor in obtaining the object. *See generally* Ung-Gi Yoon, *Real Money Trading in MMORPG*, *supra* note 114.

209. *See, e.g.*, Dan E. Lawrence, *It Really Is Just a Game: The Impracticability of Common Law Property Rights in Virtual Property*, 47 WASHBURN L.J. 505, 529–30 (2008) (arguing that "Bragg demonstrates that contract law, even in the absence of independent property rights in virtual property, can provide a remedy for an end-user wrongfully deprived of virtual property"); Michael Meehan, *Virtual Property: Protecting Bits in Context*, 13 RICH. J.L. & TECH. 7, ¶¶ 57–60 (2006) (discussing the potential applicability of good faith to restrain providers from devaluing virtual property).

210. The French right of withdrawal is subject to payment of compensation to the user of the work for any harm caused by its exercise. *See* CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] art. L121-4 (Fr.).

providers to destroy or modify those entitlements. Enforceable interests in virtual property, seen in this way, act as substantive constitutive restrictions on the scope of cyberspace self-governance.

3. Right to Privacy

The potential threats that the use of networked technologies pose to the privacy of participants has been the subject of much discussion in recent decades. The growing importance of participation and the increasing computational power and storage capacity of computer networks highlights immediate concerns about the collection, use, and distribution of personal information. Because all actions that occur "within" a virtual community are essentially reduced to information flows, they are all easily recorded and stored. Actions that are ephemeral in the corporeal world perversely take on a more tangible form when mediated through virtual information networks. Information that is not displayed or carried out synchronously must necessarily be processed and stored for later use; personal messages left on bulletin boards and profile pages are kept indefinitely on the provider's server, for example. Even information that is used synchronously, however, is vulnerable to capture, including all actions, searches, information and products browsed, real-time chats, and exchanges between participants are potentially logged and stored.[211]

The data collected presents a treasure chest of potentially valuable information if it can be analyzed and repurposed in sufficiently innovative ways. Amazon, for example, has built a very successful business model by collating the browsing and purchasing habits of its customers in order to deliver targeted advertising and product recommendations.[212] When *Facebook* decided to implement a similar system, called Beacon, that would advertise a user's purchases on certain partner sites to other people in the user's social network, it was quickly met with outrage from *Facebook* users.[213] In response

211. For example, Sony Online Entertainment has recently granted researchers access to several terrabytes of data, representing the entire collected actions of 400,000 players in *Everquest 2* over a four-year period. John Timmer, *Science Gleans 60TB of Behavior Data from Everquest 2 Logs*, ARS TECHNICA (Feb. 15, 2009, 4:00 PM), http://arstechnica.com/science/news/2009/02/aaas-60tb-of-behavioral-data-the-everquest-2-server-logs.ars; *see also* Humphreys, *supra* note 34, at 156–57 (discussing the use of spyware to monitor the activities of participants in massively multiplayer online games).

212. *See* Jennifer Bresnahan, *Personalization, Privacy, and the First Amendment: A Look at the Law and Policy Behind Electronic Databases*, 5 VA. J.L. & TECH. 8, at *3 (2000); *see also* Tal Z. Zarsky, *Mine Your Own Business: Making the Case for the Implications of the Data Mining of Personal Information in the Forum of Public Opinion*, 5 YALE J.L. & TECH. 1, 16 (2002).

213. *See* McCarthy, *supra* note 96.

to user feedback, the system was later changed to an opt-in system.[214] Social networks are potentially rich sources of revenue for advertisers, but they also raise difficult questions about the juxtaposition of commercial and personal social relationships.

Tensions over the use of personal information are likely to continue playing out in and around virtual communities for the foreseeable future. Many territorial states have some form of privacy legislation or general law rules on the collection, use, and disclosure of personal information, which may be used to restrain or limit the ability of a provider to unilaterally deal with participant data.[215] More difficult considerations arise when participants are asked to trade consent to control their data for some internal or external benefits. In some cases, these trade-offs are benign and desirable; others, of course, may be exploitative.[216] Regulating the disclosure of personal information from virtual communities into other contexts is accordingly a difficult process, but a familiar one.[217]

Using a rule of law framework, however, highlights that regulating collection and disclosure of information may not be sufficient to address the privacy interests of participants. Difficult issues arise when considering the use of private information within a virtual community, not merely its leakage out of the community. Because consenting to some level of collection is usually required in order to participate in a community, limits on disclosure typically mean that monitoring and use of information collected within the community by the provider itself is largely unregulated. Under such a regime, providers have an unfettered ability to monitor the communications and the actions of their participants, a proposition that conflicts with the limitations on governance expected of territorial states.

As participants become more involved in virtual communities over an increasing range of activities, limits on the storage and use of information collected within the community itself are likely to grow in importance. The potential for harmful use of personal information that passes through a social

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214. Mark Zuckerberg, *Thoughts on Beacon*, FACEBOOK (Dec. 5, 2007), http://blog.facebook.com/blog.php?post=7584397130.

215. *See generally* DANIEL J. SOLOVE, MARC ROTENBERG & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW (3d ed. 2009) (providing an overview of information privacy laws).

216. Radin argues that even where the trade-off is fully informed, individual waiver may deleteriously alter the character of society for those who do not waive their rights and accordingly prohibit all such waivers. Radin, *supra* note 38, at 151.

217. *See* Tal Z. Zarsky, *Information Privacy in Virtual Worlds: Identifying Unique Concerns Beyond the Online and Offline Worlds*, 49 N.Y.L. SCH. L. REV. 231, 243 (2004) (discussing privacy interests in virtual worlds).

network is not limited to linking internal profiles to external shopping or browsing information. A *Facebook* member may have a legitimate expectation that her private messages and photos will not be viewed and distributed by people within the organization, for example, even if they are not distributed to third parties. Participants in other communities, particularly virtual worlds, may have an interest in preventing the provider from building and utilizing a comprehensive behavioral profile in order to increase retention rates or to deliver highly targeted and influential marketing campaigns.[218] Further tensions exist around the powerlessness of participants in controlling the information that is collected about themselves and the internalization of external norms under the perpetual potentiality of surveillance.[219]

If these types of problems are to be addressed, privacy may need to be reconceptualized,[220] because a model that focuses on leakage of information outside of the initial area of collection is unlikely to properly consider issues of use, within the community, of information that is necessarily divulged through participation. These types of concerns will likely become more important in the future as the personal information that is collected within virtual communities continues to grow.[221] There are, however, difficult issues to resolve in any conception of privacy that attempts to address these tensions. Most importantly, any such concerns must be carefully balanced against the benefit that participants obtain through enjoying a community that is tailored to their tastes and needs.

4. Rights of Legal Enforcement

The rule of law discourse suggests another substantive limit on autonomy that is derived from the ideal of access to justice: a requirement that citizens ought to be able to enforce their rights in the legal system.[222] This is essentially a corollary to the principle that governance should be limited by law; an idea that would have little significance if the citizen is practically prevented from challenging the actions of the government. Applying this principle to online contracts highlights potential problems with contractual

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218. *Id.* at 255–56, 259–64.

219. Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 194 (2008); Penney, *supra* note 110, at 233 (discussing privacy issues that arise around actions and information within virtual environments); Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1415 (2000).

220. *See* Cohen, *supra* note 219, at 194–96; Penney, *supra* note 110 (arguing that a simplified model of privacy is required in order to address new concerns about privacy in virtual spaces).

221. Lastowka & Hunter, *supra* note 15, at 72 n.386.

222. Raz, *supra* note 86, at 200–02.

terms that purport to exclude legal enforcement.[223] This category includes terms providing "that the recipient would have no right of legal action or remedy under any circumstances," and other "gray area" terms, such as requirements to submit to binding arbitration, exclusion of class actions, undertakings to pay attorney's fees, and "severe curtailment of remedies," such as "clauses limiting the remedy for a victorious plaintiff to whatever the recipient paid for a service."[224]

Clauses in this broad category are relatively common in virtual community contracts. The *Second Life* Terms of Service, for example, previously required that any plaintiffs submit to binding arbitration in Linden Lab's home state.[225] Such a clause can be very effective at limiting legal redress for participants who allege that they have been wronged because arbitration is often expensive, travel to the provider's jurisdiction may be prohibitive, and arbitrators tend to determine cases in favor of the large corporate actors.[226] The district court in *Bragg* refused to uphold the binding arbitration clause in Linden's favor, holding that it was procedurally and substantively unconscionable.[227] In coming to this conclusion, Judge Robreno held that "[i]n effect, the TOS provide Linden with a variety of one-sided remedies to resolve disputes, while forcing its customers to arbitrate any disputes with Linden."[228]

The decision in *Bragg* follows that of the U.S. district court in *Comb v. Paypal*, which held that a compulsory arbitration clause in the Paypal Terms of Service was unconscionable because of "a lack of mutuality in the User Agreement and the practical effects of the arbitration clause with respect to consolidation of claims, the costs of arbitration, and venue."[229] These cases

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223. Radin, *supra* note 38, at 150.

224. *Id.* at 150–51.

225. *See* Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 606–07 (E.D. Pa. 2007). The updated Terms of Service provide for optional binding non-appearance-based arbitration. *See* Linden Lab, SECOND LIFE TERMS OF SERVICE, § 12 (Oct. 6, 2010), http://secondlife.com/corporate/tos.php.

226. *See, e.g.*, Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUSINESS WEEK, June 5, 2008, *available at* http://www.businessweek.com/magazine/content/08_24/b4088072611398.htm (explaining that individuals who agree to credit card terms of agreement unknowingly submit to the arbitration clauses that make it difficult to prevail against the large corporations); Alex Chasick, *Mandatory Binding Arbitration Still Sucks*, CONSUMERIST (June 9, 2008, 6:18 PM), http://consumerist.com/5014412/mandatory-binding-arbitration-still-sucks (highlighting claims that the vast majority of arbitrations between corporations and consumers are resolved in the corporation's favor).

227. *Bragg*, 487 F. Supp. 2d at 611.

228. *Id.* at 608.

229. Comb v. Paypal, Inc., 218 F. Supp. 2d 1165, 1173 (N.D. Cal. 2002).

suggest that courts may be increasingly willing to refuse to uphold terms that limit participants' rights of legal enforcement.[230]

5. Summary of Substantive Values and a More General Application

The stronger forms of the arguments for cyberspace self-governance suggest that the role of the state in imposing substantive limits on autonomy should be minimal to non-existent. These arguments are generally premised on the fact that individuals who disagree with the norms within a given virtual community have the ability to leave the community, a power which is much more difficult to exercise in the corporeal world. With this logic, since values are subjective, it makes little sense for the territorial state to limit the scope of autonomy and consensual participation in virtual communities.

This logic is faulty for a number of reasons. Primarily, as argued above, the deterministic assumptions that norms of virtual communities will necessarily be better than those of territorial states are fundamentally flawed. Irrespective of those assumptions, however, the territorial state continues to have some responsibility to protect its citizens and limit their autonomy, whether they are interacting with other citizens or with foreigners, online or off. Accordingly, the substantive values that a territorial state believes are important are likely to influence the boundaries of acceptable self-governance, at least for citizens of that territorial state and to the extent that any such limits can be effective.

It is not possible to provide any definitive answers as to which values should be read into virtual community governance structures. The answer will always depend upon the community context, the level of harm that participants are exposed to, and the beneficial effects, if any, of allowing the community to determine its own substantive values. The exact content and bounds of any such limits will always be highly contextual.

The rule of law analysis helps to highlight some of the more pressing tensions that surround private governance in virtual communities. The sets of values canvassed here: discrimination, speech, property, privacy, and rights of legal enforcement, are merely indicative of a much larger set of the issues that societies are continuously debating as new technologies bring changing social practices. It would be a mistake to treat any of these values as having a universal application, but this set provides a first pass that may give courts reason to pause and more closely consider the legitimacy of a contractual

230. *See* Ryan Kriegshauser, *The Shot Heard Around the Virtual Worlds: The Emergence and Future of Unconscionability in Agreements Relating to Property in Virtual Worlds*, 76 UMKC L. REV. 1077, 1094–1107 (2008).

framework that purports to disclaim them. The effectiveness of substantive limits on autonomy is of course widely varied, but it no longer seems plausible to claim that cyberspace is immune from the exercise of power by territorial states. This rule of law analysis supports the conclusion that territorial states have a legitimate interest in restraining the autonomy of their citizens, whether that autonomy is mediated through cyberspace or not.

IV. FORMAL LEGALITY

Because of the difficulty in articulating universally applicable substantive rights, many modern liberal rule of law theorists developed models centering on formal legality in legitimate governance instead.[231] This conception of the rule of law requires "that laws be declared publicly in clear terms in advance, be applied equally, and be interpreted and applied with certainty and reliability"[232] in order that the law "be capable of guiding the behavior of its subjects."[233] It follows that "[a]ll laws should be prospective, open, and clear" and that "[l]aws should be relatively stable."[234] These principles, stated in a number of different ways, form the standard liberal understanding of the rule of law.[235] The emphasis on the law's ability to guide the behavior of its subjects leads to two somewhat separable themes in this conception of the rule of law: an aspiration towards clarity and predictability in legal rules and, to a lesser extent, a set of due process requirements in the application of those rules.

A. PREDICTABILITY

An important component of formal legality is the ideal that laws ought to be sufficiently predictable to allow citizens to structure their lives with some degree of certainty. The rule of law "makes it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances to plan one's individual affairs on the basis of this knowledge."[236] To enhance predictability and the liberty of legal subjects, scholars who advocate formal legality emphasize the importance of a system

231. TAMANAHA, *supra* note 98, at 119.
232. *Id.* at 34 (discussing "legal liberty").
233. Raz, *supra* note 86, at 198 (emphasis removed).
234. *Id.* at 198–99 (emphasis removed).
235. *See generally* FULLER, *supra* note 86, at 38–39 (explaining failure in a legal system predominantly by reference to the clarity and regularity of law); HAYEK, *supra* note 86, at 80 (arguing that the rule of law, "[s]tripped of all technicalities," is concerned with enabling individuals to plan their affairs).
236. HAYEK, *supra* note 86, at 80.

that provides clear, prospective rules that are well-promulgated, reasonably constant, and consistently enforced.[237]

When comparing the practice of governance within virtual communities against the requirements of formal legality in the rule of law, it becomes clear that private governance does not currently live up to the ideals of encouraging predictability and guiding behavior.[238] This may, of course, be perfectly desirable; one can imagine that some games, for example, may be much more interesting if the rules are not completely predictable.[239] Alternatively, a lack of predictability in the interests of community solidarity in relatively homogeneous communities could be acceptable. For example, a small, tight-knit community with shared understandings of appropriate behavior may not need formally articulated rules or restraints on the power of the administrator to eject members deemed to be disruptive or unwanted. In some communities, however, particularly those that foster a more diverse population and are relatively open-ended, a perceived lack of predictability may be harmful to the interests of participants and imposing limits on private governance may be justified.

1. Clear Rules

The requirement that rules be clearly expressed and promulgated is familiar in the liberal rule of law discourse, where the emphasis is on the ability of law to guide behavior and the ability of citizens to plan their lives.[240] This discourse immediately highlights that the rules in virtual communities are often unclear, obscure, and difficult to understand. The contractual terms of service and end user license agreement ("EULA") documents are usually written in dense legalese and are usually presented in a form that discourages reading.[241]

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237. Raz, *supra* note 86, at 198–200.

238. *See* Risch, *supra* note 105, at 19.

239. *See* Aki Järvinen, Introducing Applied Ludology: Hands-on Methods for Game Studies, Presentation at Situated Play, Proceedings of the DiGRA 2007 Conference: International Conference of the Digital Games Research Association, 134, 141–42 (Sept. 27, 2007) (transcript *available at* http://www.digra.org/dl/db/07313.07490.pdf) (arguing that "the emotion of suspense is a fundamental emotion of player experiences, because it is a compound emotion where the emotions of hope, fear, and uncertainty come together").

240. FULLER, *supra* note 86, at 38–40; HAYEK, *supra* note 86, at 80; RAWLS, *supra* note 87, at 238; Raz, *supra* note 86, at 200–02; *see also* TAMANAHA, *supra* note 98, at 93–94.

241. Clapperton & Corones, *supra* note 37, at 9; Fred Von Lohmann, Machinima: Copyright and Contract in a New Medium, Presentation at the Computer Games, Law, Regulation, and Policy Symposium (Feb. 14, 2008).

To the extent that Montesquieu is correct in saying that "[l]iberty is the right to do everything the law permits,"[242] virtual communities do not rate highly on an imaginary scale of liberty. Some communities may create additional terms of conduct to govern internal behavior. These terms of conduct are often more clearly enumerated than the purely contractual terms of service, but even these are often unclear and indeterminate.[243] Where these codes are sufficiently clear and effective, they may be more useful in structuring a participant's behavior within the community than the contractual terms, and may therefore more adequately satisfy the ideals of the rule of law and Montesquieu's conception of liberty.

This leaves the question, however, of what to make of the obscure terms that form part of the formal contract but are not clearly understood by the community. There is at least an argument that the more onerous or surprising of these should not be upheld,[244] which would force providers to make an effort to ensure that participants are aware of and understand the key rules. This type of contractual approach may not address any problems with the substantive content of EULAs and terms of service, but it is likely to at least enhance the rule of law ideal that rules be sufficiently clear and promulgated.

2. Changing Rules

Another problematic component of virtual community governance is the rate at which legal rules can change and the lack of responsibility that providers have to compensate any participants who may be adversely affected by rule changes. Many providers purport to have the right to modify the terms of service at any time, often without notice to the participants.[245] Changes in these legal rules are rarely highlighted to the participant, who may

242. CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS 155 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., 1989); *see also* TAMANAHA, *supra* note 98, at 52 (explaining the importance of the rule of law as a protection from tyranny for liberal legality).

243. *See* Risch, *supra* note 105, at 31.

244. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

245. Andrew Jankowich, in a study of the license agreements of virtual communities, found that "[o]f the agreements surveyed in this study, 75.00% reserved to proprietors the right to modify the agreements at their discretion and 39.58% allowed proprietors to modify documents without notice to the participants who are the other less powerful party." Jankowich, *supra* note 40, at 47.

have substantial difficulty in identifying the changes and their legal effect.[246] This suggests that the mechanism of changing rules should be investigated, requiring, for example, that providers make clear statements about the effects of any changes and highlight modified sections in the dense legal agreements in order to enable participants to identify and understand rule changes.[247]

Apart from the difficulty in identifying changes, rule changes can have significant effects on the entitlements of participants within the virtual community. An interesting example comes from the ban on gambling within *Second Life* in July 2007.[248] For some time, a number of participants in *Second Life* were able to profit from establishing in-world casinos, where players could gamble Linden Dollars in unregulated gaming machines. Linden Dollars, as mentioned below, are fluidly convertible with U.S. dollars, but are stated by Linden Lab to be a "limited license" right, not a currency.[249] After some interest by the U.S. Federal Bureau of Investigation on the practice of gambling in *Second Life*,[250] Linden introduced a rule change that prohibited any gambling outright.[251]

The immediate effect of the ban was that participants who had invested in the creation of casinos were forced to close down, losing future revenues upon which they may have been relying.[252] Many participants complained

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246. *See id.* (arguing that the lack of clarity in rule changes "seems designed to encourage participants to be responsible for their role under EULAw while discouraging them from being aware of the extent of those responsibilities").

247. Fairfield argues that:

> [T]his kind of coercive information forcing rarely helps in the context of mass-market contracts. Consumers never read the new and improved contracts that courts labour over. Requiring consumers to read lengthy contracts . . . is not a solution, it is part of the problem. The resulting transaction costs would kill many of the mass-market deals that, in the aggregate, provide an enormous benefit to society. Thus, the old judicial standby of adopting information-forcing rules that require consumers to read contracts is inadequate.

Fairfield, *supra* note 55, at 468–69.

248. Robin Linden, *Wagering in Second Life: New Policy*, SECOND LIFE BLOGS (July 25, 2007), https://blogs.secondlife.com/community/features/blog/2007/07/26/wagering-in-second-life-new-policy.

249. *Terms of Service*, SECOND LIFE, § 5.1 (Oct. 6, 2010), http://secondlife.com/corporate/tos.php.

250. *Virtual Feds Visit Second Life Casinos*, CNN.COM (Apr. 4, 2007, 9:50 AM), http://web.archive.org/web/20070408124303/http://www.cnn.com/2007/TECH/internet/04/04/secondlife.gambling.reut/index.html (Internet Archive copy).

251. Linden, *supra* note 248.

252. *See* Thomas Claburn, *Second Life Gambling Ban Gets Mixed Reaction*, INFORMATIONWEEK (July 26, 2007, 5:00 PM), http://www.informationweek.com/news/internet/showArticle.jhtml?articleID=201201441.

about the rule change, arguing that while unregulated online gambling was not permissible in the United States, there were casino operators and players who were not situated in the United States.[253] Linden responded to this claim by stating that "[t]his policy applies to all use of *Second Life*. It isn't intended to describe what is or isn't legal for any particular resident or in any particular place. It describes what Linden Lab believes is appropriate to maintain its business requirements and to operate *Second Life*."[254]

The longer term effects of the ban were more widely felt. Unregulated banks had become popular in *Second Life* as a result of the growing virtual economy, some of which were offering returns of between thirty and sixty percent.[255] When Linden banned gambling, the casino operators, who were making thousands of USD equivalent Linden Dollars in profit every month, quickly sought to redeem their stored Linden Dollars, and a run on the virtual banks ensued.[256] The biggest bank, Ginko Financial, collapsed, taking with it several thousands of U.S. investment dollars.[257] This eventually prompted Linden Lab to introduce another rule change, banning virtual banks by prohibiting the payment of interest in-world by anyone not registered as a regulated bank by a territorial government.[258]

This example shows that rule changes can have significant effects. Certainly, gambling within *Second Life* was likely to be illegal under U.S. law and that of several other jurisdictions.[259] Further, the unregulated banking industry within *Second Life* appeared to be completely unsustainable and

253. *See* Christine Hurt, *From Virtual Tax to Virtual Gambling*, CONGLOMERATE (Apr. 9, 2007), http://www.theconglomerate.org/2007/04/from_virtual_ta.html.

254. Linden, *supra* note 248.

255. David Bester, *A Virtual Crash: The Rise and Fall of Ginko Financial*, THINK MAGAZINE (Jan. 2009), *available at* http://www.algorithmics.com/think/January09/Algo-THINK0109-VC-Bester.pdf.

256. *Id.*

257. *See* Pixeleen Mistral, *Ginko Financial's End-Game*, ALPHAVILLE HERALD (Aug. 6, 2007), http://alphavilleherald.com/2007/00/ginko-financial-2.html. Media reports indicated that the total amount lost to Ginko Financial was in the vicinity of $750,000, but this may be highly inflated: "[T]his figure doesn't reflect actual losses. It likely includes fictitious interest to be paid out over time, and employee salaries. The average individual loss to depositors was probably in the hundreds or in some cases the low thousands." Bester, *supra* note 255 (quoting Benjamin Duranske).

258. Kend Linden, *New Policy Regarding In-World "Banks,"* SECOND LIFE BLOGS (Jan. 8, 2008, 6:43 PM), https://blogs.secondlife.com/community/features/blog/2008/01/08/new-policy-regarding-in-world-banks.

259. *See* Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361–5367 (2006); *see also* Susan W. Brenner, *Fantasy Crime: The Role of Criminal Law in Virtual Worlds*, 11 VAND. J. ENT. & TECH. L. 1, 54 (2008).

resembled Ponzi schemes more than legitimate banking institutes.[260] Both of these rule changes were likely justified as protecting Linden Lab and *Second Life* participants. The changes, however, did create real financial losses for people who were encouraged to invest in *Second Life* because of the high potential returns and the lack of prohibitions on gambling or financial markets.

In this case, it is likely that the ban on gambling was not an illegitimate evolution of *Second Life* norms:

> The ban was not a frequent change; it was not as if Second Life banned entire lines of business and then reinstated them on a regular basis. The contract amendment was not arbitrary; gambling is illegal in many jurisdictions. The rule had no ex post facto effect; no one was penalized for past gambling. Additionally, the change was not targeted; it was a general rule with general application. So long as Second Life made no affirmative promises that gambling would be legal, the contractual law against gambling was no different from any legislative ban on real-world gambling, in accordance with the rule of law.[261]

This analysis highlights, however, that where a change is not legitimate, imposing a requirement on the providers of virtual communities that just compensation be paid when entitlements are destroyed is not inconceivable, particularly where virtual currency is fluidly convertible into real currencies. The competing tensions are the provider's ability to make and change internal rules that evolve over time and to suit new circumstances or to comply with external requirements,[262] against the participants' interests in having some measure of security in their virtual assets.

3. Emergent Behavior and Uncertain Rules

As part of the emphasis on predictability, liberal rule of law theorists strongly disfavor ex post facto laws.[263] A law that is not clearly expressed at a

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260. Benjamin Duranske, a prominent commentator on *Second Life* legal news, claimed that he was "now completely certain that Ginko is paying its obligations to previous depositors with new depositors' money rather than investing that money. As such, over two years of speculation about whether Ginko is a Ponzi scheme is over—it undeniably is." Benjamin Duranske, *Law Journal Says Ginko Financial Probable Ponzi; Yield Down 60% in 16 Months*, VIRTUALLY BLIND (Feb. 23, 2007), http://virtuallyblind.com/2007/02/23/business-law-journal-ginko/; *see also* Mark Cassidy, *Virtual Bank, Real Scam?*, ILL. BUS. L.J. (Feb. 12, 2007, 5:51 PM), http://www.law.uiuc.edu/bljournal/post/2007/02/12/virtual-Bank-real-scam.aspx.

261. Risch, *supra* note 105, at 29.

262. *See* Balkin, *supra* note 28, at 2051; Bartle, *supra* note 50, at 33.

263. FULLER, *supra* note 86, at 51–62; RAWLS, *supra* note 87, at 238.

time before a citizen takes an action is unable to guide that person's behavior as "[o]ne cannot be guided by a retroactive law."[264] This raises some immediate concerns in virtual communities, where apart from being subject to change, the rules are often enforced on an ad-hoc or retroactive basis, particularly when a new exploit is discovered, for example.[265] When unanticipated emergent behavior results in undesirable consequences, providers may attempt to punish the participants who make use of a newly discovered bug or exploit in the platform. This is done in a way that lessens certainty. Participants may have difficulty differentiating between behavior that is rewarded with material advantage or fame within the community and behavior that will be deemed against the rules and punished after the fact.[266]

Some examples may be useful here. In the *Bragg* case, Bragg allegedly took advantage of a bug in Linden's auction management software to purchase land that had not been advertised for sale, with the lack of competition allowing him to purchase the land significantly under market value.[267] Linden responded by terminating his account, alleging that he had taken advantage of an exploit.[268] Alternatively, take the case of a guild in *World of Warcraft* that was accidentally given a developer item which gave them unparalleled power in the virtual world.[269] When they used the item to beat the hardest challenges in the game, they were swiftly punished for exploitation, by permanent cancellation of their accounts.[270]

It may be that the participants in these examples should have known that their behavior would likely be punished. On the other hand, however, it is not always simple to identify wrongdoing. Significant gains are often achieved by members of virtual communities who are able to push the

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264. Raz, *supra* note 86, at 198.

265. *See* MIA CONSALVO, CHEATING: GAINING ADVANTAGE IN VIDEOGAMES 114–16, 142–44 (2007).

266. TAYLOR, *supra* note 34, at 51 ("[M]any actions deemed 'griefing' or 'exploiting' exist on the boundary lines of the game—often in spaces in which the rule set is not clearly defined or the system itself is ambiguous."); Humphreys, *supra* note 32, at 91 (reporting that "[t]rouble seemed to arise around the finer points of when play is actually cheating and when it is just clever, expert play from someone who knows the game inside out").

267. Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 597 (E.D. Pa. 2007).

268. *Id.*

269. *See* Andres Guadamuz, *Avatars Behaving Badly*, TECHNOLLAMA (June 3, 2009), http://www.technollama.co.uk/avatars-behaving-badly.

270. For a similar account of developers punishing participants who were mistakenly given powers, see Sal Humphreys, Massively Multiplayer Online Games Productive Players and Their Disruptions to Conventional Media Practices 152–54 (2005) (unpublished Ph.D. dissertation, Queensland University of Technology), *available at* http://eprints.qut.edu.au/16119/.

boundaries and find innovative new ways of doing things.[271] There is clearly room for disagreement as to whether certain forms of emergent behavior are or ought to be prohibited. A participant who is punished for behavior that she believed to be within the scope of the rules may legitimately feel aggrieved by a provider's determination that it was not.

The prevalence of unanticipated consequences to technical changes and the propensity of participants to exploit them suggests that providers may need a certain degree of flexibility in the application and enforcement of rules in order to maintain a cohesive community. The ability to punish retroactively may be necessary in the interests of maintaining order, particularly where the exploitative behavior clearly contravenes community expectations, if not explicit rules. Enforcing retrospective rules would not necessarily contravene the ideals of the rule of law in such situations:

> In the pragmatic view, a rule will be public whenever strong social agreement exists in practice, regardless of whether a legislature or a court has spoken. Similarly, if a rule exists normatively even without specific legislative enactment (as, for example, would a rule against intentional homicide), then later legislative confirmation would not necessarily mean that it would be unfair retroactive application to punish earlier transgressions. Moreover, where the line of evolution of legal interpretation is clearly foreseeable, it would not be unfair to hold people to what they can see is the emerging interpretation.[272]

This reasoning suggests that some leeway is required in order to allow providers to react to emergent behavior. In other cases, however, where participants are acting in accordance with both the stated rules and community standards, retroactive changes to the rules that significantly impact their interests could give rise to an obligation of compensation. The gray areas, where behavior is neither clearly within or outside of community standards, are much more difficult to satisfactorily determine. In some communities, it will be best to defer to the findings of the provider in order to maintain social cohesion; in others, particularly where the community is less cohesive or more open-ended, it may be best to take the more liberal view and allow all behavior that is not explicitly prohibited. As always, the context is important; the needs of particular communities will be different in every case. There is, however, a real tension between the need for flexibility and the serious threat posed by inconsistent application of the rules.

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271. *See* CONSALVO, *supra* note 265, at 122–23 (explaining various motivations for cheating in games).

272. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 815 (1989).

4. Inconsistent Application and Discretionary Enforcement

Perhaps the most troubling aspect of virtual community governance is that the rules on the books, the EULAs and terms of service, sometimes bear almost no resemblance to the rules in force in the community. Virtual community contracts are typically drafted in a very risk-averse manner, reserving for the provider almost total power to deal with members of the community. This often includes broad prohibitions on behavior that is commonplace within the community.[273] In many cases, the provider is not interested in enforcing these contracts as written but will use them as a tool against particular participants as it sees fit.[274] Essentially, these contracts are designed to reserve a wide range of discretionary powers for the provider, which is a concept that directly contradicts the values of formal legality in the rule of law that are generally understood to require that "similar cases be treated similarly."[275]

Resolving the tension between the need for flexibility and the need to avoid the worst effects of inconsistent application of discretionary rules is a difficult task that speaks to the core of the tension between formal and substantive conceptions of justice.[276] In moving away from purely positive accounts of law and responding to the need to allow, but simultaneously constrain the discretionary exercise of governance powers, the next set of values of the rule of law embrace requirements of fairness, equality, and transparency as measures of legitimacy in decision making.

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273. *See, e.g.*, Fairfield, *supra* note 55, at 462.

274. Risch, *supra* note 105, at 45 ("What providers generally want is a strict set of rules that they can enforce at will against a few users—a position directly contrary to the rule of law.").

275. RAWLS, *supra* note 87, at 237.

276. Hayek, for example, strongly argued against the exercise of discretion in pursuit of substantive equality as threatening the impartiality and generality requirements of the rule of law. *See* FRIEDRICH A. VON HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 62–64 (1982). However, Allan contends:

> Hayek's account of the rule of law may justly be criticized for adopting an interpretation of equality—in the sense of generality or impartiality—that leaves no scope for legitimate political debate and action. By excluding redistributive economic aims and outlawing governmental powers of economic management, Hayek's theory of constitutional freedom strips politics of the role it must play if the citizen is to be in any real sense an architect (together with others) of the scheme of justice he is expected to serve and endorse.

ALLAN, *supra* note 85, at 15.

B. PROCEDURAL FAIRNESS

This next set of formal rule of law values includes requirements of procedural fairness and "the availability of a fair hearing within the judicial process."[277] The rule of law requires an independent judiciary, the observation of principles of natural justice, judicial review over legislative and administrative power, easy access to courts, and limits on the discretion of the police.[278] The rule of law encompasses "the regular, impartial, and in this sense fair administration of law,"[279] and requires some form of due process: that is, a process reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances."[280] Only through conducting orderly trials and hearings with defined rules of evidence could the legal system "preserve the integrity of the judicial process."[281]

This second part of the ideal of formal legality focuses on the procedure through which legal norms are enforced. A key component of this aspect of the rule of law requires that laws are enforced fairly and that there are guarantees of fair hearings and due process available to those adversely affected.[282] Here again, private governance in virtual communities is potentially problematic. Providers are generally used to wielding absolute power, and the determination of when participants have broken the rules and what punishments are to be inflicted are very rarely subject to accountable procedural safeguards.

Bragg once again provides a good case study of potential procedural limits on a provider's exercise of power. Essentially, Bragg was alleged to have broken the rules by exploiting a loophole and purchasing virtual land significantly under market value, and Linden Lab took action by cancelling his account and confiscating not only the contested land, but all his other virtual *Second Life* assets.[283] Bragg disputed both the allegation that he had broken the rules and the penalty that was applied. Linden's position, as the creator, enforcer, and adjudicator of the rules, makes it difficult for Bragg to trust that Linden's decision was arrived at fairly and makes it altogether

277. TAMANAHA, *supra* note 98, at 119.
278. Raz, *supra* note 86, at 200–02.
279. RAWLS, *supra* note 87, at 235.
280. *Id.* at 239.
281. *Id.* at 238.
282. ALLAN, *supra* note 85, at 121 ("Conformity to [precepts of due process and equal justice] ensures a genuine—substantive—equality of all before a law that serves a coherent (if capacious and adaptable) conception of the common good.").
283. Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 597 (E.D. Pa. 2007).

impossible for Bragg to appeal within the system of review for either the finding of guilt or the penalty imposed.

Another example comes from *World of Warcraft* in 2006, when Blizzard banned a large number of players who were running the game under a GNU/Linux operating system.[284] Blizzard's anti-cheating software mistakenly identified these players as cheaters, and they were accordingly banned for using unauthorized third party software. The lack of due process had harmful effects on these players:

> The players found the process involved in getting their accounts reinstated very opaque. They were sent form letter responses to their appeals to customer service. No indication was given that an investigation was underway and there was no way to know whether any of their complaints were being addressed. The lack of transparency and the realization that there would not necessarily be any "justice" was a source of great concern.[285]

The accounts of the affected players were eventually reinstated, along with an apology and a compensatory credit.[286] This as an example of a desirable resolution and a satisfactory review policy. The tensions that this example highlights, however, are the damaging effects on players of a lack of due process—not just the result of being banned, but the uncertainty, the frustration of not being able to appeal the decision, and the damage to the participant's reputation and integrity that accompanies a false accusation.[287]

These examples raise an interesting set of questions. In order to provide a useful platform and create a harmonious community, the provider generally requires some discretion in the ability to create and enforce internal rules. In order for the exercise of discretion to be considered legitimate, however, the lack of procedural fairness, perceived equality, and transparency that often negatively characterizes the private exercise of power must be addressed.

Conceivably, virtual communities could create governance and oversight mechanisms that ensure that decisions to enforce the rules and punish participants are justly enforced. There will likely still be problems, however, where either these procedures do not exist or where they do not instill

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284. *See* Anonymous, *Over 50% Cedega WoW Accounts Banned*, LINUX-GAMERS.NET (Nov. 18, 2006, 10:45 AM), http://web.archive.org/web/20061123130644/http://www.linux-gamers.net/modules/news/article.php?storyid=1852 (Internet Archive copy).

285. Humphreys, *supra* note 34, at 157.

286. *See* Ty, *Blizzard Unbans Linux World of Warcraft Players*, LINUX LOOKUP (Nov. 22, 2006, 10:00 AM), http://www.linuxlookup.com/2006/nov/22/blizzard_unbans_linux_world_of_warcraft_players.

287. Humphreys, *supra* note 34, at 157.

sufficient confidence to reassure participants that the result is just. The question raised by the *Bragg* example remains: To what extent should the provider's discretion in enforcing the rules be externally reviewable?

A blanket rule that all administrative decisions are judicially reviewable would likely introduce much more overhead than is warranted, resulting in a system where the development and operation of innovative virtual communities is unduly disincentivized.[288] Each additional measure of public oversight adds some overhead to the process, some drag to community governance. It is important to achieve a sensible balance between the desire to protect participants and the desire to encourage the development and growth of virtual communities.

It may not be necessary or desirable to bring in the whole of public administrative review processes into virtual governance decisions. Perhaps some of the ideals of administrative review could be used in the adjudication of contract law in these circumstances. It may be possible to limit broad discretionary powers in virtual community contracts or to impose restrictions on the exercise of those powers. Conceivably, if courts are able to find that virtual community contracts have been improperly terminated due to a lack of procedural fairness, then virtual communities will be prompted to implement internal procedures that engender the trust of the community. Obviously there are communities that will have no such need for procedural fairness, such as games where arbitrary action forms part of the entertainment value.[289] But for other communities, a court may be able to evaluate with some sensitivity whether the procedures for imposing punishments or terminating subscriptions are carried out within the reasonable expectations of participants. In communities where both legitimacy and flexibility is important, it is only through introducing requirements of fairness and equality that states can ensure that discretion is legitimately exercised.

If the load on courts proves too great, establishing specialized tribunals to review these types of contractual governance issues could be an option. It seems likely, however, that only exceptional cases will continue to make it to the legal system. Accordingly, where there is significant procedural integrity in the exercise of a discretionary power in a virtual community contract, courts should probably defer to the provider's judgment.[290] In cases where a

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288. *See* Richard Bartle, *The Point of No Return*, TERRA NOVA (Apr. 4, 2008), http://terranova.blogs.com/terra_nova/2008/04/the-point-of-no.html.

289. *See* Greg Lastowka, *Rules of Play*, 4 GAMES AND CULTURE 379, 390 (2009).

290. For example, Grimmelmann argues:

significant lack of procedural fairness can be shown, however, courts may be justified in holding that the contractual power was not properly exercised, potentially relying on such limiting doctrines as unconscionability,[291] waiver,[292] good faith,[293] or estoppel.[294] If the contractual terms are rendered unenforceable in such exceptional cases with sufficient certainty to encourage providers to adopt reasonable safeguards on internal governance, a significant positive effect on the bulk of internal decision making may be achieved by establishing meaningful external bounds to providers' executive discretion.

V. THE ROLE OF CONSENT AND DEMOCRACY

Some conceptions of the rule of law predicate legitimacy on the consent of the governed, expressed primarily through the democratic process. In this way, consent provides substantive limits in a pluralistic system where universal values can no longer be explicitly justified.[295] Fundamentally, "the

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> Although plaintiff Marc Bragg's allegations that Linden expropriated his land were explosive, Linden answered them with credible evidence that Bragg had taken unfair advantage of a bug in the land transaction system. That fact alone makes Linden's suspension of his account sensible. The case settled, but had it reached a decision on the merits, the law should have treated Linden's response as presumptively legitimate.

Grimmelmann, *supra* note 59; *see also* ALLAN, *supra* note 85, at 16 (arguing that courts, in practice, generally give substantial deference to the discretionary exercise of reviewable powers "in recognition of their specialist knowledge and expertise").

291. *See, e.g.*, Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 597 (E.D. Pa. 2007) (holding that Linden Lab's binding arbitration clause was procedurally and substantially unconscionable).

292. *See, e.g.*, Erez Reuveni, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age*, 82 IND. L.J. 261, 299–300 (2007) (arguing that waiver at common law may be applicable to virtual world contracts where developers do not consistently or uniformly enforce contractual terms).

293. *See* U.C.C. § 1-304 (1977) (obligation of good faith); *see also* Meehan, *supra* note 209, ¶¶ 57–60.

294. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); *see also* Steven J. Horowitz, Bragg v. Linden*'s Second Life: A Primer in Virtual World Justice*, 34 OHIO N.U. L. REV. 223, 236 (2008) (arguing that Bragg could potentially rely on an argument in estoppel to prevent Linden Lab from reneging on its assertion that *Second Life* residents own their virtual land); Kurt Hunt, *This Land is Not Your Land: Second Life, CopyBot, and the Looming Question of Virtual Property Rights*, 9 TEX. REV. ENT. & SPORTS L. 141, 155–56 (2007) (arguing that inducing participants to treat in-world currency as real money may lead to an enforceable modification to the EULA by promissory estoppel in communities like *Project Entropia* and *Second Life*); David P. Sheldon, *Claiming Ownership, but Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods*, 54 UCLA L. REV. 751, 779–82 (2007) (discussing the possibility of a successful promissory estoppel claim in virtual worlds).

295. TAMANAHA, *supra* note 98, at 99–100.

modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees."[296]

Consent may be the single most important aspect of legitimacy in the governance of virtual communities. Cyberlaw theory suggests that the main benefit of the autonomy of virtual communities is the ability of participants to come together in spaces whose norms differ from those of other communities.[297] At its libertarian extreme, this ideal holds that through consensual participation in a boundless array of potential communities, each community's rules will more closely match the preferences of its participants than any default set of rules could. In less strong conceptions, there is still a clear recognition that the promising potential of cyberspaces is their malleability, through which individuals and communities can consensually determine their own norms and create their own meaning.

The forms through which consent can be expressed differ for any given community. Some communities, like Wikipedia for example, explicitly integrate democratic processes, complete with the massive bureaucratic overhead that such processes entail.[298] Others, like the Internet Engineering Task Force, rely on "rough consensus" and active participation.[299] Still other communities, like *A Tale in the Desert*, *Facebook*, and *EVE Online* have attempted to involve their participants in the generation of constitutional rules and ongoing community governance.[300] For many other communities, maintaining ongoing consent is an intricate exercise in customer relations.[301] For still more, consent is expressed by ongoing participation in the community where the rules are dictated by the provider, a hard line "take it or leave it" approach.[302]

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296. HABERMAS, *supra* note 88, at 449, *quoted in* TAMANAHA, *supra* note 98, at 99.

297. *See generally* Johnson & Post, *Law and Borders*, *supra* note 3.

298. *See* Malte Ziewitz, Order Without Law, Presentation at the Games Convention Online Conference Leipzig (Aug. 1, 2009).

299. Froomkin, *supra* note 43, at 794, 799–801.

300. *See generally* Timothy Burke, Play of State: Sovereignty and Governance in MMOGs 11–13 (Aug. 2004) (unpublished manuscript), *available at* http://www.swarthmore.edu/SocSci/tburke1/The%20MMOG%20State.pdf (discussing models of state within virtual worlds).

301. *See, e.g.*, Banks, *supra* note 186 (describing the importance of maintaining engagement amongst diverse player groups).

302. For example, the Something Awful community forums' moderators "pride [themselves] on running one of the most entertaining and troll-free forums on the internet" by "charging a $10 fee to filter out folks not serious about adhering to the rules, and banning those who manage to slip through and break them." *See Forum Rules*, SOMETHING AWFUL (Jan. 1, 2006), http://www.somethingawful.com/d/forum-rules/forum-rules.php?page=1.

Whatever the form consent takes, its existence will almost always change the evaluation of legitimacy of community governance. Where consent does not exist, there is little theoretical reason to allow the default rules of society to be suspended or modified. Where informed consent does exist, then concerns about predictability or substantive fairness are likely to be greatly alleviated. There must be room for participants who consensually choose to participate in communities whose rules may seem strange or arbitrary.[303] A good example is *EVE Online*, where internal norms include the concept that "fraud is fun."[304] *EVE*'s participants understand, if not at the point of creating an account then certainly before they become heavily invested in the game, that they may be defrauded by other participants at any time. This consensual understanding is the primary reason that the large-scale frauds perpetrated by *EVE*'s participants should not be understood as either theft or fraud; the loss of thousands of hours of invested time through the deceit of another is fully understood to be within the rules of participation.[305] Fraud cannot exist because consent nullifies the action.

Some difficulties appear when consensual internal norms conflict with external social values, particularly those which are expressed as partially or completely inalienable.[306] Where consensual rules conflict with external values, territorial states continue to have an interest in limiting autonomy. Territorial states will often limit the internal norms that are socially repugnant or that have deleterious effects on people outside of the community. Territorial states routinely limit the scope of consent in issues of discrimination, for example, or in content matters such as the sexualized depiction of underage persons. In this context, police and policymakers have begun to grapple with the apparently consensual practice of teenagers sharing

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The rules of participation in the forum are vigorously but subjectively enforced and continued participation is generally understood to be at the discretion of the administrators. *Id.*

303. Bartle, *supra* note 50.

304. Fairfield, *supra* note 55, at 460–61 (arguing that "the scope of acceptable behavior is not ultimately determined by the EULA. Whether 'fraud is fun' in a community ultimately depends on the views of a particular community. That, in turn, depends on the norms worked out between community members").

305. *Id.*

306. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111 (1972) (describing inalienability rules designed to prevent inefficient outcomes from significant negative externalities); Radin, *supra* note 158 (explaining partial restrictions on commodification and alienability of interests).

sexual photos of themselves with other teens.[307] Concerns about sexual play and the exposure and exploitation of children in virtual worlds are also increasingly prominent as territorial states begin to consider what type of behavior is permissible and when regulation is necessary.[308]

The emphasis on consent in this conception of the rule of law also illustrates a key tension between the internal norms of a community and the contractual terms of service. The contractual documents that purport to govern virtual communities are somewhat problematic in that they are rarely designed to encourage readability and understanding.[309] Moreover, they often conflict with the social norms within the community, usually because of discretionary enforcement, but also because norms within the community are continuously evolving through participation, whereas the written terms are unilaterally set in advance by the provider. As the community cultivates a separate understanding of the norms than is set out in the contractual documents, real questions of consent arise when the provider attempts to enforce the conflicting contractual provisions.

The *EVE* example can be contrasted with other cases in which consent to a purported change to default social rules is clearly not manifested. The *Bragg* case once again provides a useful example; there is a clear social norm within *Second Life* that participants own their virtual property and currency, one cultivated and encouraged by Linden Lab in its advertising materials and public statements.[310] The fine print in the Terms of Service, however, purports to disclaim any enforceable interests participants may have in virtual goods or currency.[311] If the contractual terms are literally enforced, they will override the consensual social practices within the community. The proposition that Linden Lab was able to modify the default rules of property ownership unilaterally, in direct opposition to the understanding of the

307. *See, e.g.*, Nancy Rommelmann, *Anatomy of a Child Pornographer*, REASON (July 2009), *available at* http://reason.com/archives/2009/06/04/anatomy-of-a-child-pornographe (discussing the ramifications of "sexting"—the exchange of explicit images or videos amongst teens).

308. *See, e.g.*, FED. TRADE COMM'N, VIRTUAL WORLDS AND KIDS: MAPPING THE RISKS (2009), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt038.shtm; R. Bloomfield & B. Duranske, *Protecting Children in Virtual Worlds Without Undermining Their Economic, Educational, and Social Benefits*, 66 WASH. & LEE L. REV. 1175 (2009); J. A. T. Fairfield, *Virtual Parentalism*, 66 WASH. & LEE L. REV. 1215 (2009); J. M. Shaughnessy, *Protecting Virtual Playgrounds: Introduction*, 66 WASH. & LEE L. REV. 995 (2009); R. F. Wilson, *Sex Play in Virtual Worlds*, 66 WASH. & LEE L. REV. 1127 (2009).

309. Dale Clapperton, *Electronic Contracts: A Law unto Themselves?*, 130 MEDIA INT'L AUSTL., INCORPORATING CULTURE & POL'Y 102, 103 (2009).

310. *See* Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 595–96 (E.D. Pa. 2007).

311. SECOND LIFE, *supra* note 249.

community, violates the ideal of governance limited by law. Instead, it resembles governance by fiat, where the technical rules that govern interaction are determined solely by the provider, in almost-absolute discretion, and bear almost no resemblance to those understood and accepted by the community.

David Post argues strongly that rules imposed by external states are less legitimate than the rules developed by virtual communities themselves. State-imposed rules completely abandon "any notion that governments derive . . . their just power from the consent of the governed, or that the individuals to whom law is applied have the right to participate in formulating those laws."[312] The imposition of rules by the territorial state stifles the ability of virtual communities to develop "as true communities, with shared norms and customs and expectations characteristic of each and continually being created and re-created by the members within each."[313] If the sovereignty of virtual communities is not recognized, then "no matter what steps they take to set up a fair and reasonable system for resolving virtual world disputes in accordance with newly created virtual world law, their efforts will come to nothing because they can't create 'real law,' " and users will "be stuck with the chaotic nonsense" of law imposed by various territorial jurisdictions.[314] Being able to fall back on enforceable state law risks making virtual law "play-law." "If everyone believes that 'real law' from 'real sovereigns' is the only law that matters (or can ever matter),"[315] then "who will undertake the hard work required to set up a legal system if it's just play-law?"[316]

There are two main readings of Post's argument. The strongest is a proposition that the rules of a virtual community can be the only legitimate source of law for participants in that community. This proposition is not particularly helpful. To suggest that internal norms will not adequately develop in the shadow of the territorial state seems to be a suspect assumption. After all, virtual communities rely upon the enforcement of territorial contract and property law, and "property and contract presuppose limits and enforcement shaped by a sovereign authority."[317] Cyberspace self-governance and state rules "form a mesh of rules,"[318] where state rules

312. Post, *supra* note 122, at 910.
313. *Id.* at 912.
314. *Id.* at 913.
315. *Id.* (emphasis removed).
316. *Id.*
317. Radin & Wagner, *supra* note 10, at 1296.
318. JEANNE PIA MIFSUD BONNICI, SELF-REGULATION IN CYBERSPACE 199 (2008).

support, maintain, and oversee self-regulation practices.[319] This suspect assumption is unnecessary as there seems to be no reason to accept either full self-rule or total state control.[320]

A less forceful reading of Post's argument, however, agrees with this Article's conception of the role of consent in legitimate governance. If the internal norms that a community develops are not respected, then the ability of the community to govern itself may be harmed.[321] In cases where the internal rules conflict with external values, such harm may be a necessary limit to self-governance. In other cases, however, legal results that conflict with internal norms for no justifiable reason must be treated with suspicion. The example from *Second Life* seems to reflect this concern: while the community organizes itself around principles of ownership interests in land and currency, the spectre of immanent revocation by Linden is likely to seriously limit any consensual governance processes.

A further example may be found in the enforcement of bans on real money trades ("RMT"). Many virtual worlds ban the sale of virtual property for corporeal profit. Many such worlds, however, simultaneously introduce game mechanics that encourage RMT.[322] In cases where a ban on RMT is not actually enforced within the community, it may make sense not to allow its enforcement in territorial courts.[323] For example, Sony Online Entertainment prohibits RMT between participants and explicitly disclaims any liability for destruction of the value of in-world property but provides some servers with an officially sanctioned trading hub where it is able to tax trades.[324] An argument that subscribers own no value in their virtual property, based upon

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319. Jeanne Bonnici argues:

> The advantages of the customised regulation of self-regulation cannot be achieved however without the constant support of states and state legislation. . . . [T]here is a continuing relevance of national legal orders. States are especially indispensable in providing a general framework of legislation and legal mechanisms that ground self-regulation. It is also important that states continue acting as "watchdog" on the regulatory actions of the groups. Oversight by states is indispensable for the fair running of the customised rules. States should continue to assist in the development and maintenance of the self-regulation rules, including by continuing financial assistance.

Id. at 213.

320. Cohen, *supra* note 4, at 224.

321. Post, *supra* note 122, at 913.

322. Juho Hamari & Vili Lehdonvirta, *Game Design as Marketing: How Game Mechanics Create Demand for Virtual Goods*, 5 INT'L J. BUS. SCI. & APPLIED MGMT. 14 (2010).

323. Balkin, *supra* note 28, at 78.

324. *Station.com—Terms of Service*, SONY ONLINE ENTM'T, § VII(F)(2), http://www.station.sony.com/en/termsofservice.vm#n7 (last visited Aug. 27, 2009).

a technical reading of the EULA, may be suspect if there turns out to be a general community expectation that both avatars and property are fluidly exchangeable for real world currency.[325]

One of the key features of rule of law limits on governance seems to be that they exist because people believe they exist.[326] This circular recognition may actually prove quite useful in evaluating appropriate regulatory responses to governance issues. In the *Second Life* example, the primary justification for enforcing the property rights of *Second Life* residents is that the residents believe they have them. The provider, by supporting and encouraging the belief that its power is limited, can be expected or compelled to uphold those expectations. In another environment, where the participants do not believe that property rights exist, then the provider or other participants have no obligations to respect the possessive rights of participants to their virtual assets. Essentially, this approach prioritizes the role of real consent in substantive governance, which distinguishes internal norms that ought to be upheld from those that should not.

Recourse to external standards to enforce disputes in virtual communities is potentially damaging to the development of internal dispute resolution mechanisms and internal governance.[327] At least to the extent that internal norms do not conflict with external values, then, it may also be desirable to avoid overriding consensual internal governance with a strict literal interpretation of the contractual documents.[328] Staying with a property-based example, this would mean that a contractual term that purported to remove any claim that participants may have to their virtual assets in a community where the internal norms support an entitlement to assets that the provider

325. A whitepaper commissioned for Sony Online Entertainment reveals that in its first year of operation, the StationExchange trading hub collected $1.87 million in player transactions, providing a revenue to Sony of $274,000. *See* Noah Robischon, *Station Exchange: Year One*, GAMASUTRA (Jan. 19, 2007), http://www.scribd.com/doc/23941/SOE-Station_Exchange-White-Paper-1-19; Michael Zenke, *SOE's Station Exchange—The Results of a Year of Trading Gamasutra*, GAMASUTRA (Feb. 7, 2007), http://www.gamasutra.com/features/20070207/zenke_pfv.htm.

326. H.L.A. HART, THE CONCEPT OF LAW 56 (2d ed. 1961) (arguing that rules become binding either because the community as a whole generally accepts them or because they are legitimately made by those who have the authority to make rules); *see* TAMANAHA, *supra* note 98, at 119; *cf.* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 20–21 (1967) (discussing and critiquing H.L.A. Hart's positivism).

327. Post, *supra* note 122, at 913.

328. *See* Fairfield, *supra* note 55, at 463 (arguing that the internal norms of the community should be taken into consideration when interpreting the contractual terms of service).

has not effectively negated should not be upheld.[329] This approach accords well with rule of law ideals of legitimacy in governance, as well as the dominant justification for encouraging cyberspace self-rule in the first place: the proposition that better rules can be generated through consensual participation in virtual communities. Essentially, if a provider wishes to enforce certain contractual rules, it must ensure that those rules are understood and accepted by the community.

The single largest difficulty with a consent model of virtual community governance is evaluating consent in fact. Communities are not all homogeneous and determining whether a community has consented to any given norm is an impossible task. Any such evaluation is most likely to proceed on an assumption of consent, which is a factual determination of whether or not the hypothetical reasonable person, joining and participating in the community, could be deemed to consent to the rule in question. Whilst clearly not a perfect model of consensual governance, this approximation at least provides an avenue for territorial courts to examine the internal social norms of the community in relation to both external values and contractual terms. Consent provides a useful indication of the internal legitimacy of community rules that can then be used as a normative guide as to whether the territorial state ought to support a particular contractual interpretation or not.

VI. CONCLUSION

Governance within virtual communities occurs at the intersection of constraints from the market, the law, technology, internal community standards, and external social values. There is a trend in cyberlaw theory, however, that attempts to reduce the legitimacy of private governance to the drawing of borders. From the act of crossing over into cyberspace to the emphasis on private contract and property rights, these borders tend to delegitimize government intervention in the practice of governance in virtual communities. These conceptions of self-governance rely on assumptions about the technology, the market, and the communities that isolate participation from the remainder of society.

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329. Duranske further argues that:

> If a company wishes to profit by selling currency and land, and outright encourages users to make their real-life living in the virtual space, it cannot reasonably protest that the fine print says it is 'only a game' when faced with users who expect to extract that stored value or expect policies that genuinely protect the assets they have purchased.

See DURANSKE, *supra* note 200, at 113.

Regulatory approaches that rely on deterministic projections of any of these forces are unlikely to provide satisfactory outcomes. The importance placed upon autonomy in much of cyberlaw theory risks overlooking the importance of restraints on the exercise of power within virtual communities. The tensions that permeate these communities are governance tensions and should be addressed as governance tensions. If governance in virtual communities is to be regulated through private law, then it is desirable to analyze the continued suitability of private law through constitutional discourses which are receptive to the potential threats posed by private governance.

The values of the rule of law and the rights of citizens are continuously protected by the evolution of the private common law.[330] The myriad legal determinations regarding how power can be exercised by members of society substantially construct the rights and interests of all citizens. So too, in virtual communities, the boundaries of private law doctrines mediate the relationships between participants and providers, as they do in disputes between participants. The rule of law, as a discourse that emphasizes the legitimacy of governance and appropriate limits on the exercise of power, provides a useful framework as a first step to reconceptualizing and evaluating these tensions in communities at the intersection of the real and the virtual, the social and the economic, and the public and the private.

330. DICEY, *supra* note 1, at 187–88.