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The Values and Limits
of Substitutional Sovereignty

Innovations Case Discussion: Second Life

I have been asked to comment on Cory Ondrejka's "Collapsing Geography" in part because I have recently written about traditional sovereignty.[1] I was not a participant in *Second Life* (SL), but as a result of this assignment I have become one. This experiment with virtualism serves to critique values of citizenship and geography that form the core of traditional sovereignty; in so doing it suggests ways to improve traditional approaches to the subject. When Ondrejka says "nations must reexamine their sources of, and claims to, national power"[2] he forces us, in Thomas Mann's words, to imagine another reality. Moreover, to the extent that SL is an economic market and more than a game (as Ondrejka urges over Thomas Malaby's objections), it invites governance by real world legal rules. These two themes—what the SL offers the first and what the first world may impose on the second—are the focal points of this comment.

CYBER LESSONS FOR THE SOVEREIGN

Traditional sovereignty has been subjected to stresses from globalism and concepts of "new sovereignty"[3]. But it also suffers from immigration crises that challenge geographical notions of sovereignty. In the U.S., the fence on the Mexican border and plans to round up and expel those here "illegally"[4] are demonstrations of traditional sovereignty. But an enforcement policy that expels rather than reforms (in ways designed to legitimate those who are within our borders) tests the limits of sovereignty and undermines international relations, especially in Mexico. In these circumstances, we are in need of fresh ideas. The SL solution, which eschews geography as an organizing principle, provides a refreshing alternative. The creation of honorary citizens or virtual citizens who are equals no matter where they are locat-

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ed physically places value on contributions over presence. A world without geographic dimensions hardly seems relevant to these immigration issues. Still it challenges us to reconcile this community with our own. Ondrejka shows us that more than one kind of citizenship is possible where geographical choices don't have to be made. Could it also be true that "citizenship" might vary in circumstances where these choices have to be made? Reflection upon the kinds of multi-level relationships that can exist in the physical world, such as guest workers or other varieties of citizen commitment and interaction, is one way to integrate these worlds. Thomas Malaby nicely makes this point with the concept of "flexible citizenship."[5] The ability to cross borders for work purposes (and for limited times) could be in everyone's interest. Dividing citizenship—or expanding it, as in Ondrejka's world—may provide a solution to most sovereignty problems, except the right to vote (which is an indicator of citizenship that is often devalued).

Since citizenship connects to sovereignty, dividing it divides sovereignty as well. U.S. notions of sovereignty devolve from the Constitution, where it is placed not in the government but in the people.[6] The people may amend or modify it by acting through their agents, congress and the executive. Perhaps their (our) mistake has been to conceive of sovereignty and citizenship too narrowly or rigidly and as incapable of modification for specific purposes. If the view of citizenship were expanded, the nativist fears engendered by undocumented aliens in our midst might be ameliorated. SL helps us to appreciate these possibilities.

The SL experience also impliedly questions the value of other forms of geographic based programs, such as education. Ondrejka shows that the rate of innovation is controlled by the cost of education. In the U.S., that proposition has serious implications since we have a higher education price index (HEPI) that exceeds the normal consumer price index (CPI). Higher education defends the HEPI by showing how extra educational services (health care, safety, athletics, dormitories, laboratories) all drive costs higher. But these expenses are mostly premised on the model of a university as a residential experience. SL tells us that the values of virtual education (pseudonymity, trust, meritocracy) may be offsetting alternatives to the face-to-face virtues of a residential college. Indeed, Ondrejka even cites situations where students at top geographical places like the Harvard Law School sometimes prefer the virtual to the classroom world.

We have to take seriously the strengths of a virtual educational experience as we plan new universities here and abroad (where the residential university is a luxury). We know the distance learning option reduces the cost of education, but if it improves the rate of innovation it must be considered more seriously. Of course there is much to be said for the broader and deeper educational experience that campus centered education makes possible. By definition the SL cannot replicate this experience. The values that residential education brings for those lucky enough to experience it are beyond the capacities of the virtual world.[7] When it comes to determing the rate of innovation, the effects of residential universities may have to be examined over a student's lifetime in order to measure it accurately. In this way, the costs of campus life may be more positively correlated to inno-

vation, and to the interaction between personal satisfaction and achievement.

There is no doubt that the SL model can improve the rate of innovation. Collaboration in safe environments where the power to fail "is not an option, but a requirement"[8] encourages and accelerates innovation. I am reminded of the success of InnoCentive, an online scientific research venture started by Eli Lilly but now freestanding.[9] InnoCentive has recently partnered with the Rockefeller Foundation to solve problems in the developing world.[10] By using a model of collaboration familiar to SL, this joint venture holds promise for solving what have always been thought as intractable problems of poverty and vulnerability. The simultaneous interaction of brilliant minds engaged in social problem solving is a compelling model for innovation and reform.

Ondrejka also asserts that avatars and the SL community experience help build trust, an indispensable value in the educational setting. Francis Fukuyama's notion that a community based on mutual trust increases social capital and economic well being[11] produces respect for trust producing institutions. In the educational setting, trust and rational discourse are enhanced when all can be heard. In the traditional classroom of course the instructor must balance the desire to call on those with eager hands against the hope that someone with the most productive answer will respond. Pseudonymity can revolutionize pedagogy in the university world by making the best answers more likely.

THE FIRST LIFE STATUS OF SECOND LIFE

The fascinating question is whether SL has created a community with real world consequences. SL has many of the indicia of sovereignty: geography (virtual land) economy (Linden/U.S. dollars) and a governance structure (benign dictatorship). These are sovereign attributes; only the power to wage war seems to be lacking.

Ondrejka highlights the governmental status of SL by emphasizing its economic, property-rights-creating dimensions and by deemphasizing the game aspects of the exercise. But the constitutional question is whether these factors are sufficient to create company town status for the purposes of the state action doctrine.[12] If that were to occur, due process protections over the decisions of SL would be conceivable. This proposition has been seriously debated.[13] The more important the community becomes in an economic and cultural sense, the more likely the state action conclusion is to be drawn. Take, for example, the possibility that an individual is barred from the site for inappropriate behavior (intolerance, harassment and indecency are grounds for expulsion). This expulsion has real world consequences—the loss of resources as well as identity—and it could lead to litigation. But does this make SL's actions governmental in nature? SL is a monopolist. But is it a public monopolist? From my perspective, the discretionary nature of the exercise (you are not compelled to work there) and the unregulated (so far) state of the Internet both counsel against imposing public status on SL. But as a cautionary matter, it would be wise for SL to provide procedures by contract, so as to make it less likely to provoke due process based state action determinations.

SL seems to be inviting state action status by creating property rights and behaving like a sovereign entity. But whether or not the courts intervene on a constitutional basis, SL should create "private" due process procedures that protect its residents. This can be done in several ways.[14] The most obvious is to provide for "hearings" when expulsion in suspension is proposed. These don't have to be trials. Arbitration can serve a valuable role so long as the values of independence and objective decision-making are respected. Once due process has been privatized and its values have been incorporated in to the virtual world, adjudications can occur in that world but on a contractual rather then due process basis.

Furthermore, if SL residents organize, they may force the host (sovereign) to provide process as a part of the basic understanding of the community. Take sports leagues, for example. They are like virtual communities also (video dominated with fantasy leagues) but they have real world consequences. Collective bargaining agreements provide for drug testing of participants and private hearings and penalties (administered by a commissioner/Czar). These requirements are only possible because of the presence of contractual/community relationships. Collective bargaining agreements constitute a form of private government and are exempted from the antitrust laws as benign monopolies precisely because they reflect private ordering principles.

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Whether the residents of SL have the incentives to organize probably depends on the purpose of the specific community arrangement. Many communities may be more competitive and atomistic, but some will be collegial and collaborative. Ondrejka might want to pursue how well his community values play out in each setting. The creation of process oriented sub-groups is a further refinement of the governance structure.

Suppose, for example, that a group is engaged in a literary development project that challenges or thwarts the established community standards. The group could well surround its activity with a hearing process that guards against arbitrary expulsion for offensive or "indecent" productions. The community substandards,

thus established, would and should be recognized by SL just as they may be by judicial process. In this way, the rules of *Second Life* and those of just life can merge successfully.

CONCLUSION

As a newcomer to this world, my avatar doesn't look like my face in the mirror. I am still struggling with my identity.[15] But I am impressed with SL's sovereign dimensions and its potential for rethinking and expanding education and innovation. Those of us in the first life have much to learn from *Second Life*, but the opposite is also true. The more SL succeeds, the more it could be intruded upon by the powers of the constitutional sovereign. We the people are increasingly becoming citizens of these two worlds.

Acknowledgements

1. Paul R. Verkuil (2007), *Outsourcing Sovereignty*, Cambridge UK: Cambridge University Press.
2. "Collapsing Geography," p. 29, in this issue.
3. See Anne-Marie Slaughter (2004), *A New World Order,* Princeton: Princeton Press.
4. NY Times, Aug. 13, 2007 (editorial).
5. See Malaby, Contriving Constraints, p. 67, in this issue.
6. Verkuil, supra note 1, at 14-16 (discussing assumptions of sovereignty at the Founding).
9. I say this as a former president of a proud, campus based institution, the College of William & Mary.
10. "Collapsing Geography," p. 38, in this issue.
11. See <www.innocentive.com>.
12. The project brings together over 100,000 online scientists to solve problems posed by nonprofits who work in the developing world. Rockefeller provides financial rewards to both the seekers and the solvers.
13. See Fukuyama (1995), *Trust,* Free Press at 9-12. At the time Fukuyama wrote, the internet attracted only a small part of his attention. See id at 195-96.
14. See Marash and Alabama, 326 U.S. 501 (1946).
15. See Jack M. Balkin, *Law and Liberty in Virtual Worlds, in The State of Play* (Jack M. Balkin & Beth Simone Noveck, eds., NYU Press 2006) at 86, 98; Jason S. Zack, *The Ultimate Company Town: Wading in the Digital Marsh of* Second Life (on file with author).
16. These suggestions are drawn from Paul R. Verkuil, "Privatizing Due Process," 57 *Admin.L.Rev.* 963 (2005).
17. See Susan Crawford, "Who's in Charge of Who I am? Identity and Law Online,' in Balkin & Noveck supra note 14, at 198.