

Fucking With the Magic

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Kristen E. Eichensehr, *Digital Switzerlands*, 167 **U. Pa. L. Rev.** ____ (forthcoming 2019), available at [SSRN](#).

Battles over the public policy obligations and implications of late 20th-century and early 21st-century technologies have long been fought via metaphor as well as via megabyte and microeconomics. Today, modern information technology platforms are characterized brightly as “[generative](#)” and darkly as “[information feudalism](#).” Public policy might be informed by treating some network providers as “[information fiduciaries](#).” Or, borrowing the phrase that prompts [Kristen Eichensehr](#)’s thought-provoking paper, tech companies might be characterized as metaphorical “digital Switzerlands.” They might be neutral institutions in their dealings with national governments.

In Professor Eichenbehr’s telling, the idea of a corporate digital Switzerland resisting government aggression—refusing to cooperate with government requests for private user information, for example—comes from a recent suggestion to that effect by Brad Smith, president of Microsoft. As she notes briefly, it’s an old idea, not a new one, even if it has migrated from corporation-vs-corporation conflict to state-vs-corporation power dynamics. Ken Auletta’s [history of Google](#) reported that back in 2005, Google CEO Eric Schmidt characterized Google’s search engine and advertising platform as a neutral “digital Switzerland” in its treatment of content companies and advertisers. Schmidt was defending the idea that Google had no agenda vis-à-vis incumbent entertainment industry players. Google’s technology produced accurate data about consumer viewing practices. If that data led advertisers to pay less for their ad buys, that wasn’t Google’s intent—or its responsibility. Schmidt’s listener, the then-president of Viacom, erupted in protest: “You’re fucking with the magic!”

Indeed. The reader should take many lessons from Eichensehr’s article. Foremost among them is this: Wandering into the digital Switzerlands of contemporary technology, whether because Microsoft (in its obvious self-interest) says that’s how we should do things or because that’s an objectively useful place to begin, is fucking with the magic—that is, the mythos that guides how scholars and policymakers think about technology purveyors and their civic roles and responsibilities.

Metaphors, it turns out, are the least of our concerns. The point that Smith and Microsoft made with the “digital Switzerland” claim is on its face a primitive and laughable appeal to the idea that technology and technology companies can and should be apolitical and neutral. Eichensehr, appropriately, barely pauses to consider the metaphorical mechanics at work.

Instead, she takes as given that technologies have politics, and that politics have technologies. Reading the paper, I was reminded of [Fred Turner’s research](#). Silicon Valley firms and their allies explicitly borrowed and built on 1960s ideologies of anti-government communalism, so much so that modern information technology came to be seen by its producers, and sold to consumers, as an instrument of personal liberation and freedom. Whether a Mac or a PC, the computer, and later the network, was and is meant to empower individuals to create social order independent of traditional, formal governments, and if necessary in opposition to them. Eichensehr doesn’t dig quite to that level. She skips ahead, helpfully escaping the metaphor wars by relying on “digital Switzerlands” as a potentially useful diagnostic. Her argument is consistent with Turner’s. Ideas have power. Maybe Smith is on to something.

Eichensehr makes a host of interesting observations and asks some critical if provocative questions. The article starts by laying out a basic toolkit. The claim that technology companies might be “digital Switzerlands” (she switches Smith’s singular to the more descriptively apt plural) implicates the foundational idea that a company might be treated

as a sovereign, as if it were a country, and the next-level idea that as a sovereign state, a technology company might be fairly characterized as “neutral” under international law. The characterization works in some respects and not in others, but as a starting point it is plausible enough that Eichensehr moves easily to her next step, which is describing and analyzing how that neutral status implicates technology companies both in relation to their individual users and in relation to governments. Microsoft or Facebook might resist government efforts to secure corporate cooperation in investigations that implicate their users. Or they might cooperate. But companies have always had to choose whether to fight or fold in response to government requests for information, or more. Today, the global reach of the largest tech companies, and the fact that they succeed as businesses because of their attractiveness to users and advertisers distinguishes them from powerful corporate behemoths of earlier eras. Those were powerful and durable for decades as resource extractors, not as modern goodwill generators.

In short, Eichensehr argues that the digital Switzerlands claim has merit. Sometimes, modern technology companies do exercise some of the powers of sovereignty that we traditionally associate with governments. They develop and deploy large-scale trust-based governance infrastructures through their technology platforms. They exercise substantial powers to structure behavior by users. Users discipline the companies via governance to a limited degree, primarily exit. Taken together, those attributes give heft and credibility to the proposition that operating as “digital Switzerlands” may enable technology companies effectively to shield their users from formal government regulation—collecting private information users store via the platform, for example. As Eichensehr notes, that power is limited; it comes at a cost, and with risks. Switzerland itself has not only been neutral but was also passive to the point of complicity with Nazi Germany during World War II. With great power—pervasively armed neutrality, in the case of Switzerland; surveillance-based surreptitious data aggregation, in the case of Facebook—comes great responsibility. That responsibility is not always exercised appropriately.

But Eichensehr is less interested in a detailed normative exploration of Facebook’s data collection practices than in using the insight about tech companies as states to build a useful framework for understanding their practices, with governments anchoring one point of the framework, tech companies anchoring a second, and users anchoring a third. She uses that framework to predict outcomes in conflicts where companies might cooperate or resist government efforts to regulate or police the companies’ users. “Stated generally, the Digital Switzerlands concept suggests that companies should fight against or resist governments when the companies perceive themselves to be and can credibly argue that they are protecting the interests of users against governments....” (P. 39.) She tests that hypothesis against some relatively easy, paradigm cases (corporate compliance is more likely when a democratic government is attempting to apply its domestic legislation to users in that jurisdiction), and reviews limitations (the government may be undemocratic; the company may misapprehend its users’ interests; governments may be applying the law extraterritorially; the company may not be aware of government action).

The core case and the exceptions lead Eichensehr to evaluate the normative implications of the framework. Here, her observations are provocative rather than definitive, because she’s challenging some cyber-orthodoxy and some fundamentals of democratic theory. Recall what happens to the magic.

First and most important, Eichensehr knocks the power and freedom of the individual off their shared pedestal as the normative standard for evaluating both government (mis)conduct and corporate practice. That view has to be handled delicately as a philosophical matter, because individual agency is one of the central pillars of democratic theory, but it is refreshingly pragmatic. She cites Madison in support of institutional pluralism. Madison was writing about the dual roles of federal and state governments; in Eichensehr’s telling, treating tech companies as states, “having two powerful regulators, rather than only one, can benefit individuals’ freedom, liberty, and security because sometimes it takes a powerful regulator to challenge and check another powerful regulator.” (P. 49.) The individual isn’t all-powerful in practice. Bigger sometimes is better.

Second, Eichensehr repositions questions of legitimacy and accountability in governance institutions, pushing past political science concepts (“exit,” “voice”), past early cyber-constitutionalism (which described tech companies as merely commercial “[merchant sovereigns](#)”), and—implicitly—past easy reliance on critiques of neoliberalism (private

appropriation of public functions, embodied in state-sanctioned invocations of contract and property law). She argues that contemporary corporate “citizenship” entails not only how the “state” disciplines those who are subject to its power, but also how the “state” advocates on their behalf. In *Digital Switzerlands*, she sees novel blends of public functions (defending user interests in privacy against state invasions), private functions (services traded in the market, data collection), and individual and collective identity, woven together at least as tightly as they were in 20th-century company towns, and arguably more so. But companies’ formally private status means that mechanisms of accountability, such as transparency and modes of due process, often can’t be imposed from without. They must be adopted voluntarily, as Google has done with its transparency reports and treatment of Right to Forgotten requests.

It’s possible to read *Digital Switzerlands* as a not-so-subtle defense of the corporate status quo, that corporate statehood is not the world that we might want but is close to the best of the world that we might have. Break up big tech in the name of old school, consumer-protective antitrust at our peril, one might infer, and instead find ways to require, expect, or just hope that big tech will adopt a better demeanor in a traditional public-oriented sense.

I think that this conservative reading is a mistake. Instead, it’s worth taking the article quite seriously on its own terms, as a thoughtful effort to take apart well-established patterns of thinking about cyberlaw and policy and to reassemble them in a forward-looking and potentially sustainable way. The tech sector may have been naïve and selfish in telling the digital Switzerland story. Digital machines are no more tools of personal liberation and freedom supplied by neutral designers—nor less—than the assembly lines of Henry Ford were sources of individual opportunity provided by benign automobile makers. Yet to some scholars, the dehumanizing factories of the early 20th century produced relatively wealthy communities and class mobility; to its defenders, Facebook gives us identity and community. Eichensehr has taken the first steps toward what may become a larger realignment of arguments about statehood and governance. That project is well-worth considering, even if—abracadabra—it may take us in unexpected directions.

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