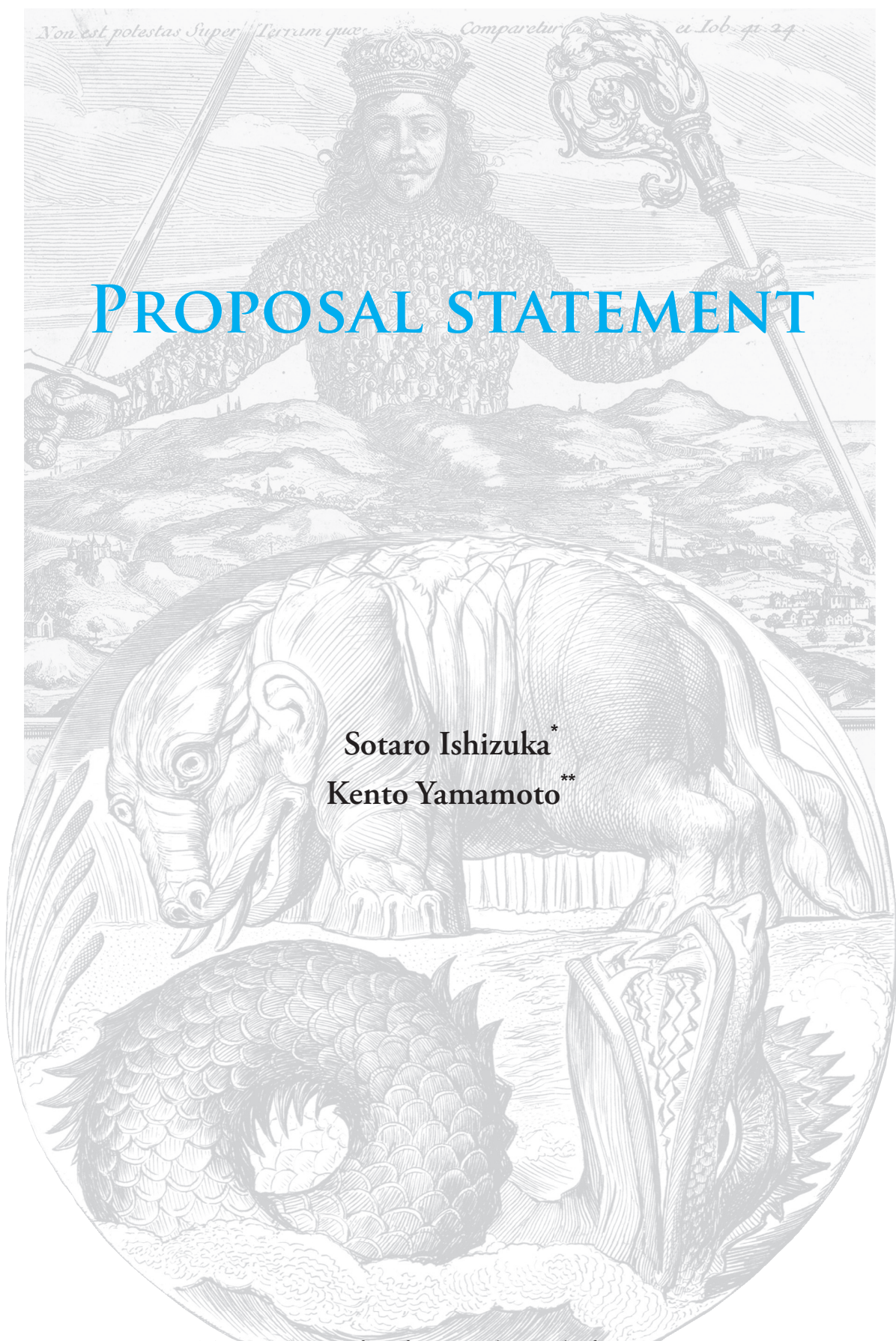


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I. Preface: Platforms and Power

Arguably, power exists so that individuals can lead a good life. However, power can exist independently of that purpose. Consequently, power is not always used solely for our “good life.” Throughout history, numerous instances have occurred where monsters wielding power have run amok, destroying our good life. Thus, although we grant power to these monsters out of necessity, we have also devised safety mechanisms to prevent them from going on a rampage.

We first sought to bring order to political chaos and granted power to Leviathans (states). The Leviathans vanquished other monsters, seized absolute power, and ensured our safety. To prevent the Leviathans from running amok, we made various agreements with them, enshrining them in constitutions. The freedoms we enjoy in our private lives are protected because these freedoms are guaranteed in constitutions.

From the gaps within this private space, small forms of power are constantly emerging and disappearing. Corporations, the mass media, political parties, and other organizations hold significant social and economic power. In that sense, the world is teeming with small monsters. However, they rarely grow into powers that can challenge the Leviathans. The Leviathans suppress the growth of social and economic powers that could negatively impact our good life. However, Behemoths began to stir, while the Leviathans were not paying attention.

Digital platforms (referred to as “DPF” in this book), which can grow into Behemoths, have been developing in the digital realm. Massive DPFs are becoming the rulers of the digital world. Digital technology and the digital space it supports began to spread during the late 20th century and explosively progressed and expanded after entering the 21st century. As we drift amid a sea of vast information, DPFs bring us together, institute order, and enable us to use it. Without the help of DPFs, we cannot engage in meaningful activities in the digital realm. Today, digital information processing is connected to all aspects of life, from administration, finance, work, and education to daily living. We are rapidly becoming dependent on DPFs in the real world as well. Holding power in the national-border-free digital realm, they have become rule-makers and encroach upon the real world. The Leviathans have not paid much attention to this digital realm that spontaneously emerged. It is a new territory. However, now that the Leviathans have noticed the stirrings of Behemoths in this new world, a race has begun between the Leviathans and the Behemoths. Under the banner of protecting personal information, the Leviathans are attempting to prevent the excessive growth of the Behemoths. In response, our agreements with the Leviathans are also beginning to be revised (for example, Article 8 of the EU Charter of Fundamental Rights, which calls for personal data protection). However, the extent to which the power and control of the Leviathans can reach into the digital realm remains unclear.

To date, we have adapted to various global changes alongside the Leviathans (states). However, is that sufficient? If the Behemoths were to grow into monsters on par with the Leviathans, simply adding personal information protection to our agreements with the latter would be insufficient. We must place restraints on the Behemoths themselves, make agreements with them, or even restructure the relationship between these two beasts.

Chapter 1 of this book examines the overarching policy and principles for confronting the Behemoths

in digital constitutionalism. It explores whether it is possible to restrain the Behemoths through constitutions and incorporate them into the monster-weakening logic of the separation of powers in a world where they have relativized the Leviathans. Chapter 2 examines the measures that can be adopted against the digital-public-sphere-dominating Behemoths. It considers the nature of their governance as rulers of the digital discursive space and the weakening of the weapons (constitutional rights) that Behemoth can claim by (partially) replacing freedom of expression with freedom of broadcasting. Chapter 3 explores the potential of competition laws to prevent the Behemoths' power from becoming overwhelming. It considers how to accurately recognize and address the Behemoths' power and establish preemptive regulations to prevent a "winner-takes-all" scenario favoring the Behemoths. Chapter 4 considers possible and better measures for taming the Behemoths. Building a collaborative relationship between them and states, making them more transparent, having smaller Behemoths lead larger ones, and imposing ex-ante and ex-post obligations on the Behemoths are all potential approaches. Points to be considered when adopting measures and current inadequacies in addressing these issues are also discussed.

Considering the discussions in the articles, these proposals, premised on the relativization of states and the rise of DPFs, tentatively outline the prospects and limitations of constitutional and competition law efforts aimed at constitutionalizing the digital space. It is noteworthy that these proposals are developmental and hypothetical views based on the ideas of the authors of this book. All the authors do not necessarily agree with them. Furthermore, the content of the proposals may overlap or conflict with one another, and they do not aim to include all the issues and perspectives related to DPF regulation. The related articles from this book are indicated with each proposal, therefore, please read them while considering how they are related.

II. Proposals

Proposal 1: Actors should structure the digital space so that constitutional values and principles are realized.

(1) Constitutional values should be seriously considered in the digital realm.

The basic principles of Japan's digital policies are outlined in laws such as the Basic Act on the Formation of a Digital Society, however, no grand design is drawn up in accordance with a set direction, and the presence of constitutional values is weak therein. Digital constitutionalism holds that constitutional values should be the basic principles, and at the very least, serious consideration must be given to how to design the fundamental principles of the digital realm.

(2) Academic theories must clarify digital constitutionalism's theoretical challenges and limitations.

Moreover, digital constitutionalism serves as an umbrella term encompassing various currents of thought.

Although directions for regulation are presented, many aspects, such as how best to implement them and how they relate to existing legal theories, remain inadequately explained or agreed upon.

(3) States should regulate DPFs through legislation that embodies constitutional values.

The EU’s digital policies are held to have shifted to a digital constitutionalism approach, and laws such as GDPR (General Data Protection Regulation), DSA (Digital Services Act), and AIA (Artificial Intelligence Act) can be considered as a way of realizing digital constitutionalism. When considering legislation that embodies constitutionalist or constitutional values, it is necessary to not only transplant existing methods into the digital realm, but also *translate* them to optimize them for the digital realm.

(See Chapter 1, Section I for details.)

Proposal 2: DPFs should, in certain cases, be bound by constitutional rights, and states should protect people’s constitutional rights from DPFs.

- (1) DPFs should be bound by constitutional rights in certain cases, and when they restrict rights, objective reasons and fair procedures (such as access, participation, transparency, notice, and hearing) should be required. Existing academic views hold that DPFs are not directly bound by constitutions (they are not directly addressed by constitutions), however, when DPFs reach a “de facto, obligatory or guarantor status comparable to traditional states”—for example, when DPFs take it upon themselves to set the framework for public communication, thus stepping into functions that were previously de facto allocated to states—direct constitutional restraints must be considered.**
- (2) The state should regulate the activities and size of DPFs through constitutional and competition law to create a constitutional digital society, a prerequisite for exercising constitutional rights.**
- (3) If we cannot rely on states to regulate DPFs, we should consider directly incorporating DPFs into constitutions.**

(See Chapter 1, Section II for details.)

Proposal 3: We should conceptualize a separation of powers that includes DPFs as actors.

- (1) Considering a separation of powers theory in a world of system differentiation is necessary.**

If DPFs are acquiring, or have already acquired, power equivalent to that of states, then it appears natural

that the separation of powers should also be applied to DPFs. However, can the usual separation of powers theories, which have been optimized to control state power, be applied to DPFs, and is it appropriate to do so?

The world is structured under functionally differentiated systems, such as politics, economics, and health-care, which form their own “constitutions” based on different logic, and DPFs amplify political and economic systems. From the perspective of social constitutionalism, which is based on this premise, traditional separation of powers theories are incomplete, and we should seek ones that consider the interconnections and influence between different systems.

- (2) Focus should be placed upon forming “balance” through an internet bill of rights. Internet bills of rights, such as the Santa Clara Principles, are seen as lacking legal binding power and having been created haphazardly by various organizations and individuals. Although because of this characteristic, they are desirable as a way to stimulate discussion on restoring the right balance between systems and gradually shape that balance.**

(See Chapter 1, Section III for details.)

Proposal 4: States should consider and implement governance for DPF providers, considering constitutional values, such as the maintenance and development of democratic systems.

- (1) The realization of objective constitutional values should be considered in addition to the guarantee of individual subjective rights.**

When considering platform governance from a constitutional law perspective, focus should be placed not only on approaches that focus on protecting individual subjective rights, but also on approaches that examine the structure of systems designed to realize the maintenance and development of democratic systems and other constitutional values.

- (2) Focus should be placed on the ongoing governance practices regarding DPFs operating in various places.**

Examples include the Santa Clara Principles 2.0, which provides principles and mechanisms for transparency in content moderation processes by DPF providers; Meta’s Oversight Board, which acts as an independent external body to review moderation processes; and collaborative governance, which involves audits, impact assessments, and monitoring by both public and private sectors.

(See Chapter 2, Section I for details.)

Proposal 5: The constitutional basis for DPF news feeds should be held not to be freedom of expression but freedom of broadcasting.

- (1) The threat that opaque-algorithm-based opinion filters pose to democracy must be considered seriously.
- (2) News feeds on social media should be understood within the framework of broadcasting freedom, which entails various regulations.
- (3) Not only order in broadcasting but also legal regulations in various fields should be implemented.
- (4) State regulation should not be oversold.

Proposal 6: In examining the competitive impact of business combinations by DPF operators, it is desirable to actively consider the concept of “comprehensive business capabilities.”

- (1) In merger reviews, evaluations should be conducted in a manner that appropriately reflects the actual characteristics of platform businesses, and the concept of comprehensive business capabilities provides a powerful framework for such assessments.

In the context of merger reviews, although the need for regulations and assessments that reflect the distinctive characteristics of the digital domain is recognized, and revisions have been made to the Merger Guidelines and related policies, these efforts remain insufficient. The greatest problem lies in the absence of an established method to determine whether the integration of companies would substantially strengthen the entire platform service—particularly those with indirect network effects—to a degree that would significantly restrict competition.

Utilizing the uniquely Japanese concept of “comprehensive business capabilities”—which evaluates the post-merger capabilities of the combined entities in areas such as procurement power, technological capacity, sales force, creditworthiness, brand strength, and advertising ability—would enable a more accurate assessment of business combinations involving digital platforms (DPFs).

- (2) Academic scholarship should clarify the concrete methodology for conducting reviews based on the evaluation of comprehensive business capabilities.

To ensure the transparency and predictability of merger regulation, it is necessary to present specific factors to be considered, as well as methods of consideration, when reviewing the content of comprehensive business capabilities—given that such content may vary depending on the individual circumstances of each case.

(See Chapter 3, Section I for details.)

Proposal 7: States should also use ex-ante regulation as part of DPF competition policies, carefully examine its role in relation to traditional ex-post regulation, and ensure that proper procedures are not overlooked.

- (1) **The state should broadly employ ex-ante regulations for gatekeeper-like DPF providers (such as preemptively prohibiting or mandating actions that pose a high risk of negatively affecting competition).**

Ex-ante regulation is important because, once an ecosystem is formed in the digital market and a “winner-takes-all” situation is reached by capturing users, it becomes difficult for market mechanisms to bring about improvements. Therefore, time is crucial for effectively recovering from an anti-competitive situation.

- (2) **When introducing and conducting ex-ante regulations, the state should ensure that it does not point to the influence of DPF actions on competition in Japan and hastily adopt shortened procedures that omit due process, such as argumentation and proof.**

When imposing competition policy regulations without concrete proof of anti-competitive effects or specific findings of violations of antitrust laws, the potential impact on not only the state and DPFs but also related third parties should be fully considered.

(See Chapter 3, Section II for details.)

Proposal 8: DPF providers should be subject to public law regulations as public entities and should cooperate in ensuring the proper formation of DPFs.

- (1) **DPFs should be considered as entities that blur the boundaries between private and public law because, in addition to being private entities, they also have aspects as a network industry and state-like entities, making them subject to regulation by both legal fields.**

As DPFs are private entities, under private law, there is scope for requiring them to provide information to ensure a foundation for user decision-making. However, this alone does not justify the obligation to provide information. Thus, a basic theory on information provision duties should be built, considering the following: ① as DPFs also regulate the network industry, they are not allowed full free competition and should bear an obligation to maintain and build a healthy DPF market, which includes information provision duties from a government administration regulation perspective as well; and ② that DPFs possess a state-like character and states must provide a certain degree of transparency to their citizens.

- (2) **DPFs should contribute to the proper functioning of the platform market by improving transparency.**

From the perspective of reducing the risk of users being involved in fraudulent transactions or making mistakes, and by extension contributing to the formation of a proper market, DPFs should display necessary information for users on their platforms. This information should be easy to understand for users with

average comprehension.

(3) DPFs exceeding a certain size should cooperate with the state to improve overall transparency of DPFs.

To contribute to forming a fair platform market overall, DPFs exceeding a certain size should create and publicly release documents summarizing how they implement information disclosure so that other DPFs can reference them. As few precedents are found for fulfilling the duty of information disclosure in the digital market, certain large DPFs should assume a leading role. This idea should be considered as a model for collaboration between the state and large DPFs.

(See Chapter 4, Section I for details.)

Proposal 9: The procedural control direction adopted by the DSA should be evaluated positively for now.

- (1) At present, knowledge regarding the risks and side effects of DPFs remains shallow, therefore, a procedural approach based on transparency and the possibility of critique is desirable. However, the possibility of substantive regulation should also be reserved, and transparency and reporting are necessary to provide the knowledge and experience for this.
- (2) States should include all stakeholders, including content creators whose posts have been removed by DPFs, in content moderation procedures.
- (3) Care should be taken when setting subjective rights corresponding to regulation and supervision.
- (4) The content moderation procedures that DPFs should provide must not vary between states but should be harmonized as much as possible.

Proposal 10: States must continue exploring ways to enhance communication platform transparency.

- (1) Transparency from communication platforms aims to ① protect personal interests (freedom of expression, consumers' economic interests, personal data); ② ensure the diversity of opinions; and ③ achieve effective control and evaluation. Appropriate measures should be taken for each of these.
- (2) To protect freedom of expression, states should impose a duty on DPFs to provide substantial reasons when they take measures, such as removing posts.

- (3) States should impose a duty on DPFs to increase transparency regarding not only the use of recommendation systems but also the algorithms used therein—for example, explaining why a particular post was shown to a user—if they use such systems.
- (4) States should impose a duty on communication platforms to indicate when automatic content delivery by computer programs, such as social bots, is being used to ensure opinion diversity. However, the legal framework for ensuring opinion diversity remains insufficient.
- (5) To enhance the transparency of communication platform control and evaluation, states should impose on communication platforms the following: ① a duty to record and make accessible information related to advertising; ② a duty to cooperate with monitoring by supervisory bodies; and ③ a duty to report on how they handle reports of illegal content and to make these reports accessible.