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DIGITAL CONSTITUTIONALISM

: Taming the Monsters

Kento Yamamoto^{*}

1 Rise of the Behemoth: Power of the DPFs

One might say that enormous digital platforms (hereinafter referred to as “DPFs”) have become a private dominant actor comparable to a state. This perception is gradually being shared in Japan as well. The following are some symbolic examples that have already been introduced in various places.

During the recent COVID-19 pandemic, the Japanese government was compelled to accept the conditions imposed by DPFs. The government requested platform operators and mobile network providers to supply “statistical data and other information that would contribute to preventing the spread of COVID-19.” Yahoo Japan responded to this request by attaching certain conditions and signing an “agreement” with the Ministry of Health, Labour and Welfare (MHLW). The conditions included limiting the purposes for which the data could be used, requiring the timely public release of outcomes based on the data, and allowing Yahoo Japan to cease data provision at its own discretion. Although this was an “unusual case of an administrative contract” in which a private company supplemented the government’s governance functions,¹ the government, being dependent on the data held by DPFs, had to accept these conditions². Another symbolic example is the Contact-Confirming Application (COCOA). This app necessarily relied on APIs (Application Programming Interfaces) provided by Apple and Google, which resulted in the Japanese government being strongly bound by the usage conditions set by the two companies. Although those conditions reflected strong concern for user privacy, it may be said that “a major sovereignty-level decision on balancing effective infection control and privacy protection was preemptively made by foreign DPFs.”³

There is no shortage of similar cases overseas, but the controversy surrounding the News Media Bargaining Code proposed by the Australian Federal Parliament in 2020 is particularly noteworthy. The bill aimed

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¹ George Shishido, “Legal Discipline of Information Flow under a Pandemic” (2020) 35 Quarterly Jurist 63 at 67. Note that, as Shishido points out, it should not be overlooked that Yahoo’s conditions were a response to the government that had made simplistic assumptions.

² Tatsuhiko Yamamoto, “Modern Sovereign States and Digital Platforms” in Hajime Yamamoto ed., *Lectures on Constitutionalism and Constitutional Law, Volume 1: Basic Theories of Constitutional Law* (Shinzansha Publisher, 2022) 147 at 148.

³ Tatsuhiko Yamamoto, “COVID-19 Infection Countermeasures and Privacy” in *Paradoxes of ‘Hyper individualism’* (Koubundou, 2023) at 206.

to correct the imbalance in bargaining power between traditional news media and DPFs by obligating DPFs to engage in special negotiations and, if negotiations failed, by subjecting them to mandatory mediation and arbitration procedures⁴. Facebook (now Meta) and Google strongly opposed the bill. Facebook even suspended its news viewing and sharing services on its platform in Australia. In response to these counter-measures and through negotiations with the two companies, the Australian Federal Parliament passed a significantly amended version of the bill in February 2021⁵. Similarly, the Canadian Federal Parliament passed an online news law with similar content⁶. However, there was also resistance and negotiation from Meta and Google, which led to various adjustments⁷. Tatsuhiko Yamamoto likens this situation to the “Humiliation of Canossa,” in which the Emperor (secular power) knelt before the Pope (religious power) to seek forgiveness, and calls it the “humiliation of Leviathan.” This illustrates how the legislative authority of the state can be subordinated to that of DPFs — that is, a situation where state power must kneel before private (DPF) power⁸. There are many other symbolic examples as well, such as the Cambridge Analytica case⁹, which revealed the potential of DPFs to influence voting behavior — the foundation of democracy—and the security implications of DPFs in modern warfare¹⁰.

DPFs are private dominant actors backed by the technological capability to create and control the use of digital technologies that have become essential to our daily lives¹¹. It can now be observed that, supported by their enormous economic interests and financial power, they have become actors capable of exerting political pressure on nation-states. To illustrate the scale of DPFs with figures: as of October 2023, the monthly active users of platforms operated by Meta reached 3.96 billion, exceeding the population of any country in the world. In addition, Apple’s total revenue in 2022 was \$394.3 billion, which is comparable to the nominal GDP of countries such as the United Arab Emirates or Denmark. In fact, only about 30 countries in the world have a nominal GDP greater than Apple’s total revenue¹².

Tatsuhiko Yamamoto compares DPFs, which have grown into private dominant actors comparable to nation-states, to Behemoth, the monster that appears in the Old Testament¹³. Behemoth is a land-based

4 For details of the bill, see Masahiko Kinoshita, “Constitutional Theory of Digital Media Platforms” (2021) 9 Journal of law and information system 16 at 30-33.

5 Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021. This law is an amendment to the Competition and Consumer Law 2010.

6 Online News Act (S.C. 2023, c. 23).

7 Nadine Yousif, “Meta’s news ban in Canada remains as Online News Act goes into effect” BBC News (19 December 2023), <https://www.bbc.com/news/world-us-canada-67755133>. The disparity in negotiating power between news media and DPFs (news portal sites and search engines such as Yahoo! News) and the issue of compensation are attracting attention as serious issues in Japan as well. See Japan Fair Trade Commission, “Report on the Actual Situation Concerning the News Content Distribution Sector” (September 2023). Note that all websites mentioned in this chapter were last accessed on December 31, 2023.

8 Tatsuhiko Yamamoto, “Digitization and Constitution (Studies)” (2023) 99:4 Journal of Autonomy Research 3 at 22-23.

9 See, e.g., Christopher Wylie, *Mind*ck: Cambridge Analytica and the Plot to Break America* (Random House, 2019).

10 See, e.g., Tatsuhiko Yamamoto, “Disobedient Infrastructure” *supra* note 3, at 327. For example, in the Russian invasion of Ukraine, information warfare that attacks people’s cognitive domains, the term “cognitive warfare” has become a household word as well as a crucial battlefield, and DPF cooperation in this battlefield is said to be inevitable.

11 In the digital space, the designer of the code can control the use (behavior) of the product using digital technology; for DPF’s sources of power and authority; see also Tatsuhiko Yamamoto, *supra* note 2 at 154-159.

12 Global Note, “World Nominal GDP Country Rankings and Trends (United Nations)” (January 2023) <https://www.globalnote.jp/post-12794.html>

13 Tatsuhiko Yamamoto, *supra* note 2 at 150.

monster, the counterpart to Leviathan—the sea monster often used as a metaphor for the state. This book examines how legal (constitutional) theory should respond to the digital space dominated by both Leviathan and Behemoth—by exploring the applicability and limitations of conventional arguments, as well as the prospects for new (constitutional) theories. The role of this introductory chapter is to clarify the concept of digital constitutionalism, which is attracting attention as one possible direction¹⁴, and to present an overview of the entire book.

2 Taming the Monsters: The Concept of Digital Constitutionalism

What is digital constitutionalism? Digital constitutionalism is a new research trend that regards the transformation of power structures in the digital space as a serious issue and seeks to examine the fundamental principles of that space by referring to the “constitutional values.” This discussion is still in a developing stage, and by employing the thought-provoking keyword “constitutionalism,” it incorporates a wide range of approaches, making it difficult to grasp the overall picture. I have previously organized the overall structure and conceptual dimensions—including the position of constitutionalism, constitutions, laws, and so forth—by relying on the arguments of Edoardo Celeste, a leading constitutional law scholar at Dublin City University. It would be beneficial to revisit that organization here as well¹⁵.

First, it is necessary to explain the reliance on the concept of “constitutionalism.” Although it is difficult to provide a widely agreed-upon definition of “constitutionalism,” in Japanese constitutional scholarship, the concept has traditionally been understood as the principle of restraining state power through a constitution. It has also been widely recognized that the “constitution” referred to in this context is based on certain modern values—namely, the rule of law, separation of powers, respect for fundamental human rights, and democracy. A possible misunderstanding of digital constitutionalism, therefore, is to regard it as a theory that advocates the limitation of private power through the constitution. However, as will be discussed later, digital constitutionalism does not necessarily assert that private power should be constrained by the constitution itself.

Digital constitutionalism understands “constitutionalism” as the idea of limiting power in order to prevent the emergence of unchecked authority. It seeks to apply constitutional values—typically understood as the rule of law, separation of powers, respect for fundamental human rights, and democracy—which have histor-

14 Japanese constitutional scholars who focus on digital constitutionalism include Tatsuhiko Yamamoto, Masahiro Sogabe, and George Shishido. Tatsuhiko Yamamoto, *supra* note 2, 8; Masahiro Sogabe, “The Digitalization of Society and Constitutional Law” in Constitutional Theory Study Group ed., *Next Generation Issues and Constitutional Law* (Keibundo, 2022) 33; George Shishido, “A Note on Digitalization of Constitution and Society,” (2023) 2023.11 Sekai 156. In addition, as my article introducing and examining the trend of this discussion, see Kento Yamamoto, “EU AI Regulation Proposal and Digital Constitutionalism” IFI Working Paper no. 13 (2023) <https://ifi.u-tokyo.ac.jp/wp/wp-content/uploads/2023/02/WP013.pdf>, and “Digital Constitutionalism and Constitutional Law” (2023) 13 Journal of law and information system 56.

15 This description overlaps in content with Kento Yamamoto, “Digital Constitutionalism and Constitutional Law” *supra* note 14 at 61-64. However, the order and wording in the description has been changed.

ically contributed to limiting the power of the state, to the limitation of power held by private actors as well. Brian Fitzgerald, an Australian scholar of information law and one of the pioneers of digital constitutionalism, stated as early as 1999:

Once upon a time it was thought (and taught) that constitutionalism was a legal and political concept that defined the exercise of power by national public institutions. So much has changed. Nowadays constitutionalism must be defined more broadly to encompass the exercise of power in the private sphere by, amongst others, corporations, groups and individuals and the growing significance of international institutions (including multinational corporations (MNCs)) to our daily lives.¹⁶

Celeste similarly argues that “overlooking the capability of non-state actors to affect individual rights would be anachronistic, and would ultimately fail to safeguard human dignity, which can be equally violated by public and private hands”¹⁷. Accordingly, digital constitutionalism can be understood as a claim that constitutional values, which have served as the foundational principles in the analog space traditionally governed by the state, should also serve as the foundational principles of the digital space, which is now dominated by both states and dominant technology corporations.

Next, I would like to explain the basic argumentative structure of digital constitutionalism. In understanding the structure of arguments in digital constitutionalism, it is useful to distinguish between: (1) the dimension that considers the values serving as the foundational principles of the digital space; and (2) the dimension that examines the methods and processes for realizing those values in the actual digital space (this dimension is also referred to as the “constitutionalization of digital space”). The number of scholars committed to digital constitutionalism and the amount of research on the topic have increased rapidly in recent years. However, with regard to specific issues—such as the appropriate form of legal regulation over private power actors like DPFs—there is a mixture of differing arguments and approaches. This is because, while (1) there is agreement that constitutional values should serve as the foundational principles of the digital space, (2) there is divergence in views concerning how those values should be realized. Examples of approaches at stage (2) include: (a) those that examine the possibility of the direct application of the constitution; (b) those that emphasize realization through laws that embody constitutional values; (c) those that promote the constitutionalization of private actors’ initiatives by using constitutional values as a standard for evaluating self-regulation; and (d) those that seek ideas for constitutional control of the digital space from bottom-up initiatives in civil society, such as Internet Bills of Rights. A wide variety of such approaches are currently being explored.

“Digital constitutionalism” can be understood both as a normative stance that constitutional values should serve as the foundational principles of the digital space, and as an umbrella term encompassing a series of studies that analyze various methods for realizing those values in the digital context.

¹⁶ Brian Fitzgerald, “Software as Discourse? A Constitutionalism for Information Society” (1999) 24 *Altern. Law J.* 144 at 144.

¹⁷ Edoardo Celeste, *Digital Constitutionalism* (Routledge, 2022) at 85.

3 Fighting Leviathans: Digital Constitutionalism and the EU

Alongside the rapid development of theoretical studies on digital constitutionalism in academic discourse, it has also been pointed out that the EU's digital policy is shifting toward an approach aligned with digital constitutionalism. A representative example is the work of Giovanni De Gregorio, an information law scholar at the Catholic University of Portugal, who has closely followed the EU's digital strategy¹⁸. I have previously summarized his research, but given the nature of this article, I will restate that summary here as well¹⁹.

According to Gregorio, since European integration originally aimed at economic integration within the region—such as the establishment of a common market—the EU also adopted a digital liberalism approach focused on promoting economic growth until the mid-2000s. This approach emphasized the protection of economic freedom and freedom of expression for private actors, minimized regulation by public authorities, and left responses largely to self-regulation by private actors. One advantage of this approach was that states themselves could benefit from innovation in digital technologies. For example, the Electronic Commerce Directive 2000, which was also influenced by Section 230 of the U.S. Communications Decency Act of 1996, is considered a typical example of the liberal approach that prioritized the smooth development of the internal market. The Directive recognized the passive role of internet service providers who were not involved in content creation and granted them immunity from liability for transmitting or hosting illegal third-party content. This framework was also based in part on the aim of protecting freedom of expression under Article 10(1) of the European Convention on Human Rights, as well as ensuring the free flow of information services.

However, by placing priority on the economic and expressive freedoms of private actors and failing to take legislative action for an extended period, private actors in the digital environment—such as DPFs—began to emerge as dominant actors, raising growing concerns about the serious restriction of individuals' fundamental rights. In the EU, the first to respond to this situation was the Court of Justice of the European Union (CJEU). With the adoption of the Charter of Fundamental Rights of the European Union and its incorporation into EU primary law in 2009, the Court began to take a more active stance—entering a phase of judicial activism. Examples include the *Scarlet Extended SA v. SABAM* case on copyright²⁰, and the *Google Spain SL v. AEPD* case concerning the “right to be forgotten.”²¹

Since the introduction of the General Data Protection Regulation (GDPR) in the field of data protection, the EU's digital policy is said to have shifted to a digital constitutionalism approach. Luciano Floridi, an information philosopher and a member of the AI High-Level Expert Group (AI-HLEG), identifies the

18 Giovanni De Gregorio, *Digital Constitutionalism in Europe* (Cambridge University Press, 2022).

19 This description duplicates Kento Yamamoto, “The EU's Proposed AI Regulation and Digital Constitutionalism” *supra* note 14 at 12-14. However, some of the contents and expressions have been changed.

20 Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, ECLI:EU:C:2011:771 (Nov. 24, 2011).

21 Case C-131/12, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, ECLI:EU:C:2014:317 (May 13, 2014). As an introduction and examination of the same case, *see, e.g.*, Kaori Ishii, “The meanings of the “right to be forgotten” and surrounding discussions” (2015) 58:4 *Journal of information processing and management* 271.

following as the core normative instruments that give concrete form to digital constitutionalism in the EU: (1) the GDPR, (2) the AI Act (AIA), (3) the Digital Services Act (DSA), (4) the Digital Markets Act (DMA), (5) the Data Governance Act (DGA), and (6) the proposed European Health Data Space (EHDS) Regulation.²² In light of the theoretical examination of digital constitutionalism in Section 2, the EU's approach to digital constitutionalism can be understood as an attempt to govern the digital space through legislation guided by constitutional values.

The Treaty on European Union (TEU) states in Article 2 that human dignity, freedom, democracy, equality, the rule of law, and respect for human rights are the values of the EU, and Article 3 sets forth the promotion of these values as one of the EU's objectives. As noted earlier, Article 6 of the TEU also affirms that the Charter of Fundamental Rights of the European Union has the same legal status as the TEU and the Treaty on the Functioning of the European Union. Given that such primary law takes precedence over secondary legislation such as the GDPR and AIA, one could argue that it is not necessary to introduce the concept of digital constitutionalism to explain EU digital policy; rather, secondary legislation has simply been enacted in a way that fully reflects the values emphasized by primary law.

That said, secondary legislation in the digital field—such as the GDPR, AIA, and DSA—strongly reflects EU values that substantially overlap with constitutional values emphasized by digital constitutionalism. If we consider the governance of the digital space through laws reflecting constitutional values as one way to realize digital constitutionalism, then it is fair to say that characterizing the current EU digital policy as a “digital constitutionalism” approach aptly captures its key features. When proposals such as the AIA and DSA were introduced, there was strong resistance from DPFs and other tech companies through lobbying and other means. For example, the AIA was passed only after substantial revisions.²³ However, despite these substantial revisions, the core risk-based approach of the AIA—identifying risks in light of constitutional values—has remained unchanged. In this sense, the EU today can be described as a “fighting Leviathans,” implementing an approach of digital constitutionalism in practice.

4 Floundering Leviathan: Digital Constitutionalism and Japan

Next, I will examine the direction of Japan's digital policy from the perspective of digital constitutionalism. This analysis is important for understanding where Japan currently stands.

What are the basic principles of Japan's digital policy? In Japan today, the Basic Act on the Formation of a Digital Society serves as the guiding framework for overall digital policy. This Act incorporates the elements of the “Ten Basic Principles for Forming a Digital Society,” as outlined in the “Basic Policies for Reform toward the Realization of a Digital Society,” which was approved by the Cabinet in 2020, and presents a

²² Luciano Floridi, “The European Legislation on AI: a Brief Analysis of its Philosophical Approach” (2021) 34 *Philos. Technol.* 215.

²³ One of the factors behind these substantial revisions was the impact of generative AI during the period between the proposal and the passage of the AIA, which led to the addition of provisions specifically addressing generative AI.

basic structure for the formation of a digital society. These 10 principles are: (1) openness and transparency, (2) fairness and ethics, (3) safety and security, (4) continuity, stability, and resilience, (5) solving social issues, (6) speed and flexibility, (7) inclusion and diversity, (8) immersion, (9) creating new value, and (10) breakthroughs and international contribution. Regarding these ten principles, George Shishido, one of the leading constitutional scholars in this field, praises them as “fully expressing the goals of the digital policy currently underway.” At the same time, however, he points out that values such as “democracy, the protection of human rights, and the rule of law” are “buried among the various other motivations for promoting digitalization,” and that their presence has become “diluted.”²⁴ The basic principles set forth in Articles 3 through 12 of the Basic Act on the Formation of a Digital Society also incorporate considerations such as the protection of individual rights, equality, transparency, and fairness. However, Shishido’s critique applies here as well. While it should be noted that Shishido also points out the possibility that constitutional values are implicitly presupposed in these principles and that such values can be interpreted as embedded within them, it is difficult to say that clear traces of constitutional values are explicitly articulated in the ten principles or the basic principles.

Turning to the basic policy on specific digital technologies, the “Principles for a Human-Centered AI Society,” published in 2019 by the Cabinet Office’s Council for Strategic Promotion of Comprehensive Innovation Strategy, is particularly noteworthy. In these principles—which are intended to guide the legislative and administrative bodies of the state—the “AI Social Principles” stipulate that “the use of AI must not infringe upon fundamental human rights guaranteed by the Constitution and international norms.” However, the “Principles for a Human-Centered AI Society” are structured in such a way that they are divided into the “AI Social Principles” and the “AI Development and Use Principles,” which are non-binding and intended for AI developers and operators. Above both sets of principles are the “Fundamental Principles.” These Fundamental Principles consist of the following three: (1) a society where human dignity is respected, (2) a society where people of diverse backgrounds can pursue diverse forms of happiness, and (3) a sustainable society. While these principles can be evaluated as indicating a desirable direction in many respects, constitutional values are not positioned as fundamental principles, but rather as one among various values to be considered or taken into account, making it difficult to grasp the overall picture.²⁵ Despite references to human-centeredness and human dignity, some scholars have described these efforts as “superficial.”²⁶ A similar situation can be observed in other areas such as personal data protection²⁷ and the development

²⁴ Shishido, *supra* note 14 at 160.

²⁵ In the field of AI technology, various ministries have established their own review bodies, such as the MIC’s “AI Network Society Promotion Council,” the Ministry of Economy, Trade and Industry (METI)’s “Study Group on Guidelines for AI Operators” (formerly the Study Group on How to Implement AI Principles, formerly the Study Group on AI Social Implementation Architecture), and the Cabinet Office’s “AI Strategy Council.” These bodies have published guidelines and principles; however, the principles and guidelines are dispersed and overlapping, making it difficult to understand their interrelationships. While it may not be the case that these review bodies have been established in a disorderly manner or that the principles and guidelines have been issued haphazardly, it is undeniable that the overall picture has become difficult to grasp.

²⁶ Tatsuhiko Yamamoto, “Foreword” *supra* note 3 at iv.

²⁷ For example, Tatsuhiko Yamamoto has pointed out that Japan’s Personal Information Protection Law “does not even provide a basic navigation,” and has argued that the law should be positioned as a constitutional embodiment law. Although this critique was made prior to the 2020 amendment of the Personal Information Protection Law, Yamamoto’s position has remained unchanged even after

of rules concerning DPF businesses.²⁸ Japan has yet to establish clear foundational principles for its digital policy and continues to take ad hoc measures—making it, so to speak, a floundering Leviathan.

At the same time, it is interesting to note that the Japanese government has expressed support for promoting digital policy based on constitutional values in its external engagements. For example, the G7 Hiroshima Leaders' Communiqué issued in May 2023, under Japan's presidency, included the following declaration:

Governance of the digital economy should continue to be updated in line with our shared democratic values. These include fairness, accountability, transparency, security, protection against online harassment, hate and abuse, respect for privacy and human rights, fundamental freedoms, and protection of personal data.

Prior to that, in the Ministerial Declaration of the G7 Digital and Technology Ministers' Meeting held in Gunma-Takasaki in April 2023, references were made to frameworks for considering the “governance of digital technologies,” accompanied by declarations that such frameworks should be based on the principles of “the rule of law, due process, democracy, and respect for human rights.” In addition, Japan is a participant in the “Declaration for the Future of the Internet,”²⁹ which begins with the statement: “We are united by a belief in the potential of digital technologies to promote connectivity, democracy, peace, the rule of law, sustainable development, and the enjoyment of human rights and fundamental freedoms.”

It could be said that Japan's current digital strategy is characterized by a disconnect: while it declares constitutional values as fundamental principles in its external commitments, the consideration of such values remains vague in its domestic policies.³⁰ As Shishido argues, commitment to constitutional values “should not end with an outward statement, but should be *explicitly articulated as a fundamental goal or task to be constantly taken into account as a higher-level demand*” (emphasis added).³¹ Following such outward declarations, there have been signs within some domestic discussions of a more explicit reference to constitutional values. For example, in the “Draft Skeleton of Guidelines for New AI Operators” presented at the Cabinet Office's AI Strategy Meeting on September 8, 2023, the objective is described as “building trustworthy AI

the revision. See Tatsuhiko Yamamoto, “Whereabouts of the Personal Information Protection Law System” *supra* note 3 at 115, 139-140.

28 For example, Act on Improving Transparency and Fairness of Digital Platforms (hereinafter, the “Transparency Act”) has been enacted, but neither the basic principles set forth in Article 3 of the Act nor the “Basic Principles for Rulemaking in Response to the Rise of Platform-Type Businesses” (2018), jointly formulated by the METI, the Japan Fair Trade Commission (JFTC), and the MIC—on which the Act is reportedly based—explicitly indicate that constitutionalist values have been taken into consideration.

29 Declaration for the Future of the Internet. U.S. Department of State, 28 Apr. 2022, <https://www.state.gov/declaration-for-the-future-of-the-internet/>

30 In this context, an observation by Masatomo Suzuki in his discussion with Tatsuhiko Yamamoto is also noteworthy. He recalled: “When Professor Masao Horibe, then Chair of the Personal Information Protection Commission, gave a presentation to the EU explaining Japan's Personal Information Protection Law, the top of his presentation slides featured ‘The Constitution of Japan.’ However, in the version of the diagram prepared by the secretariat for domestic use in Japan, the reference to the Constitution was omitted.” Tatsuhiko Yamamoto, “Whereabouts of the Personal Information Protection Legislation” *supra* note 3 at 125 (statement by Masatomo Suzuki).

31 Shishido, *supra* note 14 at 160. It should be noted that while Shishido uses the term “democratic values,” it can be regarded as conceptually compatible with what this paper refers to as “constitutional values.”

in line with our shared democratic values,” and there is mention of the use of constitutional values as agreed upon at the G7 Digital and Technology Ministers’ Meeting.³² It is to be hoped that Japan will move further in the direction of positioning constitutional values as higher-level foundational principles.

It should be added, for the sake of clarity, that even if constitutional values are positioned as foundational principles, how these values should be interpreted or embodied remains an open question. Depending on future technological developments and other factors, it is possible that, in some cases, values other than those grounded in constitutionalism may be more appropriate as foundational principles. However, such a conclusion can only be justified after constitutional values have been explicitly and seriously considered as foundational principles, and the limitations of relying on them have been persuasively demonstrated. Japan’s current digital policy is at a stage where it should seriously consider making constitutional values its foundational principles.

5 Developing a Strategy: Overview of This Book

The constitutional values that digital constitutionalism claims should serve as foundational principles are themselves open to interpretation. Even if such values are adopted as foundational principles, there is no single correct method or approach for constitutionalizing digital space. Nevertheless, the significance of digital constitutionalism lies in its clarification of two essential frameworks: first, a normative framework that calls for examining how constitutional interpretation, specific legal regulations, and governance structures should be designed in order to constitutionalize the digital space; and second, an evaluative framework for assessing existing regulations and governance of various digital spaces from the perspective of their compatibility with constitutional values.³³

What specific methods and approaches should be discussed? This question will be examined in detail in the chapters that follow. In this introductory chapter, I will provide a brief overview of the areas addressed in this volume from the perspective of digital constitutionalism.

(1) Reconstruction of the General Theory of the Constitution

Chapter 1, following this introductory chapter, addresses issues related to general constitutional theory. One of the key issues concerns how to treat the Constitution as a legal norm (Chapter 1, II). Even when considering constitutional control in the digital space, a variety of approaches are possible. For example: (1) including private DPFs among the constitutional addressees (which would likely require constitutional amendment)³⁴, (2) adding constitutional provisions to address issues specific to the digital space; (3) pre-

³² Furthermore, in the “AI Guidelines for Business (Version 1.0),” published in April 2024, references to the Constitution and constitutional values have become somewhat more substantial, at least at the level of the “Common Guiding Principles.”

³³ Kento Yamamoto, “Digital Constitutionalism and Constitutional Law” *supra* note 14 at 69.

³⁴ The Constitutional Research Committee of the Democratic Party For the People, in its document titled “Discussion Points for Constitutional Reform” (December 2020), proposed adding a provision to Article 21, Paragraph 3 of the Constitution that would

senting a new theory of constitutional interpretation to respond to problems arising in the digital space; (4) adjudicating disputes between DPFs and the public (users) through the private effect of constitutional rights; (5) encouraging the state to enact laws that embody constitutional values; and (6) interpreting existing laws in a consistent manner with the Constitution. Given that the Constitution is the legal norm that most strongly reflects constitutional values, how it is utilized is an important issue from the perspective of digital constitutionalism. It is also beneficial to examine this issue in light of the fact that state power is strengthened in the digital space, and to consider the traditional role that the Constitution has played as a legal norm constraining the state.

Another key issue concerns the division of power between the state and DPFs (→ Chapter 1, III). While the specifics of what form this division of power should take are left to the contribution by Misaki, I would like to emphasize here that this issue has the potential to shake the very foundations of constitutional theory.

Although it is often pointed out that the recent digital technological revolution is comparable to the Industrial Revolution, Tatsuhiko Yamamoto characterizes it not as an industrial revolution, but as a “revolution of the human spirit” on the scale of the Protestant Reformation—the first such transformation in 500 years.³⁵ Tatsuhiko Yamamoto argues that, because AI and algorithms have made our inner selves visible and demonstrated the possibility of manipulating them, “platforms whose source of power lies in the controllability of the inner self possess aspects that differ significantly from conventional forms of ‘social power.’”³⁶ If we organize his argument schematically, it suggests that we may be entering (or returning to) an era in which constitutional theory must assume the need to restrain and balance two forms of power—just as in the medieval period, where secular and religious powers required mutual checks and balances, and now, where both state power and the power of DPFs must be restrained and balanced. This stands in contrast to an earlier era in which constitutional scholarship could focus primarily on the control of a single form of power—namely, state power.³⁷ There may be room for disagreement with Tatsuhiko Yamamoto’s view that the power of DPFs is rooted in their potential to control the inner self. However, his claim that actors wielding digital technologies have become a distinct type of dominant actor in the digital space—one fundamentally different from the state—³⁸ and that this shift may alter the premises of constitutional theory, presents a serious and important challenge that deserves careful examination. It may also be possible to further develop digital constitutionalism as a theoretical framework that affirms the existence of two powers in the digital space—Leviathan and Behemoth—and seeks to place both under constitutional constraint.

(2) The Shifting Focus of Constitutional Rights Theory

Social media operated by DPFs is dramatically transforming the nature of freedom of expression. While

designate dominant DPFs as constitutional addressees.

35 Tatsuhiko Yamamoto, “Foreword” *supra* note 3 at iii-v.

36 Tatsuhiko Yamamoto, *supra* note 8 at 4-7.

37 Tatsuhiko Yamamoto, *supra* note 8 at 30.

38 See also Masaaki Takahashi, “Private Human Rights Guarantees,” in Tatsuhiko Yamamoto and Satoshi Yokodaido eds., *Constitutional Law Today* (Nippon Hyoronsha, 2020) 126 at 135-138.

digital methods are, in principle, merely a means of exercising rights, they have become a fundamental tool that significantly enhances the exercise of a wide range of fundamental rights related to the exchange of information, especially freedom of expression. In some situations, it is increasingly suggested that the mere availability of analog methods for exercising such rights may no longer serve as an effective alternative.³⁹

On the other hand, there are serious concerns regarding the proliferation of false or misleading information and defamatory expressions on social media. This has given rise to active debate over the appropriateness of DPFs responses—such as content moderation and account suspension—and the necessity and design of legal frameworks that would impose obligations on DPFs to take such actions. The details of these issues are addressed in the individual contributions in Chapter 2, but from the perspective of digital constitutionalism, it is worth noting that these developments support a shift in the emphasis of constitutional rights.

The nature of freedom of expression is multifaceted, but traditionally, emphasis has been placed on its aspect as a negative right—that is, a defensive right to exclude intervention by the state. This understanding is widely shared. For example, the final report (February 2020) of the Ministry of Internal Affairs and Communications (MIC)’ Study Group on Platform Services stated, with regard to countermeasures against false and misleading information in Japan, that such measures should primarily rely on self-regulation by private operators. The report explained that, “when it comes to actions such as the deletion of information by platform operators and other responses involving judgments on individual content, government intervention should be extremely cautious from the standpoint of ensuring freedom of expression.” From the conventional perspective on freedom of expression, this view may appear reasonable at first glance. However, according to the framework of digital constitutionalism, DPFs are dominant actors in the digital space, comparable in power to the state. Just as state countermeasures against false and misleading information raise concerns from the standpoint of constitutional freedom of expression, similar concerns arise regarding measures taken by DPFs—private actors that design the architecture of social media environments—⁴⁰ with respect to freedom of expression as a fundamental human right, other rights of citizens (users), and the rule of law.⁴¹ Given that the state is directly obligated by the Constitution to protect freedom of expression and other rights, and that it has historically been viewed as the most likely violator of such freedoms, it would seem appropriate to consider a legal framework in which both the state and DPFs share responsibility and work together, rather than acting independently.⁴² Recently, expert panels of the MIC have also begun to indicate this direction.⁴³ Of course, once active intervention by the state is permitted, it becomes necessary to examine whether such

39 Celeste, *supra* note 17, at 15. Kento Yamamoto, “Digital Constitutionalism and Constitutional Law” *supra* note 14 at 59-60.

40 As a work that highlights the role of DPFs as “architectural designers” of digital space, see Satoshi Narihara, “Legal Issues Regarding Platforms from the Viewpoint of the Information Law,” in *Digital Platforms and Rulemaking*, Emiko Chiba ed. (Nihon Hyoronsha, 2023) 83, at 92-93.

41 See, Nicolas Suzor, “Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms” (2018) 4 *Social Media + Society* 1.

42 There are also other views that base state intervention as a theory of constitutional interpretation; see, Masahiro Sogabe, “The Role of the State in the Internet Information Sphere and Constitutional Issues” (2024) 36 *The Japanese journal of comparative constitutional law* 111.

43 Ministry of Internal Affairs and Communications, “Draft Summary of the Working Group on Countermeasures against Illegal and Harmful Information, including Slander and Defamation” (November 28, 2023).

intervention might become excessive. At the same time, there is also the risk that state intervention may be insufficient in light of the balance of power with DPFs. Exploring what kind of legal framework and forms of state intervention are appropriate and effective is a key challenge for legal scholarship.

(3) Toward the Realization of Constitutional Values through Law

As seen in the case of the EU's digital constitutionalism, the realization of constitutional values through legislation also plays an important role in the constitutionalization of the digital space. In practice, laws such as the Personal Data Protection Law, competition law, and intellectual property law have been utilized, and new legislation has also been enacted—including laws that directly target DPFs (such as the EU's DSA and Japan's the Transparency Act), as well as AI regulatory laws (the EU's AIA is regarded as the world's first comprehensive AI regulation law).

Digital constitutionalism advocates the realization of constitutional values through legislation. This demand also overlaps with the argument for realizing *constitutional values* through law, given that the Constitution holds the highest normative status in the legal order and is the legal norm that most strongly reflects constitutional values. At this stage, what must be considered is how constitutional and constitutional values should be concretized into law, taking into account the nature of the digital space, the business models of DPFs, and the characteristics of the services they provide. In other words, rather than transplanting the conventional methods used to realize constitutional values in the analog space directly into the digital space, it may be necessary to “translate” them in a way that optimizes their application to the digital context.⁴⁴

For example, with respect to due process, there are critical views against applying the standard model of the analog space—namely, the protection of individual procedural rights and judicial oversight through appeals—to content moderation by DPFs.⁴⁵ These critiques question the significance of individual procedural guarantees in light of the volume of content that may be subject to moderation.⁴⁶ Whether or not such individual procedural mechanisms are necessary, it seems persuasive to argue that, given the realities of today's social media environment, this perspective alone is insufficient as a countermeasure. A more macro-level approach that takes into account the comprehensive system design of content moderation is needed.⁴⁷

In this volume, Chapter 3 addresses the perspective of competition law, while Chapter 4 focuses on due process and transparency. Each chapter examines relevant legal instruments such as the Antimonopoly Act, the DSA, and the Transparency Act. To reiterate, digital constitutionalism provides an analytical framework for assessing: (1) what constitutional values are being realized, (2) how those values are translated into

⁴⁴ Celeste, *supra* note 17, at 78-79, 91.

⁴⁵ Evelyn Douek, “Content Moderation as Systems Thinking” (2022) 136 Harv. L. Rev. 526. As an introduction to this discussion and pointing to the possibility of diverse translations, *See*, Eijiro Mizutani, “Constitutionalization of the Digital Media Environment” (2023) 14 Journal of law and information system 119.

⁴⁶ In the second quarter of 2022, Facebook removed 914,500,000 pieces of content. During the same period, YouTube removed 3,987,509 channels and 4,496,933 videos. In the first quarter of 2022, TikTok removed 102,305,516 videos. *See*, Douek, *ibid.* at 537-538.

⁴⁷ *See also* Mizutani, *supra* note 45; Masahiro Sogabe, “Will the Defamation Measures Left to Businesses Change? Creating an Environment Where Posting Problematic Content Is Difficult,” *Asahi Shimbun* (March 2, 2023).

concrete legal norms, (3) what roles these laws play in the constitutionalization of the digital space, and (4) what improvements may be desirable for achieving a more robust constitutional framework in the digital domain.