# The Problems and Promises of a Legal Constitution

## The Constitutional State and History*

*Davit Zedelashvili***

**Abstract**

*Nowadays, in the West, especially on the European Continent, the legitimacy of the modern state is once again subject to multifarious challenges. Against this background, the article revives one of the most important, though often overlooked themes of the constitutional theory, the relevance of the concept of progressive history for the legitimacy of the constitutional state. It is suggested, that the reappearance of the progressive history brings the supposedly forgotten themes of the objectivist metaphysics, back into the constitutional theory. The conclusion points that, only the accounts of a legal constitution, which reject the connection with progressive history, have the potential to deal with the problematic consequences that the reemergence of the metaphysically charged concept of progressive history may entail, given the contemporary socio-political conditions, characterized by the value and ideological pluralism.*

**Keywords:** constitutional state, legitimacy, progressive history, legal constitution, political constitution.

### A. Twilight; or Observing through Dark Lenses?

Until recently, in academic articles which discuss the relation of the constitutional state to history, it has been common to refer to the last decade of the twentieth century. At that time, with the disappearance of the spectre of communism,

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** SJD Candidate in Comparative Constitutional Law, Central European University, Budapest.

one could observe the cunning opening of a window of confidence that the constitutional state with its liberal and democratic underpinnings has conclusively succeeded.[1]

However, communism was never alone among the spectral creatures of Enlightenment. The prefix 'post' penetrated not only the intellectual foundations of modernity, but entered the socio-political realm. The liberal constitutional state, the once powerful child of modernity, became captivated by omnipresent 'post' vocabulary. Today from post-modern philosophical treatises to political speech, the pervasiveness of 'post-state' language, with fluctuating degrees of dramatism, announces the twilight of the constitutional state.[2]

Nowadays, the falling of dusk serves as an influential justification for many intellectual enquiries on the constitutional state. The targets vary from transcending the conception of the constitutional (nation) state to its reaffirmation. The rhetoric of the "twilight of the constitutional state" and a related theoretical debate brings to the surface the internal tensions within the conception of the constitutional state. A closer look at the scholarship exploring these internal controversies demonstrates that history is not only relevant for the constitutional state's relation to its competitors such as communism, but it is also important for the conception of the constitutional state as such.

Here, I hold none of the above listed ambitious aspirations, ranging from the reaffirming to the transcending of the constitutional state. My task instead is to outline the current debate around the constitutional state, with a focus on the theoretical controversy between the political and legal constitutionalism. I claim that the fundamental ground of a disagreement latently present in these conflicting theories can be traced in their relation to history. Opening this different perspective should further contribute to bringing some clarity to a foggy ground, where the battles over the conception of a constitutional state are being fought.

## B. Law, Liberal Political Morality, and Progressive History

In a debate between the proponents of a political and legal constitution, the camp where Ronald Dworkin occupies the prominent position is often targeted by the rival critique. In this part of the essay, I will mostly present Dworkin's theory according to his early writings, supplemented by the references to other authors, who also belong to the family of liberal normativism, and are regarded as the foremost advocates of a legal constitution. This necessarily selective treatment intends to highlight that, in liberal understanding, constitution and law remain essentially political, and are animated by the ideal of progressive history.

1 *See*, for example, F. Fukuyama, *The End of History and the Last Man*, London, Penguin Books 1992.

2 M. Loughlin, 'In Defence of Staatslehre', *Der Staat* 48(1) 2009, p. 2; M. Loughlin & P. Dobner (Eds.), *The Twilight of Constitutionalism?*, 2010. Oxford, Oxford University Press

With Dworkin, adjudication is the cornerstone of a legal theory.[3] Throughout two tier adjudication, judges should first explain an applicable positive law, and after this first stage of 'fit,' should interpret positive law in the best possible light of legal principles. For Dworkin, legal principles are the principles of political morality, present in the institutional record of political community.[4] The institutional record is legal, as principles of political morality constitute the law itself. A judge who denies justifying his/her decision in the best light of the principles of political morality betrays rule of law, as for Dworkin rule of law effectively is the rule of liberal principle.[5] Therefore, the liberal theory of justice is the foundation of Dworkin's conception of law. Liberal conceptions of justice, which animate Dworkin's 'pure' and 'good' law, are political conceptions, closely related to political conceptions of justice from John Rawls's theory.[6]

In Dworkin's theory, liberal political content finds its expression in law through judicial pronouncements. Importantly, this is a two-way street: political content dominates legal form, but at the same time law makes sure that political substance will not evade its pathways, and will not find expression through means other than legal ones. The judges become ultimate guardians of the liberal theory of justice.

The constitutional theory should remind judges of their paramount function. Dworkin's constitutional theory is to a great extent the theory of separation of powers, which determines the division of labour between legislatures and judges in performing an overarching task – making the liberal theory of justice rule. Starting from Bentamite premises, Dworkin is convinced that legislatures are best positioned to deliver judgments on a common good, but as a true liberal he is suspicious that legislative majorities will remain faithful to the full package of liberal theory of justice.[7] Therefore, legislature is entrusted to make policy, and judges shall ensure that these policies are consistent with political morality, guaranteeing that liberal principle rules.

3 The present account of Dworkin's legal theory is based on his early writings, mainly on R. Dworkin, *Taking Rights Seriously*, Cambridge, Massachusetts, Harvard University Press, 1978 and R. Dworkin, *Law's Empire*, Cambridge Massachusetts, Belknap Press of Harvard University Press, 1986. Dworkin's later engagement with political and moral philosophy, which culminated in his integrated account of moral, political, and legal philosophy, within the framework of unity of value (*See*, R. Dworkin, *Justice for Hedgehogs*, Cambridge Mass., Belknap Press of Harvard University Press, 2011) is omitted here. In his integrated account of legal theory, Dworkin rejects the fundamental premise of his earlier legal theory; namely, the understanding of law and (political) morality as the two distinct systems (*Justice for Hedgehogs*, p. 402). As a consequence of this shift, the central question of Dworkin's legal theory is no longer posed as the one of the interaction between law and morality. Accordingly, the connection of law and morality with progressive history should also be reconsidered. Structural and space limitations of this paper do not allow me to elaborate in depth on this point.

4 D. Dyzenhaus, *Rule of Law as the Rule of Liberal Principle*, *in* R. Dworkin & A. Ripstein (Eds.), 2007, Cambridge, Cambridge University Press p. 66.

5 *Ibid.*

6 This is recognized by Rawls himself, *see*, J. Rawls, *Political Liberalism*, New York, Columbia University Press 1993, p. 236-237, note 23.

7 *Supra* note 4, p. 64.

Another fragile point in early Dworkin, and in liberal constitutionalism generally, is the prominent place of subjective rights in political morality. This is the challenge that is no longer restricted to Dworkin's theory, but extends to the entire model of United States constitutionalism, to which Dworkin's account mainly refers. However, this is not a standard charge of parochialism made against Dworkin's theory,[8] given that the placement of subjective right at the foundation of constitutional order is not a novelty of US constitutionalism, or Dworkin. But the distinctive feature of US constitutionalism, which becomes the cornerstone of Dworkin's theory, is the judicial enforcement of rights. This particular feature of US constitutional order was developed in local constitutional context, on the basis of the written constitution, and the constitutional bill of rights. However, judicial review does not necessarily presuppose the written constitution, and/or the entrenched bill of rights.

Dworkinian fusion of subjective rights and political morality, and their placement at the foundation of a political order, may take place in constitutional orders which lack a written constitution or an entrenched bill of rights, or both. This is the case of Britain, where Dworkin's ideas found elaboration in the constitutional theory of T.R.S. Allan.[9] With Allan and another representative of his camp, Sir John Laws, rule of law in the British Constitution becomes Dworkinian. Allan, citing Sir John Laws, sketches out the contours of the constitutional theory, which is strikingly close to Dworkin: "Legislative and administrative distinctions and classifications must be reasonably related to legitimate public purposes, reflecting an intelligible view of the common good, consistently maintained, and compatible with the basic principles of the legal and constitutional order." The relevant criterion is "... The compatibility with those principles accepted as constitutionally fundamental, within a particular regime or polity and the underlying values of human dignity and freedom that these principles characteristically assume".[10] Certainly, in this conception of constitution, both Allan and Laws envisage judges as the ultimate guardians of constitutionally fundamental principles of political morality.

A public political culture of morality, the repository of liberal constitutional principles, rests on the history of the polity,[11] the history of political community, which has been progressing with flourishing freedom. This is the source of self-confidence that based on the firm foundations of liberal political morality, liberal constitutional state will march forward in history. According to Dworkin:

> We march in this way toward what we hope is a better community, fairer and more just; we march we hope forward though we all believe some steps are backward. But we nevertheless recognize community in our present diversity, and so accept, in the name of community, a special and further constraint.

8 *Ibid.*, p. 74.

9 T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* , Oxford, Oxford University Press 2001.

10 *Ibid.*, p. 22, referring among others to Sir John Laws, 'The Constitution: Morals and Rights', (1996) PL 622.

11 *Supra* note 9, p. 2.

> We march together so that the settlements of principle we reach from time to time, as plateaus for further campaigns, extend to everyone. We leave no wounded behind, no abandoned minorities of race or gender or sexual disposition, even when bringing them along delays the gains of others.[12]

The striking boldness of this statement could only rest on the strong record of already accomplished advance in history. There lurks behind this audacity a vision of a progressing liberal community, where liberty and equality have always reigned. This leaves not even a grain of suspicion that progress may turn into irreversible regress. Only such a conception of political community may support Allan when he, conceding with legal positivists, states that "adherence to rule of law can not serve the cause of justice" in the communities where "political culture is hostile to liberty and careless of human dignity".[13] In line with Dworkin, Allan rests all his theory on the irreversible character of liberal public political culture, which is supposed to advance and flourish with the course of history.

Dworkin's political community takes an individual on a progressive march towards the more just and fairer society. Had Dworkin been a liberal with a background in Economics, like F.A. Hayek, he would probably clarify that the progress towards the realization of liberal justice serves to the ultimate material progress of the society, where progress is "the movement for movement's sake".[14] Importantly, the destination remains obscure; as Hayek puts it concisely, it is absurd to rationally predict the future of unrealized possibilities.[15] Liberal societies are therefore placed within an infinite historical horizon of progress, which supplies them with an inexhaustible energy to move forward.

### C. Progressive History and the Passage from the Political Constitution of *Droit Politique* to the Social Constitution of *Potentia*

I continue with the debates surrounding the constitutional state, taking note that I am crossing a labyrinth, where in the depths, fundamental questions of political and legal philosophy rest, and ideological clashes make the passages even more winding. Without much ado, we shall proceed with the political constitution, which will be discussed on the basis of its most elaborate exposition, in the scholarship of Martin Loughlin.[16]

With Loughlin, only the constitution of state is a proper object of the juristic enquiry. Constitution of the state is intimately connected to the idea of the autonomous political discourse of public law.[17] The autonomy of public law stems

12 R. Dworkin, 'Law's Ambitions for Itself', 71 *Va. L. Rev.* 173 (1985) at p. 187.

13 *Supra* note 9, pp. 23-24.

14 F.A. Hayek, *The Constitution of Liberty*, Chicago, University of Chicago Press 1978, pp. 39-53.

15 *Ibid.*

16 The works that are mostly relied on here are: M. Loughlin, *Public Law and Political Theory*, Oxford, Clarendon Press 1992 (hereinafter *Political Theory*), *The Idea of Public Law*, Oxford, Oxford University Press 2003 (hereinafter *The Idea*), and *Foundations of Public Law*, Oxford, Oxford University Press 2010 (hereinafter *Foundations*).

17 *The Idea* pp. 153- 157.

from the singularity of its object. Its singular object comes from a modern state and its fundamental task, governing.[18] Governing is not restricted to the activities of the legally instituted offices of government. Loughlin rejects the reduction of the constitution of the modern state to the legal framework of the formal constitution.[19] The normativist position, that the constitution should be expounded and judicially enforced is also denied.[20] Constitutional laws, making up the formal constitution of the office of government, determine the arrangements of governing institutions, and in general, the organization of political practice; but formal constitution cannot alone stand for the constitution of the state. Constitutional rules are far from being able to exercise insurmountable legal constraint over political sovereignty.[21] The constraints of the formal constitution do not diminish, but generate the state power.[22]

Formal constitution does not constitute state power out of nothingness, but it presupposes a material constitution. For Loughlin, the concept of the constituent power stands for the material constitution.[23] Constituent power signifies the political unity of the people, whose primary mode of existence is political.[24] With Carl Schmitt, a German Jurist, from whom Loughlin takes this conceptual framework, existential quality of a political unity contains a claim, that the political is a total existential condition.[25]

In Loughlin's theory, the autonomy of public law as a political discourse, represented by the sovereignty of state, is to be understood in light of this claim to totality.[26] The autonomy of a political (public) sphere does not signify its mere independence from the other domains of life; it rather signifies the ubiquity of the political.[27] Thus, Loughlin seems to claim that the totality of political existence is fully grasped within the overarching 'scheme of intelligibility', provided by the sovereign state.[28]

Importantly, this 'scheme of intelligibility' does not come without the contradictions. Conceptual distinction between the formal and material constitution sets free a seemingly irreconcilable tension. Once the public authority of state is constituted, there remain two options; either the state encompasses and gives

18 *Ibid.* pp. 5-31.

19 The distinction between the constitution of the office of government and the constitution of state is elaborated in *Foundations*, pp. 227-237.

20 *The Idea*, p. 47, *see also*, the discussion of judicial review in United States, in *Foundations*, pp. 288-295.

21 *The Idea*, pp. 42-47.

22 *Foundations* p.230.

23 *Ibid.*, pp. 209-216, adopting Carl Schmitt's conceptual analysis of a constitution, from Schmitt's *Constitutional Theory*. Translated and edited by Jeffrey Seitzer, Durham, Duke University Press, 2008.

24 *Ibid.*

25 C. Schmitt, *Concept of the Political*, translation, introduction, and notes by George Schwab; with Leo Strauss's notes on Schmitt's essay; translated by J. Harvey Lomax; foreword by Tracy B. Strong, Chicago, University of Chicago Press, 1996.

26 *Foundations*, pp. 209-216.

27 M. Loughlin, *Sword and Scales, An Examination of the Relationship between Law and Politics*, Oxford, Hart Publishing 2000, p. 6.

28 *Foundations*, pp. 205-208 .

expression to the existential unity of the people, or the people lives on in a separate existential entity, independent from the public authority, as the external and highest source of all legitimacy. Schmitt's central claim is that a state reduced to a hierarchical order of norms cannot contain the totality of political existence; therefore, what avoids the normative confinement survives and haunts the normative order of the state with the constant subversive threat. Therefore, Schmitt holds that having the first option, which avoids the tensions of the second one, is not possible.[29]

Loughlin agrees with Schmitt's claim, but only partially. According to him, Schmitt is right to contend that state power understood in purely normative terms fails to make sense of the political unity of the people, but he disagrees with Schmitt in his broader claim, that the state power is altogether unable to contain the totality of the political. Loughlin points out that Schmitt's inability to overcome the tension between the facticity of the material, and the normativity of the formal constitution, is due to his understanding of the existential political unity in purely empirical terms, based on his rejection of the 'normative power of the factual'.[30] Loughlin follows Schmitt's theoretical and political rival Herman Heller,[31] and states that the constitution of the state is based on an immanent logic that dialectically negotiates the tension between the validity of the formal constitution and the facticity of the constituent power.[32]

Loughlin abandons Schmitt's concept of the political,[33] and against him, asserts the immanence of the state power that is capable of mending the gap between the empiricism of political existence and the normatively instituted government. Once constituted normatively, state power develops as *Potestas, Droit Politique* or political right.[34] The right ordering of the state so constituted embraces the totality of the public political sphere. Public law thus develops as a reflexive discourse, forging the unity of *Droit Politique*, by prudential negotiation of its constitutive tensions.[35] The necessary reflexivity of a prudential negotiation requires the coexistence of the normative and the factual.[36] Public law can no longer afford the dominance of an abstract normative form. It is "...conceived as an assemblage of rules, principles, cannons, maxims, customs, usages, and manners that condition and sustain the activity of governing".[37] Law stands on equal footing with other modes through which the practice of governing proceeds. Public law is liberated from a normative cage and brought down to political practice.

29 *Supra*, note 23.
30 *Ibid.*
31 *See* Dyzenhaus, infra note 80.
32 *Foundations*, pp. 233-237.
33 For Loughlin's earlier reception of Schmitt's concept of the political, *see*, *The Idea*, pp.33-35. In *Foundations* Loughlin altogether ignores Schmitt's concept of the political, and limits the discussion to Schmitt's *Constitutional Theory*.
34 *Foundations*, pp. 231-237.
35 *Foundations*, p.12.
36 *Ibid.*
37 *The Idea*, p.30.

Significantly, with this move, the nature of *Potestas* is fundamentally transformed, as it shifts to *Potentia*, to the actual modes of governing activity.[38] The political constitution of *Droit Politique* is being transformed in the social constitution of *Potentia*. The sociological positivism of Leon Duguit supplies Loughlin with the framework for grasping the workings of *Potentia*.[39] With the rise of an administrative state, the expert bodies, networks of corporations, trade unions, and other powerful social groups, the balance between *Potestas* and *Potentia* shifts to the side of the latter. Social coordination among these networks of entities becomes the ultimate task of the governing activity.[40] Social coordination is guided by an overarching, 'objective law' of social solidarity. Subjective rights are conclusively replaced by the duties, stemming from the principle of social solidarity. The paramount purpose of governing is oriented towards the satisfaction of social needs and provision of services.[41] By this move, the passage "from sacerdotal to an instrumental conception of government" is concluded, marking the "shift of moral locus from past to future... Politics is no longer a product of our essential and unchanging human nature, but an adventure in self-development and political evolution".[42]

Loughlin traces the roots of social coordination already in Rousseau's ideas.[43] But there is another important connection that he does not refer to in *Foundations*, and which situates governing as a social coordination in broader liberal setting, where there is a common 'moral locus' of the political practice. In his earlier work *The Idea*, Loughlin cites Hobbes on prudence. According to Hobbes, prudence is "a *praesumtion* of the *future* contracted from experience of time *past*".[44] We shall see later that with Hobbes, only a past experience of progress, unleashed by the passage from the state of nature to the sovereign state, encourages an individual to pursue the realization of infinite possibilities within the state, in an adventure of self-development. With his consistent embrace of the evolutionary and progressive history,[45] Loughlin remains within what we have described as a liberal historical horizon.

38 *Foundations*, pp. 407-464.

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 *Ibid.*, p. 455, citing E.L. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State*, Princeton, Princeton University Press 2005, p. 188.

43 *Supra* note 38.

44 T. Hobbes, *Leviathan* [1651], 1996 Cambridge edition, p. 23; quoted by Loughlin, *The Idea*, at p. 151.

45 Progressive history is a common theme that stretches from Loughlin's programmatic *Political Theory* to his systematic *Foundations*.

## D. The Horizon of Progressive History, and the Possibility of Escape from Metaphysics

The liberal historical horizon of progress, as Schmitt often contended, is a metaphysical horizon, which gives liberalism 'a stronger moral conviction'.[46] The syndicalism of Duguit and pluralism of Laski, which lay an intellectual foundation for Loughlin's *Potentia*,[47] are treated by Schmitt as the terminal points of liberal individualism's grip over sovereign state, leading to its elimination.[48] Schmitt alleges that Duguit's and Laski's theories, like any other liberal theory of state, cannot stand. Schmitt locates this development within the horizon of progress, which has provided liberalism with necessary energy, and has survived even after liberalism's victory over its competitors.[49]

Loughlin has duly taken note of this point, holding that "the themes of idealist philosophy", among which evolutionary and progressive history occupies a prominent place, has "...supplied its [functionalist style of public law] main intellectual energy and anchored its political objectives".[50] According to Loughlin's programmatic statement, functionalist style of public law, through which the theoretical heritage of Duguit and Laski has lived, can be rejuvenated as a 'robust social philosophy', only after the horizon of evolutionary and progressive history is properly restored.[51] Loughlin accomplishes much of this program in *Foundations*. His systematic presentation of the social constitution of *Potentia* radically challenges Schmitt's provocative polemical claim that within liberalism, no state theory is possible.[52]

Schmitt contends that neither Duguit nor Laski could succeed in offering a theory of state, due to their failure to work out the concept of the political, which any theory of state mandatorily presupposes.[53] Having no concept of the political, as Schmitt's challenge goes, leaves Duguit and Laski without an argument for the legitimacy of the state; they cannot account even for the difference between the state and other associations and power bases within the society. State loses all of its legitimacy and is unable to claim its primacy over the totality of multiple social groupings; as a consequence sovereign state eclipses.[54]

Thus, Schmitt seems to claim that liberal individualism reaches the terminal point, where it altogether renounces the political, stripping the state of all its legitimacy. How then should we connect this claim, which concerns the internal modes of legitimacy with Schmitt's other claim, which locates liberalism's moral conviction, and the source of its legitimacy in the horizon of progress? This point

46 Schmitt, *supra* note 25, p. 73.
47 *Supra* note 38.
48 Schmitt, *supra* note 25, pp. 40-45.
49 *Ibid.*, pp. 75-76.
50 M. Loughlin, 'Functionalist Style in Public Law', 55 *U. Toronto L.J.* 361 (2005), p. 403.
51 *Ibid.*
52 Schmitt, *supra* note 25, p. 61.
53 *Ibid.*, p. 44-45.
54 *Ibid.*

is only clarified once we have a closer look to Schmitt's own solution to the problem of the legitimacy of the modern state.

Schmitt's solution is not exactly what Loughlin ascribes to him, namely, the assertion of the crude empirical existence of the people against the state, understood as a purely normative order. Schmitt's material constitution presupposes the existential unity of the people according to the concrete political distinction between friend and enemy. Schmitt clearly points out that the fundamental distinction between friend and enemy derives its structure and conceptual coherence from the Christian theological doctrine of an original sin.[55] The political unity of the people, organized within the state and defined in terms of the friend/enemy groupings, is placed in an eschatological horizon of the last judgment.[56] It is the horizon of the last judgment, which in Schmitt's writings, elevates states defined according to friend/enemy groups, above the mere facticity of an existential conflict, and sustains their claim to legitimacy.

Schmitt maintains that theological concepts in state theory should have only a political significance, freed from the substantive baggage of moral theology.[57] The political distinction between friend and enemy, though bearing the affinity to the theological question, which poses the moral choice between good and evil, reduces this affinity to strictly structural terms. The decision on friend and enemy derives from its theological counterpart, only the conceptual coherence, degree of intensity and urgency, but it is stripped of any theological and moral significance.[58] Following this logic, Schmitt's horizon of the last judgment also seems to be a sort of secularized eschatology, the philosophy of history, offering the specific historical horizon.[59]

Having said this, Schmitt seems to claim that the inner legitimacy of state, residing in the people's existential unity, is sustained only within the historical horizon of the last judgement. Seen in this light, Loughlin's claim that Schmitt fails due to his purely empirical understanding of political existence should be given a further twist; Schmitt is left with the brute facticity of self-destructive existential political conflict, and ultimately fails only once his historical horizon falls. This argument acquires additional force once it is acknowledged that Schmitt's challenge against liberal democracy is structured and staged under these very terms. According to Schmitt, liberalism's political failure is a failure to forge the secular legitimacy for the state, which systematically should remain

55 *Ibid.* p. 65.

56 For the importance of Last Judgment in Schmitt's state theory, *see*, C. Schmitt, *Roman Catholicism and Political Form*, translated and annotated by G.L. Ulmen, Westport, Connecticut London, Greenwood Press, 1996; C. Schmitt, *Nomos of the Earth in the International Law of Jus Publicum Europaeum*, translated and annotated by G.L. Ulmen, New York, Telos Press, 2006; M. Marder, *Groundless Existence: The Political Ontology of Carl Schmitt*, New York, Continuum 2010.

57 *Ibid. See also*, C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by George Schwab, Cambridge Mass., MIT Press 1985.

58 *Supra* note 53.

59 On the modern understanding of history as a secularized eschatology, *see*, K. Löwith, *Meaning in History: The Theological Implications of the Philosophy of History* Chicago, University of Chicago Press, 1949, J. Taubes, *Occidental Eschatology*, translated with a preface by David Ratmoko, Stanford, Stanford University Press 2009.

strictly homologous with the traditional, transcendent one. The systematic homology does not mean the substantive homology; it rather insists on the conceptual structure and requires the mode of justification that derives its meaning only within the specific historical horizon.

Under the first limb of his challenge, concerning the internal mode of legitimacy, Schmitt contends that liberalism has pursued a consistent program of 'depolitization' and 'neutralization.'[60] Enmity, the cornerstone of politics, has been 'neutralized' under the economic mode of competition, and intellectual mode of endless discussion. Liberal suppression of the 'real possibility of violent death' eroded the foremost political justification of the state, the need of the highest decision-maker on the issues of life and death. Instead of friend/enemy groups, liberalism has produced a patchwork of individual associations which have attained significant power, but at the same time, have disguised the true political power, the decision on friend and enemy, on life and death. Schmitt claims that liberalism will not be able to domesticate political enmity under the veil of economic and technological power relations. Networks of individual associations which absorbed the diffused power inevitably reach the degree of intensity where the competition is inevitably transformed back into enmity.[61] Then, the plurality of associations, theorized in Duguit and Laski, face a binary option, either to sink in chaos, or get dissolved under the unity of the resurged sovereign state, the only institutional response to political enmity, according to Schmitt.

Thus, with Schmitt, the liberal state faces the dilemma; anarchy or the state with the proper concept of the political. He then advocates the second option, to escape the horrors of the first. Though Schmitt maintained that in politics, the choice is always binary, and attacked any attempt to neutralize the intensity of the political by introducing the third,[62] he never lost sight of this third option. Although he condemned Duguit and Laski for the failure to work out a coherent theory of state, he did not preclude that they could still argue for the state, as an 'umbrella' of the plurality of individual associations and power groups.[63] At times, Schmitt is close to concession that the observation that the power accumulated through economic and technological channels could not escape the political enmity does not necessarily mean the disappearance of economic, technological or intellectual modes of power, under the resurgent political; at least Schmitt remains ambiguous on this point. In his discussion of economic imperialism, he seems to acknowledge the ways through which predominantly economic and technological modes of power relations work to attain the same objectives, as his truly political power of the state would have pursued.[64]

60 Here I mainly rest on *The Concept of the Political*; for more specific treatment, *see*, C. Schmitt, *The Age of Neutralizations and Depoliticizations*, 1929. English translation is published in *Telos*, Issue 96, pp.130-143, 1993.

61 Schmitt, *The Concept of the Political.*

62 *Ibid.*, p. 74.

63 *Ibid.*, p. 44.

64 *Ibid.*, p. 78.

Regarding the second limb of his challenge, on liberalism's historical horizon; in the postscript to his *Political Theology II*,[65] Schmitt reconstructs liberalism's major achievement, the invention of self-empowering mode of legitimacy.[66] Despite the use of the term legitimacy, Schmitt makes it clear that no transposition from the theological sphere has taken place. Liberalism[67] is no longer engaged in depoliticization, detheologization, dejuridification, or in any process with the prefix 'de'. All these processes have been directed towards a 'clean slate,' where the rigor of theological and metaphysical concepts has been preserved in the empty structures of *tabula rasa*. 'Clean slate' has been freed from the substance, but has kept its original conceptual system. Schmitt claims that liberalism has erased even this *tabula rasa*, asserting the complete immanence in opposition to the last remnants of transcendence residing in the conceptual structures it has done away with.

Once the systematic frame of legitimacy is dismantled, what remains is the self-empowering and self-sustaining process-progress. Scientifically attained human knowledge becomes the new legitimacy, which is totally self-contained, and asserts its objectivity. Human knowledge does not even see the need for justification. Free production and use of knowledge, under the neutral and objective frame, are the expressions of human freedom. Human freedom becomes the highest value, and this is achieved at a cost of the loss of all value. Self-empowering human knowledge has first to produce the valueless nothingness, as the condition of its own possibility and continual renewal. Human knowledge, defined as a process-progress, is driven by inexhaustible individual curiosity. The individual puts the process-progress of the constant pursuit of novelty in motion, but at the same time remains its creature. The pursuit of novelty is the historical horizon of modernity. *Stat pro ratione libertas, et novitas pro libertate* [Freedom replaces reason, and novelty replaces freedom] is the concise summary of this horizon, with which Schmitt ends the *Postscript*.[68]

Schmitt attacks human knowledge, the foundation of modern legitimacy, labelling it as autistic. Although the process-progress driven by the pursuit of novelty is infinite, the realization of its possibilities is fully dependent on an individual. The self-referential system of legitimacy is based on nothingness and is unable to produce anything but nothingness, which is the only condition of its possibility. Importantly, the legitimacy based on nothingness and "pitted against the value and truth",[69] assumes its own closure and asserts objectivity and total-

65 C. Schmitt, *Political Theology II: The Myth of the Closure of Any Political Theology*, translated and introduced by Michael Hoelzl and Graham Ward, Cambridge, Polity Press 2008.

66 *Ibid. Postscript*, pp. 116-131.

67 In *Postscript* Schmitt refers to the 'modernity' in general, instead of liberalism. The *Postscript* is a comment on the book by H. Blumenberg, *Die Legitimität der Neuzeit (The Legitimacy of Modernity)*, Frankfurt am Main, Suhrkamp Verlag 1966, though this is not the only reason that explains the terminological change. For Schmitt the attack against liberalism was always a part of his wider quarrel with modernity and its intellectual legacy. *See*, for example, C. Schmitt, *Political Romanticism*, translated by Guy Oakes, Cambridge Mass., MIT Press 1986.

68 *Supra* note 65, p. 131.

69 C. Schmitt, *Legality and Legitimacy*, translated by Jeffrey Seitzer, Durham, Duke University Press 2004, p. 94.

ity. Though the historical horizon is retained, it does not refer anything or anyone but the individual himself.

Liberalism's horizon is thus circularly tied to a free individual. Does this mean that liberalism has succeeded against Schmitt's earlier prediction to the contrary, and forged the secular legitimacy placed within a proper historical frame? Loughlin answers this question affirmatively; for him, the secularization of history marks the passage of the modern state from religious to secular, from transcendent to immanent foundations, without losing its unity, and without facing the apocalyptic failure that Schmitt had destined for it.[70]

> ...the secularization of history is completed as the future becomes unrepresentable. The faceless and nameless future, unconstrained and unaffected by occult determinism, is the pure future, removed from the theological cocoon which concealed it for two centuries. From now on, no more diviners, mediators, and sacrificers. For herein lies the future's main paradox: the more the order of the invisible comes to light, the more secular it becomes; the more predictable it becomes, the less inevitable it is; the more accountable it makes us, the more it teaches us that we create it... The more we accept ourselves as authors of history; the only remaining enigma is we ourselves.[71]

Loughlin claims that the immanent foundations of the modern state are freed from the last metaphysical remnants. Schmitt also acknowledges that the immanence of the self-referential system of human knowledge announces the closure, which seals off all political theology.[72] Nevertheless, he remains deeply sceptical regarding the possibility of such a closure.[73] As Schmitt contends in *Poltical Romanticism*, the 'secularization' is never complete, and the escape from political theology ends up in a closed metaphysical system, from where there is no escape.[74]

Schmitt rejects any objectivist, immanent system of legitimacy which harbours metaphysical aspirations, whether declared or hidden. Schmitt holds that the claim of the empty system of legitimacy to totality can only be sustained

70 *See ibid.*

71 *Foundations*, p. 455, citing M. Gauchet, *The Disenchantment of the World: The Political History of Religion*, translated by Oscar Burge, Princeton, Princeton University Press 1997, pp. 184-185.

72 *Supra* note 65.

73 *Ibid.*

74 "Today, many varieties of metaphysical attitude exist in a secularized form. To a great extent, it holds true that different and, indeed, mundane factors have taken the place of God: humanity, the nation, the individual, historical development, or even life as life for its own sake, in its complete spiritual emptiness and mere dynamic. This does not mean that the attitude is no longer metaphysical. ... Metaphysics is something that is unavoidable, and as Otto von Gierke has aptly remarked we cannot escape it by relinquishing our awareness of it." Schmitt, *Political Romanticism*, p. 17.

within the historical horizon of the last judgment.[75] The horizon of the last judgment is infinite, like the horizon of progress, as it is infinitely delayed. But, regardless its infinite postponement, the last judgment is a concrete event that brings in the element of finitude, and keeps alive the awareness of limitations. In case of modernity, the horizon of infinite novelty makes the immanent system of knowledge forget its limitations, culminating in an assertion of totality through its claim to objectivity.[76] Thus, in both Schmitt's theory and in modern theory of state, as Schmitt reads it, the limitation is the condition of possibility for state's legitimacy. In modernity, the limitation is internalized and positively exploited, while Schmitt insists on its externality.

Schmitt's claim on the inescapability from political theology could be read as the consequence of an inherent irrationality of all symbolic orders; which in the case of liberal democracy, translates into the inability of the latter to work out internal modes of justification.[77] This conclusion holds only so far, as one consistently denies the substantive emptiness of a socio-political order. The quest for the full justification of the state by attempting to surmount the limitations is the common feature shared by Schmitt and his adversaries from the camp of modernity. Once again, this attitude is based on the rejection of the possibility of a social cooperation, without the substantive aim(s). It is the rigor of this point that is to be tested in the following sections.

## E. Overcoming Progressive History – The Constitution of Law

The most powerful contemporary challenge against political constitution is forwarded from legal theory, and is elaborated in the scholarship of David Dyzenhaus. This section will try to highlight the major arguments from his engagement with legal theory, followed by a general picture of his own distinctive contribution.

Confrontation with legal positivism is among the central themes of Dyzenhaus's works. Against positivism, he affirms a standard charge; law as a command of unrestrained sovereign is authoritarian.[78] Conceptual positivists' attempt to disassociate themselves from political roots, claims Dyzenhaus, also fails.[79] The positivist endeavour to work out an analytic account of law, rid of political and

75 Here I rest on the recent discussion of Schmitt's philosophy by M. Marder, *supra* note 56, pp. 1-13 and 170-190. Nevertheless, I do not share Marder's greater claim that the rejection of an immanent, objectivist metaphysics makes Schmitt's own position anti/non metaphysical. Certainly, this point requires greater elaboration, but for the purposes of this article, some of the major reasons that support this position are listed in the following sections.

76 *Ibid.*

77 See Karl Heinz Ladeur, 'Carl Schmitt und die Nichthintergehbarkeit der politischen Theologie. Die Versuchung des Totalitarismus in der liberalen Gesellschaft, *Politische Vierteljahresschrift*, 37. Jg. (1996), Heft 4, S. 665-686.

78 D. Dyzenhaus, 'Why Positivism is Authoritarian', *American Journal of Jurisprudence*, Vol. 37 (1992), p. 83.

79 D. Dyzenhaus, 'The Genealogy of Legal Positivism', *Oxford Journal of Legal Studies* 2004 24(1), pp. 39-67.

moral conflict, entirely misses the target and only contributes to a concession that law conceived as a corpus of rules complying with fundamental rule of validity may end up as an instrument in the hands of oppressive political regimes.[80]

The inability to make proper sense of the relation between law and politics is a common theme that Dyzenhaus highlights in relation to legal positivism, Dworkin's early theory[81] and Loughlin's writings prior to the *Foundations*.[82] According to him, the most rigorous claim on the separation between law and politics in the theory of Hans Kelsen brought the worst consequences. Kelsen's theory of law, allegedly purified from political and moral controversies, still perceives every state as a *Rechtstaat*. The acceptance that every state is a *Rechtstaat* leaves Kelsen defenceless against Carl Schmitt. According to Dyzenhaus, Kelsen came closest to Schmitt by effectively concluding that "... crucial political decisions are made in normative vacuum, where power is everything including the source of all authority and morality".[83] By placing himself in a position of inability to deny this conclusion, Kelsen stopped close to the ultimate Schmittian end – "The triumph of will in the battle of irrational forces."[84] Kelsen's defeat in the face of Schmitt's challenge was a result of his reluctance to admit that legal principles also have a political content. Kelsen has never acknowledged the force of Schmitt's challenge, holding that even the decision to sever law from politics counts as a political one.

The connection between law and politics is more complex than the binary logic of either/or may suggest. Therefore, Dyzenhaus does not find acceptable conflation between law and political morality in Dworkin's early writings. According to Dyzenhaus, Dworkin's error lies in the fusion of law with the political morality external to law; as contingent presence of the principles of political morality cannot guarantee against law's oppressive use.[85] Thus, according to Dyzenhaus, Dworkin, like Rawls, is under the grip of the challenge of Carl Schmitt, who argued that by insisting on value neutrality of democratic institutions, liberalism has left the doors open for rival substantive positions to subvert the state from within. For Dyzenhaus, Dworkin in his early theory was captivated in a terrain worked out by his opponents. In arguing whether there is a necessary connection between law and (political) morality, Dworkin, in line with positivists, still thought of them as distinct. As a result, he charged law from external sources, disregarding the possibility of an 'inner morality of law'.[86]

80 D. Dyzenhaus, 'The Grudge Informer Case Revisited', 83 *New York University Law Review* 2008, pp. 1000-1034.

81 *See* Dyzenhaus, *supra* note 4.

82 *See* Dyzenhaus, 'Left and the question of law', 17 *Can. J.L. & Juris.* 2004, p. 7.

83 Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Herman Heller in Weimar*, Oxford, Clarendon Press 1997, p. 160.

84 *Ibid.*

85 "... [Dworkin's] theory of the rule of law is contingent on judges' finding themselves in a legal order in which the substantive principles are not badly out of line with liberal morality." *Supra* note 25, p. 69.

86 *Ibid.* This point has been recently acknowledged by Dworkin himself; *see* the text accompanying note 3, *supra*.

Lon Fuller's[87] account of inner morality of law is relied on by Dyzenhaus throughout his polemics and in Dyzenhaus's own theory. Fuller argues that there are certain principles of legality immanent in law that can serve as an effective check against law's oppressive use. Dyzenhaus rejects Joseph Raz's point,[88] also shared by Loughlin,[89] that Fuller's principles of inner morality have only an instrumental value. Dyzenhaus claims that Raz's misunderstanding lies into his authoritarian understanding of authority. What Raz ignores is Fuller's point that law is not just a one-way projection of authority. This is a fundamental claim, similar to Heller's point on the power forming character of law and the law forming character of power, which both Loughlin and Dyzenhaus embrace.[90]

But they draw different conclusions from Heller; for Dyzenhaus the question of the constituent power or the material constitution as an external and higher source of all legitimacy does not arise, once the state as a legitimate legal authority is constituted.[91] But this does not mean that legal authority ignores the questions of politics and power, trying to subsume them under the legal rules. Dyzenhaus not only rejects the radical separation of law and politics, but also asserts that principles of rule of law are also part and parcel of the fundamentals of democracy.[92] He also accepts that legal limitation of public power constitutes a substantively new type of power, the legal authority:

> ...The operation of the rule of law is not confined to limiting public power. The rule of law is also constitutive of a certain kind of power – of legal authority; and with the aid of that insight, we can also see why the different institutions should not be understood in terms of 'competing supremacies', but rather as involved in the rule-of-law project. The rule of law turns out, then, to be constitutive in that legislatures and executives which understand their role in its maintenance will undertake experiments in institutional design in order to make law's rule into reality; and judges have a crucial role in keeping these institutions of government on that path. I will also argue that the principles are inherent in the constitution of law itself.[93]

The operation of a legal authority as a collaborative project of rule of law is freed from the impasse of an institutional antagonism. Legal authority includes the institutions of the administrative and welfare state, expert bodies and various institutional actors within the state. Importantly, Dyzenhaus does not see under

87 L.L. Fuller, *The Morality of Law*, New Haven, Yale University Press 1969.

88 Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, Cambridge, Cambridge University Press 2006, p. 220-233.

89 *Foundations*, p. 334.

90 For Dyzenhaus' discussion of Heller, *see, supra* note 83, also Dyzenhaus, 'Hermann Heller and the Legitimacy of Legality', *Oxford Journal of Legal Studies*, Vol. 16, No. 4 (1996), pp. 641-66.

91 Dyzenhaus, 'The Politics of the Question of Constituent Power', in M. Loughlin & N. Walker (Eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford, Oxford University Press 2007.

92 *Supra* note 83, p. 257-258.

93 *Supra* note 88, p. 7.

the growth of institutional structure the threat to rule of law. Rather the experiments in institutional design provide necessary furniture for the maintenance of rule of law. Dyzenhaus's claim regarding the special function of judges should not be taken as the assertion of judicial supremacism. A closer look at his image of a judge as a weatherman supports this reading. The judge as weatherman does not claim all legal authority for his own, but his primary function is rather to signal to the cooperating institutions and the general public that there are defects within the operation of rule of law project. Only the judicial task so conceived can make sense across the board of constitutional arrangements, some of which permit the legislative override of rule of law principles or have restricted or no power of judicial review.[94]

At a first glance, this position may seem close to Loughlin's understanding of *Potentia* as a social coordination. But importantly, compared to Loughlin, Dyzenhaus does not attach to rule of law the same quasi-metaphysical dignity of objectivity as Loughlin's social solidarity enjoys. Dyzenhaus, following Heller, subjects principles of rule of law to the same scrutiny of deliberative institutions of democracy as any other issue on their agenda. It is again with Heller that Dyzenhaus discards any metaphysical or quasi-metaphysical idea of the 'secure platform' as a justification for democracy. According to Dyzenhaus, Schmitt's lesson is not that of liberalism's fall into the abyss, from where only earthly gods can save us, but liberalism's fall into democracy which liberalism still has to come to terms with.[95]

The terms which democracy offers are the principles of rule of law. These principles are as Dyzenhaus puts them, aspirational. They provide a minimal yardstick for the social cooperation. With an important twist, aspirational is no longer the perfect or hitherto unimagined.[96] Living under the principles of rule of law does not offer the adventure of self-development in search of novel possibilities, they rather invite taking part in a collaborative project to live up with the minimal yardsticks of social cooperation.

Dyzenhaus does not fail to acknowledge the significance of the placement of subjective rights at the foundation of political community. Following Heller, he points out that democracy cannot afford to place subjective rights out of its political agenda, recognizing them as a foundation of political community. Dyzenhaus agrees with Schmitt that liberalism cannot be reconciled with democracy in a tension-free way, like any other substantive political position. But he does not agree that in order to overcome this tension, democracy should altogether reject the

94 *Ibid.*, pp. 1-17 and 220-234.

95 *Supra* note 92.

96 In *The Morality of Law*, *supra* note 87, pp. 3-30, Lon Fuller distinguishes between the morality of duty and the morality of aspiration. Morality of aspiration is the substantive ideal striving to perfection, to the fullest realization of human powers, and reflects the vision of a good life, while morality of duty is concerned with the minimal rules that make ordered society possible. Rule of law principles in Dyzenhaus's theory are these minimal rules of social cooperation. Giving an aspirational character does not make them substantive in a metaphysical sense, but rather downgrades claims to objectivity they might harbor. Subjection of the principles of rule of law, to the democratic inquiry, makes a different reading of this feature of Dyzenhaus's theory implausible.

rights. Democracy values rights, but does not recognize that they can provide the terms of social cooperation, like the principles of rule of law do.[97]

Dyzenhaus acknowledges that liberalism's entrenchment in democracy is a resource that enables Schmitt to shift the terrain of politics back to the metaphysical stage, to which liberals like Rawls and Habermas readily follow in their turn from political theory of democracy to philosophy. For Dyzenhaus, one has not to fall in Schmitt's trap and let him define the terrain of debate. Dyzenhaus holds that Schmitt can be fully confronted only within the political field of democracy once the stage is cleared from the philosophical baggage of liberalism.[98] Dyzenhaus undertakes this task in his engagement with the founder of political liberalism – Thomas Hobbes.

## F. Hobbesian Trap

Dyzenhaus contends that Hobbes's reputation as an inventor of a sovereign, the uncommanded *Leviathan,* is false.[99] Instead, he claims, Hobbes is the founder of a legal constitution of sovereignty. Dyzenhaus's argument is based on Hobbes's conception of a judge, and his account of laws of nature. He contends that with Hobbes, the idea of a judge precedes a sovereign. Judges are in place to ensure that laws of nature rule. For Dyzenhaus, the Hobbesian sovereign is nothing more than a legal order which legitimately rules by enacting positive laws in accordance with laws of nature. Judges, despite being subordinates of the sovereign, can without contradiction ensure that laws of nature are followed by the sovereign, as both judges and sovereign have an obligation of fidelity to laws of nature. In this very sense, Dyzenhaus describes a legally constrained *Leviathan.* He claims that judges and individuals have independent access to the content of the laws of nature. Furthermore, individuals may rebel against the sovereign if the latter, in the judgment of citizens, flagrantly disregards laws of nature.

Dyzenhaus claims that according to Hobbes, laws of nature are 'immutable' and 'transcendent'.[100] At the same time, he notes that Hobbes "...seeks wholly secular justification of political authority".[101] It seems that the latter description of Hobbes is correct and Dyzenhaus is right, that Hobbes's religious language shall not be mistaken, as it serves to justify secular state.[102] Hobbes's references to religious arguments are remnants of his early affinity with natural theology, but with his conclusive break with tradition and pre-modern thought, Hobbes also freed his thinking from theology. He unmistakably stands on firm materialist foundations, which presuppose the disestablishment of all supranaturalism and

97 *Supra* note 92.
98 Ibid.
99 Dyzenhaus, 'How Hobbes Met the "Hobbes Challenge"', *Modern Law Review* 72(3) pp. 488-506 (2009).
100 Dyzenhaus, 'The Very Idea of Judge', 60 *U. Toronto L. J.* 61 (2010).
101 *Supra* note 99, p.501.
102 *Ibid.*, p.502.

transcendence.[103]Therefore, Dyzenhaus intends to demonstrate that at the foundation of Hobbes's sovereign state are the laws of nature. He aims at showing that stripped from the transcendent and metaphysical content, laws of nature are the principles of rule of law, making up the constitution of a legal authority.

This argument is problematic. With Hobbes, laws of nature are devoid not only of any transcendental character, but are also not prior to natural right. It is 'natural right, a claim', which according to Hobbes 'is the basis of morals and politics'.[104] "...The law of nature owes all its dignity simply to the circumstance that it is necessary consequence of the right of nature."[105] To hold otherwise is not to appreciate the significance of Hobbes's break with the ancients, his affirmation of the primacy of right over law. Hobbes is the first modern political philosopher who elaborated this distinction with utmost clarity.[106]

Hobbes was always careful to distinguish between the right and law of nature:

> For though they that speak of this subject, use to confound *Jus* and *Lex*, right and law; yet they ought to be distinguished; because right, consisteth in liberty to do, or to forebeare; Whereas law, determineth, and bindeth to one of them: so that law, and right, differ as much, as obligation and liberty; which in one and the same matter are inconsistent.[107]

In all presentations of his political philosophy, Hobbes treated right prior to law and time and time again warned against their 'promiscuous' mixture.[108] The primacy of right over law celebrates fundamental distrust in rational law, the underlying belief of Hobbes in the 'impotence of reason'. This is a fundamental Hobbesian break with rationalism, which travels across modernity to relativism and postmodernism.[109] Importantly this fundamental distrust of reason places right as a basis of sovereignty, and the state, by replacing law.

With Hobbes, the recognition of the primacy of right comes as an important consequence of the admission that there is no theological, philosophical or transcendental support of world order.[110] According to Leo Strauss, in Hobbes's political philosophy after the loss of transcendent support:

> Man then can convince himself of his capacity to order his world only by the fact of his ordering activity. ... On Hobbes's assumption, one can not rest content with typical history, Thus the state of nature, which at first was intended as merely typical, again takes on an historical significance – not, indeed as a condition of absolute lack of order, but as a condition of

103 L. Strauss, *Political Philosophy of Hobbes: its Basis and Genesis*, translated from German manuscript by Elsa M. Sinclair, Chicago, University of Chicago Press 1952, p. 77.
104 *Ibid*, p. 155.
105 *Ibid.*
106 *Ibid.*
107 T. Hobbes, *Leviathan*, [1651] Chapter XIII. *Supra* note 44.
108 *Supra* note 103, p. 155-156.
109 *Ibid.*, p. 164.
110 *Ibid.*, p. 106.

> extremely defective order. And the progress which may be traced in real history, from the *prisca barbaries* to *hodiernum tempus* with reference to the conquest of nature, bears witness to the possibility of progress still to be achieved in regard to the ordering of the world of men. Thus real history has its function to vouch for the possibility of further progress by perception of progress already made.[111]

In Hobbes's philosophy, the historical outlook liberates an individual from the authority of tradition and prejudices. Since no rational order of law can guide him, he becomes convinced that he can overstep his own limits; the progress already made in history provides an individual with an irrefutable proof.[112]

> It is by the doubt of the transcendent eternal order by which man's reason was assumed to be guided and hence by the conviction of the impotence of reason, that first of all the turning of philosophy to history is caused, and then the process of 'historicising' philosophy itself.[113]

Therefore, it is difficult to extract from Hobbes, as Dyzenhaus intends, the legitimate legal authority of state, where laws of nature rule through justification. Hobbes's political philosophy is historicized, and his sovereign state firmly rests on right rather than law; based on the disillusionment with the power of law's reason, it finds guidance in progressive history. Having its basis in right, political order is put in a historical horizon, where man by its activity of political ordering, is set to progressively realize the unbounded possibilities. The infinite possibilities unleashed by progressive history surmount the finitude of man. The thrust of progress liberates man from his own weakness and the baseness of life, from the depressing anthropology that Hobbes so strikingly elaborates at the foundations of his political philosophy.

The horizon of progress is 'liberalism's horizon', which Leo Strauss meant when he pointed out to Schmitt that a successful critique of liberalism can be accomplished only by 'gaining the horizon beyond liberalism'. For this purpose, Strauss suggested that an adequate understanding of Hobbes – the founder of liberalism was due.[114] Dyzenhaus goes back to Hobbes, but his ultimate aim is not liberalism's critique. He presents the account of Hobbes the way Hobbes understood himself. Precisely at this stage, he reverses Hobbes from within; he intends to transform Hobbes from a liberal to a democrat. But one has to admit that liberalism is at the roots of Hobbes's political philosophy, and once they are cut, the tree of his political philosophy goes with them. The legal constitution of democracy, as Dyzenhaus properly acknowledges it, requires transcending the whole horizon set by Hobbes, which is only possible by reversing him and by holding

111 *Ibid.*, p. 107.
112 *Ibid.*
113 *Ibid.*
114 Strauss, *Notes on the Concept of Political*, 1985. *Supra* note 25, p. 107.

that socio-political ordering is not the instrument through which man should progressively realize the infinite possibilities.

With Dyzenhaus, such a reversal does not entail that an individual should be deprived either of its rights or from the pursuit of progressive self-realization. It is rather an admission that socio-political order is ill-suited for this purpose. The only substantive purpose social cooperation may have is to live up with minimal rules, which make the cooperation possible. All other substantive goals, including the changing conceptions of social justice, are subject to democratic inquiry under the principles of rule of law.[115]

Loughlin, following Michael Oakeshott, recognizes such an order as *societas*, but he also points out that *societas* is in constant tension with *universitas*, that is the order driven by a substantive purpose. According to Loughlin, this tension cannot be overcome, but only prudentially negotiated.[116] We see the possible danger of this negotiation in Loughlin's system of *Potentia*, where in the *societas*, understood as the social coordination among different institutions and power groups within the state, the features of *universitas*, the 'objective laws' of social solidarity and progress acquire dominance; *societas* risks collapsing into *universitas*.

Loughlin regards Hobbes as the political philosopher of *societas*,[117] but the preceding discussion of Hobbes enables us to discern the seeds of *universitas* in Hobbes's political philosophy. Once it is acknowledged, as it is with Hobbes, that political order has to provide the conditions for an individual's progressive self-realization, it is only the subsequent step to dismiss subjective rights. Then, as in Loughlin's social constitution of *Potentia*, the 'objective' notions like 'social needs' and 'social solidarity', replace the rights with the duties. Self-realization becomes a matter of social engagement and discipline.[118] Lurking behind, there is a basic Hobbesian dictum that political community marks the progress, which provides individuals with infinite possibilities to pursue an ever progressing self-realization within the state.

Schmitt would have said of Hobbes that his is a philosophy of state based on a closed metaphysical system, which accomplished the program of religious reformation, within the theory of state.[119] With his engagement with Hobbes's theory Dyzenhaus tries to strip Hobbesian ground from metaphysical content from within, by removing the historical horizon of progress. In light of the foregoing discussion, one should doubt that this can be done within Hobbes's own theory. In *Theses on Philosophy of History*, Walter Benjamin gave a metaphor of the angel of history:

115 *Supra* note 92. Thus, it is not altogether denied that the democratic state may pursue certain substantive goals; rather these substantive aspirations are deprived of the claim to objectivity, under which democratic institutions may become mere instruments, for their attainment.

116 *Foundations*, p. 160.

117 *Ibid.*, p. 162.

118 *Ibid.*, pp. 408-416.

119 Schmitt, *supra* note 65, p. 115.

> A Klee painting named 'Angelus Novus' shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are staring, his mouth is open, his wings are spread. This is how one pictures the angel of history. His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing in from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. The storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.[120]

If one perceives Hobbes as an angel of the historical horizon he founded, hopes that one can reverse or otherwise transcend it from his position appear futile. The angel can neither go back, as the storm of progress drives him into future, nor step forward into the future as his face remains directed to the past. Hobbes's horizon is full of inescapable traps; but how does this affect Dyzenhaus's project?

## G. Concluding Remarks

Benjamin's devastating critique of the liberal historical horizon in the above quote is followed by the call for revolutionary demolition of this horizon for bringing the messianic promise of redemption.[121] Benjamin is joined by Schmitt who intends to restore the horizon of the last judgment and prevent the closure of political theology. Despite the 'secular', 'anti- metaphysical' or 'post-secular' aspirations that the recent readers ascribe to Schmitt and Benjamin, the engagement of the two with the terrain of political theology once again highlights the danger that Dyzenhaus, a careful reader of Schmitt, is well aware of. Directly confronting a metaphysical position comes with a risk, that such an exercise entails the assumption of the metaphysical outlook in general. For example, anarchist Bakunin, who directly and radically confronted political theology, was Schmitt's favourite polemical companion, as Schmitt recognized in him a counterpart, 'the theologian of the antitheological'.[122]

Dyzenhaus's critique of Habermas's universalism detects in Habermas a trait which risks making him, if I am permitted to paraphrase Schmitt in this context, a 'metaphysician of the post metaphysical', a position which threatens Habermas's critical confrontation with Schmitt, and his democratic theory of law.[123] Dyzenhaus points Habermas to the path of pragmatic philosophy, which under-

120 In W. Benjamin, *Illuminations*, H. Arendt (Ed.), New York, Schocken Books, 2007, p. 257.

121 *See* the recent discussion of the issue by G. Marramao, *Messianism without Delay: On the Post-religious Political Theology of Walter Benjamin*, Constellations Vol. 15, No. 3, 2008, pp. 397-406.

122 Schmitt, *Political Theology*, p. 66.

123 Dyzenhaus, 'The Legitimacy of Legality', 46 *U. Toronto L. J.*129 (1996), p. 180.

pins the theories of Fuller and Heller, as a way out from the deadlock metaphysically charged themes of philosophy bring into his democratic theory.[124]

Dyzenhaus has not yet followed Habermas, and the most recent example of Loughlin, in fully taking a philosophical turn. Despite the awareness of the risks, the suggestion to Habermas shows that Dyzenhaus does not destine every philosophical turn to end in metaphysics. This leaves open the possibility of such a turn by Dyzenhaus; of the turn which does not entirely shift the terrain from legal and political theory to philosophy, but makes his presuppositions from pragmatic philosophy more explicit.

Pragmatic philosophy[125] and Heller's theory of state constitute the bridge that may connect the paths undertaken by Dyzenhaus and Loughlin, in the project to work out the theory of state, freed from metaphysical substance and conclusively brought down to earth. In this direction, Loughlin may take a further step; that is, freeing his pragmatic and prudential outlook from the horizon of faceless future, and progress in a spirit of the 'objective law' of social solidarity, the metaphysically laden remnants of idealist philosophy and sociological positivism.

Once the metaphysical residue of historicized politics is cleared, then the dichotomy between legal and political, formal and material constitution is dissolved, together with all of the problematic baggage it carries. Thus, the main problem of a legal constitution is to deliver its only promise: the constitution without the substantive promise(s).

124 *Ibid.*

125 For Loughlin's discussion of the pragmatic foundations of public law, *seesupra* note 50, pp. 388-391.