The nineteenth-century constitutional monarchy was a legislative state. It was to a great extent a parliamentary legislative state precisely in the decisive point, specifically, its concept of law. Only a decision receiving the consent of the representative assembly, or legislature, was a valid law in the formal sense. Such formal concepts of constitutional law are essentially political concepts. For this reason, it was the decisive triumph of the legislature that law appeared essentially in the form of statutes and that positive law was in essence statutory law, but that by definition a valid statute required a decision of the legislature.\(^1\) Indeed, one adhered firmly to the view that under statute was understood “every legal norm” and also that customary [1958/275] law was valid as positive law. But, of course, customary law was valid only as simple law and could be eliminated or circumvented by the wave of the lawmaker’s hand; and, in this regard, the legislature may act more swiftly than customary law. Moreover, in certain, especially important areas of legal life, such as criminal law, but also in constitutional and in administrative law, the permissibility of customary law is still very controversial. Practically speaking, the recognition of customary law is always a certain restrictive reservation working to the disadvantage of the lawmaker. Consequently, the acceptability of customary law is denied where one fears it could damage the trust in the legislator so central to the legislative state. One must not forget that the German theory of customary law came to fruition in the Historical School of Law before 1848, so its actual polemical-political significance was determined through the opposition against the legislative right of the absolutist Monarchs [1932/21].\(^2\) Regarding the effects on the organization of the state, the recognition of customary law always means a limitation on the parlia-
mentary lawmaker to the benefit of other organs, especially, of course, the judiciary. The same holds true for all conceptions of some “conceptual necessity,” that is to say, that which is also substantively compelling for the lawmaker. A good example of this is Fr. Eisele’s 1885 essay, to which G. Husserl has thoughtfully brought attention again. Another example is provided by the current opinion of the Reichsgericht on the question of the essential character of the civil servant. According to the decision, the transfer of authoritarian state grants of authority without a formal post should itself justify the properties of the civil servant by virtue of the “inner essence of the matter,” because the opposing assumption would be “nonsense” and the lawmaker cannot institute “something that is legally impossible and not executable.” In the essay just mentioned [p. 278], Eisele expressed what he is at issue here: “It is a question of the boundaries of legislative power.” Such boundaries can be derived from logical or reflective necessities just as well as from customary law.

Apart from such limitations, which are very controversial in their concrete application, the images of legal science and legal practice were [1958/270] (and still certainly are] mastered by a series of simple equivalencies. Law = statute; statute = the state regulation that comes about with the participation of the representative assembly. Practically speaking, that is what meant by law when one demanded the “rule of law” and the “principle of the legality of all state action” as the defining characteristic of the Rechtsstaat. In the final analysis, everything that in the course of the nineteenth century would develop into a still efficacious system and inventory of concepts, formulas, and postulates pertaining to the Rechtsstaat rested on this congruence of law and statute. The state is law in statutory form, law in statutory form is the state. Obedience will be granted only to the statute, only through the law in statutory form is the right to resistance eliminated. There is only legality, not [1932/22] authority or commands from above. Under the heading “The Rule of Law” in a classic chapter of his work on administrative law, Otto Mayer wrote: “The highest type of state will is that which is expressed in the name of the law” [1924, 64]. According to Otto Mayer, three features characterize such a legislative state: the statute’s power to create law that is objective (in contrast to the internal administra-

tive order and instructions to subordinate organs and officials), the primacy of the statute (namely, primacy over all other conceivable types of state activity), and the legislative reservation clause, more specifically, the monopoly to interfere in constitutionally guaranteed fundamental and liberty rights, which the statutory regulation has in contrast to all other types of state activity. In other words, the lawmaker, and the legislative process under its guidance, is the final guardian of all law, ultimate guarantor of the existing order, conclusive source of all legality, and the last security and protection against injustice. Misuse of the legislative power and of the lawmaking process must remain out of consideration in practical terms, because otherwise a differently constituted state form, an entirely different structure and organization, would become immediately necessary. The preexisting and presumed congruence and harmony of law and statute, justice and legality, substance and process dominated every detail of the legal thinking of the legislative state. Only through the acceptance of these pairings was it possible to subordinate oneself to the rule of law precisely in the name of freedom, remove the right to resistance from the catalogue of liberty rights, and grant to the statute the previously noted unconditional priority. In regard to the priority of the statute, one saw in the subordination of the judge to the statute a guarantee of judicial [1958/277] independence, found in the legality of the administration the most important protection against misuse of state power, and set all of the constitutionally guaranteed fundamental rights undoubtedly at the disposal of the legislature, which can interfere in these rights at its discretion by virtue of the “legislative reservation” clause.

The lawmaker in the legislative state is obviously always only the one, simple legislature. As has already been emphasized, every congruence of [1932/23] different types of lawmakers and of mutually relativizing concepts of law destroys the legislative state itself. In the legislative state with a closed system of legality, there cannot be numerous “sources of the law,” as under Roman public law, for example: leges, Plebiszito, Senatusconsulte, constitutiones principum, magistratiae, Edicte, Consulta prudentium, etc. The lawmaker of a logically consistent legislative state must retain its “monopoly” of legality. However, what should occur when the
trust in the lawmaker ceases to be based on the harmony of justice and legislative results was hardly considered in the prewar era, let alone answered. With its complicated restrictions and counterbalances—bicameral legislature, independent, royal government, supported by army and civil service, federal controls and counterweights—the legislative process contains sufficiently strong guarantees of moderation and an adequately secure protection of freedom and property against arbitrariness and misuse of the legal form. In such a state form, a purely formal concept of law, independent of all content, is conceivable and tolerable. Even if one unconditionally, without compromise and presuppositions, views everything that those in responsible positions decide via the legislative process as alone definitive of positive rights, all the typical, fundamental principles and institutions pertaining to the Rechtsstaat, such as, for example, the legal obligation of the independent judge to faithfully enforce statutes, the guarantee against arbitrary punishment contained in the principle “no sentence without statute,” or the statutory reservation on fundamental and liberty rights, would still be sensible and tolerable. They would be genuine bonds, effective guarantees, and real reservations, because the unerring, unproblematic, direct confidence in the simple lawmaker and the legislative process does not require any further bonds, guarantees, or reservations. Only because of the unshakable confidence in the [1958/278] legislature and its type of laws can principles remain unexpressed, principles such as “[t]he right of the lawmaker is unlimited; all other rights of state power are limited” (Leuthold 1884), or “[t]he legislature can infringe on property” (1932/24) (Anschütz 1912).

This confidence remains the prerequisite of each and every constitution that organizes the Rechtsstaat in the form of a legislative state. Otherwise, the legislative state would be a rather complicated absolutism; the unconditional claim to obedience would be an open, coercive act of domination; and the honorable renunciation of the right to resistance would be an irresponsible act of stupidity. When the concept of law is deprived of every substantive relation to reason and justice, while simultaneously the legislative state is retained with its specific concept of legality concentrating all the majesty and dignity of the state on the statute, then any type of administrative directive, each command and measure, every order to any officer or soldier, and all detailed instructions to a judge, by virtue of the “rule of law,” can be made legal and given the form of law through a decision of parliament or by the other organs participating in the legislative process. The “purely formal” reduces itself then to an empty term and to the slogan “statute,” giving up the connection with the Rechtsstaat. All the dignity and majesty of the statute depends exclusively and directly, more specifically with directly positive-legal meaning and effect, on this trust in the justice and reason of the legislature itself and in all the organs participating in the legislative process. All legal guarantees and insurance, every protection against misuse, are placed in the person of the all-powerful lawmaker or in the distinctiveness of the lawmaking process. If that is not to be completely senseless and pure arbitrariness, it must be dominated entirely by the presupposition of the already noted trust, which first leads to the congruence of justice and formal law. By no means is this system of legality without presuppositions. An unconditional equivalence of law with the results of any particular formal process, therefore, would only be blind subordination to the pure decision of the offices entrusted with lawmaking, in other words, a decision detached from every substantive relation to law and justice, and, consequently, an unconditional renunciation of any resistance. It would be sic volo sic jubeo in its most naive form and only conceivable [1958/279] psychologically on the basis [1932/24] of the remnant of some superstition or as residues of an earlier, substantially richer, religious-like belief in the statutory form. One can term that “positivism,” just as one can designate uncritically every type of decisionism as positivism. Only this term no longer deceives one that the former, unconditional formalism is a purely politically motivated claim to subordination, with an equally politically motivated denial of every right to resistance.

Prewar German state theory always recognized a substantive concept of law alongside a formal one. “One cannot get by in theory and practice without the substantive concept of law,” according to Anschütz (1901, 33), “and the Prussian Constitution cannot be understood or explained without it.” On this basis, the objectively determined characteristics of law are also acknowledged. Law in the substantive sense is a legal norm.
or legal principle, a determination of what should be right for everyone. One retained the view that a formal statute normally contains a substantive legal principle and is distinguishable from any command. Also, the dominant understanding of the need for a sanction to make a command into a legal rule in the form of a statute shows that the distinction of norm and command, of statute and measure, was still current. "Every statute is comprised of two different parts, the one containing the rule itself, the other the legal command, or the order of obedience" [Laband]. But one did not conclusively render this connection between legal norm and statute into a public law definition of the statute that clearly distinguishes, for example, the statute as a general, lasting rule from a sheer command or mere measure. Alongside this concept enters a second, entirely different concept of the statute, which, however, was also termed "law in the substantive sense" (specifically, therefore, because the concept was not "formal"): namely, the statute as an "interference in the freedom and property of the citizen." This circumstance is only explicable in reference to the situation of the nineteenth century and rests on the opposition of state and society, government and representative assembly, bureaucrats [subordinated to a "specified power [1932/26] relationship"] and the free state citizen, finally on the general distinction pertaining to the bourgeois Rechtsstaat between the free [in principle unlimited] private sphere and the preexisting, statutory [1958/280] [hence, in principle limited and definable] grant of state power. A further distinction stemming from this is that between the statute or, more precisely, a decree with the force of law as an "interference with the freedom and property of the state citizen" and the administrative decree as an act that does not intrude on this sphere of freedom, but rather only applies "inside the organs of administrative authority" [Anschütz].

Of course, defining statutes as involving "interference with freedom and property" had only a political meaning in a polemical sense directed against the authoritarian state executive, more specifically, against the royal government and its army and bureaucracy. That one compared the two entirely disparate criteria of a statute [substantive right and interference], both "substantive," with a "formal" criterion was not elegant in abstract-logical terms, but it was readily understand-

able given the concrete domestic political situation of the nineteenth century. By contrast, it had to confuse the concepts of a legislative state that current thinking, despite both its "substantive" concepts of law, ascribed to the formal lawmaking process the capacity to take advantage of the form of the statute for any intended purpose, though the resulting statute was no longer a law in the substantive sense and, therefore, had nothing more to do with one or the other substantive, conceptual definitions. In this way, the entire dignity of the Rechtsstaat, which was derived from the first substantive concept of law, law - legal norm, and which radiated out to include the formal legislative procedure, was cut off from its origin and from its source, particularly from its objective connection with the law. At the same time, the idea of protection and security residing in the second concept of the statute [interference with freedom and property] was surrendered to the lawmaker, specifically in favor of a formal, purely political concept of statute detached from every relation to law and justice. The statute no longer needs to be, according to its purpose, a general [in the sense of like handled as like], lasting regulation with a [1932/27] definable and certain content. The lawmaker creates what he wants in the lawmaking process; that process is always "law," and it always creates "right." Through this change, the way was open to an absolutely "neutral," value- and quality-free, formal-functional concept of legality without content. While in administrative law, one still strictly retained the general character of the decree [in contrast to the administrative directive] and considered the generality requirement in this context conceivable and even [1958/281] necessary; and though also in this context otherwise definite characteristics of the norm were acknowledged, such as determinable content, proportionality, equality, one dealt with everything in regard to the statute in public law, where it had far greater practical significance, as a pointless theoretical game lacking firm boundaries.

As long as the domestic situation was normal and peaceful, and while the confidence in the functioning of the organs constituting the legislature was unshaken, theoretical ambiguity was certainly not an issue. When the dualism of state and society was set aside at the same time as the dualistic structure of the constitutional monarchy, the state's will and
the people’s will became identical, as one would expect under
democratic logic, designating every expression of the people’s
will as “statute” and giving it the entire dignity and majesty
due this concept by virtue of its connection with law and
justice. In a democracy, law is the momentary will of the
people present at that time, that is to say, in practical terms,
the will of a transient majority of the voting citizenry, lex
est, quod populus jabet. The distinction between norm and
command, intellect and will, ratio and voluntas, which sup-
ports the parliamentary legislative state with its distinction
between statute and statutory application, is here again sub-
sumed under a “formal” concept of law and threatens the struc-
ture of the parliamentary system of legality. Nevertheless, that
is tolerable for other reasons in a logically consistent democ-
racy. For, according to democratic presuppositions, the ho-
ogeneous people have all the characteristics that a guarantee
of the justice and reasonableness of the people’s expressed will
cannot renounce. No democracy exists without the presup-
position [1932/28] that the people are good and, consequently,
that their will is sufficient. Il suffit qu’il veu. In the parlia-
mentary democracy, the will of parliament is identified with that
of the people. Here, parliament’s simple majority decision can
be both just and law, as long as it is presupposed that the ma-
ajority decision contains in itself the previously noted qualities
of the people’s will. Also in this regard, a “formal” concept of
law is conceivable and acceptable, though not unconditionally
formal. It is, instead, entirely connected with the confidence
in the congruence between the parliamentary majority and the
will of the homogeneous people. In regard to the French con-
stitutional law of 1875 and the French parliamentary democracy,
an [1958/282] exceptional author of French public law, Carré
de Malberg [1931], could therefore recently explain that all ob-
jective traits of the concept of law, such as its general character
or the permanence of the rule, are to be rejected because the
will of the parliament is directly that of the sovereign people,
the volonté générale itself. That is the characteristic formula
of parliamentary democracy. Today, in practical terms, this
formula is directed most of all against the judicial review of
statutes because such control of legislative jurisdiction would
infuse the parliamentary legislative state with elements of a
jurisdictional state [jurisdiktionellen Staates], which, as a for-

t

If the assumptions underlying the legislative state of the
parliamentary-democratic variety are no longer tenable, then
closing one’s eyes to the concrete constitutional situation and
clinging to an absolute, “value-neutral,” functionalist and for-
mal concept of law, in order to save the system of legality, is not
far off. The “law,” then, is only the present decision of the mo-
mentary parliamentary majority. As noted, that is conceivable
and tolerable given the unstated, presupposed confidence in
the capacity of parliament, both parliamentarians and of par-
liament generally, to guarantee right and reason through a pro-
cess distinguished by discussion and publicity. Already at this
point, however, another necessity [1932/29] must be stressed,
the unavoidability of which is for the most part insufficiently
acknowledged: the written constitution of the parliamentary
legislative state must ultimately limit itself to organizational
and procedural rules. That corresponds to the neutrality of a
system, in relatively liberal as well as absolutist-functional
terms, whose process and method should stand open and be
accessible to different opinions, directions, movements, and
goals. Moreover, it must be self-evident that the written con-
stitution of every legislative state will not preempt the legis-
lature that the constitution establishes, while the constitution
itself plays the role of legislature through its own substantive
legal rules. The legislative state acknowledges only a single,
ordinary legislature, which must hold the monopoly on the
creation of substantive law. Indeed, the legislative state of the
nineteenth-century German [1958/283] constitutional monar-
chy recognized a threefold concept of law. For the formal con-
cept of law, however, the consent of the popular assembly was
alone essential and conceptually definitive. Moreover, both
the struggle for the independent royal right to issue decrees
with the force of law as well as the recognition of the royal
sanction of parliamentary passage of statutes showed that a
legislative state of the parliamentary-democratic variety had
not yet come about. But even the supporters of the indepen-
dent royal decree power did not dare designate the King’s legal

24 Part I

Legislative State and the Concept of Law 25
CHAPTER 2

Legality and the Equal Chance for Achieving Political Power

Article 68 of the Weimar Constitution establishes the parliamentary legislative state: Reich statutes are passed by the Reichstag. Comprehending law and statute without relation to any content as the present conclusion of the transitory parliamentary majority corresponds to a purely functional manner of thinking. In this way, law, statute, and legality become "neutral" procedural mechanisms and voting procedures that are indifferent toward content of any sort and accessible to any substantive claim. Indeed, the parliamentary legislative state's concept of law inherently has a wide-ranging neutrality regarding the most varied content. But this concept of law must contain certain qualities, such as normative generality, substantive definiteness, and permanence, if it is to support the legislative state at all. Above all, it may not be "neutral" toward itself and its own presuppositions. If the parliamentary body is made into a mere function of general majority elections, and if its majority decision constitutes law, but without regard to the qualities of its members [1958/284] and in disregard of any substantive requirement of law; then all guarantees of justice and reasonableness, along with the concept of law and legality itself, end in an internally consistent functionalist view without substance and content that is rooted in arithmetic understandings of the majority. Fifty-one percent produces the majority in parliament; 51 percent of the votes in parliament produces law and legality; 51 percent also demonstrates the confidence of parliament and produces the parliamentary government.

[1952/31] The method of will formation through simple majority vote is sensible and acceptable when an essential similarity among the entire people can be assumed. For in this
case, there is no voting down of the minority. Rather, the vote should only permit a latent and presupposed agreement and consensus to become evident. As noted, since every democracy rests on the presupposition of the indivisibly similar, entire, unified people, for them there is, then, in fact and in essence, no minority and still less a number of firm, permanent minorities. The process of determining the majority comes into play, not because finding what is true and proper has been renounced on account of relativism or agnosticism—that would be, in view of the momentous political decisions at issue here, a suicidal renunciation and is possible, as Hans Kelsen [1928, 77] concedes, "only in relatively peaceful times," thus only when it does not matter. One must assume that, by virtue of being a part of the same people, all those similarly situated would in essence will the same thing. If the assumption of an indivisible, national commonality is no longer tenable, then the abstract, empty functionalism of pure mathematical majority determinations is the opposite of neutrality and objectivity. It is only the quantitatively larger or smaller, forced subordination of the defeated and, therefore, suppressed minority. The democratic identity of governing and governed, those commanding and those obeying, stops. The majority commands, and the minority must obey. Arithmetic calculability also stops, because one can only reasonably produce a sum from that which is very similar. One can [1958/285] designate the functionalism of shifting majorities lacking both content and presuppositions only as "dynamism," although the lack of stasis and of substance actually still does not yet need anything dynamic. But when one perfects this substantively indifferent and neutral process even more and takes it to the absurdity of only a mathematical-statistical majority determination—a substantive principle of justice will nevertheless always still have [1932/33] to be presupposed, if one wishes to keep the entire system of legality from collapsing immediately: the principle that there is an unconditional equal chance for all conceivable opinions, tendencies, and movements to achieve a majority. Without this principle, majority calculus would be a grotesque game, not merely because of its indifference toward every substantive result. The concept of legality derived from this principle would also be a shameless mockery of all justice. But, with this system, the principle would also already come to an end after the first majority is achieved, because that majority would immediately establish itself as the permanent legal power. Preserving the availability of the principle of equal chance cannot be read out of the parliamentary legislative state. It remains the principle of justice and the existentially necessary maxim of self-preservation. Also, the thoroughly settled functionalism of purely mathematical majorities cannot renounce this indispensable presupposition and foundation of its legality.

That state power is legal should, above all, eliminate and negate every right to resistance as law. But the ancient problem of "resistance against the tyrant" remains, that is, resistance against injustice and misuse of state power, and the functionalistic-formalist hollowing out of the parliamentary legislative state is not able to resolve it. This leads only to a concept of legality that is substantively noncommittal, neutral in a way that undermines its own validity, and dismissive of all substantive justice. The emptiness of mere majority calculus deprives legality of all persuasive power. Its neutrality, first of all, is neutrality toward the difference between justice and injustice. The possibility of injustice, the possibility of the "tyrant," is eliminated from the world only through a formal sleight of hand, namely, only by no longer calling injustice injustice and tyrant tyrant, much as one eliminates war from the world by terming it "peaceful measures accompanied by battles of greater or lesser scope" and designating [1958/286] that a "purely juristic definition of war." By "conceptual necessity," then, legal power simply can no longer do injustice. The old teaching of a right to resistance distinguishes among two types of "tyrants": he who [1932/33] arrives at the seat of power in a legal manner, but then exercises and abuses power badly and tyrannically, that is, the tyrannus ab exercicio; further, the tyrannus absque titulo, who achieves power without legal title and is indifferent as to whether it exercises power well or badly. Under the substantive neutrality or under the utter substantive emptiness of a functional concept of legality, there can generally no longer be the first sort of tyrant, in particular, the illegal use of legal power. However, the "tyrant without legal title" could also never occur, if the majority attained lawful title to the legal possession of power. Only he who exercises state or state-like power without the 51 percent majority on their side is ille-
gal and a “tyrant.” Whoever has this majority would no longer do injustice, but rather everything he does is transformed into justice and legality. With such consequences, the principle of a functional concept of law without content carries itself ad absurdum.

The claim to legality renders every rebellion and counter-measure an injustice and a legal violation or “illegality.” If legality and illegality can be arbitrarily at the disposal of the majority, then the majority can, above all, declare their domestic competitors illegal, that is, hors-la-loi, thereby excluding them from the democratic homogeneity of the people. Whoever controls 51 percent would be able legally to render the remaining 49 percent illegal. The majority would be permitted to use legal means to close the door to legality, through which they themselves entered, and to treat partisan opponents like common criminals, who are then perhaps reduced to kicking their boots against the locked door. With this troubling possibility in view, one attempts today to ensure a certain protection mostly through the introduction of threshold requirements and qualifications of the voting majority, demanding for selected issues a two-thirds and similar majorities. On the one hand, one gives protections against 51 percent majorities under the misleading slogan of “minority guarantees,” but then, on the other hand, one adheres to the empty functionalism of a mere arithmetic majority and minority calculations. The following chapter will show that the introduction of such numerically [1958/287] qualified [1932/34] majority calculus also devalues and destroys democracy as well as the parliamentary legislative state and its concept of legality. Indeed, it is already evident that this mathematical functionalism of the transitory majority calculus continually undermines itself when the principle of the equal chance of achieving a majority is not strictly observed. The parliamentary legislative state, which today rests on the rule of temporary majorities, can deliver the monopoly of the legal exercise of power to the majority parties and can demand that the minorities renounce the right to resistance only so long as the equal chance of achieving a majority really remains open and this assumption of its principle of justice is somehow still believable. Most of what has been presented to justify majority rule is traceable to this principle, especially what the single available monograph [Starosolsky] 1916, 63–64] on the subject has to say about the indispensable “exchange in the personal composition of the majority” or the necessary “indeterminacy” of its rule.

In his famous book about the theory of the estate-based right to resistance, Kurt Wolzendorff [1915] grounded and justified the elimination of the right to resistance in reference to the introduction of an ordered system of courts or of dispute resolution. Much more important, however, for the parliamentary legislative state than the establishment of a system of legal protections or the preservation of a chance for a trial before established courts is the maintenance of the equal chance to achieve the majority, which means political power. For when a party controlling 51 percent of the lawmaking body can legally set definitive statutes for the judiciary, then it also dictates to the judiciary the content of the judges’ decision for civil law, labor law, criminal law, service law, and all other types of legal disputes, because judges are obligated to enforce statutes. Moreover, the party with 51 percent control of the legislature forms the legal government, which has at hand all the means of state power involved in legal application. Thus the equal chance at a judicial solution for the nondominant party transforms itself into the [1932/35] opposite of such a chance. Whoever has the majority makes the valid statutes. Moreover, those in the majority themselves enforce the statutes they make. They have a monopoly over the validity of statutes and their execution as well as over the production and sanction of legality. Most important, [1958/288] however, is that the monopoly over the enforcement of valid statutes confers on those in the majority the legal possession of state means of power and with it, a political power that extends far beyond that over the mere validity of norms. The ruling party can make use of the advantage, which comes along with the mere possession of the legal means of power in a state type dominated by this form of legality. The majority is now suddenly no longer a party; it is the state itself. In the state, as Otto Mayer once said, “that which is without limits breaks through” the norms, in which the legislative state and statutory application bind themselves, however narrow and limited these sets of norms may be. Therefore, the mere possession of state power produces an additional political surplus apart from the power that is merely normative and legal, a supralegal premium on
the lawful possession of legal power and on the achievement of a majority that lies beyond any normative consideration.

This political premium is relatively calculable in peaceful and normal times; in abnormal times, it is entirely incalculable and unpredictable. It always has a threefold character. It emerges, first, from the concrete interpretation and use of undetermined and evaluative concepts, such as “public security and order,” “danger,” “emergency,” “necessary measures,” “hostility to the state and constitution,” “peaceful dispositions,” “life and death issues,” etc. Such concepts, without which no state type could survive, are distinctive in that they are bound directly to the momentary situation, that they receive their specific content initially through concrete application, and, most of all, that their concrete application and execution are alone decisive in all difficult and politically important times. Second, the legal holder of state power has the presumption of legality on his side in hard cases, which, of course, with such indeterminate concepts one always encounters in difficult political circumstances. Finally, third, even in cases of doubtful legality, [1932/36] the directives of the legal holder of state power are directly executable in the immediate instance, even when opportunities for legal challenges and judicial protections are provided. In a race between the executive and the judiciary, the judiciary will mostly arrive too late, even if one provides it the power of issuing measures and rulings for use in political cases that are valid only temporarily, under certain conditions, and in a single instance, and that, therefore, are themselves not unquestionable instruments. Consequently, the judicial chance signifies, in fact, a necessary corrective and a protection that one should not dismiss, but it cannot be politically decisive and cannot alone support this type of legality’s principle of justice, the preservation of the equal chance. Added to the current German legal consciousness, sharpened through many foreign experiences, is the fact that judicial procedures for resolving political conflicts have generally lost value and standing. In none of the life-and-death questions of German foreign policy, as things stand today, could one still impudently insist on the opportunity to win an international law case affording Germany’s death penalty.

Everything thus hinges on the principle of an equal chance to win domestic political power. If principle is no longer defended, then one gives up on the parliamentary legislative state itself, its justice and legality. In this regard, however, are good will and the best intentions of much use? Every critical moment endangers the principle of the equal chance because it reveals the inevitable opposition between the premium on the legal possession of power and the preservation of the availability of the equal chance for achievement of domestic political power. On the one hand, the equal chance is already eliminated through the mere supposition of the legality of every expression of state authority. On the other hand, no legal state power can do without this supposition. On the other hand, part of the essential content of the principle of equal chance is that its concrete interpretation and use is not one-sided, but rather that it is taken up by all parties under full legal equality. On the other hand, a concept like “equal chance” itself is again one of the indeterminate concepts tied directly to a specific situation, whose interpretation and proper use is necessarily a matter of legal power, therefore, of the present ruling party. On its own initiative, the ruling party determines what possibilities [1934/37] for action it permits domestic opponents. In this way, the ruling party decides when the illegality of competitors commences. Obviously, that is no longer equal competition and no longer an equal chance.

The principle of equal chance is of such sensitivity that any serious doubt about the loyalty of all participants already renders the principle’s application impossible. For it is self-evident that one can hold open an equal chance only for those whom one is certain would do the same. Any other use of such a principle [1938/39] would not only be suicide in practical terms, but also an offense against the principle itself. Due to this necessity, the party in legal possession of power, by virtue of its hold on the means of state power, must itself determine and judge every concrete and politically important application and use of the concept of legality and illegality. That is its inalienable right. However, it is just as much an inalienable right of the minority seeking to gain possession of the state means of power, on the basis of its claim to an equal chance with full legal equality, to render judgment itself over not merely its own concrete legality or illegality, but also over that of the opposing party in control of the means of state power. So the principle of equal chance does not contain in its own inner assump-
tions an answer to the question that arises at critical moments and is the only decisive question in practical terms: in a case of conflict, who removes doubts and resolves differences of opinion? Precisely for the proper use of the previously mentioned indeterminate concepts that are tied to particular situations, such as public order, hostility to the state or the constitution, peaceful or not, but, above all, also legal or illegal attitudes, an essential part of the equal chance is that ruling and non-ruling parties, majority or minority, have unconditional parity. A practical remedy would be to seek a solution in the introduction of an "impartial" third party, who decides the conflict, whether judicially or otherwise. But the system of legality of the parliamentary legislative state would be betrayed. For in contrast to the parties to the dispute, this third party would be a supraparliamentary, [1932/39] indeed, suprademocratic, higher third, and the political will would no longer come about through the free competition among political parties, which have fundamentally the same chances for power. The problem stemming from the principle of equal chance would not be solved through the principle itself. It would, rather, only be acknowledged that the principle merely leads to irresolvable questions and critical situations. As soon as the assumption so essential for this system of legality collapsed, specifically, that of legal disposition held equally on all sides, then there is no longer a remedy. The majority party in legal control of the means of state power must assume that the opposing party, when it achieves power legally, will use legal means in order to ensconce itself in possession of power and to close the door behind it, hence, legally eliminating the principle of legality itself. [1958/391] The minority seeking power maintains that the ruling majority has long done the same. Whether explicite or implicitie, the minority is on its own declaring the existing state power illegal, which no legal power can permit. So at the critical juncture, each denounces the other, with both playing the guardian of legality and the guardian of the constitution. The result is a condition without legality or a constitution.

With every concept of so-called political right, which rests on legal equality and harmonization, one such critical moment can appear. Concepts involving foreign policy and international law, such as security, the danger of war or of an invasion, threat, attack, war guilt, etc., recognize the same sort of dialectic. For example, in the so-called war ban clause of the Kellogg Pact of 1928, several powers expressly made the reservation that every violation of the pact relieves other states of their treaty obligations toward the aggressor. That is not an inappropriate reservation; it is actually self-evident. But one sees immediately that the pact became worthless for the critical case at which it was directed, specifically the case of war, at least so long as the pact is applied with unconditional legal equality, and, for example, so long as an imperialistic [1932/39] great power or group of powers plays the higher third and itself interprets and sanctions the indeterminate concepts of the pact, including especially the concept "war," which is likely to occur in political reality. In domestic political terms, however, an analogous, concrete decision regarding the irresolvable antimony may only be achieved through the party in possession of the legal power. In this way, the party becomes the higher third and, in the same moment, eliminates the principle of its legality, the equal chance. In other words, the advantage of the legal possession of state power decides the case.

The threefold great premium on the legal possession of power is grounded in the ease of judgment, the supposition of legality, and the ability to achieve the immediate execution of one's dictates. Its entire, primary effect eliminates any thought of the equal chance and becomes manifest in the proper use of the extraordinary powers in the state of exception. Moreover, the premium provides the ruling party control not only over the "plunder," or the "spoils," as it is traditionally known, but also over the gross domestic product that is bound up with the taxing and spending power in a quantitative total state. [1958/392] It is enough to suggest this side of the legal possibilities in order to recognize its effect on the legality principle of the parliamentary legislative state. A number of smaller premiums should be added to the large one. For the elections and votes of the next election period, for example, a majority party can alter the election law rules to its advantage and to the disadvantage of its domestic political competitors. The majority party can act like the slim majority of the Prussian legislature in the decision of April 12, 1932, at the end of the election period. With the help of a change in the order of business (§ 20) for the following election period, it intentionally rendered the choice of a Minister President more difficult, in order to take an oppor-
tunity away from its opponent and to improve its own chances for the continuation of the legal possession of power despite no longer having a majority. The "caretaker governments," which today in several countries last months, even years, offer an especially illuminating example of the type of premium from holding power that is of interest here. These caretaker governments settle not only all "current business," [1932/40] as the Prussian Constitution prescribes, for example. Rather, one reads simply "all business" instead of "continuing business," first because one relies on the Staatsgerichtshof, which refuses to clarify the distinction [Lammers and Simons 1929, 1:267], but also because it is difficult for one with a disloyal disposition to distinguish between continuing and other business. Also for these reasons, in regard to its powers, but not its limitations, one places the caretaker government completely at the same level as the duly constituted parliamentary cabinet. So a formerly ruling majority without current majority support remains in possession of the means of state power to the extent that the opposing party did not win for itself a clear countermajority. Obviously, the inner justification then is no longer the majority principle, but still only the factual possession of state power once it has been gained legally. The equal chance is no longer valid, but is still only the triumph of the beatus possident. In the same degree to which such premiums on the possession of power retain a defining political meaning and their ruthless exploitation becomes a self-evident means of partisan power maintenance, the principle of equal chance loses its persuasiveness and, consequently, its foundation in the legality of the parliamentary legislative state. When things really have gone that far, it ultimately comes [1958/293] down to who holds the reins of power at the moment when the entire system of legality is thrown aside and when power is constituted on a new basis.