The Idea and Forms of the State

John W. Burgess

Definitions of so comprehensive a term as the state are generally one-sided and always unsatisfactory. Nevertheless they are useful and helpful. This is primarily a question of political science. Not until the state has given itself a definite and regular form of organization, i.e., not until it has formed for itself a constitution, does it become a subject of public law. It may be said that a state cannot exist without a constitution. This is true in fact; but the state can be separated in idea from any particular form of organization, and the essential elements of its definition can be found in the principle or principles common to all forms. There are two ways of reaching the definition. The one is the process of pure philosophy, the other that of inductive logic. The one gives us an idea of the reason, the other a concept of the understanding. The two ought to coincide, but they more frequently differ. The sources of the difference are manifold. Either the speculation is colored by fancy, or the induction is not exhaustive. Either the idea is too abstract, or the concept too concrete. There is something deeper, too, than the intellectual character of the particular political scientist, which creates this disharmony between the idea and the concept of the state. The idea of the state is the state perfect and complete. The concept of the state is the state developing and approaching perfection. There is one thing, however, which modifies this divergence between the idea and the concept of the state, and that is the dependence, after all, of the speculative philosopher upon objective realities to awaken his consciousness of the idea. This brings the two nearer together. It makes the idea the pioneer of the concept, and the concept the stages in the realization of the idea. If we keep in mind the two processes followed in the formation of the definition, we shall be better able to reconcile the views of the different authors upon this subject. There is nothing more disheartening for the reader than to be dragged through a list of conflicting definitions at the beginning of a treatise, and to be required to select the principle before he knows the facts and details of the subject; still something of

Reprinted in a shortened version from Political Science and Comparative Constitutional Law (Boston: Ginn and Co., 1891), vol. 1, chaps. 1 and 3.
the sort must be done, briefly and tentatively at least, in order to give logical consistence to the work. The reader may take the preliminary definition upon trial at least, and accept it with a temporary faith.

From the standpoint of the idea the state is mankind viewed as an organized unit. From the standpoint of the concept it is a particular portion of mankind viewed as an organized unit. From the standpoint of the idea the territorial basis of the state is the world, and the principle of unity is humanity. From the standpoint of the concept, again, the territorial basis of the state is a particular portion of the earth’s surface, and the principle of unity is that particular phase of human nature, and of human need, which, at any particular stage in the development of that nature, is predominant and commanding. The former is the real state of the perfect future. The latter is the real state of the past, the present, and the imperfect future. In a treatise, therefore, upon public law, and upon political science only as connected with public law, we have to deal only with the latter. Our definition must, therefore, be that the state is a particular portion of mankind viewed as an organized unit. This definition requires a great deal of analysis and explanation.

I. What is the principle according to which the portions of mankind forming states are to be determined?

No answer can be given to this question that will be valid for all times and conditions. In the ancient civilization the principle of common blood or a common faith, in the mediaeval that of personal allegiance, and in the modern that of territorial citizenship, have chiefly determined the political divisions of the world. We must be careful, however, not to separate these principles, as to the time of their application, too exactly from each other. Each of them reaches out beyond its proper period and, so to speak, overlaps the next, creating that confusion in regard to citizenship and alienage which every public lawyer meets and dreads. But these answers are not wholly satisfactory. They resolve the problem in part, but they raise other and more difficult questions. How far will a bond of blood, or of faith, preserve sufficient strength to serve as the principle of political organization? What are the circumstances which direct personal allegiance towards this point or that? What are the conditions which make a particular territory the home of a state?

With these questions, we have again entered the domains of geography, ethnology and the history of civilization. In so far as the modern state is concerned—i.e., in so far as the question is practical—I have attempted to show what answer these sciences afford. As to the ancient and mediaeval states, we can only say that their principles of organization left their political limits and boundaries uncertain and inexact, producing continual unrest and conflict.

II. What are the peculiar characteristics of the organization which we term the state?
First, I would say that the state is all-comprehensive. Its organization embraces all persons, natural or legal, and all associations of persons. Political science and public law do not recognize in principle the existence of any stateless persons within the territory of the state.

Second, the state is exclusive. Political science and public law do not recognize the existence of an imperium in imperio. The state may constitute two or more governments; it may assign to each a distinct sphere of action; it may then require of its citizens or subjects obedience to each government thus constituted; but there cannot be two organizations of the state for the same population and within the same territory.

Third, the state is permanent. It does not lie within the power of men to create it today and destroy it tomorrow, as caprice may move them. Human nature has two sides to it—the one universal, the other particular; the one the state, the other the individual. Men can no more divest themselves of the one side than of the other; i.e., they cannot divest themselves of either. No great publicist since the days of Aristotle has dissented from this principle. Anarchy is a permanent impossibility.

Fourth and last, the state is sovereign. This is its most essential principle. An organization may be conceived which would include every member of a given population, or every inhabitant of a given territory, and which might continue with great permanence, and yet it might not be the state. If, however, it possesses the sovereignty over the population, then it is the state. What now do we mean by this all-important term and principle, the sovereignty? I understand by it original, absolute, unlimited, universal power over the individual subject and over all associations of subjects. This is a proposition from which most of the publicists, down to the most modern period, have labored hard to escape. It has appeared to them to contain the destruction of individual liberty and individual rights. The principle cannot, however, be logically or practically avoided, and it is not only not inimical to individual liberty and individual rights, but it is their only solid foundation and guaranty. A little earnest reflection will manifest the truth of this double statement.

First, power cannot be sovereign if it be limited; that which imposes the limitation is sovereign; and not until we reach the power which is unlimited, or only self-limited, have we attained the sovereignty. Those who hold to the idea of a limited sovereignty (which, I contend, is a contradictio in adjecto) do not, indeed, assert a real legal limitation, but a limitation by the laws of God, the laws of nature, the laws of reason, the laws between nations. But who is to interpret, in last instance, these principles, which are termed laws of God, laws of nature, laws of reason, and laws between nations, when they are invoked by anybody in justification of disobedience to a command of the state, or of the powers which the state authorizes? Is it not evident that this must be the state itself? It is conceivable, no doubt, that an individual may,
upon some point or other, or at some time or other, interpret these principles more truly than does the state, but it is not at all probable, and not at all admissible in principle. It is conceivable, also, that a state may outgrow its form of organization, so that the old organization no longer contains the real sovereignty; and that an individual, or a number of individuals, may rouse the real sovereign to resist triumphantly the commands of the apparent sovereign as misinterpretations of the truths of God, nature, and reason. That would only prove that we had mistaken the point of sovereignty, and would teach the lesson that the state must always hold its form to accord with its substance. When the French National Assembly of 1789 disputed the commands of the King, it could find no ground to rest upon, either in logic or in fact, until it declared the sovereignty to be in the nation—in the nation organized in the Assembly. The common consciousness is the purest light given to men by which to interpret truth in any direction; it is the safest adviser as to when principle shall take on the form of command; and the common consciousness is the state consciousness. In the modern national state we call it the national consciousness. The so-called laws of God, of nature, of reason, and between states are legally, and for the subject, what the state declares them to be; and these declarations and commands of the state are to be presumed to contain the most truthful interpretations of these principles, which a fallible and developing human view can, at the given moment, discover. It is begging the question to appeal to the consciousness of the world or of humanity against the consciousness of the state; for the world has no form of organization for making such interpretation, or for intervening between the state and its citizens to nullify the state’s interpretation. I do not ignore the fact that some great publicists think they see in the body of general agreements, positive and customary, between states, called international law, the postulates of a consciousness wider than that of a single state. This may be true; but we must not forget that these agreements and customs are not law between a state and its own subjects unless the state recognizes them as such. For instance, it is a firmly established principle of our own constitutional law that our own governmental organs, authorized thereto by the state, are the interpreters, in last instance, of international law for all persons subject to their jurisdiction. At the present stage of the world’s civilization, a nearer approximation to truth seems to be attainable from the standpoint of a national state consciousness than from the standpoint of what is termed the consciousness of mankind. An appeal to the consciousness of mankind, if it bring any reply at all, will receive an answer confused, contradictory, and unintelligible. In the far-distant future it may be otherwise; but for the present and the discernible future, the national state appears to be the organ for the interpretation, in last instance, of the order of life for its subjects. Contact between states may, and undoubtedly does, clarify and harmonize the consciousness of each; but it is
The state consciousness which is the sovereign interpreter, and the state power which is the sovereign transformer of these interpretations into laws. But, it may be objected, if sovereignty must have this character of infallibility, it should be denied to the state altogether. That would mean, at once and from the start, the annihilation of the state. The state must have the power to compel the subject against his will: otherwise it is no state; it is only an anarchic society. Now the power to compel obedience and to punish for disobedience is, or originates in, sovereignty. This condition can, therefore, offer no loophole of escape from the proposition.

In the second place, the unlimited sovereignty of the state is not hostile to individual liberty, but is its source and support. Deprive the state, either wholly or in part, of the power to determine the elements and the scope of individual liberty, and the result must be that each individual will make such determination, wholly or in part, for himself; that the determinations of different individuals will come into conflict with each other; and that those individuals only who have power to help themselves will remain free, reducing the rest to personal subjection. It is true that the sovereign state may confer liberty upon some and not upon others, or more liberty upon some than upon others. But it is also true that no state has shown so little disposition to do this, and that no state has made liberty so full and general, as the modern national popular state. Now the modern national popular state is the most perfectly and undisputedly sovereign organization of the state which the world has yet attained. It exempts no class or person from its law, and no matter from its jurisdiction. It sets exact limits to the sphere in which it permits the individual to act freely. It is ever present to prevent the violation of those limits by any individual to the injury of the rights and liberties of another individual, or of the welfare of the community. It stands ever ready, if perchance the measures of prevention prove unsuccessful, to punish such violations. This fact surely indicates that the more completely and really sovereign the state is, the truer and securer is the liberty of the individual. If we go back an era in the history of political civilization, we shall find this view confirmed beyond dispute. The absolute monarchies of the fifteenth, sixteenth, and seventeenth centuries were, no one will gainsay, far more sovereign organizations of the state than the feudal system which they displaced; and yet they gave liberty to the common man at the same time that they subjected the nobles to the law of the state. In fact they gave liberty to the common man by subjecting the nobles to the law of the state. Should we continue to go backward from the absolute monarchical system to those systems in which the sovereignty of the state was less and less perfectly developed, we should find the liberty of the individual more and more uncertain and insecure, until at last the barbarism of individualism would begin to appear.

At the beginning of this argument, I assumed the state to be deprived of
its unlimited power over the individual. But who or what can do this? That which can be so deprived is not the state; that which deprives is the state. Really the state cannot be conceived without sovereignty; i.e., without unlimited power over its subjects. That is its very essence. Of course the state may abuse its unlimited power over the individual, but this is never to be presumed. It is the human organ least likely to do wrong, and, therefore, we must hold to the principle that the state can do no wrong.

I think the difficulty which lies in the way of the general acceptance by publicists of the principle of the sovereignty of the state is the fact that they do not sufficiently distinguish the state from the government. They see the danger to individual liberty of recognizing an unlimited power in the government; and they immediately conclude that the same danger exists if the sovereignty of the state be recognized. This is especially true of European publicists, most especially of German publicists. They are accustomed practically to no other organization of the state than in the government; and in spite of their speculative mental character, they, as well as other men, reveal in their reflections a good deal of dependence upon the conditions of the objective world. In America we have a great advantage in regard to this subject. With us the government is not the sovereign organization of the state. Back of the government lies the constitution; and back of the constitution the original sovereign state, which ordains the constitution both of government and of liberty. We have the distinction already in objective reality; and if we only cease for a moment conning our European masters and exercise a little independent reflection, we shall be able to grasp this important distinction clearly and sharply. This is the point in which the public law of the United States has reached a far higher development than that of any state of Europe. Several of the most modern European publicists, such as Laband, Von Holst and Jellinek, have discovered this fact; and their conception of the state has, in consequence thereof, become much clearer. The European states have made great progress towards this condition since the period of the French Revolution. Europe has seen the French state several times organized in constituent convention; and in the years 1848 and 1867 something very like constituent conventions sat at Frankfort and Berlin, to say nothing of the Spanish Cortes and the less important movements of similar character. Such an organization of the state is, however, hostile to independent princely power. It tends to subject the prince to the state. It may leave the hereditary tenure, but it makes the princely power an office instead of a sovereignty. Therefore the princely government disputes the sovereignty of the constituent convention; and the political scientists become confused in their reflections by the din and smoke of the conflict in the objective world. They do not know exactly where the state is; and, therefore, they hesitate to recognize its great and essential attribute of sovereignty. The national popular state alone furnishes the objec-
tive reality upon which political science can rest in the construction of a truly
sic political system. All other forms contain in them mysteries which
the scientific mind must not approach too closely.

There is no topic of political science concerning which a more copious litera-
ture is at hand than the forms of state. There is none, again, in regard to which
a less satisfactory treatment has been attained than this. A careful student of
what has been written upon this subject, both in Europe and America, will, I
think, discover that the cause of this unsatisfactory result, upon the part of the
European publicists, is the fact that they do not discriminate clearly between
state and government; upon the part of the American writers, that they copy
too closely the European authors.

Both of these facts are explicable. In Europe, state and government are
actually more or less mingled and commingled. The publicists are confused in
their reflections by the confusion in the external object. It will be profitable to
dwell upon this point a moment, and inquire how this actual condition of
things has come about, which has exercised such a troubling influence upon
political science. I think the explanation is to be found in the consequences of
the historical development of the state. No great state in Europe, except
France, has cut its history into two distinct and separate parts by revolution,
and founded its existing institutions directly and consciously upon revolution.
We may say then, as the rule, that in the European states the form of state
generated in one period of their history laps over upon that developed in the
succeeding period or periods. A close scrutiny of this process will disclose the
following significant facts, viz, that in the transition from one form of state to
another, the point of sovereignty moves from one body to another, and the old
sovereign body, i.e., the old state, becomes, in the new system, only the
government, or a part of the government. Take the example of English history
after 1066, to make this clearer. First, the king was the state as well as the
government. Then the nobles became the state, and the king became govern-
ment only. Then the commons became the state, and both king and lords
became but parts of the government. Now this change from the old form of
state to the new, when it works itself out gradually and impliedly, so to speak,
does not mark off the boundary sharply and exactly between the old and the
new systems. Naturally the old state does not perceive the change at all or, at
least, not for a long time, and not until after suffering many bitter experiences.
It still expresses itself in the language of sovereignty. It still struts about in the
purple, unconscious that the garment is now borrowed. On the other hand, the
new sovereignty comes very slowly to its organization. Moreover, it orga-
nizes itself, for the most part, in the government, and only very imperfectly
outside of and supreme over the government. For a long time it has the
appearance of being only a part of the government, and, at first, the less important part. For a considerable time it is uncertain where the sovereignty actually is. With such conditions and relations in the objective political world, it is not strange that the European publicists have failed, as yet, to distinguish clearly and sharply between state and government, nor that their treatment of all problems, dependent for correct solution upon this distinction, is more or less confused and unsatisfactory.

In America, on the contrary, existing conditions and relations are far more favorable to the publicists. Our state is but little more than a century old, and rests wholly and consciously upon a revolutionary basis. The organization of the state existing previous to the year 1774 was completely destroyed, and did not reappear in the succeeding organization as a part of the government, holding on to its traditions of sovereignty. We Americans have seen the state organized outside of, and supreme over, the government. We have, therefore, objective aids and supports upon which to steady our reflection and by which to guide our science. The reason why the American publicists have not written better upon this subject cannot, therefore, be the lack of the proper external occasions for the excitation of thought. It is, it seems to me, as I have already said, the fact that they still copy too closely the European authors, and have not ventured to essay independent work. America has yet to develop her own school of publicists and her own literature of political science. Down to this time, the two names which stand highest in our American literature of political science are Francis Lieber and Theodore D. Woolsey. The former was, as everybody knows, a European, educated under European institutions, and a refugee from their oppression, as he regarded it. The latter was Lieber's ardent admirer—we might almost say disciple. It is not strange that they should have suffered under the power of the old influences, and should have confounded, in some degree at least, state and government in their reflections. The new and latest generation of American students of political science have been most largely trained in European universities, under the direction of European publicists, again, and by means of European literature. It will be an effort for them to make such use of their European science as always to gain advantage. It will be of the greatest service to them if they can employ it as a stepping-stone to a higher and more independent point of view; one which will enable them to win scientific appreciation of the distinctive lessons of our own institutions. If they fail to do this, however, we can expect little help from them in the attainment of a better and more satisfying treatment of the topic of this chapter.

It is, therefore, with a good deal of misgiving that I approach this part of my subject. I know that nothing has, as yet, been written in regard to it which has commanded general assent from the political scientists. I am myself conscious of mental dissatisfaction with all that has been advanced, and I
believe that the cause of the confusion of thought, clearly manifest in the different theories presented, is what I have above indicated; but when I come to the task of making clear and exact the distinction between state and government myself, I find myself involved in the same difficulties against which I have just given the word of warning. The fact is, that the organization of the state outside of, and supreme over, the government is, as yet, everywhere incomplete; and that when we assign to it this separate and supreme position, we are, in greater or less degree, confounding the subjective with the objective state, the ideal with the actual state. Nevertheless, I am resolved to make the trial upon this line; content if, upon a single point, I can bring a little more light into this discussion, and make it manifest that a better organization of the state outside of the government would be a great advance in practical politics.

The great classic authority upon this topic is Aristotle. Every student of political science is acquainted with his noted distinction of states, as to form, into monarchies, aristocracies, and democracies (politeia). Not every student reflects, however, that the Greek states were organized wholly in their governments; i.e., completely confounded with them. This fact made the question far more simple than it is at present. We of today have a double question instead of a single one. We must determine, first, the forms of state, and then, the forms of government. It is perhaps natural that the state and its government should harmonize in this respect; but it is not always a fact that they do, and it is not always desirable that they should completely coincide in form. It is difficult to see why the most advantageous political system, for the present, would not be a democratic state with an aristocratic government, provided only the aristocracy be that of real merit, and not of artificial qualities. If this be not the real principle of the republican form of government, then I must confess that I do not know what its principle is. Now, it seems to me that the Aristotelian proposition contains the true solution of the whole question for the Hellenic politics, and for all systems in which the state and the government are identical; and that it is the true and complete principle of distinction in regard to the forms of state, but not of government, in those systems where state and government are not identical, but exist under more or less separate organization.

My contention is, that the classification of states, as to form, into monarchies, aristocracies, and democracies, is both correct and exhaustive; that no additional forms can be made out of a combination of these, or out of a union of several states; and that the notion that there can be proceeds from the confounding of state and government in the treatment of the subject.

There remains now but a single point further to be touched under this topic. What we call the modern states are those based upon the principle of popular sovereignty; i.e., they are democracies. Not all of them appear to be such, but a close scrutiny of the facts will reveal the truth of the proposition
that they are. The reason of the deceptive appearance in such cases will be found to be the fact that the state has but recently taken on its new form, and has not perfected its organization; while the old state-form, remaining as government, is still clad in the habiliments of sovereignty, shabby and threadbare perhaps, but still recognizable. It will be highly instructive to consider, for a moment, the social conditions which precede, and make possible, the existence of the democratic state. They may be expressed in a single phrase, viz, national harmony. There can be no democratic state unless the mass of the population of a given state shall have attained a consensus of opinion in reference to rights and wrongs, in reference to government and liberty. This implies, in the first place, that they shall understand each other; i.e., that they shall have a common language and a common psychologic standpoint and habit. It implies, in the second place, that they shall have a common interest, in greater or less degree, over against the populations of other states. It implies, finally, that they shall have risen, in their mental development, to the consciousness of the state, in its essence, means and purposes; that is, the democratic state must be a national state, and the state whose population has become truly national will inevitably become democratic. There is a natural and an indissoluble connection between this condition of society and this form of state. It is this connection which has led to the interchangeable use of the terms state and nation. We must not forget, however, that they belong primarily to different sciences, and should not be used interchangeably without explanatory qualifications.