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'Perfection in Imperfection'

Joseph de Maistre and the Limitations of Constitutional Design

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I. Introduction

Few modern-day constitutional theorists would list Joseph de Maistre's works among 'the classics' in constitutional thought. A defender of the crumbling *Ancien Régime*, de Maistre despised most of the ideals embodied in modern constitutions.[1] Instead, he has been depicted as an enemy of liberty,[2] as 'a blind traditionalist and reactionary, as dogmatic, intransigent, absolute and violent as possible,'[3] and as 'an apostle of darkness'[4] whose ideas appeal to modern fascists.[5] Indeed, de Maistre discussed the virtues of the Spanish Inquisition, the genius of the feudal system, and the social value of the guillotine. His world vision, on the whole, seems dark and violent. Perhaps, then, it would be best to let de Maistre linger in obscurity.

Yet de Maistre was more than an ultra-conservative and religious defender of the *Ancien Régime*. In this essay, my aim is to show that de Maistre offers a unique but

* I would like to thank Kevin Cope, Denis Galligan, Raymond Kubben, and David Robertson, as well as participants at the Oxford Workshop on *Constitutions and the Classics* (June 2010) for helpful comments and suggestions. I thank Trevor Moore for excellent research assistance.

[1] I. Berlin, 'Two Enemies of Enlightenment: The Second Onslaught, Joseph de Maistre and Open Obscurantism' (Wolfson College Virtual Library, 2005), 22: <http://berlin.wolf.ox.ac.uk/lists/nachlass/maistre.pdf> accessed 5 September 2013.

[2] I. Berlin, 'Introduction', in H. Hardin (ed.), *Freedom and Its Betrayal: Six Enemies of Human Liberty* (Princeton: Princeton University Press, 2002), 5.

[3] O. Bradley, *A Modern Maistre: The Social and Political Thought of Joseph de Maistre* (Lincoln: University of Nebraska Press, 1999), ix.

[4] G. Gerrard, 'I. Berlin's Joseph de Maistre', in J. Mali and R. Worker (eds), *I. Berlin's Counter-Enlightenment* (Philadelphia: American Philosophical Society, 2003), 118.

[5] I. Berlin, 'The Counter-Enlightenment', in H. Hardin (ed.), *Against the Current* (Princeton: Princeton University Press, 1980) (noting that '[t]hese gloomy doctrines... inspired nationalism, imperialism, and finally, in their most violent and pathological form, Fascist and totalitarian doctrines') 32; I. Berlin, 'Joseph de Maistre and the Origins of Fascism', in H. Hardy (ed.), *The Crooked Timber of Humanity: Chapters in the History of Ideas* (New York: Knopf, 1990). Cf. Bradley, (n. 3) (challenging Berlin's account by noting that de Maistre analysed violence and self-destruction, but never actually propagated it), xvi.

often overlooked perspective on constitutions, which sounds surprisingly modern today. It is a constitutional theory that emphasizes the limitations of rational constitutional design, the close connection of constitutions to society, the symbolic power of constitutions, and the inherent irrationality of stable constitutional systems.

Joseph de Maistre's constitutional theory has been woefully under-analysed. In political theory, attention to de Maistre has been scant and overwhelmingly negative.[6] Where de Maistre appears on the scholarly radar, he is portrayed as the 'enemy of liberty', or worse. One notable and recent exception is the work of Owen Bradley, who characterizes de Maistre as a modern, even postmodern, thinker. My reading of de Maistre builds on Bradley's,[7] as well as the literature that links early counter-enlightenment thinkers to today's postmodernists.[8] My focus, however, is exclusively on de Maistre as a constitutional scholar. I will not cover his writings on papal authority, his cross-cultural theory of sacrifice,[9] or his dark vision of human nature.[10] This focus, of course, affects the picture that I paint. De Maistre's approach to constitutions was more sociological than his approach to other topics, which he often considered from a chiefly theological angle. De Maistre also routinely contradicts himself, and his writings contain numerous inconsistencies.[11] Nonetheless, de Maistre offers a fairly consistent theory on constitutions. It is this theory that I will expound in this essay.

I will focus on three overarching themes that run through de Maistre's constitutional writings. First, a nation's true constitution is *indigenous* and particular to the nation. It is neither universal nor rational, but grows from each nation's past and best remains unwritten. Second, well-functioning and enduring constitutional rules are often *irrational*. They do not fit the philosopher's canon of logic. Instead, they come about by chance, with a strong element of randomness, and they develop in unexpected directions. Such perfection in imperfection is impossible to design. Third, constitutional power has a strong *symbolic* element. It is symbols and rituals that

[6] Bradley (n. 3) (noting that, as of 1999, there was 'no comprehensive account of Joseph de Maistre's social and political philosophy', existing accounts being either 'entirely biographical' or ideological in nature 'treating him as a mouthpiece of the forces of reaction') vii. The various ideological accounts include those by Isaiah Berlin as well as Stephen Holmes: S. Holmes, *The Anatomy of Anti-Liberalism* (Cambridge, MA: Harvard University Press, 1993) (deeming de Maistre significant because he is one of the first well-articulated, sophisticated, voices of the anti-liberal tradition), 14.

[7] I agree with Bradley that de Maistre 'is of value to the extent that his criticism is founded on a critical analysis of irrational social forces too often left unanalysed by critics working within liberal horizons.' Bradley (n. 3). I also built on Bradley when pointing out both the dangers of de Maistre's work and the dangers of ignoring it altogether.

[8] J. Habermas, 'Modernity vs. Post-Modernity', *New German Critique*, 22 (1981), 3, 7–11 (noting that modernity entails an extension of the rational norms of Enlightenment, and that rejecting the Enlightenment premises entails a rejection of modernity).

[9] Bradley uses de Maistre's theory on sacrifice as the main organizing principle to understand all his work. Bradley, (n. 3), vii.

[10] Berlin (n. 1).

[11] J. Lively, 'Introduction', in *The Works of Joseph de Maistre*, ed. J. Lively (New York: Schocken Books, 1971) (noting that these contradictions explain why there exist so many different depictions of de Maistre in the literature, ranging from de Maistre as a modern social scientist, to a dogmatic defender of religious authority, to the forefather of modern fascism), 3.

explain why constitutions are respected. Once people expose constitutions to reason and write them down, however, constitutions lose their sacred source of power.

Constitutional scholars may be sceptical of an attempt to uncover the 'enemy of liberty's' view of the rules whose first and foremost purpose is to protect liberty. Indeed, emphasis on indigenous constitutions can be an easy excuse for repressive regimes to circumvent rights in the name of tradition. Emphasis on the imperfection and irrationality of constitutional rules may legitimize inferior, even harmful, constitutional practice, and inhibit progress. Emphasis on the symbolic value of constitutional rules may undermine the potential of institutional constraints on government power. An emphasis on a constitution's limited capacity to induce societal change may prevent constitutional change altogether and transform the constitution into a mirror of the past. It is important to keep in mind these caveats when reading de Maistre.

On the other hand, ignoring de Maistre's work altogether may also be dangerous. Nineteenth- and twentieth-century constitution-makers have done almost everything de Maistre argued against. Since de Maistre's day, the world has witnessed a proliferation of constitution-writing, informed by a 'science' of constitutional design.[12] Constitutions are often written to erase the past and imagine a new future, and commonly conform to standardized international models. Against this backdrop, de Maistre's theory might be valuable for its emphasis on each nation's unique history, on historical happenstance, and on unintended consequences. What is more, this theory strikes a chord with contemporary notions of constitution-making. While it stands at odds with rationalist and universalist premises of constitutional design, it resonates with a number of recent themes in the constitutional literature. Indeed, de Maistre's constitutional theory can be viewed as simultaneously pre-modern and postmodern.[13]

The remainder of this brief essay unfolds as follows. Section II places de Maistre in his historical context. Sections III, IV, and V set out de Maistre's constitutional claims, namely that constitutions are respectively *indigenous*, *irrational*, and *symbolic* in nature. Section VI concludes by linking de Maistre's writing to the contemporary constitutional literature.

II. Context: Revolution and Reason

1. Situating de Maistre

No event has impacted on de Maistre's writing more than the French Revolution, which changed the course of his life.[14] Born and raised as a member of the upper

[12] On constitutional design, see D. S. Lutz, *Principles of Constitutional Design* (Cambridge: Cambridge University Press, 2006); R. Hirschl, 'The "Design Sciences" and Constitutional "Success"', *Texas Law Review* 87 (2009), 1339.

[13] Cf. Bradley (n. 3) (describing postmodernism in political theory and highlighting parallels between postmodern thought and early conservative thinkers like de Maistre in the counter-Enlightenment movement), xiii.

[14] R. A. Lebrun, *Joseph de Maistre: An Intellectual Militant* (Kingston: McGill-Queen's University Press, 1988).

classes, he left his home in 1792, leaving his family behind. It was in the following years abroad, while living in Lausanne and St. Petersburg, that he did most of his political writing. Scholars have suggested that these events turned de Maistre into an 'angry man.'[15] The ousting of the *Ancien Régime*, followed by the Reign of Terror, and a prolific law-making in the new republic (by de Maistre's count, fifteen thousand pieces of legislation adopted in less than five years[16]), all led de Maistre to conclude that things had gone very wrong. Indeed, much of de Maistre's writing is directed against the French Revolution and its underlying premises.[17]

The main evil behind the revolution, according to de Maistre, was the Enlightenment ideal of reason.[18] It is because of reason that the Enlightenment *philosophes* could constantly re-invent society and change the existing political order, and that one regime could overthrow the other. De Maistre's 'revolt against reason' has been well documented in the existing literature.[19]

It is noteworthy that, in his attack on reason, de Maistre relies primarily on empirical, especially historical and comparative, analysis. The main premises of Enlightenment thought, according to de Maistre, simply lacked empirical basis and ignored the lessons of history. Philosophy, in his view, was a false science that was irrelevant to understanding real-world politics and contemporary social life. Building a government upon such theories was therefore a gross mistake to him, as the events surrounding the revolution so neatly illustrated.[20]

History, not philosophy, was 'the only teacher in politics'.[21] Indeed, history informs most of de Maistre's analysis.[22] To illustrate, when de Maistre defends monarchy against democracy, he does so based on empirical observation. History reveals that monarchy is the natural mode of government;[23] 'If it was said to us that a dice, thrown [a] hundred million times, always showed only the five numbers, 1, 2, 3, 4 and 5, could we believe that there was a 6 on one of its faces?' de Maistre asks.[24] The dice of history always shows monarchy, the form of government that is

[15] Berlin (n. 1), 1; Bradley (n. 3) (noting that all existing accounts of de Maistre start with his negative response to the revolution, 'deducing therefrom the reactionary character of his thought as a whole'), vii.

[16] Joseph de Maistre, 'Considerations on France' (first published 1796), in *The Works of Joseph de Maistre*, ed. J. Lively (New York: Schocken Books, 1971) (hereinafter, de Maistre, 'Considerations'), 81.

[17] R. Nisbet, 'Foreword: A Note on Conservatism', in *The Works of Joseph de Maistre*, ed. J. Lively (New York: Schocken Books, 1971), xi.

[18] Lively (n. 11), 4. [19] Lively (n. 11), 4. [20] Lively (n. 11), 4.

[21] De Maistre, 'Study on Sovereignty' (first published 1884), in *The Works of Joseph de Maistre* (New York: Schocken Books, 1971) (hereinafter, de Maistre, 'Sovereignty') ('History is experimental politics; and just as, in the physical sciences, a hundred books of speculative theories disappear before a single experiment, in the same way in political science no theory can be allowed if it is not the more or less probable corollary of well-attested facts'), 114.

[22] With similar tools, de Maistre assesses political systems. 'In astronomy in particular we always talk of *average distance* and *average time*. To judge the merit of a government, the same method should be used': De Maistre, 'Sovereignty', 127. To evaluate the French monarchy, 'a sum of the virtues and vices of all the French kings should be made, and divided by sixty-six: the result is an average king; and the same is true of other monarchies': De Maistre, 'Sovereignty', 127.

[23] De Maistre, 'Considerations' (n. 16), 65–6.

[24] De Maistre, 'Considerations' (n. 16), 65–6.

'most ancient and the most universal'.[25] Republics, by contrast, have only 'sometimes been known'[26] and democracy has had just 'one brilliant moment' in the days of Athens.[27] Even though de Maistre acknowledges that many kings were fools, he concludes that monarchy represents the natural, and even divine, order of things.[28] A similar empirical assessment leads de Maistre to conclude that the French Revolution was irrevocable. No matter how much he dislikes the revolution's consequences, going back to the pre-revolutionary status was like 'trying to exhaust the lake of Geneva by collecting its water in bottles'.[29]

Notably, as a student of history, de Maistre finds very little optimism for mankind. Looking at history, he observes that people are 'dark, violent, and eager to sacrifice'.[30] De Maistre sees chaos, violence, and warfare, which would come to the fore when removing people's ancient constraints and building a political system upon reason.[31] Some have attributed remarkable foresight to his world vision. George Steiner wrote that de Maistre's vision 'may well be the principal feat of precise foresight in the history of modern political . . . theory'. According to Steiner, de Maistre's prophecy 'makes the futurology of Rousseau, of Hegel and Marx look utterly shallow', because '[t]he age of the Gulag and of Auschwitz, of famine and ubiquitous torture, of Idi Amin, Pol Pot and of Ceausescu is *exactly* that which de Maistre announced.'[32]

2. Situating de Maistre's constitutional thought

The French Revolution also had a profound impact on de Maistre's *constitutional* thought. Over the course of its first five years, the new republic adopted three separate constitutions. To de Maistre, this fickleness reveals both the instability of the new regime and the dangers of building a nation on reason. Written constitutions epitomize the very Enlightenment ideals that de Maistre despises, which is why a substantial portion of his writing concerns constitutions.

To understand the baseline from which de Maistre attacks constitutions based on Enlightenment ideas, it is helpful to review the constitutional ideas and ideals that prevailed before the Enlightenment. These 'ancient' constitutions have their roots in the ancient world, where the notion of constitution was essentially synonymous with organized political structure.[33] The ancient Greeks used the term *politeia*[34] to describe the state as it actually is.[35] Aristotle, for example,

[25] De Maistre, 'Sovereignty' (n. 20), 113. [26] De Maistre, 'Considerations' (n. 16), 65–6.
[27] De Maistre, 'Sovereignty' (n. 20), 127.
[28] De Maistre's historicism often takes a religious turn. He was a Whig historian, drawing lines from one big event to another, and looking for overarching patterns or historical change. He did so not merely to study the world around him, but to look for a divine order, and to discover the revealed teachings of religion. For de Maistre, history could provide insight into the divine order, the way in which God had meant the world to function. Lively (n. 11), 31–45.
[29] Berlin (n. 1), 2–3. [30] Bradley (n. 3), xi. [31] Bradley (n. 3), xi.
[32] Bradley (n. 3) (quoting George Steiner), xi.
[33] C. H. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1947) 3.
[34] McIlwain, *Constitutionalism*, 24.
[35] McIlwain, *Constitutionalism* (quoting Isocrates, *Panathenaicus*, ¶138) 26.

described the constitution as the way of life of the citizens,[36] while Plato regarded it as 'a "representation" of the finest and noblest life'.[37] The same ideals prevailed in the Roman Republic.[38] As Cicero wrote in *De Res Publica*, 'the constitution of the republic is the work of no single time or of no single man.'[39]

The ideals of ancient constitutionalism persisted throughout the middle ages.[40] Law-making at this time was fundamentally backward-looking and precedent had to be found in the nation's past, and especially the models of the Ancient Greeks and the Roman Republic.[41] Through the force of their example, the Greek and Roman constitutional ideals therefore endured until de Maistre's day. Indeed, de Maistre quotes from Plato when defining a constitution as an amalgam of 'population, customs, religion, geographical situation, political relations, wealth, [and] good and bad qualities' of a nation, whose purpose is to 'find the laws that suit it'.[42]

In de Maistre's day, modernity forecast a new type of constitution: a constitution written by a popular assembly, based on a social contract, and designed to reshape the existing social and political order. At this time, a world vision based on wisdom from the past was replaced by one that was forward-looking and based on scientific discovery. According to Enlightenment *philosophes*, the whole world was governed by natural laws, which were to be uncovered only through human reason.[43] What is more, the notion of 'being "modern" by looking back to the ancients' was replaced by a belief that people could continuously improve themselves and the world around them.[44] Law no longer had to be found in history but could be created.[45] Constitutions, perhaps more than any other law, could reshape and reconstruct society.[46] As Thomas Paine put it, '[a] constitution is a thing antecedent to a government, and a government is only the creature of a constitution.'[47] With human reason—i.e. 'intelligent men coming together for deliberation about how

[36] Aristotle, *The Politics* (first published *c.*350 B.C.E.), ed. and tr. T. A. Sinclair and T. J. Saunders (New York: Penguin Books, 1982), 266.

[37] Plato, *The Laws* (first published *c.*360 B.C.E.), tr. T. J. Saunders (New York: Penguin Books, 1982), 310.

[38] S. Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (Cambridge, MA: Harvard University Press, 1999), 86–115.

[39] McIlwain (n. 31) (quoting Cicero), 24.

[40] McIlwain (n. 31) (quoting Cicero), 24.

[41] F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 2011) (noting that '[f]or centuries it was recognized doctrine that kings or any other human authority could only declare or find the existing law, or modify abuses that crept in, and not create law'), 235; Habermas (n. 8) (noting for centuries to come, the constitutions of ancient Athens and Rome would serve as important models 'to be recovered through some kind of imitation'), 4.

[42] Bradley (n. 3) (pointing out de Maistre's reliance on Plato), 95.

[43] R. Lesaffer, *European Legal History: A Cultural and Political Perspective* (Cambridge: Cambridge University Press, 2009), 372–84.

[44] Habermas (n. 8), 4.

[45] Hayek (n. 39) (noting that '[o]nly gradually, during the later Middle Ages, did the conception of deliberate creation of new law . . . come to be accepted' and was legislation used 'for the first time as an instrument of deliberate policy'), 235–6.

[46] G. A. Billias, *American Constitutionalism Heard Around the World 1776–1989: A Global Perspective* (New York: New York University Press, 2010), 56–7.

[47] Thomas Paine, *Rights of Man, Common Sense, and Other Political Writings* (first published 1791), ed. M. Philip (Oxford: Oxford University Press, 1995), 122.

to make the world anew'—people could *create* liberty.[48] The famous words '[t]he past is a foreign country' squarely describe the Enlightenment tradition.[49]

It is at this critical juncture of history—when the old meets the new—that de Maistre develops his ideas. His starting point is clearly that of the ancient constitution. As he often notes, the true constitution of France is 'written in the hearts of Frenchmen.'[50] But what makes de Maistre's writing so interesting is that his views on ancient constitutionalism intersect with the events of the French Revolution. He struggles with the questions of whether constitutions can be written, whether people can enter into a social contract with their government, and how political institutions endure.

Rather than simply attacking the new in the name of the old, he resorts to empirical methods, looking at real-world examples across both space and time. De Maistre was a comparativist, frequently using examples from other countries. He examines constitutions in France, Britain, Poland, Turkey, and China and develops a constitutional theory more sociological than normative. 'Looking scrupulously at the patterns of change which it presents to us,' de Maistre 's[aw] nothing that favours this chimerical system of deliberation and political engineering through previous reasoning.'[51] De Maistre therefore concludes that the social contract is nothing but a fairy tale, and that the writings of Rousseau and other social contract thinkers are merely 'a novel'.[52] In the remainder of this essay, I describe what, according to de Maistre, history and comparative analysis teaches us about constitutions and constitution-writing.

III. The Indigenous Constitution

A first and recurring theme in de Maistre's constitutional writing is that constitutions are neither universal nor rational, and best remain unwritten. For de Maistre, a constitution is indigenous to the nation and a reflection of the nation's identity. The 'true' constitution of France is 'what you feel when you are in France'. It is 'the mixture of liberty and authority, law and opinion that made the foreign traveler in France believe that he was living under a government different from his own'.[53] A constitution is thus an amalgam of the nation's distinct history, its culture, and its traditions.

If a constitution is a uniquely national product, it follows that there exist no universal principles for constitutional design. As de Maistre put it:

[48] Hayek (n. 40), 112–13.

[49] This famous phrase comes from L. P. Hartley, *The Go Between* (London: Hamish Hamilton, 1953), 9.

[50] Joseph de Maistre, 'Essay on Generative Principles' (first published 1809), in *The Works of Joseph de Maistre* (New York: Schocken Books, 1971) (hereinafter, de Maistre 'Generative Principles'), 147.

[51] De Maistre, 'Considerations' (n. 16), 84.

[52] Bradley (n. 3) (quoting from de Maistre's personal notes), 99.

[53] De Maistre, 'Considerations' (n. 16), 85.

The 1795 constitution, like its predecessors, was made for man. But there is no such thing as man in the world. During my life, I have seen Frenchmen, Italians, Russians, and so on; thanks to Montesquieu, I even know that one can be *Persian*; but I must say, as for man, I have never come across him anywhere; if he exists, he is completely unknown to me.[54]

Universal constitutional rules, therefore, only exist in the minds of philosophers: '[a] constitution that is made for all nations is a constitution that is made for none.' Such a constitution, de Maistre argues, is 'a pure abstraction, an academic exercise of the mind, according to some hypothetical ideal, that should be addressed to *man*, in whatever imaginary realm he inhabits'.[55] He therefore concludes that '[e]ach people should be assigned a particular institutional system, which is the best, not perhaps in itself, but for the state for which it was intended.'[56]

The same rejection of universalism can be found in the work of some of his French and European predecessors and contemporaries. Montesquieu, for example, notes that 'laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.'[57] The Genevan philosopher Rousseau likewise emphasizes the particularistic nature of constitutions.[58] These same assertions characterize the older constitutional tradition that predates Enlightenment thought.

De Maistre, however, goes further than these other thinkers, rejecting not only the Enlightenment's universalism, but also its rationalism. Unlike Montesquieu or Rousseau, he does not regard the constitution as a tool to shape society. He insists that written constitutions are merely declarations of pre-existing rights: 'popular rights are never written' but 'always only declaratory statements of anterior rights, of which nothing can be said other than they exist because they exist'.[59] For that reason, 'no nation has ever succeeded in developing, by written constitutional laws, rights other than those present in its natural constitution.'[60] De Maistre notes that the English would never have written the Great Charter (Magna Carta) 'if these rights had not existed before the Charter'.[61] A constitution should not just be tailor-made for a nation, but should be grown from that nation's past.

De Maistre's theory, then, seems to restrict each nation to its past and to inhibit change. Indeed, he notes that liberty, 'since it will not grow under every climate, is not open to every nation'.[62] Therefore, '[n]o one should ask what the best form of

[54] De Maistre, 'Considerations' (n. 16), 80.
[55] De Maistre, 'Considerations' (n. 16), 80.
[56] De Maistre, 'Sovereignty' (n. 20), 100.
[57] Lesaffer (n. 41) (citing Montesquieu), 420.
[58] Lively (n. 11) (noting that de Maistre quoted Rousseau with approval on this subject), 4. De Maistre points out the inconsistencies in Rousseau's contextualism: '[I]f there are as many different governments as there are different peoples . . . it is no longer permissible to talk of a *compact*'; 'If a man himself worked out these unshakable principles in a book designed to establish that "it is always necessary to go back to a convention" [quoting Rousseau]; if he writes in one chapter that "man was born free" [quoting Rousseau]; and in another that "liberty, since it will not grow under every climate, is not open to every nation" [quoting Rousseau], his utter folly could not be contested.' De Maistre, 'Sovereignty' (n. 20), 100–1.
[59] De Maistre, 'Considerations' (n. 16), 77.
[60] De Maistre, 'Considerations' (n. 16), 78.
[61] De Maistre, 'Generative Principles' (n. 48), 154–5.
[62] De Maistre, 'Sovereignty' (n. 20) (quoting Rousseau). 101.

government is in general, since none is suitable for every nation.'[63] Instead, each nation 'has its own, as it has its own language and character, and this government is the best for it'.[64] De Maistre therefore dismissed the social contract: '[s]ince none of the varying circumstances depend on men, it follows that the consent of the people plays no part in the formation of government.'[65]

But if liberty cannot be created, can an 'unfree' nation ever be free? For de Maistre, the answer to this question is both 'yes' and 'no'. The answer is 'no' because a nation cannot give itself liberty by drawing up a written document that proclaims that all men are free: 'No nation can give itself liberty if it has not it already.'[66] But the answer is also 'yes', because a constitution *can* change when society changes. Where a tradition of liberty grows, constitutional change will follow. Every important institution, according to de Maistre, is 'formed of itself by the occurrence of a thousand agents' and as a result of their unconscious acts, the institution they created 'vegetates intensely over the ages'.[67] In other words, constitutional growth tracks the growth in society. If liberty matures, so does the constitution. Constitutional change can come about through incremental change and evolution, but not revolution.

De Maistre not only insists that constitutions are neither universal nor rational, he also suggests that they best remain unwritten. He ridicules the *philosophes* who

> believe that an assembly can constitute a nation, that a constitution . . . is an artefact like any other, requiring only intelligence, knowledge, and practice, that the job of constitution-making can be learned, and that, the moment they think about it, men can say to other men *make us a government,* as a workman is told *make us a fire engine or a loom.*[68]

In other words, constitutional documents that aim to design society based on theory, but are disconnected from the existing social order, are doomed to fail. De Maistre characterizes as 'profound stupidity' the notion that 'legislators are men, that laws are pieces of paper and that nations may be created *by ink.*'[69]

His rejection of written constitutions is even more general. He rejects even those that accurately reflect the existing social order. In this sense, he distinguishes himself from other conservative theorists such as Edmund Burke, with whom de Maistre shares many views in common. While Burke also emphasizes the indigenous nature of constitutions and organic constitutional growth, Burke thinks that constitutional rules would become stronger when written down.[70] De Maistre, by contrast, believes that written constitutions are a sign of frailty and instability. It is when existing practices come under attack and the existing order is challenged from

[63] De Maistre, 'Sovereignty' (n. 20) (quoting Rousseau), 126.
[64] De Maistre, 'Sovereignty' (n. 20) (quoting Rousseau), 126.
[65] De Maistre, 'Sovereignty' (n. 20) (quoting Rousseau), 126.
[66] De Maistre, 'Considerations' (n. 16), 78.
[67] De Maistre, 'Considerations' (n. 16), 81–2.
[68] De Maistre, 'Considerations' (n. 16), 81–2.
[69] De Maistre, 'Generative Principles' (n. 48), 157.
[70] Edmund Burke, 'Speech to the House of Commons', in *Parliamentary History of England from the Earliest Period,* (1783) ('If these natural rights are further affirmed and declared by express covenants, if they are clearly defined and secured against chicane, against power and authority, by written instruments and positive engagements, they are still in a better condition'), 1315.

the outside that they are written down. De Maistre observes, for example, that it was only because existing rights were violated that the Magna Carta was written. Written constitutions represent a constitutional order in decline. As he puts it, because '[l]aws are only declarations of rights, and rights are not declared except when they are attacked', 'a multiplicity of written constitutional law shows only the multiplicity of conflicts and the danger of destruction'.[71] As a result, 'the weakness or fragility of a constitution is in direct relationship to the number of written constitutional articles.'[72]

IV. The Irrational Constitution

A second theme in de Maistre's writing is that well-functioning constitutional rules are often irrational. A nation's true constitution does not make sense from a philosopher's viewpoint; it does not conform to the canons of reason. Instead, it is a set of irrational, if not random, rules that manage to withstand the tides of change and which successfully govern the nation. Such irrational rules, according to de Maistre, are impossible to design.

De Maistre provides numerous examples of irrational constitutional rules that have demonstrated remarkable longevity. One is the monarchy. 'What is more irrational or absurd than that the son of a king, even a good king, should succeed him because he is his son?'[73] de Maistre wonders. 'A wise king may have a stupid son, a good king may have an abominable son.'[74] A more rational system, he points out, is that of Poland, in which nobles elected their king. 'But what has actually happened?' he asks. 'France was governed by sixty-six kings, some good, some bad, but mostly efficient, mostly capable... whereas Poland with its rational system is plunged into constant turbulence and has collapsed.'[75] The constitution of England was another irrational system which de Maistre much admired. That system 'works only by not working'.[76] He notes, for example, that '[h]abeas corpus... has been suspended so often and for such long periods that it could be argued that the exception has become the rule.'[77]

De Maistre's view was that the complex harmony of irrational rules is impossible to design. For example, the Habeas Corpus Act, which maintains itself through exception, could never have been designed this way: '[s]uppose for a moment that the authors of this famous Act had attempted to lay down the cases when it could be suspended, they would by that deed have destroyed it.'[78] The notion that an entire constitutional system can be designed from scratch is even more foolish, according to de Maistre. '[N]o assembly, a small number of men in relation to the

[71] De Maistre, 'Considerations' (n. 16), 78.
[72] De Maistre, 'Generative Principles' (n. 48), 151.
[73] Berlin (n. 1) (citing de Maistre), 7.
[74] Berlin (n. 1) (citing de Maistre), 7.
[75] Berlin (n. 1) (citing de Maistre), 7.
[76] De Maistre, 'Generative Principles' (n. 48), 151.
[77] De Maistre, 'Generative Principles' (n. 48), 149.
[78] De Maistre, 'Generative Principles' (n. 48), 149.

total population can ever carry through such a task.'[79] He asks '[w]hat eye is capable of comprehending all the circumstances that must fit a nation to a particular constitution?' and concludes that '[u]nless they refuse to see the truth, they must agree that this is impossible.'[80]

Such irrational rules, he argued, cannot be designed, but emerge unconsciously, or simply by accident: '[n]othing great has great beginnings.'[81] Even democracy, the form of government that the Enlightenment *philosophes* aimed to design, had accidental origins. De Maistre observes that in England, national representation 'was not a product of deliberation or the result of an action of the people making use of its ancient rights' but the result of the actions of 'an ambitious soldier' who, 'to satisfy his own designs, created the balance of the three powers after the Battle of Lewes, without knowing what he was doing.'[82] Likewise, democracy organically emerged from the feudal system. 'Having formed the local communities, the royal authority called them to the national assemblies; they could appear there only through deputies, and from this arose the representative system.'[83] De Maistre again points out that '[o]ne would have to have very little insight into what Bacon called *interiora rerum* to believe that men could have achieved such institutions by an anterior process of reasoning and that such institutions could be the product of deliberation.'[84] Thus, whenever democracy has succeeded in the past, it did so because of historical accident, not grand design.

De Maistre thus draws our attention to an element of randomness in constitution-making. Constitutional rules emerge unconsciously, through random acts that have unforeseen consequences. They develop through the acts of 'a thousand agents', who are mostly unconscious of what they are doing. De Maistre draws on the British experience when he notes that '[n]ever have statesmen gathered together and said: *Let us create three powers [and] balance them in such and such a manner.*'[85] Instead, the British constitution was the work of a finite number of unconscious acts: '[r]oman, ecclesiastic, and feudal law, Saxon, Norman and Danish customs, every kind of class privilege, prejudice and ambition, wars, revolts, revolutions, conquests and crusades, all the virtues, vices, sciences, errors and passions' all acted together to produce 'the most complex unity and the most delicate equilibrium of political forces the world has ever known'.[86]

These complex and irrational rules may be far from perfect. '[E]very political constitution has its essential faults which spring from its nature and which cannot be separated from it.'[87] Yet de Maistre believes that it is a mistake to think that such flaws can simply be removed, through an act of rational (re-)design. 'Social harmony is subject to the law of temperament, as is harmony properly speaking

[79] De Maistre, 'Considerations' (n. 16), 107.
[80] De Maistre, 'Considerations' (n. 16), 107.
[81] De Maistre, 'Generative Principles' (n. 48), 158.
[82] De Maistre, 'Considerations' (n. 16), 66–7.
[83] De Maistre, 'Considerations' (n. 16), 66.
[84] De Maistre, 'Considerations' (n. 16), 66.
[85] De Maistre, 'Generative Principles' (n. 48), 152.
[86] De Maistre, 'Generative Principles' (n. 48), 152.
[87] De Maistre, 'Generative Principles' (n. 48), 167.

in the musical scale.'[88] When one tries to '[g]et the fifths carefully in tune[,] the octaves will clash, and vice versa'. Discord therefore is 'inevitable', an intrinsic part of the divine order of constitutions.[89]

The irrational elements of constitutions ensure their stability. If we acknowledge that constitutions are irrational and can neither be designed nor perfected, political systems will be stable. By contrast, when constitutions are based on reason, the political system will be inherently unstable: what one man considers reasonable may be challenged and destroyed by another. Only where constitutions have irrational, deep historical foundations, with 'neither author nor date', will they produce stable government and withstand the tides of time. For de Maistre, therefore, there was perfection in imperfection.

V. The Symbolic Constitution

A third theme running through de Maistre's work is that constitutions succeed because of their symbolic nature. Constitutional rules remain unchallenged and upheld because of their symbolic value and their connection to something mystical. These symbolic and mystical elements both shape constitutions and make them work in practice. As discussed in the previous section, de Maistre rejects the very notion of constitutional design. A constitutional assembly may write a constitution, but it will be meaningless if it does not reflect the nation's true constitution. Even if it does reflect the nation's character, it still signals a constitutional order that is being challenged and therefore in decline. What is more, not all can be written. 'Although written laws are always only declarations of anterior rights, yet it is very far from true that everything that can be written is written; there is even in every constitution always something that cannot be written and that must be left behind a dark and impenetrable cloud on pain of overturning the state.'[90] De Maistre explains: 'as there is something in music that is impossible to annotate, there is something in all governments that is impossible to write.'[91]

What is impossible to write are the constitution's origins, which have 'neither author nor date'.[92] Constitutions have unknown roots, covered in a 'dark impenetrable cloud'. At times, de Maistre conceptualizes these origins in the religious realm and attributes them to God: 'since every constitution is divine in its origin, it follows that man cannot do anything unless he relies on God'.[93] At other times, de Maistre conceptualizes these mystical origins in a more sociological fashion and attributes them to the nation's history. It was the acts of a thousand agents, unconscious of what they were doing, that produced the constitution with 'neither author nor date'.[94]

[88] De Maistre, 'Generative Principles' (n. 48), 167.
[89] De Maistre, 'Generative Principles' (n. 48), 167.
[90] De Maistre, 'Considerations' (n. 16), 77–8.
[91] Bradley (n. 3) (citing de Maistre), 96.
[92] De Maistre, 'Considerations' (n. 16), 77.
[93] De Maistre, 'Generative Principles' (n. 48), 162.
[94] Overall, in De Maistre, 'Generative Principles' (n. 48), de Maistre takes a more religious turn than in De Maistre, 'Considerations' (n. 16), which is more sociological.

It is this part that cannot be written, those mystical origins, that makes the constitution work in practice and endows governments with authority. Governments may try to obtain power through coercion—and many do—but the real source of power is symbolic, based on something sacred. This sacred source of power can be found in mythology, language, literature, tradition, and the hearts of all people.[95] All power, de Maistre argues, rests upon prejudices, or on 'opinions of some kind adopted prior to all examination'.[96] De Maistre's concept of prejudice is important here. He urges us not to 'take this word in bad part' because '[i]t does not necessarily signify false ideas, but only, in the strict sense of the word, any opinions adopted without examination.'[97] Such prejudices, according to de Maistre 'are essential to man; they are the real basis of his happiness and the palladium of empires' and '[w]ithout them, there can be neither religion, morality, nor government.'[98] Thus, according to de Maistre, it is the rules that are followed unthinkingly, and out of habit, that give government power.

Constitutions' sacred origins give them force. If something feels sacred, people will not touch it. By contrast, when people write down what is supposed to remain unwritten, governments lose their true source of power. De Maistre states that '[m]en never respect what they have made.'[99] As he explains, '[t]hat is why an elective king never possesses the moral force of a hereditary sovereign because he is not sufficiently *noble,* that is to say, he does not pose the kind of grandeur independent of men which is the work of time.'[100] In the end, people 'submit to sovereignty because they feel that is it something sacred that they can neither create nor destroy'.[101] This, according to de Maistre, is the real secret of power.

Prejudices and the mystics of government can be cultivated through symbols. De Maistre often compares government to religion: '[g]overnment is a true religion; it has its dogmas, its mysteries, its priests; to submit it to individual discussion is to destroy it; it has life only through the national mind, that is to say, political faith, which is a creed.'[102] The coronation of kings, for example, serves this purpose. It is a ritual of government, which enhances its sacred nature and its legitimacy.[103] Thus, like religion, government needs its symbols and dogmas to ensure the faith of its subjects.

In focusing on the symbolic nature of constitutions, de Maistre effectively excludes 'the people' from the constitution-making process.[104] While people may take part in the growth of constitutions, they should do so in unintentional ways, as constitutions remain insulated from the sphere of conscious decision. Constitutional power lies in the realm of prejudice, and ought to be taken for granted and followed unthinkingly. When a constitution has sacred origins, people cannot simply change it. Or, as de Maistre puts it, 'supposing that a law of this importance exists because it is written,

[95] Bradley (n. 3), 96. [96] De Maistre, 'Sovereignty' (n. 20), 108.
[97] De Maistre, 'Sovereignty' (n. 20), 108. [98] De Maistre, 'Sovereignty' (n. 20), 108.
[99] De Maistre, 'Sovereignty' (n. 20), 104. [100] De Maistre, 'Sovereignty' (n. 20), 104.
[101] De Maistre, 'Sovereignty' (n. 20), 104. [102] De Maistre, 'Sovereignty' (n. 20), 108–9.
[103] De Maistre, 'Generative Principles' (n. 48), 162.
[104] De Maistre, 'Sovereignty' (n. 20) ('of all monarchies, the hardest, most despotic, and the most intolerable is King *People*'), 127–8.

it is certain that whatever authority has written it will have the right to annul it... The essence of a fundamental law is that no-one has the right to abolish it: but how is it beyond human power if it has been made by someone?'[105]

De Maistre believes that the sacred and symbolic element of constitutions constrains even absolute monarchs. Even though written constitutions do not offer constraints, the symbolic and sacred dimensions of constitutions do: 'it is far from true that the will of the king does everything in a monarchy... Religion, laws, customs, opinion, class, and corporate privileges restrict the sovereign and prevent him from abusing his power; it is striking that kings have even been much more often accused of lacking will than of overexerting it.'[106] De Maistre's ideal government is thus a moderate monarch who is constrained by custom, habit, and prejudice.[107] He believes that only those ancient constraints can keep mankind's violent nature at bay.

VI. Conclusion: A Postmodern de Maistre?

Modern constitution-making is a product of Enlightenment thought.[108] Today, constitutions are always written, mostly rational, and often conform to global templates. The nineteenth and twentieth centuries brought the full force of modernity to bear on constitution-writing, and witnessed all those things that were so forcefully condemned by de Maistre.

While modern constitution-making is undoubtedly a product of Enlightenment thought, recent decades have seen an emerging attention to de Maistre's conception of a constitution. First, constitutional scholarship recognizes that there do not exist universal templates for constitutional design, and that constitutions need to be tailor-made for each nation. To illustrate, in a 1994 edited book volume on constitutionalism and identity, scholars including Jon Elster, Fred Schauer, and Cass Sunstein agree that '[m]odern constitutionalism cannot be reduced to any particular form or any specific identity or difference' and that 'cross-cultural transplantation of constitutional provisions is always dangerous, as an unreflected generalization from experience in a single culture is always likely to be wrong'.[109] Even international financial institutions such as the IMF and World Bank, which are well known for their focus on best practices and uniform policy prescriptions around the world, are increasingly touting the importance of tailor-made institutions.[110]

[105] De Maistre, 'Generative Principles' (n. 48), 147.
[106] De Maistre, 'Sovereignty' (n. 20), 115. [107] Bradley (n. 3), ix.
[108] Hayek (n. 39), 108.
[109] M. Rosenfeld, 'Modern Constitutionalism as Interplay Between Identity and Diversity', in M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* (Durham: Duke University Press, 1994), 35.
[110] D. M. Trubek, 'The Rule of Law in Development Assistance: Past, Present and Future', in D. M. Trubek and A. Santos (eds), *The New Law and Economic Development* (Cambridge: Cambridge University Press, 2006), 74.

Second, like de Maistre, some modern scholars have challenged the notion that constitutional rules should be rational. Development economist Dani Rodrik, in a 2008 article in the *American Economic Review,* propagates a 'second-best mindset' in institutional design, which focuses on 'second-best institutions', which may actually be preferable to all others because of a nation's existing practices and culture.[111] Third, ever since Robert Merton popularized the idea,[112] attention has been paid to the accidental origins of constitutions as well as the unintended consequences that flow from constitutional design.[113] In a recent volume on *The Social and Political Foundations of Constitutions,* several scholars observe that important constitutional rules and practices have emerged by accident. In New Zealand, for instance, proportional representation was put on the agenda because the Prime Minister misread his note on national television.[114]

Finally, even the notion of constitutions as symbolic and sacred, probably the most controversial one among de Maistre's constitutional theories, has a surprisingly modern ring. Jack Balkin, in his 2011 book *Constitutional Redemption,* argued that the US Constitution is upheld because people have faith in it, much like they have faith in God. 'A well-designed constitution can fall apart in months without public attachment and support; an imperfect constitution can last for centuries', Balkin notes, because what ultimately matters is whether the people have faith in their constitution.[115] Like de Maistre, Balkin argues that 'constitutional traditions have much in common with religious traditions', and draws on the religious metaphor extensively to explain why the American Constitution is legitimate and complied with in practice.[116] What matters is not how well the constitution is designed, but whether it manages to capture popular imagination, and whether it gains a sacrosanct status.

All of these contemporary themes are arguably postmodernist in nature: they reject the excessive rationalism and universalism of modernity and instead emphasize 'human finitude, imperfection', 'limits', and 'irrationality'.[117] Indeed, it has been noted that these contemporary postmodern themes are essentially an extension of the counter-enlightenment tradition found in the writings of not only de Maistre, but also Burke, Vico, and Von Savigny, to name but a few. Both the counter-enlightenment thinkers of de Maistre's day and the postmodernist of today focus on the indigenous, the irrational, and the symbolic aspects of constitutions. These similarities suggest that there may still be a place for de Maistre in twenty-first-century constitutional thought.

[111] D. Rodrik, 'Second Best Institutions', *American Economic Review* 98 (2008), 100.

[112] R. K. Merton, 'The Unanticipated Consequences of Purposive Social Action', *American Sociological Review* 1 (1936), 894.

[113] D. J. Galligan and M. Versteeg, 'Theoretical Perspectives on the Social and Political Foundations of Constitutions', in D. Galligan and M. Versteeg (eds), *The Social and Political Foundations of Constitutions* (New York: Cambridge University Press, 2014), 23.

[114] D. Erdos, 'New Zealand: Abandoning Westminster?', in Galligan and Versteeg (eds), *The Social and Political Foundations of Constitutions,* 338.

[115] J. M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Cambridge, MA: Harvard University Press, 2011), 6.

[116] Balkin, *Constitutional Redemption,* 7.

[117] Bradley (n. 3), xiii; Habermas (n. 8), 7–11; Nisbet (n. 17), xvi.