

Whither Scotland? An Evaluation of a Proposed Constitutional Plan¹

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ABSTRACT

We evaluate a concrete institutional plan that has gained some traction among those contemplating a future Scottish constitution. Drawing from an original set of historical data on the content of constitutions, we locate the provisions of the plan with respect to past and present constitutional designs worldwide and among particular reference groups. We take no position the merits of the plan. Our objective is to provide some comparative perspective on the proposal based on some systematic empirical benchmarks.

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During the campaign for the 2011 Scottish parliamentary elections, the Scottish National Party (SNP) promised voters an independence referendum. Buoyed by significant support in those elections, the SNP initiated negotiations for just such a referendum with the coalition government at Westminster. These negotiations resulted in the 2012 Edinburgh Agreement, which establishes the rules for a binding referendum on Scottish independence to take place in the autumn of 2014. The referendum will ask Scottish residents (16 and older) to decide whether or not Scotland should be an independent country.

Scottish residents' decisions to vote for or against independence will (at least in part) be a function of their expectations about Scotland's prospects as an independent state, as opposed to a highly independent, subsidiary unit of the United Kingdom. Nationalist politics aside, they are likely to vote for independence if they believe they will be better off in an independent Scotland than in a subsidiary Scotland. The problem is that it is hard to predict what an independent Scotland will look like. As a result, residents' decision calculus is plagued by a great amount of uncertainty. The SNP government is fully aware of this problem and, in an effort to reduce this uncertainty, has begun to reveal its vision for an independent Scotland.² However, the institutional vision set forth by the SNP government is relatively vague (at least thus far) and lacks credibility, since the SNP is the most vocal set of advocates for independence. Nevertheless, in a striking departure from UK tradition, SNP leaders contemplate a written constitution, to be drafted through a participatory constitution-making process sometime after the referendum.³

But what would such a constitution look like? In typical constitutional drafting scenarios, stakeholders and interest groups draft competing plans in the early stages in order to fix ideas or to influence decision making. Some of these plans enter the national conversation and become important reference points for negotiation and debate. Scotland appears to be no different. At this point, at least one concrete plan has emerged and seems to have attracted some attention. The *Constitutional Commission*, a non-profit, non-partisan organization in Scotland devoted to the promotion of democratic citizenship and constitutional education,⁴ commissioned W. Elliot Bulmer to write a "Model Constitution for an Independent Scotland."⁵ The Model Constitution produced by Mr. Bulmer provides the most detailed institutional vision for an independent Scotland to date and has the potential to play a key role in shaping Scottish residents' expectations in the debate leading up to the referendum.

We do not presume to understand the nuances of Scottish politics or to understand the currency of the Bulmer draft among Scottish decision makers (much less Scottish citizens).

² See <http://www.scotreferendum.com/scotlands-future/>.

³ <http://www.scotland.gov.uk/Resource/0041/00413757.pdf>, pp. 6-9

⁴ See <http://www.constitutionalcommission.org/index.php>.

⁵ Available at

<http://www.constitutionalcommission.org/production/byre/images/assets/file/Resources%20Folder/A%20MODEL%20CONSTITUTION%20FOR%20SCOTLAND.pdf>.

Rather, we simply take the Bulmer draft to be a realistic and credible plan, and in the effort of furthering concrete discussion, we propose to understand and evaluate its contents. We should also stress our neutrality with respect to the merits of the Bulmer draft and the Scottish political future more generally. Our immediate impetus for this analysis is an invitation to contribute to a volume of scholarly analyses of the Scottish constitutional process.

Our approach is to compare the Bulmer draft to constitutions currently in force around the world, particularly those constitutions in force (or under consideration) in other European and Commonwealth countries. We draw from an original dataset (the Comparative Constitutions Project (CCP)) that records elements of constitutions across a wide range of substantive areas.⁶ We start by explaining our expectations about the content of countries' constitutions. We then assess if the Model Constitution meets these expectations by comparing it to all other constitutions in force. The comparison starts broadly by looking at the similarity between the Model Constitution and other constitutions and then focuses in on several important aspects of the draft: its level of detail, the power granted to the legislature, protection of judicial independence, and the provision of constitutional rights. The final section notes several specific provisions that are likely to be in any Scottish constitution but that are missing from Mr. Bulmer's model.

Some Baseline Expectations

In our experience, one can predict much of a constitution's content simply by knowing when and where it was written. The "when" speaks to the development of constitutional norms over time. Some constitutional provisions may not have existed when some constitutions were written, and even if they did exist, they may not have been widespread. Knowing when a constitution was written gives us information about both the possibility and popularity of various constitutional provisions, which helps us predict the likelihood that some provision will be inscribed in a given constitution. Take regulatory and oversight bodies (e.g. human rights commissions and judicial appointment commissions), for instance. Such institutions were virtually non-existent when the first set of modern (post 1800) constitutions were written, and even though there were some constitutions with these institutions by the end of World War II, such institutions were still relatively rare. Over the last thirty years or so, though, regulatory and oversight bodies have become extremely popular. Virtually every constitution written over the last 20 years has at least one or two of these institutions, leading us to suspect that any Scottish Constitution would have some.

The "where" captures country-specific factors that drive countries towards some institutions and away from others. Almost all countries have institutions that pre-date their

⁶ More information about the Comparative Constitutions Project is available at <http://www.comparativeconstitutionsproject.org/>.

entrance into the modern state system and the writing of their first constitution. Regardless of whether a state's primordial institutions were purely informal rules, as in the earliest states, or colonial structures, they will likely survive in some form. Institutions inevitably favor some individuals' interests over others, so those who benefit from the presence of some institution have a strong incentive to fight for the continued existence of that institution during constitutional drafting. Factors such as colonial heritage, legal origin, religion, ethnic fractionalization, language, and region are strong predictors of pre-state institutions and, as a result, the content of subsequent constitutional systems.

Knowing when and where a constitution is written allows for fairly precise predictions about its content. In particular, we can predict the presence of a given constitutional right with a great deal of accuracy using only four variables: 1) whether a given constitutional right was entrenched a given country's first constitution, 2) the year the constitution was written, 3) the geographic region in which the constitution was written, and 4) the percent of constitutions in force in a given countries' region which entrench a given constitutional right. On average, such a model predicts the status of constitutional rights with 84% accuracy. In other words, for the average country, we are accurately able to predict the entrenchment of about 100 of the 116 rights in our survey with only information about when and where that country's constitution was written.

These factors help identify a baseline model for what to expect from any given constitutional setting. We suspect that a Scottish constitution will look very similar to constitutions currently in force in other commonwealth countries and that it will look most like commonwealth constitutions written recently and written in countries that have performed well politically and economically (e.g. Australia, Canada, and New Zealand). A Scottish constitution might also look similar to modern European constitutions. Scotland is not only a part of Europe, but it would almost certainly apply for membership in the European Union upon becoming independent. Since the EU accession process has constitutional implications, like the fact that EU law is superior to domestic law in certain areas, we should observe some commonalities between the Scottish constitution and the constitutions of other EU member states.

The Roadmap put out by the Scottish Government says little about substance, though it does make some suggestions about principles that it will advocate. These include a strong guarantee of equality, provisions on sustainable use of natural resources, checks on military power, and freedom from nuclear weapons. Generally, however, the Scottish Government focuses on process. From our perspective, the process by which a constitution is adopted does not predict very much about its contents, though we do find that constitutions produced with public involvement tend to have more mechanisms of direct democracy.⁷

⁷ Blount, Ginsburg and Elkins, *Does the Process of Constitution-making Matter?* Annual Review of Law and Social Science 9 (2009).

But our general view is that the answers to the where and when questions will be particularly dispositive.

Similarity to the Model Constitution

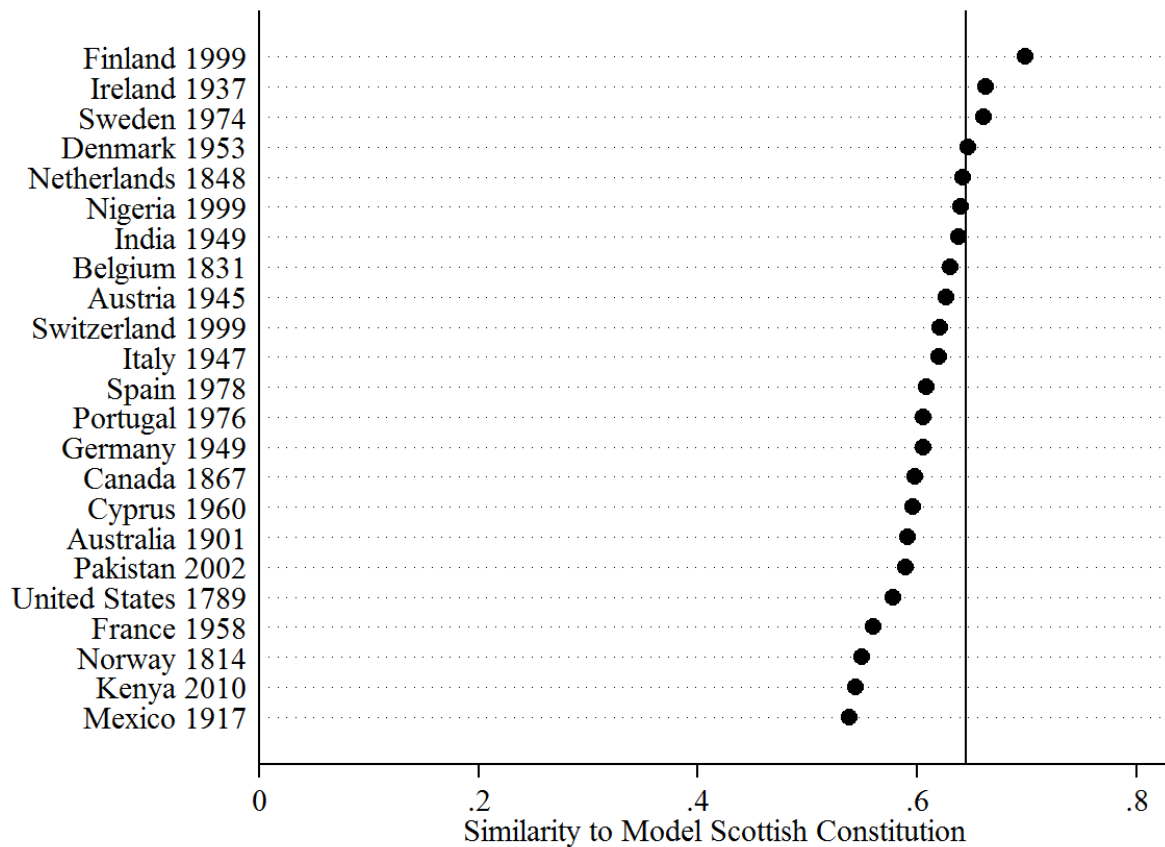
In this section, we test the expectations derived in the previous section by assessing similarity between the Model Constitution and other constitutions in force. We calculate dyadic similarity by first identifying the variables in the CCP's data set that are coded identically for both the Model Constitution and the constitution to which it is being compared and, then determining the proportion of the 1,752 variables in the CCP's data set that have the same value for both constitutions. The resulting similarity index ranges from 0.48 to 0.74 with a mean of 0.64.

The constitution most similar to the Model Constitution is that of the Solomon Islands of 1978, with a similarity score of 0.75. In other words, 75% of the variables in the CCP's dataset are coded the same for the Model Constitution and the Solomon Islands' document. Other constitutions that rank highly in terms of similarity are Namibia's 1990 constitution, Sao Tome and Principe's 1975 constitution, Vanuatu's 1980 constitution, and Belize's 1981 constitution. Although none of these constitutions are very recent, it is notable that four out of the five are from commonwealth countries; the exception is Sao Tome and Principe. The constitutions least similar to the Model constitution using our metric are those of Bosnia and Herzegovina (1995), Benin (1990), and the recently drafted constitutions in Ecuador, Madagascar, and Libya. The fact that several constitutions written over the last few years are least like the Model Constitution is a bit surprising, but we do not draw too many conclusions, since these comparator documents may themselves be unusual.

In Figure 1, we analyze the similarity between the Model Constitution and a more relevant set of constitutions. The figure illustrates similarity between the Model Constitution and 25 constitutions in force either in Europe or in prominent Commonwealth countries. Each dot reflects the similarity between that country's in force constitution and the Model Scottish Constitution, and the vertical reference line illustrates the mean level of similarity across all constitutions in force in 2012. Given that the constitutions listed in figure 1 are the ones we expected to be the most similar to the Model Constitution, it is surprising that most of the constitutions listed in the figure are less similar to the Model Constitution than the average constitution in force. None of the countries at the top of the list are commonwealth countries. Although Ireland was formerly part of the commonwealth, it withdrew in 1949 and has a constitution that is significantly different from many commonwealth countries. The only feature linking the top 5 countries on the list is the fact that they are either parliamentary democracies or semi-presidential democracies with relatively weak presidents. Notably, Australia and Canada, two countries that Scotland might try to learn from, are among the least similar to the Model Constitution. The two most recently written

constitutions in figure 1 – those in force in Pakistan and Kenya – are also towards the bottom of the list.

Figure 1 – Similarity to Model Constitution



In general, the Model Constitution is most similar to constitutions in force in commonwealth countries. On average, the Model Constitution is 0.05 more similar to commonwealth constitutions than non-commonwealth constitutions. However, the commonwealth constitutions most similar to the Model Constitution are not large, internationally important nations, like Australia or Canada. It is most similar to a number of constitutions written in small, relatively unknown former British colonies, like the Solomon Islands and Namibia, which are unlikely to be the models actively used by a future Scottish constituent assembly. Other likely sources of influence on the constituent assembly are recent constitutions and constitutions written by EU member states, but there are few overarching similarities between these constitutions and the Model Constitution.

In summary, the Model Constitution is not very similar to what we believe are the likely models for a Scottish Constitution. This suggests that the Model Constitution may be a very innovative document, which is not surprising given its origins. However, given the broad nature of the similarity analysis performed in this section, it is difficult to tell which specific

areas of the Model Constitution are most unusual. The next section looks more closely at different aspects of the Model Constitution to identify problem areas.

Characteristics of the Draft

At first glance, the Model Constitution looks quite different from a traditional commonwealth constitution. Commonwealth constitutions are among the longest in the world (in fact, India has the longest constitution ever written and Nigeria has the second longest) and traditionally enumerate very few constitutional rights. Many of the commonwealth constitutions were drafted by the British foreign office and look very much like parliamentary statutes. Australia has the only commonwealth constitution in force without a bill of rights, and both New Zealand and Canada added bills of rights to their constitutions only recently. In contrast, the Model Constitution is relatively short (only 11 articles), and much of the text (about 1/3) is devoted to elaborating constitutional rights.

Still, there are some features in the Model Constitution that will almost certainly be present in a future Scottish Constitution. Some of these features are consistently found in many commonwealth constitutions. For instance, 15 commonwealth countries, not including the United Kingdom, name the Monarch of the United Kingdom as Head of State, including Canada, Australia, and New Zealand. The SNP has indicated that Scotland would remain part of the commonwealth realm after independence, which suggests Article II, paragraph 1 of the Model Constitution is correct. Such constitutions typically create a Governor General to act in the Monarch's absence. This role is to be fulfilled by the Lord High Commissioner in the Model Constitution (Article II, paragraph 5). The Lord High Commissioner was the name given to the representative of the sovereign in the Scottish parliament prior to the 1707 Act of Union between England and Scotland, so tradition suggests that the old name be revived.

Other features of the Model Constitution are more unique to Scotland but may still be reflected in a Scottish Constitution. The legislature is a prime example. While many commonwealth countries have inherited a bicameral legislature from the United Kingdom (e.g. Australia, Canada, India, Kenya, etc.), Scotland currently has a unicameral legislature and it would likely continue to retain one house after independence. This fact is reflected in the Model Constitution (Article III, paragraph 1).

The electoral system is another example. Many commonwealth countries use one of the many majoritarian electoral systems, a feature inherited from the United Kingdom. Scotland's electoral system is not fully majoritarian. Like New Zealand, it uses a mixed member system, where some members are elected using a majoritarian system (single-member-districts) and others using a proportional system (regional party lists). This same system is specified as the electoral system in the Model Constitution (Article III, paragraph 2). That said, electoral systems are only rarely specified in constitutions, so it is possible that the constituent assembly may choose not to specify an electoral system.

The Model Constitution also specifies details about the judiciary. It largely leaves the current judicial structure in tact but adds a Supreme Court (Article V, paragraph 1), as the court of last resort, and a Judicial Appointments Council (Article V, paragraph 3), for selecting and removing judges. This model closely resembles that of the United Kingdom after the Constitutional Reform Act of 2005. Furthermore, although only a few commonwealth countries have a judicial council (e.g. Kenya), virtually all have a supreme court. In our view, then, the Model Constitution probably accurately reflects what will be the likely structure of the judiciary in an independent Scotland.

Our review of the three branches of government suggests that the basic institutional structure proposed by the Model Constitution is similar to Scotland’s current institutional structure and to the structure of other commonwealth countries. To delve even deeper into our assessment of the Model Constitution, figure 2 compares it to a few likely constitutional models along several dimensions which scholars typically compare constitutions. In each panel of figure 2, the Model Constitution is compared to the same constitutions used in figure 1 along one of the four dimensions described below. The vertical line in each panel indicates the mean of that dimension across all constitutions currently in force.

Detail

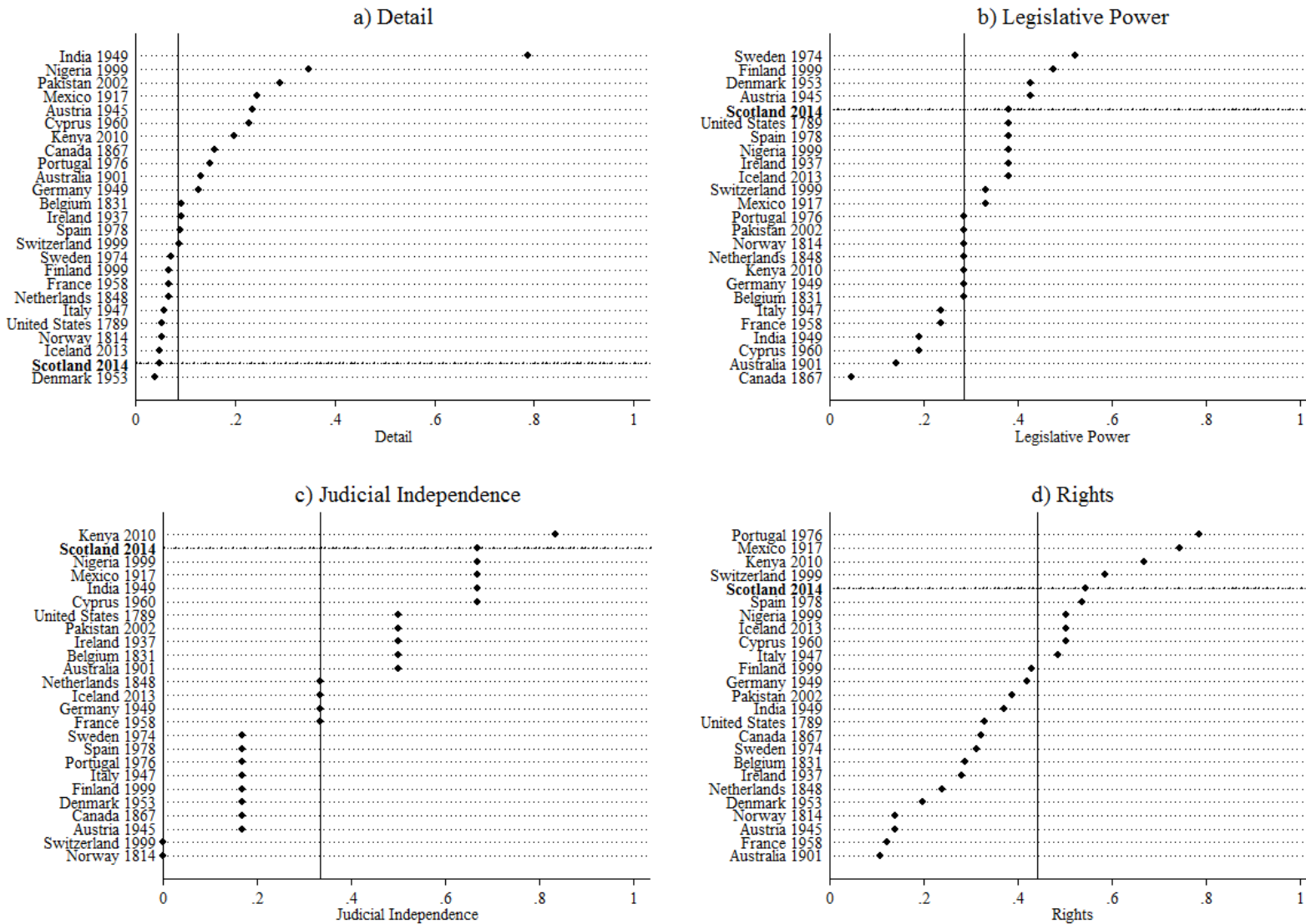
Panel A of figure 2 identifies the level of detail, as measured by the Comparative Constitutions Project, in 25 constitutions. Detail is measured as the number of words per topic, among a set of topics addressed in our survey.⁸ The measure is rescaled to range from zero to one, with one indicating the most detailed constitution and zero the least detailed constitution. This quantity says something about whether the document is more of a “framework” document, which generally advance only broad principles, or whether the document takes up very specific aspects of governance.

We have already indicated that commonwealth constitutions tend to be quite long, and this is reflected in panel A. The three most detailed constitutions are all from commonwealth countries – India, Nigeria, and Pakistan. In general, commonwealth countries are known for having quite detailed constitutions that take up very specific aspects of governance.

The Model Constitution (represented as Scotland 2014 in the figure) is one of the least detailed, not only in the figure but of all constitutions in force. The U.S. constitution is often considered to be one of the most concise, so it is notable that the Model Constitution has even less detail than its U.S. counterpart. This is perhaps the biggest difference between our expectations for a Scottish Constitution derived from the comparison group and the Model Constitution. If the ultimate constitution retains the prior institutional structure, a lot of detail may be unnecessary.

⁸ See Elkins, Ginsburg, and Melton (2009) for a full description.

Figure 2 – Four Elements of the Draft Constitution in Comparative Perspective



Legislative Power

Panel B of figure 2 compares the level of legislative power across 25 constitutions. This is an aggregate measure composed of thirty-two items which track the authority and autonomy of the legislature.⁹ Scores closer to one indicate higher levels of legislative power.

The Model Constitution provides for a parliament that is quite powerful. This is reflected in panel B, where Scotland has the fifth most powerful legislature. The Model Constitution assigns very few powers to the Monarch (or Lord High Commissioner) and what powers are assigned to the Monarch are, for the most part, purely ceremonial. Similarly, there is very little said about the government. Consistent with current practice in Scotland (and the United Kingdom) most of the government's power is informal, so even though the legislature looks more powerful in the Model Constitution, the reality is that the government (and the head of government, in particular) will almost certainly be the most powerful actor in an independent Scotland. There are hints of this power in the Model Constitution. For instance, "...due precedence shall be given to the legislative proposals and other businesses initiated by the Council of Ministers" (Article III, paragraph 12) and "[t]he Council of Ministers...shall determine all matters of foreign and domestic policy" (Article IV, paragraph 9).

The formal power granted to the legislature in the Model Constitution reflects its explicit declaration of popular sovereignty (Article I, paragraph 1) and rejection of the current system of parliamentary sovereignty. Note, though, that such an arrangement seems unlikely. Few commonwealth countries have completely rejected the Westminster model. More commonly, they formalize the powers granted to the government, rather than leaving those powers implicit, as in the United Kingdom. This is reflected in panel B, where, on paper, Australia, Canada, and Cyprus – all commonwealth countries – have the weakest legislatures. We suspect Scotland's ultimate system of government will closely resemble its current Westminster model, as suggested in the Model Constitution, but that the distribution of power between the executive and legislature will be made more explicit than it is in the Model Constitution, following its commonwealth brethren.

Judicial Independence

Panel C of figure 2 compares the level of *de jure* judicial independence across 25 constitutions. The measure is an additive index that captures the number of aspects of the constitution that are generally thought to enhance the autonomy of the judiciary: an explicit declaration of independence, selection and removal procedures that involve multiple bodies, whether or not the conditions upon which judges can be removed from office are explicitly mentioned, life

⁹ See Elkins, Ginsburg, and Melton (2009) for a full description.

tenure for judges, and protection of judges salaries.¹⁰ The original measure ranges from 0 to 6, but we have rescaled it here to range from 0 to 1 for consistency with the other measures reported in panel C.

Commonwealth countries are known for having highly independent judiciaries. It is one of the attributes commonly associated with being a former British colony and the reason why such countries are thought to perform better economically and politically. Most of the countries at the top of the scale in *de jure* judicial independence are former British colonies (the exception is Mexico), so one would expect a Scottish Constitution to also rank highly on this measure. The Model Constitution reflects this expectation, with only Kenya's constitution entrenching more institutional protection for the judiciary.

Rights

The final panel in figure 2, panel D, compares the number of constitutional rights provided across 25 constitutions. This is a measure of the volume of rights in the constitution, measured as the percentage of rights included in the constitution across 116 distinct rights included in the CCP's survey that have been specified in constitutions since 1789.

The Model Constitution includes a relatively high number of rights, as one might expect of a modern constitution. (The number of rights included in national constitutions has increased steadily over the years). The draft has noticeably more rights than most constitutions in panel D, including many commonwealth constitutions, but it has fewer rights than other recent constitutions such as those of Switzerland and Kenya.

Table 1 provides a right-by-right analysis of the rights in the Model Constitution (column 2) and those incorporated into the various statutes in force in the United Kingdom (column 3).¹¹ The fourth through sixth columns in the table provide the percentage of constitutions written in the denoted period that entrenched that right. For the most part, both the United Kingdom and the Model Constitution entrench the most common constitutional rights. In part, this reflects the influence of the European Convention of Human Rights (ECHR) on constitutional rights in both contexts. The Model Constitution draws very heavily from the ECHR; paragraphs 2-11 of Article IX have the same number as the convention.

Nonetheless, the Model Constitution provides far more rights than either the United Kingdom or the ECHR. These extra rights are mostly socioeconomic in nature, like the right to education, health care, safe working conditions, etc. (Article IX, paragraph 18). Although parliament is

¹⁰ See Ginsburg and Melton (2013) for a full description.

¹¹ The statutes included in coding rights entrenched in the United Kingdom are as follows: the 1297 version of the Magna Carta, the 1628 Petition of Rights, the 1689 Bill of Rights, the 1706 Union with Scotland Act, the 1800 Union with Ireland Act, the 1998 Human Rights Act, and the 2000 Freedom of Information Act

charged with the duty of ensuring that these rights are provided for (Article IX, paragraph 18, subparagraph e), the fact that the provisions are phrased as rights would grant judges the power to enforce these guarantees. This seems to reflect the goal, articulated by the SNP, of “securing social justice” as one of the priorities in an independent Scotland. (Indeed, the SNP has promised to reveal the details of how welfare and pension arrangement will look in an independent Scotland.) Whether judges should be granted the power to make decisions with budgetary consequences is a controversial issue around the world, but some courts have evidenced an ability to grapple with socio-economic rights in sophisticated ways. Interestingly, the Commission on a Bill of Rights in the United Kingdom recently rejected the idea of including socioeconomic rights in a proposed UK Bill of Rights because of a sense that courts should not be involved.¹² One intermediate option would be to include such rights but make them non-justiciable, as in many Latin American constitutions.

Table 1 – Rights Provisions in the Model Scottish Constitution

Right	Model Constitution	United Kingdom	Constitutions with Right (%)		
			1789-1914 (n=122)	1915-1948 (n=104)	1949-2006 (n=350)
Freedom of religion	x	x	50	87.5	88.9
Freedom of association	x	x	43.4	85.6	87.4
Freedom of expression	x	x	68.9	83.7	86.9
Freedom of assembly	x	x	49.2	87.5	85.7
Freedom of opinion	x	x	60.7	71.2	76.3
Right to own property	x	x	49.2	67.3	75.1
Freedom of movement	x	x	54.1	56.7	74.9
Right to privacy	x	x	47.5	68.3	72.9
Protection from unjustified restraint		x	41.8	57.7	71.4

¹² See <http://www.justice.gov.uk/about/cbr>.

Right	Model Constitution	United Kingdom	Constitutions with Right (%)		
			1789- 1914 (n=122)	1915- 1948 (n=104)	1949- 2006 (n=350)
Punishment by ex post facto laws prohibited	x	x	56.6	45.2	70.9
Right to trade unions	x	x	4.1	32.7	69.4
Right to counsel	x	x	11.5	20.2	64
Principle of "no punishment without law"	x	x	54.1	58.7	63.7
Right to life	x	x	23.8	39.4	60.3
Presumption of innocence in trials	x	x	5.7	8.7	60.3
Prohibition of torture	x	x	28.7	26	58
Prohibition of cruel or degrading treatment	x	x	25.4	25	57.7
Right to public trial	x	x	33.6	42.3	57.7
Freedom of the press			44.3	54.8	53.4
State duty to protect culture			3.3	25	52.6
Right of petition	x		73.8	73.1	46.9
Right to fair compensation	x		4.9	16.3	43.7
Rights of children guaranteed			2.5	22.1	43.1
Prohibition of slavery	x	x	50.8	27.9	42.6
Protection of stateless persons			14.8	16.3	42

Right	Model Constitution	United Kingdom	Constitutions with Right (%)		
			1789- 1914 (n=122)	1915- 1948 (n=104)	1949- 2006 (n=350)
Right of government to deport citizens	x		7.4	19.2	40
Right to protection from self-incrimination			40.2	35.6	39.7
Right to choose one's occupation	x		34.4	41.3	39.7
Right to strike	x		1.6	13.5	39.1
Right to health care	x		0	13.5	38.3
Right to rest and leisure	x		3.3	32.7	37.4
Prohibition of double jeopardy	x		12.3	19.2	36.6
State duty to provide health care	x		1.6	19.2	35.7
Right to a fair trial	x	x	4.9	4.8	32.9
Trial in native language of accused	x	x	0	6.7	31.4
Right to redress in the case of false imprisonment		x	9.8	14.4	30.9
Right to appeal judicial decisions	x		10.7	11.5	30.6
Jus soli citizenship			59	44.1	30.5
Right to inheritance			3.3	16.3	28

Right	Model Constitution	United Kingdom	Constitutions with Right (%)		
			1789- 1914 (n=122)	1915- 1948 (n=104)	1949- 2006 (n=350)
Right to safe work environment	x		4.9	14.4	26.6
Right to establish a business			23	32.7	26.3
Provision for matrimonial equality			0	12.5	26
Right to a speedy trial		x	5.7	7.7	24.3
Prohibition of censorship			47.5	37.5	24
Separation of church and state			3.3	17.3	24
Right to found a family	x		0.8	13.5	23.7
Right to examine evidence/witnesses	x	x	11.5	4.8	23.1
Prohibition of capital punishment	x	x	19.7	34.6	22.9
Right to marry	x	x	8.2	20.2	22.6
Right to self-development			0.8	1	22.3
Right to protect one's reputation			13.9	11.5	21.7
Limits on child employment			1.6	26	21.1
Protection of intellectual property rights			39.3	34.6	20.9
Right of pre-trial release	x	x	23	19.2	20.9

Right	Model Constitution	United Kingdom	Constitutions with Right (%)		
			1789- 1914 (n=122)	1915- 1948 (n=104)	1949- 2006 (n=350)
Right reasonable standard of living			0	13.5	20.9
Right to shelter			0.8	6.7	19.4
Freedom to view government information	x	x	1.6	1.9	18
Provision of health care at state expense	x		0	3.8	16.9
Right to renounce citizenship			1.6	6.7	16.6
Right to free market			3.3	6.7	16.6
Right to conscientious objection	x		2.5	0	14.9
State duty to provide employment			0.8	13.5	14.9
Jury trials required	x	x	36.9	22.1	14.3
Right to transfer property	x	x	17.2	8.7	13.7
Detention of debtors forbidden	x		10.7	20.2	13.4
Right to self determination			0	8.7	12.6
Special privileges for juveniles in criminal process			0.8	3.8	10.9
Protection of consumers	x		1.6	1.9	10.6

Right	Model Constitution	United Kingdom	Constitutions with Right (%)		
			1789- 1914 (n=122)	1915- 1948 (n=104)	1949- 2006 (n=350)
Right to enjoy the benefits of science			0.8	0	10
Right of testate			8.2	4.8	7.4
Prohibition of corporeal punishment			32	21.2	7.1
Right to bear arms			8.2	3.8	1.4

Summary

The purpose of this section has been to identify provisions in the Model Constitution that are unusual vis-a-vis what one might think are natural comparator groups. We have suggested that institutional framework established by the Model Constitution could likely to be retained for reasons of continuity. Like Mr. Bulmer, we expect a strong association between the current political institutions in Scotland and the institutions present in an independent Scotland. Still, we were able to identify a number of areas where the Model Constitution differs from current practice and from what one might otherwise expect from the comparison group. Perhaps most importantly, the Model Constitution is far less detailed than others. This is important because these details are where most of the inner workings of government will be spelled out and where differences between the existing and new system are likely to lie. This is also where the Scottish parliament's new competences, transferred from the parliament in Westminster, will be spelled out (more on this in the next section). Perhaps the details will be filled in if the Bulmer draft becomes the basis of a formal process, in which it would be widely circulated and debated. Related to the level of detail, we have also suggested that the power of the government may be made more explicit. The next section suggests several features that we would otherwise predict would be present in a Scottish Constitution that are omitted from the Model Constitution.

What's Missing

The Scottish parliament currently has a wide range of devolved powers granted to it by the 1998 and 2012 Scotland Acts. These two acts have transferred a substantial amount of power over Scotland's domestic affairs from Westminster to Holyrood, including limited taxing power. By the time of independence in 2016, the Scottish parliament will have had more than 15 years

of experience exercising (most of) these devolved powers, and it will most likely continue to exercise those powers in a similar manner after independence. However, at independence, the Scottish parliament will inherit a number of additional powers currently reserved for Westminster.¹³ The most obvious of these are constitutional powers (Scotland was not given the power to control its institutional structure or its own fate), but there are a number of reserved powers that will have implications for the contents of a new constitution.

Perhaps the most important policy area that the Scottish parliament will gain control over is fiscal policy. An independent Scottish parliament will have to levy taxes and/or borrow money to pay its bills, and if history is any guide, these bills will be expensive. Currently, Scotland has been able to opt out of some of the coalition government's austerity measures because the transfers it is guaranteed from London are sufficient to pay for these expenses. For instance, university education is free in Scotland as is elderly care and prescription medication, but in the rest of the United Kingdom, the coalition government has started charging for similar services that were previously free, like university education and elderly care, and has raised prices on services already charged for, like prescription medication. An independent Scotland will have to find a way to pay for these (and other) very expensive services offered by the government. Paying for these services might be tricky, given that the current Scottish parliament has been reluctant to exercise its limited taxing authority or to raise council tax rates to pay for them.

The new fiscal powers granted to the Scottish parliament will almost certainly be entrenched in the country's constitution, should it gain independence. Most constitutions elaborate the legislature's fiscal powers in great detail, and it is not uncommon for the procedure for passing budget and tax bills to be different from the procedure for passing ordinary legislation. However, the Model Constitution says relatively little about the procedure for creating fiscal policy. There are only four specific mentions of fiscal power: 1) that the debate over money bills cannot be suspended (article III, paragraph 16), 2) that tax bills expire every 12 months (article III, paragraph 18), 3) that public funds shall only be spent through an act of parliament (article III, paragraph 18), and 4) that the council of ministers shall manage public finances (article IV, paragraph 9).

This leaves open many important questions about how fiscal policy will be created. Some of these questions, like who draws up the budget and brings it before parliament for debate, are fairly benign because one can readily assume that the government will continue to have that power. However, other questions are more important. For instance, what is the default budget if the government cannot agree on a budget or the proposed budget is not approved by the legislature? This would seem to be particularly important given that, according to the Model Constitution, a new tax bill is required every year. Also, are there any balanced budget

¹³ See Schedule 5 of the 1998 Scotland Act - <http://www.legislation.gov.uk/ukpga/1998/46/schedule/5>.

requirements or limits on how much parliament can borrow? Given that Scotland is likely to use either the Euro or the Pound for its currency (meaning that the Scottish government will not have control over its own monetary policy) limits on government spending will be important to ensure that government does not abuse its new fiscal powers. Such limits might even be required if Scotland intends to join the Eurozone.

Another area of new competence will be citizenship and the movement of persons. The Model Constitution indicates two sufficient conditions for citizenship: 1) British subjects born in Scotland, or 2) residents of Scotland at independence (Article 1, paragraph 4). All other aspects of citizenship and movement of persons are left to ordinary legislation. The provisions on citizenship are extremely important because it is citizens who will be granted the political and economic rights provided in the constitution. Moreover, given the concern that many EU member-states have over the movement of persons, they are likely to be much more complicated than those found in the Model Constitution. At a minimum, we would expect the conditions for naturalization, amnesty, and deportation to be spelled out in much greater detail. We also suspect that there may be special provisions made for the movement of persons and allocation of certain rights (e.g. voting) to subjects of the United Kingdom to indicate Scotland's special relationship with the United Kingdom.

As highlighted in both of the previous omissions, the relationship with the EU is a crucial one to be resolved in principle, ideally, before the constitution is finalized. The Model Constitution makes no explicit mention of the EU. The only vague reference to the EU is in article IV, paragraph 12, which requires parliament to pass any treaty that delegates power to an international organization, like the EU, by a two-thirds majority vote. We are a bit surprised that such a treaty does not require a referendum, as has become the norm in many EU countries and is becoming the norm in the UK. One potential worry here is that Scottish residents would have to vote in too many referenda (one for independence, another to accede to the EU, presumably yet another to promulgate the constitution). As a solution to this, the government might combine the vote on EU accession with the vote on promulgating the constitution. In other words, provided the EU accession process is complete, the constituent assembly could incorporate provisions on EU membership into the proposed constitution, which would mean that a promulgation vote would implicitly also be a vote on EU membership. The risk, though, is that such a referendum might encourage strategic voting, where individuals who oppose either the constitution or EU membership would be inclined to vote against both, increasing the number of opposition votes.

In any case, failure to take the EU into account is a major oversight in the Model Constitution. The SNP has made clear that it will try to accede to the EU prior to independence in 2016, which will have important constitutional implications. At a minimum, any Scottish constitution

will have to include mechanisms for incorporating new EU law and ensuring that Scottish law does not violate pre-existing EU law. Such mechanisms are in the constitutions of most (if not) all member states.

Concluding Remarks

The Model Constitution written by Mr. Bulmer is an ambitious attempt to provoke debate on what an eventual Scottish Constitution might look like. In this report, we have identified several areas where the Model Constitution seems likely to comport with an eventual constitution for an independent Scotland. However, we have identified a number of areas where there is likely to be less overlap, at least if one assumes that Scotland will follow the path of a typical set of comparison countries.