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The Westminster Model in Comparative Administrative Law: Incentives for Controls on Regulation-Making

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Abstract

Comparative administrative law scholars have highlighted the differences between regulation-making processes in Westminster parliamentary systems and the United States' presidential system. One particular difference focused on in these works is that the United States regulation-making legislation, the Administrative Procedure Act *(1946), includes notice and comment provisions while the equivalent legislation in countries with Westminster-based systems either include no such provisions or, as in some jurisdictions in Australia, include unenforceable public consultation provisions. The comparative scholarship highlights that the differences between the United States and Westminster-based systems are due to different incentives operating in the two countries. In particular, they highlight that there are disincentives in parliamentary systems to enact such provisions. While I agree that disincentives help explain the lack of mandatory public consultation provisions in general regulation-making legislation in Westminster parliamentary systems, they do not explain direct control of regulation-making by parliaments or the inclusion of public consultation provisions in sector-specific legislation. When those features are taken into account, a different picture of regulation-making in Westminster parliamentary systems emerges.*

Keywords

Comparative Administrative Law; Westminster Parliamentary Systems; United States Presidential System; Regulation-Making; Public Consultation Provisions; Notice and Comment Provisions; Incentives

I INTRODUCTION

A theme has developed in comparative administrative law scholarship that in parliamentary systems there is little or no incentive for parliaments to enact public participation provisions for regulation-making. Since general regulation-making legislation such as the *Statutory Instruments Act 1946* (UK) does not include such provisions and court-developed principles of procedural fairness do not extend to regulation-making (to be explained further shortly), there are no general, mandatory public participation

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procedures for regulation-making. Comparative administrative law scholarship explains this as being due to the institutional arrangements applying in parliamentary systems providing no incentive for parliaments to enact such provisions.[1] The point is made in a comparative manner: there are incentives for political officials to enact and support mandatory public participation provisions for regulation-making in the US separation of powers system but not in parliamentary systems. These explanations are based on positive political theory.

In this article, I question this account of regulation-making in parliamentary systems by focusing on two countries, the UK and Australia, both of which can be characterised as having Westminster model institutional arrangements. The positive political theory account raises two specific issues and a third more general issue that I explore in this article. The first issue relates to positive political theory's focus on the lack of public participation provisions in general regulation-making legislation ('trans-substantive legislation'). That focus results in such scholarship not addressing the more common form of implementing mandatory public consultation provisions in Westminster parliamentary systems: that is, to include them in sector-specific legislation (eg environmental, financial, or communications legislation). The fact that general requirements for public consultation in the two countries that I focus on, the UK and Australia, are not enforceable can be explained by positive political theory but the sector-specific provisions so far have not. The enactment of mandatory public consultation provisions despite the disincentives suggests that the application of positive political theory to regulation-making in parliamentary systems requires adjustment.

The second issue is that positive political theory scholarship of regulation-making in parliamentary systems has not so far factored in direct parliamentary control of regulation-making in any detail. This is an important omission because if direct parliamentary control of regulation-making is effective then it suggests less incentive to establish indirect procedural methods for controlling regulation-making, such as mandatory public consultation provisions.

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[1] Susan Rose-Ackerman, 'Policy-Making Accountability: Parliamentary versus Presidential Systems' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar, 2011) 171, 176–7; Christian B Jensen and Robert J McGrath 'Making Rules about Rulemaking: A Comparison of Presidential and Parliamentary Systems' (2011) 64 *Political Research Quarterly* 656, 660; Susan Rose-Ackerman, Stefanie Egidy, and James Fowkes, *Due Process of Lawmaking: the United States, South Africa, Germany, and the European Union* (Cambridge University Press, 2015) 17–18, 263–7; Susan Rose-Ackerman, Stefanie Egidy and James Fowkes, 'The Law of Lawmaking: Positive Political Theory in Comparative Public Law' in Francesca Bignami and David Zaring (eds), *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Edward Elgar, 2016) 353, 360. But see, Jeeyang Rhee Baum, Christian B Jensen and Robert J McGrath, 'Constraining a Shadowy Future: Enacting APAs in Parliamentary Systems' (2016) 41 *Legislative Studies Quarterly* 471.

These two issues address aspects of regulation-making that have systemic significance in Westminster systems. There may be other concerns regarding the positive political theory account of public participation provisions, but I focus on these, as they are important features of these systems that so far have not been factored into the application of positive political theory in Westminster systems.

The third issue is a difficulty that underlies the first two issues. It is that comparative administrative law scholarship based on positive political theory tends to characterise institutional arrangements in different countries as specific systems or, as Moe and Caldwell state, 'package deals'.[2] The defining characteristic of parliamentary systems employed by positive political theory scholars is the concentration of political power in the executive due to its control over parliament. I will argue that this aspect of Westminster parliamentary systems helps to explain the lack of mandatory public consultation provisions in trans-substantive regulation-making legislation, but it does not explain direct parliamentary control of regulation-making or the inclusion of enforceable public participation provisions in sector specific legislation. For these controls on regulation-making in parliamentary systems, a less rigid understanding of institutional arrangements is required, one that understands such arrangements as the context or environment in which regulation-making operates rather than a specific system.[3] Environments vary and have different local effects.

The understanding of Westminster parliamentary systems in positive political theory has the potential to offer an explanation of the relationship between general institutional arrangements and particular regulation-making processes. Such an explanation has great potential benefit because regulation-making processes are often considered to be opaque, even though regulations are a very common form of law.[4] Positive political theory may also be useful in that it can potentially offer guidance into reforms if current processes are recognised to be problematic. It can help to highlight the likelihood (or not) of such reforms succeeding.[5] It is not difficult to see why the current lack of mandatory public consultation provisions in trans-substantive regulation-making legislation may be regarded as problematic. It is accepted that public consultation commonly

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2 Terry M Moe and Michael Caldwell, 'The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems' (1994) 150 *Journal of Institutional and Theoretical Economics* 171, 172. See also Nuno Garoupa and Jud Mathews, 'Strategic Delegation, Discretion, and Deference: Explaining the Comparative Law of Administrative Review' (2014) 62 *American Journal of Comparative Law* 1, 10.

3 See, eg, Jerry L Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (Yale University Press, 1997) 163–4.

4 Edward C Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (Hart Publishing, 2001) 3–4.

5 See, eg, Mashaw (n 3) 165–6.

occurs on a voluntary, informal basis in the UK[6] but concerns are commonly expressed that such procedures can be poorly conducted.[7] Such concerns could lead to the view that making consultation enforceable by courts would be a worthwhile reform, in order to enable courts to check whether notice of a regulation is adequate, submissions are actually considered, etc. As we will see below, positive political theory offers an explanation as to when statutory reforms are likely to succeed or fail, and how statutory reforms can be designed to improve their effectiveness.

Before starting my examination of these issues, it is worthwhile briefly explaining why court-based, procedural fairness principles are not helpful in this context. While UK courts have developed consultation principles, they do not apply to regulation-making.[8] Australian courts have not developed consultation principles as a matter of procedural fairness and have also confirmed that procedural fairness does not extend to administrative action that affects the public generally, as is the case for regulations.[9] While numerous academics have criticised these limits of procedural fairness,[10] there are no real signs of courts deciding to change these principles.

The primary contribution I seek to make is to criticise the way in which positive political theory has been applied in Westminster parliamentary systems in comparative administrative law scholarship. My intention is to develop a better understanding of the laws that apply to regulation-making in Westminster parliamentary systems in order to improve the insights that

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6 United Kingdom, *Parliamentary Debates*, House of Commons, 6 November 1945, vol 415, col 1113; Bernard Schwartz and HWR Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Clarendon Press, 1972) 98–9; JAG Griffith and H Street, *Principles of Administrative Law* (Pitman Publishing, 5th ed, 1973) 123–6.

7 See, eg, in the UK, Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society, 2014) 216–8; Secondary Legislation Scrutiny Committee, *Work of the Committee in Session* (HL 2015–16, 35) [27]–[30]. Secondary Legislation Scrutiny Committee, *Interim Report on the Work of the Committee in Session* (HL 2017–19, 26) [34]–[36]. In Australia, see David Borthwick and Robert Milliner, *Independent Review of the Australian Government's Regulatory Impact Analysis Process* (2012) 52; Productivity Commission, *Regulatory Impact Analysis: Benchmarking* (2012) 222, 235.

8 *R (BAPIO Action Limited) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, [41]–[47]; *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, 781–82 [44]–[45]; *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947, 3961 [35], 3962 [37]–[38].

9 *Re Gosling* (1943) 43 SR (NSW) 312, 318; *Kioa v West* (1985) 159 CLR 550, 582, 584 (Mason J), 620 (Brennan J), 632 (Deane J).

10 GJ Craven, 'Legislative Action by Subordinate Authorities and the Requirement of a Fair Hearing' (1988) 16 *Melbourne University Law Review* 569; PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, 1990) 174–6; DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996) 491, 493; Genevieve Cartier, 'Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?' (2003) 53 *University of Toronto Law Journal* 217.

positive political theory accounts can provide of regulation-making in Westminster systems. The article develops in the following order. In part II, I explain positive political theory, its initial application in the US, and how that has been drawn on to conclude that parliamentary systems include disincentives to the enactment of enforceable public consultation provisions. In part III, I analyse direct legal controls on regulation-making: the laws that enable political officials directly to control regulation-making. In part IV, I examine indirect procedural controls.

II Positive Political Theory: Concepts and Application

Before examining how positive political theory has been applied to Westminster parliamentary systems, it is worthwhile summarising its primary concepts and its application in the US, where it initially developed. This is a brief sketch focusing on how the theory understands political incentives.

A *Positive political theory: development and explanation of US administrative law*

Positive political theory was primarily developed in the 1980s and 1990s in a series of articles by a group of US political scientists, Mathew McCubbins, Roger Noll, and Barry Weingast; collectively referred to as 'McNollgast'. Their starting point is to see legislators and administrative regulation-makers as being in a principal-agent relationship. Understanding the relationship in those terms enabled McNollgast to see legislators as having an incentive to add control mechanisms to administrators' regulation-making. Controls become necessary due to the principal's concern that administrators' policy preferences may conflict with their preferences.[11] The primary work of positive political theory then becomes explaining the controls on administrators that are likely to arise from this principal-agent relationship in a government context. Direct forms of political accountability to legislatures through mechanisms such as removing officials from office, investigations, reconsidering agency funding, and legislative change are likely to be regarded as costly, in terms of time and resources to carry them out, and weak.[12] Relying exclusively on them would defeat the benefits of delegation, namely to conserve the

[11] Mathew D McCubbins, Roger G Noll and Barry R Weingast, 'Administrative Procedures as Instruments of Political Control' (1987) 3 *Journal of Law, Economics and Organization* 243, 247–8.

[12] Ibid 248–53; Mathew D McCubbins, Roger G Noll and Barry R Weingast, 'Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies' (1989) 75 *Virginia Law Review* 431, 435–7.

legislature's time and resources.[13] This creates an incentive to establish indirect controls on regulation-making by administrative officials.[14]

Procedural controls are the preferred indirect control on regulation-making by administrative officials. Public participation procedures enable or, in McNollgast's terms, 'enfranchise'[15] members of the public to influence the content of regulations. It establishes a political process designed to restrict the agency to considerations that reflect the factors initially considered at a more general level in the legislature's process developing the Act that delegates regulation-making power to the agency. According to positive political theorists, the legislature will support judicial review of an agency's non-compliance with procedural requirements. The effectiveness of participatory procedures in controlling the agency's policy decisions is dependent on their being judicially enforceable.[16] This process provides the control on the agencies' policy decisions sought by principals. Most importantly, it is a form of indirect control. Enforceable public participation provisions push the cost of controlling agency policy decisions onto members of the public and the courts. Susan Rose-Ackerman neatly captures the point as enabling Congress to 'outsource' oversight of administrative agencies to the public and the courts.[17]

Positive political theory is, as the name indicates, referred to as a positive theory.[18] Its purpose is to explain why the notice and comment provisions included in the US *Administrative Procedure Act*[19] are supported by elected politicians. These provisions and their enforcement by the courts are the paradigm of the process requirements that match the interests of political principals. The positive nature of the theory is contrasted with normative analyses of administrative procedures and is intended to provide an alternative to administrative law scholarship. Positive political theorists regard administrative law scholarship as focusing primarily on courts and concepts such as fairness and legitimacy[20] or history and culture.[21] However, positive political theory is not necessarily a critique of administrative law scholarship. In later works, McNollgast make clear that their analysis complements, and should be integrated with, administrative

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13 Rose-Ackerman (n 1) 178.

14 McCubbins, Noll and Weingast, 'Administrative Procedures as Instruments of Political Control' (n 11) 254–5; McCubbins, Noll and Weingast, 'Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies' (n 12) 443–4.

15 McCubbins, Noll and Weingast, 'Administrative Procedures as Instruments of Political Control' (n 11) 440.

16 Ibid 263.

17 Rose-Ackerman (n 1) 179.

18 McCubbins, Noll and Weingast, 'Administrative Procedures as Instruments of Political Control' (n 11) 246.

19 5 USC § 553 (1946).

20 McCubbins, Noll and Weingast, 'Administrative Procedures as Instruments of Political Control' (n 11) 245.

21 Moe and Caldwell (n 2) 186–7.

law scholarship.[22] This view has been repeated in administrative law scholarship. For example, Peter Lindseth refers to principal-agent theory (another name for positive political theory) as a 'starting point' that needs to be supplemented by historical and cultural analysis.[23]

Positive political theory analysis of administrative procedural laws has been criticised by US administrative law scholars. One commonly expressed concern is that while it can help understanding of the consequences of particular constitutional arrangements, it does not necessarily reflect current practices and is not a good predictor of future institutional behaviour.[24] Others have criticised it for being too simple for a complex system such as the administrative state with multiple principals,[25] for having questionable understanding of political participants,[26] and not engaging sufficiently with administrative law developed by the courts.[27] On the other hand, the insights from positive political theory scholarship into US administrative law have also been accepted, even by some of its critics, as helping to answer some administrative law puzzles[28] and highlighting the institutional dynamics underpinning public law.[29]

I follow the administrative law scholars who recognise the insights of positive political theory. As an administrative law scholar, I want to acknowledge those insights, yet, at the same time, do not pretend to utilise their methodology. In particular, I agree with the approach expressed in the later McNollgast works and by Lindseth that positive political theory offers insights that should be supplemented by historical and cultural research carried out by administrative lawyers.

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22 McNollgast, 'Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures' (1990) 6 *Journal of Law, Economics, & Organization* 307, 328–9; McNollgast and Daniel B Rodriguez, 'Administrative Law Agonistes' (2008) 108 *Columbia Law Review* 15, 22.

23 Peter L Lindseth, 'Judicial Review in Administrative Governance: A Theoretical Framework for Comparative Analysis' in Ernst Hirsch Ballin, Saskia Lavrijssen and Jurgen de Poorter (eds), *Judicial Review in the Administrative State* (T.M.C. Asser/Springer) forthcoming. Available at SSRN: https://ssrn.com/abstract=3326002.

24 Mashaw (n 3) 44, 127–9; M Elizabeth Magill and Daniel R Ortiz, 'Comparative Positive Political Theory and Empirics' in Susan Rose-Ackerman, Peter L Lindseth and Blake Emerson, *Comparative Administrative Law* (Edward Elgar, 2nd ed, 2017) 71, 76, 80. For an Australian political science example, see Cosmo Howard, 'The Politics of Numbers: Explaining Recent Challenges at the Australian Bureau of Statistics' (2019) 54 *Australian Journal of Political Science* 65, 71–3.

25 Adrian Vermeule, 'The Administrative State: Law, Democracy, and Knowledge' in Mark Tushnet, Mark A. Graber and Sanford Levinson (eds), *The Oxford Handbook of the US Constitution* (Oxford University Press, 2015) 259, 265–9.

26 Peter L Strauss, 'From Expertise to Politics: The Transformation of American Rulemaking' (1996) 31 *Wake Forest Law Review* 745, 775–6; Mashaw (n 3) 45.

27 Lisa Schultz Bressman, 'Procedures as Politics in Administrative Law' (2007) 107 *Columbia Law Review* 1749, 1771–6.

28 Ibid 1752, 1776–1804.

29 Mashaw (n 3) 200, 207.

B *Positive political theory and parliamentary systems*

Can positive political theory assist in refining understanding of the institutional dynamics arising in the control of regulation-making in parliamentary systems? Before answering this question, it is worthwhile recognising that while positive political theory originated in the US, it has gained a foothold in political analysis outside of that context. For example, Richard Mulgan's influential analytical work on accountability mechanisms utilises principal-agent methodology, the basis of positive political theory, to explain the concept of accountability and substantiates his understanding of it by reference to its operation in Westminster systems.[30] Principal-agent theory has also been used by UK and Australian political scientists to explain the operation of, and developments within, Westminster-based political systems.[31] This suggests that there is no general reason to limit the use of positive political theory to the US presidential system of institutional arrangements.

The emerging comparative administrative law scholarship is divided on whether positive political theory offers insights into administrative law in Westminster systems. The research has developed along two paths. The first applies positive theory to explain the differences between features of judicial review of administrative action in parliamentary systems and presidential systems. Some scholars have argued that positive political theory offers insights into the differences,[32] others are sceptical,[33] and there are those who argue that it needs to be supplemented.[34] The second path involves applying positive political theory to regulation-making in parliamentary systems. The theme of this research is the focus of this article: that there is no incentive to establish public participation procedures for regulation-making in parliamentary systems.[35] The one article recognising that such incentives can arise suggests that it is due to a fairly specific political condition: where the government controlling the legislature has uncertain electoral prospects after a period of dominance.[36]

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30 Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave McMillan, 2003) 8–11, 25, 52–5.

31 See, eg, Matthew Flinders, *Delegated Governance and the British State: Walking without Order* (Oxford University Press, 2008) 49–57; Phil Larkin, 'Ministerial Accountability to Parliament' in Keith Dowding and Chris Lewis (eds) *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU E-Press, 2012) 95, 97–9.

32 See, eg, Garoupa and Mathews (n 2); Eric C Ip, 'Doctrinal Antithesis in Anglo-American Administrative Law' (2015) 22 *Supreme Court Economic Review* 147.

33 See, eg, Magill and Ortiz (n 24) 77–80.

34 Benjamin Minhao Chen & Zhiyu Li, 'Explaining Comparative Administrative Law: The Standing of Positive Political Theory' (2016) 25 *Washington International Law Journal* 87.

35 Rose-Ackerman (n 1) 176–7; Jensen and McGrath (n 1) 660; Rose-Ackerman, Egidy, and Fowkes, *Due Process of Lawmaking* (n 1) 17–8, 263–7; Rose-Ackerman, Egidy and Fowkes, 'The Law of Lawmaking' (n 1) 360.

36 Baum, Jensen and McGrath (n 1) 490.

The authors drew this conclusion from the enactment of public participation legislation in non-Westminster parliamentary systems.

The primary point of this scholarship is that parliamentary systems involve concentrated power. In their early, influential, article, Professors Tim Moe and Michael Caldwell analyse the UK parliamentary system in contrast with the US presidential system.[37] The US constitutional system separates Congress from the president, with each having different roles and preferences regarding administrative regulation-making.[38] This is contrasted with the close connection between the executive and legislature in the UK parliamentary system. Political power is concentrated due to the government's control of Parliament, which leads to prioritising flexible, discretionary regulatory systems with informal checks on the exercise of delegated powers.[39] The general point is that controls on regulation-making have developed in accordance with the institutional arrangements in parliamentary systems.[40] And, like the claims of other early positive political theory scholarship, Moe and Caldwell see their explanation as an alternative to analysis that focuses on 'idiosyncrasies of history, culture, and tradition' and instead explores 'the rational foundations of governmental structure'.[41] As referred to earlier, that view of positive political theory has lost its force. Positive political theorists and administrative law scholars tend now to understand the two methodologies as complementing each other.

Moe and Caldwell's analysis has been developed by Professor Susan Rose-Ackerman, at times with collaborators. One theme of her research is that governments in parliamentary systems will have 'little reason to require direct accountability to the public in ways that would constrain its own discretion'.[42] This is understood to mean that statutory administrative procedures are likely to be limited to individualised administrative decision-making and that any public participation arrangements that are made are likely to be restricted to unenforceable 'hortatory recommendations' to regulation-makers.[43]

This offers an intriguing explanation into an administrative law puzzle in Westminster-parliamentary systems: why legislatures tend not to enact enforceable public participation requirements. It is particularly interesting in how it draws on institutional contexts to explain an aspect of public law. The fact that governments generally control at least the lower houses of legislatures in parliamentary systems suggests that there will be little incentive to enact indirect procedural controls on regulation-makers. The

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37 Moe and Caldwell (n 2).
38 Ibid 175–6.
39 Ibid 178–9.
40 Ibid 183–7.
41 Ibid 187, 193.
42 Rose-Ackerman (n 1) 176–7.
43 Ibid 177.

political officials that control Parliament, after all, have direct executive control of regulation-making. Legislation in the UK and Australia commonly delegates regulation-making powers to ministers,[44] officials who are members of both the majority party in parliament and the highest officials of the executive. Edward Page's empirical research into regulation-making in the UK highlights that, in practice, senior cabinet ministers can play an influential role in internal regulation-making processes.[45] Since delegation of regulation-making powers is commonly to the most senior members of the executive who (with other members of the government) largely control the Parliament, no particular incentive arises for the same group to enact direct or indirect legal controls on their delegated powers.

While the positive political theory-based account of regulation-making in Westminster parliamentary systems offers important insights, I will argue that it is a limited picture that misses features that operate in different ways. There are three particular weaknesses that limit the ability of positive political theory to provide an account that reflects the complexities of regulation-making in the UK and Australia.

The first weakness is that positive political theory accounts focus on constitutional models rather than the actual systems in particular countries. While they may recognise that such variations exist by noting that it might be better to see a spectrum between the US separation of powers at one end and the UK Westminster parliamentary systems at the other, and that parliamentary systems are often qualified,[46] they do not explore how the incentives change when qualifications and deviations are operating.[47] In Rose-Ackerman's collaborative work examining law-making procedures in the US, South Africa, Germany, and the European Union, the authors identify enforceable public participation provisions in sector-specific legislation in the parliamentary systems in South Africa and Germany,[48] but do not examine their significance for positive political theory applied to comparative administrative law. If they were to be taken into account,

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44 The terminology that is commonly used in UK legislation in provisions delegating regulation-making powers to ministers is to refer to them as the 'secretary of state': see, eg, *Teaching and Higher Education Act 1998* (UK) s 42. The common practice in Australian legislation is to delegate the power to the 'Governor-General', the formal head of the executive: see eg *Migration Act 1958* (Cth) s 504; *Social Security (Administration) Act 1999* (Cth) s 243. In practice the power is exercised by the Minister and the Governor-General is required by invariable constitutional conventions to act on the Minister's advice.

45 Page (n 4) 94–5.

46 Moe and Caldwell (n 2) 182–3; Rose-Ackerman (n 1) 178.

47 For recognition of such deviations in Westminster systems, see Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press, 2nd ed, 2012) 10.

48 Rose-Ackerman, Egidy and Fowkes, *Due Process of Lawmaking* (n 1) 127–31, 195–200.

positive political theory may offer explanations of how incentives change when the institutional environment varies from the general model.

The second weakness is the focus in the positive political theory scholarship on trans-substantive public participation procedures, such as the provisions in the US *Administrative Procedure Act*. There are such trans-substantive Acts in the UK and Australia, the *Statutory Instruments Act 1946* (UK) and the *Legislation Act 2003* (Cth) and, as would be predicted by positive political theory, neither includes enforceable public participation provisions (to be examined in Part IVA). The difficulty is that these trans-substantive Acts do not exhaust the statutory procedures for administrative regulation-making in Westminster parliamentary systems, particularly in the UK and Australia. Such procedures are also included in sector-specific legislation (to be examined in Part IVB). The provisions of these Acts commonly include procedures for parliamentary control (particularly in the UK) and public participation procedures. The search for controls on regulation-making in trans-substantive legislation results in missing the Acts most likely to include such controls.

The third weakness of the positive political theory explanation of regulation-making in Westminster parliamentary systems is that the focus on indirect controls (that is, primarily public participation procedures) misses the role of direct parliamentary controls supported by scrutiny committees (to be examined in Part III). This is important because, as we saw above in Part IIA, positive political theory focuses on indirect procedural controls because the cost and weakness of direct controls creates an incentive to establish indirect requirements that establish alternative controls. But if the direct controls are not so weak or costly, as I will argue is the case in both the UK and Australia, then there will be less incentive to rely on indirect controls.

These three weaknesses will be examined in the next two parts, Part III and Part IV. Rather than recognise them as meaning that positive political theory does not have much to contribute to administrative law in parliamentary systems, I will argue that consideration should be given to the full range of direct and indirect controls when applying it and to the qualifications and deviations from the Westminster model in the UK and Australia.

III Direct Controls — Parliamentary Review

The primary insight of positive political theory into US administrative law is that political officials have incentives to establish *indirect* controls for administrators exercising delegated authority to make regulations. As we have seen, the reason for this incentive is that *direct* controls by political officials (ie removing administrators from office, investigations, and reconsidering agency funding) are weak and costly. The question

addressed in this part is why political officials in Westminster parliamentary systems do not have the equivalent incentive. It may be expected that the incentive to establish indirect controls would also apply in parliamentary systems merely because the purpose of delegation would be defeated if parliaments invested in review mechanisms that are strong and thorough.[49] However, there may also be less incentive in Westminster parliamentary systems to include indirect procedural controls because direct parliamentary controls are different to, and not as weak or costly, as those expressed by the positive political theorists regarding the US. In this part, I will argue that these differences result in less incentive to establish indirect controls.

Parliaments have general powers to inquire, hold hearings, and report on the operation of legislative schemes, including their implementation by regulations.[50] They also play a direct role in scrutinising new regulations, including empowering parliaments to nullify a regulation with a resolution of one of the two parliamentary chambers. In the UK, this is established by legislative provisions included in Acts delegating regulation-making authority that require the regulation to be provided to one or both houses of Parliament for approval or enabling Parliament to annul statutory instruments.[51] In Australia, the general provisions establishing direct parliamentary control are the requirement to provide regulations to both houses of Parliament and the procedures enabling either house to disallow regulations included in trans-substantive legislation, the *Legislation Act 2003* (Cth), ss 38 and 42. These provisions are different to congressional control of regulations in the US. Section 801 of the *Congressional Review Act*[52] enables 'joint disapproval', disapproval of both houses of Congress, which is not effective until the President has also approved it.[53] This is accepted as a weak control on regulation-making.[54] Accordingly, direct controls in Parliamentary systems, at least in the UK and Australia, are simpler and easier than in the US.

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49 Jack Beatson, 'Legislative Control of Administrative Rulemaking: Lessons from the British Experience?' (1979) 12 *Cornell International Law Journal* 199, 212.

50 See, eg, House of Commons Justice Committee, *Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (Eighth Report of Session 2014–15, March 2015); Senate Environment and Communications References Committee, Parliament of Australia, *Economic and Cultural Value of Australian Content on Broadcast, Radio and Streaming Services* (Report, March 2019), Ch 4.

51 Malcolm Jack, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011) 675–6, 678. For the history of these provisions, see Cecil Carr, 'Parliamentary Supervision in Britain' (1955) 30 *NYU L Rev* 1045, 1045–6.

52 5 USC § 801–808 (1996).

53 *Immigration and Naturalization Service v Chadha*, 462 US 919 (1983); Cornelius M Kerwin and Scott R Furlong, *Rulemaking: How Government Agencies Write Law and Make Policy* (CQ Press, Washington DC, 4th ed, 2011) 231; Jeffrey S Lubbers, *A Guide to Federal Agency Rulemaking* (ABA Publishing, 5th ed, 2012) 164–5, n 214.

54 Kerwin and Furlong (n 53) 231; Lubbers (n 53) 166–7.

These direct controls would not be regarded as strong if political officials were required to examine all regulations provided to Parliament to determine for themselves whether particular regulations have gone beyond the parameters of the delegation of authority. Positive political theory informs us that parliamentarian's interests is for control without the workload. The UK and Australian Parliaments have long-standing solutions to this problem — in the first half of the twentieth century, they established scrutiny committees to carry out that work.[55] This takes the load off the bulk of members of parliament. Moreover, the workload for the political officials who are members of the committees is managed by legal advisors and research staff that carry out the initial scrutiny of regulations and advise the members of the committee as to the issues raised by particular regulations.[56] These processes mean that even though the committees are generally restrained to reviewing regulations on 'technical' grounds (such as whether the regulation is consistent with the parent Act and does not deal with matters better suited to Parliament or makes an unusual or unexpected use of the statutory powers),[57] they nevertheless carry out the function highlighted by positive political theory. They provide political officials with notice of regulations that push the boundaries of the authority delegated to administrative officials.

These are the primary features highlighting the reasons why the direct control of regulations by Parliaments in Westminster-based systems is stronger than the equivalent in the US. However, the comparative administrative law literature suggests a further question: is this form of parliamentary control fairly meaningless because the executive controls Parliament in parliamentary systems? The answer is: not necessarily. The bicameral nature of the UK and Australian Parliaments mean that the executive does not usually have control of the houses that do much of the scrutiny of regulations.[58] As already stated, the provisions of primary Acts

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55 The House of Lords Special Orders Committee was established 1925 and the House of Commons Select Committee on Statutory Rules and Orders was established 1944: John E Kersell, *Parliamentary Supervision of Delegated Legislation* (Steven and Sons Ltd, 1960) 28–9, 47. The Senate Standing Committee on Regulations and Ordinances was established in 1932: Senate Standing Committee on Regulations and Ordinances, *Annual Report 2017* (2018) 1. For the equivalent committees in the Australian states and territories, see DC Pearce and S Argument, *Delegated Legislation in Australi*a (LexisNexis Butterworths, 5th ed, 2017) ch 3.

56 Page (n 4) 158–9; Senate Standing Orders, Standing Order No 23(9); Kersell (n 55) 34–5; DJ Whalan, 'Scrutiny of Delegated Legislation by the Australian Senate' (1991) 12 *Statute Law Review* 87, 99–100.

57 The various committees have their own scrutiny criteria. The common grounds are that the regulation is consistent with the parent Act (in other words is intra vires) and that the regulation does not deal with matters better suited to parliament or makes an unusual or unexpected use of the statutory powers: House of Commons, Standing Orders (2018) Standing Order No 151; House of Lords Standing Orders, Standing Order No 73; Australian Senate Standing Order 23.

58 To be clear, bicameralism is a common, but not universal, feature of Westminster political systems. For example, New Zealand and Queensland have unicameral legislatures. Additionally, upper houses vary in Westminster systems in regard to

that delegate regulation-making powers commonly grant review powers to both houses of Parliament, giving the House of Lords authority to not approve the regulation according to the affirmative procedure or to annul the regulation in the negative procedure.[59] It must be noted however that this is subject to complexity and debate at the level of conventions.[60] It is also important to note that the House of Lords scrutiny committee, the Secondary Legislation Scrutiny Committee, has bipartisan membership. It has 11 members: the Chairperson and two other members are members of the Conservative Party currently in government, three are members of the Labour Party, two from the Liberal Democrat Party, and three are from the crossbench.[61] In Australia, there is no doubt about the authority of the Senate to disallow regulations.[62] Its scrutiny committee, the Committee on Regulations and Ordinances, has three members drawn from the government party and three from the opposition or other parties,[63] and it refers to itself as being non-partisan.[64] The important point is that these aspects of the control of regulation-making in the UK and Australia make those systems less concentrated, as is the case for other aspects of law-making in parliamentary systems. They are deviations from the primary characteristics of the Westminster parliamentary model[65] that make parliamentary control of executive action more independent than is usually the case in parliamentary systems.

It is true that in both countries the amount of regulations that are rejected is relatively small.[66] But that does not necessarily mean that parliamentary

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whether they are appointed or elected and in regard to the electoral systems that apply. It is beyond the scope of this article to examine how each different permeation affects parliamentary scrutiny. I have focused on the UK (often regarded as the model Westminster system) and the Parliament of Australia. The important point is that comparative administrative law scholars should recognise that these differences may affect positive political theory-based analyses of regulation-making processes.

59 Jack (n 51) 682.

60 See Lord Strathclyde, *Secondary Legislation and the Primacy of the House of Commons* (2015); Government Response to the Strathclyde Review, *Secondary Legislation and the Primacy of the House of Commons and the related Select Committee Reports* (2016); Select Committee on the Constitution, *Delegated Legislation and Parliament: A Response to the Strathclyde Review* (HL 2015–16, 9).

61 House of Lords, *Secondary Legislation Scrutiny Committee — membership*, <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/membership/>.

62 *Legislation Act 2003* (Cth) s 42.

63 Senate Standing Order 23(4)(a).

64 Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation* (2019) x, 99.

65 See Lijphart (n 47) 17–8.

66 The most recent report for the UK indicates that only five statutory instruments were rejected by the Lords between 1950 and 2015 but in that period there were 29 resolutions stating objection but stopping short of rejection: House of Lords Library Note, *Delegated Legislation in the House of Lords since 1997* (2016) 4 (defining 'fatal' and 'non-fatal' resolutions), 37. The most recent report for the Australian Senate states that since it was established there have been 172 successful disallowance motions and 9 successful

control of regulations is weak. This is due to a less well-known feature of regulation review committees. The well-known and more formal function of such committees is to bring particular regulations to the attention of the Parliament, raising a particular concern or recommending that the regulation be annulled. That may occur relatively rarely. The lesser known but more common function is to raise questions with the administrative officials that made the regulation to give them the opportunity to correct or revise their regulation or provide an explanation for it in response.[67] This is a routine feature of these committees' work.[68] Legal and political science scholars have recognised that administrative officials have an incentive to revise the regulation when concerns are raised by parliamentary committees.[69] There is otherwise a risk the regulation will be defeated. The incentive was described by a former UK Attorney-General, Lord Goldsmith, in fairly melodramatic terms, as being that, 'Government lawyers who draft such instruments shake with fear at the prospect of having their instrument publicly criticised' by scrutiny committees.[70]

To summarise, the main point I want to draw out in regard to the direct controls of regulation-making in Westminster-based parliamentary systems is that if, as seems to be the case, these direct controls are relatively easy to employ by parliamentary institutions that are not controlled by the executive, then there is less incentive to enact indirect procedural controls.

IV Indirect Procedural Controls

While there may be less reason to enact indirect procedural controls in parliamentary systems due to the relative simplicity and ease of direct controls, this does not necessarily mean there is no incentive to enact them. There must be an incentive to include such procedural provisions because there are examples of their inclusion in sector-specific legislation. There is yet to be an explanation for such provisions based on positive political theory.

I will argue in this part that while the positive political theory account of parliamentary systems does provide an explanation for the lack of

disapproval motions: Senate Standing Committee on Regulations and Ordinances (n 64) 114 n 5.

67 Fox and Blackwell (n 7) 203–5; Page (n 4) 159–60; Whalan (n 56) 100–03.

68 See, eg, Secondary Legislation Committee, *Number of Corrections to Statutory Instruments in 2014* (HL 2015–16, 20); Senate Standing Committee on Regulations and Ordinances (n 55) 13–18; Kersell (n 55) 35–40.

69 See, eg, Carr (n 51) 1052; Michael Taggart, 'From "Parliamentary Powers" to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 *University of Toronto Law Journal* 575, 607; Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (Oxford University Press, 2013) 220.

70 Quoted in Robert Thomas and Gary Lynch-Wood, 'Transposing European Union Law in the United Kingdom: Administrative Rule-Making, Scrutiny and Better Regulation' (2008) 14 *European Public Law* 177, 197.

enforceable public consultation provisions in trans-substantive regulation-making legislation, the failure to explain the sector-specific provisions is a difficulty. I will argue that positive political theory can help to understand their inclusion in sector-specific legislation but does not provide a full explanation.

A *Trans-substantive procedural legislation*

While enforceable public participation procedures were included in the initial trans-substantive regulation-making legislation in both the UK and Australia, the provisions were removed in the first half of the twentieth century and have not been added back in, at least in enforceable form. The current legislation in the UK, the *Statutory Instruments Act 1946* (UK), includes provisions concerning printing regulations (referred to as 'statutory instruments'), processes for providing them to Parliament when required, and processes for annulment.[71] Trans-substantive consultation requirements are not included in this Act and are instead included in an informal code[72] that is expressly referred to as not having 'legal force'.[73] The equivalent legislation in Australia, the *Legislation Act 2003* (Cth), is different because it does include consultation provisions.[74] However, they are expressly stated to be unenforceable.[75]

This situation was not always the case. There were consultation provisions included in the UK legislation prior to the 1946 Act, the *Rules Publication Act 1893*, and in the Australian equivalent, the *Rules Publication Act 1903* (Cth), without signs of the provisions being unenforceable. The UK provisions were regarded by judges[76] and academics[77] of the time as being beneficial additions to regulation-making. The most well know inquiry into regulation-making in this period, the Donoughmore Committee reporting in 1932, regarded public participation requirements as an important safeguard, along with judicial review and parliamentary scrutiny.[78] It made recommendations to improve the public participation provisions and parliamentary review.[79] The Committee referred to public consultation as 'a safeguard of the highest value'.[80]

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71 *Statutory Instruments Act 1946* (UK) ss 2–6.

72 Cabinet Office, 'Consultation Principles: Guidance' (19 March 2018) <https://www.gov.uk/government/publications/consultation-principles-guidance#history>.

73 Ibid Principle K.

74 *Legislation Act 2003* (Cth) s 17.

75 *Legislation Act 2003* (Cth) ss 15J(2)(e), 19.

76 Lord Hewart of Bury, *The New Despotism* (Ernest Benn Ltd, 1929) 82.

77 Harold J Laski, *A Grammar of Politics* (Allen and Unwin, 1941) 375, 91. See also Cecil Carr, *Concerning English Administrative Law* (Columbia University Press, 1941) 53–6.

78 Committee on Ministers' Powers ('Donoughmore Committee'), *Report* (1932) 41–8.

79 Ibid 62–4, 66.

80 Ibid 44.

Nevertheless, fairly shortly after these views were expressed, the UK Parliament enacted the *Statutory Instruments Act 1946*, without the consultation provisions that had been included in the 1893 legislation.[81] The primary justification for this exclusion was that consultation *practices* had made consultation *laws* redundant. The Solicitor-General, Sir Frank Soskice, explained that:

> The normal practice is that the Department will thoroughly consider objections and carefully go into the matter with all those interests who are concerned, before they get to the stage of making a statutory instrument. That process works well in practice …[82]

The point was that this early *informal* consultation meant that subsequent *formal* consultation when a proposed regulation was prepared was a 'complete waste of time' because all the discussion has already occurred: nothing would be added by a formal consultation 'which has not already been completely traversed and discussed in the preliminary talks'.[83] The point was repeated by the Chancellor in the House of Lords.[84] A second aspect of the parliamentary debate suggested a further reason — that the legislative program in the post-war period included increased reliance on regulations and that the Act was necessary for 'simplifying and codifying the machinery of delegated legislation'.[85]

This aspect of the Statutory Instruments Bill was criticised in Parliament, and changes were proposed but not adopted.[86] The important point however is that the way in which the issue was settled at the time has remained the case since.

More recently, consultation principles have been set out in a series of documents developed primarily since 2000. The UK government at that time had a 'Modernising Government' initiative that sought to extend public participation in government decision-making.[87] The Cabinet Office developed a code of consultation principles that was part of that initiative.[88]

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81 The public consultation provisions included in the *Rules Publication Act 1903* (Cth) were repealed by the *Rules Publication Act 1916* (Cth). For the sake of brevity I have focused on the UK for this aspect of the history.

82 United Kingdom, *Parliamentary Debates*, House of Commons, 6 November 1945, vol 415, col 1112.

83 Ibid.

84 United Kingdom, *Parliamentary Debates*, House of Lords, 29 January 1946, vol 139, col 11.

85 United Kingdom, *Parliamentary Debates*, House of Commons, 6 November 1945, vol 415, col 1121.

86 See United Kingdom, *Parliamentary Debates*, House of Commons, 6 November 1945, vol 415, col 1137-38; United Kingdom, *Parliamentary Debates*, House of Lords, 07 February 1946 vol 139 col 333.

87 See Public Administration Select Committee, *Innovations in Citizen Participation in Government* (HC 2000-01, 6) [19]; Rob Manwaring, *The Search for Democratic Renewal: The Politics of Consultation in Britain and Australia* (Manchester University Press, 2014) 88.

88 Cabinet Office, *Code of Practice on Written Consultation* (November 2000).

Soon after the code was established, the House of Commons Public Administration Select Committee expressed concern as to whether the Cabinet Office had the capacity to ensure departmental compliance with the code and recommended that the government consider introducing legislation with one overarching consultation process.[89] No such legislation was forthcoming, and the consultation codes have ever since expressly stated that they do 'not have legal force'.[90] Andrew Blick's research into the use of codes by governments in the UK recognises this as a common feature.[91]

The significance is clear and aligns well with the views expressed in the comparative administrative law scholarship. United Kingdom governments may not have particular qualms about public participation in general, but they are not prepared to use their control of the legislative program to enact trans-substantive provisions that make them legally effective. It is not a form of control that they see as *generally* beneficial. The implication is that they see formal, legal public participation requirements as mere delays that may be prone to litigation.

A similar history has occurred in Australia. Public consultation was a major issue in the discussions leading to the current trans-substantive legislation, the *Legislation Act 2003* (Cth). The Administrative Review Council recommended at the beginning of the reform process that consultation should be a mandatory requirement.[92] Subsequently, both major parties when in government at different times in the 1990s introduced Bills to control regulation-making processes. Each of these Bills included apparently mandatory consultation provisions: both referred to public consultation in the mandatory language of 'must'.[93] Yet both Bills also included provisions stating that failure to comply with these provisions does not affect the validity or enforceability of a legislative instrument.[94] While the language of the consultation provisions changed when the Act was passed, the provisions ensuring that they were unenforceable remained.

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89 Public Administration Select Committee, *Innovations in Citizen Participation in Government* (HC 2000-01, 6) [20], [37].

90 Cabinet Office, *Code of Practice on Written Consultation* (2000) 3; Cabinet Office, *Code of Practice on Consultation* (2004) 3; Better Regulation Executive, *Code of Practice on Consultation* (2008) 5; Cabinet Office, *Consultation Principles: Guidance* (2012) 3; Cabinet Office, *Consultation Principles 2016* (2016) 2; Cabinet Office, *Consultation Principles 2018* (19 March 2018) 2.

91 Andrew Blick, *The Codes of the Constitution* (Hart Publishing, 2016) 68.

92 Administrative Review Council, *Rule Making by Commonwealth Agencies* (Report No 35, 1992) 35 recommendation 9.

93 Legislative Instruments Bill 1994 (Cth) cl 16(1); Legislative Instruments Bill 1996 (Cth) cl 18.

94 Legislative Instruments Bill 1994 (Cth) cl 20; Legislative Instruments Bill 1996 (Cth) cl 33.

Although the Australian reforms started with a recommendation for enforceable public consultation provisions, ambivalence crept in soon after and resulted in the inclusion of unenforceable legal requirements. The clearest justification in the parliamentary debates for the 2003 Bill was that the risk of litigation regarding consultation was unacceptable to the government.[95] However, a secondary reason can be seen in these debates: that government departments sought to resist mandatory provisions and communicated with ministers to avoid it. This can be seen in the following statement in Parliament by Senator Ludwig, a member of the opposition:

> [C]onsultation is a contentious subject. Here the main concerns were not so much those of parliament but those of government agencies, who have obviously very effectively lobbied the former Attorney-General, Mr Williams, to replace the mandatory consultation provisions in the earlier bills with the mechanism in the current bills. The Senate committee noted that the current mechanism is weaker and provides for limited accountability for a failure to consult but took the view that, in light of the long history of this bill, the mechanism should be given an opportunity to work.[96]

Other reports indicate Australian government departments and agencies have acted similarly on other occasions.[97] There are also reports of it occurring in the United Kingdom in the making of the *Rules Publication Act 1893*.[98]

The point that can be drawn from the examples of reform periods in two parliamentary systems is that *political* officials are at best ambivalent about public consultation. Their priority is that regulation-making is an efficient process and that litigation on the basis of poor consultation processes is a risk that should be avoided. The Australian example points to the potential for pressure to not include enforceable provisions from *departmental* officials, who can communicate with political officials behind the scenes.

This lines up well with the positive political theory account of public participation requirements in parliamentary systems. The political officials that count in the system, the members of the executive who have primary control over the legislation proposed for debate and approval by parliament, are ambivalent enough about public participation to have no effective incentive to include enforceable public participation in trans-substantive regulation-making legislative proposals. Moreover, administrative officials have disincentives, and back-channel access to ministers, to recommend that such provisions not be included. The result

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95 Commonwealth, Parliamentary Debates, House of Representatives, 3 December 2003, 23649 (Mr Ruddock).

96 Commonwealth, Parliamentary Debates, Senate, 2 December 2003, 18625-6;

97 Administrative Review Council (n 92) [5.18], [5.27].

98 CK Allen, *Law and Orders: An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in English Law* (Steven & Sons, 3rd ed, 1965) 98.

is the unenforceable 'hortatory recommendations' referred to by Rose-Ackerman.[99]

B *Provisions of sector-specific Acts*

The fact that the incentives seem to operate in this manner for trans-substantive regulation-making legislation does not explain the fact that it is fairly common for sector-specific Acts to delegate regulation-making powers and to control the exercise of those powers with public participation requirements. We will see that this is fairly common. The question that this raises is whether positive political theory offers an explanation for such provisions. The comparative administrative law scholarship that is influenced by that theory suggests that there is no need for such indirect controls as parliamentary systems are concentrated and the executive has full control over administrative regulation-makers. How then can positive political theory offer an explanation as to why such provisions are included in Acts that delegate regulation-making authority?

My answer, to be developed in this sub-part, is that positive political theory can offer an explanation for some of these provisions: in particular, the provisions that control regulation-making by independent agencies and the provisions that governments are required by international law obligations to enact. In these contexts, the concentration of power fragments enough for there to be incentives for the government to include indirect procedural controls in legislation. This explains some but not all of the provisions. Some sector-specific Acts impose public participation provisions on Ministers (rather than independent agencies) where there seems to be no international law obligation. These provisions are an exception that I think positive political theory cannot explain.

Historical reports indicate that public consultation provisions have been attached to delegations of regulation-making authority since the early part of the twentieth century.[100] Such provisions are included in current UK legislation, for example, in areas such as aviation,[101] communications,[102] consumer protection,[103] energy,[104] the environment,[105] finance,[106] local

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99 Rose-Ackerman (n 1) 177.

100 Donoughmore Committee (n 78) 47–7; JAG Griffith, 'Delegated Legislation — Some Recent Developments' (1949) 12 *Modern Law Review* 297, 308.

101 *Aviation and Maritime Security Act 1990* (UK) ss 6(3)–7(2).

102 *Communications Act 2003* (UK) s 403(4).

103 *Consumer Protection Act 1987* (UK) s 11(5) applied in *R v Secretary of State for Health, Ex parte United States Tobacco International Inc* [1992] Q.B. 353, 370–1); *Food Standards Act 1999* (UK) ss 27(6), 30(5).

104 *Energy Act 2004* (UK) s 111(5).

105 *Environmental Assessment of Plans and Programmes Regulations 2004* (UK) reg 13(2)(b).

106 *Financial Services and Markets Act 2000* (UK) ss 138I, 138J.

government,[107] and transport.[108] A similar list of examples can be developed for Australia: communications,[109] consumer protection,[110] environment and land management,[111] finance,[112] health,[113] and social security.[114]

These provisions indicate that the search in the comparative scholarship for provisions in trans-substantive legislation, at least in *Westminster* parliamentary systems, is misplaced.[115] Mandatory public consultation provisions, the equivalent of the notice and comment provisions in the *Administrative Procedure Act*, are included in the Acts that delegate regulation-making powers in Westminster parliamentary systems rather than trans-substantive regulation-making Acts. These provisions are identified in some of the comparative administrative law scholarship, for example, Rose-Ackerman, Egidy, and Fowkes refer to such provisions in South Africa and Germany,[116] but they are treated as exceptions and not analysed in terms of positive political theory.

The positive political theory explanation for such provisions is that they are likely to be included in legislation when political officials have incentives to include them. The positive political theory comparative scholarship indicates that the incentives arise when the institutions with oversight authority are fragmented. We have already seen that the UK and Australian parliamentary systems deviate from the usual concentration of power in the executive and legislature due to upper house review of regulations. Such fragmentation also occurs when legislation delegates regulation-making authority to regulatory agencies. When such agencies are designed to be independent of the executive, both the executive and parliament may have reason to impose indirect procedural controls to help to ensure that they stay within their policy parameters. Many scholars have drawn to attention the development of regulatory agencies since the 1970s

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107 *Local Government Finance Act 1992* (UK) Sch 1A, para 3, applied in *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947.

108 *Highways Act 1980* (UK) s 90C(6); *Railways and Transport Safety Act 2003* (UK) ss 88(6), 99(3); *Transport Act 1968* (UK) s 101(6).

109 *Broadcasting Services Act 1992* (Cth) s 126; *Radiocommunications Act 1992* (Cth) s 163; *Telecommunications Act 1997* (Cth) s 460.

110 *Food Standards Australia New Zealand Act 1991* (Cth) ss 58–63.

111 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 275–6, 290–1, 303FR, 390SE; *Great Barrier Reef Marine Park Act 1975* (Cth) ss 32C, 39ZB, 39ZE; *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 123D; *Sydney Harbour Federation Trust Act 2001* (Cth) ss 29, 30.

112 *Payment Systems (Regulation) Act 1998* (Cth) s 28, applied in *Visa International Service Association v Reserve Bank* (2003) 131 FCR 300, 417–8 [548]–[554].

113 *National Health and Medical Research Council Act 1992* (Cth) ss 12–13 applied in *Tobacco Institute of Australia v National Health and Medical Research Council* (1996) 71 FCR 265; *Therapeutic Goods Regulations 1990* (Cth) ss 42ZCZJ-42ZCZS.

114 *Veterans' Entitlements Act 1986* (Cth) ss 196F–196G.

115 See, eg, Baum, Jensen and McGrath (n 1); Jensen and McGrath (n 1).

116 Rose-Ackerman, Egidy, and Fowkes, *Due Process of Lawmaking* (n 1) 126–31, 196–201.

in Britain and the fragmentation of the executive branch.[117] Multi-level governance also fragments the concentration of power by the executive and parliament in Westminster systems. This explains the inclusion of mandatory public consultation provisions in legislation that implements international obligations to enact such provisions.

There are numerous examples of regulatory agencies having their regulation-making powers controlled by provisions requiring public participation. For example, the financial regulators in the UK and Australia have their regulation-making powers controlled by such provisions,[118] as do communications regulators,[119] the Australia-New Zealand food safety regulator,[120] Australian land managers,[121] and local governments.[122]

Positive political theory can explain these mandatory public consultation provisions by recognising that the incentives shift from political officials being ambivalent about controls on regulation-making, to having a reason to control how such agencies translate the general purposes of the primary legislation into the necessary detail, while staying within their policy parameters. Enforceable public consultation enables those with most interest in the policy area to contribute to, and have some control over, the more detailed law-making in the regulatory system. This is made clear in the common form of consultation provision in the UK, which refers to consultation with representatives of those whose interests are affected.[123] Positive political theory indicates that the incentive to establish these micro political spaces is that they may help to notify political principals of matters when regulation-making is made by administrative officials removed to some degree from the political officials. Professor Matthew Flinders has

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[117] See Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press, 1999) 37–50; Michael Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (Oxford University Press, 2003) 126–31; Flinders (n 31) 75–94; Andrew Gamble and Robert Thomas, 'The Changing Context of Governance: Implications for Administration and Justice' in Michael Adler (ed) *Administrative Justice in Context* (Hart Publishing, 2010) 3, 5–11.

[118] The Prudential Regulation Authority by the *Financial Services and Markets Act 2000* (UK) s 138J and the Reserve Bank by the *Payment Systems (Regulation) Act 1998* (Cth) ss 12, 18, 28.

[119] Office of Communications ('Ofcom') by the *Communications Act 2003* (UK) s 403 and Australian Communications and Media Authority ('ACMA') by the *Broadcasting Services Act 1992* (Cth) s 126; *Radiocommunications Act 1992* (Cth) s 163; *Telecommunications Act 1997* (Cth) s 460.

[120] *Food Standards Australia New Zealand Act 1991* (Cth) ss 55–65.

[121] *Great Barrier Reef Marine Park Act 1975* (Cth) ss 32C, 39ZB, 39ZE; *Sydney Harbour Federation Trust Act 2001* (Cth) ss 29, 30.

[122] *Local Government Finance Act 1992* (UK) Sch 1A, paras 1 and 3.

[123] See, eg, *Aviation and Maritime Security Act 1990* (UK) s 6(3); *Communications Act 2003* (UK) s 403(4)(a); *Food Standards Act 1999* (UK) s 27(6).

highlighted that parliamentary committees establish a similar form of control over UK regulators.[124]

The other context in which mandatory public consultation provisions tend to occur is in legislation dealing with a regulatory field in which the country has international law obligations. This is more apparent in the UK than Australia during its membership of the EU, which came with the requirement to implement EU Regulations and Directives. Some of those Regulations and Directives include public participation requirements. This is the case in relation to communications regulation[125] and environmental regulation.[126] The public participation requirements that are enacted in this way seek to control regulation-making in the particular field of regulation or to control the transposition of the international institution's laws into domestic laws. Robert Thomas and Gary Lynch-Wood make clear the complexity of transposing EU laws into UK domestic law: the EU law may be vague, the drafting standards in the domestic legal systems may differ from other implementing countries, and there are likely to be questions to be resolved as to how the transposed law is to be administered.[127] Richard Stewart has explained that when international institutions impose public participation requirements they behave like principals concerned that domestic officials will act as agents and resist or limit implementation of their international obligations. This raises an incentive for the international institutions to require procedural controls for the implementation of international law into domestic law.[128]

The general point to emphasise is that any account of regulation-making processes in Westminster parliamentary systems requires research into

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124 Flinders (n 31) 188–201.

125 Council Directive 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services of 7 March 2002 [2002] OJL 108/33, art 6 and Council Directive on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services, 2002/22/EC of 7 March 2002 [2002] OJL 108/51, art 33. These Directives are implemented by *Communications Act 2003* (UK) s 403. See also Explanatory Notes Communications Act 2003 [874]; Athanasios Psygkas, *From the Democratic Deficit to a Democratic Surplus: Constructing Administrative Democracy in Europe* (Oxford University Press, 2017) 233–9, 263.

126 Council Directive on the assessment of the effects of certain plans and programmes on the environment. 2001/42/EC of 27 June 2001, [2001] OJL 197/30 art 6. This Directive is implemented by the *Environmental Assessment of Plans and Programmes Regulations 2004* (UK) cl 13(2)(b). See Explanatory Memorandum Environmental Assessment of Plans and Programmes Regulations 2004 [2.1]–[2.4], [3.14]; Eloise Scotford, 'SEA and the Control of Government Environmental Policy' in Gregory Jones and Eloise Scotford (eds) *The Strategic Environmental Assessment Directive: A Plan for Success?* (Oxford, Hart Publishing 2017) 213, 227–32.

127 Thomas and Lynch-Wood (n 70) 181–2. See also in the Australian context, Andrew Edgar and Rayner Thwaites, 'Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law' (2018) 19 *Melbourne Journal of International Law* 24.

128 Richard B Stewart, 'Global Standards for National Societies' in Sabino Cassese (ed) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing, 2016) 175, 183–6. Note however Stewart's doubts on page 186.

sector-specific Acts that delegate power to administrative officials as well as into trans-substantive regulation-making legislation. It is in these sector-specific Acts that enforceable public participation procedures are enacted in both the UK and Australia. On examination, there are some legislative provisions imposing public consultation requirements that seem to defy the dynamics of positive political theory. That is, when Acts delegate to ministers, rather than independent regulatory agencies, regulation-making powers along with mandatory public participation requirements where there is no apparent international law obligation to do so. There are examples of such provisions in the UK[129] and Australia.[130] However, and this is the more particular point to emphasise, there are also mandatory public participation provisions that can be explained according to positive political theory as being based on political principals' incentive to indirectly control regulation-making. These are when the regulation-making authority is granted to independent regulatory agencies or are required by international law obligations. In these contexts, the Westminster model of concentrated power is broken down to an extent and incentives arise to control regulation-making through indirect procedural requirements. The conclusion to take from this is that it is best to rely on positive political theory as potentially, but not necessarily, offering explanations for the enactment of public participation provisions. As referred to in Part IIA above, such explanation can provide a 'starting point' for further analysis rather than offering comprehensive explanations.

V CONCLUSION

The use of positive political theory in comparative administrative law can offer insights into regulation-making in Westminster parliamentary systems. However, in order to move beyond its central insight, the general disincentive in parliamentary systems to enact public participation provisions in trans-substantive legislation, it needs to be applied in a manner that engages with the qualifications and deviations that occur in Westminster-based systems. Zooming out from the core of the executive's control of Parliament reveals that other institutional arrangements affect the direct and indirect controls on regulation-making in Westminster systems. Bicameralism, delegating regulation-making powers to independent agencies, and international law obligations can affect the incentives that are thought to apply to regulation-making according to the general Westminster model. Drawing on actual institutional arrangements, rather than abstract models, enables understanding of the institutional

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[129] *Animal Welfare Act 2006* (UK) ss 13(9), 62; *Aviation and Maritime Security Act 1990* (UK) s 6(3); *Companies Act 2006* (UK) ss 784, 789.

[130] *Plant Breeder's Rights Act 1994* (Cth) s 69; *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 123D; *Water Act 2007* (Cth) ss 43, 44, 93(6)(b) and *Water Regulations 2008* (Cth) regs 4.03–4.06; *Workplace Gender Equality Act 2012* (Cth) s 33A.

contexts, or environments, that affect the ways in which public law operates in different countries.