

University of Pennsylvania Carey Law School

## Penn Law: Legal Scholarship Repository

---

Faculty Scholarship at Penn Law

---

2-7-2020

### Regulatory Abdication in Practice

Cary Coglianese

*University of Pennsylvania Law School*

Follow this and additional works at: [https://scholarship.law.upenn.edu/faculty\\_scholarship](https://scholarship.law.upenn.edu/faculty_scholarship)



Part of the [Administrative Law Commons](#), [Comparative and Foreign Law Commons](#), [Economic Policy Commons](#), [Energy and Utilities Law Commons](#), [Energy Policy Commons](#), [Environmental Law Commons](#), [Environmental Policy Commons](#), [Law and Economics Commons](#), [Legislation Commons](#), [Policy Design, Analysis, and Evaluation Commons](#), and the [Public Administration Commons](#)

---

#### Repository Citation

Coglianese, Cary, "Regulatory Abdication in Practice" (2020). *Faculty Scholarship at Penn Law*. 2144.  
[https://scholarship.law.upenn.edu/faculty\\_scholarship/2144](https://scholarship.law.upenn.edu/faculty_scholarship/2144)

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

## Regulatory Abdication in Practice

Cary Coglianese\*

“Meta-regulation” refers to deliberate efforts to induce private firms to create their own internal regulations—a regulatory strategy sometimes referred to as “management-based regulation” or even “regulation of self-regulation.” Meta-regulation is often presented as a flexible alternative to traditional “command-and-control” regulation. But does meta-regulation actually work? In her recent book, *Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality*, Fiona Simon purports to offer a critique of meta-regulation based on an extended case study of the often-feckless process of electricity regulatory reform undertaken in Australia in the early part of this century. Yet neither Simon’s case study nor her book overall succeeds in undermining the rationale for using meta-regulation.

In this review essay, I highlight the many limitations of Simon’s argument. I show how, in making existing scholarship her foil, Simon mischaracterizes what regulatory scholars have had to say about meta-regulation. Not only does Simon misleadingly make scholars out to be naïve and overly optimistic about what can be expected from meta-regulation, but she also ignores entirely the peer-reviewed empirical research that shows that meta-regulation can work. She also misstates what existing work has to say about the mechanisms that can make meta-regulation effective. The most significant problem with Simon’s book, though, is that the case study she presents in her effort to criticize meta-regulation theory does not actually describe a strategy based on meta-regulation. Rather, it shows Australian electricity regulators as passive, defensive, and weak. What Simon’s book actually offers is a detailed case study of regulatory abdication in practice.

---

\* Cary Coglianese is the Edward B. Shils Professor of Law and Professor of Political Science at the University of Pennsylvania, where he serves as the founding director of the Penn Program on Regulation. A published version of this essay appears in the *Public Administration Review* 79(5): 794-798 (2019).

## Regulatory Abdication in Practice

Cary Coglianese

*Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality*<sup>1</sup> is an uncommon scholarly book written by a highly experienced practitioner. The author, Fiona Simon, holds a Ph.D. in criminology but the book draws primarily on her professional experience in government and industry during a pivotal period when Australia restructured its electricity sector to allow retail competition. Simon's insider account offers a valuable cautionary tale about what can happen when government officials abdicate their responsibilities for solving regulatory problems. Without regulators' willingness to collect and analyze evidence and then to make the necessary tough decisions, businesses will likely face uncertainty, consumers will lack adequate protection, and conflicts will fester.

As indicated by the title of her book, Simon's main interest lies with "meta-regulation." In particular, she tells readers that her "book offers a critique of meta-regulatory theory, based on practice" (p. 14). That critique takes aim at what Simon characterizes as a "scholarly literature [that] proposes that meta-regulation is an efficient and effective response to the problems encountered by command and control regulation" (p. 227). She laments what she perceives as judgments that have "been made with little to no assessment of the regulatory costs and side effects of meta-regulation" (p. 227). Leveling charges of "naïveté" (p. 5; see also p. 227) and "wishful thinking" (p. 228), she argues that "many scholars merely observe that some regimes have meta-regulatory characteristics...and then assume this must be good"—without adequately considering actual outcomes (p. 6).

The basis for Simon's critique is a case history of Australian electricity restructuring from 1999 to 2015. The book traces a rocky path of policy development over electricity competition from its initial adoption in the state of Victoria to eventual retail competition throughout Australia. Much of the book attends to consumer protection issues, such as how electricity companies can respond when customers fail to pay their bills or whether those companies can rely on unscrupulous door-to-door sales staff to pressure consumers to switch their electricity providers. The book offers a rich narrative of policy processes too complex to summarize briefly but which will interest anyone who has lived through or studied any of the major infrastructure reforms that have occurred around the world in recent decades.

As to Simon's overall critique of meta-regulation theory, some empirically inclined readers may resist drawing inferences from a single case study. But the book's more fundamental limitation is conceptual, centered on what meta-regulation means.

The term "meta-regulation" may be unfamiliar to some readers, even those with a background or interest in regulation. Generally speaking, meta-regulation refers to deliberate

---

<sup>1</sup> In this essay, references to the book being reviewed—F. C. Simon, *Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality* (Abingdon: Routledge, 2017)—are provided using page numbers in parentheses.

efforts to induce private firms to create their own internal regulations.<sup>21</sup> Sometimes meta-regulation has been referred to as management-based regulation (Coglianese & Lazer 2003) or as “regulation of self-regulation” (Parker 2002:245). This approach to regulation is often presented as a more flexible alternative to traditional “command-and-control” regulation.

As a term of art, meta-regulation entered the mainstream of the regulatory lexicon in the 1990s and early 2000s, when it began to be used by scholars in Australia.<sup>32</sup> Although U.S. regulatory scholars have tended not to use the term much, its earliest use anywhere appears to have been in a paper published in the late 1970s by business management scholars in the U.S. (Govindarajan & Gupta 1979). Since at least the 1980s, scholars have written widely on different types of meta-regulation without necessarily using that precise term (e.g., Braithwaite 1982; Bardach & Kagan 1982; Gupta & Lad 1983; Orts 1995; Gunningham 1996; Hutter 2001). Today, meta-regulation is said to encompass an entire “family of ‘process-oriented regulation’ that mandates and monitors organizations’ self-evaluation, design, and management of their first-tier operations ... and their second-tier governance and controls” (Gilad 2010).

A concrete example of meta-regulation can be found in certain pollution prevention regulations adopted by more than a dozen U.S. states (Coglianese & Lazer 2003; Benneer 2006). These management-based regulations require companies using large quantities of toxic chemicals to develop internal plans for reducing their use of these chemicals. The rules do not require that firms actually reduce their use or emissions of toxic chemicals; they just require firms to engage in the development of their own internal plans and controls. The precise content of firms’ plans—reduction targets, technologies, operational procedures—remains entirely up to the firms themselves. The role of the government regulator becomes one of overseeing firms’ internal planning processes—that is, of “steering and observing self-regulation” (p. 29).

Why would regulators use meta-regulation rather than adopt their own performance or technology mandates? Private-sector managers possess superior knowledge of their firms’ operations, and meta-regulation seeks to leverage those managers’ ability to find better solutions to regulatory problems. Meta-regulation can sometimes “allow regulators to address problems when they lack the resources or information needed to craft sound discretion-limiting rules,” such as especially “when a regulatory problem is complex or an industry is heterogeneous or dynamic” (Coglianese & Mendelson 2010:152). With toxic pollution, for example, there are many more chemicals and industrial processes that use them than any real-world government regulator can understand well enough to regulate directly.

Of course, meta-regulation is not perfect. Paradoxically, “the same flexibility that generates its advantages also presents its potential sources of policy failure” (Coglianese 2010). The chief weakness stems from a misalignment of incentives (Coglianese & Mendelson 2010:153). If intervention by a regulator is needed in the first place, that means private actors lack adequate

---

<sup>2</sup> Some scholars have used “meta-regulation” in an altogether different sense to refer to structural or procedural rules that constrain the work of regulators themselves (such as requirements to conduct regulatory impact analyses) (Morgan 1999; Schuck 2000: 446, 459; Raedelli 2007).

<sup>3</sup> Christine Parker is perhaps best associated with use of “meta-regulation” in the sense relevant here, although she cites scholarship published in 1995 by Peter Grabowski in this connection (Parker 2002:245). Grabosky (1995:543) refers to “meta-monitoring” by regulatory authorities.

incentives to behave in a socially optimal manner. Just requiring self-regulation may not be enough because, “even though businesses have better information to find solutions to public problems, they do not necessarily have better incentives to do so” (Coglianese & Mendelson 2010:153).

Drawing on the restructuring of electricity regulation in Australia, *Meta-Regulation in Practice* seeks to highlight meta-regulation’s limitations. Simon admits that “[t]he basic principles of meta-regulation have merit” (p. 5). But she takes issue with what she sees as scholars’ tendency to view meta-regulation through rose-colored glasses. She wants to leave the reader with “a discomfiting but unsurprising conclusion: both meta-regulation and command and control regulation have their drawbacks, and these drawbacks may be impossible to eliminate” (p. 221).

That conclusion is indisputable. Indeed, as I read *Meta-Regulation in Practice*, I found myself nodding in agreement with much of Simon’s skepticism, the same kind of skepticism evident in other scholarship highlighting the downsides of meta-regulation and other flexible regulatory approaches (e.g., Gunningham & Sinclair 2009; Black 2012; Akinbami 2013; Perrow 2015; Coglianese 2017b). Still, Simon’s overall treatment of the regulatory literature gave me considerable unease. Her critique of that literature takes aim at too much straw. Anyone coming to this book without a familiarity with the existing literature on meta-regulation should be forewarned: regulatory scholars have been neither naïve nor Panglossian as Simon’s account makes them appear.

Simon targets what she terms “normative meta-regulatory theory” (p. 6). “Normative” here takes on two meanings. The first is prescriptive, as when Simon writes: “The normative literature on meta-regulation implies that it is the best way to deal with highly complex regulatory problems. This book challenges these claims” (p. 4). Yet, I am unaware of anyone who has suggested that meta-regulation is always the best way to regulate complex problems. In support of her claim about the literature here, Simon refers in a footnote to only a single source. She makes clear in the footnote that this source actually indicates only that meta-regulation “may” be the best way to address certain problems (p. 17). She further indicates that the authors of this solely cited source themselves “note that meta-regulation and self-regulation may be ‘much less than ideal,’ also a theme of this book” (p. 17). Simon’s forthright presentation in her footnote is to her credit. But just a single source, and one that only says that meta-regulation may sometimes be the best option and that acknowledges that, even when the best choice, meta-regulation can still be far from perfect, fails to support the strong claim in her text. More importantly, it reveals the straw target Simon has created for herself.<sup>43</sup>

The second meaning Simon gives to “normative meta-regulatory theory” is an explanatory one. In a chapter entitled “The Implicit Assumptions Underpinning Normative Meta-Regulatory Theory,” Simon suggests that scholars posit that the causal mechanism underlying meta-regulation involves changing the *values* held by business managers (pp. 21-48). Such normative change is apparently supposed to come about through a kind of consciousness-raising that occurs when managers engage with meta-regulators and other third-party actors. Such engagement with “the values and behaviour of its range of stakeholders, including consumers and other transactional

---

<sup>4</sup> In full disclosure, I co-authored the single source that Simon cited in this footnote. My co-author and I wrote that “meta-regulatory strategies may be the best available options under certain circumstances, but, nevertheless, they may turn out to be still much less than ideal” (Coglianese & Mendelson 2010:153).

stakeholders through the market ... is expected to create in the business [manager] a desire to self-regulate in the public interest” (p. 23; see also pp. 24-25). Managers might also strategically adopt socially responsible values out of concern about reputational harm or a loss of “social license” (p. 3, 40). Either way, “the defining thesis of meta-regulatory theory,” Simon asserts, is that “norms [will] be internalised by businesses through the market and the involvement of special interests (politics)” (p. 212-213).

For Simon, the key problem with this explanatory account is that it does not fit the real world—or certainly not the world of Australian electricity reform that she experienced. Private-sector managers think in terms of profit-making, not the public interest. Any “genuine culture change would take years to be effective” (p. 217), and electricity companies do not seem bothered by the possibility of reputational harm (p. 206). Furthermore, what counts as the “public interest” is frequently contested (p. 46, 197). Even different Australian consumer groups differed in their views of how electricity companies should respond to customers who cannot afford to pay their bills (pp. 88, 151, 197).

All fair enough. But anyone coming to *Meta-Regulation in Practice* with knowledge of the relevant research will find it difficult to see the explanatory account that Simon critiques as anything but a caricature, at best. It is telling—and, again, to Simon’s credit—that she speaks of normative change as only an “implicit assumption” behind meta-regulation. But such an assumption is far from necessary—and thus not implicit. Standard explanations grounded in firms’ self-interest can explain responsiveness to meta-regulation (Reinhardt 2000; Benneer 2006; Coglianese & Nash 2016). Nothing hinges on meta-regulation needing to provoke a “change in corporate morality” (p. 216).

But can meta-regulation actually work? Simon suggests that scholars have overlooked this question. She claims that “there is little evidence of the success of meta-regulation in practice” (p. 21), and that it is even “unclear how we might test the effectiveness of meta-regulation” (p. 6). Yet Benneer (2007) has provided a difference-in-differences analysis showing that firms in states with pollution prevention planning laws achieved relative reductions in toxic pollution of about 30%. Similar statistical analysis reveals that meta-regulation is associated with a reduction in certain foodborne illnesses (Minor & Parrett 2017). An extensive body of research has evaluated voluntary programs established by regulatory agencies to promote self-regulation (Coglianese & Borck 2009). To be sure, one must not overstate what the literature shows: not only is more research needed, but meta-regulation is far from reliably effective (Coglianese & Mendelson 2010). Still, a reader of Simon’s book misses even the available research that seeks to evaluate meta-regulatory strategies—research showing that they can sometimes work.

The biggest conceptual problem underlying *Meta-Regulation in Practice* is that its case study of Australian electricity restructuring appears actually not to be a case of meta-regulation at all. Government officials did not so much pursue meta-regulation as they just punted on many key decisions. The reader is told that the Victorian government initially decided to move toward retail competition merely by setting a date when the existing laws on monopoly electricity service would lapse (p. 59). Any policies needed to structure a competitive retail environment were “non-existent” (p. 58). The government “provided no direction for the industry” (p. 59). As a result,

“[t]he industry as a whole seemed confused” and “no one seemed to know what was required of the business or of the market” (p. 61).

Eventually, in the face of the impending date for lifting the law governing the old monopolistic system, a state regulatory authority—the Essential Services Commission (ESC)—stepped in and tried to broker a process for generating some ground rules for competition. But the ESC apparently took a light-touch approach, opting to try to work through a consultative process to craft rules satisfactory to different industry and consumer groups. As a result, ESC decisions “often meant trading off different stakeholders’ claims to arrive at some reasonable middle ground, and the ‘middle’ would shift depending on the weight of opinion” (p. 71; see also pp. 75, 203). Some ESC decisions were “only symbolic, provided to placate particularly strong stakeholder views” (p. 71).

Regulatory decision-making throughout the rest of Australia apparently took a similar consensus-based trajectory: “There were probably between ten and 20 consultation processes in play across the issues and jurisdictions at any one time, with industry (and often consumer groups) expected to attend workshops and submit formal responses” (pp. 83, 85). Too often, “regulatory decision-making ... relied on trading off assertions and finding middle ground” (p. 92). Rather than a process driven by rigorous analysis, regulatory policies often derived from “anecdotes recounted to politicians” or from “small numbers of individual case studies” (pp. 93).

What Simon describes looks not at all like meta-regulation but rather a lot like a regulatory free-for-all. Regulators appear to have structured their rule development process essentially as an open contest. They also appear to have acted defensively, worrying more about maintaining “legitimacy with ... political masters” (p. 203) than about their responsibility to make high-quality decisions that deliver public value (Coglianese 2017a).

Ironically, the end result appears not to have generated any notable self-regulation nor even the kinds of flexible rules associated with meta-regulation. To the contrary, in Victoria the “stakeholders’ pressure to codify their preferences resulted in a legalistic and detailed regulatory regime” (p. 71)—one that was “most onerous” (p. 116) and even “more legalistic than the regulations applying to the pre-[competition] environment” (p. 71). After the rest of Australia decided to move to retail electricity competition, the resulting national energy code turned out to be “a comprehensive regulatory regime with hundreds of pages of law and rules” (p. 99).

Toward the end of her book, Simon concedes that “the industry was *not* enabled and incentivised to self-regulate to meet the public interest as expected by normative meta-regulatory theory” (p. 219, emphasis in original). Indeed, she admits that “Australian policymakers did not explicitly aim to develop a meta-regulatory framework for the energy retail sector... There was no debate about whether to pursue command and control regulation or meta-regulation. Instead, meta-regulation developed naturally” (p. 220).

But meta-regulation does not just develop “naturally.” It is not a set of “inchoate actions or proposals that may have the byproduct of motivating firms to self-regulate” (Coglianese & Mendelson 2010: 162). Rather, “[m]eta-regulation refers to ways that outside regulators deliberately—rather than unintentionally—seek to induce targets to develop their own internal,

self-regulatory responses to public problems” (Coglianese & Mendelson 2010: 150; see also Grabosky 2007:184; Black 2012:1046, 1048). Regulators cannot just passively go through the motions and then be said to have opted for meta-regulation.

Simon’s real target, in the end, appears to be inadequate leadership by policymakers and regulatory officials. She reveals the underbelly of pluralist politics and the undesirable tendencies that can arise when key decision makers fixate on satisfying the “stakeholders” rather than pursuing regulatory excellence (Coglianese 2001; Coglianese 2003; Coglianese 2017a). With her illuminating insider account of Australia’s bumpy road toward electricity restructuring, Simon has offered readers not a critique of meta-regulation theory but of regulatory abdication in practice.

## References

- Akinbami, Folarin. 2013. “Is Meta-Regulation All It's Cracked Up to Be? The Case of UK Financial Regulation.” *Journal of Bank Regulation* 14, no. 1 (January): 16-32.
- Bardach, Eugene, and Robert Kagan. 1982. *Going by the Book: The Problem of Regulatory Unreasonableness*. Philadelphia: Temple University Press.
- Benbear, Lori Snyder. 2006. “Evaluating Management-Based Regulation: A Valuable Tool in the Regulatory Toolbox?” In *Leveraging the Private Sector: Management-Based Strategies for Improving Environmental Performance*, edited by Cary Coglianese and Jennifer Nash, 51-86. Washington, DC: Resources for the Future Press.
- Benbear, Lori Snyder. 2007. “Are Management-Based Regulations Effective? Evidence from State Pollution Prevention Programs.” *Journal of Policy Analysis & Management* 26, no. 2 (Spring): 327-48.
- Black, Julia. 2012. “‘New Governance’ Techniques and the Financial Crisis.” *The Modern Law Review* 75, no. 6 (November): 1037-63.
- Braithwaite, John. 1982. "Enforced Self-Regulation: A New Strategy for Corporate Crime Control." *Michigan Law Review* 80, no. 7 (June): 1466-507.
- Coglianese, Cary. 2001. “Is Consensus an Appropriate Basis for Regulatory Policy?” In *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe*, edited by Eric Orts and Kurt Deketelaere, 93-113. The Hague: Kluwer Law International.
- Coglianese, Cary. 2003. “Is Satisfaction Success? Evaluating Public Participation in Regulatory Policy Making.” In *The Promise and Performance of Environmental Conflict Resolution*, edited by Rosemary O’Leary and Lisa Bingham, 69-86. Washington, DC: Resources for the Future Press.
- Coglianese, Cary. 2010. “Management-Based Regulation: Implications for Public Policy.” In *Risk and Regulatory Policy: Improving the Governance of Risk*, edited by Gregory Bounds and Nikolai Malyshev, 159-184. Paris: OECD Publishing.



- Coglianesse, Cary. 2017a. *Achieving Regulatory Excellence*. Washington, D.C.: Brookings Institution Press.
- Coglianesse, Cary. 2017b. "The Limits of Performance-Based Regulation." *University of Michigan Journal of Law Reform* 50, no. 3 (Spring): 525-63.
- Coglianesse, Cary, and Jonathan C. Borck. 2009. "The Effectiveness of Voluntary Environmental Programs." *Annual Review of Environment and Resources* 34: 305-24.
- Coglianesse, Cary, and David Lazer. 2003. "Management-Based Regulation: Prescribing Private Management to Achieve Public Goals." *Law and Society Review* 37(4): 691-730.
- Coglianesse, Cary, and Evan Mendelson. 2010. "Meta-Regulation and Self-Regulation." In *The Oxford Handbook of Regulation*, edited by Martin Cave, Robert Baldwin, and Martin Lodge, 146-168. Oxford: Oxford University Press.
- Coglianesse, Cary, and Jennifer Nash. 2016. "Motivating without Mandates? The Role of Voluntary Programs in Environmental Governance." In *Decision Making in Environmental Law*, edited by Lee Paddock, Robert L. Glicksman, and Nicholas S. Bryner, 237-52. Cheltenham, UK: Edward Elgar Publishing.
- Gilad, Sharon. 2010. "It Runs in the Family: Meta-regulation and its Siblings." *Regulation & Governance* 4, no. 4 (December): 485-506.
- Govindarajan, Vijay, and Anil K. Gupta. 1979. "An Examination of Alternative Forms of Regulatory Mechanisms: The Case of the Health Care Industry." In *Quantitative Planning and Control: Essays in Honor of William Wager Cooper on the Occasion of His 65th Birthday*, edited by Yuji Ijiri and Andrew B. Whinston, 311-28. New York: The Academic Press.
- Grabosky, Peter N. 1995. "Using Non-Governmental Resources to Foster Regulatory Compliance." *Governance* 8, no. 4 (October): 527-50.
- Grabosky, Peter N. 2007. "Meta-Regulation and the Control of White Collar Crime." In *Encyclopedia of White-Collar Crime*, edited by Jurg Gerber and Eric L. Jensen, 184-87. Westport, CT: Greenwood Publishing Group.
- Gunningham, Neil. 1996. "From Compliance to Best Practice in OHS: The Role of Specification, Performance, and Systems-Based Standards." *Australian Journal of Labor Law* 9, no. 3 (December): 221-46.
- Gunningham, Neil, and Darren Sinclair. 2009. "Organizational Trust and the Limits of Management-Based Regulation." *Law & Society Review* 43, no. 4 (December): 865-99.
- Gupta, Anil K., and Lawrence J. Lad. 1983. "Industry Self-Regulation: An Economic, Organizational, and Political Analysis." *Academy of Management Review* 8, No. 3 (July): 416-25.
- Hutter, Bridget. 2001. *Regulation and Risk: Occupational Health and Safety on the Railways*. Oxford: Oxford University Press.
- Minor, Travis, and Matt Parrett. 2017. "The Economic Impact of the Food and Drug Administration's Final Juice HACCP Rule." *Food Policy* 68 (April): 206-13.

- Morgan, Bronwen. 1999. "Regulating the Regulators: Meta-Regulation as a Strategy for Reinventing Government in Australia." *Public Management* 1, no. 1 (Spring): 49–66.
- Orts, Eric W. 1995. "Reflexive Environmental Law." *Northwestern University Law Review* 89, no. 4: 1227-1341.
- Parker, Christine. 2002. *The Open Corporation: Effective Self-regulation and Democracy*. Cambridge: Cambridge University Press.
- Perrow, Charles. 2015. "Cracks in the 'Regulatory State.'" *Social Currents* 2, no. 3 (September): 203-12.
- Radaelli, Claudio M. 2007. "Whither Better Regulation for the Lisbon Agenda?" *Journal of European Public Policy* 14, no. 2 (March): 190–207.
- Reinhardt, Forest L. 2000. *Down to Earth: Applying Business Principles to Environmental Management*. Boston: Harvard Business School Press.
- Schuck, Peter H. 2000. *Limits of Law: Essays on Democratic Governance*. Boulder: Westview Press.