

Too Much of a Good Thing

Author : Mila Sohoni

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Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 **Journal of Legal Analysis** 185 (2014), available at [SSRN](#).

Many an administrative law article ends with a simple and appealing recommendation: “just add accountability!” Accountability, along with institutional expertise and democratic legitimacy, is one of the key yardsticks that frames evaluations of the legal rules and institutions of the regulatory state. Why might judicial deference to agency interpretations of statutes be desirable? Because agencies are more politically accountable than courts. Why might privatization be worrisome? Because corporations are less accountable than agencies. Accountability, like motherhood and apple pie, is something we can all safely get behind.

Or is it? In [Over-Accountability](#), [Jacob Gersen](#) and [Matthew Stephenson](#) look at the downsides of augmenting the accountability of political institutions. Lots of ways exist to add accountability to governmental decision-making: one could have more elections, or concentrate power in a “unitary” executive, or reduce the power of politically unaccountable Article III courts. As the authors point out, these and other such accountability-enhancing moves might actually have a surprising and perverse consequence: they might exacerbate bad behavior by the government.

The basic problem, as Professors Gersen and Stephenson explain it, is a consequence of a simple principal-agent dynamic. Agents (say, the Mayor of New York or the head of the FDA) want to look like good agents to their principals (say, the citizens of New York or the President), because the agents want the principals to retain them as their agents in the future. Under certain conditions, the agent’s desire to *appear* good may cause the agent to adopt a course of action that will convince the principal that it is a good agent, even if the agent knows that that course of action is not actually in the principal’s best interest. Put another way, an agent will sometimes have the perverse incentive to make decisions that it knows to be contrary to the principal’s best interests in order to avoid resembling a bad agent; because the principal is relatively less informed than the agent, the principal can’t tell the difference.

The authors explain that this basic overaccountability dynamic can manifest in a variety of ways. To signal their competence, agents can *pander* (take action that “cater[s] excessively” to the public); they can *posture* (take bold action to look good to the public); or they can be *persistent* (act stubbornly, so that the public doesn’t perceive them to have made a mistake). To signal their lack of capture, agents can act in way that is *populist* (in a way that unduly burdens a minority or interest group); conversely, to signal their lack of bias, agents can act in way that is *politically correct* (in way that markedly illustrates an absence of animus towards some given group). In a lively and clear fashion, the article marries its analysis of formal models of such behavior with concrete examinations of how these varieties of overaccountability might emerge in different legal contexts, from debates over affirmative action to the sentencing behavior of elected state court judges.

The article’s second part, on mitigating overaccountability, is equally interesting. In it, the authors point out that there are three strategies for coping with the phenomenon of overaccountability: (1) do nothing; (2) reduce or eliminate accountability; and (3) add oversight from *other* agents who might be able to monitor or constrain the primary agent for overaccountability problems. Some of the potential

responses they analyze—e.g., relying on judicial review by politically insulated courts—will be familiar moves. But other potential responses—randomly timing elections, for example, or reducing the principal’s ability to know which agent was responsible for a particular choice, or “altering the laws and institutional structures that govern the media and other watchdog organizations” so as to weaken their ability to report on government action—are so facially dystopian (at least to me) that it was delightful to see them drily catalogued as among the potential avenues for getting to a system that has the right quantity of accountability “on net.”

This is one of the great rewards of this paper—it forces one to see what was once familiar in an entirely new way. If you are someone who has made use of the “workhorse concept” (p.186) of accountability (as I have [done](#)), Professors Gersen and Stephenson will make you want to look that “workhorse” in the mouth.

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