Governing By Network: The Answer to Pound’s Unanticipated Dissatisfaction

STEPHENV GOLDSMITH

INTRODUCTION

Roscoe Pound first presented his lecture The Causes of Dissatisfaction with the Administration of Justice in 1906.1 It was the heyday of the Progressive Era, a government reform movement that coupled concern for social justice with efforts to improve government efficiency. Progressives opposed waste, corruption, and ward politics and sought to change both the quality and scope of government services. Reformers addressed what they viewed as an anemic government response to substantial social problems and widespread corruption.

Fast forward to today: Justice Shepherd asks us to address The Causes of Dissatisfaction Roscoe Pound Never Thought About. In framing this discussion, one needs to consider how judges can affect satisfaction with democratic government and how that satisfaction, in turn, affects them. For courts to satisfy the citizenry, ensure the efficacy of their institutions, and maintain democratic accountability, they need to adapt to significant changes occurring in the delivery of public goods and the exercise of public authority.

As “government” changes to “governance” and the barriers between the sectors become more permeable, judges face state action from multiple actors and citizens find themselves affected by official authority dispensed by private individuals. Government is changing by necessity, finding it impossible to resolve complex horizontal problems through narrow, vertical, hierarchical, command-and-control bureaucracies. Public officials find their roles transformed from direct service providers to managers who generate public value through third parties.

This trend will continue, driven by the simple fact that the public’s appetite for government solutions exceeds the resources available. And, the problem will be exacerbated as the service demands generated by an aging population put further strain on already limited funding. This imbalance between demands and resources can be illustrated by comparing the number of workers to retirees over time. Today, for each retiree, there are roughly four workers, whereas in 1930 there were forty-two. By 2050 there will be only two workers for every one retiree.2 And, those retirees will consume huge amounts of public resources. For example, expenditures on nursing home care, which in 1990 amounted to roughly $10 billion, will reach $40 billion by 2014.3

In addition to ever-increasing demands for government services, citizens today do not tolerate mediocre-quality, “one-size-fits-all” services delivered through traditional government offices during limited regular work hours. As large corporations personalize their services to global audiences, government excuses for bad

---

3. Id.
performance become unacceptable. If "mass customization" lets Dell offer its customers 16 million possible computer configurations that can be delivered just days after placing an on-line order, why can't government personalize its services?

Experts like New York University Professor Paul C. Light already see the effect of these pressures on the size and shape of government. Light's work shows that civil service employment fell by approximately 418,000 jobs between 1990 and 2002; during that same period, contract-generated jobs increased by 110,000 and grant-generated jobs by more than 440,000. These figures show that government by proxy is increasing; that is, government is producing more and more services through third parties. On this phenomenon, Martha Minow of Harvard Law School writes:

At the turn of the twenty-first century, the increasing use of private organizations to achieve public ends reflects a number of trends: disillusionment with government programs, faith in competition and consumer choice, politicians' desire to claim to have diminished government when in fact they have merely outsourced it, and strategic pressure for privatization by lobbying groups.

In our most recent book, Governing by Network, Bill Eggers and I call this evolving form of government—one in which services are provided through networks intentionally created by public actors to produce public services—networked government. Let me give you an example. In 1993, the National Park Service received a prime piece of real estate located just steps away from the Golden Gate Bridge. But turning the environmentally challenged land into a first-class park required millions of dollars that Congress had not allocated. An entrepreneurial park manager recruited the partners and funds necessary to put together a wonderful park, and today, only eighteen percent of the employees in that park work for the government. To what standard should the other park workers—volunteer, not-for-profit, and for-profit groups—be held? And, as long as park patrons receive fair and respectful services, should it really matter for whom the employee works? As my esteemed colleague Mark Moore writes, 

"[T]he innovation that is fostered by allowing or encouraging different ways of delivering public services may, over time, increase effectiveness by encouraging the exploration of new, more robust methods."

The shape of government is changing—from hierarchical, vertical silos to networks of public, private, and not-for-profit providers—but little attention has been paid to managing and protecting democratic values in the new system. Today, I would like to suggest that the answer to Pound's question depends on how courts protect public


8. Id. at 3-4.

9. Id.

values when private parties produce public goods. As Laura Dickinson, in the *Yale Journal of International Law*, summarizes:

> While advocates of privatization have generally argued for the practice on efficiency grounds, critics have worried that, even if privatization may cut financial costs, it can threaten important public law values. Because many constitutional norms protect individuals only from government misconduct, and because courts have been largely unwilling to view such norms as applicable to private contractors, these critics have argued that privatization will dramatically reduce the scope of public law protections in the United States.¹¹

However, by understanding the transformed delivery mechanism and crafting new tools and standards in response to these changes, courts can protect public values, thus encouraging public respect for democratic government and the judiciary. As Eva Sørensen of Roskilde University, Denmark, states, the move to governance—which disperses the capacity to govern among many actors—offers potential opportunities for enhancing democracy:

> [T]he increased space for self-governance increases the number of available channels of influence for each citizen . . . , increases the chances that each citizen obtains influence on the decisions that affect him or her the most, . . . increases the space for plural ways of life in society, . . . contributes to the development of the participatory skills of citizens . . . , [and] strengthen[s] the social and political sense of communality . . . .¹²

Yet, ensuring accountability without destroying the very flexibility and discretion that prompted the creation of this new delivery system presents difficult challenges. Courts will have to balance flexibility with accountability in assuring the public’s satisfaction. As Minow goes on to say, “If competition can be harnessed through public accountability requirements, however, innovations and plural forms of social provision will strengthen the nation’s total response to people in need.”¹³

In this context, the current standards and analytical tools utilized may not only be obsolete but could lead to short-term dissatisfaction with the courts, and government in general. Pound could not envision this situation because the dissatisfaction, in part, originates with the very rules Progressives advocated when he made his 1906 speech.

I present this overview not as a constitutional law scholar but from my work on public management, specifically, my examination of how government services are—more and more—delivered through a network of providers. It follows, then, that when judges evaluate the adequacy of administrative procedures and adjudicate due process and equal protection claims, which form the fundamental basis of democracy, the distinction between state action and private action may no longer be so straightforward.

In this form of governance, an elected official spends more time leveraging his assets—in order to gain flexibility, discretion, and reach—than he does managing his

---


¹³ Minow, *supra* note 6, at 1230.
employees. These assets are money, authority, and rhetoric, and they are deployed in order to induce private providers to produce public value. For example, when a chief justice focuses on a particular theme in his or her “State of the Judiciary Address,” the rhetoric furnishes a convening and focusing power for that community. As government uses private players to extend its reach, each of the branches must consider how to maintain the controls inherent in a democracy. On this topic, Freeman says:

In other words, privatization can be a means of “publicization,” through which private actors increasingly commit themselves to traditionally public goals as the price of access to lucrative opportunities to deliver goods and services that might otherwise be provided directly by the state. So, rather than compromising the democratic norms of accountability, due process, equality, and rationality—as some critics of privatization fear it will—privatization might extend these norms to private actors . . . .

Conversely, the failure of progressive bureaucracies to keep up with complex societal problems also presents serious issues for courts attempting to remedy structural deficiencies in executive branch activities. When courts are forced to place systems—such as child welfare—under their ongoing supervision, they are attempting to mitigate the inequities inherent in the existing delivery system with additional oversight and dollars. If the delivery system itself is the problem, though, then conventional oversight and dollars are not the answer. A new delivery mechanism—a network—is required. Further, the old distinction about whether a service is “inherently governmental” also does not make much sense. For example, even war, most certainly an inherently governmental function, includes participation from a mixture of sectors. To illustrate this point, I suggest comparing troop deployments. In the first Gulf War, the United States deployed one contractor for every fifty soldiers. By the Iraqi Freedom campaign, the U.S. force included one contractor for every ten soldiers.

Though these issues may not have been anticipated by Pound, he accurately captured the conditions that created these circumstances when he noted in his lecture:

A closely related cause of dissatisfaction with the administration of justice according to law is to be found in the inevitable difference in rate of progress between law and public opinion. In order to preclude corruption, to exclude the personal prejudices of magistrates, and to minimize individual incompetency, law formulates the moral sentiments of the community in rules to which the judgments of tribunals must conform. These rules, being formulations of public opinion, cannot exist until public opinion has become fixed and settled . . . .

Pound’s prediction of dissatisfaction applies in the current environment where the public’s demand for better services drives changes in governance at a rate that exceeds the ability of the courts to define and apply the rules necessary to protect democratic
values. The situation is aggravated by executive branch failures because public employees often do not possess the skills necessary to configure and manage these networks. How can the courts establish a new set of guidelines upon which to protect democratic accountability without eliminating the very benefits the network can provide?

I. THE PRACTICAL MEANING OF STATE ACTION

Consistent with my perspective as a mayor and not a constitutional scholar—and confirming that all politics are local—let me use trash collection to talk about “state action” in a networked government model. When we privatized half of the trash routes in the City of Indianapolis (multiple vendors operating competitively bid franchises within districts), we notified citizens that they should hold the mayor responsible if the trash was not picked up and contact the city call center to complain regardless of whether a city employee was assigned to that route. The city did not “off-load” its responsibility to pick up the trash. Nor did it shed its duty to make sure that trash in poorer communities was picked up with the same frequency and quality as in areas that were more affluent.

In terms of guaranteeing fairness and due process, the triggering event for public accountability and review should be whether government uses its assets to initiate the solution that delivers the service, not whether the worker providing the service is contractual. For example, Indiana recently secured proposals from organizations—private and not-for-profit—interested in taking over the front-end of its welfare benefit eligibility process. Previously, state employees provided eligibility determinations in a manner that guaranteed equal protection, although it was equally inadequate protection. Overworked government employees with insufficient technological resources required two million unnecessary trips a year—primarily from working, poor, single parents—to state welfare offices to provide information and answer questions for which the data was readily available elsewhere. Tens of millions of dollars that might have been spent helping struggling Hoosiers were spent on these determinations. The contractors taking over this function will affect the benefits of tens of thousands of Hoosiers and, though surely increasing the overall quality of the services, still must be held responsible for the important values of democratic accountability: fairness, equity, and access.

In this model, state action involves using public assets to cause private actors to accomplish public goals, and its success, ultimately, rests on controlling public values. My colleague Mark Moore shares one problematic view of the possibilities:

In this view, what is important in the distinction between public and private is not who produces the results, not even who finances the results, but instead what agent becomes the arbiter of the value of any good (whether publicly or privately financed or produced). Privatization shifts the arbiter of value from a political

---

18. See id.
process focused on defining collective ambitions and aspirations to an individual deciding whether something is good in his or her own (more or less selfish, hedonistic, and materialistic) terms. In short, we might see privatization most importantly as the individualization of judgments about value that formerly were made collectively.20

Yet, this risk can be mitigated by careful executive and judicial action that defines procedures to ensure that private actors discharge collective decisions when their conduct involves substantial public assets. Responding to this transformation, the courts should move from controlling public processes and toward preserving public value. In the networked government approach, the threshold question that guides government action—and should orient court review—is “what public value does the executive branch official intend to add?”

A. Protecting Democratic Values While Producing Public Value

To answer Pound’s question, we need to define how government institutions can adapt to and manage the transformation to third party government, such that the executive branch concentrates on outcomes and the judicial branch protects democratic values. In developing these guidelines, both branches need to clearly address a different meaning of “value”: public value. Managing public value—not programs—is the standard by which government should be judged. To illustrate this distinction, I use an example from Mayor Anthony Williams in Washington, D.C. When Mayor Williams reviewed his city’s public hospital, which like similar institutions in other cities operated as a healthcare provider of last resort, he found significant financial problems.21 In trying to rectify the situation, the Mayor considered privatization. Before making any decisions, though, he asked: What is the value I’m supposed to be producing for my citizens?22 The answer was “public health,” not “a public hospital.” Answering the question in this manner allowed the Mayor to focus on how to produce the public value of health as contrasted to the activity of a hospital. As a result, he created a community health network, which decentralized health care delivery and closed the hospital.23

Thus far, I have focused on the transformation of government services and argued that it should be the use of a government asset, and not the nature of the employer, that triggers court protection of democratic values. I am not arguing that such a distinction brings with it all the rules and review standards applied to direct state action. Therefore, the issue I want to focus on going forward is what procedures the executive branch should consider and what guidelines might the courts apply in order to protect democratic values? Providing protections without destroying the very reasons for networked government will be a continuing and difficult challenge.

20. Moore, supra note 10, at 1215 (emphasis in original).
21. See Goldsmith & Eggers, supra note 7, at 58.
22. See id.
23. Id.
B. Rule Making: Contract Provisions and Regulations

Clearly, rules provide the most direct route to protecting citizens, yet the existence of substantial, discretion-narrowing rules is the very phenomenon driving the inability of public officials to creatively solve public problems. Government's core competency is applying a narrow set of rules fairly and uniformly. What happens, though, when discretion becomes the necessary premium?

Let's look at two examples: welfare reform and incarceration. When Aid to Families with Dependent Children (AFDC) was the primary welfare benefit program, the administrative challenges were minimal: applicants lined up in front of government employees who would determine eligibility. If the applicant qualified, he or she received benefits. Evaluations of the process were based on mathematical error rates—for example, how many eligibility determinations were incorrect?

When the federal government converted AFDC to Temporary Aid for Needy Families (TANF), a work-based system, the situation changed dramatically. Under TANF, benefits are conditioned on work. Now, providing the applicant help presents more significant challenges: how can the applicant secure a job without child care, adequate education, a safe environment, child support, transportation, protection from discrimination, and more? In fact, government provides a program for each problem. But, to succeed—in this case, to assist a person to secure work—requires a network of community, faith-based, and government providers. Government can not deliver all these services itself. It is now government's responsibility to activate that network.

Federal legislation created the benefits associated with TANF, and state and local contracts implement its provisions through a combination of contractual money; authority, which conditions benefits on certain activities; and strong rhetoric, which celebrates the benefits of work. The presence of these public assets must trigger rules and provisions protecting fairness, equity, and access and safeguarding against discrimination.

The penal system offers another example of a mixed service system. On one side of the street, a sheriff may run a jail; on the other side of the same street, a private company may also run a jail. Prisoners are assigned to either facility. In both situations, obviously, the use of the state's authority caused the offender to be imprisoned and that offender is entitled to humane conditions.

Officials can more easily craft rules to protect prisoner rights than those of welfare applicants. Offenders deserve the same treatment, and the services provided can be relatively easily evaluated. Further, the sheriff can impose quality standards in the bidding and contract provisions. To the prisoner, the judge, or the sheriff, the rights provided should not depend on the color of the shirt worn by the guard or benefit worker.

Regulations promulgated in advance or imposed through a contractual vehicle do not so neatly fit the TANF situation. The need for individualized solutions produced the need for the network in the first place. Obviously, forcing government officials to treat everyone in an identical fashion would undermine the results. In addition,
measuring social service outcomes, in which the network plays a particularly important role, is enormously difficult. The public value, as illustrated in the D.C. hospital example, would not be simple "benefit eligibility" but, rather, whether the person in need of help successfully achieved his or her goals—be it drug treatment, a job, further education, or a combination of all three. Even in a straightforward situation like the jail, protections are often insufficient. Contracts do not contain suitable output measures and poorly trained monitors scrutinize inputs rather than outcomes and rights. Generally, government lawyers can competently write a request for proposal and negotiate standard contract provisions that rely on detailed accounting and reporting procedures, but these provisions do not allow for the flexible inputs required to accomplish the carefully negotiated outcomes.

Contract terms should include attention to these "public values." One example of incorporating values through rule making is Australia's Public Service Act, which requires that the Australian Public Service "incorporate and uphold" fifteen separate Public Service Values ("APS Values") and a formal Code of Conduct ("Code"). The extent to which the APS Values and Code are applied to private contractors varies by government agency:

[S]ome agencies stipulate complete adherence to the APS values. . . . More commonly, however, agencies single out certain relevant aspects of the APS Values and Code with which agencies must comply. Which aspects are considered most relevant can be summarized in terms of particular distinctive public service values . . . namely two outcome-related values (responsiveness to government and fair and impartial treatment of the public) and two process-related values (public accountability and merit appointment).26

Strict rules and input-driven contractual regulations might accomplish superficial fairness but at a huge cost in terms of effectiveness. And, of course, neither judges nor mayors aspire to achieve a standardized mediocre or failing response. Officials must recognize that accountability and flexibility often compete with each other. The use of taxpayer resources triggers certain accountability requirements, but vigilance at the cost of effectiveness is counterproductive.

Putting aside whether one agrees with her policy objectives, Dickinson, nevertheless, provides a helpful summary of contracting practices that would preserve public values when she suggests the following:

(1) [1] Incorporating public law standards in contractual terms; (2) requiring that private contractors receive training; (3) enhancing contractual monitoring, both by internal government actors and third parties; (4) requiring that contractors receive accreditation from independent organizations; (5) laying out clear performance benchmarks; (6) mandating contractor self-evaluation; (7) enhancing governmental termination provisions and allowing for partial governmental takeover of contracts; (8) allowing for beneficiary participation in contract design; and (9)


26. Id. at 62.
strengthening enforcement mechanisms, including greater whistleblower protections and more opportunities for third-party beneficiary suits.27

I am Chairman of a federal agency called the Corporation for National and Community Service (CNCS), the parent of AmeriCorps, Learn and Serve America, and Senior Corps. CNCS invests government dollars in thousands of partners that produce highly flexible, localized responses. Every year, predictably, some very small percentage of our partners does something inappropriate, which generates official response and leads to a tightening of the accountability rules to reduce the chances of abuse. The result of placing new requirements on all partners—instead of targeting the response to the organizations in the wrong—is that the honest performers are punished. They must either divert program dollars to compliance or lose some of the very discretion that made their partnerships so valuable in the first place.

In evaluating the fairness and legality of a service network, each branch of government needs to consider whether other criteria or procedures—over and above simple rule making and contract provision promulgation—ensure democratic accountability. Broader participation, which fosters greater effectiveness, creates complicated challenges for the government in ensuring the provision of administrative rights and constitutional protections. For example, how can client choice in the network help protect the interests of a pluralistic society?

C. Accommodating Pluralism Through Choice

When government uses its money or its authority, it needs to be sensitive to diversity. Obviously, a mayor should not make participation in a faith-based shelter a condition of receiving care, but nor should he or she prohibit the provider as a choice merely because of its faith perspective. Sorensen’s work shows that in a revised model of representative democracy, “[t]here must be made a considerable space for plurality for individuals and groups with regard to way of life.”28 The extent to which the network accommodates choices and variations should be a factor in determining whether government activated the delivery system in an appropriate way. As Minow writes:

[Introducing private options supported by public resources can advance pluralism. Pluralism means valuing the variety of ethnic, religious and cultural groups within society and the virtues of tolerance and mutual accommodation. Pluralism calls upon the government and private actors alike to respect distinctive groups. In the United States, the Constitution has long been understood to ensure parents a variety of educational options so that parents may guide their children to take on “additional obligations” alongside those chosen by the state. Pluralism in social services may foster meaningful connections within communities formed around neighborhood, religious, or ethnic identities.29

The adequacy of the choices depends on the nature of the organizations in the network, and one of the more difficult challenges for government involves determining

27. Dickinson, supra note 11, at 402.
28. Sorensen, supra note 12, at 103.
29. Minow, supra note 6, at 1244.
which organizations should be allowed to provide services. If an organization proposing to provide services has principles viewed as strongly antagonistic to certain populations, should it be allowed to participate? Government cannot discriminate on the basis of religion, for example, in choosing network participants. But, perhaps it can, and should, establish a process that excludes organizations espousing views inconsistent with the goals of the issuing government agency. For example, in 1995 the Anti-Defamation League called upon the United States Department of Housing and Urban Development to terminate its contract with the Nation of Islam's security firm, not because the firm provided inferior services, but because Minister Farrakhan had made disparaging comments about Jews.\textsuperscript{30} One can imagine a wide range of hypotheticals about which organizations should be allowed to participate, but addressing this question in a manner that accommodates a fair amount of choice without exposing the network to hostile partners is no easy feat.

In configuring network providers and enforcing accountability, executive officials and courts should consider the extent and type of choice citizens may exercise. As Moore notes:

\begin{quote}
[T]he populations that governments seek to serve are often heterogeneous: one size may not fit all, and the overall effectiveness of government efforts might be increased if government programs were targeted differently to different market niches. . . . The improvement to heterogeneous clients from recognizing and responding would be partially offset by concerns that clients were being treated differently (therefore, potentially unfairly) in government programs. But if efficiency and effectiveness in achieving mandated goals were the primary objective, and if concerns about justice and fairness in the differential treatment were assessed, it would be desirable overall for government to create conditions that would allow it to respond to client heterogeneity.\textsuperscript{31}
\end{quote}

Executives need to consider these diversity issues in determining which organizations are allowed to participate in providing public services, and the extent of network diversification should be an important criterion to the courts. Additionally, government's inability to produce heterogeneous responses, such as in child welfare, might very well be the reason for some of its failures.

\section{D. Enforcing Rights Without Governmentalizing the Private Sector: Hold Government Agents Responsible and Force Accountability Downward}

Writers like Gilmore and Jensen advocate forcing a vast array of public requirements—such as complying with public record requests and divulging profit, salaries, or work processes—on private participants delivering government services.\textsuperscript{32} These efforts run the risk of compelling private organizations to become more like government, thus marginalizing their value and minimizing their creativity. Clearly, private providers most assuredly need to be responsive to important norms; protection

\begin{itemize}
\item[\textsuperscript{30}] E.g., Editorial, \textit{No Contracts for Haters}, \textit{St. Petersburg Times}, Mar. 21, 1995, at 10A.
\item[\textsuperscript{31}] Moore, supra note 10, at 1224.
\end{itemize}
of these norms can be insured by obligating providers to meet certain requirements and holding government accountable when it fails to delegate its authority correctly.

Incorporating normative standards provides a starting point for networked government; technology provides the tools necessary to it. A combination of internet, intranet, service synchronization and collaboration software, shared databases, and common data interchanges make it possible to supervise outsourced partners in previously unimagined ways. Not only can events be monitored in real time, but sophisticated algorithms can determine the number of exceptions that are occurring and in which situations. Intrusive and restrictive input requirements are no longer required to hold governmental agents responsible for protecting public values and securing agreed-upon outcomes. In fact, the irony is that many of these tools exist more completely in the private sector, allowing the private sector to respond more fairly than traditional government, which routinely lacks sophisticated technological applications.

E. Require Transparency, Competition, and Public Participation

When evaluating the fairness of an outsourced activity, courts can reasonably take into account the transparency and public participation associated with the process. In a network of providers, decisions may be left to “self-governing” actors with the resulting danger “that those who already possess a high degree of participatory skills, such as members of large firms, organizations, or associations and well educated, experienced subelites, will be able to utilize the new channels of influence more efficiently then the less empowered.” 33 But, an open and competitive process assures that the standards and requirements upon which the network is built have been fully disclosed. A competitive process will more likely protect important democratic values “by enhancing publicity; by promoting plurality; by calling for the inclusion of all affected citizens; by promoting forms of participation that increase the political resources, competencies and efficacies of the less capable among the affected.” 34

II. WHEN COURTS ACTIVATE THE NETWORK

The issues presented affect chief justices in three ways. First, as defenders of democratic accountability, chief justices will need to anticipate new conditions associated with networked government in order to sustain public confidence. In addition, because chief justices often function as network activators—for example, when they operate probation and public defender programs—they will need to establish rules for nongovernmental actors utilizing government authority. When a judge places an offender in a “community assignment” in lieu of imprisonment, the court should establish rules and working relations consistent with the elements of a network operation. Additionally, the relationship among the participating entities will require careful supervision.

As an example, consider the case of the award-winning partnership between the New York State Parole Department and La Bodega de la Familia. The Parole Department engaged La Bodega in order to increase the chances of successful prisoner

33. Sørensen, supra note 12, at 104.
34. Id. at 105.
re-entry by involving families and employers in the support and sanctioning process. This creative solution appeared perfect, but the two organizations needed to overcome their cultural differences in order for the partnership to work. The parole officers viewed enforcing the technical requirements of parole, including handcuffing prisoners for curfew violations, as paramount to their jobs. La Bodega officials, however, proclaimed that keeping parolees removed from difficult circumstances (and out of jail) was more important than imposing technical requirements. In these situations, a shared understanding of the goals of the partnership is vital. These relationships and understandings become even more critical when a network partner deploys the loaned power of the state.

Public dollars and official authority granted to a community group can produce substantial results, but courts must consider the standard for services provided, conditions for success, and, in some cases, the philosophical approach of the network partner. As referenced by Minow, “Government agencies act not only as purchasers of goods and services but also as guarantors of freedom and equality.”

Finally, the need for network solutions raises complicated questions for courts: in this new environment, what does it mean for a court to appoint a master or enforce an order against a system? Judges cannot on their own transform either a welfare system or a school system, for example, but they need not necessarily be satisfied with an administrative response that spends more money inside a structurally flawed delivery system. Perhaps, they can help to ensure that a broader array of solutions is considered. Whether a judge is configuring his or her own resources or attempting to enhance the quality of services in a matter under review, true innovation rests upon officials who can envision solutions provided in this new way.

CONCLUSION

Governing by network brings with it new opportunities and new risks. With vision and significant attention to management, elected officials can produce considerably more public value—and in a more personalized fashion. However, the interlocking delegations of authority inherent to networked government often mix private and public agendas. Government officials will need new talents, tools, and approaches to insure democratic accountability and protect important values. Courts, in turn, will need to adapt more quickly to the changes occurring in the executive branch in order to avoid one of the causes of the dissatisfaction described by Pound.

Governing by network presents important questions for courts as they sort through the nuances of protecting democratic accountability:

- Does the asset deployed to create the network—rhetoric, money, or authority—affect the standards applied?
- Does the character of the public finance, whether it is a tax credit, voucher, or contractual payment, make a difference?

35. See GOLDSMITH & EGGERS, supra note 7, at 67.
36. Id. at 114–15.
37. Id.
38. Minow, supra note 6, at 1246.
• If the agent dispenses state action, can sufficient guarantees of due process be achieved by holding the government principal accountable or must the private actor allow new levels of intrusion?
• Does the role of the court increase when the quality measures in the network are more difficult to define?
• What should courts do in systemic failures (e.g., adequacy and due process suits for schools and child welfare) if the executive branch problem is not just one of money but also one of an outdated model?
• What should the courts do if equal protection means maintaining a system of equally inadequate protection?

Given limited financial resources, it is unlikely that citizens will receive all the services that they demand; as problems become more complex, citizens will increasingly look to the judiciary for protection. Government responses to these factors increasingly involve the use of third party providers, but neither schools of public administration nor schools of law pay explicit attention to the implications of this shift. This fundamental transformation in the way in which we provide public services requires the role of the courts to change to both protect democratic values and defuse the dissatisfaction that Pound never anticipated.