

Creating public value through private/public partnerships *

Mark H. Moore

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I. Introduction

Citizens living in nations throughout the world seem to have lost a great deal of confidence in their governments.¹ They are no longer confident that governments can shield them from war or terrorism launched from without, or ethnic violence and crime launched from within. They fear that widespread corruption has undermined government's capacity to secure basic civic rights such as the right to hold property, to form voluntary associations, and to participate in democratic governance. They doubt whether governments can make good on their frequent promises to provide jobs, increase material welfare, and provide at least minimum levels of health and education. They even have doubts about government's capacity to deliver the public goods and services it is currently financed to deliver in an efficient and effective way.

In contrast, citizens seem to have increasing confidence in the power of the private sector to improve conditions in their societies. Part of this confidence derives from increased faith in the capacity of private firms and market mechanisms to advance material prosperity. Of course, the world's citizens have long understood the power of capitalism and markets to spur economic and technological development. What is new, perhaps, is a belief that such advances can be made without the bad economic, social, and political consequences of the past. On one hand, there is the hope – expressed in the movement to enhance corporate social responsibility – that private firms might be persuaded to produce their material magic while avoiding the damage they have inflicted in the past on the natural and social environment.² On the other, there is the hope – expressed in the current enthusiasm for social enterprise and social entrepreneurship – that entrepreneurial energy, animated and guided by markets – can be turned to the task of dealing with important social problems, and find solutions for these problems that government has overlooked.³

A second part of the enthusiasm for the private sector comes not from faith in markets alone, but also from re-discovering and developing the power of what Bill Drayton of Ashoka describes as the “citizens sector.”⁴ Drayton's view of the “citizens sector” includes various enterprises created and led by individual entrepreneurs who authorize themselves to take action to improve society. Some of these enterprises operate as economic entities extending the opportunities that come from participating in market activity to groups and individuals who have been excluded from such participation. But other enterprises in the “citizens' sector” act as self-help civic associations that help build individual dignity and collective solidarity among groups who have been oppressed and excluded. And it includes explicitly political organizations that seek to bring influence to bear on both government and commercial enterprises to encourage them to do more to advance the public interest.

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¹ For a discussion of possible explanations of why citizens in the US have lost confidence in their government, see Joseph S. Nye, Jr., Philip D. Zelikow, and David C. King, *Why People Don't Trust Government* (Cambridge, Mass.: Harvard University Press, 1997)

² Corporate Social Responsibility as a successful movement. But see articles in *Economist*

³ On the idea of Social Entrepreneurship, see David Bornstein, *How to Change the World: Social Entrepreneurs and the Power of New Ideas* (Oxford, England: Oxford University Press, 2004)

⁴ William Drayton, Ashoka, Personnel Communication

Given declining faith in government, and increasing confidence in both for profit and nonprofit, voluntary private institutions to improve the quality of individual and collective life, it is quite natural for citizens to look to “private/public partnerships” to fill in the void left by declining faith in government. No surprise, then, that a public discourse has arisen emphasizing the great potential of private/public partnerships to take up the slack in dealing with important social problems, and increasing the effectiveness of government provided services.

The purpose of this brief paper is to take some preliminary steps in developing an analytic framework that can help us scrutinize public/private partnerships both as a general idea, and as specific, concrete proposals. While it is hard to be against the idea that such partnerships could help struggling governments in their efforts to promote economic prosperity, sociability, and justice in their particular countries, I confess to an uneasy feeling about these emergent deals. More specifically, I worry that the public side of these deals is routinely overmatched by the private side. In the vernacular, I worry that the public gets “taken to the cleaners.”

I think this occurs for at least three reasons. First, the public side is not exactly clear what it is supposed to bargain for and protect in these partnerships. Second, the public side is somewhat compromised from the outset in that its purposes may well include satisfying the private side as well as the public, and for that reason, the public side gets a bit less effective representation than it should. Third, the public side doesn’t understand quite as well as the private side how to negotiate the deal at hand, and faces difficulties re-acting to strategic moves taken by the private side in the negotiation.

I begin with a short case to illustrate the general problem, and then develop an analytic framework to help the public sector learn how to perform its due diligence responsibilities a bit more effectively.

II. The Case of the Park Plaza Development Project

In the late sixties in the City of Boston a private developer named Mort Zuckerman conceived of a plan to develop a deteriorating piece of the city.⁵ The parcel of land that interested him was one that was occupied by rundown businesses, rowdy nightclubs, and strip joints. While there were some small businessmen making a living from those few businesses that survived, and while there were some individuals who found the pleasures provided in the bars and strip joints much to their satisfaction, most citizens of the city thought the area added little of value to the economic, social, or political life of the community. Zuckerman had an alternative vision of the physical, economic, and social activities that could inhabit this site. He envisioned a modern hotel, office buildings, strong commercial ventures that would attract individuals from across the city, the region, even the world.

He shared his vision of a significant private development of this area with the Boston Redevelopment Agency (BRA) – the local government agency charged with the responsibility for guiding the physical and economic development of the City. That agency liked what they heard, and designated the site that interested Zuckerman as the Park Plaza Redevelopment area. The BRA then asked for proposals from private developers about how the space might be redeveloped to increase its value to the citizens of Boston. Zuckerman’s proposal won the competition, and the plan he proposed was quickly approved by the BRA, by the Mayor of Boston, and the City Council. It was then forwarded to the Massachusetts State Department of Community Affairs (DCA) for approval.

⁵ Colin Diver, *Park Plaza* (Kennedy School of Government Case # . . .) Also discussed intensively in Mark H. Moore, *Creating Public Value: Strategic Management in Government* (Cambridge, Mass.: Harvard University Press, 1995).

The reason that the plan was forwarded to the DCA was that only the DCA had the power to approve redevelopment plans in which the state's power of eminent domain was to be used. The power of eminent domain allowed the state to take property for public purposes as long as reasonable compensation was paid from the owner. And from the point of view of Zuckerman and the BRA, the power of eminent domain was crucial to the success of the project. If Zuckerman were forced to negotiate with each landowner in the development area, and the project could not be undertaken until all had agreed, there would be a strong incentive for each landowner to hold out for a very high price as the price of him not exercising an effective veto over the project as a whole. It was precisely to overcome such difficulties that state legislatures had granted state redevelopment agencies limited authority to use the power of eminent domain to support higher rates of urban economic development.

Because this authority to take private property represented such a significant use of state power, however, the legislature had conditioned the use of these powers by establishing six criteria that had to be met before these powers could be used: 1) the project could not be accomplished by private enterprise alone; 2) the proposed plan was "consistent with the sound needs of the community;" 3) the financial plan for the proposed redevelopment was sound; 4) the area proposed for redevelopment was "blighted"; 5) the plan for development had to be "sufficiently complete"; and 6) there was an acceptable plan for re-locating the individuals adversely affected by the proposed re-development.

One way to understand these conditions is that they represented the legislature's effort to ensure that a public asset – namely the authority of the state – would not be recklessly used, but would, instead, be used to create something that was plausibly of public value. They did not want state power to be used when private markets could produce the same result. They did not want state power to be used only to increase the profitability of a private venture. If state power were to be used, something of public value had to emerge. What constituted the public value to be produced was apparently something that was "consistent with the sound needs of the community," that was "financially sound," that would reduce "blight", and that would deal with the needs of individuals who were dislocated by the project. Each of these concepts could be seen not only as a legal criterion that had to be met, but also as a dimension of public value that was to be pursued through the use of public authority.

The official at the State level whose job it was to review and approve or reject the proposed was a man named Miles Mahoney, the Commissioner of the State Department of Community Affairs. Importantly, while Mahoney had been appointed by the Governor, and could be removed from office by the Governor, the Governor himself was not authorized to approve or disapprove the plan directly. The Massachusetts Legislature had delegated the authority to use the power of eminent domain explicitly to the Commissioner of the State Department of Community Affairs. It was only Mahoney's signature on an approval document that would allow Zuckerman and the BRA to invoke use the power of eminent domain to launch their ambitious project.

What Mahoney had to review was a proposal that called for the development of three of five parcels included in the Park Plaza Redevelopment area. The three parcels slated for immediate development were the most obviously economic valuable parts of the site. The two other parcels, where much of the objectionable blight existed, were scheduled for later development. The difficulty was that the plan included no firm commitment by the private developer to proceed to the development of these less economically valuable parcels after the completion of the first three parcels. The financial plan for the effort was also a bit sketchy. And there seemed to be little attention paid to the problem of re-locating those individuals who would be dislocated by the move. So, the plan seemed deficient on virtually all of the required criteria.

More importantly, from Mahoney's point of view, there seemed to be little in the deal that he personally considered publicly valuable. His vision of the mission of his agency focused on ensuring that poor individuals who had born the brunt of prior redevelopment efforts would be able to manage the pace and participate in the benefits of the redevelopment projects that swept over their neighborhoods. While the Park Plaza project was not one of those projects that would seriously injure a community of poor residents, Mahoney could not really see much of what he considered a public benefit in the proposal. It seemed to him that a private developer was asking him to lend him the use of the state's authority to undertake a project that would benefit him and his partners economically, and might also help the city economically, but would do little else of public value.

The question before him, then, was whether to enter into this private/public partnership by putting the power of eminent domain on the table to be used for the purposes embodied in the existing plan for Park Plaza, or to negotiate for something of greater public value at the risk of scaring away the developer.

III. Different Forms of Private/Public Partnerships

The Park Plaza case represents a somewhat old form of public private partnership: the kind that has been important in urban economic development for at least a century. It is not very different from those forms of private/public partnerships that were used for the last four centuries to build the world we now inhabit.

Private/Public Partnerships to Support Economic Development

After all, it was private/public partnerships that supported the Western exploration and development of trade with both the New World and the Far East. It was private/public partnerships that developed the modern economic infrastructure of that New World – the railroads and highways that brought forest and grain to the reach of cities and European markets, the dams that prevented damaging floods, created acres of arable land, and brought hydro-electric power to rural villages, and so on. In many such projects, government ambitions to expand territory and resource bases for the benefit of their citizens were aligned with private funds, private motivations, and private capacities to accomplish the ambitious goals. The very idea of a public corporation grew out of state sponsored efforts to promote economic development in these new domains.

In other notable historic examples, private and public partnerships were organized around scientific projects designed to advance basic knowledge, or to solve some important practical problem. A recent book documents the efforts made by the British Government to stimulate scientific efforts to find a practicable means for finding one's longitude at sea.⁶ One could also point to more recent private/public partnerships devoted to preventing illnesses such as polio and AIDs.

The point is simply to remember that the idea of private/public partnerships is hardly a new one. Public organizations have long relied on private to accomplish their goals. Private sector organizations have long relied on support from public institutions to accomplish theirs. For much of our history, private and public have co-operated in great economic enterprises, and in establishing social order.

⁶ Dava Sobel, *Longitude: The Story of the Individual Genius Who Solved the Greatest Scientific Problem of His Time*

Macro-Institutional Interdependence Between Public and Private

In fact, one could say that government is almost entirely incapable of acting without some form of partnership with the private sector. Public law designed to protect property and ensure orderly and just relationships among the citizenry cannot easily be enforced without both voluntary compliance and informal social control provided by a consenting and compliant private sector. Public goods cannot be produced, public services cannot be provided, and aggregate social conditions cannot be guaranteed without government funding; and government funding is largely supplied by appropriating private income and wealth through taxation. Indeed, one could say that the oldest and most common forms of private/public partnerships are those organized by government regulation and taxation of private individuals to achieve collectively defined public purposes!

One could equally well say that the private sector is incapable of effective action without help from government. Without government protection of property rights, there is little incentive for individuals to put their minds and energies to the task of making things for others, or imagining ways in which the efforts of other citizens might be leveraged in an organized process of production to produce more than the same group of people could produce on their own through un-coordinated action. Without government to enforce contracts made between buyers and sellers, or employers and employees, it would be difficult to organize the millions of transactions among strangers that provide the animating energy and principal activity we associate with market economies.

So, while most modern societies want to make a sharp distinction between the private and public sectors, they also have to recognize that these sectors do not exist in isolation from one another.⁷ At least at the macro-institutional level, they live in a complex, interdependent relationship with one another, with each depending on the other for some of its most basic requirements.

The New Form of Private/Public Partnerships: Micro Deals Struck Among Officials Acting for Private and Public Enterprises

But this macro-interdependence is not what we usually refer to today when we talk about private/public partnerships. What we mean today, it seems to me, are more micro kinds of arrangements: particular deals struck between the officers of private sector organizations on one hand and public sector organizations on the other. Officials who both control the assets and represent the interests of specific public and private agencies seek co-operative arrangements in which each side of the transaction can do better (in their own terms!) than either organization could do on its own.

Such partnerships can vary along many different dimensions. They can be bigger or smaller in terms of the resources engaged and controlled by the deal. Some – such as those involving decisions about how best to use government owned lands -- can involve billions of dollars and change the physical and social conditions of vast territories. Others, such as those in which a police department agrees to help a community group restore a sense of security by joining with them to crack down on street level drug dealing – are much smaller.

The partnerships can also be more or less complex in terms of the number of parties, and in the kinds of assets, resources, and activities that are exchanged in the deal. Some may involve only two officials representing two different enterprises – a government procurement officer wants to buy

⁷ For a discussion of this basic distinction, see Jeff Weintraub, Krishan Kumar, *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (Chicago, Ill.: University of Chicago Press, 1997)

serviceable desks from an office supply company. Others, such as those that have been constructed to deal with youth violence, or to restore civility to a community riven by ethnic conflict, can involve coalitions of dozens of organizations from different levels and sectors of society. Some may involve simple cash transactions in which one partner buys something from the other as when a private company offers to buy assets from the government; or when the government seeks to contract with private agencies to produce public goods and services. Others may involve complex exchanges of legitimacy and influence with one group for legitimacy and influence with another – as, for example, when a government agency seeks a closer working relationship with a community that has become estranged from government, or when a private company seeks to reassure its investors and customers that it has behaved appropriately and with government approval in some particular transaction.

Sometimes the initiative in forming the partnership has come from the private side; other times from the public. Sometimes the vast bulk of the resources has come from the private side; other times from the public. Sometimes the private side has made a great deal of money from the deal; other times the government has taken the lion's share of the benefits.

IV. Private/Public Negotiation as a Key Feature of Private/Public Partnerships

While private/public deals vary a great deal, one key feature of them all that is that they are typically developed by some kind of negotiation between those controlling assets in the private sector for private purposes and those controlling assets in the public sector for public purposes. I want to focus on these as deals and negotiations between private and public sector representatives for three key reasons.

First, by characterizing these partnerships as deals I want to emphasize their voluntary character. My claim is one of the things that separate the idea of private sector partnerships from other working relationships between the private and the public sector is that each side can walk away from the deal if they want to.⁸ They are not compelled to participate. It follows from this assumption that each party has to get enough from the deal to satisfy their own objectives to be willing to enter into that deal. And, it follows from this that the deals that are struck can be and are evaluated from the point of view of each participant to the deal. We citizens standing outside the deal might be more or less happy with the deal that is struck; and we may imagine that the public side of the deal ought to be the one that is dominant and maximized in the transaction. But the point is that no deal will be made among voluntarily consenting parties unless each party can improve their position in their own terms.

Second, by looking at private public partnerships as deals struck among officials, I want to bring into play the powerful techniques of negotiation analysis in helping us to understand how the deals are constructed and evaluated.⁹ This allows us to examine in systematic detail what can be described as the structure of the deal: the parties to the deal, their interests in the deal, the resources and actions they committed to in the deal, and how the deal distributes both the burdens and benefits of

⁸ To characterize deals as voluntary does not mean that there is no price to be paid in walking away from the deal. It means only that each side, can in principle at least, decide whether to be involved, and that such a decision would not mean that a person would die or suffer or allow others to suffer if he refused the deal. Put somewhat differently, it means the best alternative to a negotiated deal is not so dire that any ordinary human being would feel physically or morally coerced to accept the deal. There is enough material well-being and enough human dignity left to allow one to say no a deal he does not want.

⁹ For a discussion of negotiation analysis, see Howard Raiffa, *The Art and Science of Negotiation* (Cambridge, Mass.: Harvard University Press, 1982); and David A. Lax and James K. Sebenius, *The Manager as Negotiator* (New York, New York: The Free Press, 1986)

executing the deal and realizing its ambitions. It also allows us to look closely at how risks associated with possible failures of the deal are distributed.

Third, by looking at private public partnerships as deals struck among officials, I want to emphasize a *process* feature of these deals: namely, that they typically happen in an institutional context and through processes that differ significantly from the processes we ordinarily rely on to reassure ourselves that public powers and assets are being used for public purposes. Generally speaking, one could say that the powers and assets of government are deployed either when a legislature acts, or when a regulatory agent proposes a new regulation following some kind of administrative hearing, or when a court rules on a particular case before it. But the deals negotiated by public sector officials on the public's behalf are not like these processes. They are typically far less formalized, far less public, far less transparent, far less representative than these processes. This is important, I think, because public power and public assets are no less engaged when government officials strike deals to create private public partnerships than when a legislative body decides that we ought to tax and regulate ourselves to produce a particular social result, or when a court decides that a particular individual does in fact have a claim against the government in a court of law. The fact that collectively owned government powers and assets are deployed in private public partnerships, and that the institutions and processes through which such deals are constructed are less formalized and transparent creates an issue not only about the substance of the deal that is struck – whether it is efficient in achieving the purposes of the parties, and fair in the way that the burdens and benefits are divided – but also whether the deal is legitimate – whether it was constructed through a process that properly honored the stakes that citizens had in the way that public authority and money was committed in the deal. This also raises some important questions about practices that public officials might need to rely on in the creation of efficient, just, and legitimate private/public partnerships, as well as the criteria they and citizens should use to evaluate the deals that are made.

Partnerships and Negotiations in Contracting For Government Goods and Services

The simplest private public partnerships are those in which the government starts off with a well established public purpose, and then seeks help from private parties in pursuit of those purposes. The simplest form of this kind of deal is contracting out. The government has a purpose; it has some money to spend; it is looking to find a private capacity that can help it achieve its purposes at a lower cost than could be produced by the government itself. The partnership is contained in the contract that is written that specifies particular outputs for particular financial returns.

While we might describe such relationships as partnerships, there are several things worth noting about such arrangements. The first is that it seems that it is the government's purposes that dominate. It is they that occasion the deal. It is they that mobilize the financial capacity to do the deal. The private actor is not usually asked to participate in some kind of joint search for a problem and a solution. The government has decided what problem it wants to solve, and often how to solve it. The only question is whether the private sector organization wishes to join the government in its efforts in exchange for government money.

This account may significantly overstate the nature of contracting relationships however.¹⁰ Private parties do have a voice. They use it to suggest products to government agencies. If they are not successful with the agencies, they can often go higher in the political food chain and seek out

¹⁰ Steven Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (Washington, D.C.: AEI Press, 1990)

legislators or elected executives. They are sometimes explicitly invited to develop concepts. The government accepts unsolicited ideas. So, there is often more give and take in the definition of the purposes of contracting relationships than is suggested by an overly simplified model of government procurement and contracting. And, there seems to be much wisdom in changing our image of government contracting from a hard nosed effort to buy cheap, to a partnership model in which a certain amount of exploration, innovation, and joint problem-solving can go forward.

On the other hand, it is also worth noting that the parties negotiating do not share *all* the same objectives. The private organization may be indifferent to the goal that is achieved, and interested only in the money to be earned through its efforts to produce what the government wants. And, indeed, the private party might want to make money from the government by pricing the good and service well above their costs, and by shifting risk to the government. It is an important job of the government procurement officer to prevent this from happening. In principal, the procurement officer has no interest in the welfare of the contractor per se. He is interested primarily – one could say almost exclusively – in using the capacities of the private contractor to achieve the public’s purpose at the lowest possible cost to the government. If he can find a way to buy at the margin rather than pay full cost, if he can find a way to push risk back onto the private provider, he is duty-bound to do so.

In the end, both parties want a deal; that is what makes the partnership a plausible idea. But they would prefer to have the deal on their own terms, and they might fail to make a deal that is in both their interests because they didn’t get quite enough out of the deal to feel like it was a fair deal, and for that reason, did not feel that they could trust their partner in the future as they faced the prospect of having to re-negotiate matters as events took their unpredictable course.

Partnerships and Negotiations in Promoting Regulatory Compliance

A second kind of private public partnership occurs in the context of a regulatory environment.¹¹ In that case, government once again may have a well established purpose. It is also particularly likely in this case to have specified some particular means it needs to achieve its goals. And those particular expectations and claims will have fallen on particular organizations in particular contexts to live up to the regulatory standards. In traditional “command-and-control bureaucracies,” that was pretty much the end of the story. But in the brave new world of private/public partnerships, this is just the beginning of the story.

In today’s world, we hope and expect the object of regulation might come forward with a proposal to act in some way that would be better for all parties than the specific action required by the general regulation. Those who are the target of regulatory efforts might know a lower cost way of meeting the same regulatory goal. Or, they might have a method that not only reduces their costs, but achieves some other purpose the government or the local community might have. Or, more problematically, they have an explanation of why the government’s desired regulatory goal in a particular domain should be viewed as less urgent, or nowhere near as important as the costs that would be imposed, and that ought, therefore, to be exempted not only from having to use a specific means to achieve the regulatory objective, but also from the obligation of achieving the regulatory objective itself.

In short, the private parties who are regulated by government begin to negotiate a new and

¹¹ Cary Coglianese and Jennifer Nash, *Management Based Strategies for Improving Private Sector Environmental Performance* (Cambridge, Mass.: Kennedy School of Government, 2005)

different deal from the one that was embodied wholesale in the general regulations. Government regulators are asked to make exceptions in the interests of improving the overall value of the partnership.

This looks even less like a partnership than government contracting. A main reason is that the government is not offering to buy something from a willing vendor; it is compelling a private party to contribute to a public purpose without necessarily receiving any compensation for their effort. Government authority rather than government money is being spent to achieve a goal through a private public partnership, and the private partner may have no choice but to go along (on pain of fines or jail if he fails to do so). This is an important difference. But it is not the difference between night and day.

In regulatory transactions, private parties have the same opportunities to try to influence government officials about what should be produced and in what particular ways. They have the right to suggest that the circumstances they face are different, and that the public interests as a whole (both what the government is trying to accomplish as a public actor and what they are trying to accomplish as a private actor that is also a member of the society) would be better advanced in some different way than the government is asking. If they are not satisfied, they have the right to go higher in the political food chain, or out to the courts to seek redress. And, they can always choose to resist the government's demands, or simply leave the activities that expose them to what they experience as unjust, or inefficient, or illegitimate claims of government.

But what keeps the idea of private public partnerships alive even in regulatory circumstances is the belief that both parties – the private and the public – can do better in their own terms if they are allowed to search a bit for a different kind of deal than the one on offer from the government. The air can be made cleaner at a lower cost to the private firm and with less damage to a local economy. A workplace can be made safer and more comfortable for workers with less cost to an employer if the workers and the company can be allowed to negotiate with one another in the shadow of a threatened regulatory action that will impose a somewhat arbitrary safety standard and method on a particular company. To the degree that such deals can be more efficient in producing results valued by both private and public, more just in distributing the burdens and benefits of a joint effort, and more legitimate in the eyes of those who are parties to the deal as well as the wider society, then such partnerships can be much valued.

Negotiations Around the Private Uses of Economically Valuable, Governmentally Controlled Assets

A different world is one where private institutions seek to advance their purposes through government. That was case in Park Plaza. Mortimer Zuckerman, a private developer seeks to use the public power of eminent domain to help him assemble a packet of land that could be used for a large scale urban development project. His plan, if carried out with the help of government, may produce many results that citizens of Boston and their elected representatives could both recognize and enjoy as public benefits. A notoriously seedy area where vice and crime flourished could be rehabilitated to support much healthier economic, social, and cultural activities. The economic value of the real estate would be increased, and the city tax base along with that – allowing the city to share in the benefits of the economic development proposed by Zuckerman. The large investment in building would provide a welcome boon to the city's construction industry and its workers. Zuckerman himself might value these public benefits as well as the private material benefits he hopes to provide to himself and his investment partners.

But as an official of a private for profit enterprise, Zuckerman also hopes to make a significant private benefit from the deal. He hopes to make a lot of money for himself and his investors that they can spend for their own private material welfare. All he needs to produce both the private and public benefits is to be allowed to use a bit of government authority to help assemble the packet of land, and a bit of public money to help provide the appropriate public infrastructure of site development, roads, sewage systems, etc

In liberal societies, it is common to think that government should not, and does not, own things that have economic value in ordinary market exchanges – that the government is a referee of economic transactions rather than a major participant in such transactions. But the fact of the matter is that the government often has assets and powers that have extraordinary economic value, and thus become the focus of intense private sector interest.

This is obvious if we treat the authoritative powers of the government to tax and regulate as a kind of asset owned by the government, for it is entirely clear that these powers can and are used to shape economic and market transactions. Tax policy is used now not only to find the easiest and fairest way to provide revenues to governments and their established purposes; it is also used to create incentives for economic actors to “internalize” some public costs associated with their activity. Regulatory policy, too, is used by government to internalize social costs and benefits in ordinary economic transactions, and in doing so, to alter what is produced by the market, and how the burdens and benefits of that production are distributed among various groups in society. If we think of government authority as being in some important sense owned by the government; if we see that the use of its taxing and regulatory powers alters what is produced in markets; then it necessarily follows that particular uses of government authority have a calculable economic benefit. Economic actors can be helped or hurt by government uses of its taxing and regulatory power. The degree to which they are helped or hurt is the degree to which the government has something to trade economically with the private sector. The important question becomes what the public sector should negotiate for with the private sector.

But it should also be apparent that government is a powerful economic actor not only when it is taxing and regulating, but also when it is using its considerable economic power to shape the world in which we live. The government controls a huge flow of spending power that drives public purposes through private markets in the same way that consumer spending drives private purposes through private markets. The government is a major purchaser, and what it decides to buy in private markets has a profound effect on what the market produces. Part of that effect is direct: if the government wants to buy submarines, schools, and care for the aged, and if it chooses to allow private sector suppliers to compete for this work by channeling its funding through contracts with private providers or vouchers to individual beneficiaries, then the market will swing into action and produce these goods and services in the quantities and in the shapes that the government has encouraged.

But another important effect is indirect: what the government chooses to provide alters the choices that private actors in the market place choose to provide or purchase with their own resources. If the government provides a high quality, vocationally oriented vocational education system, private companies will have to supply less training to their employees. If the government provides retirement benefits, then private companies will not have to do so. If the government provides law enforcement services to help ensure that private property remains secure and contracts can be reliably enforced, then firms need not spend money on these activities.

The government also has great economic power as a guarantor of financial transactions.¹² Indeed, loan guarantees and insurance activities represent a domain where economies of scale are so great, and the public benefits associated with insuring individuals against unpredictable disasters in their economic and social life so great, that one might conclude that government has a natural economic advantage as a supplier of these goods and services. One doesn't have to go that far, however, to see that government's willingness and ability to secure loans is an attractive economically valuable asset that attracts the attention of private economic actors interested in protecting themselves from some uninsurable risks.

And, government is also a major owner of physical property – vast tracts of wilderness with valuable timber and ore; municipal parks, swimming pools and golf courses; huge stocks of solid waste; and, in some cities, large numbers of buildings that have been abandoned by their owners. As the owner of such physical assets that have both positive and negative economic value, government once again becomes the focus of private individuals who would like to lay their hands on some of the valuable assets if the price is right, and avoid having to pay their share of dealing with the value-destroying assets held by government.

Because the government owns and uses taxing and regulatory authority which has economic value; because the government is a major consumer of certain kinds of goods and services; because the government can provide insurance against loss; because the government owns physical assets; it acts within the marketplace as an economic actor as well as outside it or above it as a governing actor. And, as a participant in the market place, its economically important activities become the focus of private parties who would like to make use of the powers and assets of the government. Those private parties come forward as Zuckerman has done with reasonable sounding proposals about how those government powers and assets can be used for both private and public benefit. The government is invited into a deal at the initiative of the private sector, just as the private sector can be invited into a deal at the initiative of government.

Is the Locus of Initiative in Forming the Deal Important?

In the analysis above, different kinds of private/public partnerships are distinguished from one another primarily in terms of which side takes the initiative in proposing the partnership: government starts with its purposes, and finds uses for private sector entities; or private sector entities start with their purposes and find uses for the powers and assets held by government agencies. This is a natural way to think about such deals, I think, because we often think that initiative is strongly associated with the issue of who has the greatest interest in the deal, or whose purposes will be dominant in shaping the deal. Thus, those of us who are concerned about the capacity of private actors to influence and corrupt the government feel better when the government takes the initiative in creating private public partnership through a contract or some kind of regulation. Those of us who think that the private sector is much more creative and imaginative in finding ways to use government powers to accomplish important public purposes (with enough on the side to interest private actors) feel much better when the initiative for the partnership comes from the private side.

But I think it might be a very big mistake to confuse the idea of taking the initiative in talking about the deal with having the dominant purpose or being the important beneficiary of the deal. Often, taking the initiative in proposing a deal may signal a kind of weakness in one's bargaining position. The initiator may need the deal more than the passive partner. Seeing this to be true, the apparently

¹² Herman B. Leonard, *Checks Unbalanced: The Quiet Side of Public Spending* (New York, New York: Basic Books, 1986)

passive partner can often be very effective in shaping the deal to his own liking, and walk off with significant benefits.

The implication is that in scrutinizing private/public partnerships it might be less important to focus on where the initiative lies, and focus instead on what any particular deal actually produces, and how the burdens and benefits that joint production are distributed. To evaluate whether deals were efficient, just and legitimate, we have to look at the structure of the deals as they were made, and their performance as they are executed rather than at the history of their development. There may be no important relationship between who initiated the deal on one hand, and whose purposes dominated the deal, or who walked away with the greatest (absolute or relative) returns on the other.

V. Analyzing the Structure of Private/Public Deals

In analyzing the structure of the deals it is natural to look first at what each party to the deal gets out of it. Moreover, because we are talking about partnerships rather than adversarial relationships, we often want to begin the analysis of the deal with the claim that the deal is a “win-win” situation, and that one of the things that makes it this is that the parties to the deal “share objectives.” Now, such ideas are important in creating the possibility of and giving impetus to the creation of many value creating private/public partnerships. But before concluding either 1) that the “win-win” aspects of these deals make too close an inspection of the distribution of benefits unimportant, or 2) that shared objectives are a necessary or sufficient condition for such deals to be struck, we might want to think a bit critically about these common ideas.

Win/Win and the Distribution of the Benefits of Co-Operation

There is an important respect in which all successful deals have to be viewed as “win-win.” In negotiation theory, we learn as gospel that no actor will voluntarily agree to a deal that leaves him worse off than the condition he would be in if he refused to make the deal.¹³ The reason is that we assume there is always something that an actor can guarantee for himself in the absence of a deal. That condition is described analytically as the “best alternative to a negotiated agreement,” and such a thing always exists for each party to a negotiation.

Of course, the best alternative to a negotiated deal could be a terrible one from the point of view of one actor. And we could say that that person “needed” the deal a great deal more than the other parties. And that need would in some sense coerce the disadvantaged party into taking a deal that was not particularly good for them, or particularly fair in the way that the benefits of co-operation were divided up.

But the fact remains that by definition one party to a deal can always walk away, and that he will not choose to enter into a deal unless that deal makes him at least a bit better off in his own terms than he would be without the deal. Consequently, when a deal is made among private and public actors, we can assume that each person has “won” some improvement in their condition compared to not making the deal.

But what this observation leaves out is the important issue of how *much* better off each party to the deal became, and more particularly how the burdens and benefits associated with the deal that was struck were *distributed* among the players. A deal made among private and public officials

¹³ Lax and Sebenius, *Manager as Negotiator* pp.46-62

simultaneously imposes duties and confers privileges on each of the parties to the deal. These duties and privileges are quickly converted to material costs and benefits evaluated from the point of the view of each party to the negotiation.

To use the Park Plaza case as an example, Zuckerman seeks to obtain from Mahoney the privilege of using the state's power of eminent domain to help him execute his redevelopment project; Mahoney seeks to extract from Zuckerman the production of some publicly desired benefits in exchange for lending him the state's authority.

But it should be clear, I think, that there are a great many deals that can be made that would make each of them (acting in their particular social office) better off than they would be without the deal.¹⁴ Zuckerman can be persuaded to provide more or less public amenities in the form of attractive public uses of the site, tax payments, jobs, and public housing. Mahoney can settle for many different versions of the complex deal. All the deals will make them better off than they are without the deal. In that sense, all deals are "win-win." But the deals will differ significantly in terms of which of them got how much of the total value of the deal, and how the value of the deal was distributed between the private (and public) purposes that Zuckerman valued, and the (exclusively) public benefits that Mahoney is responsible for producing. Even in this win-win situation, one party can win a bit more than the other. That might be a focus of public concern when one of the parties to the negotiation is negotiating on the public's behalf.

It is also important to note that Zuckerman and Mahoney may share some objectives. Zuckerman – the good citizen as well as the good businessman – may value many of the same public purposes that Mahoney is obligated by his office to advance. Mahoney, as a servant of the public, may view Zuckerman's personal welfare and the purely economic value of the deal Zuckerman is proposing as something that Mahoney should be interested in supporting as best he can within the limits of his office. But it is important to keep in mind that they do not share all the same objectives. There are things that Zuckerman positively values (such as excess financial returns) that Mahoney is duty bound to value not at all, or to value negatively (he shouldn't allow the state's powers to be used to make "excess profits" for a given developer). There are things that Mahoney values (such as the construction of public housing as part of the development) that Zuckerman might disvalue (either because he thinks they are bad in themselves, or because they threaten what he really wants which is a highly profitable private development). And even if they value some of the same things in the same direction, they may attach very different weights to them. In short, Zuckerman and Mahoney do not have precisely the same interests or objectives in the deal they are trying to make.

So, the important point is that while some shared objectives may make it easier for them to find and strike a mutually satisfactory deal, the fact that they do not share all objectives does not make it impossible for them to negotiate satisfactorily. They can differ from one another in what is important and valuable to produce together, yet still find a way to co-operate. The reason is that they can decide to act with and for one another in ways that gives them enough value (evaluated in their own terms) to keep them in the deal. Jack Sprat who (reportedly) "could eat no fat," and his wife who (reportedly) "could eat no lean" could find a way to co-operate to "lick their platters clean" even though (or precisely because) they disagreed profoundly on what was worth eating.¹⁵

¹⁴ In negotiation theory, the set of deals that would make each player better off in their own terms than their batna is called the zone of possible agreement, or ZOPA. See Raiffa, *The Art and Science of Negotiation* pp.44-65

¹⁵ Lax and Sebenius refer to this as "dovetailing preferences." See Lax and Sebenius, *Manager as Negotiator*, pp.90-94.

Evaluative Criteria to Be Used in Assessing Private/Public Partnerships

The fact that the parties to a deal might have both shared and different objectives, and that the particular deal that is struck will end up producing particular results that register differently in the valuations of the parties, means that it will be difficult to offer an overall evaluation of the consummated deal. The reason is that, in such deals, there are always at least three different, somewhat overlapping perspectives one can use in deciding whether a particular deal was satisfactory or not. One perspective is that of the private party: from that perspective, the deal is evaluated in terms of how much they got out of it that was valuable to them judged in their terms. The second perspective is that of the public party: the deal is evaluated from the point of view of how much they got out of the deal that they valued. The third perspective is that of some outside actor – say a citizen – who could also evaluate the deal from the perspective of what seemed efficient, fair, and legitimate for the private and the public official to agree on.

What is confusing about this evaluation process is the imagined relationships among these different perspectives, for they are not entirely distinct. When we are thinking of the deal between the private and the public as a simple negotiation between two equal parties, it seems natural to evaluate the deal in terms of each party's perspective. When one side of that deal is the government, however, we often want the value perspective that the government brings to count for something more than just one other player's purposes. On one hand, we often imagine that the government's purposes ought to be more important than the private party's; that the private party's objectives should yield to the social urgency of the situation. On the other hand, we sometimes imagine that a liberal government would be as concerned about the private welfare of the private party it is negotiating with as it is about the aggregate purposes it seeks to achieve. Or, more precisely, that the welfare and interests (to say nothing of the rights!) of the private party have to be valued, honored, and weighed by the government in its evaluation of the deal that is being proposed along with the purposes that government has above and beyond these interests. In short, we sometimes think that the government should *incorporate* the private perspective in the public evaluation of the deal.

We could, in principle, imagine making a similar claim in the other direction: that the private party should incorporate in his evaluation of the deal the important public purposes that government is pursuing (and from which he might well benefit). But this argument is less often made.

To make this all a bit more concrete, let's return to the Park Plaza deal. One can reasonably argue that Mahoney should not be either indifferent to or hostile to the private benefits created by the deal that he is being asked to consider, but should, instead evaluate them positively. After all, Zuckerman, his investment partners, the construction workers who will be employed, the residents that will be housed, and the tourists that will find attractive hotel accommodations, are all individuals whose welfare ought to be of some concern to the state. By these lights, Mahoney should not begrudge the economic benefits of the project proposed by Zuckerman; he should think of the pursuit of those benefits as an important part of his duty! Indeed, lest he have any doubts about this, he has not only Zuckerman's arguments for this, but also the arguments of two key public actors as to the public value of the proposed plan. Both the City Council and the Mayor of Boston who have come to agree that Zuckerman's private interests are almost identical with those of the citizens of (at least) Boston (if not the wider state).

One can also argue, however, that Mahoney's primary responsibility is not to advance Zuckerman's interests in his own private wealth, or in supporting an economically valuable project as goals that are consistent with the public interest, but instead in a very limited set of public purposes

which he is specifically instructed to advance through the statute that allows him to decide how the power of eminent domain should be used. He has to be sure that the plan is sufficiently complete that he can be sure that it will be economically successful, and can see what the private and public benefits will be. He has to satisfy himself that some public benefits are produced to justify the use of the public power. In this view, Mahoney's duties require him to limit his interests to maximizing this special set of public, governmentally established purposes. He should ignore Zuckerman's welfare, or the economic contribution that the proposed development can make to the economy of Boston. Those interests will take care of themselves through the market. He is responsible only for those purposes that will not be advanced through the market that are nonetheless viewed as publicly valuable for society as a whole.

What is at stake here, of course, is the issue of what purposes Mahoney is bargaining for in his encounter with Zuckerman. He may be bargaining only for public purposes *excluding Zuckerman's interests*; or he may be bargain for public purposes that *include Zuckerman's interests*. Depending on which of these he is doing, he will evaluate different proposals differently, and feel more or less satisfied with the particular deals that are proposed.

It is at this stage that the third perspective may be used to evaluate the deal; the perspective of citizens who are observing this deal be made, and in whose name Mahoney is presumably acting. Citizens' perspectives on this deal matter at least in part because a collectively owned power of the state is being used in the making of the deal. Citizens' voices have been heard (through their elected representatives) in the construction of the legislation that gives guidance to Mahoney as to what he should insist upon as conditions to be met before invoking the power of eminent domain. Thus, in the old world, we might say that Mahoney's duty is to ensure that there is sufficient public value in this deal to justify the use of the collectively owned powers of eminent domain; further, that that test is met only when he can satisfy himself that the six conditions set out in the legislation are met. An important question about our new world, I think, is whether we are also saying that Mahoney should (not only as a practical matter, but also as a normative matter) take into account the private, economic value that comes from the Park Plaza development as well. In short, we are asking whether a good private/public partnership is one in which public, governmentally established purposes are maximized (potentially at the expense of some private interests), or one in which some combination of the privately nominated and enjoyed, and publicly nominated and enjoyed dimensions of value are maximized. Or, put somewhat differently, should a citizen's perspective on this deal be the same as the private party's, the same as the government's, or somewhere in the middle.

Note that the analysis of this deal is difficult not only substantively (because we are no longer sure what utility function ought to be used to size up the deal that is made), but also procedurally because we are not entirely sure what political community of citizens should be used to arbitrate the matter of how valuable the deal was to the public as a whole. It is one thing to see the deal as one that pits Zuckerman's profits against Mahoney's commitment to public purposes, with the citizens of Massachusetts having charged Mahoney with the obligation to ensure that there is sufficient public interest in development projects that seek to use the state's power of eminent domain. It is quite another to see the deal as one that includes effects on the wages of construction workers, the elimination of what is seen by many as a public nuisance, and an increased tax base in Boston that is strongly supported by the citizens of Boston and their elected representatives. Boston's view of what should constitute enough public value to justify the state's use of eminent domain seems to be closer to Zuckerman's than to Mahoney's. And it is by no means clear legally or morally which of the two political communities involved in this case (the City of Boston and the State of Massachusetts) ought to decide the matter of what constitutes public value.

VI. Defining “Public Value” for Purposes of Negotiation

This raises what I take to be a central intellectual and practical issue in developing and evaluating proposed private/public partnerships: namely, the crucial question of how the public value that should be the concern of the public side of this transaction is to be understood and pursued. If we citizens, and those officials who negotiate in our name, aren't sure about what constitutes public value, then it is hard to imagine that the officials representing our interests will do a good job of advancing them in the private/public partnerships we are so eager to encourage. What constitutes the public value to be produced in any particular deal is very difficult to ascertain. And the best way to learn to think about what constitutes due public diligence in a private/public deal-making may be to look at many concrete examples rather than shift to abstract philosophy. But it is worth drawing out the deep conceptual problems that exist as well as the concrete issues. The conceptual issues arise because of our confusion about what we really mean by *public* as distinct from *private* value.

Three Different Concepts of Public Value

Broadly speaking, three quite different conceptions of “public value” exist. One is the standard proposed by utilitarianism and welfare economics: public value equals the sum of individual satisfactions that can be produced by any given social system or governmental policy.¹⁶ It is this standard that we apply when we size up public policies in terms of the “greatest good for the greatest number.”

There are three important features of this conception. First, each individual is allowed to define value in their own terms. Second, the process of combining individuals in a wider society is one in which the individual satisfactions are simply added up. Third, we know that under certain assumptions competitive markets do a good job of organizing the productive resources in a society to achieve this important social goal.

A second conception of “public value” is the idea that public value is whatever a duly constituted government acting as an agent of its citizenry declares to be an important purpose to be pursued using the powers and assets of government. This is the standard used when we claim that public officials ought to be concerned with achieving the purposes they have been mandated to achieve through legislative action. It is the standard that urges Miles Mahoney to use the powers of eminent domain to promote economic and social development, but only when certain standards can be met that allow citizens to be reasonably confident that some overall public good will come from his use of this extraordinary power to pre-empt individual property rights.

There are three important features of this conception that make it quite different from the first idea. First, a collective, acting through some kind of political process, becomes the important arbiter of value – not individuals. Second, the collective that does the valuing is not viewed as a simple sum of the valuations attached to the results by the individuals who constitute the collective, but is instead viewed as some kind of deliberative body that reaches a collective agreement about what should be done that dominates the views of individuals. Third, we depend on this collective to help us focus on and produce results that are important in aggregate such as the provision of public goods and services, and the achievement of justice as well as the maximization of individual material welfare through market operations.

¹⁶ The classic statement of this position is in Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*

A third conception of public value lies somewhere between these first two: namely, that public value consists of important purposes that can enhance the degree of individual satisfaction enjoyed by members of a polity that will not necessarily be achieved by competitive markets operating by themselves, and which the polity has assigned government to help them achieve collectively for their individual benefit. In this conception, government is specially authorized and required to deal with a particular set of conditions where markets will not function well to maximize the sum of (technically feasible) individual satisfactions. These include: 1) dealing with “externalities” (where one person’s choice affects the welfare of others, but the others have no way of either registering with the first person the fact of that external effect, and no way to negotiate with them about the price they would need to be paid to compensate them for an unacknowledged injury, or that they would be willing to pay to enjoy an unrecognized benefit); and 2) producing “collective goods” (goods from which individuals cannot be easily prevented from enjoying even if they have made no contribution to their production; and where the use of the good by one person does not reduce the amount of the good that is available to others). These circumstances prevent the market from doing the work of allowing individuals to exchange things that they own with one another in ways that will aggregate to the maximum individual welfare.

A Collective Assertion of Public Value: Re-Distribution and State Paternalism

In the traditional theory of public finance (or, as my colleague Dutch Leonard calls it, the micro-economic theory of government), there are two other circumstances in which government is both expected and allowed to intrude in the workings of the market to assert some kind of collective preferences that take precedence over individual preferences. The first is where we collectively decide through some governmental mechanism that we are dissatisfied with the fairness of the market’s results: where some individuals end up with less material welfare than others, and others end up with more, in a way that offends either our individual or shared conceptions of a good and just society. In this case, the collective, acting through government, may take action to produce more equitable market results. (This deals with the problem that the market responds only to those with the ability to pay to satisfy their desires, and some may end up with much less ability to pay, or in fact no ability to pay, for their satisfactions.)

The second, much less widely accepted idea, is the notion that the collective could decide that there are some things that are valuable to individuals and to the collective that individuals might not be willing to pay for if left to their own misguided choices. These things were traditionally called “merit goods.” They included such things as education, health, culture, perhaps even a capacity for empathy and tolerance that would help individuals become good democratic citizens. They were described as “merit goods” to suggest that the collective had a right, perhaps an obligation, to help individuals develop towards virtuous lives, and that to some degree that meant not taking preferences as they were given, but seeking to shape them to promote individual human flourishing, and competent and fair democratic societies.

These last two ideas that justify the intrusion of government into the market differ from the first two in that they do not simply fix some technical aspects of production and exchange to allow the market to do its work of satisfying individual preferences; they bring a new set of preferences and a new set of normative standards into the world to be used in guiding the productive activity of a society as a whole. Those new preferences and normative standards are those that are either reflected in the choices made by a collective, or that are about some aggregate social state, or in most cases, a combination of the two. Suddenly, in the midst of a free market appears a collective arbiter of value

that makes choices about what should be produced for individuals, and what aggregate conditions individuals ought to live in, that can over-ride the preferences and results that would be produced only through free market exchange. The collective shows up with preferences as well as individuals.

It is important to see, I think, that the insertion of a government acting on behalf of some socially constructed view of what would be good for individuals and for society at large suggests an idea of public value that pushes us back toward the idea that public value is what the representative processes of government say it is, and away from the idea that public value is only what satisfies individuals, or only those things that a market will not naturally produce. Once we have a government acting with the use of collectively own assets and powers to guarantee aggregate social conditions, we have to ask the important question of how government itself is guided. And it is here that we have to turn our attention to the bases and the processes of politics – not economics.

The Political Determination of Public Value

One way to understand the bases of politics is to begin once again with individuals and their individually held conceptions of value. Of course, to start with individuals standing alone with values they seek to embody and pursue is to ignore important psychological and sociological facts about how we come to have values and preferences. And it can also be seen as an invitation to imagine that content of the values and preferences held by individuals would be selfishly material rather than altruistic, or more broadly political.¹⁷

But one doesn't have to go along this well-traveled path. One could say, for example, that individuals have values that guide their particular actions (in this, the values are individually held and important to the individual), and that we understand that these (individually held) values were socially constructed. Perhaps even more importantly, we can understand that individually held (but socially constructed) values include much more than the individual material welfare of those particular individuals. They could include, for example, a strong sense of identity and concern about the plight of other individuals with whom one shares some kind of identity. They could include a conception of a good and just and fair society that individuals sought to realize in their own lives through economic, social, and political activity. Thus, individuals could be seen as having real social and political views that attached to the economic, social, and political status of others in society. Such views could be real both in the behavioral sense that these preferences could guide action, and real in the normative sense that they could properly be used for evaluation of individual and social conditions even in a world where only individuals were allowed to be the arbiters of the value of conditions in a society or public policies designed to alter these conditions.

On this view, public value could be anything that an individual citizen thinks is publicly valuable. This would have the characteristic of being about the society at large, and not the individual's material welfare. But it would not necessarily be a collectively held view of what would be good for society. It could be the idiosyncratic view of a prophet -- or a fool! And that prophet or fool could be a citizen or an official, in the private or the public sphere!

One could also take a further step and say that something is publicly valuable not only when it is about public conditions, and not focused on one's own material welfare, but also when it gains some degree of collective assent and agreement. It is not just the idiosyncratic view of a prophet or fool; it is

¹⁷ Jane Mansbridge, ed. *Beyond Self-Interest* (Chicago: University of Chicago Press, 1990)

the more or less settled opinion of some political community.¹⁸ It is at this stage that the idea of public value begins to take on the characteristic of a set of political values that could, as a behavioral matter, animate political or civic action. Such processes can change individuals' views of the good and the just. They can also build the collective capacity to act in civic modes. And they can build the collective capacity to guide government as to how its powers ought to be used. From this perspective, then, public value consists of those values that individuals and voluntary groups of individuals attach to states of the society beyond their own individual material welfare which they seek to have enacted through individual or collective, civic or political action.

It has always seemed important to me that while liberal societies put economic rights (particularly the right to own property) in their constitutions, they also reserve a special place for political rights such as the freedom to speak and to associate, the right to petition the government, and the right to vote for officials who could commit government money and authority to particular purposes. This seems important because if a liberal society hands out political rights to individuals, it can't necessarily restrict the political views powerfully expressed in the society to those that are consistent with a libertarian view of government. Government can be used for what its citizens want to use it for, and other citizens will let them do. And presumably, if individuals hold values about the welfare of others and the aggregate state of society, the welfare of individual citizens can be enhanced if society as a whole can be brought into alignment with those desires.

All this brings us back to the idea that public value may not be what we often assume it is: namely, the maximum (material) welfare for the maximum number of individuals achieved through reliance on free markets. It may very well be instead what we as individuals will for the public conditions we would like to inhabit, and what we can collectively agree we would like to achieve together using the powers of the state.

VI. Practical Implications for Those Charged with Negotiating the Public Side of Private/Public Partnerships

While this seems fine as a theoretical matter, it creates huge problems for those with practical responsibilities for acting for the public. The reason is that it is often unclear what purposes, or what conception of public value a deliberative public wants public officials to defend and advance as a public value proposition in their encounters with the private sector. It is genuinely uncertain what ideas of public value ought to guide Miles Mahoney in his encounter with Mortimer Zuckerman.

The best guide may be the statutes that government officials are pledged to enact. But the difficulty with the statutes is that they are too general, and that there may be opportunities to do better in pursuit of both private and public purposes. That leaves the public official in an awkward position: even as we encourage him to pursue public value through private public partnerships, and depend on him to defend our interests in these deals, we are not sure how to guide him as to what constitutes the value he should defend. Indeterminacy creates a problem for those on the government side.

Substantive Confusion about What Constitutes Public Value

There are at least two key problems that public officials face when negotiating private/public partnerships, and committing public assets to these partnerships. The first is the problem we have been

¹⁸ Daniel Yankelovich, *Coming to Public Judgment: Making Democracy Work in a Complex World* (Syracuse, N.Y.: Syracuse University Press, 1991)

discussing: namely, that the substantive public purpose to be defended by the public agent is not always entirely clear. Those who authorized the public official to negotiate in their name – for example, the legislators who authorized Mahoney to use the power of eminent domain when certain conditions were met that would help to reassure them that something of public (as opposed to merely private) value was to be produced through the use of this power – may have been unclear about what precisely they sought to accomplish. They may also have been unclear about the degree to which their idea of public value included the production of different kinds of private value as an important component of the public value they sought to achieve.

Put more concretely, at least part of the issue that is before Mahoney is whether or not he should view the fact that economic developers and construction workers stand to make money from this project, and that the tax base of the city of Boston will grow as a result, as important public dimensions of public value that he should consider? Or, are those placed out of bounds in his calculus? Clearly, many of those living in Boston who are most affected by his decision seem to think the project is a valuable one. Furthermore, their elected representatives and the expert agencies at the local level that the local government relies upon to make decisions about urban re-development have decided in favor of the project. So, the important legal, practical, and normative question is whether Mahoney should weigh these positive effects on individual material welfare in deciding whether there is sufficient public benefit to justify the use of the power of eminent domain, or whether he should leave these considerations outside of his calculation, and refuse to join the partnership that is proposed until the particular public benefits that interest him are advanced.

Procedural Confusion About the Political Community that Can Arbitrate the Public Value of the Deal

The fact that the government of the City of Boston has weighed in on this issue creates a second problem for Mahoney: even if his instructions from the Massachusetts State Legislature were clear as to the substantive definition of public value that he was duty bound to pursue, he faces a moral, practical, and legal issue about which political community is the right one to help him decide on the proper use of public authority. He works for the State, and is guided by the political community at the state level. But there is a basic principle in federalism that favors decisions by those political communities that are most importantly affected by a choice. Surely the City of Boston is more importantly influenced by Mahoney's decision than the State of Massachusetts. Arguably, then, Mahoney should yield to their judgment as to public value; or at least take their views quite seriously when assessing the proposed plan. Lest he fail to see this point, the State legislature, prompted by political dissatisfaction in Boston passed legislation that would remove the decision about Park Plaza from Mahoney's jurisdiction – an initiative that was only prevented by the Governor exercising his veto power over the legislation to keep Mahoney's jurisdiction intact! So, it seems that the political principle that says that those most affected by a decision ought to decide is alive and well at the State level where Mahoney is explicitly authorized as well as at the local level.

New Responsibilities and New Skills for Public Officials Who Negotiate

These facts create new and different kinds of responsibilities for public officials who enter into negotiations with private agencies. On one hand, they have to be aware of the ambiguity of the substantive purposes they are pursuing in the deal. On the other, they have to be prepared to find means of seeking clarification about the public's interest even as they are negotiating on behalf of that interest. And they have to do this not only in the familiar sphere of their own political community and its authorizing institutions and processes, but also in the less familiar sphere of other political communities

and authorizers that are shaping the purposes of the other private and public agents with whom they are dealing.

It also suggests that there may be special responsibilities to help make such private/public deals transparent, and open to a wider circle of interested parties than is at first suggested by the image of close in private public deal making. In order for such deals to enjoy the legitimacy that is required of any use of public assets, the public may have to get a chance to examine and investigate the deal that is made in their name, and to raise questions about it.

VII. Conclusion

In all likelihood, private/public partnerships will become increasingly important as societies reach for ways to deal with difficult social problems, and as governments seek to become more responsive and more effective in achieving goals that societies have assigned to them. But it is important to understand that the embrace of private/public partnerships does not resolve the problem that continues to hang over the use of government powers to alter economic, social, and political conditions. To the extent that any private/public partnership engages the collectively owned assets and powers of the state, the quality of the partnership remains subject to the difficult questions about uses of state power that has have always bedeviled us: how collectively owned powers of a democratic state may best be used to advance prosperity, sociability and justice in a world in which we not only have different material interests, but also different ideas about the kind of relationships we want to characterize the societies of which we are a part. Such determinations continue to be the task of democratic politics.

So one way to understand what we have done in embracing the idea of private public partnerships is not found a way to avoid politics, and increase the responsiveness, efficiency and effectiveness of the state as an agent of social purposes; we have simply opened a new, more micro-domain within which interested citizens can once again consider whether and how state powers may be legitimately and effectively deployed to deal with important social conditions. This new domain lies somewhere between legislation and administrative law on one hand, and court proceedings on the other. It is a domain in which individuals representing both private and public agencies and interests look for a better deal than one that would emerge from these other more familiar but clumsier mechanisms.

While there is a great deal of promise in this deal making, there are also causes for concern. These include the idea that the policies and purposes that states rely on to guide both private and public action may become less general, and therefore vulnerable to concerns about how even-handedly and fairly the burdens of meeting a public need or accomplishing a public purpose have been distributed. Also the idea that when government has benefits to deliver rather than burdens to be imposed, that the distribution of those benefits might be less reliably fair and consistent. We also have to be concerned that private interests claim more than their share of the potential benefits that come from collaboration, and that government officials, uncertain about the public purposes they are defending, will give too much away to the powerful private interests they confront.

To exorcise these fears, we can only rely on the mechanisms we have relied on in the past: a certain amount of transparency in both the process and the substance of the deal that gets made; an invitation to those who have an interest to participate in the deal by speaking their mind; a certain kind of statesmanship that goes into weighing the relative strength of the values that are at stake in the deal. The aim, of course, is to reassure ourselves that each deal made in our name is in fact not only efficient,

but also equitable, and just.

The work of building private/public partnerships, then, cannot be just about a kind of efficiency that comes from finding that government can help private actors achieve their purposes; nor the kind that comes from allowing government to achieve its assigned purposes more efficiently and effectively. The work has to be the kind of work that has always gone on in democratic governance: the work of combining private and public assets and aspirations to achieve purposes that are publicly valuable, through methods that are experienced as legitimate and just as well as demonstrably efficient and effective. That requires more and different kinds of political work and statesmanship than the officials who are invited to make such deals ordinarily do. Thus the task of creating public value through private/public partnerships is not just a challenge to the institutional arrangements we make to guide the interactions of private and public, but also to the individuals who stand in particular positions within these institutional arrangements and have to find ways of advancing public purposes as best they can. Let us hope that continued practice and reflection on what our practices produce will help public officials meet the responsibilities for due diligence that they have in making deals on the public's behalf.

Professor Mark Harrison Moore is the Hauser Professor of Nonprofit Organizations and Director of the Hauser Center for Nonprofit Organizations. He founded and served as chair of the Kennedy School's Committee on Executive Programs for more than a decade. His research interests are public management and leadership, civil society community mobilization, and criminal justice policy and management. His publications include: "Creating Public Value: Strategic Management in Government"; "Buy or Bust: The Effective Regulation of an Illicit Market in Heroin"; "Dangerous Offenders: The Elusive Targets of Justice"; "From Children to Citizens: The Mandate for Juvenile Justice"; and "Beyond 911: A New Era for Policing". Moore's work focuses on the ways in which leaders of public organizations can engage communities in supporting and legitimatizing their work and in the role that value commitments play in enabling leadership in public sector enterprises.

Professor Mark Harrison Moore
Hauser Professor of Nonprofit Organizations
Director of the Hauser Center for Nonprofit Organizations
Harvard University
John F. Kennedy School of Government
79 JFK Street
Cambridge, MA 02138

telephone: 617-4951113 fax: 617-495-0996
email: mark_moore@harvard.edu