PUBLIC USE & PUBLIC BENEFIT: THE BATTLE FOR UPSTATE NEW YORK

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I. INTRODUCTION

On May 31, 2006, New York Regional Interconnect Inc. (NYRI) sought regulatory approval from New York State by submitting an Article VII application\(^1\) to the New York State Public Service Commission to construct a high-voltage transmission line.\(^2\) The proposed transmission line will begin in the Town of Marcy, New York, and travel approximately 190 miles south through New York State, covering seven counties and thirty towns, ultimately ending in the Town of New Windsor, New York.\(^3\) The proposed purpose of the project is to increase the flow of efficient energy to New York City.\(^4\) NYRI has proposed to build approximately ninety percent of the transmission line “within or parallel to existing railroad and

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\(^3\) NYRI, ARTICLE VII APPLICATION, EXHIBIT 4: ENVIRONMENTAL IMPACT STATEMENT 1–12, http://www.nyri.us/pdfs/Exhibit_4.pdf (last visited May 1, 2008). The transmission line will travel through the following counties for the following number of miles in parentheses: Oneida (31.7), Madison (11.4), Chenango (44.0), Broome (8.5), Delaware (24.2), Sullivan (36.6), and Orange (33.6). Id. at 2.

energy right of ways.”NYRI plans on using eminent domain to take property it has been unable to purchase. The Eminent Domain Procedure Law in New York State requires the existence of a valid “public use, benefit or purpose to be served by the proposed public project.”

Courts on both the federal and state level have discussed, interpreted, and stated various theories on what constitutes a valid public use as required by their respective constitutions. For example, the highly controversial United States Supreme Court decision, _Kelo v. City of New London_, is criticized as one of the broadest interpretations of the public use doctrine. This case held that condemnation of private property for a comprehensive redevelopment plan by a private corporation was a permissible public use.

This Comment takes the position that the concept of public use has grown too broad and requires a limitation based on the inherent

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5 NYRI, ARTICLE VII APPLICATION, supra note 3, at 2.
7 N.Y. EM. DOM. PROC. LAW § 204(B)(1) (McKinney 2003). But see N.Y. TRANSP. CORP. LAW § 11(7) (McKinney Supp. 2008) (containing former Governor Pataki’s amendment to the Transportation Corporation Law stating that the eminent domain powers granted to corporations under sections 11(3) through (3-a) do not apply to any merchant transmission company which: (a) commences and ends in the state of New York; (b) . . . has represented in testimony that the construction of such power transmission lines will increase electric rates in any part of the state; and (c) which applied for and did not receive an early designation as a national interest electric transmission corridor under an act of congress commonly known as the Energy Policy Act of 2005).
8 This legislation was created directly in response to the NYRI project. While this provision would effectively prohibit NYRI from taking property for its transmission line by eminent domain, NYRI's project can still continue if the law is declared unconstitutional in federal court. Thus, this Comment proceeds under the assumption that NYRI can use eminent domain, and then, questions whether the taking would satisfy the public use requirement of the eminent domain law of New York State. See Mark Johnson, _NYRI to Sue NY Over Eminent Domain Law_, ASSOCIATED PRESS, Feb. 1, 2007, available at http://www.abcmoney.co.uk/news/01200716547.htm (discussing NYRI's federal lawsuit challenging the legislation because it “individually punish[es] NYRI for a project intended for a public need”).
9 See, e.g., _J.C. Penny Corp. v. Carousel Ctr. Co.,_ 306 F. Supp. 2d 274, 280 (N.D.N.Y. 2004) (defining public use as “encompassing virtually any project that may further the public benefit, utility or advantage”); _see also City of Bristol v. Ocean State Job Lot Stores of Conn., Inc.,_ 931 A.2d 857, 847 (Conn. 2007) (defining public use as “public usefulness, utility or advantage, or what is productive of general benefit . . . for purposes of great advantage to the community” (quoting _Kelo v. New London_, 843 A.2d 500 (2004), _aff’d_, 545 U.S. 469 (2005))).
11 See _id_. at 484 (holding that the City of New London was allowed to condemn property to be used by a private corporation because the taking satisfied the public use requirement of the Fifth Amendment).
nature of the public use doctrine.\textsuperscript{11} When tracing the roots of the doctrine, whether as applied, written, or interpreted, eminent domain has always been used for the public benefit.\textsuperscript{12} The requirement of a valid public use as contained in the language of the Fifth Amendment,\textsuperscript{13} and as ratified by the constitutions of states such as New York,\textsuperscript{14} leaves room for interpretation by the courts. However, by examining the intrinsic nature of public use and its traditional application, the definition of public use can be seen as the equivalent of public benefit.\textsuperscript{15} For example, in cases distinguishing between projects benefiting both the private and the public, the courts have stated that the project must primarily benefit the public for the public use requirement to be satisfied.\textsuperscript{16}

Furthermore, when examining the NYRI project, the detriment to upstate New York is so dramatic that the project negates any proposed benefits, and, thus, the public use requirement of New York State's Eminent Domain Procedure Law is not satisfied.

II. HISTORY OF THE “PUBLIC USE” DOCTRINE

A. Origination of Eminent Domain

By examining the history, development, and application of eminent domain, it is clear that the intrinsic nature associated with

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  \item \textsuperscript{11} Ashley J. Fuhrmeister, Note, In the Name of Economic Development: Reviving “Public Use” as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City of New London, 54 Drake L. Rev. 171, 227–31 (2005) (discussing how the Supreme Court of the United States' interpretation of the public use doctrine has continued to grow broader, reaching its most expansive application in the Kelo decision, and how this broad approach needs to be limited).
  \item \textsuperscript{12} See Kelo, 545 U.S. at 512 (Thomas, J., dissenting) (describing the traditional eminent domain practice as the states using their taking power “to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks”).
  \item \textsuperscript{13} U.S. Const. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” (emphasis added)).
  \item \textsuperscript{14} N.Y. Const. art. 1, § 7(a) (“Private property shall not be taken for public use without just compensation.”).
  \item \textsuperscript{15} While many authors have stated that the “public benefit” approach to public use is a broad approach, and as such would essentially allow most projects to satisfy the public use requirement, this Comment takes the position that the inherent nature of public use must always be for the public benefit and rather than serving as a broadening mechanism to the public use requirement, serves instead as a limitation on the doctrine, wherein if a project does not serve a public benefit it will not satisfy a public use.
  \item \textsuperscript{16} See, e.g., Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 458 (Mich. 1981) (“The heart of this dispute is whether the proposed condemnation is for the primary benefit of the public or the private user.”).
\end{itemize}
this doctrine is limited to projects that benefit the public. The concept behind a governmental entity taking property from a private individual for the benefit of the public has existed for centuries; however, Hugo Grotius, a sixteenth century author, is credited for inventing the phrase “ eminent domain,” and in coining this phrase, he incorporated the requirement that the condemnation of land be for the “public welfare.”

Furthermore, before the United States Constitution codified the power of eminent domain, the practice of taking land for purposes that benefited the public existed as early as 1607 in the historical case of The King’s Prerogative in Saltpetre. In 1607, King James exercised his right to take saltpeter off of the land of a private individual. This taking was justified because it “extend[ed] to the defence of the whole realm, in which every subject hath benefit.” In discussing the limitations of the King’s power to take property, the court noted that the King would be prohibited from taking from an individual’s property for the purpose of making a wall or bridge that came to the King’s residence, because that does not “extend to [the] public benefit.”

In addition to this historical example, projects dealing with the construction of roads and other public projects arose as early as 1639. In addition to conferring rights upon the government to take land for projects such as public roads, the legislatures in many colonial governments passed schemes known as the “Mill Acts.” A major justification for granting this taking power unto private

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17 Timothy Sandefur, A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of “Public Use”, 32 SW. U. L. REV. 569, 571 (2003) (“‘A king can . . . take away from his subjects [property] . . . by the power of eminent domain. In order to do it by the power of eminent domain, first, the public welfare must require it, and, second, compensation must be made to the loser, if possible, from the public funds.’”) (quoting HUGO GROTIUS, THE LAW OF WAR AND PEACE 164 (Louise R. Loomis trans., Walter J. Black 1949) (1625)); see also Charles E. Cohen, Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings, 29 HARY. J.L. & PUB. POL’Y 491, 505 (2006) (“A General Theory of Eminent Domain, noted that the early civil law theorists . . . argued for limitations on the power of eminent domain, insisting . . . that the power should be used only for ‘public advantage,’ ‘public welfare,’ ‘necessity of the state,’ or ‘public utility.’”).

19 Id. at 1294–95.
20 Id. at 1295.
21 Id.
22 Cohen, supra note 17, at 501 (discussing the statutorily conferred power of local governments to take land to build roads).
23 Id. at 501–02 (discussing the purpose of the Mill Acts, which granted private grist-mill owners a right to flood private riparian land to advance the use of the privately owned mills).
entities was that furtherance of the mills benefited the public.\textsuperscript{24} Another example of governmental takings during this time period dealt with a governmental taking of a privately owned mine to “advance [the] communities’ needs for economic development and population growth.”\textsuperscript{25} The justification of economic development for the community as a whole is a rationalization for eminent domain that has reemerged in modern case law analysis, as will be seen in Part II.B. of this Comment.\textsuperscript{26}

In 1791, with the approval of the Bill of Rights, the Fifth Amendment to the Constitution codified the requirements of public use and just compensation to the federal eminent domain practice.\textsuperscript{27} This codification opened the door for more formal judicial interpretation of what constitutes a public use; again, the interpretation focused around public benefit. During the early nineteenth century, the application of eminent domain remained unchanged by the courts; the proposed projects brought in front of the courts dealt primarily with roads and dams, as had been the historical use of the doctrine.\textsuperscript{28} As the century progressed, the courts began to approve a broader range of projects under the eminent domain law, justifying projects by private entities because they would produce a public benefit.\textsuperscript{29} This trend of using eminent domain for projects relating to economic development continued in the early twentieth century as “urban redevelopment programs” began to spring up and set the stage for a series of federal cases that helped to define the public use requirement.\textsuperscript{30}

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\item \textsuperscript{24} Daniel B. Kelly, \textit{The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence}, 92 CORNELL L. REV. 1, 42–43 (2006) (“[T]he Mill Acts provided all members of society with a vital public benefit—indeed, a ‘necessity’—that otherwise could not have been obtained. As a result, the U.S. Supreme Court upheld condemnations under the Mill Acts as legitimate public uses.”).
\item \textsuperscript{25} Cohen, \textit{supra} note 17, at 502–03 (discussing the government’s power to appoint an individual to run a mine as his/her own where the original finder of the mine failed to operate it in a productive fashion within one year of discovering it).
\item \textsuperscript{26} See generally \textit{Kelo v. City of New London}, 545 U.S. 469, 484 (2005) (holding that an exercise of eminent domain to revitalize a weakened economy satisfies the public use requirement).
\item \textsuperscript{27} U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” (emphasis added)).
\item \textsuperscript{28} See Cohen, \textit{supra} note 17, at 506.
\item \textsuperscript{29} Id. (“In an effort to foster investment and speed economic development, legislatures in every state granted the power of eminent domain to private corporations building or operating railroads, turnpikes, bridges, and canals.”).
\item \textsuperscript{30} Id. at 510 (“The 1920s brought an upsurge in urban projects . . . . These programs, [were] generally designed to eliminate slums and blight or to foster commercial development . . . .”).
\end{itemize}
By examining the historical uses of eminent domain, it is clear that takings were limited to projects associated with benefitting the public. Historically, this limitation was so strong it restricted even the King from exercising a taking that did not extend to the public’s benefit. As time went on, the use of the doctrine remained consistent, allowing eminent domain to be used for roads and dams, again projects that benefited the public. Even with the broadening of the doctrine, allowing eminent domain to be used for urban redevelopment, such plans were also for the public benefit. As will be seen next, eminent domain and the public use doctrine as interpreted in federal precedent remained limited to those situations that benefited the public.

B. Federal Interpretation of Public Use

In 1954, the United States Supreme Court decided the case of *Berman v. Parker*, where the District of Columbia initiated an urban redevelopment program. The District of Columbia sought to initiate this redevelopment program due to a series of existing negative conditions, including “substandard housing and blighted areas [and] the use of buildings in alleys as dwellings for human habitation.” These conditions were recognized as “injurious to the public health, safety, morals, and welfare,” and it was declared that the “acquisition of property [was] necessary to eliminate these housing conditions.” The plan allowed the District of Columbia Redevelopment Land Agency to take the property and transfer ownership to public agencies, where it would be used for various “public purposes” such as “streets, utilities, recreational facilities, and schools.” The plan further allowed the agency to distribute the land to private entities so long as the entities conformed to the purpose of the redevelopment plan.

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31 See id. at 501–07.
32 See Sandefur, *supra* note 17, at 571.
33 See Cohen, *supra* note 17, at 506.
34 See id. at 510.
36 Id. at 28.
37 Id.
38 Id.
39 Id. Surveys of the blighted areas revealed that “64.3% of the dwelling were beyond repair, . . . 57.8% of the dwellings had outside toilets, 60.3% had no baths, [and] . . . 83.8% lacked central heating.” Id. at 30.
40 Id. at 28.
41 Id.
The appellants in *Berman* owned a department store that was to be taken for this plan and objected to the condemnation of their property based on the argument that (1) the property was commercial, not residential “slum housing,” (2) that this particular property was to be put into the hands of a private developer rather than a public one, and finally (3) that the project did not constitute a public use as required by the Fifth Amendment’s public use requirement.\(^{42}\) The Supreme Court rejected the appellant’s arguments and dismissed the public use challenge by stating that “the legislature . . . is the main guardian of the public needs to be served by social legislation.”\(^{43}\) The Court went on to state that in the legislature’s determination of what would be best for the public needs:

> It was important to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. . . . \cite{Manfredo:255} the entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers.\(^{44}\)

The Supreme Court’s determination in this case centered on the vast improvements that this redevelopment plan would have on the public as a whole. Minimizing the impact that this project would have on individuals, such as the appellant, the Court factored in the just compensation that every affected property owner would receive.\(^{45}\) The Court also found it important that the legislature determined that the scope of this project would best serve the public.\(^{46}\) *Berman* gives a first look at federal precedent that established the idea of public use as the equivalent to public benefit. The Court’s analysis is especially germane when it discusses serving the public best and looking at the project as a whole in the

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\(^{42}\) Id. at 31.
\(^{43}\) Id. at 32.
\(^{44}\) Id. at 34–35. A major argument set forth by the appellant was that his individual building was not in the same dismal condition that other buildings were in, and, thus, his building should not have been subjected to condemnation for the project. See id. at 34. However, the Court reasoned that a “piecemeal approach” to remove only individual buildings “would be only a palliative.” Id. Instead, the project was to be viewed within the context of the entire area. Id.

\(^{45}\) Id. at 36.
\(^{46}\) Id. at 35–36.
redevelopment program.\textsuperscript{47} The Court set aside the complaints of a few for the benefit of a greater good. Eminent domain, in this instance, is used to harness the interests of the public and meet them accordingly.

The next major public use case was decided in 1981 by the Supreme Court of Michigan\textsuperscript{48} in \textit{Poletown Neighborhood Council v. City of Detroit}.\textsuperscript{49} In \textit{Poletown}, the Detroit Economic Development Corporation developed a plan to acquire a tract of land through condemnation for conveyance to the General Motors Corporation for the building of an assembly plant.\textsuperscript{50} A neighborhood association, as well as other individual residents, challenged this project.\textsuperscript{51} The primary challenge examined by the Supreme Court of Michigan was whether the use of eminent domain in this situation represented a taking for \textit{private} use rather than that of public use, in violation of the Michigan Constitution.\textsuperscript{52}

In deciding this case, the court first examined the limitation imposed by the Michigan Constitution, which requires a taking to be for public use or purpose.\textsuperscript{53} In describing the meaning behind a requirement for public use or purpose, the court equated the requirement with public benefit.\textsuperscript{54} As such, the analysis of the court then turned on whether the condemnation of the tract was to be used \textit{primarily} for the benefit of the public or the benefit of General Motors.\textsuperscript{55} In determining whether the public was primarily

\textsuperscript{47} Id. at 35.
\textsuperscript{48} While the law of Michigan, as discussed in both \textit{Poletown} and \textit{Hathcock}, below, does not directly affect the analysis that will be undertaken by the New York State courts in determining whether the NYRI taking satisfies the public use requirement, it is helpful in analyzing how the public use doctrine has been interpreted. These two cases are specifically important as they represent seminal cases, discussed below, in this area of law. See Cohen, supra note 17, at 510–15.
\textsuperscript{49} 304 N.W.2d 455 (Mich. 1981).
\textsuperscript{50} Id. at 457.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id. (describing the constitutional limitations as follows: “Const. 1963, Art. 10, § 2, states in pertinent part that ‘[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. . . . Art. 10, § 2 has been interpreted as requiring that the power of eminent domain not be invoked except to further a public use or purpose”).
\textsuperscript{54} Id. (“[T]he terms ‘use and purpose’, . . . have been used interchangeably in Michigan statutes and decisions in an effort to describe the protean concept of public benefit.” (emphasis added)). The Court went on later in the opinion to again equate public use to public benefit where it stated, “[t]he power of eminent domain is restricted to furthering public uses and purposes and is not to be exercised without substantial proof that the public is primarily to be benefited.” Id. at 459 (emphasis added).
\textsuperscript{55} Id. (“[T]he most important consideration in the case of eminent domain is the necessity
benefited, the court examined the evidence under “heightened scrutiny” and stated that the public benefits must be “clear and significant” or the project would be sanctioned. The justification for the taking rested on the argument that the plant would prevent 6,150 jobs from being lost and would increase the tax revenue of the city by fifteen million dollars; both of which would help the City deal with an ongoing economic recession. The court deemed that the benefits proposed by General Motors were “clear and significant,” and as such, satisfied the requirements of the condemnation power, regardless of the fact that the private entity would receive an incidental benefit.

While this decision was eventually overturned, as will be seen below, it supports the idea that public benefit acts as a limitation upon the public use requirement. The court’s analysis in examining public versus private takings hinges on a “clear and significant” public benefit, rather than one that was merely incidental. This decision demonstrates the importance of public benefit in regard to the public use requirement, and how public benefit acts as an inherent limitation on eminent domain law in two instances. First, the court went so far as to equate public use with public benefit, and second, the court examined the public benefit in determining whether the taking was for a public or a private use.

Almost twenty years later, the Supreme Court of Michigan, in County of Wayne v. Hathcock, overturned Poletown. The court in Hathcock examined a project where eminent domain was to be used to develop a 1,300 acre business and technology park. The purpose of constructing the technology park was to “create thousands of jobs, and [generate] tens of millions of dollars in tax revenue”; furthermore, the project would “enhance the image of the County in the development community, aiding in its transformation from a high industrial area, to that of an arena ready to meet the

of accomplishing some public good which is otherwise impracticable, and . . . the law does not so much regard the means as the need.” (alternation in original) (quoting People ex. rel. Detroit & Howell R.R. Co. v. Twp. Bd. of Salem, 20 Mich. 452, 480–81 (1870)).

56 Id. at 459–60.
57 Id. at 467 (Ryan, J., dissenting).
58 Id. at 459 (majority opinion) (“[T]he city presented substantial evidence of the severe economic conditions facing the residents of the city and state, the need for new industrial development to revitalize local industries, the economic boost the proposed project would provide, and the lack of other adequate available sites to implement the project.”).
59 Id.
60 684 N.W.2d 765, 770 (Mich. 2004).
61 Id. at 769.
needs of the 21st century.”

The court shifted its analysis from the one taken in *Poletown* regarding whether the public use requirement was satisfied where a project would be developed for a private entity, in this case, the technology park. The court examined the roots of the public use requirement, focusing on the interpretation of the concept from its constitutional inception in 1963 as a “positive limit on the state’s power of eminent domain.” The court examined three factors to determine whether a taking satisfies the public use requirement; the court summarized the three factors as follows:

1. Where ‘public necessity of the extreme sort’ requires collective action;
2. Where the property remains subject to public oversight after transfer to a private entity; and
3. Where the property is selected because of ‘facts of independent public significance,’ rather than the interests of the private entity to which the property is eventually transferred.

The court stated that an affirmative finding of any one of these three factors would satisfy the public use requirement; however, the court ultimately held that the proposed condemnations in the case before it did not advance a public use, and as such, did not surmount the constitutional limitations of the public use requirement.

In conformity with this finding, the court overruled *Poletown*, calling the decision “a radical departure from fundamental constitutional principles.” Although the *Hathcock* decision did in fact overrule the *Poletown* decision, the Supreme Court of Michigan perhaps strengthened the requirements of the public use doctrine, drawing on the intent of the doctrine upon its ratification to only allow eminent domain to be exercised for the public benefit; in this case, because no such benefit could be
ascertained, the proposed takings were struck down.\textsuperscript{68}  

Looking again at federal precedent, thirty years after the decision in \textit{Berman},\textsuperscript{69} the Supreme Court decided the case of \textit{Hawaii Housing Authority v. Midkiff},\textsuperscript{70} wherein the Court examined the Hawaii Land Reform Act of 1967.\textsuperscript{71} The legislature initiated the Land Reform Act at issue in \textit{Midkiff} in response to the feudal land system that arose from the original settlers of Hawaii.\textsuperscript{72} The land reform plan called for the condemnation of much of the privately owned property; the landowners would then receive compensation and private individuals who had been acting as lessees of the property would receive title.\textsuperscript{73} The landowners who were to be subjected to this land reform plan challenged the Act, claiming that the Act violated the public use requirements of the Federal Constitution as incorporated through the Fourteenth Amendment.\textsuperscript{74}  

The legislation was upheld as constitutional under the public use requirement; the reasoning from \textit{Berman} was relied on heavily in this decision.\textsuperscript{75} The Court held that “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”\textsuperscript{76} The public purpose that was obtained in this particular case was cited by the Court as “attack[ing] certain perceived evils of concentrated property

\begin{thebibliography}{99}
\bibitem{68} Id.
\bibitem{69} 348 U.S. 26 (1954).
\bibitem{70} 467 U.S. 229 (1984).
\bibitem{71} Id. at 233.
\bibitem{72} Id. at 232–33. The feudal land tenure system developed by the Polynesian immigrants of Hawaii placed control of the land in the hands of one high chief, resulting in a system where there was no private ownership of land. Id. at 232. In the mid-1960s, the legislature of Hawaii conducted a series of hearings which resulted in a finding that the land of Hawaii was owned almost exclusively by either the government or a small group of private individuals; more specifically, forty-seven percent of the State’s land was owned by seventy-two private landowners. Id.
\bibitem{73} Id. at 233–34.
\bibitem{74} Id. at 234–35, 239.
\bibitem{75} Id. at 239–41. Justice O’Connor began her analysis of why the Hawaii Act was constitutional under the Fifth and Fourteenth Amendments by citing \textit{Berman}, such as: “Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature...is the main guardian of the public needs to be served by social legislation....This principle admits of no exception merely because the power of eminent domain is involved.” Id. at 239–40 (emphasis added) (quoting \textit{Berman v. Parker}, 348 U.S. 26, 32 (1954)).
\bibitem{76} Id. at 241; see also \textit{Berman}, 348 U.S. at 26; \textit{Rindge Co. v. Los Angeles}, 262 U.S. 700, 708 (1923); \textit{Block v. Hirsh}, 256 U.S. 135, 158 (1921).
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ownership in Hawaii.” The *Midkiff* case again demonstrates the stress placed on projects asserted for the public benefit—here a condemnation plan to redistribute property to the citizens of Hawaii—allowing lessees to escape the property limitations asserted upon them from the historical undertow of the State.

The Supreme Court’s interpretation of the public use doctrine culminated in 2005 with its decision in the highly controversial *Kelo v. City of New London* case. In *Kelo*, a group of property owners sued the City of New London as well as the New London Development Corporation in an attempt to restrict them from condemning a large portion of property that was to be used in an economic revitalization project, claiming that the takings would not satisfy the public use requirement of the Fifth Amendment. The project itself allowed a private corporation, Pfizer, to build a $300 million facility to be used not only for research, but recreational purposes as well. It was argued that because the property was to be used by a private corporation, the public use requirement would not be satisfied.

In considering whether or not the proposed project satisfied the public use requirement of the Fifth Amendment, the Court noted that the City would be prohibited from taking property if it were only “under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.” The Court went on to state that the modern analysis of whether the public use requirement has been satisfied “turns on . . . whether the [project] serves a ‘public purpose.’” Relying on past precedent, the Court

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77 *Midkiff*, 467 U.S. at 245.
79 Id. at 473–75. The project in *Kelo* stemmed from decades of economic decline in the city of New London. In 1990 the City was labeled a “distressed municipality.” Id. at 473. In 1996, a Naval Center that employed over 1,500 people was closed by the Federal Government, and in 1998, the unemployment rate of the City was double that of its home State of Connecticut. Id.
80 Id. at 473–74. In addition to the research facility, the project would include a “waterfront conference hotel” which would have several restaurants and shopping facilities. Id. at 474. In addition, the project would have marinas for both recreational and commercial purposes. Id. Furthermore, a museum for the U.S. Coast Guard was to be reserved. Id.
81 See id. at 475.
82 Id. at 478.
83 Id. at 480. The Court in *Kelo* examined and applied the reasoning of both *Berman* and *Midkiff*. The Supreme Court relied on the language of *Berman* wherein it was stated that “[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.” Id. at 481 (quoting *Berman*, 348 U.S. at 33). Furthermore, the Court relied on the reasoning of *Midkiff*, eliminating the “social and economic evils of a land oligopoly” satisfied
granted deference to the City's determination that an economic rejuvenation program was necessary. Similar to *Berman*, the Supreme Court examined the project in light of the entire plan rather than on a piecemeal basis; stating that the plan, when examined as a whole, must satisfy the public use requirement. After reviewing the proposed benefits that would stem from this project, the Court ultimately stated the plan “unquestionably” served a valid public purpose and upheld the private taking.

While this case has been criticized as a broad application of eminent domain, Justice O'Connor views the effect of this decision as implementing “proposed limitation[s]” on the public use doctrine. Essentially, she stated that the Court would not allow the project to continue if it did not benefit the public. In particular, Justice O'Connor stated that this Court proposed a limitation on the public use doctrine wherein “eminent domain may only be used to upgrade—not downgrade—property.” This “proposed limitation” is interesting for the present analysis due to the fact that the NYRI project in question will severely lower property values.

This decision represents a culmination of public use precedent: *Berman*, *Poletown*, *Hathcock*, and *Midkiff* all represent eminent domain schemes that advance public benefits. Whether the scheme is to revitalize a blighted community or to redistribute property to the citizenry, the Court makes clear that the project must benefit the public. These decisions demonstrate the inherent “public benefit” limitation that exists within the public use doctrine. As the focus now shifts to New York State law, the premise that public benefit is necessary to satisfy the public use requirement is even more prevalent.

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84 *Kelo*, 545 U.S. at 483. The Court gave deference to the City’s implementing a state statute that allowed eminent domain to be used for economic development. *Id.* at 483–84. The economic development plan created by the City projected to increase available jobs as well as increase tax revenue for the City. *Id.* at 483.

85 *Id.* at 483–84; see also *Berman*, 348 U.S. at 34 (discussing the Court’s reasoning that a “piecemeal approach” to remove only individual buildings “would be only a palliative”).

86 *Kelo*, 545 U.S. at 484.

87 *Id.* at 503 (O’Connor, J. dissenting).

88 *Id.* at 502–03.

89 *Id.* at 503.

90 See infra Part IV.B.
III. NEW YORK STATE EMINENT DOMAIN LAW

While the federal case law discussing public use is highly probative to the theories set forth in this Comment, the NYRI project itself must ultimately come face to face with the requirements of New York State’s eminent domain law set forth in its constitution and the Eminent Domain Procedure Law (EDPL), and must also comport with New York’s judicial interpretation of the public use doctrine. Similar to federal precedent, and possibly more so than federal precedent, New York State law demonstrates that the public use requirement as applied, from its origination, was limited to projects that served the public benefit.

The New York State Constitution provides that “[p]rivate property shall not be taken for public use without just compensation.” Furthermore, New York State’s EDPL implements a requirement for either the State or the private entity who wishes to use eminent domain for a taking to demonstrate “the public . . . benefit . . . to be served by the proposed public project.” The EDPL even goes so far as to define “acquisition” in terms of the public benefit. The New York courts have justified the eminent domain power as relating to the purpose of protecting the “health, safety, and general welfare of the public.”

In 1920, the New York State Court of Appeals decided a case involving a private company that wished to place power lines in front of houses, along private property, and on public streets, for the operation of its business. Justice Andrews discussed the definition of public use in his concurring opinion. Justice Andrews stated that whether a project satisfied the public use requirement depended on “whether the plan has such an obvious, or recognized, character of public utility, as to justify the exercise of the right of

91 N.Y. EM. DOM. PROC. LAW § 102 (McKinney 2003) (“This chapter shall be known as the eminent domain procedure law and may be cited as ‘EDPL.”’).
93 N.Y. EM. DOM. PROC. LAW § 204(B)(1) (McKinney 2003) (emphasis added).
94 Id. § 103(A) (“Acquisition’ means the act of vesting of title, right or interest to, real property for a public use, benefit or purpose, by virtue of the condemnor’s exercise of the power of eminent domain.” (emphasis added)).
95 D’Orazio, supra note 92, at 1137.
97 Id. at 320 (Andrews, J., concurring).
emanent domain.”

Andrews commented further by stating, “‘[i]t must be for the benefit and advantage of all the public and in which all have a right to share—a use which the public have [sic] a right to freely enter upon under terms common to all.’”

Furthermore, in 1938, the New York State Constitutional Convention Committee discussed the public use requirement in *Problems Relating to Bill of Rights and General Welfare*. In discussing the definition of public use as a valid exercise of eminent domain the committee stated:

The term ‘public use’ as used in connection with the right of eminent domain, is not easily defined. The Legislature has no right to take the property of one individual and pass it over to another, unless the use to which it is to be applied is for the public benefit . . . .

The discussion by the Constitutional Convention Committee equating public use to public benefit most accurately represents the historical interpretation of the public use doctrine and as such demonstrates the “strict treatment” of the doctrine. Furthermore, while New York State courts have begun using terms such as “use,” “benefit,” and “purpose” interchangeably, it does not change the traditional requirement that public use equates public benefit. Moreover, this limitation has not been completely lost in New York State’s modern interpretation. Over the past six years, every department of the New York State Appellate Division has used the phrase “public benefit” when referring to the public use doctrine of the EDPL.

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98 Id. (emphasis added) (quoting *In re Tuthill*, 57 N.E. 303, 305 (N.Y. 1900)).
99 Id. (emphasis added) (quoting *Bradley v. Degnon Contracting Co.*, 120 N.E. 89, 93 (N.Y. 1918)).
100 N.Y. STATE CONST. CONVENTION COMM., PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE 106, 111–12 (1938) [hereinafter 1938 CONST. CONVENTION].
101 Id. at 111 (emphasis added) (quoting *Pocantico Water-Works Co. v. Bird*, 29 N.E. 246, 248 (N.Y. 1891)). The Committee gave examples of what it believed to be uses that comported with the public use requirement pursuant to this definition; those examples included uses for public parks, providing electricity or water, building public streets or railroads, as well as eliminating slums. Id.
102 *D’Orazio, supra note 92*, at 1142.
103 Id.
104 Smith v. Town of Mendon, 822 N.E.2d 1214, 1226–27 (N.Y 2004) (Read, J., dissenting) (stating that the definition of public use is more equivalent to the meaning of public benefit).
As was seen with federal precedent, eminent domain under the scope of New York State law also suggests an inherent public benefit limitation on the public use doctrine. For the purposes of Part IV of this Comment, this limitation will be applied to the NYRI project, exploring whether the project as a whole serves some type of public benefit.

IV. THE NYRI PROJECT: BENEFITS & BURDENS

The controversy surrounding the NYRI project to build a transmission line is based on the benefits and burdens it will provide New York State. Put simply, the benefits of the project revolve around relieving the high energy demands of the downstate area; the burdens focus on the detriment to the upstate region, including health risks and diminution in property values.

A. The NYRI Project and Proposed Benefits

The purpose behind NYRI’s project is to reduce the possibility of an energy crisis in the southern portion of New York State, specifically the lower Hudson Valley, Long Island, and New York City. The State’s electrical generation or transmission grid is in need of upgrading by the year 2008; without such an upgrade, the energy demands could raise the risk of power outages or “rolling black-outs,” pressing the state’s reliability standards beyond acceptable standards. NYRI has dismissed the possibility of solving this problem by increasing the efficiency of the current system due to the significant improvements over the past twenty years, claiming that efficient uses of the current system cannot

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\[107\] Id.; see also Roy W. Krieger & Michael E. Withey, EMF and the Public Health, Nat. RESOURCES & ENV’T, Summer 1994, at 3, 3 (discussing how providing electricity is an important part of maintaining an “American standard of living [as well as maintaining] industrial strength, and . . . creature comforts”).
become any more efficient. NYRI has also dismissed the possibility of “building new generation.” According to NYRI, building new generation without upgrading the transmission grid would, supposedly, increase problems with environmental and land use issues. Consequently, this corporation has determined that the only logical solution to solving New York’s energy problem is to expand the transmission network by going through with the proposed transmission line.

With the expansion of the transmission network, NYRI predicts that the “transmission bottlenecks . . . which are responsible for unusually high costs” will be lessened. Alleviating these bottlenecks is a major advantage stemming from this project and is an essential element in solving the energy problems of New York. Moreover, the transmission line will diminish the energy costs of New York State and yield economic benefits to the state. NYRI estimates that by implementing this project, the State of New York can save over $680 million in just the first year. Furthermore, energy consumers throughout the state, but primarily those in the downstate region, will save more than $11.7 billion over the next twenty years. All in all, according to NYRI, this project “will be a win-win for all sectors of society.”

108 NYRI, HEADING OFF NEW YORK’S ENERGY CRUNCH, supra note 106, at 1.
109 Id.
110 Id.
111 Id. at 1–2 (“Adding new capacity to the bulk power transmission system, such as NYRI proposes, will allow existing surplus resources in the northern, central and western regions of New York State, and in adjacent regions, to reach markets in the lower Hudson valley, and the southeast.”).
112 Id. at 2.
113 Id. (discussing how “[a]n effective energy strategy for New York State will succeed only if it includes new transmission capacity that will reduce the major bottlenecks . . . that have been a distinguishing feature of the New York energy marketplace for decades”).
114 Id.; see also NYRI, RENEWABLE RESOURCES: PATHWAY TO MARKET; ADDITIONAL TRANSMISSION CAPACITY IS NEEDED TO KEEP NEW YORK STATE AMONG WORLD LEADERS IN THE DEVELOPMENT AND USE OF RENEWABLE RESOURCES 2 (2006) [hereinafter NYRI, RENEWABLE RESOURCES], available at http://www.nyri.us/pdfs/Reference/NYRI_RenewableResources.pdf (stating that the addition of 1200MW of transfer capacity to the network will enable New York State’s upstate generators “to capture a greater share of the southeast’s demand for less expensive energy that can not all be generated within the geographical limits of densely populated metropolitan areas”).
115 NYRI, HEADING OFF NEW YORK’S ENERGY CRUNCH, supra note 106, at 2 (discussing how savings will result from decreased reliance on gas and oil generation, using resources more efficiently, and using the already existing resources at a “greater optimization”).
116 Id.
117 NYRI, RENEWABLE RESOURCES, supra note 114, at 2; see also NYRI, HEADING OFF NEW YORK’S ENERGY CRUNCH, supra note 106, at 4 (“The NYRI Project will make a positive
B. Burdens of the NYRI Project: Health Threats and Property Values

While the monetary benefits sustainable through this project appear to be vast, they do come at a price, that being upstate New York. The opposition to this project has been so great that the New York State government, as well as the affected towns and counties, have attacked the project through the democratic process. Specifically, this subsection discusses the health risks and possibility for diminution in property values that may result from the establishment of NYRI’s transmission line.

C. Potential Health Threats

To begin, one of the results that people fear from the NYRI project is the potential for cancer risks associated with these types of power lines. Senator James Wright, the Chair of the New York State Senate Energy and Telecommunications Committee, hosted a hearing where scholarly individuals, such as Dr. Les Roberts, were contribution to the security of New York State, and particularly to the electrical power supply on which societal health and commercial prosperity depend.

118 Anthony DePalma, Pataki Signs Bill Limiting the Use of Eminent Domain to Build High-Voltage Power Lines, N.Y. TIMES, Oct. 4, 2006, at B5, available at http://www.nytimes.com/2006/10/04/nyregion/04power.html (discussing a law that would prohibit private transmission companies, such as NYRI, from condemning land to build transmission lines). While this law represents an “ideological departure” for the former Governor, Pataki justified it by stating that it provides New York State communities with “additional protections” regarding eminent domain projects. Id.; see also Press Release, John J. Bonacic, Bonacic: Senate Commits $1 Million to Fight NYRI: Says Those Who Want to Build NYRI in Ulster County ‘Completely Miss the Point’, New York State Senator John J. Bonacic Archived Press Releases (Aug. 30, 2006), available at http://senatorbonacic.com/press_archive_story.asp?id=14816 (discussing the growth of the “legal offense” fund provided by the New York State Senate to be distributed amongst the counties that would be affected by the NYRI project; Senator Bonacic justified the commitment of such a vast supply of funding because “NYRI is about one thing—cheaper power for New York City and more expensive power and blight for upstate. Our region must stand together and tell NYRI—we don’t want you anywhere, and we will fight you until the end” (emphasis added)).

119 Les Roberts, Written Submission of Testimony to: Senator James Wright Regarding Proposed NYRI 400,000 Volt Transmission Line, June 17, 2006, http://www.chenangogreens.org/pl_health.htm (discussing the public health risks associated with the NYRI project); see also Krieger & Withey, supra note 107, at 3 (discussing how the “electric utility industry” will be presented with consequences stemming from the increased need for expansion of the nation’s electricity supply through transmission lines due to the growing health concerns and studies regarding transmission line exposure and increased cases of childhood and adult cancers including “leukemia, brain cancer, lymphoma, and breast cancer”).
invited to discuss the implications of the NYRI project. Dr. Roberts stated that research has produced “compelling evidence” which suggests that “brain cancer, breast cancer, amyotrophic lateral sclerosis [], and leukemia in adults” are all associated with exposure to transmission lines. Furthermore, an “overwhelming consensus” has developed over the past six years that the risk of childhood leukemia increases with exposure to transmission lines.

The belief that there is an increased threat of leukemia in children due to transmission line exposure has also been cited in studies in the United Kingdom. This United Kingdom study found that children living within one hundred meters of power lines have almost double the chance of developing leukemia than those who do not live near transmission lines.

In discussing the NYRI project specifically, Dr. Roberts dismissed “short-term studies” that have been cited by NYRI which state that the transmission line is harmless. To the contrary, a consensus has formed between the World Health Organization, the State of California, and the United States National Institute of Environmental Health Sciences wherein it is believed that if the electromagnetic fields produced from high voltage transmission lines exceed 0.2 uTesla, health risks become more prevalent; the

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120 Roberts, supra note 119. Dr. Roberts holds a Ph.D. in epidemiology and has taught at the Johns Hopkins University School of Public Health for over a decade. Id. Dr. Roberts is a New York State resident, residing in Chenango County, one of the many counties to be affected by the NYRI project. Id. Dr. Roberts was invited to speak at this hearing by Senator Raymond Meier and was asked to discuss the effects of the NYRI project on the public health. Id.

121 Id.

122 Id. (“[T]here is a solid, almost unquestionable link between exposure to very high voltage power lines and childhood leukemia. . . . [T]he link between high voltage line exposure and leukemia is as strong as we ever see in the field of environmental epidemiology.”).


124 Trentham Envtl. Action Campaign, supra note 123.

125 Roberts, supra note 119 (stating that NYRI has cited short term studies in animals where no harmful health effects were produced with this type of exposure; however, Dr. Roberts notes that information regarding transmission line exposure near homes has not been provided by NYRI).

exposure from NYRI’s proposed transmission line has been projected to exceed this safe level by as much as forty times.\(^{127}\) This transmission line will not be one running through a desert or a barren area of land; rather, these highly dangerous levels of electromagnetic fields will be penetrating “hundreds of households” and in some areas will be “maximizing human exposure in parts of Madison, and Chenango Counties.”\(^{128}\) Dr. Roberts concluded his testimony to the Senate Committee by asserting his strong belief that cancer will occur if the NYRI project continues.\(^{129}\)

### D. Potential Diminution in Property Values

Another likely result of this project will be the diminution of property values of households or parcels of land located near the transmission line. These health and property issues are intimately related. One claim that landowners have asserted is “cancerphobia,” or the public perception of the potential for health risks stemming from transmission lines and ultimately resulting in a diminished value of property, in some cases “render[ing] the . . . property valueless.”\(^{130}\)

The idea of “cancerphobia” and its implications on property values

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\(^{127}\) Roberts, supra note 119 (“[E]lectromagnetic fields from high intensity lines [should] be kept below 0.2\(\mu\)Tesla. We have calculated that the exposures from the proposed lines beyond the right-of-way may be 10 to 40 times this level.”); see also Matthew G. Parisi, Cancerphobia: The Fear and the Decision, N.Y. St. B.J., Mar.-Apr. 1995, at 30, 33 (1995). Parisi discussed studies that stated:

[M]agnetic fields of power lines in Finland, when occurring at levels close to 0.2 \(\mu\)T [Tesla] do not form a major health risk regarding childhood cancers. However, the results of a recent Danish case control study found a positive association between all types of childhood cancer combined and exposure to an empirically defined average density of 0.4 \(\mu\)T or more of magnetic fields from high voltage installations.

Parisi, supra, at 33. While Parisi goes on to express his belief that the “conflicting results” between the two studies reveals controversy as to whether transmission line exposure is in fact hazardous, this Author feels that a more modern and reasonable inference suggests that the 0.2 \(\mu\)T level is a safe level, while anything above that could present health risks. \textit{Id}.  

\(^{128}\) Roberts, supra note 119 (stating that hundreds of households along the transmission line will incur exposure of electromagnetic fields that dwarf in comparison to the “worst of households in past studies”); see also Parisi, supra note 127, at 69 (discussing how the exposure to dangerous levels of exposure diminishes as long as there is a sufficient distance between the source of the emission and the individual being exposed).  

\(^{130}\) Dr. Sharlene A. McEvoy, Double-Edged Sword of Damocles: Utility Companies’ Liability for Diminution of Property Values Due to Electromagnetic Fields, 23 REAL EST. L.J. 109, 109, 113 (1994) (discussing a series of New York State cases dealing with the dramatic drop in value of property near power lines; citing such instances as Pleasantville, New York, home owner Howard Reese, who blames Con Ed for constructing a power line only 75 feet from his retirement home, forcing him to move and reduce his original asking price of $400,000 to $275,000 after being rejected by nearly ninety prospective buyers).
derived from the New York State Court of Appeals decision, *Criscuola v. Power Authority*. In that case, upstate New York property owners brought suit against the Power Authority, claiming that their property values were diminished due to the public perception that the close proximity to a newly constructed power line was a substantial health risk, or as the case coined the phrase, “cancerphobia.” The court unanimously held that a decreased value of property, resulting from a public scare, even if not true, still results in a legitimate loss of property value.

The scenario in *Criscuola* is very similar to what will likely result if the NYRI project goes ahead as planned. Applying this scenario specifically to the NYRI project, opponents of the power line are concerned about what will happen to the property values in their individual communities. Representatives of affected towns, such as Earle Reed, the town supervisor of New Hartford, have gone on record with their beliefs that the NYRI project will be extremely detrimental to their respective communities. Furthermore, after the New York State legislature passed the bill that restricts transmission companies such as NYRI from using eminent domain for power lines, Assemblyman Clifford Crouch stated that the depreciation of property values played a part in their decision to pass the legislation.

The effect of high power transmission lines on property values is best summarized in the following synopsis:

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131 621 N.E.2d 1195, 1195 (N.Y. 1993).
132 Id.
133 Id. at 1196 (“If no one will buy a residential lot because it has a high voltage line across it, the lot is a total loss even though the owner has the legal right to build a house on it.” (quoting Willsey v. Kan. City Power & Light Co., 631 P.2d 268, 278 (Kan. Ct. App. 1981))).
134 Both cases deal with transmission lines being built through upstate New York. See *Criscuola*, 621 N.E.2d at 1195.
136 Id. (quoting New Hartford town supervisor Earle Reed, “It would be a complete disaster. . . . It would not only greatly diminish the property values, but also the aesthetics, and it passes by our schools. . . . There’s all kinds of concerns”); see also Timothy J. Julian, Mayor of the City of Utica, New York, NYRI Fight (2003), http://www.cityofutica.com/Mayor/NYRI+Fight.htm (stating that a major reason for opposing the NYRI power line is because it will reduce property values in the many neighborhoods the line travels through).
137 John Milgrim, *Legislature Blocks NYRI’s Hopes for Land Grab*, DAILY STAR, June 24, 2006, available at http://old.thedailystar.com/news/stories/2006/06/24/nyri1.html (quoting Assemblyman Crouch, “We don’t believe there’s a need for this line. . . . We don’t believe upstate should suffer depreciation in property values for the benefit of downstate”); see also supra note 7 and accompanying text (discussing the transmission line legislation).
The presence of high-power transmission lines is like a double-edged sword of Damocles affecting perhaps the physical health, but surely the economic health, of landowners. It hangs over the heads of the utilities as well. In their own economic self-interest, if not [out of] concern for the public, utilities should press the appropriate state and federal authorities to study the problem and come up with definitive answers to the EMF puzzle before utilities and customers suffer severe, dire consequences.\footnote{McEvoy, \textit{supra} note 130, at 122.}

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\section*{V. CONCLUSION: DOES THE NYRI PROJECT CONSTITUTE A PUBLIC BENEFIT?}

When juxtaposing the proposed benefits and burdens of the NYRI project, the public benefit limitation is not satisfied. Interpretation of public use not only supports the idea that a project must be for the public benefit, but also that the public \textit{as a whole} must be benefited. For example, the New York State Court of Appeals stated in \textit{Holmes} that a project must be for the benefit of the entire public.\footnote{Holmes Elec. Protective Co. v. Williams, 127 N.E. 315, 320 (N.Y. 1920) (Andrews, J., concurring).} Moreover, in \textit{Berman}, the Court stressed that the legislature took into account the vast improvements that the project at issue would have for the community as a whole.\footnote{348 U.S. 26, 34–35 (1954).} This approach was further emphasized by the idea that condemnation may not be looked at on a “piecemeal basis,” rather the plan as a whole should be taken into account.\footnote{\textit{Id.} at 35.} The benefits and burdens need to be examined in light of the effects they will have on the state as a whole. This approach, when applied to this case, escalates what was done in \textit{Berman}, pulling the scope of the camera back from analyzing one building amidst a neighborhood, and examining one section of the state amidst a project that will ultimately affect the entire state. When viewing the project as a whole, and balancing the benefits and burdens, the project does not confer a public benefit upon the State of New York.

Along those same lines, the Supreme Court of the United States has stated that the Court is required to give deference to the legislature in their determination of what is best for the public.\footnote{See \textit{id.} at 32 (“[T]he legislature . . . is the main guardian of the public needs to be served . . .”\textsuperscript{1} for the public benefit.”).}
The legislature in New York State has determined that the NYRI project is not beneficial for the state. The recent legislation banning transmission companies from using eminent domain to construct power lines is a clear demonstration of the legislature’s disapproval of this project.\footnote{N.Y. TRANSP. CORP. LAW § 11(7) (McKinney Supp. 2008); see also note 7 and accompanying text.}

Furthermore, Justice O'Connor's dissent in \textit{Kelo} expressed the idea that the majority opinion proposes a limitation on the public use doctrine: “eminent domain may only be used to \textit{upgrade}—not \textit{downgrade}—property.”\footnote{\textit{Kelo}, 545 U.S. at 503 (O'Connor, J., dissenting) (emphasis added).} The concerns regarding the depreciation of property values as a result of transmission lines such as the one proposed by NYRI run completely contrary to this principle.

Finally, Dr. Les Roberts’s analysis of the health risks associated with this project, when juxtaposed to the benefits of the project, in the context of this Article, are best put where he stated, “I can only tell you that since . . . children will die from this project if implemented as planned, we should, as a society, be up front and honest about these costs before determining if this route, and this project, and this basic approach, are in the greater interest of society.”\footnote{Roberts, \textit{supra} note 119.} This statement by Dr. Roberts puts the supposed “public benefit” of the project in true perspective.

Can condemnation of private property for the building of a high power transmission line confer a public benefit where you must balance decreased energy costs and efficient electricity against diminished property values and the potential for cancer ridden children? This Author thinks not. The potential benefit is too small and the possible burdens are too great; the minuses far outweigh the positives. Legislative disapproval of the project, as well as the property and health implications associated with it, amount to clear evidence that a public benefit will not come out of this project. Consequently, because the NYRI project will not confer a public benefit upon all of New York State, the implicit public benefit limitation will not be satisfied. Therefore, NYRI should be prohibited from condemning land by using New York State’s eminent domain law.