Fixing *Fuller*: Securing Just Compensation for Private Beneficiaries of Federal Grazing Lands

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INTRODUCTION

In 1973, the Supreme Court decided in United States v. Fuller that when government condemns a rancher’s private property it does not have to consider the value of federal grazing permits as part of just compensation.¹ Scholars have rarely questioned this

holding,\(^2\) and the lower courts have not veered from it. Notwithstanding its almost universal acceptance, *Fuller* is flawed. This Article analyzes the reasoning in *Fuller*, in light of related cases, traditional legal principles, and public policy, to show how the Court's conclusion is flawed. In addition, it proposes a better way to determine whether value attributable to grazing lands and other government action should be included as part of just compensation.

In short, the Court misunderstood the nature of the value attributable to grazing lands. It incorrectly relied on principles of revocability and excludability and misinterpreted the Taylor Grazing Act. It also failed to acknowledge the vital role that location and potential use of land play in property valuation. This Article proposes that in place of the *Fuller* approach, the courts base determinations of whether government-created value should be part of just compensation on two primary factors: (1) whether an interest is possessory; and (2) the location and potential use of the property. Using this approach, the owners of condemned private property should receive compensation for any value attributable to grazing lands adjacent to their property.

Part I describes basic principles of just compensation, the holding in *Fuller*, and how the courts have decided related cases. Part II discusses three principles that guided the Court's rationale in *Fuller*. Part III examines the Court's rationale, concluding it is flawed. Part IV presents a better method for determining whether government-created value should be included as part of just compensation. Part V describes options for adopting this new method.

I. JUST COMPENSATION AND *FULLER*

The Fifth Amendment to the U.S. Constitution requires the federal government to pay "just compensation" for private property it takes for "public use."\(^3\) The Supreme Court has extended this


\(^3\) U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation").
requirement to state and local government. As with many constitutional provisions, the meaning of “just compensation” is open for debate. In its most simple terms, just compensation is described as the “fair market value” of the property. The meaning of “fair market value,” however, is not necessarily clear cut.

The general rule for just compensation is that “[t]he owner is to be put in the same position monetarily as he would have been [in] if his property had not been taken.” A question arises, though, when a portion of the value of condemned private property exists because of government action. For example, what if the value of private property is enhanced because government has issued the owner a mining permit that provides access to a mine adjacent to the owner’s property? Or if a private land owner adjacent to federal forest land obtains a license to operate a ski resort on the federal land? Or what if a government-owned bridge enhances the value of private property adjacent to the bridge?

When government condemns and takes private property, should it have to compensate property owners for the value it has
added to their property? A number of scholars have argued that government-created value belongs to the taxpaying public; thus, when government uses the Takings Clause to condemn private property it should not have to compensate for those prior “givings” to private parties. In 1973, the Supreme Court addressed this issue in *United States v. Fuller*, at least in regard to federal grazing lands.

**A. United States v. Fuller**

Chester Fuller and his wife operated a cow-calf ranch on 1,280 acres of land they owned in fee simple in Western Arizona. As authorized by the Taylor Grazing Act, the federal government issued an exclusive permit to the Fullers allowing them to graze their livestock on 31,461 acres of adjacent federal grazing lands. The Fullers also leased 12,027 acres from the State of Arizona. The federal government decided to condemn 920 acres of the Fullers’ private land to flood it for a dam and reservoir project.

The Fullers argued that because their land was adjacent to government grazing lands, which could be used in conjunction with their land, just compensation should include the value that use added to their land. The Court, by a slim 5-4 majority, rejected their argument. It held that “the Fifth Amendment does not require the Government to pay for that element of value based on the use of respondents’ fee lands in combination with the Government’s permit lands.” In effect, it endorsed the theory of “givings”—“that the Government as condemnor may not be required to compensate a condemnor for elements of value that the Government has created,

11 *Fuller*, 409 U.S. at 488.
12 *Id.* at 488–89.
13 *Id.; Id.* at 495 (Powell, J., dissenting).
14 *Id.* at 489.
15 *Id.* at 494–95 (Powell, J., dissenting).
16 *Id.* at 489.
17 *Id.* at 493.
or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain.”

In other words, government created the value attributable to federal grazing permits, so it should not be forced to compensate a private party for that value when it condemns private land adjacent to it.

B. Cases Related to Fuller

Since 1973, the lower courts have not had occasion to apply Fuller to identical circumstances, likely because condemnees, recognizing the bright-line rule set forth in Fuller, have little hope of winning and overturning Fuller. However, some courts have addressed similar circumstances, such as value attributable to grazing leases and preferences, as well as value from licenses, leases, or permits used in other situations.

The courts have generally recognized grazing preferences and leases as compensable. For example, in 1969—before Fuller—a federal district court held that under the Taylor Grazing Act grazing leases issued by the government are a compensable property interest. In Fuller, the Supreme Court did not contradict this holding, knowing that the Fullers leased 12,027 acres from the State of Arizona. Although in dicta, the Court said, “Nor may the United States ‘be excused from paying just compensation

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18 Id. at 492.
19 See, however, a somewhat similar claim in Bischel v. United States, 415 F. Supp. 2d 1211, 1213 (D. Nev. 2006) (holding that based on Fuller “[t]he Fifth Amendment requires no compensation, nor authorizes the attachment of any value to grazing permits to qualify a permit holder to claim an interest or value donated as a charitable contribution.”).
20 A grazing preference is “a governmentaly adjudicated right attaching to [a landowner’s] fee simple (i.e., base) property that gives him a priority position in the procurement of grazing permits on adjacent public lands.” Alves v. United States, 133 F.3d 1454, 1456 (Fed. Cir. 1998). See also 43 CFR 4100.0-5 (2006) (“Grazing preference . . . means the total number of animal unit months on public lands apportioned and attached to base property owned or controlled by a permittee, lessee, or an applicant for a permit or lease. . . . Grazing preference holders have a superior or priority position against others for the purpose of receiving a grazing permit or lease.”).
measured by the value of the property at the time of the taking; because the State in which the property is located might, through the exercise of its lease power, have diminished that value without paying compensation.” Thus, without explaining why, the Court appears to have implicitly endorsed the argument that government should compensate private parties for the value of grazing leases, even while rejecting the argument that permits should be compensable.

In 1975, a federal district court held that condemned private land and contiguous grazing land leased from the state should be considered as one property for valuation purposes. Also, shortly after Fuller, the Supreme Court of South Dakota held that courts there can consider the value of a grazing preference in appraising an estate. However, in more recent cases, the Federal Circuit Court of Appeals has held that neither grazing leases nor grazing preferences are compensable property interests.

In other cases, the courts have denied compensation for licenses, leases, or permits that mostly have no connection to specific government land. For instance, they have concluded that no compensable property interest exists in the following: a license to operate game farms, a fishing license or permit, a license to

22 Fuller, 409 U.S. at 492.
23 United States v. 40021.64 Acres of Land, 387 F. Supp. 839, 846 (D.N.M. 1975) (“Without the land leased from the state, the value of the ranches would be diminished substantially if not totally. To value the ranch without including the land leased from the State is to render an inequitable value.”).
25 Colvin Cattle Co. v. United States, 468 F.3d 803, 808 (Fed. Cir. 2006) (holding that the plaintiff could not establish a government taking by virtue of lost value in his ranch after losing a grazing lease); Alves v. United States, 133 F.3d 1454, 1457 (Fed. Cir. 1998) (holding that a grazing preference is indistinguishable from a grazing permit because neither grazing preferences nor grazing permits constitute a property interest compensable under the Fifth Amendment).
27 Arctic King Fisheries, Inc. v. United States, 59 Fed. Cl. 360 (Fed. Cl. 2004) (holding no compensable property interest in a fishing license); Am. Pelagic Fishing Co., L.P. v. United States, 379 F.3d 1363 (Fed. Cir. 2004) (holding that the revocation of a fishery’s permits does not constitute a taking because there is no cognizable property interest); Conti v. United States, 291 F.3d 1334 (Fed. Cir. 2002) (holding that a fisherman’s swordfishing permit did not give rise to a property interest cognizable under the Fifth Amendment).
operate a plant, a maintenance permit, a license to operate lottery machines, and peanut quotas leased to other farmers.

In summary, most courts have refused to recognize value attributable to federal grazing permits and to other licenses, leases, and permits that typically have no connection to government land. However, the courts tend to hold, although not unanimously or recently, that grazing preferences and leases of government lands create compensable property interests, and the Supreme Court seems to have implicitly endorsed the idea that value from such leases is compensable.

II. PRINCIPLES IN FULLER

In Fuller, the Court based its rationale on three basic principles to determine that federal grazing permits are non-compensable property interests for purposes of just compensation: (1) statutory influence; (2) revocability; and (3) excludability.

28 United States v. 42.13 Acres of Land, 73 F.3d 953 (9th Cir. 1996) (holding plaintiff power company was not entitled for damages for its loss of power plant license during new license extension period when defendant had reserved its right to terminate before original license termination date).
29 Mohlen v. United States, 74 Fed. Cl. 656 (Fed. Cl. 2006) (holding that the government does not have to compensate the owner of a permit for repairing a dock after revoking the permit because there was no cognizable property interest to support the plaintiff’s takings claim).
30 Hawkeye Commodity Promotions, Inc. v. Vilsack, 486 F.3d 430, 439 (8th Cir. 2007) (no compensable property interest in a state-issued license to operate lottery machines).
31 Members of Peanut Quota Holders Ass’n, Inc. v. United States, 421 F.3d 1323 (Fed. Cir. 2005) (holding that peanut quotas are a non-compensable property interest under the Fifth Amendment because “the property interest represented by the peanut quota is entirely the product of a government program unilaterally extending benefits to the quota holders” without any protection from alteration or extinguishment at the government’s discretion), id. at 1334.
32 As noted here: “[T]he issuance of a grazing permit does not create a right, title, interest, or estate in the land.” 63C Am. Jur. 2d Public Lands § 96; see also Hage v. United States, 51 Fed. Cl. 570, 587 (Fed. Cl. 2002) (stating that “[a]t no time have the grazing permits been recognized as a right but rather a privilege—an opportunity to rent the public range from the government.”).
A. Statutory Influence

First, the Court recognized the principle that Congress can establish by statute whether government-created value is compensable. The Court highlighted that the Taylor Grazing Act specifically states that “its provisions ‘shall not create any right, title, interest, or estate in or to the lands.’” It concluded that this provision “make[s] clear the congressional intent that no compensable property might be created in the permit lands themselves as a result of the issuance of the permit.” This provision of the Taylor Grazing Act alone would have mandated Fuller’s outcome, but the Court also set forth two non-statutory principles.

B. Revocability

Second, the Court relied on the principle that government does not have to compensate “for elements of value that the Government has created, or that it might have destroyed.” Thus, because government gave the federal grazing permit to the Fullers and could have revoked it at any time, any value in the Fullers’ property deriving from the permit was non-compensable.

In delineating this principle, the Court compared grazing permits with navigable servitude. In 1967, six years before Fuller, the Court held that when the federal government takes private property below the high water mark of a navigable waterway, the government has no obligation to compensate for the value of that property because at any time Congress could have exercised its commerce power to acquire the property. Thus, the Court

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33 Fuller, 409 U.S. at 489 (quoting 43 U.S.C. § 315(b): “[G]razing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.”).
34 Id. at 494.
35 Id. at 492.
36 Id. at 491–92.
37 Id. at 491–92 (“[I]f the owner of the fast lands can demand port site value as part of his compensation, ‘he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses.’”) (quoting United States v. Rands, 389 U.S. 121, 125 (1967) (quoting United States v. Twin City Power Co., 350 U.S. 222, 228 (1956))).
reasoned, "it would seem a fortiori that it need not compensate for value which it could remove by revocation of a permit for the use of lands that it owned outright." In other words, a key principle in Fuller was that government should not have to compensate for value it creates through its own property and, thus, has authority to destroy at its discretion.

C. Excludability

Third, the Court relied on the principle that government should not compensate private property owners for value that is exclusive to them. In explaining this principle, the Court compared grazing permits to a "public works project." Government, it said, need not compensate for the value of grazing permits because they give access to public land adjacent to private land, which "form[s] a privately controlled unit from which the public would be excluded." In contrast, government must pay for a private parcel's value derived from its proximity to a completed public works project, such as a post office, because the project is "dedicated to, and open to, the public at large." In other words, excludability is another key principle: if the private owner has exclusive access to government-created value, then that value is non-compensable, but if any member of the general public can benefit from the value, then it is non-exclusive and compensable. The majority did not explicitly explain why excludability is such an important factor, but, presumably, it does not want private parties benefitting at what citizens might perceive to be the public's expense.

In summary, the value attributable to the Fullers' federal grazing permit was non-compensable for purposes of just compensation because (1) the Taylor Grazing Act expressly prohibited it;

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38 Id. at 492.
39 Id.
40 Id. at 492–93.
41 Id. at 493.
42 Id. at 492–93.
43 See, e.g. the Court's reference to Rands: "To require the United States to pay for this . . . value would be to create private claims in the public domain." (quoting United States v. Rands, 389 U.S. 121, 125 (1967) (quoting United States v. Twin City Power Co., 350 U.S. 222, 228 (1956))).
(2) the permit was revocable; and (3) the Fullers had exclusive access to the permit’s value. As discussed below in more detail, the dissent’s primary argument was that the majority had mistakenly focused on value deriving from the permit itself, and its revocability, rather than on the grazing land’s proximity to the Fullers’ ranch. The dissent’s arguments are discussed below in more detail.

III. WAS FULLER DECIDED CORRECTLY?

Although the Court decided Fuller more than forty years ago, its outcome continues to affect individuals whose private property government condemns with no obligation to compensate for the value of grazing lands nearby. Fuller’s precedent could prevent property owners from receiving just compensation for government-created value. In reviewing the principles of Fuller, it becomes clear that the five-person majority opinion was misguided. Most significantly, the Court’s focus on revocability and excludability is flawed.

A. Statutory Influence

The Court’s assessment of statutory influence was mistaken. As the opinion points out, the Taylor Grazing Act specifically mandates that the law “shall not create any right, title, interest, or

44 A federal court later summarized the holding in Fuller, although not recognizing the excludability factor: “In determining whether a property right existed, the Supreme Court focused on the revocability of the grazing permits and the clear Congressional expression in § 315b that the issuance of a permit under the Act ‘shall not create any right, title, interest, or estate in or to the lands.’” Members of Peanut Quota Holders Ass’n, Inc. v. United States, 421 F.3d 1323, 1331 (Fed. Cir. 2005).
45 Fuller, 409 U.S. at 503 (Powell, J., dissenting) (stating that “[t]he ‘working rule’ as articulated can, therefore, only mean that the respondents’ revocable permit to use the neighboring lands is regarded by the Court as the distinguishing element. This is an acceptance of the Government’s argument that the added value derives from the permit and not from the favorable location with respect to the grazing land.”).
46 See infra notes 106–109 and accompanying text.
estate in or to the [grazing] lands.47 However, the Fullers were not asking the Court to recognize a private interest in the grazing lands themselves—they conceded that the Taylor Grazing Act prohibited such recognition.48 The Fullers argued that “on the open market the value of their fee lands was enhanced because of their actual or potential use in conjunction with permit lands.”49 In other terms, the mere location of their ranch, which was adjacent to grazing lands, created value in their property on the open market. The Fullers wanted compensation for the fair market value of their own property, as enhanced by its location and potential use, not for the value of the grazing lands themselves.

Despite recognizing this distinction, the Court determined that while the Taylor Grazing Act does not explicitly prohibit the courts from compensating private parties for the enhanced value derived from grazing lands, it is implied that Congress has not authorized it.50 In making this determination, the majority used logical gymnastics to stretch Congress’s intent to support a non-obvious interpretation. Nonetheless, it is noteworthy that based on the Court’s interpretation Congress has the power to authorize compensation if it wishes, as the Court recognized.51

47 Fuller, 409 U.S. at 489 (quoting 43 U.S.C. § 315(b): “[G]razing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.”).
48 According to the Court, “Respondents conceded that their permit lands could not themselves be assigned any value in view of the quoted provisions of the Taylor Grazing Act.” Id.
49 Id.
50 According to the Court:
The provisions of the Taylor Grazing Act quoted supra make clear the congressional intent that no compensable property might be created in the permit lands themselves as a result of the issuance of the permit. Given that intent, it would be unusual, we think, for Congress to have turned around and authorized compensation for the value added to fee lands by their potential use in connection with permit lands.

Id. at 494.
51 The Court noted, “Congress may, of course, provide in connection with condemnation proceedings that particular elements of value or particular rights be paid for even though in the absence of such provision the Constitution would not require payment.” Id.
In at least one other setting, Congress has overturned the Court’s determination not to recognize government-created value as part of just compensation. In *United States v. Rands*, the Rands family owned land adjacent to the Columbia River and argued that the federal government should have to compensate them for the value of their land as a potential port site. The Court held that the value should not be considered because the Commerce Clause gives the federal government control over all navigable waters in the United States and, thus, it could destroy the private owner’s access to the river at any time.

Three years after the *Rands* decision, Congress provided “legislative grace” by requiring just compensation to include value arising from a property’s proximity to navigable waters. If it chose to, Congress could also provide ranchers with legislative grace by modifying the Taylor Grazing Act to require full compensation for value attributable to grazing lands.

**B. Revocability**

The majority in *Fuller* also presented a faulty analysis of the idea of revocability, which was its main point of emphasis.

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52 United States v. Rands, 389 U.S. 121 (1967). In *Rands*, the Rands family owned private property adjacent to the Columbia River in Oregon. They leased the land to the state which planned to use the site in part as a port, and the state had an option to purchase it. The federal government took the land and gave it back to Oregon “at a price considerably less than the option price at which respondents had hoped to sell,” which amounted to “about one-fifth the claimed value of the land if used as a port.” *Id.* at 122.

53 *Id.* at 267.

54 Ackerman and Yanich, *supra* note 8, at 599, 601.

55 According to the dissent, revocability is “the distinguishing element” of the majority’s reasoning: “[T]he respondents’ revocable permit to use the neighboring lands is regarded by the Court as the distinguishing element. This is an acceptance of the Government’s argument that the added value derives from the permit and not from the favorable location with respect to the grazing land.” *Fuller*, 409 U.S. at 503. A lower federal court made the following statement when summarizing *Fuller* and related cases, indicating the revocability is the key: “The government is free to create programs that convey benefits in the form of property, but, unless the statute itself or surrounding circumstances indicate that such conveyances are intended to be irrevocable, the government does not forfeit its right to withdraw those benefits or qualify them as it
The Court held that value associated with grazing permits is not compensable, in part, because grazing permits are revocable.\(^{56}\) In drawing this conclusion, it compared grazing permits to navigable waters. In *Rands*, the Court determined that because “the United States may change the course of a navigable stream or otherwise impair or destroy a riparian owner’s access to navigable waters,” it has the power to revoke any value in private property attributable to the waters.\(^{57}\) As a result, government should not have to compensate private owners for value created by a property’s proximity to navigable waters because “[t]o require the United States to pay for this . . . value would be to create private claims in the public domain.”\(^{58}\)

The Court applied this reasoning in *Fuller*:

> If, as in *Rands*, the Government need not pay for value that it could have acquired by exercise of a servitude arising under the commerce power, it would seem *a fortiori* that it need not compensate for value which it could remove by revocation of a permit for the use of lands that it owned outright.\(^{59}\)

The Court limited the breadth of this principle’s application, however, by stating that the principle that government should not have to compensate for value it has created or might destroy “can[not] be pushed to its ultimate logical conclusion.”\(^{60}\) For instance, government must pay for value added from a “completed public works project,” such as a “post office building.”\(^{61}\)

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\(^{56}\) *Fuller*, 409 U.S. at 491–93.

\(^{57}\) *Rands*, 389 U.S. at 267 (citations omitted).

\(^{58}\) Id. at 268 (quoting *Twin City Power Co.*, 350 U.S. at 228).

\(^{59}\) *Fuller*, 409 U.S. at 492.


\(^{61}\) *Fuller*, 409 U.S. at 492–93. Interestingly, the Court treats value from proximity to a public works project different from value deriving from proximity to navigable waters. This approach seems inconsistent. Because government owns land for a public works project “outright,” it seems the case for including value from a public works project is weaker than for navigable waters where the
The Court’s revocability analysis was flawed for at least three reasons. First, value deriving directly from government-issued permits and licenses might technically be revocable, but, in practice, the value is essentially irrevocable. As Professor Bruce R. Huber recently noted, private claims to public land, including “[m]ining claims, leases for the development of coal or oil and gas, grazing permits, hydropower licenses, ski resort leases, even residential leases,” are “durable,” meaning “these are often extended, expanded, renewed, and protected . . . in ways that shape, and often trump, other policy objectives with respect to federal land.”62 These claims “are treated more or less as though they were protectable property interests, even when they are not so in the formal nomenclature of the law.”63

Because government consistently renews grazing permits, the private sector treats them as irrevocable. According to Huber, “as a matter of administrative practice, federal grazing permits have been and are renewed so reliably that banks customarily capitalize the permits’ value into the ranches to which they are adjacent,” even knowing they are terminable.64 Thus, while grazing permits hypothetically are revocable, “a de facto rebuttable presumption in favor of claim renewal”65 is sufficient for private federal government merely has the authority to control the waters at its discretion.

62 Bruce R. Huber, The Durability of Private Claims to Public Property, 102 Geo. L.J. 991, 994–95 (2014). Said another way, “I refer to claims that may, as a matter of law, be terminated or limited or allowed to expire, yet are not terminated or limited or allowed to expire—despite circumstances that would seem to suggest that the survival of such claims is contrary to prevailing public policy.” Id. at 995.

63 Id. at 1001.

64 Id. at 1005. Huber continues:

Yes, you read that right: banks are willing to lend against the value of a terminable grazing permit. One must assume that the banks have realized that such grazing rights, though insecure on paper, are, in actuality, quite stable. This remains true in spite of myriad analyses suggesting that public lands are overgrazed and numerous calls for reductions in public-lands grazing.

Id. See also Joan M. Youngman, The Role of Valuation in Determining Ownership for Tax Purposes, 43 TAX LAW. 65, 83–84 (1989) (noting that one scholar “demonstrated that rights terminable at will could be sufficiently durable to be possessory”).

65 Huber, supra note 62, at 1038–39.
capital markets to recognize grazing permits as protectable property interests. The courts are also not blind to the fact that grazing permits are treated as irrevocable. One federal court determined that grazing permits for federal and state land are ineligible for amortization because permits with preferential renewal privileges have an indefinite life. Despite what legal theory posits, government offers de facto renewal of grazing permits, and private markets treat the permits as if their owners hold them in perpetuity.

Second, as discussed in depth below, value deriving from grazing lands does not come from a permit alone, the property’s location adjacent to grazing lands also adds significant value. As a result, even after revoking a permit the property still has value on the open market based on its mere proximity to federal grazing lands. The only way to revoke this value would be to change the use of the land or stop issuing grazing permits.

Third, the Court’s application of the principle of revocability to public works projects is flawed. In its analysis, the Court focused on the government-created value added to private property from a project like a post office, concluding that government should have to compensate for that value when condemning pri-

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66 Uecker v. Comm’r of Internal Revenue, 81 T.C. 983 (1983), aff’d sub nom. Uecker v. C.I.R., 766 F.2d 909 (5th Cir. 1985); see also Youngman, supra note 63, at 119, n.88.
67 John A. Swain argues that in regard to taxation “possessory interests should be valued as if they will be held in perpetuity by the private owner,” although he notes the difference between property taxes, which are assessed annually, and a sales tax, which is assessed once-and-for-all, noting that the continual assessment calls for the assumption of perpetuity. John A. Swain, The Taxation of Private Interests in Public Property: Toward A Unified Theory of Property Taxation, 2000 UTAH L. REV. 421, 426 (2000). In condemnation cases, just compensation is valued once-and-for-all, so Swain’s argument may or may not apply in that situation. The dissent in Fuller also noted that the government was not using the grazing lands themselves for its project, “it left the grazing land substantially intact and available.” Fuller, 409 U.S. at 501–02 (Powell, J., dissenting). It cited United States v. Jaramillo in which a federal court determined that value from land leased from the government should be part of just compensation because the government did not use land covered by the private owner’s permit. Id. at 502, n.4 (citing United States v. Jaramillo, 190 F.2d 300 (10th Cir. 1951)).
68 See infra Part IV.B.
69 Id.
vate property. But the Court ignored the fact that value attributable to a public structure like a post office is also revocable. At any time, government could demolish a post office, change the use of the land, or even sell the property to a private party. As a result, any government-created value could be destroyed. The value of any public property is subject to destruction at the government’s will, including buildings, parks, bridges, or a sports arena.

Of course, as with a grazing permit, the revocability of value from a post office is mostly hypothetical. Government is not likely to demolish or move a post office, park, or bridge, although it could. Thus, value attributable to a grazing permit and most public works projects is similar—technically, government can revoke it, but revocation is highly unlikely. Rather than treat like value alike, however, the Court designated value from public works projects as compensable but not value from grazing permits. The Court should not get to have it both ways; it should treat value from both a grazing permit and a public works project as either revocable or irrevocable, but it should not treat them differently.

C. Excludability

The Fuller majority’s reliance on the principle of excludability was also faulty. As with revocability, the Court’s analysis focused on its analogy between grazing permits and public works projects. The Court attempted to bolster its differential treatment of grazing permits and public works project by arguing that value attributable to a post office is non-exclusive and, thus, compensable because a post office is open to the public, whereas a grazing permit is exclusive because it is “privately controlled.” State and federal courts continue to apply Fuller’s excludability principle when determining whether licenses and permits to use federal property are compensable interests for purposes of just compensation. This emphasis on excludability is misplaced when used in the context of government-created value.

70 Fuller, 409 U.S. at 492–93.
71 Id.
72 See, e.g., Palmyra Pac. Seafoods, L.L.C. v. United States, 80 Fed. Cl. 228, 232 (Fed. Cl. 2008) aff’d, 561 F.3d 1361 (Fed. Cir. 2009) (“[B]oth plaintiffs and
The Fuller Court did not explain fully why excludability is an important factor in deciding whether grazing permits are a compensable property interest. It merely quoted from Rands, stating that “[t]o require the United States to pay for this . . . value would be to create private claims in the public domain.”73 The Court’s conclusion on this point was also flawed, which becomes clear by reviewing the possessory characteristics of leases, licenses, and public works projects as based in (1) traditional property law; and (2) the principle in Rands.

1. Traditional Property Law

In traditional property law, leases are exclusive, licenses are semi-exclusive, and public works projects are mostly non-exclusive. By definition, a lease is the “exclusive possession of the premises against all the world, including the owner.”74 Thus, if excludability is a determining factor in whether property is compensable, as Fuller suggests, then value from leasing government property should likely be considered a possessory interest, and possibly compensable. In comparison, a license “merely confers a privilege to occupy the premises under the owner”;75 a licensee does not necessarily have exclusive access to or control over property. For example, the federal government can issue multiple permits for ranchers to use the same parcel of grazing land.76 Thus, while a license may provide some possessory interest in govern-
ment property, a licensee’s claim to compensation for value attributed to a license is weaker than for a lessee.\(^7\)

A public works project is somewhat non-exclusive.\(^7\) The value of private property adjacent to a government post office, courthouse, bridge, or park might increase due to its location near public property, but the only way a private property owner can exclude other private owners from that value is by purchasing all the property within the radius to which that value extends. To accomplish this task would be difficult, and costly. Thus, value derived from a public works project is mostly non-exclusive and is the weakest candidate to qualify as a possessory interest. In summary, under traditional definitions and principles of property law, a lease is exclusive and provides the greatest possessory interest; a public works project is mostly non-exclusive and likely provides no possessory interest; and a license is semi-exclusive and provides a possessory interest less significant than with a lease.

The Fuller Court appeared to recognize these clear principles; and yet, its conclusions did not follow from them. What does follow from these principles, if excludability is to be a determining factor in what value qualifies for just compensation, is that when leases and licenses are exclusive or semi-exclusive, they create possessory interests and should be compensable property interests, with semi-exclusive interests warranting a lower value than fully exclusive interests.\(^7\) Also, because public works projects create mostly non-exclusive value, they likely are not possessory interests and should not be compensable property interests.

The Court implied that value from leases is a compensable property interest,\(^8\) and, contrary to the definitions and principles just discussed, it held that value from public works projects is

\(^{77}\) See Millennium Park Joint Venture, LLC v. Houlihan, 241 Ill. 2d 281 (2010).

\(^{78}\) For further discussion, see infra Part III.C.2.

\(^{79}\) That a license is not fully exclusive is not an issue. As Bruce R. Huber noted, “It is black letter law that a valid mining claim, for example, is a property interest good against even the government, yet the holder of a mining claim may not fully exclude others from the claimed land.” Huber, supra note 62, at 1001. An interest that is only semi-exclusive should be compensable, its value will just be lower than the value of an exclusive interest such as a lease.

\(^{80}\) See supra notes 21–22 and accompanying text.
compensable, whereas value from grazing permits is not.\textsuperscript{81} Thus, the Fuller Court’s conclusion in regard to licenses and public works projects contradicted traditional property principles.

2. The Principle in \textit{Rands}

The Court’s invocation of the principle in \textit{Rands} was also inconsistent. The majority quoted from \textit{Rands} the idea that courts should not “create private claims in the public domain.”\textsuperscript{82} Presumably, the Court believes it unjust for a private party to receive not only the benefit of using a government-issued grazing permit, but also to be the only private party that benefits from that value as part of just compensation, which would amount to “a windfall to which he is not entitled.”\textsuperscript{83} In contrast, presumably the value from a public works project is non-exclusive; thus, any private party whose property is near the project can benefit, and all of those parties can receive compensation for that value following condemnation, not just one of them.\textsuperscript{84}

Once again, the Court’s rationale is inconsistent. If the principle in \textit{Rands} is designed to prevent windfalls for private parties at the public expense, then, like grazing permits, value from leases also should not be compensable because the benefits of a lease are typically exclusive to one private party and, thus, give that party a “windfall.” Furthermore, value attributable to public works projects should not be compensable because allowing courts to include such value as part of just compensation also “creates private claims in the public domain.”\textsuperscript{85}

To expound on this point, although adjacent property owners would have a difficult time excluding others from value attributable to public works projects, only property sufficiently near the public project increases in value; thus, property owners inside that radius of enhanced value could receive a windfall in comparison to those outside the radius. And even within the radius,

\begin{itemize}
  \item \textsuperscript{81} Fuller, 409 U.S. at 492–93.
  \item \textsuperscript{82} Rands, 389 U.S. at 268 (quoting Twin City Power Co., 350 U.S. at 228).
  \item \textsuperscript{83} Id. at 268.
  \item \textsuperscript{84} See discussion supra Part III.C.1.
  \item \textsuperscript{85} Rands, 389 U.S. at 268 (quoting Twin City Power Co., 350 U.S. at 228).
\end{itemize}
property owners closest to the project would receive a windfall compared to those situated further away. Thus, even in the case of a public works project, some private property owners can benefit at the public's expense. The only difference between this windfall and the windfall associated with a lease or license is that a public works project can enhance the value of numerous property owners, whereas a lease or license typically benefits only one or a few private owners. The Court's concern about creating private claims in the public domain is, therefore, unwarranted. No public program or project adds to the value of every taxpayer's real property; each undertaking benefits one individual or a specific group of people. In other words, some property owners always receive a "windfall," but not all of them.

Based on this analysis of traditional private property and the principle in *Rands*, the Fuller Court misinterpreted and misapplied the notion of excludability. Neither revocability nor excludability is very useful or appropriate for determining whether an interest should be compensable for purposes of just compensation. As illustrated, using these criteria to determine whether

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86 As an example, property situated within a few blocks of a well-maintained public park would likely increase in value, whereas property further away would not benefit as much, or at all, from its proximity to the park. As a result, if government were to condemn all the land within a ten-block radius of the park, then owners of property closer to the park would receive a windfall at the rest of the public's expense.

87 Another reason excludability is not an ideal factor to use is that it is extremely difficult, and impractical, to determine precisely how much value derives from private property which is adjacent to public works projects. For example, if a court is to subtract value deriving from public works projects, then how much value is attributable to one private parcel being adjacent to a public post office, park, and library? And should courts attempt to calculate the value of every public amenity, such as adjacent roads, sidewalks, and lighting? More simply, all of this value from public works projects is already part of fair market value and should be included in any assessment of just compensation. But its inclusion should not be based on the idea of excludability. Consider also the following from a tax perspective, which provides an inverse view:

If a possessory interest must be exclusive, a taxpayer exercising rights in common with others, as in the case of a grazing permit, has grounds to argue that the interest is not taxable. Taxing only exclusive grazing rights might foster tax avoidance by encouraging the issuance of common grants covering larger plots rather than individual permits for smaller plots. Such a rule would not be consistent with the original rationale for taxing "the possession and valuable
government-created value should be part of just compensation creates contradictions and inconsistencies which are difficult, if not impossible, to overcome. Part IV proposes a better way.

IV. A BETTER METHOD FOR DETERMINING WHETHER TO INCLUDE GOVERNMENT-CREATED VALUE AS PART OF JUST COMPENSATION

The courts should refrain from using revocability and excludability as the main criteria for determining whether government-created value should be part of just compensation. Instead, they should base their determination on two primary factors: (1) whether the interest is possessory; and (2) the location and potential use of the property.

A. Possessory Interests

Government-created interests recognized as possessory should be part of just compensation because the owner has a legal claim to a possessory interest. As described above, value created from public works projects is also likely not a possessory interest. In traditional property law, a lease is typically viewed as a possessory interest, whereas a license is not.88

Contrary to tradition, many states treat government leases and licenses as possessory interests for purposes of taxation. Because government property is typically immune from taxation,89

use of the land subsisting in the citizen.” The existence of other claims or permits similar to those held by a given taxpayer may affect the valuation of that taxpayer’s interest, but should not control its taxability. . . .

The taxability of grazing rights should not hinge upon whether two permits have been granted for the common use of land sufficient to support two herds or whether each holder was granted exclusive rights in half that area. This distinction should affect only the amount of the tax, through its effect upon the value of the grazing rights.

Youngman, supra note 63, at 82–83 (citations omitted).

88 1 Tiffany Real Prop. § 79 (3d ed.). However, grazing permit holders have to pay a fee per animal which creates an argument that grazing permits should be at least semi-possessory. See Bureau of Land Management, Fact Sheet on the BLM’s Management of Livestock Grazing, updated Mar. 28, 2014, http://www.blm.gov/wo/st/en/prog/grazing.html.

89 Swain, supra note 66, at 421–22.
governments have created exceptions to allow them to tax private interests in government property. Indeed, according to one scholar, “Courts have uniformly held that private interests in government property may be subject to tax.”

California’s approach is the most expansive. It has determined that any interest in government-owned property is taxable. And it has specifically said that grazing land permits are taxable interests. In Board of Supervisors v. Archer, California residents with federal grazing permits and leases argued that their interests in grazing lands were not possessory and, thus, not subject to taxation (likely to the chagrin of grazing permit holders seeking just compensation). The California Court of Appeal disagreed and recognized grazing permits as possessory interests subject to taxation.

As another example, Colorado’s constitution recognizes possessory interests in farming, ranching, and grazing as taxable. The Supreme Court has also held that the value of a federal dam license can be included when taxing private property adjacent to a dam, even though at any time the federal government could revoke the license. In other words, many states and the federal govern-

\[90\] Id. at 423.
\[91\] Id. at 424. Swain also wrote, “It has even been held that the measure of the tax can be the fee value of the property, as long as the private party, and not the government, is treated as the taxpayer.” Id. at 425.
\[93\] 1 Tax. Cal. Prop. § 3:9 (4th ed.). California also taxes as possessory interests Forest Service permits (residential and commercial), airport permits, Indian land leases, auto parking leases, and harbor leases. Id.
\[95\] Id. See also 9 Witkin, Summary 10th (2005) Tax, § 167, at 257 (“Federal grazing permits are taxable possessory interests despite their being non-exclusive, temporary and revocable”) (citing Board of Supervisors v. Archer, 18 C.A.3d 717, 725-28 (1971)).
\[96\] Mark W. Yoder, Taxation of Possessory Interests in Exempt Property under S.B. 02-157, Colo. Law., March 2003, at 81, 85.
\[97\] Susquehanna Power Co. v. State Tax Comm’n of Md., 283 U.S. 291, 296 (1931) (citations omitted). The Court also noted:

Nor can we say that the present tax, based upon what must be taken to be the fair value of appellant’s lands profitably used in the business of developing and selling power, is forbidden because that use would not have been possible without the control which appellant has acquired over navigable waters through the grant of its license. Those considerations which lead to the recognition of the power of a state to tax the property used by the grantee in the enjoyment of
ment recognize leases and licenses as possessory interests for purposes of taxation.

Logically, if government recognizes government-created leases and licenses as taxable possessory interests, then it should also recognize these interests as compensable for purposes of just compensation. Government should be consistent; it should not recognize these interests as possessory when doing so will fill its coffers and then reverse its opinion to avoid paying just compensation to property owners. In other words, a grazing permit should be either a possessory interest that is both taxable and compensable, or it should be both non-taxable and non-compensable. Government should not get to have it both ways.

B. Location and Use of Property

Another factor the courts should use to determine whether government-created value is compensable is the location and use of the property involved. The specific location and possible uses of any property contribute immensely to its value. This value is separate and independent from any value a government license, permit, or other similar interest might add to the property.

For example, private land located adjacent to mountainous federal or state forest land has more value merely as a potential site to be used in conjunction with a ski resort license to operate on the forest land. This added value exists even before a ski resort license is issued. Similarly, prospective buyers of private property located next to federal grazing lands might be willing to pay more for the property simply because of its location, not knowing whether they can obtain a grazing permit. The quintessential example here is a post office. The value of property near a post office or other public works project might increase due solely to its proximity to and potential use of a government amenity. No license or permit is required to gain this value. Although the value is government-

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a federal license require recognition of the power to tax it on the basis of accepted standards of value, customarily applied in the taxation of other forms of property.  
*Id.* at 296–97.
created, it is not a possessory interest because it comes from a typical public works project.

Certainly, actually obtaining a grazing permit might somewhat increase the value of adjacent land, but it is mostly the location of the private land and its use in conjunction with the grazing land that create value, not the permit itself. For instance, a cattle rancher who obtains a grazing permit but whose base property is miles from the permit lands will gain far less value from the permit lands than a rancher whose property is adjacent to them. On the open market, a potential buyer would pay more for the land adjacent to grazing land, just as a buyer who values postal services highly would pay more to be located near a post office. In other words, a grazing permit gives ranchers access to the land, but the permit creates no value unless a rancher can actually use the land. The property’s location and potential use create most of the value, not the permit.

98 The idea of “common beneficial use” may have some application here. For example, although the private owner does not own government grazing lands he is using both the grazing lands and his own property for a common beneficial use. States have recognized this use as an important factor in determinations of just compensation in the context of partial takings. See Alan T. Ackerman, Just Compensation—Remainder Damages in Partial Takings Cases, MICH. B.J., Vol. 61, No. 6 (Jun. 1982). Consider also the application of a recent holding that emission reduction credits did not directly enhance a plant’s taxable property; instead, they indirectly enhanced the owner’s income by permitting the property to be put to productive use. Elk Hills Power, LLC v. Bd. of Equalization, 57 Cal. 4th 593 (2013).

99 A federal district court recognized this fact in holding that based on Fuller the value of private property deriving from its location adjacent to a public bridge should not be excluded from valuation. United States v. Certain Land Situated in City of Detroit, Wayne Cnty., State of Mich., 547 F. Supp. 680, 685 (E.D. Mich. 1982) (stating that “[n]othing in Fuller suggests that this value should be excluded merely because of its proximity to Customs, nor would it be fair to do so. If there is no legal impediment to [ ] offering the service . . . , then the value does not depend on a Government license or permit. Instead, the value arises from the unique location of the land.”). Consider also that an owner of land near grazing lands might rely on the existence and stability of a ten-or-more-year permit to invest in his or her own property to use in conjunction with the grazing land. Perhaps these investment-backed expectations should play a part in the calculation of just compensation. For discussion on reliance interests, see Heckler v. Mathews, 465 U.S. 728 (1984).
In contrast, when government issues a license to operate a taxi cab, lottery machine, or liquor store, the license merely gives a private party permission to conduct a business activity using his or her own property—there is not government land involved.\textsuperscript{100} In these circumstances, the license is the sole source of government-created value, not its connection with government-owned property. Accordingly, nearly all states consider taxi cab licenses to be non-compensable, and many consider liquor licenses to be non-compensable.\textsuperscript{101}

The Supreme Court has recognized the importance of location and potential use in the context of taxation. In the case involving a dam license mentioned above,\textsuperscript{102} the Court stated:

An important element in the value of land is the use to which it may be put. That may vary with its location and its relationship to the property or legal interests of others. Its proximity to means of transportation, highways, railroads, or tidewater, or its location in the vicinity of water power belonging to another but available for use upon it may increase its utility and hence its taxable value. A dock on New York harbor may have a greater value than one on nonnavigable waters, even though the advantages of the former may be terminated through the exercise of the superior power of the federal government over navigable waters.\textsuperscript{103}

The Court continued:

A large part of the value of property in civilized communities has been built up by its inter-related uses; but it is a value ultimately reflected in earning capacity and the price at which the property may be sold, and hence is an

\textsuperscript{100} See supra notes 26–31 and accompanying text for other examples of licenses not attached to land.
\textsuperscript{101} Steve Oxenhandler, Taxicab Licenses: In Search of A Fifth Amendment, Compensable Property Interest, 27 TRANSPL.J. 113, 134, 158 (2000).
\textsuperscript{102} See supra note 97 and accompanying text.
\textsuperscript{103} Susquehanna Power, 283 U.S. at 296.
element to which weight may appropriately be given in determining its taxable value.\textsuperscript{104}

Thus, long before \textit{Fuller}, the Court recognized how location and use influence property value for purposes of taxation, but in \textit{Fuller} the Court seems to have rejected this fact in regard to condemnation and just compensation.\textsuperscript{105}

The four-justice dissent targeted the majority’s lack of attention to the locational factor, asserting that the majority “simply ignores [it].”\textsuperscript{106} In reply, the dissent noted: “It is commonplace, in determining market value-whether in condemnation or in private transactions-to consider such elements of value as derive from the location of the land.”\textsuperscript{107} It continued:

\begin{quote}
[T]he favorable location is the central fact. Even if no permit had been issued to these respondents, their three tracts of land—largely surrounded by the grazing land—were strategically located and logical beneficiaries of the Taylor Grazing Act. In determining the market value of respondents’ land, surely this location—whether or not a permit had been issued—would enter into any rational estimate of value.\textsuperscript{108}
\end{quote}

Finally, the dissent raised important questions related to extending the majority’s reasoning to value from public works projects:

If the Government need not pay location value in this case, what are the limits upon the principle today

\begin{flushright}
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} As the Court wrote, “[I]t would be unusual, we think, for Congress to have turned around and authorized compensation for the value added to fee lands by their potential use in connection with permit lands.” \textit{Fuller}, 409 U.S. at 494.
\textsuperscript{106} \textit{Id.} at 504 (Powell, J., dissenting).
\textsuperscript{107} \textit{Id.} at 497–98. It also said, “It hardly serves the principles of fairness as they have been understood in the law of just compensation to disregard what respondents could have obtained for their land on the open market in favor of its value artificially denuded of its surroundings.” \textit{Id.} at 504. Further, the dissent argued that the jury instructions properly emphasized the location of the Fullers’ land and the “availability and accessibility” of the adjacent public grazing land.” \textit{Id.} at 497.
\textsuperscript{108} \textit{Id.} at 503.
\end{flushright}
announced? Will the Government be relieved from paying location value whenever it condemns private property adjacent to or favorably located with respect to Government property? Does the principle apply, for example, to the taking of a gasoline station at an interchange of a federal highway, or to the taking of a farm which in private hands could continue to be irrigated with water from a federal reservoir?\footnote{Id. at 502.}

Location and potential use are key factors in land valuation. Private property owners who have the foresight to pay a premium to purchase land adjacent to government land, or who are fortunate enough to have government purchase and develop property adjacent to their land, should not be penalized for owning property with a favorable location and potential use in conjunction with government land. Denying just compensation for this value violates the core principle that “[t]he owner is to be put in the same position monetarily as he would have been [in] if his property had not been taken.”\footnote{Ackerman & Yanich, supra note 8, at 588–89, n.92 (quoting United States v. Reynolds, 397 U.S. 14, 16 (1970)). Note that this situation is clearly different from cases in which the “Miller Rule” applies. In those cases, government itself creates the value through condemnation and its projected improvement of the land; consequently, the private property owner never would have considered that government-created value before purchasing the property. See United States v. Miller, 317 U.S. 369 (1943) (holding that value created by expectations of government action post-condemnation is not compensable).}

Using locational value and potential use as primary factors for determining whether to compensate for government-created value provides two core benefits, among others. First, it provides a method for obtaining consistent results, unlike relying on revocability and excludability. Second, it provides simplicity because locational value and potential use are already part of fair market value. Consequently, when courts determine that government-created value is compensable, which would be the most likely result using these factors, they need not attempt the difficult task of parsing out how much value derives from a lease, permit, or public works project. They can simply use fair market value, which would
include any value from location, potential use, and possessory interests.

Using possessory interests, locational value, and potential use as the primary factors will lead to the most fair and just outcomes. For example, if a lease is possessory but has no locational value, then it should still be compensable. In contrast, a taxi license is not possessory and also has no locational value; thus, it should not be compensable. A grazing permit might not have a possessory interest but have locational value; thus, it should be compensable.

In summary, courts should base their determination of whether government-created value is compensable on two primary factors: (1) whether the interest is possessory; and (2) the location and potential use of the property. Government-created interests recognized as possessory should be part of just compensation. Value attributable to grazing lands derives mostly from the locational value and potential use of private property in conjunction with grazing lands, not from a permit; thus, locational value and potential use should be primary factors in making valuation determinations. Using this approach, the courts should recognize value attributable to grazing lands as compensable, no matter its source.

V. HOW TO FIX FULLER’S FLAWS

Fixing Fuller’s flaws will not be easy. The Supreme Court could simply overturn Fuller, but given its somewhat strict adherence to the principle of stare decisis, this path is unlikely to be fruitful. Perhaps lower federal courts or state courts could find a way to work around Fuller and apply the principles proposed in this Article, but this is also unlikely given Fuller’s longevity. As a result, a plea to Congress is probably the best course.

As discussed above, following the decision in Rand, Congress provided “legislative grace” by requiring just compensation to include value arising from a property’s proximity to navi...
gable waters. Congress also has authority to give ranchers legislative grace by modifying the Taylor Grazing Act to require courts to account for value attributable to grazing lands as part of just compensation—and it should. As this Article has made clear, the rationale in Fuller was flawed, and Congress should act to fix it.

VI. Conclusion

Fuller is flawed. The Supreme Court misinterpreted the Taylor Grazing Act and was misguided in emphasizing the principles of revocability and excludability. Its application of these principles creates inconsistent outcomes and is incorrectly based on the assumption that value attributable to grazing lands derives solely from the permit itself rather than the location and potential use of the land. In the place of Fuller, the courts should base determinations of whether government-created value should be part of just compensation on two primary factors: (1) whether the interest is possessory; and (2) the location and potential use of the property. This new approach will better conform to traditional principles of property law and produce outcomes that are more consistent—and just.

When government condemns private property adjacent to grazing lands, or other government property, the owners of condemned property should receive compensation for any value attributable to the public land, which will typically be reflected in fair market value. Under this approach, compensation will often be available when based on a possessory-interest analysis, and it will always be proper when considering locational value and potential use. Congress and the courts should act now to secure true just compensation for private beneficiaries of grazing lands.

113 Ackerman & Yanich, supra note 8, at 599, 601.