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## Losing Ground: How the Supreme Court’s Use of Easement Law in *U.S. Forest Service v. Cowpasture River Preservation Ass’n* Thwarts Environmental Justice\*

*In 2015, Duke Energy and Dominion Energy joined forces to begin work on a massive natural gas pipeline extending through Appalachia. The proposed path of the Atlantic Coast Pipeline, as the project was named, ran through several low-income, minority communities and also traversed a section of the Appalachian Trail located in George Washington National Forest. The U.S. Forest Service granted the energy companies a permit to build the pipeline across this national forest and the Appalachian Trail, but before work could begin, a group of environmental stakeholders filed an action challenging the Forest Service’s authority to issue the permit.*

*The Supreme Court adjudicated that challenge in *U.S. Forest Service v. Cowpasture River Preservation Ass’n*. The dispositive issue in the case was whether the Appalachian Trail is actually “land.” If so, then under established federal law, the Forest Service would lack the authority to grant the permit; if not, then the grant of the permit would be valid. To make its decision on the subject, the Court turned to private easement law principles and, in doing so, concluded that the permit grant must be upheld because the Appalachian Trail is not land. As the Court explained, “[a] trail is a trail, and land is land”—the two are distinct from one another. Or are they?*

*This Recent Development answers that question in the negative, positing that the Cowpasture Court reached an erroneous conclusion by incorrectly invoking the private law of easements to decide the case. And although Duke and Dominion eventually abandoned the Atlantic Coast Pipeline project, the legal precedent set by the Court’s decision remains. This precedent will result in increased future harms to the environment and low-income, minority communities and, in that way, ultimately constitutes lost ground for environmental advocates in the fight against environmental injustice.*

### INTRODUCTION

With its narrow progression along mountain ridgelines, slow descents into forested valleys, and meandering turns through sprawling fields, the Appalachian Trail (“the Trail”) provides a glimpse into some of the United States’ most beautifully preserved natural lands. This being the case, it is no

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wonder that, since its completion in 1937,<sup>1</sup> the Trail has been one of the country's most popular outdoor attractions.<sup>2</sup> Every year, around three million people hike some portion of the Trail's nearly 2,200 miles of footpath, which stretch along the East Coast from Maine down to Georgia.<sup>3</sup> An estimated 20,841 people have completed a thru-hike of the entire Appalachian Trail since 1936, and the number of thru-hikers has been steadily increasing each decade.<sup>4</sup> Consider for a moment how any one of these hikers would likely respond if, while trekking across the Trail's rugged track, they were asked the simple question: "Is the Appalachian Trail land?" Could any of them look down at their shoes, brown with dirt from the ground on which they had walked, and reasonably deny that the Trail is land? According to the Supreme Court in its recent decision in *U.S. Forest Service v. Cowpasture River Preservation Ass'n*,<sup>5</sup> such a denial would not only be reasonable, it would be correct.

At issue in *Cowpasture* was whether the U.S. Forest Service had the authority to issue a right-of-way permit across the George Washington National Forest for Duke Energy and Dominion Energy's joint Atlantic Coast Pipeline ("ACP") project.<sup>6</sup> Under established federal law, the head of an appropriate agency can grant a pipeline a right-of-way permit across any federal lands *except* those administered by the National Park Service.<sup>7</sup> Consequently, whether the Forest Service had the authority to grant the permit depended on if the area in George Washington National Forest that would be subject to the right-of-way fell into the statutory exception; in other words, whether the area was (1) federal land and (2) administered by the National Park Service.

All parties agreed that the Forest Service had the authority to grant a right-of-way across George Washington National Forest because (1) it is federal land and (2) it is *not* administered by the National Park Service.<sup>8</sup> However, the area of the forest that the right-of-way was to be granted over happened to include a section of the Appalachian Trail.<sup>9</sup> Whether the Forest Service had the

1. *ATC History*, APPALACHIAN TRAIL CONSERVANCY, <https://appalachiantrail.org/our-work/about-us/atc-history/> [<https://perma.cc/M6VQ-7T4L>].

2. *See 2,000 Milers*, APPALACHIAN TRAIL CONSERVANCY, <https://appalachiantrail.org/explore/hike-the-a-t/thru-hiking/2000-milers/#:~:text=It's%20estimated%20that%203%20million,have%20been%20recorded%20by%20ATC> [<https://perma.cc/UVL9-HZDV>] [hereinafter *2,000 Milers*].

3. *Id.*

4. *Id.*

5. 140 S. Ct. 1837 (2020).

6. *Id.* at 1841–42.

7. 30 U.S.C. § 185(a)–(b) (stating first that "[r]ights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes" and then defining "Federal lands" as "all lands owned by the United States except lands in the National Park System"); 54 U.S.C. §§ 100102(2), 100501 (defining the "National Park System" as any "area of land and water administered by the Secretary [of the Interior]").

8. *Cowpasture*, 140 S. Ct. at 1842–43.

9. *Id.* at 1841–42.

authority to grant a right-of-way that would cross the Trail proved to be a more contentious inquiry. The parties agreed that, unlike the George Washington National Forest, the Trail *is* administered by the National Park Service, but disagreed about whether the Trail is actually federal “land.”<sup>10</sup> If it is land, then the statutory exception would apply, and the Forest Service would have had no authority to grant the right-of-way permit; if it is not land, then the statutory exception would not apply, making the Forest Service’s grant valid.<sup>11</sup> With the case hinging on whether the Appalachian Trail would be deemed “land,” the Court turned to private easement law to settle the question.<sup>12</sup> In doing so, it characterized the Trail as merely an easement across land, not land itself,<sup>13</sup> and therefore held that the Forest Service was authorized to issue the right-of-way across the Trail.<sup>14</sup>

Following the Supreme Court’s decision in *Cowpasture*, Duke and Dominion announced that they were abandoning the ACP project in the face of ballooning costs and obstinate legal hurdles to obtaining other required permits.<sup>15</sup> The announcement was seen as a major victory for environmental advocates across the Southeast, a boon to regional conservation efforts, and a moment of liberation for the communities of color that lay in the pipeline’s proposed path.<sup>16</sup> However, lurking in the shadows of the ACP’s demise is the inescapable fact that Duke and Dominion won the day in court, and, in the process, the Court set a precedent with dangerous implications for the environment and low-income, minority communities.<sup>17</sup>

This Recent Development argues that, while the ACP’s eventual cancellation was important, the *Cowpasture* Court inappropriately invoked the law of easements to decide the case, thereby simplifying the path to obtaining a right-of-way permit across federal lands. As a result, the Court has put natural spaces and poor communities threatened by the ACP at risk of exploitation by future energy infrastructure projects and failed to deliver environmental justice to these vulnerable populations. Part I of this analysis discusses *Cowpasture*’s relevant facts and holdings and explains several statutes that are central to understanding the issues at play. Part II addresses the Court’s application of

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10. *Id.* at 1844.

11. *Id.*

12. *Id.* at 1844–46.

13. *Id.* at 1846 (concluding that the Department of the Interior has only “an easement for the specified and limited purpose of establishing and administering a Trail, but the land itself remain[s] under the jurisdiction of the Forest Service”).

14. *Id.* at 1850.

15. *Dominion and Duke Energy Abandon Atlantic Coast Pipeline*, S. ENV’T L. CTR., <https://www.southernenvironment.org/news-and-press/news-feed/victory-dominion-and-duke-energy-abandon-atlantic-coast-pipeline> [<https://perma.cc/PEW9-5TA7>] (July 6, 2020) [hereinafter *ACP Pipeline*].

16. *Id.*

17. *See infra* Part III.

the law of private easements in its reasoning and discusses why that application was inappropriate. Part III discusses the implications of the Court's decision for the environment, people of color, and low-income communities.

### I. *U.S. FOREST SERVICE V. COWPASTURE RIVER PRESERVATION ASS'N*

In 2015, Duke Energy and Dominion Energy applied to the Federal Energy Regulatory Commission ("FERC") for approval to build the Atlantic Coast Pipeline, a massive transmission structure that would be used to move natural gas through Appalachia.<sup>18</sup> In 2017, FERC approved the project and the two energy companies set to work securing the permits they needed to begin construction.<sup>19</sup> During the permitting process, Duke and Dominion applied for a permit from the U.S. Forest Service to build the ACP across a sixteen-mile tract of the George Washington National Forest in Virginia.<sup>20</sup> Importantly, the Appalachian Trail runs through George Washington National Forest, and the pipeline's proposed path traversed the Trail.<sup>21</sup> In 2018, the Forest Service issued the requested permit, thereby authorizing Duke and Dominion to build the ACP across George Washington National Forest and the Appalachian Trail.<sup>22</sup>

Following issuance of the permit, a number of environmental stakeholders coalesced to mount a challenge to the pipeline.<sup>23</sup> The legal issues they raised originated out of the jurisdictional intersection of three laws delegating control over various federal lands: the Weeks Act, the National Trails System Act, and the Mineral Leasing Act.<sup>24</sup> Understanding the interplay between these laws is crucial for processing the Court's reasoning and decision.

First is the Weeks Act, which authorizes the Department of Agriculture ("DOA") to acquire land for the National Forest System.<sup>25</sup> The National Forest System has been administered by the U.S. Forest Service, an agency of DOA,

18. *Cowpasture*, 140 S. Ct. at 1841.

19. *FERC Approves Certificate of Public Convenience and Necessity for the ACP*, ATL. COAST PIPELINE (Oct. 13, 2017), <https://atlanticcoastpipeline.com/news/2017/10/13/ferc-approves-certificate-of-public-convenience-and-necessity-for-the-acp.aspx> [<https://perma.cc/DB9G-657N>].

20. *See Cowpasture*, 140 S. Ct. at 1842.

21. *Id.* at 1841–42.

22. *Id.* at 1842.

23. *Id.* Apart from Cowpasture River Preservation Association, the group of stakeholders included Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, the Virginia Wilderness Committee, Wild Virginia, Inc., and the Sierra Club. *Id.* A large number of amici curiae also joined the case to form a united front against the pipeline. *See, e.g.*, Brief for Amici Curiae Natural Resources Defense Council, the Wilderness Society, and Defenders of Wildlife in Support of Respondents at 1, *Cowpasture*, 140 S. Ct. 1837 (Nos. 18-1584 & 18-1587); Brief of the City of Staunton and Nelson County as Amici Curiae in Support of Respondents at 1, *Cowpasture*, 140 S. Ct. 1837 (Nos. 18-1584 & 18-1587).

24. *Cowpasture*, 140 S. Ct. at 1842–43.

25. Pub. L. No. 61-435, § 7, 36 Stat. 961, 962 (1911) (codified as amended at 16 U.S.C. § 516).

since 1905.<sup>26</sup> Because George Washington National Forest was acquired by DOA for the purpose of incorporation into the National Forest System, all parties in *Cowpasture* agreed that it falls squarely under the Forest Service's jurisdiction.<sup>27</sup>

Next is the National Trails System Act (“Trails Act”), which established the National Trail System.<sup>28</sup> The Trail System is a network of scenic and historical trails, including the Appalachian Trail, that is administered by the Department of the Interior (“DOI”).<sup>29</sup> In 1969, DOI delegated control over the Appalachian Trail to one of their primary agencies, the National Park Service, which became responsible for administering the Trail.<sup>30</sup> The Trails Act also gave DOI the authority to set the physical bounds of the Appalachian Trail by entering into right-of-way agreements with landholders to allow the Trail to run across their land.<sup>31</sup> DOI entered into one of these right-of-way agreements with DOA for the Trail to run through the George Washington National Forest.<sup>32</sup>

The final statute is the Mineral Leasing Act, which authorizes the Secretary of the Interior, or the head of any “appropriate agency,” to grant rights-of-way through “federal lands” for “pipeline purposes.”<sup>33</sup> Under the Mineral Leasing Act, the term “federal lands” is defined to include “all lands owned by the United States *except lands in the National Park System.*”<sup>34</sup> The phrase “lands in the National Park System” is defined in yet another statute—the National Park Service Organic Act (“Organic Act”)—as any area of land administered by the National Park Service.<sup>35</sup> Taking these definitions together, the Mineral Leasing Act allows the head of any appropriate agency to grant rights-of-way for pipelines through federal land, as long as that land is not administered by the National Park Service. This means that, in effect, if an area

26. See 16 U.S.C. § 472 (effectuating a transfer of jurisdiction over the National Forest System from the Department of the Interior to the Department of Agriculture).

27. *Cowpasture*, 140 S. Ct. at 1842–43.

28. Pub. L. No. 90-543, § 3, 82 Stat. 919, 919 (1968) (codified as amended at 16 U.S.C. § 1242).

29. 16 U.S.C. § 1244(a).

30. National Wild and Scenic Rivers System and National Trails System: Responsibility for Planning and Operation of Programs and Projects, 34 Fed. Reg. 14,337, 14,337 (Sept. 12, 1969).

31. National Trails System Act § 7(a), (d), (e), 82 Stat. at 922–24 (codified as amended at 16 U.S.C. § 1246(a)(2), (d), (e)).

32. See Appalachian National Scenic Trail: Proposed Route, 36 Fed. Reg. 2676, 2679–80, 2739–41 (Feb. 9, 1971); Appalachian National Scenic Trail: Route Selection, 36 Fed. Reg. 19,802, 19,804–05, 19,864–66 (Oct. 9, 1971).

33. Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, sec. 101, § 28, 87 Stat. 576, 576 (1973) (codified as amended at 30 U.S.C. § 185(a)); see also Mineral Leasing Act, ch. 85, § 28, 41 Stat. 437, 449 (1920) (codified as amended at 30 U.S.C. § 185).

34. Sec. 101, § 28, 87 Stat. at 577 (emphasis added) (codified as amended at 30 U.S.C. § 185(b)(1)).

35. Act of Dec. 19, 2014, Pub. L. No. 113-287, sec. 3, § 100501, 128 Stat. 3094, 3098 (codified at 54 U.S.C. § 100501).

is both (1) federal land and (2) administered by the National Park Service, it is exempt from eligibility for pipeline right-of-way grants under the Mineral Leasing Act.

Before the Fourth Circuit, the environmental stakeholders argued that the Forest Service did not have the authority to issue the permit because the Mineral Leasing Act precludes the grant of a right-of-way over federal land administered by the National Park Service, which, under the Trails Act, includes the Appalachian Trail.<sup>36</sup> Put differently, they contended that the Forest Service did not have the authority to issue the permit to the ACP developers because the Appalachian Trail falls within the Mineral Leasing Act's exemption from eligibility for pipeline right-of-way grants. The Fourth Circuit agreed and overturned the Forest Service's decision to issue the permit,<sup>37</sup> leading Duke and Dominion to petition the Supreme Court for review.<sup>38</sup>

The Supreme Court granted certiorari and vacated the Fourth Circuit's decision, holding instead that the Forest Service *did* have the authority to issue the permit.<sup>39</sup> This holding was based on the Court's conclusion that the Appalachian Trail did *not* fall within the Mineral Leasing Act's exemption because it was not (1) federal land (2) administered by the National Park Service.<sup>40</sup> While the Court admitted that the second element of the exemption was satisfied because the Trails Act expressly grants DOI (and by delegation, the National Park Service) the authority to administer the Trail, it determined that the first element was not satisfied because the Trail is not actually federal "land" at all, but something entirely separate.<sup>41</sup> In other words, the Court made a distinction between trails and land, concluding that "[a] trail is a trail, and land is land."<sup>42</sup> To make that distinction, the Court invoked private easement law,<sup>43</sup> a collection of principles concerned with the creation and scope of easements—"interest[s] in land which grant[] to one person the right to use or enjoy land owned by another."<sup>44</sup>

First, the Court said, the Trails Act gives the National Park Service the ability to set the course of the Trail by entering into right-of-way agreements,

36. *Cowpasture River Pres. Ass'n v. U.S. Forest Serv.*, 911 F.3d 150, 179–81 (4th Cir. 2018), *rev'd*, 140 S. Ct. 1837 (2020).

37. *Id.* at 155.

38. *See* *Petition for Writ of Certiorari, U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837 (2020) (No. 18-1587); *see also* *Petition for Writ of Certiorari, Cowpasture*, 140 S. Ct. 1837 (No. 18-1584).

39. *Cowpasture*, 140 S. Ct. at 1850 (holding that "the land over which the Trail passes" is not "land within the National Park System," and "[a]ccordingly, the Forest Service had the authority to issue the permit").

40. *See id.*

41. *Id.* at 1846.

42. *Id.*

43. *Id.* at 1844–46.

44. *Com. Wharf E. Condo. Ass'n v. Waterfront Parking Corp.*, 552 N.E.2d 66, 73 (Mass. 1990).

which are merely a type of easement.<sup>45</sup> Thus, when DOA granted DOI a right-of-way for the Trail through George Washington National Forest, it was merely granting an easement.<sup>46</sup> Consequently, DOA maintained jurisdiction over the actual land on which the Trail would run because, while a right-of-way easement allows the easement holder to *use* the land in question, it does not grant *ownership* over that land.<sup>47</sup> By this reasoning, the Appalachian Trail is only an easement and is distinct from the land on which the easement sits.<sup>48</sup>

Because the Trail is only an easement, the Court explained, the Trails Act—which gives the National Park Service the authority to administer the Trail—really only gives the authority to administer an easement for the Trail.<sup>49</sup> The land on which the Trail sits (the George Washington National Forest) remains under the jurisdiction of the landholder (the U.S. Forest Service) who is free to use that land as it wishes.<sup>50</sup> To hammer home its point, the Court analogized the situation at hand to two private landowners who have an agreement for a right-of-way easement:

If a rancher granted a neighbor an easement across his land for a horse trail, no one would think that the rancher had conveyed ownership over that land. Nor would anyone think that the rancher had ceded his own right to use his land in other ways, including by running a water line underneath the trail that connects to his house. He could, however, make the easement grantee responsible for administering the easement apart from the land. Likewise, when a company obtains a right-of-way to lay a segment of pipeline through a private owner's land, no one would think that the company had obtained ownership over the land through which the pipeline passes.<sup>51</sup>

On these grounds, the Court concluded that the Appalachian Trail is not *land* administered by the National Park Service because it is, in effect, only an *easement* administered by the National Park Service. Therefore, the Forest Service has jurisdiction over the land in the George Washington National Forest on which the Trail sits and was within its authority to issue a right-of-way for a pipeline across that land.<sup>52</sup>

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45. *Cowpasture*, 140 S. Ct. at 1844.

46. *Id.* at 1845–46.

47. *Id.*

48. *Id.*

49. *Id.* at 1846–47.

50. *Id.* at 1846.

51. *Id.* at 1845.

52. *Id.* at 1850.

## II. MISAPPLICATION OF EASEMENT LAW

As is evident from the discussion above, the Court relied heavily on private easement law in reaching its conclusion that the Appalachian Trail is not land. This reliance was inappropriate because, put bluntly, the law of easements was not applicable to the situation at hand for several reasons. First, the easement principles applied by the *Cowpasture* Court are tenets of state law meant to govern disputes between private actors.<sup>53</sup> In fact, when describing the easement principles that were dispositive in this case, the Court cited exclusively to state court decisions and secondary sources.<sup>54</sup> These legal principles were not developed to cover disputes involving public, federally owned land and thus should not have been applied here.<sup>55</sup> While private law is certainly appropriate for deciding land disputes between private actors, the Court offered no reason as to why the congressional intent evident in the three federal statutes outlined above should not be controlling in a situation involving public lands. In fact, the Court has held on numerous occasions that, when it is attempting to discern the will of Congress as expressed through statutes, it must first look to the text of the statutes,<sup>56</sup> rather than “work[ing] backwards from state law” as it did here.<sup>57</sup>

The Court clearly understood these concerns about the applicability of the law of easements because it directly responded to them in the opinion:

Although the Federal Government owns all lands involved here, the same general principles apply . . . . The Trails Act refers to the

53. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) (“This Court has consistently held that state law governs issues relating to this property, like other real property, unless some other principle of federal law requires a different result.”); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 604 (1974) (“[T]he definition of property rights is a matter of state law.”); *see also* *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (“Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”); *Tyler v. United States*, 281 U.S. 497, 502 (1930) (stating that the court was bound to follow decisions by Maryland and Pennsylvania state courts to adopt common law property rules).

54. *Cowpasture*, 140 S. Ct. at 1844–46 (citing, among others, *Kelly v. Rainelle Coal Co.*, 64 S.E.2d 606 (W. Va. 1951); *Builders Supplies Co. of Goldsboro v. Gainey*, 282 N.C. 261, 192 S.E.2d 449 (1972); *Bunn v. Offutt*, 222 S.E.2d 522 (Va. 1976); *Barnard v. Gaumer*, 361 P.2d 778 (Colo. 1961); *Minneapolis Athletic Club v. Cohler*, 177 N.W.2d 786 (Minn. 1970); *Carnemella v. Sadowy*, 538 N.Y.S.2d 96 (App. Div. 1989); *Sorrell v. Tenn. Gas Transmission Co.*, 314 S.W.2d 193 (Ky. 1958); *Right of Way*, BLACK’S LAW DICTIONARY (4th ed. 1968); RICHARD R. POWELL & PATRICK J. ROHAN, REAL PROPERTY § 405 (1968)).

55. *Id.* at 1856 (Sotomayor, J., dissenting) (“[I]t makes little sense to ask whether the Government granted itself an easement over its own land under state-law principles. Between agencies of the Federal Government, federal statutory commands, not private-law analogies, govern.”).

56. *See, e.g.*, *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (“As in all such cases [of statutory construction], we begin by analyzing the statutory language.”); *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (“Statutory construction must begin with the language employed by Congress.”).

57. *Cowpasture*, 140 S. Ct. at 1856 n.9 (Sotomayor, J., dissenting).

granted interests as “rights-of-way,” both when describing agreements with the Federal Government and with private and state property owners. When applied to a private or state property owner, “right-of-way” would carry its ordinary meaning of a limited right to enjoy another’s land. Nothing in the statute suggests that the term adopts a more expansive meaning when the right is granted to a federal agency.<sup>58</sup>

It is incorrect, however, to say that Congress failed to provide statutory evidence showing that it did not want the Appalachian Trail to be characterized as an easement. In fact, Congress has indicated repeatedly that the National Park Service does not merely hold an easement for the Appalachian Trail but controls the land on which the Trail resides. For one, the Organic Act defines the National Park System as “any area of land” that is “administered” by the Park Service.<sup>59</sup> The Trails Act then states that the Appalachian Trail “shall be administered” by the Park Service, which shall “provide for the development and maintenance” of the Trail.<sup>60</sup> Taken together, these statutes indicate that Congress intended for the Trail to be considered land—not an easement—administered by the Park Service for the purposes of the Mineral Leasing Act.

If, as the Court suggests, these statutes merely grant the Park Service control over an easement for the Trail, then the question follows: How can the Park Service fulfill its duty to administer the Trail and provide for its maintenance without also controlling the land on which it sits? The Court talked around this issue by arguing that, because the Forest Service typically performs physical work along the Trail (such as removing fallen trees), the Park Service is fully capable of administering the Trail without having control over the land.<sup>61</sup> But that response does not fully answer the question. Even if the Forest Service typically performs physical work along the Trail, how can the Park Service “designat[e] Trail uses [and] provid[e] Trail markers,” physically “establish[] interpretative and informational sites” along the Trail’s path, and promulgate informed regulations for the Trail’s “protection, management, development, and administration” if the agency has no authority over the land on which the Trail sits?<sup>62</sup> The Court offered no real answer.<sup>63</sup>

58. *Id.* at 1845 (majority opinion).

59. Act of Dec. 19, 2014, Pub. L. No. 113-287, sec. 3, §§ 100102(2), 100501, 128 Stat. 3094, 3097–98 (codified at 54 U.S.C. §§ 100102(2), 100501).

60. Pub. L. No. 90-543, §§ 5(a)(1), 7(h), 82 Stat. 919, 920, 924 (1968) (codified as amended at 16 U.S.C. §§ 1244(a)(1), 1246(h)(1)).

61. *Cowpasture*, 140 S. Ct. at 1846–47.

62. *Id.* at 1846.

63. *Id.* at 1856 (Sotomayor, J., dissenting) (“Despite recognizing that the Park Service ‘administers the Trail,’ the Court insists that this administration excludes ‘the underlying land’ constituting the Trail. But the Court does not disclose how the Park Service could administer the Trail without administering the land that forms it.” (emphasis omitted) (citation omitted)).

Congress's desire for the Appalachian Trail to be considered land is further evidenced by the government's treatment of the Trail in the wake of the Organic Act and Trails Act. The Trail is frequently labeled as a "unit" of the National Park System,<sup>64</sup> which is, by statutory definition, either land or water.<sup>65</sup> That means that, "[u]nless the Court means to imply that the Appalachian Trail is water, the Trail must be land."<sup>66</sup> Additionally, when delegating administrative authority over the Trail, the Interior Secretary characterized the Park Service as the Trail's "land administering bureau."<sup>67</sup> The Park Service also considers the Trail to be land within its jurisdiction, describing the Trail as a "land protection project" and listing it alongside other "park base units."<sup>68</sup> To top things off, the government itself asserted in a lawsuit that a portion of the Trail running through a national forest was land within the National Parks System.<sup>69</sup>

However, suppose arguing that the Court was correct in finding no evidence that Congress intended the Trail to fall outside the scope of private easement law and that private easement law should therefore apply. Even if that were the case, the Court *still* failed to reach the correct result. First, an easement is, by definition, "an interest in land in the possession of another."<sup>70</sup> By necessity, the easement grantee is (1) a separate party from the easement grantor and (2) not the owner of the land over which the easement is granted.<sup>71</sup> Here, neither of these elements are present. The two parties involved—the U.S. Forest Service and the National Park Service—are not separate entities at all; they are both branches of one singular entity—the U.S. government—which

64. NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, THE NATIONAL PARKS: INDEX 2012–2016, at 142 (2016) [hereinafter NPS INDEX], <https://www.nps.gov/aboutus/upload/NPIndex2012-2016.pdf> [https://perma.cc/EJN3-HTGZ] (labelling the Appalachian Trail a "unit of the National Park System").

65. 54 U.S.C. § 100102(2) ("The term 'National Park System' means the areas of land and water described in section 100501 of this title.").

66. *Cowpasture*, 140 S. Ct. at 1856 (Sotomayor, J., dissenting).

67. National Wild and Scenic Rivers System and National Trails System: Responsibility for Planning and Operation of Programs and Projects, 34 Fed. Reg. 14,337, 14,337 (Sept. 12, 1969).

68. See NPS INDEX, *supra* note 64; NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, NATIONAL TRAILS SYSTEM: REFERENCE MANUAL 45, at 221 (2019), <https://www.nps.gov/subjects/nationaltrailssystem/upload/Reference-Manual-45-National-Trails-System-Final-Draft-2019.pdf> [https://perma.cc/652F-52LN]; NAT'L PARK SERV., DEP'T OF THE INTERIOR, NATIONAL PARK SERVICE: BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION FISCAL YEAR 2020, at ONPS-89 (2020), <https://www.doi.gov/sites/doi.gov/files/fy2020-nps-justification.pdf> [https://perma.cc/27AB-SAUZ].

69. *Cowpasture*, 140 S. Ct. at 1855 (Sotomayor, J., dissenting).

70. RESTATEMENT (FIRST) OF PROPERTY § 450 (AM. L. INST. 1944).

71. See *id.*

owns all of the land involved.<sup>72</sup> Consequently, the Court's application of easement law in *Cowpasture* raises the question: how can a landholder grant herself an easement over her own land? Since, as the Court correctly noted, an easement does not equate to land ownership,<sup>73</sup> how can a landholder both own her land and hold an easement over it at the same time? The simple answer is that she cannot.<sup>74</sup>

The Court's result is also incorrect because an easement can only be granted by the owner of the land that will be burdened by the easement.<sup>75</sup> Here, the Trails Act gives the National Park Service the authority to grant rights-of-way across any part of the National Trails System,<sup>76</sup> which indicates that the Park Service must have jurisdiction over the Trail land. Without such jurisdiction, the Park Service would not be capable of granting an easement across that land.

The Court attempted to refute this point by stating that an easement holder and grantor can simultaneously utilize the same portion of land, thereby implying that an easement holder can grant another easement over the land burdened by the original easement despite not owning that land.<sup>77</sup> This response, while true in some respects, does not adequately address the argument raised. Yes, an easement holder can use the land *as permitted by the easement* at the same time as the easement grantor.<sup>78</sup> An easement holder cannot, however, use the land in such a way as to *exercise the incidents of land ownership*—including granting rights-of-way across the land—simultaneously with the easement grantor.<sup>79</sup> In other words, just because an easement holder and grantor can use the easement at the same time does not mean that the easement holder and

72. *Cowpasture*, 140 S. Ct. at 1845. While federal agencies are distinct legal beings, they are merely responsible for managing the land owned by the federal government collectively and are not distinct landowning entities themselves apart from the federal government. See *San Juan Citizens All. v. Norton*, 586 F. Supp. 2d 1270, 1281 (D.N.M. 2008) (defining public lands as “lands owned by the United States and administered by the Secretary of the Interior” (emphasis added)); *Adams v. United States*, 255 F.3d 787, 790, 793 (9th Cir. 2001) (explaining that while “[t]he Forest Service manages Forest System lands,” those lands remain “federally owned”).

73. RESTATEMENT (FIRST) OF PROPERTY § 450(a) cmt. b (stating that an easement only entitles the easement holder to “a limited use or enjoyment of the land,” and that “a person who has a way over land has only such control of the land as is necessary to enable him to use his way”).

74. *Id.* § 450(d) cmt. d (explaining that an easement is not a normal incident of land ownership, and that “one may not have an easement in land in his own possession”).

75. *Id.*; see also *Cowpasture*, 140 S. Ct. at 1844 (“Thus, it was, and is, elementary that the grantor of the easement retains ownership over ‘the land itself.’” (emphasis added) (quoting *Minneapolis Athletic Club v. Cohler*, 177 N.W.2d 786, 789 (Minn. 1970))).

76. Pub. L. No. 90-543, § 9(a), 82 Stat. 919, 925 (1968) (codified at 16 U.S.C. § 1248(a)) (“The Secretary of the Interior . . . may grant easements and rights-of-way upon, over, under, across, or along any component of the national trails system in accordance with the laws applicable to the national park system.”).

77. *Cowpasture*, 140 S. Ct. at 1845 n.3.

78. See RESTATEMENT (FIRST) OF PROPERTY § 450 cmt. b.

79. See *id.* § 450(a), (b), cmt. b, cmt. d.

grantor can engage in *any* use of the easement at the same time. Some land rights, like the ability to grant a right-of-way, only come with land ownership and thus cannot be exercised by a landowner and easement holder at the same time.<sup>80</sup>

If, as the Court implies, an easement holder can grant secondary easements across their own easement, then they could do so contrary to the desires of the actual owner of the land—the original easement grantor. To illustrate this problem, suppose a landholder grants a right-of-way easement across her yard for a neighbor to take his lone horse to a stream for water. The landholder felt compelled to help her neighbor since the stream is the only accessible water source in the area. At the same time, she wants to keep her yard in good condition and only agreed to the easement because the neighbor has just the one horse. Subsequently, the neighbor grants easements over his easement to all of his friends to take their cattle to the stream for water. The large herds of cattle will degrade the landholder's yard against her wishes, but under *Cowpasture's* conception of easements, she has no ability to stop the neighbor from granting additional easements over her land. In this same way, the Forest Service could grant the Park Service an easement for the Appalachian Trail, at which point the Park Service could, pursuant to its Trails Act authority, issue an easement over the Appalachian Trail to the detriment of the Forest Service, which the Court claims has jurisdiction over the land.

Finally, and perhaps most indicative of the Court's error in reasoning, is the simple fact that the conclusion produced by applying private easement law—that the Appalachian Trail is not "land"—runs contrary to the common sense understanding of what "land" is. *Merriam-Webster* defines "land" as "the solid part of the surface of the earth."<sup>81</sup> The Appalachian Trail physically consists of a narrow "part of the surface of the earth" running over 2,000 miles,<sup>82</sup> and because the Trail is clearly not a body of water, it is most certainly "solid." The Trail is land by necessity because without land there could be no Trail. The Trail and the land are one and the same, and it confounds common sense to characterize the Trail as simply an easement hovering on the surface of the earth.

The Court's flawed reasoning and its foray into the law of private property also has troubling implications for the foundational property law distinction between real property and personal property. Real property is land and

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80. *Id.*

81. *Land*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/land> [<https://perma.cc/BD5Q-QEA8>].

82. *See 2,000 Milers*, *supra* note 2.

anything fixed, annexed, or attached to land.<sup>83</sup> Real property is contrasted by personal property, which is any movable property.<sup>84</sup> By these definitions, a trail is a piece of real property because it itself is land, or at the very least, is fixed to land. But under *Cowpasture*, the Appalachian Trail is an easement—which is merely a nonpossessory real property interest<sup>85</sup>—rather than real property itself. This begs the question: if the Appalachian Trail, inextricably fixed to the physical surface of the earth, is not a piece of real property, then what makes a house, with foundations embedded into the ground, real property? If the Trail can be characterized as an easement sitting on top of land, but not land itself, why can a house not be characterized as personal property sitting on top of real property, without being real property itself? Prior to *Cowpasture*, there were few questions about where the line between real property and personal property was drawn. Many will now be questioning where that line falls.

### III. ENVIRONMENTAL JUSTICE IMPLICATIONS

It is against the backdrop of the Court's misapplication of private easement law that its failure to deliver environmental justice becomes apparent. In short, by upholding the Forest Service's right-of-way grant to Duke and Dominion, the Court has established precedent that will make it easier for energy developers to obtain similar permits in the future. More specifically, by ruling in favor of the Forest Service, the Court has foreclosed the argument raised by environmental stakeholders: that pipeline rights-of-way granted across trails in the National Trails System violate the Mineral Leasing Act.

While the foreclosure of a losing argument may seem to be a mere byproduct of the American system of *stare decisis*, it is hugely important to keep open as many avenues for a legal challenge as possible when dealing with actions like pipeline construction that severely harm the environment.<sup>86</sup> After all, legal hurdles blocking the ability to obtain required permits were a key reason that Duke and Dominion ultimately decided to abandon the ACP.<sup>87</sup> Unfortunately, the argument *Cowpasture* foreclosed could have been a particularly useful one for environmental advocates across the country given the sheer size of the scenic and historic trails in the National Trails System, which stretches over 60,600 miles and crosses 90 national forests, 80 national parks,

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83. See RESTATEMENT (FIRST) OF PROPERTY § 8 (AM. L. INST. 1936).

84. *Id.* § 8 cmt. c.

85. RESTATEMENT (FIRST) OF PROPERTY § 450 cmt. b (AM. L. INST. 1944).

86. A. Tomareva, E. Yu Kozlovtsseva & V.A. Perfilov, *Impact of Pipeline Construction on Air Environment*, 262 IOP CONF. SERIES, 2017, at 1, 1.

87. See *ACP Pipeline*, *supra* note 15.

70 wildlife refuges, and 123 wilderness areas.<sup>88</sup> Following *Cowpasture*, however, the U.S. Forest Service—and for that matter, any other “appropriate agency” under the Mineral Leasing Act—can freely grant pipeline rights-of-way over these trails knowing they are safe from at least one well-supported legal challenge against them.

This simplified pathway to pipeline permits on federal lands will, in turn, result in more pipelines reaching the construction phase of development—an activity that disproportionately harms both the environment and low-income communities of color.<sup>89</sup> First, more infrastructure development means more trenches will be dug to bury pipelines, more trees will be cleared to make way for the trenches, and more construction equipment will be brought in to accomplish these tasks.<sup>90</sup> These practices will cause more greenhouse gas emissions, more light pollution, more sound pollution, more habitat destruction, and will disturb the pieces of land on which the Appalachian Trail and other national trails reside.<sup>91</sup>

While these environmental harms are undesirable in and of themselves, they also subvert the express purpose of both the National Trails System and the National Park System: conservation. Under the Trails Act, the National Park Service is to administer the National Trails System to “provide for maximum outdoor recreation potential and for the *conservation and enjoyment* of nationally significant scenic, historic, natural or cultural qualities.”<sup>92</sup> Likewise, under the Organic Act, the National Park System is meant to “*conserve* the scenery, natural and historic objects, and wild life in the [Park System] and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”<sup>93</sup> The Park Service itself seems to understand this purpose, stating its mission as “*conserving* unimpaired the natural and

88. MARK K. DESANTIS & SANDRA L. JOHNSON, CONG. RSCH. SERV., R43868, THE NATIONAL TRAILS SYSTEM: A BRIEF OVERVIEW 2 (2020), <https://sgp.fas.org/crs/misc/R43868.pdf> [<https://perma.cc/AYH8-JEHV>]; *America’s National Trails System*, PAC. CREST TRAIL ASS’N, <https://www.pcta.org/our-work/national-trails-system/> [<https://perma.cc/67DX-QSZH>].

89. Ryan E. Emanuel, Martina A. Caretta, Louie Rivers III & Pavithra Vasudevan, *Natural Gas Gathering and Transmission Pipelines and Social Vulnerability in the United States*, 5 GEOHEALTH, June 2021, at 1, 9 (finding that “the existing network of natural gas pipelines in the US is concentrated more heavily in counties where people experience high levels of social vulnerability than in counties where social vulnerability is lower”).

90. *See* U.S. Forest Serv. v. Cowpasture River Pres. Ass’n, 140 S. Ct. 1837, 1851 (2020) (Sotomayor, J., dissenting).

91. *See* Tomareva et al., *supra* note 86, at 1.

92. Pub. L. No. 90-543, § 3(b), 82 Stat. 919, 919 (1968) (emphasis added) (codified at 16 U.S.C. § 1242(a)(2)).

93. Act of Dec. 19, 2014, Pub. L. No. 113-287, sec. 3, § 100101, 128 Stat. 3094, 3096 (emphasis added) (codified at 54 U.S.C. § 100101(a)).

cultural resources and values of the National Park System.<sup>94</sup> Under the Supreme Court's decision in *Cowpasture*, these conservation efforts on federal lands will be undermined by increased energy infrastructure development.

The increase in infrastructure development will also have significant consequences on low-income communities of color. Pipelines are traditionally built through vulnerable communities because it is both cheaper and more politically achievable than building in more affluent communities whose residents are better able to organize against pipeline projects.<sup>95</sup> In that sense, low-income communities whose residents are mostly people of color are easy targets for energy infrastructure developers.<sup>96</sup> Because pipelines are disproportionately built through vulnerable communities, the environmental burdens that result from pipeline construction are disproportionately borne by these communities.<sup>97</sup> These burdens include increased truck noise and traffic as well as greater exposure to airborne pollutants emitted by construction equipment.<sup>98</sup> And the problems do not end once construction is complete. Once the construction equipment has been hauled away, the vulnerable populations must still bear the risk of the pipeline leaking into the soil and local water supply,<sup>99</sup> the risk of explosions, decreased property values in land adjacent to the pipeline, lost use of the land burdened by the pipeline, and lasting destruction to natural spaces, which may have cultural, religious, or historical significance.<sup>100</sup> When the ACP was cancelled, many low-income communities of color in the pipeline's proposed path were freed from these burdens.<sup>101</sup> With its decision in *Cowpasture*, the Court ensured that these and other similarly

94. *Our Mission, Role and Purpose*, NAT'L PARK SERV., <https://www.nps.gov/orgs/1955/our-mission-and-role.htm> [<https://perma.cc/BK6B-KV4P>] (Mar. 24, 2017) (emphasis added).

95. See *How Pipelines Fuel Climate Injustice*, CLIMATE REALITY PROJECT (Oct. 1, 2019, 8:00 AM), <https://climaterealityproject.org/blog/how-pipelines-fuel-climate-injustice> [<https://perma.cc/VTL7-WJEN>].

96. Emanuel et al., *supra* note 89, at 6.

97. *Id.* at 2 (stating that “oil and gas infrastructure pose direct risks to nearby communities” and that “individual pipeline projects can place disproportionately high and adverse burdens on racially marginalized and low-wealth communities relative to reference populations in the regions surrounding these projects”).

98. See *id.* at 9; Tomareva et al., *supra* note 86, at 6.

99. Richard Stover, *America's Dangerous Pipelines*, CTR. FOR BIOLOGICAL DIVERSITY, [http://www.biologicaldiversity.org/campaigns/americas\\_dangerous\\_pipelines/](http://www.biologicaldiversity.org/campaigns/americas_dangerous_pipelines/) [<https://perma.cc/487C-ZTH4>] (showing that, from 1986 to 2013, the oil and gas industry demonstrated “a troubling history of spills, contamination, injuries and deaths” that included over 500 deaths and 2,300 injuries spanning 8,000 unique incidents).

100. Emanuel et al., *supra* note 89, at 7.

101. The community of Union Hill, in particular, had long been united in opposition to the pipeline siting in its community. *Court Delivers Win for Union Hill Residents over Atlantic Coast Pipeline*, S. ENV'T L. CTR. (Jan. 7, 2020), <https://www.southernenvironment.org/news-and-press/news-feed/court-delivers-win-for-union-hill-citizens-over-atlantic-coast-pipeline> [<https://perma.cc/4BSN-LX89>].

situated communities will continue to face the risk of exploitation by energy infrastructure developers in the future.

#### CONCLUSION

The cancellation of the ACP was a major victory for environmentalists across the Southeast, but its importance must be qualified. The *Cowpasture* Court's holding—that the Appalachian Trail is merely an easement administered by the National Park Service—represents a triumph for energy developers across the country. This holding was only reached through an inappropriate invocation of private easement law in the face of clear statutory language and government practice indicating that the Trail is in fact “land” administered by the Park Service. Under those controlling texts, the Forest Service should have been precluded from issuing the right-of-way permit to Duke and Dominion. However, even if the Court was right in turning to private easement law to decide a dispute involving public, government-owned land, it still failed to apply those principles correctly—a mistake that both produced an erroneous outcome in the case and raises several troubling questions for the future of property law.

The true harm of the *Cowpasture* decision, however, will not fall on property law professors or Park Service administrators. Instead, it will fall on the environment and low-income communities of color who benefited the most from the ACP's demise. These groups will face an even greater risk of exploitation at the hands of future energy infrastructure projects, which will multiply now that a major legal obstacle has been cleared from the permitting path. In that way, the Court's *Cowpasture* decision has put society's most vulnerable communities and natural spaces at risk and thereby failed to deliver environmental justice.

This is not to say that all hope is lost. The ACP was never completed because Duke and Dominion feared the prospect of further legal challenges to the permits they needed to build the pipeline.<sup>102</sup> Environmental protection and environmental justice have gained traction on the national stage in recent years.<sup>103</sup> And there are still dedicated litigators working diligently to represent the interests of the natural spaces and vulnerable communities threatened by energy infrastructure development. There is solace to be taken from these

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102. See *supra* note 15 and accompanying text.

103. See Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL (Mar. 17, 2016), <https://www.nrdc.org/stories/environmental-justice-movement> [<https://perma.cc/WQ34-TB2G>] (explaining the growth of the environmental justice movement following the signing of Executive Order 12898 by President Clinton); Press Release, Appalachian Trail Conservancy, “Scenic Trail Viewshed Protection Act” Introduced in Congress (July 30, 2020), <https://appalachiantrail.org/news/scenic-trail-viewshed-protection-act-introduced-in-congress/> [<http://perma.cc/3UCW-ZG5W>] (outlining a bill that would require “stricter evaluation of natural gas pipeline projects that seek to cross [national scenic] trails or their surrounding viewsheds”).

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truths. What is clear, though, is that with the Supreme Court’s conclusion that the Appalachian Trail is not “land,” advocates across the country have lost ground in the fight to secure an environmentally just future for all.

WILLIAM W. METCALF\*\*

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