

UNHAPPY TRAILS: LEASING AUTHORITY AND THE TRAILS ACT, *U.S. FOREST SERVICE V. COWPASTURE RIVER PRESERVATION ASSOCIATION* (2020)

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INTRODUCTION

The federal government owns over a quarter of the land in the United States.¹ This vast region is managed by several entities, with the Bureau of Land Management (“BLM”), the Forest Service (“FS”), and the National Park Service (“NPS”) all managing millions of acres of land.² In addition to administering parks, the NPS administers land under eighteen other designations, including National Battlefields, National Monuments, and National Scenic Trails.³ Unlike the FS and BLM,⁴ the NPS does not support industrial development; rather, its goal is to “preserve unimpaired the natural and cultural resources and values of the national park system.”⁵ Because Park Service land is

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1. CAROL HARDY VINCENT ET AL., CONG. RSCH. SERV., R42345, FEDERAL LAND OWNERSHIP 1 (2020), <https://perma.cc/ZD8X-2PD5>.

2. *Id.*

3. *National Park System*, NAT’L PARK SERV., <https://perma.cc/L87M-LSLP>.

4. *See About the Agency*, U.S. FOREST SERV., <https://perma.cc/BP4B-8QPH> (“We balance the short-term and long-term needs of people and nature”); *Who We Are, What We Do*, U.S. BUREAU OF LAND MGMT., <https://perma.cc/CFC4-DSXN> (“Congress tasked the BLM with a mandate of managing public lands for a variety of uses such as energy development, livestock grazing, recreation, and timber harvesting while ensuring natural, cultural, and historic resources are maintained for present and future use.”).

5. *About the National Park Service*, NAT’L PARK SERV., <https://perma.cc/LKD4-JCYT>. *See also* 54 U.S.C. § 100101 (describing the NPS’s mission to “conserve the scenery, natural and historic objects, and wild life in the System units 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.”).

not considered “multiple-use,”⁶ pipelines and other energy development projects are generally not permitted on or under the National Park System.⁷

The Atlantic Coast Pipeline (“ACP”) was a project proposed by the utilities Dominion Energy and Duke Energy that would have sent 1.5 billion cubic feet of natural gas per day over six hundred miles from West Virginia to Virginia and North Carolina.⁸ The companies canceled the project in July 2020,⁹ but not before the Supreme Court handed down a ruling that would greatly affect the NPS, the FS, and public land management writ large: *U.S. Forest Service v. Cowpasture River Preservation Association*.¹⁰ Part of the ACP would have run through FS land in the George Washington and Jefferson National Forests under a Special Use Permit (“SUP”), as authorized by federal law.¹¹ In doing so, the pipeline would have run under the Appalachian National Scenic Trail (“ANST”), which NPS administers through delegation by the Secretary of the Interior under the National Trails System Act of 1968 (“Trails Act”).¹²

In *Cowpasture*, the Supreme Court held that the portions of the ANST running over FS land constituted easements, rather than land administered by the NPS, and therefore the land remained under the management of the FS and subject to the National Forest System’s resource development and extraction rules.¹³ The Court applied “basic property principles” in light of the statutory scheme created by the intersection of the Mineral Leasing Act¹⁴ (“MLA”), the Trails Act, and the Park Service Organic Act¹⁵ to come to this conclusion, despite no mention of easements in any of those statutes regarding the ANST.¹⁶

This Comment argues that, in *Cowpasture*, the Supreme Court departed from its longstanding attitude of reluctance toward the promulgation of federal

6. The NPS has a dual mission of preserving the parks and allowing recreation; however, it is not considered “multiple-use land” the way land managed by BLM and the FS is. *See Multiple Use Lands*, U.S. DEP’T OF JUST., <https://perma.cc/RC2K-QEFP>.

7. *See* 30 U.S.C. § 185 (excluding NPS lands from the definition of “Federal lands” for the purposes of pipeline rights-of-way); *see also* *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1843 (2020).

8. Jonathan Mingle, *How Overreach by Trump Administration Derailed Big Pipeline Projects*, *YALE ENV’T* 360 (July 15, 2020), <https://perma.cc/M37R-DEJP>.

9. Ivan Penn, *Atlantic Coast Pipeline Canceled as Delays and Costs Mount*, *N.Y. TIMES* (July 5, 2020), <https://perma.cc/6MVK-7BJX>.

10. 140 S. Ct. 1837 (2020).

11. *Id.* at 1841–1842; *see also* 30 U.S.C. § 185(a).

12. 16 U.S.C. §§ 1241–1251 (establishing the National Trails System); *see also* National Wild and Scenic Rivers System and National Trails System, 34 Fed. Reg. 14,337 (Sept. 12, 1969) (delegating administrative authority over the National Trails System to the NPS).

13. *See Cowpasture*, 140 S. Ct. at 1846.

14. 30 U.S.C. §§ 181–263.

15. Pub. L. No. 64–235, 39 Stat. 535 (1916) (current version at 54 U.S.C. §§ 100101, 100301–100303, 100751–100753, 102101).

16. *Cowpasture*, 140 S. Ct. at 1846.

common law. They did so by holding that in the resolution of property management and administration questions between two federal agencies, the agencies can be treated as private parties subject to common law property principles. *Cowpasture* thus unnecessarily departs from the structures of the interlocking statutes to resolve the dispute. Part I summarizes the case and its majority opinion and dissent. Part II discusses how the holding is typical of a federal common law decision, despite the majority's indication that its analysis was simple statutory interpretation.¹⁷ Part III argues that the reliance on common law property decisions and the holding itself depart from the Supreme Court's previous jurisprudence, particularly in regards to treating agencies as private parties under the common law.

I. STATUTORY BACKGROUND AND CASE SUMMARY

The National Park Service Organic Act of 1916 created the NPS to “regulate the use of Federal areas known as national parks . . . to conserve the scenery and natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”¹⁸ Under the Organic Act, the NPS had “supervision, management, and control” of the national parks and national monuments then controlled by the Department of the Interior.¹⁹ Four years later, the MLA was passed, allowing the Secretary of the Interior to authorize private parties to build pipelines “through public lands, including the forest reserves.”²⁰ In 1970, Congress clarified the definition of the National Park System in an amendment to the National Park Service Organic Act to be “any area of *land and water administered* by the Secretary, acting through the Director, for park, monument, historic, parkway, recreational, or other purposes.”²¹ The Mineral Leasing Act Amendments of 1973²² (“MLA Amendments”) allowed other agency heads, including the Secretary of Agriculture, to approve pipelines on federal lands. However, the MLA Amendments excluded from their definition of “federal lands” all lands in the National Park System.²³

The Trails Act created the National Trail System, including the ANST, in 1968 and delegated authority to the Secretaries of the Interior and Agriculture

17. *See id.* at 1845 (“In sum, read in light of basic property law principles, the plain language of the Trails Act and the agreement between the two agencies did not divest the Forest Service of jurisdiction over the lands that the Trail crosses.”).

18. National Park Service Organic Act § 1 (current version at 54 U.S.C. § 100101(a)).

19. *Id.* § 2 (current version at 54 U.S.C. § 100302(a)(3)).

20. Mineral Leasing Act, Pub. L. No. 66-146, § 28, 41 Stat. 449 (1920) (codified as amended at 30 U.S.C. § 185).

21. Pub. L. No. 91-383, § 2(b), 84 Stat. 825, 826 (1970) (codified at 54 U.S.C. § 100501) (emphasis added).

22. Pub. L. No. 93-153, § 101, 87 Stat. 576 (1973) (codified at 30 U.S.C. § 185).

23. *Id.* (codified at 30 U.S.C. § 185(b)(1)).

to administer the trails.²⁴ Three of the trails in the system, the ANST, the Natchez Trace National Scenic Trail, and the Potomac Heritage National Scenic Trail are administered as park units, while the other twenty-seven trails administered by the NPS are considered “related areas,” rather than park units.²⁵ The ANST was to “be administered primarily as a footpath by the Secretary of the Interior.”²⁶ Subsection 1246(i) of the Trails Act allows the Secretary of the Interior to utilize authorities related to units of the national park system in *administration* of the trails,²⁷ and the Secretary of the Interior delegated administrative authority over the trails to the NPS in 1969.²⁸ Subsection 1246(a) of the Act states that the National Trails System Act will not be construed to transfer *management* responsibilities established under other federal law for federally administered lands that are components of the National Trails System.²⁹ However, the Trails Act does provide that the Secretary of the Interior may grant easements under components of the National Trails System, indicating that the Secretary of the Interior has at least some jurisdiction over the land itself.³⁰ The Trails Act also allows the Secretary of the Interior to establish the location of the ANST by entering into right-of-way agreements where the trail crosses private lands.³¹

In 2017, the FS issued a SUP for the ACP authorizing construction through the George Washington National Forest and Monongahela National Forest.³² The statement by the FS noted that the pipeline would disturb 430 acres of National Forest System land during construction and 214 acres permanently.³³ The pipeline would have crossed under the ANST where the trail crosses the George Washington National Forest.³⁴ Because the trail runs from Georgia to Maine, the pipeline arguably had no alternative path to effectively

24. National Trails System Act, Pub. L. No. 90-543, 82 Stat. 919 (codified at 16 U.S.C. §§ 1241–1251).

25. NAT'L PARK SERV., *supra* note 3.

26. 16 U.S.C. § 1244(a)(1).

27. *Id.* § 1246(i) (emphasis added).

28. National Wild and Scenic Rivers System and National Trails System, 34 Fed. Reg. 14,337 (Sept. 12, 1969).

29. 16 U.S.C. § 1246(a) (emphasis added). This authority to grant easements does not, however, supersede the MLA's exclusion of NPS lands from the federal lands where authorization for pipelines may be granted.

30. *Id.* § 1248(a).

31. *Id.* § 1246(a)(2), (d)–(e).

32. Press Release, U.S. Forest Serv., USDA Forest Service Issues Final Decision to Permit the Atlantic Coast Pipeline Route on National Forests in West Virginia and Virginia, George Washington & Jefferson National Forests (Nov. 17, 2017), <https://perma.cc/N346-9MRA>.

33. *Id.*

34. *See* U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1841–42 (2020).

reach Virginia and North Carolina without crossing the trail.³⁵ The affected segment of the pipe would have been 0.1 miles long.³⁶

Respondents, comprised of mostly local environmental groups, filed a petition for review of the SUP in the U.S. Court of Appeals for the Fourth Circuit.³⁷ Their suit included MLA, National Environmental Policy Act³⁸ (“NEPA”), Administrative Procedure Act³⁹ (“APA”), and National Forest Management Act⁴⁰ (“NFMA”) claims.⁴¹ Atlantic Coast Pipeline, LLC (“ACP LLC”) intervened on behalf of the federal defendants.⁴² The Fourth Circuit held that the FS violated NFMA and NEPA through their approval of the SUP.⁴³ Additionally, the court held that the ANST was land in the National Park System, as administration of the trail had been delegated to the NPS, and the trail is land.⁴⁴ In addition to the statutory arguments, the court acknowledged that the NPS had informed the Federal Energy Regulatory Commission (“FERC”) that the ANST was a unit of the National Park System.⁴⁵ Thus, the dispute was related to whether the FS had the ability to grant pipeline rights-of-way where the ANST crossed the National Forest System.⁴⁶ The Fourth Circuit held that it did not because this would give the FS more authority than the NPS on what they held was NPS land.⁴⁷

The Supreme Court reversed.⁴⁸ Writing for the majority, Justice Thomas held that the FS was the appropriate agency head under the MLA Amendments to authorize the right-of-way because the FS retained jurisdiction over

35. The MLA does not cover the trail where it is on private or state land. Mineral Leasing Act, Pub. L. No. 66–146, § 28, 41 Stat. 449 (1920) (codified as amended at 30 U.S.C. § 185). Respondents acknowledge that if the pipeline had passed through an area that was not public land, their argument would not apply. Brief for Respondents at 8, U.S. Forest Serv. v. Cowpasture River Pres. Ass’n, 140 S. Ct. 1837 (2020) (No. 18–587).

36. *Cowpasture*, 140 S. Ct. at 1842.

37. *Id.*

38. 42 U.S.C. §§ 4321–4347.

39. 5 U.S.C. §§ 551, 553–559, 701–706.

40. 16 U.S.C. §§ 472a, 521b, 1600–1614.

41. *Cowpasture*, 140 S. Ct. at 1842. The Supreme Court did not address any of the claims other than the issue of whether the ANST is land in the National Park System. Less than 3 weeks later, ACP LLC dropped the project. Penn, *supra* note 9.

42. *Cowpasture River Pres. Ass’n v. U.S. Forest Service*, 911 F.3d 150 (4th Cir. 2018), *rev’d and remanded*, 140 S. Ct. 1837 (2020).

43. *Id.* at 160–79. Violations of these two statutes are procedural and could be fixed on remand. The MLA claims, however, could not be fixed on remand and would terminate the project. Thus, the petitioners only appealed the MLA claims. *See id.*

44. *Id.* at 179.

45. FERC was involved because they have ultimate approval authority over all interstate natural gas pipelines. *Frequently Asked Questions (FAQs) About FERC*, FED. ENERGY REGUL. COMM’N, <https://perma.cc/9B7E-ECXH>.

46. *Cowpasture*, 911 F.3d at 179–83.

47. *Id.* at 180.

48. *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1844 (2020).

the land.⁴⁹ Because the MLA allows pipelines across federal lands when the “appropriate agency head” who has jurisdiction over the land grants permission, the question of who had jurisdiction was decisive.⁵⁰ Justice Thomas found that the ANST was not land in the National Park System.⁵¹ Instead, under the Trails Act, “the Forest Service entered into right-of-way agreements with the National Park Service.”⁵² To make the determination that there was no transfer, the Court relied on language from the Trails Act that states that “nothing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System.”⁵³

Instead of finding the ANST was land in the National Park System, the Court found that it was an easement.⁵⁴ The Court relied on state law cases from West Virginia and North Carolina to define rights-of-way as a type of easement.⁵⁵ Justice Thomas, without citation, declared that if the facts of the case were analyzed between private landowners, there would be no transfer.⁵⁶ Thus, the Court held, “[a]lthough the Federal government owns all lands involved here, the same general principles apply.”⁵⁷ Therefore, “read in light of basic property law principles,” the NPS administers the easement, not the land itself.⁵⁸

The Court reconciled its holding—that the ANST was not land—with the language of the Trails Act referring to the lands to be included in the ANST by finding that the FS lands where the ANST crosses are lands burdened by the ANST, rather than being part of the ANST itself.⁵⁹ The Court relied on the NPS’s administration of the ANST “primarily as a footpath” to support this conclusion that the ANST is separate from the land it is on.⁶⁰ Justice Thomas further relied on a comparison between the Trails Act and the Wild and Scenic Rivers Act to support the proposition that Congress would have used more direct language in the Trails Act if it wished for the land beneath the ANST to be a part of the National Park System.⁶¹

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1844 (internal quotations omitted).

53. *Id.* at 1850 (citing 16 U.S.C. § 1246(a)(1)(A)).

54. *Id.* at 1846.

55. *Id.* at 1844 (citing *Kelly v. Rainelle Coal Co.*, 64 S.E.2d 606, 613 (W. Va. 1951) and *Builders Supply Co. v. Gainey*, 192 S.E.2d 449, 453 (N.C. 1972)).

56. *Id.* at 1845.

57. *Id.*

58. *Id.* at 1846–47.

59. *Id.* at 1847.

60. *Id.*

61. *Id.* (citing 16 U.S.C. § 1281(c)) (“In the Wild and Scenic Rivers Act, for instance, which was enacted the same day as the Trails Act, Congress specified that “[a]ny component of the national wild and scenic rivers system that is administered by the Secretary of the Interior

Finally, the Court predictably invoked the major questions doctrine and federalism principles to support their conclusion. Justice Thomas cited *Epic Systems Corp. v. Lewis*⁶² to contend that Congress would have spoken more clearly if it wished to make National Scenic Trails land in the National Park System.⁶³ He rejected the argument that the Secretary of the Interior has the discretion to expand NPS jurisdiction without Congressional action simply because they have the power to delegate administrative authority over the trails.⁶⁴ Thomas also found that because the ANST crosses state and private land, federalism and private property right issues are implicated.⁶⁵

Notably, the majority did not distinguish between land management and administration; it simply described jurisdiction over the land.⁶⁶ Justice Thomas acknowledged that the Secretary of the Interior can regulate trail protection, but argued that because the FS does the actual physical work of trail maintenance, the trail is distinct from the land.⁶⁷ In describing that physical work, he did not describe it as either administration or management, indicating a convergence of the concepts in this case.⁶⁸ If management and administration are separate, then it could simultaneously be true that the NPS administers the land, making it ineligible for ACP's use, and that the MLA did not transfer management responsibilities of any FS lands to the NPS.

through the National Park Service *shall become a part of the national park system.*") (emphasis in original).

62. 138 S. Ct. 1612 (2018).

63. *Cowpasture*, 140 S. Ct. at 1849 ("We will not presume that the act of delegation, rather than clear congressional command, worked this vast expansion of the Park Service's jurisdiction and significant curtailment of the Forest Service's express authority to grant pipeline rights-of-way on 'lands owned by the United States.'").

64. *Id.* at 1848–49.

65. *Id.* at 1849. The MLA only applies to federal land, so the particular issue here would not apply to state or private land, but Justice Thomas is skeptical of the broader idea that nonfederal lands may be considered part of the National Park System based on the respondents' argument. The practical impacts to federalism of a holding in the alternative are beyond the scope of this Comment. Justice Sotomayor addresses the regulation of nonfederal land in her dissent. *Id.* at 1860.

66. *Id.* at 1858 (Sotomayor, J., dissenting) ("[T]he Court elides two terms of art: 'administering' land and 'managing' it."). The respondents' brief clarified at length the distinction between administration and management, but the majority opinion nonetheless failed to address this distinction. Brief for Respondent at 36, *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837 (2020) (Nos. 18-1584, 18-1587).

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

68. The majority ostensibly addresses the dissent's concerns about this conflation in footnote five, but does not offer a persuasive reading of why they are able to conflate the terms; Justice Thomas merely stated that the dissent does not adequately demonstrate their point. *Id.* at 1847 n.5 ("The dissent argues that its position is supported by the fact that the terms 'administer' and 'manage' are 'terms of art.' The dissent, however, does not demonstrate that either term carries a widely accepted meaning.") (internal quotation and citation omitted).

Footnote four of the majority opinion responded to the dissent's charge that the majority was not engaging in statutory interpretation and that the use of state law was unwarranted.⁶⁹ Justice Thomas relied on an 1898 case for the proposition that "right-of-way" means the same thing in state and federal law,⁷⁰ and a 2014 case to support the use of "basic common law principles" in dealing with easements generally.⁷¹

Justice Sotomayor, joined by Justice Kagan, dissented, and concluded that the ANST is a unit of the National Park System.⁷² Justice Sotomayor argued that the case was one of simple statutory interpretation and that there was no basis for concluding that the trail was not land given that it is a unit of the National Park System, and all units of the NPS are either land or water.⁷³ Her dissent combined the statutory text with normative reasoning and historical practice.

Justice Sotomayor quoted the Organic Act to conclude that any land "administered" by NPS is land in the National Park System.⁷⁴ The Organic Act defines units of the NPS as any area of land and water administered by the Secretary of the Interior through the Director of the NPS for, *inter alia*, recreational purposes.⁷⁵ She concluded that the ANST is "administered" by the NPS because the Trails Act gives the Secretary broad authority over the trail, including the ability to grant easements under the ANST's surface.⁷⁶ The MLA, however, carved out lands that are units in the National Park System from the statute, so parties seeking to build natural gas pipelines through land in the National Park System cannot rely on the MLA.⁷⁷ Furthermore, there is no mention in the Organic Act or the MLA of "easements" that otherwise meet the criteria for such units.⁷⁸ Justice Sotomayor concluded that the "easements" argument in any case fails because the government owns all of the land at issue, and therefore the analogy to two separate, private parties was inapposite.⁷⁹ She additionally remarked on the failure of the Court to distinguish between administration and management, despite their distinction as terms of art.⁸⁰

Justice Sotomayor likewise made several normative arguments. She concluded that the ANST is land based on common usage.⁸¹ Furthermore, she noted that the federal government has historically identified the ANST as a

69. *Cowpasture*, 140 S. Ct. at 1846 n.4.

70. *Id.* (citing *New Mexico v. United States Trust Co.*, 172 U.S. 171 (1898)).

71. *Id.* (citing *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93 (2014)).

72. *Id.* at 1851 (Sotomayor, J., dissenting).

73. *Id.*

74. *Id.*

75. *Id.* at 1852.

76. *Id.* at 1852–53.

77. *Id.* at 1853.

78. *See id.* at 1856.

79. *Id.*

80. *Id.* at 1858.

81. *Id.* at 1851.

unit of the National Park System, and therefore land (or water) in the system.⁸² Justice Sotomayor additionally considered that construction would significantly affect the use of the ANST.⁸³ She dismissed the majority's concern that jurisdiction would be mutually exclusive, recognizing that the Court's logical conclusion should be that land may be in both the National Park System and the National Forest System, which would eliminate the concern about the transfer of land.⁸⁴ Justice Sotomayor concluded that the current holding would prevent the NPS from being able to block ACP LLC from building a pipeline above the land.⁸⁵

II. COWPASTURE'S CREATION OF A NEW FEDERAL COMMON LAW DOCTRINE

The reach of *Cowpasture's* holding is difficult to discern. The narrowest reading of the case is that in the context of the specific statutes at issue, specifically the MLA and the Trails Act, the NPS can hold easements over other federal land (and possibly nonfederal land as well). However, the implications of the decision go beyond that. The Court decided here that federal land *management* agencies can be treated as private land *owners* for the purposes of the application of property common law principles,⁸⁶ and did little to cabin this notion, leaving open the possibility that this holding could be applicable in other property law disputes involving federal agencies. This outcome is especially significant because one nearly universal rule of easements is that property owners cannot have easements against themselves,⁸⁷ and as Justice Sotomayor noted, this land is all owned by the federal government.⁸⁸ The ruling cannot be described as a mere difference in statutory interpretation, as the word "easement" never appears in the Trails Act with respect to the establishment of the ANST and is instead adopted from state law.⁸⁹ It can therefore best be described as federal common law.⁹⁰

82. *Id.* at 1854.

83. *Id.* at 1851.

84. *Id.* at 1857.

85. *Id.*

86. *See id.* at 1845 ("If analyzed as a right-of-way between two private landowners, determining whether any land had been transferred would be simple. . . . Although the Federal Government owns all land involved here, the same general principles apply.")

87. *See Easement*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An interest in land *owned by another person*, consisting in the right to use or control the land[.]") (emphasis added).

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

89. *See generally* 16 U.S.C. §§ 1241–1251. Although the majority is using the concept of easements to define "right-of-way," *Cowpasture*, 140 S. Ct. at 1846 n.4, it is the further steps the majority takes that bring it beyond this threshold.

90. Field debates to what degree definitions of federal common law sweep in run-of-the-mill statutory interpretation, which is typically considered distinct from federal common law. As she notes, the distinction is not easily drawn. *See* Martha A. Field, *Sources of Law: The Scope*

Federal common law is not universally defined, but Professor Martha Field defines it as “any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments.”⁹¹ *Erie Railroad Co. v. Tompkins*⁹² famously declared “[t]here is no general federal common law,” ending an era when federal courts applied their own common law to state law controversies. However, federal common law has persisted in particular areas in which there is no concern that outcomes would be arbitrarily different in federal and state court; in particular, areas where Congress has explicitly delegated to the courts the ability to make substantive law and areas of a uniquely federal interest.⁹³ Typically, concerns of inconsistency are relevant when there is a question of whether the federal common law will displace state law, but there was no such issue here.⁹⁴ Furthermore, Congress has arguably delegated the ability to make substantive law in this area to the Department of the Interior via the APA.⁹⁵

Although “the governing principles [of federal common law are] amorphous,”⁹⁶ the holding in this case shares the characteristics of federal common law holdings, even though Justice Thomas did not explicitly rely on that doctrine. First, *Cowpasture* falls within an area of federal competence.⁹⁷ The interplay of statutes at issue in *Cowpasture*, and specifically the application of the clause of the MLA at issue defining “Federal lands,” squarely place this case within an area of federal power. Second, this case is clearly in the jurisdiction of the federal courts.⁹⁸ By statute, all cases against the federal government are

of Federal Common Law, 99 HARV. L. REV. 881, 896 (1986). My argument is that because the rule of decision in this case veers so far from the statutory text and incorporates state common law rules, it should be considered federal common law rather than statutory interpretation.

91. *Id.* at 890.

92. 304 U.S. 64, 78 (1938).

93. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

94. 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4514 (3d ed. 2002) [hereinafter WRIGHT & MILLER].

95. Administrative Procedure Act, 5 U.S.C. §§ 500–504, 551–559, 561–584, 591–596, 701–706; *see also* JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION (2016), <https://perma.cc/M8BR-LKFN> (discussing the ability of the courts to make rules of decision surrounding agency action). The degree of substantive power delegated to the courts with regard to agencies under the APA is beyond the scope of this comment; however, I argue in Part III, *infra*, that the Court exceeded their discretion to do so here, because of the clarity of the statutory mandate.

96. WRIGHT & MILLER, *supra* note 94, at § 4514.

97. *Id.* (“[T]he development of federal common law . . . must be supported by some expressed or implied affirmative grant of power to the national government by the Constitution or a statute enacted pursuant to it.”).

98. *Id.* (defining a characteristic of a federal common law cases as “present[ing] a federal question and as such is within the original subject matter jurisdiction of the federal courts and is not dependent upon the existence of diversity of citizenship or amount in controversy or any other jurisdictional basis”).

under the jurisdiction of the federal courts.⁹⁹ Third, there is no danger of “inconsistent regimes of substantive law.”¹⁰⁰ This is both because the ruling comes from the Supreme Court and because the ruling specifically applies to the federal government and therefore state courts could not enforce different law.¹⁰¹ Fourth, Congress could theoretically override the case.¹⁰²

The holding itself falls into a category of a “definable substantive area[] in which . . . the invocation of common law has been found appropriate.”¹⁰³ This area is dominated by a “sweep of federal statutes,”¹⁰⁴ which are interlaced in a way that is not intuitively complementary. The binary distinction in the MLA between land that is and is not part of the National Park System does not account for, according to the Court, the gray areas created by the Trails Act and other statutes that create other forms of NPS jurisdiction and involvement.¹⁰⁵ While Justice Thomas purported to rely on textual statutory interpretation to decide the case, his reference to “basic property principles” implies that in fact, in his view, Congress had not created a rule of decision in the case, and therefore the courts should draw one implicitly from common law principles.¹⁰⁶

Within this category of federal common law cases, Wright and Miller argue that it is implied by congressional intent that federal courts should supply the rule of decision by “fill[ing] the interstices of a pervasively federal substantive framework, sometimes by borrowing state law.”¹⁰⁷ This principle is demon-

99. 28 U.S.C. § 1346.

100. WRIGHT & MILLER, *supra* note 94, at § 4514.

101. *See* 28 U.S.C. § 1346 (giving federal courts exclusive jurisdiction when the federal government is a defendant).

102. WRIGHT & MILLER, *supra* note 94, at § 4514 (“Usually, federal common lawmaking occurs only when Congress has not spoken to an issue. But when and if Congress does speak to that issue, its statement prevails over the then-existing federal common law.”). The dissent would argue that the outcome is not authorized by the statutory scheme in the first place. *See U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1851 (2020) (Sotomayor, J., dissenting). However, there is no constitutional barrier or other indication that Congress could not pass a law specifically overturning this case. *See id.* at 1849–50 (stating that they would expect Congress to use clear language in this case if it intended another outcome, indicating it could in fact do so).

103. WRIGHT & MILLER, *supra* note 94, at § 4514.

104. *Id.*

105. *See generally Cowpasture*, 140 S. Ct. at 1843–44.

106. *See id.* at 1846. Typically, it is the common law of the forum state that is applied if state law is used as a gap-filler for federal statutes. WRIGHT & MILLER, *supra* note 94, at § 4516. Justice Thomas relied on West Virginia and North Carolina law, both of which are in the Fourth Circuit, where the case originated and where the ACP would have run through. *Cowpasture*, 140 S. Ct. at 1844. However, he does not indicate that the rule of decision is predicated on the location of the pipeline, rather referring to “basic property principles.” *Id.* at 1846. As discussed below, Justice Thomas argued that previous jurisprudence suggests that basic property principles can be used to resolve statutory questions in right-of-way cases. *Id.* at 1846 n.4. However, as I argue below, the case Justice Thomas cited for that proposition is inapposite to the circumstances of this case.

107. WRIGHT & MILLER, *supra* note 94, at § 4514.

strated by *Textile Workers Union v. Lincoln Mills*.¹⁰⁸ The union was seeking to compel arbitration in U.S. district court, and while the Labor Management Relations Act¹⁰⁹ mandated federal jurisdiction, it did not provide substantive direction on appropriate relief. The Court held that the Act demanded a federal rule of decision, regardless of whether the statute itself supplied the substantive law. However, the Court allowed for the absorption of state law to effectuate the policy.¹¹⁰ That is unquestionably what happened here. Although Justice Thomas did not rely on any particular state's law, he repeatedly mentioned "basic property principles." These principles are not derived from the statutes governing these agencies or even from other federal or Supreme Court cases; in fact, Justice Thomas did not cite an authority at all for the discussion that easement law should apply as between two lands owned by the federal government.

Justice Thomas would disagree with this characterization, as noted in footnote four of the majority opinion.¹¹¹ His argument was that the court is simply interpreting the term "right-of-way" as used in the Trails Act.¹¹² He cited *Marvin M. Brandt Revocable Trust v. United States*¹¹³ for the proposition that the Court can use basic property principles to resolve right-of-way and easement cases.¹¹⁴ However, that case is easily distinguishable. In that case, the Court had already resolved the statutory interpretation question in a previous case designating the right-of-way as an easement,¹¹⁵ and the Court then used "basic common law principles" to resolve the terms of the easement.¹¹⁶ The underlying case, *Great Northern Railroad Co. v. United States*,¹¹⁷ cited statutory language

108. 353 U.S. 448, 456–57 (1957).

109. 29 U.S.C. § 185(a).

110. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957) ("But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.").

111. *Cowpasture*, 140 S. Ct. at 1846 n.4.

112. *Id.*

113. 572 U.S. 93 (2014). Justice Thomas also relied on *New Mexico v. U.S. Trust Co.*, 172 U.S. 171 (1898). *Cowpasture*, 140 S. Ct. at 1846 n.4.

114. *Cowpasture*, 140 S. Ct. at 1846 n.4.

115. *Brandt*, 572 U.S. at 110 ("More than 70 years ago, the Government argued before this Court that a right of way granted under the 1875 Act was a simple easement. The Court was persuaded, and so ruled. Now the Government argues that such a right of way is tantamount to a limited fee with an implied reversionary interest. We decline to endorse such a stark change in position . . ."). Notably, in *Cowpasture*, the petitioners did not even argue in their briefs that the ANST represented an easement. See generally *Petition for Writ of Certiorari, Cowpasture*, 140 S. Ct. 1837 (No. 18-1584); *Reply Brief for Petitioners, Cowpasture*, 140 S. Ct. 1837 (No. 18-1584).

116. *Brandt*, 572 U.S. at 106. See generally *id.* for the proposition that a right-of-way constitutes no right of possession. The other case that Justice Thomas cited in footnote four discussed several theories and definitions of a right-of-way and settled on one in the context of the statute at issue. See generally *New Mexico*, 172 U.S.

117. *Great N. Ry. Co. v. United States*, 315 U.S. 262, 276–77 (1942).

that *actually used the term “easement”* to make that decision. By contrast, the Trails Act uses no such language.¹¹⁸ Furthermore, the fact that the Court has previously used common law principles to resolve easement questions does not necessarily mean that what the Court did in this case can be reduced to simple statutory interpretation, in light of the characteristics of the opinion discussed above.¹¹⁹

III. CONFLICT WITH PREVIOUS JURISPRUDENCE

Although this holding represents the promulgation of a federal common law rule, the holding in the case departed from previous Supreme Court practice and jurisprudence in three ways. First, federal common law is typically used sparingly.¹²⁰ Second, there was an alternative because this case could have been resolved by relying on the statutory scheme, as the dissent noted. Third, the holding of the case itself, which as Part II has argued is that agencies can be treated as private parties for the purposes of the application of the common law of property, conflicts with previous Supreme Court jurisprudence.

The ability to make law without democratic process is one that the federal courts have historically hesitated to use. The Court has declared that “[i]nstances where we have created federal common law are few and restricted.”¹²¹ This is partially because, unlike states, the federal government does not have general police powers.¹²² As a result, Congress, and by extension the federal courts, do not have the general ability to make laws the way state legislatures, and by extension state courts, do.¹²³ Additionally, although this case does not implicate federalism concerns in the rule of decision, because the federal government owns all of the land in question, there is an inherent federalism question in allowing federal courts to make law, because Congress at least nominally represents the states, while the judiciary is wholly independent from that process.¹²⁴

118. See 16 U.S.C. §§ 1241–1251.

119. Additionally, Justice Thomas in footnote four identified “right-of-way” as the operative statutory term that rendered the opinion one of statutory interpretation. But whether the right-of-way is an easement does not necessarily resolve whether two government agencies can be treated as separate private parties for the purposes of an easement analysis when the government owns all of the land involved. This analysis also does not address whether the NPS can administer an easement that is not land or water.

120. Field, *supra* note 90, at 885 (“The received academic tradition on federal common law assumes that there are particular enclaves in which federal common law is in fact appropriate, but that after *Erie*, federal common law power is the exception, not the rule.”) (citations omitted).

121. *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

122. See Field, *supra* note 90, at 899.

123. *Id.*

124. *Id.* at 90, at 932–33.

Of course, the fact that use of federal common law is “restricted” does not mean it is never used.¹²⁵ But statutes such as the MLA and the Trails Act, which are rather detailed as compared to, for example, the Sherman Act,¹²⁶ indicate that it is less likely that Congress intended that questions be resolved by federal common law.¹²⁷ The majority fails to resolve the question using statutory construction, and the dissent demonstrates that not only is doing so possible, it is more in line with Congress’ purpose in each of the statutes at issue.¹²⁸ The MLA Amendments allow rights-of-way through any federal lands for pipelines if the appropriate agency head approves.¹²⁹ Federal lands are defined as “all lands owned by the United States except lands in the National Park System[.]”¹³⁰ Federal statute defines the National Park System in an amendment to be “any area of land *and water administered by the Secretary acting through the Director, for park, monument, historic, parkway, recreational, or other purposes.*”¹³¹ The Trails Act gives the Secretary of the Interior the ability to administer the ANST,¹³² and the Secretary delegated that responsibility to the NPS.¹³³ The Court declares the easement to be part of the National Park System without explaining how a unit that is not land or water can be part of the National Park System.¹³⁴ Given these facts, it is difficult to see how a court relying solely on the text of the statutes could come to a conclusion other than that of Justice Sotomayor. One of the prerequisites of the promulgation of interstitial federal common law is that the text is silent on the issue.¹³⁵ Because the text was not silent on the issue, this case, with the statutory framework behind it, should not have led to the promulgation of any common law rule of decision.

Finally, the Court’s holding *itself*, that the federal agencies can be treated as private parties for the purpose of a common law property question, conflicts

125. See *Wheeldin*, 373 U.S. at 651–52.

126. See 15 U.S.C. §§ 1–7.

127. WRIGHT & MILLER, *supra* note 94, at § 4516.

128. See *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1856 n.9 (Sotomayor, J. dissenting) (“The Court simply works backwards from state law, even though statutory interpretation is supposed to start with statutory text.”).

129. 30 U.S.C. § 185(a).

130. The definition also excludes “lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf.” *Id.* at § 185(b)(1).

131. 54 U.S.C. § 100501 (emphasis added).

132. 16 U.S.C. § 1244(a).

133. National Wild and Scenic Rivers System and National Trails System, 34 Fed. Reg. 14,337 (Sept. 12, 1969).

134. See *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1856 (2020) (Sotomayor, J., dissenting) (“Neither does the Court explain how the Trail could be a unit of the Park System if it is not land.”).

135. WRIGHT & MILLER, *supra* note 94, at § 4514 (citing *Rogers v. McDorman*, 521 F.3d 381, 388 (5th Cir. 2008) (“Textual silence is . . . often the predicate for interstitial federal common law.”)).

with the framework the Court developed in *United States v. Jicarilla Apache Nation*.¹³⁶ Although *Jicarilla Apache* involved a very different kind of dispute, the principles at issue were very much of a kind with *Cowpasture*. The common law issue at stake in that case was the fiduciary exception to the common law of attorney-client privilege.¹³⁷ Trust law is a body of property common law, while attorney-client privilege is a doctrine of evidentiary common law.¹³⁸ The fiduciary exception to attorney-client privilege excepts from privilege any legal advice sought by a trustee in the exercise of their fiduciary duties with respect to the beneficiary of the trust.¹³⁹

The Jicarilla Apache Nation Tribe has tribal sovereignty over a reservation in New Mexico, which contains natural resources that the Department of the Interior is at liberty to develop and extract.¹⁴⁰ Proceeds from the development are held in trust by the United States for the Tribe, under the American Indian Trust Fund Management Reform Act of 1994.¹⁴¹ The Tribe claimed that the federal government mismanaged funds held in trust for the tribe, and sued under the Tucker Act¹⁴² and the Indian Tucker Act¹⁴³ in the Court of Federal Claims.¹⁴⁴ The Tribe sought discovery of attorney work product and attorney-client documents.¹⁴⁵ The Court of Federal Claims granted the Tribe's motion to compel in part, under the common law fiduciary exception to attorney-client privilege.¹⁴⁶ The Supreme Court reversed, holding that the government is not analogous to a private trustee, the applicable law is statutory rather than the common law, and the reasons for the fiduciary exception are not applicable.¹⁴⁷

Justice Alito, writing for the majority, stated that “[t]he Government, of course, is not a private trustee.”¹⁴⁸ In contrast, in *Cowpasture*, Justice Thomas began his easement analysis with a description of how the easement would operate between two private parties, and concluded that it must be the same between two federal agencies.¹⁴⁹ Justice Alito's reasoning supports a distinction between the two cases, but not one that sufficiently explains the Court's abrupt about-face. Justice Alito relied on the distinction between “public rights”

136. 564 U.S. 162 (2011). Interestingly, Justice Sotomayor also dissented in this case.

137. *Id.* at 166–67.

138. *Id.* at 170 (explaining the English origins of trust law); *id.* at 189 (Sotomayor, J., dissenting) (explaining that while most federal evidence law is codified in the Federal Rules of Evidence, Rule 501 states that the common law governs claims of privilege).

139. *Id.* at 167.

140. *Id.* at 166.

141. *Id.*; 25 U.S.C. §§ 4011–4061.

142. 28 U.S.C. § 1491.

143. *Id.* § 1505.

144. *Jicarilla Apache*, 564 U.S. at 166.

145. *Id.* at 166–67.

146. *Id.* at 167.

147. *See generally id.*

148. *Id.* at 173.

149. *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1845 (2020).

against the government and “private rights” against private parties to establish that the government should not be treated as a private party,¹⁵⁰ thus, it may be of some significance that in *Cowpasture*, the property dispute was between two federal agencies, rather than between the federal government and another party.¹⁵¹ But regardless, as Justice Sotomayor noted in dissent, the NPS and FS are not separate private parties.¹⁵² *Jicarilla Apache* represents the historic reluctance of the court to treat government agencies as such.

Furthermore, *Jicarilla Apache* emphasizes the importance of reliance on the statute. In *Jicarilla Apache*, the Court held the description of the relationship as a trust is a statutory term, rather than one invoking the common law of trusts between private parties.¹⁵³ The majority stated that Congress may style its trust relationships in any way it chooses.¹⁵⁴ In *Cowpasture*, Justice Thomas took a term from a statute, in that case “right-of-way,” and instead of interpreting it in light of the scheme of the statute, applied it in the common law sense.¹⁵⁵ He defined a right-of-way as a type of easement using the common law.¹⁵⁶ Again, *Cowpasture* and *Jicarilla Apache* remain distinct in many ways, but the change in analytical approach is notable.

Although *Jicarilla Apache* is just one case, combined with the Court’s long history of jurisprudence on the application of the common law with statutory issues, it succinctly demonstrates the Court’s deviation in *Cowpasture* to allow a pipeline across a path of historical and ecological significance to the American people.

Justice Thomas would likely argue that *Brandt*, which allowed application of basic common law property principles in easement cases, is more relevant than *Jicarilla Apache*, because the doctrine is more of a kind with the facts of *Cowpasture*. However, the Court acknowledged that the government lost that case not because the United States should be considered a private party governed by common law principles generally, but because it had argued the previous position in a different case and won, leading to a prevailing interpretation

150. *Jicarilla Apache*, 564 U.S. at 174.

151. Notably, *Cowpasture* did involve private parties; the litigation itself was not between the National Park Service and the Forest Service. Conservation groups were suing to enforce the NEPA and MLA claims. However, the determination of the property rights was with respect to those two entities, so the analogy serves. *See generally Cowpasture*, 140 S. Ct. 1837.

152. *See Cowpasture*, 140 S. Ct. at 1856.

153. *Jicarilla Apache*, 564 U.S. at 174.

154. *Id.* at 175.

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

156. Justice Thomas relies on a nineteenth-century case for support that a right-of-way *can* be interpreted as an easement under federal law in footnote four. *Cowpasture*, 140 S. Ct. at 1846 n.4 (citing *New Mexico v. United States Trust Co.*, 172 U.S. 171 (1898)). However, that case involved a private party, and does not resolve the question of whether two federal agencies can be treated as distinct private parties for purposes of the definition of an easement.

that the Court was reluctant to overturn.¹⁵⁷ Thus, it is an inapposite precedent, and the Court's line of reasoning in *Jicarilla Apache* was more coherent here.

CONCLUSION

The power of the courts to make law has historically been limited with regard to federal courts. Although federal courts are empowered to make such law, they have been reticent to do so. *Cowpasture* notably departs from that approach. Additionally, *Cowpasture's* holding rebukes past jurisprudence surrounding the treatment of the federal government with respect to the common law. Private actors are typically treated quite differently from agencies, so treating agencies as if they are separate private entities could have lasting repercussions on public lands management and administrative law.

Although the Cowpasture River Preservation Association and their allies lost in the Supreme Court, their loss was brief. Dominion Energy and Duke Energy canceled the ACP on July 5, merely twenty days after the decision was announced.¹⁵⁸ Although ACP LLC's victory was short-lived, the broader principles in *Cowpasture* will nevertheless reverberate throughout our nation's public lands.

157. *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 102 (2014) (“The Government loses [its] argument today, in large part because it won when it argued the opposite before this Court . . .”).

158. *Penn.*, *supra* note 9.

