

# Standing to View Other People’s Land: The D.C. Circuit’s Divided Decision in *Sierra Club v. Jewell*

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## I. INTRODUCTION

In its divided 2014 decision in *Sierra Club v. Jewell*,<sup>1</sup> the U.S. Court of Appeals for the District of Columbia Circuit held that plaintiffs who observe landscape have Article III standing to sue in federal court to protect those views even if they have no legal right to physically enter the private property that they view. Two earlier decisions had reached similar conclusions, but have had little impact. The D.C. Circuit's decision could significantly enlarge the ability for plaintiffs to sue federal agencies or private parties over changes to private lands that the plaintiffs have no right to enter.<sup>2</sup> Because the Supreme Court has inconsistently applied both strict and liberal approaches to standing, it is difficult to predict how it would decide this issue. If it addresses whether plaintiffs must have a legal interest in any property they seek standing to protect, the Supreme Court might be forced to resolve the contradictions in its standing doctrine.

Part II explains the basic principles of constitutional Article III standing. Part III addresses the district court's initial decision rejecting standing and the divided D.C. Circuit decision finding standing in *Sierra Club v. Jewell*. Part IV examines two prior decisions concluding that observers have standing to challenge changes to property they do not own or have a right to enter. Part V discusses how the Supreme Court might address the issue of standing rights for those who view private lands they have no right to enter.

1. 764 F.3d 1 (D.C. Cir. 2014). Judge Sentelle dissented from the majority opinion written by Judge Srinivasan and joined by Judge Garland. *Id.* at 3, 3–9 (majority opinion), 9–11 (Sentelle, J., dissenting).

2. David LaRoss, *D.C. Circuit Decision Could Broaden Environmentalists' Legal Standing*, INSIDEEPA.COM, Oct. 9, 2014, available at <http://insideepa.com/daily-news/dc-circuit-decision-could-broaden-environmentalists-legal-standing> (subscription required).

II. INTRODUCTION TO ARTICLE III STANDING<sup>3</sup>

While the Constitution does not expressly require that each plaintiff prove standing to file suit in federal courts, the Supreme Court has interpreted Article III's limitation of judicial authority to actual "Cases" and "Controversies" as imposing standing requirements.<sup>4</sup> The Supreme Court has created a three-pronged test for constitutional Article III standing that requires a plaintiff to show that: (1) she has "suffered an injury-in-fact," which is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical;"<sup>5</sup> (2) "there [is] a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able]" to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court;"<sup>6</sup> and (3) "it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."<sup>7</sup> A plaintiff bears the burden of proof

3. The discussion of standing in Part II relies upon my earlier standing articles cited in footnote \*.

4. The constitutional standing requirements are derived from Article III, Section 2, which provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2 (footnote omitted); *see* *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–41 (2006) (explaining why the Supreme Court infers that Article III's case and controversy requirement necessitates standing limitations and clarifying that "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it"); *see generally* Michael E. Solimine, *Congress, Separation of Powers and Standing*, 59 CASE WES. RES. L. REV. 1023, 1036–38 (2009) (discussing a scholarly debate on whether the Framers intended the Constitution to require standing to sue).

5. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted).

6. *Id.* at 560–61 (internal quotation marks and citations omitted).

7. *Id.* at 561 (internal quotation marks and citations omitted).

for all three elements.<sup>8</sup> Thus, for a federal court to have jurisdiction over a suit, at least one plaintiff must prove he has standing for each form of relief sought.<sup>9</sup> Federal courts must dismiss a case for want of jurisdiction if no plaintiff meets the constitutional Article III standing requirements.<sup>10</sup>

As indicated above, standing requirements reflect core constitutional principles inferred from Article III. For example, standing doctrine bars unconstitutional advisory opinions.<sup>11</sup> Furthermore, standing requirements are grounded in separation of powers principles, which establish the division of powers between the judiciary and political branches of government so that the “Federal Judiciary respects ‘the proper—and properly limited—role of the courts in a democratic society.’”<sup>12</sup> Different justices of the Supreme Court have disagreed, however, regarding the degree to which separation of powers principles limit Congress’s authority to authorize standing to sue in federal courts for private citizen suits challenging executive branch decisions.<sup>13</sup>

8. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (stating that parties asserting federal jurisdiction must “carry the burden of establishing their standing under Article III”); *Lujan*, 504 U.S. at 561 (same); see also LARRY W. YACKLE, *FEDERAL COURTS* 336 (3d ed. 2009) (adding that a plaintiff may initially allege general facts which, if true, would establish the three standing elements, but, at the summary judgment stage, the plaintiff must argue these facts more specifically and with additional support and must ultimately prove the existence of injury, causation, and redressability).

9. See *DaimlerChrysler*, 547 U.S. at 351–52 (confirming that “a plaintiff must demonstrate standing separately for each form of relief sought”) (quoting *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)).

10. See *id.* at 340–41 (emphasizing the importance of the case or controversy requirement); *Laidlaw*, 528 U.S. at 180 (adding that courts have an affirmative duty at the outset of the litigation to ensure that litigants satisfy all Article III standing requirements).

11. See *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (“Article III of the Constitution restricts the power of federal courts to ‘Cases’ and ‘Controversies.’ Accordingly, [t]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinion[s] advising what the law would be upon a hypothetical state of facts.”) (internal quotation marks and citations omitted).

12. *DaimlerChrysler*, 547 U.S. at 341 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984), partially abrogated by *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)) (internal quotation marks omitted).

13. Compare *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–78 (1992) (majority opinion of Justice Scalia concluding that Articles II and III of the Constitution limit

III. THE D.C. CIRCUIT'S DIVIDED DECISION IN *SIERRA CLUB V. JEWELL*

The litigation in the D.C. Circuit involved efforts by plaintiffs to preserve Blair Mountain, West Virginia, which in 1921 was the site of the largest armed confrontation in U.S. history between labor unions representing coal miners and coal companies that hired 3,000 armed men to protect their property interests from the miners.<sup>14</sup> After several days of gunfire, President Harding sent federal troops to end the fighting, and the coal miners surrendered.<sup>15</sup> In recent years, several environmental and historical preservation organizations sought to protect for the Battlefield from surface coal mining by having it listed in the National Register of Historic Places.<sup>16</sup>

In 2009, the federal government briefly listed the Battlefield in the Register, but within days, the Keeper of the Register removed the Battlefield after concluding that the desires of area property owners had not been accurately reflected in the nomination process.<sup>17</sup> The plaintiff organizations sued in federal district court challenging the Battlefield's removal from the Register.<sup>18</sup> The district court granted summary judgment against the plaintiffs, holding that they lacked Article III standing because they failed to demonstrate the necessary injury, causation, and redressability.<sup>19</sup> In the majority opinion written by Judge Srinivasan, the D.C. Circuit reversed the

Congress's authority to authorize citizen suits by any person lacking a concrete injury and citing several recent Supreme Court decisions for support), *with Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."), *and Lujan*, 504 U.S. at 602 (Blackmun, J., dissenting) (arguing that the "principal effect" of the majority's approach to standing was "to transfer power into the hands of the Executive at the expense—not of the Courts—but of Congress, from which that power originates and emanates"). *See generally* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 496 (2008) (suggesting the "disagreement" is "[u]nsurprising[]" and arguing that courts should not use standing doctrine "as a backdoor way to limit Congress's legislative power").

14. *Sierra Club v. Jewell*, 764 F.3d 1, 3 (D.C. Cir. 2014).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 3–4.

lower court's decision and held that the plaintiffs had standing to challenge the Keeper's decision.<sup>20</sup> Judge Sentelle dissented and argued that the plaintiffs did not have standing because they did not have a "*legally protected* interest" in viewing property, nor a legal right to access.<sup>21</sup>

#### A. The District Court's Decision Denying Article III Standing

The district court held that the plaintiffs failed to establish any of the three requirements for standing: injury in fact, causation, or redressability.<sup>22</sup> First, the court concluded that the plaintiffs did not prove that the alleged injury was "actual or imminent."<sup>23</sup> While "a considerable amount of the Battlefield [wa]s . . . currently subject to surface mining permits," the court determined that there was no actual or imminent injury because the coal companies had yet to mine the Battlefield under their existing permits, which in some cases had been dormant for several years, and it was unclear whether they would mine the land in the near future.<sup>24</sup> Because it found that there was no actual or imminent injury, the district court did not discuss whether viewing another person's property could constitute an injury sufficient for Article III standing.<sup>25</sup>

Second, the court reasoned that the plaintiffs failed to prove standing causation because their concerns about the mining of the Battlefield depended on "speculative predictions about the actions of third parties, the coal mining companies," and not on the actions of the government defendant.<sup>26</sup> Third, although federal and West Virginia mining law generally imposes prohibitions on surface mining on property listed in the Register,<sup>27</sup> the court concluded that a favorable court ruling requiring the Battlefield to be listed would not redress their potential injury because such prohibitions contained an

20. *Id.* at 3, 5–9.

21. *Id.* at 9–11 (Sentelle, J., dissenting) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

22. *Sierra Club v. Salazar*, 894 F. Supp. 2d 97, 110–14 (D.D.C. 2012).

23. *Id.* at 110 (internal quotation marks omitted).

24. *Id.* at 110–12.

25. *Id.*

26. *Id.* at 113.

27. *Id.* at 114 (citing 30 U.S.C. § 1272(e)(3)).

exemption for permits with valid existing rights.<sup>28</sup> The district court reasoned that the coal companies probably had valid existing rights because their permits had been acquired before the historic district's inclusion in the National Register, and therefore "surface mining would be permitted on the Blair Mountain Battlefield" even if the Keeper relisted the Battlefield.<sup>29</sup> Because the plaintiffs had failed to establish Article III standing, the district court granted the defendants' motion for summary judgment.<sup>30</sup>

### B. The D.C. Circuit's Majority Opinion

A majority of the D.C. Circuit panel concluded that the plaintiffs had established Article III standing and, therefore, reversed the judgment of the lower court.<sup>31</sup> The D.C. Circuit determined that the plaintiffs' aesthetic interest in viewing of the Battlefield constituted a concrete and particularized, and actual or imminent, injury.<sup>32</sup> The court observed that Supreme Court and D.C. Circuit precedent clearly established that the purely aesthetic interests of a plaintiff in viewing property or animals are sufficient for standing injury.<sup>33</sup> Several members of the plaintiff organizations submitted declarations stating that their enjoyment of viewing the Battlefield would be diminished if the coal companies mined the site.<sup>34</sup>

Amicus West Virginia Coal Association argued that the plaintiffs could not show an injury in fact because the individuals whose interests would be injured by mining of the Battlefield owned no legal right to enter the Battlefield area.<sup>35</sup> The D.C. Circuit acknowledged that the plaintiffs had submitted no evidence that they "possess[ed] any legal entitlement to set foot on the privately owned property," although in the past several members had frequently visited

28. *Id.*

29. *Id.*

30. *Id.*

31. *Sierra Club v. Jewell*, 764 F.3d 1, 5–9 (D.C. Cir. 2014).

32. *Id.* at 5–7.

33. *Id.* at 5 ("The Supreme Court has recognized that harm to 'the mere esthetic interests of the plaintiff . . . will suffice' to establish a concrete and particularized injury.") (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009)).

34. *Id.* at 5–6.

35. *Id.* at 6.

the site.<sup>36</sup> However, the D.C. Circuit concluded that it was irrelevant whether they could physically enter the Battlefield because they could view it from public roads or surrounding areas without committing a trespass.<sup>37</sup> Because they could view the property from public lands or surrounding areas, the court reasoned that the plaintiffs did not need a legal interest in entering the Battlefield to have a cognizable standing interest in viewing the site.<sup>38</sup> “Accordingly, there [wa]s no reason that the cognizability of aesthetic and associated interests in a particular site could turn on owning a legal right to enter or view the property.”<sup>39</sup>

The D.C. Circuit relied on circuit precedent and a Ninth Circuit decision supporting its position that a standing injury may result from government actions that could interfere with aesthetic viewing of another person’s property.<sup>40</sup> In a 1988 D.C. Circuit decision, the court had found a standing injury by “rely[ing] solely on impairment of the affiant’s ability to enjoy the ‘natural vistas’ of the nearby hills from her own home, regardless of the absence (or existence) of any legal right on her part to view or make an entry onto the nearby hills.”<sup>41</sup> In its 2001 decision *Cantrell v. City of Long Beach*, the Ninth Circuit declared that “[i]f an area can be observed and enjoyed from adjacent land, plaintiffs need not physically enter the affected area to establish an injury in fact.”<sup>42</sup> The D.C. Circuit adopted the *Cantrell* decision’s position that plaintiffs who view another person’s property may have standing.<sup>43</sup>

Even though there was as yet no surface mining at the Battlefield, the D.C. Circuit concluded that the plaintiffs had demonstrated an “actual or imminent” standing injury by showing that there was a “substantial probability” of mining at the site in the near future.<sup>44</sup> In reaching its conclusion that

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 6–7.

41. *Id.* at 6 (quoting *Nat’l Wildlife Fed’n v. Hodel*, 839 F.2d 694, 714–15 (D.C. Cir. 1988)).

42. 241 F.3d 674, 681 (9th Cir. 2001). Part IV will further discuss the *Cantrell* decision.

43. *Jewell*, 764 F.3d at 6–7.

44. *Id.* at 7.



there was a substantial probability” of mining at the site in the near future, the court observed that “coal companies have mined in the vicinity of the Battlefield under permits that encompass the Battlefield.”<sup>45</sup> Additionally, the plaintiffs had demonstrated that two active permits encompassed the Battlefield area, and introduced a report showing that surface mining was moving closer to the site.<sup>46</sup> The government did not challenge the plaintiffs’ report.<sup>47</sup> While the district court had concluded that mining on the Battlefield in the near future was speculative because the permits to mine the site had remained dormant for over ten years, the D.C. Circuit observed that a letter from the coal companies’ attorney objecting to the listing of the Battlefield in the Register had stated that the companies planned to mine the site, and concluded that there was therefore a “substantial probability” of mining at that location.<sup>48</sup> Accordingly, the D.C. Circuit held that the plaintiffs had established “that its injury is ‘actual or imminent, not conjectural or hypothetical.’”<sup>49</sup>

Next, the D.C. Circuit concluded that the plaintiffs met the second and third parts of the standing test: causation and redressability.<sup>50</sup> The court observed that the causation and redressability issues overlapped because both depended upon whether inclusion in the Register would protect the Battlefield from surface mining.<sup>51</sup> The district court concluded that the plaintiffs had failed to establish standing causation and redressability because it thought it probable under West Virginia law that surface mining would continue even if the Battlefield were relisted.<sup>52</sup> However, the D.C. Circuit agreed with the plaintiffs’ argument that “even if surface mining could continue upon a relisting of the Battlefield, West Virginia law affords additional protections to places listed in the Register,” including a duty to minimize any impacts from surface mining

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 7–8.

49. *Id.* at 8 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)).

50. *Id.* at 8–9.

51. *Id.*

52. *Id.*

on the landscape of a protected site.<sup>53</sup> While there was some dispute about whether the duty of minimization only applied to initial as opposed to renewed permits, the D.C. Circuit “conclude[d], however, that for purposes of demonstrating causation and redressability, there [wa]s an adequate possibility that the regulation would apply to renewals of those permits and not only to the initial applications.”<sup>54</sup> Because the plaintiffs raised a “non-frivolous” interpretation of West Virginia law suggesting that mining companies would have a duty to minimize harm at the Battlefield if it was listed on the Register, the D.C. Circuit determined that their argument was sufficient “to establish causation and redressability.”<sup>55</sup> Accordingly, the D.C. Circuit held that the plaintiffs had demonstrated Article III standing, and reversed the judgment of the district court and remanded the case for further proceedings.<sup>56</sup>

### C. Judge Sentelle’s Dissenting Opinion

In his dissenting opinion, Judge Sentelle argued that plaintiffs must have a legal interest to enter a parcel of property to establish standing.<sup>57</sup> While noting that the majority opinion was correct that a mere aesthetic injury may suffice to establish a concrete and particularized injury for Article III standing, he contended that “this does not establish that the legally protected aesthetic interest of would-be plaintiffs encompasses the legally protected right to peer into the property of others.”<sup>58</sup> Additionally, although the majority demonstrated from precedent that a defendant’s injury to flora or fauna that harms a plaintiff’s aesthetic interests may constitute a standing injury in some circumstances, Judge Sentelle reasoned, “Nonetheless, none of these cases would lead me to suppose that my neighbor has a legally protected right that I have invaded when I trim the grass and behead the

53. *Id.*

54. *Id.*

55. *Id.* at 8–9.

56. *Id.* at 3, 5–9.

57. *Id.* at 9–11 (Sentelle, J., dissenting).

58. *Id.* at 10.

clovers, which he enjoys viewing.”<sup>59</sup> Because the plaintiffs lacked any legal entitlement to enter the Battlefield, he maintained, “neither have they put forth any evidence of any legal entitlement to view that property.”<sup>60</sup> Since the Supreme Court in its 1992 decision *Lujan v. Defenders of Wildlife* required “parties invoking federal jurisdiction [to] bear the burden of establishing an “invasion of a *legally protected* interest,” Judge Sentelle reasoned that the plaintiffs had failed to establish a standing injury because they “offered nothing to establish the invasion of any such interest.”<sup>61</sup> Accordingly, he concluded, “The dismissal of this action should be affirmed.”<sup>62</sup>

#### IV. OTHER DECISIONS FINDING STANDING TO SUE TO PROTECT A RIGHT TO VIEW OTHER PEOPLE'S PROPERTY

In its 2001 decision *Cantrell v. City of Long Beach*, the Ninth Circuit held that birdwatchers who had no right to enter a property owned by the U.S. Navy had standing to sue to protect their right to view birds on that property.<sup>63</sup> Similar to the views of Judge Sentelle, the district court decision in *Cantrell* had denied standing because the court reasoned that the plaintiffs had no legally protected interest in the naval station property and, therefore, no right to view birds on the property.<sup>64</sup> However, the Ninth Circuit disagreed with the district court and concluded:

[W]e have never required a plaintiff to show that he has a right of access to the site on which the challenged activity is occurring, or that he has an absolute right to enjoy the aesthetic or recreational activities that form the basis of his concrete interest. If an area can be observed and enjoyed from adjacent land,

59. *Id.*

60. *Id.*

61. *Id.* at 10–11 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). In a footnote, Judge Sentelle argued that a plaintiff must have a “legally protected interest” to have standing, and that the majority’s reliance on cases using the term “cognizable interests” did not change the fundamental requirement of a legal interest for standing. *Id.* at 10 n.1.

62. *Id.* at 11.

63. 241 F.3d 674, 680–82 (9th Cir. 2001).

64. *Id.* at 681.

plaintiffs need not physically enter the affected area to establish an injury in fact.<sup>65</sup>

The Ninth Circuit based this conclusion on its interpretation of the Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*<sup>66</sup> The Ninth Circuit explained:

For example, the plaintiffs in *Laidlaw* had used specific areas in and around a river to picnic, birdwatch, walk, and swim but alleged that they would no longer be able to do so because the river had been polluted by the discharges from the defendant's facility upstream. . . . In finding that the plaintiffs had established an injury in fact, the *Laidlaw* Court did not state that actual use of the river by swimming, wading, or boating was necessary to establish standing, and drew no distinction between such activities and enjoying the river from the surrounding land by hiking, camping, picnicking, and driving near the river.<sup>67</sup>

The *Cantrell* decision reasoned: "the plaintiffs *have* alleged a concrete aesthetic injury because they assert that their ability to view the birds and their habitat from the publicly accessible areas surrounding the station will be drastically limited, if not destroyed, by the Navy's actions."<sup>68</sup> Thus, "the birdwatchers have shown a concrete and particularized interest in observing the birds and their habitat from land adjacent to the station, and therefore have satisfied Article III's injury in fact requirement."<sup>69</sup>

The Ninth Circuit's reasoning was followed in a West Virginia district court decision. In its 2014 decision *Ohio Valley Environmental Coalition, Inc. v. Consol of Kentucky, Inc.*, the U.S. District Court for the District of West Virginia relied on *Cantrell* and a similar California district court decision in concluding that whether a plaintiff has a legal right to enter property does not necessarily affect his standing to view that

65. *Id.*

66. *Id.* (discussing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–82 (2000)).

67. *Id.* (discussing *Friends of the Earth*, 528 U.S. at 181–82).

68. *Id.* (emphasis in original).

69. *Id.* at 682.

property.<sup>70</sup> The district court stated, “even if Ms. Branham were not able to access any of the affected area, it is not necessarily true that the lack of access would foreclose standing.”<sup>71</sup> The Court concluded that Ms. Branham’s interest in viewing at least a portion of the property at issue was sufficient to give the plaintiff organizations to which she belonged standing to sue even though there was some dispute as to which lands she could access or view.<sup>72</sup>

#### V. CONCLUSION: HOW THE SUPREME COURT MIGHT ADDRESS THE ISSUE

It is difficult to predict how the Supreme Court might address the question of whether a plaintiff may have standing to view property that it may not legally enter. The Court has sometimes applied standing criteria more strictly and sometimes more loosely. In its *Lujan* decision, the Court emphasized a strict application of the three-part standing test discussed in Part II.<sup>73</sup> Specifically, *Lujan* imposed more stringent standing requirements on private litigants challenging government regulation of third parties than on parties directly challenging government regulation that allegedly directly injured them.<sup>74</sup>

However, the Court partially softened *Lujan*’s strict approach to standing in certain environmental cases by subsequently

70. No. 2:13-5005, 2014 WL 1761938, at \*14 (S.D.W. Va. Apr. 30, 2014) (citing *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001) (“[W]e have never required a plaintiff to show that he has a right of access to the site on which the challenged activity is occurring, or that he has an absolute right to enjoy the aesthetic or recreational activities that form the basis of his concrete interest. If an area can be observed and enjoyed from adjacent land, plaintiffs need not physically enter the affected area to establish an injury in fact.”); *Soda Mountain Wilderness Council v. Norton*, 424 F. Supp. 2d 1241, 1256 (E.D. Cal. 2006) (“The plaintiffs have standing because the proposed action may affect the manner in which the private lands are managed in the future, a cognizable interest despite the plaintiffs lack of a right to access to the land. The declarations submitted by plaintiffs demonstrate that at least some of the organizations’ members regularly travel to the edges of the public property.”)).

71. *Id.*

72. *Id.* at 11–14.

73. 504 U.S. 555, 560–61 (1992); Mank, *No Article III Standing*, *supra* note \*, at 1534, 1581 (discussing *Lujan*’s strict three-part standing test); *supra* Part II.

74. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992); Mank, *No Article III Standing*, *supra* note \*, at 1581.

holding in *Laidlaw* that plaintiffs who avoid recreational or aesthetic activities because of “reasonable concerns” about pollution have a sufficient injury for Article III standing even if they cannot prove actual harm to themselves or the environment.<sup>75</sup> Christopher Warshaw and Gregory E. Wannier, in a quantitative analysis of 1,935 lower court opinions, demonstrated that, because of *Laidlaw*, most lower courts currently do not actually apply more stringent standing requirements to private litigants challenging government regulation of third parties than to litigants directly challenging government regulation that allegedly directly injures them.<sup>76</sup> Thus, it is not surprising that the Ninth Circuit in *Cantrell* relied upon *Laidlaw* when concluding that a plaintiff may have standing to challenge a defendant’s actions harming the plaintiff’s aesthetic views of a property even if the plaintiff does not have a right to enter that property.<sup>77</sup>

Because the Supreme Court’s standing jurisprudence contains both strict and liberal interpretations,<sup>78</sup> it is difficult to predict how it would decide whether a plaintiff has standing to challenge actions affecting the aesthetic views of a property he or she does not have a legal right to enter. The Court could rely upon *Lujan*’s definition of an injury in fact as “an invasion of a legally protected interest” to require that a plaintiff must have a “legal interest” in any property it seeks standing to protect.<sup>79</sup> Judge Sentelle’s dissenting opinion relied upon *Lujan*’s “legally protected interest” language in arguing that plaintiffs must have a legal interest in the land they seek

75. 528 U.S. 167, 181–86; Christopher Warshaw & Gregory E. Wannier, *Business As Usual? Analyzing The Development Of Environmental Standing Doctrine Since 1976*, 5 HARV. L. & POL’Y REV. 289, 289–322 (2011) (empirical analysis of 1935 lower court cases found that Justice Scalia’s two *Lujan* decisions led to more dismissal of environmentalist citizen suits, but that subsequent *Laidlaw* decision reversed that trend); Mank, *No Article III Standing*, *supra* note \*, at 1534, 1581–82 (contrasting *Lujan* and *Laidlaw* decisions).

76. *See generally* Warshaw & Wannier, *supra* note 75, at 289–322; Mank, *No Article III Standing*, *supra* note \*, at 1581–82 (discussing Warshaw & Wannier).

77. *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir.2001) (discussing *Laidlaw* decision); *supra* Part IV.

78. *See* Mank, *No Article III Standing for Private Plaintiffs*, *supra* note \*, at 1534, 1581–82 (contrasting *Lujan* and *Laidlaw* decisions); *see generally* Warshaw & Wannier, *supra* note 75, at 289–322 (same).

79. *See Lujan*, 504 U.S. at 560; *supra* Part III.C.

standing to view.<sup>80</sup> Yet, as the Ninth Circuit correctly observed in its *Cantrell* decision, the Court in *Laidlaw* appeared to be unconcerned with whether the plaintiffs in that case owned any of the river area they viewed.<sup>81</sup>

There are competing and contrasting policy arguments for both broad and narrow standing for plaintiffs who seek standing to sue to protect their aesthetic interests in viewing lands they cannot enter. Environmentalists and nature observers seeking to protect beautiful areas such as Blair Mountain would usually advocate for broad standing rights for plaintiffs who sue to protect their aesthetic interests in lands they cannot physically access.<sup>82</sup> The D.C. Circuit decision in *Sierra Club v. Jewell* and the Ninth Circuit decision in *Cantrell* marshalled strong precedent for recognizing standing for nature observers because of a strong public interest in preserving aesthetic beauty, even where the public has no right to enter the property at issue.<sup>83</sup> These two cases place more weight on giving the public access to aesthetic beauty than on the property rights of the landowners. However, property rights advocates such as Judge Sentelle would argue that only those with a legal interest in entering a property should have a standing right to sue to protect it because a land owner's interest in managing his property as he sees fit outweighs any public interest in its aesthetic beauty for public viewers who lack access rights to the property.<sup>84</sup>

If the Supreme Court addresses whether plaintiffs must have a legal interest in any property they seek standing to protect, it might be forced to face the contradictions or tensions between *Lujan's* strict approach to standing and *Laidlaw's* more lenient approach.<sup>85</sup> Justice Kennedy has often been the swing vote in standing cases on the current Court.<sup>86</sup> Notably, he filed

80. *Sierra Club v. Jewell*, 764 F.3d 1, 10–11 (D.C. Cir. 2014) (Sentelle, J., dissenting) (quoting *Lujan*, 504 U.S. at 560).

81. *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir.2001) (discussing *Laidlaw* decision); *supra* Part IV.

82. *See supra* Part III.B and Part IV.

83. *Id.*

84. *See* Part III.C.

85. *See* Mank, *No Article III Standing*, *supra* note \*, at 1534, 1581–82 (contrasting *Lujan* and *Laidlaw* decisions); *see generally* Warshaw & Wannier, *supra* note 76, at 289–322 (same).

86. Mank, *Clapper*, *supra* note \*, at 215–16 n.20.

concurring opinions in both the *Lujan* and *Laidlaw* decisions; accordingly, Justice Kennedy might be the Justice who resolves the tensions between the two decisions.<sup>87</sup> By contrast, Justice Scalia has usually sought to narrow standing rights in cases in which private citizen suits seek to challenge the government's alleged under-enforcement or non-enforcement of federal statutes, notably environmental laws.<sup>88</sup> On the other hand, Justice Breyer's probabilistic approach to standing has sought to expand standing rights in such cases.<sup>89</sup>

A future majority in an aesthetic preservation case, however, might cite either the *Lujan* or *Laidlaw* decisions and ignore the others, because that would be easier than addressing those contradictions. Furthermore, some argue that the D.C. Circuit's recent decision approving broader standing in the Blair Mountain case is the result of President Obama's recent appointments to that Circuit, including Judge Srinivasan, which shifted that Circuit to a more liberal approach with regard to standing when these appointments, in combination with prior appointments by President Clinton, gave judges

87. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 579–81 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

88. *See, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–94, 496–500 (2009) (rejecting probabilistic proof of standing injury in case alleging that the Forest Service's sales of timber from government lands failed to protect the public interest in accessing and enjoying those lands and demanding that environmental plaintiffs demonstrate a specific time and place where they suffer a concrete injury); *Lujan*, 504 U.S. at 573–78 (concluding that Articles II and III of the Constitution limit Congress's authority to authorize citizen suits by any person lacking a concrete injury, requiring environmental plaintiffs to demonstrate a specific injury for standing and thus rejecting environmental suit alleging potential future harm to plaintiffs' aesthetic interest in viewing endangered species in foreign countries at some possible future time); Mank, *Clapper*, *supra* note \*, at 240–49 (discussing Justice Scalia's strict separation of powers approach to standing in general and in *Summers* and *Lujan* decisions); *see also* Andrew C. Sand, *Standing Uncertainty: An Expected-Value Standard for Fear-Based Injury in Clapper v. Amnesty International USA*, 113 MICH. L. REV. 711 (2015) (discussing Justice Scalia's stringent approach to standing in fear-based and environmental cases).

89. *See, e.g.*, *Summers*, 555 U.S. at 505–10 (Breyer, J., dissenting) (proposing "realistic threat" and probabilistic approach to standing); Mank, *Clapper*, *supra* note \*, at 236–40, 249–54 (discussing Justice Breyer's probabilistic approach to standing in general and in *Summers* and *Clapper* decisions); Sand, *supra* note 89 (discussing Justice Breyer's liberal approach to standing in fear-based and environmental cases).



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appointed by Democratic presidents a majority on the Circuit.<sup>90</sup> Accordingly, how the Court addresses the issue might depend upon future presidential appointments to the Court, and the effect these appointments have in shifting it towards either the environmentalist or property rights perspectives on standing.

90. LaRoss, *supra* note 2 (discussing concerns of “industry attorney” and “conservatives” that President Obama’s recent appointments to D.C. Circuit have shifted that court to the left in general and especially to more liberalized standing); *see generally* Jeffrey Toobin, *The Obama Brief*, THE NEW YORKER, Oct. 27, 2014, at 24, available at <http://www.newyorker.com/magazine/2014/10/27/obama-brief> [<http://perma.cc/6DFZ-6999>] (arguing that President Obama’s recent appointments to D.C. Circuit have shifted that court to the left in general).