NOTE

THE NULLITY DOCTRINE

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The Federal Rules of Civil Procedure permit litigants to make changes to the substance of their initial pleading. Those changes raise a constitutional question when the initial pleading fails to establish a constitutionally required element of a federal court's jurisdiction: May the court permit the change, or must it dismiss the complaint as a nullity? The federal circuit courts are split in their answers to that question, with some circuits even issuing internally inconsistent holdings under different procedural rules. But regardless of the procedural rule at issue, the answer should be the same: Article III's jurisdictional requirements do not prohibit procedural moves from curing a jurisdictional defect. Taking that position, this Note contributes the only thorough analysis of the so-called "nullity doctrine" and its vices and, in the process, clarifies the relationship between Article III's jurisdictional requirements and the procedural rules that effectuate them.

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INTRODUCTION

Federal court litigants routinely change the substance of their initial pleading, often through amendment, supplementation, or party substitution. But otherwise routine changes raise a constitutional question when the original complaint fails to establish a constitutionally required element of the court's jurisdiction. In those cases, courts must determine if the complaint must be dismissed without further action, or if the jurisdictional defect can be remedied. Some courts permit the jurisdictional defect to be remedied through an applicable Federal Rule of Civil Procedure. Other courts hold that the complaint is a legal nullity that must be dismissed—a position often referred to as the "nullity doctrine."[1] Though at first glance the nullity doctrine has some formalistic appeal, a closer look reveals the nullity doctrine as an overly technical and mistaken application of Article III's jurisdictional requirements—most commonly

[1] See, e.g., 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3531 n.61 (3d ed. Supp. 2022) (using the term "'nullity' doctrine"); Fund Liquidation Holdings LLC v. Bank of Am. Corp., 991 F.3d 370, 386 (2d Cir. 2021) (rejecting the "so-called 'nullity doctrine'").

that of Article III standing.[2] This Note is the first significant contribution to the academic literature to take that closer look.[3]

The reasoning in support of the nullity doctrine is straightforward. The plaintiff who filed suit failed to plead a constitutionally required element of the court's jurisdiction. As a result, the court lacks jurisdiction. Because the court lacks jurisdiction, the court cannot entertain a motion to amend or supplement the complaint or to substitute a proper party. And because the jurisdictional defect is constitutional, the Federal Rules of Civil Procedure cannot operate to retroactively cure the defect, even though some of those rules permit pleading changes to relate back to the time the suit was filed. Accordingly, permitting amendment or supplementation of the complaint or a party substitution would amount to an expansion of the court's subject matter jurisdiction, which on their own terms the federal rules cannot do.[4] Thus, there is no suit at all—the complaint is a nullity that must be dismissed, and the plaintiff must refile.

Despite that syllogism's intuitive appeal, there are powerful counterarguments.[5] The nullity doctrine operates to bar a suit that would ultimately be proper (if there is no proper suit then the dismissal is unremarkable). That renders the nullity doctrine an empty procedural formality. Further, Article III does not regulate the minutiae of federal court procedure—the federal rules do that. And there is no constitutionally prescribed moment that a lawsuit is initiated—where a federal rule permits an amendment, supplementation, or party substitution to relate back to the time of filing, Article III's jurisdictional requirements

[2] Two comments on the scope of this Note. First, though the nullity doctrine appears in both constitutional and statutory jurisdictional contexts, this Note deals only with constitutionally defective allegations of jurisdiction and uses the term "nullity doctrine" only in that context. However, this Note's rejection of the nullity doctrine's constitutional applications applies with equal force to statutory applications. Second, though the term "standing" has both constitutional and sub-constitutional applications, this Note will use the term exclusively in reference to Article III standing.

[3] The *Boston College Law Review* published a brief commentary on a nullity doctrine case in 2020. Rory T. Skowron, Comment, Whether Events After the Filing of an Initial Complaint May Cure an Article III Standing Defect: The D.C. Circuit's Approach, 61 B.C. L. Rev. E. Supp. II.-230 (2020). This Note takes a significantly more comprehensive approach to both the nullity doctrine's manifestations under multiple federal rules and the nullity doctrine's interaction with Article III.

[4] Fed. R. Civ. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts . . . .").

[5] This Note does not argue that the nullity doctrine is incorrect because of its formalism, but rather that Article III does not require the nullity doctrine's formalist approach. This Note takes no position on the utility of formalism as such.

do not bar relation back. Regardless, pleading changes do not appear to be an exercise of "judicial Power" within Article III's meaning, and instead look more like the incidental authority federal courts use to stay executions, award costs, and vacate lower court judgments even where they lack (or are unsure of) jurisdiction. And the nullity doctrine's principal sub-constitutional support—the judge-made time of filing rule—does not prevent jurisdictional cures to relate back to the time the suit was filed. In fact, though the Supreme Court has never directly addressed the nullity doctrine, Supreme Court dicta expressly reject it and many of the Court's related cases weigh heavily against it.

The federal circuit courts are split on how to treat facially deficient complaints and the procedural rules that could operate to cure the deficiency, most commonly Rule 15's amendment and supplementation provisions[6] and Rule 17(a)(3)'s party substitution provision.[7] The U.S. Courts of Appeals for the Second, Sixth, and Ninth Circuits are split with respect to Rule 17(a)(3)—the Sixth and Ninth Circuits adopting the nullity doctrine and the Second Circuit rejecting it. The Seventh, Ninth, District of Columbia, and Federal Circuits are split with respect to Rule 15—the Federal Circuit adopting the nullity doctrine under Rule 15(a) and the other circuits rejecting it under several of Rule 15's other provisions. Complicating matters, several circuit courts have issued contradictory holdings with respect to different procedural rules. Despite the Federal Circuit's adoption of the nullity doctrine under Rule 15(a), the same court rejected the nullity doctrine under Rule 15(d). And despite the Ninth Circuit's adoption of the nullity doctrine under Rule 17(a)(3), the Ninth Circuit rejected the nullity doctrine under Rules 15(b) and 15(d).

Those courts and panels that have rejected the nullity doctrine have the better position. The nullity doctrine's central premise—that Article III controls what is ultimately a procedural issue—is incorrect. Article III controls the *types* of suits that a federal court has the power to resolve, not the *methods* by which those suits come before a court. We have a lengthy

[6] Fed. R. Civ. P. 15(a) ("A party may amend its pleading once as a matter of course . . . ."); Fed. R. Civ. P. 15(c) ("[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment changes the party" and other conditions obtain); Fed. R. Civ. P. 15(d) (court may permit a supplemental pleading even where the original pleading "is defective in stating a claim or defense").

[7] Fed. R. Civ. P. 17(a)(3) ("The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to . . . be substituted into the action.").

body of procedural rules precisely because Article III *does not* regulate the types of procedural intricacies implicated by the nullity doctrine.

Despite some courts' differential treatment of the nullity doctrine under different procedural rules, the nullity doctrine's claimed constitutional justifications would apply with equal force to any procedural rule that permits a change to a pleading. And because those constitutional justifications do not stand up to scrutiny, the nullity doctrine should be rejected across the board, regardless of the procedural rule at issue. The Supreme Court should grant certiorari in an appropriate case to clarify the relationship between Article III and the procedural rules that operate in its trial courts, and to resolve this trans- and intra-circuit split, which implicates everyday procedural moves under some of the most commonly invoked federal rules.

This Note will make that argument in several parts. Part I will describe in greater depth the circuit split and the varying procedural rules and factual scenarios at issue in the nullity doctrine cases. Part II will examine the nullity doctrine's claimed constitutional underpinnings and will argue that the pleading changes that the nullity doctrine precludes are not exercises of "judicial Power" within Article III's meaning. Part III will argue that the time of filing rule does not compel adoption of the nullity doctrine, and in the process will detail Supreme Court decisions that weigh against the nullity doctrine, including Supreme Court dicta expressly rejecting it. Part III will be followed by a brief conclusion.

I. THE CIRCUIT SPLIT

The circuit split on the nullity doctrine is complicated both by the varying procedural rules at issue—Rule 17(a)(3) and several of Rule 15's provisions—and by the varying factual situations under which different federal circuit courts have considered the issue. For example, some cases involve natural plaintiffs who were deceased or entities that lacked legal existence—and therefore lacked Article III standing—at the time the lawsuit was filed.[8] Others do not.[9] Some involve situations in which jurisdiction would have been proper if the plaintiff had properly plead the

[8] See, e.g., Paradise Creations, Inc. v. UV Sales, Inc., 315 F.3d 1304, 1305–06 (Fed. Cir. 2003) (prohibiting Rule 15(a) substitution where initial plaintiff was a dissolved corporate entity).

[9] See, e.g., Perry v. Vill. of Arlington Heights, 186 F.3d 826, 827–28 (7th Cir. 1999) (addressing the nullity doctrine in case with a living natural plaintiff).

operative facts as they existed at the time the suit was filed.[10] Others involve situations in which the court did not have jurisdiction until some post-filing real-world change cured the jurisdictional defect.[11] Ultimately, this Note argues that the different procedural rules and factual situations do not change the constitutional analysis—in any of these situations and under any of these rules, an amendment, supplement, or party substitution can remedy a defective complaint without offending Article III's jurisdictional requirements.

A. Rule 17(a)(3) Party Substitutions

Rule 17(a)(1) requires that an action "be prosecuted in the name of the real party in interest."[12] Rule 17(a)(3) prohibits a court from dismissing a suit for "failure to prosecute in the name of the real party in interest until . . . a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action."[13] Rule 17(a)(3) requires ratification, joinder, or substitution to relate back to the initial time of filing: if a party is substituted into the action under the rule, "the action proceeds as if it had been originally commenced by the real party in interest."[14] The two highest-profile nullity doctrine cases were decided under Rule 17(a)(3)'s party substitution provision—the Sixth Circuit's adoption of the nullity doctrine in *Zurich Insurance Co. v. Logitrans, Inc.*[15] and the Second Circuit's rejection of the nullity doctrine in *Fund Liquidation Holdings v. Bank of America Corp.*[16] Several other courts have weighed in as well.

In *Zurich*, the Sixth Circuit prohibited a party substitution that would have remedied a standing defect present at the time of filing.[17] *Zurich* involved a negligence claim arising out of a warehouse fire that destroyed property owned by the Lear Corporation.[18] Lear's insurer, American

[10] See, e.g., Fund Liquidation Holdings LLC v. Bank of Am. Corp., 991 F.3d 370, 390 (2d Cir. 2021) (party with standing and eligible for substitution existed at time the suit was filed).

[11] See, e.g., Northstar Fin. Advisors Inc. v. Schwab Invs., 779 F.3d 1036, 1043–44 (9th Cir. 2015) (post-filing assignment of claim pled through supplemental complaint is sufficient to establish standing).

[12] Fed. R. Civ. P. 17(a)(1).

[13] Fed. R. Civ. P. 17(a)(3).

[14] Id.

[15] 297 F.3d 528 (6th Cir. 2002).

[16] 991 F.3d 370 (2d Cir. 2021).

[17] 297 F.3d at 531.

[18] Id. at 530.

Guarantee, indemnified Lear for its loss, thus becoming the "real party in interest" and proper plaintiff to bring Lear's negligence claim under Rule 17.[19] Instead, the lawsuit was filed under the name of one of American Guarantee's sister companies—Zurich Switzerland—who shared a common parent company with American Guarantee but was otherwise unconnected to the lawsuit.[20] Twenty days before trial and after the applicable statute of limitations had run on American Guarantee's claim, defendant Logitrans filed a motion to prevent Zurich Switzerland from entering evidence at trial.[21] Zurich Switzerland responded by filing a motion to substitute American Guarantee as the real party in interest under Rule 17(a)(3).[22] The district court denied Zurich Switzerland's motion.[23] On appeal, the Sixth Circuit treated the issue as one of Article III standing and affirmed the district court's denial of the party substitution motion on the grounds that Zurich Switzerland lacked Article III standing either to bring the action or to file the motion.[24]

Several other federal circuits have joined the Sixth Circuit in adopting the nullity doctrine with respect to Rule 17(a)(3). The Ninth Circuit did so in *Davis v. Yageo Corp*.[25] In *Davis*, a plaintiff that lacked standing attempted to gain standing through a Rule 17(a)(3) ratification by a party who did have standing.[26] Without otherwise addressing the nullity issue, the Ninth Circuit held that the plaintiff "cannot cure its standing problem through an invocation of Fed. R. Civ. P. 17(a)."[27] The Fourth Circuit held for the nullity doctrine in *House v. Mitra QSR KNE LLC*, an unpublished opinion.[28] In *House*, suit was filed in the name of a deceased plaintiff, Kenneth House.[29] The district court denied House's motion to substitute the personal representative of his estate. The Fourth Circuit affirmed, reasoning that "[a]bsent a plaintiff with legal existence, there can be no

[19] Id.; Fed. R. Civ. P. 17(a)(1) ("An action must be prosecuted in the name of the real party in interest.").

[20] *Zurich*, 297 F.3d at 530; id. at 533 (Gilman, J., concurring) ("Zurich [Switzerland] and American Guarantee are sister companies under the common ownership of a single corporate entity . . . .").

[21] Id. at 530 (majority opinion).

[22] Id.

[23] Id.

[24] Id. at 530–31.

[25] 481 F.3d 661 (9th Cir. 2007).

[26] Id. at 672.

[27] Id. at 678.

[28] 796 F. App'x 783 (4th Cir. 2019).

[29] Id. at 784.

Article III case or controversy" and that procedural rules "do not extend or limit the jurisdiction of the district courts."[30]

On the other side, the Second Circuit rejected the nullity doctrine in *Fund Liquidation Holdings*, thus creating the circuit split with respect to Rule 17(a)(3).[31] In *Fund Liquidation Holdings*, two investment funds filed a class action against several banks alleging unlawful manipulation of interest rates.[32] However, both investment funds had been dissolved before they filed their complaint, and therefore both funds lacked Article III standing to sue.[33] But before the suit was filed, the dissolved funds assigned their claims to a different entity—Fund Liquidation Holdings—which the dissolved funds argued "was, and had always been, the real plaintiff behind the case."[34] Denying a motion to substitute Fund Liquidation Holdings as plaintiff under Rule 17(a)(3), the district court dismissed the complaint with prejudice "on the grounds that the court had lacked subject-matter jurisdiction over the action from its outset," a defect which "could not be cured."[35] The Second Circuit reversed that holding.[36] Despite agreeing that the dissolved funds lacked Article III standing at the time of filing, the Second Circuit reasoned that "Article III is satisfied so long as a party with standing to prosecute the specific claim in question exists at the time the pleading is filed," a condition satisfied by Fund Liquidation Holdings' presence in the case.[37]

B. Rule 15 Amended or Supplemental Pleadings

Courts' treatment of the nullity doctrine under Rule 15 is complicated by the varying pleading changes permitted by Rule 15. Rule 15(a) provides that a "party may amend its pleading once as a matter of course" or may do so with the opposing party's consent or the court's leave.[38] Rule 15(c) provides that "[a]n amendment to a pleading relates back to

[30] Id. at 787, 789 (quoting Fed. R. Civ. P. 82).

[31] Fund Liquidation Holdings LLC v. Bank of Am. Corp., 991 F.3d 370, 375 (2d Cir. 2021).

[32] Id.

[33] Id. at 375, 384. Though the funds' dissolution could be understood as a lack of legal capacity to sue, the Second Circuit treated the issue as a lack of Article III standing.

[34] Id. at 377.

[35] Id. at 377–78.

[36] Id. at 375 (vacating the district court's judgment and remanding for further proceedings).

[37] Id. at 386 ("[T]he Dissolved Funds lacked Article III standing when the case was initiated . . . .").

[38] Fed. R. Civ. P. 15(a)(1)–(2).

the date of the original pleading when" certain conditions are met.[39] And Rule 15(d) may "permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented," even where the "original pleading is defective in stating a claim or defense."[40] Despite Rule 15's varying sub-constitutional requirements that operate at the level of the federal rules, the same underlying constitutional question applies across the board: When Rule 15's conditions are met, does Article III prohibit an amendment or supplement that would cure a constitutional jurisdictional defect? As with Rule 17(a)(3), circuit courts are split on the answer to that question.

The D.C. Circuit rejected the nullity doctrine with respect to Rule 15(d) in *Scahill v. District of Columbia*, in which the Court held that a factual change documented in a supplemental complaint can cure a standing defect present in the original complaint.[41] Noting a deep circuit split on the issue and citing cases from eight different federal circuit courts, the D.C. Circuit reasoned that "[t]he alternative approach forces a plaintiff to go through the unnecessary hassle and expense of filing a new lawsuit when events subsequent to filing the original complaint have fixed the jurisdictional problem."[42] Interestingly, two years later the U.S. District Court for the District of Columbia failed to follow its higher court's lead and issued a contrary ruling with respect to Rule 15(a).[43]

Despite adopting the nullity doctrine with respect to Rule 17(a)(3) in *Davis*,[44] the Ninth Circuit rejected the nullity doctrine under Rule 15(d) in *Northstar Financial Advisors Inc. v. Schwab Investments*.[45] Without

[39] Fed. R. Civ. P. 15(c)(1).

[40] Fed. R. Civ. P. 15(d).

[41] 909 F.3d 1177, 1184 (D.C. Cir. 2018); see also Skowron, supra note 3, at 238–39 (discussing *Scahill*'s rejection of the nullity doctrine).

[42] *Scahill*, 909 F.3d at 1184.

[43] Snarr v. Fed. Bureau of Prisons, No. 19-cv-01421, 2020 WL 3639708 (D.D.C. July 6, 2020). In *Snarr*, the plaintiff filed an original complaint that failed to establish standing. Id. at *4. Though the court would have permitted the plaintiff to amend his complaint as a matter of course under Rule 15(a)(1), instead the plaintiff asked the court to rule on defendant's motion to dismiss for lack of standing. Id. at *1. Obliging the plaintiff, the court held that once it had determined that the plaintiff lacked standing, the court lacked "jurisdiction to entertain a request for leave to amend to cure the jurisdictional problems." Id. Granting the defendant's motion to dismiss, the court reasoned that permitting an amendment "would retroactively create jurisdiction where it had not existed at the outset—effectively allowing an amendment when there is no pending action to amend." Id. at *6.

[44] See supra notes 25–27 and accompanying text.

[45] 779 F.3d 1036 (9th Cir. 2015).

citing *Davis*, the Ninth Circuit held that a Rule 15(d) supplemental pleading could establish standing where prior pleadings had not.[46] There, the plaintiff had filed a complaint before obtaining an assignment of the alleged claim, and thus lacked standing.[47] The district court permitted the plaintiff to amend its complaint over the defendant's objection that the intervening assignment of the claim could not remedy the plaintiff's initially defective pleading.[48] When the defendant renewed its objection to the amended complaint, the district court responded by treating the amendment as a supplemental pleading under Rule 15(d), reasoning that "parties may cure standing deficiencies through supplemental pleadings."[49] The Ninth Circuit agreed.[50]

Just a few months after *Northstar Financial*, the Ninth Circuit suggested that it also would hold against the nullity doctrine with respect to Rule 15(b) amendments. In *Estate of Cornejo ex rel. Solis v. City of Los Angeles*, an unpublished case, the Ninth Circuit held that minor children had standing to bring a § 1983 suit on behalf of their deceased father.[51] In a footnote, the Ninth Circuit reasoned that "[e]ven if we agreed with Defendants that the children otherwise lacked Article III standing, we would conclude that the parties amended the pleadings before judgement under Rule 15(b)(2) . . . resolv[ing] any standing issues."[52]

For its part, the Federal Circuit has conflicting precedents under Rules 15(a) and 15(d).[53] In *Paradise Creations, Inc. v. UV Sales, Inc.*, Paradise Creations brought suit under patent rights obtained during a period of time

[46] Id. at 1048.

[47] Id. at 1043.

[48] Id. at 1043–44.

[49] Id. at 1044 (quoting Northstar Fin. Advisors, Inc. v. Schwab Invs., 781 F. Supp. 2d 926, 933 (N.D. Cal. 2011)).

[50] Id. at 1065 ("We hold that by filing a supplemental pleading alleging a post-complaint assignment from a party that clearly had standing, [plaintiff] has standing to prosecute this case.").

[51] 618 F. App'x 917, 919 (9th Cir. 2015).

[52] Id. at 919 n.2.

[53] The Federal Circuit generally applies the procedural rules of the originating regional circuit court of appeals that do not pertain to patent law. See, e.g., C&F Packing Co. v. IBP, Inc., 224 F.3d 1296, 1306 (Fed. Cir. 2000) (applying Seventh Circuit procedural precedents in trade secrets case). However, both of the Federal Circuit's nullity doctrine cases involved questions of patent law in which the Federal Circuit applied its own procedural precedents. See Paradise Creations, Inc. v. UV Sales, Inc., 315 F.3d 1304, 1309 (Fed. Cir. 2003) (applying Federal Circuit precedent); Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1337 (Fed. Cir. 2008) (same).

in which the corporation was dissolved.[54] Further, Paradise Creations filed the suit during a time in which the corporate entity was dissolved, and therefore lacked standing.[55] After Paradise Creations was reestablished as a viable entity pursuant to state law, it filed a motion to amend its complaint by adding parties with standing under Rule 15(a).[56] Denying the motion, the district court granted summary judgment to the defendant, reasoning that Paradise Creation's lack of standing at the time of filing could not be remedied by an amended complaint.[57] The Federal Circuit affirmed, framing the question presented as "whether a state corporate revival statute can retroactively confer Article III standing where it did not exist at the time the complaint was filed," and answering that question in the negative.[58]

Five years later in *Prasco, LLC v. Medicis Pharmaceutical Corp.*, the Federal Circuit used contrary reasoning under Rule 15(d).[59] In *Prasco*, plaintiff Prasco sought a declaratory judgment that one of its products did not infringe on patents held by the defendant.[60] Prasco, however, lacked standing at the time the suit was filed because Prasco had not yet begun to market its product.[61] After the defendant filed a motion to dismiss, Prasco began marketing its product and filed an amended complaint to reflect that intervening real-world factual change.[62] The defendant responded by renewing its motion to dismiss.[63] The district court granted the motion to dismiss, and though the Federal Circuit affirmed, its reasoning rejects the nullity doctrine.[64] The Court reasoned that the operative time of filing was that of the amended complaint rather than the original complaint.[65] Thus, the amended complaint could create jurisdiction where the original complaint had not, and the Court affirmed the dismissal only because Prasco failed to establish standing despite the amendment.[66]

[54] *Paradise Creations*, 315 F.3d at 1305–06.
[55] Id.
[56] Id. at 1306.
[57] Id. at 1307.
[58] Id. at 1309–10.
[59] 537 F.3d 1329, 1337 (Fed. Cir. 2008).
[60] Id. at 1334.
[61] Id.
[62] Id.
[63] Id.
[64] Id. at 1334, 1342.
[65] Id. at 1337.
[66] Id. at 1337, 1341.

The Seventh Circuit rejected the nullity doctrine in dicta in *Perry v. Village of Arlington Heights*, in which the Court signaled a willingness to allow Rule 15 to remedy constitutionally deficient jurisdictional allegations.[67] In *Perry*, the district court held that plaintiff Perry's pleadings failed to establish an injury in fact, as required by Article III.[68] The district court dismissed Perry's original complaint but permitted Perry to file an amended complaint.[69] When the amended complaint also failed to establish Perry's standing, Perry attempted to file supplemental affidavits introducing new facts that would establish standing.[70] The district court refused to consider those affidavits and instead granted Perry leave to file a supplemental complaint.[71] But instead of filing the supplement, Perry appealed the district court's standing determination.[72] On appeal, the Seventh Circuit reasoned that standing must be established at the time of filing.[73] Still, the Seventh Circuit held that the district court was correct to grant Perry leave to file a supplemental complaint, which was the "proper mechanism" by which a party can introduce new facts "which have transpired since the date of the pleading sought to be supplemented."[74] Though not crucial to the disposition of the case, which affirmed the district court's dismissal of the amended complaint, the Court's reasoning with respect to supplemental complaints amounts to an outright rejection of the nullity doctrine. If the nullity doctrine was correct, neither an amended nor supplemented complaint could remedy the jurisdictional defect.

Finally, the Fifth Circuit adopted the nullity doctrine in *Hernandez v. Smith*, an unpublished opinion that considered an amendment under Rule 15, and briefly, party substitution under Rule 17.[75] In *Hernandez*, the named plaintiff died before the suit was filed under her name, and the

[67] 186 F.3d 826, 830–31 (7th Cir. 1999) (describing a "Rule 15(c) [sic]" supplemental pleading as a proper mechanism for bringing post-filing events which establish standing to the attention of a court). Though the court identified Rule 15(c) as the correct provision, that was probably a typographical error. Rule 15(d) is the correct rule under which to supplement pleadings. See Fed. R. Civ. P. 15(d).

[68] 186 F.3d at 828; see also Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (holding that Article III standing requires injury in fact).

[69] *Perry*, 186 F.3d at 828.

[70] Id. at 829.

[71] Id.

[72] Id.

[73] Id. at 830.

[74] Id. at 830–31.

[75] 793 F. App'x 261, 265–66 (5th Cir. 2019).

applicable statute of limitations ran before her estate was substituted into the action to press her survival claim.[76] Like the Fourth Circuit in *House*, the Fifth Circuit—citing circuit precedent involving statutory jurisdiction—treated the failure to name the estate in the initial complaint as an uncurable jurisdictional defect under Rule 15.[77]

* * *

Though these cases were resolved under different rules and often on very different facts, the same underlying principles should dictate a consistent result in all of them—Article III does not prohibit an amended or supplemented complaint or party substitution from curing a jurisdictional defect in a prior pleading. This Note will proceed by making that case.

II. ARTICLE III DOES NOT REQUIRE THE NULLITY DOCTRINE

If the nullity doctrine were benign, then it would not much matter that some courts have misunderstood Article III's role in procedure. But the nullity doctrine is not benign, and instead can create perverse results. Because the nullity doctrine may preclude a party from amending or supplementing a complaint or substituting a party, even where such a procedural move is otherwise permissible, years of litigation expenses—measured in both the parties' dollars and courts' time—may be squandered. If a statute of limitations runs in the intervening time, otherwise meritorious claims may be lost, even where there would be no prejudice to a defendant already defending against them.[78] And the nullity doctrine may invite strategic behavior on the part of defendants who recognize a constitutional jurisdictional defect in a case before a plaintiff or court does. Such defendants, safe in the knowledge that the defect cannot be remedied through amendment, supplementation, or party

[76] Id. at 263.

[77] Id. at 265 ("[W]e have held Rule 15 cannot be used to cure a jurisdictional defect.").

[78] For its part, Rule 17(a)(3) was expressly designed to avoid forfeiture of meritorious claims. Fed. R. Civ. P. 17 advisory committee's note to 1966 amendment (Rule 17 is "intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made"). Despite this, one of the leading cases holding for the nullity doctrine recognized that its holding had exactly that effect. See Zurich Ins. Co. v. Logitrans, Inc., 297 F.3d 528, 530 (6th Cir. 2002) ("Inasmuch as the statute of limitations had run on [the] claims, the denial of the motion to substitute prevented [the real party in interest] from pursuing its claims against the defendants.").

substitution, might bleed a plaintiff's resources or challenge jurisdiction only if dissatisfied with the course of the proceedings.

Any or all of those results must be tolerated if required by Article III and, even if not required, might still be tolerable if offset by some benefit. But Article III does not require the nullity doctrine, and the nullity doctrine offers no such offsetting benefit. On the contrary, in most situations all the nullity doctrine achieves is a dismissed complaint, a new case number, and wasted resources.

Fortunately, the Constitution does not require courts to treat deficient complaints as nullities. For starters, Article III does not purport to control federal court procedures. Article III does not even establish the lower federal courts, nor does it require Congress to do so,[79] and it is a stretch to interpret Article III as regulating federal district court procedures without requiring the existence of those same courts. Article III does identify nine heads of federal jurisdiction set off by its "Case" or "Controversy" requirement, from which the Supreme Court has inferred its modern standing jurisprudence.[80] But those nine jurisdictional heads control the types of lawsuits that federal courts have the power to adjudicate, not the methods by which those suits come before a court—the methods are left to the Federal Rules of Civil Procedure, none of which require the nullity doctrine.[81]

For example, some nullity doctrine cases assume Article III regulates which parties must appear in a caption before jurisdiction is proper,[82] but that responsibility belongs to Rule 10(a).[83] Nor does Article III prescribe a procedure for pleading jurisdiction—that responsibility belongs to Rule 8(a).[84] Nor does Article III regulate the conditions in which amended or supplemented complaints or party substitutions are proper—those

[79] See U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[80] Id. § 2 (describing nine categories of cases and controversies over which federal courts may exercise jurisdiction); see, e.g., Allen v. Wright, 468 U.S. 737, 751 (1984) (Article III requires plaintiffs to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief").

[81] See supra notes 6–7.

[82] See, e.g., *Zurich*, 297 F.3d at 531 (failure to name party with standing in initial complaint rendered suit a nullity).

[83] Fed. R. Civ. P. 10(a) ("The title of the complaint must name all the parties . . . .").

[84] Fed. R. Civ. P. 8(a) ("A pleading that states a claim for relief must contain: a short and plain statement of the grounds for the court's jurisdiction . . . .").

procedures are controlled by a variety of different procedural rules.[85] We have a lengthy body of procedural rules precisely because Article III does not address those types of details.

A simple hypothetical lays bare the nullity doctrine's erroneous constitutionalizing of procedure. Consider a hypothetical statute or rule promulgated by Congress prescribing the following procedure for the federal district courts.[86] When a plaintiff fails to establish some constitutionally required element of a federal court's jurisdiction, that plaintiff's complaint is "dismissed," but the plaintiff has twenty-one days[87] to file a new complaint fixing the problem. And if the plaintiff does so, the "new" case will be assigned the same case number, any applicable filing fees are waived, no intervening statutes of limitations apply, and the case proceeds normally. Whether or not such a procedural rule would make sense as a matter of sound policy, courts that have adopted the nullity doctrine must think that Article III prohibits such a procedure.[88] But to state the nullity doctrine in that hypothetical's terms is to take the first step toward refuting it—nothing in Article III would prevent Congress from enacting such a scheme, or a court from allowing an existing procedural rule to achieve the same effect.

A. The Nullity Doctrine Challenges the Routine Operation of Multiple Federal Rules

If the nullity doctrine is correct and Article III does regulate procedural minutiae in the way the nullity doctrine envisions, the result would amount to a constitutional challenge to the routine operation of multiple federal rules, some of which include provisions that operate directly contrary to the nullity doctrine. The sheer breadth of that reach should give us pause.

The first such rule that the nullity doctrine draws into question is Rule 15(a)(1): amendments as a matter of course. Rule 15(a)(1) permits a party

[85] See supra notes 6–7; see also Fed. R. Civ. P. 21 ("Misjoinder of parties is not a ground for dismissing an action . . . . [T]he court may at any time, on just terms, add or drop a party."); Fed. R. Civ. P. 25(a) ("If a party dies and the claim is not extinguished, the court may order substitution of the proper party.").

[86] I owe this helpful formulation to both Professor Caleb Nelson and Dev Ranjan.

[87] This is an arbitrary number. Any whole number other than zero would do. The point is not how long a litigant might have to refile, but that Congress's rule would permit the litigant to refile.

[88] No court of which I am aware has formulated the issue in those terms. But the hypothetical rule as described would amount to an outright rejection of the nullity doctrine.

to amend its pleadings once as a matter of course within twenty-one days of the initial filing.[89] Amendments as a matter of course may proceed without the court's supervision.[90] But if courts were to take the nullity doctrine seriously, they could not permit plaintiffs to amend their complaints without the court's supervision—if they did, plaintiffs might use the amendment to remedy a standing defect present in the initial complaint in contradiction of the nullity doctrine's requirement that the complaint be dismissed and refiled. Some courts, however, do permit Rule 15(a)(1) amendments to remedy standing deficiencies[91] in contradiction of the nullity doctrine.[92]

Similar problems obtain for Rules 15(c)(1)(C) and 17(a)(3), both of which include provisions that permit amendments or party substitutions to relate back to the time a suit was filed.[93] Because both rules can implicate a change in party—which necessarily affects the Article III standing analysis—the rules themselves comprehend situations in which a court must reevaluate jurisdiction such that the court's new determination would relate back to the time of filing. If the nullity doctrine were correct, however, Rule 17(a)(3)'s relation-back provision often would be unconstitutional as applied, and many amendments eligible for Rule 15(c)(1)(C)'s relation-back provision would be barred. Indeed, that is the conclusion that courts holding for the nullity doctrine have reached.[94]

Though not implicated by the circuit split as described in this Note, the nullity doctrine poses problems for at least two other federal rules: Rules

[89] Fed. R. Civ. P. 15(a)(1).

[90] See, e.g., Rogers v. Girard Tr. Co., 159 F.2d 239, 241 (6th Cir. 1947) ("Leave of the District Court [to amend as a matter of course] was not necessary . . . .").

[91] See, e.g., Swanigan v. City of Chicago, 775 F.3d 953, 963 (7th Cir. 2015) ("[Plaintiff] may not be able to establish standing . . . [b]ut the time to evaluate any jurisdictional or legal impediments . . . is *after* [plaintiff] has amended his complaint [under Rule 15(a)(1)]."); Cunegin v. Zayre Dep't Store, 437 F. Supp. 100, 101–02 (E.D. Wis. 1977) (permitting Rule 15(a) substitution of correct defendant where original defendant played no role in causing plaintiff's injury).

[92] See, e.g., House v. Mitra QRE KNE LLC, 796 F. App'x 783, 784–85 (4th Cir. 2019) ("[W]here the original suit is a nullity . . . there exists no claim or action capable of amendment . . . ." (internal quotation marks omitted)).

[93] Fed. R. Civ. P. 15(c)(1)(C) ("[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment changes the party or the naming of the party against whom a claim is asserted" and when other conditions are met); Fed. R. Civ. P. 17(a)(3) ("After ratification, joinder, or substitution [of the real party in interest], the action proceeds as if it had been originally commenced by the real party in interest.").

[94] See supra Part I.

21 and 25(a)(1). Rule 21 provides that "[m]isjoinder of parties is not a ground for dismissing an action" and that "the court may at any time, on just terms, add or drop a party."[95] The nullity doctrine's prohibition of party substitutions under Rule 17(a)(3) applies with equal force to those that a court might order under Rule 21. Similarly, Rule 25(a)(1) permits a court to hold open a claim for ninety days when the plaintiff dies but their claim survives.[96] In other words, Rule 25(a)(1) permits a court to continue to exercise jurisdiction over a suit that has no plaintiff at all, and therefore has no plaintiff with standing. In order to reconcile the nullity doctrine with Rule 25(a)(1), its advocates would either need to make some fine distinctions that may not be supportable,[97] or embrace that the nullity doctrine would prohibit the plaintiff-less suits that Rule 25(a)(1) explicitly permits.

B. The Nullity Doctrine Operates to Dismiss Article III-Compliant Suits

One of the nullity doctrine's advocates' principal arguments is that permitting an amendment, supplement, or party substitution to remedy a jurisdictional defect would "expand the subject matter jurisdiction of [the] federal courts."[98] But that is not correct. Every nullity doctrine case involves a claim that—whether initially filed under Rule 3 or perfected through an amendment, supplement, or party substitution—ultimately would comply with Article III.[99] And though the Supreme Court has attributed significant substance to Article III's "Case" or "Controversy" language,[100] there is little reason to believe that language compels an

[95] Fed. R. Civ. P. 21.

[96] Fed. R. Civ. P. 25(a)(1).

[97] For example, advocates of the nullity doctrine might cite the time of filing rule, see infra Section III.A, to argue that a post-filing change in party does not deprive the court of jurisdiction. However, that argument might run up against mootness doctrine, especially given its recent treatment by the Supreme Court. See Uzuegbunam v. Preczewski, 141 S. Ct. 792, 796–97 (2021) (determining whether case was moot by asking whether plaintiff continued to have Article III standing).

[98] Zurich Ins. Co. v. Logitrans, Inc., 297 F.3d 528, 531 (6th Cir. 2002); see also House v. Mitra QSR KNE LLC, 796 F. App'x 783, 789 (4th Cir. 2019) (quoting the same reasoning from *Zurich*).

[99] See, e.g., Paradise Creations, Inc. v. UV Sales, Inc., 315 F.3d 1304, 1306, 1310 (Fed. Cir. 2003) (plaintiff's lack of standing due to dissolution of corporate entity would have been cured if plaintiff had been permitted to amend complaint to reflect plaintiff's reestablishment as a viable corporate entity).

[100] See, e.g., Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (establishing the modern three-part standing test).

empty procedural formality that operates regardless of whether or not a lawsuit ultimately takes the form of a case or controversy that a federal court may adjudicate.

For example, take the suit filed in *Zurich*. Though the lawsuit was filed with the incorrect party named in the caption of the complaint, there was a live, Article III-compliant dispute between the defendant and prospective plaintiff, American Guarantee, who was willing to join the lawsuit.[101] There was no jurisdictional defect vis-à-vis American Guarantee, who would have had standing to file the claim in the first instance. In other words, if American Guarantee's substitution had been permitted, the court would have had jurisdiction over the post-substitution lawsuit. And even if the suit was dismissed, American Guarantee would have had standing to refile and prosecute the same claim—all that would change would be the case number, a superficial aspect of a case.[102] But from Article III's perspective, it should not matter if an otherwise proper suit arrives before a court through an amendment, supplement, or party substitution under Rules 15 or 17, or if it arrives through a new filing under Rule 3.

Wright and Miller's *Federal Practice and Procedure* criticized *Zurich* on exactly those grounds, referring to the decision as a "particularly troubling illustration" of "the nefarious consequences of pushing too far the Article III foundations of standing theory."[103] According to Wright and Miller, it was "nonsensical to make jurisdiction depend on whether the nominal plaintiff [Zurich Switzerland] has standing."[104] Rather, American Guarantee's "presence and standing assured that there was a live controversy when the action was initiated."[105] As a result, the "policies embodied in Rule 17 could—and should—have been implemented by allowing substitution of American [Guarantee] as real party in interest."[106]

[101] See *Zurich*, 297 F.3d at 530 (recognizing that American Guarantee was subrogated to the injured party's claims). Though subrogation does not necessarily resolve the standing analysis, the Sixth Circuit did not suggest that American Guarantee lacked standing, but rather that it had not been "vigilant in protecting its claims." Id. at 532.

[102] The reason American Guarantee could not refile had nothing to do with the court's jurisdiction, but rather that the applicable statute of limitations had run. Id. at 530.

[103] Wright et al., supra note 1, § 3531 n.61.

[104] Id.

[105] Id.

[106] Id.

To be sure, *other* considerations might prohibit such procedural moves, for example, a complaint which is ineligible for amendment under the provisions of Rule 15, or a party ineligible for substitution under Rule 17's real party in interest requirement. But those are procedural concerns, not constitutional issues. As a constitutional matter, the Sixth Circuit's expansion-of-jurisdiction reasoning would apply only if the court adjudicated the claim with Zurich Switzerland as plaintiff, since Zurich Switzerland had no stake in the suit.[107] But because Article III does not control exact procedural methods, the Sixth Circuit could—and should—have permitted American Guarantee's substitution and treated American Guarantee as if it had filed as an initial matter.[108]

C. Rules 15 and 17's Procedural Mechanisms Do Not Implicate the Judicial Power

There is an independent reason why Article III does not prohibit the jurisdiction-curing procedural moves permitted by Rules 15 and 17. Article III's case or controversy requirement is a limitation on the exercise of "judicial Power,"[109] and amendment, supplementation, and party substitution need not be considered exercises of judicial power.

A federal court does not need constitutional jurisdiction for every action that it might take. For example, the mere fact of having a lawsuit on a federal court's docket cannot in and of itself be an exercise of judicial power—if it were, no federal court could docket a case over which it lacked jurisdiction under Article III.[110] Similarly, dismissing a suit over

[107] The Sixth Circuit made one other argument in support of its jurisdiction-enlargement theory on the basis of a hypothetical in Rule 17's advisory committee notes. Zurich Ins. Co. v. Logitrans, Inc., 297 F.3d 528, 531–32 (6th Cir. 2002). However, that hypothetical develops the concept of real party in interest and does not purport to describe a standing deficiency. See Fed. R. Civ. P. 17 advisory committee's note to 1966 amendment (describing situations in which fictitious or unrelated parties are not the real parties in interest to a named plaintiff's claims such that they could not substitute into the action under Rule 17(a)(3)).

[108] Doing so would have resembled the Supreme Court's treatment of a plaintiff in a similar circumstance. See infra Section III.A; Rockwell Int'l Corp. v. United States, 549 U.S. 457, 478 (2007) (treating the United States as if it had filed suit in the first instance for jurisdictional purposes when the government had intervened post-filing).

[109] U.S. Const. art. III, § 2 ("The judicial Power shall extend to [enumerated cases and controversies] . . . .").

[110] One might counter by arguing that there is an operative difference between a court and its clerks such that docketing a case is an action taken by the clerk but not by the court itself. Cf. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 544 (2021) (Roberts, C.J., concurring in part and dissenting in part) (reasoning that clerks, but not judges, would be appropriate defendants in a suit to enjoin enforcement of the Texas Heartbeat Act, also known as S.B. 8).

which a court lacks jurisdiction cannot be an exercise of judicial power—if it were, federal courts would be stuck in a catch-22 in which they could neither resolve on the merits nor dismiss cases over which they lack jurisdiction.

The *Munsingwear* doctrine demonstrates a more substantive federal court action taken without jurisdiction. Under the *Munsingwear* doctrine, when a suit is mooted on appeal the appeals court may reverse or vacate the lower court's judgment and remand with an order to dismiss.[111] Because mootness is often jurisdictional,[112] the *Munsingwear* doctrine permits appeals courts to take an action that affects the legal rights of the parties despite the materialized lack of jurisdiction. Indeed, the *Munsingwear* doctrine permits a court without jurisdiction—the appellate court ordering the remand—to order vacation of a judgment entered by a court with jurisdiction—the district court's judgment entered before the suit was mooted.[113] Other examples of federal courts acting without established jurisdiction are readily available. Courts can award costs even when a case is mooted and the court otherwise lacks jurisdiction.[114] Courts can issue restraining orders "for the purpose of preserving existing conditions pending a decision upon its own jurisdiction"—in other words, before the court knows that it has jurisdiction.[115] Courts can stay an execution while the issue of its jurisdiction is being determined.[116] And

[111] United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950).

[112] United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1537 (2018) ("A case that becomes moot at any point during the proceedings is no longer a Case or Controversy for purposes of Article III, and is outside the jurisdiction of the federal courts." (internal quotation marks omitted)).

[113] There is a counterargument to this point. Even if the *Munsingwear* doctrine requires an appellate court to exercise some sort of judicial power over a moot case, the appellate court is cancelling a prior exercise of judicial power (the lower court's judgment). In other words, the net effect is that the federal judiciary as a whole has not changed the status quo that existed between the parties before the lower court entered judgment. Though this is a powerful point, it is not clear that it washes out the significance of the appellate court's power to vacate a judgment despite the case being moot at the time of remand.

[114] Heitmuller v. Stokes, 256 U.S. 359, 362–63 (1921) (awarding costs paid by party in error despite holding that the underlying controversy was moot). It is worth noting, however, that the costs awarded were incurred while the case was not moot. Id.

[115] United States v. United Mine Workers of Am., 330 U.S. 258, 290 (1947).

[116] Brewer v. Lewis, 997 F.2d 550, 558 (9th Cir. 1993) (Reinhardt, J., dissenting from failure to grant en banc review) ("[T]he Supreme Court has held expressly that courts have Article III power to stay an execution while the issue of jurisdiction is being determined." (citing United States v. Shipp, 203 U.S. 563, 573 (1906))).

courts can dismiss a suit for *forum non conveniens* before confirming jurisdiction.[117]

Permitting an amendment, supplement, or party substitution to cure a standing defect is arguably a less significant exercise of authority than that which the *Munsingwear* doctrine and those other examples already permit. After all, permitting amendment, supplementation, or party substitution does not meaningfully alter the legal rights of the interested parties, at least not with respect to the court's jurisdiction to adjudicate their dispute. The parties have the same relationship vis-à-vis the standing inquiry regardless of whether or not the court adjudicates their dispute following an initial filing under Rule 3 or an amendment, supplement, or party substitution under Rules 15 or 17. It would make sense for federal courts to consider such procedural moves as exercises of the sort of incidental powers that grease the wheels of federal procedure in similar situations.

The Supreme Court's reasoning in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership* is instructive on a related distinction: the difference between procedural moves and resolving a claim on the merits.[118] In *U.S. Bancorp*, the Court rejected respondent Bonner Mall's argument that Article III's limitation to judicial power prohibited the Court from granting U.S. Bancorp's motion to vacate a lower court's judgment.[119] The Court recognized that "no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy."[120] However, the Court explicitly rejected as without "reason [or] authority" the idea that a federal court could not take any action "once it has been determined that the requirements of Article III no longer are (*or indeed never were*) met."[121] Rather, "Article III does not prescribe such paralysis."[122]

U.S. Bancorp's distinction between deciding the merits and taking other actions is an important one. One of the principal and commonly accepted purposes of Article III standing is ensuring properly adverse

[117] Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 432 (2007).
[118] 513 U.S. 18 (1994).
[119] Id. at 21–22.
[120] Id. at 21.
[121] Id. (emphasis added). The Court's reasoning specified federal appellate courts, but that distinction is not operative with respect to Article III's limitations on the judicial power, which apply with equal force to any federal court.
[122] Id.

parties[123]—the "question of standing is whether the litigant is entitled to have the court decide the merits of the dispute."[124] Permitting an amendment, supplement, or party substitution to remedy a jurisdictional defect is not a decision on the merits. And indeed, in the context of the nullity doctrine cases, those procedural moves would *ensure* properly adverse parties before resolution on the merits. In other words, the procedural moves that the nullity doctrine prohibits not only do not implicate Article III's principal limitation on the judicial power, they effectuate it.

D. What Does *Article III Require?*

If Article III permits some procedural moves to cure constitutionally deficient jurisdiction, is there some moment at which Article III *does* intervene to prohibit such a cure? The Supreme Court may have answered that question by refusing to permit jurisdictional cures after judgment is entered.[125] Indeed, some of the Court's reasoning in related cases suggests that the entry of judgment is the operative time at which jurisdiction must be proper.[126] And drawing the line at the time of judgment would be consistent with standing doctrine's focus on a litigant's entitlement to a

[123] See Flast v. Cohen, 392 U.S. 83, 95 (1968) (standing "limit[s] the business of federal courts to questions presented in an adversary context"); see also Heather Elliott, The Functions of Standing, 61 Stan. L. Rev. 459, 468 (2008) (describing concrete adversity as standing doctrine's "only plausible function"). But see James E. Pfander & Daniel D. Birk, Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction, 124 Yale L.J. 1346, 1356–58 (2015) (questioning standing doctrine's adverse party requirement).

[124] Allen v. Wright, 468 U.S. 737, 750–51 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

[125] See Summers v. Earth Island Inst., 555 U.S. 488, 495 n.* (2009) (refusing to consider affidavits filed after the district court entered judgment and reasoning that "[i]f respondents had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively"); see also Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17–18 (1951) (vacating judgment entered by district court that lacked jurisdiction at the time judgment was entered).

[126] *Am. Fire & Cas. Co.*, 341 U.S. at 18 ("To permit a federal trial court to enter a judgment . . . where the federal court could not have original jurisdiction of the suit *even in the posture it had at the time of judgment*, would [be improper]." (emphasis added)). That reasoning leaves open the possibility that, had jurisdiction been proper at the time of judgment, the Court may have permitted the district court's judgment to stand. The *American Fire & Casualty* Court also identified cases in which judgments were upheld where jurisdiction was proper when judgment was entered. Id. at 16 ("There are cases which uphold judgments in the district courts even though there was no right to removal. In those cases the federal trial court would have had original jurisdiction . . . at the time of . . . the entry of the judgment.").

merits decision.[127] However, drawing the line at the time of judgment would be in some tension with cases allowing a federal court to maintain jurisdiction over a suit that has at least one plaintiff with standing regardless of other plaintiffs' standing deficiencies.[128] In fact, the so-called "one-plaintiff rule" permits standing-less parties to enforce judgments that a court would have lacked jurisdiction to enter if the standing-less party had been the only plaintiff to bring suit.[129]

Though the time of judgment would be a sensible line to draw, current case law does not necessarily require such a line. And it may be that other constitutional provisions, for example, the Fifth Amendment's Due Process Clause, have a role to play.[130] Ultimately, this Note will not take a position on the exact point at which Article III might intervene to prohibit a jurisdictional cure, other than to argue that Article III does not intervene as early as many circuit courts have presumed.

III. SUPREME COURT PRECEDENTS DO NOT REQUIRE THE NULLITY DOCTRINE AND MANY WEIGH AGAINST IT

The Supreme Court has not directly addressed the nullity doctrine. However, several of the Courts' precedents reject the proposition that the Constitution mandates a procedure for initiating a lawsuit, and the Court has outright rejected the nullity doctrine in dicta.

Separately, the Court has developed a judge-made doctrine—the time of filing rule—that some courts have cited in support of the nullity doctrine.[131] The time of filing rule is a sub-constitutional procedural practice requiring jurisdiction to be evaluated against the state of things at the time a lawsuit is filed.[132] The time of filing rule is important for two reasons. First, because this Note's rejection of the nullity doctrine's

[127] See supra notes 123–24 and accompanying text.

[128] Aaron-Andrew P. Bruhl, One Good Plaintiff Is Not Enough, 67 Duke L.J. 481, 554–56 (2017) (collecting cases).

[129] Id. at 508–10 (describing that the one-plaintiff rule "licenses courts to give enforceable judgments to persons who lack standing and therefore should not be parties at all" and detailing illustrative cases).

[130] U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

[131] See, e.g., Paradise Creations, Inc., v. UV Sales, Inc., 315 F.3d 1304, 1307 (Fed. Cir. 2003) (applying the time of filing rule in holding for the nullity doctrine). But see Fund Liquidation Holdings LLC v. Bank of Am. Corp., 991 F.3d 370, 389–90 (2d Cir. 2021) (reconciling the Court's rejection of the nullity doctrine with the time of filing rule).

[132] Grupo Dataflux v. Atlas Glob. Grp., L.P., 541 U.S. 567, 583 (2004) (Ginsburg, J., dissenting) (time of filing rule not derived from "any constitutional or statutory text").

constitutional dimensions would be irrelevant if the time of filing rule would require the same results. And second, because many of the Supreme Court's time of filing rule cases reflect a pragmatic approach to jurisdictional cures, independently counseling against the nullity doctrine's formalist underpinnings. This Note will proceed by detailing the time of filing rule's doctrinal development and its implications before turning to the Court's rejection of a constitutionally prescribed moment for the initiation of a lawsuit.

A. The Time of Filing Rule's Development and Erosion

The Supreme Court established the time of filing rule in *Mollan v. Torrance* in 1824, holding that "the jurisdiction of the Court depends upon the state of things at the time of the action brought."[133] The Court since has applied that reasoning to the standing inquiry.[134] But *Mollan*'s formulation leaves open several questions: Where does a court look to determine the "state of things" (for example, an initial complaint or an amended complaint)? What sets the "time of the action brought?" Are there any exceptions? Fortunately, the time of filing rule's erosion in favor of efficiency concerns takes some steps in answering those questions.

The time of filing rule's erosion began almost immediately: five years after *Mollan*, the Court established a change of party exception to the time of filing rule in *Conolly v. Taylor*.[135] In *Conolly*, the citizenship of one of the originally named parties defeated the court's jurisdiction.[136] The offending party's name, however, was struck from the pleading after the suit was filed but "before the cause was brought before the court," raising the question of whether the "original defect was cured" such that "the court, having jurisdiction over all the parties then in the cause, could make a decree."[137] The Court held that the jurisdictional defect was cured and that the lower court could exercise jurisdiction given the removal of the

[133] 22 U.S. 537, 539 (1824).

[134] Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180 (2000) (requiring "standing at the outset of the litigation"); see also S. Utah Wilderness All. v. Palma, 707 F.3d 1143, 1153 (10th Cir. 2013) ("[S]tanding is determined at the time the action is brought . . . ." (internal quotation marks omitted) (citation omitted)).

[135] 27 U.S. 556, 565 (1829).

[136] Id. at 564.

[137] Id.

problematic party.[138] Indeed, the Court reasoned, "[s]trike out [the problematic party's] name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed [between the remaining parties to the suit]."[139]

The Court's erosion of the time of filing rule continued more recently in *Newman-Green, Inc. v. Alfonzo-Larrain*.[140] In *Newman-Green*, the Court held that "a court of appeals may grant a motion to dismiss a dispensable party whose presence spoils statutory diversity jurisdiction," creating an exception to the rule.[141] And the Court extended *Conolly* and *Newman-Green*'s exceptions to removal jurisdiction in *Caterpillar Inc. v. Lewis*, a diversity jurisdiction case in which complete diversity was lacking at the time the case was removed to federal court.[142] Despite the lack of jurisdiction at the time of removal, a pre-trial settlement with the non-diverse party remedied the diversity defect and the case proceeded to trial and final judgment.[143] Focusing on the potential waste of judicial resources of requiring the parties to relitigate their case because of the initial jurisdictional defect, the Court reasoned, "[t]o wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose . . . a cost incompatible with the fair and unprotracted administration of justice."[144]

[138] Id. at 565 ("We can perceive no objection, founded in convenience or in law, to [the exercise of jurisdiction]."). Advocates of the nullity doctrine might point out that *Conolly*'s exception addresses a different issue: removing a party from an otherwise proper suit may be distinguishable from introducing a party or factual allegation to create jurisdiction where it otherwise was lacking. Though that may be true, it would be easy to make too much of that argument. The statutory exceptions to the time of filing rule recounted in this section may not independently defeat the nullity doctrine. They do, however, demonstrate that the time of filing rule is not a hard and fast rule, and should not be treated as dispositive support for the nullity doctrine, even in constitutional cases.

[139] Id.

[140] 490 U.S. 826 (1989).

[141] Id. at 827.

[142] 519 U.S. 61, 64 (1996).

[143] Id.

[144] Id. at 77. As with *Conolly*, advocates of the nullity doctrine have a rejoinder: *Caterpillar* is a statutory case, and given the Court's focus on potential inefficiency, the case probably would have come out differently if the district court had identified the jurisdictional defect before trial and judgment. Fair enough. *Caterpillar* is offered here as an example of the Court's willingness to set aside the time of filing rule in order to retroactively remedy at least some jurisdictional defects.

B. Rockwell *Rejects a Strict Time of Filing Rule*

The Court's willingness to make practical exceptions to the rule continued in *Rockwell International Corp. v. United States*.[145] In *Rockwell*, the Court considered some of the False Claims Act's jurisdictional limitations.[146] Plaintiff Stone brought a *qui tam* action under an original complaint that survived a motion to dismiss.[147] Subsequently, the government intervened and joined Stone in filing a joint amended complaint.[148] Stone remained on the case through trial and judgment, after which defendant Rockwell filed a post-verdict motion to dismiss Stone's claims for lack of jurisdiction.[149]

The Court held that jurisdiction vis-à-vis Stone was lacking, rejecting Stone's argument that the Court should look only to his original complaint—not his amended complaint—for the operative jurisdictional allegations.[150] In rejecting that argument, the Court addressed the potential relevance of the time of filing rule, reasoning that the time of filing rule did not require the Court to look only to the original complaint and that "[t]he state of things and the originally alleged state of things are not synonymous."[151] Though the Court recognized that falsity in or withdrawal of the original allegations "will defeat jurisdiction," the Court provided an important caveat: "unless [the allegations] are replaced by others that establish jurisdiction."[152] The Court continued, "[t]hus, when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."[153] That reasoning was not new—the recognition that successive amended complaints are consistent with the time of filing rule dates back to *Mollan* itself.[154]

[145] 549 U.S. 457 (2007).
[146] Id. at 460.
[147] Id. at 463.
[148] Id. at 464–65.
[149] Id. at 466.
[150] Id. at 473, 475.
[151] Id. at 473.
[152] Id.
[153] Id. at 473–74.
[154] Mollan v. Torrance, 22 U.S. 537, 540 (1824) ("[T]he parties may amend their pleadings, which are very defective.").

1. The State of Things Versus the State of Things Originally Alleged

Rockwell's distinction between the state of things and that originally alleged is worth unpacking, and there may be several ways to understand the Court's reasoning. The Court may have been drawing a distinction between the allegations found in a complaint and the state of things in the real world, with the latter determining a court's jurisdiction rather than the former. That formulation would be consistent with the Court's reasoning in some other jurisdictional contexts.[155] And it would explain the Second Circuit's holding in *Fund Liquidation Holdings LLC v. Bank of America Corp.*, which cited that exact language in reasoning that there is a difference between a court's actual jurisdiction and the allegations of a court's jurisdiction.[156] Alternatively, the Court may have been making an unremarkable distinction between successive pleadings such that the "state of things" as pleaded can change as the complaint is amended. Or the Court may have been implying both—that courts look to the real-world factual situation that exists at the time a complaint is amended, rather than just the real-world facts as they existed at the time of the initial pleading.

That last reading—that *Rockwell* directs courts to consider the real-world factual scenario as it may change over time and as a complaint is amended to reflect those changes—is consistent with *Rockwell*'s treatment of a different jurisdictional issue that resembles the issue presented by nullity doctrine cases. Because plaintiff Stone lacked jurisdiction at the time the original complaint was filed and the United States intervened pursuant to an amended complaint, the Court had to determine whether or not jurisdiction was proper vis-à-vis the United States.[157] That determination turned on the False Claims Act's provision for jurisdiction over actions "brought by the Attorney General."[158] Rejecting Stone's argument that the United States' intervention resolved

[155] See TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) (Article III limits courts to "real controvers[ies] with real impact on real persons" (quoting Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring))).

[156] 991 F.3d 370, 388–89 (2d Cir. 2021).

[157] *Rockwell*, 549 U.S. at 464–65.

[158] Id. at 478; 31 U.S.C. § 3730(e) (prohibiting jurisdiction under conditions that obtained in *Rockwell* "unless the action is brought by the Attorney General or the person bringing the action is an original source of the information"). Because the Court held that Stone was not an "original source" within the meaning of the statute, the only avenue for the United States' jurisdiction was a determination that the action was brought by the Attorney General. *Rockwell*, 549 U.S. at 477–78.

any jurisdictional concerns over his claims, the Court reasoned that the statute "draws a sharp distinction" between actions brought by the Attorney General and those brought by private citizens.[159] As a result, "[a]n action brought by a private person does not become one brought by the Government just because the Government intervenes."[160]

The Court's reasoning, however, adopted a different tone in addressing whether or not the statute's "sharp" distinction "cast into doubt the courts' jurisdiction with respect to the Government," and in the process underscored the Court's preference for efficiency over rigidity.[161] Holding that jurisdiction over the United States was proper, the Court reasoned that "common sense" dictated that "an action originally brought by a private person, which the Attorney General has joined, becomes an action brought by the Attorney General once the private person has been determined to lack [jurisdiction]."[162] Indeed, a contrary holding that the "Government's judgment must be set aside" would be a "bizarre result."[163] Instead, the Court reasoned that its treatment of jurisdiction vis-à-vis the government was similar to "cur[ing] a jurisdictional defect by dismissing a dispensable nondiverse party."[164]

The Court's reasoning with respect to the government cannot be squared with a focus on the real-world state of things at the time the suit was filed without consideration of subsequent events—the suit was neither commenced nor "brought" by the government, and yet, the Court treated it as having been. Rather, the Court's reasoning sounds more in the treatment of successive pleadings, where jurisdictional deficiencies can be cured by later amendments or substitutions such that they relate back to the initial filing—there, the joint amended complaint in which the government intervened. Though *Rockwell* involved a statutory jurisdictional issue, its reasoning vis-à-vis the government's jurisdiction would defeat the nullity doctrine if applied to constitutional cases.

2. Squaring Rockwell *with* Matthews v. Diaz

Rockwell's loose treatment of the time of filing rule in favor of efficiency concerns is consistent with a peculiar case that preceded

[159] *Rockwell*, 549 U.S. at 477.
[160] Id.
[161] Id. at 478.
[162] Id.
[163] Id.
[164] Id. (quoting Grupo Dataflux v. Atlas Glob. Grp., L.P., 541 U.S. 567, 573 (2004)).

Rockwell by several decades, *Matthews v. Diaz*.[165] In *Matthews v. Diaz*, the Court held that a non-waivable jurisdictional defect could be remedied through a supplemental complaint.[166] Plaintiff Espinosa failed to exhaust available administrative remedies under the Social Security Act.[167] But Espinosa's real-world actions corrected that error after the complaint was filed.[168] Espinosa brought those changed factual circumstances to the district court's attention without filing a supplemental pleading.[169] Still, because a "supplemental complaint in the District Court would have eliminated [the] jurisdictional issue," the Court could properly exercise jurisdiction because "it is not too late, even now, to supplement the complaint to allege this fact."[170] Citing 28 U.S.C. § 1653's direction that defective jurisdictional allegations should be amended, the Court reasoned that "avoiding needless sacrifice to defective pleading" counseled in favor of exercising jurisdiction and that, in any event, the defective pleadings did not prejudice the defendant.[171] In fact, the Court reversed the district court's ruling on the merits rather than remanding for the filing of the supplemental complaint.[172] The time of filing rule is conspicuously absent from the Court's opinion,[173] and *Matthews v. Diaz* is not cited by any of the subsequent time of filing cases previously discussed in this section, including *Rockwell*.[174]

Like *Rockwell*'s reasoning with respect to the United States' jurisdiction, *Matthews v. Diaz* cannot be squared with a reading of

[165] 426 U.S. 67 (1976).

[166] Id. at 75. In recent years, the Supreme Court has tightened its use of the term "jurisdictional." See Boechler, P.C. v. Comm'r of Internal Revenue, 142 S. Ct. 1493, 1497 (2022) ("[W]e have endeavored to bring some discipline to use of the jurisdictional label." (internal quotation marks omitted) (citation omitted)). The Court now requires a clear congressional statement that a procedural requirement is jurisdictional. Id. It is unclear if the exhaustion requirement at issue in *Matthews v. Diaz* would survive the modern Court's test, and if it would not, that might diminish *Matthews v. Diaz*'s relevance here.

[167] *Matthews*, 426 U.S. at 72.

[168] Id. at 72–73.

[169] Id. at 72.

[170] Id. at 75.

[171] Id. at 75 n.9.

[172] Id. at 75 ("Under these circumstances, we treat the pleadings as properly supplemented by the Secretary's stipulation that Espinosa had [exhausted the relevant administrative remedies]."); id. at 87 (reversing the district court's judgment).

[173] See generally *Matthews*, 426 U.S. 67 (not referencing time of filing rule).

[174] See generally Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989) (not citing *Matthews v. Diaz*); Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996) (same); Grupo Dataflux v. Atlas Glob. Grp., L.P., 541 U.S. 567 (2004) (same); Rockwell Int'l Corp. v. United States, 549 U.S. 457 (2007) (same).

Rockwell that focuses on the real-world state of things only at the time of the initial filing. If the real-world state of things at the time of initial filing controlled, then Espinosa's suit would have been a nullity that no supplemental complaint could have saved. Of course, *Matthews v. Diaz* precedes *Rockwell* by several decades, so it may be that *Rockwell*'s contemporary formulation of the time of filing rule would bar the supplementation that *Matthews v. Diaz* permitted. But the two cases can be squared by adopting a less severe reading of *Rockwell*: one that permits courts to look to the real-world factual situation at the time of amended or supplemented allegations, not just at the time of the original filing.

Though *Rockwell*'s treatment of the time of filing rule is subject to several different readings, even the most conservative interpretation—that the real-world state of things at the time of the initial filing controls—would square with the Second Circuit's rejection of the nullity doctrine in *Fund Liquidation Holdings*. And a more liberal reading accepting that amended complaints set a new operative "time of filing" for purposes of the rule would permit all of the amendments and supplementations—and perhaps party substitutions—that the nullity doctrine would prohibit. Either way, the time of filing rule lends little support to the nullity doctrine.

C. There Is No "Particular Magic"[175] to the Way a Suit Is Initiated

The nullity doctrine generally—and those courts that lean on the time of filing rule in particular—assume a hard line for the initiation of a lawsuit: the filing of the initial pleading. To be sure, there may be some sub-constitutional support for such a position.[176] But at the sub-constitutional level, courts have made clear that there are exceptions: several procedural rules have relation-back mechanisms that attribute post-filing changes to the time of filing, and the time of filing rule itself has significant exceptions.[177] The nullity doctrine, on the other hand, attributes its hard line to Article III, though there is little reason to believe that Article III demands such a line. *Rockwell*'s treatment of the

[175] Hackner v. Guar. Tr. Co. of N.Y., 117 F.2d 95, 98 (2d Cir. 1941).

[176] See, e.g., Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."); see also supra Sections III.A, III.B (discussing the time of filing rule).

[177] See supra notes 6–7; see also supra Sections III.A, III.B (discussing deviations from a strict time of filing rule).

government's post-filing intervention as the government having "brought" the suit demonstrates as much.[178]

Fortunately, there are other cases that shed light on the validity of the nullity doctrine's claimed constitutional foundations. The Supreme Court evaluated the Constitution's role in initiating a lawsuit in *Chisholm v. Gilmer*, decided before the Federal Rules of Civil Procedure were promulgated and during a time in which federal district courts applied the procedures of the state in which they sat.[179] At issue in *Chisholm v. Gilmer* was a Virginia pleading practice—notice of motion for judgment—in which a plaintiff could initiate a lawsuit through a highly informal procedure.[180] Under Virginia's procedure, a plaintiff could "draft and sign a rather informal document" rather than filing a more formal pleading like the complaints used today.[181] This "notice of motion" would inform a prospective defendant that the plaintiff would move for judgment against them on a particular day, and would include some recounting of the legal basis for the claim.[182] The motion, which initiated the lawsuit, was not issued under the seal of the court, nor was it signed by a clerk of the court.[183]

The Supreme Court found no constitutional problem with this method.[184] In fact, it attributed to states broad latitude in determining how a suit is initiated.[185] The Court directly addressed the Constitution's role in that type of procedural issue, reasoning that "[t]he Constitution of the United States does not attempt to make a choice between one method and another, provided only that the method employed gives reasonable notice and affords fair opportunity to be heard before the issues are

[178] See supra notes 161–64 and accompanying text.

[179] 299 U.S. 99, 99 (1936); Thomas Rowe, Suzanna Sherry & Jay Tidmarsh, Civil Procedure 14–15 (5th ed. 2020) (noting that state court procedures applied in federal courts before the Federal Rules of Civil Procedure took effect in 1938).

[180] 299 U.S. at 100.

[181] Leas & McVitty v. Merriam, 132 F. 510, 510 (W.D. Va. 1904) (describing Virginia's notice of motion practice).

[182] Id. (describing notice of motion procedure with respect to a contract claim). Virginia's notice of motion procedure spread from contract disputes to other areas of the law like torts and statutory remedies. *Chisholm*, 299 U.S. at 101.

[183] *Leas & McVitty*, 132 F. at 510.

[184] *Chisholm*, 299 U.S. at 102.

[185] Id. ("How a suit shall be begun, whether by writ or by informal notice, is a question of practice of the state or of its forms and modes of proceeding.").

determined."[186] The absence of any role for Article III in that reasoning is noteworthy.

The Second Circuit came to a similar conclusion in rejecting the nullity doctrine in *Fund Liquidation Holdings*.[187] There, the court noted that the early common law pleading practice was to name as plaintiff the party whose "*legal* rights had been affected by the act of the defendant," not necessarily the real party in interest as now required by Rule 17.[188] The court drew two conclusions from that change in pleading standard. First, the court concluded that rules concerning which party is named in a complaint do not have a jurisdictional dimension, because "[a]fter all, if [they] were jurisdictional, it's not clear how [they] could be changed over time without offending the Constitution."[189] Second, the court concluded that if the party named in the caption is non-jurisdictional, then "it stands to reason that failing to initially name the correct party is not itself a constitutional problem."[190] Rather, failure to name a proper plaintiff "is akin to an error in the complaint's *allegations* of jurisdiction," not jurisdiction itself, and therefore may be cured through an amended pleading.[191] The court also noted that the opposite understanding would create significant constitutional tension with the text of Rule 17(a)(3), which prohibits dismissal until a reasonable opportunity for substitution has been given.[192]

The Second Circuit also reconciled its rejection of the nullity doctrine with the time of filing rule.[193] In doing so, the court made two significant arguments in the alternative. First, the court reasoned that subject matter jurisdiction had always been proper because, though not named in the original complaint, Fund Liquidation Holdings was the "functional equivalent of the original plaintiff."[194] As a result, Fund Liquidation

[186] Id. (internal quotation marks omitted) (citation omitted).

[187] Fund Liquidation Holdings LLC v. Bank of Am. Corp., 991 F.3d 370, 387 (2d Cir. 2021) (nullity doctrine is "immediately suspect given its tension with how pleading requirements have evolved over time"). Not all courts holding for the nullity doctrine have cited the time of filing rule for support. See, e.g., Zurich Ins. Co. v. Logitrans, Inc., 297 F.3d 528 (6th Cir. 2002) (no mention of the time of filing rule).

[188] *Fund Liquidation Holdings*, 991 F.3d at 387 ("[I]dentifying the party for whose use a case was brought was not necessary." (internal quotation marks omitted)).

[189] Id. at 388.

[190] Id.

[191] Id. at 388–89.

[192] Id. at 388.

[193] Id. at 389–90.

[194] Id. at 389.

Holdings' substitution into the suit did not "substitute a new cause of action over which there is subject-matter jurisdiction for one in which there [was] not."[195] Alternatively, the court reasoned that even if subject matter jurisdiction was lacking at the time of filing, a party substitution could cure such a defect.[196] The court supported this conclusion by citing diversity jurisdiction cases in which a lack of complete diversity was remedied by a Rule 15 amendment,[197] and by citing extra-circuit precedent permitting Rule 15 to remedy "true-blue constitutional defects."[198]

Chisholm v. Gilmer and *Fund Liquidation Holdings*' bottom lines are underscored by Supreme Court dicta in *Sierra Club v. Morton*.[199] In *Sierra Club*, the Court held that plaintiff Sierra Club had failed to plead a sufficient injury in fact.[200] Despite this pleading deficiency, the Court reasoned that "[o]ur decision does not, *of course*, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal Rules of Civil Procedure."[201] The Court's chosen language—"of course" the pleading deficiency could be fixed through amendment—suggests that that conclusion should be obvious. Whereas many of the other cases in this section have addressed statutory jurisdictional defects or sub-constitutional issues adjacent to the nullity doctrine, *Sierra Club*'s dicta is directly on point: it envisions a Rule 15 remedy to constitutionally deficient jurisdiction.

[195] Id. (internal quotation marks omitted) (citation omitted). That is the same line of reasoning advanced by this Note in Section II.B.

[196] Id. at 390 ("[N]umerous courts have made clear that . . . subject-matter jurisdiction can even be obtained after a case's initiation and given retroactive effect through procedural rules.").

[197] Id. (citations omitted) (first citing Grupo Dataflux v. Atlas Glob. Grp., L.P., 541 U.S. 567 (2004); and then citing Matthews v. Diaz, 426 U.S. 67 (1976)).

[198] Id. at 390–91 (first citing Northstar Fin. Advisors Inc. v. Schwab Invs., 779 F.3d 1036 (9th Cir. 2015); then citing Scahill v. District of Columbia, 909 F.3d 1177 (D.C. Cir. 2018); and then citing Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329 (Fed. Cir. 2008)).

[199] 405 U.S. 727 (1972). Though *Sierra Club* does not reference Article III, the case is commonly considered as resolving a constitutional standing issue. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (citing *Sierra Club* for the proposition that Article III requires injury in fact); cf. Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's The Federal Courts and The Federal System 117–18 (7th ed. 2015) (discussing *Sierra Club*'s injury in fact requirement within the context of Article III's concrete and personalized injury requirement).

[200] 405 U.S. at 734–35.

[201] Id. at 735–36 n.8 (emphasis added).

Chisholm v. Gilmer and *Sierra Club* are devastating to the nullity doctrine's central premise: that Article III controls the methods by which otherwise Article III-compliant cases come before a court.[202] Taken together with the time of filing rule's exceptions, it is difficult to see how Article III would prohibit an amended complaint or a party substitution from curing a jurisdictional defect in an initial filing. There is no constitutionally prescribed moment that a suit is initiated. Whether or not a suit has already been "commenced" within Rule 3's meaning does not speak to that issue, and anyhow, no one thinks Rule 3 bars the amended or supplemented complaints or party substitutions permitted by other rules.[203] There is no Article III reason that an amendment, supplement, or party substitution cannot supply jurisdiction either by relating back to the time of the initial filing, or by being considered as a new filing for purposes of the time of filing rule.

CONCLUSION

Even though the Supreme Court has never squarely ruled on the nullity doctrine, a mountain of reasoning counsels against it. Perhaps least significant of those reasons are the perverse results and needless formality that the nullity doctrine requires, which are not offset by any meaningful gain that the nullity doctrine offers. But many other reasons obtain. Several federal rules on their own terms permit jurisdictional fixes to relate back to the time an original pleading was filed. The circuit courts that have rejected the nullity doctrine have all done so on more thorough and sound reasoning than those that have adopted it. Prominent

[202] There is one more case worth mentioning in support of this point: *Mullaney v. Anderson*, 342 U.S. 415 (1952). In *Mullaney*, the then-territory of Alaska challenged the plaintiff's organizational standing to bring a claim on behalf of its members. Id. at 416–17. Though it is unclear if Alaska's argument was understood as having a constitutional dimension (the Court did not comment on that possibility), the Court's reaction to the argument is noteworthy. See id. (describing Alaska's standing objection without characterizing it as constitutional). Rather than evaluate its jurisdiction, the Court "remove[d] the matter from controversy" by permitting proper parties to be joined under Rule 21, reasoning that "[t]o dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration." Id. Though a recent Fourth Circuit case declined to follow *Mullaney*'s "assumptions," the Fourth Circuit reasoned that *Mullaney* "implie[d] that whether the original parties had standing was irrelevant because the joinder of proper parties could cure any lack of Article III jurisdiction." Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 14 F.4th 322, 327 n.4 (4th Cir. 2021).

[203] See Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court.").

commentators like Wright and Miller have criticized it. The Supreme Court has significantly eroded the only sub-constitutional concept that would recommend the nullity doctrine—the time of filing rule, which on its own terms does not require dismissal and refiling in place of amendment, supplementation, or party substitution. Supreme Court dicta have expressly rejected it. And the Supreme Court has time and again distinguished between deciding a case on the merits and exercising the sort of incidental powers that permit courts without jurisdiction to dismiss cases, vacate judgments, stay executions, and award costs. Permitting procedural moves to bring an otherwise compliant suit into line with the court's jurisdiction goes no further than that which is already allowed in other contexts.

In 1941, Judge Charles Clark—a principal architect of the Federal Rules of Civil Procedure[204]—provided the exact roadmap that courts should follow with respect to the nullity doctrine. In *Hackner v. Guaranty Trust Co. of New York*, a post-filing amendment added plaintiff Eastman to an ongoing suit with multiple plaintiffs.[205] However, the Court later determined that jurisdiction was lacking vis-à-vis all plaintiffs other than the late-joining Eastman, raising the question of whether or not Eastman could continue with the existing suit or if she had to refile.[206] Holding that the suit need not be refiled, Judge Clark reasoned:

> Defendants' claim that one cannot amend a nonexistent action is purely formal, in the light of the wide and flexible content given to the concept of action under the new rules. Actually [Eastman] has a claim for relief, an action in that sense; as the Supreme Court has pointed out, there is no particular magic in the way it is instituted. So long as a defendant has had service "reasonably calculated to give him actual notice of the proceedings," the requirements of due process are satisfied. Hence no formidable obstacle to a continuance of the suit appears here, whether the matter is treated as one of amendment or of power of the court to add or substitute parties, Federal Rule 21, or of commencement of a new action by filing a complaint with the clerk, Rule 3. In any event we think this action can continue with respect to Eastman without the delay

[204] Zahn v. Int'l Paper Co., 414 U.S. 291, 297 (1973) ("Judge Charles Clark . . . was a principal architect of the Federal Rules of Civil Procedure.").

[205] 117 F.2d 95, 97–98 (2d Cir. 1941).

[206] Id. at 98.

> and expense of a new suit, which at long last will merely bring the parties to the point where they now are.[207]

It is difficult to imagine a more thorough takedown of the nullity doctrine than that.

The Supreme Court should grant certiorari in the earliest appropriate case to resolve the circuit split and to put the nullity doctrine to rest permanently. Doing so will send a strong message to the lower courts not to use Article III to erroneously elevate form over function.

[207] Id. (citations omitted).