

Standing for Something More: Respect and Article III

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Rachel Bayefsky, [Remedies and Respect: Rethinking the Role of Federal Judicial Relief](#), 109 *Geo. L. J.* 1263 (2021).

The last Supreme Court Term featured [a bumper crop of important decisions](#) on standing, justiciability, and remedies. The outcomes were not monolithic. Some were sympathetic to those seeking access to judicial remedies in federal court, while others seemed to erect significant barriers—even in [stark defiance](#) of the express will of the federal government’s two other branches. The Court’s recent pronouncements also reveal sharp divides among the justices about issues at the heart of what they and the rest of the federal judiciary actually do: determine whether and when parties are entitled to judicial remedies.

Against this backdrop, Rachel Bayefsky’s article offers an especially timely and valuable contribution. Bayefsky identifies and critiques what she calls the “circumscribed” approach to the remedial authority of federal courts. At the core of this approach is a presumption that judicial remedies address solely the parties’ material circumstances. As Bayefsky shows, this vision undergirds the Court’s (or at least some justices’) attitudes on a range of issues—whether parties have Article III standing to sue in federal court, whether an offer of complete relief to a class representative can thwart a class action by mooted the representative’s individual claims, whether suits seeking only nominal damages may proceed in federal court, whether a party has “prevail[ed]” such that they are entitled to attorney fees, and whether injunctive relief for unconstitutional conduct may extend “nationwide.” For these issues, the circumscribed theory threatens to restrict or burden access to the federal courts and the power of those courts to remedy legal violations. And the circumscribed approach often acts as a matter of constitutional law—dictating the scope of Article III’s “case or controversy” requirement in a way that shuts the doors to federal courts.

Bayefsky offers a compelling alternative: an “expressive account” of judicial remedies. She argues that “a legitimate and important remedial task for federal courts is to express respect for parties’ dignity”—beyond the merely material concerns that are the focus of the circumscribed approach. These dignitary harms should be understood as constitutionally cognizable injuries that federal courts can and should remedy.

In support of this vision, Bayefsky marshals both historical and empirical support. She details, for example, the common law’s robust recognition of a party’s legal interest in respectful treatment. And she emphasizes the role that dignity and respect have played in a range of contemporary legal doctrines, such as antidiscrimination and equal protection law. Bayefsky also invokes empirical studies revealing how litigants’ dignitary concerns—the quest for respect and the need to redress disrespectful treatment—drive litigation. Vindicating these concerns increases procedural justice as litigants actually experience it and bolsters judicial legitimacy.

Bayefsky makes a convincing case that it is fundamentally mistaken to constitutionalize the circumscribed “material harm” vision into Article III’s “case or controversy” requirement. In doing so, she persuasively refutes the objection that dignitary remedies will invite federal courts to render “advisory opinions” in merely “hypothetical” disputes. That critique is premised on the circumscribed understanding of remedial authority. Once the expression of respect is recognized as an appropriate remedial task, disputes involving claims for such remedies are hardly hypothetical.

In refining her framework, Bayefsky provides sophisticated responses to some intriguing questions that her expressive approach presents. She distinguishes, for example, the “dignitary consequences of respectful and disrespectful treatment” from the psychological effects of such treatment. There is value in remedying disrespect, regardless of whether its targets suffer psychological trauma. Yet Bayefsky resists the conclusion that every legal violation

necessarily causes dignitary harm, offering benchmarks to guide when expressive remedies are warranted. In addition, she highlights the importance of collective redress for dignitary harms that derive from an individual plaintiff's membership in a broader group. This insight sheds particular light on the debate surrounding nationwide injunctions and other remedies that benefit individuals beyond the specific plaintiff bringing suit.

The Supreme Court's jurisprudence on standing, justiciability, and remedies has long been the subject of criticism and perplexity. Bayefsky's argument for dignitary harm as a cognizable injury and a proper subject of the federal judiciary's remedial authority has the potential not only to correct substantive blind spots in the Court's current doctrine, but to pave the way toward a more coherent and workable framework. It is a commendable, welcome, and well-supported proposal.

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