

2018

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Recommended Citation

Benjamin C. Zipursky, *Ziglar v. Abbasi and the Decline of the Right to Redress*, 86 Fordham L. Rev. 2167 (2018).

Available at: <https://ir.lawnet.fordham.edu/flr/vol86/iss5/18>

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Erratum

Law; Litigation; Fourth Amendment; Constitutional Law; Torts; Supreme Court of the United States; Civil Procedure; President/Executive Department; Legal Remedies

ZIGLAR V. ABBASI AND THE DECLINE OF THE RIGHT TO REDRESS

Benjamin C. Zipursky*

INTRODUCTION

It is a truism of American legal history that a political pendulum that swings far to one side will eventually swing just as far to the other. At first blush, it appears that the Warren Court's swing to the left is now being counterbalanced by the Roberts Court's swing to the right, just as the Burger Court was in many ways counterbalanced by the Rehnquist Court. Like most truisms, however, there is a great deal that is misleading and perhaps even false in such statements. *Obergefell v. Hodges*,¹ *National Federation of Independent Business v. Sebelius*,² *King v. Burwell*,³ *Bank of America Corp. v. City of Miami*,⁴ and numerous other decisions paint a far more complicated picture. And some domains—like the First Amendment—are simply not well suited to the left/right characterization because “rights victories” are favored alternately by conservatives and progressives, depending on the context.⁵

This Article turns to a domain of U.S. Supreme Court decision-making that is strikingly less politically ambiguous, displaying what really is a consistent and marked shift from Warren- and Burger-era thinking. In a form that is concededly simplistic, I mark the shift by discussing the Supreme Court's June 2017 decision in *Ziglar v. Abbasi*.⁶ *Ziglar* considers what could be called a textbook case of a constitutional tort, a case in which utterly innocent

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1. 135 S. Ct. 2584 (2015).

2. 567 U.S. 519 (2012).

3. 135 S. Ct. 2480 (2015).

4. 137 S. Ct. 1296 (2017).

5. Compare *Citizens United v. FEC*, 558 U.S. 310 (2010) (striking down a federal law in an opinion by conservative Justices on free speech grounds with liberal Justices in dissent), with *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down a federal law in an opinion by predominantly left-wing Justices on free speech grounds with predominantly conservative Justices in dissent).

6. 137 S. Ct. 1843 (2017).

Muslims had been thrown into brutal jails and had remained imprisoned simply because of their ethnicity, at the behest of Attorney General John Ashcroft and FBI Director Robert Mueller.⁷ In *Ziglar*, the Court found that there was no claim at all against these executive officers.⁸ Here, one sees that the pendulum has swung very far indeed from the Supreme Court's landmark decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,⁹ where the Court passionately recognized an individual's claim in far less draconian circumstances.¹⁰

The author of *Ziglar*, Justice Kennedy, is not properly treated as an emblem of the conservatism of the Roberts Court. To the contrary, of course; he is an emblem of the middle, seemingly proving that there has not been a seismic shift on the Court. And that, in part, is why the case is so telling. What it tells, I shall argue, is a change so deep and so dramatic that *Ziglar*'s denial of redress now seems milquetoast or middle ground.

Bivens was, of course, a case about the Fourth Amendment and the right against government intrusion.¹¹ It was also about the FBI, about the pioneering role of the U.S. Supreme Court, and about the prerogative of Justices to engage in judicial improvisation for reasons of justice. For this Article, however, I shall not focus on any of those themes but on one that is concededly nearer and dearer to my own area of tort law and tort theory. In this domain, *Bivens* is a case about implied rights of action for individuals seeking to hold accountable someone who wronged them.¹² It stands for the maxim *ubi jus, ibi remedium*¹³ (where there is a right there is a remedy),¹⁴ a principle that Justice John Marshall ironically celebrated in *Marbury v. Madison*,¹⁵ standing alongside his recognition of the Court's authority to engage in judicial review. *Bivens* is about access to courts and access to justice.¹⁶ The near dismissal of *Bivens* in *Ziglar* manifests a much larger aspect of where the Supreme Court, like our legal culture more generally, has gone in its thinking about an individual's right of redress.

Part I briefly describes the facts of *Ziglar*, its journey through the federal courts, and the Court's treatment of it. Part II offers a commentary on Justice Kennedy's opinion in *Ziglar*, focusing especially on his analysis of the reasons for and against recognizing a *Bivens* action and his choice to dispose

7. *Id.* at 1853.

8. *Id.* at 1860–61.

9. 403 U.S. 388 (1971).

10. *Id.* at 389 (describing the officers' treatment of *Bivens*).

11. *See id.*

12. *Id.* at 397.

13. *Tex. & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916). This case is one of the Supreme Court's most famous statements of this maxim:

“So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.”

This is but an application of the maxim, *Ubi jus ibi remedium*.

Id. at 39–40 (quoting Holt, C.J., *Anonymous*, 6 Mod. 26, 27).

14. *Bivens*, 403 U.S. at 399 (Harlan, J., concurring).

15. 5 U.S. (1 Cranch) 137 (1803).

16. *See Bivens*, 403 U.S. at 402–04.

of the case through a *Bivens* framework. I argue that his reasoning in *Ziglar* reflects an untenably narrow conception of the place of private rights of action in our legal system. In this respect, Part III suggests that the atrophy of *Bivens* in the Supreme Court exemplifies a wide range of changes in the Court's outlook on many aspects of litigation. The Court's decisions on standing, class actions, punitive damages, federal preemption, pleading, summary judgment, and immunities have all been deeply affected by a failure to take the basis of private rights of action seriously. This skewed mindset largely came into place in the Rehnquist era and has thrived in the Roberts Court. Part IV suggests that some aspects of this hostility to private rights of action have been absorbed by the bench and bar as a kind of centrist, pragmatic wisdom about what our court system can tolerate.

I. *ZIGLAR* V. *ABBASI*

In *Ziglar*, the six plaintiffs were men of Arabic or South Asian descent, and five of the six were Muslim.¹⁷ They were detained and subjected to strip searches, beatings, and solitary confinement in American prisons for several months.¹⁸ The complaint alleges—and the federal government does not contest, for the purposes of this litigation—that they were rounded up as part of a group of hundreds of individuals arrested and imprisoned at the direction of the defendant Attorney General and head of the FBI.¹⁹ The criteria that led to the arrest and the detention were that the individuals were men of this ethnicity and religion who had overstayed their visas in the United States; eighty-four such persons were placed in the Metropolitan Detention Center in Brooklyn.²⁰ The plaintiffs alleged due process, substantive due process, and equal protection violations (among others) under the Fourth and Fifth Amendments of the Constitution.²¹

The litigation path that ended in Justice Kennedy's *Ziglar* opinion was long and circuitous. In 2009, the Supreme Court famously decided *Ashcroft v.*

17. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1853 (2017).

18. *Id.* Indeed, the complaint contained the following allegations:

Conditions in the Unit were harsh. Pursuant to official Bureau of Prisons policy, detainees were held in “tiny cells for over 23 hours a day.” Lights in the cells were left on 24 hours. Detainees had little opportunity for exercise or recreation. They were forbidden to keep anything in their cells, even basic hygiene products such as soap or a toothbrush. When removed from the cells for any reason, they were shackled and escorted by four guards. They were denied access to most forms of communication with the outside world. And they were strip searched often—any time they were moved, as well as at random in their cells.

Some of the harsh conditions in the Unit were not imposed pursuant to official policy. According to the complaint, prison guards engaged in a pattern of “physical and verbal abuse.” Guards allegedly slammed detainees into walls; twisted their arms, wrists, and fingers; broke their bones; referred to them as terrorists; threatened them with violence; subjected them to humiliating sexual comments; and insulted their religion.

Id. (quoting *Turkmen v. Hasty*, 789 F.3d 218, 228 (2015)).

19. *Id.* at 1852.

20. *Id.* at 1852–53.

21. *Id.* at 1853–54.

Iqbal,²² which required the dismissal of this group of plaintiffs' complaints; after the plaintiffs responded by filing amended complaints, some of those complaints were once again rejected under the stringent standards the Supreme Court had declared in its *Iqbal* decision.²³ The plaintiffs in *Ziglar*, however, had managed to overcome the district court's rejection of claims against the executive officials by a victory from a panel of the Second Circuit.²⁴ Rehearing en banc was denied and the case went to the Supreme Court.²⁵ Interestingly, two of the Justices—Sotomayor and Kagan—took no part in the decision, and Justice Gorsuch was not part of the Court.²⁶ Justice Kennedy wrote for himself and three other Justices (Chief Justice Roberts, Justice Thomas, and Justice Alito).²⁷ In an opinion concurring in the judgment and concurring in all of the opinion except for the part that related to Warden Hasty's qualified immunity, Justice Thomas opined that a more traditional, historically based conception of qualified immunity should be utilized.²⁸ Justice Breyer, with whom Justice Ginsburg dissented, put forward point-by-point bases for rejecting Justice Kennedy's majority opinion.²⁹

The historical backdrop provided by Kennedy's opinion turned out to be extremely important. He began by observing that the Supreme Court has made clear in a series of cases over the past thirty years that *Bivens* is, in at least one crucial respect, not to be read broadly.³⁰ In particular, the *Bivens* Court was to be interpreted as holding that a person like Webster Bivens, who was able to demonstrate that a particular kind of Fourth Amendment rights violation was committed against him, would have a private right of action against a federal agent who engaged in that rights violation.³¹ That holding *might* provide support for individuals alleging that a different kind of Fourth Amendment violation generates a private right of action, or even for individuals alleging that a different kind of individual rights violation by a federal actor generates a private right of action. But it might not. In any event, the case *is not* to be read as holding that individuals who can prove that their constitutional rights were violated by federal actors have a private right of action for damages. That is far too broad. Indeed, it is far too broad even if we qualify it by saying that, under *Bivens*, individuals who can prove that their constitutional rights were violated by federal actors have a private right of action for damages unless the federal actor falls under the shield of qualified immunity.

22. 556 U.S. 662 (2009).

23. *Id.* at 666.

24. *Ziglar*, 137 S. Ct. at 1852.

25. *Id.*

26. *Id.* at 1869.

27. *Id.* at 1851. Justice Thomas wrote a separate concurrence for part IV-B of the opinion.

28. *Id.* at 1869–72.

29. *Id.* at 1872–85.

30. *Id.* at 1856–57.

31. *See id.*; *see also* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390 (1971).

Interestingly, *Bivens* is in this important sense treated a bit like an Article I font of lawmaking power for a branch of the federal government. Because it (and those of its Supreme Court progeny that come out in favor of the plaintiff) are precedents, it seems, they provide authority for the Article III judiciary to craft private rights of action for different domains of individuals' rights violations. The question, in each new kind of *Bivens* claim asserted, is whether the judiciary should regard itself as properly exercising this power.³² Justice Kennedy explained that *Bivens* stemmed from a time when the Court thought differently about implied rights of action in the statutory context:

In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now. During this “*ancien regime*,” the Court assumed it to be a proper judicial function to “provide such remedies as are necessary to make effective” a statute’s purpose. Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself.

. . . .

Later, the arguments for recognizing implied causes of action for damages began to lose their force. In cases decided after *Bivens*, and after the statutory implied cause-of-action cases that *Bivens* itself relied upon, the Court adopted a far more cautious course before finding implied causes of action. . . . [B]ut it cautioned that, where Congress “intends private litigants to have a cause of action,” the “far better course” is for Congress to confer that remedy in explicit terms.³³

Justice Kennedy’s opinion in *Ziglar* comes into focus on this frankly restrictive view. The question, in a previously uncovered kind of asserted *Bivens* claim, is whether the Court should extend *Bivens* to this kind of lawsuit. In answering the question, Justice Kennedy declares, a key principle is “that a *Bivens* remedy will not be available if there are ‘special factors counselling hesitation in the absence of affirmative action by Congress.’”³⁴ Indeed, the principle of restrictiveness is curiously doubled. That is because Justice Kennedy’s *Ziglar* opinion holds that the scope of established *Bivens* contexts is itself to be read narrowly:

Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency

32. See, e.g., *Ziglar*, 137 S. Ct. at 1857.

33. *Id.* at 1855 (citations omitted) (first quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001); then quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964); and then quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979)). In depicting this era, Justice Kennedy drew from (and quoted) Professor Andrew Kent: “In light of this interpretive framework, there was a possibility that ‘the Court would keep expanding *Bivens* until it became the substantial equivalent of 42 U.S.C. § 1983.’” *Id.* (quoting Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1139–40 (2014)).

34. *Id.* at 1857 (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980)).

to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.³⁵

In other words, nearly any kind of difference will create an obligation to consider “special factors.”³⁶

What are the special factors? One is that high-level executive branch deliberations might be at issue.³⁷ A second is that the executive branch was making policy.³⁸ A third is that a *Bivens* claim against these officials would involve liability of some individuals for the acts of those who are lower down, which raises difficult questions of supervisory liability.³⁹ Crucially, the Court notes that Congress has remained silent on the question of whether there should be private rights of action for those wrongfully detained.⁴⁰ Finally, because habeas review and injunctive relief may be available, this is not plausibly seen as a “damages or nothing” scenario.⁴¹ For all of these reasons, the Court declined to recognize a *Bivens* action.⁴²

The rejection of a *Bivens* claim against Ashcroft and Mueller is followed by a different treatment of a claim against prison warden Dennis Hasty.⁴³ In light of the Court’s precedent in *Carlson v. Green*,⁴⁴ which recognized *Bivens* claims against prison actors, it was hard for the Court to reject such claims here. Yet, the Court did not reverse—it remanded.⁴⁵ The lower courts are directed to ascertain, on remand, whether special factors counsel against the recognition of a *Bivens* claim in this new context.⁴⁶

As to a civil conspiracy action under 42 U.S.C. § 1985(3), the Court held that there was qualified immunity under *Harlow v. Fitzgerald*⁴⁷ and *Anderson v. Creighton*.⁴⁸ The Court’s basic reason for its decision in *Ziglar* was surprising, however. The Court treaded on accepting an argument from the *Ziglar* defendants that there was no conspiracy claim at all because the alleged conspiracy was within workers of the same group and, thus, there was a single (corporate) person.⁴⁹ Yet it stopped short of this analysis, preferring to utilize uncertainty about the progress of corporate-personality doctrine to say that the law of conspiracy for such high-level actors was unsettled under

35. *Id.* at 1859–60.

36. *Id.* at 1860.

37. *Id.* at 1860–61.

38. *Id.*

39. *Id.* at 1860.

40. *Id.* at 1860–61.

41. *Id.* at 1862 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971)).

42. *Id.* at 1860.

43. *Id.* at 1850.

44. 446 U.S. 14 (1980).

45. *Ziglar*, 137 S. Ct. at 1869.

46. *Id.*

47. 457 U.S. 800 (1982); *see also id.* at 818.

48. 483 U.S. 635 (1987); *see also* 42 U.S.C. § 1985(3) (2012); *Creighton*, 483 U.S. at 646.

49. *Ziglar*, 137 S. Ct. at 1867.

Harlow and *Anderson* and that, therefore, there was qualified immunity.⁵⁰ The Court added an argument that the potential chilling effect of deliberations by high-level officials necessitates a finding of no liability in this instance.⁵¹

II. A PARTIAL CRITIQUE OF JUSTICE KENNEDY'S *ZIGLAR* OPINION

In light of *Iqbal*, in light of the Court's express hostility to *Bivens* over the past several decades, and in light of the height of the perch at which two of the defendants—Ashcroft and Mueller—sat, one could hardly say that the outcome in *Ziglar* was surprising. On the contrary, it was entirely predictable. Yet it is worth taking a moment to observe that the decision is in some ways quite shocking for several reasons.

First, and perhaps foremost, nothing, or almost nothing, in Justice Kennedy's decision turned on the noncitizen status of the plaintiffs. It is entirely plausible that the American citizens who were rounded up, shackled, confined, and abused in this manner for months would have no right of redress. In other words, our federal government can do this to its own citizenry without legal accountability.

Second, there was a racial dimension to the roundup in *Ziglar* that is reminiscent of what occurred in *Korematsu v. United States*⁵² decades ago. I had always thought and learned in school that *Korematsu* was a blot on our record as a nation of law and equality—not just for the federal actors but also for the Justices who failed to hold them accountable. Now, we know that federal officials at the highest level are free from accountability in the courts if they do the same thing, and the Justices will still stay out. The first and second points combine the notion that, while there is a difference in immigration status between the legally permissible plaintiffs (many of whom were citizens) in *Korematsu* and the impermissible ones in *Ziglar*, the Court did not rely upon the plaintiffs' impermissible presence in the country to deny the availability of a *Bivens* action.⁵³

Third, the decision is not generated principally by traditional concerns about second-guessing the special high offices of the Attorney General and the FBI director. Right or wrong, those would be considerations that go to the scope of immunity that is proper for officials so high. Although the Court possibly left alive a *Bivens* claim against a much lower official—Warden Hasty—that was principally because of the kind of claim, not the status of the defendant. Moreover, the Court showed its willingness on the § 1985

50. *Id.* at 1872.

51. *Id.* at 1868.

52. 323 U.S. 214 (1944).

53. Some might argue that the plausible existence of nonracial grounds for the permissibility of the initial arrest in *Ziglar* distinguishes it from the wholly racial seizure at issue in *Korematsu*, but this distinction provides little comfort. To a substantial degree, it was the impermissible postarrest conduct that was at issue in *Ziglar*. Moreover, it is unlikely that a special-factors analysis like that in *Ziglar* would have come out in favor of plaintiffs if applied to a *Bivens* action in a hypothetical *Korematsu* today.

conspiracy claim to utilize qualified immunity, but it did not in fact use qualified immunity.⁵⁴ This means that the same conduct in the face of a recent Supreme Court opinion expressly rejecting the permissibility of such conduct still would not face liability. There is no need for qualified immunity because there is simply no claim at all.

Finally, the admittedly difficult separation of powers questions at issue in wartime cases cannot explain the Court's decision. That is because, as my colleague Andrew Kent has pointed out, the Court displayed its willingness to override the other branches in *Boumediene v. Bush*⁵⁵ and other post-9/11 cases.⁵⁶

Let me put my principal point in a more moderate and academic way: The Supreme Court was unwilling to permit illegal aliens to recover damages personally from the Attorney General and the FBI director for their implementation of the U.S. government's aggressive 9/11 policies. A variety of political considerations render this decision unsurprising (e.g., a public sentiment of hostility to illegal aliens), and a variety of institutional considerations arguably render it somewhat defensible (e.g., the traditional deference of the Court to the executive branch on issues of national defense). But what is bracing is that neither the illegality of the plaintiffs' presence in the United States nor the immunity of the executive actors proved central to the decision. Nor, for that matter, did separation of powers concerns relating to the relationship between the judiciary and the executive branch.

The words of *Ziglar* do convey a deep concern about separation of powers, but what drives his concern more than the Article II/Article III separation problem is the Article I/Article III separation problem.⁵⁷ Justice Kennedy insists that Congress, not the courts, should be conferring remedies upon those aggrieved by constitutional wrongs.⁵⁸ At one level, this is clearly disingenuous since we appear to be very far from a Congress that would confer such remedies. It is fair to say, however, that Kennedy believes it is unduly activist for the Court to be finding implied rights of action in statutes or the Constitution. Indeed, the structure of the opinion is that there will not be a new *Bivens* action in any but the most straightforward case, either covered clearly by the old *Bivens* action or presenting no difficult issues (or special factors).⁵⁹

I suggest that one of most important passages in the *Ziglar* case is this:

During this "*ancien regime*" [of the 1960s,] the Court assumed it to be a proper judicial function to "provide such remedies as are necessary to make effective" a statute's purpose. Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself.

54. *Ziglar*, 137 S. Ct. at 1868.

55. 553 U.S. 723 (2008).

56. Kent, *supra* note 33, at 1192–93.

57. See U.S. CONST. arts. I–III.

58. *Ziglar*, 137 S. Ct. at 1858.

59. See *id.*

....

Later, the arguments for recognizing implied causes of action for damages began to lose their force.⁶⁰

Several facets of this passage jump off the page. One is that what was plainly quite a progressive era is described as the “ancien regime,” without a hint of irony. Another is that the Burger Court is described as having “assumed” providing remedies was a proper judicial function—as if the Court did not even think about it. Thirdly, the reason for providing remedies was allegedly to render a statute’s “purpose” effective. *Purposivism* has become a dirty word in statutory interpretation, at least among those attracted to Justice Scalia’s jurisprudence. Finally, it is striking that Justice Kennedy used passive and descriptive language rather than active or normative language in flagging the problem of the Supreme Court when it was more inclined to recognize implied rights of action. Later, the arguments for recognizing implied causes of action for damages began to lose their force. This is essentially saying that they became less popular among the Justices, not that the reasons for deeming them sound had been persuasively undercut.

What is most interesting about this passage, however, is what is *not* said. There is no recognition in Justice Kennedy’s opinion that the core of *Bivens* is the core of *Marbury v. Madison*—the principle that where there is a right there is a remedy.⁶¹ Indeed, he characterizes the reasons behind the decision of courts to recognize private rights of action as reasons of pursuing statutory (or, in this case, constitutional) purposes.⁶²

My central contention is that the core of *Ziglar* is the Supreme Court’s neglect of the normative basis of the principle that “where there is a right there is remedy.”⁶³ Justice Breyer begins his dissent with a substantial recognition of that fundamental principle within our system.⁶⁴ The reasons for recognizing a right of action stem from the entitlement of the individuals whose rights were violated to demand redress from the violators. The plaintiff in a *Bivens* claim is not a private attorney general trying to further the policies behind the Bill of Rights. Nor is the plaintiff presenting himself principally as a person who has suffered concrete losses that require compensation, though that may well be true. The plaintiff is seeking redress for a rights violation.⁶⁵

The point here is that it is a core mission of our courts to provide that redress and, in so doing, to empower the victims of such legal wrongs. Once

60. *Id.* at 1855 (citations omitted) (first quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001); then quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)); *see also supra* note 33 and accompanying text.

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

62. *Ziglar*, 137 S. Ct. at 1855.

63. The *ubi jus* principle is at the core of the civil recourse theory that I have developed along with Professor John Goldberg. *See Benjamin C. Zipursky, Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 84 (1998); *supra* note 13 and accompanying text. *See generally* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005).

64. *Ziglar*, 137 S. Ct. at 1872–73 (Breyer, J., dissenting).

65. *Id.* at 1869.

one sees this principle as the core of recognition of *Bivens* claims, one is forced to confront the question whether it really is a congressional function in the first instance to recognize rights of redress. Of course, there are positivistic and federalist reasons for supposing that the Article III judiciary should leave creation of private rights of action to Congress. But note that it is not an atheoretical or normatively neutral point; on the face of it, this posture requires a substantial argument *against* the traditional position that the judiciary is in charge of whether to reject or accept private claims against wrongdoers who have injured individuals.

III. THE RIGHT TO A REMEDY

Justice Kennedy's abandonment of the notion that "where there is a right there is a remedy" in his *Ziglar* opinion is a vivid illustration of a great deal of what has happened in our Supreme Court and our legal culture. Anyone who follows tort reform and litigation reform more generally knows that corporate America—like many factions in our society—has sought to influence a number of different sources of power in our legal system. Most obviously, the U.S. Chamber of Commerce, in concert with defense lawyers and a range of manufacturers, has tried (with substantial success) to persuade the public that tort law was out of control.⁶⁶ The next step has been, and continues to be, efforts to persuade state legislatures to change tort law and to make it much more difficult for plaintiffs to win, to diminish plaintiffs' recovery in damages, to disincentivize lawsuits by disincentivizing plaintiffs' lawyers, to enact statutes of repose, and so on.⁶⁷ But that is not all. They have also, over the past several decades, tried to get Congress to enact statutory protections for big product manufacturers—for example, the handgun industry.⁶⁸ The airline (after 9/11) and childhood vaccine industries have had strong victories in Congress on tort reform.

Many of the most successful efforts to shrink tort law have occurred in the Supreme Court. In the late 1980s, the Supreme Court's *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁶⁹ decision in conjunction with Federal Rule of Evidence 702⁷⁰ spurred states around the country to follow suit and to scrutinize expert witnesses with a fine-toothed comb. *Daubert* and its progeny appear to have had a substantial impact in diminishing tort suits.

In 1890, by interpreting the Eleventh Amendment in a nontextualist manner, the Court radically shut off lawsuits against states.⁷¹ In the 1990s, the Supreme Court got into the business of shearing down punitive damages

66. See, e.g., David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 83 U. CIN. L. REV. 903, 903–04 (2015); Georgene Vairo, *The Role of Influence in the Arc of Tort Reform*, 65 EMORY L.J. 1741, 1743 (2016).

67. Logan, *supra* note 66, at 907–14 (describing federal and state tort reform successes).

68. *Id.* at 911 n.40; see also Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–7903 (2012).

69. 509 U.S. 579 (1993).

70. See FED. R. EVID. 702.

71. *Hans v. Louisiana*, 134 U.S. 1, 17–18 (1890).

awards under the Fourteenth Amendment's due process clause.⁷² In the late 1990s, it interpreted Rule 23 of the Federal Rules of Civil Procedure⁷³ narrowly and shut down a range of mass tort actions brought as class actions.⁷⁴

The twenty-first century has brought its own rather remarkable trends in narrowing a plaintiffs' ability to go to court. In civil procedure, the radical reconceptualization of pleading standards in *Bell Atlantic Corp. v. Twombly*⁷⁵ and *Iqbal* have in fact streamlined motions to dismiss and mounted impressive barriers to bringing civil cases at all. In products liability law, the Court has generated an uneven but daunting stream of cases protecting manufacturers against state tort actions by inflating the doctrine of federal preemption.⁷⁶ Surprisingly, six of the Justices left failure-to-warn claims against prescription drug manufacturers alive in *Wyeth v. Levine*⁷⁷ in 2009 and two subsequent decisions—*Pliva, Inc. v. Mensing*⁷⁸ in 2011 and *Mutual Pharmaceutical Co. v. Bartlett*⁷⁹ in 2013—effectively declaring the end of products liability for generic drugs that cause injuries. Similarly, tort claims against huge corporate entities have also been protected from plaintiff attack by a combination of cases, including the recent *Bristol-Myers Squibb Co. v. Superior Court*⁸⁰ decision and the *Goodyear Dunlop Tires Operations, S.A. v. Brown*⁸¹ and *Daimler AG v. Bauman*⁸² decisions. These cases form a doctrine that promises a radical curtailment of personal jurisdiction in mass tort cases.

IV. LITIGATION REFORM, ACCESS TO JUSTICE, AND THE LEGAL PROFESSION

It is no exaggeration to call these systematic curtailments of plaintiffs' substantive and procedural rights an attack on access to justice. It is also no epiphany. Not just trial lawyers and consumer advocates but progressives in general have railed against this onslaught.⁸³

I want to conclude, however, by offering a few observations that cast these issues in a different light, and to do so in a manner that connects them, especially when thinking about the bench and the bar. Justice Kennedy is in some ways known as a judicial moderate, although many of his business decisions lean right and many of his personal liberty decisions lean left. And much of his now remarkable corpus appears to be centrist. It is quite natural

72. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996).

73. *See* FED. R. CIV. P. 23.

74. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

75. 550 U.S. 544 (2007).

76. John C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 443–55 (2016).

77. 555 U.S. 555 (2009).

78. 564 U.S. 604 (2011).

79. 133 S. Ct. 2466 (2013).

80. 137 S. Ct. 1773 (2017).

81. 564 U.S. 915 (2011).

82. 134 S. Ct. 746 (2014).

83. *See generally* ALEXANDRA LAHAV, IN PRAISE OF LITIGATION (2017).

to regard several of the issues I have just enumerated—punitive damages, class actions, *Daubert*, pleading—as issues that have political consequences but that are intrinsically nonpolitical. Even if that is not quite right, it is nonetheless plausible that a judge staking out positions on such issues might himself or herself aspire to be quite apolitical. We know that is true of Justice Kennedy and that he seeks the middle.

Justice Kennedy's effort to take the middle road in *Ziglar* provides a lens through which to view his decisions on all of these cases. In these decisions, as in his decision in *Ziglar*, he appears to maintain a self-conception as a reasonable and moderate justice. One might say that it takes a good deal of self-discipline to take the putative rights invasions in *Ziglar* seriously and then decline to recognize a *Bivens* claim. And one gets the feeling that Justice Kennedy regarded such (putative) self-discipline as foundational to his judicial role—as if actually recognizing the *Bivens* claim rather than deferring to Congress was the kind of activism the Rehnquist and Roberts Courts have learned to overcome.

Two worries arise from this line of thought. My first worry is that Justice Kennedy is representative of the bench more generally and that the curtailment of the right to redress—not necessarily in restricting *Bivens* actions particularly but in the array of domains I enumerated—is deemed to be a relatively middle-of-the-road, sensible kind of gatekeeping.

My second worry is that the organized bar, such as it is, displays a similar overall outlook. The legal profession today is sensitive to the question whether our society has too much litigation and too much liability. I have little doubt that it is appropriate that we, the legal profession, be sensitive to these concerns. But there are different kinds of sensitivities and different ways of framing the relevant issues, and I worry that we have been narrow-minded in doing so. What masquerades as a kind of pragmatic wisdom about what our court system and our other institutions can tolerate is really a particular sort of political position that should greatly concern us.

One could, in theory, distinguish between two different sorts of evaluative criteria in appraising litigation reform. Some of the criteria pertain to the substantive goals of an area of the law while others pertain to substantive normative constraints on it. One could identify deterrence and compensation as goals of tort law, for example, but one might also identify as constraints that we want our system not to cost too much for the courts or for those who sustain liability, and we rightly examine the potential for interference with various institutions, such as the market or other branches of government. The same could be said of related areas of law; for example, securities and civil rights.

In my view, the bench and bar have overwhelmingly occupied what might be called a public law perspective on litigation reform—certainly, this is true of tort reform. The criteria I laid out above are almost entirely public oriented. But there is a private law way of looking at it too. Providing private rights of action to individuals is a means to an end, but it is not just a means to an end. It is also a way of allocating private power. The right to redress is a legal power in our system, one that exists because the judiciary itself is a

font of legal power and, under the political norms of our constitutional system, is obligated to provide that power to private individuals under various circumstances. “Where there’s a right, there’s a remedy”—what Justice Kennedy left out of his *Ziglar* opinion and Justice Breyer highlighted—is a norm governing courts. It is an understatement to say they must bear it in mind.

CONCLUSION

After all this doom and gloom, I want to end on a more positive note—the positive note that led me to organize this Colloquium. The access-to-justice movement is probably a movement from the left more than from the right. But, as my Fordham colleagues’ events and a growing series of developments around the country have indicated, it has come to develop support from across the political spectrum, certainly within the bench. Fortunately, it emphasizes what I would describe (from within my admittedly peculiar perspective) as private law criteria for litigation reform: it is about the extent to which individuals are empowered through our courts. As my frequent collaborator, John Goldberg, and I have been arguing over the past two decades, a right to redress is a fundamental equality norm within our political system. While the bench and the bar are certainly obligated to be vigilant of the practical workability of our litigation system and of its potential excesses, we are also in charge of securing compliance with that equality norm.