

SUPREME COURT OF THE UNITED STATES

No. 91-42

UNITED STATES, PETITIONER v. THERESE A. BURKE,
CYNTHIA R. CENTER, AND
LINDA G. GIBBS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT
[May 26, 1992]

JUSTICE SOUTER, concurring in the judgment.

Respondents may not exclude their recovery from taxable income unless their action was one “based upon tort or tort type rights.” 26 CFR §1.104-1(c) (1991). On the reasonable assumption that the regulation reflects the broad dichotomy between contract and tort posited by the dissent, *post*, at 2-3, there are good reasons to put a Title VII claim on the tort side of the line. There are definite parallels between, say, a defamation action, which vindicates the plaintiff's interest in good name, and a Title VII suit, which arguably vindicates an interest in dignity as a human being entitled to be judged on individual merit. Our cases have, indeed, recognized parallels (though for different purposes) between tort claims and claims under antidiscrimination statutes other than Title VII. See *Goodman v. Lukens Steel Co.*, 482 U. S. 656, 661 (1987) (similarity between claim under 42 U. S. C. §1981 and personal-injury claim for purposes of determining applicable statute of limitations); *Wilson v. Garcia*, 471 U. S. 261, 277-278 (1985) (same for 42 U. S. C. §1983).

The reasons do not go solely to that one side, however. While I do not join the majority in holding that the tort-like character of a claim should turn solely on whether the plaintiff can recover for “intangible elements of injury,” *ante*, at 6, I agree that Title VII's limitation of recovery to lost wages (“back pay”) counts against holding respondents' statutory action to be “tort-type.” Tort actions, it

cannot be gainsaid, commonly (though not invariably¹) permit recovery for intangible injury. *Ante*, at 5-8. Back pay, on the other hand, is quintessentially a contractual measure of damages.

¹In those States that have barred recovery in tort for "intangible elements of injury," see, e. g., N. J. Stat. Ann. §59:9-2(d) (1982) (action against public entity or employee); Wash. Rev. Code §4.20.046(1) (1989) (action by estate of deceased), the modified action is still fairly described as one "based upon tort rights," and certainly is an "action based upon tort-type rights."

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A further similarity between Title VII and contract law, at least in the context of an existing employment relationship, is the great resemblance of rights guaranteed by Title VII to those commonly arising under the terms and conditions of an employment contract: Title VII's ban on discrimination is easily envisioned as a contractual term implied by law. See *Hishon v. King & Spalding*, 467 U. S. 69, 74–75, n. 6 (1984) (“Even if the employment contract did not afford a basis for an implied condition that the [decision to promote] would be fairly made on the merits, Title VII itself would impose such a requirement”); *Patterson v. McLean Credit Union*, 491 U. S. 164, 177 (1989) (“[T]he performance of established contract obligations and the conditions of continuing employment [are] matters . . . governed by state contract law and Title VII”). Indeed, it has been suggested that “the rights guaranteed by Title VII are implied terms of every employment contract” C. Shanor & S. Marcossou, *Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988–89*, 6 *Lab. Law.* 145, 174, n. 118 (1990) (emphasis added).

In sum, good reasons tug each way. It is needless to decide which tug harder, however, for the outcome in this case follows from the default rule of statutory interpretation that exclusions from income must be narrowly construed. See *United States v. Centennial Savings Bank FSB*, 499 U. S. ____, ____ (1991) (slip op., at 10); *Commissioner v. Jacobson*, 336 U. S. 28, 49 (1949). That is, an accession to wealth is not to be held excluded from income unless some provision of the Internal Revenue Code clearly so entails. There being here no clear application of 26 U. S. C. §104(a) (2) as interpreted by the Treasury Regulation, I concur in the judgment.