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## Denial of Unemployment Benefits to Otherwise Eligible Women on the Basis of Pregnancy: Section 3304(a)(12) of the Federal Unemployment Tax Act

Twenty-one million women<sup>1</sup> in the United States between the ages of eighteen and thirty-four are in the civilian labor force.<sup>2</sup> Approximately eighty-five percent of women in this age range<sup>3</sup> are likely to give birth to at least one child during their working lives.<sup>4</sup> The availability of unemployment compensation for women who wish to return to work after leaving their most recent employment because of pregnancy is therefore a critical issue. Unemployment compensation may constitute a substantial portion of the financial resources of these women.<sup>5</sup>

Although unemployment compensation is generally a matter of state law, the federal government has assumed a supervisory role.<sup>6</sup> The Federal Unemployment Tax Act<sup>7</sup> (FUTA) established guidelines for the administration of state plans. A state must comply with these federal standards to be eligible for federal assistance.<sup>8</sup> In 1976, Congress amended section 3304(a)(12) of FUTA, prohibiting disbursement of federal funds to states that deny unemployment compensation "solely on the basis of pregnancy."<sup>9</sup>

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1. U.S. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, No. 363, POPULATION PROFILE OF THE UNITED STATES: 1980, at 33 (1981) [hereinafter cited as CENSUS BUREAU, POPULATION PROFILE].

2. The term "civilian labor force" refers to all nonmilitary persons classified as employed or unemployed. Excluded are persons neither employed nor seeking work outside their own home, retired persons, students, seasonal workers for whom the survey fell in an off season, those with long-term disabilities and the voluntarily idle. U.S. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS: CONSUMER INCOME, SERIES P-60, No. 132, MONEY INCOME OF HOUSEHOLDS, FAMILIES AND PERSONS IN THE UNITED STATES: 1980, at 225 (1982) [hereinafter cited as CENSUS BUREAU, MONEY INCOME].

3. This age range was selected as representative of the peak childbearing years. Most of the data reported in a 1977 Census Bureau fertility survey relate to this age group. See U.S. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, No. 325, FERTILITY OF AMERICAN WOMEN: JUNE 1977 (1978) [hereinafter cited as CENSUS BUREAU, FERTILITY SURVEY].

4. This calculation is based on data collected in CENSUS BUREAU, FERTILITY SURVEY, *supra* note 3, at 22. See also S. KAMERMAN, MATERNITY AND PARENTAL BENEFITS AND LEAVES 8 (Impact on Policy Series Monograph No. 1, 1980) (summary of relevant statistics).

5. See *Porcher v. Brown*, 459 U.S. 1150, 1153 (1983) (White, J., dissenting from denial of certiorari).

6. See notes 34-45 *infra* and accompanying text for a description of federal and state cooperation in the field of unemployment compensation.

7. 26 U.S.C. §§ 3301-3311 (1982).

8. See notes 29-33 *infra* and accompanying text.

9. 26 U.S.C. § 3304(a)(12) (1982). For the text of this section, see text at note 46 *infra*.

Several states and the District of Columbia<sup>10</sup> currently deny benefits to claimants who left their last position for health reasons unrelated to employment.<sup>11</sup> In these states women who are otherwise entitled to unemployment compensation under state law are subject to probable disqualification if they terminate their employment as a

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10. The Solicitor General, in his brief as amicus curiae in *Porcher v. Brown*, noted that eight states and the District of Columbia denied benefits to claimants who left work because of health problems unrelated to their employment: Louisiana, Missouri, Nebraska, New Mexico, Oklahoma, South Carolina, West Virginia and, to a lesser extent, Vermont. Brief for the United States as Amicus Curiae at 18, *Porcher v. Brown*, 459 U.S. 1150 (1983) (denial of certiorari) [hereinafter cited as Amicus Curiae Brief]. Since the brief was filed, however, New Mexico has amended its statute to prohibit the denial of benefits solely on the basis of pregnancy. N.M. STAT. ANN. § 51-1-7(A) (1983 Rep. Vol.). Thus, although New Mexico still disqualifies claimants who leave work for causes unrelated to employment, pregnancy is exempt from this disqualification.

11. In two of these jurisdictions, the District of Columbia and Louisiana, decisions explicitly upholding disqualification of women who left their last employment as a result of pregnancy are in effect. *Brooks v. District of Columbia Dept. of Employment Servs.*, 453 A.2d 812 (App. D.C. 1982) (per curiam); *Algiers Homestead Assn. v. Brown*, 246 La. 738, 167 So. 2d 349 (1964). The *Brooks* case involved a pregnant security guard who separated from her job because the heavy belt holding her revolver and other items that she was required to wear pressed against her stomach, making her ill. In refusing to set aside the claimant's disqualification, the District of Columbia Court of Appeals stated: "Nothing in the record suggests that her resignation was other than voluntary, and it cannot be argued that pregnancy is a work-related illness." 453 A.2d at 813. In Louisiana, a person leaving "his employment . . . without good cause connected with his employment" is disqualified from unemployment benefits. LA. REV. STAT. ANN. § 23:1601(1) (West 1964 & Supp. 1984). In *Algiers Homestead*, a woman who left work because of illness due to pregnancy was denied benefits because this cause was unconnected with her employment. 246 La. at 744, 167 So. 2d at 351. See also *Martin Mills v. Department of Employment Sec.*, 391 So. 2d 56 (La. Ct. App. 1980) (woman on maternity leave disqualified for duration of leave because pregnancy not connected with employment). In the other five jurisdictions, no cases involving pregnancy disqualification have been reported, although some may have arisen at the commission level. However, judicial decisions or statutory provisions relating to the denial of benefits on the basis of other medical conditions suggest that a woman who leaves her work because of a pregnancy-related condition would be denied benefits if she were not reinstated when she sought to return to work.

The Missouri Court of Appeals has held that an employee's illness is not to be considered grounds for involuntary termination unless the illness was caused or aggravated by the employer. *Duffy v. Labor & Indus. Relations Commn.*, 556 S.W.2d 195, 198 (Mo. Ct. App. 1977). Leaving work because of pregnancy is regarded as voluntary. *Davis v. Labor & Indus. Relations Commn.*, 554 S.W.2d 541 (Mo. Ct. App. 1977). In Nebraska, the standard is that a termination must be involuntary and for good cause attributable to the employer. Thus, benefits have been awarded to an employee who left work because factors directly connected with his employment caused his illness. *Glionna v. Chizek*, 204 Neb. 37, 40, 281 N.W.2d 220, 223 (1973).

Oklahoma, by statute, sanctions disqualification for voluntarily leaving employment without good cause connected with employment. OKLA. STAT. tit. 40, § 2-404 (1981). The succeeding section makes an allowance for illness in cases where job conditions so change that the job becomes detrimental to the employee's health. OKLA. STAT. tit. 40, § 2-405 (1981). Presumably, pregnancy would not fit within the exception provided in § 2-405. Similarly, Vermont and West Virginia provide for statutory disqualification of an employee who leaves his last employment voluntarily without good cause attributable to the employer. VT. STAT. ANN. tit. 21, § 1344(a)(2)(A) (Supp. 1983); W. VA. CODE § 21A-6-3(1) (1978). Until 1982, persons in West Virginia who left their last employment for health-related reasons were disqualified from receipt of benefits under the authority of *State v. Hix*, 132 W. Va. 516, 54 S.E.2d 198 (1949). In 1982, the West Virginia Court of Appeals overruled *Hix* in relevant part in *Gibson v. Rutledge*, 298 S.E.2d 137 (W. Va. 1982). It is not clear whether the *Gibson* decision will encompass denial of benefits on the basis of pregnancy.

result of pregnancy. In effect, these states interpret section 3304(a)(12) to require only that pregnancy not be treated differently from any medical condition not connected with employment.<sup>12</sup> The Department of Labor, the agency charged with evaluating state plans,<sup>13</sup> endorses this interpretation of the statute.<sup>14</sup>

In a recent Fourth Circuit case, *Brown v. Porcher*,<sup>15</sup> two formerly pregnant women challenged this reading of section 3304(a)(12). The court held that South Carolina's policy of denying benefits to women who left their last employment because of pregnancy violated the mandate of section 3304(a)(12), regardless of the state's treatment of claimants who separated from work because of other medical conditions.<sup>16</sup> The Supreme Court recently denied certiorari in the *Porcher* case, with three justices dissenting.<sup>17</sup> The Court's disposition of the petition allows discordant interpretations of section 3304(a)(12) to stand.<sup>18</sup>

This Note examines the conflicting interpretations of section 3304(a)(12) of the Federal Act. The *Porcher* decision serves as a point of reference throughout this Note, since opposing constructions of the section were presented in the case. Part I describes the basic framework of FUTA and presents the disparate interpretations of section 3304(a)(12) that have been advanced.

Part II analyzes section 3304(a)(12) with reference to the statutory language and legislative history. As a preliminary matter, this part considers the degree of deference that should be afforded the

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12. See Amicus Curiae Brief, *supra* note 10, at 8.

13. Each year on October 31 the Secretary of Labor must certify to the Secretary of the Treasury each state whose law has been previously approved that continues to comply with FUTA. States that are found to be in violation of FUTA are given an opportunity for a hearing. 26 U.S.C. § 3304(c) (1982).

14. See note 54 *infra* and accompanying text.

15. *Brown v. Porcher*, 502 F. Supp. 946 (D.S.C. 1980), *modified and remanded*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983).

16. 660 F.2d at 1004. See also notes 47-63 *infra* and accompanying text (description of the *Porcher* opinion); 20 J. FAM. L. 572 (1981-82) (brief overview of *Porcher* decision).

17. 459 U.S. 1150 (1983). Justice White, joined by Justices Powell and Rehnquist, dissented. For a discussion of Justice White's dissent, see note 63 *infra* and accompanying text.

18. As a result, administrators of state plans cannot be sure exactly what standard the Federal Act imposes. See 459 U.S. at 1152 (White, J., dissenting from denial of certiorari).

In addition, working women who are pregnant, or who may become pregnant in the future, have an identifiable interest in a reliable guideline. The *Porcher* decision applies only to South Carolina's law. The Secretary of Labor can continue to certify other state plans that deny benefits to women who left work because of pregnancy on the same basis that benefits are denied to persons who leave their job for any other medical condition unrelated to their employment.

Although no estimate is available of the amount of the total additional benefit that states would have to pay if they were required to include in their plans eligible women who leave work because of pregnancy, considerable resources are undoubtedly at issue. The United States, in its amicus curiae brief in *Porcher*, reported that South Carolina was paying an additional \$1.5 million in benefits and estimated that West Virginia, which is also in the Fourth Circuit, would be liable for about the same amount. Amicus Curia Brief, *supra* note 10, at 18.

Secretary of Labor's certification of state programs that treat pregnancy like all other medical conditions for purposes of denial of benefits. This Note argues that the Secretary's determination that these plans satisfy the requirement of FUTA is not dispositive because: (1) the statutory language does not vest absolute discretion in the Secretary of Labor and (2) courts are not required to endorse administrative readings that conflict with the enabling statute or the policy behind it. On the basis of the statutory language and the available legislative history, this Note concludes that Congress, in enacting section 3304(a)(12), intended that a pregnant woman's necessary separation from work, as determined by the woman and her physician, should not be the basis for denial of benefits if the woman seeks to return to work after childbirth but is not reemployed.

Part III discusses policy considerations relevant to analysis of section 3304(a)(12). Because pregnancy uniquely affects women, statutes that deny benefits because of pregnancy may discriminate on the basis of sex. In addition, Congress and the courts have recognized both the important economic contributions of women in the work force and the fundamental personal and societal interests related to procreation. States that deny unemployment benefits to women on the basis of pregnancy force women to choose between employment and childbirth, thus frustrating these policies.

This Note further contends that treating pregnancy in the same manner as other medical conditions glosses over the fact that virtually all pregnant women must at some point leave their employment to attend to childbirth. Allowing the states to group pregnancy with other medical conditions effectively permits the states indirectly to deny benefits on the basis of pregnancy when they clearly could not do so directly, in disregard of the fact that Congress specifically addressed the issue of pregnancy-related disqualifications in section 3304(a)(12).<sup>19</sup>

## I. SECTION 3304(a)(12) IN CONTEXT AND THE CURRENT CONTROVERSY OVER ITS INTERPRETATION

### A. *Federal Involvement in Unemployment Compensation*

Unemployment compensation in the United States is a cooperative federal-state venture.<sup>20</sup> Distribution to individual claimants is generally a matter of state law. All states require a claimant to sat-

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19. This Note recognizes that the language and history of § 3304(a)(12) do not require payment of benefits to all pregnant claimants. For example, women who make themselves unavailable for work while still able to work or who elect to remain home after childbirth are ineligible. Rather, the provision was added to prohibit states from denying compensation to otherwise eligible women on the ground that they left their last employment as a result of pregnancy.

20. See note 35 *infra*.

isfy some form of a three-tier test.<sup>21</sup> First, the claimant must meet the state's qualifying requirements before filing for benefits. This involves working for a statutorily defined period or earning a specified amount of wages.<sup>22</sup> Second, the unemployed worker must be eligible to receive benefits. To be eligible an individual must be both able to work and available for work.<sup>23</sup> Third, the worker must not be subject to any disqualification prescribed by the statute.<sup>24</sup> The most common reasons for disqualification<sup>25</sup> include voluntarily leaving the job without good cause,<sup>26</sup> discharge for misconduct<sup>27</sup> and refusal of suitable work.<sup>28</sup> The federal government performs a supervisory function through a system of tax incentives.<sup>29</sup> FUTA provides for grants to state governments<sup>30</sup> and tax credits to employers<sup>31</sup> in states certified by the Secretary of Labor as having complied

21. Amicus Curiae Brief, *supra* note 10, at 3; *see also* W. HABER & M. MURRAY, UNEMPLOYMENT INSURANCE IN THE AMERICAN ECONOMY 113-19 (1966) (describing general requirements for unemployment compensation).

22. This requirement is designed to measure the claimant's attachment to the labor market. W. HABER & M. MURRAY, *supra* note 21, at 113. The idea is to insure some link between the source of unemployment funds and their expenditure. Without some type of qualifying requirement, compensation pools might be depleted by persons who work intermittently at the expense of the regularly employed. *See* R. ALTMAN, AVAILABILITY FOR WORK 75 (1950).

23. *See* R. ALTMAN, *supra* note 22, at 84; W. HABER & M. MURRAY, *supra* note 21, at 264-65.

24. A principal function of unemployment compensation is to assist individuals who are involuntarily unemployed. *See Economic Security Act: Hearings on S. 1130 Before the Senate Comm. on Finance*, 74th Cong., 1st Sess. 1328 (1935). Disqualifications are imposed to eliminate claimants whose unemployment results from their own actions. W. HABER & M. MURRAY, *supra* note 21, at 114.

25. NATIONAL COMM. ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT COMPENSATION: FINAL REPORT 46 (1980). *See also* R. ALTMAN, *supra* note 22, at 81; W. HABER & M. MURRAY, *supra* note 21, at 114.

26. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-775(1) (1983); ARK. STAT. ANN. § 81-1106(a) (Repl. 1976 & Supp. 1983); DEL. CODE ANN. tit. 19, § 19, § 3315(1) (Repl. 1979 & Supp. 1982); N.J. STAT. ANN. § 43:21-5(a) (West 1962 & Supp. 1984).

27. *See, e.g.*, ALA. CODE § 25-4-78(3) (1975); D.C. CODE ANN. § 46-111(b) (1981); LA. REV. STAT. ANN. § 23:1601(2) (West 1964 & Supp. 1984); MASS. GEN. LAWS ANN. ch. 151A, § 25(e) (West 1976 & Supp. 1984).

28. *See, e.g.*, ALASKA STAT. § 23.20.379(b) (1981); FLA. STAT. § 443.101(2) (1983); MICH. COMP. LAWS § 421.29(1)(e) (1979).

29. FUTA levies an excise tax on employers in an amount equal to a percentage of wages paid. 26 U.S.C. § 3301 (1982). The term "wages" includes the cash value of all remuneration for employment, subject to several listed exclusions. 26 U.S.C. § 3306(b) (1982). Employers are then allowed a credit of up to 90% of the federal tax for contributions to state plans that have been approved by the Secretary of Labor. 26 U.S.C. § 3302 (1982). For a brief description of the mechanics of FUTA, *see California v. Grace Brethren Church*, 457 U.S. 393, 397 (1982); *Saint Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 775 n.3 (1981); *Brown v. Porcher*, 502 F. Supp. at 947.

30. 26 U.S.C. § 3304 (1982).

The Social Security Act authorizes release of federal funds to state governments found to be in compliance with federal standards. 42 U.S.C. §§ 501-504, 1101-1108 (1982). These grants are to be used to defray the costs of administering the state's compensation program. 42 U.S.C. § 1101(c)(1)(B) (1982).

31. 26 U.S.C. § 3302 (1982). An employer is defined as anyone who, during the calendar

with the fundamental federal standards enumerated in section 3304(a).<sup>32</sup> Unemployment compensation is thus grounded in federal law, but its execution is a function of state law.<sup>33</sup>

The original Federal Act<sup>34</sup> was adopted in 1935, in the wake of the Great Depression.<sup>35</sup> The objective was to encourage the states to establish unemployment compensation plans.<sup>36</sup> Despite a variety of

year, paid at least \$1,500 in wages or employed at least one person for any portion of 20 days in 20 different weeks. Wages paid for domestic services are excluded. 26 U.S.C. § 3306(a)(1) (1982).

32. See note 13 *supra*. Section 3304(a) presently lists 17 requirements for approval of a state plan. These requirements have been termed fundamental federal standards because Congress has stated that federal aid is available only to those states which meet these basic prerequisites. See *Steward Mach. Co. v. Davis*, 301 U.S. 548, 594 (1937); see also *New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519, 539 (1979) (quoting *Steward Mach.*, 301 U.S. at 594); *California Dept. of Human Resources Dev. v. Java*, 402 U.S. 121 (1971). Some of the § 3304(a) requirements concern administration of state programs. For example, § 3304(a)(1) requires that all compensation be paid through public employment agencies or other agencies that have been approved by the Secretary of Labor. Others focus on actions that must be taken by the claimant. For example, § 3304(a)(7) states that "an individual who has received compensation during his benefit year is required to have had work since the beginning of such year in order to qualify for compensation in his next benefit year."

Two subsections regulate payment of benefits to certain classes of employees. See 26 U.S.C. § 3304(a)(13) (1982) (athletes); 26 U.S.C. § 3304(a)(14) (1982) (aliens). Two additional subsections prohibit denial of benefits under given circumstances. Section 3304(a)(5) prohibits denial of benefits to an otherwise eligible claimant who refuses to accept new work because of any of the following conditions: (1) the position is available as a result of a labor dispute (*e.g.*, strike); (2) the wages or work conditions are not as favorable as the prevailing conditions for similar work; or (3) acceptance of the work would require the claimant to join a company union or to resign from or refrain from joining a labor organization. Section 3304(a)(12) states that "no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy."

All 50 states and the District of Columbia are at present certified by the Secretary of Labor. See *Saint Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 775 n.3 (1981); *Cabais v. Egger*, 690 F.2d 234, 236 n.1 (D.C. Cir. 1982).

33. NATIONAL COMM. ON UNEMPLOYMENT COMPENSATION, *supra* note 25, at 14.

34. The original unemployment insurance provisions were enacted under Title IX of the Social Security Act of 1935, ch. 9, Pub. L. No. 74-271 §§ 301-303, 49 Stat. 620, 626-27 (1935). The same provisions were assimilated into the 1939 Internal Revenue Code as the Federal Unemployment Tax Act, ch. 23, §§ 3301-3308, 68A Stat. 439-54 (1954). See generally 1B UNEMPL. INS. REP. (CCH) ¶ 1020 (Sept. 29, 1980) (description of federal unemployment legislation). The Federal Act is currently part of the Internal Revenue Code, 26 U.S.C. §§ 3301-3311 (1982).

35. The federal government became involved in unemployment compensation in response to widespread unemployment in the aftermath of the Great Depression. A few states, *e.g.*, Wisconsin and New Hampshire, attempted to meet the needs of the unemployed by imposing a tax on employers. Most states, however, feared that such a tax would drive industry to other states with more favorable tax laws. See generally 15 SUFFOLK U. L. REV. 381, 382-84 (1981) (concise summary of the history of the Federal Act as well as a comprehensive list of related sources). See also *Saint Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 775 (1981); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 587-88 (1937); H.R. REP. NO. 615, 74th Cong., 1st Sess. 8 (1935) [hereinafter cited as H.R. REP. NO. 615]; S. REP. NO. 628, 74th Cong., 1st Sess. 12, 13 (1935) [hereinafter cited as S. REP. NO. 628]. The plan of federal-state cooperation was thus aimed at stimulating creation of state compensation plans, within the constraints of federalism. See *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 310 (1942); *Buckstaff Bath House Co. v. McKinley*, 308 U.S. 358, 363 (1939); *New Hampshire Dept. of Employment Sec. v. Marshall*, 616 F.2d 240, 241 (1st Cir. 1980), *appeal dismissed*, 449 U.S. 806 (1980).

36. The idea was to furnish an incentive for the states to provide benefits to the newly

amendments to the Federal Act since it was originally passed,<sup>37</sup> the basic statutory scheme has remained intact.<sup>38</sup> Periodically, however, Congress has found it necessary to amend FUTA to keep the Act attuned to changes in the composition of the work force.<sup>39</sup> As a rule, the amendments have expanded the scope of the Act's coverage to include workers who were previously not protected by the federal guidelines.<sup>40</sup>

In 1976, Congress adopted a series of major amendments to FUTA.<sup>41</sup> These amendments were grouped into four main categories with the following objectives:<sup>42</sup> (1) to extend unemployment compensation to substantially all wage and salary earners;<sup>43</sup> (2) to restore solvency to the federal and state programs; (3) to modify the

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unemployed worker "at a time when otherwise he would have nothing to spend." *Economic Security Act: Hearings on S. 1130 Before the Senate Comm. on Finance*, 74th Cong., 1st Sess. 99, 119 (1935) (statement of Frances Perkins, Secretary of Labor), *quoted in* California Dept. of Human Resources v. Java, 402 U.S. 121, 131 (1971). By maintaining the worker's purchasing power while he looked for alternative employment, the system served to stabilize the economy during cycles of high unemployment. *See Economic Security Act: Hearings on H.R. 4210 Before the House Comm. on Ways and Means*, 74th Cong., 1st Sess. 172, 182 (1935) (statement of Frances Perkins, Secretary of Labor), *quoted in* Java, 402 U.S. at 132-33.

37. *See, e.g.*, Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667 (1976) (extending coverage to certain previously excluded government employees, farmworkers and domestic employees); 5 U.S.C. §§ 8521-8525 (1982) (extension of benefits to ex-servicemen in period following the Korean War); *see also* Brown v. Porcher, 502 F. Supp. 946, 954 (D.S.C. 1980) (citing examples of congressional modification of FUTA to reflect changes in the work force).

38. *See* New Hampshire Dept. of Employment Sec. v. Marshall, 616 F.2d 240, 241 (1st Cir.), *appeal dismissed*, 449 U.S. 806 (1980).

39. *See* note 37 *supra*. For data on labor force changes during the past 20 years, *see* CENSUS BUREAU, POPULATION PROFILE, *supra* note 1, at 29.

40. *See, e.g.*, Saint Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 775 (1981).

41. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667 (1976).

42. *See* S. REP. NO. 1265, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5997 [hereinafter cited as S. REP. NO. 1265, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS]; H.R. REP. NO. 755, 94th Cong., 2d Sess. (1976) [hereinafter cited as H.R. REP. NO. 755]. *See generally* THE AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, 94th Cong., Rep. No. 10, UNEMPLOYMENT COMPENSATION AMENDMENTS (1976) (analysis of key provisions). The House report accompanying the amendments listed the objectives of the bill:

The Unemployment Compensation Amendments Act of 1975 (H.R. 10210) is designed to achieve the following objectives:

provide coverage under the permanent Federal-State Unemployment Compensation law for substantially of all the nation's wage and salary earners and thereby eliminate the need for the temporary Special Unemployment Assistance program;

restore solvency in the Unemployment Compensation program at the State and Federal levels by increasing revenues in a manner that distributes fairly the impact of additional employer-paid taxes;

modify the "trigger mechanism" in the Extended Benefits program; and

establish a National Study Commission that will undertake a thorough and comprehensive examination of the present Unemployment Compensation program and make recommendations for further improvements.

H.R. REP. NO. 755, *supra*, at 1.

43. The House Report listed the "major groups of workers that were without permanent



conditions for the extended benefits program; and (4) to establish a National Study Commission. The first category of modifications related to benefit eligibility.<sup>44</sup> These provisions were designed to extend coverage by eliminating certain impediments to the receipt of benefits and by providing protection under permanent law to major groups of workers not covered under the existing law. This section included a provision prohibiting disbursement of federal unemployment funds to states that deny compensation solely on the basis of pregnancy,<sup>45</sup> which was codified as follows:

§3304. Approval of State Laws

(a) Requirements — The Secretary of Labor shall approve any state law submitted to him, within 30 days of submission, which he finds provides that —

(12) No person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy . . . .<sup>46</sup>

Thus, after 1976, states that denied benefits solely on the basis of pregnancy were to be ineligible for federal unemployment funds. Nevertheless, the ambiguity inherent in the language "solely on the basis of pregnancy" has led to differing interpretations of section 3304(a)(12).

B. *Disparate Interpretations of Section 3304(a)(12): Brown v. Porcher*

The meaning of section 3304(a)(12) was subject to judicial scrutiny for the first time in *Brown v. Porcher*.<sup>47</sup> The plaintiffs initiated a class action on behalf of themselves and other women who were indefinitely denied unemployment compensation because they left their last employment as a result of pregnancy.<sup>48</sup> In South Carolina, women who separated from employment because of pregnancy were

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coverage" as: (1) state and local government employees (2) agricultural employees and (3) domestic workers. H.R. REP. NO. 755, *supra* note 42, at 2.

44. See H.R. 10210, 94th Cong., 2d Sess. title III, 122 CONG. REC. 22515 (1976).

45. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667 (codified at 26 U.S.C. § 3304(a)(12) (1982)).

46. 26 U.S.C. § 3304(a)(12) (1982).

47. 502 F. Supp. 946 (D.S.C. 1980), *modified and remanded*, 660 F.2d 1001 (4th Cir. 1981) (remand only to consider relief as to named plaintiffs), *cert. denied*, 459 U.S. 1150 (1983). See generally 20 J. FAM. L. 572 (1981-82) (summary of *Porcher* decision).

48. 502 F. Supp. at 947, 952-53. Plaintiff Brown was a dietary aide at a county hospital. After she began to experience illness and discomfort due to pregnancy, her physician advised her to cease working if the job became too taxing. Subsequently, Mrs. Brown notified the hospital and terminated her employment. Shortly after giving birth, she sought to return to work. At that time she was informed that there were no openings. Plaintiff Johnson was employed as a salesclerk. She discontinued her employment because of pregnancy-related physical problems. Mrs. Johnson was also denied reinstatement after the birth of her child. 502 F. Supp. at 948-49; Brief for Appellees at 3-4, *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981) [hereinafter cited as Brief for Appellees].

deemed to have quit voluntarily without good cause.<sup>49</sup> Plaintiffs argued that this practice violated section 3304(a)(12) of FUTA because it denied benefits to women otherwise able to, and available for, work solely on the basis of their pregnancy.<sup>50</sup> Plaintiffs interpreted section 3304(a)(12) to require that pregnancy not be the determinative factor in a decision to deny benefits. This interpretation would compel decertification of plans that deny benefits to women who, but

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49. Under South Carolina law a worker is disqualified from receipt of benefits if the South Carolina Employment Security Commission (S.C.E.S.C.) finds he or she has left his or her most recent work voluntarily without good cause:

41-35-120. Disqualification for Benefits. Any insured worker shall be ineligible for benefits:

(1) *Leaving work voluntarily*—if the Commission finds that he has left voluntarily without good cause his most recent work . . .

S.C. CODE ANN. § 41-35-120(1) (Law. Co-op. 1976 & Supp. 1983).

The Supreme Court of South Carolina has held that the words "good cause" mean, in most cases, a cause connected with the claimant's employment. *Sherbert v. Verner*, 240 S.C. 286, 125 S.E.2d 737 (1962), *revd. on other grounds*, 374 U.S. 398 (1963); *Stone Mfg. Co. v. South Carolina Employment Sec. Commn.*, 219 S.C. 239, 64 S.E.2d 644 (1951).

The S.C.E.S.C. took the position that pregnancy was to be considered a voluntary resignation unrelated to employment and therefore grounds for disqualification. This policy does not appear in the South Carolina statute itself, but was set forth in official S.C.E.S.C. guidelines. The relevant portions read:

2. Any individual who voluntarily leaves her most recent work because of pregnancy is subject to the same disqualification provision of . . . the South Carolina Employment Security Law as any other individual who voluntarily leaves for a personal reason not attributable to the employment.

3. An individual who is separated by the employer because of pregnancy will not be subject to a disqualification period under . . . the Law.

4. A claimant who is separated from an employer because of a policy which provides for separation of a woman worker after a certain stage of pregnancy will not be subject to any disqualification under . . . the Law.

5. If an individual accepts a maternity leave of absence for a definite period, the Commission's policy governing leaves of absence will be followed if a claim is filed prior to the expiration thereof or after the claimant does not report back for duty.

S.C.E.S.C. UNEMPLOYMENT COMPENSATION INSTRUCTIONS M-135 (Oct. 16, 1972), *quoted in Porcher*, 502 F. Supp. at 950-51. Another such publication cited pregnancy as an example of personal reasons which did not constitute good cause:

The South Carolina Employment Security Law provides in Section 41-35-120(1) that if the Commission finds that a claimant voluntarily left his most recent employment without good cause, such claimant shall be ineligible for benefits from the effective date of the claim and continuing until he has performed services in covered employment . . . The South Carolina Supreme Court has interpreted the words "good cause" to mean a cause attributable to or connected with the claimant's employment. Personal reasons, therefore, do not constitute good cause for quitting. Examples of such personal reasons are as follows:

. . . .  
(d) Due to Pregnancy.

The individual who quits because he [sic] is dissatisfied with his job or for personal reasons as stated above will be disqualified for quitting without good cause.

S.C.E.S.C. UNEMPLOYMENT COMPENSATION BULLETIN No. 236 (Nov. 1977), *quoted in Porcher*, 502 F. Supp. at 951.

50. Brief for Appellees, *supra* note 48, at 10; *Porcher*, 502 F. Supp. at 953. The plaintiffs' claim involved only those women who were actively seeking work during or shortly after pregnancy. It did not address the claims of women who were unavailable for employment or unable to work during pregnancy. See Brief In Opposition To Certiorari at 2, *Porcher v. Brown*, 459 U.S. 1150 (1983) [hereinafter cited as Brief In Opposition To Certiorari] (denial of certiorari); Brief for Appellees, *supra* note 48, at 1 n.1.

for the fact that they left work because of pregnancy, would be allowed to receive benefits.<sup>51</sup>

The South Carolina Employment Security Commission (S.C.E.S.C.) officials named as defendants in the suit maintained that the state did not deny compensation *solely* on the basis of pregnancy because it treated pregnancy like any other medical condition unrelated to employment.<sup>52</sup> Under this view, section 3304(a)(12) prohibits the state from singling out pregnancy for unfavorable treatment, but as long as pregnancy is not an exclusive category for determining ineligibility for benefits, the requirements of section 3304(a)(12) are satisfied.<sup>53</sup> Further, the Commission contended that South Carolina was not in violation of FUTA because it followed the interpretation advanced by the Department of Labor, which had repeatedly certified South Carolina's plan.<sup>54</sup>

The district court held that South Carolina's policy of denying

51. The plaintiffs argued that the statutory language "solely on the basis of pregnancy," *see* text at note 46 *supra*, was used precisely to prevent states from denying benefits to women who are unemployed because they left work due to pregnancy. *See* Brief In Opposition To Certiorari, *supra* note 50, at 3-4.

52. Brief for Appellants at 10-14, *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981) [hereinafter cited as Brief for Appellants].

In support of its position, the S.C.E.S.C. pointed out that some pregnancy-related claims were paid: for example, if an employer fired a woman because of pregnancy. The commission contended that if claims were being denied *solely* on the basis of pregnancy, then no pregnancy-related claims would have been paid. *Id.* at 13. Title VII of the 1964 Civil Rights Act, however, essentially makes it unlawful to discharge an employee because of pregnancy. 42 U.S.C. §§ 2000e-2(a)(1), 2000e(k) (1982). Thus, as a practical matter, the S.C.E.S.C.'s policy of denying pregnancy-related claims extended to most women who would presumably be covered by 26 U.S.C. § 3304(a)(12).

Despite the S.C.E.S.C. contention that some pregnancy-related claims were paid, the district court in *Porcher* determined that for all practical purposes all cases involving pregnant women were subject to the same policy of disqualification. The court cited many examples of pregnant women who were discharged from employment or separated because their work involved health hazards and who were denied compensation under South Carolina's policy. 502 F. Supp. at 951 & n.10.

53. The United States argued that "[u]se of the word 'solely' indicates that Congress meant to ban only those state laws that single out pregnancy for disadvantageous treatment." *Amicus Curiae* Brief, *supra* note 10, at 8. Under this interpretation a plan that treated pregnancy as any other medical condition would satisfy the FUTA requirements.

54. On October 31, 1979, pursuant to § 3304(c), the Secretary of Labor certified South Carolina's unemployment compensation plan as being in compliance with FUTA. Brief for Appellants, *supra* note 52, at 24 (citing Joint Appendix at 123-26, *Porcher v. Brown*, 660 F.2d 1001 (4th Cir. 1981) [hereinafter cited as Joint App.]).

Although the Department of Labor did not formally announce its interpretation of § 3304(a)(12), during the *Porcher* case the S.C.E.S.C. submitted a letter at trial discussing the Department's interpretation. In its letter to the S.C.E.S.C., the Department of Labor maintained that "[a]s long as a State is determining eligibility of pregnant claimants under the State law in the same manner as it is determining the eligibility of other claimants . . . that State law so applied is consistent with 3304(a)(12), FUTA." Joint App., *supra* note 54, at 131. Neither court in *Porcher* afforded the letter great evidentiary weight. 660 F.2d at 1004-05; 502 F. Supp. at 957 n.20. However, the letter can be seen as representing the Labor Department's continued understanding of § 3304(a)(12). The Solicitor General, in his brief for the United States as *amicus curiae*, relied on the letter as evidence of the Labor Department's interpretation. *Amicus Curiae* Brief, *supra* note 10, at 12-13.

benefits to otherwise eligible workers because they left their last employment for medical reasons associated with pregnancy violated the Federal Act.<sup>55</sup> The court maintained that receipt of unemployment benefits by a woman actively seeking work after childbirth should not be subject to the whim and calculations of the employer. Rather, FUTA requires respect for an individualized medical decision that a pregnant woman must stop work to avoid job-related exposure to health hazards or to attend to the biological imperatives of childbirth.<sup>56</sup> The court accepted the plaintiffs' interpretation of section 3304(a)(12), noting that "[i]n plain, unambiguous language, Congress imposed a sweeping ban on the use of pregnancy or its termination as an excuse for denying benefits to otherwise eligible women."<sup>57</sup>

The Fourth Circuit, on appeal, affirmed the district court's holding.<sup>58</sup> The circuit court also found the statutory mandate to be clear and unambiguous: "[R]egardless of how the Commission treats employees with other disabilities, . . . [it] cannot deny compensation 'solely on the basis of pregnancy or termination of pregnancy.'" <sup>59</sup> The court stated that the Secretary's certification of South Carolina's law was "neither controlling nor entitled to great weight," noting that the allegedly offensive practice did not appear on the face of the law.<sup>60</sup> Thus, the court believed that the Secretary's certification may have been a summary approval of the statutory language without examination of actual state practice.

The S.C.E.S.C. applied to the United States Supreme Court for relief from the decision below.<sup>61</sup> The Supreme Court denied certiorari.<sup>62</sup> Justice White, joined by two other justices, wrote a sharp dissent. Justice White maintained that the direct conflict between the Department of Labor's position and the Fourth Circuit's holding represents, at a minimum, the existence of substantial uncertainty in an area of great practical significance to the states, the Department of Labor and large numbers of pregnant women.<sup>63</sup>

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55. The district court expressly stated that "[t]he policies and practices of the South Carolina Employment Security Commission are declared to be in direct contravention of 26 U.S.C. § 3304(a)(12)." 502 F. Supp. at 958. In so holding, the court found it unnecessary to consider constitutional claims raised by the plaintiffs. 502 F. Supp. at 958 n.22.

56. 502 F. Supp. at 957.

57. 502 F. Supp. at 955 (emphasis omitted).

58. 660 F.2d at 1007. The Fourth Circuit, however, modified the judgment with respect to the individual awards. The case was then remanded for further proceedings consistent with the circuit court's opinion.

59. 660 F.2d at 1004.

60. 660 F.2d at 1004.

61. *Porcher v. Brown*, petition for cert. filed, 50 U.S.L.W. 3882 (U.S. May 16, 1982) (No. 81-1972).

62. *Porcher v. Brown*, 459 U.S. 1150 (1983).

63. Justice White, joined by Justices Powell and Rehnquist, thought three major aspects of

### III. STATUTORY ANALYSIS

#### A. *Weight to be Accorded the Secretary of Labor's Certification of Plans that Group Pregnancy with Other Medical Conditions*

Ordinarily, the process of interpreting a statutory provision begins with the language itself,<sup>64</sup> read with reference to applicable canons of statutory construction.<sup>65</sup> In conjunction with the canons, it is usually considered appropriate to consult the legislative history<sup>66</sup> for insight into the intended meaning of the words chosen by the legisla-

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the *Porcher* decision deserved consideration: (1) the conflicting interpretations of § 3304(a)(12) advanced by the Secretary of Labor and the Fourth Circuit; (2) the relevance of the eleventh amendment to the decision; and (3) the availability of a cause of action under 42 U.S.C. § 1983 to redress the state's failure to comply with § 3304(a)(12). 459 U.S. at 1151-54.

64. See, e.g., *United States v. Bass*, 404 U.S. 336, 339 (1971) ("Not wishing 'to give point to the quip that only when legislative history is doubtful do you go to the statute; we begin by looking to the text itself.'") (citing Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947)); *March v. United States*, 506 F.2d 1306, 1313 (D.C. Cir. 1974) ("When a court construes a statute, the starting point must be the language of the statute."); *GAF Corp. v. Milstein*, 453 F.2d 709, 716 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972) ("We are well aware of the first catechism of statutory construction which teaches that we should begin the process of interpretation with 'the language of the statute itself.'") (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 420 (1968)).

65. See, e.g., *Irons v. Diamond*, 670 F.2d 265, 269 n.13 (D.C. Cir. 1981) ("Whether Congress so intended, of course, is a question of statutory interpretation to be resolved by reference to the language of the statute, its legislative history, and the canons of statutory construction."); *In re Chicago, M., St. P. & Pac. R.R.*, 658 F.2d 1149, 1157 (7th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) ("In reaching this conclusion, we must reference appropriate canons and maxims of statutory construction . . .").

66. See, e.g., *District of Columbia Natl. Bank v. District of Columbia*, 348 F.2d 808, 810 (D.C. Cir. 1965) ("And since the judicial function is to ascertain the legislative intention the Court may properly exercise that function with recourse to the legislative history . . ."); *United States v. Hepp*, 497 F. Supp. 348, 349 (N.D. Iowa 1980), *aff'd*, 656 F.2d 350 (1981) ("[E]ven though the statute appears clear on its face, inquiry must not stop there, but rather the court must also examine the statutory scheme and legislative history . . ."). It is often stated, however, that resort to the legislative history is appropriate only when the words of the statute are ambiguous. See, e.g., *Central Trust Co. v. Official Creditors Comm.*, 454 U.S. 354, 359-60 (1982) ("It is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.") (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)); *Albright v. United States*, 631 F.2d 915, 918 (D.C. Cir. 1980) ("If the language is clear and unambiguous, a court must give effect to its plain meaning.") (citations omitted). Other courts recognize, however, that words are rarely so clear so as to be subject to only one meaning. See, e.g., *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972) ("But, while the clear meaning of statutory language is not to be ignored, 'words are inexact tools at best,' and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history.") (quoting *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943)); *Freeman v. Chicago Title & Trust Co.*, 505 F.2d 527, 533 n.17 (7th Cir. 1974) ("But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to legislative history no matter how 'clear the words may appear on 'superficial examination.'") (quoting *Harrison*, 317 U.S. 479 (1943)). In any event, any claim that § 3304(a)(12) is unambiguous on its face is academic given that the department charged with its administration and the Fourth Circuit subscribed to divergent interpretations of the section. Cf. *GAF Corp. v. Milstein*, 453 F.2d 709, 716 n.14 (2d Cir. 1971) (meaning of term not considered plain when judges in two recent cases did not agree on meaning), *cert. denied*, 406 U.S. 910 (1972).

ture.<sup>67</sup> By charging the Department of Labor with the administration of the provision, however, the framework of FUTA requires a reviewing court to start at a different point. The court must begin by ascertaining the proper weight to attach to the position taken by the Secretary, as representative of the charged department.<sup>68</sup> If, for example, the Secretary's findings should be considered conclusive by law, then the practical significance of investigating alternative interpretations is diminished. As a general proposition, many courts state that interpretation of a statute by an agency entrusted with its implementation is entitled to great weight.<sup>69</sup> This rule, however, is infrequently applied in the absolute.<sup>70</sup> For example, the general rule is often qualified to read that the agency's interpretation is to be upheld absent "compelling indications that it is wrong"<sup>71</sup> or evidence

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67. See *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973) ("[W]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers . . .") (quoting *Puerto Rico v. Shell Co.*, 302 U.S. 253, 258 (1937)); *Colorado Pub. Interest Group, Inc., v. Train*, 507 F.2d 743, 746 (10th Cir. 1974), *revd. on other grounds*, 426 U.S. 1 (1975) ("It is a basic rule of statutory construction that statutes are to be construed in a manner so as to effectuate the intent of the enacting body . . .").

68. 26 U.S.C. § 3304(a), (c) (1982). See note 52 *supra*. FUTA provides for judicial review in 26 U.S.C. § 3310 (1982). Section 3310(a) indicates that any state denied certification by the Secretary may file for review in the United States Court of Appeals. Section 3310(c) authorizes the court to set aside or affirm the Secretary's actions.

69. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) ("The administrative interpretation of the Act by the enforcing agency . . . [is] entitled to great deference.") (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971)); *Johnson v. Robison*, 415 U.S. 361, 367-68 (1974) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.") (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)); *Hamilton v. Butz*, 520 F.2d 709, 714 (9th Cir. 1975) ("Courts accord 'great weight' only to the interpretations given a statute by the agency charged with the statute's administration."); *Budd Co. v. OSHA*, 513 F.2d 201, 204 (3d Cir. 1975) (per curiam) ("In dealing with questions regarding the interpretation of statutes or regulations . . . committed to a federal administrative agency . . . federal courts are obliged to accord 'great deference' to the agency's construction . . ."). See generally 5 B. MEZINES, J. STEIN & J. GRUFF, *ADMINISTRATIVE LAW* 51.01 (1983) (discussion of judicial review of findings of law and fact).

70. See, e.g., *FTC v. Colgate-Palmolive*, 380 U.S. 374, 385 (1965) (although Commission's judgment is entitled to great weight, in the last analysis the legal standard is a matter of judicial construction); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945) (reviewing courts need not merely accept Board's conclusions); *Thompson v. Clifford*, 408 F.2d 154, 167 (D.C. Cir. 1968) ("Administrative construction is less potent . . . where it does not rest upon matters peculiarly within the administrator's field of expertise."). But see *Morris v. Gressette*, 432 U.S. 491, 504-05 (1977) (Congress authorized the Attorney General to perform a preclearance review of a state's voting laws under § 5 of the Voting Rights Act as an "expedient alternative to declaratory judgment actions," and since "judicial review of the Attorney General's actions would unavoidably extend this period, it is necessarily precluded").

71. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) ("This principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . ."). This language from *Red Lion* has been quoted frequently. See, e.g., *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973); *Columbia Broadcasting Sys. v. Democratic Natl. Comm.*, 412 U.S. 94, 121 (1973); *Ute Indian Tribe v. Probst*, 428 F.2d 491, 497 (10th Cir. 1970).

that it is "plainly erroneous"<sup>72</sup> or "clearly wrong."<sup>73</sup>

In instances in which the statutory grant of power to an agency is very broad or confers a wide degree of discretion, the courts are more likely to defer to agency determination.<sup>74</sup> Courts have afforded great deference in cases involving a charged agency's initial interpretation of an undefined central statutory term.<sup>75</sup> Similarly, if the agency has interpreted a provision in the same manner for many years, the courts are normally reluctant to substitute their own judgment.<sup>76</sup> This is especially true when Congress has reenacted the legislation with no attempt to modify agency practice.<sup>77</sup>

In cases in which the statutory language is relatively precise, yet still allows for some agency discretion, courts tend to examine the

72. *United States v. Larionoff*, 431 U.S. 864, 872 (1977) ("[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *Beatty v. Schweiker*, 678 F.2d 359, 360 (3d Cir. 1982) ("Indeed, we will uphold the Secretary's interpretation of the regulations 'unless it is plainly erroneous or inconsistent with the regulation[s].'" (quoting *Bowles*, 325 U.S. at 414)).

73. *Stevens v. Commissioner*, 452 F.2d 741, 746 (9th Cir. 1971) ("As the agency charged . . . Interior's interpretation is entitled to 'great weight' and 'is not to be overturned unless clearly wrong . . .'" (quoting *United States v. Jackson*, 280 U.S. 183, 193 (1930)); see also *R.V. McGinnis Theatres & Pay T.V., Inc. v. Video Indep. Theatres, Inc.*, 386 F.2d 592, 594 (10th Cir. 1967) (if administrative construction of a statute is clearly wrong, it is the duty of the court to so find)).

74. See, e.g., *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977) (express delegation to Secretary of power to prescribe regulations); *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 315 (1933) (Tariff Commission authorized to adopt such reasonable procedures, rules and regulations as it may deem necessary); *Santise v. Schweiker*, 676 F.2d 925, 933 (3d Cir. 1982) ("Secretary is accorded full power to make rules and regulations and to establish procedures").

75. See, e.g., *Unemployment Compensation Commn. v. Aragon*, 329 U.S. 143, 153 (1946) (definition of labor dispute in "active progress"); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944) (definition of term "employee").

76. See, e.g., *Udall v. Tallman*, 380 U.S. 1, 18 (1965) ("It therefore comes within the rule that the practical construction given to an act of Congress . . . by those charged . . . is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons.") (quoting *McLaren v. Fleischer*, 256 U.S. 477, 480-81 (1921)); *Universal Battery Co. v. United States*, 281 U.S. 580, 583 (1930) ("This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong."); *West v. Bergland*, 611 F.2d 710, 720-21 (8th Cir. 1979) ("The substance of the current regulation and its predecessor . . . has been in effect for about thirty years . . . Absent 'compelling indications' that the Secretary is wrong, his long-standing interpretation . . . is entitled to great deference.").

77. See, e.g., *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (When "an agency's statutory construction has been 'fully brought to the attention of the public and Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.") (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940)); *Board of Governors of the Fed. Res. Sys. v. First Lincolnwood Corp.*, 439 U.S. 234, 248-49 (1978) ("[A]n agency's long-standing construction of its statutory mandate is entitled to great respect, 'especially when Congress has refused to alter [ . . . ] construction.'" (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)). But cf. *March v. United States*, 506 F.2d 1306, 1315 n.37 (D.C. Cir. 1974) (when meaning of statute is plain, subsequent reenactment does not signify adoption of administrative construction).

agency's determinations with greater scrutiny.<sup>78</sup> The Supreme Court's decision in *Skidmore v. Swift & Co.*<sup>79</sup> indicates that courts are to evaluate the action of a charged agency by taking into consideration all factors which affect the persuasiveness of the agency's conclusion.<sup>80</sup> In particular, courts in such cases frequently examine agency action for its compatibility with congressional purpose. The Supreme Court has stated on several occasions that reviewing courts are not required to accept agency decisions that are plainly inconsistent with legislative intent or policy,<sup>81</sup> especially when such policy has been clearly articulated.<sup>82</sup>

In the specific case of section 3304(a)(12), the Secretary must determine if the state is denying benefits "solely on the basis of pregnancy."<sup>83</sup> On the whole, this language is relatively straightforward. The only term that could reasonably be subject to more than one contextual interpretation is the word "solely."<sup>84</sup> Because "solely" is not one of the key definitional phrases under the statute and the Secretary's interpretation is relatively recent, adherence to the general

78. See *United States v. Bacto-Unidisk*, 394 U.S. 784, 799 (1969) (statute imprecise in differentiating a "drug" from a "device"; therefore, Secretary's interpretation upheld as reasonable in light of statutory purpose); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944) (case-by-case determinations by the administrator as to whether waiting time was working time under the Fair Labor Standards Act entitled to some deference because of experience and knowledge accumulated in the course of his duties).

79. 323 U.S. 134 (1944).

80. 323 U.S. at 140. ("The weight of such [an agency] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). The *Swift* standard for evaluating agency action has been quoted frequently. See, e.g., *Federal Maritime Bd. v. Ibrandtsen Co.*, 356 U.S. 481, 499-500 (1958); *Henson v. City of Dundee*, 682 F.2d 897, 903 n.7 (11th Cir. 1982); *Mercy Hosp. & Medical Center v. Harris*, 625 F.2d 905, 907 (9th Cir. 1980); *Usery v. Columbia Univ.*, 568 F.2d 953, 963 n.4 (2d Cir. 1977).

81. See *Espinosa v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973) ("The Commission's more recent interpretation of the statute . . . is no doubt entitled to great deference, but that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent . . .") (citation omitted); *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 272 (1968) ("But the courts are the final authorities on issues of statutory construction . . . and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'") (quoting *NLRB v. Brown*, 380 U.S. 278, 291 (1965)).

82. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165-66 (1941) ("As a standard, the Board must comply also with the requirement that the unit selected must be one to effectuate the policy of the act . . . . Where the policy of an act is so definitely and elaborately stated, this requirement acts as a permitted measure of delegated authority.").

83. 26 U.S.C. § 3304(a)(12) (1982).

84. The district court in *Brown v. Porcher*, 502 F. Supp. 946, 955 (D.S.C. 1980), *modified and remanded*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983), found that the statute unambiguously prohibited the use of pregnancy to deny benefits to otherwise eligible women. See text at note 57 *supra*. The Fourth Circuit, affirming the district court's decision, believed that the statute was so clear on its face that resort to the legislative history was unnecessary. 660 F.2d at 1004.



rule granting the charged agency's determination great deference is unnecessary. In addition, reviewing courts need not afford great deference to an agency's interpretation of statutory language if construction of that language does not require experience or expertise peculiar to the charged agency.<sup>85</sup> Thus, although the Secretary's interpretation is to be taken into consideration, it should not be viewed as dispositive. This conclusion is consistent with the principle that statutory construction is properly a function of the judicial branch.<sup>86</sup> Administration or implementation of a statute may be vested in an agency, but in the final analysis, the courts have the power to interpret statutory enactments. Because certification by the Secretary of Labor of state plans that group pregnancy with other medical conditions is not necessarily dispositive, analysis of section 3304(a)(12) requires attention to the standard means of statutory interpretation.<sup>87</sup>

### B. *The Language of Section 3304(a)(12)*

Congressional intent in enacting section 3304(a)(12) must be determined in the context of the issues considered by Congress. At the time of the introduction of the bills that became the 1976 amendments to FUTA, several claims of pregnancy-related sex discrimination in employment were pending in the federal courts.<sup>88</sup> Of particular relevance is *Turner v. Department of Employment Security*.<sup>89</sup> In *Turner*, the Utah Supreme Court upheld a state statute

85. See *Town of Brookline v. Gorsuch*, 667 F.2d 215, 220 (1st Cir. 1981); *Brennan v. General Tel. Co.*, 488 F.2d 157, 160 (5th Cir. 1973).

86. See *FTC v. Colgate-Palmolive*, 380 U.S. 374, 385 (1965) ("[W]hile informed judicial determination is dependent upon enlightenment gained from administrative experience, in the last analysis the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction."); *Young v. AAA Realty Co.*, 350 F. Supp. 1382, 1385 (M.D.N.C. 1972) ("Administrative interpretations of statutes are not to be followed in every instance, but are only helpful guides to aid the courts in their task of statutory construction. The ultimate authorities on issues of statutory interpretation are the courts.") (citations omitted).

87. See generally 2A J. SUTHERLAND, STATUTORY CONSTRUCTION § 45 (C. Sands 4th ed. 1973). See also notes 64-67 *supra* and accompanying text.

88. See, e.g., *Manhart v. City of Los Angeles, Dept. of Water and Power*, 553 F.2d 581 (9th Cir. 1976), *vacated and remanded*, 435 U.S. 702 (1978) (pension plan contributions); *Satty v. Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975), *affid. in part, vacated in part and remanded*, 434 U.S. 136 (1977) (maternity leave and seniority accumulation); *Gilbert v. General Elec. Co.*, 519 F.2d 661 (4th Cir. 1975), *revd.*, 429 U.S. 125 (1976) (exclusion of pregnancy from employer disability insurance plans) (overruled by 42 U.S.C. § 2000e(k) (1982)). During the 1970's, increased participation by women accounted for 60% of the growth of the country's work force. CENSUS BUREAU, MONEY INCOME, *supra* note 2, at 3. The biggest increase was recorded for women within the peak childbearing years — from ages 25 to 34. S. KAMERMAN, *supra* note 4, at 7. This influx of women into the labor force was accompanied by an increase in litigation challenging employment practices that allegedly discriminated on the basis of sex. See generally Cook, *The Burger Court and Women's Rights 1971-1977*, and Ginsburg, *Women, Men, and the Constitution: Key Supreme Court Rulings*, in NATIONAL CENTER FOR STATE COURTS, PUB. NO. R0037, WOMEN IN THE COURTS 21-46, 47-83 (1978) (discussing judicial trends in decisions affecting the rights of women).

89. 531 P.2d 870 (Utah), *vacated and remanded per curiam*, 423 U.S. 44 (1975).

which conclusively presumed pregnant women to be incapacitated and therefore ineligible for unemployment compensation for a period before and after giving birth.<sup>90</sup> One month after the introduction of the 1976 amendments,<sup>91</sup> the United States Supreme Court vacated and remanded on the ground that the provision did not satisfy the substantive due process requirements of the fourteenth amendment.<sup>92</sup> Those who argue that Congress meant to ban only state laws that single out pregnancy as a criterion for denying benefits contend that section 3304(a)(12) was a response to the *Turner* case and merely codifies the *Turner* result in striking down presumptions based on pregnancy. However, an examination of the language of the statute, applicable canons of construction and the legislative history leads to the conclusion that Congress had more than this narrow purpose in mind.

Section 3304(a)(12) prohibits disbursement of federal funds to states that deny benefits "solely on the basis of pregnancy or termination of pregnancy." The word "solely," given its plain and ordinary definition, means "to the exclusion of all else."<sup>93</sup> Section 3304(a)(12), then, forbids disqualification from being determined on the basis of pregnancy alone. This literal reading unfortunately does little to resolve the issue of proper application of the provision. The section is still open to the two divergent constructions argued in *Porcher*,<sup>94</sup> but the language used and the structure of the statute support the conclusion that Congress intended to prohibit the use of pregnancy as a determinative factor in denying unemployment benefits.

The language of section 3304(a)(12) is very broad.<sup>95</sup> If Congress

90. 531 P.2d at 871. The Utah statute at issue, UTAH CODE ANN. § 35-4-5, U.C.A. 1953 (Repl. 46), deemed a woman leaving work ineligible for benefits for 12 weeks before and 6 weeks after childbirth. 531 P.2d at 870.

91. H.R. 10210 was introduced in October 1975. H.R. 10210, 94th Cong., 1st Sess. (1975). The Supreme Court handed down its decision in *Turner* in November 1975.

92. The Court reasoned that presumptive disability for purposes of unemployment compensation suffered from the same constitutional infirmity as mandatory maternity leave provisions. Two years earlier in *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1973), the Court had decided that a policy prohibiting school teachers from working for a period before and after childbirth violated the due process clause on the ground that the Constitution requires a more individualized determination of physical capacity. In *Turner*, the Court concluded that

The presumption of incapacity and unavailability for employment created by the challenged provision is virtually identical to the presumption found unconstitutional in *Cleveland Board of Education v. LaFleur* . . . .

. . . The Fourteenth Amendment requires that unemployment compensation boards no less than school boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake.  
423 U.S. at 46 (citation omitted).

93. WEBSTER'S NEW COLLEGIATE DICTIONARY 1097 (8th ed. 1980); see also Reply of Respondents to Brief for the United States as Amicus Curiae at 3, *Porcher v. Brown*, 459 U.S. 1150 (1983) (denial of certiorari) (citing Webster's).

94. See notes 50-53 *supra* and accompanying text.

95. See text at note 46 *supra*.

had intended merely to codify the *Turner* result or, for that matter, to ban presumptive disability periods of any length, it could easily have stated that such presumptive disability periods were to be prohibited. There would have been no need to resort to such general language to remedy a specific problem.<sup>96</sup>

In addition, Congress changed the language of the section that eventually became section 3304(a)(12) between the introduction of the bills and the final adoption of the statute. The original draft proposed that the states be prohibited from denying compensation "solely on the basis of pregnancy" and from determining voluntary termination, availability, active search for work and refusal of work "in a manner which discriminat[ed] on the basis of pregnancy."<sup>97</sup> The version that was eventually codified eliminated most of the expository language, retaining only the portion that prohibited denial of benefits "solely on the basis of pregnancy or termination of pregnancy."<sup>98</sup>

As a matter of statutory construction, a change in the words used from one draft to the next is generally assumed to be by design.<sup>99</sup> Here the excluded clause disallowed evaluation of the ordinary eligibility criteria<sup>100</sup> in a way which prejudicially considered pregnancy. The legislative history contains no express indication of the reasons why section 3304(a)(12) was modified. However, if the intent was to create a statute that merely prohibited differentiation between pregnancy and other medical conditions, then the language relating to

96. The Fourth Circuit in *Porcher* rejected the S.C.E.S.C.'s argument that Congress, in enacting § 3304(a)(12), sought to eliminate *Turner*-type statutes that contained shorter periods of presumptive disability. The circuit court maintained that

[i]f Congress had intended, as the Commission argues, only to codify the *Turner* decision and take the additional step of barring discrimination on the basis of pregnancy, it could easily have drafted a statute reflecting those limited purposes. Instead, it broadly provided that "[n]o person shall be denied compensation under . . . state law solely on the basis of pregnancy or termination of pregnancy."

660 F.2d at 1004 (quoting 26 U.S.C. § 3304(a)(12) (1982)).

97. The provision in the 1975 Bill reads:

No person shall be denied compensation solely on the basis of pregnancy and determinations under any provision of such State law relating to voluntary termination of employment, availability for work, active search for work, or refusal to accept work shall not be made in a manner which discriminates on the basis of pregnancy.

S. 2079, 94th Cong., 1st Sess. § 8(a) (1975); H.R. 8366, 94th Cong., 1st Sess. § 8(a) (1975).

98. H.R. 10210, 94th Cong., 1st Sess. 312 (1975), cited in H.R. REP. NO. 755, *supra* note 42, at 66.

99. *Cf. Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."); *Brewster v. Gage*, 280 U.S. 327, 337 (1930) ("The deliberate selection of language so differing from that used in the earlier Acts indicates that a change of law was intended."); *Klein v. Republic Steel Corp.*, 435 F.2d 762, 765-66 (3d Cir. 1970) ("It is a canon of statutory construction that where as here the words of a later statute differ from those of a previous one on the same or a related subject, the legislature must have intended them to have a different meaning.").

100. See notes 21-24 *supra* and accompanying text.

discriminatory consideration of the various factors would have been extremely relevant. Instead, that language was discarded between bills without any recorded debate. In addition, Congress certainly was not unaware of the possibility of grouping pregnancy with other disabilities and, when so disposed, was able to spell out clearly that intent.<sup>101</sup>

As a general proposition, when Congress alters and then codifies a section, it intends the clause to be interpreted in a manner consistent with the general tenor of the statute as a whole.<sup>102</sup> The introductory remarks at the hearings on the first draft of the 1976 amendments evinced congressional intent to improve the unemployment compensation system in order to provide a better source of protection for the nation's workers,<sup>103</sup> a goal consistent with both the general aims of FUTA<sup>104</sup> and the trend toward expansion of federal coverage.<sup>105</sup> The codified version of section 3304(a)(12) must be read in light of these remedial purposes,<sup>106</sup> which weigh against any presumption that Congress altered the section to limit its application. Generally, courts have taken the position that remedial legislation is to be liberally construed<sup>107</sup> and any exceptions to such legislation narrowly interpreted.<sup>108</sup> In particular, it has been stated that a re-

101. Two years after § 3304(a)(12) was adopted, Congress amended the Federal Equal Employment Opportunity Act to state explicitly that "women affected by pregnancy, childbirth, or related medical conditions shall be treated for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." Pub. L. 95-555, § 1, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (1982)).

102. The unchanged sections and the amendment must generally be given "the most harmonious comprehensive meaning possible . . . . To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 488-89 (1947); *see also Markham v. Cabell*, 326 U.S. 404, 411 (1945); 2A J. SUTHERLAND, *supra* note 87, at §§ 22.35, 46.05.

103. *See Phase III: Proposed Changes in the Permanent Federal-State Unemployment Compensation Programs, Before the Subcomm. on Unemployment Compensation of the Comm. on Ways and Means*, 94th Cong., 1st Sess. 7 (1975) (statement of James Corman, Chairman, Subcomm. on Unemployment Compensation).

104. *See* notes 35-38 *supra* and accompanying text.

105. *See* notes 39-43 *supra* and accompanying text.

106. Remedial statutes are generally those which afford or improve remedies and those which correct defects in civil institutions and state administration. Modern social legislation is generally characterized as remedial. *See* 2A J. SUTHERLAND, *supra* note 87, at § 60.02.

107. *See, e.g., Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("In addition, we are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."); *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 533 (1967) ("[T]his view . . . seems compelled by the language of the present statute, which is remedial and to be liberally construed.");

108. *See, e.g., A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (in referring to the Fair Labor Standards Act, the Court stated: "Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed . . ."); *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 748 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983) (stating that exceptions to the Age Discrimination in Employment Act should be narrowly interpreted "because of the general maxim that exceptions to a remedial statute are to be 'narrowly and strictly construed.'") (quoting *Sexton v. Beatrice Foods Co.*, 630 F.2d 478, 486 (7th Cir. 1980)).

strictive interpretation of the reach of federal statutes governing unemployment compensation would violate the broad purposes of the federal legislation.<sup>109</sup>

The position of section 3304(a)(12) in the overall structure of the

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109. See *Henry Broderick, Inc. v. Squire*, 163 F.2d 980 (9th Cir. 1947). The Ninth Circuit relied on the basic policies and purpose of the Social Security Act, which at the time included compensation for the unemployed, to hold that brokers should be classified as "independent contractors" rather than "employees" for purposes of social security and federal unemployment taxes: "[I]t has been consistently held that a narrow and legalistic interpretation of the scope of the Act here in question would not be in conformance with the broad purposes of federal social security legislation." 163 F.2d at 982.

Although it is apparent that Congress intended the Federal Act to serve as a comprehensive remedy, it is important to note Congress' concurrent interest in preserving state responsibility for unemployment compensation. See *New York Tel. Co. v. New York State Dept. of Labor*, 566 F.2d 388, 392-93 (2d Cir. 1977), *aff'd*, 440 U.S. 519 (1979) (upholding a state statutory provision permitting the payment of unemployment compensation to individuals involved in labor disputes). The *New York Telephone Co.* court attached great importance to the fact that Congress did not forbid payments to striking workers despite pressure to do so. It quoted from a 1935 committee report that accompanied the original federal unemployment compensation act: "Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington." 566 F.2d at 392 (quoting S. REP. NO. 628, 74th Cong., 1st Sess. 13 (1935)). The Second Circuit noted that expressed "congressional intent to avoid excessive intrusion into local affairs [was] entirely consistent with the doubt that existed at that time concerning Congress' power to enact legislation of this character without encroaching to an unconstitutional degree on the powers of the States." 566 F.2d at 393; see also *Florida AFL-CIO v. Florida Dept. of Labor & Employment Sec.*, 504 F. Supp. 530, 532-33 (N.D. Fla. 1980), *aff'd*, 676 F.2d 513 (11th Cir. 1982) (citing the Supreme Court's decision in *New York Telephone Co.* for the proposition that the Social Security Act of 1935 placed great emphasis on state autonomy in the formulation of unemployment compensation plans). The legislative history accompanying the 1976 amendments reiterated congressional respect for the restraints that federalism places on control of unemployment compensation by the federal government. See, e.g., 122 CONG. REC. H22521 (daily ed. July 19, 1976) (statement of Rep. Frenzel) (praising the Ways and Means Committee's restraint in not suggesting a federal benefit standard).

These concerns for federalism have a distinct practical significance when potential increases in a state's financial responsibility to its citizens are at issue. See *Amicus Curiae Brief*, *supra* note 10, at 14 (citing *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 484, 492-93 (1977)). Eligibility requirements have been considered the province of the states at least in part because Congress and the states were concerned with the fiscal integrity of state plans and the possibility that states might over-extend themselves. Cf. *National League of Cities v. Usery*, 426 U.S. 833, 851-52, 855 (1976) (tenth amendment held to be a limitation on federal government's power under the commerce clause to interfere in areas affecting essential state functions). But cf. *New Hampshire Dept. of Employment Sec. v. Marshall*, 616 F.2d 240 (1st Cir.), *appeal dismissed*, 449 U.S. 806 (1980) (upholding provision of the 1976 amendments to FUTA requiring states to extend coverage to state employees against tenth amendment attack). For a comparison of the *Usery* and *Marshall* decisions, see 15 SUFFOLK U. L. REV. 381 (1981).

The key question is what balance Congress sought to strike between preservation of state autonomy and federal regulation. In 1937, in *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937), the Supreme Court, interpreting the newly enacted federal unemployment statute, asserted that the states were to be afforded a wide range of discretion as long as they did not depart from those standards which Congress had deemed fundamental. 301 U.S. at 593-94. Congress had created a general framework of federal control by imposing a series of standards with which states desirous of federal aid must comply. As long as these threshold standards are not violated, a state is free to create any type of compensation plan it wishes, without jeopardizing its claim for federal funds. 301 U.S. at 593-94. See also *Marshall*, 616 F.2d at 246

statute also argues for a generous interpretation of the provision. It is significant that the federal guidelines prohibiting denial of benefits solely on the basis of pregnancy or termination of pregnancy are listed among the seventeen requisites for approval of state laws.<sup>110</sup> Courts have identified the guidelines set forth in section 3304(a) as the standards that Congress considered fundamental.<sup>111</sup> The entire system of federal leverage over state plans hinges on state compliance with these guidelines. To construe these fundamental federal standards narrowly would effectively permit the states to evade the basic purposes of FUTA. Plans that label a woman's separation from work because of pregnancy as a voluntary termination of employment without good cause in essence act indirectly to deny benefits on the basis of pregnancy, when a state clearly could not do so directly.

To summarize, interpretation of the section as requiring only that pregnancy be treated like any other medical condition would essentially read the provision as enunciating a prohibition on discriminatory treatment of pregnancy. Acceptance of this interpretation would resurrect language expressly discarded by Congress. It is a basic principle of statutory construction that words of a statute are not to be disregarded in favor of an earlier but uncodified version.<sup>112</sup> Further, the contention that Congress intended a broader remedy than one that simply prohibited the states from singling out pregnancy for adverse treatment is consistent with the remedial purposes of the 1976 amendments and of FUTA in general.<sup>113</sup>

### C. The Legislative History

The legislative history of the 1976 amendments and of FUTA in general is well documented. As the Fourth Circuit observed in

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(rejecting claim that state's option to comply with federal standards is illusory: "We do not agree that the carrot has become a club because rewards for conformity have increased.").

This general relationship of federal-state control envisioned by the 1935 Act has essentially remained intact, except to the extent that Congress has increased federal dominion over unemployment compensation plans. *Cf. Marshall*, 616 F.2d at 241; see also note 42 *supra* and accompanying text. The First Circuit added in *Marshall* that "We must also recognize that, since 1935, the philosophy and objective of the unemployment compensation program, *viz.*, that unemployment is a national problem that must be dealt with on a national basis, have been woven into the fabric of our society." 616 F.2d at 246.

In sum, although Congress was concerned with allowing the states latitude to control unemployment compensation, when the fundamental federal standards of § 3304(a) are at issue, the federal guidelines are to take precedence. The argument that the states should be allowed to experiment with plans that treat pregnancy in innovative ways is unconvincing given that Congress placed the prohibition against denial of benefits on the basis of pregnancy among the fundamental federal standards of § 3304(a).

110. 26 U.S.C. § 3304(a)(1)-(17) (1982).

111. See note 32 *supra*.

112. See note 99 *supra*.

113. See notes 34-45 *supra* and accompanying text.

*Porcher*, however, the legislative history of section 3304(a)(12) itself is "scant."<sup>114</sup> Neither the statute nor the available legislative history expressly indicates whether Congress, in using the word "solely," sought to ban all statutes that deny benefits on the basis of pregnancy or only those provisions that single out pregnancy for adverse treatment. Examination of the legislative history of section 3304(a)(12) and of FUTA in general, however, leads to the conclusion that Congress meant to eliminate pregnancy as a determinative factor in disqualification decisions.

One of the arguments used to support a narrow reading of section 3304(a)(12) is that the report of the Senate Finance Committee on the 1976 amendments,<sup>115</sup> presented several months after *Turner*, specifically refers to the case.<sup>116</sup> It is thus apparent that Congress was aware of statutes, such as Utah's, which contained conclusive presumptions of incapacity. The Labor Department maintains that this evidences congressional intent to eradicate only the specific infirmity illustrated by the Utah statute.<sup>117</sup> However, several considerations weigh against adopting such a narrow view of congressional purpose.

The passage of the Senate report that refers to the *Turner* decision begins by listing three requisites for qualification for unemployment compensation. A worker must demonstrate that he or she is

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114. 660 F.2d at 1004.

115. S. REP. NO. 1265, 1976 U.S. CODE CONG. & AD. NEWS 5997, *supra* note 42. The Committee's report is dated September 20, 1976.

116. The report reads:

D. Provisions Related to Benefit Eligibility Disqualification for Pregnancy  
(Sec. 302 of the Bill)

In order to qualify for unemployment compensation benefits, a worker must be able to work, be seeking employment, and be available for employment. In a number of States, an individual whose unemployment is related to pregnancy is barred from receiving any unemployment benefits. In 1975 the Supreme Court found a provision of this type in the Utah unemployment compensation statute to be unconstitutional. The Utah requirement had disqualified workers for a period of 18 weeks (12 weeks before birth through 6 weeks after birth). The Court stated that "a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid." A number of other States have similar provisions although most appear to involve somewhat shorter periods of disqualification.

The committee bill includes, without modification, the provision of the House bill which would prohibit States from continuing to enforce any provision which denies unemployment compensation benefits solely on the basis of pregnancy (or recency of pregnancy). Pregnant individuals would, however, continue to be required to meet generally applicable criteria of availability for work and ability to work.

S. REP. NO. 1265, at 19, 21, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 6013, 6015, *supra* note 42.

117. The Solicitor General interpreted the above-mentioned passage from the Senate report as "suggest[ing] not that Congress intended to require preferential treatment of pregnancy, but only that it was concerned with elimination of a variety of automatic pregnancy disqualification provisions contained in state laws at that time." *See* Amicus Curiae Brief, *supra* note 10, at 10-11.

able to work, is seeking work and is available for work.<sup>118</sup> The report then describes the facts of the *Turner* case as an example of a state statute that denies compensation in cases of pregnancy-related unemployment.<sup>119</sup> The implication is that three main factors are to be considered and that the conclusive presumption employed in Utah demonstrates an impermissible bypass of those factors.<sup>120</sup> This interpretation is supported by the fact that the succeeding paragraph concludes with a reaffirmation that “[p]regnant individuals would, however, continue to be required to meet generally applicable criteria of availability for work and ability to work.”<sup>121</sup>

Similarly, the House report accompanying the bill mentions, with apparent approval, eligibility provisions applicable to “all claimants, including pregnant women” that disqualify “anyone who is physically unable to work or who is unavailable for work.”<sup>122</sup> The implication is not that it is permissible to deny benefits to claimants on the basis of pregnancy as long as all others subject to a medical disability are treated the same. Rather, the standard suggests that all those unavailable for or unable to work are to be treated alike. The House’s approval did not, therefore, extend to provisions which deny benefits to pregnant women who are able to and available for work or to women who are actually seeking to return to work after giving birth.

The legislative history makes several references to *Turner*-type statutes.<sup>123</sup> It is, however, devoid of any statement indicating that Congress intended merely to codify the *Turner* result. Thus, although the *Turner* case focused congressional attention on the broad issue of denial of unemployment compensation for separation from work due to pregnancy, Congress did not limit its inquiry to presumptive disability.<sup>124</sup>

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118. S. REP. NO. 1265 at 19, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 6013, *supra* note 42. See generally notes 21-24 *supra* and accompanying text (discussing general eligibility criteria).

119. S. REP. NO. 1265 at 19, 21, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 6013, 6015, *supra* note 42.

120. See 122 CONG. REC. 22517, 22518 (1976) (comments of Mr. Steiger). Mr. Steiger emphasized that not all pregnant women would, under the proposed amendment, automatically receive benefits. Pregnant women should be adjudged in terms of availability for work and ability to work, as are all other claimants. See also notes 21-24 *supra* and accompanying text.

121. S. REP. NO. 1265 at 21, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 6015, *supra* note 42.

122. H.R. REP. NO. 755, *supra* note 42, at 50. The report commented on the inequity of statutes that “deny benefits without regard to the woman’s ability to work, availability for work, or efforts to find work.”

123. See H.R. REP. NO. 755, *supra* note 42, at 50; SUBCOMMITTEE ON UNEMPLOYMENT COMPENSATION OF THE COMM. ON WAYS AND MEANS, 94TH CONG., 1ST SESS., INFORMATION TO ACCOMPANY H.R. 10210 12 (Comm. Print 1975).

124. See Brief for Appellees, *supra* note 48, at 13. But cf. Amicus Curiae Brief, *supra* note



Additional evidence that Congress did not seek merely to eliminate presumptive disability clauses is contained in the report of the House committee that presented the bill in December of 1975.<sup>125</sup> The report referred to nineteen state provisions that denied benefits because of pregnancy.<sup>126</sup> It did not limit examples of these provisions to *Turner*-type violations, but delineated two major classes of pregnancy disqualifications: those that employed conclusive presumptions and those that disqualified women who left work because of pregnancy.<sup>127</sup>

While the House report did not list the nineteen states to which it referred, there is some speculation<sup>128</sup> that the nineteen states intended were those mentioned in a Labor Department Unemployment Insurance Program Letter<sup>129</sup> one week earlier. This bulletin listed a variety of discriminatory state provisions relating in general to family obligations and to pregnancy.

Although it is not certain why the Labor Department focused on these nineteen states, at a minimum there seems to be no reason to assume that Congress meant to alter the practices of only these states. Other states that did not appear on the list had promulgated supplementary regulations or had adopted policies that denied benefits to pregnant or formerly pregnant women on similar grounds.<sup>130</sup> The House report stated that although the provisions varied among the nineteen states, all were inequitable because they denied benefits despite the woman's availability and attempts to secure employ-

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10, at 9-11 (Congress concerned with elimination of automatic pregnancy disqualification in laws at that time).

125. H.R. REP. NO. 755, *supra* note 42.

126. The relevant portion of the House Report explains: "At the present time, 19 States have provisions which, in effect, deny benefits because of pregnancy. They vary from State to State, but they are all inequitable in that they deny benefits without regard to the woman's ability to work, availability for work, or efforts to find work." H.R. REP. NO. 755, *supra* note 42, at 50.

127. In a section comparing the proposed provisions with those then in effect, the House report states: "Nineteen states have special disqualification provisions pertaining to pregnancy. Several of these provisions hold pregnant women unable to work and unavailable for work; the remainder disqualify a claimant because she left work on account of her condition or because her unemployment is a result of pregnancy." H.R. REP. NO. 755, *supra* note 42, at 7.

128. *See* Brief for Appellants, *supra* note 52, at 18.

129. "Summary of Discriminatory State Provisions Relating to Pregnancy, Domestic and Marital Obligations and Dependent's Allowances," *Unemployment Insurance Program Letter* No. 33-75, [1975-1980 Unemployment Insurance Transfer Binder] UNEMPL. INS. REP. (CCH) ¶ 1996 (1975) [hereinafter cited as *Unemployment Insurance Program Letter*]. The nineteen jurisdictions cited as having discriminatory pregnancy provisions were Alabama, Arkansas, Colorado, Delaware, the District of Columbia, Indiana, Kansas, Maryland, Minnesota, Montana, Nevada, New Jersey, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah and West Virginia.

130. The prime example is South Carolina. The *Porcher* case involved a challenge to state practice. No reference to pregnancy appeared on the face of the statute. S.C. CODE ANN. § 41-35-120(1) (Law. Co-op., 1977 and Supp. 1982).

ment.<sup>131</sup> Presumably, a similar denial of benefits in any state would be just as inequitable.

The nineteen state provisions listed in the Department of Labor's Unemployment Insurance Letter were quite diverse in their treatment of pregnancy. Some states provided for prescribed periods of ineligibility after return to work<sup>132</sup> or after giving notice of a desire to resume work.<sup>133</sup> Others included presumptive periods of disability or unavailability.<sup>134</sup> A few states presumed inability or unavailability until proof to the contrary was tendered.<sup>135</sup> If Congress were concerned only with presumptive disability, then only those statutes that employed such presumptions would have been under consideration. The variety of provisions in the nineteen mentioned states suggests that Congress was seeking a broader remedy.

Thus, it appears likely that although Congress focused on presumptive disability, it elected to implement a broader remedy. Yet, even if Congress had intended only to eliminate presumptive disability provisions, statutes that deny benefits to formerly pregnant women on the ground that they have voluntarily quit without good cause related to employment would still contravene congressional intent. The basic defect inherent in presumptive disability periods, as indicated by the Supreme Court in *Turner* and implied in the committee reports accompanying the 1976 amendments, is that presumptive disability clauses supplant individualized determinations of a claimant's ability and availability.<sup>136</sup> Statutes that label a woman's separation from work because of childbirth as a voluntary leaving without good cause<sup>137</sup> merely substitute one presumption for an-

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131. "Under eligibility provisions applicable to all claimants, including pregnant women, anyone who is physically unable to work or who is unavailable for work is ineligible for benefits. These determinations are made on the basis of the facts of each individual case and make discriminatory disqualifications because of pregnancy unnecessary." H.R. REP. NO. 755, *supra* note 42, at 50.

132. For example, in Colorado a claimant generally was ineligible after childbirth until she had worked 13 weeks. If she was the sole support of a child or an invalid spouse, however, she was ineligible for only 30 days. In Tennessee, a woman was disqualified for 21 days after she was able to work. In West Virginia, the period of ineligibility ranged from 30 days after return to work to 6 weeks before and after, depending on the circumstances of separation. *Unemployment Insurance Program Letter*, *supra* note 129.

133. Alabama disqualified women whose maternity leaves extended beyond ten weeks unless they gave three weeks notice of a desire to return to work. *Id.*

134. The District of Columbia, Kansas, Montana, New Jersey, Rhode Island, Utah and Texas provided for varying periods of presumptive disability or unavailability. *Id.* All of these statutes are presumably unconstitutional after the Supreme Court decision in *Turner*.

135. Delaware, Oregon, Maryland, Nevada and Ohio presumed disability until rebutted by a statement from the woman's physician or by a ruling by the program's administrator. *Id.*

136. The Supreme Court in *Turner* held that the fourteenth amendment required the state to use more individualized procedures. See note 92 *supra* (quoting *Turner*, 423 U.S. at 46). Both the Senate and House reports accompanying what is now § 3304(a)(12) stressed the importance of individualized determinations on the basis of the criteria normally employed in evaluating a worker's claim. See notes 121 & 126 *supra* and accompanying text.

137. See note 11 *supra*.

other. Under this type of statute, a pregnant or formerly pregnant woman is denied benefits without regard to the circumstances surrounding her departure. Presumably, even if Congress did direct its inquiry at presumptive disability, statutes that contain the very infirmities Congress sought to remedy in a slightly altered form cannot be said to effectuate congressional intent.

### III. POLICY CONSIDERATIONS

#### A. *Pregnancy Policy and the Potential for Gender Discrimination*

The theory that pregnancy should be afforded the same treatment as that afforded any physical disability or medical condition originated in the 1970's in the context of employment discrimination claims.<sup>138</sup> Although these claims met with varying degrees of success,<sup>139</sup> a general definition of the nature of pregnancy claims began to emerge.

The majority of these suits involved challenges to mandatory maternity leave policies<sup>140</sup> or to disqualification of pregnancy from employer-sponsored disability insurance plans.<sup>141</sup> In these cases, employers routinely contended that pregnancy was not an illness,<sup>142</sup> but a temporary physical condition voluntarily assumed,<sup>143</sup> and therefore reasonably subject to unique treatment.<sup>144</sup> Most courts re-

138. Some of these suits were brought under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1982). See, e.g., *Berg v. Richmond Unified School Dist.*, 528 F.2d 1208 (9th Cir. 1975), *vacated per curiam*, 434 U.S. 158 (1978) (mandatory maternity leave); *Gilbert v. General Elec. Co.*, 519 F.2d 661 (4th Cir. 1975), *revd.*, 429 U.S. 125 (1976) (overruled by 42 U.S.C. § 2000e(k) (1982) (enacted Oct. 31, 1978)) (pregnancy benefits); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir. 1975), *vacated*, 424 U.S. 737 (1975) (pregnancy benefits and maternity leave). Others were based on equal protection theories brought under the fourteenth amendment or 42 U.S.C. § 1983. See, e.g., *LaFleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184 (6th Cir. 1972), *aff'd*, 414 U.S. 632 (1974) (mandatory maternity leave); *Aiello v. Hansen*, 359 F. Supp. 792 (N.D. Cal. 1973), *rev'd sub nom. Geduldig v. Aiello*, 417 U.S. 484 (1974) (exclusion of pregnancy from state disability plan); *Bravo v. Board of Educ.*, 345 F. Supp. 155 (N.D. Ill. 1972), *rev'd*, 525 F.2d 695 (7th Cir. 1975) (mandatory maternity leave).

139. See generally Note, *The 1978 Pregnancy Discrimination Act: A Problem of Interpretation*, 58 WASH. U. L.Q. 607, 607-23 (1980) (description of state of law at time of enactment of 42 U.S.C. § 2000e (1982)).

140. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Green v. Waterford Bd. of Educ.*, 473 F.2d 629 (2d Cir. 1973).

141. See, e.g., *Gilbert v. General Elec. Co.*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976) (overruled by 42 U.S.C. § 2000e(k) (1982) (enacted Oct. 31, 1978)); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir. 1975), *vacated*, 424 U.S. 737 (1976).

142. See, e.g., *Newman v. Delta Air Lines*, 374 F. Supp. 238, 245 (N.D. Ga. 1973), *aff'd per curiam*, 475 F.2d 768 (5th Cir. 1973).

143. See *Gilbert v. General Elec. Co.*, 519 F.2d 661, 665 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976) (overruled by 42 U.S.C. § 2000e(k) (1982)); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 206 (3d Cir. 1975), *vacated*, 424 U.S. 737 (1976).

144. See *Hutchison v. Lake Oswego School Dist. No. 7*, 519 F.2d 961, 963 (9th Cir. 1975), *cert. denied*, 429 U.S. 1037 (1977); *Scott v. Opelika City School*, 63 F.R.D. 144, 147 (M.D. Ala. 1974). See generally Note, *Income Protection for Pregnant Workers*, 26 DRAKE L. REV. 389, 391-94 (1976) (discussing legislation and case law affecting pregnant women).

jected this argument on two grounds. First, the courts recognized that pregnancy is not necessarily voluntary, in the ordinary sense of the word.<sup>145</sup> Second, although pregnancy is not an illness or a disease, it is a condition with similar attributes.<sup>146</sup> Both illness and pregnancy can lead to inability to work, the incurrence of medical expenses and a loss of income.<sup>147</sup>

Congress has also, in some instances, equated pregnancy with other medical conditions. Since 1972, the Equal Opportunity Commission guidelines have drawn an analogy between pregnancy and illness.<sup>148</sup> More recently, Congress incorporated the correlation between sickness and pregnancy into the Pregnancy Discrimination Act of 1978.<sup>149</sup> Yet, it is important to note that, despite the fact that pregnancy has been compared to illness, the analogy is not an exact one.

Pregnancy and childbirth are different from illness in the funda-

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145. Many women cannot or will not use birth control for religious or medical reasons. Further, no method of birth control is 100% effective. *See* *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 206 (3d Cir. 1975), *vacated*, 424 U.S. 737 (1976). *See generally* Note, *Fourteenth Amendment: Public School Maternity Leave: Cleveland Board of Education v. LaFleur*, 35 OHIO ST. L.J. 1004, 1022 & n.140 (1974) (describing documented side effects of currently available contraceptive drugs). *But cf.* *Cohen v. Chesterfield County School Bd.*, 474 F.2d 395, 398 (4th Cir. 1973), *revd. sub nom. Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (pregnancy is usually voluntary).

146. *See* *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 206 (3d Cir. 1975), *vacated*, 424 U.S. 737 (1976); *see also* Note, *Love's Labor Lost: New Conceptions of Maternity Leaves*, 7 HARV. C.R.-C.L.L.R. 260, 282 (1972) (listing shared characteristics of childbirth and short-term disabilities in general).

147. *Geduldig v. Aiello*, 417 U.S. 484, 500-01 (1974) (Brennan, J., dissenting) (overruled by 42 U.S.C. § 2000e(k) (1982) (enacted Oct. 31, 1978)); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 206 (3d Cir. 1975), *vacated*, 424 U.S. 737 (1976).

148. 29 C.F.R. § 1604.10 (1984). The original 1972 version of the regulations is printed in 37 Fed. Reg. 6835, 6837 (1972). This section reads:

§ 1604.10 Employment policies relating to pregnancy and childbirth.

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of title VII.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

The guidelines in their current form contain the same language requiring employers to treat pregnancy-related disabilities as any health disability. The current version, however, has been amended to include a statement on health benefits covering abortion. Section 1604.10(d)(1) was added to mandate that fringe benefit programs comply with the regulations by April 1979. 29 C.F.R. § 1604.10(d)(1) (1984).

149. 42 U.S.C. § 2000e(k) (1982).

mental sense that our society recognizes distinct and important rights associated with procreation and family matters.<sup>150</sup> Aside from the fundamental personal liberties that are also involved, the state has an acute interest in promoting survival of the species.<sup>151</sup>

Furthermore, a distinguishing characteristic of pregnancy is that it is exclusively a female condition. Several courts<sup>152</sup> and Congress<sup>153</sup> have acknowledged that policies relating to pregnancy and childbirth must be considered in light of the fact that they uniquely affect women. This alone does not serve to distinguish pregnancy from illness, since some illnesses are gender-linked.<sup>154</sup> Nonetheless, it is important to recognize that policies affecting pregnant women potentially could be used to discriminate on the basis of sex.

Even absent discriminatory intent, regulation of benefits on the basis of pregnancy may have the effect of sex discrimination.<sup>155</sup> The Equal Employment Opportunity Commission has stated: "Essentially, the courts have found that discrimination does not occur solely through the conscious, intentional actions against individual victims, or observable, unequal treatment of different groups, but most pervasively through the discriminatory *impact* on whole classes of people of employment practices which may appear facially neutral."<sup>156</sup> Consideration of the practical consequences flowing from enforcement of a statute is a relevant facet of statutory construction.<sup>157</sup> Congress and the courts have endorsed a national policy to

150. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 152-53 (1972) (abortion); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (contraceptives); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 536 (1942) (mandatory sterilization).

151. *See* *Zablocki v. Redhail*, 434 U.S. 374, 383 (1977); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Buckley v. Coyle Pub. School Sys.*, 476 F.2d 92, 96 (10th Cir. 1973).

152. *See, e.g.*, *Buckley v. Coyle Pub. School Sys.*, 476 F.2d 92, 95 (10th Cir. 1973) (mandatory maternity leave "penalizes feminine schoolteacher for being a woman"); *Farkas v. Southwestern City School Dist.*, 8 Empl. Prac. Dec. (CCH) 9619 (S.D. Ohio), *affd. mem.*, 506 F.2d 1400 (6th Cir. 1974) (failure to pay sick leave for pregnancy-related absences constitutes sex discrimination). *But cf.* *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974) (validating state policy of excepting pregnancy from disability insurance plan on ground that program did not discriminate against any definable class).

153. *See, e.g.*, 42 U.S.C. § 2000e(k) (1982) (defining "because of sex" or "on the basis of sex" as including but not limited to "because of or on the basis of pregnancy, childbirth, or related medical conditions").

154. *See* *Mitchell v. Board of Trustees*, 15 Fair Empl. Prac. Cas. (BNA) 338, 340 (1977).

155. In the equal protection area, the Supreme Court has held that discriminatory impact may be evidence of discriminatory intent even in the case of a statute that is neutral on its face. *See* *Personnel Admr. v. Feeney*, 442 U.S. 256, 273 (1979); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

156. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM., *ELIMINATING DISCRIMINATION IN EMPLOYMENT: A COMPELLING NATIONAL PRIORITY I-1* (1979) (emphasis in original); *see also* *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

157. *See, e.g.*, *Hasbrouck Heights Hosp. Assn. v. Borough of Hasbrouck Heights*, 15 N.J. 447, 453, 105 A.2d 521, 524 (1954).

eliminate all forms of employment discrimination.<sup>158</sup> Interpretation of section 3304(a)(12) in a way which intentionally or effectively fosters sex discrimination in employment directly undercuts this important policy.

### B. Denial of Unemployment Compensation as an Economic Barrier

Historically, maternal benefit legislation was aimed at protecting the health of women and newborns.<sup>159</sup> In recent years, attention has shifted to include concern with protection of the economic contributions of women.<sup>160</sup> Studies have shown that not only are more women participating in the work force,<sup>161</sup> but that these women are either making a significant contribution to family income<sup>162</sup> or are the sole source of it.<sup>163</sup> Because a pregnant woman will almost invariably have to leave work for some time for childbirth,<sup>164</sup> the availability of some type of income security is crucial. Women whose employers grant maternity leave and who return to work on a speci-

158. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM., *supra* note 156, at I-1.

159. S. KAMERMAN, *supra* note 4, at 13; cf. *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.").

160. S. KAMERMAN, *supra* note 4, at 13.

161. During the 1970's women represented 60% of the growth in the labor force. The participation rate of women in the labor force climbed from 43% in 1970 to 51% in 1980. CENSUS BUREAU, MONEY INCOME, *supra* note 2, at 3.

162. See S. KAMERMAN, *supra* note 4, at 8. In a 1974 study, nearly two-thirds of all women in the work force were reported to be unmarried or married to men who earned less than \$7,000 per year. WOMEN'S BUREAU, U.S. DEPT. OF LABOR, WHY WOMEN WORK (1974). Further, the median percentage of family income accounted for by a working wife's earnings is highest when the family income is less than \$3000. U.S. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-23, No. 100, A STATISTICAL PORTRAIT OF WOMEN IN THE UNITED STATES: 1978, at 79 (1980).

163. See S. KAMERMAN, *supra* note 4, at 8.

164. See *LaFleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184, 1189 (6th Cir. 1972) (Phillips, C.J., dissenting in part), *aff'd*, 414 U.S. 632 (1974). In a policy statement adopted in 1974, the American College of Obstetricians and Gynecologists explained:

Pregnancy is a physiological process. All pregnant patients, however, have a variable degree of disability on an individual basis, as indicated below, during which time they are unable to perform their usual activities. (1) In an uncomplicated pregnancy, disability occurs near the termination of pregnancy, during labor, delivery and the puerperium. The process of labor and puerperium is disabling in itself. The usual duration of such disability is approximately six to eight weeks. (2) Complications of a pregnancy may occur which give rise to other disability. Examples of such complications include toxemia, infection, hemorrhage, ectopic pregnancy, and abortion. (3) A woman with pre-existing disease which in itself is not disabling, may become disabled with the addition of pregnancy. Certain patients with heart disease, diabetes, hypertensive cardiovascular disease, renal disease, and other systemic conditions may become disabled during their pregnancy because of the adverse effect pregnancy has upon these conditions.

The onset, termination and cause of the disability, related to pregnancy, can only be determined by a physician.

Policy Statement of the American College of Obstetricians and Gynecologists (adopted Mar. 2, 1974), quoted in *Geduldig v. Aiello*, 417 U.S. 484, 501 n.4 (1974) (Brennan, J., dissenting).

fied day have no problem. For women who are denied reinstatement when they seek to return to work, however, the availability of unemployment compensation may be of great importance. This is especially true given that only a small minority of women are covered by private health plans for the time period of actual disability caused by pregnancy.<sup>165</sup>

Some courts have criticized the denial of benefits because of pregnancy, arguing that it forces a woman to choose between employment and childbirth through subtle economic pressures that demean her role in the economy<sup>166</sup> by frustrating her attempts to reenter the job market.<sup>167</sup> The district court in *Porcher* speculated that without financial assistance, *e.g.*, for expenses such as child care, recent mothers might not be able to compete in the employment process with other applicants.<sup>168</sup> A woman who has withdrawn from the labor force will likely experience a decline in job status and hourly earnings upon her reentry.<sup>169</sup> Further, when a woman leaves the work force, both the employer's and the woman's incentives to invest in her potential economic capacity are weakened.<sup>170</sup> Thus, discouraging a woman from maintaining attachment to the labor force following pregnancy can cause long-term economic disadvantage in addition to a short-term decline in her family's standard of living.<sup>171</sup>

Unemployment compensation is designed to provide partial wage replacement to the involuntarily unemployed worker so he or she can look for a job.<sup>172</sup> The requirements of section 3304(a)(12) do not mandate a departure from this purpose. The section does not necessarily require payment of benefits to a pregnant woman who

165. See S. KAMERMAN, *supra* note 4, at 12.

166. See, *e.g.*, *Buckley v. Coyle Pub. School Sys.*, 476 F.2d 92, 96 (1973) (school policy of termination after six months of pregnancy invades a woman's privacy by forcing her to choose between employment and pregnancy); *Hanson v. Hutt*, 83 Wash. 2d 195, 201, 517 P.2d 599, 603 (1974) (rejecting argument that pregnant women are unattached to the labor market). *But cf.* *Dandridge v. Williams*, 397 U.S. 471, 483-86 (1970) (nondiscriminatory allocation of welfare benefits does not impermissibly burden family interests). Unemployment compensation, however, is distinguished from general welfare. Welfare payments are to provide subsistence, while unemployment compensation serves to replace lost earnings. See *Super Tire Engg. Co. v. McCorkle*, 550 F.2d 903, 908 (3d Cir. 1977).

167. See Conlin, *Equal Protection Versus Equal Rights Amendment — Where Are We Now?*, 24 *DRAKE L. REV.* 259, 306 (1975).

168. 502 F. Supp. at 956.

169. See E. APPLEBAUM, *BACK TO WORK: DETERMINANTS OF WOMEN'S SUCCESSFUL RE-ENTRY* 45-54 (1981).

170. Sandell, *Lifetime Participation in the Labor Force and Unemployment Among Mature Women*, in *WOMEN IN THE U.S. LABOR FORCE* 142, 151 (A.F. Cahn ed. 1979).

171. See E. APPLEBAUM, *supra* note 169, at 28-29.

172. See *California Dept. of Human Resources Dev. v. Java*, 402 U.S. 121, 132 (1971) (citing *Hearings on H.R. 4120 Before the House Comm. on Ways and Means*, 74th Cong., 1st Sess. 214 (1935) (statement of federal relief administrator and member of the Committee on Economic Security)).

left work before truly disabled or who, for personal reasons, did not return to work when able after childbirth.<sup>173</sup> Nor does this section prevent the states from imposing a period of disqualification on pregnant women who are unable to or unavailable for work.<sup>174</sup> What section 3304(a)(12) does prohibit is the denial of benefits to an otherwise eligible individual solely because she left her last employment because of pregnancy or because she is currently pregnant.

In the absence of section 3304(a)(12), perhaps a state could treat pregnancy as any other medical condition for purposes of unemployment compensation, without endangering its claim to federal funds. This would be consistent with the policy of allowing the states to formulate their own guidelines in areas not covered by the Federal Act.<sup>175</sup> Congress, however, enacted section 3304(a)(12) in 1976 as a prohibition against denying benefits solely on the basis of pregnancy or termination of pregnancy. The fact that pregnancy is in some respects like an illness<sup>176</sup> does not necessarily imply that it must be treated as such for all purposes.

In section 3304(a)(12) Congress specifically addressed the issue of denial of benefits based on pregnancy. Perhaps, ideally, Congress should prohibit disqualification on the basis of separation due to any bona fide medical condition. The process of legislating, however, necessarily involves the drawing of lines.<sup>177</sup> The fact that Congress chose to focus on only one aspect of the problem<sup>178</sup> does not alter the binding nature of the remedy elected.

The original purpose of federal unemployment legislation was to induce the states to provide benefits to certain workers when the

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173. See Amicus Curiae Brief, *supra* note 10, at 23 (discussing likely impact of alternative applications of the *Porcher* decision). The exact date upon which a pregnant woman should leave work or return to work after childbirth is a medical decision that should be reached by the woman and her doctor.

174. See note 23 *supra* and accompanying text; note 120 *supra*.

175. See note 111 *supra*. Bella Abzug, congresswoman from New York, taking the floor in support of the 1975 Unemployment Compensation Amendments as presented in H.B. 10210, commented:

I want to commend the committee for including section 312 which prohibits States from delaying or terminating benefits solely on the basis of pregnancy. This exclusion, which has been challenged by court action in several States, has placed an additional burden on women seeking to collect benefits.

The decision when to terminate one's employment because of pregnancy is an individual one to be decided by the woman and her doctor. So long as a woman is available for work she is entitled to collect unemployment compensation.  
122 CONG. REC. 22516 (1976).

176. See notes 138-54 *supra* and accompanying text.

177. See *Califano v. Aznavorian*, 439 U.S. 170, 174 (1978) ("Social welfare legislation, by its very nature, involves drawing lines among categories of people . . ."); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (*per curiam*).

178. In the context of the equal protection clause of the fourteenth amendment, the Supreme Court has repeatedly held that Congress may act to eliminate an evil without simultaneously remedying every related evil. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 485 (1980); *Cleland v. National College of Business*, 435 U.S. 213, 220 (1978) (*per curiam*).



states may not have done so on their own initiative.<sup>179</sup> Allowing the states to deny compensation to otherwise eligible women returning to the work force after or during pregnancy thus frustrates one of the most basic goals of the program. Under the framework of FUTA, the states are given a choice: to comply with the Act's fundamental standards or to forgo federal assistance.<sup>180</sup> Policies that encourage eligible women to pursue their job search best serve the broad remedial purposes of FUTA.<sup>181</sup>

#### IV. CONCLUSION

In 1976, Congress addressed an issue of substantial concern to working women: the availability of unemployment compensation to persons whose unemployment results from pregnancy. By adding section 3304(a)(12) to the list of fundamental federal standards, Congress sought to enjoin the states from denying benefits to otherwise eligible claimants solely because they left their last employment due to a pregnancy-related disability. In enacting section 3304(a)(12), Congress recognized that women who are otherwise attached to the work force may become displaced by the period of disability that necessarily accompanies childbirth. The intent of the legislature was to bring these women within the coverage of the federal act precisely because some states denied benefits to pregnant or formerly-pregnant women despite their ability to work and availability for employment.

The intent expressed by Congress in enacting section 3304(a)(12) is consistent with the realities of the changing American labor force. Increasing numbers of women join the labor force each year. The majority of these women will become pregnant at some point in their working lives. Denial of income security to these women demeans their economic role in society by frustrating their attempts to reenter the work force. Furthermore, because pregnancy uniquely affects women, policies that deny benefits on the basis of pregnancy create the potential for intentional or effective gender discrimination.

The interpretation of section 3304(a)(12) advanced by several states and endorsed by the Department of Labor directly contravenes the language of that statute and the policy behind it. Congress enacted section 3304(a)(12) as an express prohibition against denial of unemployment compensation to claimants who would have received benefits but for the fact that they left their last employment because of pregnancy. Congress intended to leave the decision of when a pregnant woman should terminate her employment to the

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179. See note 35 *supra*.

180. See *New Hampshire Dept. of Employment Sec. v. Marshall*, 616 F.2d 240, 241 (1st Cir.), *appeal dismissed*, 449 U.S. 806 (1980).

181. *Porcher*, 502 F. Supp. at 956.

woman and her physician. To allow the states to label such a termination voluntary and thus deny benefits defeats the very purpose of the section. Similarly, allowing the states to treat pregnancy like any other medical condition ignores the fact that Congress specifically addressed the issue of pregnancy-related disqualification in section 3304(a)(12).