

# Federal Rule of Evidence 301 and Congressional Acts: When Does an Act Otherwise Provide

Martin McHenry

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## NOTE

### FEDERAL RULE OF EVIDENCE 301 AND CONGRESSIONAL ACTS: WHEN DOES AN ACT "OTHERWISE PROVIDE"?

During the congressional hearings on the proposed Federal Rules of Evidence, few subjects sparked as much concern and disagreement as that of presumptions.<sup>1</sup> The significant role presumptions can play in litigation sparked the congressional debate. Presumptions can shift the burden of proof<sup>2</sup> and, therefore, possibly dictate the outcome of a trial.<sup>3</sup>

Rule 301,<sup>4</sup> which emerged from this congressional concern and disagreement, has descended into obscurity despite the importance of presumptions. A number of reasons could explain this phenomenon.<sup>5</sup> An

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<sup>1</sup> 10 J. MOORE & H. BENDIX, *MOORE'S FEDERAL PRACTICE* § 300.01 (2d ed. 1981).

<sup>2</sup> The expression "burden of proof" actually encompasses two different burdens: the "burden of production" and the "burden of persuasion." J. MAGUIRE, *EVIDENCE: COMMON SENSE AND COMMON LAW* 175-77 (1947). The burden of production is also called the burden of "bringing forward evidence." McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382, 1382 (1955). The burden of production requires that the party with the burden on a given issue come forward with sufficient evidence to enable "a reasonable jury" to find for him on the issue. *Id.* at 1383. In short, the burden of production is the onus placed on a party to avoid a directed verdict. *See* J. MAGUIRE, *supra*, at 177.

Commentators have characterized the burden of production as a judicial means of preventing irrational jury findings. *See* McNaughton, *supra*, at 1382. Even in nonjury proceedings, however, judges frequently refer to the burden or its "sufficiency" standard. *See, e.g.,* NLRB v. Silver Spur Casino, 623 F.2d 571, 577 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981) ("sufficient evidence to demonstrate" nonexistence of presumed fact deemed adequate to rebut presumption in nonjury proceeding).

In contrast to the burden of production, the burden of persuasion does not entail an intermediate judicial determination of evidentiary "sufficiency." Instead, the burden requires the party to convince the factfinder of the truth of his version of the facts. *See* J. MAGUIRE, *supra*, at 177. Additionally, the burden of persuasion is appropriate, and indeed necessary, in both jury and nonjury proceedings. The required degree of persuasion can vary from a "bare preponderance," the typical civil level, to "beyond a reasonable doubt," the criminal level. *See* R. FIELD, B. KAPLAN & K. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 502-05 (4th ed. 1978).

<sup>3</sup> *See infra* notes 10-25 and accompanying text.

<sup>4</sup> FED. R. EVID. 301 provides:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

<sup>5</sup> For example, rule 301 only applies to a limited number of the presumptions used in federal courts. *See infra* notes 27-30 and accompanying text. Furthermore, many judges, lawyers and scholars are hostile to the rule's premise that presumptions subject to the rule should

inherent ambiguity in the rule renders the rule's scope unclear and may offer a partial explanation: by its terms, rule 301 does not apply to presumptions "otherwise provided for by Act of Congress."<sup>6</sup> The federal courts have failed to articulate when an act of Congress provides for an alternative to rule 301.<sup>7</sup> Until the courts explain when rule 301 applies, its scope will remain unclear and its use neglected—a fate hardly appropriate for such a potentially important rule that has been the cause of so much concern.

## I

### THE ANALYTICAL FRAMEWORK OF PRESUMPTIONS: RULE 301 AND ITS EXCEPTIONS

Scholars generally agree on the basic analytical framework of presumptions. The concept of conditional compulsion underlies this framework: if the proponent of a presumption can prove specified basic facts,<sup>8</sup> the trier of fact, whether judge or jury, *must* find specified presumed facts *unless* the opponent of the presumption successfully rebuts the presumed facts.<sup>9</sup> Although in agreement on these fundamentals, scholars disagree on the crucial issue of the quantum of evidence that the opponent must provide to rebut successfully presumed facts once the proponent has established the basic facts.<sup>10</sup>

be applied uniformly. *See, e.g., Hearings on Proposed Rules of Evidence Before the Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 191 (1973) [hereinafter cited as *House Hearings I*] (memorandum submitted on behalf of the Washington Council of Lawyers) (presumptions are a matter of state policy, and federal courts should therefore follow state practice); 10 J. MOORE & H. BENDIX, *supra* note 1, § 300.01 ("Some felt it was undesirable to have a single general rule applicable to all types of presumptions; and that the effect of presumptions should vary and be based upon the reason for the creation of a particular presumption.")

<sup>6</sup> FED. R. EVID. 301.

<sup>7</sup> *See infra* notes 66-78, 79-96 and accompanying text.

<sup>8</sup> Basic facts can be established by pleadings, stipulation, judicial notice, compelling evidence, or judicial findings. *See* MODEL CODE OF EVIDENCE Rule 702 (1942).

<sup>9</sup> *See* M. GRAHAM, FEDERAL RULES OF EVIDENCE IN A NUTSHELL § 301.6, at 46 (1981); 1 D. LOISELL & C. MUELLER, FEDERAL EVIDENCE 536 (1977) (distinguishing inferences from presumptions); Hecht & Pinzler, *Rebutting Presumptions: Order Out of Chaos*, 58 B.U.L. REV. 527, 528 (1978); Ladd, *Presumptions in Civil Actions*, 1977 ARIZ. ST. L.J. 275, 277.

Conditional compulsion distinguishes presumptions from inferences and so-called conclusive presumptions. Inferences are merely permissive logical conclusions without the compelling force of law, and conclusive presumptions are essentially substantive rules of law that cannot be rebutted. Note, *Presumptions According to Purpose: A Functional Approach*, 45 ALB. L. REV. 1079, 1082-83 (1981). Conditional compulsion inheres in the very nature and definition of presumptions, whether statutorily or judicially created, and whether used in a jury or non-jury context. *See, e.g., Whitman v. Califano*, 617 F.2d 1055, 1057 (4th Cir. 1980) (statutory presumption used in an administrative, nonjury context); *In re Briarbrook Dev. Corp.*, 11 Bankr. 515, 519 (W.D. Mo. 1981) (attribute of conditional compulsion inherent in presumptions that rule 301 governs).

<sup>10</sup> *See, e.g., M. GRAHAM, supra* note 9, § 301.10, at 52-54; Louisell, *Constructing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings*, 63 VA. L. REV. 281, 301 (1977).

The traditional school of thought, the "Thayer" camp, contends that a presumption should shift only the burden of production<sup>11</sup> on the issue of the presumed facts, and that the ultimate burden of persuasion should remain on the proponent.<sup>12</sup> Thus, the opponent of the presumption need only produce evidence sufficient to support a jury finding of the nonexistence of the presumed facts in order to rebut the presumption.<sup>13</sup> Upon a showing of this evidence, a Thayer presumption disappears altogether, like a "bursting bubble." Advocates of this approach argue that a "bursting bubble" presumption is easily administered,<sup>14</sup> and is consistent with the only valid reason for creating and using presumptions: forcing the opponent to produce evidence.<sup>15</sup>

The reformist, or "Morgan" camp, on the other hand, believes that a presumption should have a stronger effect: once the proponent estab-

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<sup>11</sup> See *supra* note 2.

<sup>12</sup> See R. FIELD, B. KAPLAN & K. CLERMONT, *supra* note 2, at 498-99.

<sup>13</sup> See *id.*; Hecht & Pinzler, *supra* note 9, at 531 (credibility of rebuttal evidence irrelevant); Louissell, *supra* note 10, at 301 (same). But see Note, *supra* note 9, at 1084 ("any" evidence sufficient to rebut Thayer or traditional presumptions).

Although traditional presumptions appear technically inappropriate in nonjury proceedings, judicial or administrative courts sitting without a jury can and do use them. See *supra* note 2. Furthermore, traditional presumptions can play a decisive role in nonjury proceedings because the concept of legal compulsion inheres in the definition of presumption itself. See *supra* notes 8-9 and accompanying text. Thus, a judge or administrative official acting in a quasi-judicial capacity must accept the presumed facts of a traditional presumption if the proponent has established the basic facts and the opponent has failed to produce any evidence establishing the nonexistence of the presumed facts. See, e.g., *Whitman v. Califano*, 617 F.2d 1055, 1057 (4th Cir. 1980).

Courts have applied variants of the pure traditional model. They have done so by fixing the level of evidence necessary for rebuttal either above or below the traditional "sufficiency" level: to strengthen the presumption, they have raised the level of rebuttal; to weaken the presumption, they have lowered the level. See, e.g., *Pennzoil Co. v. Federal Energy Regulatory Comm'n*, 645 F.2d 360, 392 (5th Cir. 1981) (an indecisive, or perhaps confused, court first raised the level to "substantial evidence" and then lowered it to "some evidence"), *cert. denied*, 454 U.S. 1142 (1982). A variant popular in New York is the so-called "substantial evidence rule." Note, *supra* note 9, at 1089.

The level of evidence needed to rebut a Thayer presumption in a nonjury case is not clear. The judge could require, and still remain faithful to Thayer doctrine, "any" or "some" evidence in rebuttal. See *In re Tomeo*, 1 Bankr. 673, 678-79 (E.D. Pa. 1979) ("some" evidence required; credibility irrelevant). Indeed, the higher the required amount of evidence needed for rebuttal, for example, a requirement of "substantial" evidence, the more important the credibility of the rebuttal evidence becomes; and as the burden shifted to the presumption opponent becomes more like a burden of persuasion, the more closely the presumption resembles a reformist presumption. If a judge or administrative official were to require "clear, cogent and convincing evidence," see *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 243, 297 (9th Cir. 1978), he would be imposing a burden of persuasion on the presumption opponent and, therefore, applying a reformist presumption. See J. MAGUIRE, J. WEINSTEIN, J. CHADBOURN & J. MANSFIELD, *CASES AND MATERIALS ON EVIDENCE* 1039 (6th ed. 1973).

<sup>14</sup> See Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 18 (1959).

<sup>15</sup> See 1 D. LOUISELL & C. MUELLER, *supra* note 9, at 554-55 (proponent uses presumption to "smoke out" adversary).

lishes the basic facts, the burden of persuasion,<sup>16</sup> as well as the burden of production, on the issue of the presumed facts should shift to the opponent. Thus, upon proof of the basic facts the opponent must convince the factfinder, whether judge or jury, of the nonexistence of the presumed facts by a preponderance of the evidence.<sup>17</sup> The reformists argue that this stronger effect is consistent with the true purpose of presumptions—allocating the burden of persuasion to promote judicial and legislative policies. The reformists identify three such policies: (1) a social policy of handicapping the party advancing a disfavored contention;<sup>18</sup> (2) a policy of ensuring fairness in litigation by forcing the party with superior access to the evidence relevant to a particular issue to prove that issue or, conversely, relieving the party with inferior access to the evidence of the risk of nonpersuasion on the issue;<sup>19</sup> and (3) a policy of accounting for probability by forcing the party who would benefit from an exception to a perceived statistical norm to prove that he fits within the exception.<sup>20</sup> The reformists accurately point out that these policies are the considerations that have traditionally guided judges in allocating the burden of persuasion in the first instance.<sup>21</sup>

Whether a judge chooses to accord a presumption a traditionalist "bursting bubble" effect or a stronger reformist effect may have significant practical consequences. First, the choice could determine whether the issue of the existence of the presumed facts will go to the jury or whether the judge will instruct the jury that it must find for the opponent on the issue.<sup>22</sup> Second, the choice could decide those issues that the

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<sup>16</sup> See *supra* note 2.

<sup>17</sup> See, e.g., R. FIELD, B. KAPLAN & K. CLERMONT, *supra* note 2, at 499; M. GRAHAM, *supra* note 9, § 301.6, at 47; Note, *supra* note 9, at 1086-87. In order to rebut a Morgan presumption, the opponent of the presumption must disprove the presumed fact by a preponderance of the evidence. *Id.*

<sup>18</sup> See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 343, at 806-07 (2d ed. E. Cleary ed. 1972) [hereinafter cited as MCCORMICK]; see also *id.* § 337, at 786-87.

<sup>19</sup> See MCCORMICK, *supra* note 18, § 343, at 806-07; Louisell, *supra* note 10, at 292.

<sup>20</sup> See MCCORMICK, *supra* note 18, § 343, at 806-07.

<sup>21</sup> See *id.*; see also 21 C. WRIGHT & K. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5122, at 555-57 (1977) (burden of proof allocated according to three "p's": policy, access to proof, and probability); Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843, 850 (1981) ("Presumptions that shift the burden of persuasion are simply affirmative defenses that are created for the same reasons of policy that generally inform the decision to allocate burdens of persuasion. Indeed, whether an affirmative defense goes by its usual label or that of a presumption seems entirely fortuitous."); Cleary, *supra* note 14, at 21 ("governing considerations" for allocating the "elements of a case" between litigants and for using presumptions "are identical: policy, fairness and probability").

The reasons for allocating to a party the burden of persuasion on a particular issue, either in the first instance or through a presumption, would also justify allocating to the party the burden of production on the issue. See F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE § 7.8, at 251-53 (2d ed. 1977). For criticisms of both the Thayer and Morgan approaches see Note, *supra* note 9, at 1085-88.

<sup>22</sup> The choice between the traditional approach to presumptions, with its low rebuttal standard, and the reformist approach is particularly important to the proponent of an arbi-

factfinder, whether judge or jury, could not decide for itself.<sup>23</sup> Third, the strength of a presumption often significantly affects the trial strategy of both the proponent and the opponent.<sup>24</sup> Finally, the choice may determine whether the parties actually litigate the presumptive issue.<sup>25</sup>

Rule 301 of the Federal Rules of Evidence embodies the traditionalist "bursting bubble" approach.<sup>26</sup> A federal judge must give a pre-

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trary presumption. Arbitrary presumptions are those for which there is no logical connection between the basic and presumed facts. If the proponent of a nonarbitrary traditional presumption suffers an adverse ruling on the rebuttal of the presumption, the logical connection between the basic and presumed facts may still suffice to avoid a directed verdict. In the case of arbitrary traditional presumptions, however, if the proponent only introduces evidence establishing the basic facts and the opponent introduces evidence, however incredible, "sufficient" to establish the nonexistence of the presumed facts, *see supra* notes 2, 12, 13 and accompanying text, a judge will probably direct a finding for the opponent. *See* 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, § 5122, at 563-64. The reformist rule would dictate a different result both because greater rebuttal evidence would be necessary and because judges are often reluctant to direct a finding in favor of the party with the burden of persuasion. *See* R. FIELD, B. KAPLAN & K. CLERMONT, *supra* note 2, at 532; Note, *supra* note 9, at 1086 (Morgan approach precludes directed verdicts against proponents of presumptions).

<sup>23</sup> When the factfinder cannot decide for itself on the issue of the presumed facts—that is, when it perceives that the probabilities for and against the existence of the presumed facts are equal—then it is in equipoise. In such situations, the party with the burden of persuasion will lose. *See* 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, § 5122, at 558. Thus, when the proponent of a presumption establishes the basic facts and the factfinder is in equipoise on the presumed facts, the opponent in a traditional presumption jurisdiction will win; in a reformist jurisdiction, however, he will lose because he bears the burden of persuasion.

<sup>24</sup> *See* Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 197-98 (1979). For example, in the tax arena, in which the government enjoys the benefit of a reformist presumption of the correctness of tax assessments, *see infra* notes 45-52 and accompanying text, the government need only introduce its assessment into evidence to force the taxpayer to prove nonliability. *Id.*

<sup>25</sup> When an opponent of a presumption does not have access to evidence bearing on the presumed facts, a presumption can effectively prevent him from litigating these facts and force him to rely on an affirmative defense. The cases involving the presumption of a union's continued majority status illustrate the effect. *See infra* notes 32-44 and accompanying text. The employer, in rebutting the reformist presumption of continued majority status, must overcome the difficulty that the relevant evidence is in the union's possession. *See* R. GORMAN, BASIC TEXT ON LABOR LAW 110, 114 (1976). Thus, the employer is often forced to rely exclusively on the affirmative defense of his good faith belief in union minority. *See infra* note 38 and accompanying text. The issue of the union's actual status remains unlitigated. *See* Note, *NLRB Determination of Incumbent Unions' Majority Status*, 54 IND. L.J. 651, 665 (1979). Conversely, if the presumption received a weaker traditional effect, the union would retain the burden of persuasion on the majority-status issue and this issue would be litigated more often. Apparently sensitive to this, the NLRB in *Stoner Rubber Co.* gave the majority-status presumption a traditional effect, and set the standard of rebuttal at "sufficient evidence to cast serious doubt on the union's continued majority status". 123 N.L.R.B. 1440, 1445 (1959).

<sup>26</sup> *See* *Reeve v. General Foods Corp.*, 682 F.2d 515, 522 n.10 (5th Cir. 1982); *Legille v. Dann*, 544 F.2d 1, 6-7 (D.C. Cir. 1976); M. GRAHAM, *supra* note 9, § 301.6, at 46; I D. LOUISELL & C. MUELLER, *supra* note 9, at 555 (credibility of rebuttal irrelevant); MCCORMICK, *supra* note 18, § 343, at 105 (Rule 301 "states the 'bursting bubble' theory in its pure form."); 10 J. MOORE & H. BENDIX, *supra* note 1, § 301.01[1], at 6 ("Congress adopted an un sullied Thayer theory in Rule 301 . . ."); *see also* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 81 (2d ed. 1977) (sufficiency as standard of rebuttal); Louisell, *supra* note 10, at 318-19 (analyzing memo sent to Congress by Edward Cleary, Reporter of the Advisory Committee, in which Cleary interpreted rule 301 as a traditionalist rule, with a

sumption the weak effect of shifting only the burden of production unless the presumption fits into one of the rule's exceptions. Rule 301 contains three exceptions.<sup>27</sup> First, it does not apply to criminal cases, but only to "civil actions and proceedings."<sup>28</sup> Second, rule 301 does not govern diversity cases in which state law provides the rule of decision for the element of a claim or defense to which the presumption applies.<sup>29</sup> Finally, rule 301 does not apply when an act of Congress provides

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sufficiency standard of rebuttal, making the credibility of rebuttal irrelevant). *But see* U.S. Indus./Fed. Metal Inc. v. Director, Office of Workers' Compensation Programs, 102 S. Ct. 1312, 1316 n.5 (1982) (suggesting that a rule 301 presumption must be rebutted by "substantial evidence"); 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, § 5122, at 571-73 (rule 301 adopts an intermediate ground between a reformist and a traditional rule).

Two commentators have suggested that the federal courts could conceivably interpret rule 301 to permit variants of the traditional presumptions. *See supra* note 13; *see also* Hecht & Pinzler, *supra* note 9, at 554-55 ("The ambiguity of the language [of rule 301] may permit federal courts to adopt a Thayer variant rather than the 'bursting bubble' approach") (footnote omitted). They have proved to be prophetic. *See* Pennzoil Co. v. Federal Energy Regulatory Comm'n, 645 F.2d 360, 392 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). Such Thayer-variant interpretations of rule 301 have gained favor in the nonjury proceedings of the bankruptcy courts. *See In re* Briarbrook Dev. Corp., 11 Bankr. 515, 519 (W.D. Mo. 1981) ("some evidence"); *In re* Eichorn, 11 Bankr. 81, 83 (D. Mass. 1981) (same). One bankruptcy court labeled rule 301 a Thayer "bursting bubble theory," but gave it a Thayer variant level of rebuttal of "some evidence." *In re* Tomeo, 1 Bankr. 673, 678-79 (E.D. Pa. 1979).

<sup>27</sup> The use of the term "presumption" in rule 301 limits the rule's operative scope. For example, rule 301 does not apply to inferences. *See supra* notes 8-9 and accompanying text. Nor does rule 301 apply to so-called conclusive presumptions. *See* 1 D. LOUISELL & C. MUELLER, *supra* note 9, at 534-35, 539; *supra* notes 8-9 and accompanying text. Nor does the rule apply to an "assumption"—the allocation of the burden of persuasion in the first instance, without the aid of a presumption. *See* 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, § 5123, at 574 ("[Rule 301] . . . does not . . . alter the control of courts over the allocation of the burden of proof [persuasion]; i.e., the power to create 'assumptions.' Thus, while a court could not create a presumption that placed the burden of proof on the opponent, it could, under its decisional power over the substantive law, allocate to him the burden of proof on the issue.") (footnote omitted); *id.* § 5124, at 589 (assumptions are not presumptions because they do not depend upon establishing basic facts); *see also* S. SALTZBURG & K. REDDEN, *supra* note 26, at 92 ("[T]he line separating presumptions that shift burdens of persuasion from rulings placing burdens of persuasion in the first instance [assumptions] is not clear. . . ."). Thus, rule 301 does not affect the allocation of the burden of persuasion to a plaintiff on the elements of his claim, nor to a defendant on his affirmative defenses. Courts often justify their allocation of the burden of persuasion through conventional presumption analysis when they are, in reality, assigning the burden as an assumption. *See, e.g.,* Sharp v. Coopers & Lybrand, 649 F.2d 175, 188-89 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1426 (1982).

Courts and legislatures often interpret so-called "prima facie" cases, which can be created either by statute or judicial decision, as the equivalents of presumptions. *See* Pennzoil Co. v. Federal Energy Regulatory Comm'n, 645 F.2d 360, 392 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982); *In re* Tomeo, 1 Bankr. 673, 678 (E.D. Pa. 1979); CAL. EVID. CODE § 602 (West 1966). Rule 301, therefore, can be interpreted to limit the effect a court can give to these "prima facie" cases. *But see In re* Friedman, 436 F. Supp. 234, 236 n.1 (D. Md. 1977) ("The Federal Rules of Evidence . . . do not define the effect of prima facie evidence."). For a list of federal statutory "prima facie" cases, see 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, § 5123, at 579 n.29.

<sup>28</sup> FED. R. EVID. 301.

<sup>29</sup> *Id.* 301, 302.

otherwise.<sup>30</sup>

Only rarely have the federal courts addressed explicitly and clearly resolved whether an act of Congress provides for a reformist presumption.<sup>31</sup> Consequently, the case law does not provide one clear test for defining the parameters of this exception to rule 301. In the limited number of cases addressing rule 301 and arising under federal statutes, the federal courts have instead articulated (often obliquely), or implicitly applied, two different tests.

## II

### THE TESTS IMPLICIT IN THE CASE LAW

#### A. *The Policy Test*

The "policy" test can be stated as follows: If the purposes of or the policies underlying the act are better served by giving the presumption a reformist effect, the act "otherwise provides" for this greater effect. Courts have applied this test in several refusal to bargain cases arising under the National Labor Relations Act,<sup>32</sup> most notably in *NLRB v. Tahoe Nugget, Inc.*<sup>33</sup> In *Tahoe Nugget*, the Ninth Circuit reviewed the application of the NLRB's nonstatutory presumption<sup>34</sup> of a union's continued majority support.<sup>35</sup> According to this presumption, once the Board establishes either that the Board certified or that the employer voluntarily recognized the incumbent union over a year before the employer refused to bargain with it, a presumption arises that the union enjoyed majority support when the employer refused to bargain.<sup>36</sup> The court ruled that this presumption shifted the burden of persuasion on the issue of majority support to the employer.<sup>37</sup> To meet this burden, the em-

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<sup>30</sup> *Id.* 301.

<sup>31</sup> Only the Court of Claims has addressed and resolved the issue. *Pennsylvania Dep't of Transp. v. United States*, 643 F.2d 758, 763 (Ct. Cl. 1981). The Court of Claims' test consists of a three-fold inquiry to determine the effect of the act in question: (1) whether the act expressly requires the burden of persuasion on specified facts to shift once certain basic facts have been established; (2) whether the legislative history "implicitly require[s] such a result"; and (3) whether shifting the burden of persuasion through a presumption would place the burden on the party with better access to relevant evidence. *Id.*

<sup>32</sup> 29 U.S.C. §§ 151-169 (1976).

<sup>33</sup> 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

<sup>34</sup> *See* 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, § 5123, at 124-25 (Supp. 1982).

<sup>35</sup> 584 F.2d at 297. The majority support issue is an element of a refusal to bargain charge: "To sustain [a refusal to bargain] charge, the General Counsel must show the union represented a majority of the unit employees when the employer refused to bargain." *Id.*

<sup>36</sup> *See id.*

<sup>37</sup> *Id.* The General Counsel initially bore the burden of persuasion. *See id.* (to sustain a refusal to bargain charge, General Counsel must show union majority status); *see also* *NLRB v. Silver Spur Casino*, 623 F.2d 571, 577 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981) ("In an unfair labor practice proceeding . . . the General Counsel [must prove] by a preponderance of the evidence that an unfair labor practice has occurred"). The shift of the burden of persuasion on the majority-support issue from the General Counsel to the employer demonstrates that this presumption is indeed a presumption and not an "assumption." *See supra* note

ployer had to convince the factfinder<sup>38</sup> by "clear, cogent, and convincing evidence"<sup>39</sup> that either the union did not in fact enjoy majority support when the employer refused to bargain or that when the employer refused he entertained a good faith reasonable doubt of the union's majority status.<sup>40</sup>

The Ninth Circuit rejected rule 301<sup>41</sup> out of hand, stating that "[o]nly a superficial reading of the rule" could prohibit the persuasion burden from shifting,<sup>42</sup> and asserted that courts had approved the presumption's force both before and after the Federal Rules of Evidence.<sup>43</sup> The court suggested that a weaker presumption would encourage employers to refuse to bargain and would foster industrial strife.<sup>44</sup>

27. Thus, it fits within the operative scope of rule 301. *See id.* *But see* 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, § 5124, at 134 n.33 (Supp. 1982) (majority-support presumption probably an "assumption").

<sup>38</sup> In NLRB proceedings, the Board and its administrative officials are the factfinders. *See* 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, § 5123, at 100 (Supp. 1981). Because these are nonjury proceedings, technically traditional presumptions are inappropriate. *See supra* note 13. *But see* NLRB v. Silver Spur Casino, 623 F.2d 571, 577 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981) (presumption of majority support "deemed rebutted" when the employer in an NLRB proceeding presents "sufficient evidence to demonstrate" union's minority status).

<sup>39</sup> 584 F.2d at 297. This level of persuasion is more demanding than the normal civil standard of "by a preponderance of the evidence."

<sup>40</sup> *Id.*; *see also* NLRB v. Windham Community Memorial Hosp., 577 F.2d 805, 813 (2d Cir. 1978); NLRB v. Vegas Vic, Inc., 546 F.2d 828, 829 (9th Cir. 1976), *cert. denied*, 434 U.S. 818 (1977) (citing Terrell Mach. Co. v. NLRB, 427 F.2d 1088, 1090 (4th Cir.), *cert. denied*, 398 U.S. 929 (1979)).

Proof of the employer's good faith reasonable doubt is not truly a rebuttal in that it does not establish the nonexistence of the presumed fact of actual majority support. *See supra* note 9 and accompanying text. Therefore, as some courts have suggested, proof of a good faith reasonable doubt is an affirmative defense. *See* NLRB v. Silver Spur Casino, 623 F.2d 571, 579 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981). This may explain the judicial disregard of rule 301 in this context, for rule 301 applies to presumptions, not to affirmative defenses.

<sup>41</sup> The Federal Rules of Evidence apply in unfair labor practice hearings "so far as practicable." 29 U.S.C. § 160(b) (1976). Professors Wright and Graham argue that because the NLRB does not use a jury, *see supra* note 38, and because rule 301 regulates only the relationship between judge and jury, the use of rule 301 in unfair labor practice proceedings is not "practicable." 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, § 5123, at 124-25 (Supp. 1982).

<sup>42</sup> 584 F.2d at 297.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 301-04. The Ninth Circuit reaffirmed the importance of promoting industrial peace in NLRB v. Silver Spur Casino, 623 F.2d 571, 578 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981). The *Silver Spur* court described the presumption's effect in traditionalist terms. *See supra* notes 11-15 and accompanying text. For example, it concluded that "[a]n employer may rebut the presumption by presenting *sufficient evidence* to demonstrate that the union was actually in the minority or that the employer had a good faith reasonable doubt of the union's majority support at the time of the refusal to bargain." 623 F.2d at 577 (emphasis added). Furthermore, the court suggested that, despite the presumption, the General Counsel always bears the burden of persuasion. *Id.* This traditionalist description does not represent repudiation of the reformist rule laid down in *Tahoe Nugget*. Instead, it reflects sloppy and inappropriate use of presumption terminology. For example, the concept of sufficiency of evidence is inappropriate in the NLRB nonjury context. *See supra* notes 2, 13, 38. Further-

The federal courts have implicitly sanctioned the use of the policy test in cases that concern assessable tax penalties and arise under the provisions of the Internal Revenue Code.<sup>45</sup> Presuming the propriety of a tax assessment is of judicial rather than statutory origin.<sup>46</sup> When the government introduces a tax assessment into evidence, a presumption arises that the taxpayer has committed all of the acts statutorily required for liability.<sup>47</sup>

Before enactment of the Federal Rules of Evidence, federal courts ruled that this presumption shifted to the taxpayer both the burden of production and the burden of persuasion on essentially the entire issue of liability. The leading pre-rules case is *Psaty v. United States*.<sup>48</sup> In *Psaty*,

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more, the court cited *Tahoe Nugget* in support of its use of the sufficiency language. 623 F.2d at 577. *Tahoe Nugget* does not contain any such language. Indeed, it stands for the proposition that the presumption shifts the burdens of persuasion and production to the employer on the issue of union majority support. See *supra* notes 37-40 and accompanying text. Thus, the sufficiency standard is inapplicable.

The First Circuit has managed to avoid rule 301 in labor relations cases without resorting to a *Tahoe Nugget* policy analysis. See *Big Y Foods, Inc. v. NLRB*, 651 F.2d 40, 45 (1st Cir. 1981). The court held that rule 301 did *not* limit the effect of the so-called presumption of the propriety of a bargaining unit, because the presumption was a "substantive, not a procedural, presumption such as is set forth in rule 301." *Id.*

<sup>45</sup> The penalty provision relevant here is I.R.C. § 6672(a) (1979), which provides:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

<sup>46</sup> See 10 J. MOORE & H. BENDIX, *supra* note 1, § 301.02, at 14 n.5 (presumption as creation of common law).

<sup>47</sup> See *Osborn v. United States*, 81-1 U.S. Tax Cas. (CCH) ¶ 9302 (W.D. Mo. 1981) ("The presumption that the assessment was correct in all aspects, necessarily inclusive of all statutory elements was not rebutted.") (emphasis added). The statutory elements of liability are: (1) that the taxpayer was required to collect, truthfully account for, and pay over withholding taxes to the government and (2) that he willfully failed to do so. I.R.C. § 6672(a) (West Supp. 1979); see *supra* note 45.

<sup>48</sup> 442 F.2d 1154 (3d Cir. 1971). In *Psaty*, the taxpayer brought a refund suit to recover the portion of the assessed penalties that he had paid and the government counterclaimed for the balance of the assessment. *Id.* at 1156. The Third Circuit ruled that the burdens of production and persuasion on the issue of liability were, with respect to the taxpayer's refund claim, initially on the taxpayer and, with respect to the government's counterclaim, initially on the government. *Id.* at 1158-60. Furthermore, the court held that the government established a prima facie case on its counterclaim by offering into evidence the certification of the Commissioner's assessment and thereby shifted both burdens to the taxpayer. *Id.* at 1159-60; see also *United States v. Sefansky*, 16 A.F.T.R.2d (P-H) 5640, 5640-41 (E.D. Mich. 1965) (Introduction of the Administrative Assessment File into evidence in a government collection action "placed the burden on the defendant to establish by a preponderance of the evidence that the one hundred percent penalty imposed by Section 6672 was erroneously assessed against him."). The government need not introduce its assessment into evidence, for the assessment is not a prerequisite for liability. See *id.* However, *Psaty* suggests that unless the government introduces its assessment into evidence, the burden of persuasion on the govern-

the Third Circuit defended this presumption by asserting that it is more probable than not that the taxpayer ultimately will be liable.<sup>49</sup> Furthermore, the court stressed that the presumption promoted the sound public policies embodied in the Internal Revenue Code: it required taxpayers to meet the Code's bookkeeping obligations by accounting for the taxpayer's better access to relevant evidence, and required corporate officers to explain their failure to perform the duties imposed by the Code.<sup>50</sup> Finally, in defense of according the presumption a reformist effect, the court stated that "[w]here a presumption owes its origin, as here, to an important public policy, it should operate to fix the burden of persuasion, as well as the burden of going forward."<sup>51</sup> Even after the passage of the Federal Rules of Evidence, federal courts have often overlooked rule 301 and continued to give a Morgan effect to the presumption.<sup>52</sup>

### B. *The Language-Consistency Test*

The "language-consistency" test can be stated as follows: If the court must give the presumption a reformist effect to render it consistent with the language of the act, the act "otherwise provides" for this greater effect. In *Solder Removal Co. v. International Trade Commission*<sup>53</sup> the Court of Customs and Patent Appeals implicitly sanctioned this test in analyzing the statutory presumption of patent validity.<sup>54</sup> The presumption provides that once a patentee introduces into evidence the letters of

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ment's counterclaim will not shift to the taxpayer. 442 F.2d at 1159-60. This shifting of the burden of persuasion demonstrates that the presumption of correctness is indeed a presumption, not an "assumption." See *supra* note 27. But see 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, § 5124, at 107 n.22, 108 n.30 (Supp. 1981). Thus, it fits within the operative scope of rule 301.

This presumption of correctness, however, which is often applied in contexts other than § 6672 penalty actions, appears to be used more like an assumption than a true presumption. See, e.g., *Llorente v. Commissioner*, 74 T.C. 260, 272 (Fay, J., concurring), 274, 276-77 (Tannenwald, J., concurring) (1980) (considering effect of statutory notice of deficiency in income reconstruction case). Thus, the procedural status of this "presumption," and consequently the applicability or nonapplicability of rule 301, varies by court and by statutory context. Compare *United States v. Rexach*, 482 F.2d 10, 15-16 (1st Cir. 1973) (assumption analysis in case in which government sues on assessment to collect taxes) with *Herbert v. Commissioner*, 377 F.2d 65, 69, 71 (9th Cir. 1967) (presumption of correctness treated as true presumption in case involving an omission from gross income). See generally *Llorente v. Commissioner*, 74 T.C. 260, 273 (1980) (Tannenwald, J., concurring).

<sup>49</sup> 442 F.2d at 1160.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (citing Morgan, *Presumptions and Burden of Proof*, 47 HARV. L. REV. 69, 83 (1933)).

<sup>52</sup> See, e.g., *Anderson v. United States*, 561 F.2d 162, 165 (8th Cir. 1977) ("The burden is upon the party assessed to prove that it was not . . . responsible [for withholding taxes] or that its failure to pay the taxes was not willful.").

<sup>53</sup> 582 F.2d 628 (1978).

<sup>54</sup> 35 U.S.C. § 282 (1976) provides: "A patent shall be presumed valid . . . . The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity."

patent issued to him by the Patent and Trademark Office, the burden of proof shifts to the party challenging its validity.<sup>55</sup> The court in *Solder Removal* ruled that this presumption shifted the burden of persuasion on the issue of patent validity from the patentee to the party asserting invalidity.<sup>56</sup>

In rejecting the argument that rule 301 prohibits such a shift, the court relied on the text of the statute: "The burden of establishing invalidity of a patent . . . shall rest on the party asserting such invalidity."<sup>57</sup> The court reasoned that placing the burden of persuasion on the patentee "would involve total disregard of [this statutory language]."<sup>58</sup> The court concluded that the patent act took "precedence" over rule 301.<sup>59</sup> The Supreme Court, in *Turner Elkhorn Mining Co. v. Usery*,<sup>60</sup> exhibited a similar unwillingness to look beyond an act's language when it gave a Thayer effect to two presumptions in the Federal Coal Mine Health and Safety Act of 1969.<sup>61</sup>

<sup>55</sup> See *Saginaw Prods. Corp. v. Eastern Airlines Inc.*, 615 F.2d 1136, 1140 (6th Cir. 1980); *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 713 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975) (ruling that patentee has the initial burden of proving the validity of his patent); see also 3 E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 97.21, at 394-95 (3d ed. 1977) ("[F]rom the issuance of the letters patent, it is presumed that a claimed invention which is 'novel' and 'useful,' amounts to a 'discovery or invention' over what was already known in the prior art [and therefore the patent is valid].").

<sup>56</sup> 582 F.2d at 632-33 n.3. The federal courts often disagree about the proper level of persuasion that the party asserting invalidity must meet. Compare *Saf-Gard Prods. v. Service Parts*, 532 F.2d 1266, 1271 (9th Cir.), *cert. denied*, 429 U.S. 896 (1976) ("clear and convincing evidence") with *Dickstein v. Seventy Corp.*, 522 F.2d 1294, 1297 (6th Cir. 1975), *cert. denied*, 423 U.S. 1055 (1976) ("preponderance of the evidence").

<sup>57</sup> 582 F.2d at 633 n.8 (relying on the last sentence of the first paragraph of 35 U.S.C. § 282 (1976)).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* The result reached in *Solder Removal* can be justified without presumption analysis. One can reasonably argue that § 282, taken in its entirety, creates an "assumption," not a presumption, in favor of the patentee and that therefore rule 301 does not apply. See 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, § 5123, at 576-77 n.13; *supra* note 27. Indeed, the court in *Solder Removal* supported the propriety of such an analysis: "the burden of persuasion is and remains always upon the party asserting invalidity." 582 F.2d at 633 (emphasis added). The structure of § 282 lends further support to this analysis. For example, the statute explicitly labels invalidity as a defense "to be pleaded" by the party asserting invalidity. 35 U.S.C. § 282 (1976); see also *E.I. du Pont de Nemours & Co. v. Berkley & Co.*, 620 F.2d 1247, 1256 (8th Cir. 1980); 3 E. DEVITT & C. BLACKMAR, *supra* note 55, § 97.04, at 378-80. Since the party who pleads a proposition normally must prove it, see *infra* note 67, § 282 suggests that at the pleading stage the burden of persuasion must fall upon the party attacking the patent.

<sup>60</sup> 428 U.S. 1, 26 (1976).

<sup>61</sup> 30 U.S.C. § 921(c)(1) (Supp. IV 1980) provides: "If a miner who is suffering or suffered from pneumoconiosis [black lung disease] was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that [the disease] arose out of such employment." 30 U.S.C. § 921(c)(2) (Supp. IV 1980) provides: "[I]f a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to [black lung disease]."

The court ruled peremptorily that "[e]ach presumption is explicitly rebuttable, and the effect of each is simply to shift the burden of going forward with evidence from the claimant to the operator." 428 U.S. at 27 (citing rule 301). Clearly it could have put forth a *Tahoe*

C. *Conflict Between the Policy Test and the Language Consistency Test*

The "policy" test<sup>62</sup> appears to be fundamentally incompatible with this "language-consistency" test. The policy test ties the effect of presumptions, whether created judicially, administratively, or statutorily, to policies underlying congressional acts, while the language-consistency test limits the effect of a presumption to the effect that the words of the act dictate. A court applying the latter test would be unwilling to look beyond the four corners of the act.

Although these two tests appear fundamentally incompatible, on one occasion the Supreme Court has suggested a willingness to apply both tests to the same presumption. In *Wilson v. Omaha Indian Tribe*,<sup>63</sup> a case involving a land dispute between Indians and whites, the Court implicitly acknowledged that the statutory presumption in issue<sup>64</sup> would have passed the "language consistency" test as well as the "policy" test.<sup>65</sup>

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*Nugget* or *Psaty*-like policy justification for shifting the burden of persuasion from the claimant-coal miner to the mine operator, *see supra* notes 32-52 and accompanying text. This justification would have been straightforward and grounded in the declared purpose of the Act: "It is the purpose of the bill . . . to protect the health and safety of coal miners, and to combat the steady toll of life, limb, and lung, which terrorizes so many unfortunate families." H.R. REP. NO. 563, 91st Cong., 1st Sess. 1, *reprinted in* 1969 U.S. CODE CONG. & AD. NEWS 2503. To ensure most effectively compensation to an afflicted miner and his family and to promote most effectively this statutory purpose, the statutory presumptions should operate to relieve the claimant-miners of the burden of persuasion. Such a policy justification is particularly strong for a presumption added several years after Congress passed the Federal Coal Mine Health and Safety Act. *See* 30 U.S.C. § 921(c)(4) (Supp. IV 1980). The years immediately after the Act's passage witnessed few successful claims, and the miner's major problem was evidentiary. The purpose of the presumption was to remedy this problem and, therefore, it should shift the burden of persuasion. *See* *United States Steel Corp. v. Gray*, 588 F.2d 1022, 1028 (5th Cir. 1979) (construing § 921(c)(4) and concluding, without policy justification, that it shifts the burden of persuasion).

The unwillingness to explore statutory purposes or policies exhibited in *Turner Elkhorn Mining Co.* has appeared in other statutory contexts as well. *See, e.g.,* *Poncy v. Johnson & Johnson*, 460 F. Supp. 795, 803 (D.N.J. 1978) (assuming that nonuse of a trademark for two consecutive years gives rise to a rebuttable presumption of abandonment under 15 U.S.C. § 1127(a), and concluding that it does not shift the burden of persuasion to the party denying abandonment) (citing rule 301).

<sup>62</sup> *See supra* notes 53-59 and accompanying text.

<sup>63</sup> 442 U.S. 653 (1979).

<sup>64</sup> 25 U.S.C. § 194 (1976) provides:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Thus, the basic fact of this statutory presumption is prior possession or ownership by Indians, and the presumed fact is present Indian title. *See id.*

<sup>65</sup> [I]n view of the evident purpose of the statute and its use of the term "presumption" which the "white man" must overcome, we are in agreement with the two courts below that § 194 contemplates the non-Indian's shouldering the burden of persuasion as well as the burden of producing evidence once the tribe has made out its prima facie case of prior title or possession.

## III

## AN ANALYSIS OF THESE TESTS

A. *The Policy Test*

The policy test<sup>66</sup> is inadequate because it necessarily engenders confusion and inconsistent treatment of the same presumption. Three considerations support this pessimistic conclusion. First, federal judges are not always sensitive to the same statutory policies; one judge may recognize a statutory policy that requires allocation of the burden of persuasion through a presumption to the opponent of the presumption, while another judge may not recognize such a policy and would allocate the burden to the proponent on other grounds.<sup>67</sup> The effect of a given presumption would thus vary with each judge's receptivity to purported statutory policies.<sup>68</sup>

Second, an act may have several legitimate, recognized purposes, each of which may argue for different outcomes. One purpose of the act may dictate that a presumption shift the burden of persuasion to its opponent, while another may dictate that the burden remain upon the proponent. The National Labor Relations Act and the presumption of majority support<sup>69</sup> provide an example. Two congressional goals appear in the Act: industrial stability<sup>70</sup> and industrial democracy.<sup>71</sup> To pro-

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<sup>66</sup> See *supra* notes 32-52 and accompanying text.

<sup>67</sup> These "other grounds" are the factors that courts have traditionally considered in allocating the burden of persuasion in the first instance: social policy, fairness between litigants, and probability. See *supra* note 21. Of course, a court may not consciously consider such factors in each case and, instead, may simply assign the burden of persuasion to the party traditionally responsible for pleading the particular issue. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 21, § 7.8, at 251; D. LOUISELL & C. MUELLER, *supra* note 9, § 66, at 528. Nevertheless, the factors that have determined the allocation of the burden of persuasion have also traditionally determined the requirements of pleading. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 19, § 7.8, at 251 (burdens of pleading and proof as "manifestations of the same or similar considerations") (citation omitted). Therefore, allocation of the persuasion burden according to the traditional pleading requirements will usually parallel allocation made after a conscious consideration of the traditional factors.

<sup>68</sup> The "prima facie" analysis common in employment discrimination cases should not be analyzed in presumption terms because the employer-presumption opponent usually must do more than simply rebut presumed facts. See, e.g., *United States v. City of Chicago*, 411 F. Supp. 218, 232 (N.D. Ill. 1976) (Employer not only must show no discriminatory intent, but also must show that the requirements "bear a demonstrable relationship to successful performance of the jobs for which it was used."). Some courts, however, have relied upon presumption analysis in such cases and, consequently, have confronted rule 301. Two of these cases illustrate how inconsistency can arise from differing sensitivities to purported statutory policies. Compare *id.* at 231-33 (congressional policies underlying federal anti-discrimination statutory scheme justified shifting burden of persuasion to employer) with *Brooks v. Virginia Marine Resources Comm'n*, 16 Empl. Prac. Dec. (CCH) ¶ 8204 (1977) (rule 301 applicable and therefore claimant continued to shoulder burden).

<sup>69</sup> See *supra* notes 32-44 and accompanying text.

<sup>70</sup> See Note, *Application of the Good-Faith-Doubt Test to the Presumption of Continued Majority Status of Incumbent Unions*, 1981 DUKE L.J. 718, 718 (citing 29 U.S.C. § 151 (1976 & Supp. III 1979)); *supra* note 44 and accompanying text.

mote industrial stability, a judge would shift the burden of persuasion on the majority issue to the employer,<sup>72</sup> while to promote industrial democracy, the judge would not shift the burden away from the NLRB.<sup>73</sup> Thus, the effect of the presumption depends upon which competing policy the court chooses to promote.<sup>74</sup>

Finally, the policy test forces the courts to resolve a vague question of balance: At what mystical point do the policies of an act, assuming that they all cut in the direction of shifting the burden of persuasion to a presumption opponent, outweigh the congressional policy of uniformity reflected in rule 301?<sup>75</sup> This question is inherently open-ended and lacks the internal guidelines necessary to ensure an acceptable measure of consistency. Two recent tax penalty cases manifest this confusion and inconsistency. The courts declined to follow the cases holding that the tax-assessment presumption shifts the burden of persuasion to the taxpayer,<sup>76</sup> and relied on rule 301 as the ground for their hesitancy.<sup>77</sup>

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<sup>71</sup> See Note, *supra* note 25, at 663 ("Principles of industrial democracy are central to the national labor policy.") (footnote omitted); see also Note, *supra* note 70, at 718 (citing 29 U.S.C. §§ 151, 157, 159(a) (1976 & Supp. III 1979)).

<sup>72</sup> See Note, *supra* note 70, at 719; see also notes 41-44 and accompanying text. *But see* Note, *supra* note 70, at 738-39.

<sup>73</sup> See Note, *supra* note 70, at 733, 737-38; Note, *supra* note 25, at 662-64. *But see* Pennco, Inc., 250 N.L.R.B. 716, 716-17 (1980) (heavy evidentiary burden on employer promotes industrial democracy and stability).

<sup>74</sup> The Ninth Circuit has consciously and explicitly subordinated the goal of industrial democracy to that of stability. See *NLRB v. Silver Spur Casino*, 623 F.2d 571, 578 (9th Cir. 1980) (In applying the presumption of union majority support, "the Board has favored continuity in the bargaining structure over the enhancement of employee free choice."), *cert. denied*, 451 U.S. 906 (1981); *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 302 (9th Cir. 1978) ("We conclude the Board did not abuse its discretion in balancing free choice and stability when it determined that, in this instance, freedom of choice must subserve the goal of industrial peace"); see also Note, *supra* note 70, at 719 (NLRB has "maximized industrial stability at the expense of employee free choice by placing an unduly heavy burden on the employer to prove that the incumbent union no longer commands the majority support of the employee unit"; because the union is better able than the employer to prove its majority status, it should bear this burden).

<sup>75</sup> See *Decker v. SEC*, 631 F.2d 1380 (10th Cir. 1980). In *Decker*, the Tenth Circuit reviewed the censure of an investment broker who had been civilly charged with aiding and abetting a violation of the Investment Company Act, 15 U.S.C. § 80a-17(e)(1) (1976), which proscribes accepting compensation in exchange for purchase or sale of property to or for an investment company. The court approved a presumption used by the SEC: upon proof of the broker's conflict of interest, a presumption arose that he had violated § 80a-17(e)(1). 631 F.2d at 1385. Citing rule 301, the court held that this presumption shifted to the broker *only* the burden of production: "the ultimate burden of proof remains on the Enforcement Division to prove each element of the alleged violation by a preponderance of the evidence." *Id.* at 1385 n.7. The court refused to shift the burden of persuasion to best effectuate "the statutory policy of preventing conflicts of interest." *Id.* at 1385.

<sup>76</sup> See *supra* notes 45-52 and accompanying text.

<sup>77</sup> *United States v. Pomponio*, 635 F.2d 293, 297 (4th Cir. 1980) (declining to decide whether the presumption shifts both burdens or whether rule 301 prohibits shifting the burden of persuasion); *Osborn v. United States*, 81-1 U.S. Tax. Cas. (CCH) ¶ 9302 (W.D. Mo. 1981) (citing *Psaty v. United States*, 442 F.2d 1154 (3d Cir. 1971), but suggesting that rule 301 prevents the assessment from shifting the burden of persuasion).

Despite this tendency toward confusion and inconsistency, the policy test rests upon a solid premise: If Congress intended to have the opponent of a judicial or statutory presumption bear the burden of persuasion on a particular issue, rule 301 should not frustrate this intent. The strength of the policy test stems from its recognition that “[r]ule 301 does not forbid Morgan-type presumptions—it only imposes a preference for Thayer-type presumptions in the absence of legislative judgment to the contrary.”<sup>78</sup> The failings of the test stem not from its premise, but from its inherent inability to define and confine the expansive, nebulous concept of “legislative judgment.”

### B. *The Language-Consistency Test*

The application of the language-consistency test would necessarily derogate the policy test’s purpose of effectuating congressional intent. The language-consistency test requires an express provision in an act to activate the exception of “not otherwise provided for by Act of Congress.” Statutory presumptions alone, therefore, could fit within the exception, for common law presumptions would not involve an act of Congress. In short, the common law presumptions used by the federal courts could do no more than shift the burden of going forward.<sup>79</sup>

Limiting the rule 301 exception to statutory presumptions can be squared with the premise of the policy test only if the only significant congressional judgment on the proper allocation of the burden of persuasion appears in statutory language. This assumption is patently false in light of two realities of legislative drafting. First, Congress simply cannot resolve through the words of an act all of the issues that arise in connection with actions brought under it; enough time and paper simply do not exist. Second, many such issues, like the allocation of the burden of persuasion, are legal and technical in character and are unfamiliar concepts to many congressmen. Because of this unfamiliarity and

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<sup>78</sup> Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1160 n.162 (1980). In *Mitchum v. Foster*, 407 U.S. 225 (1972), the Supreme Court applied a policy test to resolve a question analogous to that presented by the meaning of “not otherwise provided for by an Act of Congress.” In *Mitchum*, the Court defined the parameters of the exception to the federal anti-injunction statute, which provided that a federal court “may not grant an injunction to stay proceedings in a State court *except as expressly authorized by Act of Congress.*” 28 U.S.C. § 2283 (1976) (emphasis added). The Court faced the issue of whether a “suit in equity” to redress “the deprivation of any rights privileges, or immunities secured by the Constitution,” 42 U.S.C. § 1983 (1976), fit this exception. In holding that a § 1983 equity suit did fit this exception, the Court probed the legislative history of § 1983, determined that § 1983 was a congressional attempt to remedy state courts’ failure to protect federal rights, and formulated the following “test”: “whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.” 407 U.S. at 238 (emphasis added). In this context, then, the Supreme Court has shown a willingness to go beyond statutory language in ascertaining “legislative judgment.”

<sup>79</sup> See, e.g., 10 J. MOORE & H. BENDIX, *supra* note 1, ¶ 301.02, at 14.

these inherent limitations of passing legislation, Congress often does not directly resolve the issue of the burden of persuasion through statutory language.<sup>80</sup> This failure to resolve expressly the issue of the burden of persuasion, however, does not mean that Congress has failed to provide guidance for its proper resolution.

Congressional guidance is often buried in the legislative history of an act. Indeed, this guidance may be such that to ignore it may lead a court, while true to the words of the act, to frustrate its purpose. The cases arising under the Carmack Amendment to the Interstate Commerce Act<sup>81</sup> illustrate the significant role of legislative history in allocating the burden of persuasion and, more specifically, in allocating the burden through a presumption.

The language of the Carmack Amendment does not expressly address the burden of proof on the issue of a carrier's negligence.<sup>82</sup> Federal courts, however, have developed a common law presumption of a carrier's negligence,<sup>83</sup> and a court that fails to place the burden of proof on the carrier would be acting against congressional wishes. As the Sixth Circuit noted in finding rule 301 inapplicable: "For well articulated reasons Congress chose to place the burden of proof on a carrier in whose hands goods are damaged rather than on the shipper."<sup>84</sup> The primary basis for this presumption, the court noted, was the carrier's superior access to the evidence bearing on the issue of its negligence.<sup>85</sup>

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<sup>80</sup> See Cleary, *supra* note 14, at 9 ("Unfortunately, the statute which states in so many words the procedural effect of its terms is a rarity.")

<sup>81</sup> 49 U.S.C. § 20(11).

<sup>82</sup> *Id.*

<sup>83</sup> A presumption of the carrier's negligence arises once the shipper establishes delivery of his goods to the carrier in good condition and the return of his goods in damaged condition. See, e.g., *Plough, Inc. v. Mason & Dixon Lines*, 630 F.2d 468, 470-71 (6th Cir. 1980).

Federal courts are confused over whether a carrier's negligence should even be treated as an element of the shipper's claim, and thus be subject to presumption analysis at all. Indeed, the word "negligence" does not appear in the Carmack amendment. 49 U.S.C. § 20(11); see also *Secretary of Agriculture v. United States*, 350 U.S. 162, 165 n.9 (1956) (§ 20(11) is a codification of the common law rule that the shipper need not show the carrier negligent, but the carrier has defense of lack of negligence); *United States v. Central of Ga. Ry.*, 411 F. Supp. 1023, 1027 (E.D. Tenn. 1976) ("Negligence need not be proved in actions brought under 49 U.S.C. § 20(11).")

<sup>84</sup> *Plough, Inc. v. Mason & Dixon Lines*, 630 F.2d 468, 472 (6th Cir. 1980) (footnote omitted).

<sup>85</sup> *Id.* at 472 n.1. The court described the presumption as "a rule akin to *res ipsa loquitur*," without which the shipper would "often have an intolerable task to prove negligence." *Id.* Like the Sixth Circuit in *Plough, Inc.*, the courts in two recent bankruptcy cases have recognized the necessity of examining legislative history before determining whether rule 301 applies. The statutory presumption involved in these cases was the presumption of insolvency: "the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition." 11 U.S.C. § 547(f). In both cases the courts ruled that the legislative history of § 547(f) required, in accordance with rule 301, that the burden of persuasion *not* shift to the debtor. *In re Briarbrook Dev. Corp.*, 11 Bankr. 515, 519 (W.D. Mo. 1981); *In re Eichorn*, 11 Bankr. 81, 83 (D. Mass. 1981).

The language-consistency test would require courts to overlook significant congressional judgments simply because they were not expressly stated in statutory language; it would also expand rule 301's scope to a much greater breadth than the rule's own history warrants. The test would require that common law presumptions no longer shift the burden of persuasion as well as the burden of production.<sup>86</sup> Consequently, the test would significantly change adjudicative procedure established well before Congress passed the Federal Rules of Evidence.<sup>87</sup>

This history of rule 301 does not justify such an effect on established adjudicative procedure.<sup>88</sup> Indeed, the legislative history of rule 301 is a study in confusion and ineptitude.<sup>89</sup> Congress clearly did not understand accepted presumption theory and did not fully comprehend the problems involved.<sup>90</sup> Furthermore, despite the admonitions of the Advi-

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<sup>86</sup> See *supra* note 79 and accompanying text.

<sup>87</sup> For example, in refusal to bargain cases arising under the NLRA, the Board, not the employer, would bear the burden of persuasion on union majority status if rule 301 were applied. Long before the Federal Rules of Evidence were enacted, the NLRB and the courts gave the presumption of a union's continued majority support a reformist effect, thus placing the burden of persuasion on the employer. See, e.g., *Terrel Mach. Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970). Cases decided subsequent to rule 301 have continued this practice. See *supra* notes 32-44 and accompanying text.

Rule 301 would also change the tax-penalty cases by placing the burden of persuasion on the government, rather than on the taxpayer, to show responsibility and willfulness. This allocation of the burden of persuasion, although consistent with rule 301, is inconsistent with the allocation manifested in the cases predating the rules. See 10 J. MOORE & H. BENDIX, *supra* note 1, § 301.02; *supra* notes 48-51 and accompanying text.

<sup>88</sup> The rule proposed by the Advisory Committee, headed by Professor Edward Cleary, and submitted to the House by the Supreme Court, embodied the Morgan approach. See FED. R. EVID. 301 advisory committee note, *reprinted in* 10 J. MOORE & H. BENDIX, *supra* note 1, ¶ 301.01, at 6-10. The Advisory Committee flatly rejected the contention that its proposed Morgan rule would violate due process, and simply assumed that its rule fell within the confines of the enabling legislation. *Id.* Furthermore, the Committee criticized bursting bubble presumptions as too weak. *Id.*

The House, however, rejected this reformist proposal in favor of an intermediate rule: a presumption would not shift the burden of persuasion, but would always suffice to carry the presumptive issue to the jury. See 10 J. MOORE & H. BENDIX, *supra* note 1, ¶ 301.01, at 10-11. Unimpressed, the Senate rejected this intermediate rule because it felt that the rule treated presumptions as evidence, rather than merely as a means of dealing with evidence. See S. REP. NO. 1277, 93d Cong., 2d Sess. 9 (1974); see also *Hearings on Proposed Rules of Evidence Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 12 (1974) [hereinafter cited as *Senate Hearings*] (testimony of David Dennis, member of the House subcommittee that drafted the intermediate rule) (retreating from House rule, arguing that treating presumptions as evidence would be a "truly grievous error," and favoring bursting bubble rule); *id.* at 56-58 (prepared statement on behalf of the Judicial Conference of the United States, Committee on Rules of Practice and Procedure) (intermediate rule is "an invasion of judicial function"; recommending return to reformist, Morgan-type rule). The Senate then drafted, and the House accepted, what now stands as rule 301. See S. REP. NO. 1277, 93d Cong., 2d Sess. 9 (1974); H.R. REP. NO. 1597, 93d Cong., 2d Sess. 6 (1974), *reprinted in* 10 J. MOORE & H. BENDIX, *supra* note 1, § 301.01, at 12-13.

<sup>89</sup> See, e.g., Louisell, *supra* note 10, at 318-20.

<sup>90</sup> The clearest illustration of this appears in the reports of the House and Senate Conferences. Each report concludes that a presumption is merely permissive, that a jury "may," but

sory Committee,<sup>91</sup> Congress apparently abandoned the Supreme Court's proposed reformist rule primarily because of constitutional and statutory concerns, and not because of a belief that reformist presumptions yield inequitable results.<sup>92</sup> Finally, Congress was apparently unaware of the potential widespread and significant changes that their rule on presumptions could bring.<sup>93</sup> In light of this confusion and uncertainty, mechanical application of rule 301 would be nonsensical.

Despite the failings of the language-consistency test, it does have the unquestionable advantage of promoting the Federal Evidence Rules' primary goals of uniformity and certainty.<sup>94</sup> By requiring express statutory language to activate the exception of "not otherwise provided for by Act of Congress," all common law presumptions that the federal courts use would be given the rule 301 effect.<sup>95</sup> The only candidates for the exception, therefore, would be statutory presumptions. Moreover, the language-consistency test, if applied strictly to the statutory lan-

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need not, infer presumed facts from established basic facts. S. REP. NO. 1277, 93d Cong., 2d Sess. 9 (1974); H.R. REP. NO. 1597, 93d Cong., 2d Sess. 6 (1974). Of course, these reports are inconsistent with the most fundamental attribute of presumptions, that of conditional compulsion. See *supra* notes 8-9 and accompanying text; see also 1 D. LOUISELL & C. MUELLER, *supra* note 9, § 67, at 533 (Senate report language has been interpreted so as to confuse presumptions with inferences). This failure to recognize the most fundamental attribute of presumptions permeated the congressional hearings. See, e.g., *Senate Hearings, supra* note 88, at 48 (Senator Ervin in discussion with Professor Cleary) ("But this is just a presumption . . . the jury can disregard the presumption even in the absence of evidence.").

<sup>91</sup> See *supra* note 94.

<sup>92</sup> The position paper of the Association of Trial Lawyers of America reflects these statutory and constitutional concerns. *Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 130-34 (1973) [hereinafter cited as *House Hearings II*]. These concerns arose throughout the hearings. See, e.g., *House Hearings I, supra* note 5, at 221 (statement of New York Trial Lawyers' Committee on the Proposed Federal Rules of Evidence). The House essentially adopted the Association's proposed intermediate rule. Compare *supra* note 88 with *House Hearings II, supra* note 92, at 134. In light of this similarity between the House's proposal and the Association of Trial Lawyer's position, and considering the general prevalence of these statutory and constitutional concerns, it is reasonable to assume that these were the concerns that motivated the House's departure from the Supreme Court's Morgan-type rule. In short, the departure was motivated by factors other than a widely-held and articulated belief that the Supreme Court rule was unjust, confusing, or inefficient. But see 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, § 5121, at 543 ("Although it is quite clear that the opponents [of the Supreme Court's proposed rule] objected to Rule 301 on the merits as well, the basis for their objections is seldom articulated.").

<sup>93</sup> Congress rarely considered the actual effect that the rule would have. When it did, it appeared preoccupied with but one possible effect: would the rule apply in *res ipsa loquitur* cases? See *House Hearings I, supra* note 5, at 543 (testimony of Professor Cleary); see also *id.* at 295-96 (testimony of James F. Schaeffer of the American Trial Lawyer's Association). Congress did not consider the possible applicability of their rule to such long-established presumptions as that of a union's continued majority support or of the correctness of a tax assessment. See *supra* note 87 and accompanying text.

<sup>94</sup> See 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, at 583.

<sup>95</sup> See *supra* note 86 and accompanying text. This assumes, of course, that the common law presumption does not fit one of the other exceptions to rule 301. See *supra* notes 28-29 and accompanying text.

guage, would even further narrow the category of presumptions subject to the exception.<sup>96</sup>

#### IV

##### A PROPOSED TEST: A RECOGNITION, A MODIFICATION

Both the policy and language-consistency tests have advantages and disadvantages. The policy test, at least theoretically, would lead to an allocation of the burden of persuasion consistent with the congressional intent reflected in the legislative history of the particular act;<sup>97</sup> the cost, however, would be confusion and inconsistency.<sup>98</sup> The language-consistency test would promote greater certainty and uniformity,<sup>99</sup> but would force the federal courts to disregard significant congressional judgments not expressed explicitly in the statute.<sup>100</sup> A more appropriate test would maximize these advantages while minimizing their disadvantages. A three-pronged test accomplishes this goal.

1. *If the language of the act, when analyzed in its entirety, indicates that Congress intended to have the opponent of a statutory presumption bear the burden of persuasion on the presumptive issue, then the court should give the presumption a reformist effect.*

This prong of the test recognizes the language-consistency test when it is clearly applicable.<sup>101</sup> It legitimately allocates the burden of persuasion in accordance with the congressional intent expressed in the language of the act itself.

Courts should not interpret this prong of the proposed test so narrowly as to hold Congress to an unfamiliar form of expression; for Con-

<sup>96</sup> For example, if judges interpret the test to require a statute to use the language "burden of persuasion," as opposed to the ambiguous "burden of proof," they would effectively remove a substantial number of statutory presumptions from the class of candidates.

<sup>97</sup> See *supra* note 78 and accompanying text.

<sup>98</sup> See *supra* notes 66-77 and accompanying text.

<sup>99</sup> See *supra* notes 94-96 and accompanying text. Commentators appear to have simply assumed that only the language-consistency test is appropriate. See M. GRAHAM, *supra* note 9, § 301.1, at 40 ("Rule 301 applies in civil actions and proceedings where federal law provides the rule of decision with the exception of those statutory presumptions as to which Congress has specifically provided that the presumption shall have some other effect.") (emphasis added); 10 J. MOORE & H. BENDIX, *supra* note 1, § 301.02, at 14. *But cf.* P. ROTHSTEIN, *RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES* 55 (2d ed. 1979) ("Query also, is the exception for contrary Congressional Acts meant to apply only where an effect contrary to the rule is expressly prescribed by Congress, or will a former judicial gloss do the trick?") (emphasis added). Indeed, this appears to have been the assumption of the American Trial Lawyer's Association. See *House Hearings II*, *supra* note 92, at 133 ("Rule 301 applies with equal force to all presumptions not expressly excepted from its operation . . .") (emphasis added). Only Professors Wright and Graham have considered at length the criteria for determining when a presumption is "otherwise provided for." See 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, § 5123, at 579-83; *id.* § 5123, at 124-5 (Supp. 1982).

<sup>100</sup> See *supra* notes 79-85 and accompanying text.

<sup>101</sup> See *supra* notes 53-65 and accompanying text.

gress "to otherwise provide" for a reformist presumption, an act need not speak in terms of basic facts, presumed facts, and the burden of persuasion. Insistence upon technical niceties would be an unrealistic view of legislative drafting.<sup>102</sup> Instead, courts should accord the statutory words of Congress their most reasonable import.<sup>103</sup> This first prong, therefore, requires statutory language to justify departure from rule 301's traditional approach.<sup>104</sup>

2. *If the traditional considerations that would justify allocating to the opponent the burden of persuasion on the presumptive issue clearly guided Congress when it considered and drafted the act, then the court should give the presumption a Morgan effect.*

This prong of the test is a modification of the "policy" test.<sup>105</sup> It rests upon a similar premise: if an act's legislative history would support an allocation of the persuasion burden to the opponent without a presumption, rule 301 should not preclude the courts from allocating the burden in the same way through a presumption.<sup>106</sup>

<sup>102</sup> See *supra* note 80 and accompanying text.

<sup>103</sup> The use of "reasonable" here does not make this a "reasonableness test." This prong of the test involves a determination of whether Congress actually intended by the Act's language to have the burden of persuasion shift, not whether one can reasonably argue that Congress so intended. Therefore, if one could reasonably interpret statutory language to require the burden to shift, but the most reasonable interpretation of the language required the burden to remain on the proponent of the presumption, then the burden must remain on the proponent in accordance with rule 301.

<sup>104</sup> Thus the statutory presumptions concerning patent validity, see *supra* notes 53-59 and accompanying text, and of Indian title to land, see *supra* notes 63-65 and accompanying text, would pass this test. The statutory presumptions used in black lung benefits proceedings, see *supra* notes 62-64 and accompanying text, because they are silent on the burden of proof, would not.

<sup>105</sup> See *supra* notes 32-52 and accompanying text.

<sup>106</sup> This premise is consistent with the common sense notion that allocating the burden of persuasion through a presumption is effectively the same as allocating the burden in the first instance; they are but different routes to the same destination. See MCCORMICK, *supra* note 18, § 344, at 819 (e.g., a presumption shifting the burden of persuasion on negligence is effectively and logically the same as making lack of negligence an affirmative defense); Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and A Proposal for Reform*, 76 NW. U.L. REV. 892, 901 (1982). If Congress manifested concerns that would justify a court in allocating to a presumption opponent the burden on the presumptive issue in the first instance, it would be self-defeating to forbid the court from reaching the same result simply because it used a presumption as its means.

Of course, a court could conceivably allocate the burden to the opponent in the first instance simply by exercising its inherent power to create "assumptions," and thereby avoid any problems posed by presumptions and rule 301. See *supra* note 27; see also Cleary, *supra* note 14, at 21-22 (proposed method of placing the burden directly at the pleading stage).

The premise of this prong of the test should not be lumped under the name of "congressional intent." Indeed, in those situations in which Congress has not specified in statutory language the procedural effect of a presumption, one can rarely argue that Congress intended, in the sense of conscious consideration and choice, to have the presumption manifest one procedural effect rather than another. *But see In re Briarbrook Dev. Corp.*, 11 Bankr. 515, 519 n.7 (W.D. Mo. 1981) ("According to the relevant legislative history, the presumption of insolvency in [11 U.S.C. § 547(e)(4)] 'is as defined in Rule 301 of the Federal Rules of Evi-

This prong would require federal judges to weigh those considerations that they have traditionally considered when allocating the burden of persuasion in the first instance: probability, relative access to evidence, and social policy.<sup>107</sup> Because the test is to determine whether an act, as the manifestation of congressional judgment,<sup>108</sup> provides for a Morgan presumption, the courts should consider only those factors that actually guided Congress during its promulgation of the act. Conversely, they should ignore those factors that appear to apply under a particular statutory scheme, but that Congress did not in fact consider.<sup>109</sup>

This prong of the proposed test can be applied as a disjunctive series of three conditions, each condition corresponding to a traditional factor. If Congress clearly expressed in the legislative history (1) its belief that the opponent's rebuttal of the presumptive issue would be improbable,<sup>110</sup> or (2) its belief that the opponent had superior access to the evidence relevant to the presumptive issue,<sup>111</sup> or (3) its desire to disfavor the opponent for policy reasons on the presumptive issue,<sup>112</sup> then the court should give the presumption a reformist effect.

The fundamental difference between this prong of the proposed test and the policy test is a functional one<sup>113</sup> of providing the courts with

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dence.'"). Because of their legal and technical nature, presumptions and their various procedural effects are rarely the focus of overt congressional consideration. The premise of this prong of the test, therefore, should not be interpreted to require that the legislative history of the particular act indicate that Congress consciously chose a reformist over a Thayer effect. Rather, it requires that the legislative history of the act clearly indicate that had Congress considered the various procedural effects of presumptions, it would have probably chosen a Morgan effect.

<sup>107</sup> See *supra* notes 13-21 and accompanying text.

<sup>108</sup> See *supra* notes 80-85 and accompanying text.

<sup>109</sup> Thus the second prong of the test proposed in *Pennsylvania Dep't of Transp. v. United States*, 643 F.2d 758, 763 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 826 (1981), whether the legislative history "implicitly requires" shifting the persuasion burden, is legitimate. See *supra* note 31. The third prong of the proposed test, however, improperly looks to considerations that Congress did not consider by examining the court's own view of who has better access to the evidence. See *supra* note 31.

<sup>110</sup> See *supra* notes 20-21 and accompanying text.

<sup>111</sup> See *supra* notes 19, 21 and accompanying text.

<sup>112</sup> See *supra* notes 18, 21 and accompanying text.

<sup>113</sup> On the other hand, the theoretical rationales of the two tests are similar. Indeed, so-called congressional policies often grow out of, or are based upon, the three conditions. See *supra* notes 110-12. For example, in *Psaty v. United States* the court allocated the burden of persuasion through a presumption to the taxpayer because, among other reasons, the taxpayer had better access to relevant facts. 442 F.2d 1154, 1160 (3d Cir. 1971); see also *supra* note 111 and accompanying text. And in *NLRB v. Tahoe Nugget, Inc.*, the Ninth Circuit disfavored the employer's contention that the union had lost majority support for policy reasons, and placed the burden of persuasion on the employer. 584 F.2d 293, 301-02 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); see also *supra* note 112 and accompanying text. Thus, if Congress, in the course of drafting the relevant legislation, had clearly expressed its belief that the taxpayer had better access to evidence relevant to a § 6672 penalty action, and that the employer's denial of an incumbent union's majority support should be disfavored in unfair

different starting points. The policy test requires courts to start with an identification of general statutory policies or goals, and to shift the burden of persuasion through a presumption if such a shift would better effectuate them. The second prong of the proposed test, on the other hand, would require courts to first identify specific instances in the legislative history when Congress addressed one of the three specific factors, and then to shift the persuasion burden only if Congress clearly expressed a desire in its discussion to effectuate the factor.

This functional difference should ensure a more acceptable measure of consistency and certainty than the policy test.<sup>114</sup> By its terms, this prong of the test requires a *clear* expression of affirmative congressional belief or desire,<sup>115</sup> without which the act cannot be said to “otherwise

labor practice hearings, the policy test and the second prong of the proposed test would yield the same result for essentially the same reasons.

<sup>114</sup> Of course, this second prong would not ensure a measure of certainty comparable to that ensured by the first prong. Congressional belief and desire, like congressional intent, are inherently ambiguous concepts. Indeed, trying to give these concepts meaning for a specific act inevitably raises a host of difficult questions. How can Congress, a collection of many individuals, have one belief? And, assuming that Congress can have one belief, where would Congress express it? In recorded debates? Position papers? Committee reports? The inherent ambiguity of these concepts renders their application difficult, increases the chances of reasonable disagreement, and consequently makes the application of any test based on them prone to uncertainty. For a concise discussion of the dangers in searching for congressional intent or belief in legislative materials, and of the relative strengths and weaknesses of the different materials, see Wasby, *Legislative Materials as an Aid to Statutory Interpretations: A Caveat*, 12 J. PUB. LAW. 262 (1963).

<sup>115</sup> To be “clear,” the expression must reasonably represent an official congressional statement. Thus, a statement of a Congressman in debate or a witness in a hearing would not constitute a “clear” expression, while the same statement made in official congressional legislative commentary would suffice. See Wasby, *supra* note 114, at 265 (“[T]he report of the committee has . . . a higher quality than debates on the floor of the House. The representations of the latter may indeed be ascribed to the exaggerations of advocacy or opposition.”) (quoting with approval *United States v. Caminetti*, 242 U.S. 470, 499 (1917) (McKenna, J., dissenting)). See generally Wasby, *supra* note 114, at 270-71 (advantages and disadvantages of using committee reports in interpreting legislation).

Furthermore, to be “clear,” a statement of belief or desire must bear directly on the relevant proposition. For example, an official statement that employers should be discouraged from refusing to bargain with an incumbent union on the grounds of union nonmajority is “clear,” while an official statement that the goal of the NLRA is industrial stability is not. This requirement of clarity should reduce the number of expressions activating this second prong and, consequently, should promote greater adherence to rule 301.

Of course, the “clarity” of a congressional expression is itself often disputed. Two recent labor cases in the Tenth Circuit involved such a dispute. Both of these cases involved the application of the presumption of the propriety of a bargaining unit to bargaining units in health care facilities. In both cases, the Tenth Circuit held that this presumption could not shift even the burden of production, on the issue of the impropriety of a *restricted* bargaining unit, to the employer. *Beth Israel Hosp. & Geriatric Center v. NLRB*, 677 F.2d 1343, 1345-47 (10th Cir. 1981); *Presbyterian/St. Luke's Medical Center v. NLRB*, 653 F.2d 450, 457 (10th Cir. 1981), *appeal pending*, 455 U.S. 987 (1982). The court based its holdings upon the language of the congressional committee reports accompanying the 1974 amendments to the National Labor Relations Act: “Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry.” *Beth Israel Hosp. & Geriatric Center*, 677 F.2d at 1345 (quoting House, Senate and Senate Conference reports). Consistent

provide." The number of such expressions are likely to be few, and therefore this prong of the test will probably be rarely activated.<sup>116</sup>

Although the nature of the three factors would limit the effect of this second prong, it would not completely destroy the effect. These factors often underlie statutory policies or goals.<sup>117</sup> For example, the policy of reducing the evidentiary burden of shippers in their suits against carriers is based upon the carriers' superior access to evidence pertaining to the damages suffered by the shippers' goods.<sup>118</sup> In its statement of this policy, Congress may have expressed its belief that carriers have superior access to pertinent evidence, and thus have provided the necessary clear affirmative belief. In any case, the Carmack-amendment presumption would probably be valid under the third prong.

3. *If, before the passage of the Federal Rules of Evidence, Congress had acquiesced in the courts' settled practice of allowing the presumption to shift the burden of persuasion, then the court should give the presumption a Morgan effect.*

This prong of the test is an addition to the tests implicit in the case law.<sup>119</sup> The prong's legitimacy stems from the importance of congressional inaction toward settled practices. By not passing remedial legislation to alter court-created reformist presumptions, Congress implicitly stamped the practice with its approval. Consequently, by the effective date of the Federal Rules, the reformist presumptions had become part of the rights conferred by Congress through the act. The confused history of rule 301 does not reveal a congressional desire to change such

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with this congressional mandate, the Board must "consider the trend toward broader units." *Id.* If read strictly, the language of the congressional reports would not satisfy the "clarity" requirement: the reports do not directly express a congressional desire to favor either the proponent or opponent of the presumption. However, the reports can be read broadly to require the Board to favor the opponent of the presumption, the employer, over its proponent, the General Counsel.

<sup>116</sup> The rarity of application would be due to the infrequency with which Congress addresses the three specific factors directly and explicitly. Congressmen proposing, debating, and drafting an act rarely express opinions on whether the truth of a particular litigant's contention in an action under the proposed act would be improbable, whether the litigant would have superior access to evidence, or whether the litigant, for whatever reasons, should be disadvantaged in litigating the issue. When the members of Congress fail to express such opinions, one cannot reasonably argue that Congress as a whole has the affirmative belief or desire needed to activate the second prong of the test.

<sup>117</sup> See *supra* note 113.

<sup>118</sup> See *supra* notes 81-85 and accompanying text.

<sup>119</sup> The Ninth Circuit and a commentator have implied that this is a valid prong. See *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 297 (9th Cir. 1978) (refusing to apply rule 301 to the presumption of an incumbent union's majority support because "courts . . . approved the presumption's use and force . . . both before and after the adoption of the Federal Rules of Evidence"), *cert. denied*, 442 U.S. 921 (1979); P. ROTHSTEIN, *supra* note 99, at 55. *But see* 10 J. MOORE & H. BENDIX, *supra* note 1, § 301.03(2), at 18 (rule 301 applicable to common law presumptions that previously shifted the burden of persuasion); 21 C. WRIGHT & K. GRAHAM, JR., *supra* note 21, § 5123, at 583 (rule 301 applicable to statutory presumptions interpreted before the Federal Rules as stronger than Thayer presumptions).

settled procedural rights.<sup>120</sup>

Of course, this does not mean that the courts should give a reformist effect to every presumption given that effect before the passage of Federal Rules. Indeed, congressional inaction is significant only if it indicates that Congress actually acquiesced in the reformist practice. Acquiescence in turn connotes awareness: Congress cannot approve of a practice of which it is not aware. Thus, to qualify under this prong of the test, the reformist practice in question should have been widespread among the federal courts, of substantial duration, and well settled. If the practice was followed in only a few circuits, or if it had emerged recently before the Federal Rules, it probably would not qualify.<sup>121</sup> Finally, the nature of the presumption itself will also bear upon the issue of congressional awareness. If the presumption is merely tactical,<sup>122</sup> imputing congressional awareness again becomes more difficult; conversely, if the presumption affects a substantive element of a case, its effect in litigation would have been more dramatic and the imputation of awareness becomes more reasonable.

#### CONCLUSION

The federal courts should articulate clear guidelines for determining when an act of Congress provides for a presumption stronger than rule 301's traditional "bursting bubble" effect. These guidelines should enhance the Federal Rules' goals of uniformity and certainty. They should not, however, dogmatically subordinate the congressional judgment reflected in congressional acts to these goals through an unduly strict reading of rule 301.

*Martin McHenry*

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<sup>120</sup> See *supra* notes 86-93 and accompanying text.

<sup>121</sup> The long established presumptions of a union's majority status and of the correctness of a tax assessment satisfy this prong of the test. See *supra* notes 89-93 and accompanying text.

<sup>122</sup> A tactical presumption does not cover an element of a claim or defense. MCCORMICK, *supra* note 18, § 347, at 833; Cleary, *supra* note 14, at 25-26.