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## Title VII and Rule 301: An Analysis of the Watson and Atonio Decisions

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Repeal: Title VII, Rule 301, and Atonio

**TITLE VII AND RULE 301:  
AN ANALYSIS OF THE WATSON AND  
ATONIO DECISIONS**

by

HUGH JOSEPH BEARD, JR.\*

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## I. THESIS

The thesis of this paper is that the recent opinions of the Supreme Court in *Watson v. Fort Worth Bank & Trust*<sup>1</sup> and *Wards Cove Packing Co v. Atonio*<sup>2</sup> are consistent with development of the last fifteen years of antidiscrimination jurisprudence under Title VII of the Civil Rights

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<sup>1</sup> 108 S. Ct. 2777 (1988) (O'Connor, J., joined by Rehnquist, C.J., and White and Scalia, JJ.). See also *id.* at 2791 (Blackmun, Brennan, and Marshall, JJ., concurring in part and concurring in the judgment); *id.* at 2797 (Stevens, J., concurring). Justice Kennedy did not participate. *Id.* at 2791.

<sup>2</sup> 109 S. Ct. 2115 (1989). See also *id.* at 2127 (Stevens, Brennan, Marshall, and Blackmun, JJ., dissenting); *id.* at 2136 (Blackmun, Brennan, and Marshall, JJ., dissenting).

Act of 1964<sup>3</sup> and are the logical and necessary result of two independent decisions made by the Congress and by the Supreme Court in 1975: the enactment of Rule 301 of the Federal Rules of Evidence<sup>4</sup> and the decision in *Albemarle Paper Co. v. Moody*.<sup>5</sup> This paper shall demonstrate that these holdings were logically consistent with previous decisions of the Supreme Court, though not with those of several lower courts; that they reflect the will of Congress as found in its statutory enactment of the Federal Rules of Evidence and thus conform Title VII litigation to the general rules of decision governing all other kinds of civil litigation,<sup>6</sup> and that they effectuate the remedial purpose of Title VII by tending to merge and simplify the two judicially created “causes of action” — disparate impact and disparate treatment — and their attendant lore into one uncomplicated claim for relief.<sup>7</sup> This operative effect of Rule 301 is not particularly controversial as regards disparate treatment cases: it was discussed in detail by the Supreme Court in an unanimous decision in *Texas Department of Community Affairs v. Burdine*.<sup>8</sup> The uncertainty of its logical and lawful effect in disparate impact cases makes this paper pertinent.

It is a necessary corollary to the thesis of this paper — and a means perhaps by which the validity of its analysis may be evaluated — that

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<sup>3</sup> 42 U.S.C. § 2000e-2000e-17 (1982) [hereinafter Title VII].

<sup>4</sup> Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

<sup>5</sup> 422 U.S. 405 (1975).

<sup>6</sup> *Yellow Freight System, Inc. v. Donnelly*, 110 S. Ct. 1566 (1990); *Martin v. Wilks*, 109 S. Ct. 2180 (1989); *Atonio*, 109 S. Ct. at 2118 (“usual method for allocating persuasion and production burdens in the federal courts”); *id.* at 2133 (Stevens, J., dissenting) (“Ordinary principles of fairness require that Title VII actions be tried like ‘any lawsuit’”); *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1792 (1989) (Brennan, J.) (“Conventional rules of civil litigation generally apply to Title VII cases”); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 718 (1983); *United States v. Paradise*, 480 U.S. 149, 191 (1987) (Stevens, J., concurring) (“The notion that this Court should craft special and narrow rules for reviewing judicial decrees in racial discrimination suits was soundly rejected in *Swann*.”) *Cf. Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971) (“[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right.”); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 457 n.6 (1979) (rejecting “suggestion that this Court should play a special oversight role in reviewing the factual determinations of the lower courts in school desegregation cases”); *Rizzo v. Goode*, 423 U.S. 362, 378 (1976); *Hills v. Gautreaux*, 425 U.S. 284, 294 n.11 (1976) (“a controlling principle governing the permissible scope of federal judicial power, a principle not limited to a school desegregation context”); *General Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 399 (1982). *Cf.* 110 Cong. Rec. 7214 (1964) (Interpretive Mem. submitted by Sen. Clark and Sen. Clifford) [hereinafter Case Clark Interpretive Mem.] (“[T]he plaintiff, as in any civil case, would have the burden of proving that discrimination had occurred.”) *But see Terrell, Employment Discrimination: The Defendant’s Burden*, 29 Loy. L. Rev. 287, 303 (1983).

<sup>7</sup> *Cf. NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1335-36 (3d Cir. 1981) (en banc).

<sup>8</sup> 450 U.S. 248 (1981).

the decisions made by the Congress and the Supreme Court in 1975 must necessarily lead to an allocation and order of proof in disparate impact cases virtually identical to that under *Burdine* and *McDonnell Douglas Corp. v. Green*,<sup>9</sup> and that should have resulted — or should result — in a convergence between disparate impact and disparate treatment.<sup>10</sup>

The “disparate impact” cause of action is the result of the decision of the Supreme Court in *Griggs v. Duke Power Co.*<sup>11</sup> The Court’s decision in *Griggs* can be analyzed in two ways, both derived from the language in opinions of the United States Supreme Court interpreting Title VII and both plausibly explaining the language and arguably promoting the goals of Title VII. *Griggs* can be viewed as recognizing a claim for relief based solely on statistics and numbers, to which the employer’s showing of business necessity is an affirmative defense,<sup>12</sup> or *Griggs* can be viewed

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<sup>9</sup> 411 U.S. 792 (1973). See *Atonio*, 109 S. Ct. at 2126 (disparate impact should conform to *Burdine*); cf. Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C.L. REV. 419, 423 (1982); Terrell, *supra* note 6, at 305; Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376, 419-22 (1981) [hereinafter Note, *Judicial Dualism*].

<sup>10</sup> In interpreting the law since 1965, the Supreme Court and other federal tribunals have primarily utilized two methods of analysis in determining whether an employment decision was forbidden by Title VII — disparate treatment and disparate impact. Disparate treatment focuses on the employer’s motivation for the employment decision, and openly seeks to discover whether the decision was intended to discriminate. It looks to a difference in treatment between individuals of different groups.

Disparate impact, on the other hand, focuses on the effects of the employment decision. It looks to an identical treatment of individuals of different groups that nevertheless has a very different impact — and a negative impact — on individuals of a particular group. This different impact is shown by numbers, by statistical differences between the representation of specific groups within an employer’s workforce. Initially (at least), it entirely disregards whether this imbalance was the result of any intent to treat members of different groups unequally. Where this imbalance is shown to exist, the employer is called on to explain the relationship between the employment selection practice which produced this imbalance and the operation of his business. See B.L. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1286-87 (2d ed. 1983) [hereinafter Schlei & Grossman].

<sup>11</sup> 401 U.S. 424 (1971). But see Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1211-12 (1981).

<sup>12</sup> *Atonio*, 109 S. Ct. at 2130-31 (Stevens, J., dissenting); see *infra* text accompanying notes 150-81; Belton, *supra* note 11, at 1235-36; Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843, 849-50 (1981) [hereinafter Allen, *Presumptions*]; Cox, *The Future of the Disparate Impact Theory of Employment Discrimination After Watson v. Fort Worth Bank*, 1988 B.Y.U.L. REV. 753, 754-55; Gold, *Griggs’ Folly: An Essay on the Theory, Problems, and Origins of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 451-53 (1985) [hereinafter *Griggs’ Folly*]; Comment, *The Business Necessity Defense to Disparate Impact Liability under Title VII*, 46 U. CHI. L. REV. 911, 921-25 (1979) [hereinafter Comment, *Business Necessity Defense*].

Indeed, Professor Belton suggests that the disparate treatment theory of liability based on proof of intentional discrimination was a “[p]rocrustean attempt to distinguish *Griggs* and at the same time enunciate a new theory . . . since some claims of discrimination now must be analyzed from the standpoint of intent.” Belton, *supra* note 11, at 1228-31 (emphasis added). See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 390-91 (1977) (Marshall, J., dissenting); Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 SAN DIEGO L. REV. 63, 73-84 (1988). But see *Teamsters*, 431 U.S. at 335 n.15 (Intentional discrimination is the “most

as recognizing an evidentiary order of proof in which statistics establish a prima facie case — a rebuttable presumption.<sup>13</sup> This latter view was for many years generally rejected in practice by many commentators and lower courts, to whom it was matter of faith that *Griggs* created a claim based on disparate impact separate and independent from any claim of intentional discrimination.<sup>14</sup> This position was also adopted by the four federal agencies responsible for the enforcement of Title VII in the Uniform Guidelines on Employee Selection Procedures.<sup>15</sup> This was largely unchallenged for thirteen years.<sup>16</sup>

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obvious evil that Congress had in mind when it enacted Title VII.”); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964); *id.* at 291-92 (Goldberg, J., concurring). *Cf. Atonio*, 109 S. Ct. at 2129 (Stevens, J., dissenting) (“The *Griggs* framework . . . proved inapposite for analyzing an individual employee’s claim . . . that an employer intentionally discriminated on account of race.”)

<sup>13</sup> The term “prima facie case” was not used in the *Griggs* opinion. Zuck, *Shifting Burdens of Proof under Disparate Impact Analysis: Conflict and Problems of Characterization*, 27 DUQ. L. REV. 535, 539 n.15 (1989).

<sup>14</sup> See Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1019-21, 1025 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1974); *Vulcan Society of New York City Fire Department v. Civil Service Commission*, 490 F.2d 387, 393 (2d Cir. 1973); *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1015 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1980); *Burwell v. Eastern Air Lines*, 633 F.2d 361, 369-72 (4th Cir. 1980) (en banc); *id.* at 374 (Butzner, J., concurring); *id.* at 378, 380 (Murnaghan, J., concurring); *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 571-72 (4th Cir. 1985) (“affirmative defense”); *James v. Stockham Valves & Fitting Co.*, 559 F.2d 310, 337 (5th Cir. 1977); *Johnson v. Uncle Ben’s, Inc.*, 657 F.2d 750, 753 (5th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982); *Harless v. Duck*, 619 F.2d 611 (6th Cir. 1980), *cert. denied*, 449 U.S. 872 (1980); *Kent County Sherrif’s Ass’n. v. County of Kent*, 826 F.2d 1485, 1492 (6th Cir. 1987); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1321 (7th Cir. 1974); *United States v. Town of Cicero*, 786 F.2d 331, 333 (7th Cir. 1986); *Griffin v. Board of Regents*, 795 F.2d 1281 (7th Cir. 1986); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1299 (8th Cir. 1978), *cert. denied*, 459 U.S. 844 (1978); *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir. 1983); *EEOC v. Rath Packing Co.*, 787 F.2d 321 (8th Cir. 1986); *cert. denied*, 479 U.S. 910 (1986); *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1276-80 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1981); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 481 (9th Cir. 1983); *Williams v. Colorado Springs, Colorado, School District*, 641 F.2d 835, 840-42 (10th Cir. 1981); *Thomas v. Metroflight, Inc.*, 814 F.2d 1506, 1509 (10th Cir. 1987); *Nash v. Consolidated City of Jacksonville*, 837 F.2d 1534, 1536-37 (11th Cir. 1988); *Walker v. Jefferson County Home*, 726 F.2d 1554, 1558 (11th Cir. 1984); *Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984); *id.* at 1297 (Edwards, J., concurring) (“affirmative defense”), *Cert. Denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985). See also Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1312 (1987).

<sup>15</sup> § 3A of the Uniform Guidelines on Employee Selection Procedures provides:

§ 3A. *Procedure having adverse impact constitutes discrimination unless justified.* The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

43 Fed. Reg. 38290, 38297 (1978) (codified at 29 C.F.R. § 1607 (EEOC); 5 C.F.R. § 380.103(c) (OPM); 28 C.F.R. § 50.14 (Department of Justice); and 41 C.F.R. § 60-3 (Department of Labor)) [hereinafter Uniform Guidelines]. See *Atonio*, 109 S. Ct. at 2130 n.14 (Stevens, J., dissenting) (citing Uniform Guidelines). *Cf.* 29 C.F.R. § 1602 (EEOC Record Keeping).

<sup>16</sup> See *United States v. City of Chicago*, 411 F. Supp. 218, 231-33 (N.D. Ill. 1976). *But see* NAACP v. Medical Center Inc., 657 F.2d 1322, 1334-35 (3d Cir. 1981) (en banc) (Title VI case adopting and describing Title VII burden of proof); *Croker v. Boeing Co.*, 662 F.2d 975, 991 (3d Cir. 1981) (en banc);

This understanding of *Griggs* and disparate impact was thrown into utter confusion by Justice O'Connor's plurality opinion in *Watson v. Fort Worth Bank and Trust*,<sup>17</sup> a confusion intensified to enraged dismay by *Wards Cove Packing Co. v. Atonio*. This analysis explains that these decisions do nothing more than recognize the logical implication of two events long accepted as properly enunciating governing principles for civil rights and other civil litigation: the enactment of Rule 301 and the decision in *Albemarle* characterizing the showing of disparate impact as a *prima facie* case.

In *Albemarle*, the Court found itself presented with the opportunity to determine the order and allocation of proof in a disparate impact case. At the time of the *Griggs*' decision, there had been no uniform rules of evidence governing litigation under federal statutes. The allocation and order of proof, including presumptions and shifting burdens, were subject to a multitude of *ad hoc* precedents, each flowing from the peculiarities of the substantive law.<sup>19</sup> *Griggs* could be read as suggesting an order of proof whereby a showing of disparate impact shifted the burden of persuasion to the defendant.<sup>20</sup> This clearly resembled the uniform allocation of proof in the Court's language proposed for Rule 301 in 1969.<sup>21</sup> However, the Federal Rules of Evidence, adopted on January 2, 1975, and effective on July 1, 1975, had provided that presumptions shifted only the burden of production and articulation, not persuasion.<sup>22</sup> Thus, the

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Dillon v. Coles, 746 F.2d 998, 1002 n.5 (3d Cir. 1984) (Title VII case); cf. Kirby v. Colony Furniture Co., 613 F.2d 696, 703 n.5 (8th Cir. 1980) ("The exact nature of this 'burden of proof' is unclear"); Belton, *supra* note 11, at 1243; Furnish, *supra* note 9, at 423-25.

<sup>17</sup> 108 S. Ct. 2777 (1988). See Scharf, *Litigating Personnel Measurement Policy*, 33 J. Voc. BEH. 235, 237-43 (1988).

<sup>18</sup> 109 S. Ct. 2115. See *An 18-Year Misunderstanding*, The Washington Post, June 9, 1989, at A26; *Coyle The Court Turns 180 Degrees*, N.Y. Times, June 12, 1989, at A18; *Repealing Title VII*, The Sun (Baltimore), June 12, 1989, at 10-A; *Court Rulings Erode Equal Opportunity*, USA TODAY, June 8, 1989, at 10-A. See also *The Court's Shift to Right*, N.Y. Times, June 7, 1989, at A-1; S.1261, 101st Cong., 1st Sess., 135 Cong. Rec. S7513 (daily ed. June 23, 1989); R.H. BORK, *THE TEMPTING OF AMERICA* 109 (1989); Comment, *Texas Department of Community Affairs v. Burdine: The Procedural Subversion of Griggs v. Duke Power Co.*, 17 N. ENG. L. REV. 999, 1018 (1982) [hereinafter *Procedural Subversion*].

<sup>19</sup> Professor Morgan, quoted in testimony with respect to Rule 301, listed five different ways by which a burden of proof shifted. The approach proposed by Professor Thayer and his own are at the opposite extremes. J.B. THAYER, *PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW*, 336 (1898) (reprinted by Augustus M. Kelley, 1969); E.M. MORGAN, *BASIC PROBLEMS OF EVIDENCE*, 34-36 (1961).

<sup>20</sup> Belton, *supra* note 11, at 1258.

<sup>21</sup> Rule 3-03, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 212-19 (1969) [hereinafter *Draft Rules of Evidence*]. See text *infra* at 117-19.

<sup>22</sup> Professor Belton provides useful definitions among the burdens of pleading and proof:

The burden of pleading imposes upon a party the obligation to notify his opponent and the court, in the appropriate manner, of the elements upon which he intends to rely either to sustain or to defeat liability. The policy behind the pleading burden is to provide notice to the courts and to the other party of the nature of a claim or defense upon which evidence will be presented to the court.

adoption of Rule 301 of the Federal Rules of Evidence limited the Court's options as to allocation of proof: it could characterize the showing of disparate impact as one of initial "threshold" liability to be met with an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure,<sup>23</sup> or as a *prima facie* case to be met with a rebuttal under Rule 301. The Court's decision in *Albemarle* on June 25, 1975, less than a week before Rule 301 was to go into effect, characterized the disparate impact case as merely "*prima facie*," and describing a three stage order of proof in disparate impact litigation<sup>24</sup> In choosing the latter alternative, the Court implicitly recognized that the newly adopted rules would govern the order of proof in Title VII.

This hypothesis may be verified because, if this analysis is valid, the Court's choice must necessarily result in an allocation and order of proof in disparate impact cases substantially the same as that in disparate treatment cases, specifically in the following four critical aspects of disparate impact litigation:

- A. The burden of proof on the defendant at the second stage is a burden of production and articulation, not of persuasion;
- B. The showing of disparate impact by the plaintiff at the first stage is not limited to disparities in selection rates caused by objective criteria but may be made using any method by which a procedure, objective or subjective, is shown to cause a significant statistical disparity between the workforce and the most relevant labor force from which it is drawn;
- C. The defendant must show in rebuttal at the second stage that the procedure reasonably advanced any specific non-discriminatory purpose of the employer; and

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The burden of producing evidence, or — as it is sometimes called — the burden of going forward with the evidence, is the obligation imposed upon a party during trial to present evidence on the element at issue. The evidence presented must be of sufficient substance to permit the fact finder to act upon it. This burden aids the court in determining whether, if the trial were halted at the conclusion of the party's presentation, the court would immediately decide the case itself or instead send it to the jury . . . .

The burden of persuasion refers to the risk of uncertainty about an element's resolution. When the parties are in dispute over a material element of a case, the party having the burden of persuasion on that element will lose if the fact finder's mind is in equipoise after he has considered all the relevant evidence. The degree of certainty required to determine whether the burden of persuasion has been met is subject to different standards; for example, some cases have relied upon the preponderance of the evidence test, while others have required a showing of clear and convincing evidence.

Belton, *supra* note 11, at 1216 (citations omitted). See THAYER, *supra* note 19, at 355-64.

<sup>23</sup> See *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2130-31 (Stevens, J., dissenting); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>24</sup> See, e.g., *Connecticut v. Teal*, 457 U.S. at 446-47 ("*Griggs* and its progeny have established a three-part analysis of disparate-impact claims. To establish a *prima facie* case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of

D. The plaintiff at the third stage must persuade the court that there was intentional discrimination by the defendant.

*Watson* and *Atonio* reflect the current extent to which the Court has met, or not yet met, these expectations. Nevertheless, the Court's slow but consistent convergence toward these expected results is evidenced by the cases in which the Court has from time to time discussed the order and allocation of proof;<sup>25</sup> *McDonnell Douglas, Albemarle, Board of Trustees of Keene State College v. Sweeney*,<sup>26</sup> *New York City Transit Authority v. Beazer*,<sup>27</sup> *Burdine, Connecticut v. Teal*,<sup>28</sup> *United States Postal Service Board of Governors v. Aikens*,<sup>29</sup> and *Price Waterhouse v. Hopkins*.<sup>30</sup> Interpreted in light of this thesis, these apparently unsystematized cases reflect a view of the law more logical and consistent than those working from different understandings have suggested.<sup>31</sup>

*Albemarle's* reduction of the emphasis on and significance of statistics in turn reduced the pressure toward quotas and race- and sex-conscious employment decisions. This outcome may have prompted the authors of *Albemarle*<sup>32</sup> and *Connecticut v. Teal*<sup>33</sup> and undoubtedly influenced the *Watson* four:

We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. See *Sheet Metal Workers v. EEOC*, 478 U.S. 421,

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discrimination. *Griggs, supra*, at 432, [91 S. Ct. at 854]. Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.”)

<sup>25</sup> There are relatively few such cases. *Furnish, supra* note 9, at 420 & n.12.

<sup>26</sup> 439 U.S. 24 (1978).

<sup>27</sup> 440 U.S. 568 (1979).

<sup>28</sup> 457 U.S. 440 (1982).

<sup>29</sup> 460 U.S. 711 (1983).

<sup>30</sup> 109 S. Ct. 1775 (1989) (Brennan, Marshall, Blackmun, and Stevens, JJ.) *See also id.* at 1795 (White, J., concurring); *id.* at 1796 (O'Connor, J., concurring); *id.* at 1806 (Kennedy, J., Rehnquist, C.J., and Scalia, J., dissenting).

<sup>31</sup> *See* Belton, *supra* note 11, at 1208-09; Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 U.C.L.A. L. REV. 305, 320 (1983); Zuck, *supra* note 13; Note, *Judicial Dualism, supra* note 9, at 400-19; Note, *Watson v. Fort Worth Bank and Trust: A Plurality's Proposal to Alter the Evidentiary Burdens in Title VII Disparate Impact Cases*, 67 N.C.L. REV. 725 (1989) [hereinafter Note, *Plurality's Proposal*].

<sup>32</sup> *See* Brief of Amicus Curiae the Chamber of the Commerce of the United States of America at 26, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (No. 74-389).

<sup>33</sup> *See* Brief of Amicus Curiae the AFL-CIO at 9, *Connecticut v. Teal*, 457 U.S. 440 (1982) (No. 80-2147) (“[p]rohibiting . . . discrimination, not mandating racial balance, is the object of disparate impact analysis”). *Cf.* Chamallas, *supra* note 31, at 313. The *Teal* Court's rejection of the “bottom-line” defense is similarly consistent with the avoidance of any encouragement of quotas. *See* Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 Tex. L.J. 31-32 (1977); Chamallas, *supra* note 31, at 313.



489 . . . (1986) (O'Connor, J., concurring in part and dissenting in part). It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.

\* \* \*

Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, see, e.g., *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 . . . (1986), and it has long been recognized that legal rules leaving any class of employers with "little choice" but to adopt such measures would be "far from the intent of Title VII." *Albemarle Paper Co.*, 422 U.S. at 449 . . . (Blackmun, J., concurring in judgment). Respondent and the United States are thus correct when they argue that extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today.<sup>34</sup>

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<sup>34</sup> *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2787-88. Cf. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2123 ("As noted above, a contrary ruling on this point would almost inexorably lead to the use of numerical quotas in the workplace, a result that Congress and this Court have rejected repeatedly in the past"); *Hopkins*, 109 S. Ct. at 1803 (O'Connor, J., concurring); *Albemarle*, 422 U.S. at 444 (Blackmun, J., dissenting). See also *Watson*, 108 S. Ct. at 2788 n.1; Brief of Amicus Curiae the United States at 23-25, *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988); Delahunty, *Perspectives on Within-Group Scoring*, 33 J. Voc. BEHAV. 463, 468-69 (1988); *Griggs' Folly*, *supra* note 12, at 457-63; Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis*, 59 NEB. L. REV. 345, 353-55 & n.43 (1980). But see Holdeman, *Watson v. Ft. Worth Bank and Trust: The Changing Face of Disparate Impact*, 66 DENVER L. REV. 179, 189 n.68 (1989) [hereinafter Holdeman, *Changing Face*]; Chamallas, *supra* note 31, at 308; Comment, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 103-06 (1974) [hereinafter *No-Alternative Approach*].

Professor Belton recognizes that *Griggs'* emphasis on statistics produces this result but argues that "[w]hile neither the laws that prohibit discrimination nor their legislative histories expressly provide for preferential treatment of protected class members, this concept is implicit in the enactment of laws prohibiting discrimination and provides greater justification for the [view] proposed by this Article." Belton, *supra* note 11, at 1286 (footnote omitted). See also Remarks of Eleanor Holmes Norton, Chairman of the Equal Employment Opportunity Commission, December 22, 1977, Commission meeting, D.L.B. (BNA) No. 43, at E-1 to E-4 (Mar. 3, 1978) (quoted in Lerner, *Employment*, 8

Indeed, the use of a presumption to encourage racial preferences would be of questionable constitutional validity.<sup>35</sup>

## II. *Griggs v. Duke Power Co.*

The view of *Griggs v. Duke Power Co.*<sup>36</sup> now championed by the dissents in *Atonio* contends that statistical imbalances establish a separate and independent cause of action under section 703(a)(2).<sup>37</sup>

The circumstances of *Griggs* is the classic case of bad facts and bad holdings below begetting highly ambiguous language on review. During the years before 1964, Duke Power Company and its unions had maintained an intentionally and quite invidiously segregated workforce. During this period, the Company instituted two new employment requirements for most of the better jobs — a high school diploma and general intelligence tests. These two factors effectively precluded any substantial black advancement during the years immediately following Title VII's 1965 effective date. When blacks challenged the process, the district court, basing its opinion on the Power Company's benevolently paternalistic attitude toward blacks, found no discriminatory intent.<sup>38</sup> The Fourth

*Discrimination: Adverse Impact, Validity, and Equality*, 1979 SUP. CT. REV. 17, 40 n.62, 43 n.75); Booth & Mackay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 EMORY L.J. 121, 125 & nn. 12, 14 (1980) [hereinafter Booth & Mackay]. Middleton, Michael A., *Challenging Discriminatory Guesswork: Does Impact Analysis Apply?* 42 OKLA. L. REV. 187 (1989); Jackson, *Bush Smiles, but So Far Hasn't Delivered*, Newsday, April 16, 1990, at 43.

Similarly, Professor John A. Hartigan and Ms. Alexandra K. Wigdor defend racial preferences on the grounds of "a skeptical assessment of the liberal values of equality, color-blind law, merit, and fair competition seen from the perspective of those who were barred from enjoying these things until the passage of the Civil Rights Act of 1964. . . . [N]ow the myth of equality provides a veneer for further oppression." FAIRNESS IN EMPLOYMENT TESTING 38 (J.A. Hartigan & A.K. Wigdor eds. 1989) [hereinafter FAIRNESS IN TESTING].

<sup>35</sup> "The power to create presumptions is not a means of escape from constitutional restrictions." *Bailey v. Alabama*, 219 U.S. 219, 239 (1911).

<sup>36</sup> 401 U.S. 424 (1971).

<sup>37</sup> The statutory basis for a disparate impact claim has been found in the different language of sections 703(a)(1) and 703(a)(2), and in the statute's purpose of protecting group rights. Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1982), provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

See *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144-45 (1977); Rigler, *Connecticut v. Teal: The Supreme Court's Law, Exposition of Disparate Analysis*, 59 NOTRE DAME L. REV. 313, 325-35 (1984); Welch, *Superficially Neutral Classifications: Extending Disparate Impact Theory to Individuals*, 63 N.C.L. REV. 849, 851-54 (1985). But see Rutherglen, *supra* note 14, at 1299-1302; Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U.L. REV. 799, 826-28 (1985); Welch, *supra*, at 856-60.

<sup>38</sup> *Griggs v. Duke Power Co.*, 401 U.S. at 428. See *Griggs' Folly*, *supra* note 12, at 467-71.

Circuit affirmed this finding.<sup>39</sup> The court was bound by those findings under its “two-court” rule<sup>40</sup> when it received the case for review. When *Griggs* was argued, the use of statistics to show discriminatory intent had not been discussed or approved by the Court.<sup>41</sup>

In *Griggs*, the court discussed the threshold showing necessary to establish liability:

Under the Act, practices, procedures, or tests neutral on their face, even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices. . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as “built-in headwinds” for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the [Title VII of the Civil Rights] Act to the *consequences* of employment practices, not simply the motivation.<sup>42</sup>

The Court then discussed the employer’s burden of proof:

Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.<sup>43</sup> . . . If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.<sup>44</sup>

<sup>39</sup> *Griggs*, 401 U.S. at 428-29. See *Griggs’ Folly*, *supra* note 12, at 471-77.

<sup>40</sup> Neil v. Biggers, 409 U.S. 188 (1972); Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949) (“A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error”); *cf.* FED. R. Civ. P. 52(a) “[F]indings of fact shall not be set aside unless clearly erroneous.”)

<sup>41</sup> See *International Bhd. of Teamsters v. United States*, 431 U.S. at 335 n.15; *Castaneda v. Partida*, 430 U.S. 482, 494-97 (1978); *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Alexander v. Louisiana*, 405 U.S. 625, 630-33 (1972). *But cf.* *Neal v. Delaware*, 103 U.S. 370, 397 (1881). Under such an evidentiary rule, the findings below might have been different. See *Griggs’ Folly*, *supra* note 12, at 596-97; *Furnish*, *supra* note 9, at 442-43; Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following Texas Department of Community Affairs v. Burdine*, 55 TEMP. L.Q. 372 n.3 (1982). A remand because the courts below had failed to consider this evidentiary test for discriminatory intent would not have conflicted with the two court rule, but this ground was not available under the questions presented on certiorari. Petition for Certiorari at 2, *Griggs*.

<sup>42</sup> *Griggs*, 401 U.S. at 430-32.

<sup>43</sup> *Id.* at 432.

<sup>44</sup> *Id.* at 431.

Finally, the Court discussed the nature of the employer's showing:

The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.<sup>45</sup>

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.<sup>46</sup>

*Griggs* did not discuss or even suggest the existence of a third stage. These passages plausibly can be construed to establish that a separate and independent claim for relief under Title VII is established by showing a significant statistical imbalance.<sup>47</sup> This claim is defeated only by a showing of business necessity, arguably an affirmative defense.<sup>48</sup> Events in 1975, however, changed this.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 436.

<sup>47</sup> *Cox, supra* note 12, at 757-59.

<sup>48</sup> *Cf. Griggs' Folly, supra* note 12, at 477-89. Justice Blackmun, concurring in *Watson v. Fort Worth Bank & Trust*, articulates this position:

The prima facie case of disparate impact established by a showing of a significant statistical disparity is notably different [from disparate treatment]. Unlike a claim of intentional discrimination, which the *McDonnell Douglas* factors establish only by inference, the disparate impact caused by an employment practice is directly established by the numerical disparity. Once an employment practice is shown to have discriminatory consequences, an employer can escape liability only if it persuades the court that the selection process producing the disparity has "a manifest relationship to the employment in question." Connecticut v. Teal, 457 U.S. 440, 446 (1982), quoting *Griggs v. Duke Power Co.*, 401 U.S. at 432. The plaintiff in such a case already has proved that the employment practice has an improper effect; it is up to the employer to prove that the discriminatory effect is justified.

*Watson*, 108 S. Ct. at 2794.

A disparate-impact claim . . . focuses on the *effect* of the employment practice. See *id.* at 336, n.15 (disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another"). Unless an employment practice producing the disparate effect is justified by "business necessity," *ibid.*, it violates Title VII, for "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups." *Griggs v. Duke Power Co.*, 401 U.S. at 432.

*Watson*, 108 S. Ct. at 2793.

Justice Stevens, dissenting in *Atonio*, at long last characterizes the employer's showing as an affirmative defense:

Decisions of this Court and other federal courts repeatedly have recognized that while the employer's burden in a disparate treatment case is simply one of coming forward

### III. MAJOR PREMISE: RULE 301

Rule 301 of the Federal Rules of Evidence describes the operational effect of presumptions. The term "presumption" is not defined by the rule, but, as commonly described, "is a rule of law that deals with the assumption — at least temporarily — of a certain factual situation based upon proof of other usually logically related facts." Absent contradicting evidence of some degree, the inference by the court is compelled.<sup>49</sup>

In March, 1965, Chief Justice Earl Warren appointed an Advisory Committee to formulate rules of evidence for the federal courts. By order entered on November 20, 1972, (Justice Douglas dissenting), the Supreme Court prescribed federal rules of evidence, including rules governing presumptions, to be effective July 1, 1973.<sup>50</sup> Pursuant to various enabling acts, Chief Justice Warren Earl Burger transmitted the rules to Congress on February 5, 1973. Congress promptly enacted Public Law 93-12, deferring the effectiveness of the rules until expressly approved by Congress. Congress then amended the proposed rules in various aspects and enacted them into law.<sup>51</sup> The effective date of the rules was the 180th day after the date of enactment: July 1, 1975. These rules apply to proceedings bought after the rules take effect, and under most circumstances to proceedings pending on July 1, 1975.<sup>52</sup>

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with evidence of legitimate business purpose, its burden in a disparate impact case is proof of an affirmative defense of business necessity.

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In contrast, intent plays no role in the disparate impact inquiry. The question, rather, is whether an employment practice has a significant, adverse effect on an identifiable class of workers — regardless of the cause or motive for the practice. The employer may attempt to contradict the factual basis for this effect; that is, to prevent the employee from establishing a prima facie case. But when an employer is faced with sufficient proof of disparate impact, its only recourse is to justify the practice by explaining why it is necessary to the operation of business. Such a justification is a classic example of an affirmative defense.

*Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2130-31 (Stevens, J., dissenting). See also *Connecticut v. Teal*, 457 U.S. at 456-58 (Powell, J., dissenting).

<sup>49</sup> Belton, *supra* note 11, at 1222; UNIF. R. EVID. 13; 1 S.A. GARD, JONES ON EVIDENCE § 3.1, at 125 (6th ed. 1972) [hereinafter JONES ON EVIDENCE]; MORGAN, BASIC PROBLEMS, *supra* note 19, at 32; THAYER, *supra* note 19, at 313 n.1; J.B. WEINSTEIN and M.A. BERGER, WEINSTEIN'S EVIDENCE § 300(01), at 300-1 (1989) [hereinafter WEINSTEIN]; 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5124, at 586-87 (1977); Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 325 (1952); 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 (1977).

<sup>50</sup> Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 208 (1973) [hereinafter Proposed Rules]. See also Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 336 (1971) [hereinafter Rev. Draft Prop. Rules]; Draft Rules of Evidence, *supra* note 21, 46 F.R.D. at 212-19.

<sup>51</sup> Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

<sup>52</sup> *Albemarle Paper Co. v. Moody* was decided on June 25, 1975.

For many years before, debate had taken place over the proper operational effect of presumptions. The two primary theories were that championed by Professors Thayer and Wigmore, and that championed by Professors Morgan and McCormick. Professors Thayer and Wigmore argued that a presumption shifted merely the burden of production or "articulation" of evidence, but not the burden of persuasion.<sup>53</sup> Professors Morgan and McCormick believed that a presumption shifted both the burden of production and the burden of persuasion. While there were other theories, e.g., Professor Bohlen,<sup>54</sup> most participants in the debate were convinced that the choice was between Thayer and Morgan.<sup>55</sup> Ultimately, the Advisory Committee had recommended that the view of presumptions advocated by Professor Morgan be accepted over the view of Professor Thayer. This recommendation was accepted by the Supreme Court.<sup>56</sup> The language of the rule proposed by the Supreme Court gave presumptions virtually the effect of an affirmative defense.<sup>57</sup> This result was consistent with the dissenter's view of *Griggs* and of the initial showing in *disparate impact*.<sup>58</sup> The proposed rule read as follows:

In all cases 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 proving that the nonexistence of the presumed fact is more probable than its existence.<sup>59</sup>

The Advisory Committee's note is highly relevant:

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the *prima facie* case of a plaintiff and affirm-

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<sup>53</sup> THAYER, *supra* note 19, at 336.

<sup>54</sup> Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920). See MORGAN, *BASIC PROBLEMS*, *supra* note 19, at 36; 21 WRIGHT & GRAHAM, *supra* note 49, § 5122, at 565-66.

<sup>55</sup> WEINSTEIN, *supra* note 49, at ¶ 300[01], at 300-5, (quoting 18 A.L.I. Proceedings 210-13 (1941)); *id.* ¶ 300[02], at 300-7 to 300-9; 21 WRIGHT & GRAHAM, *supra* note 49, § 5122, at 566; Gausewitz, *supra* note 49, at 331; Hecht & Pinzler, *supra* note 49, at 530.

<sup>56</sup> FED. R. EVID. 301 advisory committee's note.

<sup>57</sup> WEINSTEIN, *supra* note 49, ¶ 300[03], at 300-15.

<sup>58</sup> See text, *supra* at 107-08, 113-15.

<sup>59</sup> Proposed Rules, *supra* note 50, 56 F.R.D. at 208; see also Draft Rules of Evidence, *supra* note 19, 46 F.R.D. at 212.

ative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions.<sup>60</sup>

The view of presumptions championed by Professors Morgan and McCormick provided that presumptions were created for reasons of policy; therefore, a presumption should "permanently alter the burden of persuasion. No matter how much contradictory evidence was introduced indicating the nonexistence of the presumed fact, the burden of persuasion was always on the adverse party."<sup>61</sup> This view of presumptions was a distinct minority among the states, having been adopted clearly only in Pennsylvania,<sup>62</sup> though it apparently reflected the view of presumptions in some Federal courts.<sup>63</sup> The Morgan theory nevertheless enjoyed substantial support among the academic community.<sup>64</sup>

Professor Thayer had advocated the so-called "bursting bubble" theory in which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact. The Supreme Court rejected this theory as according presumptions too "slight and evanescent an effect."<sup>65</sup> Edward W. Cleary, Reporter for the Advisory Committee on the Federal Rules of Evidence, argued against the bursting bubble theory on the basis that "presumptions embody the same con-

<sup>60</sup> FED. R. EVID. 301 advisory committee's note.

<sup>61</sup> *Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 138 (1974) [hereinafter *Senate Hearings*] (Statement of Richard H. Keatinge, Chrm., Cal. Evid. Law Rev. Comm'n.)

<sup>62</sup> MORGAN, BASIC PROBLEMS, *supra* note 19, at 36; 21 WRIGHT & GRAHAM, *supra* note 49, § 5122, at 566-567; JONES ON EVIDENCE, *supra* note 49, § 3.8, at 143. See *Doud v. Hines*, 269 Pa. 182, 112 A. 528 (1921); *Holzheimer v. Lit Bros.*, 262 Pa. 150, 105 A. 73 (1918). Cf. J.H. WIGMORE, 9 EVIDENCE IN TRIALS AT COMMON LAW § 2493f, at 328 & n.6 (Chadbourne rev., 1981) (quoting Professor Morgan, 18 A.L.I. Proceedings 221-22 (1941) (Proposed Rule 301 was "making a change.")

<sup>63</sup> Statement of the New York Trial Lawyers Committee on the Proposed Federal Rules of Evidence, submitted by Robert L. Clair, Jr., ("[Rule 301] is nothing more than a summary of existing law as to the treatment to be given to presumptions by the Federal courts"). *Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 221 (1973) [hereinafter *House Hearings*]. See also *Coffin v. United States*, 156 U.S. 432 (1895) ("California rule"). But see *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935) (citing THAYER & WIGMORE); *N.Y. Life Ins. Co. v. Gamer*, 303 U.S. 161 (1938); 21 WRIGHT & GRAHAM, *supra* note 49, § 5121, at 543; 1 D.N. LOUISELL & C.B. MUELLER, FEDERAL EVIDENCE, § 69, at 560-61 (1977); Gausewitz, *supra* note 49, at 332. See also Louisell, *Constructing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings*, 63 VA. L. REV. 281 (1977) (adapted from LOUISELL & MUELLER).

<sup>64</sup> 1 LOUISELL & MUELLER, *supra* note 63, § 65, at 522-23. See *Charges on Presumptions and Burdens of Proof*, 5 N.C.L. REV. 291 (1927); Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 19-20 (1959). See generally E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, Ch. 36 (2d ed. 1972); Bohlen, *supra* note 54, at 321; Gausewitz, *supra* note 49; UNIF. R. EVID. 301, discussed at 9 WIGMORE, *supra* note 62, § 2493j, at 351.

<sup>65</sup> Advisory Committee Note Rule 301, quoted in WEINSTEIN, *supra* note 49, at 301-13. See Morgan and Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937). Professor Morgan describes the minimum proof needed to rebut a Thayer presumption as being "some testimony is put in which anybody can disbelieve, which comes from interested witnesses, and which is of a sort that is usually disbelieved, evidence which may be disbelieved by the trier of fact." 9 WIGMORE, *supra* note 62, § 2493j, at 328 (quoting Professor Morgan, 18 A.L.I. Proceedings 221-22.)

siderations of fairness, policy, and probability that underlie the process of allocating responsibility for the elements of a case between the plaintiff and defendant in the guise of prima facie case and affirmative defense, and therefore are entitled to greater effect than accorded by the bursting bubble theory.”<sup>66</sup>

The Supreme Court’s proposal met with substantial opposition from the bench and bar on the grounds that a Morgan presumption shifted too great a burden of proof,<sup>67</sup> and the proposal was not adopted by Congress. The House of Representatives, on recommendation of its Committee on the Judiciary, proposed a compromise between the Morgan theory and Thayer theory.<sup>68</sup> This language was similar to the treatment that had been accorded presumptions under prior California law.<sup>69</sup>

The House compromise was in turn also severely criticized. Professor Cleary stated that the House proposal on Rule 301 “is probably the only instance in which we would feel that what the House has done has been to make a rule that is just totally unworkable. The other disagreements that we have with the House are simply matters of judgment. But this one is not. I think we can say flatly it just won’t do.”<sup>70</sup> Judge Charles W. Joiner stated merely that “[t]he presumption rule adopted by the House is not comprehensible.”<sup>71</sup> Congressman Dennis stated with respect to the House Proposal that “presumptions are not evidence, and that, in an ill-starred effort to reach a middle ground between the so-called ‘bursting bubble’ theory, and that originally adopted and submitted by the Court, [the House through its subcommittee has] in effect said that [presumptions were evidence.] This is truly grievous error and ought to be abandoned.”<sup>72</sup> Richard H. Keatinge, Former Chairman, California Evidence Law Revision Commission, and John T. Blanchard, of Los Angeles,

<sup>66</sup> *House Hearings*, *supra* note 63, at 92.

<sup>67</sup> WEINSTEIN, *supra* note 49, ¶ 301[01], at 301-18 to 301-19 & n.2.

<sup>68</sup> The House proposal stated:

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 the evidence, and even though met with contradicting evidence, a presumption is sufficient proof of the fact presumed to be weighed by the trier of the facts.

*House Hearings (Supp)*, *supra* note 63, at 134. See 10 J. MOORE, MOORE’S FEDERAL PRACTICE, ¶ 301.01[7], at III-11 (2d ed. 1988).

<sup>69</sup> *House Hearings (Supp)*, *supra* note 63, at 364; 120 Cong. Rec. 2375 (1974). The House compromise was supported by the Association of Trial Lawyers of America, *House Hearings (Supp)*, *supra* note 63, at 130.

<sup>70</sup> *Senate Hearings*, *supra* note 61, at 48.

<sup>71</sup> *Id.* at 73.

<sup>72</sup> *Id.* at 23 (Statement of Hon. David W. Dennis of Indiana). See also *id.* at 12. A Statement by the Standing Comm. on Rules of Practice and Procedure and the Advisory Comm. on Rules of Evid. of the Judicial Conf. of the United States also criticized the California provision. *Id.* at 56-58.



California, submitted a statement severely criticizing the prior California Rule:

As amended by the House of Representatives, Rule 301 provides, in substance, that "a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion;" even when met with contradicting evidence, a presumption is "merely deemed sufficient evidence of the fact presumed, to be *considered* by the jury or other finder of fact."

However, it seems that in actuality, the fact finder *considers the basic fact and not the presumption itself*. The House Committee allows drawing inferences (a conclusion which the fact finder is *permitted*, but *not required* to draw from proof of the basic fact). Since all courts allow fact finders to draw inferences, the House Committee has inadvertently endorsed the Wigmore-Thayer "bursting bubble theory."<sup>73</sup>

Albert E. Jenner, Jr., Chairman, Advisory Committee on Rules of Evidence of the Judicial Conference of the United States also opposed the House Compromise. He stated that:

[the House version of] Rule 301 on presumptions as amended would be almost impossible for a trial lawyer, on the plaintiff's or the defendant's side, or the presiding judge, to administer. It confuses presumptions with evidence; it confuses the burden of going forward with the limited use that you put in the trial of a case to presumptions.<sup>74</sup>

The Advisory Committee also continued to support the version of Rule 301 proposed by the Supreme Court over the House version.<sup>75</sup>

During the Senate's consideration of Rule 301, substantial support for the Thayer-Wigmore "bursting bubble" rule was submitted. As Congressman Dennis stated,

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<sup>73</sup> *Id.* at 138 (emphasis added in first paragraph); *see id.* at 196-97.

<sup>74</sup> *Id.* at 207 (Testimony of Albert E. Jenner, Jr.)

<sup>75</sup> *See, e.g.*, Testimony of Albert E. Jenner, Jr., *id.* *See also* McCORMICK'S HANDBOOK § 345, at 822-26.

It does not follow, to my mind, that the Court's rule ought to be reinstated. In my view a presumption simply imposes on the party against whom it is directed the burden of going forward with the evidence — and that is all it does. The burden of proof never shifts. The presumption disappears when countervailing evidence is introduced. The problem is one of the most complicated in the law of evidence; but I believe this is sound theory, and that calling it a “bursting bubble” does not make it less so.<sup>76</sup>

Similarly, George A. Spiegelberg supported the position that “[t]he burden of establishing [liability] never shifts and remains upon the party who has the benefit of the presumption until the very end.”<sup>77</sup>

Keatinge and Blanchard also argued for the Thayer theory: “Professors Wigmore and Thayer believed that, since presumptions were based on considerations of probability and practical convenience, once sufficient evidence was introduced to sustain a finding of the *nonexistence* of the presumed fact, the presumption *completely disappeared* from the case.”<sup>78</sup> Thereafter, Mr. Keatinge supported the bursting bubble theory explicitly:

Adoption of the “bursting bubble theory” will encourage the use of presumptions. . . . [T]he use of presumptions in this manner will still serve to expedite trials. . . . The minute controverting evidence is introduced the presumption should disappear and that is in effect what we think the House did, even though the language used is not clear. That is the reason we brought this up: the House states it adopted an intermediate view between the Wigmore and McCormick view. What we did was adopt the “bursting bubble” — the ultimate result of what they did is that presumptions do not have any real evidentiary value providing controverting *evidence* is introduced. Once controverting evidence is introduced the presumption ceases to have any value. In our California code we have the specific provision that presumptions are not evidence and they affect merely the burden of producing evidence. . . . [I]f we have to make a choice it would definitely be the “bursting bubble theory,” because once the controverting evidence is introduced, as a practical matter, you

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<sup>76</sup> *Senate Hearings*, *supra* note 61, at 12.

<sup>77</sup> Letter to Hon. Wm. L. Hungate (July 11, 1973), *House Hearings (Supp)*, *supra* note 63, at 197.

<sup>78</sup> *Senate Hearings*, *supra* note 61, at 138 (Prepared statement submitted, The Federal Rules of Evidence: An Overview and Critique).

know that the jury or the judge is going to look at both sides of the case anyway, and, as a practical matter, I don't care how the instruction is given, or how you handle it, both sets of evidence, both for and against the basic facts, are going to get weighed by the finder of fact whether a jury or judge. Therefore, as a practical matter, if you have to make a choice, the "bursting bubble" is the choice.<sup>79</sup>

The Thayer rule had previously been accepted by the American Law Institute and the Model Code of Evidence.<sup>80</sup>

The Senate was apparently convinced by this argument, and declined to adopt either the House compromise version or the Morgan version of Rule 301 proposed by the Supreme Court.<sup>81</sup> Instead, the Senate version of Rule 301 provided:

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 the 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>82</sup>

<sup>79</sup> *Id.* at 196-97 (Testimony of Richard A. Keatinge).

<sup>80</sup> WEINSTEIN, *supra* note 49, ¶ 300[01], at 300-5. See Colorado Bar Association, *House Hearings (Supp.)*, *supra* note 63, at 354.

<sup>81</sup> 21 WRIGHT & GRAHAM, *supra* note 49, § 5122, at 571.

<sup>82</sup> See 120 Cong. Rec. 36925 (1974). The Senate Report stated:

The rule governs presumptions in civil cases generally. . . .

As submitted by the Supreme Court, presumptions governed by this rule were given the effect of placing upon the opposing party the burden of establishing the non-existence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it.

Instead of imposing a burden of persuasion on the party against whom the presumption is directed, the House adopted a provision which shifted the burden of going forward with the evidence. They further provided that "even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of fact." The effect of the amendment is that presumptions are to be treated as evidence.

The committee feels the House amendment is ill-advised. . . .

. . . The effect of the rule as adopted by the committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden of persuasion remains on the party to whom it is allocated under the rules governing the allocation in the first instance.

The court may instruct the jury that they may infer the existence of the presumed fact from proof of the basic facts giving rise to the presumption. However, it would be inappropriate under this rule to instruct the jury that the inference they are to draw is conclusive.

Because of the disagreement between House and Senate on Rule 301 and other rules, a conference committee was appointed by both houses. The conference accepted the Senate language. The Conference Report describes the effect of this decision:

The House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut it. Even though evidence contradicting the presumption is offered, a presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption but it does not shift to that party the burden of persuasion on the existence of the presumed fact.

Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may presume the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.<sup>83</sup>

While initially there may have been some reason for confusion,<sup>84</sup> Justice Powell in *Burdine* left no cause for doubt that Congress in amending proposed Rule 301, fully accepted the view of presumptions as

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<sup>83</sup> H.R. CONF. REP. NO. 1597, 93rd Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7099 [hereinafter CONF. COMM. REPORT].

<sup>84</sup> 1 LOUISELL & MUELLER, *supra* note 63, § 70, at 566-67, disagrees with the Thayer theory and proposes variations from this position plausibly "consistent with Rule 301 on its face," though admitting that the rule can be read to adopt the Thayer view. See also *id.* § 67, at 532-34. Wright and Graham seem to proceed on the assumption that Congress sought a theory intermediate between the Morgan and Thayer theories. 21 WRIGHT & GRAHAM, *supra* note 49, § 5121, at 546-47; § 5122, at 571; § 5126, at 606, 614. See 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, 893 (1982) [hereinafter Allen, *Anatomy*] ("[T]he ambiguity is primarily attributable to loose language in the commentary to the Rule rather than to the wording of the Rule itself."); Broun, *The Unfulfillable Promise of One Rule for All Presumptions*, 62 N.C.L. REV. 697, 704 (1984) (arguments for stronger reading of Rule 301 have merit). Cf. *Procedural Subversion*, *supra* note 18, at 1009 n.57.

articulated by Thayer in 1898, the “bursting bubble” view of presumptions.<sup>85</sup>

Rule 301 of the Federal Rules of Evidence, both as proposed and as adopted, governs all presumptions in civil litigation under federal statutes. The language of all of the draft versions of Rule 301 reflects that the rule was intended generally to govern presumptions.<sup>86</sup> Only presumptions created specifically by Act of Congress and whose terms conflict with the provisions of the rule were excepted.<sup>87</sup> There was no intent to repeal or amend any such provisions. As to all other presumptions, including presumptions created by common law or judicial construction and accorded greater weight by those sources, Rule 301 would govern.<sup>88</sup> In the debates over Rule 301, and with respect to the Federal Rules of Evidence in general, there is no suggestion that these rules would not apply to Title VII, or would apply only to disparate treatment cases. There is also no suggestion in the legislative history of the rules of evidence that Title

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<sup>85</sup> *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 255 n.10 (“See generally J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 314 (1898).”) See JONES ON EVIDENCE, *supra* note 49, § 3.8 at 28 (1988 Supp.); 10 MOORE’S, *supra* note 68, ¶ 301.01[1], at III-6 (“unsullied Thayer theory”); WEINSTEIN, *supra* note 49, ¶ 300[03], at 300-16; 9 WIGMORE, *supra* note 62, § 2493h, at 340; Hecht & Pinzler, *supra* note 49, at 530, 554; Allen, *Anatomy*, *supra* note 84, at 893; Zuck, *supra* note 13, at 543. Professor Edward W. Cleary, Reporter for the Advisory Committee, stated “the proposed Senate bill adopts a straight bursting bubble rule.” Memorandum of Oct. 31, 1974 *quoted in* WEINSTEIN, *supra* note 49, ¶ 301[01], at 301-10.

<sup>86</sup> 1 LOUISELL & MUELLER, *supra* note 63, § 68, at 540; Ladd, *supra* note 49, at 283. *Cf.* Gausewitz, *supra* note 49, at 331-32.

Wright & Graham contend, possibly persuasively, that certain rules allocating burdens of persuasion, though called “presumptions” are not true presumptions for the purposes of Rule 301 because these allocations are not dependent on the establishment of a basic fact. See definition of presumption at text accompanying note 49, *supra*. Examples of this form of “presumption,” which they label “assumptions” are the “assumption” of innocence in criminal cases. This exception is not relevant to Title VII litigation because the presumption in a prima facie case is dependent on the establishment of basic facts of disparate impact or disparate treatment. 21 WRIGHT & GRAHAM, *supra* note 49, § 5129, at 589-91.

They further discuss other instances where courts have spoken of presumptions, but which are purportedly unrelated to the burden of proof or establishment of facts. *Id.* at 591-92. This is also beyond the scope of this paper.

<sup>87</sup> 10 MOORE’S, *supra* note 68, ¶ 301.02, at III-14 (“If the statute does not declare the effect [of a presumption] then the Thayer effect stated in Rule 301 would govern.”) Where a statutory presumption had been judicially construed to shift a burden of persuasion, Rule 301 prevails and alters this previous interpretation. 21 WRIGHT & GRAHAM, *supra* note 49, § 5123, at 583.

<sup>88</sup> Proposed Rules, *supra* note 50, 56 F.R.D. at 208 (advisory committee’s note); Rev. Draft Prop. Rules, *supra* note 50, 51 F.R.D. at 336 (“This rule governs presumptions generally.”); WEINSTEIN, *supra* note 49, ¶ 300[03], at 300-12. See Draft Rules of Evidence, *supra* note 21, 46 F.R.D. at 214; 10 MOORE’S, *supra* note 68, ¶ 301.03[2], at III-18; 21 WRIGHT & GRAHAM, *supra* note 49, § 5122, at 570. *But see* 21 WRIGHT & GRAHAM, *supra* note 49, § 5123, at 577 (“presumptions in a civil nonjury trial under Rule 301 are little more than rhetorical devices[;] . . . they have no mandatory effect”); *id.* § 5123, at 578 (“presumptions created to enforce constitutional rights are probably beyond the power of Congress to alter.”) Rule 302 governed civil litigation under state laws.

VII itself provided for a different treatment of presumptions.<sup>89</sup> Indeed, the language of the rule was modified twice to assure that it would apply to all civil proceedings, and apply to no criminal matters. There is no suggestion that Congress intended to reverse the Court's preference for a uniform treatment for presumptions, except where "otherwise provided by Act of Congress."<sup>90</sup>

Professor Morgan would not have supported this uniform treatment of all presumptions, but instead believed that all presumptions should not be treated similarly.<sup>91</sup> Rather, he urged that presumptions rested on different theories as to their respective purpose, and, depending upon the purpose on which the presumption being dealt with rested, the operational effect of the presumption should vary from the "bursting bubble" theory (Thayer) to a total shifting of the burden of persuasion.<sup>92</sup> Though many states followed two or more rules concerning presumptions, listing presumptions of each sort,<sup>93</sup> the Supreme Court declined to have two types of presumptions and opted for uniformity. A number of legal scholars also supported this decision.<sup>94</sup> On the other hand, the Thayer position adopted by Congress was intended to describe the operational effect of all presumptions.<sup>95</sup>

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<sup>89</sup> *But see* United States v. City of Chicago, 411 F. Supp. 218, 231-33 (N.D. Ill. 1976). Both the NAACP and the Equal Employment Opportunity Commission commented on the proposed Federal Rules of Evidence. Neither chose to comment on Rule 301. Letter from Jack Greenberg, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc., to Hon. William L. Hungate, Chairman (Mar. 5, 1973), *House Hearings*, *supra* note 63, at 514-15; Letter from William A. Carey, General Counsel, Equal Employment Opportunity Commission to the Hon. William L. Hungate (Aug. 7, 1973), *House Hearings (Supp)*, *supra* note 63, at 311.

<sup>90</sup> See Subcomm. Note, Subcomm. on Crim. J., House Comm. on the Judiciary, 93rd Cong., 1st Sess. (Comm. Print 1973), *reprinted in House Hearings (Supp)*, *supra* note 63, at 152; Comments by Richard H. Field, on the Subcomm. Draft of the Federal Rules of Evidence, submitted by Hon. William S. Cohen by letter to Hon. William L. Hungate (July 31, 1973), *House Hearings (Supp)*, *supra* note 63, at 268-73.

<sup>91</sup> Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931).

<sup>92</sup> 9 WIGMORE, *supra* note 62, § 2493f, at 326 & n.4. See Position Paper on Proposed Federal Rule of Evidence No. 301, submitted for the Association of Trial Lawyers of America by the Committee of Federal Evidence and Procedure, Article III, Presumptions. *House Hearings (Supp)*, *supra* note 63, at 130-34. See also, e.g., O'Dea v. Amodeo, 118 Conn. 58, 60, 170 A. 486, 487 (1934); WEINSTEIN, *supra* note 49, ¶ 300[02], at 300-8. *But see* Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 912-13 (1937) (Morgan supported uniform treatment of presumptions); Belton, *supra* note 11, at 1267-68.

<sup>93</sup> E.g., California Evidence Code, § 630-45, 660-68; WEINSTEIN, *supra* note 49, ¶ 300[02], at 300-8; Unif. R. Evid. 14.

<sup>94</sup> WEINSTEIN, *supra* note 49, ¶ 300[02], at 300-8 to 300-9.

<sup>95</sup> 9 WIGMORE, *supra* note 62, § 2493f, at 328 (quoting 18 A.L.I. Proceedings at 226). Cf. THAYER, *supra* note 19, at 313-52.

The enactment of the Federal Rules of Evidence, including rules governing presumptions, was well within the authority of Congress.<sup>96</sup> The plenary authority of Congress over Rules of Evidence, in both their procedural and substantive aspects, was supported by a number of submissions in the consideration of the Federal Rules of Evidence. As Ronan E. Degnan, Professor of Law at the University of California Law School, Berkeley, stated:

[t]he power of Congress over evidence law is not fettered by the distinction between substance and procedure; that given to the Court is. Some rules often grouped under the general name of evidence may affect substantive rights in a manner prohibited by the restricting clauses of the enabling acts [allowing the Supreme Court to adopt procedural rules]. Presumptions and burden of proof are probably within the prohibition, even in federal question cases.<sup>97</sup>

The Supreme Court accepted this view not only by acquiescing in the adoption of the Rules as modified, but also by its holding in *Usery v. Turner Elkhorn Mining Co.*,<sup>98</sup> a case concerning presumptions and in which Rule 301 was cited. There the Court noted that "Congress . . . has plenary authority over the promulgation of evidentiary rules for the federal courts."<sup>99</sup>

#### IV. MINOR PREMISE: THE THREE STAGE ORDER OF PROOF

In *McDonnell Douglas Corporation v. Green*,<sup>100</sup> the Supreme Court outlined a three-part order of proof.

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. . . . The burden then must shift to the employer to articulate some legitimate nondiscriminatory

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<sup>96</sup> *But see Senate Hearings, supra* note 61, at 58 (Statement of Stand. Comm. on Rules of Practice and Procedure and the Advisory Comm. on Rules of Evidence of the Judicial Conf. of the United States).

<sup>97</sup> Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 283 (1962). *See House Hearings, supra* note 63, at 306 (Statement of James F. Schaeffer); *id.* at 495, 510 (Statement by Stuart H. Johnson, Jr.); Position Paper on Proposed Federal Rule of Evidence No. 301, submitted for the Association of Trial Lawyers of America by the Committee of Evidence and Procedure, Article III, Presumptions, *House Hearings (Supp.)*, *supra* note 63, at 130-34.

<sup>98</sup> 428 U.S. 1 (1976).

<sup>99</sup> 428 U.S. at 31. *See also* *Lavine v. Milne*, 424 U.S. 577, 585 (1976) ("Outside the criminal law area, . . . the locus of the burden of persuasion is normally not an issue of federal constitutional moment."); *Hawkins v. United States*, 358 U.S. 74, 78-79 (1958); *Tot v. United States*, 319 U.S. 463, 467-69 (1943). *Cf.* Proposed Rules, *supra* note 50, 56 F.R.D. at 185 (Douglas, J., dissenting).

<sup>100</sup> 411 U.S. 792 (1973).

reason for the employee's rejection. . . . [T]he inquiry must not end here. . . . [R]espondent must, . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext [for the sort of discrimination prohibited by section 703(a)(1)].<sup>101</sup>

While this opinion concerned initially only "the order and allocation of proof in a private, non-class action challenging employment discrimination,"<sup>102</sup> it is the seminal treatment of the burdens allocation question,<sup>103</sup> and was subsequently utilized in *International Brotherhood of Teamsters v. United States*<sup>104</sup> for class actions.<sup>105</sup>

In *Albemarle*, the Supreme Court construed the claim for relief under *Griggs* to require the same three stage allocation and order of proof set forth in *McDonnell Douglas*:<sup>106</sup>

In *Griggs v. Duke Power Company* . . . this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Id.* at 432. [Footnote omitted] This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, *i.e.*, has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 817, 36 L.Ed.2d 668 (1973). If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other test or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship." [*McDonnell Douglas*, 411 U.S.] at 801, 93 S.Ct. [at 1823]. Such a showing would be evidence that the employer was using its test merely as a "pretext" for

<sup>101</sup> *Id.* at 802-04.

<sup>102</sup> *Id.* at 800. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 252-53; *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. at 713 n.1.

<sup>103</sup> *Belton*, *supra* note 11, at 1235.

<sup>104</sup> 431 U.S. 324, 336, 357-58 (1977). *But compare* *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1799 (O'Connor, J., concurring) (dicta suggesting that the employer's burden with respect to unnamed individual members of a successful class is one of persuasion) with *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 875 (1984) (stating that "existence of a discriminatory pattern or practice established a presumption that [unnamed] individual class members had been discriminated against" (citing *Burdine*) (emphasis added).)

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But see Schler & Grossman, *supra* note 10, at 1288-89.

<sup>106</sup> 411 U.S. 792.



discrimination. [*McDonnell Douglas*, 411 U.S.] at 804-805, 93 S.Ct. [at 1825-1826]. In the present case, however, we are concerned only with the question whether Albemarle has shown its test to be job related.

The concept of job relatedness takes on meaning from the facts of the *Griggs* case.<sup>107</sup>

The Court acknowledged that this order of proof was newly applied to disparate impact cases.

The appropriate standard of proof for job relatedness has not been clarified until today. Similarly, the respondents have not until today been specifically apprised of their opportunity to present evidence that even validated tests might be a "pretext" for discrimination in light of alternative selection procedures available to the Company.<sup>108</sup>

The application of the *McDonnell Douglas* allocation and order of proof was not disavowed in any of the concurring and dissenting opinions.<sup>109</sup>

<sup>107</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. at 425-26. In characterizing the nature of the rebuttal evidence as merely "job related," the Court substantially broadened the Fourth Circuit's far more restrictive characterization. See *Albemarle*, 474 F.2d 134, 138 n.2, (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).)

<sup>108</sup> *Albemarle*, 422 U.S. at 436. The three stage order of proof was not suggested in any of the briefs filed by the parties, nor by the amici. Only the defendants even characterize the disparate impact showing as a prima facie case, Brief of Petitioners at 28 ("In any Title VII case, plaintiff bears the burden of showing prima facie discrimination. *McDonnell Douglas*"), id. at 47 n.45 ("Title VII imposes a heavy burden on defendants after a prima facie effect on minorities is shown."); Petition for Certiorari at 14 ("it does not follow that Petitioner cannot ultimately rebut the prima facie case of discrimination by properly validating the tests. Compare *McDonnell Douglas*.") See Brief of Amici Curiae the United States and the Equal Employment Opportunity Commission at 36 (disparate impact is a "threshold showing"); Brief of Amicus Curiae the American Society for Personnel Administration; Brief of Amicus Curiae the Chamber of Commerce of the United States of America; Brief of Amicus Curiae the Scott Paper Co. Similar to Justice O'Connor's opinion in *Watson*, the Court sua sponte provided detailed guidance as to the order and allocation of proof, which guidance was not necessary to the determination of the questions presented on certiorari.

<sup>109</sup> *Albemarle*, 422 U.S. at 440-49. Justice Blackmun appears to have forgotten the genesis of the order and allocation of proof in a disparate impact case. In *Watson v. Fort Worth Bank & Trust*, he states:

The plurality's suggested allocation of burdens bears a closer resemblance to the allocation of burdens we established for disparate-treatment claims in *McDonnell Douglas Corp. v. Green* (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-256, 101 S. Ct. 1089, 1093-1095, 67 L.Ed.2d 207 (1981), than it does to those the Court has established for disparate-impact claims.

*Watson*, 108 S. Ct. at 2792. See also id. ("near-perfect echo," "mimic"), id. at 2794, ("echo"). As discussed in the text, the allocation of proof in disparate impact cases resembles that established in *McDonnell Douglas* because the order of proof was explicitly modeled after *McDonnell Douglas*; *Washington v. Davis*, 426 U.S. at 254 (Stevens, J. concurring) ("[T]he line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not as critical, as the reader of the Court's

There was no mention of Rule 301, which would become effective six days later. Nevertheless, this order of proof was entirely consistent with the newly enacted rule, just as *Griggs* itself had been consistent with the rule proposed in 1969.

In subsequent decisions, the Court similarly described the three stage allocation and order of proof in disparate impact cases.<sup>110</sup>

As Title VII law has developed since *Albemarle*, the Court has retreated from any holding that Title VII allows a separate claim for group rights and racial proportionality under the guise of "disparate impact."<sup>111</sup> The Court has been very reluctant, however, to repudiate explicitly the construction of *Griggs*,<sup>112</sup> heretofore accorded it by so many of the lower federal courts and thus to slaughter one of the sacred cows of civil rights. *Atonio*, however, produced the bovine corpse and proceeded to examine its entrails.

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opinion might assume."); NAACP v. Medical Center Inc., 657 F.2d 1322, 1335 (3d Cir. 1981) (en banc); Cf. Furnish, *supra* note 9, at 421-22; Lamber, *Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases Under Title VII*, 1985 WISC. L. REV. 1, 9 (1985); Reynard, *Proving Title VII Sex-Based Wage Discrimination after County of Washington v. Gunther*, 4 CARDOZO L. REV. 281, 308 n.132 (1983). *Contra*, Belton, *supra* note 11, at 1244 (*Albemarle* only "seemed" to adopt *McDonnell Douglas* approach).

<sup>110</sup> *Teal*, 457 U.S. at 446-47. See *Dothard v. Rawlinson*, 433 U.S. at 329 (three stage order of proof beginning with "prima facie case of discrimination"); *New York City Transit Auth. v. Beazer*, 440 U.S. at 584 ("prima facie violation"); *id.* at 587 ("prima facie case of discrimination" beginning a three stage order of proof). See also *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2131, 2135 (Stevens, J., dissenting) ("prima facie case," "prima facie case of discrimination").

<sup>111</sup> In *Teal*, the Court made clear that "the principal focus [of Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole." 457 U.S. at 453-54. This followed the Court's position in *City of Los Angeles Dep't. of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978) where the Court held that "the basic policy of [Title VII] requires that we focus on fairness to individuals rather than fairness to classes." See also *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978). *Teal*'s emphasis on individual rights effectively undermined the operational purpose for the distinction between disparate treatment and disparate impact. Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of Connecticut v. Teal*, 20 HARV. J. ON LEGIS. 99, 109 (1983) (disapproves); Delahunty, *supra* note 33, at 469-71; McConnell, *Affirmative Action After Teal: A New Twist or a Turn of the Screw?* 7 REG., Mar.-Apr. 1983, at 38; Welch, *supra*, note 37, at 868 n.100. Cf. Chamallas, *supra* note 31, at 314; Lamber, *supra* note 109, at 40.

<sup>112</sup> See Belton, *supra* note 11, at 1209 ("the burden of proof issue may well be the battleground upon which some judges are attempting to repudiate the disparate impact theory of discrimination.") On the other hand, Professor Belton notes that "[t]he courts have recognized that the line between discriminatory intent and discriminatory impact is not as distinct as it appears to be at first glance." *Id.* at 1280 (citing *Washington v. Davis*, 426 U.S. 229, 254 (1976) (Stevens, J., concurring) and (generally) *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (Powell, J., announcing judgment)).

## V. SYLLOGISM: FOUR LOGICAL RESULTS

The metaphysical difference between the dissenters' view of *Griggs* and the analysis announced in *Watson* and *Atonio* probably boils down to the question whether a claim of disparate impact *currently* has any ultimate reference to discriminatory intent despite the specific language in *Griggs* to the contrary.<sup>113</sup> The practical differences between these two views, however, are whether the burden of persuasion is shifted by a prima facie case of disparate impact; whether a prima facie case may be easily established by statistics reflecting merely a significant imbalance; whether the evidence must show indispensable business necessity or merely a reasonable relationship to a legitimate business purpose; and whether the burden in all cases which reach the third stage is to show intentional discrimination.<sup>114</sup> It is toward the resolution of these more practical questions that the Court has addressed its more recent holdings.

The application of Rule 301 as a pure Thayer definition of presumptions to Title VII disparate impact litigation results in the conclusions discussed earlier.<sup>115</sup> The decisions of the Supreme Court since *Albemarle*, particularly *Watson* and *Atonio*, approach this convergence to a significant degree in each of these four areas.

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<sup>113</sup> Justice O'Connor states the most recent answer to this question:

Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination. Rather, the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.

*Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2785. This concept was also evident in Justice O'Connor's approach to the effect of direct evidence of discrimination in *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1803-04 ("While the prima facie case under *McDonnell Douglas* and the statistical showing of imbalance involved in an impact case may both be indicators of discrimination or its 'functional equivalent,' they are not, in and of themselves, the evils Congress sought to eradicate from the employment setting.") Cf. *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 710 n.20 ("*Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences."); Rutherglen, *supra* note 14, at 1311; Reynard, *supra* note 109, at 309, 312 n.150; Survey, *Leading Cases — 1987 Term*, 102 HARV. L. REV. 143, 317-20 & n.60 [hereinafter 1987 Term].

<sup>114</sup> Cf. Furnish, *supra* note 9, at 438. Professor Furnish recognized this convergence, but disregarded the analytical importance of Rule 301. See also Note, *Judicial Dualism*, *supra* note 9, at 408-19; Alberti, *Rebutting the Griggs Prima Facie Case Under Title VII: Limiting Judicial Review of Less Restrictive Alternatives*, 1981 ILL. L. REV. 181; Chamallas, *supra* note 31, at 320-21; Lamber, *supra* note 109, at 8, 10; Terrell, *supra* note 6.

<sup>115</sup> See *supra* text at 110-11.

### A. *Second Stage's Burden of Proof*

If Rule 301 is applied to Title VII litigation, the burden of proof that is shifted can only be one of production or articulation. This is the clearest mandate of Rule 301: “[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption.”<sup>116</sup> Justice O’Connor was unusually casual but perfectly clear in announcing this result in *Watson*: “[t]hus, when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons.”<sup>117</sup> There are no citations to authority or logic. Rule 301 is not mentioned. Justice White was less casual in *Atonio*: “[i]n this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. . . . This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts, see Fed. Rule Evid. 301.”<sup>118</sup>

While this result was first explicitly announced by the plurality in *Watson*, it is derived from the logic of legal scholarship on evidentiary presumptions, perhaps best exemplified by Professor Wigmore; it is consistent with the Court’s decisions since *Albemarle*; and it is not adequately answered by the dissents of Justices Stevens in *Atonio* and Blackmun in *Watson*.

#### 1. *Logic*

As discussed above, for seventy five years between the publication of Professor Thayer’s treatise in 1898 and the enactment of the Federal Rules of Evidence in 1974, legal scholars debated the proper function of evidentiary presumptions. Wigmore’s argument for accepting the Thayer version of presumptions paints an example which is easily analogized to the discrimination question. Professor Wigmore supposes

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<sup>116</sup> Fed. R. Evid. 301. See 1 LOUISELL & MUELLER, *supra* note 63, § 70, at 564. *But cf.* Player, *The Evidentiary Nature of Defendant’s Burden in Title VII Disparate Treatment Cases*, 49 Mo. L. Rev. 17, 31-38 (denying the propriety of using inferred facts to rebut a presumption).

<sup>117</sup> *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2790.

<sup>118</sup> *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2126.

that the sole issue in a case is the death of X. Plaintiff has a doctor testify that X was well-known to the witness and that the witness attended X in his last illness and saw him die. Now, if no further evidence is introduced, plaintiff is entitled to a directed verdict. The evidence — standing alone — possesses such overwhelming force that plaintiff will win a directed verdict if the defendant remains silent. Yet, if the defendant comes forward with evidence, for example, that X and Y were twins and the doctor treated Y, defendant takes away from plaintiff the benefit plaintiff would derive from the probative force of his evidence standing alone. Defendant could accomplish this purpose even if his evidence were of very questionable credibility. The defendant probably could not accomplish this merely by asserting that X was alive without presenting some positive evidence of this assertion. Assume, on the other hand, that the legislature created a presumption of death from seven years absence without tidings and assume plaintiff relies solely on this presumption to establish the death of X, there is really nothing paradoxical in equating the presumptive evidence of death with the direct evidence of death. In both situations, absent any evidence from defendant, plaintiff wins. In both situations, if defendant introduces sufficient evidence to avoid a directed verdict, the case goes to the jury. Arguably, it is paradoxical to view the two situations as substantially different. Thus, it is unreasonable to impute to the legislature the intention that the indirect evidence determined by it to create a presumption should have greater force than plaintiff's direct evidence; it is irrational to take something which is naturally weaker than something else (seven years' disappearance is weaker, naturally, than the doctor's direct evidence) and infuse it with artificial force to make it stronger.<sup>119</sup>

An analogous example can be hypothesized with respect to Title VII. Defendant A selects employees for manufacturing jobs by use of a mechanical ability test which he has been using for the last 40 years. Defendant A has never had a policy of discriminating on the basis of race. The mechanical ability test has a disparate impact against minorities. Across the street, his direct competitor B chooses employees for the same sort of job by a personal unstructured interview, a procedure that was established on July 1, 1965, immediately before Title VII became effective.

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<sup>119</sup> 9 WIGMORE, *supra* note 62, § 2493g, at 334-36 (quoting Chadbourne, *A Study Relating to the Uniform Rules of Evidence — Burden of Producing Evidence, Burden of Proof, and Presumptions*, 6 CALIFORNIA LAW REVISION COMMISSION REPORT RECOMMENDATIONS AND STUDIES 1047 (1964)).

Previously B had declined to hire any minorities, and made statements that found their way into the record that he would never hire minorities, and, if forced to do so, would hire as few as possible. Because of automation, during the last 20 years B has not hired many new employees at all, and very few during the last few years, thereby making any statistical analysis impracticable.

Both employers are charged with racial discrimination in violation of Title VII. Under the dissenter's theory of the shifting burden of persuasion, A bears a far higher burden of proof in defense than B, even though there appears to be direct evidence of discrimination by B. This burden (unlike the hypothetical presumption of death) has never been explicitly — or probably implicitly — approved by Congress.<sup>120</sup> Under Rule 301, shifting only the burden of production, the two employers bear the same burden. It is this reasoning that persuaded the *Watson* four.<sup>121</sup>

## 2. Precedents: Between *Albemarle* and *Watson*: *Dothard*, *Beazer*, and *Teal*

The Supreme Court's holdings and *dicta* in Title VII cases following *Albemarle* reflect ambiguity as to the actual burden that is shifted by the *prima facie* case, if not support for a burden only of production.<sup>122</sup>

The Supreme Court in the 1978 case of *Dothard v. Rawlinson*, did not focus on what burden of proof is shifted by a *prima facie* case. The Court states that "the employer must meet 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question,'" citing *Griggs*.<sup>123</sup> However, (then) Justice Rehnquist in concurrence explicitly described the burden of proof as one of "articulation" in disparate impact cases, a description not disavowed by the majority.<sup>124</sup> No other member of the Court disavowed this description.

<sup>120</sup> Cf. Gold, *Reply to Thomson*, 8 INDUS. REL. L.J. 117 (1986); Rutherglen, *supra* note 14, at 1308-09. But see Atonio, 109 S. Ct. at 2129 & n.9, 10-11 (Stevens, J., dissenting); Thomson, *The Disparate Impact Theory: Congressional Intent in 1972 — A Response to Gold*, 8 INDUS. REL. L.J. 105 (1986). But see also S. 2104, 100th Cong., 2d Sess. §§ 2 & 3, 136 Cong. Rec. (daily ed. Feb. 7, 1990) [hereinafter S. 2104].

<sup>121</sup> *Watson*, 108 S. Ct. at 2785. See *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1801-02 (O'Connor, J., concurring) ("That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there is direct evidence of intentional discrimination."); *id.* at 1803 ("I believe there are significant differences between shifting the burden of persuasion to the employer in a case resting purely on statistical proof as in the disparate impact setting and shifting the burden of persuasion in a case like this one, where an employee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision.") See also *NAACP v. Medical Center, Inc.*, 657 F.2d at 1335. But see Smith, *supra* note 41, at 394 n.112; Middleton, *supra* note 34, at 203-04.

<sup>122</sup> Reynard, *supra* note 109, at 306.

<sup>123</sup> *Dothard v. Rawlinson*, 433 U.S. at 329.

<sup>124</sup> *Id.* at 340 (Rehnquist, J., concurring). See Note, *Judicial Dualism*, *supra* note 9, at 410-11.

The circumstances in *Dothard* are consistent with Justice Rehnquist's formulation. The majority described the minimal elements of the defendant's burden — elements not found in the record before them:

In the district court, however, the appellants produced no evidence correlating the . . . requirements with requisite[s] . . . thought essential to good job performance. Indeed, they failed to offer evidence of any kind in specific justification of the . . . standards.<sup>125</sup>

The defendant relied in part on its claim that the fact that the criteria in question were required by state statute itself constituted a sufficient showing that the criteria were "job related."<sup>126</sup> The Court found that the employer failed to "produce" or "offer" this evidence.<sup>127</sup> This is the same minimum evidentiary standard of articulation required of disparate treatment defendants. Justice Rehnquist in concurring with the majority's conclusion is quite explicit in describing the employer's burden:

[H]ere, the district court permissibly concluded that appellants had not shown enough of a nexus even to rebut the inference [arising from a prima facie case].

Appellants, in order to rebut the prima facie case under the statute, had the burden placed on them to advance job-related reasons for the qualification. *McDonnell Douglas Corp v. Green* . . . . This burden could be shouldered by offering evidence or by making legal arguments not dependent on any new evidence. . . .<sup>[128]</sup>

But once the burden has been placed on the defendant, it is then up to the defendant to articulate the asserted job-related reasons underlying the use of the minima: *McDonnell Douglas Corp v. Green* . . . ; *Griggs v. Duke Power Co* . . . ; *Albemarle Paper Co v. Moody* . . . . As appellants did not even present the . . . contention to the District Court as an asserted job-related reason for the qualification requirements, I agree that their burden was not met.<sup>129</sup>

<sup>125</sup> *Dothard*, 433 U.S. at 331 (footnote omitted).

<sup>126</sup> *Id.* n.14.

<sup>127</sup> Cf. Note, *Judicial Dualism*, *supra* note 9, at 410-11. See discussion on *Sweeney*, *infra* at 145-48. *But see* *Furnish*, *supra* note 9, at 428.

<sup>128</sup> *But see* *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 255 & n.9.

<sup>129</sup> *Dothard v. Rawlinson*, 433 U.S. at 339-40 (Rehnquist, J., concurring).

One year later the Court in *Beazer* noted that plaintiffs had the “ultimate burden of proving a violation of Title VII.”<sup>130</sup> Professor Belton recognized that “[i]f the analysis in *Beazer* were adopted as a general rule in disparate impact cases . . . then the burden imposed upon a defendant after a plaintiff establishes a prima facie case would be, in effect, the same as the ‘articulation’ burden adopted in the disparate treatment cases.”<sup>131</sup>

The subsequent decision in *Teal v. Connecticut*<sup>132</sup> did not repudiate this reasoning. In *Teal*, the issue was strictly the question of how a prima facie case of disparate impact is shown and whether there is a defense that the employer’s total selection rate was not disproportionate: the “bottom line.”<sup>133</sup> The nature of the burden of proof imposed on the employer by the showing of the prima facie case of disparate impact is not discussed because the district court “held that the employer was not required to demonstrate that the promotional examination was job related.”<sup>134</sup> The court makes passing references to the defendant’s burden to “show,”<sup>135</sup> and to “demonstrate.”<sup>136</sup> As discussed below, such references fail to establish any clear distinction with respect to the meaning of these terms in the light of *Sweeney*.

The holdings of *Dothard*, *Albemarle*, and, indeed, *Griggs* were that the evidence submitted — all of it in *Griggs* and *Dothard* and a large part of it in *Albemarle* — did not support even an inference that the criterion at issue related to such a business purpose.<sup>137</sup> Such evidence must be more than a “scintilla” of evidence,<sup>138</sup> and the belief of the employer that the test was job-related is irrelevant to the question of whether the evidence in fact supported such an inference.

*Dothard*, *Beazer*, and *Teal* confirm the general teaching of both *Albemarle* and *McDonnell Douglas*, as well as *Watson*, that rebuttal to

<sup>130</sup> 440 U.S. at 587 n.31 (Stevens, J.).

<sup>131</sup> Belton, *supra* note 11, at 1247 (footnotes omitted); Furnish, *supra* note 9, at 438 n.174; Lamber, *supra* note 109, at 22; Note, *Judicial Dualism*, *supra* note 9, at 411-15. *But see* Lamber, *supra* note 109, at 23-29. Justice White’s dissent in *United States v. South Carolina* barely touches on this issue, referring to the State’s “carr[ying] its burden of justifying the test despite its disparate racial impact.” 434 U.S. 1026, 1027 (1978) (White, J., dissenting). *See* Alberti, *supra* note 114, at 192 n.64.

<sup>132</sup> 457 U.S. 440 (1982).

<sup>133</sup> *Id.* at 442.

<sup>134</sup> *Id.* at 445. For the same reason, the third stage is not explicated.

<sup>135</sup> *Id.* at 445, 446, 450.

<sup>136</sup> *Id.* at 446.

<sup>137</sup> Similarly, the Court found that no proof of business purpose had been introduced below in its disparate impact analysis of *Nashville Gas Co. v. Satty*, 434 U.S. 136, 143 (1977).

<sup>138</sup> 9 WIGMORE, *supra* note 62, § 2494, at 384; MCCORMICK’S HANDBOOK, *supra* note 75, at 789 & n.29; Furnish, *supra* note 9, at 427-28.



a prima facie case must consist of at least an articulation of the actual reason for an employment decision. Such evidence cannot be a mere denial of discriminatory intent, nor the introduction of policies prohibiting discrimination.<sup>139</sup> "[T]he defendant's explanation . . . must be clear and reasonably specific . . . . This obligation arises . . . from the necessity of rebutting the inference of discrimination."<sup>140</sup> It must be positive evidence of the actual purpose or motivation for the specific employment decision or procedure.<sup>141</sup>

This teaching is consistent with Rule 301, which itself requires that the prima facie showing is rebutted only if the defendant introduces evidence supporting the inference that the challenged employment decision was based on a specific reason.<sup>142</sup> Evidence only asserting that the reason was not based on a prohibited criterion is not sufficient.<sup>143</sup> The question at issue, however, is exclusively one of relevance, in an evidentiary sense, of the evidence. If the evidence is relevant to, *i.e.*, supports an inference that the selection procedure advances a specific, articulated purpose, it meets the burden of articulation. *Dothard, Beazer, and Teal* hold that the defendants had failed to meet their burden at the second stage, but present this holding in language consistent with the burden of production.

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<sup>139</sup> In *Hazelwood School District v. United States*, 433 U.S. 299 (1977), the Supreme Court was faced with the minimum evidence needed to rebut the prima facie case of disparate treatment: Hazelwood offered virtually no additional evidence in response, relying instead on evidence introduced by the Government, perceived deficiencies in the Government's case, and its own officially promulgated policy "to hire all teachers on the basis of training, preparation and recommendations, regardless of race, color, or creed. [The defendants offered only one witness, who testified to the total number of teachers who applied and were hired for jobs in the 1971-1972 and 1972-1973 school years. They introduced several exhibits, consisting of a policy manual, policy book, staff handbook, and historical summary of Hazelwood's formation and relatively brief existence.] *Id.* at 303-304 & n.6 (footnote inserted in text). This evidence was deemed insufficient to rebut the Government's case. *See also* *Alexander v. Louisiana*, 405 U.S. at 631-32.

<sup>140</sup> *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 258; WEINSTEIN, *supra* note 49, ¶ 301[03], at 301-45. *Cf.* *Castaneda v. Partida*, 430 U.S. 482, 497-500 (1977). *See also* *Burdine*, 450 U.S. at 255 n.9.

<sup>141</sup> *Burdine*, 450 U.S. at 254-55; *See Alexander v. Louisiana*, 405 U.S. at 631-32; *Middleton*, *supra* note 34 at 202.

<sup>142</sup> 10 MOORE'S, *supra* note 68, § 301.05, at III-24 n.2. ("The contradictory proof, however, must be such that it would support a finding of the non-existence of the presumed fact, although it need not be believed."); THAYER, *supra* note 19, at 336 ("[T]here is meant such an amount of evidence or reason as may render the view contended for rationally probable."); Smalls, *The Burden of Proof in Title VII Cases*, 25 How. L.J. 247, 262-63 & n.96 (1982).

<sup>143</sup> *Burdine*, 450 U.S. at 255.

### 3. Precedents: *Burdine*

The decision in *Texas Department of Community Affairs v. Burdine*,<sup>144</sup> a disparate treatment case, indicated that the Supreme Court would ultimately conform all of Title VII practice to the Rules of Evidence. This opinion precisely analyzes Rule 301 and its effects on *all* civil litigation.

The opinion, admittedly, is not entirely unambiguous as to its coverage of both disparate impact and disparate treatment cases.<sup>145</sup> The more extensive application of *Burdine* arises from Justice Powell's substantive and scholarly discussion of the shifting burden of proof, the nature of the presumption, and the nature of the rebuttal. These issues are discussed and authorities cited in terms applicable not only to all Title VII claims, but to all civil litigation before the Federal courts.<sup>146</sup> Except for the references noted above, the language does not suggest that these rules do not apply to disparate impact cases. Justice Powell discussed first the ultimate burden of the plaintiff.

The nature of the burden that shifts to the defendant should be understood in the light of the plaintiff's ultimate and intermediate burden. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff. See *Board of Trustees of Keene State College v. Sweeney*, . . . [Disparate

<sup>144</sup> 450 U.S. 248.

<sup>145</sup> In the preamble to the decision, Justice Powell states:

This case requires us to address again the nature of the evidentiary burden placed upon the defendant in an employment discrimination suit brought under Title VII . . . . The narrow question presented is whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed.

*Id.* at 249-50. After discussing the facts, Justice Powell acknowledged that *McDonnell Douglas Corp v. Green* was a Title VII case alleging discriminatory treatment, *id.* at 252-53, and in a footnote to this sentence, stated:

We have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes. See *McDonnell Douglas*, 411 U.S. at 802, n. 14, 93 S. Ct., at 1824 n. 14; *Teamsters v. United States*, 431 U.S. 324, 335-36, and n. 15, 97 S. Ct. 1843, 1854-1855, n. 15, 52 L.Ed. 2d 396 (1977).

*Id.* at 253 n.5. Thereafter, Justice Powell discusses how a prima facie case of disparate treatment is established. *Id.* at 253-54. The distinctions are thus described as merely differences in the character and nature of the evidence produced. See *NAACP v. Medical Center, Inc.*, 657 F.2d at 1335 n. 15. Belton, *supra* note 11, at 1245, inexplicably suggests that these statements implicitly suggest a repudiation of the three part test in disparate impact established in *Albemarle*.

<sup>146</sup>*Burdine*, 450 U.S. at 252-56. Cf. *Furnish*, *supra* note 9, at 435; *Procedural Subversion*, *supra* note 18, at 1000. The Court has now explicitly revealed that *Burdine* applies to all Title VII litigation. *Wards Packing Co. v. Atonio*, 109 S.Ct. at 2126 ("This rule . . . more specifically . . . conforms to the rule in disparate treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. See *Texas Dept. of Community Affairs v. Burdine*.")

treatment case]. See generally 9 J. Wigmore, Evidence Section 2489 (3d Ed. 1940) (the burden of persuasion “never shifts”). The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question.<sup>147</sup>

Justice Powell then discussed the prima facie case:

The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. See *Teamsters v. United States*. . . . As the court explained in *Furnco Construction Co. v. Waters*. . . the prima facie case “raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.” Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.<sup>148</sup>

The language again applied to all civil litigation, Title VII and otherwise. The effect of a prima facie case is consistent with the nature of a “presumption” under Rule 301. The third matter taken up by Justice Powell is the specific nature of the burden that is shifted.

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. See *Sweeney, supra*, at 25 . . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for plaintiff's rejection. [An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.] The explanation provided must be legally sufficient to justify a judg-

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<sup>147</sup> *Burdine*, 450 U.S. at 253.

<sup>148</sup> *Id.* at 253-54 (footnote omitted).

ment for the defendant. If the defendant carries this burden of production, the presumption raised by the *prima facie* case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's *prima facie* case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.<sup>149</sup>

On the whole, *Burdine* was not cast as a discussion on the way to litigate one type of Title VII case, it was a discussion of the effects of presumptions in civil litigation in general, and the effects of this general doctrine on Title VII litigation. There is not a word in the opinion suggesting that this doctrine did not apply with equal force to disparate impact cases.

#### 4. Objections: Justice Stevens

The most fundamental objection to the thesis here offered is that a *prima facie* case of disparate impact is simply not governed by Rule 301.<sup>150</sup> This objection is grounded on the Court's observation that while Rule 301 governs all presumptions, it does not govern all rules shifting burdens of proof. This argument — implicitly based on the decision in *Transportation Management* — was advanced by Justice Stevens in his *Atonio* dissent.<sup>151</sup>

In *NLRB v. Transportation Management Corp.*,<sup>152</sup> the Court was faced with a situation in which the General Counsel of the National Labor Relations Board had established that an employer had fired an employee because of protected union activities. The employer responded that, even if union activity had been one of the motivating factors, the employee would have been fired in any event because of other unsatisfactory conduct. The employer contended that Rule 301 placed the burden of persuasion on the General Counsel to show that the employee would not have been fired. The Board held that, since the General Counsel had shown that union activity was one motive of the employer, the employer would have the burden to prove that the employee still would have been fired without considering his union activity. Discussing Rule 301, the Court said:

<sup>149</sup>*Id.* at 254-55 (footnote inserted into text.)

<sup>150</sup>See 21 WRIGHT & GRAHAM, *supra* note 49, § 5724, at 585-86. *But see* 1 LOUISELL & MUELLER, *supra* note 63, § 67, at 539.

<sup>151</sup>*Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2130-31 (Stevens, J., dissenting). *See* Smith, *supra* note 41, at 394.

<sup>152</sup>462 U.S. 393 (1983).

The Rule merely defines the term "presumption." It in no way restricts the authority of a court or an agency to change the customary burdens of persuasion in a manner that otherwise would be permissible. Indeed, were respondent correct, we could not have assigned to the defendant the burden of persuasion on one issue in *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).<sup>153</sup>

The Board had considered the employer's burden to be in the nature of "an affirmative defense,"<sup>154</sup> and "[t]he Board has instead chosen to recognize, as it insists it has done for many years, what it designates as an affirmative defense that the employer has the burden of sustaining."<sup>155</sup> Similarly, the burden announced in *Mount Healthy Board of Education v. Doyle*, was a non-statutory and analogous affirmative defense.<sup>156</sup> The Court has recognized other affirmative defenses without express statutory authority.<sup>157</sup>

An affirmative defense has the nature of a confession and avoidance in that it assumes (at least *arguendo*) initial liability and shows by extrinsic evidence that no remedy — or ultimate liability for that matter — should attach.<sup>158</sup> It fits into the three stage order and allocation of proof as a "fourth stage."<sup>159</sup> Such a defense admits that there has in fact been

<sup>153</sup> *Id.* at 404 n.7.

<sup>154</sup> *Id.* at 401.

<sup>155</sup> *Id.* at 402.

<sup>156</sup> 429 U.S. 274, 287 (1977).

<sup>157</sup> *E.g.*, *Sorrells v. United States*, 287 U.S. 435, 436 (1932) (entrapment); *Davis v. United States*, 469 U.S. 1156 (1985) (insanity).

<sup>158</sup> See FED. R. CIV. P. 8(c). See also *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2131 (Stevens, J., dissenting) (justification or excuse); THAYER, *supra* note 19, at 356 ("new and distinct fact"); *id.* at 368-69 ("An admission may, of course, end the controversy; but such an admission may be, and not yet end it; and if that be so, it is because the party making the admission sets up something that avoids the apparent effect of it; as subsequent payment avoids the effect of what shows a claim in contract."); *id.* at 376 (equitable defenses) (cited in *Atonio*, 109 S. Ct. at 2131 n.15 (Stevens, J., dissenting)); C. LANGDELL, EQUITY PLEADING §§ 108-114 (2d ed. 1883); ABA, PROCEEDINGS, INSTITUTE ON THE FEDERAL RULES OF CIVIL PROCEDURE 49 (1939); Belton, *supra* note 11, at 1257-58 & n.229. See also Allen, *Presumptions*, *supra* note 12, at 849-50; Belton, *supra* note 11, at 1214, 1260; McCORMICK'S HANDBOOK, *supra* note 75, at 8. Cf. *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1811 (Kennedy, J., dissenting) ("there by definition [illegitimate cause] is the but-for cause of the employment decision, and the only question remaining is how the employer can justify it.") *But cf.* *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943); McCORMICK, *supra* note 64, at 15.

<sup>159</sup> Thus, the *Hopkins* analysis is not an alternative to the *Burdine* and *McDonnell Douglas* analysis (*But see Hopkins*, 109 S. Ct. at 1805 (O'Connor, J., concurring)) or to the *Albermarle* and *Watson* analysis, but rather is a subsequent analysis. Disparate treatment and disparate impact are alternative (but not exclusive alternatives) means by which to establish that the employment decision was (decisively or merely substantially) caused by discrimination or its "functional equivalent." Once this stage has been reached, *Hopkins* 109 S. Ct. at 1795 (Brennan, J.), then — and only then — is the *Hopkins* analysis available or necessary to establish that the same result would have occurred (or, its equivalent, that no harm would have resulted to the employee from the discriminatory factor in the employment decision). However, the *Hopkins* analysis will govern in every case in which this stage of the order of proof is reached. *Hopkins*, 109 S. Ct. at 1795; Player, *supra* note 116, at 30 n.40. *But see id.*, at 1806 ("limited number," "closely defined set of cases") (Kennedy, J., dissenting).

been discrimination and then justifies this admitted discrimination. This is essentially an interpretation of the substantive law, and neither Rule 8(c) itself nor federal case law provide a universal test to determine whether a defense not enumerated in Rule 8(c) must be so pled.<sup>160</sup>

The best examples of Title VII affirmative defenses are those recognized by the Court in *Dothard* and more recently in *Hopkins*. In both instances the Court had found that there had been an impermissible cause for an employment decision. In *Dothard*, the Court found that the employer had offered sufficient evidence to convince the court that gender was a *bona fide* occupational qualification.<sup>161</sup> In *Hopkins*, the Court remanded for a decision whether the employer had or could offer sufficient evidence to convince the trial court that “when the situation is viewed hypothetically and after the fact, the same decision would have been made even in the absence of discrimination.”<sup>162</sup>

Justice Stevens, in his *Atonio* dissent, argues that the employer’s showing in a disparate impact case is such an affirmative defense. “But when an employer is faced with sufficient proof of disparate impact, its only recourse is to justify the practice by explaining why it is necessary to the operation of business. Such a justification is a classic example of an affirmative defense.”<sup>163</sup> An argument could logically be made that the employer’s showing is an affirmative defense. Justice Stevens certainly attempts this. But Justice Stevens — contrary to his own assertion<sup>164</sup>

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<sup>160</sup> THAYER, *supra* note 19, at 370-76; Belton, *supra* note 11, at 1215. Cf. Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527, 539 (1955).

Rule 301 also limits the power of the courts to shift the burden of persuasion by requiring all such shifts to be treated as affirmative defenses. In contrast, Congress may shift the burden of persuasion without triggering the procedural formalities of an affirmative defense by creating a statutory “Morgan” presumption. See Allen, *Anatomy*, *supra* note 84, at 906. Justice Stevens’ dissent conforms to this limitation by largely abandoning the *prima facie* terminology of *Albermarle* and subsequent cases. *Atonio*, 109 S. Ct. at 2127-36 (Stevens, J., dissenting); *But see id.* at 2131, 2135 (using term “*prima facie*”).

<sup>161</sup> *Dothard v. Rawlinson*, 433 U.S. at 332-37; *Hopkins*, 109 S. Ct. at 1789 (Brennan, J.); *id.* at 1811 (Kennedy, J., dissenting). See § 703(e) of the Civil Rights Act of 1964 (codified at 42 U.S.C. § 2000e-2(e) (1982)). Cf. *Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 2261, 2261-67 (1989).

<sup>162</sup> *Hopkins*, 109 S. Ct. at 1788 n.11. Perhaps a third example of an affirmative defense is also to be inferred from *Hopkins*: Where discrimination has been established to be a cause of the employment decision, such an established claim of “reverse” discrimination is defeated by convincing the court that the decision was made pursuant to a legitimate affirmative action plan. *Hopkins*, 109 S. Ct. at 1805-06 (O’Connor, J., concurring); *id.* at 1813 n. 4 (Kennedy, J., Rehnquist, C.J., and Scalia, J., dissenting); cf. *Johnson v. Transportation Agency*, 480 U.S. 616, 657 (1987) (White, J., dissenting).

<sup>163</sup> *Atonio*, 109 S. Ct. at 2131 (Stevens, J., dissenting). See also *id.* n.17 (Stevens, J., dissenting) (citing FED. R. CIV. P. 8(c) and THAYER, *supra* note 19, at 368-69); Smith, *supra* note 41, at 394; Zuck, *supra* note 13, at 546-50. Thus, the essence of Title VII would not be prohibiting discrimination, but assuring proportionality whenever feasible.

<sup>164</sup> *Atonio*, 109 S. Ct. at 2127 (“longstanding rule of law”); *id.* at 2132 (“the statutory construction that developed in the wake of *Griggs*,” “consistent interpretation of a federal statute”) (Stevens, J., dissenting).

— is not standing with fifteen years of consistent Title VII jurisprudence; he stands against it. Justice Stevens and his colleagues, at the very least, introduce a new terminology, if not a new concept, into Title VII law.<sup>165</sup>

In the disparate impact cases between *Albemarle* and *Atonio*, the employer's showing in defense has never been referred to by any member of the Court as an affirmative defense.<sup>166</sup> Since *Albemarle*, it has always been characterized as a rebuttal to a prima facie case.<sup>167</sup> It is not among the defenses listed in Rule 8(c). Additionally, Title VII practice has been inconsistent with such an analysis. The employer's responsive showing has not been required to be plead as an affirmative defense under Rule 8(c),<sup>168</sup> nor has failure so to plead been deemed a waiver of the defense, as with true affirmative defenses.<sup>169</sup>

The situation in *Mt. Healthy* and *Transportation Management* and the rebuttal to a prima facie case in Title VII are thus fundamentally different. In the two former cases the existence of a prohibited purpose as one motivation for the defendant's conduct (causing plaintiff's injury) had already been established. Defendants were seeking to show that the same conduct would have occurred (causing plaintiff the same injury) because the conduct would have been motivated by legitimate, unprohibited purposes. In the Title VII prima facie case and its rebuttal, the existence of the prohibited motivation (discrimination or its "functional equivalent," disparate impact) as even one causal factor for the defendant's conduct had not only not yet been established, but the existence of that factor was the exclusive focus of the proceeding. Once the existence of this factor as a motivation of the defendant's conduct is established by the preponderance of the evidence, then — and only then

<sup>165</sup> A discussion of the proclivity of the affirmative defense concept where applied to Title VII litigation to lead to racial preferences and quotas is to be found at Cox, *supra* note 12, *passim*; Scharf, *supra* note 17, at 239-40, 244-52. Such a policy analysis is beyond the scope of this paper. On the other hand, this concept can also lead to the contention that overt and intentional racial discrimination can be justified by an affirmative defense of "business necessity." Note, *Defining the Proper Scope of the Business Necessity Defense in Title VII Litigation*, 30 CATH. U.L. REV. 653 (1981). Cf. § 4(b), S. 2104, *supra* note 120.

<sup>166</sup> See NAACP v. Medical Center, Inc., 657 F.2d at 1333-36. *But see* Guardians Assoc. v. Civil Service Comm'n., 463 U.S. 582, 598 (1983) (White, J., announcing judgment) (Rehnquist, J., concurring in part) (Title VI case discussing Title VII analysis); e.g. Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 571-72 (4th Cir. 1985); United States v. City of Chicago, 411 F. Supp. 218, 231-33 (N.D. Ill. 1976).

<sup>167</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. at 425; *Dothard v. Rawlinson*, 433 U.S. at 329; *New York City Transit Auth. v. Beazer*, 440 U.S. at 584; *id.* at 602 (White, Brennan, and Marshall, JJ., dissenting); *Connecticut v. Teal*, 457 U.S. at 446; *Watson v. Fort Worth Bank & Trust*, 108 S.Ct. at 2787; *id.* at 2792 (Blackmun, concurring).

<sup>168</sup> See *Belton*, *supra* note 11, at 1259 ("If Congress has in fact imposed upon the defendant the burden of persuasion on business necessity, then this defense should be treated as an affirmative defense under Rule 8(c), and the defendant should be required to plead it."); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); Allen, *Presumptions*, *supra* note 12, at 849-50. *But see also* *Gomez v. Toledo*, 446 U.S. at 642 (Rehnquist, J., concurring); cf. *Bohlen*, *supra* note 54, at 308.

<sup>169</sup> See 2A MOORE'S, *supra* note 68, ¶ 8.27(3), at 8-251 to 8-253.

— may a defense analogous to that in *Mt. Healthy* and *Transportation Management* be relevant to show that the same conduct would have been motivated by lawful purposes.

Moreover, the law recognizes two types of prima facie cases. The first type of prima facie case is where the established facts create a presumption of liability, the legal consequences of which are governed by Rule 301.<sup>170</sup> Additionally, Justice Powell notes in *Burdine* that the term “prima facie case” can mean merely offering sufficient relevant evidence to allow also the finder of fact to preclude dismissal<sup>171</sup> and to “get to the jury.”<sup>172</sup> This type of prima facie case is established where the evidence allows, but does not compel, an inference of ultimate liability — in Title VII cases discrimination — and precludes dismissal at the close of plaintiff’s evidence.<sup>173</sup> Thus, if a prima facie case of disparate impact were not a presumption, then it would be merely the minimum proof necessary “to get to the jury.”<sup>174</sup> Such a classification would accord the prima facie case of disparate impact even less strength than a presumption under Rule 301.<sup>175</sup> In any event, a Title VII “prima facie case” is clearly a presumption. “*McDonnell Douglas* should have made it apparent that in the Title VII context we use ‘prima facie case’ in the former sense.”<sup>176</sup> Another footnote in *Burdine* also clarifies that burden-shifting effect of a prima facie case is a “presumption”:

<sup>170</sup> *But cf.* SCHLEI & GROSSMAN, *supra* note 10, at 1325-26 (declining to discuss prima facie case as presumption).

<sup>171</sup> Texas Dep’t of Community Affairs v. *Burdine*, 450 U.S. at 254 n.7 (“The phrase ‘prima facie case’ may denote not only the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff’s burden of producing enough evidence to permit the trier of fact to infer the fact at issue.” 9 WIGMORE, *supra* note 62, at § 2494; Ladd, *supra* note 49, at 278-79; 1 LOUISELL & MUELLER, *supra* note 63, § 67, at 537; SCHLEI & GROSSMAN, *supra* note 10, at 1325-26; Zuck, *supra* note 13, at 543 n.44; Belton, *supra* note 11, at 1214 n.32, 1222; Terrell, *supra* note 6, at 308-10.

<sup>172</sup> Obviously a metaphor, and perhaps a useful one. Ordinarily, there is no jury in Title VII litigation.

<sup>173</sup> See Belton, *supra* note 11, at 1236. Professor Belton additionally uses the term prima facie case also to refer to instances where the plaintiff has established by a preponderance of the evidence that conduct was motivated by a forbidden purpose and the defendant seeks to show a “same result” defense. He cites *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270-71 n.21 (1979) (“threshold showing”) and *Mt. Healthy*, neither of which refer to this showing as a prima facie case. Belton, *supra* note 11, at 1247-50. *Cf.* Zuck, *supra* note 13, at 554-56. See also discussion, *infra* at 148-53.

<sup>174</sup> See Zuck, *supra* note 13, at 543.

<sup>175</sup> Professor Belton suggests that *McDonnell Douglas* and *Albemarle* do not unequivocally state that the prima facie case creates a presumption and not merely an inference, i.e., merely sufficient evidence to get to the jury. Belton, *supra* note 11, at 1235-36. This is consistent with 21 WRIGHT & GRAHAM, *supra* note 49, § 5122, at 571, that “[u]nlike the Thayer-Wigmore presumption . . . the proponent [of the presumed fact] is not entitled to a directed verdict [under Rule 301] if the opponent introduces no evidence of the non-existence of the presumed fact.” However, *Burdine* establishes that Rule 301 creates a presumption which compels the appropriate inference in the absence of contradicting evidence. *Burdine*, 450 U.S. at 253.

<sup>176</sup> *Burdine*, 450 U.S. at 254 n.7; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 309, n.44 (1978); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. at 714. See CAL. EVIDENCE CODE § 602 (West 1966). *Cf.* Allen, *Anatomy*, *supra* note 84, at 911.



Usually, assessing the burden of production helps the judge determine whether the litigants have created an issue of fact to be decided by the jury. In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the illusive factual question of intentional discrimination.<sup>177</sup>

*Albemarle, Dothard, Beazer, and Teal* do not suggest otherwise.

Where a prima facie case raises a presumption, it must be governed by Rule 301, and thus by Thayer, unless it is either a statutory exception or a surviving non-statutory Morgan presumption. One district court, confronted with Rule 301, held that the presumption shifting the burden of persuasion in disparate impact was created by statute and thus excepted from Rule 301.<sup>178</sup> The court, however, prudently declined to cite any statutory language creating this supposed exception.<sup>179</sup> On the other hand, no court has expressly stated that the presumption in disparate impact is a non-statutory exception, and only a very few have claimed that there are *any* non-statutory exceptions to Rule 301. But if a prima facie case of disparate impact is not a presumption, it has no defined place in general rules of evidence and litigation practice. It is unique and *sui generis*. As such it constitutes precisely one of those alleged exceptions in civil rights cases to general law disparaged by the Court in a number of cases.<sup>181</sup>

Justice Stevens's contention thus contradicts the long-standing characterization of the employer's burden and the law of presumptions as it has been developed by both the courts and the Congress.

<sup>177</sup> *Burdine*, 450 U.S. at 255 n.8.

<sup>178</sup> *United States v. City of Chicago*, 411 F. Supp. 218, 231-33 (N.D. Ill. 1976); 1 LOUISELL & MUELLER, *supra* note 63, § 65, at 520 & n.6; § 70, at 565. *But see* *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2132 n.18 (Stevens, J., dissenting). *See also* S. 1261, 101st Cong., 1st Sess., 135 Cong. Rec. S7513 (daily ed. June 23, 1989) (creating statutory "Morgan" presumption).

<sup>179</sup> The statutory language most plausibly creating this exception, § 703(h) of the Civil Rights Act of 1964 (codified at 42 U.S.C. § 2000e-2(h) (1982)), would apply *only* to "ability tests." In relevant part, it provides, "[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, [etc.]" *See* *Griggs v. Duke Power Co.*, 401 U.S. at 433-36; *Belton*, *supra* note 11, at 1232. *But see* *International Bhd. of Teamsters v. United States*, 431 U.S. at 343-56. *Accord*, *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980) (703(h) requires proof of intent to discriminate). Disparate impact, however, as *Watson* held, is much broader, and applies to any selection procedure or criterion. *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2786-87; *id.* at 2791-92 (Blackmun, J., concurring); *id.* at 2797 (Stevens, J., concurring). Further, statutory presumptions excepted from Rule 301 are created by language far more specific in operative effect than Section 703(h). *See, e.g.*, *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 669 (1979) (25 U.S.C. § 194); 21 WRIGHT & GRAHAM, *supra* note 49, § 5123, at 582-83.

<sup>180</sup> *See* 1 LOUISELL & MUELLER, *supra* note 63, § 68, at 540; *cf.* *Allen, Anatomy*, *supra* note 84, at 912. *But see* WEINSTEIN, *supra* note 49, ¶ 301[02], at 301-32 & n.12, 301-43 to 301-48; 21 WRIGHT & GRAHAM, *supra* note 49, § 5123, at 578-79.

<sup>181</sup> *See supra* note 6.

## 5. Objections: Justice Blackmun

An objection articulately raised by Justice Blackmun in *Watson* is that — whatever the logic or the law — the operative words of the Court’s precedents in disparate impact cases clearly require a shifting of the burden of persuasion. Justice Blackmun makes his case as follows:

Our cases make clear, however, that, contrary to the plurality’s assertion, *ante*, at 2790, a plaintiff who successfully establishes this *prima facie* case shifts the burden of *proof*, not production, to the defendant to establish that the employment practice in question is a business necessity. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (employer must “meet the burden of *proving* that its tests are ‘job related’ ”); *Dothard v. Rawlinson*, 433 U.S. at 329, 97 S.Ct., at 2727 (employer must “*prov[e]* that the challenged requirements are job related”); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971) (“Congress has placed on the employer the burden of *showing* that any given requirement must have a manifest relationship to the employment in question”) (emphasis added in each).<sup>182</sup>

The burden of production is allegedly different from the burden described in *Griggs*, *Albemarle*, and *Dothard*.<sup>183</sup> The issue is therefore whether the meaning of the burden “to show,” “to prove,” and “to demonstrate” currently is the same as the burden “to persuade,” or the burden “to articulate” or “to produce evidence.”<sup>184</sup>

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<sup>182</sup> *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2792 (Blackmun, J., concurring); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2130 n.14 (Stevens, J., dissenting). See *Atonio*, 109 S. Ct. at 2126 (“We acknowledge that some of our earlier decisions can be read as suggesting [a burden of persuasion]”); Holdeman, *Changing Face*, *supra* note 34, at 182, 194-96. *But cf.* SCHLEI & GROSSMAN, *supra* note 10, 1328-29.

<sup>183</sup> See also *Connecticut v. Teal*, 457 U.S. at 446-47 (“demonstrate”); *New York City Transit Auth. v. Beazer*, 440 U.S. at 587 (“demonstrate”) (1979); *id.* at 602 (White, J., dissenting) (“show”); *NAACP v. Medical Center, Inc.*, 657 F.2d at 1335.

<sup>184</sup> See McCORMICK, *supra* note 64, at 635 (“‘Proof’ is an ambiguous word. We sometimes use it to mean evidence. . . . Sometimes, when we say a thing is ‘proved’ we mean that we are convinced.”); THAYER, *supra* note 19, at 384 (“the old ambiguity as to *probatio* and *probare*”); McCormick, *supra* note 64, at 15 (“inexact expression”); Brief of Amicus Curiae the United States at 25-26, *Atonio*; *Procedural Subversion*, *supra* note 18, at 1006 n.39. *Cf.* Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1151 (1980); Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1, 6-7 (1979).

The decision of the Supreme Court of the United States in *Board of Trustees of Keene State College v. Sweeney*,<sup>185</sup> suggests the resolution of this issue. Here the Court was faced with explaining or escaping language in disparate treatment cases, *McDonnell Douglas* (“to show”),<sup>186</sup> and *Furnco* (“prove”),<sup>187</sup> that strongly suggested a burden of persuasion. The First Circuit Court of Appeals, in a disparate treatment case, had found that a prima facie case under *McDonnell Douglas* had been made. It then stated that the burden shifted “requiring the defendant to prove absence of discriminatory motive”.<sup>188</sup>

The Court found that this language improperly shifted the burden of persuasion to the employer, and remanded the case. In so doing, the majority discussed the meaning of the words “articulate,” “show,” and “prove.” In describing the employer’s burden in Title VII litigation following the establishment of a prima facie case, the court states:

While words such as “articulate,” “show,” and “prove,” may have more or less similar meanings depending upon the context in which they are used, we think there is a significant distinction between merely “articulat[ing] some legitimate, non-discriminatory reason” and “prov[ing] absence of discriminatory motive.” By reaffirming and emphasizing the *McDonnell Douglas* analysis in *Furnco Construction Co. v. Waters*, *supra*, we made it clear that the former will suffice to meet the employee’s prima facie case of discrimination.<sup>189</sup>

The dissenting opinion in *Sweeney*, written by Justice Stevens with whom Brennan, Stewart, and Marshall joined, is particularly illuminating. The dissent states its disagreement as follows:

As its sole basis for this conclusion, this Court relies on a distinction drawn for the first time in this case “between merely ‘articulate [ing] some legitimate, nondiscriminatory reason’ and ‘prov[ing] absence of discriminatory motive’ [439 U.S.] at 295.” This novel distinction has two parts, both of which are illusory and were unequivocally rejected in *Furnco* itself.

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<sup>185</sup> 439 U.S. 24 (1978) (per curiam).

<sup>186</sup> 411 U.S. at 792, 802.

<sup>187</sup> 438 U.S. at 577-78.

<sup>188</sup> *Sweeney*, 569 F.2d 169, 177 (1st Cir. 1978).

<sup>189</sup> *Sweeney*, 439 U.S. at 25.

First is a purported difference between “articulating” and “proving” a legitimate motivation.<sup>190</sup>

Thus, both the majority and the dissent in *Sweeney* concurred that “articulate,” “show,” and “prove,” generally may have more or less similar meanings. Where they disagreed was on whether the First Circuit placed the word “prove” in such a context as to require a meaning different from “articulating.”<sup>191</sup> It was not mentioned in *Sweeney* — and the negative is 35 weeks pregnant — is whether “articulate,” “prove,” and “show” in a disparate treatment case mean the same thing as those words in disparate impact cases.<sup>192</sup> The reasoning in *Sweeney* implicitly leads to the conclusion that similar language in the classic disparate impact cases, *Griggs* and *Albemarle*, could no longer be taken to impose a burden of persuasion.

Additionally, the court in *Sweeney* noted that a shifting burden of persuasion was inconsistent with the three stages of proof prescribed in all Title VII litigation. First, the prima facie case is set forth; second, rebuttal evidence is presented; third, the plaintiff may offer pretext evidence. The court reasoned that a requirement that the defendant (in the second stage) prove the absence of discriminatory motive “would make entirely superfluous the third step [pretext] in the *Furnco-McDonnell Douglas* analysis, since it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring contrary proof from the employee as part of the third step.”<sup>193</sup> No mention was made of Rule 301.<sup>194</sup>

<sup>190</sup> *Id.* at 27-28 (footnote omitted) (Stevens, J., dissenting).

<sup>191</sup> *Cf. Procedural Subversion*, *supra* note 18, at 1004. Belton, *supra* note 11, at 1239-40, n.146, suggests a more substantial difference between the majority and the dissent, but acknowledges that “[s]ome courts appear to believe that the Court in *Sweeney* was unanimous in its view of the obligation that shifted to the defendant. *See, e.g., Lieberman v. Gant*, 630 F.2d 60, 65 n.7 (2d Cir. 1980).” *See also Note, Judicial Dualism*, *supra* note 9, at 409 n.172.

The Court has apparently not escaped from this confusion. *See, e.g., Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) (Brennan, Marshall, Blackmun, and Stevens, JJ.); *id.* at 1796 (O’Connor, J., concurring); *id.* at 1806 (Kennedy, J., Rehnquist, C.J., and Scalia, J., dissenting), where it is difficult to discern whether a member of the Court is referring merely to producing evidence or to convincing the court of a presumption’s basic facts. All members of the Court use these terms without apparent concern for the two distinct meanings its prior opinions have assigned to them. Professor Thayer notes that even the best of judges confuse these meanings. THAYER, *supra* note 19, at 359-60. Because of the possibility of such confusion, this paper has attempted to avoid terms such as “prove”, “show”, or “demonstrate”, and instead to use “establish”, “convince”, or “persuade” or on the other hand, “produce”, “offer”, or “present”, where applicable. *Cf. THAYER*, *supra* note 19, at 362.

<sup>192</sup> *See NAACP v. Medical Center, Inc.*, 657 F.2d at 1335. Professor Belton, *supra* note 11, at 1238, suggests that the words mean the same, but that all of these words require persuasion. *See Silberhorn v. General Iron Works*, 584 F.2d 970, 971 (10th Cir. 1978).

<sup>193</sup> *Sweeney*, 439 U.S. at 24 n.1. Professor Belton agrees. Belton, however, would render the allocation of proof logical by imposing a burden of persuasion at the second stage, and abolishing the third stage. Belton, *supra* note 11, at 1212 (“the pretext stage of proof enunciated in *McDonnell Douglas Corp. v. Green* should be eliminated since it allows for the analytically bankrupt [sic] possibility that a court could find both the defense of a legitimate, nondiscriminatory reason or business justification and a pretext in the same case.”) *See also id.* at 1273-74; *cf. S. 2104*, §§ 3 & 4, *supra* note 120. *Published by IdeaExchange@IAKrona, 1990*  
<sup>194</sup> *Cf. Mendez*, *supra* note 184, at 111-60; Terrell, *supra* note 6, at 310-17; *Procedural Subversion*, *supra* note 18, at 1006 & n.40.

Similarly, the third stage of the disparate impact case, pretext,<sup>195</sup> would also be obviated by imposing a burden on the defendant to persuade the court that his articulated legitimate business purpose actually motivated his employment decision.<sup>196</sup>

As Professor Belton recognizes, the disparate impact and disparate treatment theories are alternative approaches to determinations of discrimination. There is no reason to create a burden of persuasion *vel* burden of production dichotomy between these two modes of analyses. "The same policy, probability, and fairness considerations apply to a prima facie case under both theories."<sup>197</sup> Thus, the "legitimate business purpose" rebuttal is equally an "act of Congress" as the "legitimate non-discriminatory reason" rebuttal,<sup>198</sup> and therefore equally within the mandate of Rule 301.

### B. First Stage's Prima Facie Case

Rule 301 does not govern the nature of the basic facts which must be shown in order to establish a presumption and to shift the burden of production. It merely governs the nature of the burden of proof that is thereby shifted. Nevertheless, the logic supporting Rule 301 argues that the burden should not be onerous, and the Court's decisions agree.<sup>199</sup>

A presumption is based upon inferences and balances of probability.<sup>200</sup> The plaintiff bears the burden of establishing a prima facie showing of an unlawful employment practice, *i.e.*, the basic facts of the presumption, by a preponderance of the evidence.<sup>201</sup> The finder of fact must be

<sup>195</sup> See *Connecticut v. Teal*, 457 U.S. at 447.

<sup>196</sup> See *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2131 (Stevens, J., dissenting) (third stage abandoned); *NAACP v. Medical Center, Inc.*, 657 F.2d at 1335; *Furnish*, *supra* note 9, at 436; *Alberti*, *supra* note 114, at 204-05; *Reynard*, *supra* note 109, at 307 & n.131. *Cf.* *Lamber*, *supra* note 109, at 12-13. See also text at 161-63.

<sup>197</sup> *Belton*, *supra* note 11, at 1267

<sup>198</sup> *Id.* *Cf.* *Chamallas*, *supra* note 31, at 323.

<sup>199</sup> *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2788-90; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 253. *Cf.* *Furnish*, *supra* note 9, at 435. *But see* *Middleton*, *supra* note 34, at 203.

<sup>200</sup> *Greer v. United States*, 245 U.S. 559, 561 (1917) (Holmes, J.) ("A presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that the courts may notice the truth."); *Laughlin*, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 211 (1953).

<sup>201</sup> *Burdine*, 450 U.S. at 252-54; *Watson*, 108 S. Ct. at 2788; 1 LOISELL & MUELLER, *supra* note 63, § 66, at 526. See 56 F.R.D. 208-11 (1972) (Advisory Committee Note); 46 F.R.D. 161, 214-15 (1969) Draft, Advisory Committee's Note). 21 WRIGHT & GRAHAM, *supra* note 49, § 5125, at 596-603; MORGAN, BASIC PROBLEMS, *supra* note 19, at 34; Prop. FED. R. EVID. 303(C)(1)(B), 46 F.R.D. 161, 212-19 (1969); RULE 702, MODEL CODE OF EVIDENCE ("The basic fact of a presumption may be established in an action by the pleadings, or by stipulation of the parties, or by judicial notice, or by evidence which compels a finding of the basic fact, or by a finding of the basic fact from the evidence."); UNIF. R. EVID. 13 ("facts found or otherwise established in the action.") See *Player*, *supra* note 116, at 34; MCCORMICK'S HANDBOOK, *supra* note 75, at 821. *Cf.* 21 WRIGHT & GRAHAM, *supra* note 49, § 5125, at 604. It is critical to distinguish between the basic fact (or facts) of the presumption and the

persuaded that each element of the prima facie case is true — not just that there is sufficient evidence from which it could so find.<sup>202</sup> The facts necessary to establish a prima facie showing will vary depending on the particular context and may be established through either direct or circumstantial evidence.<sup>203</sup> This again is consistent with general evidenti-

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presumed fact.”); Allen, *Presumptions*, *supra* note 12, at 852. *But cf.* McCormick, *supra* note 64, at 7-8.

Justice O'Connor, in a confusing discussion in *Hopkins*, 109 S. Ct. at 1801-03, uses language that seems to suggest that the mere offer of evidence of a certain type — direct evidence of discriminatory intent — should operate as the basic fact of a presumption and shift the burden of persuasion. This language would apparently not require that the court be persuaded even that the evidence itself was true, though in *Hopkins* the evidence at bar — gender stereotyped statements — was apparently undenied. See *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1802 (“where there is direct evidence”) (emphasis original); *id.* (“where plaintiff presents direct evidence of discrimination”); *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556 (11th Cir. 1983) (Tjoflat, J.) (“presenting direct evidence”); *Fields v. Clark Univ.*, 817 F.2d 931, 935-37 (1st Cir. 1987) (“produced ‘strong evidence’”); *Thomkins v. Morris Brown College*, 752 F.2d 558, 563 (11th Cir. 1985) (“evidence . . . shifted burden of persuasion”) (cited in *Hopkins*, 109 S. Ct. at 1802-03. See also *Hopkins*, 109 S. Ct. at 1812 (Kennedy, J., dissenting) (“produced proof”). A shifting of the burden of persuasion upon merely an offer of evidence would be unique. See authorities cited *supra* note 6. On the other hand, Justice O'Connor's language could plausibly be construed to mean that this evidence must be found to be true in order to operate as the basic fact of a presumption. A shifting of the burden of persuasion on such a finding of a basic fact of statements reflecting explicit gender stereotyping would be a new (but not illogical) presumption falling within the class of “Morgan” presumptions. THAYER, *supra* note 19, at 315-31; text *supra* at 117-19, 144. However, in the absence of direct Congressional sanction the new presumption's effect of shifting the burden of persuasion — rather than the burden of production — would be precluded by Rule 301. See text *supra* at 123-25. A third reading of Justice O'Connor's discussion is roughly consistent with the plurality's view in *Hopkins* that where the plaintiff has established that an illegitimate criterion was a ‘substantial factor’ in the employment decision the burden of persuasion is shifted to the defendant, with the Court's view in *Transportation Management and Mt. Healthy*, and with the position here advanced. See *Hopkins*, 109 S. Ct. at 1804 (“In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.”); *id.* at 1805 (“Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made ‘because of the plaintiff's protected status.’”); *cf. id.* at 1806 (Kennedy, J., dissenting) (“proves by direct evidence”). *But see supra* note 191.

Similarly, Professor Belton is critical of *Burdine* as adding a “novel requirement” in requiring a prima facie case to be established by a preponderance of the evidence. He apparently (and perhaps Justice O'Connor) confuse the two meanings of a prima facie case, where, as discussed *supra* at 135-36, a prima facie case sufficient to “get to the jury” imposes only a burden of production or articulation, while a prima facie case sufficient to raise a presumption (Morgan or Thayer) and to shift any burden of proof, however defined, requires that the basic fact (or facts) be established by a preponderance of the evidence. Belton, *supra* note 11, at 1240. See *id.* at 1265; Middleton, *supra* note 34, at 192. *But see id.* at 1214 n.32.

<sup>202</sup> *Watson*, 108 S. Ct. at 2792 (Blackmun, J., concurring) (“[T]he plurality, of course, is correct that the initial burden of proof is borne by the plaintiff, who must establish, by some form of numerical showing, that a facially neutral hiring practice select[s] applicants . . . in a significantly discriminatory pattern.”); *Dothard v. Rawlinson*, 433 U.S. 329; 46 F.R.D. at 214-15; MORGAN, BASIC PROBLEMS, *supra* note 19, at 34; Smith, *supra*, note 41, at 387. *Cf. Watson*, 108 S. Ct. at 2789 (“Nor are courts or defendants obliged to assume that plaintiff's statistical evidence is reliable”).

<sup>203</sup> *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. at 716-17.

ary principles concerning the facts that raise presumptions.<sup>204</sup>

To make a prima facie showing of a Title VII violation, the Supreme Court has stated generally that evidence must be presented establishing actions by the defendant which, absent explanation, would normally be thought to be based on discriminatory criteria.<sup>205</sup> In many circumstances, statistical evidence showing disparities in the representation or selection rates of racial, ethnic, or gender groups may be sufficient to establish such a prima facie case. The Court's previous discussion of the use of statistics reflects the acceptability of disparate impact and statistical imbalances as evidence from which logically to infer and to presume<sup>206</sup> discriminatory intent.

Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative in the community from which employees are hired. Evidence of long lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though Section 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.<sup>207</sup>

<sup>204</sup> The specific denial of an element of the basic facts of a prima facie case by the defending party, and the introduction of evidence in support of that denial, does not shift the burden of persuasion to the party defending. *JONES ON EVIDENCE*, *supra* note 49, § 5:2, at 525-26.

<sup>205</sup> *Burdine*, 450 U.S. at 253-54. ("The prima facie case serves an important function in litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection.") See *International Bhd. of Teamsters v. United States*, 431 U.S. at 358 & n.44; *Furnco Const. Co. v. Waters*, 438 U.S. at 575-76; *Laughlin*, *supra* note 200, at 211-12. Cf. 46 F.R.D. 161, 212-13, 214-15 (1969).

<sup>206</sup> There is some precedent in criminal matters for the contention that the Constitution requires that the basic fact of presumption (civil or criminal) must permit an inference of the presumed fact. 10 MOORE'S, *supra* note 68, ¶ 301.06, at III-26. See *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639 (1929).

<sup>207</sup> *Teamsters*, 431 U.S. 324, 339 n.20 (disparate treatment) (cited by *Atonio*, 109 S. Ct. at 2121 n.6.) See also *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("an invidious discriminatory purpose may often be inferred from the totality of relevant facts . . . It is also not infrequently there that the discriminatory impact may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is difficult to explain on non-racial grounds."). *But cf. Griggs' Folly*, *supra* note 12, at 439-45.

Nevertheless, statistical proportionality is not assumed to be the norm. As Justice O'Connor states without ambiguity, "[i]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. . . . It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2787 (O'Connor, J.); *id.* at 2797 (Stevens, J., concurring). Cf. *Cox*, *supra* note 12, at 762-63.

Disparate impact, as with disparate treatment, has as its function the "allocation of burdens and the creation of a presumption by the establishment of a prima facie case . . . intended progressively to sharpen the inquiry into the illusive factual question of intentional discrimination."<sup>208</sup> Evidence establishing a disparate impact is thus the functional equivalent for a prima facie showing of discriminatory intent in making a prima facie showing of an unlawful employment practice.<sup>209</sup> Such a purpose does not demand a difficult trigger, and is effectuated by an easy one.<sup>210</sup>

In *Watson*, the Court allowed a prima facie case of disparate impact to be made using the statistical imbalance caused by subjective selection procedures.<sup>211</sup> The Court thereby further conformed the allocation and order of proof in this aspect of disparate impact litigation to *McDonnell Douglas*. Justice Blackmun does not object to this particular mimicry, and, indeed, concurs.<sup>212</sup>

*Watson* also departs significantly in one respect from the position perhaps accepted by the dissenters and clearly expressed in the 1978 Uniform Guidelines. Sections 3A and 4D define adverse (or disparate) impact strictly in terms of a four-fifths disparity in the selection rate of actual applicants resulting from the use "tests and other selection procedures."<sup>213</sup> However, the Court had never limited the use of statistics to the selection rate<sup>214</sup> and *Watson* explicitly overruled the four-fifths rule

<sup>208</sup> *Burdine*, 450 U.S. at 255 n.8. See also *Bakke*, 438 U.S. at 308 n.44 (1978) (Powell, J.) ("[T]he presumption in *Griggs* [is] that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute.")

<sup>209</sup> Cf. *Watson*, 108 S. Ct. at 2785. The "functional equivalence" theory holds that neutral criteria that have an adverse impact on protected classes and do not serve any legitimate business purpose are the functional equivalents of race, and therefore should be treated like race. Willborn, *supra* note 37, at 804, 812-14.

<sup>210</sup> See *Senate Hearings*, *supra* note 61, at 196-97 (Testimony of Richard A. Keatinge); *Furnish*, *supra* note 9, at 435-36. Indeed, the easing of the plaintiff's burden in making a prima facie case of disparate impact effectuated by *Watson*, argues for the easing of the defendant's burden on rebuttal. See SCHLEI & GROSSMAN, *supra* note 10, at 1328 n.139. Cf. *Furnish*, *supra* note 9, at 436; *Holdeman, Changing Face*, *supra* note 34, at 181.

<sup>211</sup> In part, the Court was motivated in this decision to address "subconscious stereotypes and prejudices," *Watson*, 108 S. Ct. at 2786, and in part because it questioned whether "discriminatory intent . . . can be adequately policed through disparate treatment analyses." *Id.* at 2786. Cf. *Cox*, *supra* note 12, at 776-77; cf. generally *Rutherglen*, *supra* note 14.

<sup>212</sup> *Watson*, 108 S. Ct. at 2792 (Blackmun, J.) See *id.* at 2797 (Stevens, J.)

<sup>213</sup> See Uniform Guidelines, *supra* note 15, § 2B, at 38297. See also Questions 5 and 6, Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11996, 11997 (1979) [hereinafter Questions].

<sup>214</sup> The Court in *Dothard* stated: "[t]here is no requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants." 433 U.S. at 330. See also *New York City Transit Auth. v. Beazer*, 440 U.S. at 584-87 (1979). Cf. *Teamsters*, 431 U.S. at 340 n.20 ("general population"); *Hazelwood School Dist. v. United States*, 433 U.S. at 308 ("relevant labor market"), cited in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2195 (Stevens, J., dissenting). But cf. *Booth & Mackay*, *supra* note 34, at 143.



in favor of a case-by-case approach.<sup>215</sup>

Thus, both *Watson's* unanimous holding on subjective procedures and its plurality holding on the four-fifths rule, not only facilitate the establishment of a prima facie case, but also require only a little more — if any — than the proof necessary to raise an inference of intentional discrimination under statistical disparate treatment cases.<sup>216</sup>

On the other hand, *Atonio* perhaps illuminates a surviving distinction between a disparate impact case and a statistical disparate treatment case. The Court held that comparisons between different employee groups within the same firm where one group is not chosen from the other, *i.e.*, neither a selection nor a representation rate, is “nonsensical”<sup>217</sup> and “irrelevant.”<sup>218</sup> Additionally, the Court in *Atonio* required that there not only be a disparity in selection or representation rates, but that this disparity be causally connected to a particular and specific selection practice or criterion.<sup>219</sup> Under a statistical disparate treatment case, neither restriction is observed, and any imbalance disclosed by the employment population — provided it is sufficiently large not to be the result of mere chance — is admitted. Both of *Atonio's* requirements are irrelevant if a disproportion alone is the essence of the disparate impact case, but highly relevant if a well disguised discriminatory intent is the target of the prima facie case.<sup>220</sup> The distinction recognizes the difference between the missions of the two analyses: the statistical disparate treatment case seeks to uncover the manipulation of a variety of criteria and procedures to accomplish a discriminatory goal, while the disparate impact case focuses on the use of one particular criterion or procedure for the same purpose.

<sup>215</sup> *Watson*, 108 S. Ct. at 2789 n.3 (“At least at this stage of the law’s development, we believe that such a case-by-case approach properly reflects our recognition that statistics come in infinite variety and . . . their usefulness depends on all of the surrounding facts and circumstances.”); *id.* at 2792 n.2 (Blackmun, J., concurring). See *Teamsters*, 431 U. S. at 340. Cf. *Griggs’ Folly*, *supra* note 12, at 446-51.

<sup>216</sup> See *Atonio*, 109 S. Ct. at 2121 (citing *Teamsters* and *Hazelwood*); cf. *Teamsters*, 431 U.S. at 337-43; *Hazelwood School Dist. v. United States*, 433 U.S. at 307-13; *id.* at 347-49 (White, J., concurring in *Hazelwood* (disparate treatment) and dissenting in *Dothard* (disparate impact) but applying the same reasoning in both cases); *Castaneda v. Partida*, 430 U.S. at 487-92; *Alexander v. Louisiana*, 405 U.S. at 629-31. But see *Rutherglen*, *supra* note 14, at 1332; *Middleton*, *supra* note 34, at 203.

<sup>217</sup> *Atonio*, 109 S. Ct. at 2122.

<sup>218</sup> *Id.* at 2123; see Uniform Guidelines, *supra* note 15, § 3A, 4, at 38297; Questions 9-27, *supra* note 213, 44 F. Reg. at 11997-12000.

<sup>219</sup> *Atonio*, 109 S. Ct. at 2124-25; *Watson*, 108 S. Ct. at 2788-90; *id.* at 2792 n.1 (Blackmun, J., concurring in part). Cf. Uniform Guidelines, *supra* note 15, § 4C.

<sup>220</sup> *Rutherglen*, *supra* note 14, *passim*; *Cox*, *supra* note 12, at 757-58, 772-78; cf. *Atonio*, 109 S. Ct. at 2124-25. In this sense, the definition of disparate impact propounded by the Uniform Guidelines a strict selection rate may support the latter concept of disparate impact’s target.

While disparate impact is established by a different kind of statistical imbalance than disparate treatment, the underlying concept of the significance, relevance and logical strength of such statistics as supporting an inference of intentional discrimination is presupposed, perhaps with some confusion, by all members of the Court. Justice Stevens states that "evidence of a racially stratified work force" has "probative value."<sup>221</sup> A fact cannot be merely probative of itself, but must be probative of some other fact. The use of the term suggests that this imbalance points toward something other than itself, toward something other than a mere statistical imbalance or disproportion. Unless one imbalance is evidence of another, mathematically unrelated, more legally relevant imbalance, this "other fact" may well be intentional discrimination, for which statistical imbalances and disparate impact are a "functional equivalent". This "probative value" is explicitly utilized in a statistical disparate treatment case. In disparate impact, Justice Stevens cites two disparate treatment cases, *Hazelwood* and *Teamsters*, as authority providing the standard for proper statistical evidence<sup>222</sup> and refers to such statistics as sufficing "to establish a prima facie case of discrimination"<sup>223</sup> — a commingling of disparate impact and disparate treatment concepts to which he objects when done by the Court.<sup>224</sup>

In defining the character of a disparate impact case, the members of the Court have struggled with an elaborate judicially created construct that imposed a substantial difference in analysis and consequence between the similar basic facts and similar justification of a statistical disparate treatment case and a disparate impact case. The logic of Rule 301 has allowed the majority in *Atonio* to rationalize this anomaly, to simplify pertinent legal analysis, to facilitate the plaintiff's initial burden, and to attach similar consequences to similar circumstances.

### C. Second Stage's Evidence

Under the dissenters' view, as noted by Justice Blackmun, "the disparate impact caused by an employment practice is *directly established* by the numerical disparity," which is then negated by establishing "a manifest relationship to the employment in question."<sup>225</sup> It is difficult

<sup>221</sup> *Atonio*, 109 S. Ct. at 2127 (Stevens, J., dissenting).

<sup>222</sup> *Id.* at 2134-35 (Stevens, J., dissenting).

<sup>223</sup> *Id.* at 2135 (Stevens, J., dissenting). See *Teamsters*, 431 U.S. at 335 n.15; Middleton, *supra* note 34, at 202.

<sup>224</sup> *E.g.*, *id.* n.29 (Stevens, J., dissenting).

<sup>225</sup> *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2794 (Blackmun, J., concurring). See also *Atonio*, 109 S. Ct. at (Stevens, J., dissenting). The purpose of Title VII thus becomes the maximum feasible racial and gender balance, not the elimination of invidious discrimination. *But see* *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1803-04 (O'Connor, J., concurring) ("While the prima facie case under *McDonnell Douglas* and the statistical showing of imbalance involved in an impact case may both be indicators of discrimination or its 'functional equivalent,' they are not, in and of themselves, the evils Congress sought to eradicate from the employment setting.") *Cf. infra* note 235.

to fit this view of the disparate impact showing into any theory of presumptions, Morgan, Thayer, or other.<sup>226</sup> Evidence of job relatedness, or even the most persuasive kind of business necessity, does not "meet," "rebut," or "contradict" this disparity. It is logically unrelated to the statistics. Only evidence attacking the statistics, i.e., showing their lack of reliability or lack of connection to the selection procedure at issue, would "meet" the disparity.

On the other hand, if disparate impact is directed toward "discriminatory" practices and the "functional equivalent" of discrimination,<sup>227</sup> then rebuttal evidence of a non-statistical nature is relevant because such evidence contradicts the inference of intentional discrimination or other invidious purpose. Applying the logic of Rule 301 to the second stage of Title VII litigation would require that the presumption raised by the prima facie case be rebutted by *any* affirmative evidence from which a non-discriminatory motive or purpose may be inferred. Such evidence would be "evidence to rebut or meet the presumption,"<sup>228</sup> or "evidence contradicting the presumed fact."<sup>229</sup> As the Court noted in *Teamsters*, "[t]he employer's defense must, of course, be designed to meet the prima facie case of the Government."<sup>230</sup> This evidence does not have to be in fact believed by the court, and evidence refuting the defendant's assertions are not properly considered at this stage. Thus, evidence that the proffered motive was not the defendant's actual motive would not undermine or negate the rebuttal, but would rather support a finding at the third stage that the defendant's proffered motive was in fact a pretext or coverup for intentional discrimination.<sup>231</sup>

The propriety of this broad spectrum of evidence was not recognized by *Watson*, though Justice Blackmun seems to think it was.<sup>232</sup> Nor was

<sup>226</sup> As noted previously, Justice Stevens no longer even tries. *Atonio*, 109 S. Ct. at 2130, 2131 ("affirmative defense.")

<sup>227</sup> See *id.* at 2121 & n.6; Rutherglen, *supra* note 14, *passim*; Cox, *supra* note 12, *passim*.

<sup>228</sup> FED. R. EVID. 301.

<sup>229</sup> CONF. COMM. REPORT, *supra* note 83, 1974 U.S. CODE CONG. & ADMIN. NEWS at 7099. See also Draft Rules of Evidence, *supra* note 21, 46 F.R.D. at 212 ("Evidence . . . contrary to the existence of the presumed fact"); MODEL CODE OF EVIDENCE, Rule 704 ("evidence . . . which would support a finding of [the] non-existence [of the presumed fact]."); THAYER, *supra* note 19, at 336; WEINSTEIN, *supra* note 49, ¶ 301[02], at 301-32 to 301-33 & n.14; 21 WRIGHT & GRAHAM, *supra* note 49, § 5125, at 601-02 ("evidence which is contrary to the presumed fact.") Cf. Ladd, *supra* note 49, at 283-85.

<sup>230</sup> *International Bhd. of Teamsters v. United States*, 431 U.S. at 360 n.46. Cf. *Greer v. United States*, 245 U.S. at 561 (basic fact must allow a logical inference of presumed fact); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28-29 (1975); *Tot v. United States*, 319 U.S. 463 (1943); *Belton*, *supra* note 11, at 1218-19, 1222; *Hecht & Pinzler*, *supra* note 49, at 529. See generally Note, *Constitutionality*, *supra* note 160. But see *Allen*, *Anatomy*, *supra* note 84, at 898; *Hecht & Pinzler*, *supra* note 49, at 532-33.

<sup>231</sup> See text *infra* at 162-63.

<sup>232</sup> *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2794 (Blackmun, J., concurring). See generally *Holderman v. Charming Breeze*, *supra* note 34, at 198-94.

it accepted in *Atonio*.<sup>233</sup> The Court still appears to maintain the possibility that a legitimate, nondiscriminatory reason unrelated to the defendant's business would not be sufficient to rebut a disparate impact prima facie case.<sup>234</sup> This would appear to conflict with pronouncements by members of the Court that Title VII prohibits only employment decisions caused by the prohibited criteria (race, color, national origin, religion, or sex) and leave the employer free to make such decisions on any other criteria whatsoever.<sup>235</sup>

However, if Justice Blackmun's reasoning is accurate, Justice O'Connor's decision — consistent with Rule 301 — leads to the use of any specific non-discriminatory reason for rebuttal.<sup>236</sup>

<sup>233</sup> *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2125-26.

<sup>234</sup> *Id.* ("serves, in a significant way, the legitimate employment goals of the employer."); *Watson*, 108 S. Ct. at 2790 (O'Connor, J.) ("legitimate business reason"). See *Middleton*, *supra* note 34, at 231. For example, assume that a named plaintiff establishes a prima facie disparate impact case by showing that the defendant preferentially hires members of his own extended family. The defendant responds not that family ties generate more efficient workers, but that they needed jobs and, if unemployed, he would be morally obligated to support them. Assume further that there is no evidence of pretext, e.g., of inconsistent use of family ties to the disadvantage of protected groups, or of a similar nature. This situation, though unlikely, arguably would not be a "legitimate business purpose," *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1303 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984), but would meet Rule 301 standards for rebuttal and might well attract five members of the Supreme Court. Similarly, an employer might exclude a bankrupt from employment because he would create additional administrative burdens unrelated to his actual job performance. *Furnish*, *supra* note 9, at 442. Analogous voluntary preferences might be based on military service, community activism, or astrological signs. See, e.g., *Garcia v. Gloor*, 609 F.2d 156, 162 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). *But cf.* § 712 of the Civil Rights Act of 1964 (codified at 42 U.S.C. § 2000e-10) (preserving veterans' preference).

<sup>235</sup> The legislative history of Title VII found pertinent by Justice Brennan and noted in *Hopkins* is equally pertinent here: "[t]he converse, therefore, of 'for cause' legislation, Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employer's freedom of choice." In support of this assertion, Justice Brennan notes

Congress specifically declined to require that an employment decision have been 'for cause' in order to escape affirmative penalty (such as reinstatement or backpay) from a court. As introduced in the House, the bill that became Title VII forbade such affirmative relief if an 'individual was . . . refused employment or advancement, or was suspended or discharged for cause.' H.R. 7152, 88th Cong., 1st Sess. 77 (1963) (emphasis added [by Justice Brennan]). The phrase 'for cause' eventually was deleted in favor of the phrase 'for any reason other than' one of the enumerated characteristics. See 110 Cong. Rec. 2567-2571 (1964). Representative Celler explained that this substitution 'specified] cause'; in his view, a court 'cannot find any violation of the act which is based on facts other . . . than discrimination on the grounds of race, color, religion, or national origin.' *Id.*, at 2567.

*Price Waterhouse v. Hopkins*, 109 S. Ct. at 1784-85 & n.4 (Brennan, Marshall, Blackmun, and Stevens, JJ.) See also 110 Cong. Rec. 6549 (1964) (Remarks of Sen. Humphrey) ("any reason, good or bad"). *Cf.* Comment, *Business Necessity Defense*, *supra* note 12, at 926-28; Rothschild & Werden, *Title VII and the Use of Employment Tests: An Illustration of the Limits of the Judicial Process*, 11 J. LEGAL STUD. 262, 262, 266-68 (1982) [hereinafter Rothschild & Werden]. *But cf.* *Cox*, *supra* note 12, at 759, 769, 777-78, 783-84, 794-97 (Under the dissenters' view of disparate impact, Title VII regulates the concept of individual "merit").

<sup>236</sup> See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 254 ("legitimate, non-discriminatory reason"). As discussed *supra* at 135-38, a mere denial of discriminatory motive will not suffice, and the employer must proffer evidence of a specific purpose.

Nevertheless, *Watson* and *Atonio*, under any construction, substantially reduce, though perhaps do not eliminate, the difference between the rebuttal evidence for disparate treatment and that for disparate impact. In *Watson*, Justice O'Connor states:

A second constraint on the application of disparate impact theory lies in the nature of the "business necessity" or "job relatedness" defense. Although we have said that an employer has "the burden of showing that any given requirement must have a manifest relationship to the employment in question," *Griggs*, 401 U. S., at 432, such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. Thus . . . the defendant has met its burden [by] producing evidence that its employment practices are based on legitimate business reasons . . . .

Our cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal "validation studies" showing that particular criteria predict actual on-the-job performance.<sup>237</sup>

Justice White in *Atonio*, takes a similar approach:

Though we have phrased the query differently in different cases, it is generally well-established that at the justification stage of such a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. See, e.g., [*Watson*]; *New York Transit Authority v. Beazer*, 440 U.S., at 587, n. 31 . . . ; *Griggs v. Duke Power Co.*, 401 U.S., at 432. . . . The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practice. At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and

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<sup>237</sup> *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2790 (O'Connor, J.). As recognized by Professor Hartigan and Ms. Wigdor, general aptitude tests have now been substantially validated consistent with the Uniform Guidelines through the technique of "validity generalization" for the 12,000 or more job categories covered by the United States Employment Service, if not all job categories within the American economy. FAIRNESS IN TESTING, *supra* note 34, at 119-88.

would result in a host of evils we have identified above.<sup>238</sup>

**Examining the logical implications of Justice O'Connor's position, Justice Blackmun disagreed:**

Intertwined with the plurality's suggestion that the defendant's burden of establishing business necessity is merely one of production is the implication that the defendant may satisfy this burden simply by "producing evidence that its employment practices are based on legitimate business reasons." *Ante*, at 2790. Again, the echo from the disparate-treatment cases is unmistakable . . . . An employer accused of discriminating intentionally need only dispute that it had any such intent — which it can do by offering *any* legitimate, nondiscriminatory justification.<sup>239</sup>

Justice Blackmun's description of the minimum evidence on rebuttal contrasts sharply with that of the plurality. He states:

Precisely what constitutes a business necessity cannot be reduced, of course, to a scientific formula, for it necessarily involves a case-specific judgment which must take into account the nature of the particular business and job in question. The term itself, however, goes a long way toward establishing the limits of the defense: To be justified as a business *necessity* an employment criterion must bear more than an indirect or minimal relationship to job performance . . . . The criterion must *directly* relate to a prospective employee's ability to perform the job effectively . . . . In sum, under *Griggs* and its progeny, an employer, no matter how well intended, will be liable under Title VII if it relies upon an employment-selection process that disadvantages a protected class, unless that process is shown to be

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<sup>238</sup> *Atonio*, 109 S. Ct. at 2125-26. Hartigan and Wigdor argue that where an employment procedure has been validly established to provide only moderate and imperfect prediction of future job success (such as the General Aptitude Test Battery developed by the United States Employment Service), and where the procedure results in disparate impact on racial minorities, racial preferences should be used to correct the disparate impact and provide an equal proportion (by race) of the relevant employment opportunities. *FAIRNESS IN TESTING*, *supra* note 3r, at 283-84. However, even the moderate and imperfect predictability of a selection procedure would not be a "spurious, seemingly neutral, employment practice," and thus not a "mere insubstantial justification." *Cf.* Booth & Mackay, *supra* note 34, at 169-70. Hence, the racial preferences advocated by Hartigan and Wigdor would be unlawful under Title VII if they were imposed on employers.

<sup>239</sup> *Watson*, 108 S. Ct. at 2794 (Blackmun, J., concurring). The similarity, if not the identity, of the rebuttal evidence in both disparate treatment and disparate impact cases is perhaps epitomized by Justice O'Connor's characterization of the employer's burden in a *treatment* case as "sufficient business reasons." *Hopkins*, 109 S. Ct. at 1804 (O'Connor, J., concurring). *Cf.* *Furnco Const. Co. v. Waters*, 438 U.S. at 577; *McDonnell Douglas Corp. v. Green*, 411 U.S. at 801; *Furnish*, *supra* note 9, at 437.

necessary to fulfill legitimate business requirements.<sup>240</sup>

The Court's prior cases have not unequivocally supported business necessity as described by Justice Blackmun,<sup>241</sup> nor validation as the sole means of showing such necessity,<sup>242</sup> though some lower court opinions do support both contentions.<sup>243</sup> *Griggs* and *Teal* used the ambiguous term

<sup>240</sup> *Watson*, 108 S. Ct. at 2794-95 (Blackmun, J., concurring). See *Atonio*, 109 S. Ct. at 2132 (Stevens, J., dissenting). See also *Hopkins*, 109 S. Ct. at 1786 (Brennan, J.) ("emphasis on 'business necessity' in disparate impact cases"). Cf. also S. 1261, 101st Cong., 1st Sess., 135 Cong. Rec. S7513 (daily ed. June 23, 1989) (statement of Sen. Metzenbaum) ("essential to effective job performance"). But see *Albemarle Paper Co. v. Moody*, 422 U.S. at 449 (Blackmun, J., concurring) ("The simple truth is that pre-employment tests, like most attempts to predict the future, will never be completely accurate. We should bear in mind that pre-employment testing, so long as it is fairly related to the job skills or work characteristics desired, possesses the potential of being an effective weapon in protecting equal employment opportunity because it has a unique capacity to measure all applicants objectively on a standardized basis.")

<sup>241</sup> To the contrary, in *Hopkins*, the plurality reflects that "[Title VII] does not purport to limit the other qualities and characteristics that employers may take into account in making employment decisions." *Hopkins*, 109 S.Ct. at 1784 (Brennan, Marshall, Blackmun, and Stevens, JJ.); *id.* at 1787 (" 'Any other criterion or qualification for employment is not affected by this title' 110 Cong. Rec. 7213 (1964).") See also *Aguilera v. Cook County Police and Corrections Merit Bd.*, 760 F.2d 844, 846-47 (7th Cir.) (Posner, J.), *cert. denied*, 474 U.S. 907 (1985) (Supreme Court formulations are not as stringent as they might seem); Smith, *supra* note 41, at 396-99; Middleton, *supra* note 34, at 232.

<sup>242</sup> Significantly Justice Blackmun in *Watson* concedes that formal validation is, at least, not always necessary. *Watson*, 108 S. Ct. at 2795. Cf. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976); *Alberti*, *supra* note 114, at 197; *Booth & Mackay*, *supra* note 34, at 127, 137-38 (1970 Guidelines not endorsed by *Griggs*.) See generally SCHLEI & GROSSMAN, *supra* note 10, at 94-95 & nn. 46-49; *id.* at 22 (1987 Supp.).

<sup>243</sup> See, e.g., *Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1974); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 370 (4th Cir. 1980); *cert. denied*, 450 U.S. 965 (1981); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971); *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1389 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979); *James v. Stockham Valve & Fitting Co.*, 559 F.2d 310, 344 (5th Cir. 1977); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88 (6th Cir. 1982); *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975); *EEOC v. Rath Packing Co.*, 787 F.2d 318, 331-32 (8th Cir. 1986); *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1495 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984); *Williams v. Colorado Springs School Dist. No. 11*, 641 F.2d 835, 842 (10th Cir. 1981); *Crawford v. Western Electric Co., Inc.*, 745 F.2d 1373, 1385 (11th Cir. 1985); *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 837 (D.C. Cir. 1977). See also 29 C.F.R. 1606.7 (b & c) ("business necessity"). See *Furnish*, *supra* note 9, at 426; *Maltz*, *supra* note 34, at 349. See generally *Booth & Mackay*, *supra* note 34, at 128-29, Comment, *Business Necessity Defense*, *supra* note 12, at 918-920, 933-934.

But see, e.g., *Teal v. Connecticut*, 645 F.2d 133 (2d Cir. 1981), *aff'd on other grounds*, 457 U.S. 440 (1982); *NAACP v. Medical Center*, 657 F.2d 1332 (3d Cir. 1981) (en banc) (Title VI case discussing Title VII standards); *Coker v. Boeing Co.*, 662 F.2d 975 (3d Cir. 1981) (en banc); *Walls v. Mississippi State Dep't. of Pub. Welfare*, 730 F.2d 306, 316-317 (5th Cir. 1984); *Smith v. Olin Chem. Corp.*, 555 F.2d 1283, 1287-88 (5th Cir. 1977) (en banc); *EEOC v. J.C. Penney Co.*, 843 F.2d 249 (6th Cir. 1988); *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1257, 1262 (6th Cir. 1981); *Aguilera v. Cook County Policy Corrections Merit Bd.*, 760 F.2d 844, 846-477 (7th Cir. 1985); *Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496, 498-500 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978); *Washington v. Kroger*, 671 F.2d 1072, 1077 (8th Cir. 1982). See Smith, *supra* note 41, at 400-401.

term "manifest relationship to the employment,"<sup>244</sup> and *Griggs* implies that employment tests must only be "[r]elated to measuring job capability"<sup>245</sup> and "demonstrably a reasonable measure of job performance."<sup>246</sup> *Beazer* suggests an arguably more flexible standard of "significant service" to business goals.<sup>247</sup> In *Albemarle*, the Court expounded the standard as being "job related,"<sup>248</sup> and declined to use or endorse the Fourth Circuit's language below, based on *Lorillard*,<sup>249</sup> probably the quintessential discussion of the dissenters' view of the second stage.<sup>250</sup> *Dicta* in both *United States v. South Carolina*<sup>251</sup> and in *Washington v. Davis*<sup>252</sup> would require only that the criterion be related to performance

*But see also* *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972) (degree of validity or relationship to business purpose required for particular job is inversely dependent on degree of risk to public).

Some analyses suggest that there were in fact two criteria, a "business necessity" standard for employment practices and a "job related" standard for written employment tests. *E.g.* Note, *Title VII and Competitive Testing*, 15 HOFSTRA L. REV. 299, 307-09 (1987). *Cf.* Note, *Judicial Dualism*, *supra* note 9, at 387-91, 401-03.

<sup>244</sup> *Griggs v. Duke Power Co.*, 401 U.S. at 432; *Connecticut v. Teal*, 457 U.S. at 446. *Cf.* *Chamallas*, *supra* note 30, at 343-44. Indeed, the Court's decision in *McDonnell Douglas* characterizes the selection procedure forbidden in *Griggs* as those devices that overstate "what is necessary for competent performance . . . or [are] unrelated to [the] applicant's personal qualification as an employee." *McDonnell Douglas Corp. v. Green*, 411 U.S. at 806, *quoted in* *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2129 n.11 (Stevens, J., dissenting). *Cf.* *Furnish*, *supra* note 9, at 426; *Rutherglen*, *supra* note 14, at 1313; Note, *Judicial Dualism*, *supra* note 9, at 386-87 (*Griggs* "susceptible to highly divergent interpretations limited only by the particular court's perspective of Title VII"); *id.* at 401-03; Comment, *Business Necessity Defense*, *supra* note 12, at 929-30.

<sup>245</sup> *Griggs*, 401 U.S. at 432.

<sup>246</sup> *Id.* at 436. *Cf.* *Image of Greater San Antonio v. Brown*, 570 F.2d 517, 521 n.5 (5th Cir. 1978); *SCHLEI & GROSSMAN*, *supra* note 10, at 112-13; *Furnish*, *supra* note 9, at 426-27.

<sup>247</sup> 440 U.S. 568, 587 n.31 (1979); *id.* at 602 (White, J., dissenting) ("some relationship to the employment"). *See* *Belton*, *supra* note 11, at 1246; *Furnish*, *supra* note 9, at 429-32; Comment, *Business Necessity Defense*, *supra* note 12, at 918; Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. PRTT. L. REV. 555, 597-600 (1985); *Middleton*, *supra* note 34, at 199-200, 238.

<sup>248</sup> 422 U.S. at 425.

<sup>249</sup> 444 F.2d 791, 798 (4th Cir. 1971) ("there [must exist] an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplished it equally well with a lesser differential impact." *Albemarle Paper Co. v. Moody*, 474 F.2d 134, 138 n.2 (*quoting* *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)). *See* *Booth & Mackay*, *supra* note 34, at 132; *but see* *Caldwell*, *supra* note 247, at 594-95.

<sup>250</sup> *Belton*, *supra* note 11, at 1232-33 n.114; *Furnish*, *supra* note 9, at 429 n.89; *Maltz*, *supra* note 34, at 349; Comment, *Business Necessity Defense*, *supra* note 12, at 918-19 & n.46.

<sup>251</sup> 434 U.S. at 1026 (1978). *See id.* at 1026-28 (White, J., dissenting). *Cf.* *Booth & Mackay*, *supra* note 34, at 138.

<sup>252</sup> 426 U.S. 229, 248-52; *id.* at 256 (Stevens, J., concurring). *See* *Booth & Mackay*, *supra* note 34, at 136; *Maltz*, *supra* note 34, at 350.



in a job training program. In *Dothard v. Rawlinson*,<sup>253</sup> one of the issues before the court was the nature of the rebuttal proof offered to a prima facie case. In contrast to Justice Blackmun's demand in *Watson* for business necessity, the Court required that the evidence must only permit an inference of job-relatedness, *i.e.*, relevance.

If the job-related quality that the appellants identify is bona fide, their purpose *could* be achieved by adopting and validating a test for applicants that measures strength directly. Such a test fairly administered, would fully satisfy the standards of Title VII because it would be one that measure[s] the person for the job and not the person in the abstract. *Griggs v. Duke Power Co.* . . . . But nothing in the present record even *approaches* such a measurement.<sup>254</sup>

A footnote referred to the EEOC Guidelines on Employee Selection Procedures,<sup>255</sup> *Washington v. Davis*, *Albemarle*, and *Officers for Justice v. Civil Service Commission*.<sup>256</sup> This suggests strongly that a test that was not formally validated — but that actually measured the needed quality — could show job-relatedness even if the requirements for the then-operative 1976 EEOC Guidelines were not fully met. *Griggs*, *McDonnell Douglas*, and *Burdine* all had required only a certain minimum of rebuttal evidence, which was not presented by the State of Alabama: "In the district court, however, the appellants produced no evidence correlating the . . . requirements with requisite[s] thought essential to a good job performance. Indeed, they fail[ed] to offer evidence of any kind in specific justification of the . . . standards."<sup>257</sup>

In any event, the degree of disparate impact or statistical imbalance does not affect the relevance of evidence of legitimate business purpose.<sup>258</sup> "Congress has specifically provided that employers are *not* required to avoid 'disparate impact' as such . . . 42 U.S.C. § 2000e-2(j)."<sup>259</sup> However,

<sup>253</sup> 433 U.S. 321 (1977).

<sup>254</sup> *Dothard v. Rawlinson*, 433 U.S. at 332 (footnotes omitted) (emphasis added). *But see id.* at 331-32 & n.14 ("necessary to safe and efficient job performance," "essential to good job performance"). *Cf. Furnish*, *supra* note 9, at 427-28.

<sup>255</sup> 29 C.F.R. Part 1607 (1976).

<sup>256</sup> 395 F. Supp. 378 (N.D. Calif. 1975) (preliminary injunction). *See id.* at 380-81 (height requirement supported by no relevant evidence); *id.* at 384-85 (physical agility requirement not correlated with performance ratings).

<sup>257</sup> *Dothard*, 433 U.S. at 331.

<sup>258</sup> *Rutherglen*, *supra* note 14, at 1326; *but see id.* at 1320-29; *Willborn*, *supra* note 37, at 822-26; *Note, Judicial Dualism*, *supra* note 9, at 395-96; *SCHLEI & GROSSMAN*, *supra* note 10, at 170; *No-Alternative Approach*, *supra* note 34, at 101.

<sup>259</sup> *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2787. *See id.* at 2797 (Stevens, J., concurring). *Cf. Furnco Const. Co. v. Waters*, 438 U.S. 567. *But see Watson*, 108 S. Ct. at 2793, 2794-95 (Blackmun, J., concurring). *Uniform Guidelines*, *supra* note 15, § 3B, at 38297.

a high disparate impact may be relevant to the question at stage three of whether the procedure has been used as a pretext for discrimination.<sup>260</sup>

Thus, the Court narrowed substantially the difference between the nature of the defendant employer's rebuttal burden at the second stage in disparate impact and disparate treatment. But while the former has approached the latter, but has not yet converged, the logic of Rule 301 should ultimately prevail.

#### D. Third Stage's Ultimate Issue

At the third stage, the issue is the existence of intentional discrimination as the motivation for the employment decision.<sup>261</sup> This is the unanimous teaching of all Supreme Court disparate impact cases from *Albemarle* until *Watson*; it is the teaching of Rule 301 and *Burdine*; and it is the logical ramification of "functional equivalence" as that concept is shaped by the discussion in *Watson* and *Atonio*.

The contrary view has taught that after a defendant has met its burden in response to a showing of disparate impact, the plaintiff may prevail by making one of a variety of showings.<sup>262</sup> Justice Stevens has

<sup>260</sup> *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2126-27. Cf. Schnapper, *Two Categories of Discriminatory Intent*, 17 HARV. C.R.-C.L. L. REV. 31 (1982); Willborn, *supra* note 37, at 825-26.

<sup>261</sup> Discriminatory intent is the same for Title VII and the Equal Protection Clause of the Fourteenth Amendment. Cf. *International Bhd. of Teamsters v. United States*, 431 U.S. at 335-37 & n.15; *New York City Transit Auth. v. Beazer*, 440 U.S. at 587; Schnapper, *supra* note 260, at 58.

<sup>262</sup> This view of the third stage of Title VII litigation is not confined by its proponents to disparate impact cases alone. Two members of the Court have attempted to apply it to recent disparate treatment cases.

In *Hopkins*, Justice Brennan noted that "[i]f the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic [i.e. intentional discrimination] played a part in the employment decision, then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual." *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1789 n.12. See Brief of Amicus Curiae the United States at 17, *Hopkins* ("if the defendant's evidence raises a genuine issue of fact, then the plaintiff must introduce evidence tending to show either that the defendant's explanation 'is unworthy of credence,' or that 'a discriminatory reason more likely motivated the employer' (*Burdine*, 450 U.S. at 256) [sic].") Justice Brennan's view is contradicted by the legislative history that he found pertinent and persuasive in the same case, *supra* at note 235. See also *infra* note 311.

In *Aikens*, Justice Blackmun, concurring, implied that the "ultimate burden" in disparate treatment can be something other than intentional discrimination. Joined here only by Justice Brennan, he states that "the McDonnell Douglas framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates the legitimate nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. at 718. Such true reason, however, need not necessarily be a "pretext for discrimination," *McDonnell Douglas Corp. v. Green*, 411 U.S. at 804-05, or as a "coverup for a racially discriminatory decision," *id.*, but merely another, possibly less easily articulated — but none the less nondiscriminatory — motivation, and the court need not necessarily find that the employer was in fact motivated by intentional discrimination.

Thus Justices Brennan and Blackmun, and perhaps Justices Marshall and Stevens, believed

has now abandoned the third stage, not mentioning it even in passing in his dissent in *Atonio*, and recognizing perhaps that the third stage is inconsistent with the imposition of the burden of persuasion on the employer at the second stage.<sup>263</sup> However, in light of *Atonio*'s majority, the third stage undoubtedly will be the last bastion of the orthodox view.<sup>264</sup>

One of these prevailing showings at the third stage, of course, is that the use of the selection procedure was merely a pretext or coverup for discrimination and that the employer was actually motivated, at least in part, by discriminatory intent.<sup>265</sup> However, the dissenters' argument claims that other showings are equally effective for the plaintiff to prevail. The first of these is that there are alternative selection procedures with equal effectiveness in advancing the employer's articulated business purpose that would have had less disparate impact.<sup>266</sup> A second possible showing is that the procedure does not in fact advance the employer's articulated business purpose.<sup>267</sup> A third is that the articulated business

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that the plaintiff may prevail in a disparate *treatment* case even though the court has specifically found that intentional discrimination did *not* play a part — solely, substantially, supportively, or even a walk-on role — in the employment decision. *Hopkins*, 109 S. Ct. at 1789 n.12. *But see id.* at 1783 (Brennan, J.) (“fabricated its complaints about Hopkins’ interpersonal skills as a pretext for discrimination”). Justice O’Connor apparently disavows this interpretation of pretext, *Hopkins*, 109 S. Ct. at 1801 (O’Connor, J., concurring) (“Nor have we confined the word ‘pretext’ to the narrow definition which the plurality attempts to pin on it today. See *ante*, at 1788-89.”) Justice White has not signed on either, *Hopkins*, 109 S. Ct. at 1795-96 (White, J., concurring); *Player*, *supra* note 116, at 28 n.36.

<sup>263</sup> See text *supra* at 148-49; *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. at 24 n.1; *Belton*, *supra* note 11, at 1212, 1273-74; see also *Furnish*, *supra* note 9, at 436. *Cf. Lamber*, *supra* note 109, at 12-13; S. 2104 § 4, *supra* note 120.

<sup>264</sup> *Cf. Rothschild & Werden*, *supra* note 235, at 273 (third stage rarely if ever reached); SCHLEI & GROSSMAN, *supra* note 10, at 82, 156-57 (scored tests rarely shown to be used for discriminatory purpose); *Holdeman*, *Changing Face*, *supra* note 34, at 181. *But see* § 4, S. 2104.

<sup>265</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. at 436; *Connecticut v. Teal*, 457 U.S. at 447; *Brief of Amicus Curiae the United States* at 29 n.37, *Wards Cove Packing Co. v. Atonio*; *Tidwell v. American Oil Co.*, 332 F. Supp. 424 (D. Utah 1971).

<sup>266</sup> *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2795 (Blackmun, J., concurring); *Brief of Amicus Curiae the United States* at 14, 15, 28-29, *Atonio*; SCHLEI & GROSSMAN, *supra* note 10, at 92, 1325. The Uniform Guidelines, *supra* note 15, additionally required the defendant to prove the absence of such alternative means. §§ 3B; 15B(9); 15C(6); 15D(8). *Cf.* 29 C.F.R. § 1607.3 (1976); *Booth & Mackay*, *supra* note 34, at 190; *Alberti*, *supra* note 114, at 197, 202, 205-07 & n.147; *Caldwell*, *supra* note 247, at 602; *Lamber*, *supra* note 109, at 44-45 & n.168. So did a number of lower federal courts, e.g., *Robinson v. Lorillard Corp.*, 444 F.2d at 798-800. See generally *Furnish*, *supra* note 9, at 423 n.34; *Player*, *supra* note 116, at 35 n.52; *Note*, *Judicial Dualism*, *supra* note 9, at 397-400. *But see Albemarle*, 422 U.S. at 425; *Teal*, 457 U.S. at 447; *New York City Transit Auth. v. Beazer*, 440 U.S. at 587; *Furnish*, *supra* note 9, at 425; *Griggs’ Folly*, *supra* note 12, at 463-64; *Maltz*, *supra* note 34, at 351; *Player*, *supra* note 116, at 35 n.52. *Cf. Furnco*, 438 U.S. at 578; *Alberti*, *supra* note 114, at 203.

<sup>267</sup> *Watson*, 108 S. Ct. at 2796 n.6 (Blackmun, J., concurring); *Brief of Amicus Curiae the United States* at 15, 27-28, *Atonio*. The Uniform Guidelines, by requiring the employer-defendant to undertake highly formal validity studies, as a practical matter also placed the burden of persuasion of this element on the defendant.

purpose is not in fact the actual motivation for the employer's decision to use the selection process at issue, though the motivation is not shown to be an intent to discriminate.<sup>268</sup> There may well be others.<sup>269</sup> Any one of these showings purportedly negates the defendant's showing and wins the case for the plaintiff.<sup>270</sup>

The dissenter's view has been caused at least in part by a implicit interpretation of the term "pretext" as it has been used by the Supreme Court in describing the issue before the court — and thus the plaintiff's burden — at the "third stage" of Title VII litigation. It suggests that "pretext" can mean something other than that the proffered reason was a "mere pretext for discrimination." This interpretation is not based on *Griggs* because *Griggs* does not discuss or even allude to the third stage.<sup>271</sup>

However, pretext is logically, grammatically, and legally part of a prepositional phrase: a proffered motive is shown to be a "pretext for" a concealed motive.<sup>272</sup> The means other than "pretext for discrimination" that are advanced to negate an employer's showing are in fact means by which "pretext" itself may be established. Each is indirect and circumstantial evidence of intentional discrimination that encourages — but does not compel — an inference that the defendant was in fact motivated by a discriminatory purpose.<sup>273</sup>

### 1. Between *Albemarle* and *Watson*

The Court in *Albemarle* provides the most explicit support for the need to establish intentional discrimination at the third stage.<sup>274</sup> There

<sup>268</sup> Cf. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. at 718 (Blackmun, J., concurring) (disparate treatment). The apparent justification for this view is that, if the plaintiff can show that the defendant's proffered explanation is not accurate, he should be left, at the very least, in the same position he would have been in had his prima facie case not been rebutted in the first place. Cf. *Brief of Amicus Curiae the United States* at 13, *Harbison-Walker Refractories v. Briek*, 109 S. Ct. 546-47 (1988) (writ dismissed as improvidently granted); *Player*, *supra* note 116, at 30 n.39.

<sup>269</sup> *Mendez*, *supra* note 184, at 1154 n.128.

<sup>270</sup> The last three showings are primarily relevant only to a showing that the defendant employer was not in fact motivated or using the selection procedure to advance the articulated business purpose. However, the credibility of the rebuttal evidence, even if totally destroyed, cannot revive the prima facie case to any degree whatsoever. See *infra* note 282. But see 1 LOUISELL & MUELLER, *supra* note 63, § 68, at 542 n.49; *Player*, *supra* note 116, at 25-30. MORGAN, BASIC PROBLEMS *supra* note 19, at 34-36 (Type 2) (Professor Morgan, however, finds few supporting opinions for this type of "presumption").

<sup>271</sup> *Furnish*, *supra* note 9, at 421.

<sup>272</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1797 (1971); *Albemarle*, 422 U.S. at 425 ("Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination"); *McDonnell Douglas Corp. v. Green* 411 U.S. 804-05 (same); *New York City Transit Auth. v. Beazer*, 440 U.S. at 587 (same); *Connecticut v. Teal*, 457 U.S. at 447 (same).

<sup>273</sup> Cf. *Schnapper*, *supra* note 260, *passim*; *Furnish*, *supra* note 9, at 444; *Alberti*, *supra* note 114, at 209-10; *Player*, *supra* note 116, at 36 n.53.

<sup>274</sup> *Maltz*, *supra* note 34, at 351; *Smith*, *supra* note 41, at 402-05; *Booth & Mackay*, *supra* note 34, at 123; *Friedman*, *supra* note 184, at 14. Cf. *Chamallas*, *supra* note 31, at 320 & n.79; Note, *Judicial Dualism*, *supra* note 9, at 415-16; Note, *Plurality's Proposal*, *supra* note 31, at 738 n.119.

the Court describes the issue at the third stage after the prima facie case of disparate impact has “dropped from the case” — and the ultimate legal issue that then remains in Title VII litigation:

If an employer does then meet the burden of proving that its tests are “job related,” it remains open to the complaining party to show that other test or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest in “efficient and trustworthy workmanship.” [*McDonnell Douglas*] at 801, 93 S.Ct. at 1823. Such a showing would be evidence that the employer was using its test merely as a “pretext” for discrimination. [*McDonnell Douglas*] at 804-805, 93 S.Ct. at 1825-1826.<sup>275</sup>

*Albemarle* reflects that this third stage is modeled on — if not precisely identical to — the third stage in the *McDonnell Douglas* order of proof.<sup>276</sup> Both *McDonnell Douglas* and *Albemarle* require that a showing of “pretext” be a demonstration that the decision was caused by unlawful discrimination and that the proffered explanation was merely a pretext for discrimination.<sup>277</sup>

The Court in *Beazer* reached a similar conclusion, stating that since there was an express finding that the criterion in question “was not motivated by racial animus,” the plaintiff could not successfully claim that it “was merely a pretext for intentional discrimination.”<sup>278</sup> If the existence of an alternative selection criterion with less disparate impact had entitled the plaintiff to judgment as a matter of law, irrespective of the presence or absence of an actual intent to discriminate, then the factual finding of no racial animus by the trial court would not have precluded a remand to consider this alternative criterion. In *Beazer*, however, the absence of discriminatory intent did obviate further consideration of less disproportionate alternative criteria.<sup>279</sup>

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<sup>275</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. at 425. The Court in *Albemarle* did not disclose any other method to show pretext than the existence of an alternative with less disparate impact. *Furnish*, *supra* note 9, at 423.

<sup>276</sup> *Albemarle*, 422 U.S. at 425; *Furnish*, *supra* note 9, at 422-23; Note, *Judicial Dualism*, *supra* note 9, at 415-17 (“The incorporation of the concept of pretext into a disparate impact case is compelling evidence that the disparate treatment and disparate impact analyses are being merged.”)

<sup>277</sup> *Albemarle*, 422 U.S. at 425, 436; *McDonnell Douglas Corp. v. Green*, 411 U.S. at 804-05.

<sup>278</sup> *New York City Transit Auth. v. Beazer*, 440 U.S. at 587. See *Furnish*, *supra* note 9, at 424; *Alberti*, *supra* note 114, at 207-10; *Caldwell*, *supra* note 247, at 600-02; *Chamallas*, *supra* note 31, at 320 & n.79; *Lamber*, *supra* note 109, at 21. *But see Chamallas*, *supra* note 31, at 320 & n.77.

<sup>279</sup> See *Maltz*, *supra* note 34, at 351-52; Note, *Judicial Dualism*, *supra* note 9, at 417-19; Note, *Plurality’s Proposal*, *supra* note 31, at 738 n.119. *Cf. Alberti*, *supra* note 114, at 209-10; *Middleton*, *supra* note 34, at 204-05 & n.99.

Summarizing this line of cases, the majority in *Teal*, states:

Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.<sup>280</sup>

## 2. Rule 301 and *Burdine*

Under Rule 301, the prima facie case disappears from the case once it is rebutted. The prima facie case has no further effect in the litigation.<sup>281</sup> This evidence must be more than "a scintilla," but need not in fact be believed.<sup>282</sup> The case is decided as though there had never been a presumption or a prima facie case.<sup>283</sup> In a jury case, the word "presumption" and its effects would not even be mentioned in jury instructions.<sup>284</sup> The issue in litigation following the introduction of rebuttal evidence ignores the prima facie case. After the rebuttal in Title VII litigation, there are no disparate impact cases and no disparate treatment cases: there are just Title VII cases. The court focuses solely and exclusively on the ultimate legal burden of the claim for relief.<sup>285</sup> The resolution of this ultimate legal issue is thus the only issue in the third stage.

And that ultimate legal issue is intentional discrimination. Once the prima facie case of disparate impact has dropped from the litigation, it

<sup>280</sup> *Connecticut v. Teal*, 457 U.S. at 447. Cf. SCHLEI & GROSSMAN, *supra* note 10, at 312 (1987 Supp.) Since the *Teal* trial court had held that a prima facie case — apparently of any kind — had not been established, neither the second nor the third stage was discussed in detail. *Id.* at 445.

<sup>281</sup> See 1 LOUISELL & MUELLER, *supra* note 63, § 69, at 555; McCORMICK'S HANDBOOK, *supra* note 75, § 345, at 821; MORGAN, BASIC PROBLEMS, *supra* note 19, at 34-35; WEINSTEIN, *supra* note 49, ¶ 300[01], at 300-3; 21 WRIGHT & GRAHAM, *supra* note 49, § 5122, at 572; Alberti, *supra* note 114, at 193 n.67; Ladd, *supra* note 49, at 282; Laughlin, *supra* note 200, at 212.

<sup>282</sup> See *House Hearings*, *supra* note 63, at 92 (Statement of Edward W. Cleary). Professor Morgan describes the minimum proof needed to rebut a Thayer presumption as being "some testimony is put in which anybody can disbelieve, which comes from interested parties, and which is of a sort that is usually disbelieved . . . evidence which may be disbelieved by the trier of fact." 9 WIGMORE, *supra* note 62, § 2493f at 328 & n.6, (quoting 18 A.L.I. PROCEEDINGS 221-22). Professor Cleary described the "bursting bubble" theory as being that "a presumption disappears from the case upon the introduction of evidence sufficient to support of findings of the nonexistence of the presumed fact, even though no one believes that evidence." *House Hearings*, *supra* note 63, at 92; 21 WRIGHT & GRAHAM, *supra* note 49, § 5122, at 564-65; McCORMICK, *supra* note 64, at 16-19; Hecht & Pinzler, *supra* note 49, at 53 ("[T]he Thayer test is one of sufficiency and not creditability of the evidence."); *id.* at 549; Laughlin, *supra* note 200, at 212. *But cf.* Hecht & Pinzler, *supra* note 49, at 550-51.

<sup>283</sup> *United States v. Hendrix*, 542 F.2d 879, 882 (2d Cir. 1976), *cert. denied*, 430 U.S. 959 (1977); *Alpine Forwarding Co. v. Pennsylvania R. Co.*, 60 F.2d 734, 736 (2d Cir. 1932) (Hand, J.); CONF. COMM. REPORT, *supra* note 83; MODEL CODE OF EVIDENCE RULE 704(2), *quoted in* Gausewitz, *supra* note 49, at 333; WEINSTEIN, *supra* note 49, ¶ 300[01], at 300-4. Professor Cleary's Memorandum to the Senate stated that "the presumption vanishes as a presumption." *Id.* ¶ 301[02], at 301-10.

<sup>284</sup> MORGAN, BASIC PROBLEMS, *supra* note 19, at 40-42; WEINSTEIN, *supra* note 49, ¶ 300[01], at 300-4 to 300-5; ¶ 301[02], at 301-29; Gausewitz, *supra* note 49, at 334.

<sup>285</sup> Cf. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 255-56.

is the only issue remaining. It is only to the issue of intentional discrimination that the rebuttal evidence required under either Rule 301 or the dissenter's view — business necessity, job-relatedness, or legitimate business purpose — is logically relevant.<sup>286</sup>

The Court's opinion in *Burdine*<sup>287</sup> describes the legal theory inherent in the Thayer view of presumptions that compels this result: "Third, should the defendant carry this burden [of rebutting the prima facie case], the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."<sup>288</sup> It is at this point, according to *Burdine*, that the plaintiff:

must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.<sup>289</sup>

As is true in civil actions generally,<sup>290</sup> and to the chagrin of Justice Blackmun,<sup>291</sup> the burden of persuasion remains with the plaintiff. "[A] presumption . . . does not shift to such party [against whom it is directed] 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>292</sup>

Nevertheless under this analysis, after the presumption raised by a prima facie case of disparate impact is rebutted, the statistics that gave rise to the prima facie case are still available to show intent.

<sup>286</sup> See *supra* at 153-54.

<sup>287</sup> 450 U.S. 248, 252-53 (1981) (disparate treatment).

<sup>288</sup> *Burdine*, 450 U.S. at 256.

<sup>289</sup> *Id.*

<sup>290</sup> F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.6, at 243 (2d ed. 1977); 1 JONES ON EVIDENCE, *supra* note 49, § 5.2 at 524; 1 LOUISELL & MUELLER, *supra* note 63, § 66 at 526-28; MCCORMICK, *supra* note 64, § 337 at 786; W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 41 at 237 (4th ed. 1971); 21 WRIGHT & GRAHAM, *supra* note 49, § 5122, at 555-56; Belton, *supra* note 11, at 1235.

<sup>291</sup> Justice Blackmun disagrees:

Nothing in our cases supports the plurality's declaration that, in the context of a disparate impact challenge, "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Ante*, at 2790.

Watson v. Fort Worth Bank & Trust, 108 S. Ct. at 2792 (Blackmun, J., concurring).

<sup>292</sup> FED. R. EVID. 301. See also *New York City Transit Auth. v. Beazer*, 440 U.S. at 587 n.31; 110 Cong. Rec. 7214 (Case Clark Interpretive Mem. *supra* note 6.); RESTATEMENT (SECOND) OF TORTS § 433 B (1965). Cf. *Nashville Gas Co. v. Satty*, 434 U.S. at 144.

In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether or not the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.<sup>293</sup>

This critical point has been purposefully ignored by the dissenters. Because this analysis governs disparate impact cases as well as disparate treatment cases,<sup>294</sup> intent can be established inferentially — by circumstantial evidence such as statistics — as well as directly, and the centrality of the question of discriminatory intent should not inhibit meritorious claims of actual discrimination, whether proven by disparate impact or otherwise.

### 3. *Watson* and *Atonio*

While language in both *Watson* and *Atonio* incongruously appears to support both the application of Rule 301 and the dissenters' view to the third stage, an examination of these passages reflects that the showing of employment selection procedures with less disparate impact authorized by this language is only an "indirect" and "circumstantial" means by which to establish intentional discrimination.

In apparent agreement with the dissenters' view, *Watson* states:

Thus, when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest

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<sup>293</sup> *Id.* at 255 n.10. See SENATE REPORT, *supra* note 82, quoted in U.S. CODE CONG. & ADMIN. NEWS 7051, 7056 ("The court may instruct the jury that they may infer the existence of the presumed fact [intentional discrimination] from proof of the basic facts giving rise to the presumption."); Hecht & Pinzler, *supra* note 49, at 532, 549; Laughlin, *supra* note 200, at 214-22.

<sup>294</sup> *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2126 ("This rule . . . more specifically . . . conforms to the rule in disparate treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. See [*Burdine*].")



in efficient and trustworthy workmanship." *Albemarle Paper Co.* (citation omitted; internal quotation marks omitted). Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals. The same factors would also be relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment. Cf. *ibid.*<sup>295</sup>

Similarly, the Court in *Atonio* states:

If, on remand, respondents meet the proof burdens outlined above, and establish a prima facie case of disparate impact with respect to any of petitioners' employment practices, the case will shift to any business justification petitioners offer for their use of these practices. This phase of the disparate-impact case contains two components: first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less racial impact.<sup>296</sup>

\* \* \*

Finally, if on remand the case reaches this point, and respondents cannot persuade the trier of fact on the question of petitioners' business necessity defense, respondents may still be able to prevail. To do so, respondents will have to persuade the factfinder that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s]," by so demonstrating, respondents would prove that "[petitioners were] using [their] tests merely as a 'pretext' for discrimination."<sup>297</sup>

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<sup>295</sup> *Watson*, 108 S. Ct. at 2790. Cf. Comment, *Business Necessity*, *supra* note 236, at 923-25; Middleton, *supra* note 34, at 233. Justice Blackmun uses similar language.

And even where an employer proves that a particular selection process is sufficiently job-related, the process in question may still be determined to be unlawful, if the plaintiff persuades the court that other selection processes that have a lesser discriminatory effect could also suitably serve the employer's business needs. *Albemarle Paper Co. v. Moody*, 422 U.S. at 425.

*Watson*, 108 S. Ct. at 2795 (Blackmun, J., concurring).

<sup>296</sup> *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2125.

<sup>297</sup> *Id.* at 2126.

Beard, Title VII, Rule 301, and Atonjo

These passages are subject to the construction that the challenged employment practice was not motivated by intentional discrimination, but was merely its “functional equivalent,” not requiring the trial court to make the more difficult finding even at the third stage.

In other passages, however, both Justice O'Connor and Justice White appear to endorse the requirement that intentional discrimination be established at the third stage. Justice O'Connor's description of the “ultimate legal issue” supports this view: The “ultimate legal issue” which the plaintiff in disparate impact has the burden to establish is the same “ultimate legal issue” as in disparate treatment:

The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used. See, e.g., *Washington v. Davis*, 426 U.S. 229, 253-254 (1976) (Stevens, J., concurring).<sup>298</sup>

This language is consistent with every case since *Albemarle*, as well as with Rule 301. The Court (again almost unanimously) describes the “ultimate legal issue” in disparate treatment:

If the defendant carries this burden of production, the plaintiff must prove by a preponderance of all the evidence in the case that the legitimate reasons offered by the defendant were a pretext for discrimination. [*Burdine*], at 253, 255, n. 10. We have cautioned that these shifting burdens are meant only to aid courts and litigants in arranging the presentation of evidence: “The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” [*Burdine*], at 253. See also *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983).<sup>299</sup>

To reiterate, this is the same legal issue for both disparate treatment and disparate impact.

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<sup>298</sup> *Watson*, 108 S. Ct. at 2785. See *id.* at 2792 (Blackmun, J., concurring); *id.* at 2797 (Stevens, J., concurring); Roeger, *Watson v. Fort Worth Bank and Trust: The Supreme Court Robs Peter to Pay Paul*, 17 CAP. U.L. REV. 533, 552 & nn. 108 & 109 (1989); 1987 Term, *supra* note 113, at 315, 316 & n. 52. But see *Watson*, 108 S. Ct. at 2797 (Stevens, J., concurring).

<sup>299</sup> *Watson*, 108 S. Ct. at 2784; *id.* at 2792 (Blackmun, J., concurring). Cf. Cox, *supra* note 12, at 778-81; Middleton, *supra* note 34, at 225, 234. But see *Watson*, 108 S. Ct. at 2797 (Stevens, J., concurring).

Less abstractly and more directly, both *Watson* and *Atonio* define the alternative showings at the third stage in such a manner that this evidence necessarily is focused on a circumstantial and indirect establishment of intentional discrimination. Justice O'Connor's description in *Watson* looks to equal effectiveness — rather than merely “serv[ing] the [employer's] legitimate interest in efficient and trustworthy workmanship and which are substantially equally valid”<sup>300</sup> — and to cost and other burdens.<sup>301</sup> In *Atonio*, Justice White's discussion looks not only to costs but also to actual knowledge by the employer of the less discriminatory criterion or procedure:

If respondents, having established a prima facie case, come forward with alternatives to petitioners' hiring practices that reduce the racially-disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for non-discriminatory reasons.

Of course, any alternative practices which respondents offer up in this respect must be equally effective as petitioners' chosen hiring procedures in achieving petitioners' legitimate employment goals. Moreover, “[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals.”<sup>302</sup>

The imposition of these conditions upon the plaintiff's showing at the third stage (particularly the actual knowledge of the employer of the availability and usefulness of the proposed alternatives) so limits the showing that it could only be made for the purpose — and the nearly conclusive effect — of showing intentional discrimination “indirectly”<sup>303</sup>

The practical effect of this analysis is not as significant as its rhetorical effect. It is decisive perhaps only in deciding defendants' motions

<sup>300</sup> Uniform Guidelines, *supra* note 15, ¶ 3B, at 38297. *But see* Holdeman, *Changing Face*, *supra* note 34, at 198-99.

<sup>301</sup> The Uniform Guidelines do not include such factors in the calculation of the alternative criteria. *See id.* §§ 3B, 5K, 15B(9), at 38297, 38299, 38305; Questions 31, 48-52, *supra* note 213, at 12001, 12003.

<sup>302</sup> *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2127 (quoting *Watson*, 108 S. Ct. at 2790). *See* Rothschild & Werden, *supra* note 235, at 271-72.

<sup>303</sup> *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 256. *Cf.* Lamber, *supra* note 109, at 21.

for summary judgment.<sup>304</sup> Where the defendant comes forward with a legitimate nondiscriminatory explanation, but the plaintiff persuades the court that the explanation is a pretext "for discrimination," then the court must find for the plaintiff. Where a defendant offers evidence that it acted for Nondiscriminatory Reason A, but instead the court finds that the employer was motivated by Nondiscriminatory Reason B, such a finding alone is not sufficient under *Albemarle, Teal*, or Rule 301 for the plaintiff to prevail. The finding that the employer acted for Nondiscriminatory Reason B when the employer has been saying that he acted for Nondiscriminatory Reason A, however, is evidence from which an inference can be made that the employer is at least in this respect untruthful and that neither nondiscriminatory reason in fact motivated the employer.<sup>305</sup> The finding does not alone necessarily and conclusively compel a finding that the employer acted with discriminatory intent. Similarly, the finding that the procedure had no reasonable relationship to Nondiscriminatory Reason A, or that another procedure equally effectuated Nondiscriminatory Reason A but with less adverse impact on protected groups, is also evidence (persuasive though not conclusive) of discriminatory intent.<sup>306</sup>

Any one of these findings — in conjunction with the evidence offered to establish the original prima facie case — supports an inference of intentional discrimination,<sup>307</sup> but under consistent Supreme Court jurisprudence, none of these findings establish a conclusion or even a presumption of intentional discrimination. At the third stage, all of the evidence, direct or indirect and circumstantial, must tend to establish intentional discrimination.<sup>308</sup>

Nevertheless, the rhetorical and moral effect is important. Under the dissenter's view, any one of several showings becomes the ultimate burden of the plaintiff.<sup>309</sup> However, no one has contended that the ultimate purpose of Title VII is to provide an appropriately proportionate workforce<sup>310</sup> or to restrict or regulate non-invidious employment decisions.<sup>311</sup> But

<sup>304</sup> See, e.g., *Taylor v. James River Paper Co.*, 51 Fair Empl. Prac. Cas. (BNA) 893 (S.D. Ala. 1989).

<sup>305</sup> Smith, *supra* note 41, at 379.

<sup>306</sup> See *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. at 716 n.5; *Furnish*, *supra* note 9, at 444.

<sup>307</sup> *Burdine*, 450 U.S. at 255 n.10. See *Patterson v. McLean Credit Union*, 109 S. Ct. at 2377-79; *Maltz*, *supra* note 34, at 351; *Schnapper*, *supra* note 260, at 39-40 & nn.39, 50-59.

<sup>308</sup> See *Friedman*, *supra* note 184, at 14-15; *Alberti*, *supra* note 114, at 193 n.67; *Lamber*, *supra* note 109, at 21; *Smalls*, *supra* note 142, at 265.

<sup>309</sup> *Id.* at 256.

<sup>310</sup> *Watson*, 108 S. Ct. at 2787-88 (O'Connor, J.). *But see* FAIRNESS IN TESTING, *supra* note 33, at 35-39; *cf.* *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. at 2130-31 (Stevens, J., dissenting)

<sup>311</sup> *United Steelworkers v. Weber*, 443 U.S. 193, 197, 204-07 (1979) ("Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that 'management prerogatives and union freedoms . . . be left undisturbed to the greatest extent possible'"). See *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1784-85 & n.4 (Brennan, J.) (discussing legislative history), quoted *supra* at note 235.

if one of these showings is the ultimate issue that remains in a Title VII suit after the prima facie case has dropped from the litigation, then this functionally is the goal of the Civil Rights Act of 1964. This conclusion is not only without support in the legislative history or the decisions of the Supreme Court, but also it contradicts the rhetorical and moral basis advanced during the past fifty years in support of such enactments.

## VI. CONCLUSION

The thesis of this paper, as noted at its beginning, is that the Supreme Court's decisions in *Watson* and *Atonio* are the logical and consistent development from the three stage order of proof first announced in *Albemarle* in 1975. This thesis better explains the development of Title VII law since *Griggs*, better effectuates the purposes of Title VII disclosed both in its legislative history and in the Court's decisions previous to *Watson*, and better provides a guide to its future development, than any alternative analytical method. Clearly not all of the principles of law which this analysis would require have yet to be accepted, but the foundation is now securely in place.<sup>312</sup>

This thesis does not require that the trial of Title VII cases proceed in four separate and alternating presentations of evidence.<sup>313</sup> Nor is it refuted because this procedure does not and often as a practical matter cannot take place.<sup>314</sup> It describes the analysis by which all evidence, whenever and by whomever offered, is properly weighed.

The logical and ethical motivation for the *Watson* four and the *Atonio* five, as it almost certainly was for the *Albemarle* majority,<sup>315</sup> in thus comprehensively repudiating the widespread misinterpretation of *Griggs*, was succinctly stated by Justice O'Connor:

In sum, the high standards of proof [for plaintiffs] in disparate impact cases are sufficient in our view to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment.<sup>316</sup>

This passage reflects the resolute determination of the Court at least since 1975, if not before, that Title VII was enacted to end the curse of racial discrimination and that it shall not become an instrument of racial preference.

<sup>312</sup> Cf. *Furnish*, *supra* note 9, at 440-45.

<sup>313</sup> See *THAYER*, *supra* note 19, at 364-65; *LANGDELL*, *supra* note 158, at §§ 4-14. Cf. *Hopkins*, 109 S. Ct. at 1812 (bifurcated trials).

<sup>314</sup> See *Hopkins*, 109 S. Ct. at 1805 (O'Connor, J., concurring); *Player*, *supra* note 116, at 21 n.13.

<sup>315</sup> See Brief of Amicus Curiae the Chamber of Commerce of the United States, at 16-25, *Albemarle Paper Co. v. Moody*. See also *Albemarle*, 422 U.S. at 449 (Blackmun, J., concurring) ("I fear that a too-rigid application of the EEOC Guidelines will leave the employer with little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII.")

<sup>316</sup> *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2791; *Cox*, *supra* note 12, at 761-62, 770-71.