"A POWER OF ENORMOUS CONSEQUENCE": THE PRESUMPTION OF CORRECTNESS IN STATE TAXATION

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ABSTRACT

The use in Texas of "conclusive evidence" as the standard by which a taxpayer must overcome the presumption of correctness enjoyed by the Comptroller in tax controversy settings is highly problematic. The rule, accidental in origin, undermines fair tax administration by treating a certificate of delinquency as practically irrefutable. The rule's persistence, its lack of legislative underpinning, and its dismissive implications for even-handed dispute resolution amount to a subversion of procedural due process. This article examines the origin of the rule, its facile acceptance over the decades, and pathways to correction.

The power of administrative bodies to make findings of fact which may be treated as conclusive . . . is a power of enormous consequence.

— Chief Justice Charles Evans Hughes[1]

1. *Important Work of Uncle Sam's Lawyers*, 17 A.B.A. J. 237, 238 (1931).

I. INTRODUCTION

"Conclusive evidence" is hyperbole, not a traditional evidentiary standard. That judicial opinions in Texas invoke the term frequently does not lessen the force of that reality. State tax controversies—and Texas taxpayers—have been victimized by a semantic slip, one that rises to the level of an embarrassment to sound tax administration and jurisprudence. It is an aberration waiting for a remedy.

Putting taxpayers to the burden of establishing their correct tax liability by "conclusive evidence"—a standard that in the first place begs its own meaning—is without foundation in either the law of evidence or accepted usage elsewhere in civil litigation. Accordingly, this article is a reasoned call for a return to traditional standards of proof and customary norms of administrative and judicial practice. Tax-related criminal prosecutions are beyond the scope. Rather, the focus is on routine tax controversies playing out within the larger confines of the judicial system, where there simply is no defensible rationale for holding taxpayers to a burden that mirrors, and arguably exceeds, the familiar "beyond a reasonable doubt" standard.

In a civil controversy setting, the notion of "conclusive evidence" adds nothing toward achieving a fair analysis of the relevant facts. Routine disputes between taxpayers and taxing authorities—in Texas or anywhere else—are about determining tax liability; they certainly are not inquisitorial in the penal sense. Even so, Texas taxpayers essentially are guilty until proven innocent, an inversion of common sense as well as of fundamental fairness.

Chief Justice Hughes's prescient observation has come home to roost. As a result of the courts' uncritical application of an inappropriate evidentiary standard, the Comptroller of Public Accounts holds a power of enormous consequence. Part II of this article explores how this came to be. Part III then surveys the landscape and explains in detail why a "conclusive evidence" standard has no place in tax controversy settings. Finally, Parts IV and V summarize the reasons, both obvious and less so, why the more traditional civil standards are the better fit for the tax system and outline the largely self-evident remedial measures that can and should be taken.

II. THE "CONCLUSIVE" CONUNDRUM

A. *The Prima Facie Presumption*

The Texas legislature has empowered the Attorney General to sue in the name of the state to recover delinquent taxes, penalties, and interest, and has conferred exclusive jurisdiction and venue upon the Travis County District Courts.[2] Taxpayer-initiated challenges to collection actions by the Comptroller as well as tax refund suits also must be filed in Travis County.[3] Appeals from these cases are heard exclusively by the Third Court of Appeals in Austin.

While one familiar with traditional civil litigation practice in Texas might assume that tax litigation would be governed by the same procedural rules and precedent applicable to civil controversies generally, such an assumption would, unfortunately, be quite wrong. In one profoundly important respect the Court of Appeals, with some inadvertent help from the Texas Supreme Court, has tilted the process by way of an overwhelming deference to the Comptroller's certificates of delinquency. Specifically, the courts have imposed a burden of proof on taxpayers not borne by any party in any other kind of civil litigation.

To understand exactly how taxpayers wishing to challenge the validity of a certificate of delinquency came to face such an insurmountable burden, the statute is a good place to begin. Section 111.013(a) of the Texas Tax Code states:

> In a suit involving the establishment or collection of a tax imposed under Title 2 or 31 of this code, a certificate of the comptroller that shows a delinquency is prima facie evidence of:
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> (1) the stated tax or amount of the tax, after all just and lawful offsets, payments, and credits have been allowed;
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> (2) the stated amount of penalties and interest;
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> (3) the delinquency of the amounts; and
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> (4) the compliance of the comptroller with the applicable provisions of this code in computing and determining the amount due.[4]

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2. TEX. TAX CODE § 111.010.

3. TEX. TAX CODE §§ 111.0102, 112.001.

4. TEX. TAX CODE § 111.013(a). The predecessor to section 111.013, article 1.08, was substantially similar and treated identically by the state courts of appeals. Closely tracking the language of section 111.013 is section 151.603 of the Sales, Excise, and Use Tax Act: "In an action brought under this subchapter a certificate of the comptroller showing the delinquency is prima facie evidence of the determination of the tax or the amount of the tax

It is the prima facie component of this statute's operation that is central to the Courts of Appeals' decisions, and to its historic error in granting the Comptroller's certificates of delinquency near-unimpeachable status. As the Texas Supreme Court has noted, prima facie evidence is merely "the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true."[5] That the presumption of correctness has come to require "conclusive" evidence to be overcome is an anomaly of such starkness that it speaks for itself.

B. *Smith v. State*

Smith v. State was the first Texas case to impose the conclusive evidence standard on taxpayers.[6] The Comptroller had sued the operator of the Empire Room, a Dallas nightclub, for delinquent admissions taxes, as well as the owner of the building in which the club operated, seeking foreclosure of a tax lien on the property.[7] The operator defaulted but the owner answered the suit, arguing that the assessed taxes constituted an estimate rather than the actual amount due.[8] After judgment was entered in favor of the Comptroller, the owner appealed, arguing again that the State's claim was not based on an actual count of the number of entry tickets sold.[9]

At trial, the Comptroller had introduced its tax claim by certificate under the provisions of Article 1.08, Title 122A, the predecessor of section 111.013(a).[10] On appeal, the *Smith* court held that the Comptroller had proven its tax claim on introduction of the certified delinquency and that the property owner had offered no evidence as to the proper amount of taxes owed in reply to that prima facie proof.[11] On this evidentiary record, the court could simply have affirmed, but it seized the opportunity to

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. . . and of the compliance of the comptroller with this chapter in computing and determining the amounts due." TEX. TAX CODE § 151.603.

5. *See generally In re* E.I. Dupont de Nemours & Co., 136 S.W.3d 218, 223 (Tex. 2004) (*per curiam*).

6. *See* Smith v. State, 418 S.W.2d 893, 896 (Tex. Civ. App.—Austin 1967, no writ).

7. *See id.* at 894.

8. *See id.*

9. *See id.* at 894–95. The tax period involved in *Smith* covered the year 1962 and the first nine months of 1963. Quarterly reports had been filed with the Comptroller for 1963 but none had been made for 1962. As a result, the tax claim for 1963 was based on calculations made from the quarterly reports while the claim for 1962 was based on an estimate made by the Comptroller. The property owner's appeal focused on the estimated tax for 1962.

10. *See id.* at 895.

11. *See id.*

announce a particular standard for taxpayers wishing to challenge a certificate of delinquency. Specifically, the *Smith* court stated:

> With the prima facie presumption established that the State's claim ... was as shown in the Comptroller's certificate under Article 1.08, appellant had the burden to overcome the inference with such evidence tending to support the contrary as would be conclusive, or evidence so clear and positive it would be unreasonable not to give effect to it as conclusive.[12]

Given the procedural history of the case—i.e., trial on the merits, not summary judgment—it seems a reasonable inference that the court intended that this unusual evidentiary burden rest with the taxpayer during a trial on the merits. This, in and of itself, would create an unfair burden on taxpayers. As will be outlined below, however, that burden was later extended to a taxpayer's burden at summary judgment, thereby requiring taxpayers to adduce conclusive evidence simply to get to trial.[13]

First, however, it is worthwhile to examine the authority on which the *Smith* court based its holding: *Southland Life Insurance Company v. Greenwade.*[14]

C. *Southland Life*

The *Southland Life* case involved a bereaved widow who had sued her late husband's life insurer after it refused to pay the death benefit on grounds that the policy had lapsed for nonpayment.[15] In light of substantial testimonial evidence that in fact the premium payment had timely been mailed, judgment had been rendered for Mrs. Greenwade.[16] After the court of appeals affirmed, the case arrived at the Texas Supreme Court on the basis of strenuous argument by the insurer that the mailbox rule had been misapplied.[17]

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12. *Id.* at 896.

13. *See* Ayeni v. State, 440 S.W.3d 707, 711 (Tex. App.—Austin 2013). *See also In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) ("That the statute should create a greater obstacle for the plaintiff to get into the courthouse than to win its case seems nonsensical.").

14. *See generally* Southland Life Ins. Co. v. Greenwade, 159 S.W.2d 854 (Tex. 1942).

15. *See id.* at 855.

16. *See id.* at 856.

17. *Id.* at 857. Prior to the case reaching the Texas Supreme Court, the Waco Court of Appeals had held, incorrectly, that "the presumption of the receipt of a letter from proof that it was mailed ... does not stand merely until evidence comes in to then disappear. It continues as evidence, to be considered in the light of all the facts and circumstances adduced on the trial and to be given such weight as the triers think it entitled...." Southland Life Ins. Co. v. Greenwade, 143 S.W.2d 648, 650 (Tex. App.—Waco 1940).

Southland Life is a challenging case to evaluate because, unfortunately, the opinion would have benefitted from greater clarity in at least one important respect. Specifically, the court identified the insurer's contention as being that the "'presumption of fact that the mailed letter was received' vanished when [the insurer's] evidence tending to show the letter was not received, was introduced."[18] Later in the opinion, however, it seems the insurer also had argued that "the evidentiary facts upon which [the presumption] was established could no longer be considered by the trier of fact," just as it had before the Waco Court of Appeals.[19]

These details matter. They explain why the *Southland Life* court appeared to go to such lengths to analyze the law on the nature of evidentiary presumptions. They likely also explain why the court felt it necessary to make the proclamation upon which *Smith* relied so heavily—namely, that:

> [A]n inference established prima facie (as in the present case) is overcome, together with the evidentiary facts tending to establish it, only when the evidence tending to support the contrary inference is conclusive, or so clear, positive and disinterested that it would be unreasonable not to give effect to it as conclusive.[20]

Unfortunately, what the *Smith* court failed to recognize was the most important aspect of the *Southland Life* holding—that the focus was *not* on the minimum quantum of evidence necessary simply to *rebut* a presumption, but on the evidence required in order to *completely overcome* the underlying facts which gave rise to it. The *Southland Life* court *agreed* with the insurer that "a presumption, as such, is not evidence and that it vanished as such in view of the opposing evidence . . . ."[21] But, the court went on, the only way for *both* the presumption *and* the evidentiary facts tending to establish it to vanish is "when the evidence tending to support the contrary inference is conclusive, or so clear, positive and disinterested that it would be unreasonable not to give effect to it as conclusive."[22] In other words, the *Smith* court failed to recognize the distinction between mere rebuttal of a presumption

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18. *Southland Life*, 159 S.W.2d at 857.

19. *Id.*; *see also* Ayeni, 440 S.W.3d at 714 (Pemberton, J., concurring) ("Specifically, the insurance company argued that because it had produced evidence that it had never actually received the premium, both the presumption of receipt and the foundational evidence supporting that presumption . . . 'disappeared' such that the trier of fact could no longer consider it; thus leaving the plaintiff without any proof of receipt.").

20. *Southland Life*, 159 S.W.2d at 858.

21. *Id.* at 857.

22. *Id.* at 858.

(which *creates* a fact question) and overcoming a presumption and its underlying evidence (which *eliminates* a fact question).

It is not clear why the *Smith* court chose to rely on such a limited portion of the *Southland Life* opinion as the foundation for its analysis. Nor is it evident exactly why it relied on *Southland Life*—a mailbox rule case—at all. What *is* clear, however, is that in doing so it set in motion a series of later decisions reaffirming the same proposition, several of which complicated the matter by incorrectly applying the conclusive evidence standard to a taxpayer's burden of proof as the non-movant in pre-trial dispositive motion practice.

D. *The Smith Progeny*

The unfortunate *Smith* dictum stating that conclusive evidence is required to overcome the Comptroller's presumption of correctness effectively has been adopted as black-letter law in Texas.[23] Further, it regularly appears as overkill in the same sense that it did in *Smith*—that is, where the taxpayer produced either no records at all or plainly insufficient records.[24] In those cases the point obviously is moot, yet made in passing anyway.

The now frequently cited *Baker v. Bullock*,[25] decided in 1975, is a case in point. The taxpayer had sued for a refund of sales taxes paid under protest.[26] The jury had found in the taxpayer's favor but the trial court rendered judgment for the State notwithstanding the verdict.[27] The court of appeals affirmed, noting the statutory presumption of correctness due the delinquency certificate: "In order to overcome this presumption, the taxpayer must conclusively establish that he owes no tax."[28]

Under the circumstances, this amounted to taking a sledgehammer to a gnat. Although the court of appeals unhelpfully omitted any recitation of what evidence the taxpayer *had* been allowed to introduce at trial—evidence which, whatever its sum and substance, certainly had persuaded the jury—inferentially, it consisted principally of oral testimony.[29] The court could have affirmed simply on the basis of the statutory presumption not

23. *See* Baker v. Bullock, 529 S.W.2d 279, 281 (Tex. Civ. App.—Austin 1975).

24. *See id.*

25. *See generally id.* 279–81.

26. *See id.* at 280.

27. *See id.*

28. *Id.* at 281.

29. *Id.* ("Vague allegations alone by a taxpayer seeking a refund to the effect that the Comptroller's method of ascertaining the tax due was either incorrect or inapplicable are not sufficient to merit consideration by the trier of facts.").

having been overcome without the gratuitous "conclusively" reference. "The law is clear," the court recited, "that . . . the taxpayer must show not only that he overpaid, but also, the exact amount of the overpayment."[30] And so it is, but that says nothing about the particular standard of proof, much less does it imply a burden of persuasion bordering on irrefutability.

In retrospect, it is clear that *Baker* opened the floodgates. Just one year later the Austin court echoed *Baker* in *Nu-Way Oil Company v. Bullock*,[31] a motor fuel tax case in which the taxpayers sought refunds but lacked the evidence to support their claims. Following a bench trial, the trial court entered judgment that the taxpayers take nothing.[32] The court of appeals affirmed, holding:

> It is settled that . . . the burden rests on the taxpayer, not on the Comptroller, to establish what became of the fuel unaccounted for. Article 9.05(2)[33] of the motor fuel tax law directs that "Any motor fuel purchased tax-free which is unaccounted for . . . shall be *Prima facie* presumed to have been sold or used for taxable purposes." (Emphasis supplied). This Court held in *Smith v. State*, . . . that with the *prima facie* presumption established by the States' assessment, the burden shifts to the taxpayer to overcome the presumption with such evidence, tending to support the contrary, as would be conclusive, or would be so clear and positive as to render it unreasonable not to give effect to the evidence as conclusive.[34]

Once again, overkill trumped reason. It is far from clear that the language characterizing what *Smith* purportedly "held" really merits that level of respect. "Dictum with a flourish" seems a more nuanced and safer characterization, particularly considering that the statutory presumption afforded the Comptroller's certificate says nothing at all about the taxpayer's burden of proof. Rather, it states simply that the Comptroller's certificate "is prima facie evidence of" the amount due, that those amounts are delinquent, and that the Comptroller complied with the applicable provisions of the Tax Code.[35] That is a far cry from demanding "conclusive" rebuttal evidence, a problem that has crept into the system by unfortunate accident. Nevertheless, later cases reflect that the

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30. *Id.*

31. *See generally* Nu-Way Oil Co. v. Bullock, 546 S.W.2d 336 (Tex. Civ. App.—Austin 1976).

32. *See id.* at 338.

33. TEX. TAX CODE § 162.012(a) ("Motor fuel unaccounted for is presumed to have been sold or used for taxable purposes.").

34. *Nu-Way Oil*, 546 S.W.2d at 339 (internal citations omitted).

35. TEX. TAX CODE §§ 111.013(a), 151.603.

"conclusive evidence" standard has become all but set in stone in the state tax controversy context.

The *Smith* progeny took what ultimately would prove to be its most misguided turn in 1984, with the court of appeal's decision in *Hylton v. State*,[36] a sales tax case otherwise notable only for its general similarity to those other decisions cited above. In *Hylton*, the court followed its by-then formulaic *Smith* recitation with a demonstration of startlingly misguided reasoning:

> It was provided by statute that in an action for recovery of the sales tax the Comptroller's tax delinquency certificate would be *prima facie* evidence of the justness and correctness of the State's claim. This Court has held that a taxpayer has the burden to overcome a deficiency certificate's presumed correctness with such evidence tending to support the contrary as would be conclusive, or evidence which would be so clear and positive it would be unreasonable not to give effect to it as conclusive.
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> Such conclusive evidence is required only to overcome the deficiency certificate's presumed correctness; once such presumption is overcome the ultimate issue must be decided by a preponderance of the competent evidence.[37]

It must be observed, in the first place, that *Paine v. State Board of Equalization*,[38] the California Court of Appeals case on which the *Hylton* court principally relied, said no such thing. Within the setting of relatively routine sales tax litigation in which the taxpayer asserted that its sales were tax-exempt, the California Court of Appeals merely noted its unremarkable starting place that the Board's determination was presumed to be correct, then followed with the routine corollary that "[t]he burden of overcoming this presumption is on the taxpayers."[39] The *Paine* court said nothing at all that would suggest that the noted presumption had to be overcome by "conclusive" evidence. Indeed, its one and only reference to the burden of proof is explicitly to the contrary: "[t]he taxpayer must affirmatively establish the right to a refund of the taxes by a preponderance of the evidence."[40]

But the far more critical failing of *Hylton* lies in its supposition that something remains to be done in a litigation setting once a party—*either* party—has introduced "conclusive"

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36. *See generally* Hylton v. State, 665 S.W.2d 571 (Tex. App.—Austin 1984).
37. *Id.* at 572–573 (internal citations omitted).
38. *See generally* Paine v. State Bd. Of Equalization, 187 Cal. App. Rptr. 47 (1982).
39. *Id.* at 51.
40. *Id.* at 49.

evidence. The *Hylton* logic is an impossible inversion of the nature of things. Assume, for example, that Fact *A* is established "conclusively" to be true. If so, would there be any basis on which to submit the evidence to a trier of fact in order to argue that Fact *A* is not true? Of course not, which illustrates the practical effect that *Hylton* has had on state tax litigants: without saying so explicitly, it established the precedent that a taxpayer would not be entitled to a trial on the merits unless it could present evidence to the trial court—presumably in response to a motion for summary judgment by the Comptroller—that *conclusively* established the error or invalidity of the Comptroller's certificate of delinquency.

This *Hylton* problem was illustrated three years later, when the error was echoed in *State v. Glass*,[41] a fuel tax[42] case in which the trial court had sided with the taxpayer and ruled that the subject sales were tax-exempt. Reversing, the court of appeals, specifically relying on *Hylton*, stated:

> Confronted with the *presumed* correctness of the Comptroller's deficiency certificate, it was *incumbent* upon Glass to come forward with evidence *conclusively establishing* that he owed no tax during the audited period.
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> Had Glass produced conclusive evidence to overcome the deficiency certificate's presumed correctness, the ultimate issues would have then been decided by a preponderance of the competent evidence.[43]

As in *Hylton*, the *Glass* court advances a fatally flawed logic. Assuming for the sake of argument that conclusive evidence of a fact exists and is accepted as such, a directed verdict or its equivalent is the only appropriate step. In other words, following the admission of "conclusive" evidence, a case is over, or certainly should be.

Unfortunately, the *Hylton* problem did not end with *Glass*. In 1998, that standard was, on the strength of *Smith*, *Baker*, and *Hylton*, among other cases, applied in the context of both the state hotel occupancy tax[44] and sales taxes in *Penny v. State*.[45] In *Penny*, the court of appeals shed additional light on the absurdity of the precedent it had worked to establish over the prior thirty years,

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41. *See generally* State v. Glass, 723 S.W.2d 325 (Tex. App.—Austin 1987).

42. *See generally* TEX. TAX CODE, Chapter 162.

43. *Glass*, 723 S.W.2d at 327.

44. *See generally* TEX. TAX CODE, Chapter 156.

45. *See generally* Penny v. State, No. 03-97-00399-CV, 1998 WL 394173 (Tex. App.—Austin 1998).

holding that even if the taxpayer could have overcome the Comptroller's prima facie evidence with its own *conclusive* evidence, the Comptroller still could somehow have established that the taxpayers were liable for the claimed taxes.[46] Stated another way, the court advanced the notion that, once the Comptroller's certificate of delinquency was shown to be incorrect *conclusively*, a trier of fact could somehow find that the taxpayer owed the amounts set forth in that certificate. The plain absurdity of this idea cannot be overstated.

But the greatest insult to rationality came in 2004 with *Wimmer v. State*.[47] Unlike all its predecessors in the Austin Court of Appeals, *Wimmer* was a case that had been decided by summary judgment below.[48] Consequently, the *Wimmer* court formalized that which *Hylton* had simply implied: that a taxpayer must marshal conclusive evidence to overcome a motion for summary judgment filed by the Comptroller.[49] As the *Wimmer* court stated repeatedly:

> Given the statutory presumption of correctness that accompanies a comptroller's certificate of delinquency, the State satisfied its summary judgment burden when it produced those certificates. Wimmer bore the burden of producing conclusive contrary evidence.
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> [O]nce the State proffered the tax delinquency certificates, the burden then shifted to Wimmer to prove conclusively that the certificates were incorrect. He must do so with evidence that is so clear and positive that it would be unreasonable not to give it effect as conclusive.[50]

From a procedural standpoint, the *Wimmer* opinion created a pathway by which the Comptroller could virtually guarantee itself a victory in the trial court and affirmance on appeal. As of the date of this writing, there is not a *single* decision out of the Austin Court of Appeals holding that a taxpayer has produced evidence sufficient to conclusively overcome the Comptroller's certificate of delinquency.

The *Wimmer* opinion was the culmination of nearly forty years of state tax jurisprudence. As is explained below, the

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46. *See id.* at *3.

47. *See generally* Wimmer v. State, No. 03-03-00135-CV, 2004 WL 210629 (Tex. App.—Austin 2004).

48. *See id.* at *1.

49. *See id.* at *3.

50. *Id.* at *3–4.

standard by which taxpayers are now judged when challenging the Comptroller is extraordinarily problematic.

III. A PROBLEM OF ENORMOUS CONSEQUENCE

A. *There is No Statutory Basis for a "Conclusive Evidence" Burden*

Amazingly, it was not until 2013 that any justice of the court of appeals recognized in a published opinion the impropriety of this judicially-created standard. As Justice Pemberton observed in his concurring opinion in *Ayeni v. State*,[51] "[t]he notion that a taxpayer must present conclusive contrary evidence to rebut a Comptroller's certificate of deficiency does not find explicit textual support in the current tax code . . . . [N]othing in section 111.013 purports to require *conclusive* contrary evidence to rebut or join issue with a Comptroller's certificate."[52] Nor, he might have added had it been relevant to the case before him, is there *any* statutory support for *any* requirement that a taxpayer produce "conclusive" evidence of *any* foundational or ultimate fact—not even during a trial on the merits.

Ayeni involved a dispute between the Comptroller and the owner of a Houston convenience store.[53] The Comptroller conducted a sales-tax audit of the business covering the years 2004 through 2006.[54] The taxpayer acknowledged that he maintained poor records, and the Comptroller resorted to estimating the taxpayer's sales and the resulting tax liability statistically—i.e., from analysis of records of its beer purchases obtained from certain of his vendors and application of industry sales averages.[55] Based on these calculations, the Comptroller determined that the taxpayer owed approximately $48,000 in unpaid sales taxes for the audit period, plus penalties and interest.[56]

After the taxpayer failed to pay the determination, the Comptroller issued a certificate of delinquency and the Attorney General sued on the Comptroller's behalf.[57] The state filed a motion for summary judgment, attaching as evidence the Comptroller's certificate.[58] The taxpayer's response included

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51. *See generally* Ayeni v. State, 440 S.W.3d 707 (Tex. App.—Austin 2013).
52. *Id.* at 713 (Pemberton, J., concurring).
53. *See id.* at 708.
54. *See id.*
55. *See id.*
56. *See id.*
57. *See id.*
58. *See id.*

affidavits from himself and his bookkeeper in which they disputed the Comptroller's calculations and underlying sales estimates along with providing numerous receipts to reflect the taxpayer's actual purchases.[59]

Following a hearing, the Travis County District Court granted partial summary judgment in favor of the Comptroller, holding that the taxpayer was liable for the certified deficiency.[60] The taxpayer filed a motion for reconsideration.[61] Following a second hearing, the district court denied the motion and entered a final judgment incorporating its earlier partial summary judgment. The taxpayer appealed.[62]

Not surprisingly, the Court of Appeals followed what was, by 2013, well-settled law. In an opinion authored by Justice Pemberton, the court reiterated the statutory mandate that the Comptroller's certificate constitutes prima facie evidence of the amount of taxes, penalties, and interest owed.[63] The court further held that the affidavit testimony offered by the taxpayer constituted "bare conclusions unsupported by facts," and were, therefore, incompetent summary judgment evidence.[64] Finally, the court held that the taxpayer's affidavits did not state what his total sales amounts were for the period at issue and therefore did not raise a question of fact as to the correct amount owed even if they were competent summary judgment evidence.[65]

Without question, however, Justice Pemberton's own concurring opinion is the most important part of *Ayeni*. After noting that nothing in section 111.013 purports to require *conclusive* contrary evidence to rebut a certificate of delinquency,[66] he explained the origins of *Smith* and its progeny with a thoughtful discussion of the *Southland Life* opinion and the scope of its true holding.[67] More importantly, however, he acknowledged that the *Wimmer* court—in extending the *Smith* reasoning to summary judgment cases—wholly failed to provide *any* analysis of whether (or how) the *Smith* concepts should properly be applied in

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59. *See id.* at 708–09.

60. *See id.* at 709.

61. *Id.* at 709.

62. *Id.*

63. *Id.* at 710.

64. *Id.* at 712 ("To be competent summary-judgment evidence, an affidavit must contain specific factual bases, admissible in evidence, upon which its conclusions are based." (citing Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984)); *see* TEX. R. CIV. P. 166a(f) (affidavits "shall set forth such facts as would be admissible in evidence")).

65. *Ayeni*, 440 S.W.3d at 712. (citing TEX. TAX CODE § 151.051 (imposing sales tax based on a percentage of sale price)).

66. *Id.* at 713 (Pemberton, J., concurring).

67. *Id.* at 713–15 (Pemberton, J., concurring).

the vastly different procedural context of summary judgment.[68] And, Justice Pemberton noted:

> [C]ontrary to the holdings of *Wimmer*, and any progeny, their analytical cornerstone in *Southland Life* would imply that the contrary evidence used to rebut the presumption, even if not conclusive, would raise a fact issue that would have to be resolved by the fact finder and not by summary judgment.[69]

The essence is clear—*Wimmer* erred in its application of *Southland Life* to the *Smith* line of cases addressing summary judgment.

The significance of this concurring opinion cannot be overstated. To understand how strongly Justice Pemberton must have believed that the *Wimmer* court had committed error, it is only necessary to pause on the thought that he went to the trouble of writing a concurrence to his own majority opinion, specifically for the purpose of calling attention to the problem created by *Wimmer*. In the opinion of these authors, Justice Pemberton's critique of the *Wimmer* analysis, while extremely valuable, addresses only half of the problem created by *Smith* and its progeny—that related to motions for summary judgment.[70] Moreover, while Justice Pemberton limited his critique of the *Smith-Wimmer* line of cases to a discussion of analytical weaknesses, he could well have explored additional reasons why the law established in those cases is so extraordinarily problematic.

B. *The Mailbox Rule*

Southland Life's progeny have clarified the Supreme Court's reasoning and holdings regarding the power of evidentiary presumptions and the quantum of evidence necessary to either rebut or overcome them in mailbox rule cases. Unfortunately, the *Smith* line of cases tended to follow *Smith's* holding, with occasional reference to *Southland Life*, but never analyzed other courts' treatment of *Southland Life's* foundational reasoning. Had they done so, perhaps the *Smith-Wimmer* line of cases might have been avoided.

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68. *Id.* at 716 (Pemberton, J., concurring) (citing Wimmer v. State, No. 03-03-00135-CV, 2004 WL 210629 at *3–4 (Tex. App.—Austin 2004)) (noting in a footnote that the Court of Appeals had followed *Wimmer* in *Kawaja v. State*, No. 03-05-00491-CV, 2006 WL 1559343 (Tex. App.—Austin June 8, 2006, no pet.) (mem.op.)).

69. *Id.* at 716 (Pemberton, J., concurring) (citing Southland Life Ins. Co. v. Greenwade, 159 S.W.2d 854, 857 (Comm'n App. 1942)).

70. *Id.* at 716–17 (Pemberton, J., concurring).

In 2004, ironically the same year as the *Wimmer* disaster, the Houston Court of Appeals addressed the issue in *Texaco, Inc. v. Phan*.[71] The owners of a service station, arguing that Texaco had induced them to enter into contracts to create and operate two service stations, had sued Texaco for fraud, breach of contract, negligent misrepresentation, and conversion.[72] The owners served Texaco through its registered agent and, after Texaco failed to answer, moved for a default judgment, which the trial court granted.[73] Texaco then filed a motion with the trial court seeking a ruling on the date it received notice of the default judgment under Texas Rule of Civil Procedure 306a.[74] The trial court heard the motion and deemed the date that Texaco received notice to have been three days after the notice of default judgment was mailed by the District Clerk's office.[75] Texaco filed a restricted appeal.[76]

The court of appeals held that "[d]irect testimony that a letter was properly addressed, stamped, and mailed to the addressee raised a presumption that the letter was received by the addressee in due course."[77] The court further noted, correctly and importantly, that "mere denial of receipt is sufficient to rebut the presumption."[78] This is precisely the point which the *Southland Life* court failed to state clearly and which the *Smith* court later failed to grasp in its reading of that case. The *Phan* court stated that "[a]lthough a denial of receipt may be sufficient to rebut the presumption of receipt, the denial is not conclusive and merely presents a fact issue for the factfinder."[79]

Again, this is the very point that the *Smith* court overlooked. In not allowing the taxpayer to rebut the presumption with a minimal level of evidence (e.g., an affidavit disputing the amount owed, supported by specific and admissible factual bases), it effectively gave the taxpayer only one option: to rebut the presumption "conclusively." Unlike *Smith* and its progeny, the mailbox rule line of cases has recognized clearly that there is an important distinction to be made between the mere rebuttal of a presumption raising a fact issue and the sufficiency of evidence capable of overcoming the evidence supporting that presumption.

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71. Texaco, Inc. v. Phan, 137 S.W.3d 763 (Tex. App.—Houston [1st Dist.] 2004).
72. *Id.* at 766.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 767.
78. *Id.*
79. *Id.*

C. *Presumptions and Prima Facie Evidence*

The term "prima facie" simply "refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted."[80] It is the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true."[81] Stated another way, prima facie evidence is the bare minimum quantum (and kind) of evidence that would sustain a cause of action where an opposing party offered absolutely nothing whatsoever to challenge it.

Similarly, "[a] presumption is simply a rule of law requiring the trier of fact to reach a particular conclusion in the absence of evidence to the contrary."[82] This principle was stated explicitly by the Texas Supreme Court in 1970, and arguably has been the law since Dean Wigmore announced it in his 1940 treatise on evidence.[83] "The presumption disappears when evidence to the contrary is introduced."[84] In the procedural context of a motion for summary judgment, which the *Wimmer* opinion addressed, "the party against whom the presumption operates must produce

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80. *In re* Lipsky, 460 S.W.3d 579, 590 (Tex. 2015); *see also Prima Facie,* BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "prima facie evidence" as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced"); Coward v. Gateway Nat'l Bank of Beaumont, 525 S.W.2d 857, 859 (Tex. 1975) (showing that prima facie evidence "entitles the proponent to an instructed verdict on the issue in the absence of evidence to the contrary"); Dodson v. Watson, 220 S.W. 771, 772 (Tex. 1920) ("Prima facie evidence is merely that which suffices for the proof of a particular fact until contradicted and overcome by other evidence.").

81. Texas Tech Univ. Health Scis. Ctr. v. Apodaca, 876 S.W.2d 402, 407 (Tex. App.—El Paso 1994).

82. Temple Indep. Sch. Dist. v. English, 896 S.W.2d 167, 169 (Tex. 1995). *Compare* TEX. R. EVID. Art. III (stating, for the section on presumptions, only that there are "[n]o rules adopted at this time."), *with* FED. R. EVID. 301 ("[i]n a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally").

83. *See* Sudduth v. Commonwealth County Mutual Ins. Co., 454 S.W.2d 196, 198 (Tex. 1970) (citing 9 JOHN WIGMORE ON EVIDENCE § 2491 (3rd ed. 1940)).

84. *Temple Indep. Sch. Dist.*, 896 S.W.2d at 169; *see also Sudduth*, 454 S.W.2d at 198; Balawajder v. Texas Dep't of Crim. Just. Inst'l. Div., 217 S.W.3d 20, 27 (Tex. App.—Houston [1st Dist.] 2006). Thayer's well-known "bursting bubble" analogy—a presumption disappears (it "bursts") as soon as the burdened party steps forward with some credible opposing evidence—explains the mechanism. A presumption by definition operates only in the absence of testimonial, documentary, or other relevant evidence tending to establish a contrary version of the truth. Its support of Fact A is reasonable and allowable only as long as no alternative version of the truth, Fact B, is introduced. Once both A and B are plausible, however, the issue must be put to the trier of fact with the same instruction as in any other civil case: to determine which is the truth, or which shall be taken as true for purposes of the case, without regard to any presumption and on the basis of either the preponderance of the evidence or, in limited cases, some notionally higher standard such as "clear preponderance" or "clear and convincing" if applicable law demands such given the nature of the case.

evidence sufficient 'to neutralize the effect of the presumption' for the case to proceed to trial."[85]

The *Balawajder* court provided a thoughtful analysis of when a court should impose a greater burden on non-movants in summary judgment proceedings to rebut a presumption with more evidence than would satisfy a preponderance standard. In *Balawajder*, the Houston Court of Appeals (1st District) addressed this issue in the context of a suit brought by an inmate to challenge policies of the Texas Department of Criminal Justice regarding the storage of religious materials, and announced that Texas courts "read every word in a statute as if it were deliberately chosen and presume that omitted words were excluded purposely."[86] Therefore, the court stated, it must "presume that had the legislature intended to require clear and convincing evidence to rebut the presumption that favors prison regulations, the legislature would have expressly set forth this requirement in [the statute]."[87] Accordingly, the court held that it must apply the general rule that the non-movant need only present evidence raising a fact issue to rebut the presumption at summary judgment.[88] More specifically, *Balawajder* held that to rebut the presumption, the party against whom the presumption operates need only present "more than a scintilla" of evidence to show that the government regulation does not further a compelling governmental interest and that the regulation is not the least restrictive means of furthering that interest.[89]

The *Balawajder* opinion's value, for purposes of addressing the error that has become entrenched in state tax cases, lies in the clarity with which the Houston Court of Appeals discusses the state of the law in Texas where presumptions, burden-shifting,

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85. *Balawajder*, 217 S.W.3d at 27 (quoting Amaye v. Oravetz, 57 S.W.3d 581, 584 (Tex. App.—Houston [14th Dist.] 2001)).

86. *Id.* at 20, 27 n.6.

87. *Id.* at 23–4, 27 n.6. In *Balawajder*, the plaintiff, a Hare Krishna devotee, was a state prison inmate. He filed a request to be allowed to practice his religion, which he asserted was substantially burdened by Administrative Directive 3.72 (AD 3.72), requiring that the total volume of an offender's property must be placed in a closable storage container not to exceed two cubic feet in size. When that request was denied, the plaintiff exhausted his administrative remedies and then sued pursuant to the Texas Religious Freedom Restoration Act, contending that AD 3.72 imposed a substantial burden on his free exercise of religion that was neither in furtherance of a compelling governmental interest nor the least restrictive means of furthering that interest. In Texas, a rule "that applies to a person in the custody of a jail or other correctional facility . . . is presumed to be in furtherance of a compelling governmental interest and the least restrictive means of furthering that interest," but the presumption is rebuttable. TEX. GOV'T CODE ANN. § 493.024 (West 2012).

88. *Balawajder*, 217 S.W.3d at 27 (citing *Amaye*, 57 S.W.3d at 584).

89. *Id.* (citing *Amaye*, 57 S.W.3d at 584).

and statutory construction are concerned. There is no confusion whatsoever: a presumption merely shifts the burden to the party opposing it to marshal more than a scintilla of credible evidence to rebut it. Moreover, courts should not unilaterally impose a greater burden upon parties seeking to rebut a presumption—whether at summary judgment or during trial—absent clear legislative intent. The *Smith-Wimmer* line of cases clearly violates this cornerstone of judicial restraint.

D. *At or Above "Beyond a Reasonable Doubt"*

To establish a fact by conclusive evidence is as burdensome as proving a fact beyond a reasonable doubt, if not more so.[90] As the Texas Supreme Court stated so clearly in 2005 in *City of Keller v. Wilson,*[91] an inverse condemnation case in which property owners sought money damages, "[e]vidence is conclusive only if reasonable people could not differ in their conclusions."[92] In 2012, the Supreme Court further explained in *Natural Gas Pipeline Company of America v. Justiss*[93] just how heavy a burden this is, when it announced that "[u]ndisputed evidence can be susceptible to competing interpretations. Conclusive evidence cannot."[94] While the *City of Keller* court conceded that determining precisely when proof becomes conclusive is "impossible,"[95] *Justiss* provided examples of cases in which the court previously had held evidence to be conclusive because it "pointed to only one conclusion."[96] Clearly, *Justiss* stands for the proposition that, to be conclusive, evidence must be even more persuasive than undisputed evidence.

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90. *Compare Conclusive Evidence,* BLACK'S LAW DICTIONARY (10th ed. 2014) (defining conclusive evidence as "[e]vidence so strong as to overbear any other evidence to the contrary."), *with* State v. Wells, 45 So.3d 577, 582 (La. 2010) ("'[C]onclusive' means '[s]hutting up a matter; shutting out all further evidence; not admitting of explanation or contradiction; putting an end to inquiry; final; irrefutable; decisive.'" (quoting BLACK'S LAW DICTIONARY (4th ed. 1968)).

91. City of Keller v. Wilson, 168 S.W.3d 802 (Tex. 2005).

92. *Id.* at 815–16.

93. Nat. Gas Pipeline Co. of Am. v. Justiss, 397 S.W.3d 150, 154 (Tex. 2012).

94. *Id.* (citations omitted).

95. *City of Keller,* 168 S.W.3d at 815. *Cf.* Kirby Corp. v. Pena, 109 F.3d 258, 263 (5th Cir. 1997) (equating "conclusive evidence" with "incontestible").

96. *Justiss,* 397 S.W.3d at 154 (citing Murdock v. Murdock, 811 S.W.2d 557, 560 (Tex. 1991) (paternity test "conclusively proved" nonpaternity); then citing Exxon Corp. v. Emerald Oil & Gas Co., 348 S.W.3d 194, 203–09 (Tex. 2011) (documents detailing leaseholder's wrongful acts sent and received by royalty owners "conclusively establish[ed]" that royalty owners had knowledge of such wrongdoing); and then citing Shell Oil Co. v. Ross, 356 S.W.3d 924, 929–30 (Tex. 2011) ("readily accessible, publicly available documents" conclusively established leaseholder's alleged fraud could have been discovered through exercise of reasonable diligence)).

The Austin Court of Appeals has itself acknowledged that this is an extraordinarily difficult burden to satisfy.[97]

It is instructive to refer to criminal jurisprudence in order to appreciate just how unrealistic the conclusive evidence burden really is. In 1991, the Court of Criminal Appeals endeavored to mandate a uniform set of jury instructions governing the beyond a reasonable doubt standard in criminal cases.[98] Although the court later reversed itself, determining that it was not necessary to provide all criminal juries with a uniform definition of reasonable doubt, the meaning originally announced by the court reveals that the conclusive evidence standard is arguably more burdensome than the criminal standard:

> A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.
>
> Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.[99]

Reading these definitional elements of a hypothetical criminal jury charge, it is apparent that even proof beyond a reasonable doubt does not instruct jurors that they may only find a defendant guilty if the evidence points to a single conclusion. Rather, it simply describes proof significant enough for jurors to rely on in their personal dealings.

Routine tax disputes, by contrast, are civil matters between private citizens and the state. They essentially are collection actions, and granting such extreme deference to the Comptroller's determination of tax liability that taxpayers may rebut the presumption only with conclusive proof is wholly inappropriate. It is tantamount to a stacked deck.

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97. Sundown Farms, Inc. v. State, 89 S.W.3d 291, 293 (Tex. App.—Austin 2002); *see also* Wimmer v. State, No. 03-03-00134-CV, 2004 WL 210629 at *3 (Tex. App.—Austin 2004); Kawaja v. State, No. 03-05-00491-CV, 2006 WL 1559343 at *2 (Tex. App.—Austin 2006); Jeff Kaiser, P.C. v. State, No. 03-15-00019-CV, 2016 WL 1639731 at *4 (Tex. App.—Austin 2016).

98. Geesa v. State, 820 S.W.2d 154 (Tex. Crim. App. 1991), *overruled by* Paulson v. State, 28 S.W.3d 570 (Tex. Crim. App. 2000).

99. *Geesa*, 820 S.W.2d at 162 (citing 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 11.14; PATTERN JURY INSTRUCTIONS—5TH CIRCUIT UNITED STATES COURT OF APPEALS (1988); P. McClung, JURY CHARGES FOR CRIMINAL PRACTICE, at p. 6 (1990)).

E. *Matters of Greater Consequence Involve a Less Stringent Burden*

Texas courts have addressed the quantum of evidence required to rebut a presumption in civil matters of far greater consequence than mere collection efforts by the Comptroller. In each of the cases discussed below, the courts have concluded—based either on traditional common law analysis or application of an explicit statutory mandate—that to overcome a particular presumption a party challenging it must produce clear and convincing evidence, a standard distinctly less stringent than conclusive evidence.[100]

For example, the clear and convincing evidence standard is used in suits affecting the parent-child relationship, arguably the most important form of civil litigation over which Texas trial courts preside. Indeed, courts have long recognized not only that "[t]here is a strong presumption that a child's interest is best served by preserving the relationship between parent and child,"[101] but that "[t]he relationship between a parent and child has constitutional dimension."[102] Those courts follow precedent handed down from the United States Supreme Court stating that the Constitution protects "parents' fundamental right to make decisions concerning the care, custody, and control of their children."[103] It follows, Texas courts hold, that "[b]ecause the termination of parental rights implicates fundamental interests, a higher standard of poof—clear and convincing evidence—is required at trial."[104]

Accordingly, before terminating parental rights, Texas courts are required to find, by clear and convincing evidence, at least one statutorily-mandated ground for termination *and* that termination is in the child's best interest.[105] In these cases, the courts have noted that evidence is clear and convincing if it "produce[s] in the mind of the trier of fact a firm belief or conviction

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100. In the interest of brevity, the authors omit discussion of many other areas of state law in which important public policy concerns support statutory presumptions that nevertheless are rebuttable in the traditional manner—i.e., by the introduction of some, but certainly not conclusive, credible evidence. *See, e.g.*, Loera v. Loera, 815 S.W.2d 910, 910–11 (Tex. App.—Corpus Christi 1991) ("This presumption [that the most recent marriage is presumed valid against any preceding marriage (now section 1.102, Texas Family Code)] is 'one of the strongest known to the law.'"). Yet only "some evidence" need be introduced to rebut that presumption for the issue of which marriage is valid to go to the jury. *See* Estate of Claveria v. Claveria, 615 S.W.2d 164, 166 (Tex. 1981).

101. *In re* J.K.V., 490 S.W.3d 250, 257 (Tex. App.—Texarkana 2016).

102. *Id.* at 253.

103. Troxel v. Granville, 530 U.S. 57, 65 (2000).

104. *In re* A.B., 437 S.W.3d 498, 502 (Tex. 2014).

105. *In re* E.N.C., 384 S.W.3d 796, 798 (Tex. 2012).

as to the truth of the allegation sought to be established."[106] The same clear and convincing standard is applied with respect to establishing paternity or lack thereof.[107]

In yet another vital family court context, this time involving the assignment of ownership to property, Texas courts have held that property owned by either spouse during or on dissolution of marriage is presumed to be community property.[108] Parties who argue that certain property is theirs separately have the burden of rebutting that presumption by tracing and clearly identifying the property in question as separate by clear and convincing evidence.[109]

How can it be that the state, in seeking to collect allegedly delinquent taxes enjoys greater deference than a parent seeking to maintain custody of her or his child? The answer is quite simple: it defies logic. To suggest that a taxpayer challenging the government's calculation of tax liability would be required to marshal greater evidence than would the state or other litigant wishing to separate a child from its parent is nonsensical.

IV. A CALL FOR CONSISTENCY

While it is too late, obviously, for those taxpayers whose disputes with the Comptroller have already been resolved, it certainly is not too late to enact change to ensure fairness for future taxpayer-litigants. And, although the *Smith-Wimmer* line of cases still constitute binding precedent at this time, Justice Pemberton certainly has signaled a willingness to reconsider the merits of the court's previous holdings. Moreover, it is well within the power and discretion of the Texas Supreme Court to clarify, modify, or overrule altogether any or all of the *Smith-Wimmer* authorities. We propose that the aim of such a reconsideration

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106. TEX. FAM. CODE ANN. § 101.007 (West 2014); *see In re* J.O.A., 283 S.W.3d 336, 344 (Tex. 2009).

107. *See In re* J.A.M., 945 S.W.2d 320, 324 (Tex. App.—San Antonio 1997) (noting that the Family Code requires clear and convincing evidence to rebut the presumption of paternity).

108. *See* Tarver v. Tarver, 394 S.W.2d 780, 783 (Tex. 1965) (explaining the presumption of community property and the burden to prove otherwise).

109. Pearson v. Fillingim, 332 S.W.3d 361, 363 (Tex. 2011). The Texas courts have also applied a clear and convincing standard in cases involving a challenge to donative intent. *See, e.g.*, Richardson v. Laney, 911 S.W.2d 489, 492 (Tex. App.—Texarkana 1995) (stating that the presumption of donative intent must be rebutted by clear and convincing evidence). And, in the employment discrimination context, federal courts have held that once an employee has established a prima facie case of discrimination under the ADEA, the burden shifts to the employer to rebut the presumption of intentional discrimination by articulating "some legitimate, nondiscriminatory reason" why the plaintiff was rejected or someone else was preferred." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

ought to be on achieving consistency within the law—with respect both to the treatment of state tax cases in relation to the wider body of civil procedural authority and to other tax disputes governed by the Texas Tax Code (namely, ad valorem tax cases).

A. *Consistency with The Rules of Civil Procedure*

1. At Summary Judgment

Texas Rule of Civil Procedure 166a sets forth the standard by which a party may obtain summary judgment on a claim or defense. It provides, in relevant part, "[t]he judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response."[110] As Justice Pemberton noted in his *Ayeni* concurrence, the Supreme Court of Texas has made it clear that:

> Non-movants do not face higher or different summary judgment burdens based on the burdens of proof they may face at trial: "The failure of one party in a hearing upon a motion for summary judgment to discharge the burden which would rest on him at a trial on the merits is no ground for a summary judgment in favor of the other party.[111]

When a party moves for summary judgment, the court hearing the motion must simply "determine if there are any issues of fact to be tried, and not to weigh the evidence or determine its credibility, and thus try the case on the affidavits."[112] "The underlying purpose of [Rule 166a] was elimination of patently unmeritorious claims or untenable defenses; not being intended to deprive litigants of their right to a full hearing on the merits of any real issue of fact."[113] Therefore, the burden to prove that there is no genuine issue of any material fact is upon the movant, and "[a]ll doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment."[114]

> In determining a motion thus depending upon extrinsic evidence, the court's task is analogous to that which he

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110. TEX. R. CIV. P. 166a(c).

111. Ayeni, 440 S.W.3d at 716–17 (Pemberton, J., concurring) (internal citations omitted).

112. Gulbenkian v. Penn, 252 S.W.2d 929, 931–32 (Tex. 1952); *see also* Haley v. Nickles, 235 S.W.2d 683, 685 (Tex. Civ. App.—Austin 1950).

113. Kaufman v. Blackman, 239 S.W.2d 422, 428 (Tex. Civ. App.—Dallas 1951).

114. De La Garza v. Ryals, 239 S.W.2d 854, 856 (Tex. Civ. App.—Fort Worth 1951) (quoting Sarnoff v. Ciaglia, 165 F.2d 167, 168 (3d Cir. 1947)).

> performs on a motion for directed verdict. He accepts as true all evidence of the party opposing the motion which tends to support such party's contention, and gives him the benefit of every reasonable inference which properly can be drawn in favor of his position.[115]

The Supreme Court has mandated further that a movant's burden of proof in support of a motion for summary judgment does not depend on its burden of proof at trial, stating in *Missouri–Kansas–Texas Railroad Company v. City of Dallas*,[116] "[t]he presumptions and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear."[117] Consequently, even if a taxpayer's burden of proof during a jury or bench trial on the merits would require him to produce conclusive evidence to prevail on the merits (which even Justice Pemberton seemed to touch on in more of a "for the sake of argument" tone in his concurrence), the taxpayer need only produce evidence *sufficient to raise a question of fact* as to the taxing authority's claim in order to avoid summary judgment.

Similarly, a no-evidence summary judgment should only be granted if the non-movant fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact.[118] If the evidence supporting the non-movant rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions, then more than a scintilla of evidence exists.[119] Less than a scintilla of evidence exists only when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact, the legal effect of which is that there is no evidence.[120]

This standard by which both traditional and no-evidence summary judgments in Texas are governed is precisely the standard by which a Comptroller's motion for summary judgment against a taxpayer ought to be treated. There is no justifiable reason that the courts should hold taxpayers to a higher burden, much less one that is tantamount to marshaling evidence which would satisfy the beyond a reasonable doubt standard.

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115. *Gulbenkian*, 252 S.W.2d at 931 (quoting McDonald, TEXAS CIVIL PRACTICE Vol. 4, Sec. 17.26, p. 1394).

116. Mo.-Kan.-Tex. R.R. Co. v. City of Dallas, 623 S.W.2d 296 (Tex. 1981).

117. *Id.* at 298.

118. *See* TEX. R. CIV. P. 166a(i); *see also* Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997).

119. *Havner*, 953 S.W.2d at 711.

120. Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983).

2. At Trial on the Merits

In civil controversies in the United States there are only two traditional standards of proof or burdens of persuasion, "preponderance of the evidence" and, in certain cases involving fraud or some other perceived need for heightened proof, "clear and convincing evidence" or some variation thereon. Criminal cases bring in the third traditional standard, that of proof "beyond a reasonable doubt."[121] The Supreme Court of Texas has similarly held that the applicable evidentiary standard is generally determined by the nature of the case or particular claim. Specifically,

> [c]riminal cases require proof beyond a reasonable doubt, a near certainty, whereas civil cases typically apply the preponderance-of-the-evidence standard, that is, a fact-finder's determination that the plaintiff's version of the events is more likely than not true. Some civil claims, including some defamation claims, elevate the evidentiary standard to require proof by clear-and-convincing evidence.[122]

Nothing in the body of the Supreme Court's or the Court of Appeals' jurisprudence on the Comptroller's delinquency suits has articulated a public policy reason or "other perceived need for a heightened standard of proof"—as to *either* party. Moreover, there is no Texas case articulating a particular cause of action in which either party should be required to marshal "conclusive" evidence in order to prevail at trial.

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121. *See* Microsoft Corp. v. i4i Limited Partnership, 131 S. Ct. 2238, 2245 n.4 (2011) ("Various standards of proof are familiar—beyond a reasonable doubt, by clear and convincing evidence, and by a preponderance of the evidence."); Addington v. Texas, 441 U.S. 418, 423 (1979) ("[T]he law has produced across a continuum three standards or levels of proof for different types of cases."); *see also*, FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 323–24 (4th ed. 1992) ("[T]here are three generally recognized standards of proof, in ascending order of weight: preponderance, clear and convincing, and beyond a reasonable doubt."); Bill Vance, *The Clear and Convincing Standard in Texas: A Critique*, 48 BAYLOR L. REV. 391, 392 (1996) ("In Texas, only two standards—preponderance of the evidence in civil cases and beyond a reasonable doubt in criminal cases—have historically been used when charging a jury on the quantum of proof necessary to determine the fact questions entrusted to its decision. A third standard—clear and convincing evidence—has appeared from time to time, primarily as a tool of appellate evidentiary review for certain disfavored types of cases."). *See also* Kevin M. Clermont, *Death of Paradox: The Killer Logic Beneath the Standards of Proof*, 88 NOTRE DAME L. REV. 1061, 1125 (2013).

122. *In re* Lipsky, 460 S.W.3d 579, 589 (Tex. 2015). *Cf.* Hardy v. State, 102 S.W.3d 123, 129 (Tex. 2003) (explaining that once the state has established probable cause to initiate a forfeiture proceeding, the burden shifts to the claimant to prove that the property is not subject to forfeiture by a preponderance of the evidence only).

It is unreasonable and wholly unsupportable to require that a taxpayer who wishes to challenge the validity of a certificate of delinquency disprove the validity of that certificate with conclusive evidence. The more appropriate course of action, absent some legislative directive establishing that such a claim must be proven by clear and convincing evidence, is for the courts to hold that a taxpayer may prevail in its defense of a Comptroller's delinquency suit by proving his case by a preponderance of the evidence.

B. *Consistency with Statewide Ad Valorem Litigation*

The Court of Appeals should recognize that the Comptroller's suits to collect delinquent taxes should be afforded no greater deference than is given to any other taxing authority in this state. The Tax Code grants the identical prima facie treatment to county and municipal taxing authorities as it does the Comptroller:

> In a suit to collect a delinquent tax, the taxing unit's current tax roll and delinquent tax roll or certified copies of the entries showing the property and the amount of the tax and penalties imposed and interest accrued constitute prima facie evidence that each person charged with a duty relating to the imposition of the tax has complied with all requirements of law and that the amount of tax alleged to be delinquent against the property and the amount of penalties and interest due on that tax as listed are the correct amounts.[123]

In contrast to the *Smith-Wimmer* line of cases, however, Texas courts have followed a different path in a long line of *ad valorem* tax cases. The courts of appeals have consistently held that once a taxing authority in a delinquency suit introduces the tax records described in section 33.47(a) into evidence, it establishes a prima facie case as to every material fact necessary to establish its claim.[124] At that point, the burden shifts to the taxpayer to rebut that presumption. In order to do so, the taxpayer must simply provide *competent* evidence that he has paid the full

123. TEX. TAX CODE § 33.47(a).

124. *See* City of Bellaire v. Sewell, 426 S.W.3d 116 (Tex. App.—Houston [1st Dist.] 2012) (*citing* Nat'l Med. Fin. Servs. Inc. v. Irving Indep. Sch. Dist., 150 S.W. 3d 901, 906 (Tex. App.—Dallas 2004)); *see also* Maximum Medical Improvement, Inc. v. County of Dallas, 272 S.W.3d 832 (Tex. App.—Dallas 2008); Estates of Elkins v. County of Dallas 146 S.W.3d 826, 829 (Tex. App.—Dallas 2004, no pet.); Davis v. City of Austin, 632 S.W.2d 331, 333 (Tex. 1982).

amount of taxes, penalties, and interest or that there is some other defense that applies to his case.[125]

C. *Consistency with Tax Exemption Litigation*

Finally, the Austin Court should bring its treatment of Comptroller delinquency suits in line with the body of authority recognized by the courts of appeals in determining whether a party claiming tax-exempt status has met its burden of proof at trial. Addressing this issue, the Amarillo Court of Appeals stated unequivocally that Texas recognizes only three standards of proof: "'beyond a reasonable doubt' in criminal cases; 'by clear and convincing evidence' in the termination of parental rights and involuntary mental commitment cases; and 'by a preponderance of the evidence' in *all other civil cases*."[126] As that court recognized, Texas courts have declined to mandate a higher standard of proof for exempt status in tax cases.[127] In such cases, the courts simply held the party seeking to prove tax-exempt status by a preponderance of the evidence.[128]

V. CONCLUSION

We recognize that the judicial process of correcting the errors committed by prior courts will require at least two distinct steps. First, a case must reach the Austin Court of Appeals in which a taxpayer has presented enough evidence in response to a Comptroller's motion for summary judgment as would raise a genuine issue of material fact as to the correctness of the delinquency certificate. At that point, assuming the error is preserved properly, the court will be in position to walk back from the *Wimmer* error and restate—correctly—the burden of proof necessary for a taxpayer to avail themselves of a trial on the merits. Second, a case must reach the Austin Court in which a taxpayer presented evidence during a trial on the merits sufficient to allow the trier of fact to find—by a preponderance of the evidence—that the taxpayer's state tax liability was something other than that set forth in the Comptroller's certificate of delinquency. At that point, the Austin court will be in position to state a more appropriate burden of proof for taxpayers challenging

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125. *See Sewell*, 426 S.W.3d at 120; *Maximum Med. Improvement, Inc.*, 272 S.W.3d at 835; *Nat'l Med. Fin. Servs., Inc.*, 150 S.W.3d at 906; *Estates of Elkins*, 146 S.W.3d at 829.

126. Lamb Cty. Appraisal Dist. v. S. Plains Hosp.-Clinic, Inc., 688 S.W.2d 896, 903 (Tex. App.—Amarillo 1985) (emphasis added); State v. Turner, 556 S.W.2d 563 (Tex. 1977), 435 U.S. 929 (1978).

127. *S. Plains Hosp.-Clinic, Inc.*, 688 S.W.2d at 903.

128. *Id.*

delinquency certificates. It seems clear that Justice Pemberton is patiently awaiting the right case(s) through which to correct these errors.

Alternatively, the Texas legislature could (and should) make short work of this issue by amending the Tax Code to state explicitly the quantum of evidence necessary for a taxpayer to rebut the presumption of correctness which arises as a result of the prima facie treatment given the Comptroller's certificates, as well as the standard by which triers of fact must determine a taxpayer's liability for state taxes, penalties, and interest.[129]

As has been noted elsewhere, "[a] phenomenon so powerful and protean must have powerful and protean causes."[130] The phenomenon examined here has neither a proper cause nor any saving rationale. It is, as said, an aberration waiting to be remedied.

129. For example, the Legislature recently amended the Texas Citizens Participation Act to add section 27.005(d), which provides that, even if a claimant establishes a prima facie case, a court "shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d) (West 2016); H.B. 2973, 82nd Leg., Reg. Sess. (Tex. 2011).

130. Christopher DeMuth, *Can the Administrative State be Tamed?*, 8 J. LEGAL ANALYSIS 121, 157 (2016).