Oklahoma Law Review

Volume 71 | Number 2

2019

How to Raise Money: State Question 640, Revenue Bills, and the Oklahoma Supreme Court

Paul Anthony Tortorici

COMMENT

How to Raise Money: State Question 640, Revenue Bills, and the Oklahoma Supreme Court

I. Introduction

A series of Oklahoma Supreme Court decisions in 2017 have significantly altered the treatment of tax legislation in Oklahoma. These cases involved challenges to various legislative enactments designed to close the budget shortfall in the last few days of the 2017 Regular Session. The resulting decisions clarified the definition of "revenue bill" under the Oklahoma Constitution and will provide up-to-date guidelines for the legislature when drafting future revenue-raising measures.

Keeping the revenue bill restrictions of State Question 640 and these recent Oklahoma Supreme Court decisions in mind, this Comment seeks to explain what the Oklahoma legislature should consider when authoring legislation that affects revenue. In Part II, this Comment provides a brief background of the events leading up to the 2017 Oklahoma Supreme Court cases. Part III discusses the most important cases regarding revenue bills in Oklahoma's Supreme Court history and how they have affected legislative drafting before and after State Question 640. Part IV analyzes the 2017 Oklahoma Supreme Court rulings that will, going forward, serve as guides for drafting revenue-raising legislation. Part V discusses how these cases serve as guides and what their respective rulings mean for the future of Oklahoma revenue bills. Finally, Part VI concludes these issues.

II. Background

Since its enactment in 1907, article V, section 33 of the Oklahoma Constitution[1] has prohibited revenue-raising bills "from originating in the Senate and prohibited their enactment within the last five days of the legislative session."[2] While application of article V, section 33 has been consistent throughout Oklahoma's history, an increasingly narrow definition of "revenue bill" emerged, accompanied by a number of potential exceptions.[3] In the past century, the Oklahoma Supreme Court has

1. OKLA. CONST. art. V, § 33.

2. Mark H. Ramsey, *What Is a Revenue Bill Within the Meaning of Our Most Recent Constitutional Amendment*, 63 OKLA. B.J. 1567, 1568 (1992).

3. *Id.*

considered several of these exceptions.[4] Some exceptions have been altered or added by a 1992 vote by the people that made raising revenue in Oklahoma extremely onerous: State Question 640.[5]

Twenty-five years ago, the people of Oklahoma voted to amend the Oklahoma Constitution via State Question 640, which further restricted the ability of the state legislature to pass revenue-raising measures.[6] State Question 640, proudly supported by the mantra "No New Taxes Without A Vote Of The People," was designed to greatly increase the constitutional requirements for the Oklahoma legislature to pass revenue bills.[7] State Question 640 accomplished this goal by amending the minimum vote requirement under article V, section 33 of the Oklahoma Constitution to require a simple majority of the people or a three-fourths supermajority in both Houses to pass revenue bills.[8] Only Oklahoma, Michigan, and Arkansas require such a stringent supermajority to pass revenue bills.[9] Over the years, Oklahoma has felt the effects of this significant revenue-raising barrier, and many very important state functions have suffered.[10] On the other hand, revenue reductions, such as tax cuts, face little trouble making it through the legislature, leading to even lower budgets for state functions such as public schools, mental health clinics, and veteran affairs.[11] In short, it is relatively easy to pass bills that decrease revenue, but extremely difficult to pass legislation that increases it. All these budget issues finally

---

4. *See, e.g.,* Richardson v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 85, 406 P.3d 571; Okla. Auto. Dealers Ass'n v. State, 2017 OK 64, 401 P.3d 1152; Naifeh v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 63, 400 P.3d 759.

5. State Question No. 640, Initiative Petition No. 348 (as proposed by Okla. Sec'y of State, Oct. 30, 1991), https://www.sos.ok.gov/documents/questions/640.pdf.

6. *Id.*; *see also* Fent v. Fallin, 2014 OK 105, ¶ 10, 345 P.3d 1113, 1116.

7. *Fent*, 2014 OK 105, ¶ 13, 345 P.3d at 1117.

8. State Question No. 640, Initiative Petition No. 348, *supra* note 5; OKLA. CONST. art. V, § 33 (C)-(D).

9. ARK. BUREAU OF LEGISLATIVE RESEARCH, REP. NO. 05-101, A SUMMARY OF LEGISLATIVE SUPERMAJORITY REQUIREMENTS 2 (2005) (noting that, although both Michigan and Arkansas have the same requirement as Oklahoma, the Michigan constitutional restriction only applies to state property taxes); *see also* Naifeh v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 63, ¶ 13 nn.18-21, 400 P.3d 759, 764 nn.18-21.

10. *See* Gene Perry, *However You Count It, Oklahoma's Per Pupil Education Funding Is Way Down*, OKLA. POL'Y INST. (Oct. 20, 2016), https://okpolicy.org/however-count-oklahomas-per-pupil-education-funding-way/.

11. *Id.* ("[T]he total cost of Oklahoma's cuts to the top income tax rate since 2004 has reached $1.022 billion per year."); *see also* David Blatt, *Proposed Budget Leaves Oklahoma Services Massively Underfunded*, OKLA. POL'Y INST. (May 25, 2017), https://okpolicy.org/proposed-budget-leaves-oklahoma-services-massively-underfunded/.

came to a head with the 2017 Regular Session for the Oklahoma legislature, during which "months of wrangling and stalled negotiations" led to delays for several bills designed to increase revenue for the state budget.[12]

The Oklahoma legislature began its 2017 Regular Session with the constitutional requirement to balance[13] an approximately $800 million budget deficit.[14] This deficit equates to a staggering inflation-adjusted $1.25 billion drop in the state budget compared to 2009.[15] In an attempt to avoid "draconian cuts to [Oklahoma's] core services," the House and Senate proposed a number of last-minute bills designed to generate revenue to fill the budget hole.[16] The state legislature, aware of the requirements imposed by State Question 640, appears to have simply hoped for the best in enacting many of these last-minute bills that did not reach supermajority support.[17] This may have been due to a lack of clarity in what renders a bill a revenue bill under State Question 640 and Oklahoma Supreme Court precedent, but it could also have been due to panic in the Oklahoma legislature.

No matter the underlying cause of the state of emergency that necessitated the 2017 Special Session, recent Oklahoma Supreme Court decisions have created a roadmap for the Oklahoma legislature to follow when enacting revenue-raising legislation.[18] Some of the revenue-raising legislation was challenged and addressed by the Oklahoma Supreme Court

---

12. Blatt, *supra* note 11.

13. See OKLA. CONST. art. X, § 23.

14. Blatt, *supra* note 11. Governor Mary Fallin and the Oklahoma legislature had a severe budget crisis on their hands that was directly affecting education, health care, and several other important industries. *See* Associated Press, *Oklahoma Faces $878 Million Shortfall for Upcoming Year, Revenue Failure Declared*, KFOR (Feb. 21, 2017, 11:11 AM), https://kfor.com/2017/02/21/oklahoma-faces-878-million-shortfall-for-upcoming-year-revenue-failure-declared/.

15. Blatt, *supra* note 11.

16. Governor Mary Fallin, *Press Release: Gov. Fallin Statement on 2018 Fiscal Year Budget Agreement*, OK.GOV (May 24, 2017), http://services.ok.gov/triton/modules/newsroom/newsroom_article.php?id=223&article_id=32877; *see also* Blatt, *supra* note 11. Oklahoma's revenues have been on a steep decline for years, and 2018 (and beyond, if the trend continues) will be no exception, despite all the bills that either have not been challenged or have already been upheld by the Supreme Court. *See* Blatt, *supra* note 11. While the projected revenue for 2018 was slightly higher than 2017, agencies will still get budget cuts, just as they have for the five preceding years. *Id.*

17. *See id.*

18. *See, e.g.*, Richardson v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 85, 406 P.3d 571; Okla. Auto. Dealers Ass'n v. State, 2017 OK 64, 401 P.3d 1152; Naifeh v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 63, 400 P.3d 759.

in 2017, starting with *Naifeh v. State ex rel. Oklahoma Tax Commission*, which involved a challenge to Senate Bill 845.[19] Senate Bill 845, known as the "Smoking Cessation and Prevention Act of 2017," created a smoking cessation fee of $1.50 per pack of cigarettes.[20] Despite language in the text of the bill suggesting that its primary purpose was to benefit the public health,[21] the Oklahoma Supreme Court struck down Senate Bill 845 under article V, section 33 as an improperly enacted revenue bill.[22] The loss of this bill single-handedly caused "$215 million in appropriated funds for fiscal year 2018" to evaporate, exacerbating the revenue shortfall.[23]

After *Naifeh*, the Oklahoma Supreme Court decided *Oklahoma Automobile Dealers Ass'n v. State*, a case involving the constitutionality of House Bill 2433.[24] In upholding House Bill 2433, which partially removed a sales tax exemption that was given to automobile sales in 1935,[25] the court ruled that although the bill did not satisfy the requirements of article V, section 33, House Bill 2433 did not constitute a revenue bill within the meaning of the Constitution.[26] Thus, the court did not strike down the bill as unconstitutional.[27] This legislation is expected to generate $123 million in 2018.[28]

The third case, *Sierra Club v. State ex rel. Oklahoma Tax Commission*, brought a challenge to House Bill 1449.[29] Congress drafted House Bill 1449 to modify the "Motor Fuels Tax" to set new registration fees for hybrid and fully electric vehicles.[30] According to the author of House Bill 1449, the bill was intended "to replace lost motor fuel tax revenue that's used for road and bridge repairs" such that electric and hybrid car owners pay their fair share

19. *Naifeh*, ¶ 7, 400 P.3d at 762-63.

20. S. 845, 56th Leg., 1st Sess. (Okla. 2017).

21. *See infra* Section IV.A (explaining that merely drafting a regulatory purpose for revenue-raising legislation is not enough: the legislation must effectuate that purpose through the use of the raised funds).

22. *Naifeh*, ¶ 51, 400 P.3d at 775.

23. OKLA. HOUSE OF REPRESENTATIVES, 56TH SESS., 2017 SESSION IN REVIEW 43 (2017), https://www.okhouse.gov/Documents/SIR%202017%20web.pdf [hereinafter OKLA. HOUSE, 2017 SESSION IN REVIEW].

24. *Okla. Auto. Dealers*, 2017 OK 64, ¶ 2, 401 P.3d at 1153HB.

25. *Id.* ¶ 2, 401 P.3d at 1153-54 (citing H.R. 2433, 56th Leg., 1st Sess. (Okla. 2017)).

26. *Id.*

27. *See id.*

28. OKLA. HOUSE, 2017 SESSION IN REVIEW, *supra* note 23.

29. 2017 OK 83, ¶ 1, 405 P.3d 691, 694.

30. H.R. 1449, 56th Leg., 1st Sess. (Okla. 2017).

for general road upkeep.[31] The court held that the bill was a revenue bill and struck the law down as unconstitutional.[32]

Finally, *Richardson v. State ex rel. Oklahoma Tax Commission* was a challenge to several bills.[33] While House Bills 2433 and 1449 were already decided in the previous cases, the petitioner challenged House Bill 2348 for the first time.[34] The Oklahoma Supreme Court denied their jurisdiction over the case and so did not reach the issue of House Bill 2348 because, at the time of the decision, it was not possible to know "whether the law would increase revenue."[35]

III. The History of Oklahoma Revenue Legislation in the Supreme Court

For well over a century, article V, section 33 of the Oklahoma Constitution has produced significant litigation over its interpretation. As discussed below, the Oklahoma Supreme Court created a two-pronged test to determine whether legislation is revenue legislation within the meaning of article V, section 33. This test has changed considerably over time.

A. Article V, Section 33 and the Anderson *Test*

The original two requirements for a revenue bill to become a law are still in place today. First, a revenue bill must "originate in the House," rather than the Senate.[36] Second, the bill must not "be passed during the last five days of the [legislative] session."[37] Article V, section 33 of the Oklahoma Constitution did not originally contain the supermajority clause it does now. The first case to establish guidelines for revenue bills in Oklahoma was *Anderson v. Ritterbusch*, decided just one year after the formation of Oklahoma as a state.[38] Anderson, the petitioner in the case, appealed the assessment of taxes on his property stemming from a newly enacted senate bill.[39] Of his many arguments, the most pertinent to this Comment was his challenge under article V, section 33 that the bill in question was an

31. Dale Denwalt, *Proposed Oklahoma Fees on Hybrid, Electric Cars Would Generate $1M Annually*, OKLAHOMAN (Mar. 30, 2017, 12:00 PM), http://newsok.com/article/5543560.
32. *Sierra Club*, ¶ 26, 405 P.3d at 700.
33. 2017 OK 85, 406 P.3d 571.
34. *See id.* ¶ 1, 406 P.3d at 572.
35. *Id.* ¶ 5, 406 P.3d at 573.
36. OKLA. CONST. art. V, § 33.
37. *Id.*
38. 1908 OK 250, 98 P. 1002.
39. *See id.* ¶¶ 1-2, 98 P. at 1004.

unconstitutionally enacted revenue bill.[40] Justice Kane, writing for a unanimous Supreme Court, primarily discussed the history of the origination clause in the U.S. Constitution and concluded that the bill in question was not a revenue-raising bill within the meaning of the Oklahoma Constitution.[41] The origination clause was created by the British House of Commons and adopted by the U.S. Constitution, and it mandates that revenue legislation must start in the House of Representatives.[42] Thereafter, a majority of states adopted the same clause in their own constitutions,[43] Oklahoma included. Justice Kane reasoned that, to properly rule on this issue of first impression in Oklahoma, he needed to understand why the clause was drafted in the first place. Borrowing language from Justice Harlan of the United States Supreme Court, Justice Kane established the two-pronged test that has been used throughout Oklahoma's history. The first prong defines revenue bills as "those that levy taxes in the strict sense of the word," and the second prong states that "the principal object is the raising of revenue" and not "bills for other purposes which may incidentally create revenue."[44] Justice Kane held that the bill in question did not satisfy the second prong of this test because the primary purpose of the bill was to prevent property owners from circumventing taxes, not to raise revenue.[45] Since *Anderson*, this test has been used consistently in cases dealing with revenue bills, including cases decided after the passing of State Question 640, albeit with some alterations.[46] Moreover, the *Anderson* opinion contained dicta stating that bills which "lower the rate of taxation of the state" are also considered revenue bills within the meaning of the Oklahoma Constitution.[47] This assertion was eventually resolved by State Question 640 in *Fent v. Fallin* discussed below.[48]

---

40. *Id.* ¶ 2, 98 P. at 1004.

41. *Id.* ¶¶ 15-18, 98 P. at 1007.

42. *Id.* ¶ 6, 98 P. at 1005 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 871, at 338 (1833)); *see also* U.S. CONST. art. I, § 7, cl. 1.

43. *Anderson*, ¶ 8, 98 P. at 1006 (quoting STORY, *supra* note 42, § 875, at 342).

44. *Id.* ¶ 16, 98 P. at 1007 (quoting Twin City Nat'l Bank v. Nebeker, 167 U.S. 196, 202 (1897)).

45. *Id.* ¶ 15, 98 P. at 1007.

46. Okla. Auto. Dealers Ass'n v. State, 2017 OK 64, ¶ 8 n.21, 401 P.3d 1152, 1155 n.21; *see also* Naifeh v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 63, ¶¶ 17-20, 400 P.3d 759, 765-66.

47. *Anderson*, ¶ 14, 98 P. at 1006 (dictum).

48. 2014 OK 105, ¶¶ 7, 17–18, 345 P.3d 1113, 1115–16, 1118 (overruling dicta in the *Anderson* opinion that suggested the definition of "raising revenue" might include bills

B. Levying a Tax in the Strict Sense of the Word

The first Oklahoma Supreme Court case after the establishment of the *Anderson* two-pronged test, which also dealt with the constitutional treatment of the removal of a tax exemption, was *Cornelius v. State ex rel. Cruce*.[49] Cornelius, the "register of deeds of Oklahoma," brought this suit and demanded the state pay a newly-enacted tax owed for recording a mortgage.[50] This tax was created to remove an exemption in place for mortgages by "deem[ing] [them] to be real property, and . . . assess[ing] and tax[ing]" them as such under the challenged act.[51] The Oklahoma Supreme Court, in another unanimous opinion written by Justice Thomas, did not strike down the act under article V, section 33 and held that a bill "merely declar[ing] that certain property theretofore exempt from taxation shall thereafter be subject to taxation" is not a revenue measure within the meaning of the Constitution because it does not levy a tax in the strict sense of the word[52] and, therefore, fails the first prong of the test.[53] Just as the court in *Anderson* studied the history of revenue bills to reach its decision, Justice Turner looked to decisions in other states to come to his conclusion.[54]

Just one year later, Justice Hardy revisited the treatment of tax exemptions under article V, section 33 and reaffirmed *Cornelius* for the same reasons.[55] This holding has been questioned throughout Oklahoma's history, including after State Question 640, but the Oklahoma Supreme Court has not wavered.[56] Thereafter, the next challenge to legislation which removed a tax exemption came to the Oklahoma Supreme Court nearly half a century later.[57] In 1956, the court upheld *Cornelius* in *Leveridge v. Oklahoma Tax Commission* by ruling that a bill removing an exemption from a registration fee for used cars failed the first prong of the test because

---

resulting in a decrease of revenue (citing Perry Cty. v. Selma Ry. Co., 58 Ala. 546 (Ala. 1877)).

49. 1914 OK 222, 140 P. 1187.

50. *Id.* ¶ 1, 140 P. at 1188.

51. *Id.* ¶ 9, 140 P. at 1188.

52. *Id.* ¶¶ 9, 11, 140 P. at 1188 (quoting Mumford v. Sewall, 4 P. 585 (Or. 1883)).

53. *Id.* ¶ 11, 140 P. at 1188.

54. *See, e.g.*, *id.*

55. *See* Trs.', Ex'rs' & Sec. Ins. Corp. v. Hooton, 1915 OK 1059, ¶¶ 25-26, 158 P. 293, 298.

56. *See, e.g.*, Okla. Auto. Dealers Ass'n v. State, 2017 OK 64, ¶ 26, 401 P.3d 1152, 1162.

57. *See* Leveridge v. Okla. Tax Comm'n, 1956 OK 77, 294 P.2d 809.

"[t]he bill under consideration d[id] not within its four corners levy a tax."[58] *Leveridge*, the most recent case to examine bills that remove a tax exemption under article V, section 33 before the 2017 cases, received heavy scrutiny in *Oklahoma Automobile Dealers Ass'n v. State*, discussed below, with four justices arguing that it should be overruled in light of State Question 640.[59]

C. The Principal Object of Raising Revenue

The second prong in the *Anderson* test has gone through even more significant changes in interpretation than the first prong. The first decision, based primarily on the second prong, occurred in *In re Lee*, in which the plaintiff challenged a law establishing the $25 docket fee then charged "in each case filed in the Supreme Court."[60] One basis of the challenge to the enacted law was that it was a revenue bill that originated in the Senate and was therefore unconstitutional under article V, section 33.[61] Relying on *Cornelius* and the test laid out in *Anderson*, the court upheld the law because "it prescribes a fee to the public for services rendered by their officers, and is not exacted for revenue, but as compensation."[62] Effectively, this law failed the second prong of the revenue bill test because it generated revenue "incidentally."[63]

The following year, the Supreme Court upheld another law for the same reason in *Lusk v. Ryan*.[64] The law in question in *Lusk* provided first that a revenue officer must hold alleged illegal and excessive taxes for thirty days after the taxpayer gives the officer notice that the taxpayer believes that the taxes are illegal. Second, the law provided that the revenue officer must pay back any amount deemed by a court to be excessive and illegal.[65] The Oklahoma Supreme Court held that the enacted law was not a revenue bill because it "simply provide[d] a procedure to recover illegal taxes paid."[66] This was not "a bill for the raising of revenue" within the meaning of article V, section 33 because the bill was not intended to raise any revenue.[67]

---

58. *Id.* ¶¶ 12-13, 294 P. at 811-12 (citing *Cornelius*, 1914 OK 222, 140 P. 1187).

59. *See Okla. Auto. Dealers*, ¶ 7-11, 401 P.3d at 1168 (Watt, J., dissenting).

60. *In re* Lee, 1917 OK 458, ¶ 1, 168 P. 53, 54, *superseded by statute on other grounds*, 20 OKLA. STAT. § 15 (2011).

61. *Id.* ¶ 32, 168 P. at 57.

62. *Id.*

63. *See id.*

64. 1918 OK 94, ¶ 3, 171 P. 323, 324.

65. *Id.* ¶ 2, 171 P. at 324.

66. *Id.*

67. *Id.*

Although the bill specifically targeted taxes, it did not attempt to raise or change them. It simply gave taxpayers a method to recover taxes collected when a court ruled the taxes illegal.

The principal object prong was used, yet again, to uphold a law called the Motor Vehicle Act, which provided a "license fee to be paid by operators" of commercial motor vehicles using the Oklahoma state highways for profit.[68] In two similar cases challenging the enacted law, *Ex parte Sales* and *Ex parte Tindall*, the Oklahoma Supreme Court ruled that the Motor Vehicle Act was not a revenue bill because the law "regulat[ed] a growing effort, on the part of certain enterprises, to appropriate the public highways to their own free use" and did not set out to raise revenue.[69] Just as in *Lusk*, the principal purpose of the enacted law was not to raise revenue. The tax revenue was merely incidental to the true purpose of maintaining the public highways.

In *Tindall*, the first of the two challenges, Petitioner A.L. Tindall was arrested for not complying with the then-enacted Motor Vehicle Act.[70] Tindall challenged the enacted law under numerous provisions of the Oklahoma Constitution, including article V, section 33.[71] The following case, *Ex parte Sales*, had facts, allegations, and defenses identical to *Tindall*,[72] but the court investigated article V, section 33 in more detail. The *Sales* court noted that the Motor Vehicle Act, by requiring for-profit users of the public highways to pay a fee, provided a method of supporting the regulation and maintenance of the highways.[73] Any revenue raised was "merely incidental" to that purpose.[74] Therefore, the court held that the enacted law was not a revenue bill.[75]

As the court elaborated in more recent cases, the money raised went directly to support the true purpose of the bill: supporting public transportation on highways. In *Pure Oil Co. v. Oklahoma Tax Commission*, the court dealt with a similar set of circumstances and upheld another law requiring a license fee for certain vehicle operators, following *Sales* and *Tindall*.[76]

---

68. *Ex parte* Sales, 1924 OK 668, ¶ 7, 233 P. 186, 187; *see also Ex parte* Tindall, 1924 OK 669, ¶ 4, 229 P. 125, 127.

69. *Sales*, ¶ 7, 233 P. at 187.

70. *Tindall*, ¶¶ 1-2, 229 P. at 127.

71. *See id.* ¶ 5, 229 P. at 127.

72. *Sales*, ¶ 2, 233 P. at 187.

73. *Id.* ¶ 7, 233 P. at 187.

74. *Id.*

75. *Id.*

76. 1936 OK 516, ¶ 10, 66 P.2d 1097, 1100 (citing *Tindall*, 1924 OK 669, 229 P. 125).

D. State Question 640 and Fent v. Fallin

Throughout the many challenges to revenue legislation, the two-pronged test has been reaffirmed time and time again.[77] At the time of this Comment, Oklahoma's definition of "revenue bill" is well established. However, in 1992, when the people of Oklahoma voted on State Question 640, there was a degree of uncertainty as to what constituted a revenue bill.[78] State Question 640, passed by a 56.2% majority of the people,[79] added two provisions to article V, section 33 of the Oklahoma Constitution.[80] The first provision imposes a democratic vote requirement for most revenue bills:

> C. Any revenue bill originating in the House of Representatives shall not become effective until it has been referred to the people of the state at the next general election held throughout the state and shall become effective and be in force when it has been approved by a majority of the votes cast on the measure at such election and not otherwise, except as otherwise provided in subsection D of this section.[81]

The second provision created an alternative way to enact revenue bills by allowing a 75% supermajority of both the House and Senate.[82] In effect, State Question 640 requires a majority of the people or a 75% supermajority of both houses of the legislature to enact revenue bills.

At the time of passage of State Question 640, the Oklahoma Supreme Court had only ruled on article V, section 33 challenges to legislation that increased taxes, but not legislation that decreased them.[83] The court faced such a challenge in *Fent v. Fallin* in 2014.[84] The bill at issue in *Fent* contained provisions that would "reduce[] income taxes in some

77. *See , e.g.*, Calvey v. Daxon, 2000 OK 17, ¶ 18, 997 P.2d 164, 171; Fent v. Okla. Capitol Improvement Auth., 1999 OK 64, ¶ 12, 984 P.2d 200, 209; *In re* Initiative Petition No. 348, State Question No. 640, 1991 OK 110, ¶ 3 n.3, 820 P.2d 772, 774 n.3 (citing Pure Oil Co. v. Okla. Tax Comm'n, 1936 OK 516, 66 P.2d 1097); Bd. of Cty. Comm'rs v. Okla. Pub. Emp. Ret. Sys., 1965 OK 111, ¶ 23, 405 P.2d 68, 73; Wallace v. Gassaway, 1931 OK 210, ¶¶ 18-19, 298 P. 867, 870.

78. State Question No. 640, Initiative Petition No. 348, *supra* note 5.

79. *State Question 640, What's That?*, OKLA. POL'Y INST., https://okpolicy.org/state-question-640/ (last visited Aug. 11, 2018).

80. State Question No. 640, Initiative Petition No. 348, *supra* note 5.

81. *Id.*

82. *Id.*

83. Fent v. Fallin, 2014 OK 105, ¶ 7, 345 P.3d 1113, 1116.

84. *Id.* ¶ 17, 345 P.3d at 1117-18.

circumstances" by modifying Oklahoma income tax rates.[85] The attorney Jerry Fent challenged that bill under article V, section 33 alleging that the bill was an unconstitutionally enacted "revenue bill" under the Oklahoma Constitution.[86] At first glance, this case appeared to be an easy decision in favor of the petitioner. The bill in question lowered income tax rates, and such a bill was a "revenue bill" under the *Anderson* line of cases. Therefore, Petitioner Fent argued that "whether legislation increases or decreases taxes is irrelevant if the purpose of the legislation is to collect taxes."[87] While that seemed to be the rule under *Anderson*, the Oklahoma Supreme Court took a different view after the people amended article V, section 33 of the Oklahoma Constitution. Writing for the majority, Justice Kauger held instead that "the voters did not intend § 33 to apply to bills which decrease state revenues" when they enacted State Question 640.[88] Justice Kauger focused very closely on what "the ordinary person who voted on the 1992 amendment" believed they were supporting.[89] Referring to the news and press at the time of the vote, she concluded that the people approved State Question 640 because they wanted to "limit[] the Legislature's taxing power" and "restrict[] tax hikes to bring accountability" to Oklahoma's government.[90] While the *Anderson* court relied on state court and United Kingdom precedent, Justice Kauger focused on "[t]he intent of the framers and electorate in adopting" State Question 640.[91] Justice Kauger concluded that there was no suggestion that the amendment should apply to any laws other than those which seek to raise revenue or "increase the tax burden."[92]

Ultimately, it was clear to the Oklahoma Supreme Court that the amendment changed the meaning of "revenue bill" within the Oklahoma Constitution.[93] Thus, in *Fent*, the Supreme Court officially resolved the issue presented by the *Anderson* dicta[94] regarding State Question 640: the

85. *Id.* ¶¶ 2, 4, 345 P.3d at 1114-15.

86. *Id.* ¶¶ 3-4, 345 P.3d at 1115.

87. *Id.* ¶¶ 4, 7, 345 P.3d at 1115-16. This "secondary" holding in *Anderson* was, in fact, dicta; however, it was still an important part of the opinion, and *Fent* provided the opportunity to challenge it. *See* Okla. Auto. Dealers Ass'n v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 64, ¶ 8 n.21, 401 P.3d 1152, 1155 n.21 (noting that *Fent* overruled *Anderson* dicta).

88. *Fent*, ¶ 10, 345 P.3d at 1116.

89. *Id.* ¶ 13, 345 P.3d at 1117.

90. *Id.* ¶ 10, 345 P.3d at 1116.

91. *Id.*

92. *Id.* ¶ 17, 345 P.3d at 1117-18.

93. *Id.* ¶ 13, 345 P.3d at 1117.

94. *Id.* ¶ 18, 345 P.3d at 1118.

term "revenue bill" no longer includes bills that would decrease revenue because such legislation does not have the principal purpose of raising revenue.[95]

IV. The 2017 Supreme Court Rulings

Three years after *Fent*, the Oklahoma Supreme Court ruled on several challenges brought against various newly enacted House and Senate bills.[96] These cases, paired with *Fent*, form the general guidelines for the Oklahoma legislature to follow when authoring revenue bills. With the decisions laid down in these three cases, the justices explained how they will treat different revenue-raising measures under State Question 640. The first 2017 revenue bill case was *Naifeh v. State ex rel. Oklahoma Tax Commission*, challenging a new "fee" imposed on cigarette wholesalers. The second was *Oklahoma Automobile Dealers Ass'n v. State*, challenging a partial revocation of a tax exemption on the sale of vehicles. The third was *Sierra Club v. State ex rel. Oklahoma Tax Commission*, challenging a new "fee" placed on the purchase of hybrid and fully-electric vehicles. The final case was *Richardson v. State ex rel. Oklahoma Tax Commission,* challenging not only the tax exemption removal and fee for hybrid and electric vehicles, but also the changes in the standard Oklahoma income tax deduction.

A. Naifeh v. State

Naifeh involved a challenge to the newly enacted[97] Senate Bill 845, the "Smoking Cessation and Prevention Act of 2017," which assessed a new $1.50-per-pack fee on cigarette wholesalers.[98] Justice Wyrick, writing for a unanimous court, ruled that the legislation was a revenue bill within the meaning of article V, section 33 of the Oklahoma Constitution because it was a tax in the strict sense of the word and had the principal purpose of increasing revenue, thereby satisfying both prongs of the *Anderson* test.[99]

---

95. *Id.* ¶ 13, 345 P.3d at 1117.

96. *See* Naifeh v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 63, 400 P.3d 759; Okla. Auto. Dealers Ass'n v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 64, 401 P.3d 1152; Richardson v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 85, 406 P.3d 571.

97. The legislators recognized that it was "a decision between bad or worse": either they do not balance the budget, or they enact legislation subject to a potentially successful challenge under article V, section 33. *Naifeh*, ¶ 9, 400 P.3d at 763 (citing OKLA. CONST. art. X, §§ 23, 25).

98. *Id.* ¶ 2, 400 P.3d at 761 (citing S. 845, 56th Leg., 1st Sess. (Okla. 2017)).

99. *Id.* ¶ 3, 400 P.3d at 761.

After a backdrop of the history of revenue bills in Oklahoma, the court began its discussion with the second prong of the *Anderson* test and considered whether the legislation had the principal purpose of raising revenue.[100] One of the first and most pressing considerations was that the amount of revenue resulting from the fee that would actually serve the claimed purpose of the bill was insignificant compared to the expected overall revenue from the legislation.[101] As the title suggests, Senate Bill 845 purported to raise money to cease and prevent smoking throughout Oklahoma.[102] While the government argued that this bill is "regulatory in nature," the court disagreed: "only a tiny fraction (about 0.5%) of the revenues are to be apportioned to a fund used for smoking-cessation efforts" while the vast majority of the funds would be used for general state healthcare purposes.[103] As previously discussed, the budget for Oklahoma was in dire straits, and Senate Bill 845 was expected to raise a significant amount of money for the state—more than $250 million.[104] The principal issue facing the court was that the money raised from this bill did not really have a specific purpose outside of the "tiny fraction" being used for the legislation's smoking cessation façade, which was only one million of the expected $250 million.[105] Senate Bill 845 represented the "single largest source of new revenue for the State" and was crucial to offset Oklahoma's budget crisis.[106] However, the revenue was not raised for a purpose permissible for the bill to avoid the constitutional restrictions of article V, section 33.[107]

In the text of the bill, the drafters attempted to show that the main purpose was smoking prevention, but the bill did not actually require that an amount be spent to that end.[108] Instead, it appropriated everything except $1 million to a "Heath Care Enhancement Fund" which was meant to

100. *Id.* ¶ 21, 400 P.3d at 766.

101. *Id.* ¶ 24, 400 P.3d at 767.

102. S. 845, 56th Leg., 1st Sess. (Okla. 2017).

103. *Naifeh*, ¶ 24, 400 P.3d at 767.

104. S. 845 (Comm. Substitute), 56th Leg., 1st Sess., at 5 (Okla. 2017); The Oklahoman Editorial Board, *Legal Challenge to Oklahoma Tobacco "Fee" Is No Surprise,* NEWSOK (June 12, 2017 12:00AM), https://newsok.com/article/5552303/legal-challenge-to-oklahoma-tobacco-fee-is-no-surprise (citing an official estimate of $257 million).

105. S. 845, 56th Leg., 1st Sess. 4 (Okla. 2017).

106. *Naifeh*, ¶ 33, 400 P.3d at 770.

107. *Naifeh*, ¶ 36-37, 400 P.3d at 770.

108. There are no specific mandated expenditures to be found anywhere in the text of the bill. There are only certain required acts which generally discourage smoking in certain places. *See* S. 845, 56th Leg. 1st Sess. (Okla. 2017).

generally "enhanc[e] the health of Oklahomans."[109] Justice Wyrick's concern, at least in terms of article V, section 33, was that the bill "[did] not provide more specific direction nor [did] it send any money" to any specific government agency for the purpose of preventing smoking in Oklahoma.[110] Although the bill stated that "[t]he State Department of Health and the Tobacco Settlement Endowment Trust shall work together" and "[t]he Oklahoma State Department of Health and the Department of Mental Health and Substance Abuse Services shall work together" to attack smoking-related issues in Oklahoma, it did not identify how, when, or with what money these agencies would perform their respective duties.[111] Furthermore, Justice Wyrick held that the other "regulatory" provisions written in the bill are nothing more than codifications of previously enacted policies or are otherwise vague and ambiguous with little or no direction given to the agencies tasked with implementing them.[112]

The court continued the principal purpose analysis with some comparisons to relevant Oklahoma Supreme Court precedent.[113] First, Justice Wyrick dismissed the government's contention that the revenue from the $1.50-per-pack fee was incidental to the purpose of preventing smoking in Oklahoma.[114] While he agreed that in other circumstances it could be the case, such as if the fee imposed by the law was instead a penalty for a smoking-related violation, Justice Wyrick did not believe that "a quarter-of-a-billion dollars per year" can really be said to be "incidental."[115] The court agreed that this sort of fee was, for all intents and purposes, a "sin tax" subject to the constraints of article V, section 33 because its main purpose is to raise revenue.[116] Differentiating this "fee" from the fee challenged in *In re Lee*, Justice Wyrick noted that in *Lee* "there was a direct nexus between the fee and the government service being provided to the payor of the fee," e.g. the $25 filing fee for the Supreme

109. *Id.* at 4.

110. *Naifeh*, ¶ 26, 400 P.3d at 767.

111. S. 845, 56th Leg., 1st Sess. 3 (Okla. 2017). The bill provides specific issues that these duos are supposed to research but does not give them any money with which to work. Id.

112. *Naifeh*, ¶¶ 25-31, 400 P.3d at 767-68.

113. *Id.* ¶ 39, 400 P.3d at 771.

114. *Id.* ¶ 38, 400 P.3d at 770-71.

115. *Id.* ¶ 35, 400 P.3d at 769-70 ("If the Legislature had chosen to reduce smoking by making it illegal . . . with civil penalties . . . the revenue generated . . . might well be incidental . . . .").

116. *Id.* ¶ 36, 400 P.3d at 770.

Court;[117] whereas Justice Wyrick pointed out a very obvious difference between the *Lee* filing fee and the cigarette "fee" in *Naifeh*: "the 1.50 assessment [was] actually assessed against the seller of cigarettes, whom no one argues will make use of any government-provided health services."[118] According to the court, the past cases in which various fees were ruled to be incidental to the purpose of the bills that created them were different from the *Naifeh* smoking cessation fee because this fee "is ultimately aimed at consumers rather than upon a [taxpayer] profiting from the use of state services," especially considering the vague and non-specific directives drafted for the fee revenue.[119] Thus, Justice Wyrick concluded that Senate Bill 845 had passed the principal purpose prong of the *Anderson* test.[120] Additionally, the court reaffirmed the holding in *Fent v. Fallin* by "reiterat[ing] that whether a measure is 'intended to raise revenue' must be the overarching consideration in determining whether a measure is a 'revenue bill.'"[121]

The court next considered the first prong of the Anderson test—whether the Smoking Cessation and Prevention Act "levie[d] a tax in the strict sense" of the word.[122] The ultimate question in *Naifeh* was whether the "smoking cessation fee" was, in fact, "a fee or a tax."[123] While Justice Wyrick agreed that the text of Senate Bill 845 itself suggested that the $1.50 per pack was a fee because it was "assessed primarily" for regulatory purposes, he noted that the nature of the cessation fee did not effectuate the purpose as it was written in the legislation.[124] There have been many different cigarette fees that have been enacted in Oklahoma and all of them have been "codified as excise taxes."[125] This $1.50-per-pack fee would have been treated no differently than these other excise taxes.[126] The revenue from the fee would have been collected by the Oklahoma Tax Commission and deposited in the State Treasury for use by the government for general

117. *Id.* ¶ 39, 400 P.3d at 771.
118. *Id.*
119. *Id.* ¶ 41, 400 P.3d at 772.
120. *See id.* ¶ 42, 400 P.3d at 772.
121. *Id.*
122. *Id.* ¶ 43, 400 P.3d at 772.
123. *Id.* ¶ 43, 400 P.3d at 773.
124. *Id.* ¶ 43, 400 P.3d at 772-73 (quoting GenOn Mid-Atl., LLC v. Montgomery Cty., 650 F.3d 1021, 1023 (4th Cir. 2011)).
125. *Id.* ¶¶ 43-44, 400 P.3d at 772-73 (citing several different Oklahoma bills and statutes that tax cigarettes in different ways).
126. *Id.* ¶ 44, 400 P.3d at 773 & n.72.

healthcare enhancements.[127] None of those general healthcare enhancements are directly related to smoking, the only exception being the $1 million used for the express purposes of the bill.[128] Justice Wyrick went even further and pointed out that the "consumer who ultimately bears the costs of the assessment is paying the retailer consideration in exchange for a pack of cigarettes, rather than the government in exchange for healthcare for his smoking-related illness."[129] His worry, if the court upheld Senate Bill 845, was that a "quintessential excise tax [could] be transformed into a fee merely by calling it a fee and adding some regulatory gloss" thereby increasing the tax burden without a vote of the people or the supermajority required by State Question 640.[130] This would go directly against the "tax relief" purpose of State Question 640 to require "all 'future bills "*intended to raise revenue*"'" to have a supermajority of the Legislature or a majority of the people supporting it.[131] The smoking cessation fee in question levied a tax because it would increase the tax burden without conferring a specific benefit to the taxpayer.[132] Having satisfied both prongs of the *Anderson* test, the court unanimously struck down Senate Bill 845 as an unconstitutionally enacted revenue bill because the bill was approved within the final five days of the legislative session, thereby violating article V, section 33 of the Oklahoma Constitution.[133]

B. Oklahoma Automobile Dealers Ass'n v. State

In *Oklahoma Automobile Dealers*, a trade association of car dealers brought an unsuccessful challenge to the newly enacted revenue measure House Bill 2433.[134] House Bill 2433 removed 1.25% of the sales tax exemption on automobile sales.[135] In a fiercely divided court, the justices upheld the law 5-4.[136]

127. S. 845, 56th Leg., 1st Sess. 4 (Okla. 2017).
128. *Id.*
129. *Naifeh*, ¶ 47, 400 P.3d at 774.
130. *Id.* ¶ 49, 400 P.3d at 774-75.
131. *Id.* (quoting Fent v. Fallin, 2014 OK 105, ¶ 14, 345 P.3d 1113, 1117).
132. *Id.* ¶ 39, 400 P.3d at 771.
133. *Id.* ¶¶ 2-3, 400 P.3d at 761.
134. Okla. Auto. Dealers Ass'n v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 64, ¶ 0, 401 P.3d 1152, 1153.
135. H.R. 2433, 56th Leg., 1st Sess. (Okla. 2017).
136. *Okla. Auto. Dealers*, ¶¶ 25-26, 401 P.3d at 1162.

1. The Majority Opinion

At the outset of the majority opinion written by Justice Wyrick, the court ruled that the bill satisfied the primary purpose prong of the *Anderson* test: it had the principal purpose of raising revenue.[137] The court compared this case to *Leveridge*, discussed above, because it was based on similar circumstances.[138] Like in *Leveridge*, the *Oklahoma Automobile Dealers* court rejected the argument that the bills in question had any purpose other than raising revenue.[139] Hence, the court focused heavily on the first prong of the *Anderson* test: whether House Bill 2433 levies a tax in the strict sense of the word.[140]

In fact, the overarching consideration for the court in *Oklahoma Automobile Dealers* was the 1956 holding in *Leveridge*. The House Bill in question in *Leveridge* sought to amend a statute to remove a sales tax exemption for the sale of used cars in Oklahoma.[141] The *Leveridge* court held that the law was not a revenue bill subject to the strictures of the Oklahoma Constitution because it did not levy a tax, but "merely declare[d] that certain property (automobiles of the latest manufactured models owned by used car dealers) theretofore exempt from taxation . . . shall thereafter be subject to taxation."[142] The *Leveridge* court, by following the holding in *Cornelius v. State*, refused to subject bills that remove tax exemptions to the constitutional restrictions of article V, section 33.[143] And in *Oklahoma Automobile Dealers*, the court opted to follow the *Leveridge* rule in spite of State Question 640,[144] a decision which the dissenting justices hotly contested.[145]

In an attempt to distinguish *Leveridge*, the Petitioners in *Oklahoma Automobile Dealers* argued that, unlike the law at issue in *Leveridge*, House Bill 2433 was a revenue bill because "it cause[d] people to have to pay more taxes."[146] House Bill 2433, providing revenue in the form of a

137. *Id.* ¶ 12, 401 P.3d at 1157.

138. *Id.* (citing Leveridge v. Okla. Tax Comm'n, 1956 OK 77, 294 P.2d 809).

139. *Okla. Auto. Dealers*, ¶¶ 11-13, 401 P.3d at 1156-57.

140. *Id.* ¶ 13, 401 P.3d at 1157; *see also* Anderson v. Ritterbusch, 1908 OK 250, ¶ 15, 98 P. 1002, 1007.

141. *Leveridge*, ¶ 7, 294 P.2d at 811.

142. *Id.* ¶ 13, 294 P.2d at 812.

143. *Id.*

144. *See generally Okla. Auto. Dealers*, 2017 OK 64, 401 P.3d 1152.

145. *Id.* ¶¶ 24-25, 401 P.3d at 1162; *id.* ¶¶ 1-13, 401 P.3d at 1162-66 (Combs, C.J., dissenting); *id.* ¶¶ 1-24, 401 P.3d at 1166-75 (Watt, J., dissenting).

146. *Id.* ¶ 17, 401 P.3d at 1158.

removal of sales tax exemptions, increases tax revenue in practice. But the majority held that merely because a bill raises revenue does not mean the bill "levies" a tax.[147] In fact, "because *the original levies* of the sales tax on automobile sales were subject" to the constitutional restrictions, this sales tax has already successfully satisfied the purposes behind article V, section 33.[148]

The court also dismissed one of the most persuasive arguments in *Fent v. Fallin*: State Question 640 did not affect the definition of "revenue bill" such that it would encompass bills that remove exemptions from already-levied taxes.[149] The court rejected the notion that State Question 640 changed the definition of revenue bill so drastically as to remove the requirement that a bill levy a tax in the strict sense of the word.[150]

As a final justification for its holding, the court discussed the constitutional policies supporting it.[151] The majority read article V, section 33 in conjunction with two other constitutional provisions to conclude that they "express an unmistakable constitutional policy disfavoring special exemptions from taxation."[152] First, article X, section 5 provides that "[t]axes shall be uniform upon the same class of subjects."[153] The court reasoned that, in order to allow the legislature to make taxes more uniform, it would be contrary to the constitution to disallow the legislature from removing special exemptions, especially if those exemptions would create an unjust disparity.[154] Second, article V, section 50 limits the legislature's power from enacting tax exemptions for "any property withis [*sic*] this State."[155] The legislature can only enact exemptions that the constitution specifically allows.[156] The court further reasoned that, were they to rule against the State, the voting requirement to enact special exemptions would be a simple majority, but taking those same exemptions back would require the article V, section 33 supermajority restriction.[157] This would make it even more difficult for the legislature to raise money for the State, which

147. *Id.*
148. *Id.*
149. *Id.* ¶ 19, 401 P.3d at 1159.
150. *Id.* ¶ 18, 401 P.3d at 1158.
151. *Id.* ¶ 22, 401 P.3d at 1160-61.
152. *Id.* ¶ 22, 401 P.3d at 1161; *see also* OKLA. CONST. art. 10, § 5); OKLA. CONST. art. 5, § 50.
153. OKLA. CONST. art. 10, § 5(B).
154. *Okla. Auto. Dealers*, ¶ 22, 401 P.3d at 1160-61.
155. OKLA. CONST. art. 5, § 50.
156. *Id.*
157. *Okla. Auto. Dealers*, ¶ 24, 401 P.3d at 1161-62.

the court decided would be at odds with the Oklahoma Constitution.[158] Additionally, this difficulty would be contrary to the policy that "those lacking . . . political clout" could not secure exemptions from tax, forcing the poor to shoulder a disproportionally large burden of support for the State.[159]

2. The Dissenting Opinions

In both dissenting opinions, the dissenting justices disagreed with Justice Wyrick's reliance on *Leveridge* as dispositive of the issue. Chief Justice Combs' dissent spent considerable time differentiating *Leveridge* from *Oklahoma Automobile Dealers*.[160] Those joining in his dissent agreed with the chief justice that the law implicated in *Leveridge* was not the product of a revenue bill because the "principal object was *not* to raise revenue," but rather "to close a loophole that allowed used car dealers to avoid certain taxation" by, effectively, abusing the system.[161] Essentially, the chief justice believed that the revenue raised from closing that loophole was incidental to the actual purpose of preventing legal tax evasion that was the source of drafter error.[162] The majority parried this argument by pointing out that *Leveridge* was not decided on that issue at all.[163] In fact, as discussed above, the majority almost immediately conceded that prong of the *Anderson* test: there is no dispute that the purpose of House Bill 2433 was to raise revenue, and there was no dispute in *Leveridge* as to whether the bill in that case had any purpose other than to raise revenue.[164] In both cases, the decision turned exclusively on whether the bill levied a tax in the strict sense of the word—the first prong of the test.

Additionally, both Chief Justice Combs and Justice Watt separately argued that, under State Question 640, *Fent v. Fallin* stood to recognize not only that the definition of "revenue bill" had changed, but that *Oklahoma Automobile Dealers* presented the opportunity for it to change again.[165] Justice Watt pointed out that "the fact that the text of [an] amendment did

158. *Id.* ¶ 24, 401 P.3d at 1162.

159. *Id.*

160. *Id.* ¶ 6, 401 P.3d at 1164-65 (Combs, C.J., dissenting).

161. *Id.* ¶ 6, 401 P.3d at 1165 (Combs, C.J., dissenting) (emphasis added).

162. *See id.* ¶ 6, 401 P.3d at 1164-65 (Combs, C.J., dissenting).

163. *Id.* ¶ 13, 401 P.3d at 1157.

164. *Id.* ¶ 8, 401 P.3d at 1155-56; Leveridge v. Okla. Tax Comm'n, 1956 OK 77, ¶ 12, 294 P.2d 809, 811 ("The bill under consideration does not within its four corners levy a tax and for said reason is not per se a revenue bill.").

165. *Okla. Auto. Dealers*, ¶ 8, 401 P.3d at 1165 (Combs, C.J., dissenting); *Id.* ¶ 4, 401 P.3d at 1167 (Watt, J., dissenting).

not specifically change the original language" of the Constitution does not prevent changes in the definitions of words found in the provisions "in light of the intent of the voters" that pass those constitutional amendments.[166]

As the majority opinion pointed out,[167] the dissent focused heavily on the argument that because the bill would force taxpayers to pay more money to the State, it is automatically a revenue bill within the meaning of the Oklahoma Constitution, especially in light of State Question 640 and *Fent*.[168] The dissent further argued that, just as State Question 640 caused *Anderson* to be partially overruled, so too should it cause *Leveridge* to be overruled.[169] The *Fent* court recognized that State Question 640 was not meant to restrict the legislature's ability to amend tax measures that are already in place unless "such statutory amendments do not 'raise' or *increase the tax burden*."[170] Justice Watt contended that the primary purpose of House Bill 2433 was "to reach into the people's pockets" to support the government; the bill increases the tax burden on the people and, therefore, is a revenue bill within the meaning of the Constitution.[171] To hold as the majority did, according to the dissent, elevated "form over function."[172]

But, although the majority recognized that it would be easy to view the holding as such, there exists a clear distinction between the "elimination of a special exemption from an existing tax" and the levy of a brand new tax.[173] As previously discussed, the court chose not to overrule *Leveridge* because of the "unmistakable constitutional policy disfavoring special exemptions."[174] State Question 640 did not convince the majority that it should ignore that policy, even if it would result in a higher taxpayer burden. Although the overarching consideration is whether a bill seeks to raise revenue, State Question 640 did not completely remove the first prong of the *Anderson* test requiring that the bill levy a tax in the strict sense of the word. So, relying again on that prong, the majority dismissed much of the dissents' arguments because they failed to establish that House Bill 2433 actually levied a new tax.

166. *Id.* ¶ 8, 401 P.3d at 1169 (Watt, J., dissenting) (citing Fent v. Fallin, 2014 OK 105, 345 P.3d 1113).
167. *Id.* ¶ 17, 401 P.3d at 1158.
168. *Id.* ¶ 12, 401 P.3d at 1170 (Watt, J., dissenting).
169. *Id.* ¶ 20, 401 P.3d at 1174 (Watt, J., dissenting).
170. *Id.* (quoting *Fent*, ¶ 17, 345 P.3d at 1117-18).
171. *Id.*
172. *Id.* ¶ 15, 401 P.3d at 1170 (Watt, J., dissenting).
173. *Id.* ¶ 21, 401 P.3d at 1160.
174. *Id.* ¶ 22, 401 P.3d at 1161.

C. Sierra Club v. State *and* Richardson v. State

Two other cases brought before the Supreme Court were decided under much of the same analysis as *Fent* and *Leveridge*. The first case, *Sierra Club v. State*, was a challenge to House Bill 1449 and the "Motor Fuels Tax Fee."[175] Basing the decision primarily on the reasoning from *Naifeh*, the court ruled that House Bill 1449 was a revenue bill that was enacted unconstitutionally.[176] Second, attorney and gubernatorial candidate Gary Richardson brought challenges to House Bill 1449, House Bill 2433, and House Bill 2348 in *Richardson v. State*.[177] While the constitutionality of House Bill 1449 and House Bill 2433 was already challenged and resolved in the previous cases, the court had to consider House Bill 2348, which "uncouple[d] the standard Oklahoma income tax deduction from" that of the Internal Revenue Code.[178] The court chose not to rule on that issue, however, because it was, at the time of the challenge, impossible to accurately predict how the new law would affect revenue for the State.[179]

1. Sierra Club v. State

The Petitioner in *Sierra Club v. State*[180] was a national environmental organization that primarily advocated for the "mov[ement] away from . . . fossil fuels . . . and [moving] toward[s] a clean energy economy."[181] The organization brought a challenge to House Bill 1449 that created the "Motor Fuels Tax Fee," which was designed to affect drivers of hybrid and electric cars.[182] The purpose of the law was to recoup revenue lost from gas taxes by charging an annual fee of $100 for electric cars and $30 for hybrids in lieu of the tax the drivers would have paid on fuel.[183] In a 6-3 decision, the court held that House Bill 1449 was a revenue bill within the meaning of the Oklahoma Constitution and was enacted outside of the restrictions of article V, section 33.[184] In effect, Oklahoma did not previously tax electric cars, so this tax was a new levy.

---

175. Sierra Club v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 83, ¶¶ 2-3, 405 P.3d 691, 694.
176. *Id.* ¶¶ 23, ¶ 26, 405 P.3d at 700.
177. Richardson v. State, 2017 OK 85, ¶ 1, 406 P.3d 571, 572.
178. *Id.* ¶ 3, 406 P.3d at 572.
179. *Id.*
180. *Sierra Club*, 2017 OK 83, 405 P.3d 691.
181. *About*, SIERRA CLUB, http://www.sierraclub.org/about (last visited Feb. 17, 2018).
182. H.R. 1449, 56th Leg., Reg. Sess. (Okla. 2017).
183. *Id.*
184. *Sierra Club*, ¶ 26, 405 P.3d at 700.

For the most part, the court reiterated much of its decision in *Naifeh* in concluding that House Bill 1449 satisfied both prongs of the *Anderson* test. However, the court faced the government's persuasive comparisons to the "mileage tax cases," *Pure Oil Co. v. Oklahoma Tax Commission*, *Ex parte Tindall*, and *Ex parte Sales*,[185] because these cases raised the question of whether the purpose of House Bill 1449 was to raise revenue, or whether that revenue gained was incidental to a more regulatory purpose.[186] Oklahoma argued that those cases were dispositive of whether House Bill 1449 was a revenue bill because its principal purpose was to "equaliz[e] the financial burden of maintaining" the state highways.[187] However, the court differentiated the mileage tax cases by examining the purposes behind their respective bills. In both *Ex parte Tindall* and *Ex parte Sales*, the court ruled consecutively on the same provision of an act that established a fee for using the public highways for profit for "common carriers."[188] That fee was ruled to not be a revenue bill because the primary purpose of the fee was "to regulate the use of public highways by transportation companies," and the fee gave the companies the privilege of that use.[189] The fee in *Pure Oil Co.* was also only assessed on "commercial enterprises" that use the highways for profit.[190] House Bill 1449, on the other hand, created a fee that would have been prescribed to potentially all Oklahomans, as long as they purchased a hybrid or electric vehicle.[191]

Furthermore, the laws upheld in the "mileage tax cases" were given specific regulatory purposes, and the revenue raised was incidental to those purposes.[192] In contrast, House Bill 1449 provided very little regulatory direction of the funds that would be collected by the fee it created.[193]

---

185. *Id.* ¶ 13, 405 P.3d at 697; *see also* Pure Oil Co. v. Okla. Tax Comm'n, 1936 OK 516, 66 P.2d 1097; *Ex parte* Tindall, 1924 OK 669, 229 P. 125; *Ex parte* Sales, 1924 OK 668, 233 P. 186.

186. *Sierra Club*, ¶ 13, 405 P.3d at 697.

187. *Id.*

188. *Tindall*, ¶ 6, 229 P. at 128; *see Sales*, ¶ 12, 233 P. at 187 ("The facts in the two cases being identical, and the same questions of law being involved in both cases, the decision in this case must follow the opinion in the Tindall Case.").

189. *Tindall*, ¶¶ 0, 1, 229 P. at 126.

190. *Pure Oil Co.*, ¶ 10, 66 P.2d at 1100.

191. *Sierra Club*, ¶ 16, 405 P.3d at 697.

192. *Id.*

193. *Id.* ¶ 16, 405 P.3d at 697-98. The text of the bill does not impose any new regulatory restrictions which would use the revenue collected from the law. It merely directs revenue to be collected from hybrid and electric vehicle owners each year. H.R. 1449, 56th Leg., Reg. Sess. 2-3 (Okla. 2017).

Although the bill created the "State Highway Construction and Maintenance Fund," it only directed "the lessor of Ten Thousand Dollars . . . and one and one-half percent" of the revenue to any specific use, namely "the development and maintenance of alternative fuel corridors."[194] House Bill 1449 satisfied the principal purpose requirement of revenue bills because the revenue raised was not incidental to a regulatory purpose; raising revenue was the main concern for the bill.

Following this reasoning, the court concluded that the Motor Fuels Tax Fee also satisfied the first prong: it levied a tax in the strict sense of the word.[195] Contrasting again with the "mileage tax cases," the court noted the "*extensive regulations* that went along with the fee[s]" in those cases, as opposed to the distinct lack of regulations in House Bill 1449, "except to forbid registration of [a] vehicle if the [fee] is not paid."[196] The court concluded that, because the payment by the taxpayer blends with the general benefit of supporting governmental functions, it is a tax.[197] Much like the "Smoking Cessation Fee" contested in *Naifeh* was held to be a tax instead of a fee, the "Motor Fuels Tax Fee" is also a tax.[198] The amount paid was not in exchange for a specific, statute-apportioned governmental service, instead it was for the general funding of the state with only a very small portion of the funds directed to a fund designed to compensate for damage to public roads.[199] Because this fee's provisions were very similar to those of the "Smoking Cessation Fee" challenged in *Naifeh*, the court held that it passed both prongs of the *Anderson* test, and it was a revenue bill within the meaning of the Oklahoma Constitution.[200] Therefore, because the bill was enacted outside the strictures of article V, section 33, it was unconstitutional.

194. H.R. 1449, 56th Leg., Reg. Sess. 3 (Okla. 2017).

195. *See Sierra Club*, ¶ 24, 405 P.3d at 699-700.

196. *Id.* ¶ 22, 405 P.3d at 699.

197. *Id.* ¶ 24, 405 P.3d at 700.

198. *Id.* ¶ 24, 405 P.3d at 699.

199. *Id.*; H.R. 1449, 56th Leg., Reg. Sess. 3 (Okla. 2017); *see also* Naifeh *v. State ex rel. Okla. Tax Comm'n*, 2017 OK 63, ¶ 45, 400 P.3d 759, 773 (distinguishing a tax from a fee by saying a tax is subject to a "reasonable rule of apportionment" so as "to provide public revenue for the support of the government" (quoting Obusee Co-op Ass'n v. Okla. Wheat Utilization Research & Mkt. Dev. Comm'n (1964 OK 81, ¶ 8, 391 P.2d 216, 218))).

200. *Sierra Club*, ¶ 26, 405 P.3d at 700.

2. Richardson v. State

Gary Richardson brought the final case in the series of 2017 revenue bill cases decided by the Oklahoma Supreme Court.[201] Petitioner Richardson challenged House Bills 2433, 1449, and 2348.[202] The Supreme Court had already decided on the constitutionality of both House Bill 2433, in *Oklahoma Automobile Dealers*, and House Bill 1449, in *Sierra Club*.[203] Therefore, the court did not revisit those bills, nor did Richardson present any new arguments against them.[204]

However, the court had not yet considered House Bill 2348.[205] In an effort to freeze the Oklahoma standard tax deduction at the 2017 level, the Oklahoma legislature enacted House Bill 2348,[206] which "uncouples the standard [state] deduction from the amount allowed by the Internal Revenue Code."[207] The issue boiled down to whether this was even a justiciable controversy before the court.[208] It proved impossible to discern whether this enacted law would provide more or less revenue, or make any change at all.[209] The court denied jurisdiction over the challenge to House Bill 2348 because it was not possible to decide whether the enacted law was a revenue bill within the meaning of article V, section 33.[210] As discussed above, a bill is only a revenue bill if it increases revenue or the tax burden on the public, as decided in *Fent v. Fallin*.[211] While the previous revenue bill cases all had estimated tax burden changes, it was unclear at the time of the decision whether this bill would have any effect.[212] Because the bill was "not ripe for review," the court was unable to decide the constitutionality of House Bill 2348 and denied original jurisdiction.[213]

While House Bill 2348 was implicitly upheld for the time being, a future challenge is certainly possible now that the effects of House Bill 2348 are

201. *See* Richardson v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 85, ¶ 0, 406 P.3d 571, 572.
202. *Id.* ¶ 1, 406 P.3d at 572.
203. *See* Okla. Auto. Dealers Ass'n v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 64, 401 P.3d 1152; *Sierra Club*, 2017 OK 83, 405 P.3d 691.
204. *See Richardson*, ¶¶ 2, 4, 406 P.3d at 572.
205. H.R. 2348, 56th Leg., Reg. Sess. (Okla. 2017).
206. *Id.*
207. *Richardson*, ¶ 3, 406 P.3d at 572.
208. *Id.* ¶ 5, 406 P.3d at 573.
209. *Id.* ¶¶ 3, 5, 406 P.3d at 572, 573.
210. *Id.* ¶ 5, 406 P.3d at 573.
211. *See* discussion *supra* Section III.D.
212. *Richardson*, ¶ 3, 406 P.3d at 572.
213. *Id.* ¶¶ 5, 7, 406 P.3d at 573.

known.[214] With the Trump Administration's changes to the Internal Revenue Code, the standard deduction has greatly increased.[215] Had this bill been struck down as unconstitutional, the Oklahoma standard deduction would have greatly increased with the federal standard deduction. The majority in *Richardson* made it clear that the only reason a review of House Bill 2348 was not ripe for review was because "it [was] unclear at th[at] time whether H.B. 2348 w[ould] increase revenue in Oklahoma."[216] This language strongly suggests that, now that the effects are known, this law is very susceptible to a constitutional challenge. However, just as House Bill 1449 in *Sierra Club* was struck down in part due to its broad application to taxpayers, House Bill 2348 could be struck down because changes to the standard deduction affect the vast majority of Oklahomans.[217] While the amount of revenue expected to be raised is minimal, only $4.4 million,[218] House Bill 2348 would also prevent the massive decrease in revenue that would come with the increase in the federal standard deduction. It is therefore likely that the Oklahoma Supreme Court would rule that the principal purpose of House Bill 2348 is to raise revenue, thereby satisfying the second prong of the *Anderson* test.

Assuming House Bill 2348 does satisfy the second prong, the court in *Richardson* would then be faced with deciding whether House Bill 2348 levied a tax in the strict sense of the word, the first prong of the *Anderson* test. Just as the court in *Oklahoma Automobile Dealers* was not persuaded by the fact that House Bill 2433 would require taxpayers to pay more,[219] the fact that the *Richardson* bill would prevent taxpayers from enjoying a larger deduction is not enough for the court to consider the bill a new tax levy. The *Richardson* bill is very similar to House Bill 2433 in the sense that both

214. *See supra* Section IV.D.

215. *Compare* I.R.S. Pub. 501, 25 tbl.6 (Jan. 2, 2018), *with* Rev. Proc. 2018-18, 2018-10 I.R.B. 396 (Mar. 5, 2018) (doubling the federal standard income tax deduction). Many federal exemptions have been removed to make up for the difference in the standard deduction. Oklahoma would have seen a proportional increase in the state standard deduction without the removal of any tax exemptions. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11021, 131 Stat. 2054, 2072-73 (to be codified at 26 U.S.C. § 63).

216. *Richardson*, ¶ 5, 406 P.3d at 573 (emphasis omitted).

217. *See infra* Part V.C.

218. Associated Press, *Oklahoma House Passes Standard Deduction Revenue Measure*, U.S. NEWS & WORLD REP. (May 2, 2017, 12:35 PM), https://www.usnews.com/news/best-states/oklahoma/articles/2017-05-02/oklahoma-house-passes-standard-deduction-revenue-measure (citing Republican Representative Louis Moore, the bill drafter).

219. Okla. Auto. Dealers Ass'n v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 64, ¶ 17, 401 P.3d 152, 1158.

bills sought to change only a part of a previously enacted tax benefit.[220] Because the *Richardson* court ruled that a partial removal of a tax exemption did not levy a tax in the strict sense of the word, it seems unlikely that simply changing the relationship of a state deduction to the equivalent federal deduction would levy a tax, either.

V. How the Oklahoma Legislature Can Raise Money

The cases discussed above serve as the most up-to-date guidelines for the Oklahoma legislature when drafting new legislation to raise revenue and increase the tax burden. This section outlines the implications of each 2017 Supreme Court case and provides some reasonable inferences that can be gleaned from those decisions.

A. Raising Revenue for Specific Purposes

The Oklahoma Supreme Court's opinion in *Naifeh* outlined many important considerations for the Oklahoma legislature when authoring bills that are either regulatory in nature and contain a fee provision or are purely a tax increase. In light of the continuing deficit crisis after Senate Bill 845's invalidation, the guidelines provided by *Naifeh* must be closely adhered to for future legislative sessions.

The Supreme Court has made it clear that if the legislature is going to provide a regulatory purpose in new legislation, the revenue received from the bill in question must substantially go toward fulfilling that purpose.[221] The revenue raised from the bill must be merely incidental to the true purpose of the bill.[222] The legislature can provide any purpose in the bill, but it is not dispositive of the issue.[223] The purpose should not only be written into the bill, but should also be reflected in the enactment of the legislation by explaining how revenue will be collected and why it is being collected. Because the fee in *Naifeh* was not allocated directly to a government agency to confer a benefit to the taxpayer, it could not be said to have a regulatory purpose.[224] It simply provided a way to increase the tax burden to cover Oklahoma's budget deficit. Although "contextual evidence" can be extremely important in evaluating the revenue-raising potential of new legislation, it is possible that the text, on its own, can

220. *See generally* H.R. 2348, 56th Leg., 1st Sess. (Okla. 2017).
221. Naifeh v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 63, ¶ 34, 400 P.3d 759, 769.
222. *Id.* ¶¶ 32-33, 400 P.3d at 768-69.
223. *See id.* ¶ 32, 400 P.3d at 768-69.
224. *See id.* ¶ 39, 400 P.3d at 771.

establish the "primary operation and effect" of raising revenue to support the state.[225]

That said, even if legislation provides a sufficiently regulatory purpose, the amount of money raised for a claimed purpose in relation to the total expected revenue from a bill will now represent another important factor, as will the total expected revenue itself.[226] According to Justice Wyrick, "a quarter-of-a-billion dollars per year is hardly 'incidental'" even if the aim is "designed to reduce smoking."[227] While this amount is possibly dispositive on its own, it is compounded by the fact that only an insignificant 0.5% of the revenue would actually go towards preventing and reducing smoking.[228] It remains unclear just how far the estimated $1 million would have gone in achieving this result throughout the entire state of Oklahoma, but it was certainly not far enough to convince the Oklahoma Supreme Court that the generic cigarette tax was a simple regulatory "fee," especially given how much excess revenue the bill provided. The court may have been satisfied with the "regulatory purpose" arguments had a much more substantial portion of the revenue gone to the claimed purpose. While the estimated minimum fraction of future revenue that would satisfy a regulatory purpose is far from certain, the legislature was nowhere close in the Smoking Cessation and Prevention Act.

The government also argued that a "sin tax could never be a 'revenue raising measure' because such a tax is always imposed" to regulate the behavior it is taxing—but the court disagreed.[229] Because the revenue raising "is *itself* the 'regulatory device,'" the principal purpose is to raise revenue.[230] For this reason, virtually all "sin taxes" constitute revenue bills within the meaning of the Oklahoma Constitution.[231] The primary purpose of a "sin tax"[232] is to "reach into the people's pockets," undoubtedly the principal purpose behind Senate Bill 845—"the single largest source of . . . revenue" that the legislature drafted during the 2017 Session.[233]

---

225. *Id.* ¶ 22, 400 P.3d at 766.

226. *See id.* ¶ 36, 400 P.3d at 770.

227. *Id.* ¶ 35, 400 P.3d at 769-70.

228. *Id.* ¶ 24, 400 P.3d at 767.

229. *Id.* ¶ 35 & n.55, 400 P.3d at 770 & n.55.

230. *Id.* ¶ 35, 400 P.3d at 770.

231. *See id.* ¶ 36, 400 P.3d at 770 (describing cigarette taxes as "regulatory tool[s]" and "sin tax[es]").

232. *Sin Tax*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "sin tax" as "[a]n excise tax").

233. *Naifeh*, ¶ 37, 400 P.3d at 770.

Moreover, Justice Wyrick explained another legislative consideration when making a regulatory bill: flexibility of the provisions. The drafters of Senate Bill 845 attempted to create a regulatory scheme by prohibiting the use of tobacco on state-owned property, directing certain organizations to "work together" to combat specific smoking-related issues, and adding a "*conspicuous* sign[]" requirement for areas which already prohibit smoking.[234] In fact, one provision directed owners of public places to simply "[a]sk smokers to refrain from smoking."[235] Justice Wyrick ruled that these kinds of provisions were simply too vague and flexible to be considered truly "regulatory."[236] In fact, some of these provisions, as it turns out, simply codified policies already in place: Section 5 of the bill codified Governor Fallin's executive order prohibiting smoking on state-owned property.[237] None of these provisions utilized the revenue derived from the fee, and some would not even be controlled functions of the state. The provisions hewed closer to guidelines or suggestions than regulatory laws that require adherence. Requiring owners of certain businesses to place anti-smoking signs and tell smokers to leave their premises simply does not require $200 million from the state budget. To be truly "regulatory," a bill will not only have to explicitly state how those subject to the provisions can comply but might also need to explain how the money raised will be used. If the legislature wants to transform a revenue bill into a regulatory bill, the regulatory measures cannot be nearly as malleable as those set forth in the Smoking Cessation and Prevention Act, especially if it is one which would generate significant state income.

The final important consideration the legislature must make when following *Naifeh* is where it allocates the generated revenue. There must be "a direct nexus between the fee and the government service" that the fee supports.[238] In *Naifeh*, the fee was intended to support a fund designed to reduce smoking in Oklahoma, and the written purpose in section 1 of the bill attempts to effectuate this. But upon scrutinizing the bill, one can see that it hardly allocated any revenue to that purpose or directed any agencies to require any specific activity to accomplish it. The fee, as paid by wholesalers when they purchase cigarettes for their own profit, would not be paid by a taxpayer that received any direct benefit of services being

234. S. 845, 56th Leg., 1st Sess., at 2 (Okla. 2017).

235. *Id.*

236. *Naifeh*, ¶ 24, 400 P.3d at 767.

237. *See* Exec. Order 2012-01 (as enacted by Gov. Mary Fallin Feb. 6, 2012), https://www.sos.ok.gov/documents/executive/829.pdf.

238. *Naifeh*, ¶ 39, 400 P.3d at 771.

created by Senate Bill 845.[239] Instead, all but $1 million went directly to the state treasury for the "Health Care Enhancement Fund" that does not have any smoking-related strictures attached to it.[240]

In one final attempt by the State to argue for a meek regulatory purpose, *Sierra Club v. State* instead reiterated much of what was decided in *Naifeh*. The State argued that the true purpose of the Motor Fuels Tax Fee was to recoup gas tax losses from taxpayers switching to electric and hybrid vehicles.[241] Unfortunately, just as Senate Bill 845 in *Naifeh* did not actually describe in any real detail how the funds would be used for the stated purpose of the legislation, the text of the Motor Fuels Tax Fee did not provide any helpful insight into the revenue it would produce. In fact, House Bill 1449 was in an even worse position than Senate Bill 845 because it contained no stated purpose in the text of the bill that would have supported the state's contention.[242] This exemplifies the importance of the stated purpose of a bill. If the claimed purpose of a bill is regulatory in nature, then the drafters must discuss exactly where the revenue will go. It is much more likely that the Oklahoma Supreme Court will not subject a bill to article V, section 33 if the drafters of the bill include a well-defined regulatory purpose and provisions effectuating that purpose.

In both *Naifeh* and *Sierra Club*, the Oklahoma Supreme Court reiterated the holding in *Fent*: the principal concern when deciding if a bill is a "revenue bill" under the Oklahoma Constitution is whether the principal purpose is raising revenue. Until *Fent*, revenue "raising" was less important. The court in *Fent*, and now in *Naifeh* and beyond, recognized the intention of the people in enacting State Question 640—no new taxes without a vote of the people.

B. Removing Exemptions from Previously Levied Taxes

Oklahoma Automobile Dealers illustrates plainly that the first prong of the *Anderson* test requiring that a bill levy a tax in the strict sense of the word not only remains an important consideration but can be dispositive in deciding that a bill does not qualify as a "revenue bill" under the Oklahoma Constitution. Because the Oklahoma Supreme Court did not eliminate this factor, the court upheld *Leveridge* with its holding. Basically, bills that seek

239. *Id.* ("[T]he . . . assessment is actually assessed against the seller of cigarettes, whom no one argues will make use of any government-provided health services.").

240. S. 845, 56th Leg., 1st Sess. (Okla. 2017).

241. Sierra Club v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 83, ¶¶ 10, 13, 405 P.3d 691, 695-96, 697.

242. *Id.* ¶ 11, 405 P.3d at 696.

to remove tax exemptions are not revenue bills within the meaning of article V, section 33.

Although the principal purpose of the removal of a tax exemption is to raise revenue, thereby satisfying the first prong of the *Anderson* test, removing a tax exemption does not levy a new tax in the strict sense of the word. The court pointed out that the exemption the legislature sought to remove via the bill in question in *Oklahoma Automobile Dealers* was put in place eighty-two years before this decision for a tax that had already been levied two years before that.[243] While the original enactment of the sales tax was subject to the strictures of article V, section 33, the removal of an exemption of that tax is not. The court made it clear that removing an exemption inherently means that the tax has already been levied.[244] While the original tax would obviously be subject to article V, section 33, removing an exemption of that tax does not equate to a brand-new levy.

This poses the question of whether the holding is limited to exemptions. Besides all the possibilities of partially or fully removing tax exemptions, there are also many tax deductions and credits that the legislature can increase, decrease, eliminate, or enact. If the legislature drafts a bill reducing or removing a tax deduction or credit, the bill would unquestionably have the principal object of raising revenue, satisfying the second prong of the *Anderson* test. It would be an obvious way of preventing the people from enjoying all or part of a process to lower their tax bill. Although nothing is certain until the issue comes before the Supreme Court, it seems likely that the reduction or removal of a tax deduction or credit would not satisfy the first prong of the *Anderson* test because, under *Oklahoma Automobile Dealers*, it would not levy a new tax in the strict sense of the word.[245]

While there is no narrow tax imposed on only a specific set of taxpayers like the one in *Oklahoma Automobile Dealers*, tax deductions and credits act against the original tax imposed in the Oklahoma tax code.[246] The function of a tax deduction is effectuated by decreasing the taxable income before taxes are ultimately imposed. Just as the removal of an exemption from an already levied tax did not constitute a newly levied tax, the removal of a deduction from pretax income would not likely constitute a newly levied tax. In a similar vein, tax credits are enjoyed only in specific

243. Okla. Auto. Dealers Ass'n v. State *ex rel.* Okla. Tax Comm'n, 2017 OK 64, ¶ 15, 401 P.3d 1152, 1170 (Watt, J., dissenting).

244. *Id.* ¶ 2, 401 P.3d at 1153.

245. *See id.* ¶ 20, 401 P.3d at 1160.

246. *See generally* 68 OKLA. STAT. § 2355 (2011).

circumstances for certain taxpayers by decreasing the calculated tax owed by a specific amount. Eliminating a tax credit is akin to the removal of an exemption because it would not force the taxpayer to pay any new tax. Instead, it would simply dispose of the ability of that taxpayer to lower the amount they owe because of their circumstances.

C. Targeting Legislation at Smaller Groups of Taxpayers

Finally, through a very important contrast to the mileage tax cases, the court in *Sierra Club* suggested that the more taxpayers a revenue-raising bill affects, the more likely the court will subject the bill to the requirements of article V, section 33. As discussed above, *Ex parte Tindall*, *Ex parte Sales*, and *Pure Oil Co.* were all examples of legislation that was upheld despite an increase in the tax burden for some taxpayers.[247] The enacted fees in the mileage tax cases were imposed only on taxpayers that were considered transportation companies using the public highways for their own profit. The government in *Sierra Club* compared those fees to the Motor Fuels Tax Fee to show it was fully regulatory in nature. However, the court distinguished the Motor Fuels Tax Fee because, unlike those in the mileage tax cases, the fee in *Sierra Club* would have been imposed on any taxpayer that opted to purchase a hybrid or electric vehicle. This reasoning demonstrates that the court looks not only at the amount of revenue that the legislature estimates they can collect from a bill, but also at the width of the net the bill casts on the public. The more potential payors on whom the bill imposes the fee, the more likely the legislation will be deemed a revenue bill creating a new tax instead of a regulatory fee.

VI. Conclusion

To the extent the Oklahoma legislature wants to use taxes to close the deficit, the drafters must be able to create revenue-raising bills that raise revenue in a constitutionally permissible manner. Because it is so difficult to satisfy article V, section 33 of the Oklahoma Constitution, it is imperative that the legislature drafts bills to avoid it when they can.[248] Such tailoring could possibly include removing some exemptions, deductions, or credits. Revenue-raising legislation likely cannot include any kind of fee

247. *See generally* Pure Oil Co. v. Okla. Tax Comm'n, 1936 OK 516, 66 P.2d 1097; *Ex parte* Tindall, 1924 OK 669, 229 P. 125; *Ex parte* Sales, 1924 OK 668, 233 P. 186.

248. *See* OKLA. CONST. art. 5, § 33. In an historic moment for the state, the Oklahoma legislature reached the supermajority requirement for the first time since the passage of State Question 640 when they passed House Bill 1010 on March 26, 2018. H.R. 1010, 56th Leg., 2nd Spec. Sess. (Okla. 2018); *see also State Question 640, What's That?*, *supra* note 79.

that seeks to affect a large portion of the population, unless that fee has a written regulatory purpose that goes beyond merely raising money for the state. No matter how the Oklahoma legislature chooses to raise the needed money, if the supermajority requirement is too stringent, and a vote of the people forced to pay the imposed taxes too unlikely, then the legislature will have to find a different way to comply with the Oklahoma Constitution.

Paul Anthony Tortorici