2017 OK 64

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA AUTOMOBILE DEALERS ASSOCIATION, an Oklahoma corporation, L and J ACQUISITIONS, LLC d/b/a BATTISON HONDA, and CAITLIN CANNON, an individual,	)	FILED SUPREME COURT STATE OF OKLAHOMA AUG 31 2017
Petitioners,	)	No. 116,143
vs.	)	FOR OFFICIAL PUBLICATION
STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION,	)	
Respondent.	)	

Watt, J., with whom Combs, C.J., Edmondson, and Colbert, JJ., join, dissenting:

¶ 1 I respectfully dissent.

A. History of Article V, Section 33 of the Oklahoma Constitution

¶ 2 At the time of enactment, Article V, Section 33 of the Oklahoma Constitution required that a *revenue bill* be introduced in the House of Representatives and forbid passing of revenue bills during the last five days of session. Okla. Const. art. V, § 33 (1907). One year after statehood, this Court considered what it meant to be a *revenue bill* and determined the appropriate meaning and application, in Oklahoma, in light of the history of *revenue bills* at common law. *Anderson v. Ritterbusch*, 1908

OK 250, 98 P. 1002. This Court looked to Judge Story's discussion of the clause from his work on the Constitution, where he noted that the clause regarding *revenue bills* originally came from the British House of Commons where it applied to all money bills because the House of Commons was presumed to have more ample means of local information and more directly represented the opinions, feelings, and wishes of the people. *Id.* ¶¶ 6-8, 98 P. at 1005-06. Judge Story noted that this broad application is inapplicable in state Constitutions where both the House and Senate are equal representatives of the people. *Id.* ¶ 7, 98 P. at 1005-06. This Court noted that "American decisions, both State and federal, have followed Judge Story, and have uniformly refused to hold a bill void because it originated in the Senate, unless the bill levied or imposed a tax in the strict sense of the word." *Id.* ¶ 11, 98 P. at 1006.

¶ 3 In 1956, this Court clearly re-stated the 1908 rule from *Anderson* that (1) "'[r]evenue laws' are those laws only whose principal object is the raising of revenue, and not those under which revenue may incidentally arise," and (2) "'[r]evenue bills' are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue" *Leveridge v. Okla. Tax Comm'n*, 1956 OK 77, ¶ 8, 294 P.2d 809, 811. Over time, this Court consistently interpreted *revenue bill* in Article V, Section 33 *narrowly* in light of the interpretation and rules from *Anderson* such that it placed minimal restrictions on the Legislature.

¶ 4 A "substantial departure from precedent can only be justified . . . in light of

experience with the rule to be abandoned or in the light of an ***altered historic environment***. *Phillips v. Okla. Tax. Comm'n*, 1978 OK 34, ¶ 48, 577 P.2d 1278, 1285-86 (internal citations omitted)(emphasis added). And in 1992, the people of the State of Oklahoma altered the historic environment in this State by amending Article V, Section 33 of the Oklahoma Constitution by initiative petition. The "public theme and message of the proponents of this amendment [expressed it as]: 'No New Taxes Without A Vote Of The People.'" *Fent v. Fallin* (*Fent*), 2014 OK 105, ¶13, 345 P.3d 1113, 1117. The ballot title for the initiative petition stated:

> This measure amends the State Constitution. It adds new provisions to Section 33 of Article 5. These would change the method by which state government makes laws that *raise revenue*. The measure requires that a bill to raise revenue be voted upon by the people at the next general election. A bill would not be effective until it was approved by a majority of the voters. The measure also provides a way that a revenue bill could become law without a vote of the people. A bill would have to be approved by a 3/4 vote of each house of the legislature and go to the Governor for proper action. A revenue bill approved by a 3/4 vote of each house of the legislature would not become effective until ninety days after the approval date. Such a bill would not be subject to the emergency measure provision.

In re Initiative Petition No. 348, State Question No. 640, 1991 OK 110, ¶ 21,820 P.2d 772, 778-79 (emphasis added). The amended section now provides that *revenue bills* must originate in the House of Representatives, must be passed by a 3/4 vote of each house of the legislature or must be submitted to a vote of the people, are not subject to the emergency measure provision, and may not be passed within the last five days of session. Okla. Const. art. V, § 33 (2011).

B. Post-1992 Treatment of *Revenue Bill* under Article V, Section 33

¶ 5 In 2000, a challenge was brought against a bill that transferred money from fee-generated funds to the special cash fund. *Calvey v. Daxon*, 2000 OK 17, ¶ 0, 997 P.2d 164. This Court determined that the bill in question was not subject to Article V, Section 33, because it was not a *revenue bill*. *Id.* ¶ 18, 997 P.2d at 171. The Court noted that in the initiative petition challenge to amend Section 33, this Court had defined revenue bill, in a footnote, consistently with prior case law. *Id.* ¶ 11, 997 P.2d at 169 (citing *In re Initiative Petition No. 348, State Question No. 640*, 1991 OK 110, ¶ 2 fn. 3). The Court declared that amendments are presumed to change judicially interpreted constitutional language. *Id.* ¶ 13, 997 P.2d at 169. But noted that while the amendment added provisions imposing stricter procedural requirements it did not amend the original language referring to *revenue bills* in Section 33. *Id.* ¶ 13, 997 P.2d at 169-70. The Court pointed out that constitutional provisions *should be* applied to give effect to the intent of the people voting on them; but *without considering the intent of the people*, stated that the amendment "merely changed the method state government may use to raise revenue" and did not change the meaning of the terms *revenue bill* or *revenue raising*. *Id.* ¶ 14, 997 P.2d at 170.

¶ 6 In 2014, this Court examined the history of the meaning and interpretation of the terms *revenue bill* and *revenue raising* under Article V, Section 33. *Fent*, 2014 OK 105, ¶¶ 5-15, 345 P.3d at 1115-17. In regard to the amendment to Article V,

Section 33 by State Question (SQ) 640, we considered "**what would the ordinary person who voted on the 1992 amendment, as explained by its ballot title, understand they were approving regarding the generation of State revenue**." *Id.* ¶ 13, 345 P.3d at 1117 (emphasis added). We also considered the over-riding purpose of the amendment: to "secure tax relief." *Id.* ¶ 15, 345 P.3d at 1117. We noted that *Calvey* did not analyze the term *revenue bill* or consider the 1992 ballot title and what it revealed that voters would understand SQ 640 would do. *Fent*, 2014 OK 105, ¶ 16, 345 P.3d at 1117. Rather, *Calvey* simply related that the amendment had not enlarged the definition of *revenue bill* such that it would include a transfer of money already in possession of the state. *Fent*, 2014 OK 105, ¶ 16, 345 P.3d at 1117. The *Fent* Court determined that "[n]othing in the ballot title or text of the provision reveals any intent to bar or restrict the Legislature from amending the existing revenue measures, so long as such statutory amendments do not "raise" or *increase the tax burden*." *Id.* ¶ 17, 345 P.3d at 1117-18 (emphasis added). In light of how the 1992 amendment changed the historic environment of Section 33, this Court held the challenged bill, decreasing taxes, was not under the umbrella of Article V, Section 33, as amended. *Id.* ¶ 18, 345 P.3d at 1118. Further, due to the intent of the voters in SQ 640, *Anderson v. Ritterbusch* was overruled to the extent it implied *revenue bill* in Article V, Section 33 includes a *decrease* in revenue. *Id.* ¶¶ 17-18, 345 P.3d at 1118.

¶ 7 Recently, in *Naifeh*, we determined that a "smoking cessation fee" was a

revenue bill subject to Article V, Section 33. *Naifeh v. State ex rel. Okla. Tax Comm'n*, 2017 OK 63, ¶ 49, __ P.3d __. The majority states that in *Naifeh*, we "appl[ied] the traditional two-part test." Majority Op. ¶ 18 nn. 37, 40. However, while *Naifeh stated* the traditional two-part test used to determine if a measure is a *revenue bill*, it immediately acknowledged that since 1992 we have changed the definition to exclude revenue *decreasing* bills. *Naifeh*, 2017 OK 63, ¶ 17, citing *Fent*, 2014 OK 105, ¶ 17, 345 P.3d at 1117-18. As the only case where this Court has analyzed *revenue bills*, between *Fent* and the current case, the *Naifeh* Court followed *Fent* and looked at the ballot title of the 1992 amendment and considered the bill under review in light of "whether it [was] the type of measure 'intended to raise revenue' that the people have mandated be enacted only through legislative super-majority or popular vote." *Naifeh*, 2017 OK 63, ¶ 20. The Court noted that "the people have insisted that legislative measures 'intended to raise revenue'-i.e., those whose primary effect is to reach into the people's pockets to take more money to fund state government- be significantly more difficult to enact than other types of legislation." *Id.* ¶ 36. The Court then unanimously agreed that **"whether a measure is 'intended to raise revenue,' must be the overarching consideration in determining whether a measure is a 'revenue bill.'"** *Naifeh*, 2017 OK 63, ¶ 42 (emphasis added). The fact that *Naifeh* stated it applied the traditional two-part test, *id.* ¶¶ 0, 17, does not change the fact that it ***did not apply*** the test in the traditional way. *Id.* ¶¶ 20, 36, 42. Since the bill under review in *Naifeh* originated in the Senate

during the last five days of the legislative session, if SQ 640 did not change the analysis for *revenue bills*, all analysis and discussion of the amendment and any expectations for tax relief from the changes it enacted would be irrelevant as the bill would have been equally unconstitutional prior to 1992.

¶ 8 The majority explains that the first part of Article V, Section 33 describes objects, *revenue bills*, and the second part imposes requirements on those objects. Majority Op. ¶ 19. However, the majority incorrectly relies on *Calvey* for their conclusion that SQ 640 only changed the second part of Section 33. *Id.* ¶ 19 n. 38. Due to the unique issues in *Calvey*, the Court did not perform a full analysis on what the ballot title showed about the meaning of *revenue bill*. The majority implies that the drafters of SQ 640 were aware of our prior case where we had stated an exemption-removing measure was not a *revenue bill* and therefore chose to not change the definition of *revenue bill* to include the removal or repeal of an exemption by not using more explicit language. Majority Op. ¶ 19. However, that is not supported by our holding in *Fent*. While in *Fent* we stated that SQ 640 did not change the definition of *revenue raising*; the majority fails to acknowledge that in *Fent*, we then considered the intent of the voters of SQ 640 when we **held that SQ 640 changed the definition of *revenue bill*** to no longer include bills that create a decrease in revenue. *Fent*, 2014 OK 105, ¶ 17, 345 P.3d at 1118. Clearly, the fact that the text of the amendment did not specifically change the original language in Section 33 did not prevent a definition change from occurring in light of the intent of

the voters. There would not have been the same public concern over SQ 640 without its effect on state government funding, yet the majority's interpretation strips SQ 640 from any real impact as the legislature can now grant and remove any and all exemptions, as they please with only 51% of the vote, making the need for *revenue bills* as the majority defines them essentially nil in light of the "billions worth" of exemptions that the majority states are currently in our tax code. Furthermore, in both *Fent* and *Naifeh* we applied the test to determine if a measure is a *revenue bill* differently than pre-1992, in light of SQ 640. *Fent*, 2014 OK 105, ¶ 13, 345 P.3d at 1117, *Naifeh*, 2017 OK 63, ¶ 42. Since the historic change to this important constitutional provision through the enactment of SQ 640, this Court has clearly recognized that the test now must consider the amendment.

¶ 9 A constitutional provision must be construed considering its purpose and be given an interpretation that carries out the purpose of the framers and people who adopted it. *Fent*, 2014 OK 105, ¶ 17, 345 P.3d at 1117-18. "Language employed by the makers of the basic law of the state should not be given a strained or subtle meaning, but such meaning as the *average citizen* would conclude the language imports." *Dixon v. Shaw*. 1927 OK 24, ¶ 21, 253 P. 500, 504 (emphasis added). Therefore, the question is **what the *voters* of SQ 640, the average citizens of the State, believed it would do.**

¶ 10 To determine what the voters understood, we look to the language of the provision and the ballot title. *Fent*, 2014 OK 105, ¶¶ 10-11, 345 P.3d at 1116. The

initiative power should not be crippled, avoided, or denied by technical construction by the courts. *In re Initiative Petition No. 360*, 1994 OK 97, ¶ 9, 879 P.2d 810, 814. If technical restrictive constructions are placed upon initiative petitions, the purpose and policy of the people "will be entirely defeated, and instead of becoming an effective measure for relief from evils . . .there will be naught but an empty shell and a continuation of the condition for which relief in this manner has been sought." *Ruth v. Peshek*, 1934 OK 674, ¶ 30, 5 P.2d 108, 112. To hold that SQ 640 did not in any way change the analysis of how we determine if a measure is a *revenue bill* ignores the rules of construction and defeats the purpose of SQ 640 such that it would be an empty shell.

¶ 11 In light of the reasoning for this Court's original narrow interpretation of *revenue bill* and this Court's thorough analysis in *Fent* and *Naifeh* regarding the history and purpose of the amendment to Article V, Section 33, it is clear that this Court now considers the intent of the *electorate* in adopting the 1992 amendment when it determines if a challenged bill is a *revenue bill*. *Naifeh*, 2017 OK 63, ¶ 20, *Fent*, 2014 OK 105, ¶ 10, 345 P.3d at 1116, *Oliver v. City of Tulsa*, 1982 OK 121, ¶ 31, 654 P.2d 607, 613. Whether a measure is *intended to raise revenue* is now the overarching consideration in determining whether a measure is a *revenue bill*, *Naifeh*, 2017 OK 63, ¶ 42, both because it considers the intent of the people in amending the constitution and because it is also one of the considerations behind whether a measure is a levy of a tax.

C. Analysis of H.B. 2433

¶ 12 Therefore first, and most importantly, the Court must determine whether the principal object of H.B. 2433 is the raising of revenue or if it is a bill under which revenue incidentally arises. *Leveridge*, 1956 OK 77, ¶ 8, 294 P.2d at 811; *Naifeh*, 2017 OK 63, ¶ 42. In evaluating a measure's object or purpose, the Court must look to its actual operation and effect, not simply to what the Legislature says it is accomplishing. *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 21, 373 P.3d 1057, 1068. H.B. 2433 amends several sections of the Oklahoma Statutes to remove part of the exemption from the payment of sales tax for sales of motor vehicles and provides for the collection of the newly required 1.25% sales tax on the purchase of a motor vehicle, such that people purchasing vehicles after the enactment of H.B. 2433 will now pay 1.25% more in taxes on the purchase of a motor vehicle then prior to H.B. 2433's enactment. There is nothing in the bill to give even a purported purpose or object other than to reach into the people's pockets to take more money to fund state government.

¶ 13 The Court next must determine whether H.B. 2433 levies a tax in the strict sense of the word or is a bill for another purpose which incidentally creates revenue. *Anderson*, 1908 OK 250, ¶ 11, 98 P. at 1006; *Leveridge*, 1956 OK 77, ¶ 8, 294 P.2d at 811. Therefore, the object or purpose of the bill remains an important component in our analysis. The majority states that H.B. 2433 does not levy a tax. Majority Op. ¶ 2. Whether an assessment is a tax is determined "according to the mission

given it by the law under which it is levied." *Red Slipper Club, Inc. v. City of Oklahoma City*, 1979 OK 118, ¶ 4, 599 P.2d 406, 408. A key distinction in a tax is that it "is levied primarily for revenue raising purposes." *Naifeh*, 2017 OK 63, ¶ 43. The newly required 1.25% assessment for sales tax on the purchase of a motor vehicle in H.B. 2433 is *clearly a tax* as it is primarily for revenue raising purposes and has no alternate mission given to the assessment. However, the majority seems to focus not on whether this is a *tax* in the strict sense of the word, but rather whether H.B. 2433 contains a *levy* in the strict sense of the word. Majority Op. ¶¶ 2, 10. This is inconsistent with *Naifeh* and with the majority opinion's statement in n.41, regarding a distinction "between measures that levy taxes from measures that impose fees", which imply a focus on whether the measure is a *tax* in the strict sense. *Naifeh*, 2017 OK 63, ¶¶ 43-49. The two-part test states a *revenue bill* must be a "levy of a tax in the strict sense of the word." Word is singular, thus the focus must be on either a *levy* in the strict sense or a *tax* in the strict sense.[1]

¶ 14 The question thus becomes, does H.B. 2433 *levy* that tax? "Strictly speaking, a levy is the legislative act . . . which determines that a tax shall be laid, and fixes its amount . . . . Levying a tax usually means the fixing of the rate at which property is to be taxed" *Olson v. Okla. Tax Comm'n*, 1947 OK 58, ¶ 11, 180 P.2d 622, 624. The verb *levy* means "[t]o assess; raise; execute; exact; collect; gather; take up; seize.

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[1] I believe the rule refers to a tax in the strict sense of the word, however, for sake of addressing the majority's statements, I will address the question of whether this is a *levy* in the strict sense of the word.

Thus, to levy (assess, exact, raise, or collect) a tax . . . ." *Levy*, Black's Law Dictionary (4th ed. 1951). Black's Law Dictionary states that, "[i]n reference to taxation, the word may mean the legislative function and declaration of the subject and rate or amount of taxation . . . . The qualified electors 'levy' a tax when they vote to impose it." *Id.* The Legislature *levied* a tax in H.B. 2433 when they voted to exact a new, higher rate at which automobiles will now be taxed and provided the method to collect the raised tax.

¶ 15 The majority argues that the partial removal of the exemption in H.B. 2433 does not levy a tax because the sales tax was "levied in 1933," majority op. ¶ 9, but that is an elevation of form over function. A sales tax is a *type* of excise tax ("Excise taxes are indirect taxes on activities, occupations, privileges and consumption, such as the sales and use taxes. The term 'excise tax' is a general term used to distinguish it from a property tax." *Twin Hills Golf & Country Club, Inc. v. Town of Forest Park*, 2005 OK 71, ¶ 12, 123 P.3d 5, 8.). **Automobiles have not *ever* been subject to paying *both* the state sales tax and the state motor vehicle excise tax.** Eighty-four years ago, the State enacted its original 1% sales tax. 1933 Okla. Sess. Laws 456, 459-60. And eighty-two years ago, the State gave a *complete exemption* to payment of the 1% sales tax coinciding with the first levy of a specific 1% motor vehicle excise tax. 1935 Okla. Sess. Laws 308, 309-10; 1935 Okla. Sess. Laws 328, 328. Clearly, the legislature was not granting a special exemption from a tax so much as it was creating a special distinct category of taxation for vehicles.

The rules for statutory interpretation are clear:

> A statute which is enacted for the primary purpose of dealing with a particular subject, and which prescribes the terms and conditions of that particular subject matter, *prevails over a general statute which does not refer to the particular subject matter*, but does contain language which might be broad enough to cover the subject matter if the special statute was not in existence. In summary, when there is a conflict between two statutes, one specific (or special) and one general, the statute enacted for the purpose of dealing with the subject matter controls over the general statute.

Multiple Injury Trust Fund v. Coburn, 2016 OK 120, ¶ 23, 386 P.3d 628, 635-36 (emphasis added).

¶ 16 Section 1354 "levie[s] upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of four and one-half percent [on the sales of t]angible personal property" and other specifically enumerated objects. 68 O.S. Supp. 2015, § 1354. Section 1355 provides that the enumerated objects are specifically exempted from the tax levied, pursuant to the provision of Section 1350 et seq. of the title, due to being subject to other taxes. 68 O.S. Supp. 2017, § 1355. Pursuant to H.B. 2433, subsection (2) now states that for sales of motor vehicles subject to the Oklahoma Motor Vehicle Excise Tax levied in Section 2101 et seq., the exemption applies to "all but a portion of the levy provided under Section 1354 of this title, equal to one and twenty-five-hundredths percent (1.25%) of the gross receipts of such sales."68 O.S. Supp. 2017, § 1355.

¶ 17 The specific statute providing the motor vehicle excise tax is titled the, "Tax for Transfer of Vehicle Ownership. 68 O.S. Supp. 2012, § 2103. As the majority has

noted, transfer of vehicle ownership is simply a reference to the sale of a vehicle. This is clearly not a special exemption from the payment of sales tax, as this is a specific statute enacted for the primary purpose of dealing with taxation of the sale of vehicles. Subsection (A)(1) levies an excise tax upon the transfer of ownership of any vehicle registered in this state, and states the excise tax at four and one-half percent (4.5%) for the sales of all-terrain vehicles, utility vehicles, and motorcycles used exclusively off roads and highways and at three and one-fourth percent (3.25%) on the value of a new vehicle, with additional rates for used vehicles and other commercial style vehicles. *Id.* Thus within Section 2103, prior to H.B. 2433, some vehicles were already taxed at the same rate as tangible personal property under Section 1354, and some vehicles had been designated to be taxed at a lower rate. *See id.*, 68 O.S. Supp. 2015, § 1354.

¶ 18 Section 2106 states the general rule in subsection (a), "[t]he ***excise tax levied by this article is in lieu of all other taxes*** on the transfer or the first registration in this state of vehicles . . ." 68 O.S. Supp. 2017, § 2106 (emphasis added). Subsection (a) continues on to list the exemptions or exceptions from the excise tax being in lieu of other taxes. *Id.* H.B. 2433 added a new subsection, (a)(4) which now provides exemption for the sale of motor vehicles except to the extent of, "One and twenty-five-hundredths percent (1.25%) of the gross receipts upon which the tax is levied by Section 1354 of this title." *Id.* This new language in Section 2106 levies a tax in the amount of 1.25% by attempting to subject the specific statutes for taxation

of the sales of motor vehicles to the general statute for taxation of tangible personal property. To say that a removal of an exemption from a general statute where there is a specific statute in place, and which requires that citizens of this State pay a tax they have not been subject to for eighty-two years, is not the levy of a tax **is a forced and constrained interpretation to reach a result** and "is an abject failure to carry out 'the manifest purpose of the framers and the people who adopted [SQ 640].'" *Naifeh*, 2017 OK 63, ¶ 49, *Fent*, 2014 OK 105, ¶ 17, 345 P.3d at 1117.

¶ 19 The majority states:

> Our cases have always recognized the important constitutional **distinction between measures levying new taxes and measures removing exemptions** to already levied taxes. In an unbroken line of decisions dating to near statehood, **we have accounted for this distinction** through application of a two-part test that limits Article V, Section 33's application to only those measures whose "principal object is the raising of revenue" *and* which "levy taxes in the strict sense of the word. The first prong isn't seriously in doubt here; the passage of HB 2433 was motivated by a desire to capture additional tax revenue to be used to support state government. But because we have always said that bills must have both features, this case turns on the second prong . . . .

Majority Op. ¶ 8 (bold emphasis added). However, there ***is no unbroken line of decisions*** as claimed by the majority accounting for this constitutional distinction between measures levying new taxes and measures removing exemptions. The quote from the majority cites to **sixteen cases**, leading the reader to believe that **all sixteen cases support this "unbroken line of decisions"** where we have made that distinction. *Id.* n. 21. In this long line of cases, ***only one*** relied on the exemption

for a part of its holding. *Leveridge*, 1956 OK 77, ¶¶ 0, 13, 294 P.2d at 809, 812.[2] Only one more of the cited cases even *mentioned* exemptions. *Cornelius v. State ex rel Cruce*, 1914 OK 222, ¶ 9, 140 P. 1187 (holding that, "[i]t is apparent that this act is not a revenue bill within the contemplation of said section of the Constitution, for the reason that the revenue to be derived therefrom is merely an incident to the main object of the bill, and that its general purpose was not that of raising revenue." *Id.* ¶ 5.).[3] ***None of the other fourteen cases cited mention a distinction between measures levying new taxes and measures removing exemptions to already levied taxes***. The citations in the footnote are followed by the declaration that:

> [t]hese cited cases establish that we have consistently and always applied the traditional two-part test in *all* Article V, Section 33 cases– a test requiring that a measure 'levy a tax in the strict sense of the word,' which necessarily excludes measures that eliminate exemptions because such measures simply do not levy a tax *in the strict sense of the word*. We have only decided two Article V, Section 33 cases

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[2] The bill under consideration does not within its four corners levy a tax and for said reason is not per se a revenue bill.

Moreover, and at most, sections of Title 47 O.S.1951, as amended, contained in H. B. 885, supra, merely declare that certain property (automobiles of the latest manufactured models owned by used car dealers) theretofore exempt from taxation (the motor vehicle excise tax) shall thereafter be subject to taxation. Such amendments do not constitute a revenue bill.

Leveridge, 1956 OK 77, ¶¶ 12, 13, 294 P.2d at 811-12.

[3] In *dicta,* the Court discussed an 1883 case from Oregon where the act in question required mortgages on real estate be deemed as real property and assessed and taxed in the County they were recorded in; the Oregon court said: "Some of us have considerable doubt whether the bill is not properly a bill for raising revenue, and therefore in violation of section 18 of art. 4 of the state Constitution, because it originated in the senate. But it *is not sufficiently clear that a law which merely declares that certain property theretofore exempt from taxation, shall thereafter be subject to taxation, is strictly a law for raising revenue.*" *Cornelius*, 1914 OK 222, ¶ 9, 140 P. 1187 (emphasis added).

> involving exemptions (both of which held that measures eliminating exemptions are not subject to Article V, Section 33) in over a century of hearing such challenges, which bolsters the conclusion that measures eliminating exemptions have not traditionally been understood as falling within Article 5, Section 33's purview.

Majority Op. ¶ 8 n. 21. However, the cases cited **also do not support the contention that we "consistently and always appl[y] the traditional two-part test in *all* Article V, Section 33 cases."** One case relied on by the majority is a one paragraph order with **no discussion or citation to *any test or cases*.**[4] Three of the cases discuss the first prong only and do not mention or apply the requirement that the measure levy a tax in the strict sense of the word,[5] Of the other cases cited, this

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[4] *Ali v. Fallin*, 2017 OK 39, __ P.3d __. The full text states: "Original jurisdiction is assumed. *Edmondson v. Pearce*, 2004 OK 23, ¶ 11, 91 P.3d 605. Senate Bill No. 1604, Laws 2016, c. 341, 1, eff. Nov. 1, 2016, is not a revenue bill subject to the strictures of Okla. Const. Art. V, 33." *Id.*

[5] *Pure Oil Co. v. Okla. Tax Comm'n*, 1936 OK 516, ¶ 10, 66 P.2d 1097, 1100 (Neither stating, citing to, nor even applying the two-part test directly. The sole discussion is limited to:

> In *Ex parte Tindall*, 102 Okl. 192, 229 P. 125, 127, we held that the real purpose of such an act as the instant one is to regulate the use of the highways, instead of raising revenue, and that therefore the section of the Constitution relied upon does not apply. The fifteenth syllabus of that decision is as follows: "The real purpose of the act being to regulate the use of public highways * * * a provision in such act requiring payment of a tax or license fee for the privilege of operating such business, such fee or tax being merely incidental to the enforcement of the real purpose of the act, does not render the act void under section 33, art. 5, of the Constitution, which requires all revenue bills to originate in the House of Representatives."

Id.), *In re Lee*, 1917 OK 458, ¶ 32, 168 P.53, 57 (Neither stating, nor citing to two-part test. Discussion limited to :

> From what has been said in the discussion of the first objection to the statute, it prescribes a fee to the public for services rendered by their officers, and is not exacted for revenue, but as compensation. An act prescribing such fees is not a revenue measure within the meaning of the Constitution. Chapter 248, Sess. Laws 1913, p. 684, imposing a registration tax on mortgages, was held in Cornelius v. State, 40 Okl. 733, 140 Pac. 1187, not to be a revenue measure within the meaning of this section of the Constitution, and was reaffirmed in Trustees, etc., v. Hooton, 157 Pac. 293, L. R. A. 1916E, 602.

Court has been neither consistent nor unfailing in applying the two-part test.[6]

Id.), *Trustees' Executors' & Sec. Ins. Corp. v. Hooton*, 1915 OK 1059, ¶¶ 24-26, 157 P. 293, 298 (Quoting and applying only first part of two-part test, but no mention or application of second part of test.).

[6] *Anderson*, 1908 OK 250, ¶ 11, 98 P. at 1006 (Creating two-part test), *Naifeh*, 2017 OK 63, ¶ 17 (Stating two-part test from *Anderson* and applying it with additional consideration of the intent of the voters of SQ 640), *Fent*, 2014 OK 105, ¶¶ 6, 10, 345 P.3d at 1115-16 (Stating that the two-part test was not changed by SQ 640, but then re-defining *revenue bill* in light of SQ 640 such that it no longer includes bills that decrease revenue. Even under the majority's characterization of *Fent* in fn 40, where they state that *Fent* "looked to the context surrounding the enactment of the 1992 amendment not to redefine the term 'revenue bill,' but rather to answer a question that had never been posed to this Court," *Fent* would not be an example of how this Court has "consistently and always applied the traditional two-part test."), *Calvey*, 2000 OK 17, ¶¶ 10-14, 997 P.2d at 169-70 (Stating that the two-part test was not changed by SQ 640 due to the lack amendatory language to the original Section 33 and this Court's footnote stating the test in the challenge to the initiative petition, without analyzing what the voters understood from the ballot title of SQ 640 that it would do), *Fent v. Okla. Capitol Improvement Auth.*, 1999 OK 64, ¶ 12, 984 P.2d 200, 209 (Quoting the two-part test from *Leveridge* and finding bills to not be *revenue bills* due to principal objects of providing adequate and proper facilities, and determination that no tax is levied by appropriation-risk or moral obligation bond measures), *In re Initiative Petition No. 348, State Question No. 640*, 1991 OK 110, ¶ 3 n. 3, 820 P.2d at 774 n.3 (In the challenge to the amendment to Article V, Section 33, in a footnote to "revenue raising bills," stating only the second prong of the two-part test, that "'Revenue Bills' are those that levy taxes in the strict sense of the word and are not bills for other purposes which may incidentally create revenue. *Pure Oil Co. v. Oklahoma Tax Commission*, 179 Okla. 479, 482, 66 P.2d 1097, 1100 (1936)".), *Bd. Of Cty. Comm'rs of Lincoln Cty. v. Okla. Pub. Emps. Ret. Sys.*, 1965 OK 111, ¶¶ 22-23, 405 P.2d 68, 72-73 (Quoting two-part rule from *Leveridge*. Holding a retirement act to not be a *revenue bill* because "[t]he Act levies no taxes and does not contain any provisions for revenue [and] the principal purpose of the Act is to provide a retirement system for public employees and not to raise revenue."), *Wallace v. Gassaway*, 1931 OK 210, ¶ 18, 298 P. 867, 870, (Stating the two-part test from *Anderson* and *applying only the first prong* to hold that a tax resale is not for the purpose of raising revenue, quoting: "The primary object seemed to have been lost to the sight of the courts, that being that the object of tax sales was to support the government by enforcing payment of taxes." *Id.* ¶ 19.) *Ex parte Sales*, 1924 OK 668, ¶ 7, 233 P. 186, 187 (Citing to *Anderson without stating the two-prong test*, and *holding based on the first prong*: "The act in question is not one for the purpose of raising revenue. It is one for the purpose of regulating a growing effort, on the part of certain enterprises, to appropriate the public highways to their own free use as a "transportation roadbed" for hire and profit, to the inconvenience and detriment of the public. It is true that the act provides for a tax in the nature of a license fee to be paid by operators of such transportation lines, but such fee or tax, if it may be so called, is merely incidental to the attainment of the real purpose of the act, and it is not a revenue law, whose principal object is the raising of revenue, and is therefore not violative of said section 33."), *Lusk v. Ryan*, 1918 OK 94, ¶ 3, 171 P. 323, 324 (Stating both prongs of the test, but only *applying the first prong*: "We are of the opinion, and so hold, that section 7 . . . is not a bill for the raising of revenue, but simply provides a procedure to recover illegal taxes paid . . . and therefore said section 7 is in no wise in conflict with section 33, article 5, of the

Further, as explained above, measures eliminating exceptions *can* levy a tax in the strict sense of the word. The fact this Court has only written two opinions regarding *revenue bills* relating to exemptions in the past one hundred years, only one of which held, that a measure eliminating an exemption was not subject to Article V, Section 33, does not "bolster the conclusion that measures eliminating exemptions have not traditionally been understood as falling within Article 5, Section 33's purview." Instead, it bolsters the conclusion that prior to 1992, we applied the definition of revenue bill extremely narrowly, in light of the history of the provision at common law, and that the People acted in 1992 to change that definition to put restraints on our legislature.

¶ 20 The majority further states that H.B. 2433 is simply a removal of an exemption from another tax, which *Leveridge* said is not a *revenue bill. Leveridge*, 1956 OK 77, ¶ 13, 294 P.2d at 812. However, *Leveridge* occurred prior to SQ 640 and our altered analysis to determine if a measure is a revenue bill. In *Fent*, we noted that "[n]othing in the ballot title or text of the provision reveals any intent to bar or restrict the Legislature from amending the existing revenue measures, so long as such statutory amendments do not "raise" or *increase the tax burden.*" *Fent*, 2014 OK 105, ¶ 17, 345 P.3d at 1117-18 (emphasis added). A removal of a tax exemption serves to increase the tax burden and thus falls under the amended restrictions of Article V, Section 33. It seems clear that the removal of this exemption, results in the

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Constitution.").

payment of a "sales tax"on the purchase of a vehicle for the first time in eighty-two years,[7] and is "intended to raise revenue." It is precisely this type of *revenue raising* that the people mandated could only be enacted through legislative super-majority, i.e. 75% of the vote, or by popular vote. The primary effect of H.B. 2433 is to reach into the people's pockets to take more money to fund state government and is prohibited under our precedent. *Naifeh*, 2017 OK 63, ¶¶ 20, 36.The majority ignores this mandate from SQ 640 when they place a technical restrictive interpretation to *revenue bill* that is contrary to what the average citizen would understand it to mean.

D. Constitutional Policies

¶ 21 The majority further argues that there are policies deeply rooted in our Constitution disfavoring special exemptions and favoring uniformity in taxation.[8] The majority states that the people who enacted policy disfavoring exemptions in the

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[7] The majority states that, "HB 2433 revokes part of [the] sales tax exemption so that sales of automobiles are once again subject to the sales tax, but only a 1.25% sales tax. Sales of automobiles remain exempt from the remainder of the sales tax levy." Majority Op. ¶ 5. However, this is misleading as the sales tax was only 1% when the exemption was put in place.1935 Okla. Sess. Laws 308, 309-10; 1935 Okla. Sess. Laws 328, 328. Not only does H.B. 2433 require the people to pay the sales tax for the first time in 82 years, but the newly required tax is **125%** of the amount that the people were originally exempted from.

[8] However, the provision on uniform taxes simply requires taxes to be *uniform on the same class of subjects*. Okla. Const. art. X, § 5(B). The "special exemption," in question here isn't an exemption from paying taxes such that taxes aren't uniform, but rather an exemption from paying a *specific tax* because of the levy of a *different tax* that is specially levied only on automobiles. While H.B. 2433 removes only part of the exemption from the payment of sales tax such that the tax on the purchase of an new automobile will now be equal to the tax on other purchases, it creates a 1.25% higher tax on the purchase of all-terrain vehicles, utility vehicles, and motorcycles that will be used off road. The majority's holding would also allow removal of the full exemption without being a *revenue bill*, which would create a *higher* tax on new motor vehicles such that the taxes again will not be uniform.

Constitution would not have intended for the disfavored exemptions to be difficult to remove under the "strict restrictions" of Article V, Section 33. However, prior to SQ 640 in 1992, Section 33 and its restrictions were never strictly applied, so there would not have been a policy conflict as the majority suggests. Prior to the amendment, Section 33 simply required a *revenue bill* be introduced in the House of Representatives and forbid passing of revenue bills during the last five days of session. Okla. Const. art. V, § 33 (1907). The majority fails to consider the changes over time in how we have addressed revenue bills under Article V, Section 33 of the Oklahoma Constitution, especially those changes to our historic environment from the 1992 Amendment to Section 33 in SQ 640. The intent of the original framers of the Oklahoma Constitution in regard to whether exemptions fall under Section 33 as *revenue bills* is no longer determinative in light of the intent of the electorate in amending Article V, Section 33 of the Oklahoma Constitution in 1992.

¶ 22 The majority states that to hold otherwise would create a *one-way rachet rule*, where the Legislature could hand out exemptions with only 51% of the vote, but would need over 75% of the vote to remove them. Majority Op. ¶ 24. However, this conclusion wholly ignores the intent and will of the people enacting SQ 640 that changed the definition of *revenue bill* to apply only to legislation that increases, not decreases, revenue. *Fent*, 2014 OK 105, ¶ 17, 345 P.3d at 1118. The majority's interpretation ignores the will of the people in SQ 640 and their clear desire to place limits on new taxes. *Naifeh*, 2017 OK 63, ¶¶ 13, 16.

¶ 23 Although the majority emphasizes the Constitution's preference for uniformity of taxation, this preference is wholly thwarted in application. If we truly honor the Constitutional mandate for uniformity of taxation, we would treat the removal of a tax exemption, resulting in a higher overall tax rate, the same as we treat all *revenue bills* (and require the same vote, as was required prior to 1992). The majority states, "[t]here are undoubtably some who think a rule making special exemptions difficult to revoke would be a victory for taxpayers. But it wouldn't be; it would be a victory for the status quo." Majority Op. ¶ 24 n. 47. The majority's conclusion distorts this Court's long-standing precedent. The only relevant issue is whether the legislation is within the intended meaning of a *revenue bill*. If the purpose of the bill is to reach into the people's pockets to take more money to fund state government, then whether it is a removal of an exemption or a new type of tax, it is subject to the rigors of Article V, Section 33 of the Oklahoma Constitution. To ensure "uniformity of taxation" as advocated by the majority, then *all revenue bills* should be treated the same.

¶ 24 In trying to create a bright-line rule, the majority creates a rule that is anything but bright. Because the primary purpose and effect of H.B. 2433 is clearly revenue raising and it raises the rate of taxation on motor vehicles by 1.25%, levying a tax in the strict sense of the word not for an incidental purpose, it is a *revenue bill* under Article V, Section 33 of the Oklahoma Constitution.

> [W]here the will of the legislature, declared in its statutes, stands in

> opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. . . . [W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

The Federalist No. 78, at 466-67 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

The majority's holding today ignores the will of the people in amending Article V, Section 33 in 1992 and disregards our duty as the judiciary. I dissent.