
STATE CONSTITUTIONAL LAW — RELIGIOUS DISPLAYS ON STATE PROPERTY — OKLAHOMA SUPREME COURT RULES TEN COMMANDMENTS MONUMENT UNCONSTITUTIONAL. — *Prescott v. Oklahoma Capitol Preservation Commission*, No. 113,332, 2015 WL 3982750 (Okla. July 27, 2015).

For years, Ten Commandments monuments displayed on government property have generated a significant amount of controversy.¹ Last June, in *Prescott v. Oklahoma Capitol Preservation Commission*,² the Oklahoma Supreme Court weighed in on the issue when it ordered the removal of a Ten Commandments monument from the Oklahoma state capitol grounds.³ Unlike many prior Ten Commandments display cases, *Prescott* did not turn on the Establishment Clause;⁴ rather, the court ruled the monument in question unconstitutional under article II, section 5 of the Oklahoma Constitution, which states: “No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion”⁵ In a per curiam decision, the court held that a Ten Commandments display operates by definition for “the use, benefit, or support” of a system of religion.⁶ But while the *Prescott* court refrained from evaluating context in its per curiam decision, consideration of context is generally necessary when operating in a constitutional system that values the separation of church and state but does not demand the complete removal of all religious acknowledgment from the public sphere. By not looking to context in *Prescott*, the court passed up an opportunity to provide guidance regarding how a contextual analysis of a public religious display should be conducted.

In early May 2009, the Oklahoma legislature passed the Ten Commandments Monument Display Act,⁷ authorizing the State Capitol Preservation Commission to place on the state capitol grounds “a suitable monument displaying the Ten Commandments.”⁸ Pursuant to the

¹ See, e.g., Natalie Schachar, *Oklahoma’s Ten Commandments Case Is Part of an Age-Old Battle in U.S.*, L.A. TIMES (July 9, 2015, 3:00 AM), <http://www.latimes.com/nation/la-na-ten-commandments-20150709-story.html> [<http://perma.cc/R7SM-69B2>].

² No. 113,332, 2015 WL 3982750 (Okla. July 27, 2015) (per curiam).

³ *Id.* at *1–2.

⁴ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion”); see, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 881 (2005) (finding Ten Commandments displays inside two county courthouses unconstitutional); *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (upholding Ten Commandments monument located on Texas capitol grounds).

⁵ OKLA. CONST. art. II, § 5.

⁶ *Prescott*, 2015 WL 3982750, at *1–2.

⁷ 2009 Okla. Sess. Laws 852.

⁸ OKLA. STAT. tit. 74, § 4110(B) (2011).

Act, the Commission accepted such a monument as a gift from Dr. Mike Ritze, a member of the Oklahoma House of Representatives.⁹ In November 2012, the display was placed on capitol grounds.¹⁰

On August 19, 2013, a group of Oklahoma citizens petitioned the District Court of Oklahoma County, seeking the removal of the monument.¹¹ Citing article II, section 5 of the Oklahoma Constitution, they argued that the monument was a forbidden use of public property for the benefit of a system of a religion.¹² The district judge disagreed. Finding that the display did not violate article II, section 5, Judge Prince granted the Commission's motion for summary judgment and denied the plaintiffs' request for an injunction.¹³ The plaintiffs appealed the trial court's ruling to the Oklahoma Supreme Court.

The Oklahoma Supreme Court reversed.¹⁴ In a per curiam decision, the court concluded that the "plain intent of Article 2, Section 5 is to ban State Government, its officials, and its subdivisions from using public money or property for the benefit of any religious purpose."¹⁵ Focusing on the provision's use of "no," "ever," and "any," and the fact that the ban even extended to uses "indirectly" benefitting religion, the court explained that article II, section 5's scope is "broad and expansive" and determined that the monument in question fell within the scope of the prohibition.¹⁶ The court noted that although the Oklahoma monument displayed the same text as the monument upheld by the U.S. Supreme Court in *Van Orden v. Perry*,¹⁷ the question here involved the Oklahoma Constitution, not the Establishment Clause.¹⁸ Moreover, the court rejected the notion that "a non-religious historic purpose was given for the placement of the monument," stating that "the Ten Commandments are obviously religious in nature and are an integral part of the Jewish and Christian faiths."¹⁹

The court denied the Commission's subsequent petition for rehearing.²⁰ Although it provided no reasons for the denial, the order generated four concurrences and a dissent. Chief Justice Reif, concurring

⁹ Petition for Declaratory and Injunctive Relief at 3, *Prescott v. Okla. Capitol Pres. Comm'n*, No. CV-2013-1768, 2014 WL 10585384 (Okla. Dist. Ct. Sept. 23, 2014).

¹⁰ *Id.* at 4.

¹¹ *Id.* at 1, 10.

¹² *Prescott*, 2015 WL 3982750, at *1.

¹³ See Journal Entry of Judgment at 1, *Prescott v. Okla. Capitol Pres. Comm'n*, No. CV-2013-1768, 2014 WL 10585384 (Okla. Dist. Ct. Sept. 23, 2014). Judge Prince stated only his conclusions and did not elaborate on his reasoning anywhere in the record. See *id.*

¹⁴ *Prescott*, 2015 WL 3982750, at *1.

¹⁵ *Id.*

¹⁶ *Id.* at *1-2.

¹⁷ 545 U.S. 677 (2005).

¹⁸ *Prescott*, 2015 WL 3982750, at *1.

¹⁹ *Id.*

²⁰ *Id.* at *2.

specially to the denial of rehearing, argued that the per curiam decision correctly looked to the plain meaning of article II, section 5's text to discern its intent.²¹ Given the text's unambiguous nature, he concluded that any "extrinsic" analysis would be "improper and unnecessary."²² But he would have granted rehearing solely to discuss the applicability of *Meyer v. Oklahoma City*,²³ which held that a fifty-foot Latin Cross on municipal fairgrounds did not violate article II, section 5.²⁴ For Chief Justice Reif, this case differed from *Meyer* in that fairgrounds, unlike the capitol, are a "commercial setting" with a "distinctly secular environment."²⁵ Moreover, the cross was merely a "symbolic message" whereas the Ten Commandments monument "explicitly 'display[ed]' and 'articulate[d]' ideas that directly pertain to the Judeo-Christian system of religion."²⁶

Justice Edmondson, as well, concurred in the denial of rehearing.²⁷ Citing both *Meyer* and federal Establishment Clause cases, Justice Edmondson acknowledged that a display on public property containing religious speech is constitutional, even under article II, section 5, if its "language and [its] setting" give the display a plausible "secular or nonreligious meaning."²⁸ But he concluded that the display here had "no embracing historical and secular context."²⁹

Justice Taylor, joined by Justice Gurich, also concurred in the denial of the petition for rehearing.³⁰ Justice Taylor contended that article II, section 5 "unequivocally bars the state from allowing its property to be used for a religious benefit"³¹ and that the display clearly fell within the scope of the prohibition.³² But unlike Chief Justice Reif and Jus-

²¹ *Id.* at *2 (Reif, C.J., concurring specially in the denial of rehearing).

²² *Id.*

²³ 496 P.2d 789 (Okla. 1972).

²⁴ *See id.* at 792–93; *see also Prescott*, 2015 WL 3982750, at *2 (Reif, C.J., concurring specially in the denial of rehearing).

²⁵ *Prescott*, 2015 WL 3982750, at *2.

²⁶ *Id.* (emphasis omitted).

²⁷ *See id.* at *3 (Edmondson, J., concurring in the denial of rehearing).

²⁸ *Id.*

²⁹ *Id.* Justice Edmondson, as well as Vice Chief Justice Combs and Justices Taylor and Gurich, also rejected the claim that article II, section 5 is a state Blaine Amendment. *See id.*; *id.* at *8 (Taylor, J., concurring in the denial of rehearing); *id.* at *16 (Gurich, J., concurring in the denial of rehearing); *id.* at *22 (Combs, V.C.J., dissenting from the denial of rehearing). In the 1870s, Congressman James Blaine proposed a federal constitutional amendment — ultimately adopted in many state constitutions — to prohibit public appropriations benefitting religious educational institutions. *Id.* at *7–8 (Taylor, J., concurring in the denial of rehearing). In its briefing, the Commission had argued that article II, section 5 is a state Blaine Amendment, and, as such, its scope should not extend to displays on the capitol grounds. *See Answer Brief of Appellee Oklahoma Capitol Preservation Commission at 26–27, Prescott*, 2015 WL 3982750 (No. 113,332).

³⁰ *See Prescott*, 2015 WL 3982750, at *3 (Taylor, J., concurring in the denial of rehearing).

³¹ *Id.* at *4.

³² *Id.* at *4–5.

tice Edmondson, Justice Taylor concluded that *Meyer* was an “anomaly in our jurisprudence,” and the “Court should place no weight on its holding or analysis.”³³ And in contrast to Justice Edmondson, Justice Taylor averred that the Establishment Clause jurisprudence is irrelevant to interpreting the Oklahoma Constitution, though, to be sure, Justice Taylor explained that the display in question would probably be unconstitutional even under the federal constitution.³⁴

Justice Gurich wrote a separate concurrence, in which she emphasized the overtly religious purpose of the display and its enabling legislation.³⁵ While emphasizing that Establishment Clause jurisprudence is ultimately irrelevant to this case, she, too, distinguished *Van Orden*, noting that the present litigation was initiated “within months of the installation of the monument,” whereas the Texas monument had stood for decades before being challenged.³⁶

Vice Chief Justice Combs dissented from the denial of rehearing, arguing that the court’s strict construction “ignores the context-based analysis” that it had employed in *Meyer*.³⁷ Moreover, he argued that the Establishment Clause jurisprudence, which also employs a context-based approach, is relevant in interpreting what constitutes “support” of a “system of religion” under article II, section 5.³⁸ Vice Chief Justice Combs concluded that the context of the monument did not “rise[] to the level of being sacred” and “an informed reasonable observer” would not “conclude it supports a system(s) of religion.”³⁹

The different opinions accompanying the denial of rehearing reveal a court divided over the role context ought to play in article II, section 5 analyses. The court’s per curiam decision, by holding that a Ten Commandments display, on its own, is “obviously religious in nature” and automatically “operates for the use, benefit, or support of” a system of religion,⁴⁰ seemingly sided with those justices advocating a contextless approach. Although evaluating context raises its own issues, it is difficult to square a contextless approach with a constitutional system that allows for at least some public acknowledgement of religion. Even if the consideration of context might not have changed the outcome in *Prescott*, the court passed up an opportunity to provide clearer guidance on how a contextual analysis should be conducted.

³³ *Id.* at *7.

³⁴ *See id.* at *9–10.

³⁵ *See id.* at *11–14 (Gurich, J., concurring in the denial of rehearing).

³⁶ *Id.* at *11–12.

³⁷ *Id.* at *19 (Combs, V.C.J., dissenting from the denial of rehearing).

³⁸ *Id.*

³⁹ *Id.* at *21.

⁴⁰ *Id.* at *1 (per curiam).

Prescott reveals a disagreement among the justices regarding the relevance of context in article II, section 5 religious display cases, a divide most apparent in their treatments of *Meyer*, the only time the court had decided a public religious display case. The *Meyer* court, in holding that a fifty-foot-high Latin Cross on municipal fairgrounds did *not* violate article II, section 5,⁴¹ specifically looked to the display's context — noting the “secular *environment*,” “the alleged commercial *setting*,”⁴² and the “commercial *atmosphere*”⁴³ — in addition to the display's nature. In *Prescott*, Chief Justice Reif, Vice Justice Combs, and Justice Edmondson all maintained that *Meyer*'s context-based approach remains good law, although they disagreed on how the context in *Prescott* should have been evaluated.⁴⁴ Justices Taylor and Gurich, by contrast, both argued that *Meyer* should be overruled.⁴⁵

Justices Taylor and Gurich's approach seems to have guided the court's per curiam decision. Considering neither the context nor the predominant purpose of the monument in question, the court simply asked whether the use of public property had “*any* religious purpose” in the most “broad and expansive” sense of that phrase.⁴⁶ It concluded, matter-of-factly, that “the Ten Commandments are obviously religious in nature and are an integral part of the Jewish and Christian faiths.”⁴⁷ In other words, the Ten Commandments are, essentially, per se religious for purposes of the Oklahoma Constitution, regardless of a display's context. Had the context of Oklahoma's display been more neutral,⁴⁸ or had it even suggested a clearly secular purpose, the court's reasoning should still yield the same conclusion.⁴⁹

⁴¹ *Meyer v. Oklahoma City*, 496 P.2d 789, 793 (Okla. 1972).

⁴² *Id.* at 792 (emphases added).

⁴³ *Id.* at 792–93 (emphasis added).

⁴⁴ Compare *Prescott*, 2015 WL 3982750, at *2 (Reif, C.J., concurring specially in the denial of rehearing), and *id.* at *3 (Edmondson, J., concurring in the denial of rehearing), with *id.* at *20 (Combs, V.C.J., dissenting from the denial of rehearing).

⁴⁵ *Id.* at *7 (Taylor, J., concurring in the denial of rehearing); *id.* at *13 (Gurich, J., concurring in the denial of rehearing).

⁴⁶ *Id.* at *1 (per curiam) (emphasis added).

⁴⁷ *Id.*

⁴⁸ There is good reason to think that the specific context of this case *does* suggest a predominantly religious, not secular, purpose. As Justice Gurich put it, the display in question was installed at “the heart of [the] state government,” *id.* at *14 (Gurich, J., concurring in the denial of rehearing) (emphasis omitted), was not part of any broader secular or historical display or initiative, and, like the monument found unconstitutional in *McCreary County* and unlike the monument approved of in *Van Orden*, was embroiled in controversy and litigation from nearly the moment it was put up, *id.* at *12.

⁴⁹ For Justice Gurich, the analysis remains straightforward and requires no context: the capitol is the “civic home of every one of the State's citizens,” *id.* at *14 (quoting *Van Orden v. Perry*, 545 U.S. 677, 745 (2005) (Souter, J., dissenting)), and the Ten Commandments are “plainly religious in nature,” *id.* (quoting *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam)); see also *id.* at *10 (Taylor, J., concurring in the denial of rehearing) (employing a similar analysis).

The Oklahoma Supreme Court, of course, has the authority to overturn *Meyer* and its context-based approach. But even though article II, section 5 is broadly worded, it is difficult to conclude that the Oklahoma Constitution forbids, per se, all religious texts or displays on public property. In *Murrow Indian Orphans Home v. Childers*,⁵⁰ the court observed: “It is not the exposure to religious influence that is to be avoided; it is the adoption of sectarian principles or the monetary support of one or several or all sects that the State must not do.”⁵¹ Thirteen years later, the court again noted: “It is a well settled principle and philosophy of our Government that we should preserve separation of church and state, but that does not mean to compel or require separation from God. That would be directly contrary to cardinal precepts of the founding and preservation of our government”⁵² Indeed, the preamble to the Oklahoma Constitution itself begins by “[i]nvoking the guidance of Almighty God.”⁵³

Given this precedent and history, it is difficult to maintain that the Oklahoma Constitution categorically bars all public acknowledgement of religion. The challenge, then, is discerning those displays that impermissibly “use, benefit, or support” religion and those that merely acknowledge it. Considering context would seem to be a useful tool in making such distinctions.⁵⁴ Moreover, there can be cases in which the text itself is not obviously of a religious nature. In such cases, determining whether the display is an unconstitutional “use, benefit, or support” of religion would require a more contextual inquiry.⁵⁵

Justice Breyer, in his controlling opinion in *Van Orden*, made a similar point.⁵⁶ Finding that the Texas Ten Commandments monument had a predominantly historical purpose despite its explicitly religious text, he observed, “the relation between government and religion is one of separation . . . not of mutual hostility and suspicion”; consequently

⁵⁰ 171 P.2d 600 (Okla. 1946).

⁵¹ *Id.* at 602.

⁵² *State v. Williamson*, 347 P.2d 204, 207 (Okla. 1959).

⁵³ OKLA. CONST. pmb1.

⁵⁴ Suppose, for instance, the Oklahoma legislature erected a display with the text “Thou shalt not kill.” Suppose also that surrounding this display were other displays with slogans about the immorality of murder, as well as pictures of recent victims of gun violence. It would be hard to conclude that such a display, while featuring a quotation from the King James version of the Ten Commandments, is really for the “use, benefit, or support” of a system of religion. But now suppose that surrounding the display of “Thou shalt not kill” were nine other displays, each featuring another one of the Ten Commandments, as well as a display of the nativity scene, all located right at the entrance to the state capitol. This context would seem to drastically alter the analysis.

⁵⁵ For example, consider a display stating: “Be kind to strangers.” On its face, such a display could have tremendous religious meaning for members of several faiths, yet it could also be communicating a purely secular message.

⁵⁶ See *Van Orden v. Perry*, 545 U.S. 677, 699–701 (2005) (Breyer, J., concurring in the judgment). Because Justice Breyer cast the deciding vote in *Van Orden*, his concurrence is considered controlling. See, e.g., *Card v. City of Everett*, 520 F.3d 1009, 1018 n.10 (9th Cir. 2008).

“difficult borderline cases” will arise that will require the judge to “take account of context and consequences.”⁵⁷ Justice Breyer concluded that “no single mechanical formula . . . can accurately draw the constitutional line in every case,”⁵⁸ and the inquiry must “consider the context of the display.”⁵⁹ Granted, as correctly stated by the *Prescott* per curiam decision and several of the concurrences, article II, section 5 is more restrictive than the Establishment Clause and thus is not controlled by a case like *Van Orden*. Yet Justice Breyer’s point remains relevant: so long as the state approves of some types of public religious expression, context is an important tool that courts can use to distinguish the permissible from the prohibited.

Admittedly, looking to context raises certain problems. Weighing context can lead to unpredictable, hard-to-reconcile results,⁶⁰ which raises concerns about the institutional capacity of judges to adjudicate borderline cases.⁶¹ Context is expansive, and it is often difficult to determine the relative weight and relevance of various contextual factors. *Prescott*, in fact, offers a striking example of this challenge. Vice Chief Justice Combs and Justice Gurich both invoked the monument’s precise location and setting to reach opposing conclusions.⁶² Moreover, they looked to different criteria to supplement their contextual analyses. Vice Chief Justice Combs saw the spacing and density of the various monuments on the capitol grounds as suggesting a secular purpose,⁶³ while Justice Gurich asserted that the display was religiously motivated by pointing to the identity of the legislation’s sponsor, the institute authorized by the legislation to defend the display’s legality, and the speed with which the constitutionality of the display was challenged.⁶⁴

But the solution is not to ignore context. Rather, given the importance, if not the necessity, of context in ascertaining which displays

⁵⁷ *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment).

⁵⁸ *Id.* at 699.

⁵⁹ *Id.* at 701.

⁶⁰ On the very same day the U.S. Supreme Court allowed the Texas Ten Commandments monument at issue in *Van Orden*, it found unconstitutional other Ten Commandments displays in Kentucky. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005).

⁶¹ See generally Richard W. Garnett, *Judicial Enforcement of the Establishment Clause*, 25 CONST. COMMENT. 273 (2008).

⁶² Justice Gurich, seeing a religious purpose, noted that the monument “sits alone on the north side of the Capitol,” and that the site was “specifically selected as a ‘serene, reflective setting’ and ‘one which supports the reflective purpose for the individual’ in relation to the monument.” *Prescott*, 2015 WL 3982750, at *11 (Gurich, J., concurring in the denial of rehearing). But Vice Chief Justice Combs argued that the display was put “in possibly the most inconvenient and low-trafficked part of the Capitol grounds imaginable,” and could not “provide accommodation for meditation or other religious activity.” *Id.* at *21 (Combs, V.C.J., dissenting from the denial of rehearing).

⁶³ *Id.* at *22.

⁶⁴ *Id.* at *12–15 (Gurich, J., concurring in the denial of rehearing).

are really for the “use, benefit, or support” of religion, the solution may be to offer more guidance on *how* courts ought to perform a contextual analysis.⁶⁵ Indeed, hard, borderline religious display cases are unlikely to disappear from the court’s docket.⁶⁶ By ignoring context altogether, the per curiam opinion passed up an opportunity to clarify how various contextual factors should be considered.

In *Prescott*, the Oklahoma court was forced to make the final decision in a particularly fraught and polarized dispute.⁶⁷ And perhaps the court’s strict stance toward this display can be seen as a reflection of and reaction to this political polarization. There is a certain ease to concluding that all religious texts or symbols on public grounds are per se unconstitutional. But flexibility and indeterminacy are inherent in navigating church-state issues,⁶⁸ and it is specifically in politically polarized moments when a more nuanced, balanced, and context-cognizant approach is most needed.

⁶⁵ A full discussion of how different contextual factors should be weighted and evaluated goes beyond the scope of this comment. It should be noted, however, that while Justice Gurich’s consideration of the religious identity of the legislation’s sponsor and counsel is relevant, there is danger in concluding, solely based on their identities, that they had a religious motive. Cf. PAUL HORWITZ, *THE AGNOSTIC AGE* 258–62 (2011) (arguing that the Establishment Clause should be understood to focus on religious “outputs,” not “inputs”); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 89 (2002) (same).

⁶⁶ See Eugene Volokh, *Oklahoma Constitution Prohibits Public Display of Ten Commandments Monument*, WASH. POST: VOLOKH CONSPIRACY (July 1, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/01/oklahoma-constitution-prohibits-public-display-of-ten-commandments-monument> [<http://perma.cc/FH94-XVXB>] (suggesting that the Oklahoma court will still have “some latitude for some religious references” and finding it “odd that the court didn’t even discuss what that rule might look like”).

⁶⁷ In the wake of *Prescott*, some state representatives called for the impeachment of the justices in the majority, see Jonathan Greco, *Reps Call for Impeachment of Justices Who Ruled to Remove 10 Commandments Statue*, KOCO (July 1, 2015, 6:36 AM), <http://www.koco.com/news/reps-call-for-impeachment-of-justices-who-ruled-to-remove-10-commandments-statue/33860930> [<http://perma.cc/W8PF-GZKE>], and the Governor has voiced a desire to amend the constitution, see Jon Herskovitz, *Ten Commandments Monument Removed from Oklahoma Capitol Grounds*, HUFFINGTON POST: POL. (Oct. 6, 2015, 10:51 AM), http://www.huffingtonpost.com/entry/oklahoma-ten-commandments_5613de7be4b0baa355ad4c3c [<http://perma.cc/QF5K-G45E>]. In additional protest, a group of cowboys rode on horseback to the state capitol to present the Governor with a Ten Commandments plaque, which she accepted. Elizabeth Rahal, *Texas Cowboys Ride to Oklahoma, Protest Removal of 10 Commandments Monument*, KTUL (Oct. 23, 2015), <http://ktul.com/news/local/texas-cowboys-ride-to-oklahoma-protest-removal-of-10-commandments-monument> [<http://perma.cc/N4W9-YHTN>].

⁶⁸ See 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION* 1 (2008).