

Public Recording



By Paul Engel

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- When can you record a public conversation?
- Do the states have the right to prohibit you from recording a conversation in public?
- Oregon tried to restrict the ability to record conversations in public, with only a few exceptions. The Ninth Circuit opined on that law.

Do you have a right to record people in public? A recent case out of Oregon asked that very question. Can states restrict who and when people can record conversations in public? An Oregon law prohibiting recording public conversations except in certain limited circumstances, was challenged by Project Veritas. As is so often the case, both the legal challenges and judicial opinion make some questionable constitutional claims. This is why we're going to look at the opinion of the Ninth Circuit Court Panel and decide for ourselves. Does recording the public conversations of others violate the law or does the law violate the Constitution?

Here we have an interesting situation, with tension between two apparent rights. It's just not the rights mentioned in this case: The right to privacy vs the right to operate a recording device.

Oregon law generally prohibits unannounced recordings of conversations, subject to several exceptions. We conclude that Oregon's law is a content-based restriction that violates the First Amendment right to free speech and is therefore invalid

on its face.

[Project Veritas v. Schmidt](#)

Oregon has a law prohibiting unannounced recordings of conversations. This could open up a rather large can of worms, since everything from security and body cameras to the casual recording of others could be implicated. However, I want to start with the statement that it violates the First Amendment.

First Amendment

The Ninth Circuit claims that Oregon's law violates the Free Speech clause of the First Amendment.

Congress shall make no law ... abridging the freedom of speech,

[U.S. Constitution, Amendment I](#)

The first problem we run into with the case is the fact that the law in question is a state law and not one made by Congress. Therefore it cannot violate the First Amendment. If this were a free speech violation, it would be of Article I, Section 8 of the Oregon Constitution.

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

[Oregon Constitution](#), Article I, Section 8

That leads us to the second problem: The law does not restrain speech, but the collection of speech.

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend I. "While the First Amendment literally forbids the abridgment only of speech, the Supreme Court has long recognized that its

protection does not end at the spoken or written word.”

[Project Veritas v. Schmidt](#)

Once again we see the courts, especially the Supreme Court simply making things up as they go along. The Constitution says one thing, but the courts decide it means something else. For example, the courts claim that the First Amendment is applicable to the states through the Fourteenth Amendment. But that amendment says no such thing.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

[U.S. Constitution, Amendment XIV](#)

The Fourteenth Amendment says nothing about changing the scope of the First Amendment. This is simply made up by the Supreme Court, I believe, to promote an agenda of federal supremacy. Furthermore, the First Amendment says the Freedom of Speech shall not be abridged, even though the Oregon law does not abridge the freedom of speech, but the recording of speech.

We have recognized there is no material “distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or artwork) in terms of the First Amendment protection afforded.”

[Project Veritas v. Schmidt](#)

Once again, writing and painting are not speech but publication. That means they would be violations of Freedom of the Press, which Webster’s 1828 dictionary defines as:

The art or business of printing and publishing.

[Press – Webster’s 1828 Dictionary](#)

The court further obfuscates the issue.

Indeed, “we have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection.”

[Project Veritas v. Schmidt](#)

There’s a difference between writing down your own words, and those of someone else. Even by their own twisted view of the First Amendment, they have not found a protection of the right to record the speech of others. The court did find a constitutional violation though, just not the one they claimed.

This general rule is subject to numerous exceptions. ... Two are relevant here. First, section 165.540(1)(c) does not apply to a “person who records a conversation during a felony that endangers human life.” ... Second, section 165.540(1)(c) allows “[a] person [to] record[] a conversation in which a law enforcement officer is a participant” if the recording is “made while the officer is performing official duties” and meets other criteria.

[Project Veritas v. Schmidt](#)

It’s actually the exceptions that the court will focus on, not because they are violations of the Constitution, but of Supreme Court precedent.

Because we must determine the constitutionality of section 165.540(1)(c) under the First Amendment, we next turn to the question whether it is content based or content neutral.

[Project Veritas v. Schmidt](#)

This idea of content neutrality was made up by the Supreme Court in order to allow governments to infringe on free speech, as long as they were equally suppressing speech on all sides.

Because we conclude that section 165.540(1)(c) and its exceptions constitute a content-based speech restriction, we can uphold the statute only if it survives strict scrutiny.

[Project Veritas v. Schmid](#)

Here we arrive at one of the Supreme Court's most egregious violations of the Constitution: The modern interpretation of judicial review and strict scrutiny.

A standard of Judicial Review for a challenged policy in which the court presumes the policy to be invalid unless the government can demonstrate a compelling interest to justify the policy.

[Strict Scrutiny – The Free Legal Dictionary](#)

The court is claiming that, assuming the policy is invalid, that it's unconstitutional unless the government can show a compelling interest in violating the Constitution. That means, the current application of judicial review (as opposed to the original understanding from *Marbury v. Madison*), is not only a violation of the judge's oath to support the Constitution, but a violation of the supreme law of the land as well.

That's not to say there wasn't someone who disagreed with the rest of the panel.

Dissent

CHRISTEN, Circuit Judge, dissenting:

"The right to speak and publish does not carry with it the unrestrained right to gather information."

My colleagues do not contest that Oregon has a significant interest in protecting people from unannounced recordings of in-person conversations, but they rewrite the State's articulated purpose. The purpose Oregon advances

[Project Veritas v. Schmidt](#)

Judge Christen is right about a couple of things. She includes the right to publish, the Freedom of Press, in her dissent. She also points out that there is a distinction between expressing ideas and gathering information. It's the ability to gather information that's at the heart of this case.

Does the State of Oregon have a legitimate interest in protecting people from unannounced recordings of in-person conversations? That's actually a very simplistic way of looking at this case. Americans often talk about a right to privacy, but again, contrary to the beliefs of the courts, that is not a right protected by the Constitution. Before you start screaming about the Fourth Amendment, remember what it says:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

[U.S. Constitution, Amendment IV](#)

What right to privacy do you have when you are in public? Can your image be recorded? If so, why not your speech? Does it make a difference if you are recorded by government or by a citizen? What if the person doing the recording is a participant in the conversation? These are all questions that seem to have been ignored by the State of Oregon and the Ninth Circuit.

The Opinion

Since almost all federal judges have abandoned their oath to support the Constitution in favor a slavish devotion to whatever the nine high priests in black robes say, we end up with opinions like this.

Reading section 165.540(1)(c) as a whole, we conclude that it is a content-based speech restriction that cannot survive strict scrutiny because Oregon has not asserted a compelling

government interest and because the statute is not narrowly tailored. The statute is also not a valid time, place, or manner restriction because it does not leave open ample alternative channels for communication. Applying Oregon law, we may not sever the exceptions because severing them would not render section 165.540(1)(c) constitutional. Accordingly, we conclude that the statute is facially unconstitutional.

REVERSED and REMANDED.

[Project Veritas v. Schmidt](#)

The court finds the law unconstitutional not because it violates the Constitution of the United States, but because the State of Oregon didn't satisfy the court they had sufficient reason to violate it.

Conclusion

Which brings us to the question we should be asking. Do we have a right to keep private what we express in public and, if so, to what extent? For example, if you tell me something, I can testify to that conversation. Why can't I record that conversation, either to supplement my memory or to report on it to others? That's not to say I should be allowed to "eavesdrop" on others' conversations and use that against them. If there is any constitutional basis for a right to keep private what we express in public, I think it would fall under copyright, the laws for which are regulated by Congress, not the State of Oregon.

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[U.S. Constitution, Article I, Section 8](#), Clause 8

You have a right to your own words, including how they are used. If you share them in public though, can you really be

surprised that others might remember them, either mentally or electronically?

One thing the court and I do agree with is the unequal treatment this Oregon law establishes, which makes it a violation of the Fourteenth Amendment, not the First.

nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws.

[U.S. Constitution, Amendment IV](#)

The Oregon law grants law enforcement the legal authority to record others, but not the everyday citizen. While the court had an issue with the exception for the recording of a felony in progress, I do understand the logic behind it, if not the actual application. For example, say you see an argument and start recording in case it escalates into a felony. Then the criminality of your actions are completely dependent on whether or not someone else commits a felony. Does that sound just to you?

For all of these reasons, I believe the court came to the correction conclusion, just for the wrong reasons.

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E-Mail Paul Engel: paul@constitutionstudy.com