GPS Tracking, Police Intrusion, and the Diverging Paths of State and Federal Judiciaries

"The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . . Can it be that the Constitution affords no protection against such invasions of individual security?"

I. INTRODUCTION

Approximately eighty-two years after Justice Brandeis’s dissent in Olmstead v. United States, the United States Court of Appeals for the Ninth Circuit held that the warrantless placement of a global positioning system (GPS) on a criminal suspect’s vehicle did not violate the Fourth Amendment’s prohibition of unreasonable searches and seizures. The court, relying on precedent established by the United States Supreme Court, concluded that Drug Enforcement Agency (DEA) officials did not invade any area in which the appellant possessed a reasonable expectation of privacy. Furthermore, the court upheld the constitutionality of the GPS technology used by the DEA to track the appellant’s movements to and from suspected marijuana “grow houses.”

2. 277 U.S. 438 (1928).
3. See United States v. Pineda-Moreno, 591 F.3d 1212, 1217 (9th Cir. 2010) (holding DEA agents did not violate defendant’s Fourth Amendment rights); see also U.S. CONST. amend. IV. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

4. See Pineda-Moreno, 591 F.3d at 1215 (holding DEA agents did not invade area in which appellant possessed reasonable expectation of privacy); see also Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (mandating consideration of “twofold requirement” when determining reasonable expectation of privacy). The areas included the appellant’s driveway, the underside of the appellant’s vehicle, and public parking lots. Pineda-Moreno, 591 F.3d at 1214-16.

5. Pineda-Moreno, 591 F.3d at 1217 (holding DEA’s search of appellant’s car by GPS tracking
The Ninth Circuit’s holding in *United States v. Pineda-Moreno* does not constitute an outlier, but rather the latest in a growing body of federal jurisprudence in which courts have permitted advances in technology to restrict the privacy rights of citizens. When faced with privacy issues stemming from advances in technology over the last decade, federal courts have continued to rely upon precedent established twenty-seven years ago, rather than issuing decisions that recognize the implications created by new technology. Even as technology evolves to become more pervasive, courts continue to rely on an outdated application of the Fourth Amendment, thereby jeopardizing citizens’ privacy rights.

While federal courts continue to narrowly interpret the Fourth Amendment, many states have endeavored to provide more expansive rights to their citizens under their respective constitutions. In recent decades, several states have diverged from the federal courts’ narrow interpretation of the Fourth Amendment—especially as it relates to police tracking—instead, opting for a more expansive protection of privacy rights under their state constitutions.

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8. *See United States v. Knotts*, 460 U.S. 276, 285 (1983) (holding police placement of beeper in barrel of chloroform not Fourth Amendment search). While the Court in *Knotts* upheld the police’s placement of the “beeper,” it acknowledged the respondent’s fear that “the result of the holding sought by the government would be that ‘twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.’” *Id.* at 283. In response to respondent’s apprehension, the Court asserted that “if such dragnet type law enforcement practices . . . should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.” *Id.* at 284; see also Renée McDonald Hutchins, *Tied up in Knotts? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 413-14 (2007) [hereinafter Hutchins, *Tied up in Knotts*] (arguing federal courts must adapt to intrusiveness of modern technology).
9. See Hutchins, *Tied up in Knotts*, supra note 8, at 413 (noting applications of Fourth Amendment must adapt to new technology); see also Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1322 (2008) (urging increased judicial scrutiny of advances in technology).
This disparity between rights protected by state constitutions and those protected by the United States Constitution likely will continue to grow with advances in technology. This Note will first describe the evolution of GPS technology over the last twenty years. Next, it will discuss the Supreme Court’s jurisprudence regarding the constitutionality of searches using technology that led to the Ninth Circuit’s decision in Pineda-Moreno, and the ways in which advances in technology have continued to erode citizens’ expectations of privacy. Next, this Note will briefly discuss the conflicting holdings of the circuit courts regarding the constitutionality of warrantless GPS tracking. Finally, this Note will discuss the constitutions of Massachusetts, New York, and Washington, and the increased protection provided to the citizens of these states under their constitutions regarding the use of GPS technology.

The analysis section of this Note will first consider the repercussions of erosion in privacy, as demonstrated by ever-increasing police and government intrusions into the private lives of citizens. Next, it will consider why state courts have interpreted their state constitutions to provide greater protection. Finally, it will argue that this conflict between state and federal governments furthers the democratic ideals of the United States because it allows the states to maintain their roles as the “laboratories” of democracy and experiment with the rights and privileges they wish to afford to their citizens.

II. HISTORY

A. The Evolution of GPS Technology

Over the previous ten years, the use of GPS technology has increasingly pervaded nearly every aspect of daily life. Two decades ago, when the

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12. See Henderson, supra note 7, at 374 (noting state constitutions often provide greater protection than Fourth Amendment). The Fourth Amendment is recognized as only providing a “constitutional floor” upon which state constitutions are allowed to provide “a more complete picture of existing protections.”

13. See infra Part II.A (chronicling evolution of GPS technology).

14. See infra Part II.B (discussing Supreme Court jurisprudence leading up to Pineda-Moreno).

15. See infra Part II.C (noting conflict between circuits regarding constitutionality of warrantless GPS tracking).

16. See infra Part II.D.1 (discussing article XIV of Massachusetts Declaration of Rights and pertinent Massachusetts case law); Part II.D.2 (discussing article I, section 12 of New York Bill of Rights and pertinent New York case law); Part II.D.3 (discussing article I, section 7 of Washington Constitution and pertinent Washington case law).

17. See infra Part III.A (discussing evolution of technology paralleled by erosions in privacy).

18. See infra Part III.B (analyzing reasons behind greater protection provided by state constitutions).

19. See infra Part III.C (stressing benefits of conflict between state and federal jurisprudence regarding privacy rights).

Supreme Court first addressed the privacy issues of “beepers,” the devices did little more than assist police officers involved in the active pursuit of a criminal suspect.\(^{21}\) Compared to the relative simplicity of beeper technology, which was only able to “ping” the location of a suspect’s vehicle or an article of contraband, GPS technology enables law enforcement officials to track every move of a criminal suspect with tremendous ease.\(^{22}\) For example, instead of having to actively pursue the “pings” of a beeper, law enforcement officials today can simply run a search on their laptop to gather the precise location of a particular criminal suspect.\(^{23}\) Despite the increasing pervasiveness of GPS technology, and the ease with which law enforcement officials may track a suspect’s movements, the privacy questions surrounding this technology remain largely unanswered by the United States Supreme Court.\(^{24}\)

**B. The Supreme Court, Technology, and Privacy**

In 1928, the United States Supreme Court first addressed the issues concerning technology and privacy with its holding in *Olmstead v. United States*.\(^{25}\) In *Olmstead*, the Court considered whether the admission of private telephone conversations between the petitioners and others, intercepted by wiretapping, violated the Fourth and Fifth Amendments.\(^{26}\) In order to gather evidence of an alcohol-smuggling conspiracy, federal officials inserted small wires into the telephones of the petitioners and, for several months, accumulated information regarding the operation.\(^{27}\) After accumulating the necessary evidence, the Government charged the petitioners with violating the National Prohibition Act.\(^{28}\)

Writing for the Court, Justice Taft held that “the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.”\(^{29}\) In reaching this holding, the Court reasoned that telegraph and telephone messages did not deserve the same protection afforded to mailed, \(\)
sealed letters. Rejecting petitioners’ constitutional and exclusionary arguments, the Court affirmed the convictions and discarded the argument that the government’s actions constituted an unconstitutional invasion of privacy.

While the majority rejected petitioners’ argument in favor of increased privacy rights, Justice Brandeis’s dissent ultimately shaped the course of Supreme Court privacy jurisprudence in the following decades. Brandeis rejected the Court’s distinction between telephone conversations and sealed letters, reasoning that intercepting one’s private phone conversations constituted a greater invasion of privacy than interference with one’s mail. While the Court failed to endorse his stance when rendering the Olmstead decision in 1928, thirty-nine years later, in Katz v. United States, the Court adopted Justice Brandeis’s position.

Reminiscent of the issues in Olmstead, the Court in Katz encountered advances in technology and its impact on privacy expectations. In Katz, a jury convicted the petitioner, a participant in a nationwide, illegal gambling operation, of transmitting wagering information via telephone, in violation of a federal statute. At issue before the Court was the way the government obtained its evidence: the wiretapping and recording of the public telephone booth used by the petitioner in the gambling operation. While the petitioner argued that his Fourth Amendment rights were violated, the Government countered by arguing that a public telephone booth did not constitute a “constitutionally protected area.”

30. See id. at 464. In reaching this distinction, the Court reasoned that “the intervening wires [between telephones and telegraphs] are not part of [a man’s] house or office, any more than are the highways along which they are stretched.” Id. at 465. Supreme Court precedent, Justice Taft reasoned, could not “justify enlargement of the language [of the Fourth and Fifth Amendments] . . . beyond the possible practical meaning of houses, persons, papers, and effects.” Id.

31. Id. at 470 (affirming Ninth Circuit’s holding).

32. See id. at 473-74 (Brandeis, J., dissenting) (noting majority will allow “subtler and more far-reaching” means of privacy invasion). In his dissent, Justice Brandeis took umbrage with the majority’s focus on the lack of any physical invasion of property. See id. Instead, Justice Brandeis reasoned that “it is not the breaking of his doors, and the rummaging of his drawers” that constitutes a violation of one’s Fourth Amendment rights, but instead “the invasion of his indefeasible right of personal security, personal liberty and private property.” Id. at 474-75.

33. See Olmstead, 277 U.S. at 475 (Brandeis, J., dissenting). Disagreeing with the majority, Justice Brandeis reasoned, “The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails.” Id. When the government wiretaps a phone line, “the privacy of the persons at both ends of the line is invaded, and all conversations between them . . . may be overheard,” thus violating more than just the privacy of the government’s “target.” Id. at 475-76.

34. 389 U.S. 347 (1967).

35. See id. at 353 (noting Court’s holding in Olmstead “discredited,” and adopting Brandeis’s approach).

36. See id. at 350 (explaining issue before Court).

37. Id. at 348.

38. Katz, 389 U.S. at 348. At trial, the Government introduced evidence of the petitioner’s end of the conversations obtained through the Government’s wiretap of the public telephone booth used by the petitioner. Id.

39. Id. at 351.
The Court ultimately reversed the petitioner’s convictions. Overruling its holding in *Olmstead*, the Court reasoned that “[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures,” regardless of the tangibility of the property searched or seized. While Justice Stewart wrote for the majority of the Court, the *Katz* decision is best remembered for Justice Harlan’s concurring opinion, in which Harlan proposed a two-part test to determine the reasonableness of an individual’s expectations of privacy.

Under the first prong of Justice Harlan’s test, an individual must exhibit an actual, subjective expectation of privacy. Second, the expectation of privacy exhibited by the individual must be one that “society is prepared to recognize as ‘reasonable.’” Utilizing his two-part test, Justice Harlan reasoned that when a man enters a telephone booth and places a call, it is reasonable to assume that those outside the booth are not intercepting his conversation. While Justice Harlan’s concurrence did not control at the time he wrote it, the Court subsequently adopted the two-prong expectation of privacy test in *Smith v. Maryland*.

Roughly two decades after its decision in *Katz*, the Supreme Court addressed the constitutionality of the use of beepers to track and monitor criminal suspects. In *United States v. Knotts*, the Court carefully defined the limits of the use of beepers to track criminal suspects. While the Court upheld the
use of a beeper to track the suspect’s vehicle, it did so with reservations, and it
warned law enforcement officials that intrusions into other areas likely violated
the constitution. Intrusion into the home, the most sacred of “constitutionally
protected areas,” gave the Court great pause and reflected a scenario in which
the Court restricted the power of government officials to monitor suspects’
activities.

Recognizing the implications of its dated privacy jurisprudence, in 2001, the
Court in *Knotts* strove to address the concerns raised by the
Court in *Knotts*. In *Knotts*, federal agents utilized an “Agema Thermovision
210” thermal imager to scan heat emanating from suspected marijuana “grow
houses.” Addressing the intrusiveness of the technology, the Court
recognized that the *Katz* test, introduced nearly forty years prior, could not
properly address the issues raised in *Kyllo*. In place of the *Katz* test, the Court

The Court in *Knotts* drew a careful distinction between monitoring a suspect in his vehicle and monitoring a
suspect within his residence. See id. The operator of a vehicle, the Court reasoned, “has no reasonable
expectation of privacy in his movements from one place to another” because he chooses to drive on public
roads. Id. at 281. As a result, the Court held that the police had acted within constitutional bounds by utilizing
a beeper to follow the defendant’s vehicle. See id. at 282. Once the surveillance breached the suspect’s
residence, however, his “traditional expectation of privacy within a dwelling place” protected against
unwarranted police intrusion. Id. In other words, while the police did not violate the suspect’s constitutional
rights while monitoring the movements of his vehicle, once the beeper entered the suspect’s residence, the
police intruded upon a constitutionally protected area. See id. at 281-82.

50. See id. at 282 (noting limitations of Court’s holding); see also *Karo*, 468 U.S. at 718 (holding warrant
required for search of home). The Court in *Karo* strove to answer one of the questions left unanswered by the
Court’s holding in *Knotts*: “[W]hether monitoring of a beeper falls within the ambit of the Fourth Amendment
when it reveals information that could not have been obtained through visual surveillance.” *Karo*, 468 U.S. at
707. Resolving this question, the Court held that the use of a beeper, when it reveals information transmitted
from inside of private premises, violates a suspect’s Fourth Amendment rights. See id. at 718.

51. See *Hutchins*, *Tied up in Knotts*, supra note 8, at 435-37 (discussing implications of Court’s holding
in *Knotts*). Hutchins notes that the Court has held that the use of “sense augmenting” technology, such as the
beepers in *Knotts* and *Karo*, is “constitutionally unremarkable” provided that “law enforcement’s unaided
observation under the same circumstances would be unobjectionable.” Id. at 436.

52. *Kyllo*, 533 U.S. at 29-30 (describing technology used by agents to uncover marijuana-growing
operation). The heat scanner detected infrared radiation emanating from the home that was not visible to the
naked eye. Id. at 29. When utilized during a suspected drug operation, the imager converted radiation into
images based on the warmth of the home: black images indicated “cool” areas of the home, white areas
indicated “hot” areas of the home, and grey images noted the differences between the white and black images.
Id. at 30. When officials targeted *Kyllo*’s home, the images indicated that the roof over the garage and a side
wall of the home were relatively hot compared to the remainder of the home, indicating the possibility of a
marijuana-growing operation. Id.

53. See id. at 34 (noting *Katz* test needs refining in face of new technology). Writing for the Court,
Justice Scalia noted, “It would be foolish to contend that the degree of privacy secured to citizens by the Fourth
Amendment has been entirely unaffected by the advance of technology.” Id.
implemented a four-part test intended to balance the needs of investigators with the constitutional rights of all citizens, including those suspected of criminal activities.\footnote{\textit{Id.} at 34-35 (explaining adoption of four-part test).}

Under the \textit{Kyllo} test, courts must first consider whether law enforcement officials obtained the information via “sense-enhancing technology.”\footnote{\textit{Id.} at 35.} Second, courts must consider whether the “sense-enhancing technology” produced information regarding the interior of the suspect’s home.\footnote{\textit{Kyllo} v. United States, 533 U.S. 27, 34 (2001).} Third, courts must consider whether the information obtained by the police could have been obtained in another fashion, without a “physical intrusion into a constitutionally protected area.”\footnote{See \textit{id.}} Finally, examining the technology itself, courts must determine whether the technology is currently in use by the general public.\footnote{See \textit{id.}} Applying its new four-part test, the Court held that evidence obtained from the scanner failed to satisfy the standards established in the four-part test and thus violated Kyllo’s Fourth Amendment rights.\footnote{See \textit{id.} at 40-41 (reversing holding of Court of Appeals).}

In June 2011, the Supreme Court granted certiorari for the first time to a case regarding the constitutionality of GPS tracking.\footnote{See \textit{United States v. Maynard}, 615 F.3d 544 (D.C. Cir.), 	extit{cert denied}, 131 S. Ct. 671 (2010), and \textit{cert granted sub nom. United States v. Jones}, 131 S. Ct. 3064 (2011).} Over the past two years, the United States Courts of Appeals have issued conflicting opinions regarding GPS technology, forcing the Court to address the split among the circuits.\footnote{Compare \textit{United States v. Pineda-Moreno}, 591 F.3d 1212 (9th Cir. 2010) (holding warrantless use of GPS on vehicle not Fourth Amendment search), with \textit{Maynard}, 15 F.3d 544 (holding warrantless GPS tracking constitutes Fourth Amendment search).}

\textbf{C. Pineda-Moreno, Maynard, and the Circuit Split}

While the Supreme Court has yet to render a decision regarding the constitutionality of GPS tracking, the federal courts are confronting the issue with increasing frequency.\footnote{See, e.g., \textit{United States v. Sparks}, 750 F. Supp. 2d 384, 393 (D. Mass. 2010) (holding defendant lacked reasonable expectation of privacy in underside of vehicle); \textit{United States v. Williams}, 650 F. Supp. 2d 633, 668 (W.D. Ky. 2009) (concluding no expectation of privacy on exterior of vehicle); \textit{United States v. Coulombe}, No. 1:06-CR-343, 2007 WL 4192005, at *4 (N.D.N.Y. Nov. 26, 2007) (holding no Fourth Amendment violation when no damage to vehicle from installation of GPS); \textit{United States v. Moran}, 349 F. Supp. 2d 425, 481 (N.D.N.Y. 2005) (holding officers’ warrantless attachment of GPS to vehicle not search or seizure).} While the United States Courts of Appeals have addressed the impact of new technologies on law enforcement in several decisions rendered over the last two decades, they did not reach the issue of GPS tracking prior to the past few years.\footnote{See, e.g., \textit{United States v. Forrester}, 512 F.3d 1212 (9th Cir. 2010) (holding surveillance through IP address not Fourth Amendment search or seizure); \textit{United States v. Brathwaite}, 458 F.3d 376, 381 (5th Cir.)}
1. GPS Tracking in United States v. Pineda-Moreno

On October 5, 2009, the United States Ninth Circuit Court of Appeals heard arguments in Pineda-Moreno. The court considered whether law enforcement officials violated Pineda-Moreno’s Fourth Amendment rights during an investigation regarding a marijuana-manufacturing conspiracy. Law enforcement officials gathered the evidence needed to charge Pineda-Moreno largely through the use of several GPS devices.

On appeal, Pineda-Moreno offered three ways in which DEA agents violated his Fourth Amendment rights. In sum, Pineda-Moreno argued that the DEA, by attaching a GPS device to the underside of his Jeep and monitoring his movements, violated his reasonable expectation of privacy. Pineda-Moreno’s arguments, however, did not persuade the court, which ultimately used the Supreme Court’s reasoning from Knotts to affirm the district court’s ruling.
2. GPS Tracking in United States v. Maynard

Approximately one month after arguments occurred in Pineda-Moreno, the United States Court of Appeals for the District of Columbia heard arguments in Maynard. In Maynard, a jury convicted the two appellants of several drug-related charges. Akin to the DEA agents in Pineda-Moreno, law enforcement personnel in Maynard tracked the movements of Jones, one of the two appellants, through a GPS device placed on the underside of Jones’s vehicle. Relying on Katz, Jones asserted that the placement of a GPS on the underside of his vehicle violated his reasonable expectation of privacy. Acknowledging the precedent established by Katz, the Government nevertheless argued that Katz did not control because the decision in Knotts, which was more recently decided, controlled.

The court refused to extend the Knotts holding to the facts of Jones’s case. Rejecting the application of Knotts, the court noted that the decision in Knotts “explicitly distinguished between the limited information discovered by use of the beeper—movements during a discrete journey—and more comprehensive or sustained monitoring of the sort at issue in this case.” Refusing to apply the Kyllo four-part test, the court instead considered Jones’s appeal in light of the Katz test. Weighing the invasiveness of the tracking—law enforcement officials monitored Jones twenty-four hours a day for approximately one month—coupled with the fact that Jones expected the movements of his vehicle to remain private, the court, applying the Katz test, refused to recognize such a level of monitoring as reasonable.

73. Id. A jury convicted the appellants of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and fifty grams or more of cocaine base. Id.
74. Id. at 555.
75. Id.
76. See Maynard, 615 F.3d at 555-56. According to the Government, Knotts controlled because a “[p]erson traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” Id. at 556 (quoting United States v. Knotts, 460 U.S. 276, 281 (1983)). Because Jones elected to operate his vehicle on public roads, the Government argued, he “voluntarily conveyed to anyone who wanted to look [at] his progress and route,” and, as a result, he could not “expect privacy in ‘the fact of his final destination.’” Id. (quoting Knotts, 460 U.S. at 281).
77. See id. at 555-56.
78. See United States v. Maynard, 615 F.3d 544, 555-56 (D.C. Cir.), cert denied, 131 S. Ct. 671 (2010), and cert granted sub nom. United States v. Jones, 131 S. Ct. 3064 (2011); see also Hutchins, Tied up in Knotts, supra note 8, at 440 (noting Court recognized “a very important limitation to its language” in Knotts). The Court’s holding in Knotts, Hutchins explains, was “never intended to place ‘dragnet type’ surveillance beyond the reach of the U.S. Constitution.” Hutchins, Tied up in Knotts, supra note 8, at 446.
79. See Maynard, 615 F.3d at 558-59.
80. See id. at 560-68 (holding law enforcement officials violated Jones’s reasonable expectation of privacy). Initially, the court noted, “Prolonged surveillance reveals types of information not revealed by short-term surveillance,” such as a person’s habits or daily routines. Id. at 562. Applying Katz to Jones’s appeal, the court reasoned that it could reach “only one conclusion.” Id. at 563. First, Jones clearly expressed a subjective expectation of privacy, satisfying the first part of the Katz test. Id. In addition, society clearly recognized
Six days before the Ninth Circuit’s holding in *Pineda-Moreno*—that an
appellant does not possess a reasonable expectation of privacy in the
movements of his vehicle—the court in *Maynard* reached the opposite
conclusion and held the continuous GPS monitoring of Jones violated the
Fourth Amendment. 81 The resolution of the scope of a constitutional search
using GPS technology is now left to the Supreme Court, which will address the
circuit split during its next term. 82

D. State Constitutional Law and GPS Tracking

While the federal courts have, by and large, refused to recognize protections
under the Fourth Amendment when faced with intrusions caused by new
technology, several states have taken a different approach by opting to protect
far more rights under their constitutions than those protected by the Fourth
Amendment. 83 Three states in particular—Massachusetts, New York, and
Washington—have acknowledged that their constitutions provide greater
growth to their citizens than the Fourth Amendment. 84

1. Massachusetts—Article XIV of the Declaration of Rights

Article XIV of the Massachusetts Declaration of Rights is the state’s analog
to the Fourth Amendment. 85 Interpreting the language of article XIV, the
Supreme Judicial Court of Massachusetts (SJC), in *Commonwealth v. Balicki*, 86
noted that Massachusetts has long provided more expansive rights to its

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81. See *id.* at 568 (reversing Jones’s conviction).
82. See *Maynard*, 615 F.3d 544 (providing Court opportunity to address GPS technology and Fourth
Amendment); see also Tarik N. Jallad, Recent Development, *Old Answers to New Questions: GPS
Supreme Court’s potential grant of writ of certiorari in *Maynard*).
83. See generally Henderson, supra note 7 (noting more expansive rights under state constitutions).
Constitution provides greater protection than Fourth Amendment); *People v. Weaver*, 909 N.E.2d 1195, 1202
(N.Y. 2009) (providing greater rights to citizens under New York Constitution); *State v. Jackson*, 76 P.3d 217,
221 (Wash. 2003) (protecting more rights under Washington Constitution).
85. See MASS CONSTIT. pt. I, art. XIV. Article XIV of the Massachusetts Declaration of Rights provides:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his
houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the
cause or foundation of them be not previously supported by oath or affirmation; and if the order in
the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected
persons, or to seize their property, be not accompanied with a special designation of the persons or
objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the
formalities prescribed by the laws.

*Id.*
86. 762 N.E.2d 290 (Mass. 2002).
citizens than those provided by the Fourth Amendment.\footnote{See id. at 299 n.11 (noting article XIV affords greater protection than Fourth Amendment).}

Most recently, in its 2009 decision in \textit{Commonwealth v. Connolly} \footnote{913 N.E.2d 356 (Mass. 2009).}, the SJC addressed the issue of GPS tracking of criminal suspects.\footnote{See id. at 360-61 (noting nature of GPS tracking involved in charges).} In \textit{Connolly}, a jury convicted the defendant, a suspected drug dealer, of trafficking and distributing cocaine.\footnote{Id. at 360.} Suspecting Connolly’s involvement in a drug-trafficking operation, state and local law enforcement officials obtained a warrant to place a GPS device on Connolly’s vehicle.\footnote{Id. at 361-62 (describing process utilized by police to track Connolly).} Later, law enforcement officials obtained a warrant to search Connolly’s vehicle and discovered a substantial quantity of cocaine.\footnote{See \textit{Connolly}, 913 N.E.2d at 362 (describing contents of search).}

It should be noted that while law enforcement officials secured a warrant for the placement of a GPS, questions persisted as to whether the warrant had expired.\footnote{Id. at 361 (explaining police had obtained search warrant to place GPS); see also William F. Galvin, \textit{Harwich Drug Case Shapes Law on GPS Surveillance}, CAPE COD CHRON., Oct. 22, 2009, http://capecodchronicle.com/harnews/har102209_1.htm (detailing SJC’s decision in \textit{Connolly}). Sg t. Jack Mawn, a member of the Massachusetts State Police narcotics unit, referred to the warrant as a “hybrid.” See Galvin, supra. Police wrote the affidavit for the warrant using language from two search warrant statutes: one used for tangible property and the other for electronic eavesdropping. \textit{Id.} Utilizing this so-called “hybrid” warrant, police may conduct a search for fifteen days, the time allowed under the eavesdropping statute, as opposed to seven days, the time allowed under the tangible property statute. \textit{Id.}}

While the Commonwealth had not broached the subject in its brief, the court found the issue of whether a warrant is needed for GPS installation so important that it decided to go beyond the dispositive issue and provide guidance to law enforcement regarding the necessity of warrants.\footnote{See \textit{Commonwealth v. Connolly}, 913 N.E.2d 356 (Mass. 2009) (discussing need for warrant in placing GPS device). The court noted that, in its brief, the Commonwealth failed to take a position as to whether a warrant is required for the installation of a GPS device. \textit{See id. at 366}. As a result, the court interpreted the Commonwealth’s brief as suggesting that a warrant is not necessary to track a suspect via GPS. \textit{Id.}}

Recognizing the importance of the subject, the court looked to federal and state jurisprudence to determine if search warrants are required for GPS installation and tracking.\footnote{See \textit{Connolly}, 913 N.E.2d at 368-70. Turning first to the federal jurisprudence, the court noted that the Supreme Court had not determined the Fourth Amendment ramifications of unwarranted GPS tracking. \textit{Id. at 367}. Examining other federal precedent, the court explained that many federal courts had dealt with issues surrounding technology and police tracking, but they had not expressly addressed the constitutionality of GPS tracking and whether a warrant is required. \textit{Id. at 368}. Turning to the decisions of other state courts, the court}
evolution of article XIV, acknowledging that it provides at least equal, but often greater, protection to Massachusetts citizens than the Fourth Amendment. Weighing its own jurisprudence against the holdings of several other state courts, the SJC ultimately elected to provide greater protection to its citizens by holding that “the monitoring and use of data from GPS devices requires a warrant under art. 14.”

2. New York—Article I, Section 12 of the New York Bill of Rights

Much like article XIV of the Massachusetts Declaration of Rights, article I, section 12 of the New York Bill of Rights provides greater protection to New York citizens than its federal analog. Despite acknowledging the increased protection of article I, section 12, lower courts throughout New York continued to uphold the warrantless placement of GPS devices. The Court of Appeals

noted that other state courts, regardless of the alleged protections provided by the Fourth Amendment, had held that the installation of “a sophisticated electronic tracking device” on a citizen’s vehicle constituted a search requiring a warrant under their respective state constitutions. See id. at 369. The court reasoned that when police install a GPS device on a suspect’s vehicle, “the government’s control and use of the defendant’s vehicle to track its movements” interferes with the driver’s privacy interests. See id. at 369; see also John R. Ellement, SJC OK’s Secret Use of GPS Device, BOS. GLOBE, Sept. 18, 2009, http://www.boston.com/news/local/massachusetts/articles/2009/09/18/sjc_oks_secret_use_of_gps_devices/ (discussing SJC’s holding in Connolly). William Leahy, chief counsel for the Committee on Public Counsel Services, praised the holding, predicting that the warrant requirement “will be a barrier to widespread use by law enforcement.” Ellement, supra. Ellement further provides that prosecutors praised the court’s decision, thankful that the court had finally “spelled out what rules police must follow when they target a suspect.” Id. Guidance, prosecutors claimed, had been “lacking.” Id.

See People v. Weaver, 909 N.E.2d 1195, 1202 (N.Y. 2009) (noting expansive protection of New York Constitution). Citing its own precedent, the court acknowledged that “we have on many occasions interpreted our own Constitution to provide greater protections when circumstances warrant and have developed an independent body of state law in the area of search and seizure.” Id. It went on to explain that at times, the court has “adopted separate standards,” from the Fourth Amendment regarding searches and seizures, “when doing so best promotes ‘predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens.’” Id (quoting People v. P.J. Video, 501 N.E.2d 556, 561 (N.Y. 1986)). Article I, section 12 of the New York Bill of Rights provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

N.Y. CONST. art. I, § 12.

See People v. Lacey, 887 N.Y.S.2d 158, 159-61 (App. Div. 2009) (upholding constitutionality of unwarranted GPS placement on vehicle); People v. Gant, 802 N.Y.S.2d 839, 845-47 (Westchester Cnty. Ct. 2005) (denying motion to suppress evidence obtained from unwarranted GPS tracking). In both Lacey and Gant, the courts reasoned that article I, section 12 of the New York Bill of Rights did not preclude law
of New York (Court of Appeals) ultimately resolved this disagreement with its holding in People v. Weaver. 100

In Weaver, New York State Police investigators continuously monitored the movements of Weaver for approximately sixty-five days via a “Q-Ball” GPS placed inside the bumper of his vehicle. 101 Due in large part to the data produced by the GPS, a jury convicted Weaver of two counts of burglary. 102 At the Court of Appeals, Weaver challenged the admission of the GPS data, arguing that the unwarranted GPS monitoring of his vehicle violated article I, section 12 of the New York Bill of Rights. 103 Although the court began with an examination of federal cases concerning the constitutionality of GPS tracking, it ultimately refused to delve into the unsettled state of federal law. 104 The enforcement officials’ placement of a GPS on a suspect’s vehicle. Lacey, 887 N.Y.S.2d at 159–61; Gant, 802 N.Y.S.2d at 847–48. The court in Gant, basing its decision on the Supreme Court’s holding in Knotts, held that the defendant “[h]ad not established that he has a legitimate expectation of privacy in a vehicle traveling upon a public roadway” to require the securing of a warrant prior to the installation of a GPS device. Gant, 802 N.Y.S.2d at 847. 100 See generally 909 N.E.2d 1195 (N.Y. 2009). 101 Id. at 1195–96. The record before the court offered no explanation as to why law enforcement officials chose to monitor the defendant. Id. Ultimately, officials sought to use data produced by the GPS in the prosecution of the defendant for two separate burglaries. Id. at 1196. 102 See id. at 1196. The Supreme Court of New York, Appellate Division, affirmed the defendant’s conviction with one justice dissenting. Id. The dissenting justice argued that the continuous tracking of the defendant violated his rights under the New York Constitution, which affords protection to its citizens where they may “‘have a reasonable expectation that their every move will not be continuously and indefinitely monitored by a technical device without their knowledge, except where a warrant has been issued based on probable cause.’” Id. at 1196–97 (quoting People v. Weaver, 860 N.Y.S.2d 223, 228 (App. Div. 2008) (Stein, J., dissenting)). 103 Id. 1196–97 (explaining procedural history of case); see also Roy L. Reardon & Mary Elizabeth McGarry, New York Court of Appeals Roundup: GPS Tracking as Illegal Search, Ruling on Optional Safety Feature, N.Y. L.J., June 11, 2009, at 3, available at http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202431363669&isreturn=1 (describing extent of police tracking). Weaver was convicted for his involvement in two burglaries of a K-Mart. Reardon & McGarry, supra, at 3. The data produced by the GPS established that Weaver’s van traveled “slowly” through the K-Mart parking lot prior to the burglaries. Id. The van itself, however, was not used in the burglaries. Id. The device placed on Weaver’s bumper required batteries, and on more than one occasion police removed the GPS from the bumper, replaced the batteries, and reattached the GPS. Id. 104 Weaver, 909 N.E.2d at 1198–1202 (describing history of federal law regarding GPS tracking). At the outset of its analysis, the court distinguished the circumstances surrounding Weaver’s convictions from those of the defendant in Knotts. Id. at 1198. While acknowledging the superficial similarities between the two cases, the court reasoned that “Knotts involved the use of what we must now, more than a quarter of a century later, recognize to have been a very primitive tracking device.” Id. at 1199. The court asserted that GPS technology, in contrast, “is vastly different and exponentially more sophisticated and powerful technology that is easily and cheaply deployed and has virtually unlimited and remarkably precise tracking capability.” Id. The GPS technology at issue in Weaver, the court explained, “yields and records with breathtaking quality and quantity . . . a highly detailed profile, not simply of where we go, but by easy inference, of our associations—political, religious, amicable and amorous, to only name a few—and of the pattern of our professional and avocational pursuits.” Id. at 1199-1200; see Renée McDonald Hutchins, The Anatomy of a Search: Intrusiveness and the Fourth Amendment, 44 U. RICH. L. REV. 1185, 1186-87 (2010) [hereinafter Hutchins, Anatomy of a Search] (discussing struggles of Court of Appeals addressing “treatment of novel technologies”); see also supra notes 20–23 and accompanying text (discussing ramifications of advances in GPS technology).
court, instead, chose to base its decision solely on the New York Constitution.\(^{105}\) Relying on the language of the state constitution, the Court of Appeals reversed Weaver’s convictions.\(^{106}\) It expressed apprehension about the “unacceptable risk of abuse” inherent in unwarranted GPS surveillance and held that law enforcement officials must secure a warrant before tracking a suspect with a GPS device.\(^{107}\)

3. Washington—Article I, Section 7 of the Washington State Constitution

Article I, section 7 of the Washington State Constitution provides that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law.”\(^{108}\) Akin to the Massachusetts Constitution and the New York Constitution, the Washington State Constitution provides more protection to its citizens than the Fourth Amendment.\(^{109}\)

In *State v. Jackson*,\(^{110}\) the Supreme Court of Washington confronted the issue of the constitutionality of GPS tracking under the state constitution.\(^{111}\) In *Jackson*, police suspected that the defendant played a role in the disappearance of his nine-year-old daughter.\(^{112}\) As part of the investigation, law enforcement

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105. Weaver, 909 N.E.2d at 1202.

106. People v. Weaver, 909 N.E.2d 1195, 1202-04 (N.Y. 2009). At the outset of its state constitutional analysis, the court turned to Justice Brandeis’s dissent in *Olmstead* and answered “no” to Brandeis’s query: “‘[C]an it be that the Constitution affords no protection against such invasions of individual security?’” *Id.* at 1202 (quoting *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting)). Much like the SJC in *Connolly*, the Court of Appeals looked to the holdings of the highest courts of other states. *Id.* at 1203. While it acknowledged that the issue could be left to the legislature, the court refused to do so. *See id.* at 1202-03. Simply leaving the matter to the legislature, the court reasoned, “would be defensible only upon the ground that there had been no intrusion upon [Weaver’s] privacy qualifying as an article I, § 12 ‘search.’” *Id.* at 1202.

107. See Weaver, 909 N.E.2d at 1203 (reversing Weaver’s conviction); see also Michelle Kliegman, *Court of Appeals of New York: People v. Weaver*, 26 TOURO L. REV. 837, 839-40 (2010) (discussing basis of Weaver decision).


110. 76 P.3d 217 (Wash. 2003) (en banc).

111. *Id.* at 222. The court did not address the issue in light of the Fourth Amendment because the issue was not raised by Jackson. *Id.*

112. *Id.* at 221. On October 18, 1999, Jackson called 911 to report his daughter missing. *Id.* Police investigators noted bloodstains and faded blood on the young girl’s sheets and pillow, which Jackson explained resulted from a nosebleed. *Id.* Soon after, police officials began to investigate Jackson’s possible role in his daughter’s disappearance. *Id.*
officials placed GPS devices on two of Jackson’s vehicles.\textsuperscript{113} Utilizing the data gathered from the GPS, police tracked Jackson’s movements to and from the area where investigators ultimately discovered his daughter’s body.\textsuperscript{114} A jury convicted Jackson of first-degree murder.\textsuperscript{115}

After appealing to the Washington Court of Appeals, Jackson appealed his conviction to the Supreme Court of Washington because he believed law enforcement officials violated his rights under article I, section 7 of the Washington State Constitution.\textsuperscript{116} Noting that law enforcement officials obtained valid warrants to track Jackson’s movements via GPS, the court affirmed the murder conviction.\textsuperscript{117} Of greater concern to the court, however, was the manner in which the court of appeals ignored the necessity of a warrant for GPS tracking.\textsuperscript{118} Wary of the “uninterrupted, 24-hour a day surveillance” made possible through the use of GPS devices, the court held that law enforcement officials must secure a warrant before proceeding with GPS tracking.\textsuperscript{119} In reaching this conclusion, the court considered the intrusiveness of GPS technology and the ease with which law enforcement officials may now compile staggering amounts of once-private information.\textsuperscript{120} Concerned with its citizens’ rights, the court refused to grant unchecked access to its citizens’ most intimate information, thereby rejecting the assertion by the court of appeals that warrantless GPS tracking does not violate the Washington State Constitution.\textsuperscript{121}

\begin{itemize}
\item \textsuperscript{113} Id. at 220-21. On October 26, 1999, police officers obtained two warrants authorizing the placement of GPS devices on Jackson’s vehicles. Id. After placing the devices on Jackson’s vehicles, law enforcement officials returned the vehicles to Jackson. Id. at 221. Jackson, however, did not know of, or consent to, the placement of GPS devices on his vehicles. Id.
\item \textsuperscript{114} Jackson, 76 P.3d at 221-22. Over several days, Jackson traveled from a storage unit to several remote locations. Id. at 221. Law enforcement officials searched the area where Jackson stopped, and they discovered his daughter’s body in a shallow grave at one site and bloodstained duct tape at another. Id.
\item \textsuperscript{115} Id. at 221.
\item \textsuperscript{116} State v. Jackson, 76 P.3d 217, 221-22 (Wash. 2003) (en banc) (explaining Jackson’s grounds for appeal). Following his conviction, Jackson appealed to the Washington Court of Appeals, which affirmed the conviction. Id. The court of appeals also concluded that warrants authorizing the installation and use of GPS devices were unnecessary under the Washington State Constitution. Id.
\item \textsuperscript{117} Id. at 231.
\item \textsuperscript{118} See id. at 222 (addressing need for warrants when tracking with GPS). The court refused to decide without addressing the lack of concern the court of appeals demonstrated regarding a requirement for a warrant. See id. The court of appeals had declined to address the warrant issue because it classified GPS devices as “merely sense augmenting” devices that revealed information Jackson voluntarily exposed to the public. Id. at 223.
\item \textsuperscript{119} Id. at 223-24.
\item \textsuperscript{120} See Jackson, 76 P.3d at 224 (criticizing use of intrusive technology). The court opined, “The resulting trespass into private affairs of Washington citizens,” made possible by warrantless GPS tracking “is precisely what article I, section 7 was intended to prevent.” Id.
\item \textsuperscript{121} See id. (explaining reasoning for requiring warrant). In its holding, the court reasoned that “citizens of this State have a right to be free from the type of governmental intrusion” resulting from warrantless GPS tracking. Id.
\end{itemize}
II. ANALYSIS

A. The Repercussions of Eroding Expectations of Privacy

The sophistication of technology and its evolution have served to make it far easier for law enforcement officials to intrude into more areas of citizens’ private lives. By insisting to rely on the precedent established by Knotts, the circuit courts continue to turn a blind eye to the invasiveness of technology in 2011. American society has changed significantly in the last twenty-seven years, and the federal courts’ refusal to recognize these changes has increasingly jeopardized facets of life once deemed private by citizens. Until the Supreme Court addresses and, ideally, restricts law enforcement officials’ use of GPS tracking devices, American citizens must accept the erosion of their expectations of privacy that were, at one time, protected by the Fourth Amendment.

The question that must be asked, therefore, is: What are the repercussions of these erosions in privacy? If the Court declines to apply a warrant requirement to GPS tracking of criminal suspects, there is little doubt that government intrusion will increase. The specter of George Orwell’s “Big Brother,” an all-seeing, all-hearing governmental entity, becomes increasingly more likely as the federal judiciary continues to provide law enforcement officials with

122. See Hutchins, Tied up in Knotts, supra note 8, at 457-59 (commenting on wealth of information available to law enforcement through GPS technology). Discussing the pervasiveness of current GPS technology, Hutchins notes that law enforcement officials may now access satellite photographs of a suspect’s address, three-dimensional schematics of the address, and “turn-by-turn” monitoring of a suspect’s movements. Id. at 458.

123. See Gershman, supra note 20, at 958-60 (discussing “stark” difference of technology used in Weaver compared to technology used in Knotts). In Knotts, law enforcement officials monitored Knotts “on one discrete occasion.” Id. at 958. In Weaver, however, law enforcement officials “constantly and continuously” monitored Weaver for approximately sixty-five days. Id. The “dragnet” technology utilized by the police in Weaver, however, “conjures up Orwellian images of ‘mass surveillance’ of motorists picked at random by the government.” Id. at 958-59.

124. See Hutchins, Tied up in Knotts, supra note 8, at 464 (arguing Court must balance dangers in modern American society with citizens’ privacy rights). Hutchins notes the issues faced by modern law enforcement officials—most notably the concerns raised by the threats of terrorism—that the Court could not have anticipated in its prior holdings regarding the invasiveness of tracking technology. Id. Hutchins fears that the government will exploit the fears of terrorism to the point that American citizens will eventually “cede significant ground to a bunker mode of existence, retaining only that sliver of privacy that we cannot envision a madman exploiting.” Id.

125. See Hutchins, Anatomy of a Search, supra note 104, at 1212 (discussing need for new perspective regarding Fourth Amendment jurisprudence). Hutchins points out that the Fourth Amendment “can be a powerful ally in the fight to protect privacy.” Id. The problem, however, is the Court’s choice to engage in “analytical leaps,” which, in turn, undermine the privacy protections intended by the Fourth Amendment. Id.

126. See Hutchins, Tied up in Knotts, supra note 8, at 465 (arguing Supreme Court must consider present as well as future technological advances). Should the Court’s relative lethargy regarding the constitutionality of GPS tracking continue, Hutchins notes, “George Orwell’s 1984 will become a much more likely version of our future.” Id.
seemingly unchecked access to a citizen’s every move.\textsuperscript{127} Entrusting the
government with this sort of unchecked power attacks the core notions upon
which the United States was established and threatens to erode the society the
Founding Fathers established and fought to protect.\textsuperscript{128}

One would demonstrate a great deal of naïveté to believe that the use of GPS
technology marks the pinnacle of law enforcement’s exploitation of new forms
of intrusive technology.\textsuperscript{129} While courts today consider the constitutionality of
GPS tracking, a newer, more intrusive technology will likely emerge in due
time, possibly creating even greater privacy concerns than those raised by
current technology. Consequently, the Supreme Court will likely continue to
restrict citizens’ privacy interests as technology evolves.\textsuperscript{130}

\section*{B. State Constitutions—The Protectors of Citizens’ Rights}

At first glance, the language of the Fourth Amendment, when compared with
the language of the corollaries found in the Massachusetts, New York, and
Washington state constitutions, does not differ greatly in form or substance.\textsuperscript{131}
The difference lies in the ways that these analogs have been interpreted.\textsuperscript{132} The
state jurisprudence over the last three decades has demonstrated that states are
providing greater privacy rights to their citizens.\textsuperscript{133} Massachusetts, New York,
and Washington, in particular, have strived to differentiate the privacy
guarantees of their constitutions from those provided by the United States
Constitution.\textsuperscript{134} These three states should serve as a model to other state
judiciaries because they have strived to protect the privacy rights of citizens
while at the same time enabling the government to operate efficiently.\textsuperscript{135}

\begin{itemize}
\item \textsuperscript{127} See id. (warning against limited interpretation of Fourth Amendment).
\item \textsuperscript{128} See id. at 464 (lamenting repercussions of restricting Fourth Amendment protections). Should the
courts continue on their current course, Hutchins argues, we will have “radically altered the country in which
we live.” Id. Due to the warrantless use of GPS tracking and other invasive technologies, “[t]he country we
will have saved from the terrorists and street thugs will be a country none of us wishes to inhabit.” Id.
\item \textsuperscript{129} See supra Part II.B (chronicling Supreme Court’s handling of evolving technology).
\item \textsuperscript{130} See supra Part II.B (explaining trend of Supreme Court to restrict citizens’ privacy rights in face of
new technology).
\item \textsuperscript{131} See Henderson, supra note 7, at 427-38 (providing text of Fourth Amendment and respective state
analogs).
\item \textsuperscript{132} See id. at 393-412 (discussing interpretation of state constitutional privacy provisions).
\item \textsuperscript{133} See id. (noting evolution of state constitutional privacy provisions). Prior to the 1930s, state
constitutional privacy provisions played little of a role in American constitutional jurisprudence. Id.; supra
note 84 and accompanying text. Beginning in the 1970s, however, state constitutional provisions began to
diverge from the Supreme Court’s interpretation of the Fourth Amendment, leading to the conflicts that exist
today between the Fourth Amendment and state constitutions. See supra note 84 and accompanying text.
\item \textsuperscript{134} See, e.g., Commonwealth v. Balicki, 762 N.E.2d 290, 299 n.11 (Mass. 2002) (noting Massachusetts
Constitution provides greater protection than Fourth Amendment); People v. Weaver, 909 N.E.2d 1195, 1202
(N.Y. 2009) (providing greater rights to citizens under New York Constitution); State v. Jackson, 76 P.3d 217,
\item \textsuperscript{135} See supra notes 88-97, 110-121 and accompanying text (noting balance struck by highest courts of
Massachusetts and Washington).
\end{itemize}
doing so, they have provided a framework upon which American citizens will receive greater privacy protections under their state constitutions than those provided by the Fourth Amendment.\textsuperscript{136}

Instead of relying solely on federal jurisprudence regarding the Fourth Amendment as a guide for interpreting their state constitutions, state courts should look to the decisions of the highest courts of Massachusetts, New York, and Washington.\textsuperscript{137} It is particularly noteworthy that these states have conflicted with the decisions of federal courts sitting in those states.\textsuperscript{138} Most recently, the United States District Court of Massachusetts held that the government’s placement of a GPS device on a suspect’s vehicle did not implicate any privacy interests under the Fourth Amendment.\textsuperscript{139} This holding, of course, did not affect the SJC’s interpretation of the Massachusetts Constitution. It may, however, entrench the SJC’s holding regarding the constitutionality of these searches and allow for a difficult situation in which the state’s highest court and its federal court operate under the guidance of conflicting holdings.\textsuperscript{140}

When faced with questions regarding the constitutionality of GPS tracking, other states should embrace the approaches taken by Massachusetts, New York, and Washington, and strive to provide greater protection to their citizens than those afforded under the federal constitution.\textsuperscript{141} The highest courts of these states should serve as a model of judicial efficiency because not only have they provided greater protections to their citizens, but they have also provided law enforcement officials with a means to utilize the newest technologies, and guidance as to what they can and cannot do with those technologies.\textsuperscript{142} Should other states require warrants prior to tracking via GPS, they will successfully

\textsuperscript{136} See supra Part II.D.1-3 (discussing efforts of Massachusetts, New York, and Washington to provide greater rights to citizens); see also Grasso, supra note 11, at 340-41 (noting importance of state courts expanding rights provided by federal judiciary). Grasso argues that state courts should not “shrink” from interpreting and expanding state constitutional protections when required by the actions of the federal judiciary. \textit{Id.} Quoting Justice Souter, Grasso explains, “If we place too much reliance on Federal precedent we will render the State rules a mere row of shadows.” \textit{Id.} (quoting State v. Bradberry, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring)).

\textsuperscript{137} See supra Part II.D.1-3 (describing expansive rights provided by Massachusetts, New York, and Washington high courts).

\textsuperscript{138} See supra note 64 (discussing conflicting holdings regarding GPS technology).


\textsuperscript{140} See supra Part II.D.1 (describing SJC’s holding in \textit{Connolly}). To date, the SJC has not reversed its decision in \textit{Connolly}.

\textsuperscript{141} See supra Part II.D.1-3 (noting greater rights provided under Massachusetts, New York, and Washington constitutions); see also Grasso, supra note 11, at 342 (describing importance for state courts to monitor constitutional decisions of other state jurisdictions). When state courts fail to monitor the decisions of other state judiciaries, Grasso explains, it “undermines the legitimacy that permits the lawmaking power of the non-majoritarian branch to be accommodated in a democracy.” \textit{Grasso}, supra note 11, at 342.

\textsuperscript{142} See supra Part II.A (detailing advent of use of GPS technology by law enforcement); supra Parts II.B-D (discussing decisions of Massachusetts, New York, and Washington courts regarding GPS technology); see also Gershman, supra note 20, at 959-60 (noting availability of GPS technology to law enforcement officials if warrants secured).
balance protecting their citizens’ rights while respecting the power of the state to enforce the law.\textsuperscript{143} They will accomplish this goal because they will allow law enforcement officials to track suspects via GPS as long as they follow procedure that provides for protection of citizens’ privacy rights.\textsuperscript{144} As Massachusetts, New York, and Washington have demonstrated, GPS tracking of citizens and the protection of those citizens’ privacy rights are not mutually exclusive.\textsuperscript{145}

\section*{C. State and Federal Holdings—Why the Discrepancy?}

One unanswered question remains: Why have states provided greater privacy rights to their citizens under their state constitutions than those afforded by the Fourth Amendment?\textsuperscript{146} One possible reason may be that state courts are far closer to the citizens of their states.\textsuperscript{147} While the federal government must consider the interests of approximately 300 million individuals, state judiciaries concern themselves with only a fraction of the U.S. population.\textsuperscript{148} Given this difference, state courts should continue to strive to exist as autonomous law-interpreting bodies and independently reach their own conclusions regarding their state constitutions instead of reacting to holdings rendered by the Supreme Court and the federal appeals courts regarding the United States Constitution.\textsuperscript{149} When confronted with the intrusiveness of GPS technology, the highest courts of Massachusetts, New York, and Washington have embraced this challenge and crafted a body of law that provides far greater protection than the Fourth Amendment.\textsuperscript{150} As other state judiciaries face the

\textsuperscript{143} See supra notes 88-97, 114-121 and accompanying text (discussing holdings rendered by highest courts of Massachusetts and Washington).

\textsuperscript{144} See Walsh & Dominguez, supra note 107, at 28-29 (discussing potential value of GPS tracking after securing warrant). Walsh and Dominguez argue that allowing unwarranted GPS tracking creates the potential of “staggering” abuse by law enforcement officials. Id.


\textsuperscript{146} See Kaye, supra note 11, at 848 (noting state courts allow greater rights to their citizens under state constitutional parallels).

\textsuperscript{147} See id. The close proximity of state courts to their citizens “both shapes their strategic judgments and renders any erroneous assessments they may make more readily redressable by the People.” Id. at 848-49.

\textsuperscript{148} See id. at 148 (noting state courts have “different focus” from federal judiciary). While the federal judiciary must interpret laws that apply to a diverse body of citizens spread over thousands of miles, state courts, Kaye notes, must “fashion workable rules for a narrower, more specific range of people and situations.” Id.

\textsuperscript{149} See id. at 849 (noting importance for state courts to create their own body of law). By creating a body of state-created law, as opposed to relying on federal precedent, state courts help to promote predictability and stability in enforcing their respective states’ laws. Id.

issue of GPS technology, they should embrace the progressive thinking of these sister courts, discard the obsolete precedent of the federal judiciary, and strive to produce precedent that protects their citizens’ most vital privacy rights.151

The judicial history of the Fourth Amendment also serves to explain the disparity between state and federal privacy holdings.152 While state courts have strived to provide greater privacy protections to their respective citizens, the Fourth Amendment has long been recognized as providing only “a floor of rights applicable all across the nation.”153 Historically, the Supreme Court has exercised judicial restraint regarding the impact of technology on privacy rights, thereby empowering state courts to address the impact of new technologies, including GPS technology, on personal privacy.154 With the recent split among the circuits, the Court will likely have to abandon its restraint and address the wide array of issues concerning GPS technology and its impact on the privacy rights of American citizens.155 Regardless of the Court’s decision, states should continue to act autonomously when interpreting their state constitutions to protect the rights of their citizens.156

IV. CONCLUSION

As this Note awaits publication, the Supreme Court has granted Jones’s writ for certiorari. It is expected that the Court will address the issue of warrantless GPS tracking in its next session. Until then, the federal courts will continue to apply the twenty-seven-year-old precedent established by the Supreme Court in Knotts and will likely continue to reach opposite conclusions, as demonstrated by the Ninth and D.C. Circuits. Champions of privacy rights hold out hope, however, that the Court will uphold the D.C. Circuit’s holding in Maynard.

Affirming the D.C. Circuit’s holding in Maynard will enable Supreme Court...
privacy jurisprudence to adapt to the newest technologies and recognize that the technology it ruled constitutional twenty-seven years ago bears little resemblance to that used in Maynard or Pineda-Moreno. Continuing to rely on the now obsolete precedent established by Knotts would be akin to an individual convincing himself or herself that television technology has not evolved since the black-and-white console. The Founding Fathers intended for our Constitution to be a living, breathing document that adapts to the changes of the times and technology. The Founding Fathers could not have anticipated the privacy implications raised by Facebook, Twitter, cellular, and GPS technology when they drafted the constitution over two hundred years ago. The Supreme Court must embrace this notion of the Constitution as a living document, break down the wall of twenty-seven-year-old precedent, and embrace the privacy ramifications of ever-evolving technology.

Regardless of what path the Supreme Court chooses, state high courts must continually strive to protect their citizens’ rights. From the advent of our federalist system, states have served as the great protectors of citizens’ most vital rights, a role as vital in 2011 as it was in 1787. Regardless of what unforeseen developments in technology await the American public in the forthcoming decades, this role should not change.

Brian Andrew Suslak