HIGH COURT STUDIES

CHIEF JUSTICE MARGARET MARSHALL: A LIFETIME DEVOTED TO DEFENDING LIBERTY AND JUSTICE FOR ALL

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“The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens . . . It may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.”

I. INTRODUCTION

Chief Justice Margaret Marshall, the first female chief justice of the oldest continuously-functioning appellate court in the Western Hemisphere, is an iconic figure. From her political activism against apartheid in her native South Africa as a young adult, to her most recent accomplishments as the Chief Justice of the Massachusetts Supreme Judicial Court, Chief Justice Marshall has earned a reputation as one of the nation’s most eminent jurists.

This paper will examine Chief Justice Marshall’s voting trends during her tenure as Chief Justice of the Massachusetts Supreme Judicial Court (October 1999 to November 2010). In Part II, the Chief Justice’s upbringing and career path will be discussed. Part III will provide a brief overview of the ideological composition of the Court. Then, in Part IV, Chief Justice Marshall’s voting patterns

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3 See infra Part II.
4 See infra Part II.
5 See infra Part III.
will be studied in three important ways. First, divided cases will be analyzed to reveal any patterns that emerge. Additionally, these decisions will be reviewed to determine when, and regarding what matters, Chief Justice Marshall joined an associate justice’s dissent. Second, cases authored by Chief Justice Marshall will be reviewed. Here, split decisions will be scrutinized more closely, especially those of a controversial nature. Third, dissents authored by Chief Justice Marshall will be evaluated, and data will be examined to illustrate the number of times these opinions were joined by associate justices on the bench. The methodology for each portion will be explained in the footnotes. An emphasis will be placed on cases that most accurately depict areas where the Chief Justice has a particular interest, instead of those where the Court reached a unanimous decision. Finally, Part V will present the findings of the voting analysis, as well as potential explanations for the results reached.

II. BIOGRAPHICAL NOTES

Before examining Chief Justice Marshall’s voting patterns, it is important to understand her background and career path. Marshall was born in Newcastle, South Africa in 1944. Her mother, Hilary A.D. Marshall, was born in Richmond, England, and her father, Bernard Charles Marshall, was native to Johannesburg, South Africa. Mr. Marshall was a chemist as well as a production manager at African Metals Corporation. In 1948, shortly after Chief Justice Marshall’s birth, the Nationalist Government in South Africa came to power and enacted laws that enforced segregation throughout society. Known as apartheid laws, this legislation had the power of institutionalizing discrimination. Some of these laws included the Prohibition of

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6 See infra Part IV.
7 See infra Part IV.A.
8 See infra Part IV.B.
9 See infra Part IV.B.
10 See infra Part IV.C.
11 See infra Part V.
13 Id.
14 Id.
Mixes Marriages Act of 1949, which prohibited marriage between people of different races, and the Immorality Act of 1950, which forbade all sexual relations between whites and non-whites. The political landscape of South Africa during this time played a vital role in the development of Marshall’s principles and beliefs.

Chief Justice Marshall attended the University of Witwatersrand in Johannesburg, South Africa where she majored in English and art history. From 1966 to 1968, she was her school’s president of the National Union of South African Students, and led her fellow classmates in protests against apartheid. At the time, the National Union of South African Students was the only multiracial national group in the entire country.

In 1968, Chief Justice Marshall immigrated to the United States in order to pursue a graduate education. She studied at Harvard University, where she was awarded a graduate scholarship by the Ernest Oppenheimer Trust, and received her master’s degree in education. Soon thereafter, from 1973 to 1975, she attended Yale Law School and received her juris doctor degree.

Chief Justice Marshall began her legal career in private practice. From 1976 to 1989, she served as both an associate and a partner in the Boston, Massachusetts law firm of Csaplar & Bok. During this time, in 1978, she was naturalized as a United States citizen. A few years later, she married then New York Times columnist, and two-time Pulitzer Prize winning author, Anthony Lewis. From 1989 to 1992, Marshall continued in private practice at another Boston firm, Choate, Hall & Stewart. Her practice consisted primarily of civil litigation, and she was renowned for her expertise in the area of intellectual property law.

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17 MARGARET HILARY MARSHALL, supra note 12.
18 Id.
20 MARGARET HILARY MARSHALL, supra note 12.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
28 MARGARET HILARY MARSHALL, supra note 12.
While pursuing her career in private practice, Chief Justice Marshall continued the fight against apartheid by pressuring the United States to impose sanctions against South Africa for its racial segregation.\textsuperscript{29} At that time, advocating sanctions against her native country was a reasonable offense, and as a result, she was banned due to her activities in America.\textsuperscript{30}

In 1992, Chief Justice Marshall returned to Harvard University, where she served as General Counsel and Vice President until 1996.\textsuperscript{31} In that position, she was responsible for Harvard’s legal and regulatory affairs.\textsuperscript{32} Additionally, she served as an active member of the President’s Academic Council.\textsuperscript{33}

Chief Justice Marshall was first appointed an Associate Justice of the Supreme Judicial Court of Massachusetts in November 1996.\textsuperscript{34} In September 1999, she was appointed as Chief Justice by Republican Governor Paul Cellucci.\textsuperscript{35} Following her confirmation by the Governor’s Council, she began her term on October 14, 1999.\textsuperscript{36} Chief Justice Marshall is the second woman to serve on the Supreme Judicial Court, following former Associate Justice Ruth Abrams.\textsuperscript{37} Of great significance, Marshall was the first woman to serve as Chief Justice in the Court’s more than 300-year history.\textsuperscript{38}

On July 21, 2010, Chief Justice Marshall shocked the Court when she announced her resignation after serving as Chief Justice for eleven years.\textsuperscript{39} She expressed that her decision was the result of her wish to spend more time with her husband, who had been diagnosed with Parkinson’s disease.\textsuperscript{40} She stated,

\begin{quote}
[a]s many of you know, when you have the kind of marriage that Tony and I have, . . . our decisions are always joint decisions. But Tony insisted from the beginning this was my decision. I think he has been wonderfully supportive throughout my career and he is very supportive of this
\end{quote}

\begin{itemize}
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Massachusetts Chief Supreme Court Justice Resigning: Marshall was State’s First Female Chief Justice, THE BOSTON CHANNEL (July 21, 2010), http://www.thebostonchannel.com/r/24337707/detail.html.
\item \textsuperscript{40} Id.
\end{itemize}
decision as well, but the decision is mine. Many were saddened by the news of Marshall’s retirement.

On November 4, 2010, Governor Deval Patrick nominated Justice Roderick L. Ireland to become the first African American Chief Justice of the Massachusetts Supreme Judicial Court. A politically liberal member of the Court, Ireland often voted alongside Marshall in many of her landmark decisions. Marshall, an avid supporter of Ireland’s nomination, stated “[i]n the annals of our long history, Roderick Ireland will be recognized as one of the great jurists, one of the great chief justices of this commonwealth. . . . I support, in the strongest possible terms, his confirmation to that position.”

III. THE CURRENT COURT

In order to gain a better perspective of Chief Justice Marshall’s voting pattern, it is helpful to look at her votes in comparison to the rest of the bench. In general, the Massachusetts Supreme Judicial Court is considered to be liberal because it tends to favor criminal defendants, and appears to extend a broader protection of fundamental rights.

The “politically liberal” justices of the Court include Justices Roderick L. Ireland (the newly appointed Chief Justice), Margot Botsford, and Ralph D. Gants. Justices Bostford and Gants were both appointed by Democratic Governor Deval Patrick in 2007 and 2009 respectively, while Ireland was appointed by Republican Governor Paul Cellucci in 1997. These justices, although their voting patterns are not extensively studied for the purposes of this article, exhibited tendencies such as favoring criminal defendants

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41 Id.
43 See infra Part IV.
46 Goodnough, supra note 42, at A19.
and upholding individual liberties.48

The “politically conservative” justices of the Court include Justices Francis X. Spina, Judith A. Cowin, and Robert J. Cordy. All were appointed by Republican Governor Paul Cellucci.49 Justices Spina and Cowin were appointed in 1999, and Justice Cordy was appointed in 2001.50 Also, though not studied extensively, these Justices exhibited tendencies such as favoring the prosecution in criminal matters, and narrowly construing fundamental rights.51

IV. VOTING ANALYSIS

A. Split Decisions from October 1999 to November 2010

During the time period from October 1999 to November 2010, the Court issued 104 split decisions.52 Of these 104 split decisions, Chief Justice Marshall voted with the majority 85 times,53 or 82% of

48 See infra Part IV.
50 See id.
51 See infra Part IV.
52 See infra notes 53–54. To conduct the voting analysis, parallel searches were run in Westlaw and LexisNexis, both of which are legal databases. Search results were compared, and each case was examined individually to verify that the data was correct.
the time; she voted with the dissent 19 times, or 18% of the time.

1. Dissents: Ideological Breakdown

The chart below depicts the ideological breakdown of when Chief Justice Marshall voted with the dissent. Criminal cases pertain to the rights of a criminal, including such issues as reasonableness of searches and seizures and the admissibility of evidence. Labor and employment cases encompass the employer and employee relationship regarding issues such as employment discrimination,


wages, unemployment compensation, workplace safety, and workers’ compensation. Family cases involve adoption, child custody, divorce, marriage, and guardianship matters.

**FIGURE 1: TYPES OF CASES WHERE CHIEF JUSTICE MARSHALL JOINED THE DISSENT**

2. Dissents: Associate Justice's Dissents Joined by Chief Justice Marshall

The chart below depicts the number of times Chief Justice Marshall joined an associate justice’s dissent. The legend characterizes the ideology of each justice as either politically liberal or conservative. In addition to the current Court, Justices Ruth Abrams, John Greaney, and Martha Sosman are also included, all of whom are now retired from the bench.
As indicated by the chart, Chief Justice Marshall joined a politically conservative justice’s dissent ten times, or approximately fifty-three percent of the time, while she joined a politically liberal justice’s dissent only nine times, or approximately forty-seven percent of the time. Although this is nearly an even split, because Marshall is regarded as an extremely
liberal justice, these results are surprising.

Of the nineteen times she joined a dissent, Marshall joined Justice Cordy in dissent most frequently at five times, or about twenty-six percent of the time. It is worth noting that in four of these five dissenting opinions, Justice Cordy ruled in favor of the criminal defendant. For example, in Commissioner v. Gonzales, Justice Cordy dissented from the majority decision which held that the presence of cash on defendants was enough to link them to the possession of heroin, even though there was no evidence that the defendants were present when an informant purchased drugs. For example, in Commissioner v. Gonzales, Justice Cordy dissented from the majority decision which held that the presence of cash on defendants was enough to link them to the possession of heroin, even though there was no evidence that the defendants were present when an informant purchased drugs. Here, Justice Cordy advocated for the criminal defendant as he asserted that there was insufficient evidence to convict him of drug possession. Similarly, in Commissioner v. Martin, Justice Cordy dissented from the majority, describing the dangers of suggestive one-on-one identification and its “real threat to the truth-finding process of criminal trials.” In both cases, Justice Cordy focused primarily on the procedural aspects of the case in finding for the criminal defendant. It must be noted, however, that while Justice Cordy is labeled as politically conservative, when Marshall joined his dissents, he was ruling in favor of the criminal defendant; therefore, Marshall, in joining his dissents, still remained consistent with her pro-criminal defendant trend.

B. Split Decisions Authored by Chief Justice Marshall

The chart below depicts the topical breakdown of split decisions authored by Chief Justice Marshall. As discussed previously, criminal matters refer to the rights of the accused; family cases involve marriage, divorce, custody, and other such issues; and labor and employment cases focus on the relationship between the employer and employee.

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57 Gonzales, 892 N.E.2d 255; Martin, 850 N.E.2d 555; Angelo Todesca Corp., 842 N.E.2d 930; Lyons, 828 N.E.2d 1.
58 Gonzales, 892 N.E.2d at 265.
59 Martin, 850 N.E.2d at 568.
From 1999 to 2010, Chief Justice Marshall authored 234 opinions. Of these opinions, only fourteen were split decisions.

As it is difficult to examine voting patterns when the Court is in agreement, the chart focuses on only those cases in which there was a dissenting opinion.

An example of a controversial case is the landmark decision of *Goodridge v. Department of Public Health*, which legalized same-sex marriage. In this decision, Chief Justice Marshall stated that the marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason . . . . An absolute disqualification of same-sex couples who wish to enter into civil marriage . . . suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.

In this case, Marshall characterized the right broadly as “the right to marry,” rather than narrowly as “the right to marry a member of the same sex.” Using this approach, the Court looked to due process and equal protection rights to hold that Massachusetts did not have a rational basis to deny same-sex couples the right to marry. Following this decision, Massachusetts became the first state to legalize same-sex marriage.

Dissenting opinions were filed by Justices Cordy, Spina, and the late Justice Sosman. All advocated that it was the Legislature’s responsibility to change the law, and not the role of the judiciary to render such a decision. Justice Sosman also found it


62 *Goodridge*, 798 N.E.2d 941.

63 *Id.* at 968.

64 *Id.* at 957.


66 *Goodridge*, 798 N.E.2d at 974, 978, 983.

67 *Id.*
inappropriate to rule in favor of same-sex marriage without a more prolonged period of observation of this new family structure.\textsuperscript{68} She stated “until such a time as it is certain that redefinition will not have unintended and undesirable social consequences,”\textsuperscript{69} the judiciary should not get involved.

C. Dissents Authored by Chief Justice Marshall

1. Topical Breakdown of Dissents

The chart below depicts the topical breakdown of the dissents authored by Chief Justice Marshall. In her eleven years on the Court as Chief Justice, Marshall has only authored fifteen dissents.\textsuperscript{70} Therefore, it is especially important to closely scrutinize these opinions. As illustrated by the chart, Marshall authored nine dissents, or approximately sixty percent of her dissents, for criminal matters.\textsuperscript{71} Generally, these criminally-based dissents are pro-criminal defendant, and in furtherance of ensuring certain fundamental rights.

\textsuperscript{68} Id. at 978.
\textsuperscript{69} Id. at 982.
\textsuperscript{71} In re Subpoena, 912 N.E.2d 970; Blake, 909 N.E.2d 532; Ciampi, 892 N.E.2d 270; Durham, 843 N.E.2d 1035; Feyenord, 833 N.E.2d 590; Chapman, 825 N.E.2d 508; Harris, 825 N.E.2d 58; Hyde, 750 N.E.2d 963; Roe, 750 N.E.2d 897.
2. Topical Breakdown of Criminal Dissents Authored by Chief Justice Marshall

The chart below specifies the types of criminal matters in which Chief Justice Marshall authored a dissent. The search and seizure cases involve the Fourth Amendment and the Massachusetts Declaration of Rights’ protection against unlawful searches and seizures. Trial evidence focuses on the admissibility of evidence in a criminal trial. Liberty interests focuses on criminal defendants’ fundamental right to freedom and other such liberties. Discipline is a narrow category regarding the treatment of criminal defendants in the prison system.
An example of a criminal matter involving liberty interests is *Commonwealth v. Blake.* Here, the majority held that a delay of thirteen months between a jury-waived trial and the trial judge’s decision, adjudicating the defendant as a sexually dangerous person, did not violate the defendant’s due process rights. Chief Justice Marshall dissented, stating that there was no compelling state interest in waiting this extended period of time. Moreover, she stressed the “precious” nature of one’s liberty interests and how, in this case, those rights were violated because the defendant was “not able, among other things, to leave Massachusetts Treatment Center[,] . . . arrange his own living quarters, or his own day[,] . . . to communicate with others inside or outside the treatment center[,] . . . or to direct his health care or other aspects of his welfare without the State’s permission.” Therefore,
Marshall advocated for the criminal defendant’s fundamental right to liberty against the judiciary’s prolonged period of hearing his case.

Another example is *Roe v. Attorney General*, where the majority held that a requirement that convicted sex offenders mail a form to the sex offender registration board setting forth his or her name, home address, and work address before receiving a hearing on the issue of present dangerousness, did not offend procedural due process.\(^{77}\) Chief Justice Marshall dissented claiming that the statute was too far reaching in that it would require registration without a hearing from people who likely posed no threat to children or other vulnerable parties.\(^{78}\) She stressed that only a home address should be required so these individuals could be contacted to schedule a hearing.\(^{79}\) Here, she advocated for the individual’s right to be heard prior to being forced to reveal personal information when there may be no basis to collect this information in the first place.

3. Associate Justices Joining Chief Justice Marshall in Dissent

The chart below depicts the number of times associate justices have joined Chief Justice Marshall’s dissenting opinions. Associate justices joined her criminal dissents ten times,\(^{80}\) or approximately sixty-three percent of the time. Of the nine criminal cases in which other justices joined, eight times, or approximately eighty-nine percent of the time, she ruled in favor of the criminal defendant.\(^{81}\) Therefore, it can be inferred that Marshall has the most credibility in her opinions regarding criminal matters and, more specifically, in her rulings that are pro-criminal defendant.

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\(^{78}\) *Id.* at 917.

\(^{79}\) *Id.*


In Commonwealth v. Hyde, the majority held that an electronic surveillance statute prohibited secret recording by a private individual of any communication when the defendant, having been stopped by police officers, surreptitiously tape recorded the encounter.\(^8\) In her dissent, Chief Justice Marshall stressed that the “actions of public officials taken in their public capacities are not protected from exposure.”\(^9\) She alleged that the Court’s ruling prevented the very important role of “watchdog” to ensure the proper behavior of public officials, such as police.\(^10\)

Another example of a liberty interest case is In re Grand Jury Subpoena, where the majority held that no privacy interest existed, under the Fourth Amendment or the Massachusetts Declaration of Rights, in recorded telephone calls made by a pretrial detainee to prevent the grand jury from obtaining the conversations by

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\(^8\) Hyde, 750 N.E.2d 963, 964–66, 971.  
\(^9\) Id. at 975 (Marshall, J., dissenting).  
\(^10\) Id. at 976 (Marshall, J., dissenting).
Chief Justice Marshall dissented on the belief that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.” Here, she asserted that recording phone calls for the limited purpose of security does not translate into unlimited dissemination to a grand jury. Moreover, Marshall addressed important policy considerations, such as the plight of pretrial detainees, who are likely poor and unable to post bail, using these telephone privileges to contact family members or mental health professionals. She stressed that with the majority’s holding, these conversations—no matter how intimate—would be open to “the prosecutor’s unfettered eavesdropping and any legitimate function of the grand jury.”

V. FINDINGS & CONCLUSION

After evaluating Chief Justice Marshall’s voting patterns during her time as Chief Justice, a significant pattern emerged—a steady trend of protecting criminal defendants from the injustices of the criminal system. Marshall’s pro-criminal defendant stance can be inferred by her dissenting opinions, as well as her joining in the dissents of associate justices that advocate for the criminal defendant. Again, of the nineteen dissents in which Marshall joined, thirteen of these were criminal matters. Furthermore, in all fourteen criminal cases, she joined a dissent that supported the rights of a criminal defendant. Notably, she joined dissents almost evenly split between politically conservative and politically liberal justices. Therefore, Marshall is consistent in her support of the criminal defendant, regardless of the justice authoring the opinion.

85 In re Grand Jury Subpoena, 912 N.E.2d at 976.
87 Id. at 980 (Marshall, J., dissenting).
88 Id. at 982 (Marshall, J., dissenting).
89 Id.
90 See supra Figure 1.
92 See id.
To explain this trend, it is important to recall Chief Justice Marshall’s upbringing. A product of the apartheid era, Marshall witnessed the bitter injustice of segregation early on. At this time, she learned the importance of zealously defending justice and equality, and carried this belief with her when entering the legal world as both an attorney and a judge. Her message of protecting fundamental rights resonates in every one of her many opinions. A lifelong defender of justice and equality, Marshall has consistently upheld these values during her time as Chief Justice of the Massachusetts Supreme Judicial Court.