

HIGH COURT STUDIES

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

*Jessie R. Cardinale**

“The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens [I]t may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.”¹

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.² 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 of one of the nation’s most eminent jurists.³

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.⁴ Part III will provide a brief overview of the ideological composition of the Court.⁵ Then, in Part IV, Chief Justice Marshall’s voting patterns

* Executive Editor for *State Constitutional Commentary*; J.D., Albany Law School, 2011.

¹ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948–49 (Mass. 2003).

² Press Release, Supreme Judicial Court, Chief Justice Margaret H. Marshall Will Retire (July 21, 2010), available at <http://www.mass.gov/courts/press/pr072110.html>; *The Massachusetts Judicial System: The Supreme Judicial Court*, MASS.GOV, <http://www.mass.gov/courts/sjc/supreme-judicial-court.html> (last visited Aug. 9, 2011).

³ See *infra* Part II.

⁴ See *infra* Part II.

⁵ See *infra* Part III.

will be studied in three important ways.⁶ First, divided cases will be analyzed to reveal any patterns that emerge.⁷ 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.⁸ Here, split decisions will be scrutinized more closely, especially those of a controversial nature.⁹ 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.¹⁰ 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.¹¹

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 1944.¹² Her mother, Hilary A.D. Marshall, was born in Richmond, England, and her father, Bernard Charles Marshall, was native to Johannesburg, South Africa.¹³ Mr. Marshall was a chemist as well as a production manager at African Metals Corporation.¹⁴

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.¹⁵ Known as apartheid laws, this legislation had the power of institutionalizing discrimination.¹⁶ Some of these laws included the Prohibition of

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.

¹² MARGARET HILARY MARSHALL, JRANK.ORG, <http://law.jrank.org/pages/8448/Marshall-Margaret-Hilary.html> (last visited Aug. 9, 2011) [hereinafter MARGARET HILARY MARSHALL].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ DAVID DOWNING, WITNESS TO HISTORY: APARTHEID IN SOUTH AFRICA 14 (2004).

¹⁶ APARTHEID MUSEUM, APARTHEID MUSEUM: FROM APARTHEID TO DEMOCRACY: THE STRUGGLE FOR LIBERATION IN SOUTH AFRICA 2 (2004), available at <http://www.apartheidmuseum.org/downloads/apm1.pdf>.

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Mixed 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.¹⁷ 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.¹⁸ At the time, the National Union of South African Students was the only multiracial national group in the entire country.¹⁹

In 1968, Chief Justice Marshall immigrated to the United States in order to pursue a graduate education.²⁰ 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.²¹ Soon thereafter, from 1973 to 1975, she attended Yale Law School and received her juris doctor degree.²²

Chief Justice Marshall began her legal career in private practice.²³ From 1976 to 1989, she served as both an associate and a partner in the Boston, Massachusetts law firm of Csaplar & Bok.²⁴ During this time, in 1978, she was naturalized as a United States citizen.²⁵ A few years later, she married then *New York Times* columnist, and two-time Pulitzer Prize winning author, Anthony Lewis.²⁶ From 1989 to 1992, Marshall continued in private practice at another Boston firm, Choate, Hall & Stewart.²⁷ Her practice consisted primarily of civil litigation, and she was renowned for her expertise in the area of intellectual property law.²⁸

¹⁷ MARGARET HILARY MARSHALL, *supra* note 12.

¹⁸ *Id.*

¹⁹ *National Union of South African Students*, SOUTH AFRICAN HISTORY ONLINE, <http://www.sahistory.org.za/organisations/national-union-south-african-students-nusas> (last visited Aug. 9, 2011).

²⁰ MARGARET HILARY MARSHALL, *supra* note 12.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*; 1963 Winners, PULITZER.ORG, <http://www.pulitzer.org/awards/1963> (last visited Aug. 9, 2011); 1955 Winners, PULITZER.ORG, <http://www.pulitzer.org/awards/1955> (last visited Aug. 9, 2011).

²⁷ CHIEF JUSTICE MARGARET H. MARSHALL, MASS.GOV <http://www.mass.gov/courts/press/chief-justice-marshall-biographical-info.pdf> (last visited Aug. 9, 2011).

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.²⁹ At that time, advocating sanctions against her native country was a treasonable offense, and as a result, she was banned due to her activities in America.³⁰

In 1992, Chief Justice Marshall returned to Harvard University, where she served as General Counsel and Vice President until 1996.³¹ In that position, she was responsible for Harvard's legal and regulatory affairs.³² Additionally, she served as an active member of the President's Academic Council.³³

Chief Justice Marshall was first appointed an Associate Justice of the Supreme Judicial Court of Massachusetts in November 1996.³⁴ In September 1999, she was appointed as Chief Justice by Republican Governor Paul Cellucci.³⁵ Following her confirmation by the Governor's Council, she began her term on October 14, 1999.³⁶ Chief Justice Marshall is the second woman to serve on the Supreme Judicial Court, following former Associate Justice Ruth Abrams.³⁷ Of great significance, Marshall was the first woman to serve as Chief Justice in the Court's more than 300-year history.³⁸

On July 21, 2010, Chief Justice Marshall shocked the Court when she announced her resignation after serving as Chief Justice for eleven years.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.⁴⁰ She stated,

[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

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

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>.

⁴⁰ *Id.*

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decision as well, but the decision is mine.⁴¹

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.⁴² A politically liberal member of the Court, Ireland often voted alongside Marshall in many of her landmark decisions.⁴³ 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."⁴⁴

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.⁴⁵

The "politically liberal" justices of the Court include Justices Roderick L. Ireland (the newly appointed Chief Justice),⁴⁶ 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 1997.⁴⁷ These justices, although their voting patterns are not extensively studied for the purposes of this article, exhibited tendencies such as favoring criminal defendants

⁴¹ *Id.*

⁴² Abby Goodnough, *Nomination for Massachusetts Chief Justice*, N.Y. TIMES, Nov. 5, 2010, at A19.

⁴³ See *infra* Part IV.

⁴⁴ Glen Johnson, *Marshall Lobbies for Ireland as SJS Replacement*, ASSOCIATED PRESS, BOSTON.COM, (Dec. 1, 2010); http://www.boston.com/news/local/massachusetts/articles/2010/12/01/governors_council_holds_hearing_on_ireland/.

⁴⁵ Robert A. Marangola, *High Court Study: Independent State Constitutional Adjudication in Massachusetts: 1988-1998*, 61 ALB. L. REV. 1625 (1998).

⁴⁶ Goodnough, *supra* note 42, at A19.

⁴⁷ JUSTICE MARGOT BOTSFORD, MASS.GOV, <http://www.mass.gov/courts/sjc/justices/botsford.html> (last visited Aug. 9, 2011); JUSTICE RALPH D. GANTS, MASS.GOV, <http://www.mass.gov/courts/sjc/justices/gants.html> (last visited Aug. 9, 2011); JUSTICE RODERICK L. IRELAND, MASS.GOV, <http://www.mass.gov/courts/sjc/justices/ireland.html> (last visited Aug. 9, 2011).

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.

⁴⁹ JUSTICE FRANCIS X. SPINA, MASS.GOV, <http://www.mass.gov/courts/sjc/justices/spina.html> (last visited Aug. 9, 2011); JUSTICE JUDITH A. COWIN, MASS.GOV, <http://www.mass.gov/courts/sjc/justices/cowin.html> (archived Web site on file with author); JUSTICE ROBERT J. CORDY, MASS.GOV, <http://www.mass.gov/courts/sjc/justices/cordy.html> (last visited Aug. 9, 2011).

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.

⁵³ Boston Hous. Auth. v. Nat'l Conference of Firemen & Oilers, 458 Mass. 155 (2010); Commonwealth v. Goodwin, 933 N.E.2d 925 (2010); Commonwealth v. Slicch-Brodeur, 930 N.E.2d 91 (2010); Commonwealth v. Washington W., 928 N.E.2d 908 (2010); Commonwealth v. Charles, 923 N.E.2d 519 (2010); Commonwealth v. Vasquez, 923 N.E.2d 524 (2010); Commonwealth v. Porter P., 923 N.E.2d 36 (2010); Choy v. Commonwealth, 927 N.E.2d 970 (2010); Howell v. Enter. Publ'g Co., LLC, 920 N.E.2d 1 (2010); Commonwealth v. Bell, 917 N.E.2d 740 (2009); Herman v. Admit One Ticket Agency LLC, 912 N.E.2d 450 (2009); Commonwealth v. Cory, 911 N.E.2d 187 (2009); Commonwealth v. Zanetti, 910 N.E.2d 869 (2009); Warfield v. Beth Israel Deaconess Med. Ctr., Inc., 910 N.E.2d 317 (2009); Commonwealth v. Little, 906 N.E.2d 286 (2009); Commonwealth v. Young, 905 N.E.2d 90 (2009); Commonwealth v. Gomes, 903 N.E.2d 567 (2009); Commonwealth v. Pina, 902 N.E.2d 917 (2009); Commonwealth v. Bernardo B., 900 N.E.2d 834 (2009); Mitchell v. Bd. of Bar Exam'rs, 897 N.E.2d 7 (2008); Thurdin v. SEI Boston, LLC, 895 N.E.2d 446 (2008); Commonwealth v. Donohue, 892 N.E.2d 718 (2008); Commonwealth v. Benoit, 892 N.E.2d 314 (2008); Commonwealth v. Garden, 883 N.E.2d 905 (2008); Carter v. Lynn Hous. Auth., 880 N.E.2d 778 (2008); Commonwealth v. Urban, 880 N.E.2d 753 (2008); Commonwealth v. Blache, 880 N.E.2d 736 (2008); Bjorklund v. Zoning Bd. of Appeals of Norwell, 878 N.E.2d 915 (2008); Blackstone v. Cashman, 860 N.E.2d 7 (2007); Wilkinson v. Citation Ins. Co., 856 N.E.2d 829 (2006); Commonwealth v. Chhim, 851 N.E.2d 422 (2006); Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623 (2006); Hershenow v. Enter. Rent-A-Car Co. of Boston, Inc., 840 N.E.2d 526 (2006); Austin v. Austin, 839 N.E.2d 837 (2005); Commonwealth v. Pagan, 837 N.E.2d 252 (2005); *In re* McHoul, 833 N.E.2d 1146 (2005); Bransford v. Zoning Bd. of

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the time; she voted with the dissent 19 times,⁵⁴ or 18% of the time.

1. Dissents: Ideological Breakdown

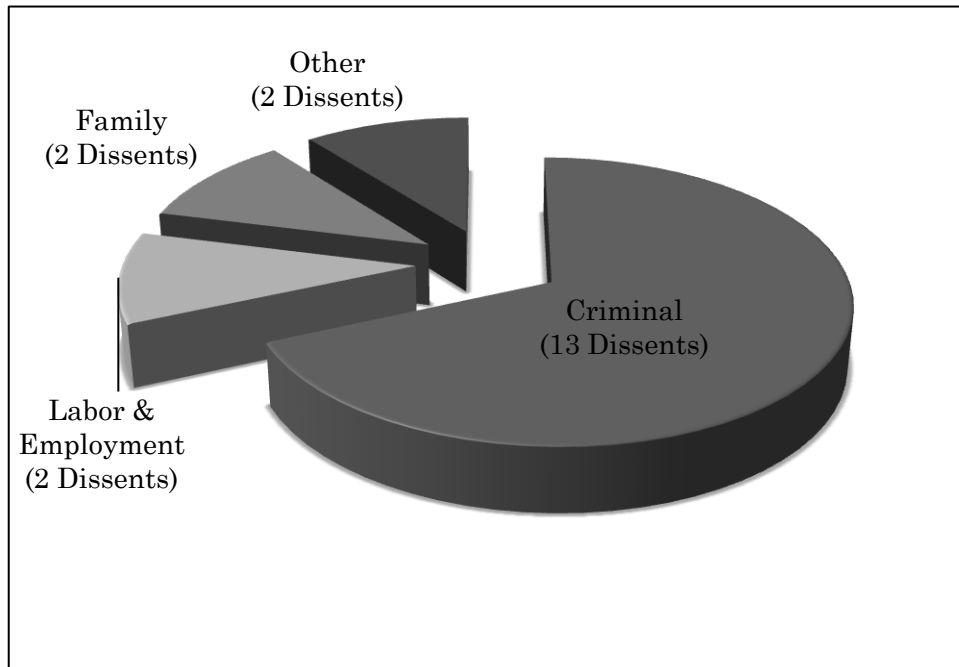
The chart below depicts the ideological breakdown of when Chief Justice Marshall voted with the dissent. Criminal cases pertain to the rights of a criminal, including such issues as reasonableness of searches and seizures and the admissibility of evidence. Labor and employment cases encompass the employer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

Appeals of Edgartown, 832 N.E.2d 639 (2005); Commonwealth v. Rogers, 827 N.E.2d 669 (2005); Foster v. Hurley, 826 N.E.2d 719 (2005); Commonwealth v. Adjutant, 824 N.E.2d 1 (2005); Hancock v. Comm'r of Educ., 822 N.E.2d 1134 (2005); Bldg. Inspector and Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp., 818 N.E.2d 1040 (2004); Commonwealth v. DiGiambattista, 813 N.E.2d 516 (2004); Aspinall v. Philip Morris Cos., 813 N.E.2d 476 (2004); *In re* Moore, 812 N.E.2d 1197 (2004); White v. Blue Cross & Blue Shield of Mass., Inc., 809 N.E.2d 1034 (2004); Wilson v. Comm'r of Transitional Assistance, 809 N.E.2d 524 (2004); Commonwealth v. Given, 808 N.E.2d 788 (2004); Soc'y of Jesus of New England v. Commonwealth, 808 N.E.2d 272 (2004); Stonehill Coll. v. Mass. Com'n Against Discrimination, 808 N.E.2d 205 (2004); Clancy v. McCabe, 805 N.E.2d 484 (2004); Commonwealth v. Catanzaro, 803 N.E.2d 287 (2004); Durand v. IDC Bellingham, LLC, 793 N.E.2d 359 (2003); Brittle v. City of Boston, 790 N.E.2d 208 (2003); Commonwealth v. O'Connell, 783 N.E.2d 417 (2003); Leblanc v. Friedman, 781 N.E.2d 1283 (2003); Eccleston v. Bankosky, 780 N.E.2d 1266 (2003); Commonwealth v. Jimenez, 780 N.E.2d 2 (2002); Commonwealth v. Villalobos, 777 N.E.2d 116 (2002); Haverty v. Comm'r of Corr., 776 N.E.2d 973 (2002); Blixt v. Blixt, 774 N.E.2d 1052 (2002); Commonwealth v. Santiago, 774 N.E.2d 143 (2002); Commonwealth v. Gavin G., 772 N.E.2d 1067 (2002); McClure v. Sec'y of Commonwealth, 766 N.E.2d 847 (2002); Hanover Ins. Co. v. Golden, 766 N.E.2d 838 (2002); Ciardi v. F. Hoffmann-La Roche, Ltd., 762 N.E.2d 303 (2002); Commonwealth v. Lapage, 759 N.E.2d 300 (2001); Commonwealth v. Ray, 755 N.E.2d 1259 (2001); Sch. Dist. of Beverly v. Geller, 755 N.E.2d 1241 (2001); Commonwealth v. Quincy Q., 753 N.E.2d 781 (2001); Turner v. Lewis, 749 N.E.2d 122 (2001); Davis v. Allstate Ins. Co., 747 N.E.2d 141 (2001); Commonwealth v. Russ R., 744 N.E.2d 39 (2001); CNA Ins. Companies v. Sliski, 744 N.E.2d 634 (2001); Ross v. Garabedian, 742 N.E.2d 1046 (2000); Douillard v. LMR, Inc., 740 N.E.2d 618 (2001); Commonwealth v. Conaghan, 740 N.E.2d 956 (2000); Schaer v. Brandeis Univ., 735 N.E.2d 373 (2000); Am. Honda Motor Co., Inc. v. Bernardi's, Inc., 735 N.E.2d 348 (2000); Rogers v. Town of Norfolk, 734 N.E.2d 1143 (2000); Commonwealth v. Smith, 728 N.E.2d 272 (2000); Commonwealth v. Silva, 727 N.E.2d 1150 (2000); Commonwealth v. Calderon, 725 N.E.2d 182 (2000); Commonwealth v. Clint C., 715 N.E.2d 1032 (1999); E.N.O. v. L.M.M., 711 N.E.2d 886 (1999).

⁵⁴ Commonwealth v. Simon, 923 N.E.2d 58 (2010); Commonwealth v. Mateo-German, 906 N.E.2d 970, (2009); Commonwealth v. Eggleston, 903 N.E.2d 1087 (2009); Commonwealth v. Santiago, 896 N.E.2d 622 (2008); Commonwealth v. Gonzalez, 892 N.E.2d 255 (2008); Commonwealth v. White, 891 N.E.2d 675 (2008); Case of Alves, 884 N.E.2d 468 (2008); Commonwealth v. Kendall, 883 N.E.2d 269 (2008); Commonwealth v. Martin, 850 N.E.2d 555 (2006); Commonwealth v. Angelo Todesca Corp., 842 N.E.2d 930 (2006); Commonwealth v. Isabelle, 828 N.E.2d 53 (2005); Commonwealth v. Lyons, 828 N.E.2d 1 (2005); Kobrin v. Gastfriend, 821 N.E.2d 60 (2005); T.F. v. B.L., 813 N.E.2d 1244 (2004); Local 1652, Intern. Ass'n Of Firefighters v. Town of Framingham, 813 N.E.2d 543 (2004); Commonwealth v. Rahim, 805 N.E.2d 13 (2004); Town of Sudbury v. Scott, 787 N.E.2d 536 (2003); Commonwealth v. Marquez, 749 N.E.2d 673 (2001); Commonwealth v. Neumyer, 731 N.E.2d 1053 (2000).

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

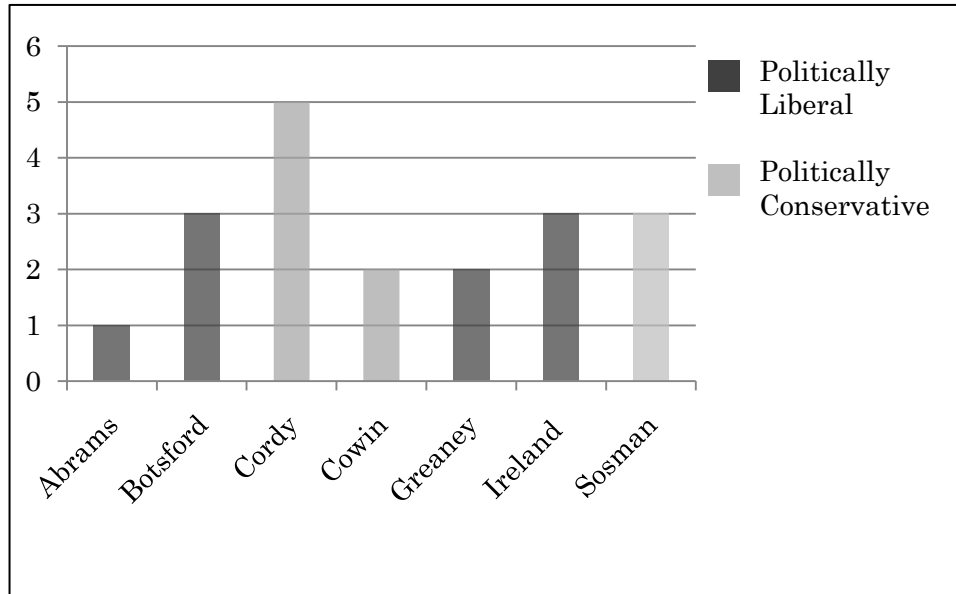
The chart below depicts the number of times Chief Justice Marshall joined an associate justice's dissent. The legend characterizes the ideology of each justice as either politically liberal or conservative. In addition to the current Court, Justices Ruth Abrams, John Greaney, and Martha Sosman are also included, all of whom are now retired from the bench.

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FIGURE 2: ASSOCIATE JUSTICE'S DISSENTS JOINED BY CHIEF JUSTICE MARSHALL



As indicated by the chart, Chief Justice Marshall joined a politically conservative justice's dissent ten times,⁵⁵ or approximately fifty-three percent of the time, while she joined a politically liberal justice's dissent only nine times,⁵⁶ or approximately forty-seven percent of the time. Although this is nearly an even split, because Marshall is regarded as an extremely

⁵⁵ *Commonwealth v. Gonzalez*, 892 N.E.2d 255 (2008) (joining Cordy, J. dissenting); *Commonwealth v. Kendall*, 883 N.E.2d 269 (2008) (joining Cowin, J. dissenting); *Commonwealth v. Martin*, 850 N.E.2d 555 (2006) (joining Cordy, J. dissenting); *Commonwealth v. Angelo Todesca Corp.*, 842 N.E.2d 930 (2006) (joining Cordy, J. dissenting); *Commonwealth v. Isabelle*, 828 N.E.2d 53 (2005) (joining Sosman, J. dissenting); *Commonwealth v. Lyons*, 828 N.E.2d 1 (2005) (joining Cordy, J. dissenting); *Kobrin v. Gastfriend*, 821 N.E.2d 60 (2005) (joining Sosman, J. dissenting); *Local 1652, Intern. Ass'n Of Firefighters v. Town of Framingham*, 813 N.E.2d 543 (2004) (joining Sosman, J. dissenting); *Town of Sudbury v. Scott*, 787 N.E.2d 536 (2003) (joining Cordy, J. dissenting); *Commonwealth v. Marquez*, 749 N.E.2d 673 (2001) (joining Cowin, J. dissenting).

⁵⁶ *Commonwealth v. Simon*, 923 N.E.2d 58 (2010) (joining Justice Botsford's dissent); *Commonwealth v. Mateo-German*, 906 N.E.2d 970 (2009) (joining Ireland, J. dissenting); *Commonwealth v. Eggleston*, 903 N.E.2d 1087 (2009) (joining Ireland, J. dissenting); *Commonwealth v. Santiago*, 896 N.E.2d 622 (2008) (joining Ireland, J. dissenting); *Commonwealth v. White*, 891 N.E.2d 675 (2008) (joining Botsford, J. dissenting); *Case of Alves*, 884 N.E.2d 468 (2008) (joining Botsford, J. dissenting); *T.F. v. B.L.*, 813 N.E.2d 1244 (2004) (joining Greaney, J. dissenting); *Commonwealth v. Rahim*, 805 N.E.2d 13 (2004) (joining Greaney, J. dissenting); *Commonwealth v. Neumyer*, 731 N.E.2d 1053 (2000) (joining Abram, J. dissenting).

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.⁵⁷ 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.⁵⁸ 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.”⁵⁹ 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.

⁵⁷ *Gonzalez*, 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 *Gonzalez*, 892 N.E.2d at 265.

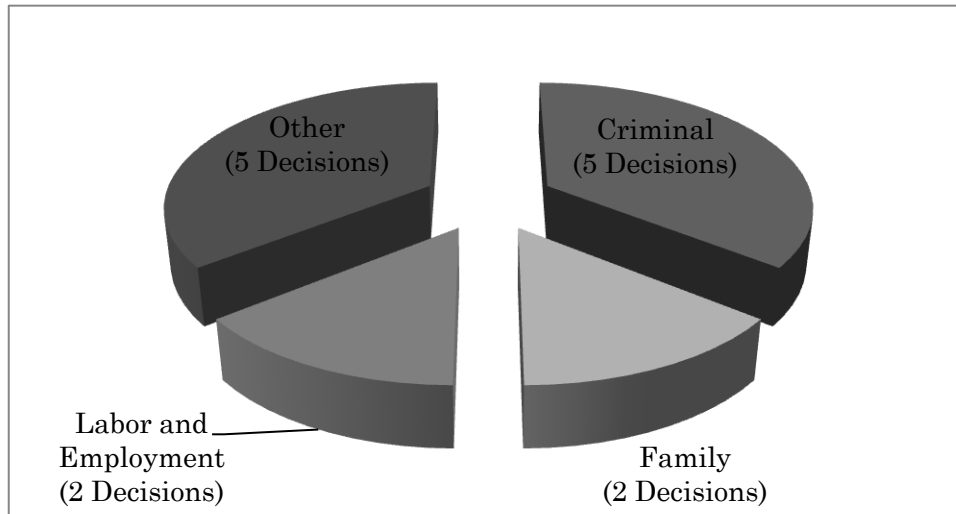
⁵⁹ *Martin*, 850 N.E.2d at 568.

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FIGURE 3: SPLIT DECISIONS AUTHORED BY CHIEF JUSTICE MARSHALL



From 1999 to 2010, Chief Justice Marshall authored 234 opinions.⁶⁰ Of these opinions, only fourteen were split decisions.⁶¹

⁶⁰ *Anzalone v. Admin. Office of Trial Court*, 932 N.E.2d 774 (2010); *In re McDonough*, 930 N.E.2d 1279 (2010); *Ansin v. Craven-Ansin*, 929 N.E.2d 955 (2010); *Brantley v. Hampden Div. of Probate and Family Court Dep't.*, 929 N.E.2d 272 (2010); *Commonwealth v. Marzilli*, 927 N.E.2d 993 (2010); *DeMoranville v. Comm'r of Revenue*, 927 N.E.2d 448 (2010); *Scully v. Tillery*, 926 N.E.2d 154 (2010); *Millennium Equity Holdings, LLC v. Mahlowitz*, 925 N.E.2d 513 (2010); *Wheatley v. Mass. Insurers Insolvency Fund*, 925 N.E.2d 9 (2010); *Commonwealth v. Charles*, 923 N.E.2d 519 (2010); *Commonwealth v. Vasquez*, 923 N.E.2d 524 (2010); *Moot v. Dep't of Env'tl. Protection*, 923 N.E.2d 81 (2010); *Commonwealth v. Stote*, 922 N.E.2d 768 (2010); *Commonwealth v. Mercado*, 922 N.E.2d 140 (2010); *In re Estate of Beaugard*, 921 N.E.2d 954 (2010); *Commonwealth v. Mattei*, 920 N.E.2d 845 (2010); *Commonwealth v. Tyree*, 919 N.E.2d 660 (2010); *In re Zita*, 915 N.E.2d 1067 (2009); *Hitachi High Technologies Am., Inc. v. Bowler*, 916 N.E.2d 322 (2009); *Astra USA, Inc. v. Bildman*, 914 N.E.2d 36 (2009); *Silva v. Rent-A-Center, Inc.*, 912 N.E.2d 945 (2009); *Town Fair Tire Centers, Inc. v. Comm'r of Revenue*, 911 N.E.2d 757 (2009); *Bd. of Registration in Med. v. Hallmark Health Corp.*, 910 N.E.2d 898 (2009); *Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Bd. of Appeal of Billerica*, 909 N.E.2d 1161 (2009); *Feeney v. Dell Inc.*, 908 N.E.2d 753 (2009); *Lobisser Bldg. Corp. v. Planning Bd. of Bellingham*, 907 N.E.2d 1102 (2009); *Commonwealth v. Means*, 907 N.E.2d 646 (2009); *Leavitt v. Brockton Hosp., Inc.*, 907 N.E.2d 213 (2009); *Commonwealth v. Torres*, 905 N.E.2d 101 (2009); *Everett v. 357 Corp.*, 904 N.E.2d 733 (2009); *Commonwealth v. Ruiz*, 903 N.E.2d 201 (2009); *CFM Buckley/North LLC v. Bd. of Assessors of Greenfield*, 902 N.E.2d 381 (2009); *In re Walker's Case*, 901 N.E.2d 1227 (2009); *Comm'r of Rev. v. Comcast Corp.*, 901 N.E.2d 1185 (2009); *Commonwealth v. Bernardo B.*, 900 N.E.2d 834 (2009); *Boston Hous. Auth. v. Bridgewater*, 898 N.E.2d 848 (2009); *Case of Sellers*, 898 N.E.2d 494 (2008); *Saab v. Mass. CVS Pharmacy, LLC*, 896 N.E.2d 615 (2008); *O'Connor v. Redstone*, 896 N.E.2d 595 (2008); *Pavian, Inc. v. Hickey*, 895 N.E.2d 480 (2008); *Commonwealth v. Goewey*, 894 N.E.2d 1128 (2008); *Salvas v. Wal-Mart Stores, Inc.*, 893 N.E.2d 1187 (2008); *McMenimen v. Passatempo*, 892 N.E.2d 287 (2008); *Hershman-Tcherepnin v. Tcherepnin*, 891 N.E.2d 194 (2008); *Renzi v. Paredes*, 890 N.E.2d 806 (2008); *Matsuyama v. Birnbaum*, 890 N.E.2d 819 (2008); *WB & T Mortg. Co., Inc. v. Bd. of Assessors*

of Boston, 889 N.E.2d 404 (2008); *Sweenie v. A.L. Prime Energy Consultants*, 887 N.E.2d 238 (2008); *Commonwealth v. Stephens*, 885 N.E.2d 785 (2008); *Cahaly v. Benistar Property Exchange Trust Co., Inc.*, 885 N.E.2d 800 (2008); *Taylor v. Bd. of Appeals of Lexington*, 885 N.E.2d 98 (2008); *Martin v. Commonwealth*, 884 N.E.2d 442 (2008); *Case of Haslam's*, 883 N.E.2d 949 (2008); *Scott v. NG U.S. 1, Inc.*, 881 N.E.2d 1125 (2008); *Carter v. Lynn Hous. Auth.*, 880 N.E.2d 778 (2008); *In re Crossen*, 880 N.E.2d 352 (2008); *T & D Video, Inc. v. City of Revere*, 876 N.E.2d 842 (2007); *DiLiddo v. Oxford St. Realty, Inc.*, 876 N.E.2d 421 (2007); *Bernier v. Bernier*, 873 N.E.2d 216 (2007); *Commonwealth v. Alfonso*, 871 N.E.2d 1066 (2007); *Commonwealth v. Madigan*, 871 N.E.2d 478 (2007); *Cioch v. Treasurer of Ludlow*, 871 N.E.2d 469 (2007); *Town Of Middleborough v. Hous. Appeals Comm.*, 870 N.E.2d 67 (2007); *Devine v. Town of Nantucket*, 870 N.E.2d 591 (2007); *Commonwealth v. Cannon*, 869 N.E.2d 594 (2007); *Suffolk Const. Co., Inc. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33 (2007); *Commonwealth v. Braley*, 867 N.E.2d 743 (2007); *Maffei v. Roman Catholic Archbishop of Boston*, 867 N.E.2d 300 (2007); *In re Will of Crabtree*, 865 N.E.2d 1119 (2007); *Commonwealth v. Pring-Wilson*, 863 N.E.2d 936 (2007); *Chapman v. Katz*, 862 N.E.2d 735 (2007); *Vranos v. Franklin Med. Ctr.*, 862 N.E.2d 11 (2007); *Moot v. Dep't of Env'tl Prot.*, 861 N.E.2d 410 (2007); *Household Retail Serv., Inc. v. Comm'r of Revenue*, 859 N.E.2d 837 (2007); *In re Grossman*, 859 N.E.2d 423 (2007); *John Hancock Mut. Life Ins. Co. v. Banerji*, 858 N.E.2d 277 (2006); *A.H. v. M.P.*, 857 N.E.2d 1061 (2006); *Commonwealth v. Galicia*, 857 N.E.2d 463 (2006); *Commonwealth v. Dagraca*, 854 N.E.2d 1249 (2006); *In re Lupo*, 851 N.E.2d 404 (2006); *Senior Hous. Properties Trust v. HealthSouth Corp.*, 850 N.E.2d 1027 (2006); *Carney v. Attorney Gen.*, 850 N.E.2d 521 (2006); *Commonwealth v. Gilbert*, 849 N.E.2d 1246 (2006); *Bleich v. Maimonides Sch.*, 447 Mass. 38, 849 N.E.2d 185 (2006); *Standerwick v. Zoning Bd. of Appeals of Andover*, 849 N.E.2d 197 (2006); *O'Rourke v. Hunter*, 848 N.E.2d 382 (2006); *Haglund v. Philip Morris, Inc.*, *Boehm v. Premier Ins. Co.*, 846 N.E.2d 1145 (2006); *Gasior v. Mass. Gen. Hosp.*, 846 N.E.2d 1133 (2006); *Commonwealth v. Choern*, 845 N.E.2d 310 (2006); *Haufler v. Zotos*, 845 N.E.2d 322 (2006); *Am. Lithuanian Naturalization Club, Athol, Mass., Inc. v. Bd. of Health of Athol*, 844 N.E.2d 231 (2006); *Newell v. Dep't of Mental Retardation*, 843 N.E.2d 1084 (2006); *Doe v. Harbor Sch., Inc.*, 843 N.E.2d 1058 (2006); *Pardo v. Gen. Hosp. Corp.*, 841 N.E.2d 692 (2006); *Hershenow v. Enter. Rent-A-Car Co. of Boston, Inc.*, 840 N.E.2d 526 (2006); *Town of Holden v. Wachusett Regional Sch. Dist. Comm.*, 840 N.E.2d 37 (2005); *Seng v. Commonwealth*, 839 N.E.2d 283 (2005); *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, 837 N.E.2d 1121 (2005); *Commonwealth v. Daniels*, 837 N.E.2d 683 (2005); *Commonwealth v. Pillai*, 833 N.E.2d 1160 (2005); *Commonwealth v. Rivera*, 833 N.E.2d 1113 (2005); *Commonwealth v. Reed*, 831 N.E.2d 901 (2005); *Boston Edison Co. v. Town of Bedford*, 831 N.E.2d 882 (2005); *Gove v. Zoning Bd. of Appeals of Chatham*, 831 N.E.2d 865 (2005); *Foster v. Group Health Inc.*, 830 N.E.2d 1061 (2005); *Commonwealth v. DeMarco*, 830 N.E.2d 1068 (2005); *Goldberg v. Bd. of Health of Granby*, 830 N.E.2d 207 (2005); *Watson v. Baker*, 829 N.E.2d 648 (2005); *Eisenstein v. David G. Conlin, P.C.*, 827 N.E.2d 686 (2005); *Commonwealth v. Lam*, 827 N.E.2d 209 (2005); *Sullivan v. Liberty Mut. Ins. Co.*, 825 N.E.2d 522 (2005); *City of Boston v. Boston Police Patrolmen's Ass'n*, 824 N.E.2d 855 (2005); *Cape Cod Times v. Sheriff of Barnstable County*, 823 N.E.2d 375 (2005); *Commonwealth v. Cabral*, 819 N.E.2d 951 (2005); *Case of Walker*, 819 N.E.2d 595 (2004); *Commonwealth v. Zagrodny*, 819 N.E.2d 565 (2004); *In re Discipline of Attorney*, 815 N.E.2d 1072 (2004); *Hodas v. Morin*, 814 N.E.2d 320 (2004); *Commonwealth v. Jewett*, 813 N.E.2d 452 (2004); *Knott v. Racicot*, 812 N.E.2d 1207 (2004); *Darviris v. Petros*, 812 N.E.2d 1188 (2004); *Associated Subcontractors of Mass. Univ. of Mass. Bldg. Auth.*, 810 N.E.2d 1214 (2004); *Cohan v. Feuer*, 810 N.E.2d 1222 (2004); *White v. Blue Cross and Blue Shield of Mass., Inc.*, 809 N.E.2d 1034 (2004); *Marram v. Kobrick Offshore Fund, Ltd.*, 809 N.E.2d 1017 (2004); *Commonwealth v. Gaudette*, 808 N.E.2d 798 (2004); *Mulhern v. MacLeod*, 808 N.E.2d 778 (2004); *Commonwealth v. Ennis*, 808 N.E.2d 783 (2004); *Opara v. Mass. Mut. Life Ins. Co.*, 806 N.E.2d 924 (2004); *Ramirez v. Bd. of Registration in Med.*, 806 N.E.2d 410 (2004); *Swift v. AutoZone, Inc.*, 806 N.E.2d 95 (2004); *Lavecchia v. Mass. Bay Transp. Auth.*, 804 N.E.2d 932 (2004); *Ali v. City of Boston*, 804 N.E.2d 927 (2004); *Commonwealth v. Deberry*, 804 N.E.2d 911 (2004); *Commonwealth v. Kirker*, 804 N.E.2d 922 (2004); *Commonwealth v. Zimmerman*, 804 N.E.2d 336 (2004); *Fitchburg Gas & Elec. Light*

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Co. v. Dep't of Telecomm. & Energy, 801 N.E.2d 220 (2004); Commonwealth v. Wallis, 800 N.E.2d 699 (2003); Coke v. Equity Residential Properties Trust, 800 N.E.2d 280 (2003); City of New Bedford v. Mass. Com'n Against Discrimination, 799 N.E.2d 578 (2003); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (2003); *In re* Will of Crabtree, 795 N.E.2d 1157 (2003); Trio Algarvio, Inc. v. Comm'r of Dep't. of Env'tl Prot., 795 N.E.2d 1148 (2003); Triplett v. Town of Oxford, 791 N.E.2d 310 (2003); *In re* Guardianship of Hocker, 791 N.E.2d 302 (2003); Brittle v. City of Boston, 790 N.E.2d 208 (2003); Commonwealth v. Quinn, 789 N.E.2d 138 (2003); Connors v. Northeast Hosp. Corp., 789 N.E.2d 129 (2003); Commonwealth v. Caputo, 786 N.E.2d 352 (2003); Krapf v. Krapf, 786 N.E.2d 318 (2003); Commonwealth v. Ennis, 785 N.E.2d 677 (2003); Atlanticare Med. Ctr. v. Comm'r of Div. of Med. Assistance, 785 N.E.2d 346 (2003); Sch. Comm. of Pittsfield v. United Educators of Pittsfield, 784 N.E.2d 11 (2003); Sch. Comm. of Newton v. Newton Sch. Custodians Ass'n, Local 454, 784 N.E.2d 598 (2003); Buster v. George W. Moore, Inc., 783 N.E.2d 399 (2003); Commonwealth v. Vatcher, 781 N.E.2d 1277 (2003); Commonwealth v. Vardinski, 780 N.E.2d 1278 (2003); Eccleston v. Bankosky, 780 N.E.2d 1266 (2003); *In re* Grella, 777 N.E.2d 167 (2002); Wong v. Univ. of Mass., 777 N.E.2d 161 (2002); Haverty v. Comm'r of Corr., 776 N.E.2d 973 (2002); Commonwealth v. Santiago, 774 N.E.2d 143 (2002); Newman v. Commonwealth, 773 N.E.2d 963 (2002); Chandler v. County Comm'rs of Nantucket Cnty., 772 N.E.2d 578 (2002); *In re* Grand Jury Investigation, 772 N.E.2d 9 (2002); *In re* Care and Prot. Summons, 770 N.E.2d 456 (2002); Commonwealth v. Martinez, 769 N.E.2d 273 (2002); Zoning Bd. of Appeals of Wellesley v. Ardmore Apartments Ltd. P'ship, 767 N.E.2d 584 (2002); Commonwealth v. Dyous, 767 N.E.2d 51 (2002); Commonwealth v. Fernandes, 766 N.E.2d 1288 (2002); *In re* Abrams, 767 N.E.2d 15 (2002); Youngworth v. Commonwealth, 766 N.E.2d 834 (2002); Comm'r of Revenue v. Oliver, 765 N.E.2d 742 (2002); Commonwealth v. Serino, 765 N.E.2d 237 (2002); DeMatteo v. DeMatteo, 762 N.E.2d 797 (2002); Bates v. Dir. of Office of Campaign and Political Finance, 763 N.E.2d 6 (2002); Commonwealth v. Azar, 760 N.E.2d 1224 (2002); Commonwealth v. Stroyny, 760 N.E.2d 1201 (2002); Cohen v. Bolduc, 760 N.E.2d 714 (2002); Commonwealth v. Fletcher, 760 N.E.2d 273 (2002); Woodward v. Comm'r of Social Sec., 760 N.E.2d 257 (2002); Mello v. License Com'n of Revere, 759 N.E.2d 1201 (2001); Commonwealth v. Duran, 755 N.E.2d 260 (2001); R.W. Granger & Sons, Inc. v. J & S Insulation, Inc., 754 N.E.2d 668 (2001); Weber v. Cmty. Teamwork, Inc., 752 N.E.2d 700 (2001); Kordis v. Appeals Court, 751 N.E.2d 355 (2001); Hoffman v. Houghton Chem. Corp., 751 N.E.2d 848 (2001); Commonwealth v. Burgess, 749 N.E.2d 112 (2001); Dahill v. Police Dept. of Boston, 748 N.E.2d 956 (2001); Commonwealth v. Coleman, 747 N.E.2d 666 (2001); Martin v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 747 N.E.2d 131 (2001); *In re* Paternity of Cheryl, 746 N.E.2d 488 (2001); Kelley v. Neilson, 745 N.E.2d 952 (2001); *In re* Adoption of Willow, 745 N.E.2d 330 (2001); Commonwealth v. Cyr, 744 N.E.2d 1082 (2001); Walker v. Walker, 744 N.E.2d 60 (2001); Hillman v. Hillman, 744 N.E.2d 1078 (2001); CNA Ins. Cos. v. Sliski, 744 N.E.2d 634 (2001); Commonwealth v. Seabrooks, 743 N.E.2d 831 (2000); Commonwealth v. Cardarelli, 743 N.E.2d 823 (2000); Patsos v. First Albany Corp., 741 N.E.2d 841 (2000); Darius v. City of Boston, 741 N.E.2d 52 (2000); Town of Hingham v. Dep't of Telecomm. & Energy, 740 N.E.2d 984 (2000); Commonwealth v. Valiton, 737 N.E.2d 1257 (2000); Commonwealth v. Connor C., 738 N.E.2d 731 (2000); Commonwealth v. Jones, 737 N.E.2d 1247 (2000); Boston Herald, Inc. v. Sharpe, 737 N.E.2d 859 (2000); L.W.K. v. E.R.C., 735 N.E.2d 359 (2000); Commonwealth v. Francis, 734 N.E.2d 315 (2000); Commonwealth v. Harwood, 733 N.E.2d 547 (2000); Pereira v. Comm'r of Social Services, 733 N.E.2d 112 (2000); Commonwealth v. Vinton, 733 N.E.2d 55 (2000); Dep't of Revenue v. C.M.J., 731 N.E.2d 501 (2000); Kadlick v. Dep't of Mental Health, 731 N.E.2d 495 (2000); Wakefield Teachers Ass'n v. Sch. Comm. of Wakefield, 731 N.E.2d 63 (2000); Theos & Sons, Inc. v. Mack Trucks, Inc., 729 N.E.2d 1113 (2000); Wynn & Wynn, P.C. v. Mass. Com'n Against Discrimination, 729 N.E.2d 1068 (2000); Smith v. Comm'r of Transitional Assistance, 729 N.E.2d 627 (2000); *In re* Adoption of Greta, 729 N.E.2d 273 (2000); *In re* Adoption of Vito, 728 N.E.2d 292 (2000); Commonwealth v. Sparks, 727 N.E.2d 78 (2000); Commonwealth v. Bregoli, 727 N.E.2d 59 (2000); Commonwealth v. Wolinski, 726 N.E.2d 930 (2000); Doe v. Senechal, 725 N.E.2d 225 (2000); Commonwealth v. Ellerbe, 723 N.E.2d 977 (2000); Commonwealth v. McCravy, 723 N.E.2d 517 (2000); Commonwealth v. Whitman, 722 N.E.2d 1284 (2000); Glidden v. Maglio,

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.⁶² In this decision, Chief Justice Marshall stated that

[t]he marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason [A]n 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.⁶³

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.⁶⁴ Following this decision, Massachusetts became the first state to legalize same-sex marriage.⁶⁵

Dissenting opinions were filed by Justices Cordy, Spina, and the late Justice Sosman.⁶⁶ 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.⁶⁷ Justice Sosman also found it

722 N.E.2d 971 (2000); *Nat’l Lumber Co. v. LeFrancois Const. Corp.*, 723 N.E.2d 10 (2000); *Crenshaw v. Macklin*, 722 N.E.2d 458 (2000); *Commonwealth v. Christian*, 722 N.E.2d 416 (2000); *Commonwealth v. Rosario*, 721 N.E.2d 903 (1999).

⁶¹ *Commonwealth v. Charles*, 923 N.E.2d 519 (2010) (Spina, J., dissenting); *Commonwealth v. Vasquez*, 923 N.E.2d 524 (2010) (Cordy, J., concurring in part and dissenting in part; Spina, J., dissenting); *Commonwealth v. Bernardo B.*, 900 N.E.2d 834 (2009) (Spina, J., dissenting); *Carter v. Lynn Hous. Auth.*, 880 N.E.2d 778 (2008) (Ireland, J., dissenting); *Hershenow v. Enter. Rent-A-Car Co. of Boston, Inc.*, 840 N.E.2d 526 (2006) (Greaney, J., dissenting); *White v. Blue Cross and Blue Shield of Mass., Inc.*, 809 N.E.2d 1034 (2004) (Cowin, J., dissenting); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (2003) (Spina, J., dissenting; Cordy, J., dissenting; Sosman, J., dissenting); *Brittle v. City of Boston*, 790 N.E.2d 208 (2003) (Cowin, J., dissenting); *Eccleston v. Bankosky*, 780 N.E.2d 1266 (2003) (Cowin, J., dissenting); *Haverty v. Comm’r of Corr.*, 776 N.E.2d 973 (2002) (Cordy, J., dissenting); *Commonwealth v. Santiago*, 774 N.E.2d 143 (2002) (Cowin, J., dissenting); *Bates v. Dir. of Office of Campaign and Political Finance*, 763 N.E.2d 6 (2002) (Cowin, J., dissenting; Spina, J., dissenting); *CNA Ins. Co. v. Sliski*, 744 N.E.2d 634 (2001) (Spina, J., dissenting); *L.W.K. v. E.R.C.*, 735 N.E.2d 359 (2000) (Cowin, J., dissenting).

⁶² *Goodridge*, 798 N.E.2d 941.

⁶³ *Id.* at 968.

⁶⁴ *Id.* at 957.

⁶⁵ Pam Belluck, *Massachusetts Gay Marriage to Remain Legal*, N.Y. TIMES, June 15, 2007.

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

⁶⁷ *Id.*

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inappropriate to rule in favor of same-sex marriage without a more prolonged period of observation of this new family structure.⁶⁸ She stated “until such a time as it is certain that redefinition will not have unintended and undesirable social consequences,”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.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.⁷¹ Generally, these criminally-based dissents are pro-criminal defendant, and in furtherance of ensuring certain fundamental rights.

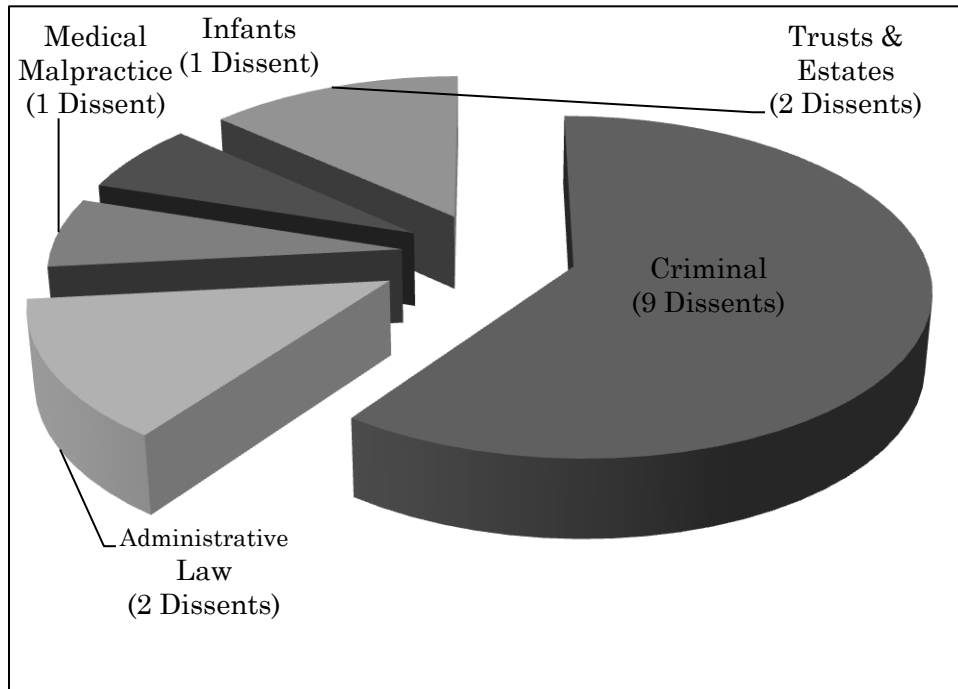
⁶⁸ *Id.* at 978.

⁶⁹ *Id.* at 982.

⁷⁰ *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787 (2010); *In re Grand Jury Subpoena*, 912 N.E.2d 970 (2009); *Commonwealth v. Blake*, 909 N.E.2d 532 (2009); *Ciampi v. Comm’r of Corr.*, 892 N.E.2d 270 (2008); *Coombes v. Florio*, 877 N.E.2d 567 (2007); *Commonwealth v. Durham*, 843 N.E.2d 1035 (2006); *Commonwealth v. Feyenord*, 833 N.E.2d 590 (2005); *In re Angela*, 833 N.E.2d 575 (2005); *Commonwealth v. Chapman*, 825 N.E.2d 508 (2005); *Commonwealth v. Harris*, 825 N.E.2d 58 (2005); *Peterson v. Comm’r of Revenue*, 806 N.E.2d 78 (2004); *Bongaards v. Millen*, 793 N.E.2d 335 (2003); *Commonwealth v. Hyde*, 750 N.E.2d 963 (2001); *Commonwealth v. Buccella*, 751 N.E.2d 373 (2001); *Roe v. Attorney Gen.*, 750 N.E.2d 897 (2001).

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.

FIGURE 4: DISSENTS AUTHORED BY CHIEF JUSTICE MARSHALL



2. Topical Breakdown of Criminal Dissents Authored by Chief Justice Marshall

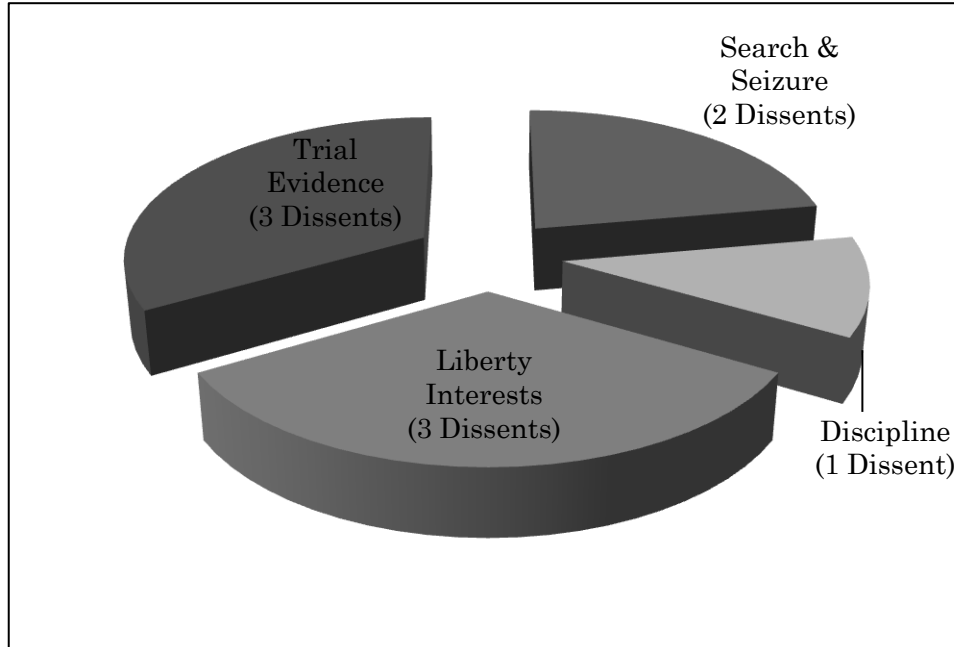
The chart below specifies the types of criminal matters in which Chief Justice Marshall authored a dissent. The search and seizure cases involve the Fourth Amendment and the Massachusetts Declaration of Rights' protection against unlawful searches and seizures. Trial evidence focuses on the admissibility 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.

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FIGURE 5: TOPICAL BREAKDOWN OF CRIMINAL DISSENTS AUTHORED BY CHIEF JUSTICE MARSHALL



An example of a criminal matter involving liberty interests is *Commonwealth v. Blake*.⁷² 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.⁷³ Chief Justice Marshall dissented, stating that there was no compelling state interest in waiting this extended period of time.⁷⁴ Moreover, she stressed the "precious"⁷⁵ 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."⁷⁶ Therefore,

⁷² *Blake*, 909 N.E.2d 532.

⁷³ *Id.* at 533.

⁷⁴ *Id.* at 545.

⁷⁵ *Id.* at 543.

⁷⁶ *Id.* at 544.

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.

⁷⁷ *Roe v. Attorney Gen.*, 750 N.E.2d 897, 915 (2001)..

⁷⁸ *Id.* at 917.

⁷⁹ *Id.*

⁸⁰ *In re Grand Jury Subpoena*, 912 N.E.2d 970 (2009); *Commonwealth v. Blake*, 909 N.E.2d 532 (2009); *Ciampi v. Comm'r of Corr.*, 892 N.E.2d 270 (2008); *Commonwealth v. Durham*, 843 N.E.2d 1035 (2006); *Commonwealth v. Feyenord*, 833 N.E.2d 590 (2005); *Commonwealth v. Chapman*, 825 N.E.2d 508 (2005); *Commonwealth v. Harris*, 825 N.E.2d 58 (2005); *Commonwealth v. Hyde*, 750 N.E.2d 963 (2001). When calculating the number of times a justice joined an opinion, the information was based on individual justices and not individual cases. Therefore, if two justices joined an opinion that was counted as two.

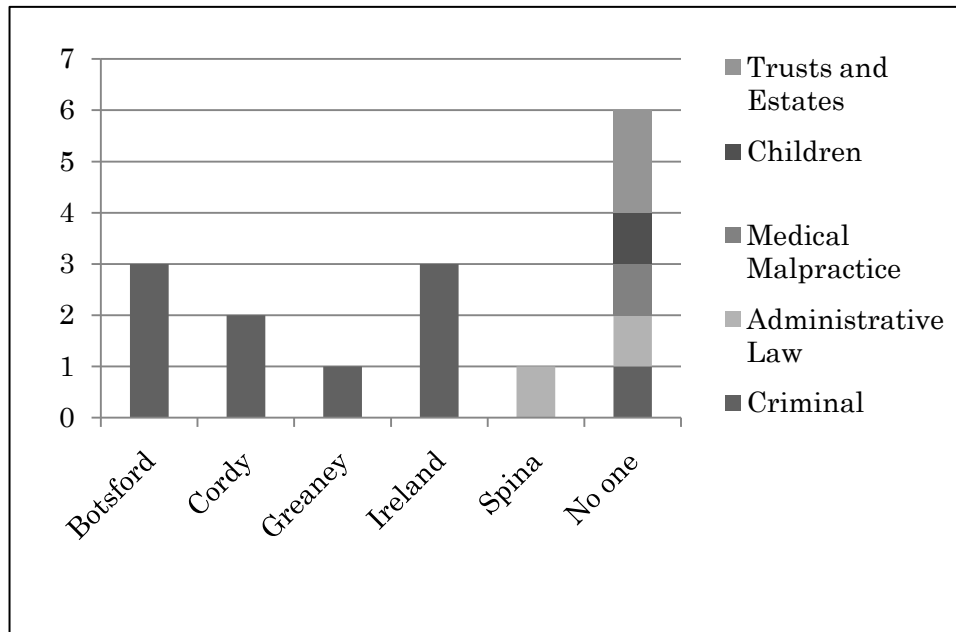
⁸¹ *In re Grand Jury Subpoena*, 912 N.E.2d 970 (2009); *Commonwealth v. Blake*, 909 N.E.2d 532 (2009); *Ciampi v. Comm'r of Corr.*, 892 N.E.2d 270 (2008); *Commonwealth v. Durham*, 843 N.E.2d 1035 (2006); *Commonwealth Feyenord*, 833 N.E.2d 590 (2005); *Commonwealth v. Chapman*, 825 N.E.2d 508 (2005); *Commonwealth v. Harris*, 825 N.E.2d 58 (2005); *Commonwealth v. Hyde*, 750 N.E.2d 963 (2001).

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FIGURE 6: TOPICAL BREAKDOWN OF CRIMINAL DISSENTS AUTHORED BY CHIEF JUSTICE MARSHALL



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.⁸² In her dissent, Chief Justice Marshall stressed that the “actions of public officials taken in their public capacities are not protected from exposure.”⁸³ 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.⁸⁴

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

⁸² *Hyde*, 750 N.E.2d 963, 964–66, 971.

⁸³ *Id.* at 975 (Marshall, J., dissenting).

⁸⁴ *Id.* at 976 (Marshall, J., dissenting).

subpoena.⁸⁵ 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.”⁸⁶ Here, she asserted that recording phone calls for the limited purpose of security does not translate into unlimited dissemination to a grand jury.⁸⁷ 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.⁸⁸ 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.”⁸⁹

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,⁹⁰ thirteen of these were criminal matters.⁹¹ Furthermore, in all fourteen criminal cases, she joined a dissent that supported the rights of a criminal defendant.⁹² 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.

⁸⁶ *Id.* at 979 (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987) (Marshall, J., dissenting)).

⁸⁷ *Id.* at 980 (Marshall, J., dissenting).

⁸⁸ *Id.* at 982 (Marshall, J., dissenting).

⁸⁹ *Id.*

⁹⁰ *See supra* Figure 1.

⁹¹ *Commonwealth v. Simon*, 923 N.E.2d 58 (2010); *Commonwealth v. Mateo-German*, 906 N.E.2d 970 (2009); *Commonwealth v. Eggleston*, 903 N.E.2d 1087 (2009); *Commonwealth v. Santiago*, 896 N.E.2d 622 (2008); *Commonwealth v. Gonzalez*, 892 N.E.2d 255 (2008); *Commonwealth v. White*, 891 N.E.2d 675 (2008); *Commonwealth v. Kendall*, 883 N.E.2d 269 (2008); *Commonwealth v. Martin*, 850 N.E.2d 555 (2006); *Commonwealth v. Angelo Todesca Corp.*, 842 N.E.2d 930 (2006); *Commonwealth v. Isabelle*, 828 N.E.2d 53 (2005); *Commonwealth v. Lyons*, 828 N.E.2d 1 (2005); *Commonwealth v. Rahim*, 805 N.E.2d 13 (2004); *Commonwealth v. Marquez*, 749 N.E.2d 673 (2001); *Commonwealth v. Neumyer*, 731 N.E.2d 1053 (2000).

⁹² *See id.*

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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.