

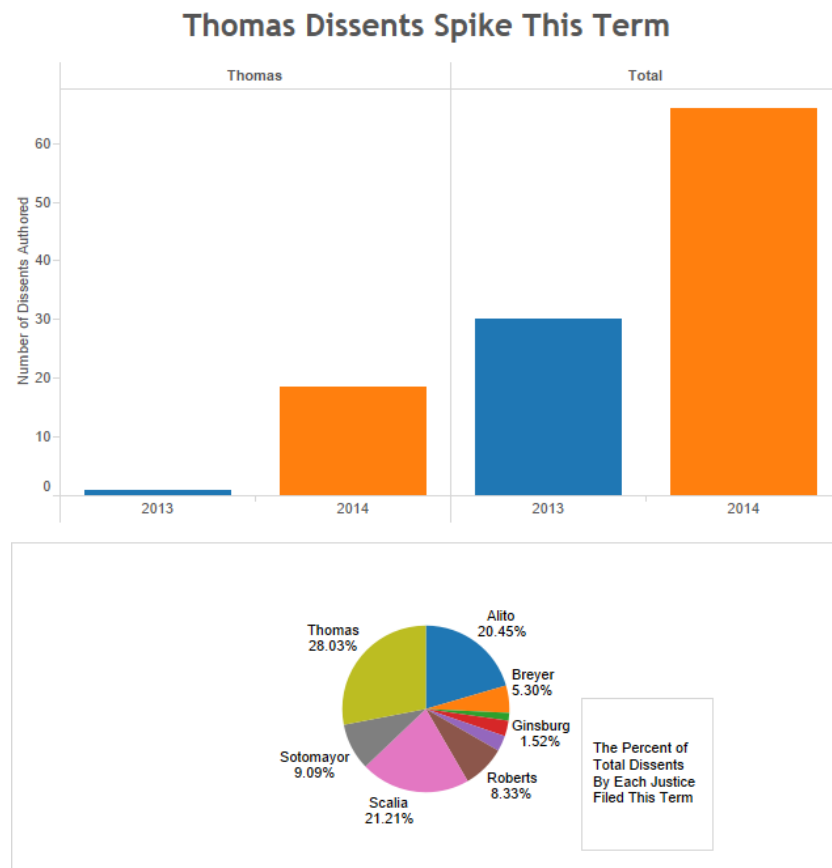
## Justice Thomas Lets His Dissents Do The Talking

By Jake Simpson

*Law360, New York (June 30, 2015, 4:37 PM ET)* -- The most prolific U.S. Supreme Court justice this term didn't utter a single word during oral arguments, as usual. But Justice Clarence Thomas put his stamp on the session by setting a personal record for opinions and dissents and writing far more than any of his colleagues.

Justice Thomas wrote eight of the 66 signed majority opinions for the high court's October 2014 term, which ended Monday. In the 58 cases where another justice wrote the majority opinion, he wrote a concurrence or dissent an astonishing 29 times.

### Thomas Dissents Spike This Term

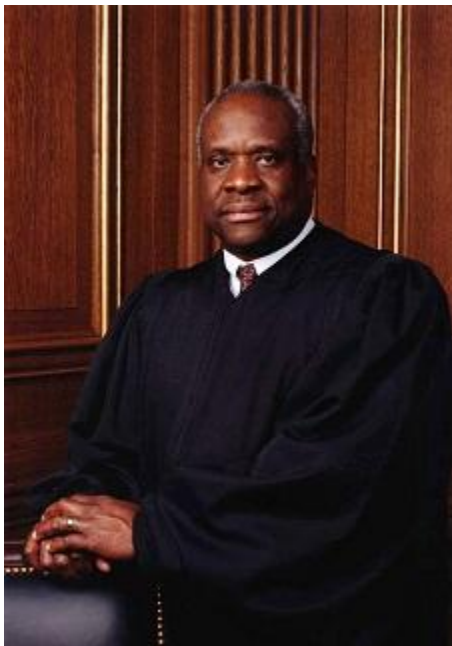


Justice Thomas' 17 dissents and three partial dissents this term were more than Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, Sonia Sotomayor and Anthony Kennedy wrote — combined. His nine concurrences and three partial concurrences also topped the court this term.

"When you're talking about almost 20 dissents, and almost 30 separate opinions, that's a historically large number," said Dan Himmelfarb, an appellate partner at Mayer Brown LLP who once clerked for Thomas.

Justice Thomas' dissents and concurrences ranged from lengthy procedural musings on prior court decisions to tart one-paragraph rebuttals of his fellow justices. When Justice Kennedy expressed concern about the solitary confinement of a convicted murderer in *Davis v. Ayala*, Justice Thomas wrote a three-sentence concurring opinion noting that the inmate's accommodations were "a far sight more spacious than those in which his victims ... now rest."

The many liberal decisions authored by the court this term gave Justice Thomas more opportunities to pen dissents than he had in previous terms. He was in the majority in just 62.3 percent of cases this term, according to Law360 data, well below his 84.7 percent average over the previous five terms. He and his fellow conservatives, Justices Antonin Scalia and Samuel A. Alito Jr., wrote 70 percent of the court's dissents this term.



Justice Clarence Thomas

But Justice Thomas' esoteric views often prompted him to write on his own in cases where Justices Scalia or Alito wrote the primary dissent. In *Alabama Democratic Conference v. Alabama*, the high court ruled in March that an Alabama district court had misread the Voting Rights Act. Justice Thomas joined Justice Scalia's main dissent and then penned his own dissent that attacked decades of Supreme Court precedent interpreting the Voting Rights Act.

"I write only to point out that, as this case painfully illustrates, our jurisprudence in this area continues

to be infected with error," he said in his dissent.

Again and again this term, Justice Thomas set his sights on both the majority opinion in a case and the precedent it referenced, repudiating the stare decisis doctrine of following legal principles laid down in previous decisions. His dissents and concurrences this term took on past Supreme Court rulings affirming the authority of government agencies and applying the so-called disparate impact doctrine to housing discrimination, among others.

"Thomas is much less willing to hold with stare decisis, and he's been that way for a long time," Himmelfarb said. "He has very specific views about things."

Some of Justice Thomas' most strongly held legal views stand in contrast to those of Justices Scalia and Alito, making him more likely to express those views in a solo dissent or concurrence.

In *EEOC v. Abercrombie & Fitch Stores Inc.*, he was the only dissenter from Justices Scalia's majority opinion that Abercrombie & Fitch could not refuse to hire a Muslim woman because her headscarf violated the company's employee dress code policy.

"Unlike the majority, I adhere to what I had thought before today was an undisputed proposition: Mere application of a neutral policy cannot constitute 'intentional discrimination,'" he wrote.

Justice Thomas also penned his own separate opinions in cases concerning the dormant Commerce Clause and the Confrontation Clause, both areas of the law where he holds strong views, according to Himmelfarb.

Though the next Supreme Court term may not have the confluence of factors that led Justice Thomas to write so often, industry watchers said he is unlikely to return to his output level from the 2013 term, when he wrote just one dissent and five concurrences.

Goldstein & Russell PC partner Thomas C. Goldstein, whose 35 Supreme Court oral arguments have all been during Justice Thomas' tenure on the court, said that he has become "vastly more efficient" in writing majority and separate opinions than he was 10 years ago.

"It's been amazing that he can put so many stamps on the court's law and written record," Goldstein said. "In that sense, he's been the court's most influential justice."

--Editing by Kat Laskowski and Katherine Rautenberg.