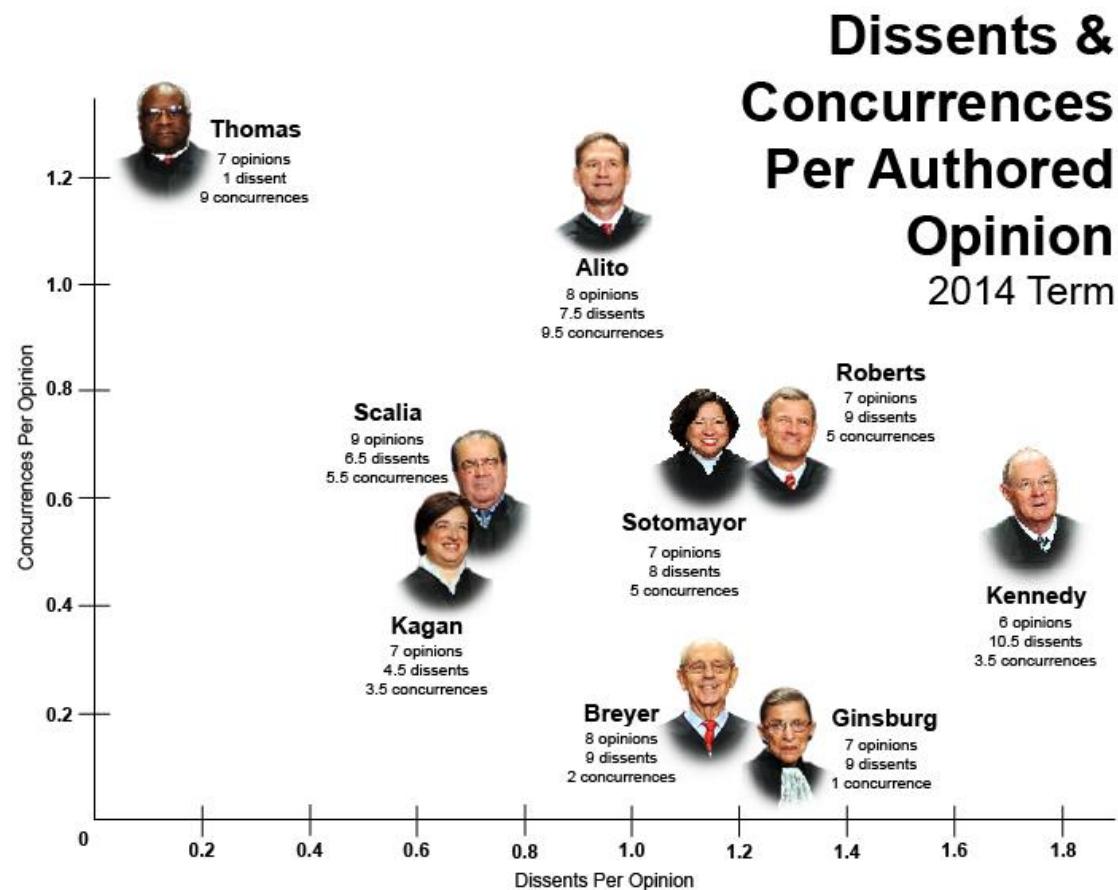


## Three Justices Trusted With Most Controversial Opinions

By Ed Beeson

*Law360, New York (June 29, 2015, 8:58 PM ET) --* In the divisive U.S. Supreme Court term that just ended, three justices stood out for rendering close opinions that drew the most dissents, showing their ability to build coalitions around controversial legal ideas and keep them intact despite fundamental opposition.

From gay marriage to campaign finance, Justice Anthony Kennedy, Chief Justice John G. Roberts and Justice Ruth Bader Ginsburg were entrusted to render majority opinions on controversial topics that sparked multiple dissenting views from the minority of the bench.



Justice Kennedy by far was the author of the court's most divided decisions. In six opinions for the majority of the court for the 2014 term, he received 10 full dissents, plus one partial dissent.

In other words, for every opinion he wrote, Justice Kennedy received 1.75 dissents in response, according to data tracked by Law360.

That includes the four dissents from each of the court's conservatives over his 28-page ruling in *Obergefell v. Hodges*, **the historic decision** that declared same-sex marriage a constitutional right.

By comparison, the chief justice and Justice Ginsburg each crafted seven majority opinions and received nine dissents in return. On average, for every opinion they wrote they received 1.29 opinions in disagreement.

All three justices also garnered fewer concurring opinions this term than they did last year, according to Law360's data.

Overall, dissenting opinions skyrocketed during the 2014 term. The court, led by its conservative wing, issued 65 dissents this term — nearly the same number of cases it decided — compared to the 30 dissents delivered across 67 cases issued last term.

The average number of dissents per opinion was also up significantly this term compared to last. Not counting per curiam decisions, the average proportion of dissents per opinion was 0.98. Last year's proportion was 0.45 dissents per opinion.

Legal experts say it is not the justice writing the opinion who invites dissent, but the underlying case itself, as is evident in the hotly contested Obergefell decision.

"I would not agree that certain justices attract more dissent because of who they are and what they say," Rory Little, a law professor at the University of California Hastings, said.

The number of dissents per opinion, particularly the opinions by more junior justices, is likely to fluctuate year-to-year based on what cases are assigned to the judges.

Still, scholars say, there are a couple of clear reasons why Justice Kennedy would be faced with so many contrarian opinions in one term. His role as both the court's swing vote and one of its senior justices leaves him with many of the toughest and most controversial cases to write.

The senior judge in the majority assigns who writes the opinion of the court, which makes it almost certain that Kennedy will be in that seat whenever the court's liberal wing wins a case on a 5-4 majority, notes Charles Rothfeld, special counsel at Mayer Brown LLP.

"More often than chance dictates, he is going to give himself the important and controversial cases," said Rothfeld, who focuses his practice on Supreme Court and appellate litigation.

Kennedy's role as the swing vote also confers him an advantage when he joins the court's conservatives as well, Rothfeld and others added. To cement his vote, the ranking justice may assign him the opinion.

"The best way to keep your fifth vote, if your fifth vote is Kennedy, is to get him to write the opinion," said Aaron Saiger, a law professor at Fordham University.

On the whole, Justice Kennedy rendered majority opinions in some of the term's most contested votes. He wrote two 5-4 rulings, two 6-3 opinions and one 6-2 opinion. Only one of his opinions was unanimous.

Curiously, though, Justice Kennedy was one of the least likely to issue a dissent himself, delivering just two over the term. Justice Clarence Thomas, on the other hand, delivered 18 full dissents and one partial dissent, more than any other.

Just as Justice Kennedy is likely to assign himself the important and controversial cases, so too would Chief Justice Roberts. By default, "those are the ones that are going to generate dissents," Rothfeld said

Yet as this past term bears out, there is no telling what will inspire dissenting justices to issue their own opinions rather than latch on to the main dissent. One of the most controversial cases of the term — King v. Burwell, which upheld the **Affordable Care Act's use of subsidies** — last week yielded only one dissenting opinion from the three conservative justices who decided not to join the majority.

An earlier decision by Chief Justice Roberts, in Williams-Yulee v. The Florida Bar, on its own brought three dissents when the chief justice ruled that the speech of judicial candidates can be regulated under the First Amendment and that the state of Florida is permitted to ban elected judges from soliciting campaign contributions.

Justice Ginsburg also netted three dissents from a single opinion, in Monday's Arizona State Legislature v. Arizona Independent Redistricting Commission, which allows voters in the state to take redistricting authority away from state lawmakers and place it with an independent, nonpartisan commission.

While the 82-year-old justice, who over the past year became something of a pop-culture icon nicknamed the Notorious RBG, saw her conservatives counterparts delivering most of the dissents to her opinions this term, she also faced an unusual disagreement from the court's most junior jurist.

In Yates v. U.S., the **infamous "fish-dumping" ruling**, Justice Elena Kagan, a liberal, joined with Justices Antonin Scalia, Thomas and Kennedy to first question the majority's interpretation of what counts as a "tangible object" under the Sarbanes-Oxley Act and then, more centrally, question the wide powers that prosecutors have to go after violations of the accounting law's "anti-shredding" provisions.

Though most of the high court was no stranger to dissent this year, Justices Kagan and Thomas barely felt rebukes to their decisions this term. Kagan, for example, only received four dissenting opinions and one partial dissent to the seven she wrote all term.

Last year, Kagan was the author of some of the court's **most divisive opinions**, garnering the highest proportion of dissents-to-opinions, according to Law360 data.

Justice Thomas received only a single dissenting opinion from the seven decisions he wrote all term. This came in the matter of Baker Botts LLP v. Asarco LLC, a 6-3 decision that said bankruptcy courts cannot award fees to lawyers over the hours they spend defending the rates they charge.

Yet, even when the court lined up entirely behind Justice Thomas, he received concurring opinions that

showed splits with some of his holdings.

In *Reed v. Town of Gilbert, Arizona*, Thomas issued a unanimous opinion that barred governments from setting up different standards to control different types of messages on billboards and other outdoor signs.

This was followed by three concurring opinions that tweaked the majority opinion in notable ways. Justice Kagan, for example, warned that the ruling will spawn test cases in the lower courts and that the high court "may soon find itself a veritable Supreme Board of Sign Review."

**Methodology:** All references to '2014 Term' in the graphics refer to the Supreme Court's October 2014 Term, and all references to '2013 Term' refer to the October 2013 Term. Separate opinions that concurred in part and dissented in part were counted as 0.5 concurrences and 0.5 dissents.

--Additional reporting by Jake Simpson. Editing by John Quinn and Chris Yates.

*Correction: An earlier story misspelled Charles Rothfeld's last name. The error has been corrected.*

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