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WITHOUT SCALIA, ROLES CHANGE FOR SUPREME COURT JUSTICES

By Brent Kendall

The Supreme Court's extended period with only eight justices began to offer a glimpse of the roles the court's remaining members could play in the future.

Justice Samuel Alito is perhaps the member of the court who most raised his profile in the months since Antonin Scalia's death as he took on a role as a prominent voice for the court's three most conservative members.

He in the past week offered two lengthy dissents from the bench, saying the court's decision to strike down Texas abortion rules was "an abuse of authority" and criticizing as "remarkably wrong" a ruling that upheld the use of race as a factor in college admissions.

In a written dissent Tuesday, Justice Alito protested the court's choice not to hear an appeal from a family pharmacy that objected on religious grounds to Washington state rules requiring it to sell emergency contraceptives. "This case is an ominous sign," he wrote, joined by Chief Justice John Roberts and Justice Clarence Thomas.

"Alito has been a very consistent conservative," said Erwin Chemerinsky, dean of the University of California, Irvine School of Law. Justice Alito's voice may get more attention post-Scalia, "but it's a different kind of voice," one that is less

sarcastic, and less guided by Justice Scalia's focus on the original meaning of the Constitution, Mr. Chemerinsky added.

On the liberal side of the court is Justice Sonia Sotomayor, who continued to stake out her own voice, particularly on issues related to police practices and race.

She was highly critical of a ruling this month in which a 5-3 court allowed the admissibility of drug evidence obtained after a Utah police officer illegally detained someone without reasonable suspicion. "It is no secret that people of color are disproportionate victims of this type of scrutiny," Justice Sotomayor wrote, citing "the talk" that generations of "black and brown parents" have given their children about avoiding innocuous behaviors that could provoke police.

Justice Sotomayor "is sort of the counterweight to Justice Alito" said Kannon Shanmugam, a lawyer with Williams & Connolly LLP who argues regularly before the court. "She's the closest thing to a more traditional liberal justice on this court."

Moderate conservative Justice Anthony Kennedy remains the court's pivot point, but even his role has shown hints of change. On a nine-member court, he was effectively the decider in cases that divided the other justices along ideological lines, sometimes

producing conservative victories and sometimes liberal ones.

This term his options changed somewhat: He either sided with liberal justices on left-leaning rulings, or the court deadlocked in ideologically divided cases.

If a Democratic president is able to replace Justice Scalia and give the liberal bloc a majority, “the role of Justice Kennedy is going to profoundly change,” Mr. Shanmugam said. “Ultimately, it is the confirmation of that ninth member that’s really going to start to define the roles of the remaining eight.”

In addition to Justice Kennedy, Justice Stephen Breyer, one of the court’s liberals, this term showed that he, too, can play a pivotal role. And he may do so more often in the future, if he ends up in the center of a court that moves left.

Justice Breyer joined with conservative justices to form a majority in the Utah police case that drew the ire of Justice Sotomayor. He also wrote the court’s blockbuster ruling in the Texas abortion case, an assignment he would have received from Justice Kennedy, who was the senior justice in the majority.

Justice Breyer “continues to write flexible, case-specific opinions that can keep a majority together,” said William Jay an appellate lawyer with Goodwin Procter LLP. “It’s striking that Justice Kennedy assigned him that opinion.”

Given the continued stalemate in Congress and looming presidential election, the court’s uncertain eight-member dynamic could persist for much of the 2016-17 term, which begins in October.

That may mean more efforts by Chief Justice Roberts and his colleagues to come together when they can with narrower consensus rulings.

“You win, but not as broadly as you wanted. The court has handed down a number of rulings like that,” Mr. Jay said.