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FAX page #1

VACANCY ON THE SUPREME COURT

A Jurist Who Took 'One Case at a Time'

■ O'Connor played a central role in several controversial cases, often eschewing ideology in favor of pragmatism.

By Henry Weinstein

She has sat on the Supreme Court for a generation, and for at least half that time Justice Sandra Day O'Connor has been the court's swing member — the controlling voice on some of the nation's most divisive issues.

O'Connor cast the key vote in cases that preserved abortion rights, affirmed the right of colleges to use affirmative action in admissions, upheld the separation of church and state and paved the way for George W. Bush to become president of the United States.

Her role has been so pivotal that for the past dozen years "she has been the most powerful woman in America," said University of Texas constitutional law professor Douglas Laycock.

Although she was widely considered a conservative when Ronald Reagan appointed her to the high court in 1981, many of the younger, more ideological conservatives who hold sway in the Bush administration have criticized O'Connor's approach. As a result, conservative and liberal legal scholars expect that at least some of the court decisions she crafted will not survive her departure from the bench.

O'Connor's critics and her admirers agreed that what made her vote unpredictable was that she took cases one by one.

"She is a real judge; she judges one case at a time," Laycock said.

As the one member of the court who had served as a legislator before joining the bench, O'Connor never cast herself as a grand legal theorist. Instead,

"Justice O'Connor sees the work of the law as making the law work," said UCLA law professor Eugene Volokh, one of her law clerks in 1993-94. "She is a pragmatist. She thinks it is important to see what works on the ground."

Many of O'Connor's critics on the right have rallied around her colleague, and frequent adversary, Justice Antonin Scalia. This week, Scalia attacked the majority — including O'Connor — for failing to set out a consistent legal principle on when the Ten Commandments can be displayed on public property.

O'Connor's response, in a separate opinion of her own, displayed her pragmatic approach. For decades, she wrote, the court's precedents had worked — they had allowed religion to flourish in a diverse nation.

"Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"

On a court that was often closely divided into blocs with well-known views, lawyers arguing cases often seemed to tailor their arguments to O'Connor, knowing that she would be the one to decide their cases.

Making those arguments could be a "real challenge," said Kenneth S. Geller, one of the lawyers who had appeared most frequently before the court. O'Connor was "not so ideological" that she predictably would vote a certain way, Geller said. "She was willing to listen and try to figure out the right result."

The criticism O'Connor has received from conservatives is somewhat surprising given the balance of her rulings, several legal scholars said.

"It's easy to lose sight of her conservatism," said Washington attorney Tom Goldstein. He has argued 14 cases before the high court and teaches courses on Supreme Court practice at Harvard and Stanford law schools.

"She is a moderate in the present

sense, but not in modern historical terms if you look at the last half-century," Goldstein said. "The country has a view of her as more liberal than she was because the goalposts moved so far to the right."

In 1984, for example, O'Connor wrote the majority opinion in a case that sharply limited the ability of death row inmates to challenge their convictions based on mistakes made by their attorneys.

Five years later, she wrote the court's opinion in a case that forbade government agencies from setting aside a fixed percentage of public contracts for minority businesses.

And, said Carter G. Phillips, a Washington attorney who had argued 45 cases before the Supreme Court, O'Connor was the court's most "ardent supporter of limiting punitive damages" — the sometimes-large awards made by juries in civil cases to punish defendants for alleged misconduct. At first, O'Connor was in the minority, but eventually the court majority came around to her view.

O'Connor, along with Chief Justice William H. Rehnquist, was also a leader in a series of cases over the past decade that limited the power of the federal government to pass laws on topics traditionally handled by states.

Nonetheless, her public image has become that of a moderate because "the court has moved very far to the right," said Harvard law professor Laurence Tribe.

The court's shift began with the retirement of Chief Justice Earl Warren, who was succeeded by Warren Burger in 1969. The appointments of arch-conservatives Rehnquist in 1972 and Scalia in 1986, combined with the subsequent retirements of liberal justices William J. Brennan Jr., Harry A. Blackmun and Thurgood Marshall accelerated the trend. As that happened, O'Connor, by standing firm or occasionally tacking slightly to the left, became the court's pivot, said Los Angeles attorney Edward

Lazarus, a former Supreme Court law clerk and author of "Closed Chambers," a 1998 book on the Supreme Court.

"Once the court moved into her comfort zone, she wouldn't budge another inch to the right," Lazarus said.

That bitterly disappointed many conservatives who initially had cheered her appointment. Abortion opponents were particularly infuriated in 1992 when O'Connor joined four other Republican appointees — John Paul Stevens, Blackmun, Anthony M. Kennedy and David H. Souter — to reaffirm that the Constitution protects a woman's right to have an abortion.

In 2000, O'Connor cast the fifth vote for a decision reversing a Nebraska law against the late-term abortions that opponents call "partial-birth abortions."

Two years ago, O'Connor again angered conservatives when she cast the key vote to uphold affirmative action in university admissions.

"In a society like our own, race unfortunately still matters," O'Connor wrote. "In order to cultivate a set of leaders with a legitimacy in the eyes of citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."

The court's rulings that day illustrated O'Connor's preference for compromise. Though she upheld affirmative action, she also said it should not go on forever.

"Enshrining a permanent justification of racial preferences would offend [the] fundamental equal protection principle" set by the Constitution, she said. "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further interest approved today."

In another decision that day, O'Connor struck down a different affirmative action program, saying it was too rigid.

Conservatives were not the only ones to criticize that tendency to split the difference in hard cases. O'Connor's approach "is a good way of doing justice in individual cases but not a good way of making law that guides other decision makers," including lower court judges, said Georgetown University law professor Mark Tushnet.

Still, Stanford University law professor Pamela Karlan noted that many of O'Connor's positions mirrored where the center of public opinion lay. Over

time, O'Connor "became a pretty good barometer of what people in the country think the Constitution means," Karlan said.

O'Connor showed the same instinct in a passionate dissent she wrote last month when the court ruled, 5 to 4, that cities had broad power under the Constitution's "eminent domain" rules to bulldoze homes and small stores to make way for business development. O'Connor and the other dissenters accused the majority of sacrificing the rights of ordinary homeowners to please well-connected developers.

"Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner. Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall or any farm with a factory," she wrote.

In the weeks since, the majority ruling has been criticized across the ideological spectrum. O'Connor once again appeared in tune with the public pulse.

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VACANCY ON THE SUPREME COURT

A pivotal vote

Justice Sandra Day O'Connor cast swing votes in many decisions. Here are some cases in which she played an important role:

Religion and government

Display of the Ten Commandments violates the Constitution when its purpose is to advance religion. (McCreary County vs. ACLU, 2005. O'Connor concurrence.)

Affirming:

Souter
Stevens
Ginsburg
O'Connor
Breyer
Dissenting:
Rehnquist
Scalia
Kennedy
Thomas

□
A nativity scene's inclusion in a city's holiday display does not advocate a particular religious message; it simply depicts historical origins of the holiday. (Lynch vs. Donnelly, 1984. O'Connor concurrence.)

Affirming:
Burger

Rehnquist
White
O'Connor
Powell
Dissenting:
Stevens
Brennan
Marshall
Blackmun

□
Abortion

State abortion regulations cannot impose an "undue burden" on a woman seeking an abortion prior to the fetus being able to survive on its own. (Planned Parenthood vs. Casey, 1992. O'Connor co-wrote majority decision with two other justices.)

Affirming:

O'Connor
Blackmun
Kennedy
Stevens
Souter
Dissenting:
Rehnquist
Scalia
White
Thomas

□
Equal protection and due process

George W. Bush's election was assured when the court overruled the Florida Supreme Court's order of county vote recounts. (Bush vs. Gore, 2000. O'Connor joined the majority. Seven justices found constitutional problems, but four filed dissents.)

Affirming:

Rehnquist
Scalia
Kennedy
O'Connor
Thomas
Dissenting:
Stevens
Souter
Ginsburg
Breyer

□
Affirmative action

A narrowly tailored use of race in college admissions to assure educational benefits of a diverse student body does not violate the Constitution or the 1964 Civil Rights Act. (Grutter vs. Bollinger, 2003. O'Connor authored majority opinion.)

Affirming:

O'Connor
Stevens
Ginsburg

Souter
Breyer
Dissenting:
Rehnquist
Scalia
Kennedy
Thomas

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Sources: Cornell University Legal Information Institute, www.oyez.org, U.S. Supreme Court. Graphics reporting by Cheryl Brownstein-Santiago, John L. Jackson

Times Staff Writer

GRAPHIC:

A pivotal vote (text included here; graphic includes photos of justices)

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Photo:

LOOKING AHEAD: An abortion opponent prays outside the U.S. Supreme Court building after O'Connor's resignation is announced Friday. She has disenchanted many a conservative.

ID NUMBER:20050702iiympxkn

Photographer:

MANNIE GARCIA Reuters

Photo:

FIRST DAY ON THE JOB: Sandra Day O'Connor is sworn in as an associate justice by Chief Justice Warren Burger on Sept. 25, 1981. Her husband, John, holds two family bibles during the proceeding. O'Connor, appointed by President Reagan, was initially considered a conservative but eventually came to be viewed as a moderate.

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Photographer:

Michael Evans White House

Photo:

REPERCUSSIONS: Abortion-rights supporters gather to contemplate what O'Connor's retirement will mean for their cause. In 1992, the justice voted to affirm abortion rights.

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Joe Raedle Getty Images

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