

Webster and Incomplete Judicial Review

*by Lynn A. Baker**

Not even the Supreme Court knows what, if anything, it said about the law of abortion in last term's highly publicized case, *Webster v. Reproductive Health Services*.¹ Chief Justice Rehnquist, joined by Justices White and Kennedy, concluded that their opinion "would modify and narrow" both *Roe v. Wade*² and "succeeding cases," although it did not, they asserted, require them "to revisit the holding of *Roe*."³ Justice Scalia claimed that the opinion of those three justices "effectively would overrule" *Roe*, something he agreed "should be done."⁴ Justice Blackmun, joined by Justices Brennan and Marshall, asserted that "the Court extricates itself from this case without making a single, even incremental, change in the law of abortion"⁵

In fact, when Chief Justice Rehnquist presented the judgment in *Webster*, he was able to deliver the opinion for a unanimous Court only with respect to Part II-C—some three paragraphs concerning a purely pro-

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¹ 109 S. Ct. 3040 (1989). Less surprising is the fact that commentators have disagreed widely about the meaning of the *Webster* decision. Compare, e.g., Dellinger & Sperling, *Abortion and the Supreme Court: The Retreat from *Roe v. Wade**, 138 U. Pa. L. Rev. 83, 83 (1989) (plurality "eviscerate[d] *Roe* without explicitly overruling the case") and Bopp & Coleson, *What Does *Webster* Mean?*, 138 U. Pa. L. Rev. 157, 157 (1989) (noting that *Webster* means "that *Roe* and its progeny are de facto overruled" but "others proclaim that *Webster* was merely a funding case with little precedential value for abortion litigation and legislation.") with Estrich & Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. Pa. L. Rev. 119, 122 (1989) ("*Webster* decided nothing at all.").

² 410 U.S. 113 (1973).

³ 109 S. Ct. at 3058.

⁴ *Id.* at 3064 (Scalia, J., concurring in part and concurring in the judgment).

⁵ *Id.* at 3067 (Blackmun, J., concurring in part and dissenting in part).

cedural issue.⁶ Justices O'Connor, Scalia, Blackmun, and Stevens each wrote opinions in the case, concurring and dissenting in various parts. And not even a simple majority could agree on the proper *standard* for resolving the most jurisprudentially (and politically) important issue in *Webster*: the constitutionality of a Missouri statute requiring any physician who performs an abortion first to determine the viability of any "unborn child" that the doctor "has reason to believe is . . . of twenty or more weeks gestational age," by undertaking tests "necessary to make a finding of [its] gestational age, weight, and lung maturity . . ."⁷

Whatever *Webster's* ultimate effect on the substance of abortion law and privacy doctrine, the case has great (and scarcely remarked upon) import for judicial review. Most significantly, the unwillingness of the current Court to speak on abortion in anything more than a cacophony of voices has inescapable implications for the very meaning of judicial review. And, to come full circle, disagreement among the justices as to the proper role of judicial review in the context of abortion and privacy doctrine is, I think, responsible for much of the fragmentation of the Court's voice in *Webster*.

I.

It is no secret that a majority of the present Court is uncomfortable with the Court's 1973 decision in *Roe v. Wade*.⁸ Justice White dissented in *Roe*, accusing the majority of "an improvident and extravagant exercise of the power of judicial review" in its fashioning of "a new constitutional right for pregnant mothers."⁹ Chief Justice Rehnquist, the other *Roe* dissenter, stated that the majority both misappropriated the right of privacy into the abortion context and illegitimately expanded the protection to be provided the liberty interests of pregnant women under the fourteenth amendment's due process clause.¹⁰ Justice Kennedy, who joined in every part of Chief Justice Rehnquist's opinion in

⁶ *Id.* at 3053-54 (holding controversy over public funding provision of Missouri statute moot since appellees no longer challenge the provision's constitutionality).

⁷ Mo. Rev. Stat. § 188.029 (1988), reprinted in *Webster*, 109 S. Ct. at 3054. The very meaning of the provision was disputed among the justices. See *id.* at 3054-55 (opinion of Rehnquist, C.J., White, and Kennedy, JJ.); *id.* at 3060-64 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 3069-71 (Blackmun, Brennan, and Marshall, JJ., concurring in part and dissenting in part); *id.* at 3079-80 (Stevens, J., concurring in part and dissenting in part).

⁸ 410 U.S. at 113.

⁹ *Doe v. Bolton*, 410 U.S. 179, 221-22 (1973) (White, J., dissenting). Justice White's dissent in *Doe* also applied to *Roe*. 410 U.S. at 221-23.

¹⁰ *Roe*, 410 U.S. at 172-77 (Rehnquist, J., dissenting).

Webster,¹¹ would appear to share his views on *Roe*. Justice O'Connor has repeatedly asserted that she finds *Roe*'s trimester framework problematic¹² and that an "undue burden" test should instead be used to evaluate the constitutionality of state abortion regulations.¹³ Justice Scalia has stated unambiguously that the Court should overrule *Roe* and should do so explicitly.¹⁴

It is also no secret that each of these five justices advocates judicial restraint.¹⁵ And *Webster* therefore presented each a dilemma. If *Roe* is,

¹¹ See *Webster*, 109 S. Ct. at 3046-58.

¹² See, e.g., *id.* at 3063 (O'Connor, J., concurring in part and concurring in the judgment)("I continue to consider problematic [*Roe*'s trimester framework] . . ."); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 828 (1986)(O'Connor, J., dissenting)(criticizing "Roe's outmoded trimester framework"); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 459 (1983)(O'Connor, J., dissenting)(finding "no justification in law or logic for the trimester framework adopted in *Roe*" and terming it "unworkable.").

¹³ See, e.g., *Webster*, 109 S. Ct. at 3063 (O'Connor, J., concurring in part and concurring in the judgment)("a regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion.") (quoting *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting)); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 505 (1983)(O'Connor, J., dissenting)(applying a constitutionality standard of "undue burden on the limited right to undergo an abortion" and asserting "that the validity of this requirement is [not] contingent in any way on the trimester of pregnancy in which it is imposed . . ."); *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting)("In my view, this 'unduly burdensome' standard should be applied to the challenged regulation throughout the entire pregnancy without reference to the particular 'stage' of pregnancy involved.").

¹⁴ *Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring in part and concurring in the judgment)("I share Justice Blackmun's view that it [the Rehnquist majority opinion] effectively would overrule *Roe v. Wade*. I think that should be done, but would do it more explicitly.") (citations omitted).

¹⁵ See, e.g., Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings before the Committee on the Judiciary of the United States Senate, 100th Cong., 1st Sess. 138, 141 (1987)(response of Kennedy)("Judges are not to make laws; they are to enforce the laws. . . . I think judicial restraint is important in any era."); Nomination of Judge Antonin Scalia: Hearings before the Committee on the Judiciary of the United States Senate, 99th Cong., 2d Sess. 48 (1986)(response of Scalia)("I think it is fair to say you would not regard me as someone who would be likely to use the phrase, living Constitution."); Nomination of Justice William Hubbs Rehnquist: Hearings before the Committee on the Judiciary of the United States Senate, 99th Cong., 2d Sess. 210 (1986)(response of Rehnquist)("And I think . . . judicial activism is perhaps seeking to cure a social evil by an expansive construction of the Constitution. And I think my record of 15 years on the bench reflects that I do not subscribe to that view."); Nomination of Sandra Day O'Connor: Hearings before the Committee on the Judiciary of the United States Senate, 97th Cong., 1st Sess. 64 (1981)(response of O'Connor)("If I have suggested that Congress might want to consider doing something, then I would feel that it is indeed Congress which should make that decision and I would not feel free as a judge to, in effect, expand or restrict a particular statute to reflect my own views of what the goals of sound public policy should be."); Nomination of Byron R. White: Hearings before the Committee on the Judiciary of the United States Senate, 87th Cong., 2d Sess. 23 (1962)(response of

for better or worse, a decision of the Supreme Court interpreting the Constitution, does judicial restraint not require that its dictates be respected? But if *Roe* was itself an improper exercise of the Court's power does not judicial restraint instead require that something more legitimate than *Roe* provide the standard for deciding the constitutionality of statutes regulating abortion?

Justice Scalia resolved this central dilemma by stating that the constitutionality of state abortion regulations should no longer be decided using *Roe* as the benchmark and asserted that he would explicitly overrule *Roe*.¹⁶ Justice O'Connor, in contrast, said that a "fundamental rule of judicial restraint" prevented her from "reconsidering" *Roe*.¹⁷ But, after reiterating her disagreement with *Roe*'s trimester framework, she applied a standard that appears nowhere in *Roe* to decide the constitutionality of Missouri's testing requirement.¹⁸ Chief Justice Rehnquist, joined by Justices Kennedy and White, claimed only to "modify" and not to overrule *Roe*,¹⁹ but simultaneously asserted that the *Roe* trimester framework had proven to be "unsound in principle and unworkable in practice" and should therefore be overruled.²⁰ Those three justices also went on to apply a standard that appears nowhere in *Roe* to decide the constitutionality of Missouri's testing requirement.²¹

A majority of the *Webster* Court, in sum, seemingly agreed that the standard set out in *Roe* would no longer be used to determine the constitutionality of state abortion regulations such as the Missouri testing provision. Four of those justices nonetheless maintained that it was not necessary to reconsider *Roe* in order to rule on the constitutionality of Missouri's testing requirement. In a sense, of course, they are right: The pertinent issue presented in *Webster* was inevitably factually different from that presented in *Roe*. *Roe* nonetheless sets out the Court's standard for determining the constitutionality of state abortion regulations. And it would therefore seem necessary explicitly to reconsider that standard—and therefore also *Roe*—if a majority of the Court finds that standard no longer proper.

Perhaps because none of the majority justices claimed in *Webster* to be

White)("I think it is clear under the Constitution that legislative power is not vested in the Supreme Court. It is vested in the Congress; and I feel the major instrument for changing the laws in this country is the Congress of the United States.").

¹⁶ *Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring in part and concurring in the judgment).

¹⁷ *Id.* at 3061 (O'Connor, J., concurring in part and concurring in the judgment).

¹⁸ *Id.* at 3063 (O'Connor, J., concurring in part and concurring in the judgment).

¹⁹ *Id.* at 3058.

²⁰ *Id.* at 3056-57.

²¹ *Id.* at 3057.

reconsidering *Roe*,²² they thought it unnecessary—perhaps even undesirable—to agree on the new standard to be employed when determining the constitutionality of state abortion regulations. Indeed, had they agreed on a replacement standard, the majority could not as credibly have claimed not to be reconsidering *Roe*. Thus, Chief Justice Rehnquist, joined by Justices White and Kennedy, upheld Missouri’s testing requirement because it “permissibly furthers the State’s interest in protecting potential human life”²³ Justice O’Connor, however, found the testing requirement constitutional because it “does not impose an undue burden on a woman’s abortion decision.”²⁴ And Justice Scalia simply stated that the Missouri statute was constitutional without delineating the alternative standard (if any) by which he reached that result.²⁵

By agreeing not to apply the *Roe* standard but not agreeing on the replacement standard, the *Webster* majority engaged in an unusual and incomplete form of judicial review—a form in which the Supreme Court says what the law will no longer be but does not say what the law henceforth is.

II.

This incomplete form of judicial review is not without merit. First, by disclosing that the *Roe* standard will no longer be applied even if the majority cannot yet agree on its substitute, the Court warns state legislatures and pertinent interest groups that a new law of abortion is imminent, enabling them better to plan their future activity in the area. Second, by making clear that the unresolved question is not whether the *Roe* standard is correct, but rather what the replacement standard should be, the Court provides future litigants valuable guidance in focusing their arguments. Those arguments, as well as replacement standards suggested by the lower federal courts in their abortion decisions, will in turn provide the Court valuable guidance as it goes about crafting the replacement standard.

Against these benefits of incomplete judicial review, one must balance the costs. Three objections spring quickly to mind. First, *Marbury*

²² Although Justice Scalia stated that the opinion of Chief Justice Rehnquist “effectively would overrule *Roe*” and agreed “that should be done,” he declined to undertake that task in his opinion. See *Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring in part and concurring in the judgment).

²³ *Id.* at 3057.

²⁴ *Id.* at 3063 (O’Connor, J., concurring in part and concurring in the judgment).

²⁵ *Id.* at 3067 (Scalia, J., concurring in part and concurring in the judgment).

v. Madison states that "It is emphatically the province and duty of the judicial department to *say what the law is.*"²⁶ This judicial duty was understood to entail more than merely deciding *whether* a legislative act is unconstitutional or deciding *which* of two conflicting laws governs a particular case: "Those who apply the rule to particular cases, must of necessity *expound and interpret* that rule. If two laws conflict with each other, the courts must decide *on the operation* of each."²⁷

Second, decisions of the Supreme Court, especially those involving constitutional interpretation, necessarily affect others besides the litigants in the particular case. The Court imposes substantial costs on a wide range of persons and entities when it renders a judgment without providing a clear statement of the governing law. In the abortion context, for example, one might reasonably expect a losing party that is not told the rule of law by which the adverse judgment was reached to feel aggrieved and unjustly treated. In addition, if the Supreme Court does not state the standard to be applied, the lower federal courts will not be able to render just or correct decisions when asked to rule on the constitutionality of state abortion regulations. State legislatures will not be able effectively to determine the range of permissible abortion regulations from which they might choose if they do not know the standard by which the constitutionality of those regulations is likely to be determined. Similarly, both pro-choice and pro-life interest groups will not be able effectively to target their lobbying efforts if they cannot determine the likely range of permissible state regulations.

Third, the authority and legitimacy of the Court itself are threatened when it speaks not as an institution, but as individual justices. Chief Justice John Marshall thought it critical to the Court's public respect and intra-governmental power that it speak in one voice. Under his leadership, the Court ceased its practice of delivering seriatim decisions and began to have one judge, usually the Chief Justice, render a single decision for the entire Court.²⁸ Although the "opinion of the Court" was sometimes only that of a majority, dissents and concurrences were delivered only in the most extraordinary circumstances.²⁹ When Mar-

²⁶ 5 U.S. (1 Cranch) 137, 177 (1803)(emphasis added).

²⁷ *Id.* (emphasis added).

²⁸ See, e.g., L. Baker, *John Marshall: A Life in Law* 414-15 (1974); G.E. White, *The Marshall Court and Cultural Change, 1815-35* 181-95 (1988); White, *The Working Life of the Marshall Court, 1815-1835*, 70 *Va. L. Rev.* 1, 36-39 (1984).

²⁹ See, e.g., G.E. White, *supra* note 28, at 182, 186-88; White, *supra* note 28, at 36-38. Marshall himself eventually filed nine dissents and one special concurrence from opinions of the Court while he was Chief Justice. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 *Cornell L.Q.* 186, 196 & n.57 (1959).

shall left the Court, its current practices of multiple opinions and open disagreement were rapidly institutionalized.³⁰ Today, individualism pervades the Court's decisions to an extent unparalleled in post-Marshall Court history.³¹

That this increasing inability or unwillingness of the Court to speak as other than nine individuals has not enhanced the esteem in which the intelligent public holds the Court was pithily expressed by *The New Yorker* recently. Beneath the heading "The Jurisprudential Life," it printed as one of those little bottom-of-the-page "amusing typos we have seen" the summary list of opinions for a recent Supreme Court decision.³² The list was, however, not a typographical error: Justice Blackmun's "judgment of the court" was in fact formally divided into seven parts, and five different justices actually wrote opinions in the case.³³ (Those who read closely learned that Justice Blackmun, in an increasingly rare and impressive feat of consensus-building, managed to secure a majority for Parts III-A, IV, and V of his opinion.)

³⁰ G.E. White, *supra* note 28, at 194-95; White, *supra* note 28, at 46-47.

³¹ Many commentators have noted that the number and length of separate and dissenting opinions continue to increase. See, e.g., G. Casper & R.A. Posner, *The Workload of the Supreme Court* (1976); F. Frankfurter & J.M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1928); Casper & Posner, *The Caseload of the Supreme Court: 1975 and 1976 Terms*, 1977 *Sup. Ct. Rev.* 87; Easterbrook, *Agreement Among the Justices: An Empirical Note*, 1984 *Sup. Ct. Rev.* 389, 389-90; Ginsburg, *Remarks on Writing Separately*, 65 *Wash. L. Rev.* 133, 147-48 (1990); Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 *Harv. L. Rev.* 1709 (1978); ZoBell, *supra* note 29, at 186-87; and the summary tables in each November issue of the *Harvard Law Review*.

Judge (then Professor) Easterbrook has also noted, however, that the extent of the justices' "real" disagreement about the law has remained relatively constant since 1943. Easterbrook, *supra*, at 390-97.

³²

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Blackmun, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III-A, IV, and V, in which Brennan, Marshall, Stevens, and O'Connor, JJ., joined, an opinion with respect to Parts I and II, in which O'Connor and Stevens, JJ., joined, an opinion with respect to Part III-B, in which Stevens, J., joined, and an opinion with respect to Part VI. O'Connor, J., filed an opinion concurring in part and concurring in the judgment, in Part II of which Brennan and Stevens, JJ., joined. Brennan, J., filed an opinion concurring in part and dissenting in part, in which Marshall and Stevens, JJ., joined. Stevens, J., filed an opinion concurring in part and dissenting in part, in which Brennan and Marshall, JJ., joined. Kennedy, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Rehnquist, C.J., and White and Scalia, JJ., joined.

The New Yorker, Oct. 9, 1989, at 125.

³³ The decision was *County of Allegheny v. ACLU*, 109 S. Ct. 3086 (1989).

III.

In the post-Marshall Court years, we and the Court have come to believe that the advantages of dissenting and concurring opinions usually outweigh their disadvantages.³⁴ Typically, however, these additional opinions are not delivered at the cost of the Court abnegating its duty to "say what the law is."³⁵ If the Court would resume that duty and abandon incomplete judicial review, it must take steps to guard against the costly individualism displayed in *Webster*.³⁶

Toward that end, the current Court might do well to consider re-instituting a practice devised and employed by Chief Justice John Mar-

³⁴ For good discussions of the value and costs of writing separately, see, e.g., K.N. Llewellyn, *The Case Law System in America* 52-61 (M. Ansaldi trans., P. Gewirtz ed. 1989); R.A. Posner, *The Federal Courts: Crisis and Reform* 232-47 (1985); Brennan, *In Defense of Dissent*, 37 *Hastings L.J.* 427 (1986); Easterbrook, *supra* note 31, at 389-90; Easterbrook, *Ways of Criticizing the Court*, 95 *Harv. L. Rev.* 802 (1982); Ginsburg, *supra* note 31; Kelman, *The Forked Path of Dissent*, 1985 *Sup. Ct. Rev.* 227; Stone, *Dissenting Opinions Are Not Without Value*, 26 *Judicature* 78 (1942); ZoBell, *supra* note 29, at 210 nn.123 & 124 (citing commentaries arguing against and for, respectively, any limitation upon the publication of minority opinions).

³⁵ The number of plurality opinions, like the number of dissents and concurrences, has increased over time. One study found that during the more than 150 years from Chief Justice Marshall's tenure in the early 1800s until 1956, the Court was unable to reach a clear majority in only forty-five cases. Davis & Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1975 *Duke L.J.* 59, 60. During the 1970 Term alone, in contrast, the Court rendered fifteen plurality opinions. *Id.* From 1970 through the 1979 Term, the Burger Court handed down eighty-eight plurality decisions, more than in the entire previous history of the Court. Note, *Plurality Decisions and Judicial Decisionmaking*, 94 *Harv. L. Rev.* 1127, 1127 n.1, 1147 (1981).

For good discussions of the costs and benefits of plurality opinions by the Supreme Court, see, e.g., Davis & Reynolds, *supra*; Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 *Colum. L. Rev.* 756 (1980); Note, *Plurality Decisions and Judicial Decisionmaking*, *supra*.

³⁶ Judge Richard Posner has suggested that the proliferation of separate opinions might be curbed by the exercise of judicial self-restraint:

One cannot expect the dissenting judge to switch over and give the plurality a majority. But the concurring judge—who at least agrees with the plurality's outcome, and can hardly expect to move all the members of the plurality to his own, as it were private, view of the case—has a responsibility to think long and hard before condemning the bar to the tedious labor of trying to extract a usable precedent from a decision in which no opinion commands a majority.

R.A. Posner, *supra* note 34, at 238.

As a corollary remedy, Judge Posner suggests reducing the number of law clerks provided each justice. *Id.* at 102-19, 230-41. See also Griswold, *Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts*, 32 *Cath. U.L. Rev.* 787, 799 (1983) ("proliferation of law clerks has a good deal to do with [proliferation of opinions].").

Judge Ginsburg has hinted (tongue only partially in cheek) that restricting the use of word processors and computers might also help. Ginsburg, *supra* note 31, at 148-49 ("Brandeis had only one clerk; today most Justices have four, to say nothing of more efficient means to retrieve and process words.").

shall late in his tenure when there was a greater likelihood of fragmentation among his fellow justices on major constitutional issues.³⁷ The late Marshall Court would not deliver even a judgment in “cases where constitutional questions are involved” unless a majority of the justices “concur in opinion, thus making the decision that of a majority of the whole court.”³⁸ The only stated exception was in “cases of absolute necessity,” and the Marshall Court apparently never encountered any.³⁹ On at least two occasions, however, Chief Justice Marshall in fact delivered an “opinion of the court” that stated: “In the present case[] four [of the Court’s then-seven justices] do not concur in opinion as to the constitutional questions which have been argued” and directed that the cases be re-argued at the next term.⁴⁰

If the current Court had such an in-house rule, its resolution of *Webster* would have been substantially different. If a majority of the justices had remained unwilling to agree on the proper standard for determining the constitutionality of Missouri’s testing requirement, no judgment would have been rendered and the case would have been set for re-argument this term. Or, if a majority of the justices thought it sufficiently important to decide the case expeditiously, they would have been forced (by their pre-commitment to Marshall’s rule) to compromise on certain issues in order to reach a majority consensus. We would today, in short, either have an opinion in *Webster* that stated a standard, a rule of law, by which the majority reached its decision, or we would not yet have a judgment in the case.

Were the current Court to re-institute such a practice, I am optimistic that neither its productivity nor effectiveness would be adversely affected. On many issues, the Court would continue, as at present, to reach without much difficulty at least a majority consensus in the opinion to be rendered.⁴¹ Such a consensus in “hard” and controversial cases might, at least at first, take longer to reach than currently, and fewer such cases might at first be decided. But the justices, I think, could reasonably be expected quickly to devise effective and efficient strategies for negotiation and compromise. Most importantly, if the Court adopted Marshall’s rule, both we and the justices would be assured that whenever the Court spoke it said what the law is.

³⁷ See, e.g., G.E. White, *supra* note 28, at 195.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Mayor of New York v. Miln*, 33 U.S. (8 Pet.) 118, 121 (1834); *Briscoe v. Commonwealth Bank*, 33 U.S. (8 Pet.) 118, 121 (1834).

⁴¹ Good statistics on the Court’s recent performance in this regard appear in Easterbrook, *supra* note 31, at 401-409.

