Beyond the Embryonic Stage: Younger v. Harris and Proceedings of Substance on the Merits in the Context of Preliminary Injunctive Relief

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BEYOND THE “EMBRYONIC STAGE”:
YOUNGER V. HARRIS AND “PROCEEDINGS OF
SUBSTANCE ON THE MERITS” IN THE CONTEXT
OF PRELIMINARY INJUNCTIVE RELIEF

Jarrod L. Schaeffer*

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I. INTRODUCTION

Federal courts historically have been dubbed “the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States,” yet a party bringing an action in federal court must first surmount numerous jurisdictional obstacles. Having invested a significant amount of time, money, and other resources in preparing a claim for federal review, putative plaintiffs may be surprised when a court ultimately abstains from deciding a case under one of several judicially-crafted doctrines. Largely predicated on notions of federalism

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* J.D., Boston University School of Law; B.A., Cornell University. I offer my sincere thanks to Dan Tyler, Joanna Grigas, and the members of the Suffolk Journal of Trial and Appellate Advocacy. What follows benefitted greatly from their work.


2 For example, federal courts may abstain where a federal constitutional or statutory issue may be mooted by an interpretation of state law. See Propper v. Clark, 337 U.S. 472, 486-87 (1949) (cautioning against overruling issues of state law in federal court judgments); R.R. Comm’n of Tex. v. Pullman, 312 U.S. 496, 501 (1941) (finding abstention appropriate because state law provided easy determination of authority). They may also abstain in cases that involve
and comity, these principles may ring hollow for those seeking emergency relief from a constitutional deprivation. For these and other reasons, federal courts generally do not refuse to exercise jurisdiction and abstention supposedly serves as “an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.” Despite this “virtually unflagging obligation,” however, the scope of abstention doctrines has expanded significantly in recent years.

Though courts may abstain from exercising jurisdiction for a number of reasons, this article focuses exclusively on abstention under Younger v. Harris. In Younger, the Supreme Court held that federal courts generally must abstain from enjoining state criminal proceedings or otherwise interfering with state criminal prosecutions. Since then Younger has evolved; the doctrine has been steadily enlarged to include quasi-criminal proceedings, state administrative proceedings, and even some civil actions. Concerns about federalism and comity, rather than the original equitable justifications, now predominate and courts usually justify abstention by invoking the talisman of “Our Federalism” and voicing a desire for harmonious relations between federal and state judiciaries.

an important state policy interest and implicate unclear state law. See La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959) (recognizing necessity for stay of proceedings implicating unclear state law). Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943) (holding abstention was appropriate when issues clearly involved important state policy).

3 See Younger v. Harris, 401 U.S. 37, 44-45 (1971) (stressing comity and federalism support bar to adjudication of state criminal prosecution by federal courts). But see Propper, 337 U.S. at 493 (suggesting comity not complete bar to adjudication of state rights).


7 Id. at 49-50 (forbidding federal courts to stay pending state court criminal proceedings except under special circumstances).

8 Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987) (explaining Younger abstention may apply when civil proceedings are pending); Middlesex Cnty. Ethics Comm’n v. Garden State Bar Ass’n, 457 U.S. 423, 432 (1982) (extending Younger doctrine to administrative judicial proceedings because important state interests are involved); Huffman v. Pursue, Ltd., 420 U.S. 592, 609 (1975) (“[H]old[ing] that Younger standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies.”).

9 See, e.g., Middlesex, 457 U.S. at 436-37 (emphasizing notion that federal government should hesitate to interfere with states’ interests).

In Hicks v. Miranda [422 U.S. 332 (1975)] we held that ‘where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in federal court, the principles of Younger v. Harris should apply in full force.’ An analogous situation is presented here; the principles
Much has been written about the development and wisdom (or lack thereof) of these developments. This article charts a more pragmatic course, exploring the intersection of Younger and preliminary injunctive relief to resolve a split among the lower federal courts concerning the significance of temporary restraining orders.

The Supreme Court has yet to articulate a comprehensive standard for the application of Younger in this context. In particular, though one treatise has reasonably and confidently asserted that abstention is warranted after “a denial of a temporary restraining order” by a federal district court but not after “the issuance of a temporary restraining order,” the federal courts are actually split on how they view these two occurrences and the

of comity and federalism which call for abstention remain in full force.

Id. (citations and footnotes omitted); Mallinckrodt LLC v. Littell, 616 F. Supp. 2d 128, 138 (D. Me. 2009) (explaining reasoning behind Younger doctrine). Younger abstention is founded on twin concerns: 1) the federal courts presume “the state courts are as capable as their federal counterparts of guaranteeing federal rights;” and, 2) “[r]elated to this presumption of equal competency is the concept of comity, which counsels federal courts to be sensitive to the existence of a parallel system of state governance.” Id. (citing Bettencourt v. Bd. of Reg. in Med. of Commonwealth of Mass., 904 F.2d 772, 776-77 (1st Cir. 1990)); Blackwelder v. Safnauer, 689 F. Supp. 106, 116 (N.D.N.Y. 1988) (“These comity and federalism concerns, of course, are at the heart of the Younger doctrine, and have been the justification for the extension of the doctrine to cases in which non-criminal state proceedings might be disrupted by an adjudication in a federal court.”); see also MARTIN A. SCHWARTZ, SECTION 1983 LITIG. CLAIMS & DEFENSES § 14.03 (2012) (“This doctrine is based primarily on principles of comity and federalism . . . . The doctrine is also supported by the ancient maxim that equity will not enjoin a criminal proceeding.”).


See infra Part III.
case law hardly reflects this neat generalization. The most that can be said definitively is that the “[d]enial of a temporary restraining order and issuance of such an order might well be viewed differently” by the Supreme Court.

No court or commentator has outlined a coherent framework for abstention following proceedings concerning preliminary injunctive relief. A uniform standard governing the application of Younger following these proceedings is desirable, however, because a consistent approach would better observe the federalism and comity concerns that motivate abstention, balance the interests of litigants, and provide guidance in abstention cases. This article offers a way to resolve the split among the lower courts as to when abstention is required after the issuance of a temporary restraining order. Specifically, it argues that viewing the issuance of such an order in the same manner as the issuance of a preliminary injunction is the most logical and doctrinally consistent approach.

II. OVERVIEW OF THE YOUNGER DOCTRINE

The modern Younger doctrine is best described as an exception to a federal court’s duty to exercise jurisdiction where federal adjudication would disrupt an ongoing state enforcement proceeding. The doctrine embodies the judicial determination that, absent extraordinary circumstances, federal courts should not interfere with actions pending

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12 See 32A AM. JUR. 2D FEDERAL COURTS § 1088 (asserting abstention is not warranted after granting temporary restraining order); see also, e.g., Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 238 (1984) (“Whether issuance of the February temporary restraining order was a substantial federal court action or not, issuance of the June preliminary injunction certainly was.”); Fresh Int’l Corp. v. Agric. Labor Relations Bd., 805 F.2d 1353, 1358 n.5 (9th Cir. 1986) (“It may be that issuance of a temporary restraining order, as opposed to denial of one, is a proceeding of substance on the merits.”); Hunt v. City of Longview, 932 F. Supp. 828, 834 (E.D. Tex. 1995) (“Whether granting a temporary restraining order is a ‘proceeding of substance on the merits’ is unclear.”), aff’d, 95 F.3d 49 (5th Cir. 1996); Adams v. Attorney Registration & Disciplinary Comm’n of S. Ct. of Ill., 600 F. Supp. 390, 395 n. 3 (N.D. Ill. 1984) (“The Supreme Court has not been clear on whether, for Hicks purposes, it considered a temporary restraining order a proceeding of substance.”).

13 17B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4253 (3d ed. 2011) (discussing applicability of Younger doctrine in different federal proceedings). These authors went on to observe, quite rightly, that “lower court decisions are of limited use as guides to the future.” Id. “The doctrine is peculiarly the Supreme Court’s own creation, the Court has not been reluctant to alter its contours repeatedly, and interpretations of the doctrine by the lower courts are not reliable guides until the Supreme Court has spoken to the particular issue.” Id.

14 See infra Part IV.

15 See infra Part III.

16 See, e.g., Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987) (reasoning enforcement action can be either criminal or civil); Huffman v. Pursue, Ltd., 420 U.S. 592, 609 (1975) (same).
before state judiciaries. “Our Federalism,” as the Supreme Court explained, requires that “the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.” “Perhaps the strongest justification for Younger deference is the recognized need to avoid disrupting the state judicial process. . . . [and t]his principle has long served as an essential element of federalism.”

Pursuant to Younger, a federal court generally must abstain from interfering in state proceedings when certain circumstances are present, even if it properly has jurisdiction over a claim. Younger does not compel abstention, however, where extraordinary circumstances indicate that a party will suffer irreparable injury in the absence of federal intervention, where a state prosecution is brought in bad faith, where a state statute is patently unconstitutional, where a state proceeding does not provide an adequate forum for a party’s claims, where a state submits to federal jurisdiction, or where a party waives the abstention argument by failing to raise it. Outside these exceptions, the federal courts generally must stay their hand if an ongoing state proceeding implicates important state interests and the state tribunal is competent to hear federal constitutional

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17 See, e.g., Younger v. Harris, 401 U.S. 37, 45 (1971) (listing irreparable injury as extraordinary exception for federal court interference).
18 Id. at 44.
19 Redish, The Younger Doctrine, supra note 10, at 484.
20 See Ohio Bureau of Emp’t. Servs. v. Hodory, 431 U.S. 471, 480 (1977) (“If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State’s own system.”); Trainor v. Hernández, 431 U.S. 434, 446-47 (1977) (noting exception to Younger doctrine where state statute is unconstitutional); Kugler v. Helfant, 421 U.S. 117, 123-25, 126 n.6 (1975) (stating that federal injunctive relief can be appropriate where irreparable injury can be shown); Sosna v. Iowa, 419 U.S. 393, 396-97 n.3 (1975) (upholding Court’s conclusion that board members’ pecuniary interest disqualified them from passing on issues); Gibson v. Berryhill, 411 U.S. 564, 579, 590 (1973) (stating that “those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes”); Dombrowski v. Pfister, 380 U.S. 479, 490 (1965) (finding abstention not required where party threatens criminal process with no hope of success); Schlager v. Phillips, 166 F.3d 439, 442 (2d Cir. 1999) (quoting and discussing Cullen v. Fliiger, 18 F.3d 96, 103-04 (2d Cir. 1994)) (“These factors amounted to bad faith and prompted [the court] to affirm the awarding of injunction relief because the plaintiff demonstrated ‘the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith.’”); Cullen, 18 F.3d at 103-04 (2d Cir. 1994) (viewing instance as extension of exception for extraordinary circumstances that threaten irreparable injury). In Cullen, for example, the Second Circuit explained that to prove irreparable injury under Younger, “the party bringing the state action must have no reasonable expectation of obtaining a favorable outcome” or must prove that “a prosecution or proceeding has been brought to retaliate for or to deter constitutionally protected conduct, or [that] a prosecution or proceeding is otherwise brought in bad faith or for the purpose to harass.” Cullen, 18 F.3d at 103-04.
claims. Moreover, the Supreme Court “ha[s] since recognized that [its] concern for comity and federalism is equally applicable to certain other pending state proceedings,” gradually extending Younger in ways both topical and temporal.21

As to the former, Younger has grown beyond state criminal proceedings and now applies to almost any ongoing state proceeding that implicates important state interests.22

The temporal evolution—relating to when Younger is relevant in the course of litigation—is the main focus of this article. Originally, Younger abstention was appropriate only if state judicial proceedings were pending or about to be pending before a federal action was commenced.23 In the absence of a pending state proceeding, the Younger Court opined that “considerations of equity, comity, and federalism have little vitality.”24 The Court extended the doctrine significantly, however, when it held in Hicks v. Miranda25 that Younger applies to state proceedings initiated “against [] federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court.”26 Shortly afterward, in Doran v. Salem Inn, Inc.,27 the Court added that a “prayer for injunction is squarely governed by Younger”28 where the “federal litigation was in an embryonic stage and no contested matter had been decided.”29 To say that the Court’s reasoning in these cases was unclear would be an understatement.29 Today, the upshot of Hicks and

22 See id. (expanding Younger doctrine to nearly all ongoing state proceedings implicating state interests).
24 Steffel, 415 U.S. at 462 (examining decision in Younger).
26 Id. at 349.
27 422 U.S. 922 (1975).
28 Id. at 929.

On December 28, 1973, Judge Lydick denied the request for a temporary restraining order, in part because appellees ‘have failed totally to make that showing of . . . likelihood of prevailing on the merits needed to justify the issuance of a temporary restraining order.’ These proceedings the Court says implicitly, were not sufficient to satisfy the test it announces. Why that should be, even in terms of the Court’s holding is a mystery.

Id. Barely a year earlier, the Court had held that, “[w]hen no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system.” See Steffel, 415 U.S. at 462.
Doran is still complicated by the murky question of what constitutes a “proceeding of substance on the merits” or the “embryonic stage” and it thus remains unclear when a subsequently filed state proceeding can displace actions already taken in federal court. This lack of clear guidance has left the matter to be fleshed out by the lower courts.

Wrestling with this question, courts have reached some consensus on how to define “proceedings of substance on the merits” and the

Moreover, if abstention is made to turn only on the nature of a proceeding as Hicks and Doran suggest, it is not clear why the proceedings in Hicks itself failed to satisfy the new standard. See Doran v. Salem Inn, Inc., 422 U.S. at 929 (declining to provide rationale for proceedings failing new standard), Hicks, 422 U.S. at 351 (same).

See, e.g., Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 238 (1984) (issuing of preliminary injunction after hearing was “substantial federal court action”); Fresh Int’l Corp. v. Agric. Labor Relations Bd., 805 F.2d 1353, 1358 (9th Cir. 1986) (deciding arguments on cross-motions for summary judgment constituted proceedings of substance on merits); Adultworld Bookstore v. City of Fresno, 758 F.2d 1348, 1350-51 (9th Cir. 1985) (extending evidentiary hearing on motion for preliminary injunction constituted substantial proceeding); Kennecott Corp. v. Smith, 637 F.2d 181, 186 (3d Cir. 1980) (“Where, as here, the district court considered affidavits and briefs, heard extensive oral arguments, and analyzed and ruled on the merits of a motion for preliminary injunctive relief, Younger does not compel the federal courts to stay their hands.”); Meadow Valley Contractors, Inc. v. Johnson, 89 F. Supp. 2d 1180, 1184 (D. Nev. 2000) (“In comparison, a federal action for prospective relief advances beyond its ‘embryonic stage’ only upon the conduct of extensive hearings for a motion for preliminary injunction or the grant of such a motion.”).

As an initial matter, these phrases, “proceeding of substance on the merits” and the “embryonic stage” are theoretically susceptible of at least two different interpretations. See CHARLES ALAN WRIGHT ET AL., supra note 13, at § 4253. These different readings depend on whether proceedings are evaluated uniformly or relative to the instant action. Id. The question is whether a proceeding has substance simply by virtue of the procedures involved (a uniform standard applied in all cases) or whether substance turns on the relation of the proceedings to the actual claim or action at bar (a variant standard depending on the facts and law of each case). Id. Similarly, the point at which a federal action matures past the “embryonic stage” may be evaluated with reference to what the court has done or what it must do in order to reach a conclusion regarding a plaintiff’s actual claims. In general, courts employ an objective inquiry that defines the “embryonic stage” by the procedures themselves, without reference to the actual claim. Compare, e.g., Doran, 422 U.S. at 929 (abstaining under Younger where state criminal summons issued day after federal suit was filed), with Vill. of Belle Terre v. Boraas, 416 U.S. 1, 2 n.1 (1974) (finding abstention inapplicable where notice of ordinance violation issued day after filing federal suit).

Indeed, this was one of the primary bases on which three Justices dissented. See Hicks, 422 U.S. at 353 n.1 (Stewart, J., dissenting).
“embryonic stage.” In *Tucker v. Ann Klein Forensic Center*,32 for example, the plaintiff filed a federal complaint thirteen months before he eventually filed an analogous state complaint.33 During that time, the district court examined and dismissed several of the plaintiff’s claims.34 Ruling that the district court was not required to abstain, the Third Circuit Court of Appeals noted that, when the plaintiff “filed his complaint in the Superior Court [of New Jersey], his federal action had been pending for more than one year, both the District Court and this Court had addressed and resolved the merits of several of [the plaintiff]’s claims, and there had been one appeal to this Court.”35 Those circumstances clearly indicated to the court that the “federal action had progressed beyond the point at which Younger abstention could properly be invoked.”36 Not all cases, however, present so clear a case and the abstention question is routinely closer where federal “proceedings” are not so obviously extensive.

Typically, courts do not view mere filings—e.g., of pleadings or an application for a temporary restraining order—or the scheduling of a hearing on a preliminary injunction as progressing beyond the “embryonic stage.”37 Since a “proceeding of substance” must be “on the merits,” courts also require consideration of an important controversy germane to the issues presented in the case.38 Questions related solely to abstention or jurisdiction are usually insufficient.39 It remains unclear, however, how broadly courts should define the “merits” of a proceeding.40 Federal courts

32 174 Fed. App’x 695 (3d Cir. 2006).
33 Id. at 697 (setting forth facts).
34 Id. at 697-98 (outlining procedural history).
35 Id. at 698.
36 Id.
37 See *Hicks*, 422 U.S. at 337, 353 n.1 (Stewart, J., dissenting) (abstaining under Younger despite filing of TRO motion and response, twelve affidavits, and additional documents); *Polykoff v. Collins*, 816 F.2d 1326, 1332 (9th Cir. 1987) (concluding federal action in embryonic stage where state court complaint was filed). In *Polykoff*, the Ninth Circuit found the federal action was still in the embryonic stage when the state court complaint was filed after a hearing in federal court on a preliminary injunction motion was scheduled but two days before the hearing was actually held. *Polykoff*, 816 F.2d at 1332.
38 See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929 (1975) (emphasis added) (“When the criminal summonses issued . . . the federal litigation was in an embryonic stage and no contested matter had been decided.”).
39 See, e.g., *Ciotti v. Cook Cnty.*, 712 F.2d 312, 314 (7th Cir. 1983) (ruling abstention not required over jurisdictional issues).
40 Compare *Blackwelder v. Safnauer*, 689 F. Supp. 106, 117 (N.D.N.Y. 1988) (deciding that amended complaint and intervention by state did not implicate merits), and *Mannheim Video, Inc. v. Cnty. of Cook*, 884 F.2d 1043, 1045-46 (7th Cir. 1989) (holding that grant of motion to dismiss was not “on the merits”), cert. denied, 493 U.S. 957 (1990), with *For Your Eyes Alone, Inc. v. City of Columbus*, 281 F.3d 1209, 1218 (11th Cir. 2002) (finding answer, motion to dismiss, motion for summary judgment, and hearing denying TRO sufficiently “on the merits”).
have also declined to abstain in cases where “state law expressly indicates that the [state] proceeding is not a judicial proceeding or part of one,” the proceeding “lack[ed] trial-like trappings,” or the specific constitutional claim at issue could not obviously be adjudicated.41

This article focuses on the interpretation of “proceedings of substance on the merits” and the “embryonic stage” in the context of preliminary injunctive relief, i.e. a preliminary injunction or a temporary restraining order (“TRO”).42 The Supreme Court’s piecemeal labeling of “proceedings of substance on the merits” in this context has unfortunately fostered an interpretive guessing game among the lower courts. A reasoned approach is necessary to harmonize these interpretations and ensure coherent application of the Younger doctrine.43

III. YOUNGER AND PRELIMINARY INJUNCTIVE RELIEF

With the exception of certain cases defined by statute, courts may grant preliminary injunctive relief to address a pressing need for immediate and extraordinary intervention.44 Granting preliminary relief may, for instance, sometimes be the only way in which a federal court can protect its jurisdiction or ensure that litigants have enough time to present arguments for the exercise of that jurisdiction.45 In broad strokes, a federal court

41 See Telco Commc’ns, Inc. v. Carbaugh, 885 F.2d 1225, 1228 (4th Cir. 1989) (citation omitted) (holding that “informal fact-finding conference” is not judicial in nature); see also Monaghan v. Deakins, 798 F.2d 632, 638 (3d Cir. 1986) (finding that abstention was inappropriate), aff’d in part, vacated in part on other grounds, 484 U.S. 193 (1988). “At the time the plaintiffs filed their federal complaint no state judicial proceeding in which they could have adjudicated their constitutional claims for return of the seized property was pending.” Monaghan, 798 F.2d at 638.
42 See infra Part IV (detailing how lower courts apply Younger abstention).
43 See id.
44 See 28 U.S.C. § 1341 (2012) (“The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”); 28 U.S.C. § 2283 (2012) (“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”); Developments in the Law Injunctions, 78 Harv. L. Rev. 994, 1060 (1965) (“The ex parte temporary restraining order is indispensable to the commencement of an action when it is the sole method of preserving a state of affairs in which the court can provide effective final relief.”).

As a practical matter, a district court must give the parties time to research and prepare for a preliminary injunction hearing. At the time the motions for temporary restraining order and preliminary injunction were filed, no state court proceeding was pending. This court determined that a temporary
grants preliminary injunctive relief according to the procedural guidelines of Rule 65 of the Federal Rules of Civil Procedure. Generally, a litigant seeking preliminary relief must make a satisfactory showing that (1) the movant will be irreparably harmed in the absence of an injunction; (2) the movant is likely to succeed on the merits; (3) the balance of the harms favors the movant; and (4) the public interest is not harmed by the granting of an injunction. As injunctive relief is an equitable remedy, the standard for such preliminary relief is flexible and different courts may address all or a subset of these factors, as well as other considerations unique to the case at bar. The Supreme Court, however, has consistently reaffirmed the requirement that a movant demonstrate irreparable injury. Accordingly, every circuit employs a test that requires a showing of a likelihood of irreparable harm. It is also important to note that the inquiry into irreparable injury at the preliminary relief stage is often more stringent than at the time of judgment. Because courts must act under limited time

restraining order should issue, thus maintaining the status quo until a preliminary injunction hearing could be held. Given that this exercise of jurisdiction was proper, it would be nonsensical for this court to abstain because Defendants assert that had they had the opportunity, they would have rushed to initiate a quo warranto proceeding before the scheduled preliminary injunction hearing.

Id. See FED. R. CIV. P. 65 (establishing procedure for injunctions).


See Bates, supra note 47, at 1530-35 (examining flexibility of factors used by federal courts).

See, e.g., Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 314-15 (1999) ("Preliminary injunctive relief should not have issued if the plaintiff's prospects of winning were not sufficiently clear, or the plaintiff was not suffering irreparable injury."); Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987) ("In brief, the bases for injunctive relief are irreparable injury and inadequacy of legal remedies."); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) ("The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of the issuance he will suffer irreparable injury."); Granny Goose Foods, Inc. v. Bd. of Teamsters & Auto Truck Drivers, 415 U.S. 423, 441 (1974) ("The party seeking the injunction would bear the burden of demonstrating the various factors justifying preliminary injunctive relief, such as the likelihood of irreparable injury."); Brown v. Chote, 411 U.S. 452, 456 (1973) (stating lower court properly considered "the possibility that irreparable injury would have resulted").

See STOLL-DEBELL, DEMPSEY & DEMPSEY, supra note 47, at 22-35 (listing elements employed by each circuit).

constraints and without complete briefing of the issues or a full trial on the merits, courts are understandably more circumspect when it comes to issuing any kind of preliminary relief. In recognition of these limitations, courts tend to apply a “balancing test that takes account of the irreparable injury to plaintiff if preliminary relief is erroneously denied and the irreparable injury to defendant if preliminary relief is erroneously granted.” Thus, courts functionally employ a more exacting irreparable injury standard for preliminary relief.

In the Younger context, the Supreme Court has drawn two important distinctions between (1) the issuance of preliminary injunctive relief and the denial of relief and (2) preliminary injunction proceedings and TRO proceedings. In combination with the question of whether “proceedings of substance on the merits” have occurred in federal court, the Court’s distinctions have generated a patchwork outline to guide the Younger inquiry in cases involving preliminary injunctive relief. Some rules are firmly established. First, it is clear that the denial of a preliminary injunction does not constitute a “proceeding of substance on the merits.” Likewise, the Court has squarely held that, where state proceedings begin soon after the filing of a federal complaint, the denial of a TRO is not sufficient to preclude abstention. Conversely, the issuance of a

against reckless use of preliminary injunctions).

Douglas Laycock, The Death of the Irreparable Injury Rule 111 (1991) (“Acting without a full presentation from either side and without time for reflection, the court is more likely to err.”).

Id. at 113.

See id. at 113 (“[Courts at the preliminary relief stages routinely find that damages will be an adequate remedy for injuries they would consider irreparable after a full trial.”).

See id.

See id. at 113 (“[Courts at the preliminary relief stages routinely find that damages will be an adequate remedy for injuries they would consider irreparable after a full trial.”).

See LAYCOCK, supra note 52, at 134-36 (examining decisions in federal courts regarding federal interference with state law issues).


See Ohio Civil Rights Comm’n v. Dayton Christian Sch., Inc., 477 U.S. 619, 622 (1986) (holding abstention under Younger doctrine was warranted); cf. Vespa-Papaleo, 339 F. App’x at 240 (finding denial of preliminary injunction not proceeding of substance on merits).

See Hicks, 422 U.S. at 348-49 (holding denial of TRO was not proceeding on merits);
preliminary injunction is considered a “proceeding[] of substance on the merits.”\textsuperscript{59}

The significance of the issuance of a TRO, however, is not yet settled.\textsuperscript{60} While only four courts have addressed this question directly, the dispute breaks down along two fairly predictable lines: those courts that view the granting of a TRO as a “proceeding of substance on the merits” and those that do not.\textsuperscript{61} Because the conclusion a court reaches depends on whether the court accords more weight to the process of obtaining a TRO versus the significance of granting relief, I term these opposing perspectives the “procedural” and “substantive” views, respectively.\textsuperscript{62} This section identifies and classifies those courts that have stated a position on this question. In short, courts in the First, Seventh, and Eleventh Circuits have endorsed approaches that treat the issuance of a TRO as a “proceeding of substance on the merits.”\textsuperscript{63} In contrast, courts in the Third, Fourth, and Ninth Circuits have either held or intimated that the issuance of a TRO is not sufficient to preclude abstention under \textit{Hicks} and \textit{Doran}.\textsuperscript{64} Though the remaining circuits have sometimes highlighted the discrepancy between the

\textsuperscript{59}\textit{Midkiff}, 467 U.S. at 238 (quoting \textit{Hicks}, 442 U.S. at 349) (finding federal court action where preliminary injunction granted beyond embryonic stage).

\textsuperscript{60} See id. (questioning whether issuance of TRO was substantial federal court action). In \textit{Midkiff}, the Court considered a case in which a federal district court had issued a TRO and a preliminary injunction before any state court proceedings were initiated relative to the action. Id. The court held that, “Whether issuance of the February temporary restraining order was a substantial federal court action or not, issuance of the June preliminary injunction certainly was” and ruled that “proceedings of substance on the merits” sufficient to preclude abstention had taken place. Id. To date, however, the Court has not revisited the significance of the issuance of a TRO.


\textsuperscript{62} See infra Part IV, subsections A & B. Of course, these labels should not be taken to imply either that the “procedural view” has no substantive component or that the “substantive” view is completely divorced from procedural considerations. Few concepts in law are so brightly defined. Rather, these labels are used merely for convenience and reference the different factors that courts appear to have found most dispositive.

\textsuperscript{63} See \textit{Mass. Delivery Ass’n v. Coakley}, 671 F.3d 33, 43 (1st Cir. 2012) (treating issuance of TRO as “proceeding of substance on the merits”); \textit{For Your Eyes Alone, Inc. v. City of Columbus}, 281 F.3d 1209, 1217-18 (11th Cir. 2002) (same); \textit{Ciotti v. Cook Cnty.}, 712 F.2d 312, 314-15 (7th Cir. 1983) (same).

\textsuperscript{64} See \textit{Fresh Int’l Corp. v. Agric. Labor Relations Bd.}, 805 F.2d 1353, 1358 (9th Cir. 1986); \textit{Kennecott Corp. v. Smith}, 637 F.2d 181, 185-86 (3rd Cir. 1980); \textit{Kim-Stan, Inc. v. Dept. of Waste Mgmt.}, 732 F. Supp. 646, 651 (E.D. Va. 1990).
issuance and denial of a TRO, they have yet to definitively adhere to one approach.  

A. The “Procedural” View

The “procedural” interpretation is most succinctly expressed in Kim-Stan, Inc. v. Department of Waste Management.  

In Kim-Stan, the U.S. District Court for the Eastern District of Virginia held that the granting of a TRO was not a “proceeding of substance on the merits” sufficient to defeat a claim of abstention under Younger. Kim-Stan, Inc., a Virginia corporation that operated a sanitary landfill, was attempting to stem the flow of pollution from its landfill when it simultaneously began accepting out-of-state waste disposals. When evidence of pollution was discovered at a nearby pond, the Virginia Department of Waste Management (“DWM”) issued an official emergency order directing Kim-Stan to stop accepting waste. Kim-Stan brought suit to enjoin the DWM from enforcing its emergency order revoking the company’s permit and a United States Magistrate Judge granted Kim-Stan’s application for a TRO.

The Commonwealth of Virginia then filed a complaint in state court on behalf of the State Water Control Board (“SWCB”), seeking temporary and permanent injunctive relief and a judgment for civil 

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65 See, e.g., Hunt v. City of Longview, 932 F. Supp. 828, 834 (E.D. Tex. 1995) (“Whether granting a temporary restraining order is a ‘proceeding of substance on the merits’ is unclear.”), aff’d, 95 F.3d 49 (5th Cir. 1996). The remaining circuits, of course, are the Second, Fifth, Sixth, Tenth, and Federal Circuits. Some courts in these circuits have explicitly acknowledged the lack of a standard. Others simply have yet to confront the issue directly.


67 Id. at 650. The district court actually made two alternative holdings. Id. at 649-50. First, it held that an initial administrative order issued before Kim-Stan, Inc., had filed its complaint had begun proceedings in state court and therefore that Younger abstention clearly applied. Id. at 649. The court went on to hold as a “second alternative basis” that the “issuance of the June 16 temporary restraining order (“TRO”) was not a proceeding of substance, and therefore no federal substantive proceeding preceded the filing of the June 23 suit in state court.” Id. at 650.

68 Id. at 647 (describing facts).

69 See id. The State Water Control Board (“SWCB”) followed by issuing an emergency special order closing the landfill. Id. Alleging that the leakage was caused by waste buried for over a year before the incident at the pond, Kim-Stan claimed that that ceasing to accept out-of-state waste, “a massive project that would ultimately destroy the business,” would not solve the problem and was unnecessary. Id. Several days later Kim-Stan certified that it had complied with the agencies’ orders to cease operations, but inspectors for the DWM found evidence to indicate that the pollution had not abated. Id. The DWM then issued a second emergency order revoking Kim-Stan’s permit to operate in Virginia and prohibiting the company from accepting all waste. Id. at 648.

70 Id. at 648.
penalties against Kim-Stan.\textsuperscript{71} The District Court for the Eastern District of Virginia issued a TRO that enjoined the SWCB from pursuing any action against Kim-Stan in any capacity and also enjoined Kim-Stan from further discharges of pollution.\textsuperscript{72} At a subsequent hearing for a preliminary injunction, all parties represented to the court that the matter had been settled and the TRO was lifted.\textsuperscript{73} The DWM issued a superseding administrative order and entered into a consent decree with both the SWCB and Kim-Stan.\textsuperscript{74} The settlement to be entered in the case pending in state court was contingent upon approval by the SWCB, however, which ultimately rejected its terms.\textsuperscript{75} The DWM then issued a notice of a formal hearing under the state’s Administrative Procedures Act to consider the revocation of the Kim-Stan’s operation permit and the company refiled in federal court to enjoin the pending DWM hearing.\textsuperscript{76}

In considering Kim-Stan’s motion, the district court focused on the issue of abstention under \textit{Younger}.\textsuperscript{77} Viewing the grant of a TRO as “a temporary affirmative act . . . more than a denial of a TRO, yet less than the issuance of a preliminary injunction,” the court found that such a grant was less substantive than the issuance of a preliminary injunction.\textsuperscript{78} The court further held that “while the issuance of a preliminary injunction constitutes ‘proceedings beyond the embryonic stage,’ the issuance of a TRO does not.”\textsuperscript{79} In particular, the court highlighted several aspects of a preliminary injunction: that it requires notice; is based on “evidence that goes beyond the unverified allegations of the pleadings;” usually issues only after “both parties have presented evidence and argument;” and is an “extraordinary remedy” granted by a court only upon a showing that a party is “likely to succeed on the merits” and “will suffer irreparable harm.”\textsuperscript{80} The court contrasted these requirements with the elements of a TRO, stating that a TRO “may be issued \textit{ex parte;}" does not require “specific findings of facts or conclusions of law;” is designed “only [to] preserve the status quo;” and is limited in duration to a ten day period.\textsuperscript{81} The court in \textit{Kim-Stan} also

\begin{itemize}
    \item \textsuperscript{71} \textit{Kim-Stan}, 732 F. Supp. at 648 (stating procedural history).
    \item \textsuperscript{72} Id.
    \item \textsuperscript{73} Id.
    \item \textsuperscript{74} Id.
    \item \textsuperscript{75} Id.
    \item \textsuperscript{76} \textit{Kim-Stan}, 732 F. Supp. at 648.
    \item \textsuperscript{77} Id. (examining abstention doctrine under \textit{Younger}).
    \item \textsuperscript{78} Id. at 651 (explaining court’s finding).
    \item \textsuperscript{79} Id. (stating grant of TRO “is somewhere in the middle”).
    \item \textsuperscript{80} Id.
    \item \textsuperscript{81} See \textit{Kim-Stan}, 732 F. Supp. at 651 (distinguishing requirements of TROs from requirements of preliminary injunctions). Though Fed. R. Civ. P. 65 now mandates that a TRO
emphasized that “a preliminary injunction requires the Court to predict the outcome on the merits while a temporary restraining order only requires the Court to . . . maintain the status quo for ten days until the need for a preliminary injunction or other remedy is determined.”

Similar interpretations of the need to abstain under Younger are found in the decisions of several other courts. In Kennecott Corp. v. Smith, the Third Circuit held that “where, as here, the district court considered affidavits and briefs, heard extensive oral arguments, and analyzed and ruled on the merits of a motion for preliminary injunctive relief, Younger does not compel the federal courts to stay their hands.” However, in Williams v. Government of Virgin Islands, the same court abstained under Younger despite the issuance of two TROs enjoining action by a government agency and a stipulation of the parties providing for a TRO to preserve the status quo until a formal hearing could be held. Reading these cases in concert, the clear implication is that the Third Circuit does not view TROs and preliminary injunctions equally under the banner of “preliminary injunctive relief.”

While the Ninth Circuit has not addressed the question directly, the court did note in Fresh International Corporation v. Agricultural Labor Relations Board that “[i]t may be that issuance of a temporary restraining order, as opposed to denial of one, is a proceeding of substance on the merits.” In an unpublished decision, however, the Ninth Circuit held that a “TRO [that] was issued the day after the [federal] complaint was filed and was issued without a hearing and before the defendants had an opportunity to respond” was not a proceeding of substance. Mirroring the language of Kim-Stan, the court explicitly stated that in the absence of “extensive hearings on the matter . . . neither the issuance of the TRO nor the denial of the preliminary injunction constitute[s] a proceeding of substance on the

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may not be issued for more than fourteen days, up from the previous ten day period, the Rule also provides that an order can be extended by the court or converted into a preliminary injunction. See Fed. R. Civ. P. 65. Kim-Stan, 732 F. Supp. at 651; see also Aaron v. Target Corp., 357 F.3d 768, 770 (8th Cir. 2004) (noting district court granted TRO before later converting it to preliminary injunction sua sponte).

637 F.2d 181 (3d Cir. 1980).

64 Id. at 186 (determining whether district court should have granted relief).


86 Id. at *1, *10.

87 805 F.2d 1353 (9th Cir. 1986).

88 Id. at 1358 n.5 (citations omitted).

89 Nitz v. Otte, No. 96-35155, 1996 WL 341140, at *1 (9th Cir. June 20, 1996) (holding proceeding is not one of substance on merits).
merits of the case.

B. The “Substantive” View

The clearest expression of the “substantive” view is found in Graham v. Breier \(^9\) and in Wal-Mart Stores, Inc. v. Rodriguez. \(^2\) In Graham, the owner of a Milwaukee theatre at which nude and semi-nude dancers performed, the manager of the theatre, and the dancers themselves brought suit seeking declaratory and injunctive relief from the enforcement by the Chief of Police of Milwaukee, the City Attorney of Milwaukee, and the District Attorney of the County of Milwaukee of a state statute and municipal ordinances prohibiting obscenity. \(^3\) The federal district court granted the plaintiffs’ ex parte motion for a TRO prior to the commencement of any state action and scheduled a hearing on the plaintiffs’ motion for a preliminary injunction and the defendants’ motions to dismiss the action. \(^4\) Shortly after the district judge entered the TRO, a criminal complaint was filed against the plaintiffs in state court. \(^5\) Because “a party must present at least a prima facie case in order to be eligible for a temporary restraining order,” the court concluded that the issuance of a TRO, “[w]hile not a final determination of the merits,” constituted a “proceeding of substance on the merits” within the meaning of Hicks and declined to abstain. \(^6\)

The issue in Wal-Mart stemmed from a merger between Wal-Mart Stores, Inc. (“Wal-Mart”); Wal-Mart Puerto Rico, Inc. (“Wal-Mart PR”); and Supermercados Amigo, Inc. (“Amigo”). \(^7\) On the afternoon that the merger was to consummate, the Secretary of Justice of Puerto Rico issued a press release in which she publicly declared that she would be filing a lawsuit against the parties to the merger. \(^8\) Wal-Mart, Wal-Mart PR, and

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\(^{9}\) Id.; accord Polykoff v. Collins, 816 F.2d 1326, 1332 (9th Cir. 1987) (citing Adultworld Bookstore v. City of Fresno, 758 F.2d 1348, 1350–51 (9th Cir. 1985)) (“A federal proceeding may be deemed to have passed beyond the ‘embryonic stage’ if the federal court has conducted extensive hearings on a motion for a preliminary injunction.”).

\(^{10}\) 418 F. Supp. 73 (E.D. Wis. 1976).

\(^{11}\) 236 F. Supp. 2d 200 (D.P.R. 2002).


\(^{13}\) Id., 418 F. Supp. at 74, 77–78 (describing procedural history).

\(^{14}\) Id. at 77 (discussing motions to dismiss).

\(^{15}\) Id. at 78.


\(^{17}\) Id.
Amigo then brought an action under 42 U.S.C. § 1983 against the Secretary alleging equal protection and due process violations and seeking to enjoin the Secretary from instituting any action against them.\textsuperscript{99} The district court held a hearing after which the court declared it intended to issue a TRO prohibiting the Secretary from filing an antitrust suit against the parties in state court.\textsuperscript{100} After the hearing, the Secretary filed an “Informative Motion” that notified the court that she had already filed in state court and claimed “it was her understanding that at that time, the TRO had not been issued nor notified to her by the Court.”\textsuperscript{101} The state court then issued a preliminary injunction \textit{ex parte} that prohibited the parties to the merger from completing “any transaction or contract that would operate to implement the merger.”\textsuperscript{102} Shortly after, the parties to the merger filed a copy of the district court’s TRO with the state court.\textsuperscript{103} The Secretary then moved to dissolve the TRO on abstention grounds.\textsuperscript{104}

The \textit{Wal-Mart} court held that the issuance of a TRO on a contested matter was a “proceeding of substance on the merits” sufficient to preclude abstention under \textit{Younger}.\textsuperscript{105} Observing that “[w]hether granting or denying injunctive relief in the form of a TRO or a preliminary injunction is a ‘proceeding of substance on the merits’ remains unclear throughout federal circuits and district courts,” the court went on to focus on circumstances of the issuance of the TRO.\textsuperscript{106} It noted that the court in \textit{Kim-Stan} had “distinguished a TRO from a preliminary injunction [by] alluding to the fact that the former may be issued \textit{ex parte} and that the opposing party may not even have ‘the opportunity to be heard before the TRO is issued,’” but did not find this to be dispositive.\textsuperscript{107} Recognizing that those procedures “may be the typical situation when a TRO is issued,” the court distinguished \textit{Kim-Stan} by emphasizing that “the TRO [in \textit{Wal-Mart}] was not granted \textit{ex parte and} both sides were given the opportunity to be heard prior to issuance of the order.”\textsuperscript{108} More generally, however, the court noted

\begin{itemize}
\item \textsuperscript{99} Id.
\item \textsuperscript{100} Id.
\item \textsuperscript{101} Id. at 203-04 (detailing facts leading up to litigation).
\item \textsuperscript{102} \textit{Wal-Mart Stores, Inc.}, 236 F. Supp. 2d at 204.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Id. at 209 (“That [TRO] hearing together with the grant of the requested TRO was a proceeding of substance . . . on the merits that took place before Defendant filed her state court action.”).
\item \textsuperscript{106} Id. at 208.
\item \textsuperscript{107} \textit{Wal-Mart Stores, Inc.}, 236 F. Supp. 2d at 209 (stating reasoning of court).
\item \textsuperscript{108} Id. at 209 (distinguishing TRO review in \textit{Kim-Stan}, Inc. v. Dep’t of Waste Mgmt., 732 F. Supp. 646, 651 (E.D. Va. 1990)). The court in \textit{Wal-Mart} also drew a more subtle distinction, explaining in a parenthetical that \textit{Kim-Stan} held that “granting a TRO by a magistrate judge is not
that “[i]n addition, even when a TRO has been issued ex parte several courts have found that granting it was a proceeding of substance on the merits.”

It explained that “the Court had to consider the merits of this case in ruling on all the elements of the four prong test for temporary or preliminary injunctive relief, and specifically, the first element which requires a court to consider a plaintiff’s likelihood of success on the merits of his/her claims.”

Drawing a parallel with the decision in Graham, the court in Wal-Mart found that “during the TRO hearing that took place ... a contested matter was decided.”

That hearing ... with the grant of the requested TRO was a proceeding of substance, as opposed to a final determination, on the merits that took place before [the Secretary] filed her state court action.

Similar approaches have been adopted by other courts. In Housworth v. Glisson, the court endorsed the analysis in Graham and determined that proceedings of substance on the merits had taken place in federal court once a TRO issued. Stating that, “because the movant must establish a prima facie claim to obtain such relief, ‘proceedings of substance on the merits,’ within the contemplation of Hicks had taken place in the federal suit as of the date the order was signed.” In For Your Eyes Alone, Inc. v. City of Columbus, the Eleventh Circuit also applied a similar analysis. In that case, the court held that proceedings of substance on the merits had occurred in federal court even though the district court denied a TRO. Distinguishing the case from Hicks and Doran—the court opined that the “procedural facts” were “completely divergent”—the court focused on the fact that “before ruling on the TRO ... [it] heard testimony ... and ... heard arguments from counsel of both

a proceedings of substance on the merits.” Id. (emphasis added). Functionally and analytically, however, this distinction was not important to the outcome.


Id. (citation omitted); see also Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 5 (1st Cir. 1991) (listing elements of standard for issuing preliminary injunction in First Circuit).

Id. at 33 (citing Graham v. Breier, 418 F. Supp. 73 (E.D. Wis. 1976)).

See cases cited infra notes 114-126 and accompanying text (describing cases that considered issuance of TRO to be “proceeding of substance”).


Id. at 33 (citing Graham v. Breier, 418 F. Supp. 73 (E.D. Wis. 1976)).

Id.

281 F.3d 1209 (11th Cir. 2002).

Id. at 1217-20 (describing reasoning).

Id. at 1218.
sides.” In light of this “thorough evidentiary hearing,” the court had “no trouble concluding that . . . proceedings of substance on the merits had taken place in federal court under Hicks.”

In National City Lines, Inc. v. LLC Corp., the District Court for the Western District of Missouri also cited Graham and held that abstention was not warranted because “there had been substantial proceedings . . . before the State Court proceedings were instituted” where the court had granted a TRO and had just concluded that a preliminary injunction should issue. Since the Eighth Circuit is among those courts that apply identical criteria for obtaining a TRO and a preliminary injunction, it would likely find that the issuance of preliminary injunctive relief based on those criteria is a “proceeding of substance on the merits” irrespective of whether that relief is styled as a TRO or a preliminary injunction. Indeed, in another case the Western District of Missouri observed in passing that the issuance of a TRO may be a proceeding of substance on the merits, especially where the party appealed the TRO and the Court of Appeals treated the TRO as a preliminary injunction. Several other courts, while not addressing this issue specifically, have indicated that they would consider the granting of a TRO to be a “proceeding of substance.”

120 Id.
121 Id. In at least one case the Fifth Circuit reached a similar result, focusing on the extent and complexity of the issues actually resolved by the court. See Red Bluff Drive-In, Inc. v. Vance, 648 F.2d 1020, 1025 n.2 (5th Cir. 1981) (“[P]roceedings of substance on the merits [occurred where b]efore reaching the merits, the trial courts had to resolve venue challenges, troublesome standing questions, and the applicability of various abstention doctrines.”).
122 524 F. Supp. 906 (W.D. Mo. 1981), aff’d, 687 F.2d 1122 (8th Cir. 1982).
123 Id. at 913 (citing Graham v. Breier, 418 F. Supp. 73, 78 (E.D. Wis. 1976)) (holding abstention was not warranted because substantial proceedings were instituted before state court proceedings).
124 See Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981) (en banc) (advocating that preliminary injunction and TROs include identical requirements). But see Aaron v. Target Corp., 357 F.3d 768, 776 (8th Cir. 2004) (holding no “proceeding[] of substance” when injunction and TRO motions and TRO hearing held). “At the time the court issued its TRO . . . the only developments in federal court had been the filing of motions for injunction and TRO and the TRO hearing.” Id. “The state action on the other hand had been scheduled for trial the morning after the TRO was issued, and discovery and motions had preceded.” Id. In Aaron, however, the “state eminent domain case was . . . develop[ed] for some six weeks after it was filed” and the “state court ruled on permissible discovery, set deadlines, and issued a protective order” before the plaintiffs ever sought a TRO. Id. Under those circumstances and recalling that the appeal in question related to the issuance of a preliminary injunction, it is unlikely that the court’s ruling turned on whether the issuance of a TRO is a “proceeding of substance on the merits.” See id.
125 Quinn v. Missouri, 681 F. Supp. 1422, 1428 (W.D. Mo. 1988) (refusing to apply Younger abstention), rev’d on other grounds, 855 F.2d 856 (8th Cir. 1988).
126 Cf. Floyd v. Anders, 440 F. Supp. 555, 537 (D.S.C. 1977) (noting in dicta that “[o]ne would suppose that the actual issuance of a temporary restraining order, after a hearing, was a
IV. TOWARD A UNIFORM APPLICATION OF YOUNGER

The most logical approach—and the approach most consonant with the policy goals that undergird the Younger doctrine—is to treat the issuance of a TRO in the same manner as the issuance of a preliminary injunction. Procedural, functional, and equitable considerations all militate in favor of an approach that applies the same rules to the same decisions regarding both forms of preliminary injunctive relief. Thus, in accordance with settled law, courts should continue to abstain in cases where a state action is filed soon after the denial of a preliminary injunction or the denial of a TRO in federal court. Conversely, courts should view both the issuance of a preliminary injunction and the issuance of a TRO as “proceedings of substance on the merits” sufficient to preclude abstention under Younger. This approach embraces the federalism and comity concerns inherent in the abstention analysis, effectively balances the interests of both parties to the litigation, and provides clearer guidance to the lower courts.

A. Procedural Similarity

First, the fact that the procedures for obtaining a preliminary injunction and a TRO may differ does not justify distinct treatment for the purposes of Younger. The principle differences between a preliminary injunction and a TRO are (1) a TRO may be issued ex parte and (2) preliminary injunctions typically remain in effect for longer periods. Usually, a TRO is sought by a party facing possible irreparable injury before a Rule 65(a) preliminary injunction hearing can be held. In those cases, “[t]he order is designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction and may be issued with or without notice to the adverse party.” As with preliminary injunctive relief generally, every circuit proceeding of substance in the district court within the meaning of Hicks, but we need not stand on that ground”); vacated and remanded on other grounds, 440 U.S. 445 (1979).

127 See infra Part IV, subsections A, B, and C.
128 See infra Part IV, subsection B.
129 See FED. R. CIV. P. 65(b) (defining when TRO may issue); STOLL-DEBELL, DEMPSEY & DEMPSEY, supra note 47, at 22-30 (defining when preliminary injunction may issue).
130 See Loral Corp. v. Sanders Assocs., Inc., 639 F. Supp. 639, 642 (D. Del. 1986) (“[T]he Court could not have found that the plaintiffs would have been irreparably injured pendente lite if relief were not granted . . . therefore, the motion would have been denied.”); WRIGHT ET AL., supra note 47, at § 2948 (explaining when TRO is sought in practice).
131 See WRIGHT ET AL., supra note 47, at § 2951.
requires a showing of irreparable injury before a TRO will issue.\textsuperscript{132} Moreover, when a TRO is granted without notice it must comply with the Rule 65(b) provisions designed to protect the nonmovant in lieu of the opportunity to be heard at a formal hearing.\textsuperscript{133} These constraints are not merely prudential but are substantially informed by Supreme Court precedent emphasizing the constitutional dimensions of providing notice and an opportunity for a fair hearing.\textsuperscript{134}

When the opposing party actually receives notice, however, both the standard and procedure for obtaining a TRO are substantially the same as the standard and procedure to obtain a preliminary injunction.\textsuperscript{135} In fact, when a TRO is issued after a hearing, courts may simply treat it as a

\textsuperscript{132} The First, Second, Fifth, Eighth, Ninth, and Eleventh Circuits have expressly held that the standard for a issuing a preliminary injunction and a TRO are identical. See, e.g., Beaty v. Brewer, 649 F.3d 1071, 1072 (9th Cir. 2011) (applying standard for preliminary injunctions to TROs); Schiavo ex rel. Schinder v. Schiavo, 403 F.3d 1223, 1225-26 (11th Cir. 2005) (same); Latin Am. Music Co. v. Cardenas Fernandez & Assoc., 2 F. App’x 40, 42 (1st Cir. 2001) (same); Local 1814, Int’l Longshoremen’s Ass’n AFL-CIO v. New York Shipping Ass’n, Inc., 965 F.2d 1224, 1229-29 (2d Cir. 1992) (same); Clark v. Prichard, 812 F.2d 991, 993, 996 (5th Cir. 1987) (same); Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981) (en banc) (same). Though the remaining circuits have not explicitly applied the same standard to both preliminary injunctions and TROs, each requires a showing of irreparable harm before a TRO will issue. See, e.g., Sne v. Barone, 359 F. App’x 281, 283-84 (3d Cir. 2009) (affirming denial of TRO because movant failed to demonstrate irreparable injury); Estate of Coll-Monge v. Inner Peace Movement, 524 F.3d 1341, 1349 (D.C. Cir. 2008) (granting a TRO and explaining that “[i]n deciding whether to grant preliminary injunctive relief, the district court must consider whether . . . the party seeking the injunction will be irreparably injured if relief is withheld”); Wiechmann v. Ritter, 44 F. App’x 346, 347 (10th Cir. 2002) (citation omitted) (“To merit a temporary restraining order or preliminary injunction, the movant must establish that . . . she will suffer irreparable injury if she is denied the injunction . . .”); P&G v. Bankers Trust Co., 78 F.3d 219, 226 (6th Cir. 1996) (citation omitted) (“In issuing a TRO, a district court is to review factors such as the party’s likelihood of success on the merits and the threat of irreparable injury.”); W & D Ships Deck Works, Inc. v. United States, 39 Fed. Cl. 638, 647 (Fed. Cl. 1997) (citations omitted) (“When deciding if a TRO is appropriate in a particular case, a court uses the same four-part test applied to motions for a preliminary injunction.”); Mylan Pharms., Inc. v. Thompson, 207 F. Supp. 2d 476, 484 (N.D.W. Va. 2001) (citing Virginia v. Kelly, 29 F.3d 145, 147 (4th Cir. 1994)) (applying standard for preliminary injunction to TRO); Ecologix, Inc. v. Fansteel, Inc., 676 F. Supp. 1374, 1378 (N.D. Ill. 1988) (stating that “five requirements necessary for the issuance of [TRO]” include showing of “irreparable harm”).

\textsuperscript{133} See FED. R. CIV. P. 65(b)(1) (setting out procedure for obtaining TRO). This includes the application of a heightened standard of review. Id.


\textsuperscript{135} Compare FED. R. CIV. P. 65(b) (describing TRO process), with FED. R. CIV. P. 65(a) (prescribing preliminary injunction process).
preliminary injunction. Further, some courts also require a party seeking a TRO to show that it is likely to succeed on the merits and others employ tests that explicitly engage in a balancing of hardships or evaluate the effect of the TRO in light of the public interest. Under these circumstances, it is difficult if not impossible to differentiate a TRO and a preliminary injunction based on the showing that a movant must make to obtain relief. Arguably the only salient difference in such cases is the length of time for which the relief remains in effect. Not surprisingly, duration is the most common basis on which courts distinguish a TRO from a preliminary injunction, often characterizing TROs merely as brief measures designed “only [to] preserve the status quo.”

136 See, e.g., Sampson v. Murray, 415 U.S. 61, 87-88 (1974) (“[W]here an adversary hearing has been held, and the court’s basis for issuing the order [is] strongly challenged ... we view the [temporary restraining] order at issue here as a preliminary injunction.”); Levas & Levas v. Vill. of Antioch, 684 F.2d 446, 448 (7th Cir. 1982) (rejecting claim that different evidentiary standards and burdens of proof apply to TROs and preliminary injunctions). Casually rejecting formalistic distinctions between a TRO and a preliminary injunction is more significant than first meets the eye, as the denial of a TRO is generally not appealable while the denial of a preliminary injunction is. Compare El Paso Natural Gas Co. v. Netzsosie, 526 U.S. 473, 482 (1999) (“Preliminary injunctions are, after all, appealable as of right.”), with Office of Pers. Mgmt. v. Am. Fed’n of Gov’t Emps., 473 U.S. 1301, 1303-04 (1974) (“[T]he established rule is that denials of temporary restraining orders are ordinarily not appealable.”).


138 See Fed. R. Civ. P. 65 (showing similarity in procedure for TROs and preliminary injunctions).

139 See sources cited supra note 136 (pointing out discernible similarity between TROs and preliminary injunctions). As noted previously, one other difference between a TRO and a preliminary injunction is that a TRO usually is not appealable. See Office of Pers. Mgmt., 473 U.S. at 1304. However, some courts ignore this distinction and it is unclear whether this difference should affect the classification of a “proceeding of substance on the merits.” See Sampson, 415 U.S. at 94 (Douglas, J., dissenting).

In the *Younger* context, however, duration is a distinction without a difference. Focusing solely on the difference in duration of a TRO and a preliminary injunction leads to a cramped view of the purpose TROs serve, as well as the impact they can have on federalism and comity interests. To be sure, preserving the status quo may sometimes imply a smaller expenditure of judicial resources and a mitigated intrusion on parallel state proceedings. But depending on when and how one defines the status quo, not to mention the seriousness of the threat to the existing state of affairs, it is hardly clear that the effects of a TRO and a preliminary injunction are measurably different.141 Invoking the maintenance of the status quo to demonstrate that the issuance of a TRO is not a “proceeding of substance on the merits” gives short shrift to the potential value of preserving the current balance of interests in a dispute.142 Worse, the view that merely preserving the status quo renders a TRO a less significant undertaking than a run-of-the-mill preliminary injunction may get the law exactly wrong. Preliminary injunctions are routinely crafted simply to preserve the status quo and several circuits actually require a heightened showing when preliminary injunctive relief might alter the current positions of the parties.143 Though perhaps relevant to other aspects of litigation, duration does not augment or diminish the significance of granting preliminary relief.144

In sum, on procedural grounds, there is little reason to accord different treatment to a TRO and a preliminary injunction under *Younger.* Preliminary injunctions and TROs both require a showing of substantially the same elements.145 Moreover, when the opposing party receives notice

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141 In fact, courts and commentators have criticized the use of the concept of the “status quo” for this reason. See, e.g., Ortho Pharm. Corp. v. Amgen, Inc., 882 F.2d 806, 814 (3d Cir. 1989) (advocating focus on extent of injury in lawsuit); Roland Mach. Co. v. Dresser Indus. Inc., 749 F.2d 380, 383 (7th Cir. 1984) (“[S]tatus quo’ is ambiguous.”); Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 166 (2001) (“The trend in the federal circuits toward a heightened preliminary injunction standard in cases involving mandatory orders that upset the status quo has little to recommend it.”); *Developments in the Law – Injunctions*, supra note 44, at 1058 (“The concept status quo lacks sufficient stability to provide a satisfactory foundation for judicial reasoning.”). “[T]he focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.” Ortho Pharm. Corp., 882 F.2d at 814 (citing Canal Auth. of State of Fla. v. Callaway, 489 F.2d 567, 576 (5th Cir. 1971)).

142 See For your Eyes Alone, Inc. v. City of Columbus, 281 F.3d 1209, 1219 (11th Cir. 2002) (explaining that holding attempts to balance interests); Houghton v. Cortelyou, 208 U.S. 149, 156 (1908) (stating TRO appropriate if status quo need not be preserved).

143 See generally Lee, supra note 141, at 115-21, 143-47 (discussing heightened burden used by Second, Ninth, and Tenth Circuits).

144 See Sampson, 415 U.S. at 86-88 (finding extending TRO did not limit on grant of preliminary injunction).

145 See FED. R. CIV. P. 65(d) (describing contents and scope of preliminary injunctions and
of a TRO, the standards and procedures employed are practically identical. Finally, a focus purely on the fact that a TRO is of shorter duration overlooks the significant impact that a TRO can have on both the parties and the litigation. Duration alone does not measurably alter the effect of preliminary injunctive relief on the issues relevant to Younger’s policy goals.

B. Federal Equity Power, Federalism, and Comity

Second, both the issuance of a preliminary injunction and the issuance of a TRO are exercises of federal power that may impinge on state prerogatives. When a federal court determines it to be legally appropriate to exercise both its jurisdiction and its authority to issue preliminary injunctive relief, that issuance should be sufficient to preclude abstention under Younger. The Supreme Court appears tacitly to acknowledge this reasoning. Recall that whether “proceedings of substance on the merits” have occurred in a case involving a preliminary injunction varies depending on whether the court actually issues the injunction. But why is this so? The standard ostensibly concerns the actual proceedings that have occurred; the only salient difference between an issuance and a denial is the outcome, the proceeding itself is the same. Why should an issuance and a denial be treated differently? The strongest response is that, despite the language in Hicks and Doran, whether injunctive relief is actually granted is also important under Younger. This interpretation makes sense because the issuance of any injunctive relief is an exercise of federal equity power that bears on the federalism and comity concerns identified by the Court. Thus, although Hicks and Doran focused on the procedural aspects of litigation to determine if “proceedings of substance on the merits have taken place,” the actual issuance of preliminary injunctive relief is also relevant.

This conclusion has important implications for the issuance of a

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146 See FED. R. CIV. P. 65 (stating procedures to obtain preliminary injunction or TRO).
147 See sources cited supra note 136 and accompanying text (comparing TROs and preliminary injunctions).
148 Id.
TRO. The temporary nature of a TRO in no way diminishes the fact that its issuance is still an exercise of federal power that may affect state interests. Even acting solely to prevent irreparable injury or to preserve the status quo is still an exercise of federal equity power that can invade the prerogatives of the state, stay or disrupt state proceedings, and effect the relative positions of the litigants. For example, in *Hawaii Housing Authority v. Midkiff*, the plaintiffs filed a complaint in federal court seeking temporary and permanent relief from Hawaii’s Land Reform Act of 1967. The district court initially issued a TRO that prevented the Housing Authority from proceeding against the plaintiffs’ estates before later issuing a preliminary injunction. The forced delay of state administrative proceedings allowed the federal court to conduct “proceedings of substance on the merits” in the form of the preliminary injunction hearing and, in that respect, the TRO prevented the state from taking administrative action that would likely have deprived the court of jurisdiction.

A federal district court in *Hunt v. City of Longview* followed that course when members of the Longview City Council brought an action in federal court to prevent the state district attorney from initiating a *quo warranto* proceeding to remove them from office. The district court first issued a TRO that prevented the initiation of any *quo warranto* proceedings until a preliminary injunction hearing could be held. Later arguing that the federal district court should abstain, the City pointed out that the district court’s issuance of a TRO had prevented it from bringing a *quo warranto* action before the district court could hold a hearing. The court acknowledged that “but for the granting of the temporary restraining order,

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153 Id. at 238 (setting forth factual and procedural history).
154 Id. (noting state court proceedings still not initiated).
155 Id. As noted, the Court did not reach the question of whether the issuance of a TRO was itself a “proceeding[] of substance on the merits.” Id. “Whether issuance of the February temporary restraining order was a substantial federal court action or not, issuance of the June preliminary injunction certainly was.” Id. (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929-31 (1975)).
156 932 F. Supp. 828 (E.D. Tex. 1995), aff’d, 95 F.3d 49 (5th Cir. 1996).
157 See id. at 832 (listing qualifications for holding office in Longview). A *quo warranto* proceeding challenges the authority of a party to exercise a specific right or power and may be brought in Texas by a district attorney or the attorney general pursuant to Tex. Civ. Prac. & Rem. Code § 66.002. Id. at 833-35.
158 Id. at 833.
159 Id. at 837.
a petition for leave to file an information in the nature of *quo warranto* would have been filed in state district court before this court could have held a preliminary injunction hearing. However, it was not persuaded that this compelled abstention.161

Likewise, in *Westin v. McDaniel*, a criminal defense attorney facing prosecution for hindering an undercover officer sought a preliminary injunction in federal court to enjoin the state’s attempt to indict him.162 The state district attorney’s first attempt to bring charges had been unsuccessful.163 Before the district attorney could make a second attempt to obtain an indictment, the federal district court entered a TRO preventing the grand jury from hearing the evidence against the attorney.164 Noting that “[t]he temporary restraining order . . . [had] stopped an entirely new attack against [the defendant] after the State’s case had been dismissed,” the court concluded that no state criminal proceedings were actually pending.165 The court proceeded to exercise jurisdiction, observing that “the temporary restraining order allowed for substantial proceedings on the merits, in the form of [a] preliminary injunction hearing . . . to occur in [federal] court before the State took any steps against Westin.”166 Thus, the issuance of the TRO prevented state action that would otherwise have ousted federal jurisdiction, a fact freely acknowledged by the district court.

Appropriate recognition of and respect for the equitable powers of federal courts also supports viewing any issuance of preliminary injunctive relief as a “proceeding of substance on the merits.” The issuance of such relief, even in the form of a TRO, clearly has at least some implications for federalism and comity.167 As other scholars have noted, the creation of

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160 *Id.* (emphasis added). The district attorney and the city attorney had provided sworn affidavits averring that this assertion was true. *Id.*
163 *Id.* at 1564.
164 *Id.* at 1565 (quoting GA. CODE ANN. § 16-10-24 (West 2012)) (dismissing charges because no evidence suggested that law was broken “knowingly and willfully”).
165 *Id.*
166 *Id.* at 1568 (adding such case would not become “pending” until grand jury returned true bill).
168 *Id.* at 1568 n.3 (“The court is . . . aware that its own temporary restraining order . . . allowed proceedings of substance on the merits to occur here [in federal court] before the state grand jury could hear evidence against [the defendant], but did not believe that this fact change[d] the outcome.”).
judge-made abstention doctrines largely tracks the expansion of state administrative agencies and echoes a “concern with federal district judges’ telling state officials how to carry out their jobs as a matter of state law.”

Moreover, the expansion of Younger was further informed by a concern that, “given the commingling of powers within state courts and agencies, federal court involvement in state administrative action might present problems of legitimacy.” Thus, the expansion of Younger arguably began as an attempt by the Supreme Court to accommodate these burgeoning administrative regimes. Buttressed by the “sense that federal courts, unlike state courts, should not be working partners in the establishment of state policy,” this history evinces the preference under Younger for restraint regarding the use of federal equity power. This preference exists irrespective of whether a court’s federal equity power is exercised through the issuance of a TRO or a preliminary injunction.

The issuance of a TRO should be accorded the significance commensurate with any exercise of that power. As is evident in Midkiff, Hunt, and Westin, a TRO can substantially impact state objectives. The manifestation of federal authority inherent in the issuance of a TRO thus intrudes on the exercise of state power and should be viewed in the same manner as the issuance of a preliminary injunction. In light of the similar repercussions for federalism and comity, it makes more sense to treat the issuance of any preliminary injunctive relief in the same regard. Further, neither federalism nor comity is served by abstaining after a federal court has already intervened through an exercise of its equitable powers. At that point, a state can win only a Pyrrhic victory, for

injury and ‘likelihood of prevailing’ [in the context of a TRO in Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)] would have clearly had federalism implications, since the effect would have been to restrain further seizures by order of the state court.”).

Ann Woolhandler & Michael G. Collins, Judicial Federalism and the Administrative State, 87 CALIF. L. REV. 613, 646 (1999) (analyzing rise of administrative state and its implications for judicial federalism). More in depth treatment of this subject is regrettably beyond the scope of this article.

Id. at 647 (suggesting reasons behind expansion of Younger doctrine).

See generally id. at 646-48.

Id. at 646.


Cf. Town of Lockport v. Citizens for Cnty. Action at Local Level, Inc., 430 U.S. 259, 264 n.8 (1977) (“[P]rinciples of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court.”); Vill. of Belle Terre v. Boraas, 416 U.S. 1, 3 n.1 (1974) (citation omitted) (“Younger v. Harris is not involved here, as on August 2, 1972, when this federal suit was initiated, no state case had been started.”). Moreover, the plaintiffs in such disputes are significantly disadvantaged as they must replead, reargue, and refile according to new state rules. See Town of Lockport, 430 U.S. at
relinquishing federal jurisdiction will not undue a prior intervention. If Younger aims to preserve the dignity of state tribunals and encourage respect for state courts’ ability to adjudicate constitutional claims, a better approach is to place greater emphasis on the significance of issuing injunctive relief in the first instance.\textsuperscript{176} This purpose is best served by recognizing that the issuance of preliminary injunctive relief, whether in the form of a preliminary injunction or a TRO, is a “proceeding of substance on the merits.”

In short, there is little functional difference between the issuance of a TRO and a preliminary injunction. Although temporary, the issuance of a TRO is still an exercise of federal equity power that implicates notions of federalism and comity. Moreover, the historical evolution of the policy considerations underlying Younger suggest that the potential of a TRO to intrude on state interests evokes the same concerns attendant to other forms of equitable relief.\textsuperscript{177} As such, there is little reason to draw a distinction between the manifestations of federal power inherent in the issuance of a TRO and the issuance of a preliminary injunction. Lastly, federalism and comity are only obliquely served by requiring abstention where a TRO has already issued.

\textbf{C. Equitable Concerns}

Finally, viewing both the issuance of a preliminary injunction and the issuance of a TRO as “proceedings of substance on the merits” avoids a myopic focus on structural concerns and better accommodates the interests of the parties. Although federalism and comity have come to the fore in the abstention calculus, the Younger doctrine was originally grounded on equitable principles.\textsuperscript{178} As such, equitable maxims shaped the abstention

\footnotesize{\textsuperscript{264} n.8.}

\textsuperscript{176} See Soifer & Macgill, supra note 151, at 1159 (detailing costs of equitable relief). It should be noted, however, that little additional emphasis is likely required. Equitable relief has always been an extraordinary remedy that also imposes costs on the federal courts and courts do not lightly grant such relief.

\textsuperscript{177} See generally Lee, supra note 141, at 140-57 (laying out history of preliminary injunctive relief).

\textsuperscript{178} Younger v. Harris, 401 U.S. 37, 54 (1971) (emphasis added) ("[O]ur holding rests on the absence of the factors necessary under equitable principles to justify federal intervention."); cf. Kugler v. Helfant, 421 U.S. 117, 124 (1975) ("The policy of equitable restraint expressed in Younger v. Harris, in short, is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights."). Younger held that federal courts should abstain because the state criminal proceeding provided a forum in which the defendant could raise his constitutional claims and thus that the state proceedings provided an adequate remedy. See Younger, 401 U.S. at 54. This, of course, is
inquiry from its inception. Historically, “courts of equity” have “interfere[d] by way of injunction to prevent wrongs; whereas, courts of common law . . . grant[ed] redress only, when the wrong [wa]s done.” Equitable relief is only available, however, in the absence of “a plain, adequate, and complete remedy” at law. The lodestar of any equitable inquiry is the likelihood of irreparable injury. Equity seeks to prevent irreparable injuries that materially alter the positions of the parties, change the issues to be litigated, or deprive the court of jurisdiction. In consonance with its overall orientation toward fairness and its basis in jurisdiction over actual persons, equity is particularly concerned with irreparable injury to individual interests. Such injuries may be obvious where a party faces the risk of losing real or physical property that cannot be replaced through eventual damages. However, one can also suffer irreparable injury with respect to intangible interests and federal courts have recognized a risk of irreparable injury with respect to eviction, harm to medical health, harm to the


See Story, supra note 180, at 24. See id. at 23 (reiterating Lord Redesdale’s account of “[t]he jurisdiction of a court of equity”). See John W. Edmonds, Reports of Select Cases Decided in the Courts of New York, Not Heretofore Reported, or Reported only Partially 85 (1883).

Id. See Laycock, supra note 52, at 37-48 (describing irreparable injury as that which cannot be replaced with damages).
environment, and violations of tribal sovereignty.\textsuperscript{185} Likewise, irreparable injury can inhere in constitutional violations, such as the abridgement of the freedom of speech, infringement of religious beliefs, interference with the right to vote, or imposition of cruel and unusual punishment.\textsuperscript{186}

Preliminary injunctive relief is often essential to protect a party’s rights until the power of the courts can be brought to bear. When a court determines that a TRO should issue to safeguard a party’s constitutional interests, that conclusion is premised on a judicial finding of a likelihood of irreparable injury and a recognition that no adequate legal mechanism exists to ensure the immediate protection of those interests.\textsuperscript{187} Requiring abstention after issuing a TRO trivializes the court’s determination that federal intervention is necessary and may prejudice the party for whose


\textsuperscript{186} See Elrod v. Burns, 427 U.S. 347, 373 (1976) (“[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”); Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996) (finding irreparable injury where officials sought to keep prisoner in “medical keeplock” during pending lawsuit); Hoevenaar v. Lazaroff, 276 F. Supp. 2d 811, 827-28 (S.D. Ohio 2003) (finding that cutting prisoner’s hair in violation of sincerely held religious beliefs constituted irreparable harm); rev’d on other grounds, 422 F.3d 366, 371 (6th Cir. 2005); Cardona v. Oakland Unified Sch. Dist., 785 F. Supp. 837, 840 (N.D. Cal. 1992) (citations omitted) (“Abridgment or dilution of a right so fundamental as the right to vote constitutes irreparable injury.”).

\textsuperscript{187} See generally Friedman, supra note 10, at 531 (detailing roles of state and federal courts); Julie A. Davies, Pullman and Burford Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases, 20 U.C. DAVIS L. REV. 1, 2 (1986) (same); Redish, Abstention, supra note 10, at 72, 86 (same); Burt Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1105 (1977) (same). This is not to say that state courts (or state administrative proceedings) are necessarily less protective of federal rights, a question that is a subject of fierce debate among many academics. For the purposes of this article, it is enough to note that state and federal standards for awarding equitable relief designed to protect constitutional rights vary. At least some scholars suggest that this recognition means federal courts are more protective of federal rights. See Neuborne, supra, at 1105 (“[D]ismissing what is termed the] myth . . . that state courts will vindicate federally secured constitutional rights as forcefully as would the lower federal courts.”). Nor can one hypothesize that some other, extralegal remedy might be available, “for, if [a remedy] be doubtful and obscure at law, equity will assert a jurisdiction.” STORY, supra note 180, at 24.
benefit the TRO was granted. This concern is particularly salient in the context of "reverse removal," where a state can oust otherwise proper federal jurisdiction. This development has met staunch criticism.

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188 Kugler v. Helfant, 421 U.S. 117, 123 (1975) (reviewing principles governing judicial intervention in Younger). The observation is buoyed by the fact that, where "exceptional circumstances creat[e] a threat of irreparable injury 'both great and immediate,'" courts need not apply Younger at all. Id.

189 See Fiss, supra note 10, at 1135-36 (describing "reverse removal"). By pursuing the logic of "Our Federalism" to utter extreme, Hicks fundamentally altered the structure of the federal jurisdictional scheme: it vested the district attorney—not the aggrieved citizen—with the power to choose the forum, and, indeed, the nature of the proceeding in which the federal constitutional claim would be litigated. In essence, Hicks created—in such stark contrast to the post-Civil War [sic] removal statutes—a reverse removal power: a power to remove a case from the federal court to the state court. After a federal anticipatory suit is filed, the district attorney can initiate a criminal prosecution against the aggrieved citizen and by that action abort the federal suit and remit the citizen to adjudicating his claim as a defense in a criminal prosecution in the state court.

Id. (emphasis in original) (internal citations omitted); see also Hicks v. Miranda, 422 U.S. 332, 357 (1975) (Stewart, J., dissenting) ("The Court's new rule creates a reality which few state prosecutors can be expected to ignore. It is an open invitation to state officials to institute state proceedings in order to defeat federal jurisdiction."); Corpus Christi Peoples' Baptist Church, Inc. v. Tex. Dep't of Human Res., 481 F. Supp. 1101, 1107 (S.D. Tex. 1979), aff'd, 621 F.2d 438 (5th Cir. 1980).

Plaintiffs suggested during oral argument that the filing of the state suit was done deliberately to strip this Court of jurisdiction and that the Court should find such conduct offensive. Even assuming such is the case, it is nothing more than the precise result predicted by the four dissenters in Hicks when they characterized the majority opinion as "an open invitation to state officials to institute state proceedings in order to defeat federal jurisdiction." That prediction, here fulfilled, obviously did not command a majority of the Court and therefore can be of little use to these Plaintiffs.

Id. (citation omitted).

190 See Hicks, 422 U.S. at 356 (Stewart, J., dissenting). [The new rule went] much further than simply recognizing the right of the State to proceed with the orderly administration of its criminal law; it ousted the federal courts from their historic role as the ‘primary reliances’ for vindicating constitutional freedoms. This is no less offensive to ‘Our Federalism’ than the federal injunction restraining pending state criminal proceedings condemned by Younger v. Harris.

Id. Other scholars have agreed. See Gerald P. Lopez, Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration, 77 Geo. L.J. 1603, 1704-05 (1989). Even if you meet all the constitutional and statutory requirements for making a claim in federal court, it turns out that the judge alone can still tell you to go to or stay in a state court or agency . . . . It turns out that sometimes even the lawyer for the state officials you’re suing can make you go to a state court or agency . . . . It turns out that even if you never wanted to be in a state agency or court, you might not only be required to go there, but you also might never get to federal court either . . . .
Thus, treating a preliminary injunction and a TRO differently in terms of “proceedings of substance on the merits” runs the risk of undervaluing the risk of irreparable injury to the party in the case actually before the court. Where a party makes a showing that a fundamental federal interest is sufficiently in danger of being irreparably harmed to obtain preliminary injunctive relief, it makes little sense to require abstention simply because the relief issued in the form of a TRO.

V. CONCLUSION

The Supreme Court has yet to articulate a comprehensive standard governing the application of Younger to proceedings concerning preliminary injunctive relief. Struggling to define “proceedings of substance on the merits” and the “embryonic stage,” the lower federal courts have reached different conclusions as to the significance of the issuance of such relief. These disparate decisions hinder a coherent application of Younger in a context where extraordinary intervention is sought to prevent irreparable injury to vital interests. A uniform standard governing the application of Younger to these proceedings would better observe the federalism and comity concerns that inform the abstention analysis, balance the interests of litigants, and provide guidance to the lower courts.

This article maintains that where preliminary injunctive relief is denied, a court has not exercised its federal equity power or expended judicial resources to award relief and, under those circumstances, it makes sense that no “proceedings of substance on the merits” sufficient to preclude abstention have taken place. Conversely, because both a TRO and a preliminary injunction bear on the policy concerns at the core of Younger, it is logical to view both the issuance of a preliminary injunction and the issuance of a TRO as “proceedings of substance on the merits.” Therefore, when a federal court determines it to be legally appropriate to exercise both its jurisdiction and its authority to issue preliminary injunctive relief that issuance, whether in the form of a preliminary injunction or a TRO, should

_id. (citations omitted); Bryce M. Baird, Comment, Federal Court Abstention in Civil Rights Cases: Chief Justice Rehnquist and the New Doctrine of Civil Rights Abstention, 42 BUFF. L. REV. 501, 531 (1994) (citing Hicks, 422 U.S. at 349) (“In effect, this rule provides the state prosecutor a ‘reverse removal’ power to defeat the plaintiff’s choice of a federal forum simply by adding him to (or initiating) an action against him in state court prior to any ‘proceedings of substance on the merits’ in federal court.”). But see Calvin R. Massey, Abstention and the Constitutional Limits of the Judicial Power of the United States, 1991 BYU L. REV. 811, 837 (1991) (“[Hicks] delineate[s] a constitutional line between the outer limits of federal judicial power and the correlative power inherent in the states’ residual sovereignty.”).
be sufficient to preclude abstention under *Younger.* In other words, the issuance of any preliminary injunctive relief by a federal court should be considered a “proceeding of substance on the merits” that takes a case beyond the “embryonic stage.” This approach makes sense in light of procedural, functional, and equitable considerations; and viewing the issuance or denial of preliminary relief in the same way for both forms of relief promotes a neat, parallel framework that provides clear guidance to courts. Hopefully this article will contribute to the distillation of a coherent, consistent standard governing abstention in these cases.