

# PRIMARY RIGHTS

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## ABSTRACT

*The article examines primary rights, the central doctrine in California procedural law which underlies e.g., res judicata, summary judgment, demurrers (motions to dismiss), and statutes of limitations. The article explores the roots of the doctrine of primary rights, its current uses, the major criticisms; and notes some cracks perhaps presaging its demise.*

*“The general principle which I have thus drawn . . . can be applied to all possible cases, and will furnish a sure and simple test by which to determine whether one or more causes of action have been embodied in any complaint or petition.”* – John Norton Pomeroy<sup>1</sup>

## I. INTRODUCTION

The doctrine of primary rights is the central doctrine in California civil law, defining a “cause of action” and so girding all discussions of res judicata<sup>2</sup> and many analyses of summary judgment,<sup>3</sup> demurrers (motions to dismiss),<sup>4</sup> statutes of limitations<sup>5</sup> and some venue<sup>6</sup> matters. It lies at the beating heart of our civil law.

But the doctrine is opaque. While routinely invoked, it is “notoriously uncertain in application”<sup>7</sup> and has for a long time been severely criticized. O.W. Holmes Jr. wrote it was a doctrine “invested with a mystic

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1. JOHN NORTON POMEROY, REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION 490 (1st ed. 1876) (emphasis supplied).

2. *Bucur v. Ahmad*, 198 Cal. Rptr. 3d 127, 134 (Ct. App. 2016); *Ass'n of Irrigated Residents v. Dep't of Conservation*, 218 Cal. Rptr. 3d 517, 538 n.24 (2017) (Where the question is whether a former federal suit bars a current state suit under principles of res judicata, state law, not the very different federal law (discussed below) controls), *pet. rev. filed*, (July 5, 2017); *Franceschi v. Franchise Tax Bd.*, 205 Cal. Rptr. 3d 75, 82 (Ct. App. 2016); *Balasubramanian v. San Diego Cmty. Coll. Dist.*, 95 Cal. Rptr. 2d 837, 845–46 (Ct. App. 2000).

3. *Hindin v. Rust*, 13 Cal. Rptr. 3d 668, 669 (Ct. App. 2004); *People ex rel. Feuer v. Superior Court (Cahuenga's The Spot)*, 184 Cal. Rptr. 3d 809, 816–17 (Ct. App. 2015).

4. *Fremont Indem. Co. v. Fremont Gen. Corp.*, 55 Cal. Rptr. 3d 621, 637-38 (Ct. App. 2007) (A “demurrer must dispose of an entire cause of action.”).

5. Whether a claim relates back to an original filing *may* depend on a primary rights analysis. *Applied Med. Corp. v. Thomas*, 217 Cal. Rptr. 3d 169, 184–85 (Ct. App. 2017) (Jones, P.J., concurring and dissenting), *rev. denied*; PAUL TURNER & KATHLEEN M. BANKE, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL: STATUTES OF LIMITATIONS ¶¶ 8:185–202 (The Rutter Group 2017); ROBERT WEIL ET AL., CAL. PRAC. GUIDE: CIV. PROC. BEFORE TRIAL ¶ 11:193.2 (The Rutter Group 2017).

6. *Massae v. Superior Court*, 173 Cal. Rptr. 527, 530 (Ct. App. 1981).

7. *Baral v. Schnitt*, 376 P.3d 604, 615 (Cal. 2016).

significance.”<sup>8</sup> We have not done better than Holmes: no one really knows what it means in practice.

This note explores the roots of the doctrine of primary rights and its current uses, and notes some cracks perhaps presaging its demise.

## II. AN ASIDE ON ‘CAUSE OF ACTION’

As cases and commentators have noted, the term ‘cause of action’ is used in many ways.<sup>9</sup> Lawyers are notoriously unconcerned with its precise definition, and may draft complaints with multiple causes of action under a caption suggesting a single cause of action, and may generously spread allegations for one cause of action across multiple sections each separately captioned as a cause of action. Sometimes it is used as an indiscriminate synonym for “claim,” which in state court it is not,<sup>10</sup> or “count,” a term perhaps better suited to criminal complaints and indictments. These variations in practice do not dictate what ‘cause of action’ means.<sup>11</sup> A cause of action must also be distinguished from a *violation*, such as one of potentially many violations of a consumer statute.<sup>12</sup>

The primary rights doctrine plainly defines a ‘cause of action’ for not only purposes of res judicata or claim preclusion, but to be precise also for pleading purposes, including for demurrers and summary adjudication.<sup>13</sup> However, as matter of practice, and especially if there is no objection, demurrers and motions for summary adjudication are frequently entertained regarding a putative cause of action even when the underlying primary right is the same as that underlying a different ostensible cause of action. In these situations, lawyers and judges typically define a cause of action by the *elements* set forth in jury instructions.<sup>14</sup> Indeed, summary judgement’s controlling statute and most important Supreme Court opinion do not even allude to primary rights, but rather to “each element of the cause of action.”<sup>15</sup> Thus, for example, fraud and negligent misrepresentation do not have exactly

8. Oliver Wendel Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

9. WEIL, *supra* note 5, at ¶ 10:39.1; *Eichler Homes of San Mateo, Inc. v. Superior Court*, 361 P.2d 914, 916 (Cal. 1961).

10. *Baral*, 376 P.3d at 392 (claim may be a *part* of a cause of action).

11. *Hindin v. Rust*, 13 Cal. Rptr. 3d 668, 675 (Ct. App. 2004); *Skrbina v. Fleming Cos.*, 53 Cal. Rptr. 2d 481, 487–88 (Ct. App. 1996).

12. See discussion *infra* Part 3, Section B(I).

13. *Hindin*, 13 Cal. Rptr. 3d at 675–76; *Quiroz v. Seventh Ave. Ctr.*, 45 Cal. Rptr. 3d 222, 238 n.25 (Ct. App. 2006) (“A motion for summary judgment necessarily tests the pleadings.”); see *Olsen v. Breeze, Inc.*, 55 Cal. Rptr. 2d 818, 827 (1996) (summary adjudication approved of ostensible ‘causes of action’ not the subject of motion for summary adjudication, which alleged same primary right as those expressly subject of motion for summary adjudication); see *Chen v. Kraft*, 197 Cal. Rptr. 3d 453, 460 n.12 (App. Dep’t Super. Ct. 2016).

14. The instructions are found in the Judicial Council of California’s Civil Jury Instructions (CACI) (2016). See generally WEIL, *supra* note 5, at ¶ 6:121.1. Rules of court prescribing the pleading format of ‘causes of action’ do not mention or allude to primary rights, but rather to types of claims such as fraud, negligence, breach of contract, and so on. Cal. Rules of Court, Rule 2.112 (Deering 2007).

15. *Aguiar v. Atl. Richfield Co.*, 24 P.3d 493, 509 (Cal. 2001) (quoting Cal. Code Civ. Proc. § 437c(o)).

the same elements, and are in that sense different causes of action.<sup>16</sup> But under primary rights they may be the same cause of action.<sup>17</sup>

This uneasy tension between the meaning of ‘cause of action’ as used in these two different ways—the primary rights definition verses the elements-of-the-claim definition—does not appear to have been addressed by appellate courts. It underlies some of the problems presented by the primary rights doctrine outlined below in § 3(B)(1).

### III. THE DOCTRINE

Primary rights define a cause of action. This is most important when we are trying to figure out the application of res judicata, typically when a party complains that the same cause of action was previously litigated and must not be litigated again. If the same primary right is in play, it’s the same cause of action; otherwise it’s not. As one case has framed the doctrine:

The cause of action is the right to obtain redress for harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. California's res judicata doctrine and its definition of “cause of action” is based upon the primary right theory. The primary right theory is a theory of code pleading that has long been followed in California. It provides that a ‘cause of action’ is comprised of a ‘primary right’ of the plaintiff, a corresponding ‘primary duty’ of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action . . . . As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. It must therefore be distinguished from the legal theory on which liability for that injury is premised: ‘Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.’ The primary right must also be distinguished from the remedy sought: ‘The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.’<sup>18</sup>

While the use of the word “simply” in this quotation is misleading—more on that below—it is true that at a high level of abstraction the doctrine appears straightforward. It focuses on the harm suffered; it sets aside and

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16. *Moncada v. W. Coast Quartz Corp.*, 164 Cal. Rptr. 3d 601, 611 (Ct. App. 2013).

17. *Epstein v. BDO Seidman, LLP*, No. B207187, 2009 WL 323412, at \*5 (Cal. Ct. App. Feb. 11, 2009).

18. *Franceschi v. Franchise Tax Bd.*, 205 Cal. Rptr. 3d 75, 82–83 (Ct. App. 2016) (citations omitted).

does not consider the remedy sought.<sup>19</sup> It is a triumvirate of elements: (1) a right, (2) a corresponding duty, and (3) an act; which together comprise the cause of action. But as we will see, this three-element test tends in practice to slim down quickly to a single element; later we will see that even this one element has little predictive power for new fact patterns.

I discuss the three elements in reverse order.

A focus on the third element—*injury-causing act*—can be misleading because “different primary rights may be violated by the same wrongful conduct.”<sup>20</sup> So we set that aside as an identifying marker of what constitutes a primary right, and in turn, a cause of action.

When we turn to ‘right’ and the corresponding ‘duty’ we find that the cases essentially dispense with the *duty*, probably because it is thought of as just the flip side of the *right*, that is, if Bob has a right to be free of an injury (getting his arm sliced open) then Alice has a duty (not to slice it open); if Alice has a right to be free of contract breach, then Bob (the other contracting party) has a corresponding duty to not breach it. “For example, one has a duty not to trespass on another’s land, and the owner of the land has a corresponding right to be free of such trespasses.”<sup>21</sup> Focusing on duty can be misleading for another reason, which is that the specific *legal theory* advanced is never determinative;<sup>22</sup> and there isn’t much daylight between legal theories and types of duties. For example, a primary rights analysis would hold that the duties involved in negligence, breach of implied warranty, and strict liability were all part of a single cause of action, even though the duties—the legal theories—differ.<sup>23</sup>

Thus it is that this element of duty, too, tends to drop out of the primary rights analysis.

Finally, we return to the first element I named, the *right* to be free of a particular type of injury.<sup>24</sup> Here, we look to the “particular injury suffered.”<sup>25</sup> One injury gives rise to only one claim for relief<sup>26</sup> and one cause of action.<sup>27</sup>

19. *Wade v. Ports Am. Mgmt. Corp.*, 160 Cal. Rptr. 3d 482, 489 (Ct. App. 2013); *Bullock v. Philip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382, 393 (Ct. App. 2011). There are historical reasons for this express disclaimer of looking at remedies, discussed *infra* Part V; see also *infra* note 140.

20. *Branson v. Sun-Diamond Growers*, 29 Cal. Rptr. 2d 314, 322 (Ct. App. 1994); *Furnace v. Giurbino*, 838 F.3d 1019, 1024 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2195 (2017).

21. Nathan B. Oman, *Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law*, 39 FLA. ST. U. L. REV. 137, 156–57 (2011).

22. *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, 855 P.2d 1263, 1266 (Cal. 1993); *Mycogen Corp. v. Monsanto Co.*, 51 P.3d 297, 306 (Cal. 2002).

23. WEIL, *supra* note 5, at ¶ 6:252.1 *et seq.* (citing *Plotnik v. Meihaus*, 146 Cal. Rptr. 3d 585, 604 (2012)); see also, *e.g.*, *Barrett v. Superior Court*, 272 Cal. Rptr. 304, 306 (Ct. App. 1990).

24. See generally WEIL, *supra* note 5, at ¶ 6:251 *et seq.* (Rutter 2017); 9 B. WITKIN, CALIFORNIA PROCEDURE, JUDGMENT §§ 402, 409 (2005); 5 B. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 34 (5th ed. 2008); *Boeken v. Philip Morris USA, Inc.*, 230 P.3d 342, 348 (Cal. 2010); *Villacres v. ABM Indus. Inc.*, 117 Cal. Rptr. 3d 398, 409 (Ct. App. 2010); *McCoy v. Gustafson*, 103 Cal. Rptr. 3d 37, 74 (Ct. App. 2009).

25. *Wade v. Ports Am. Mgmt. Corp.*, 160 Cal. Rptr. 3d 482, 489 (Ct. App. 2013) (quoting *Crowley v. Katleman*, 881 P.2d 1083, 1090 (Cal. 1994)).

26. Although different sorts of relief can be available, *Franceschi v. Franchise Tax Bd.*, 205 Cal. Rptr. 3d 75, 82–83 (Ct. App. 2016).

27. *Slater v. Blackwood*, 543 P.2d 593, 594–95 (Cal. 1975).

We have a central focus: the “right to be free from the particular injury,”<sup>28</sup> and so “the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right.”<sup>29</sup> Thus claims under two different securities laws may seek compensation for the same harm and thus be the same cause of action.<sup>30</sup> There are two primary rights when a defendant lawyer breaches a contract with a client and under the same basic facts defrauds the client; but a single cause of action for the one harm suffered when a malicious prosecution case targets two bad lawsuits.<sup>31</sup> Personal injury and property damage are separate causes of action.<sup>32</sup>

As a forecast of the difficulties in application, some cases state that the same harm generally suggests the same primary rights, but not always, and then cite cases in which the same *wrongful conduct* involves a different primary right, all of which arguably conflates the first (right to be free from a harm) and third (act or conduct) elements.<sup>33</sup>

Some cases first pay homage to the “harm suffered” element, but then seem rapidly to shift to the identification of distinct rights: “breaching a contract inflicts harm on a *legally protected interest* different from tortious conduct that renders uncollectable a judgment arising from the breach of contract, two different primary rights arise.”<sup>34</sup> But that result is at least consistent with other authority: breaches of contract inflict harms materially different from torts.<sup>35</sup> However, it does not follow that all breaches of contract inflict one harm, and so constitute one cause of action: if “distinct contract covenants were breached at different times,” we may have different causes of action.<sup>36</sup> Nor, alas, does it even follow that in all cases tort and contract claims will be deemed to seek redress for different harms; sometimes it’s the same.<sup>37</sup> Where many acts of attorney negligence lead to an identified client loss, there is one primary right at stake.<sup>38</sup> But where there are different, unrelated legal matters, “with different and distinct obligations,

28. *Mycogen Corp. v. Monsanto Co.*, 51 P.3d 297, 306 (Cal. 2002).

29. *Villacres*, 117 Cal. Rptr. 3d at 410 (quoting *Boeken*, 230 P.3d at 348); *Burdette v. Carrier Corp.*, 71 Cal. Rptr. 3d 185, 199 (Ct. App. 2008).

30. *Fed. Home Loan Bank of San Francisco v. Countrywide Fin. Corp.*, 154 Cal. Rptr. 3d 873, 882 (Ct. App. 2013).

31. *Hindin v. Rust*, 13 Cal. Rptr. 3d 668, 676 (Ct. App. 2004).

32. *Olsen v. Breeze, Inc.*, 55 Cal. Rptr. 2d 818, 826-27 (Ct. App. 1996).

33. *Ivanoff v. Bank of Am., N.A.*, 215 Cal. Rptr. 3d 442, 450 (Ct. App. 2017).

34. *Fujifilm Corp. v. Yang*, 167 Cal. Rptr. 3d 241, 245 (Ct. App. 2014) (emphasis supplied).

35. *E.g.*, *Biro v. Keyes*, No. B247927, 2015 WL 3610573, at \*4 (Cal. Ct. App. June 10, 2015).

36. *Fed'n of Hillside & Canyon Ass'ns. v. City of Los Angeles*, 24 Cal. Rptr. 3d 543, 558 (Ct. App. 2004) (citing *Mycogen Corp. v. Monsanto Co.*, 51 P.3d 297, 309 (Cal. 2002)); *Site Mgmt. Servs., Inc. v. Cingular Wireless LLC*, No. D057106, 2014 WL 971714, at \*26 (Cal. Ct. App. Mar. 13 2014) (contract violated in different ways creates different causes of action for purposes of summary adjudication). *Compare* *Branson v. Sun-Diamond Growers*, 29 Cal. Rptr. 2d 314 (Ct. App. 1994) in which claims for contractual and equitable indemnity invoked different primary rights presumably because the injury in each case was different—although one might have concluded that the injury—not obtaining indemnity—was the same.

37. *Alpha Mech., Heating & Air Conditioning, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 35 Cal. Rptr. 3d 496, 507 (Ct. App. 2005).

38. *See, e.g.*, *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 855 P.2d 1263 (Cal. 1993); *Khodayari v. Mashburn*, 132 Cal. Rptr. 3d 903, 909 (Ct. App. 2011).

and distinct and separate alleged damages,” we have more than one primary right.<sup>39</sup> We also know that in the employment context, these are “two grounds for liability: the initial hostile environment sexual harassment ... and retaliation for complaining about the harassment.”<sup>40</sup> Vicarious negligence for botched oral surgery and direct negligent post-operative care assert separate primary rights.<sup>41</sup> But a loss of consortium suit and a subsequent wrongful death action assert the same primary right, because there is one injury: the spouse is “permanently and wrongfully deprived of spousal companionship and affection.”<sup>42</sup>

We must be *very* careful about this most important of terms, ‘harm.’ In the orthodox use of the doctrine, the notion of “harm” in the primary rights context does not match the ordinary meaning, such as the set of injuries one might have suffered in a fall. So, for example a single set of physical injuries (in the layperson’s sense) suffered implicates two [legal] harms for primary rights analysis: the harm suffered when the victim does not obtain “prompt, certain compensation for all work-related injuries” in the workmen’s’ compensation setting and *different* harm because the victim suffered from his employer’s negligent maintenance of the work area.<sup>43</sup> Nevertheless, we will see below that cases seeking to implement the doctrine find “harm” at a variety of levels of abstraction including down to this ‘layperson’ level, i.e., down to what we might call the *immediate* harm.

To borrow language quoted above, we are ultimately looking for harm to a *legally protected interest*, and it is in that light that we might understand, for example, the distinction between “a statutory right to be free from one type of harm and distinct common law rights to be free from other types of harm.”<sup>44</sup> Similarly, there are distinct harms. Because injuries are to distinct protected interests, when an employee is suspended from employment: “The primary right protected by the state civil service system is the right to continued employment, while the primary right protected by FEHA is the right to be free from invidious discrimination and from retaliation for opposing discrimination.”<sup>45</sup> This is how we understand the essential distinction in primary rights analysis between the harm done to property and the harm of personal injury.<sup>46</sup> These are different legally protected interests.

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39. Lilienthal & Fowler v. Superior Court, 16 Cal. Rptr. 2d 458, 461 (Ct. App. 1993).

40. Mathieu v. Norrell Corp., 10 Cal. Rptr. 3d 52, 62 (Ct. App. 2004).

41. Samara v. Matar, 214 Cal. Rptr. 3d 346, 357 (Ct. App. 2017), *aff’d on other grounds*, 419 P.3d 924 (Cal. 2018).

42. Hi-Desert Med. Ctr. V. Douglas, 190 Cal. Rptr. 3d 897, 912 (Ct. App. 2015) (discussing Boeken v. Philip Morris USA, Inc., 230 P.3d 342 (Cal. 2010)).

43. Le Parc Cmty. Ass’n v. Workers’ Comp. Appeals Bd., 2 Cal. Rptr. 3d 408, 417 (Ct. App. 2003).

44. Agarwal v. Johnson, 603 P.2d 58, 72 (Cal. 1979), *disapproved of on other grounds*, White v. Ultramar, Inc., 981 P.2d 944 (Cal. 1999); Indulkar v. E. Desert Valley Inves., Inc., No. G050400, 2015 WL 544913, at \*5 (Cal. Ct. App. Feb 10, 2015).

45. George v. California Unemployment Ins. Appeals Bd., 102 Cal. Rptr. 3d 431, 439 (Ct. App. 2009).

46. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982), comment a (“Thus it was held by some courts that a judgment for or against the plaintiff in an action for personal injuries did not preclude an action by him for property damage occasioned by the same negligent conduct on the part of the defendant—this deriving from the idea that the right to be free of bodily injury was distinct from the property right.”).

But how do we know when we have met a distinct legally protected interest—as opposed to one which is essentially the same as another candidate?

We don't.

#### IV. CRITICISMS

##### A. LEVELS OF ABSTRACTION

Commentators<sup>47</sup> and courts,<sup>48</sup> including the California Supreme Court,<sup>49</sup> have expressed concern with the doctrine of primary rights. How does one discern a primary right? Because it depends on injury, specifically an injury to a legally protected interest, we might ask: what is a distinct legally protected interest?

A few cases will help illustrate the conundrum. Recall first, for example, the case of the suspended employee. Even though suspension from employment was, in both sets of claims, the harm suffered ('harm' in the layperson sense), the court held that there were separate primary rights: first that "protected by the state civil service system . . . the right to continued employment, [as well as, secondly, the distinct] primary right protected by FEHA<sup>50</sup>[, i.e.,] . . . the right to be free from invidious discrimination and from retaliation for opposing discrimination."<sup>51</sup> Now consider flight attendants who sued an airline for sex discrimination under Title VII, a stand-alone statute, part of the federal Civil Rights Act of 1964. The plaintiffs later sued under entirely distinct statutes: FEHA and the state Constitution.<sup>52</sup> These

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47. Holmes, *supra* note 8, at 462 ("[T]he so-called primary rights and duties are invested with a mystic significance."); see also Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 826 (1924) ("The 'primary right' seems quite elusive to the writer."); Elizabeth L. Hisserich, *The Collision of Declaratory Judgments and Res Judicata*, 48 UCLA L. REV. 159, 166 (2000) ("What precisely constitutes a primary right, however, is not an easy question to answer."); O. L. McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614, 618 (1925) ("[P]rimary right, which is apparently thought of as a simple and precise thing, turns out to be complex and indefinite. It means what the person using the term makes it mean.") (quoting Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 827 (1924)). One need only read the title of some articles to discern the criticism, e.g., Walter W. Heiser, *California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 509 (1998); Walter W. Heiser, *California's Unpredictable Res Judicata (Claim Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 559 (1998); Robin James, *Res Judicata: Should California Abandon Primary Rights*, 23 LOY. L.A. L. REV. 351 (1989); see also Steven J. Andre, *California Personal Injury Statutes of Limitations: The Modern Tort and the Judicial Abandonment of an Archaic Doctrine*, 27 SANTA CLARA L. REV. 657 (1998) (describing difficulties in applying primary rights to some statutes of limitation).

48. *Furnace v. Giurbino*, 838 F.3d 1019, 1024 (9th Cir. 2016), *cert. denied*, 137 S.Ct. 2195 (2017) ("California's primary rights theory can be complicated"); see also, e.g., *Boeken v. Philip Morris USA, Inc.*, 230 P.3d 342, 354 (Cal. 2010) (Moreno, J., dissenting).

49. *Baral v. Schnitt*, 376 P.3d 604, 615–16 (Cal. 2016) ("[T]he meaning of 'cause of action' remains elusive and subject to frequent dispute and misconception.") (quoting 4 B. WITKIN, CALIFORNIA PROCEDURE, Pleading § 35 at p. 100 (2005)).

50. See California Fair Employment and Housing Act, Govt. Code §§ 12900, Deering's Notes to Decisions, Section 15: Dismissal (referencing the discussion of primary rights in *Henderson v. Newport-Mesa Unified School Dist.*, 154 Cal. Rptr. 3d 222, 237–38 (2013)).

51. *George v. California Unemployment Ins. Appeals Bd.*, 102 Cal. Rptr. 3d 431, 439 (Ct. App. 2009).

52. *Johnson v. Am. Airlines, Inc.*, 203 Cal. Rptr. 638, 640 (Ct. App. 1984).

were premised on the *same* primary right because the injury in both lawsuits was “the right to be free from employment discrimination based on sex.”<sup>53</sup> The second suit was barred.

Here are more instances. In one case, the one statute (FEHA) creates *three* different legally protectable rights: the right to be free of employment discrimination based on national origin, the right to be free of employment discrimination based on age, and the right to be free of employment discrimination based on disability.<sup>54</sup> But in other FEHA cases, there is one right: “the right to continued employment.”<sup>55</sup> In another case, three sets of allegations—“violation of the seniority system, retaliation for filing prior grievances alleging racially discriminatory practices, and discrimination against minority employees” were dubbed various *theories of liability*; there was one injury: plaintiff’s “termination,” and so only one cause of action.<sup>56</sup>

To round out this bouquet of legally protectable interests or rights, here’s an assortment from those cited (many from other cases) just in *Henderson*:<sup>57</sup> we have an employee’s “right to continued employment” protected by the civil service system; the “right to be free from invidious discrimination and from retaliation for opposing discrimination,” protected by FEHA; the right to force reinstatement of employment; the right not to suffer *nonpayment* of salary; the right to be employed as a certain officer; the right to recover damages when not so hired; the right to have contractual obligations performed; the right to be free from tortious behavior preventing collection of a judgment; and multiple rights not to have *separate* contracts breached.

As is often the case in legal muddles, the problem is abetted by conflating levels of abstraction. The “particular injury”<sup>58</sup> can be described at a variety of levels. Where a home owner sues a bank, which provided the mortgage and has now foreclosed, an ‘injury’ is not obtaining the disclosures required by federal law,<sup>59</sup> another is the injury suffered when saddled with contract terms to which she hadn’t agreed;<sup>60</sup> two injuries, two causes of action. But we might also discern, as did the trial judge who got reversed, one injury which is to have obligations never agreed to;<sup>61</sup> so, one primary right. And then there’s this injury, the immediate injury the plaintiff, free from the

53. *Acuna v. Regents of Univ. of Cal.*, 65 Cal. Rptr. 2d 388, 394 (Ct. App. 1997) (following *Johnson*, 203 Cal. Rptr. 638)

54. *Skrbina v. Fleming Companies*, 53 Cal. Rptr. 2d 481, 487–88 (Ct. App. 1996); *see also, e.g., Dominguez v. Washington Mut. Bank*, 85 Cal. Rptr. 3d 705 709, 716 (Ct. App. 2008) (citing *Lilienthal*, directing summary adjudication of one part of plaintiff’s “three-part [FEHA] cause of action” for retaliation).

55. *Seaton v. Cal. State Dep’t of Corrs.*, No. B161173, 2003 WL 21766524, at \*4 (Cal. Ct. App. July 31, 2003) (relying on *Balasubramanian v. San Diego Cmty. Coll. Dist.*, 95 Cal. Rptr. 2d 837, 846–47 (Ct. App. 2000)). The difference of opinion as to whether one or more causes of action are alleged in a FEHA action with different claims is noted in, *e.g., Mathieu v. Norrell Corp.*, 10 Cal. Rptr. 3d 52, 62 (Ct. App. 2004).

56. *Wade v. Ports Am. Mgmt. Corp.*, 160 Cal. Rptr. 3d 482, 490 (Ct. App. 2013).

57. *Henderson v. Newport-Mesa Unified Sch. Dist.*, 154 Cal. Rptr. 3d 222, 238–40 (Ct. App. 2013).

58. *Franceschi v. Franchise Tax Bd.*, 205 Cal. Rptr. 3d 75, 82–83 (2016) (quoting *Crowley v. Katleman*, 881 P.2d 1083, 1090 (Cal. 1994)).

59. *Ivanoff v. Bank of Am., N.A.*, 215 Cal. Rptr. 3d 442, 450 (Ct. App. 2017).

60. *Id.*

61. *Id.* at 447.



doctrinal wrangles teased out in this note, knows about: the lost home.<sup>62</sup> All of these are accurate descriptions of injury in common parlance, and it's not clear (until after one reads the opinion) at what level of abstraction one makes the call, just as it's not clear in the employment context whether the injury is a specific type of discrimination (e.g., race based) as opposed to another (e.g. gender-based), or the loss of employment that results, or the loss of income, or the loss of a certain position which also ensues from the discrimination, or the loss of contractual rights when the discrimination causes a breach of an employment agreement, and so on and so forth. Every one of these injuries could be seen as flowing from assaults on legally protected interests.<sup>63</sup> That is to say, the primary rights doctrine has little predictive power; it's tough to tell, in advance, which way a court will come out unless there's a case on point.

The conflation of levels of abstraction is a basic problem. It is an example of a broader logical difficulty discussed below at § 6, which pertains to how we think about 'essences' and attributes, left over from the time of Aristotle, and before.

## B. THE COUNTING PROBLEM

### 1. *Lilienthal*

The *Lilienthal*<sup>64</sup> case is a remarkable example of the problems generated by trying to accede to both new legislative commands and the old common law as presented by Pomeroy. *Lilienthal*'s ramifications have yet to be fully understood.

The problem in *Lilienthal* was how to count the number of causes of action. Client sued lawyer for malpractice and asserted two episodes of malpractice occurring at "different times on two separate and distinct matters."<sup>65</sup> The complaint had breach of contract and negligence 'causes of

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62. Other examples of this sort of 'immediate' injury identified with a primary right can be found in *e.g.*, *Verdier v. Verdier*, 22 Cal. Rptr. 93, 102 (1962) ("The right is not the right to procure a divorce, which pertains merely to the remedy; other remedies, such as the right to separation, to maintenance, etc., may accrue from the same misconduct. The primary right consists of the right not to be subjected to extreme cruelty, not to be deserted by one's spouse, not to have one's spouse engage in adulterous conduct, and the like. Presumably facts involving a violation of each of these rights may form a separate cause of action.").

63. This is, roughly, the same problem that has long been identified. *See, e.g.*, Clark, *supra* note 47 ("Thus in actions of trespass to land, ejection and the like, my 'property right in the land' is sometimes viewed as the primary right, which is over and above such subordinate and lesser rights as my right that you shall not trespass upon it and the like. The net result in practice is that the primary right, which is apparently thought of as a simple and precise thing, turns out to be complex and indefinite. It means what the person using the term makes it mean. In the case of injury to person and property at the same time, there might be two primary rights, a right to an uninjured personality, a right to uninjured property; or perhaps there is only one, a right not to be caused loss by defendant's negligence. My view of primary right may differ from yours, and we have no common ground, only the statement of our opposing views.") (notes omitted). For a modern riff on how the rhetoric of primary rights can be adapted to mean anything, *see* Carter Dillard, *The Primary Right*, 29 PACE ENVTL. L. REV. 860 (2012) (rights to: wilderness, leave the polity, to be "free to not consent to others' power, control, and influence;" "exit rights," etc.).

64. *Lilienthal & Fowler v. Superior Court*, 16 Cal. Rptr. 2d 458, 460 (Ct. App. 1993).

65. *Id.* at 459.

action,’ but both episodes were alleged in each ‘cause of action.’ Motions for summary adjudication were brought. The statute then (as now) allowed such motions but only if they disposed of an entire ‘cause of action.’ The court held that each of the complaint’s putative ‘causes of action’ really each contained two separate causes of action, one per episode.

We learned two things from this. First, as noted above,<sup>66</sup> it doesn’t matter how lawyers arrange their complaints: judges still have to figure out how many actual ‘causes of action’ there are. The second, far more significant, aspect of this case is that it refuses to follow the primary rights doctrine for what appear to be two reasons. First, it cites the then-current version of California’s indispensable bible of pre-trial procedure, the Rutter Guide,<sup>67</sup> which reported a “common usage” of the phrase ‘cause of action’ to mean those chunks of the complaint which pertained to a ‘theory of liability.’ In so doing, *Lilienthal* distinguishes and sets aside the state’s long history with the primary rights doctrine.<sup>68</sup> Secondly, *Lilienthal* turns to an interpretation of the statute at issue, C.C.P. § 437c, which governs summary judgment and adjudication.<sup>69</sup> The opinion moves rapidly to legislative history and figured the legislative intent would be served by deeming the two episodes of malpractice to create separate causes of action, because each presented “separate and distinct wrongful acts.”<sup>70</sup>

The point is not that the result in *Lilienthal* is inconsistent with classic primary rights doctrine; it probably isn’t. Indeed, as we’ll see later, it may also be consistent with the transactional approach common in other jurisdictions.<sup>71</sup> Rather, the problem is that in its reach to legislative intent behind a statute (§ 437c)<sup>72</sup> to the exclusion of a real effort to figure primary rights, it gave birth to a string of cases<sup>73</sup> that would have judges simply look

66. See discussion *supra* Part I.

67. WEIL, *supra* note 5. A few grains of salt: I am one of the current co-authors of this Rutter Guide.

68. *Lilienthal*, 16 Cal. Rptr. 2d at 460–61 (“A leading treatise has observed that the meaning of ‘cause of action’ is unclear. ‘In a broad sense, a ‘cause of action’ is the invasion of a primary right (e.g. injury to person, injury to property, etc.) . . .” and with the quoted word “However,” the opinion goes off to other criteria for a cause of action. It is not clear why the amorphous practices of lawyers (see discussion *supra* Part 1) noted by the Rutter Guide should be precedent for the technical definition of a cause of action. Cases such as *Boeken v. Philip Morris USA, Inc.*, 230 P.3d 342, 348 (Cal. 2010) make the point expressly that the amorphous “indiscriminate[.]” usage of counsel does *not* define a cause of action.

69. *Lilienthal*, 16 Cal. Rptr. 2d at 461. It is of course ordinary to interpret a governing statute, but courts generally do so against the backdrop of and consistent with established usage; i.e., courts assume that a term of art (here, ‘cause of action’) was meant by the legislature to mean what it meant in the case law up to that point unless the legislature says otherwise. *Ford Dealers Assn. v. Dep’t of Motor Vehicles*, 650 P.2d 328, 359 (Cal. 1982) (“Words with an accepted judicial interpretation should be given the same interpretation in statutes dealing with the same subject matter.”).

70. *Lilienthal*, 16 Cal. Rptr. 2d at 459. By contrast, under classic primary rights doctrine one act can support many causes of action, e.g., *Scripps Clinic v. Superior Court*, 134 Cal. Rptr. 2d 101, 107 (Ct. App. 2003) (many contract causes of action), and many acts may implicate only a single cause of action, see discussion *infra* Part 3, Section B(2).

71. See discussion *infra* Part 7.

72. Some question if the statutory interpretation is correct, because the statute does, after all, focus on ‘causes of action’ and not on ‘wrongful acts.’ *Bagley v. TRW, Inc.*, 86 Cal. Rptr. 2d 909, 910 n.2 (Ct. App. 1999). See also *Linden Partners v. Wilshire Linden Assocs.*, 73 Cal. Rptr. 2d 708, 715–16 (Ct. App. 1998) (criticizing *Lilienthal*’s legislative analysis).

73. E.g., *Mathieu v. Norrell Corp.*, 10 Cal. Rptr. 3d 52, 62 (Ct. App. 2004); *Edward Fineman Co. v. Superior Court*, 78 Cal. Rptr. 2d 478, 481 (Ct. App. 1998) (permissible to seek summary adjudication

to whether “separate theories of liability” are alleged<sup>74</sup> and, more pointedly, whether we have one or more “wrongful acts.” Contrary to general primary rights doctrine, it has been relied on for the proposition that one “can move for summary adjudication of any distinct claim within a cause of action.”<sup>75</sup> This is all juxtaposed to the fundamental focus of primary rights doctrine which, we will recall, is the “right to be free from the particular injury.”<sup>76</sup> *Lilienthal* probably works under that latter analysis, as well: whereas, for example, many acts of attorney negligence leading to an identified client loss invoke one primary right,<sup>77</sup> in *Lilienthal* we probably had separate and entirely independent losses (injuries), which go far towards meeting the primary rights test. But this is exactly what makes *Lilienthal* so fraught. Its odd, non-primary rights focus on wrongful acts survives because the case nevertheless can be understood as implementing primary rights analysis. Thus, cases such as *Lilienthal* and the similar *Fineman* have been interpreted as reaching the right result<sup>78</sup> with some opinions going so far as to suggest that *Lilienthal* actually applies the primary rights doctrine.<sup>79</sup>

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on 23 of 83 checks); *see also* Lookout Stock Ass'n v. Gerig, No. C076886, 2016 WL 7373837, at \*6 (Cal. Ct. App. Dec. 20, 2016) (without objection from the other party, court handled summary adjudication motion based on wrongful acts separate and distinct from others, and which “occurred at different times, affected different property, and would result in different damages”). Some cases notice what *Lilienthal* did, but then essentially ignore it. *E.g.*, *Hindin v. Rust*, 13 Cal. Rptr. 3d 668, 675 (Ct. App. 2004).

74. This approach was endorsed by *e.g.*, *Garrett v. Howmedica Osteonics Corp.*, 153 Cal. Rptr. 3d 693, 701 n.7 (Ct. App. 2013); *cf.*, *e.g.*, *Silva v. Sees Candy Shops, Inc.*, 212 Cal. Rptr. 3d 514, 534 (Ct. App. 2016) (considering various “theories” of liability susceptible to separate treatment under summary adjudication statute, although the court here may, in fact, mean separate Labor Code statutes). However, this is very odd because it is so clear that the number of legal theories does not correlate with the number of primary rights at stake. *See Mycogen Corp. v. Monsanto Co.*, 51 P.3d 297, 306 (Cal. 2002); *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, 855 P.2d 1263, 1266 (Cal. 1993); *Gone v. Santa Clara Valley Transp. Auth.*, No. H039234, 2016 WL 737313, at \*10 (Cal. Ct. App. Feb. 25, 2016) (assuming without deciding that that summary judgment can be brought on various “theories” of, for example, negligence); *Wade v. Ports Am. Mgmt. Corp.*, 160 Cal. Rptr. 3d 482, 490 (Ct. App. 2013). In the rest of my discussion of *Lilienthal* I will focus not on its attention to these legal “theories,” but on the way *Lilienthal* counts acts, because it is generally this aspect of the case that is picked up by subsequent authority.

75. *Mann v. Quality Old Time Serv., Inc.*, 15 Cal. Rptr. 3d 215, 223 (Ct. App. 2004) *disapproved on separate grounds*, *Baral v. Schnitt*, 376 P.3d 604, 617 (Cal. 2016) (emphasis supplied).

76. *Mycogen*, 51 P.3d 297 at 306 (emphasis supplied). A commentator has expressed concern that *Lilienthal* did not apply the primary rights doctrine in the summary adjudication context. Walter W. Heiser, *California's Unpredictable Res Judicata (Claim Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 559, 617 (1998) (*Lilienthal* “distinguishing “cause of action” in the summary adjudication statute, where it means theory of liability, from the res judicata context, where it means the invasion of a primary right”).

77. *See, e.g.*, *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 855 P.2d 1263 (Cal. 1993); *Khodayari v. Mashburn*, 132 Cal. Rptr. 3d 903, 909 (Ct. App. 2011).

78. *E.g.*, *Tutor-Saliba-Perini, J.V. v. L.A. Cty. Metro. Transp. Auth.*, No. B143430, 2005 WL 240685, at \*10 (Cal. Ct. App. Jan. 25, 2005).

79. *E.g.*, *Samara v. Matar*, 214 Cal. Rptr. 3d 346, 357 (Ct. App. 2017), *aff'd.*, 419 P.3d 924 (Cal. 2018); *Morgado Four Const., Inc. v. Superior Court*, No. H032567, 2009 WL 1154272, at \*8 (Cal. Ct. App. Apr. 29, 2009) (*modified* May 28, 2009) (“in order to come within the rule of *Lilienthal*, even though claims are pleaded in one cause of action, there must be separate and distinct wrongful acts or obligations that are subject to otherwise prohibited piecemeal adjudication because they allege the actual invasion of different primary rights”); *Skrbina v. Fleming Companies*, 53 Cal. Rptr. 2d 481, 487–88 (Ct. App. 1996) (directly suggesting *Lilienthal* applies primary right analysis).

## 2. Statutory Causes of Action

As intimated, the *Lilienthal* problem erupts when one attempts to count causes of action. What does one count? Under classic primary rights doctrine, one counts the injuries (protected by a legally protectable right). Under *Lilienthal*'s reasoning, one counts wrongful *acts*, such as the number of checks at issue in *Fineman*. The problem becomes acute when trying to sort the number of statutory causes of action one might have. We have already seen how the problem leads to inconsistent rulings in the FEHA context.<sup>80</sup> It has also arisen in other statutory areas, where courts have sought to count causes of action. For example, *Jayhill*<sup>81</sup> decided the number of causes of action for false advertising when confronted with a large number of violations.<sup>82</sup> The court ruled there was only one—because there was one “scheme to mislead customers by a series of misrepresentations”—with penalties calculated by the number of violations.<sup>83</sup> There was no mention of primary rights; the court simply construed the statute, and based its ruling directly and only on what it thought the legislature intended.<sup>84</sup> Many acts, many violations, but one cause of action.<sup>85</sup> The same result occurs in other statutes, such as those for public nuisance and the narcotics abatement law.<sup>86</sup> Each statute is held to define one cause of action.<sup>87</sup> These situations involve claims by a public prosecutor; and they are generally not *res judicata* bars to, for example, subsequent class actions where individual claims are litigated<sup>88</sup> because they are “brought fundamentally for the benefit of the public and as a law enforcement action.”<sup>89</sup> This strongly suggests that governmental causes

80. See discussion *supra* Part 3, Section A.

81. *People v. Superior Court (Jayhill)*, 507 P.2d 1400, 1400 (Cal. 1973).

82. CAL. BUS. & PROF. CODE § 17500.

83. *Jayhill*, 507 P.2d at 1403; *People ex rel. Feuer v. Superior Court (Cahuenga's The Spot)*, 184 Cal. Rptr. 3d 809, 825 (Ct. App. 2015) (reading *Jayhill* as holding there is only one cause of action against a defendant for violating § 17500); see also, e.g., *Olsen v. Breeze, Inc.*, 55 Cal. Rptr. 2d 818, 827 n.6 (Ct. App. 1996) (apparently, one primary right per statute violated).

84. *Jayhill*, 507 P.2d at 1404.

85. Quite aside from the issue of defining a cause of action, *Jayhill* also attacked the very different issue of how to calculate penalties. There, it was on a per person basis; in other cases, with different statutes, it might be on a per act basis, or some other basis. E.g., *People v. Beaumont Inv., Ltd.*, 3 Cal. Rptr. 3d 429, 450–51 (Ct. App. 2003); *People v. Casa Blanca Convalescent Homes, Inc.*, 206 Cal. Rptr. 164, 180 (Ct. App. 1984) *abrogated on other grounds*, *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 539 (1999).

86. *Cahuenga's The Spot*, 184 Cal. Rptr. 3d at 823–25.

87. *Id.* at 1382 (“The primary rights in this case are rights created by the UCL, LAMC section 12.21A.1(a) and the NAL. Those sections define the elements of the causes of action; of the public's rights to be free from such conduct”); See *id.* at 1380 (“The Attorney General has only one cause of action against a particular defendant for violating section 17500; for this he seeks several forms of relief, including the civil penalty of \$2,500 set forth in section 17536. Since multiple victims are involved he prays for a penalty for each violation, but this does not elevate each violation to a separate cause of action.”); see also, e.g., *Jarman v. HCR ManorCare, Inc.*, 215 Cal. Rptr. 3d 231, 246 (Ct. App. 2017), *pet. rev. gntd.*, 396 P.3d 596 (2017) (14,060 unauthorized signatures constituted a *single cause of action under Health and Safety Code § 1430*).

88. *Payne v. Nat'l Collection Sys., Inc.*, 111 Cal. Rptr. 2d 260, 267–68 (Ct. App. 2001). But the result may be different when the government's case also seeks and recovers money for the individuals. See *Villalobos v. Calandri Sunrise Farms LP*, No. CV122615GAFJEMX, 2012 WL 12886832, at \*7 (C.D. Cal. Sept. 11, 2012).

89. *Payne*, 111 Cal. Rptr. 2d at 267.

of action involve a sort of single injury.<sup>90</sup> The marker for a ‘cause of action’ is the legislatively created right and the correlating harm of having the statutory right infringed—“to be free from such conduct.”<sup>91</sup> This hard focus on the statute and consequently legislative intent is understandable, after all, these causes of action are purely creations of the legislature.<sup>92</sup> Thus it is that some courts carefully align the causes of action with the specific wording of a statute, for example, noting separate causes of action for, first, improper classification as a teacher (entitled to permanent or probationary treatment), and, secondly, classification as a temporary teacher (entitled to priority in employment).<sup>93</sup>

But unfortunately we cannot assume that causes of action are always counted on a per statute basis as they were in, for example, *Jayhill* and *Cahuenga's The Spot*.<sup>94</sup> In some cases, courts deciding the number of causes of action inherent in violations of a statute do not focus on the right (and harm) created by the legislature; rather, they go back to a more traditional primary rights analysis<sup>95</sup> to determine the *underlying* interests, and harms, served by the statute, and thus are able to find that only one cause of action is implicated even where two different statutes, one state and one federal, are in play.<sup>96</sup> This follows, because in both cases there was a single harm.<sup>97</sup>

Other cases counting causes of action created by statute invoke primary rights, but then turn to the statute and its legislative history to decide how many ‘harms’ the legislature meant to create with the statute and so how many causes of action there are.<sup>98</sup>

That is, when confronted with statutory causes of action, courts have to make the same difficult choices concerning harm as they do in the other cases: they can find it as a function of the specific statute, in which case every statute will create a separate cause of action, or they may find it at a lower level of abstraction, all the way down to the harm as experienced by the plaintiff, such as a loss of money, or loss of a job, in which case multiple statutes may yet generate a single cause of action.

The situation is the same when both statutory and common law claims are pled. There is no general rule which tells us whether one or more causes of action will be in play. On the one hand, we have cases in which statutory

90. *Id.*

91. *Cahuenga's The Spot*, 184 Cal. Rptr. 3d at 825.

92. *Justus v. Atchison*, 565 P.2d 122, 127 (Cal. 1977); *Hi-Desert Med. Ctr. v. Douglas*, 190 Cal. Rptr. 3d 897, 912 (Ct. App. 2015).

93. *Henderson v. Newport-Mesa Unified Sch. Dist.*, 154 Cal. Rptr. 3d 222, 239 (Ct. App. 2013).

94. *Cahuenga's The Spot*, 184 Cal. Rptr. 3d at 823–25.

95. Primary rights doctrine was used to identify a cause of action for CEQA purposes. *Fed'n of Hillside & Canyon Ass'ns. v. City of Los Angeles*, 24 Cal. Rptr. 3d 543, 558 (Ct. App. 2004). CEQA is the acronym for the California Environmental Quality Act, Public Resources Code § 21000 *et seq.* (1970).

96. *Fed. Home Loan Bank of S.F. v. Countrywide Fin. Corp.*, 154 Cal. Rptr. 3d 873, 882 (Ct. App. 2013); *see* CAL. CORP. CODE § 25504 (in a declaratory relief action) and Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1933).

97. *Fed. Home Loan Bank*, 154 Cal. Rptr. 3d at 882 (“The gravamen of both claims is Countrywide Financial controlled a party who made misrepresentations in connection with the same residential mortgage-backed securities, harming the Bank.”).

98. *Nevarrez v. San Marino Skilled Nursing & Wellness Ctr.*, 163 Cal. Rptr. 3d 874, 901 (Ct. App. 2013); *Miller v. Collectors Universe, Inc.*, 72 Cal. Rptr. 3d 194, 207 (Ct. App. 2008).

and common law rights are deemed to differ, done by focusing on the legislatively-specified right.<sup>99</sup> On the other hand, we have cases in which the statute and the common law right are deemed to address the same interests and present a single cause of action; this is done by focusing on the actual harm as experienced by the plaintiff, such as his personal injury.<sup>100</sup> There are disagreements at the highest levels on whether statutory claims and common law claims present different or identical causes of action.<sup>101</sup>

### 3. Predicate Statutes

California has a series of what we might call predicate statutes, that is, laws which impose liability for the violation of other laws. The classic is Business and Professions Code § 17200 *et seq.*, which makes it an unlawful business practice to violate (almost) any other law, state and federal.<sup>102</sup> We also have the Private Attorney General Act, or PAGA.<sup>103</sup> These sorts of laws obviously present a problem: do we have one cause of action, or do we have as many causes of action as there are predicates? Even if we focused solely on legislatively fixed harm, following *Jayhill*, we might still have one (e.g. a function of the § 17200 statute) or many causes of action (a function of every predicate statutory violation).

One might focus on the higher level legislative purpose of PAGA or § 17200. Section 17200, for example, has one central purpose: “the preservation of fair business competition,” and it does so by barring the predicate business practices.<sup>104</sup> Generally speaking, the right at stake is fair business competition, and the relevant “injury” is deprivation of fair competition. A similar high level ascription of purpose can be imputed to PAGA. With these readings, each of the those two statutes creates a single cause of action. The consequences are not entirely predictable or benign, because this approach would probably make it difficult if not impossible to (i) peel out for summary adjudication any predicate offense or Labor Code violation, thus sending cases to trial that have demonstrably no factual support as to many (perhaps most) of the predicates, and (ii) avoid res

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99. *E.g.*, *Le Parc Cmty. Ass'n v. Workers' Comp. Appeals Bd.*, 2 Cal. Rptr. 3d 408, 417 (Ct. App. 2003); *Branson v. Sun-Diamond Growers*, 29 Cal. Rptr. 2d 314, 321 (Ct. App. 1994).

100. *Slater v. Blackwood*, 543 P.2d 593, 594 (Cal. 1975) (given (i) statutory cause of action under former California ‘guest statute’ (Vehicle Code, § 17158) and (ii) claim for negligence, “there is but one cause of action for one personal injury”); *see also* *Balasubramanian v. San Diego Cmty. Coll. Dist.*, 95 Cal. Rptr. 2d 837, 846–47 (Ct. App. 2000) (federal civil rights claim and state contract claim, but only one cause of action because underlying injury is failure to be hired as assistant professor).

101. Compare the majority with the dissent in *Boeken v. Philip Morris USA, Inc.*, 230 P.3d 342, 353 (Cal. 2010).

102. *See generally* *Cel-Tech Comm, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 539 (Cal. 1999) (referring to “sweeping, embracing” coverage of the law); *In re Tobacco Cases II*, 192 Cal. Rptr. 3d 881, 891 (Ct. App. 2015); William L. Stern, *BUSINESS & PROFESSIONS CODE SECTION 17200 PRACTICE* (The Rutter Group 2017).

103. Labor Code Private Attorneys General Act of 2004, CAL. LAB. CODE § 2698 *et seq.* (2004) (“This statute authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state.”); *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 133 (Cal. 2014). *See generally* *Williams v. Superior Court*, 398 P.3d 69, 74 (Cal. 2017); *Arias v. Superior Court*, 209 P.3d 923, 926 (Cal. 2009); CAL. LAB. CODE § 2699.5 (2004) (providing examples of the many, many labor code violations that can be invoked).

104. *In re Tobacco Cases II*, 192 Cal. Rptr. 3d 881, 891 (Ct. App. 2015).

judicata bars when a few but not all predicates are the subject of a prior suit. But if one were instead to focus on each predicate, hundreds of motions for summary adjudication could be brought,<sup>105</sup> and the resolution of a handful of, for example, labor code violations in one PAGA case would probably have no impact on the next PAGA case against the same employer by the same employee. The state of the law is unclear.<sup>106</sup>

### C. SUMMARY

Picking out primary rights may be difficult for contemporary lawyers and judges, but the doctrine, as we will see, is hundreds of years old, and erupted across the American legal landscape at a time when the rights were, quite literally, “self-evident,”<sup>107</sup> and indeed dates to eras before that, when the underlying natural rights were equally obvious. The doctrine presumes a sort of doctrinal simplicity, a formalism, which is now very much ephemeral, even more so now than a century ago when Holmes castigated the doctrine. We still use it, even though we are no longer assured of our ability to intuit the primary rights; and those we do pick out would be unrecognizable to those who developed the doctrine. But before we turn to that history, a quick look at the current law in other jurisdictions.

### V. MAJORITY RULE

The Federal Rules of Civil Procedure do not contain the phrase, “cause of action.” Their basic requirement for stating a claim in a complaint is only that a complaint must set forth “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>108</sup>

Very few other states use the primary right doctrine.<sup>109</sup> For most jurisdictions, we “know now, of course, that Pomeroy’s classification lost the intellectual debate over a century ago.”<sup>110</sup> Federal courts in non-diversity cases follow the suggestion of the Restatement,<sup>111</sup> and adopt the so-called

105. This is the nightmare scenario described in *Bagley v. TRW, Inc.*, 86 Cal. Rptr. 2d 909, 910 n.2 (Ct. App. 1999) as it evaluated the applicability of *Lilienthal*.

106. See, e.g., *Silva v. Sees Candy Shops, Inc.*, 212 Cal. Rptr. 3d 514, 533–34 (Ct. App. 2016) (different PAGA claims warrant different summary adjudication treatment).

107. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

108. FED. R. CIV. P. 8(a)(2).

109. One commentator cited only California as an example, albeit without saying there were no others. Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 1017 (1998). Another commentator in 1989 suggested there might be 9 states, see James, *supra* note 47, at 353 n.11. My own Westlaw search located a few cases which suggest a handful of states apply some sort of primary rights analysis. I only looked at cases available from 2000 onwards. California of course had many hundreds of cases. The other states are: Pennsylvania: *Kelly v. Kelly*, 887 A.2d 788, 792 (Pa. Super. Ct. 2005); Kansas: *Dexter v. Brake*, 269 P.3d 846, 853 (Kan. Ct. App. 2012); Virginia: *Kiser v. A.W. Chesterton Co.*, 736 S.E.2d 910, 916 (Va. 2013); and perhaps Washington: see *Phillips v. Valley Comm., Inc.*, 159 Wash. App. 1008 (2010). A confused opinion from an intermediate Minnesota court, later reversed in part, addresses California’s primary rights analysis ascribing it to the Ninth Circuit (as such), and perhaps applies it: *Drewitz v. Motorwerks, Inc.*, 706 N.W.2d 773, 781 (Minn. Ct. App. 2005), *aff’d in part, rev’d in part*, 728 N.W.2d 231 (Minn. 2007).

110. Theodore W. Ruger, *Health Law’s Coherence Anxiety*, 96 GEO. L.J. 625, 633–34 (2008).

111. RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 46.

transactional test,<sup>112</sup> as do most of the states.<sup>113</sup> For example, *res judicata* analysis in federal courts has as one of four elements whether “the same claim or cause of action must be involved in both cases.”<sup>114</sup> This element is addressed by the transactional test which:

requires that the two actions be based on the same ‘nucleus of operative facts.’ [Citations] [A] prior judgment’s preclusive effect extends to all rights of the plaintiff ‘with respect to all or any part of the transaction, or series of connected transactions, out of which the [original] transaction arose.’ [Citations] What constitutes a “transaction” or a “series of transactions” is determined by weighing various factors such as ‘whether the facts are related in time, space, origin, or motivation [;] whether they form a convenient trial unit[;] and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.’ [Citations]<sup>115</sup>

This test is often abbreviated to whether the two claims or causes of action arise “out of the same nucleus of operative facts.”<sup>116</sup>

A simple example of where the primary rights and transactional analysis generate different results is provided by a commentator.<sup>117</sup> In a car accident, the victim may suffer both property damage (to the car) and bodily injury. That’s two causes of action in California, where the victim can bring first one and then the other claim even if she loses the first case. But because these claims obviously arise from the same set of operative facts, both claims have to be brought in one suit under the transactional test. If only one is brought, *res judicata* will bar the second suit.

Only in a primary rights state such as California would we find this phrase: “although Ivanoff’s contract and TILA claims are largely based on

112. *Franceschi v. Franchise Tax Bd.*, 205 Cal. Rptr. 3d 75, 83 n.1 (Ct. App. 2016) (in contrast to state courts, federal courts use transactional analysis); *Furnace v. Giurbino*, 838 F.3d 1019, 1024 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2195 (2017). *See generally* Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 792–98 (2004).

113. *Erichson*, *supra* note 109, at 973 (state law generally follows Restatement (Second) of Judgments).

114. *Oreck Direct, LLC v. Dyson, Inc.*, 560 F.3d 398, 401 (5th Cir. 2009) (quoting *In re Ark-La-Tex Timber Co., Inc.*, 482 F.3d 319, 330 (5th Cir. 2007)).

115. *Id.* at 402; *accord, e.g.*, *Pohl v. U.S. Bank for Merrill Lynch First Franklin Mortg. Loan Trust Back Certificates Series 2007-4*, 859 F.3d 1226, 1231 (10th Cir. 2017) (applying Colorado law); *Parungao v. Cmty. Health Sys., Inc.*, 858 F.3d 452, 458 (7th Cir. 2017) (applying Illinois law); *Telamon Corp. v. Charter Oak Fire Ins. Co.*, 850 F.3d 866, 873 (7th Cir. 2017) (applying Indiana law); *Cox v. Nueces Cty., Texas*, 839 F.3d 418, 421 (5th Cir. 2016) (applying Texas law); *Cooper v. WestEnd Capital Mgmt., L.L.C.*, 832 F.3d 534, 543 (5th Cir. 2016) (applying Louisiana law); *Res. Investments, Inc. v. United States*, 785 F.3d 660, 665 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 2506 (2016); *U.S. ex rel. Sheldon v. Kettering Health Network*, 816 F.3d 399, 414 (6th Cir. 2016) (applying Ohio law); *Bode & Grenier, LLP v. Knight*, 808 F.3d 852, 858 (D.C. Cir. 2015) (applying Michigan law); *Lynch v. Nat’l Prescription Adm’rs, Inc.*, 787 F.3d 868, 871 (8th Cir. 2015) (applying New York law); *Covert v. LVNV Funding, LLC*, 779 F.3d 242, 247 (4th Cir. 2015); *In re FFS Data, Inc.*, 776 F.3d 1299, 1307 (11th Cir. 2015). *But see* *United States v. Beane*, 841 F.3d 1273, 1285 (11th Cir. 2016) (transactional analysis does not apply in some tax court proceedings).

116. *Magee v. Hamline Univ.*, 775 F.3d 1057, 1059 (8th Cir. 2015).

117. *James*, *supra* note 47.



the same set of underlying facts, the two actions do not involve the same primary rights.”<sup>118</sup>

## VI. ROOTS

The spinning jenny has just been invented; Daniel Boone is back from the French and Indian Wars, which have recently concluded. The Boston Tea Party — which will presage the formation of the United States — is eight years in the future.

It is 1765, and William Blackstone has begun to publish his *Commentaries*. There he maps out “the three great and primary rights, of personal security, personal liberty, and private property.”<sup>119</sup> Sheridan tells us these “three primary rights derived from God and Nature,”<sup>120</sup> following Blackstone’s own invocation of “absolute rights, which were vested in [individuals] by the immutable laws of nature.”<sup>121</sup> Natural rights have a long history,<sup>122</sup> but it is enough here to note, first, that Blackstone’s primary rights were initially natural rights, and second, probably concomitantly, that the observer—or at least the legal observer—knew them as self-evident. Our Declaration of Independence, of course, makes this express<sup>123</sup> with equal confidence in the ability of its authors to know the “Laws of Nature and of Nature’s God.”<sup>124</sup> Later cases, including American opinions that discussed primary rights, reflect this confidence in the perception of the rights. For example:

The right of enjoying and defending life consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and in resisting, even to the commission of homicide, where such resistance is necessary to save one's own life. The right of enjoying and defending life, without the privilege of protecting it by all the means which the law as well as nature, in extreme cases, furnishes, would be illusory to the last degree. Therefore, this privilege belongs to us, and, by the Constitution of the United States, to every other citizen of the United States in common with us.<sup>125</sup>

Blackstone and others into the nineteenth century built a great formalism in the law: Blackstone with his three primary rights and five auxiliary

118. *Ivanoff v. Bank of Am., N.A.*, 215 Cal. Rptr. 3d 442, 450 (Ct. App. 2017).

119. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 123 (1765). The *Commentaries* were published between 1765 and 1769.

120. CHARLES FRANCIS SHERIDAN, *OBSERVATIONS ON THE DOCTRINE LAID DOWN BY SIR W. BLACKSTONE, RESPECTING THE EXTENT OF THE POWER OF THE BRITISH PARLIAMENT, PARTICULARLY WITH RELATION TO IRELAND* 37 (1779).

121. Blackstone, *supra* note 119.

122. That is, *very* long, back to Roman times at the very least. *E.g.*, Richard A. Pacia, *Roman Contributions to American Civil Jurisprudence* 49 R.I. BAR J. 5, 37 (2001).

123. “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE (U.S. 1776).

124. *Id.*

125. *Douglass v. Stephens*, 1 Del. Ch. 465, 470–71 (1821).

subordinate rights, designed to maintain the primary rights,<sup>126</sup> cases that followed the classification,<sup>127</sup> and later Pomeroy, whose first edition of *Remedies and Remedial Rights By The Civil Action* in 1876 was the turning point in California's adoption of the primary rights doctrine.

Indeed, a generation before that, by 1820-1830, formalism was on the rise in the United States, and with it the growing sense that law was a *scientific* pursuit, and that its secrets could be discerned, and its structure arranged, as the sciences structured their postulates, assumptions, reasoning, and conclusions.<sup>128</sup> As Blackstone traced it,<sup>129</sup> knowledge of the law thus moved from the sort of Platonic intuition of the law to a logical reasoning—but equally evident. The rhetoric of legal thought shifted from what some contended to be value-laden and moral judgment, to a neutral and “objective” approach where rules of procedure, for example, were applied as an algorithm is applied to data. The rhetoric may well have actually been a cover for the imposition of a new set of values, in particular mercantile values,<sup>130</sup> but the formalism was real, and I suggest it furthered in its own way the apparent confidence judges and lawyers had in their understanding of the fundamental rights. The push towards these “objective” standards and the rhetoric of moving away from (arguably subjective) value judgments that might be made in courts of equity came to a head in 1848 when New York adopted David Dudley Field's code of civil procedure, abolishing the formal distinction between the courts of law and equity.<sup>131</sup>

A year after California became a state, in 1851 it adopted the Practice Act, which was heavily influenced by the Field Code.<sup>132</sup> This was the fusion of law and equity, the subject of much commentary.<sup>133</sup> By definition, the cognizable claims could no longer be classified as a function of the remedy sought, such as injunctions and other equitable remedies (for the equity courts), as opposed to money damages (available in the former courts of law).<sup>134</sup> It was into this context—this loss of a venerable formal structure—that a reborn doctrine of primary rights adopted from Blackstone, and formally assembled by Pomeroy had arrived.

Just as natural scientists had their taxonomy of flora and fauna, so too the legal scientists had their taxonomies: elaborating the great troika of Blackstone's primary rights, commentators were by 1917 able to arrange

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126. Blackstone, *supra* note 119, at 136.

127. *Douglass*, 1 Del. Ch. at 470–71.

128. *See generally, e.g.*, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 256 (1977); Curtis E. A. Karnow, *Prejudices of The Past and the Role of Experiential Learning, in LITIGATION IN PRACTICE* 169, 169, 175 (2017).

129. Roscoe Pound, *Theories of Law*, 22 *YALE L.J.* 114, 129–30, 140 (1912).

130. HORWITZ, *supra* note 128. Attention to what Horwitz calls substantive justice gave way to formal legal rules. *Id.* at 266.

131. HORWITZ, *supra* note 128, at 265; Joseph Lavitt, *Leaving Contemporary Legal Taxonomy*, 90 *DENV. U. L. REV.* 213, 244–46 (2012).

132. Field's brother, Stephen served as a Chief Justice in California before his appointment to the U.S. Supreme Court.

133. *E.g.*, William Schofield, *Uniformity of Law in the Several States As an American Ideal*, 21 *HARV. L. REV.* 583 (1908); *see also* Robert G. Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 *COLUM. L. REV.* 1 (1989); POMEROY, *supra* note 1, at 27 *et seq.*

134. Lavitt, *supra* note 131.

primary rights as subspecies of larger categories such as “rights privileges, powers, and immunities” and, under the rubric of ‘rights,’ the subdivisions of *in personam* and *in rem* rights, each in turn liable to a variety of other subdivisions.<sup>135</sup> These primary rights provided a means to identify that which was essential, the “unchangeable features and elements,”<sup>136</sup> which had survived the fusion of law and equity and the concomitant old forms of classification.

Pomeroy first published his treatise in 1876,<sup>137</sup> and ever since, California cases invoking the primary rights doctrine have cited to this work directly or indirectly through intervening cases.<sup>138</sup> Indeed, only two years after Pomeroy’s first publication, it was cited to the California Supreme Court.<sup>139</sup> For the new state without its own precedent, the timing was perfect. Here was a compendium of cases, and the extracted legal principles, ready for the taking. Pomeroy directly took up the Blackstone troika of rights and gave them additional elaboration in an effort to cover the waterfront of litigated cases. His higher-level taxonomy had private (civil) and public (criminal) primary rights.<sup>140</sup> The rights “were roughly the standard natural rights of liberal theory: personal security, subdivided into rights to life, body and limb, and reputation; the right to personal liberty; the right to acquire and enjoy private property; and finally, the right of religious belief and worship.”<sup>141</sup>

As a further amplification of Blackstone’s primary rights, Pomeroy contrasted them with secondary rights: the entitlement, or power, one has to

135. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 716 (1917). Here’s a nice sample of his taxonomy: using “more satisfactory terms for the phrases *in personam* and *in rem*, we shall have to deal *seriatim* with eight classifications, as follows: 1. paucital rights (or claims) and multital rights (or claims); 2. paucital privileges and multital privileges; 3. paucital powers and multital powers; 4. paucital immunities and multital immunities; 5. paucital no-rights and multital no-rights; 6. paucital duties and multital duties; 7. paucital disabilities and multital disabilities; 8. paucital liabilities and multital liabilities. Each of these eight definite classifications must, for the sake of clearness, receive somewhat separate treatment. Owing, however, to limitations of space, the present article will deal chiefly with the first subdivision, i.e., paucital rights, or claims, and multital rights, or claims.” See also *id.* at 716–17.

136. David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 482 (2010) (quoting JOHN NORTON POMEROY, REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION ACCORDING TO THE REFORMED AMERICAN PROCEDURE § 45, at 70 (4th ed. 1904)).

137. POMEROY, *supra* note 1. Another edition was printed in 1883 and a widely cited (in California, at least). The fifth edition was published in 1929.

138. For example, the iconic *Mycogen Corp. v. Monsanto Co.*, 51 P.3d 297, 301–02 (Cal. 2002) relies almost exclusively on *Crowley v. Kattleman*, 881 P.2d 1083, 1090 (1994) which cites *McKee v. Doud*, 93 P. 854, 855–56 (Cal. 1908), which relies on Pomeroy. Many cases rely on either (or both) *Wulfjen v. Dolton*, 151 P.2d 846, 849 (Cal. 1944) or *McKee*, both of which rely on Pomeroy. And many cases skip the genealogy and rely directly on Pomeroy. *E.g.*, *Branson v. Sun-Diamond Growers*, 29 Cal. Rptr. 2d 314, 321 (Ct. App. 1994).

139. *Atkinson v. Amador & Sacramento Canal Co.*, 53 Cal. 102, 104 (1878) (this is not the court’s opinion, but argument of counsel). See also Comment, *Cause of Action Broadened in California*, 1 STAN. L. REV. 156, 157 (1948) (“California courts early began quoting Professor Pomeroy’s “primary rights” concept of a single cause of action.”).

140. POMEROY, *supra* note 1, at 3.

141. Lavitt, *supra* note 131, at 249 (quoting Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1254 (2001)).

enforce primary rights.<sup>142</sup> Others such as Bentham<sup>143</sup> and Austin<sup>144</sup> called these secondary rights ‘sanctioning’ and ‘remedial’ rights, that is, the right to enforce a primary right. As Austin put it, one needed secondary rights because not all persons respected primary rights. So, for example, “[o]n this view a contract creates a primary obligation to perform. The obligation to pay damages is a secondary duty.”<sup>145</sup>

## VII. EXTRACTING THE IDEAL

Pomeroy’s organization was, like many formalist constructions, “not a function of practical real world outcomes, but rather the result of some feature of the rights-based idealization of the real world dispute.”<sup>146</sup> Like Blackstone, the authors of Declaration of Independence and their precursors, Pomeroy saw his rights taxonomy as “natural and true,”<sup>147</sup> manifested and in effect proven to be true by all history: by “the experience of mankind as shown in the history of legal development from an infancy of rude barbarism to a maturity of enlightened civilization.”<sup>148</sup>

Pomeroy’s primary rights were the eternal, true, and consistent feature of law which he would identify, and thereby shepherd the transition of the American legal system through the “shocking,” “modern reforms”<sup>149</sup> effected by the adoption of the Field Codes in New York and many other states, as well. He distinguished primary rights, first, from the old (and bizarre) Roman formalism which required the utterances of certain words and certain gestures,<sup>150</sup> and second, from the long tradition of English common law, the pre-Field Code procedures of the equity and law courts which, too, rested on arbitrary, “peculiar and artificial” procedures.<sup>151</sup> He saw

142. Alan Calnan, *The Instrumental Justice of Private Law*, 78 UMKC L. REV. 559, 583–84 (2010); POMEROY, *supra* note 1, at 50–51.

143. Grey, *supra* note 141, at 1242.

144. John Austin, *Outline of the Course of Lectures*, in 1 AUSTIN’S JURISPRUDENCE 31, 43 (John Campbell ed., 5th ed. 1885) (explaining distinction between primary and sanctioning rights); *see also*, JOHN AUSTIN, LECTURES ON JURISPRUDENCE, THE PHILOSOPHY OF POSITIVE LAW 2 (1875) (notes for Lecture XXVII); *id.* at 378.

145. Oman, *supra* note 21, at 157; *see also*, e.g., Calnan, *supra* note 142, at 583–84 (2010) (“[S]econdary rights give people the power to defend their legally protected interests . . . by taking affirmative action against their fellow citizens . . . either by undertaking some self-help measure to stop or control the actions of others or by dragging them into court to take their money.”) (notes omitted). This distinction between primary and secondary rights is the reason why later court opinions held that the relief or remedy sought had nothing to do with the primary right in play. *E.g.*, *Hutchinson v. Ainsworth*, 15 P. 82, 84 (Cal. 1887).

146. Bone, *supra* note 133, at 52–53.

147. POMEROY, *supra* note 1, at 31. *See also*, e.g., Bone, *supra* note 130, at 52 (“For Pomeroy, however, each legal dispute had a natural structure and natural boundaries determined by plaintiff’s cause of action.”).

148. POMEROY, *supra* note 1, at 31.

149. *Id.* at 5.

150. *Id.* at 10 (“Nothing can exceed the arbitrary nature and intense formalism of these proceedings.”).

151. *Id.* at 25–26. Pomeroy mocks the good old days this way: “The lawyer knew exactly what remedies the courts would grant in a given case, and the form, manner, and means by which such remedy was to be sought and obtained. There was an order, a classification, running through the whole department of civil remedies which could be acquired by an exercise of the memory; and although the reasons upon which that classification was based were, like much of so-called legal reasoning, a mere formula of words,

the fusion of the law and equity as earthshaking, a “fundamental reform” which posed a serious risk that the essence of legal rights might be lost, the baby tossed out with the bathwater, as it were:

When a fundamental reform has been accomplished, when the artificiality and arbitrariness in the whole body of the law have been removed, when the division-wall between law and equity has been broken down, when all the separate forms of legal actions have been abolished, the *raison d'etre* of the existing classification of remedies and remedial rights also disappears.<sup>152</sup> When at one blow all these peculiar and artificial means and instruments are swept away, the very basis of the classification disappears, and with it the classification itself.<sup>153</sup>

The answer was not, as some judges thought, “to declare[] that all the ancient legal actions still exist in their substance, with simply the loss of their names. This is, of course, a palpable error; for all the marks which distinguished one action from another—for example, ‘covenant’ from ‘debt’ or ‘assumpsit,’ or ‘trespass’ from ‘case’ or ‘trover’—were external, technical, and formal, and have been swept away.”<sup>154</sup> The problem was far more serious, and Pomeroy wrote to isolate and identify the persistent, essential elements of the law that had operated at the core of the common law system, and survived—*had* to survive—the fusion of law and equity.<sup>155</sup> Those were primary rights. Primary rights doctrine was the lifeline through which the law would be said to persist, while at the same time accounting for the massive reorganization of procedures brought about by the state legislatures, the fusion of law and equity.

As persistent features of a legal claim, primary rights were—and *had* to be—ideals, abstractions of real world lawsuits.<sup>156</sup> When he contrasted the peculiar common law forms as “based upon arbitrary external facts, — facts which had no necessary a priori existence,”<sup>157</sup> Pomeroy provided insight to these rights as *a priori*, eternal, extant, truths. The work of taxonomy, or mere organization, had given birth to a metaphysical reality.<sup>158</sup>

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without any real meaning, yet, when the artificial premises were conceded, the results could be understood. The system, however, did not rest upon its reasoning so much as upon dogmatic authority, precedent, and habitual use.”

152. *Id.* at 25.

153. *Id.* at 26.

154. *Id.* at 37.

155. *Id.* at 60, 62, 69, 80, 82, 122, 137; *see also id.* at 76 (“It has been abundantly settled, in perfect accordance with the theory developed in the preceding section, and in strict conformity with the language and design of all the State codes and practice acts, that the new system has not produced, and was not intended to produce, any alteration of nor direct effect upon the primary rights, duties, and liabilities of persons.”); Schofield, *supra* note 133, 592 (“A cardinal principle of the code procedure is, ‘a single form of action for the protection of all primary rights, whether legal or equitable’”) (note omitted).

156. Bone, *supra* note 133, at 53 (“Lawsuit structure was not a function of practical real world outcomes, but rather the result of some feature of the rights-based idealization of the real world dispute”).

157. POMEROY, *supra* note 1, at 31.

158. It was precisely to this that Holmes objected. Holmes, *supra* note 8, at 458 (“The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas, about which I shall have something to say in

This is an ancient, persistent problem. When one categorizes things (such as animals, trees, or legal claims) into hierarchies and groups, one forms classes of things and ascribes attributes to those things—indeed, this is the same process. We might for example take a group of animals and classify them into dogs, wolves, and coyotes, then subdivide dogs into terriers and poodles, and subdivide those, and so on. In each case, we have simultaneously created a class of things (dogs and terriers) and ascribed a property: being a dog, a terrier, and so on. The number of classes and properties is infinite: just with these animals we can have groups of black and brown animals, large and small, fuzzy and long haired, and so on; we can even have classes of animals which are inside my house, and those outside, and those common in Africa or India, or indeed those which are fictitious (unicorns and most dragons are in that class). By the same token an animal can have an infinite number of properties and so be a member of an infinite number of classes; and “brown things” can have an infinite number of attributes as well, such as being a dog or tree or a spot. Because being in class or set is fundamentally no different than having a property ascribed to a thing, almost any statement about things can be seen as a statement about a class (a class can have one member).

It is tempting to identify some of these properties as essential—as primary, perhaps—and others less so, or more contingent; indeed, philosophers since at least Aristotle have done this.<sup>159</sup> Even though we tend to see some classes as more basic or primary than others (such as the class of “dog” as more basic than the class of “poodle,” and “dog” more primary than “brown”), the logic quickly peters out. Determining which attribute is more or less fundamental always depends on the context. So we might say the color of a dog is less essential than its breed. Perhaps even less essential is the property of being inside the house, or being thirsty, or being short. But it always depends. The good Samaritan on a hot day is looking only for thirsty animals, of any sort; and the farmer worried about coyotes divides his animals into two primary classes: those inside and those outside the barn.

The very notions of essences, in which Pomeroy deeply believed, is odd, yet very familiar. The classic Aristotelian picture is to have an entity—say “man”—which is *essentially* rationale (a member of the class of rational animals) and, as matter of accident or contingency (the opposite of ‘essentially’) has attributes such as ‘two legged’ and ‘pale’ and ‘short.’ Man is *essentially* a rational animal; the other attributes aren’t essential.

But this isn’t right.<sup>160</sup> We treat many people as ‘man’ (or, better for our time, “human”) who are irrational, comatose, and insane. My son Ben at age 2 was, despite his complete lack of rational behavior, essentially human (I

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a moment, is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But, as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; — and so of a legal right.”)

159. Aristotle, *Categoriae (Categories)*, in THE BASIC WORKS OF ARISTOTLE 7, 9 (Richard McKeon ed., 1970); Aristotle, *Metaphysica (Metaphysics)*, in THE BASIC WORKS OF ARISTOTLE 689, 739–40, 786 (Richard McKeon ed., 1970); Bk IV Ch. 4:20 *et seq.*; *id.* at Bk.VII Ch. 3:14 *et seq.*

160. See generally Willard Van Orman Quine, *On What There Is*, in FROM A LOGICAL POINT OF VIEW 13, 17 (1961).

think). The truth is that we define things with a (sometimes large) collection of attributes, and with various degrees of those attributes. And when all the attributes are taken away, there is actually nothing left. I provide an example: a boat. “Essentially,” what is it? Here are some candidate attributes: floats on water, has sides, contains (or can contain) cargo, can be propelled across water. We can peel some of these away, but we might still have a boat: the prow has disintegrated and it lies on the shore (“the boat is broken”); it cannot float because it has a hole and it is exhibited in a museum (still a boat); it has no sides (“it’s a boat without sides”); or it is a small metal model and cannot float nor contain cargo—but we might still call it a boat. The constellation of attributes makes a thing a boat, and if we take some of them away, depending on how many of them and to what extent they are removed, we might at some point no longer say it’s a boat. A plank, or even a lot of planks, from a boat is not a boat. There is no “essential” boat, or anything else, apart from the collection of attributes which to varying degrees will be enough to make it out. There is no “essence” to “dog” or “boat.” There are collections of attributes which, depending on the context and the degree to which the attributes are present, are good enough to say we have a dog or a boat. Delete all the attributes, and nothing is left.<sup>161</sup>

For Pomeroy to succeed in his task of identifying the golden thread that existed before the Field Code yet survived into his “modern” era thereafter, he had to strip the notion of a legal claim from all the contingencies of the common law forms—all the attributes. Only an essence was left. But this had no content, no meaning.

The real world always approximates abstractions to an extent; just knowing the abstraction is insufficient to determine whether the real-world situation approximates it to a *sufficient* extent to qualify for membership. We might ask, how red must my red rose be; how much is promissory estoppel like a contract. Even believing red was an essential attribute, or that a contract right is primary, won’t answer the questions. For the same reason, the doctrine of primary rights can’t predict which right is at stake in a new case and whether it is “primary” or not. Essences don’t exist.

## VIII. TRANSITIONS

On August 10, 2000, lawyers for a company known as Mycogen filed a petition for review in the California Supreme Court. They had lost in the court of appeals when that court “appl[ied] a narrow, hide-bound view of claim preclusion principles,”<sup>162</sup> that is to say, primary rights. The Petition’s first citation to pertinent law was to the RESTATEMENT (SECOND) OF JUDGMENTS § 24, which of course embodied the majority rule on a

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161. This discussion doesn’t pertain to things which could be said to have ‘essences’ as it were *by definition*, such as bachelors which by definition are unmarried men. So too we might simply define ‘gold’ as the substance with an atomic number of 79 and then be able to say that the ‘essence’ of gold is that it has an atomic number of 79. But these definitions just make tautologies, they create *identities* between two descriptions (gold = atomic number 79), and the notion of ‘essence’ drops away as an abstraction of a thing, or as any sort of explanatory or descriptive concept.

162. Pet. for Review at 2, Mycogen Corporation v. Monsanto, No. S090337, 2000 WL 34226975 (Cal. Aug. 10, 2000).

transactional analysis of res judicata.<sup>163</sup> Noting that the court of appeal had relied on primary rights, Mycogen's lawyers had very little good to say about that "19th Century theory," discussing it under the caption "This Court's Precedent Adds To The Confusion In California Claim Preclusion Law."<sup>164</sup>

Monsanto's lawyers, including one Jon B. Eisenberg,<sup>165</sup> who had won below, thought it very likely the Supreme Court had granted review in order to end the reign of primary rights in favor of the Restatements' transactional approach. They thought it possible that Justice Mosk, who had authored *Crowley*, which explained primary rights but only to distinguish it from the issue then at bar,<sup>166</sup> was ready to abandon primary rights, and for that reason perhaps had urged his colleagues to grant review. Thus, the lawyers briefed it both ways—asking for affirmance because both primary rights and the Restatement's approach so counseled.<sup>167</sup> All parties, indeed amicus as well,<sup>168</sup> invited the court to find a way out of primary rights.

What happened? For those outside the Court, we'll never know. Justice Mosk, who may have been ready to accept the invitation to accept the invitation, died in June 2001, after review was granted in *Mycogen*. Justice Carlos Moreno, after joining the court in October 2001, took the case, and wrote the Court's opinion, published in August of the next year.<sup>169</sup> The new Justice firmly ensconced primary rights theory as a fundamental part of state law, noting that a "clear and predictable res judicata doctrine promotes judicial economy."<sup>170</sup> Perhaps ironically, the Court relied on Mosk's opinion in *Crowley*. It mentions the Restatement's transactional rule only in a footnote, the last one, and only to say that because the "result in this case would be the same under either theory, we decline to reconsider our long-standing approach to res judicata."<sup>171</sup>

Primary rights doctrine is plainly the law of this state, most emphatically after *Mycogen*. But there are some interesting opinions which hint, as the *Mycogen* footnote itself suggests, that the transactional approach often leads to the same result. These opinions remind me of the rider trying to change horses mid-charge: there's only one way to do it, which is—for a while—to ride both horses at once. And this begins as far back as 1994, when Justice Mosk wrote *Crowley*. Justice Arabian dissented in that case (where Justice Mosk had declined to use res judicata at all) because he thought res judicata

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163. *Id.*

164. *Id.* at 23 *et seq.*

165. Eisenberg is the author of the authoritative CIVIL APPEALS AND WRITS (The Rutter Group 2017). I am grateful to him for sharing with me his reminiscences of this case.

166. *Crowley v. Katleman*, 881 P.2d 1083, 1090 (Cal. 1994) ("The primary right theory has a fairly narrow field of application."). Mosk also signed onto Justice Peter's dissent in *Busick v. Workmen's Comp. Appeals Bd.*, 500 P.2d 1386, 1400 (Cal. 1972), in which the majority used primary rights to block a worker's compensation claim in light of an earlier superior court case.

167. My thanks to Jon Eisenberg for a copy of his brief.

168. *Mycogen Corp. v. Monsanto Co.*, 51 P.3d 297, 309 n.13 (Cal. 2002).

169. *Id.* at 297.

170. *Id.* There are echoes here of Pomeroy. See POMEROY, *supra* note 1.

171. *Id.*



could be applied—under primary rights but “interpreted in light” of the transactional approach.<sup>172</sup>

Indeed, *Lilienthal*, that most disquieting of cases, had anticipated this the year before. That opinion focused on the distinct and separate *circumstances* surrounding the two obligations, writing, “There is no dispute that the two matters have no relation to each other and involve legal services performed at different times, with different and distinct obligations, and distinct and separate alleged damages”.<sup>173</sup>

A case decided five years later read *Lilienthal* just in this way, distinguishing *Lilienthal*’s facts as relating to “separate and distinct unrelated transactions.”<sup>174</sup> In 2004, a California appellate court expressly stated that the two tests—primary rights and the “transactional standard”—were *both* in play, citing a law review article which had noted serious problems with primary rights.<sup>175</sup> And, by 2013, an appellate court first expressly invoked the primary rights doctrine,<sup>176</sup> and then, calling on “the same nucleus of operative facts and . . . the same legal issues” as between two matters, found *res judicata* barred the second suit.<sup>177</sup> Two years later, a court invoked the transactional standard, citing *Lilienthal*.<sup>178</sup> In 2016, *Franceschi* first noted

172. *Crowley v. Katleman*, 881 P.2d 1083, 1101 fn.1 (1994) (Arabian, J., dissenting) (suggesting the use of “a ‘primary right’ analysis . . . interpreted in light of modern transactional notions (*cf.* Restatement 2d, Judgments § 24, subd. (1))”).

173. *Lilienthal & Fowler v. Superior Court*, 16 Cal. Rptr. 2d 458, 461 (Ct. App. 1993). Other cases have suggested that if the transactional test is satisfied—that is, if under the majority rule there are two separate transactions and so two causes of action—the same result would obtain under the California rule. *Thomas-Villaronga v. Cal. Dep’t of Corr.*, No. A124422, 2010 WL 3675547, at \*7 (Cal. Ct. App. Sept. 22, 2010) (“Separate transactions give rise to separate causes of action, even if both events were wrongful for the same reason.”).

174. *Crouse v. Brobeck, Phleger & Harrison*, 80 Cal. Rptr. 2d 94, 102 n. 2 (Ct. App. 1998) (emphasis supplied).

175. *Fed’n of Hillside & Canyon Ass’ns v. City of Los Angeles*, 24 Cal. Rptr. 3d 543, 558 (Ct. App. 2004) (“These authorities do not mean that injuries arising from the same set of facts can give rise to only one cause of action.”) The California Supreme Court has rejected the transactional theory of *res judicata*. [Citations] Rather, these authorities indicate that in defining the injury suffered, primary rights theory incorporates to some degree a transactional standard. (See Heiser, *California’s Unpredictable Res Judicata (Claim Preclusion) Doctrine (1998)* 35 *SAN DIEGO L.REV.* 559, 569-570.) I note the Heiser article above in context, notes 47 & 76.

176. *Fed. Home Loan Bank of S.F. v. Countrywide Fin. Corp.*, 154 Cal. Rptr. 3d 873, 883 (Ct. App. 2013).

177. *Id.* The same dual invocation is found in *Indulkar v. E. Desert Valley Investments, Inc.*, No. G050400, 2015 WL 544913, at \*5 (Cal. Ct. App. Feb. 10, 2015) (“Appellant could recast his causes of action ad infinitum, but the *primary rights* at stake in both actions would still be the same. Indeed, appellant acknowledges that “the *nucleus of facts is the same*” in each action”) (emphasis supplied).

178. *L.A. Properties Inv., Inc. v. Saghian*, No. B246988, 2015 WL 5604289, at \*7 (Cal. Ct. App. Sept. 23, 2015) (“In the instant case, the trial court properly applied the principle articulated in *Lilienthal* to separately adjudicate the fraud and interference claims based on the Santee Note transaction and those based on the Five Notes transaction, notwithstanding that LA Properties combined allegations related to these *separate transactions* in the same causes of action. As Defendants correctly observe, the Santee Note and Five Notes transactions “involved separate and distinct promissory notes, secured by entirely different real properties and executed at completely different times, *under entirely different circumstances*.” Separately adjudicating the claims distinctly based on *one or the other transaction* was wholly consistent with the time and cost saving purposes the Legislature sought to promote when it amended the summary adjudication statute (See *Lilienthal, supra*, 12 *Cal.App.4th at p. 1853*.)”) (emphasis supplied).

the “shared set of facts,” which is transactional talk, as between two claims subject to *res judicata* before alluding to primary rights.<sup>179</sup>

## IX. CONCLUSION

Blackstone helped move us away from an unquestioning faith in our ability to discern the truth of a “supernatural legislator” embodied in Nature, to a faith in the power of reason to discover the eternal truths of the law,<sup>180</sup> and Pomeroy believed, accordingly, that primary rights were patent.

But the world is a bigger place, and we are no longer content to see in our experience simply the confirmation of our predispositions. As Corbin told us, the truth is that natural law “should be recognized for what it is—a complex system of human notions, variable with the people and changeable with time.”<sup>181</sup> Reasoned law is no different. Tradition “easily leads us into the false notion of ‘universal reason.’ Every people is easily convinced, inasmuch as the verification is by ‘civilized mankind’ and by ‘just men,’ and those terms just describe *us*.”<sup>182</sup>

Primary rights are no longer self-evident, if they ever were. We can use the doctrine to argue for and make rulings in a new case, but only when the new case is very, very, close to precedent. This is not to say that the alternative, the transactional approach set out in the Restatement is simple. Pomeroy had harsh words for it, calling it “broad, comprehensive, vague, and uncertain.”<sup>183</sup> But that is a topic for another chapter, perhaps, in the evolution of California’s law.

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179. *Franceschi v. Franchise Tax Bd.*, 205 Cal. Rptr. 3d 75, 86–87 (Ct. App. 2016) (“[W]e reject Franceschi’s argument because the First and Second Actions arise out of a shared set of facts, they involve the same parties, and, perhaps most critically, the same primary right.”). The more recent case of *Bucur v. Ahmad*, 198 Cal. Rptr. 3d 127, 135 (Ct. App. 2016) may have done the same thing in its focus on the “same subject matter” shared by two claims. (“As to the newly added causes of action, including those for defamation and violation of *Business and Professions Code section 17200*, the judgment in *Bucur I* is also conclusive because the new causes of action, although not expressly pleaded in *Bucur I*, were within the original scope of that action and were related to the same subject matter. [Citation] Appellants cannot, by negligence or design, withhold issues and litigate them in consecutive actions.”).

180. Pound, *supra* note 129, at 126.

181. Arthur L. Corbin, *Rights and Duties*, 33 YALE L.J. 501, 505 (1924).

182. *Id.* at 501, 505 n.5a (quoting Sir Frederick Pollock, 39 LAW Q. REV. 518 (1923)). Apparently, this same “civilized mankind” for example thought the doctrine of primary rights protected the right to own slaves. *Trustees of Quaker Soc. v. Dickenson*, 12 N.C. 189, 202 (1827) (“It is true that an individual may purchase a slave from gratitude or affection, and afford him such indulgencies as to preclude all notion of profit. The right of acquiring property and of disposing of it in any way consistently with law, is one of the primary rights which every member of society enjoys.”).

183. POMEROY, *supra* note 1, at 496. And the majority rule based on the Restatement does have its share of problems. It’s a “pragmatic” standard (RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 46, at comment *b*), which usually means ‘it depends on the facts,’ which is fine, except that—as with primary rights—it can be tough to predict a court’s ruling. This difficulty follows because of (1) the competing considerations underlying the test, i.e., “the need to strike a delicate balance between, the interests of the defendant and of the courts in bringing litigation to a close on the one hand, and, on the other, the interest of the plaintiff in the vindication of a just claim,” *op. cit.*; (2) the factors to consider such as “whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes,” *op. cit.*, and (3) the exceptions to the rule, *see e.g.*, Robert Ziff, *For One Litigant’s Sole Relief: Unforeseeable Preclusion and the Second Restatement*, 77 CORNELL L. REV. 905, 908–09 (1992).