

# Opinion Analysis: People v. Buza

## Overview

The California Supreme Court's recent opinion in *People v. Buza* (S223698) decided the constitutionality of Proposition 69 (the 2004 "DNA Fingerprint, Unsolved Crime and Innocence Protection Act") which requires law enforcement officials to collect DNA samples from all persons arrested for a felony offense.<sup>[1]</sup> The case is significant for both privacy rights and the law of search and seizure.

In a sharply divided 4-3 decision the court upheld the act under both the federal and state constitutions. In its decision the California Supreme Court missed a rare opportunity to reassert the independence of the

California constitution's search and seizure provision. This resulted in two separate and vigorous dissents, one by Justice Liu and one by Justice Cuéllar, the latter being almost as long as the majority opinion. In combination, these dissents lay out the next generation of arguments that the California constitution independently protects individual rights above and beyond those provided by the federal constitution, a doctrine I refer to as California constitutionalism.

This article examines: *Buza*'s significance in the history of California constitutionalism; why *Buza* is a missed opportunity to re-invigorate the doctrine; Justice Kruger's emerging importance as the court's swing vote and how *Buza* reflects her incremental approach to jurisprudence; and the future of arguments for California constitutionalism as expressed by Justices Liu and Cuéllar and the problems that remain for the doctrine moving forward.

## 1. California constitutionalism

California constitutionalism has also been referred to as "independent state grounds" or "the new judicial federalism."<sup>[2]</sup> It is rooted in the principle that the California constitution provides independent, additional protection for individual rights above and beyond what the federal constitution requires. This doctrine includes those rights that are identically or similarly worded in both constitutions. For example, the right against unreasonable search and seizure is in the U.S.

constitution's Fourth Amendment, and in the California constitution in article I, section 13.

During the Warren Court years, the federal and California high courts expanded criminal procedural rights in close accord.<sup>[3]</sup> California constitutionalism emerged in reaction to the more conservative turn in criminal procedure jurisprudence in the subsequent Burger Court years. Proponents of the Warren Court's view of criminal procedural rights (Justice William Brennan, for example) called on state courts to retain the expansive direction of Warren Court jurisprudence by basing their constitutional rulings on their state constitutions, which could provide protections greater than those required by the federal constitution.<sup>[4]</sup>

The California Supreme Court heeded Brennan's call, and with Justice Stanley Mosk as its most vocal advocate, proceeded to develop a criminal procedural jurisprudence that was more protective of criminal defendant rights than what was required by federal constitutional decisions.<sup>[5]</sup> This, however, ultimately ran afoul of a shift in California voter sentiment that favored hard-on-crime provisions.<sup>[6]</sup> In 1982, Proposition 8's Truth-in-Evidence provision effectively limited both search and seizure and *Miranda* rights under the California constitution to no more than what the federal constitution requires.<sup>[7]</sup> And in 1990 Proposition 115 included an even broader provision, which restricted California criminal procedural rights to no more than the federal constitution provides.<sup>[8]</sup>

Proposition 115 was a bridge too far for the California Supreme Court, which abrogated it as an unconstitutional restriction on the court's ability to interpret the state constitution.<sup>[9]</sup> But that decision was a Pyrrhic victory for California constitutionalism advocates.<sup>[10]</sup> Proposition 8 had already effectively lock-stepped the California constitution to the federal constitution in the most important areas of criminal procedure.<sup>[11]</sup> The era of California constitutionalism in criminal procedure appeared to be over.

## **2. Buza's procedural history and holding**

So things stood until *People v. Buza*. Buza was arrested for several felonies and transported to jail. At booking, he was informed that he was required to provide a DNA sample via cheek swab. Buza refused. A jury later convicted him of both the

arrest crimes and the misdemeanor offense of refusing to provide the sample required by Proposition 69.[12]

Buza appealed his conviction for refusing to provide the DNA sample, contending that the sample requirement violated his federal Fourth Amendment right against unreasonable searches. After the Court of Appeal found in Buza's favor on that ground the California Supreme Court accepted review. While the case was pending the U.S. Supreme Court decided *Maryland v. King*, which held that a similar DNA collection statute in Maryland did not violate the Fourth Amendment.[13]

The California Supreme Court remanded *Buza* for reconsideration in light of *Maryland v. King*.[14] The Court of Appeal again reversed — this time on the ground that the DNA collection act violated the California constitution's prohibition on unreasonable searches and seizures.[15] Because the issue in *Buza* did not involve excluding evidence at a criminal proceeding, it fell outside the Truth-in-Evidence provision in article I, section 28(f)(2).[16] Consequently, the Court of Appeal concluded that it was not required to tie the California search and seizure provision (article I, section 13) to the Fourth Amendment, and held that the California constitution provides more protection in this area.[17]

The California Supreme Court again took up the case. Its analysis turned on two main questions: How similar were the Maryland DNA and California collection schemes? And if the two collection schemes were substantially similar, did the California constitution nonetheless afford more protection for individual privacy than the federal constitution?

The *Buza* majority held that the collection schemes were substantially similar and that the California statute's requirements were valid under both the state and federal constitutions.[18] The *Buza* majority declined to find that the California constitution affords greater search and seizure rights than does the federal constitution. This was a missed opportunity to reassert the California constitution's independent search and seizure rights.

The majority also declined to reach two divisive privacy issues:

- Whether Proposition 69 was unconstitutional because it allowed collection

from persons before a probable cause determination.

- Whether the procedures to expunge samples from the DNA database adequately protect individuals whose DNA was collected, but who are later released after a no probable cause or a not guilty finding.

The majority declined to reach these issues because Buza was both held to answer and found guilty by a jury.[19]

### **3. The (almost) emerging liberal majority on the California Supreme Court**

Following Governor Jerry Brown's appointments of Justices Liu, Cuéllar, and Kruger, some court watchers hailed the emerging liberal majority on the court when Justice Werdegar sometimes joined the three new appointees in delivering majority opinions.[20] The fact of Justice Werdegar's retirement and absence from the *Buza* opinion does not explain the absence of a liberal majority here. In *Buza*, Justice Perluss sat pro tem for Justice Werdegar, and indeed acted as Justice Werdegar sometimes did in delivering a liberal vote. It was Justice Kruger who did not deliver the fourth liberal vote that would have gained the dissenting justices (Liu, Cuéllar, and Perluss) the majority. Justice Kruger was the swing vote here, and as Justice Kennedy did on the U.S. Supreme Court, Justice Kruger appears to have played the tie-breaking role between the liberal and conservative blocks by authoring a opinion that avoided reaching some of the most divisive privacy issues raised in the case.

Court watchers have remarked on Justice Kruger's incremental approach to opinion writing.[21] And that incremental approach was evident in *Buza* where her majority opinion declined to reach an issue that it certainly could have: the constitutionality of requiring a DNA sample *after* the arrest but *before* a magistrate makes a probable cause finding.

While California's statute is similar in many ways to the Maryland statute upheld in *King*, it differs in three significant ways. The DNA Act applies to a broader category of arrestees than the Maryland law. Unlike the Maryland law, California's statute authorizes both DNA collection and testing before charging and a probable cause finding. And the DNA Act does not provide for automatic sample destruction if the arrestee is cleared.[22]

Of those the second was the most significant in *Buza*. Justice Liu framed the issue as: "The question is whether Buza can be convicted of refusing to provide his DNA at booking *prior to any judicial determination of whether he was validly arrested.*"[23] By not reaching this issue, the majority effectively eliminated any significant difference between the California and Maryland statutes. This effectively re-framed the constitutional questions the majority opinion ultimately addressed. On the federal constitutional question, this re-framing made the answer easy. If the two statutes are substantially similar, then *King* controls and California's statute complies with federal law. The California constitutional question still remained, but in the following form: Is a statute that the U.S. Supreme Court upheld under the federal constitution also lawful under the California constitution?

The majority opinion's re-framing of the constitutional issues affected every aspect of the arguments between the majority and the dissents, and resulted in the majority and the dissents talking past each other at crucial points and blurring many of the arguments concerning California constitutionalism. This stems from the posture of the constitutional arguments as they emerged from the Court of Appeal opinions. The first Court of Appeal opinion only considered federal law and the lack of any probable cause requirement. After *King*, Buza's case was arguably still distinguishable on federal constitutional grounds because of the significant difference between the California and Maryland statutes. This left the Court of Appeal at liberty on remand to affirm its original holding solely on Fourth Amendment grounds.

But in its second opinion, the Court of Appeal took a different approach and considered whether collection before a probable cause finding violated the California constitution.[24] The *Buza* majority's refusal to reach the probable cause issue significantly reframed the matter: Compared with the dissents and second Court of Appeal opinion, the majority was evaluating a completely different California constitutional question.

Why did the majority not reach the probable cause issue? It would have taken little effort. As the Cuéllar and Liu dissents point out, the issue was squarely presented.[25] But it appears that no majority could be reached on this issue. This is where Justice Kruger's incrementalism perhaps saved the day. She wrote an opinion

garnering consensus for the points on which a majority could be formed, and left the divisive issues for another case.

Whatever role practical necessity played behind the scenes, Justice Kruger concludes the opinion with a spirited statement of judicial incrementalism:

While passing on the validity of a law wholesale may be efficient in the abstract, the law teaches that we should ordinarily focus on the circumstances before us in determining whether the work of a coequal branch of government may stand or must fall. We accordingly abide by what has been called a cardinal principle of judicial restraint — if it is not necessary to decide more, it is necessary not to decide more.[26]

#### **4. State constitutionalism in the Liu and Cuéllar dissents**

The significance of Proposition 8 raises an interesting question concerning the role of a state-specific history in interpreting a state constitutional right. During the state constitutionalism period under Justice Mosk, the California Supreme Court expanded the state constitution's search and seizure protections. But the California electorate responded by amending the state constitution to limit those protections to no more than the federal constitution. Moving forward, which of these elements in a state-specific history is more relevant to interpreting the California constitution?

Justice Liu argued that the *Buza* majority failed to respect the California constitution's independence by adopting what amounts to a rebuttable presumption of correctness standard for federal constitutional decisions involving rights that are independently protected by the California constitution.[27] This is only somewhat fair: While the majority opinion does cite some cases that stress deference to federal constitutional decisions, the main thing dividing the majority from the dissents is the fact that they are considering different constitutional issues, not their generalized approaches to considering rights under the state constitution.[28]

Justice Liu also cited his law review article, which distinguishes between rights in state constitutions "that have formative state-specific histories" and rights that do not.[29] For example, many state constitutions have rights that the federal constitution does not, or have significantly differently language.[30] A state-specific

history lends immediate credence to an argument supporting the different scope and effect of a state right in comparison to its federal counterpart. But some rights are identically worded in both the state and federal constitutions. This reflects that “[d]rafters of state constitutions have made regular recourse to other states’ constitutions and to the Federal Constitution; in turn, the Framers of the Federal Constitution borrowed heavily from state constitutional text and experience.”[31] Consequently, rights that lack formative state-specific histories are more difficult to justify as having different interpretations from federal law.

Justice Cuéllar’s 32-page dissent reads like a majority opinion that might have been. It builds a state-specific history for search and seizure under the California constitution, both as a constitutional right (privacy) not found in the federal constitution, and a state-specific history of a more protective search and seizure right, despite its identical wording to the federal right.

The article I, section 1 right to privacy has long been a provision that California constitutionalists have sought to establish as a robust basis for protecting individual rights. Unfortunately, it has largely been a paper tiger.[32] The privacy right was limited early on by judicial decision to provide no state-specific search and seizure rights.[33] Acknowledging this, the Cuéllar dissent makes the valid counterpoint that “neither have we held that this language is devoid of meaning when considered together with that of article I, section 13.”[34] And furthermore: “Even if the language in article I does not create a separate class of privacy rights, at a minimum this reference underscores how certain infringements of personal privacy deserve heightened scrutiny in our search and seizure analysis relative to what the federal analysis requires.”[35]

The Cuéllar dissent notes that *Raven* listed numerous decisions from the court “interpreting the state constitution as extending protections to our citizens beyond the limits imposed by the high court under the federal constitution.”[36] Yet neither *Raven* nor Justice Cuéllar acknowledged that six of those eight decisions had been abrogated by Proposition 8’s Truth-in-Evidence provision.[37] Indeed, Justice Cuéllar did not mention Proposition 8 at all.

## **Conclusion**

From the Warren Court's perspective, history appeared to be moving in the same direction for individual rights under both the state and federal constitutions. Thus it was not surprising when that court held that rights previously recognized by state courts were also federal constitutional rights.[38] This all appeared to be the same story of rights. The same rights, recognized by both the state and federal constitutions, were blossoming into what they had always implicitly been, in a liberal narrative of progress.[39]

But the countermovement represented by Proposition 8 throws a wrench into that narrative. That countermovement was made possible by the relative ease of amending the California constitution, even individual rights. There is something paradoxical about fundamental individual rights that are nonetheless open to alteration through the ordinary political process.[40] Justice Liu may be correct that, as a matter of descriptive political science, "state constitutionalism is properly understood as a mechanism by which ongoing disagreement over fundamental principles is acknowledged and channeled in our democracy."<sup>[41]</sup> Buza shows that this paradox (amendable basic individual rights) and its ramifications continue to cause complications for defining a contemporary jurisprudence of California constitutionalism.

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[1] Gov. Code § 76104.6.

[2] *Michigan v. Long* (1983) at 1038.

[3] For more details on this and other background history recounted here, see David A. Kaiser & David A. Carrillo, *California Constitutional Law, Reanimating Criminal*

*Procedural Rights After The “Other” Proposition 8* (2016) 56 Santa Clara L. Rev. 33.

[4] *Id.* at 34.

[5] *Id.* at 36.

[6] *Id.* at 37.

[7] The Truth-in-Evidence provision is currently at Cal. Const., art. I, § 28, subd. (f)(2).

[8] Cal. Const., art, I, § 24.

[9] *Raven v. Deukmejian* (1990).

[10] Kaiser & Carrillo, *supra* note 3, at 70.

[11] *Id.* at 72-73.

[12] *People v. Buza* (2011).

[13] *Maryland v. King* (2013).

[14] *Buza* (2014) at 758.

[15] *Ibid.*

[16] *Id.* at 784-85.

[17] *Ibid.*

[18] *Buza* (2018) at 29, 40.

[19] *Id.* at 15.

[20] Gerald F. Uelmen & Kyle Graham, *A Shifting Balance at the California Supreme Court?*, California Lawyer (Sep. 2015) available at <https://legacy.callawyer.com/2015/09/a-shifting-balance-at-the-california-supreme-court/>; see also California Constitution Center, *Governor Jerry Brown 2.0: Judicial Appointments Now New and Improved*, SCOCABlog (Jun. 18, 2015) available at

<https://scocablog.com/governor-jerry-brown-2-0-judicial-appointments-now-new-and-improved/>.

[21] See, e.g., Maura Dolan, *As Gov. Jerry Brown Ponders A California Supreme Court Vacancy, One Of His Earlier Appointees Defies Expectations*, L.A. Times (Jun. 1, 2018).

[22] *Buza* at 15.

[23] *Buza* at 1 (dis. opn. by Liu, J.) (Italics in original).

[24] This is not in any way meant as a criticism of the Court of Appeal's approach, which had good strategic reasons to shift to the California constitution given the uncertainty of the federal constitution in this area after *King*, even if *King* was still arguably distinguishable on the probable cause issue.

[25] See, e.g., *Buza* at 25 (dis. opn. by Cuéllar, J.).

[26] *Buza* at 44 (quotations and citations omitted). While the court was not required to reach an issue simply because it could have, was the court nonetheless required to reach this issue to do justice to the defendant's claims as an individual litigant? Buza had a procedural problem: he forfeited the argument by not raising the probable cause issue below. *Buza* at 23. And there is a substantive remedies argument for not reaching the probable cause issue: Buza would not have gained any relief even if the court held that it is unconstitutional to require a DNA sample before a finding of probable cause for the felony arrest. Ultimately any constitutional error here was harmless beyond a reasonable doubt, because Buza was both held to answer and convicted at trial.

[27] *Buza* at 11-12 (dis. opn. by Liu, J.), citing Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal* (2017) 92 N.Y.U. L. Rev. 1307, 1314.

[28] "At issue here is the compelled physical production of a biological sample from someone who has not been convicted." *Buza* at 13 (dis. opn. by Cuéllar, J.). As discussed above, the majority opinion treats the issue in light of the fact that Buza was ultimately convicted.

[29] Liu, *supra* note 25, at 1326.

[30] *Id.* at 1313.

[31] *Id.* at 1321-22.

[32] *Buza* at 11 (dis. opn. by Cuéllar, J.), citing Prop. 11 (Nov. 7, 1972). The word “privacy” was added to the list of inalienable rights in article I, section 1 in 1972 by ballot initiative.

[33] “In the search and seizure context, the article I, section 1 ‘privacy’ clause has never been held to establish a broader protection than that provided by the Fourth Amendment of the U.S. constitution or article I, section 13 of the California constitution.” *People v. Crowson* (1983) at 629.

[34] *Buza* (2018) at 10 (dis. opn. by Cuéllar, J.).

[35] *Ibid.*

[36] *Id.* at 4, citing *Raven v. Deukmejian* (1990) at 353-54.

[37] Kaiser & Carrillo, *supra* note 3, at 72-73.

[38] See e.g., Liu, *supra* note 27, at 1332, where he describes state decisions on individual rights that departed from an earlier federal precedent that were subsequently adopted by the U. S. Supreme Court: the exclusionary rule in *Mapp v. Ohio* (1961), race-based peremptory challenges in *Batson v. Kentucky* (1986), and sodomy in *Lawrence v. Texas* (2003).

[39] David A. Kaiser, *Putting Progress Back Into Progressive: Reclaiming A Philosophy of History For the constitution*, (2014) 6 Wash. U. Jur. Rev. 257.

[40] This was evident most vividly in the debate over the second Proposition 8, which amended the California constitution such that only opposite-sex marriage would be recognized as marriage. See Kaiser & Carrillo, *supra* note 2, at 44-45. Justice Moreno’s dissenting opinion in *Strauss v. Horton* addressed the paradox of a state constitution equal protection clause subject to political amendment. *Strauss v. Horton* (2009) 484-85.

[41] Liu, *supra* note 25, at 1336.