A new constitutional right to housing is a house of straw

By David A. Carrillo and David A. Kaiser | March 16, 2023 at 05:12 PM

Assembly member Matt Haney recently proposed an initiative constitutional amendment (ACA 10) that would create a new California constitutional right "to adequate housing for everyone in California." The measure would require state and local governments "to respect, protect, and fulfill this right" and to "achieve the full realization of the right, by all appropriate means, including the adoption and amendment of legislative measures, to the maximum of available resources." This proposal stems from the battle between local governments and the state over housing production. Supporters of increased affordable housing think ACA 10 will generate increased state power to impose building mandates on local governments. That's unlikely to happen, because a new constitutional right to adequate housing has dim prospects in the courts.

California court decisions have often quashed the ambitious goals of other positive constitutional rights, because rights that require the government to do something are conceptually difficult. Most constitutional rights are *negative*: they prohibit the government from interfering with specified individual liberties, so they *bar* government action. The underlying liberty (to possess arms, to speak, to assemble) is secondary to the primary purpose of barring government infringement. Rights against something are easier to enforce because they apply to something the government has already done or plans to do. Positive rights *for* something (to due process, to counsel, to housing) are harder to define and enforce because they compel government *activity*.

State constitutions have always protected more positive rights than the federal constitution, and California is no exception, with rights to education, to fish, and to privacy. Those all have the problem inherent in rights that require the government to actively do something: Do what, exactly? That mystery has turned those positive rights in California's constitution into nullities. And that experience suggests that a new adequate housing right would also fail in the courts.

Rights to education, to fish, and to privacy all began with laudable goals to protect specific individual liberties — but all three fizzled in the courts. Education rights now largely concern equal protection questions rather than guaranteeing any basic adequacy standard. The right to fish was diminished to a mere privilege to fish by license from the state. And as the authors explain in *California Constitutional Law: Privacy* (2022) 59 San Diego L. Rev. 119, privacy law now largely exists by statute, with only an autonomy privacy right to abortion retaining real power. Against that history there's little reason to think that a new positive right will gain traction in the courts.

In contrast, 2022 Proposition 1 (which added abortion rights to California's constitution) is a classic negative right that bars the state from interfering with an individual's reproductive freedom. It was prompted by the need to capture an existing right that suddenly lost its federal judicial foundations, so it was intended to preserve the status quo. Thus, Proposition 1 presents

the converse of a new housing right. Courts have spent decades developing abortion doctrine into a well-defined legal structure — but the first judge to confront a right-to-housing case will have little guidance. If experience with the rights to education, to fish, and to privacy is any guide, that process is unlikely to result in a robust new judicially-mandated program of government housing enforcement.

How should judges define the core question of *adequate* housing? In the education context the courts have struggled to define a constitutionally mandated minimum educational standard. As explained in *California Constitutional Law: The Right to an Adequate Education* (2015) 67 Hastings L.J. 323, there is no satisfactory answer to the policy-laden question of what quality level the education right guarantees. Indeed, California courts have mostly evaded the issue, with the California Supreme Court denying review in the last case to raise the it, *Vergara v. State of California* (2016) 246 Cal.App.4th 619. That leaves the courts with no standard for measuring education adequacy, and — more importantly — leaves citizens with no remedy.

Similar conceptual problems doomed the rights to privacy and to fish. In the privacy context courts concerned about impacts on business operations raised the bar for constitutional privacy claims so high that the cause of action is all but dead. And courts robbed the right to fish of independent force, holding that it has no independent meaning and that only a privilege to fish by license exists.

A new housing right presents the same definitional problems as these other positive rights and likely would suffer a similar fate. "Adequate" housing could include a well-anchored tarp, any housing fit for human habitation, or something subjective. What's the remedy? Not money damages; ACA 10 is silent on that issue and courts are reluctant to invent damages actions for constitutional violations. An injunction then, ordering the state or local government to — do what? Courts will not order the legislature to appropriate money. So if there is no existing fund for redressing inadequate housing claims this becomes a right without a remedy. And what does "the maximum of available resources" mean? Must the legislature devote 100% of the state budget to housing, or only 100% of discretionary funds? Does that mean no more food stamps?

These policy mysteries can and should be worked out with another legislative process — passing a statute. That's the legislature's primary tool; yet it often asks the voters to do its homework. In *California Constitutional Law: Direct Democracy* (2019) 92 S. Cal. L. Rev 557 the authors showed that 88% of all California initiative constitutional amendments came from the legislature, not the voters. This suggests that when the legislature cannot agree on a policy it outsources its job to the initiative process. That seems to be the case here too.

Rather than figuring out how to structure and fund a massive new government housing program, the legislature will ask the electorate to vote for a details-to-be-determined program of unknown cost and scope. This lets the legislature look like it is doing something without having to make the hard policy choices. It instead punts these problems to the courts.

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David A. Carrillo *is the executive director of the California Constitution Center.*

David A. Kaiser *is an attorney in private practice and a senior research fellow at the California Constitution Center.*