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Residents Against Housing

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RESIDENTS AGAINST HOUSING:
A RESPONSE TO PROFESSOR INFRANCA'S
'DIFFERENTIATING EXCLUSIONARY TENDENCIES'

*Lee Anne Fennell**

Incumbent residents routinely oppose residential development.¹ Interestingly, this is true of both homeowners and renters, if for opposite reasons. Homeowners typically worry that new housing will cause the market value of their own homes to fall, resulting in a hit to what is usually a house-heavy personal wealth portfolio.² Tenants typically worry that new housing will cause the market value of their own homes to rise, generating pressure toward higher rents and displacement.³ Both homeowners and tenants also express concern that new housing development will change the character of their neighborhoods in unwanted ways.⁴

Resident opposition to housing plays out in community after community across the country, with pernicious effects on productivity and equity.⁵ These efforts choke off the supply of homes—essential ingredients in every human being's life plan—in the very places where people most wish to live. The consensus view among housing scholars is that all of this opposition to residential development is wrongheaded. While homeowner opposition is often cast as normatively illegitimate

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1. John Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. 1271, 1273 (2020).

2. See WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS 4 (2001) (arguing that the home's significance to the wealth of homeowners leads them to be "acutely concerned about public events that effect their homes' value"). Some homeowners, especially those in lower-income communities, may fear property value *increases* if they lack the liquidity to pay rising property taxes. See *infra* note 43 and accompanying text.

3. See, e.g., Michael Hankinson, *When Do Renters Behave Like Homeowners? High Rent, Price Anxiety, and NIMBYism*, 112 AM. POL. SCI. REV. 473, 474 (2018) (observing that "renter NIMBYism is strongly correlated with concerns over high housing prices"); Vicki Been et al., *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL'Y DEBATE 25, 25–26 (2019) (discussing opposition to new market-rate development from renters and housing advocates who are concerned about rising rents and home prices).

4. See, e.g., Infranca, *supra* note 1, at 1294–95; *infra* Part I.B.

5. Resident opposition produces these effects in conjunction with land use restrictions that limit housing supply. See, e.g., Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11(2) AM. ECON. J.: MACROECONOMICS 1 (2019); Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSP. 3 (2018); Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76, 85–90 (2017); David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 114–17 (2017); Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, in 5B HANDBOOK OF REGIONAL AND URBAN ECONOMICS 1289, 1294 (Gilles Duranton et al. eds., 2015).

NIMBYism, tenant opposition is criticized for just plain getting the facts wrong. Citing the law of supply and demand, academics point out that adding more housing will tend to decrease, not increase, the price of housing, which should help rather than harm the pocketbooks of tenants.⁶

Professor John Infranca's thoughtful and well-reasoned piece accepts this premise, but asks whether we should nonetheless view anti-development opposition by incumbent residents of some communities differently, not just as a matter of political expediency, but as a normative matter.⁷ Specifically, should people residing in lower-income communities that have been historically disadvantaged by redlining and other forms of racism and disinvestment have a greater say in what happens next, development-wise? For Infranca, such differential treatment "should be designed primarily to address unwanted changes to neighborhood character and the claims of long-term residents to a distinct stake in the neighborhood," while "[o]ther local concerns, most notably concerns regarding displacement and rent increases, do not justify special treatment in the form of greater local control."⁸

Infranca's "modest case for distinct treatment"⁹ thus rests on two hard-to-dispute claims: (1) that housing supply is the solution to, and not the cause of, housing unaffordability; and (2) that people living in lower-income communities long ravaged by racism and economic exclusion have a stronger *normative* basis for resisting neighborhood change than do affluent NIMBYs.¹⁰ Yet taking the first proposition seriously means that the people who are in the strongest normative position in opposing

6. See, e.g., Been et al., *supra* note 3, at 27 ("[T]he preponderance of the evidence shows that restricting supply increases housing prices and that adding supply would help to make housing more affordable."). Nonetheless, recent empirical work suggests a widespread belief among the general public that adding housing supply will not lead to lower housing prices. Clayton Nall et al., *Folk Economics and the Persistence of Political Opposition to New Housing* 6–7 (Nov. 2, 2022) (unpublished manuscript), <https://ssrn.com/abstract=4266459> [<https://perma.cc/7SAU-29E4>] (finding via survey data "that about 30% to 40% of Americans believe, contrary to basic economic theory and robust empirical evidence, that a large, exogenous increase in their region's housing stock would cause rents and home prices to rise").

7. Infranca, *supra* note 1, at 1277. Cf. Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFFS. 350 (1986) (arguing that, even if economic theory correctly predicts that rent control will reduce supply and harm in-movers, countervailing normative considerations relating to existing tenants' interests in their community may nonetheless justify it).

8. Infranca, *supra* note 1, at 1278.

9. See *id.*

10. For purposes of this response, I assume the validity of both of these claims. Notably, the second claim does not imply that *any* category of incumbents necessarily has a stronger normative claim than would-be in-movers—the comparison concerns only the relative normative standing of different sets of incumbents.

housing also tend to be on the shakiest ground empirically.¹¹ Infranca addresses this tension by shifting attention away from incumbents' arguments about rent levels and displacement risks—the subjects of quantitative empirical work—and toward incumbents' efforts to protect interests like community character.¹² This move cannot fully escape the empirical shakiness at the heart of opposition in lower-income communities, however, as many of the qualitative changes that incumbents oppose may not be substantially *caused by* (and indeed, should be mitigated by) the addition of new housing.¹³

In this response, I suggest repurposing this causal weakness in the case against housing into a fulcrum for policy. The fact that adding housing supply reduces rather than increases home prices makes it workable—and incentive-compatible—to pair new housing development with protection against rising local housing costs.¹⁴ Notably, this approach distinguishes between two sets of fears voiced by housing opponents: those that relate to *increasing* home values (more commonly expressed in prototypical gentrification scenarios) and those that relate to *decreasing* home values (more commonly raised in traditional exclusionary zoning scenarios). Concerns about housing price increases stand on different empirical and normative footing than those relating to home value declines, which makes them both especially important and unusually feasible to address.¹⁵ Protecting incumbents against rising housing costs in neighborhoods experiencing growth in housing supply aligns both with current empirical understandings and with the normative distinctions that Infranca draws.

This essay proceeds in two steps. Part I reviews reasons for opposition to housing development and discusses how incumbents' arguments interact with the empirics of housing supply. Part II makes a case for addressing incumbent concerns about housing price increases while

11. Residents of historically disadvantaged lower-income neighborhoods are more likely to be renters who are concerned about housing development driving *up* housing prices. See Nall et al., *supra* note 6, at 5–6; see also JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., AMERICA'S RENTAL HOUSING 2022 14 (2022), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2022.pdf [<https://perma.cc/6G83-SFYD>] (observing, based on 2019 data, that “high-poverty neighborhoods are often predominantly high-rental areas”). Further, renter households have much lower median incomes and wealth levels than homeowner households and are almost twice as likely to be “headed by a person of color” as homeowner households (48% versus 25%). *Id.* at 12; see also *id.* at 14 (observing that “[t]he legacy of structural racism” is evident in patterns of renter residence in high-poverty neighborhoods).

12. See Infranca, *supra* note 1, at 1278, 1294–96.

13. See *infra* Part I.B.

14. See *infra* Part II.C.

15. By focusing on the perceived threat of rising home values, I do not mean to suggest that incumbents' concerns about falling home values can or should be ignored in devising housing policy—only that I will not address that topic here.

expanding housing supply. Such a policy response would not be premised (counterfactually) on new supply causing price increases, but rather on the potential for exogenous changes in demand to drive up prices. Residents would be insured against catastrophic losses caused by these external forces if (and only if) their neighborhoods undertook loss mitigation by adding significant new housing supply.¹⁶

I. WHY OPPOSE HOUSING?

When incumbent residents oppose housing development, what exactly are they worried about, and how well founded are their fears? I start with an overview of concerns related to home value changes, and then turn to concerns about unwanted changes in the community. I then suggest a different way of characterizing housing opposition, one that connects to Infranca's idea of residents having "a distinct stake in the neighborhood."¹⁷

A. Home Value Changes

Anti-housing discourse reflects pervasive concerns about impacts on home values, but the nature of these concerns varies. By and large, homeowners fear that new housing development will make housing prices fall (devaluing their largest financial assets—their homes), while renters fear that new housing development will make housing prices rise (potentially putting their existing homes out of their financial reach).¹⁸ We might expect little sympathy for wealthy homeowners who wish to prop up their home values by artificially suppressing supply. But Infranca also finds lower-income residents' concerns about rising rents and potential displacement to be "largely unmerited."¹⁹ He bases that view on robust empirical findings that new housing development does not put

16. The idea of conditioning insurance on insureds undertaking certain risk reduction and loss mitigation measures is familiar from existing insurance contexts. See Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 210–12, 214–15 (2012); see also *infra* Part II.C (discussing the insurance approach to rent increases and citing past literature on such proposals).

17. Infranca, *supra* note 1, at 1286–87.

18. See *supra* notes 2–3 and accompanying text. Not all homeowners or renters hold these views. See, e.g., Nall et al., *supra* note 6, at 42 (“[H]omeowners do not universally believe that a large regional supply increase would reduce home values—and they are not monolithically opposed to additional housing development.”). I assume here that incumbents who do express these fears do so sincerely. Certainly, people might voice insincere concerns to cover other motives, or interest groups might manufacture and capitalize on the purported fears of lower-income residents for their own ends. Yet even if lower-income residents do not actually fear rent increases or displacement, policy efforts that protect them from these outcomes should shift the discourse by making it less possible to cite those fears as bases for housing development opposition.

19. See Infranca, *supra* note 1, at 1287.

upward pressure on housing prices nor cause people to be pushed out of their communities.²⁰

There are two wrinkles worth noting, however—both of which Infranca recognizes. The first relates to baselines. If residential development occurs during a period of rising demand, housing prices may still rise, even if the increase is not as great as it would have been in the counterfactual world in which no housing development occurred but demand still increased.²¹ Because this counterfactual world is unobservable, the correlation between new development and rising rents may be confused for causation.²² Here, the culprit is not housing development, but rather *insufficient* housing development to meet increased demand. When there are not enough new units to absorb this demand, prices will be bid up for existing units—a process known as “filtering up.”²³

The second wrinkle relates to the possibility that new housing development will make an area more *attractive* (literally), inducing more demand than would have otherwise existed.²⁴ The concern here is that new housing development and the enhanced amenities that go along with it—such as shops, restaurants, parks, and infrastructure—could make an area more appealing to well-off homeseekers.²⁵ For example, if added housing density makes it feasible to add a light rail station in a given neighborhood, the residential experience in that neighborhood is upgraded from a car-dependent one to a light-rail-commutable one. If people are willing to pay more for transit-friendly homes, then rents will be bid up for that reason, even though having *more* of this transit-friendly housing makes each unit less expensive, for familiar supply and demand reasons. New housing thus does two things in this story: it increases supply, which helps control prices, but it also contributes to an upgraded residential experience that homeseekers will bid more to obtain.²⁶

Evidence suggests, however, that any upward price pressure due to

20. *Id.* at 1288–94.

21. *See, e.g.,* Been et al., *supra* note 3, at 27.

22. *See id.*; *see also* Nall et al., *supra* note 6, at 10, 22. Nall et al. also found that nearly everyone in their survey agreed with the statement “most of the new housing in [their] area has been built in neighborhoods where home prices and rents are going up.” *Id.* at 36.

23. *See* Been et al., *supra* note 3, at 28; Infranca, *supra* note 1, at 1288; John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL’Y REV. 91, 103 (2014). The reverse process, “downward filtering,” occurs when housing units vacated by more affluent households (due to added supply at the top end) become more affordable to lower-income households. *See* Been et al., *supra* note 3, at 29; Mangin, *supra*, at 102–03.

24. *See* Been et al., *supra* note 3, at 26, 29–30.

25. *See* Infranca, *supra* note 1, at 1288–89.

26. I use the term “upgraded” here to refer to market valuation, which may not match the subjective view of every resident. *See infra* Part I.B. (discussing concerns about community character).

such amenity effects will be outweighed by the price-mitigating effects of increased supply.²⁷ Further, these amenity effects may be merely correlated with, not caused by, increased residential development. In the transit example above, we posited that the greater density made possible by new housing stock actually triggered an amenity improvement. But in other cases, amenity changes would have occurred anyway, without any increased housing development, through the filtering-up of existing units.²⁸ In such instances, a correlation between new housing and amenity-driven home value increases might be observed, but it would be incorrect to confuse that correlation with causation.

Carefully separating correlation from causation is essential in addressing social policy questions. Nonetheless, the factors that produce the correlations that are apt to get confused with causation are very real: increased demand to live in a given area and related amenity enhancements. Those forces, by all accounts, *can* increase housing prices.²⁹ Getting the causal story right need not imply that these exogenously caused impacts on housing prices fall outside the scope of our normative concern. This point has important implications for Infranca's analysis given the role that exogenous demand and amenity factors (as opposed to the new housing itself) likely *also* play in producing unwanted community changes.

B. Community Character

Incumbents often oppose new housing development for reasons that fall under the general rubric of "community character."³⁰ Although such formulations have often been deployed by affluent homeowners bent on racial or class-based exclusion, lower-income communities of color may also resist economic and demographic changes to their neighborhoods on character-related grounds.³¹ Infranca suggests that these arguments, unlike ones premised on rent increases and displacement, provide a valid basis for differentiating lower-income communities' opposition to

27. See, e.g., Xiaodi Li, *Do New Housing Units in Your Backyard Raise Your Rents?*, 22 J. ECON. GEOGRAPHY 1309, 1331 (2022); Brian J. Asquith et al., *Supply Shock Versus Demand Shock: The Local Effects of New Housing in Low-Income Areas 1*, (W.E. Upjohn Inst. for Emp. Rsch., Working Paper No. 19-316, 2019), https://research.upjohn.org/cgi/viewcontent.cgi?article=1334&context=up_workingpapers [<https://perma.cc/4SDB-Z5AR>]; see also Infranca, *supra* note 1, at 1289 (citing empirical studies); Been et al., *supra* note 3, at 29–30 (finding the possibility of induced demand fully counteracting increased supply "unrealistic" and inconsistent with the empirical data).

28. See *supra* note 23 and accompanying text.

29. See, e.g., Asquith et al., *supra* note 27, at 22 ("While there is a strong observed correlation between new construction, rising rents, and demographic change, this is because new buildings are typically constructed in areas that are already changing.")

30. See Infranca, *supra* note 1, at 1275.

31. *Id.* at 1285-87, 1294-96.

housing.³² But is the causal connection between new housing and feared changes in the character of these communities any more robust than the debunked causal link between new housing and price increases?

It might seem self-evident that adding new housing units will mean adding new people to the area, and that those new people will very likely change the community's character. But this connection is not inevitable. If new housing units were added to a completely closed system, the existing population would simply reallocate themselves among the now-larger set of housing units in different ways: Families who had previously doubled up might move into their own units, unhappy roommates or couples might split up and get their own places, and people who were unhoused might become housed. Some units might sit empty. All would become more affordable. We would not expect any dramatic changes in the character or feel of the community, apart from improvements in well-being due to the more plentiful and less expensive housing options.

Real life diverges from this thought experiment in obvious ways. Housing will be added only if there is current or expected demand for it. As a result, new construction will typically be accompanied by an influx of new residents. Whether or not significant numbers of existing residents depart, this influx will change the membership of the community. It will also change the community's demographics to the extent the new residents' characteristics differ from those of the incumbents. And to the extent the newly composed community has different tastes than the previously composed community, changes in local amenities and services might follow. All of these things are likely to change the feel of the community. But are they *caused* by the new housing development?

Our earlier discussion suggests some reason for doubt. Once again, we have to run the counterfactual: What would have happened to community character in the absence of new housing construction, but in the presence of increased demand for housing? Based on the earlier analysis, we might expect wealthier in-movers to move in anyway, outbid incumbents, renovate the units (filtering up), and demand new amenities in the community.³³ If all this happens in the absence of new housing construction, then community character is just as foundationally changed as in the case where new housing is constructed, with one key difference:

32. *See id.* at 1278.

33. *See, e.g.,* Asquith et al., *supra* note 27, at 22 ("If high-income households like a particular neighborhood, preventing the construction of new housing in those neighborhoods does not prevent them from moving to that neighborhood. Instead, it simply leads them to outbid lower-income households for whatever housing is already available in that neighborhood."). By contrast, *poorer* in-movers would be unable to enter a supply-constrained community and alter its character in the absence of the introduction of more, or more affordable, housing. Thus "character" arguments voiced by wealthy communities to block new housing development are premised on an equation between excluding housing and excluding people that does not exist in lower-income communities.

housing has become more scarce relative to demand, and hence more expensive. That upward price pressure might be expected to further accelerate the pace of neighborhood change by changing who can afford to live there.³⁴

Of course, *some* of the new demand and *some* of the new amenities may be induced by new housing construction, even if the development is, on net, absorbing more demand than it creates.³⁵ If so, blocking new housing could dampen (but not fully arrest) these sources of community change, albeit at the price of making housing more expensive than it otherwise would be. On the other hand, if the now-more-costly housing causes more incumbents to move away, or differentially attracts new people whose preferences are further removed from those of the incumbents, then community change could ramp up as a result of the housing opposition.

Nonetheless, the ability to fence out the construction-induced portion (if any) of in-movers and amenities provides a reason why incumbent residents with extremely strong preferences for minimizing community change might choose to oppose new housing. Tenants who like the community as-is might do all they could to reduce the influx of new people, even if they fully understood that new housing construction would benefit them (on net) in the domains of rental rates and displacement risk (by meeting whatever portion of demand is exogenous to the construction itself, and bringing down housing prices accordingly).³⁶ Such incumbents would, in effect, be expressing a willingness to pay *more* to avoid change.

Further, notwithstanding the causation discussion above, the empirical basis for “character” arguments is stronger in the following sense: Rents and displacement risks cannot rise as a result of new housing unless the development induces so much demand as to fully offset the impact of added supply—that is, unless it has a *net* positive effect once the new construction’s supply is also taken into account. By contrast, *any* effect of new construction on a neighborhood’s membership and amenities could impact the community’s character in some qualitative way compared with the counterfactual no-development world. To be sure, any such changes would be accompanied by the rent-mitigating effects of new supply, which would tend to slow down change overall by

34. *See id.* (observing that high-income in-movers’ bids for constrained housing “raises rents for everyone and lowers the ability of low-income residents to stay in or move to the area”).

35. *See* Been et al., *supra* note 3, at 29–30 (acknowledging that “some additional households may be drawn from outside (or from within the city) to buy or rent homes as supply increases” but finding it “highly unlikely” that this new demand will fully offset the added supply).

36. Although recent evidence suggests confusion about these supply effects is widespread, it is not universal; there are “Supply Believers” as well as “Supply Skeptics” among the ranks of renters. *See* Nall et al., *supra* note 6, at 24–26.

allowing lower-income people to stay in or move in. We might expect these effects to “net out” in a manner that is more character-preserving than the no-construction world, echoing the prediction about rent levels. Still, residents’ sense of the neighborhood’s character might be especially vulnerable to certain high-profile changes like new luxury buildings.

In any event, the causal connection between housing development and changes in neighborhood character is a slender reed on which to base policy. Not only do incumbents in lower-income neighborhoods typically pair character-based arguments with ones about rent increases and displacement, but their character arguments do not (and could not) separate out the quantum of community change specifically attributable to new housing as opposed to exogenous demand and amenity factors. Incumbents are better understood as expressing opposition to the overall shift in their neighborhood, however caused. Due to the changes that have come to their communities, residents face the distressing prospect of paying more for something that they do not want and never asked for. Opposing new housing cannot change that fact, but can only adjust, at the margin, the mix of price increases and community changes that will be realized.

C. *The Realization Event*

The discussion above suggests that most (though not all) of the outcomes feared by residents of lower-income communities when they oppose new housing are not only *not caused by* new housing, but are actually *made worse by* keeping out new housing. Although one might attempt to identify, and base policy on, whatever subset of feared outcomes *do* bear the specified causal relationship to new housing supply, these efforts would strip out the dominant and most normatively compelling concern of incumbents: housing price increases. That might seem like the right move—after all, shouldn’t we summarily filter out arguments that are rooted in economic ignorance and denial of empirical evidence? Yet any approach that ignores the central worry animating housing opposition in lower-income neighborhoods will be of limited efficacy in altering attitudes.

Here, it bears emphasis that fears of rising housing costs are not necessarily unfounded, even though blame is often placed on the wrong parties.³⁷ Exogenously increasing demand and associated amenity changes can drive up housing prices independent of (and in spite of) the increase in supply. Providing good empirical data on the effects of new housing is an important—and increasingly impactful—contribution to

37. *See id.* at 40 (“[W]e observe a very strong tendency [among survey respondents] to blame housing providers (developers) for high housing prices.”).

policy debates.³⁸ But it may not assuage the concerns of incumbents who face the prospect of housing cost increases, if, as seems likely, those concerns are less about the *cause* of the cost increases than about the *fact* of the cost increases. Nonetheless, opposing housing because one is concerned about rising rents might seem a bit like blocking firefighters who are trying to extinguish the flames engulfing your home.

There is another way of looking at the problem. New housing development offers a focal point. It is a kind of realization event, to borrow a concept from the tax arena.³⁹ It signals, even if it does not cause, a change in demand conditions. And it wraps those changes in a tangible package that doubles as a target for communities that have historically been harmed rather than benefited by change. We should not be surprised to see proposed development treated as a political moment for these communities. Nor should we expect all opposition to dissolve upon contact with economic truths. Incumbents see that change is coming to their community and that a bill may soon be coming due that they will have to foot if they wish to stay. They also see that other people, including the very developers before them, are going to profit from this change. When, if not then, *should* they speak up to express their fears about rising rents and displacement?

This point connects to Infranca's discussion of incumbents as people who, at least in some cases, can appropriately claim a stake in the rising fortunes of their community.⁴⁰ Such stake-claiming is one way to understand incumbent arguments that would otherwise appear to be rooted in economic misunderstandings. Given the dominance of loss aversion in human psychology,⁴¹ it is not surprising that claims would be couched in terms of the perceived downsides of neighborhood change—

38. See, e.g., Erik Engquist, *In Socialists We Trust: Tiffany Cabán and the Great Housing Breakthrough*, THE REAL DEAL (Sept. 16, 2022, 12:46 PM), <https://therealdeal.com/2022/09/16/in-socialists-we-trust-tiffany-caban-and-the-great-housing-breakthrough/> [<https://perma.cc/6RX7-6TDP>] (reporting on two elected officials who changed their views about the effects of housing supply on rents, in one case citing an empirical study showing it would not raise neighborhood rents).

39. See, e.g., Terrence R. Chorvat, *Perception and Income: The Behavioral Economics of the Realization Doctrine*, 36 CONN. L. REV. 75 (2003).

40. See, e.g., Infranca, *supra* note 1, at 1286–87.

41. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 278–79 (1979). Some recent work has questioned the generalizability of loss aversion, including on the grounds that it might be confused with rational risk aversion where a loss carries such large stakes that it would change a person's circumstances. See David Gal & Derek D. Rucker, *The Loss of Loss Aversion: Will It Loom Larger Than Its Gain?* 28 J. CONSUM. PSYCH. 497, 506 (2018) (“[I]t is rational to perceive a greater impact from losing \$1000 that is needed to pay the rent than from gaining \$1000 when basic needs are already covered.”). But regardless of whether fears about rent increases and threatened displacement from one's home and community are best understood as risk aversion or loss aversion, such concerns would be expected to loom larger than promised gains in the minds of lower-income residents.

including rent increases and displacement—even if the supply effects of new housing were well understood.

II. ADDRESSING HOUSING PRICE INCREASES

Incumbent fears about rising housing prices are both important and feasible to address in conjunction with efforts to expand housing supply. The fact that adding housing pushes prices down rather than up does not invalidate these concerns, but instead provides useful policy leverage for confronting them. The sections below sketch the normative case for such a policy response and suggest the form it might take.

A. *The Directional Distinction*

In the neighborhoods that are the focus of Infranca’s differentiating analysis, incumbents’ concerns about housing prices are more likely to relate to feared *increases* rather than *decreases*. Lower-income historically disadvantaged neighborhoods contain higher percentages of renters,⁴² who are vulnerable to price increases. Moreover, some homeowners in these neighborhoods may be concerned about property value increases if they lack the liquidity to pay higher property tax bills.⁴³

To be sure, Infranca’s argument emphasizes that opponents to housing development are concerned about more than just housing prices; they also fear qualitative changes in the community.⁴⁴ But housing price points nonetheless offer touchstones for differentiating among “community character” arguments. Those who invoke “character” arguments to oppose housing development that would make their communities more accessible to those with less purchasing power are often thought to be speaking in code about race and class.⁴⁵ These “character” claims relate

42. See *supra* note 11.

43. Tax foreclosures are especially likely to occur in lower-income neighborhoods, where overassessments abound. See, e.g., Bernadette Atuahene & Christopher Berry, *Taxed Out: Illegal Property Tax Assessments and the Epidemic of Tax Foreclosures in Detroit*, 9 UC IRVINE L. REV. 847, 851–53 (2019). For recent work suggesting that homeowners in distressed neighborhoods may be positively motivated by local changes that produce property value increases, see Michael Hankinson et al., *The Policy Adjacent: How Affordable Housing Generates Policy Feedback Among Neighboring Residents* (Sept. 1, 2022) (unpublished manuscript), <https://osf.io/preprints/socarxiv/769s8/> [<https://perma.cc/6HNL-K23S>].

44. See Infranca, *supra* note 1, at 1285–87, 1294–95.

45. See, e.g., *MHANY Mgmt. v. County of Nassau*, 819 F.3d 581, 608–09 (2d Cir. 2016) (describing resident comments at a public hearing regarding the impact of a proposed affordable housing development on the area’s “flavor” or “character” and finding reasonable the district court’s conclusion that these and other remarks “were code words for racial animus”); Katherine Levine Einstein et al., *Who Participates in Local Governance? Evidence from Meeting Minutes*, 17 PERSP. ON POL. 28, 36 (2019) (observing that “the nearly 11 percent of commenters [in their data set of Massachusetts zoning board and planning board meeting minutes] who cited ‘neighborhood character’ in opposition to a housing project may be using racially coded language.”).

to falling area housing prices, not rising ones.

By contrast, when historically disadvantaged communities oppose development on “character” grounds, their fears typically center on wealthier newcomers whose presence will alter the neighborhood’s feel, and who will demand amenities that are out of keeping with the community’s understanding of itself. While these kinds of character changes *could* occur without housing prices rising—low housing prices do not block the entry of wealthier people in the way that high housing prices block the entry of lower-income people—incumbents will presumably associate shiny new housing stock with higher price points, not lower ones.

Differentiating opposition based on the feared direction of housing price movements is not just an administratively convenient way to get at other relevant distinctions among neighborhoods, however. There is also a practical asymmetry between the worries that attach to housing price increases and those that attach to housing price decreases. Homeowners who lose some increment of value in their homes may experience no short-run effects, depending on their equity situation and plans to move or refinance. Housing price increases, by contrast, can quickly and dramatically impact renters by making their housing units unaffordable.⁴⁶ Overall, higher housing prices disproportionately benefit higher-income people, while leaving lower-income people vulnerable to housing instability and all that it entails.⁴⁷

The empirical supply-and-demand story does not diminish the importance of these feared harms, although it does strongly shape the appropriate policy response to them. In formulating and cabining that response, we can look to common law analogies for guidance.

B. *Common Law Analogies*

Building on Infranca’s analysis, we might think of incumbents of lower-income neighborhoods as having a kind of collective property interest in their communities.⁴⁸ Because much of the value of any residential experience depends on factors beyond the four corners of the dwelling unit, we can think of the home as comprising not only the physical house or apartment, but also the surrounding amenities, services,

46. Obviously, home value losses can also cause financial distress, restrict resident mobility and, at the limit, lead to foreclosure. But homeowners, especially those with long-term fixed rate mortgages, generally have a longer horizon of home price protection than do tenants, whose leases tend to be for terms of one year or less. *See, e.g.*, Todd Sinai & Nicholas S. Souleles, *Owner-Occupied Housing as a Hedge Against Rent Risk*, 129 Q.J. Econ. 763, 764 (2005) (observing that homeowners “avoid . . . rent uncertainty by buying a long-lived asset that delivers a guaranteed stream of housing services for a known up-front price”).

47. *See* Hankinson, *supra* note 3, at 473.

48. *See* Infranca, *supra* note 1, at 1286–87.

and conditions that add to or detract from its value.⁴⁹ One implication of this idea is that residents will seek to control what happens outside their walls and beyond their property lines. That control has long been embodied in land use restrictions like zoning that effectively confer collective property rights,⁵⁰ and that are typically deployed (often in exclusionary ways) to keep property values high. But we might use this same collective property rights framing to express the interests that some residents have in keeping home values low.

Common law doctrines address a variety of co-owner and successive owner situations that we can mine for analogies in thinking about the implications of this shared ownership stake in the neighborhood. While it is most common to think of doctrines that protect a concurrent or future interest holder from suffering the effects of deterioration or depletion at the hands of a life tenant or co-owner—i.e., *falling* property values—some doctrines deal with the opposite problem of unwanted *increases* in value that operate to the disadvantage of an individual with an ownership stake in a shared or divided resource.

Consider the hoary common law maxim that a landowner cannot be “improved out of his estate.”⁵¹ This principle, applied in a variety of contexts, holds that owners cannot be forced to pay for improvements that someone else decided to add to their property—even if that someone else is a co-owner.⁵² The specter of displacement is explicit in the formulation; courts articulating the principle find it intolerable that an owner could lose land due to the prohibitive cost of improvements installed by others without the owner’s involvement or consent.⁵³ Such so-called improvements might actually “detract from the value of the estate” or, even if they add to it, “might not be of a character which the owner

49. See generally LEE ANNE FENNELL, *THE UNBOUNDED HOME, PROPERTY VALUES BEYOND PROPERTY LINES* (2009).

50. See ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS* 15-18 (1977).

51. See, e.g., *Aurand v. Wilt*, 9 Pa. 54, 59 (1848) (“[T]here is no principle better than that an owner cannot be improved out of his estate.”); *Pulaski Cnty. v. State*, 42 Ark. 118, 120 (1883) (“A land owner can not be improved out of his estate.”).

52. See, e.g., *Hernandez v. Hernandez*, 645 So. 2d 171, 174–75 (Fla. Dist. Ct. App. 1994). See also *infra* text accompanying note 56 (discussing credit for the added value of improvements upon sale or partition).

53. See, e.g., *Brooks v. Evetts*, 33 Tex. 732, 740 (1870) (observing that “[i]t would indeed be an alarming doctrine to hold that the owner of the estate for years or life could place whatever improvements he pleased on the premises, and compel the remainder man to pay for them” and analogizing the remainderman in that situation to one “who drew the elephant as his prize”); *Goodwyn v. Myers*, 16 Gratt. 336, 354 (Va. 1862) (describing as “a crying enormity, the disherison of men, by compelling them to pay for improvements they did not make, and perhaps would not have desired”).

desired placed on his land.”⁵⁴ This resistance to requiring payment for unwanted improvements tracks a much-noted asymmetry in law between the imposition of harm (for which law requires compensation) and the gratuitous conferral of benefits (which, with few exceptions, the law does not generally allow parties to recover).⁵⁵

Could a similar principle apply when gentrification processes cause the value of one’s home to increase as a result of actions carried out by other parties? The same core concern about displacement resulting from unwanted improvements resonates, although there are obvious differences—most notably, that the improvements in question are not physically placed on any property owned by the incumbents. First, consider renters. If we take the leasehold at face value, then it only protects against rent increases for its term, after which the housing unit becomes like any other commodity on the open market for which people can bid as their financial resources permit. The tenant cannot be improved out of her estate, it would seem, for the simple reason that she has no estate from which to be displaced. Yet if her stake in the community is understood as granting a continuing collective interest, the analogy might be rehabilitated, at least insofar as displacement from the community as a whole would be the upshot of increased home prices.

For homeowners who fear property value increases, the situation is slightly different in that area improvements reflected in their property taxes could lead to displacement from an actual (fee simple) estate—albeit not as a result of improvements made on the property itself. It also might seem problematic (and unnecessary) to suggest that higher property taxes violate the “improved out of one’s estate” maxim, given that they presumably represent only a share of the much greater returns that are simultaneously accruing to the owner’s equity in the property. Yet until that increase is realized through a sale or other transaction, it may be inaccessible to the owner. Again, the doctrine of co-ownership is instructive: although co-owners cannot be forced to contribute to the cost of an improvement, the improving cotenant *can* lay claim to the increase in market value (if any) produced by an improvement when the property is sold or partitioned.⁵⁶ Similarly, homeowners could settle up on their

54. *Reppard, Snedeker & Co. v Morrison*, 47 S.E. 554, 555 (Ga. 1904) (holding that a lien cannot be placed on land for improvements made without the owner’s consent and observing that a party cannot be “improved out of his estate” unless he has “at least consent[ed] to the making of the disastrous improvement”).

55. *See, e.g.*, ROBERT C. ELLICKSON ET AL., *LAND USE CONTROLS: CASES AND MATERIALS* 568–73 (4th ed. 2013); Ariel Porat, *Private Production of Public Goods: Liability for Unrequested Benefits*, 108 MICH. L. REV. 189, 195–98 (2009).

56. *See* JESSE DUKEMINIER ET AL., *PROPERTY* 435–36 (10th ed. 2022).

property taxes when the associated gain in value is realized.⁵⁷

There is another common law doctrine worth mentioning in this context: ameliorative waste. Concurrent or successive owners may be unhappy with changes that the current occupants of the property bring about, even if those changes increase the property's value and will inure to their direct financial benefit. For instance, remaindermen who are attached to an outdated mansion or a rickety old barn may sue to keep the property substantially unchanged, even when this seems to defy economic sense.⁵⁸ Views diverge on how ameliorative waste should be treated, but the modern trend is to deny the claims of those who oppose changes that increase the property's market value, at least where the property's extant form is unsuited to current land use patterns.⁵⁹ While this approach seems to impose on those who want things to stay just as they are, preventing the change would impose on those who prefer more valuable uses.⁶⁰

In the gentrification context, residents may oppose changes that would enhance overall market value at the expense of altering the community's existing character. Do those who prefer the status quo have a claim that can or should be recognized? Economics tells us that keeping out new housing is a highly counterproductive way to try to hold back change in an area that is experiencing increased demand.⁶¹ Nonetheless, incumbents might seek to suppress certain physical manifestations of change that they view as independently undesirable,⁶² or that they predict will differentially attract wealthier or otherwise demographically different in-movers to their specific neighborhood. But attempting to keep out categories of in-movers through the suppression of housing is likely to only hamper the cause of stable racial and economic integration by undermining affordability.

A better way to protect neighborhood character (consistent with other societal goals) is to protect the financial ability of people to remain in the

57. Some states have laws that defer property taxes for qualifying senior homeowners until the homeowner dies or the property is sold. *See, e.g.*, STEPHANIE M. STERN & DAPHNA LEWINSOHN-ZAMIR, *THE PSYCHOLOGY OF PROPERTY LAW* 68 (2020); 320 ILL. COMP. STAT. 30 (2022).

58. *See, e.g.*, *Brokaw v. Fairchild*, 237 N.Y.S. 6 (Sup. Ct. 1929); *Woodrick v. Wood*, No. 65207, 1994 WL 236287 (Ohio Ct. App. May 26, 1994).

59. *See, e.g.*, *Melms v. Pabst Brewing Co.*, 79 N.W. 738 (Wis. 1899) (affirming denial of a claim for ameliorative waste and articulating what has become the majority rule); Sally Brown Richardson, *Reframing Ameliorative Waste*, 65 AM. J. COMP. L. 335, 336–40 (2017) (surveying a range of views and articulating the majority rule in U.S. jurisdictions).

60. *Cf.* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960) (describing land use conflict as “a problem of a reciprocal nature”).

61. *See supra* note 33 and accompanying text.

62. *See Infranca, supra* note 1, at 1286 (distinguishing aspects of community character that relate to the built environment from those that depend on social interactions among residents).

communities that they wish to shape—something that housing price increases, no matter their causes, can directly threaten. These observations suggest the merit of applying and adapting some aspects of the “improved out of one’s estate” analogy. But there is little basis for embracing an ameliorative waste analogy that would grant incumbents a veto over changes that enhance the value of the area.⁶³ Instead, protection against upward price movements could be formulated in ways that incentivize, rather than threaten, the addition of new housing supply.

C. Insurance and Incentives

Insurance offers a useful model for framing an incentive-compatible policy response to incumbent concerns about housing price increases. Scholars have previously observed the ways in which existing housing policy measures such as rent control provide de facto insurance against housing cost increases.⁶⁴ Policies might deliver more explicit insurance against rent increases by, for example, granting tenants financial instruments that increase in value as local rents rise.⁶⁵ Because this short response does not permit a deep dive into the innumerable design details involved,⁶⁶ my aim here is more modest: to make the case for the conceptual aptness of a risk-buffering frame.

To fix ideas, imagine a city-run program in which tenants residing in neighborhoods experiencing substantial housing growth receive a financial instrument keyed to the average rent level in their neighborhood for a given household size.⁶⁷ Each year thereafter, if that benchmark rent

63. To be clear, the kinds of value enhancements I have in mind here are those that come from real gains in amenities and productivity, not those that are artifacts of socially harmful exclusion or artificial suppression of housing supply. Significantly, it is fully possible (and indeed expected) for an area to become more valuable in the aggregate even as housing within it becomes more plentiful and affordable.

64. See Rebecca Diamond et al., *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 109 AM. ECON. REV. 3365, 3365–66 (2019) (discussing rent control as a form of insurance).

65. See, e.g., Diamond et al., *supra* note 64, at 3393 (observing that government-provided insurance could protect tenants against rent increases with less distortion than a mandate imposed on landlords and calling for further research “to design an optimal social insurance program to insure renters against large rent increases”). For a proposal using financial options, see Robert I. Lerman & Signe-Mary McKernan, *Promoting Neighborhood Improvement While Protecting Low-Income Families*, THE URB. INST., May 3, 2007, at 2–3, <https://www.urban.org/research/publication/promoting-neighborhood-improvement-while-protecting-low-income-families> [<https://perma.cc/XDW7-RM4L>]. For further thoughts on how such an arrangement might be structured, see Lee Anne Fennell & Julie A. Roin, *Controlling Residential Stakes*, 77 U. CHI. L. REV. 143, 165–71 (2010).

66. See Fennell & Roin, *supra* note 65, at 165–71.

67. See *id.*; Lerman & McKernan, *supra* note 65 at 2–3. Among the many design details to be worked out would be the length of residence required for eligibility, the periodicity of

index increases by more than a certain increment, the tenant could receive a payment to help cover the gap.⁶⁸ She could use the money to stay in the community or to fund a move elsewhere.⁶⁹ Importantly, these payments would only be made in neighborhoods that have added a specified amount of net new housing stock over a specified rolling lookback period (the past few years, say). Payment would not depend on whether the new housing *caused* the price increase. Rather, the program would be pitched as one in which communities can receive protection against exogenous sources of rental price increases only by undertaking the most powerful loss mitigation measure available: hosting new housing supply.

This framing has several advantages. For starters, it tackles head-on the largest, most salient fears of people in lower-income and historically disadvantaged neighborhoods who oppose housing. In so doing, it directly counters the credibility problem that pro-housing advocates face when, a sheaf of empirical studies in hand, they assure incumbents that they are wrong to fear rising housing prices. Insuring against exactly that eventuality means putting one's money where one's mouth is.

Further, insurance offers a tried-and-true way to protect people from large losses not of their own making. Demand conditions that run up housing costs are, from the tenant's perspective, not unlike a natural disaster in their potential for displacement.⁷⁰ Whether one thinks that rapidly rising rents are likely or unlikely to occur in areas experiencing housing growth, insurance provides a framework for managing that risk. Not only is insurance ideally suited to address low-probability events, but it can be structured to require or induce risk reduction and loss mitigation.⁷¹

Local governments on the hook for payouts under the program can limit their exposure by finding ways to add more housing supply in areas where rent increases appear likely.⁷² The more successful those efforts, the fewer and lower the payouts will be. At the same time, real

payments, and the way in which neighborhoods are defined (whether in terms of census tracts, zip codes, local wards, community names, or otherwise).

68. See Lerman & McKernan, *supra* note 65, at 2–3. The calculation of rent increases could net out inflation and perhaps region-wide price trends. Additionally, the amount of coverage could be scaled based on various factors.

69. Other academic proposals addressed to gentrification are similarly designed to extend this “stay or leave” option to incumbents. See, e.g., Rachel D. Godsil, *The Gentrification Trigger: Autonomy, Mobility, and Affirmatively Furthering Fair Housing*, 78 BROOK. L. REV. 319, 335–37 (2013); Infranca, *supra* note 1, at 1319–27 (discussing a variety of prior proposals and presenting a set of TDR-based approaches).

70. Cf. Michele L. Landis, *Fate, Responsibility, and “Natural” Disaster Relief: Narrating the American Welfare State*, 33 LAW & SOC’Y REV. 257 (1999).

71. See generally Ben-Shahar & Logue, *supra* note 16.

72. To avoid taxing housing development, the insurance program should be government-funded, although it might be administered in partnership with developers who introduce new housing to the area.

improvements in the area that make it more attractive, densely populated, and amenity rich should be reflected in the tax base, providing a potential source of funding.

Incumbents, too, would be incentivized to push for (or at least not oppose) more housing in their communities. This is where the requirement of loss mitigation in the form of new housing supply fits in: residents can receive coverage against rising rents only after some quantum of new housing is added to the neighborhood, and only for a specified time window after its addition.⁷³ Making protection against rising rents contingent on the continued flow of new housing into the community can turn incumbents who previously opposed housing because they feared rising rents into supporters of new housing initiatives.

Providing downside protection that allows people to stay in the neighborhood is also an especially apt way to recognize the stake that incumbents hold in their neighborhood's fortunes. Significantly, this approach would make the relevant currency for recognizing incumbents' stakes unabashedly money, not any absolute right to block, veto, divert, or delay the development of housing in areas where housing demand exceeds housing supply—even in the name of preserving community character. Character would be protected indirectly by ensuring that people who live in the community will not lose the financial means to stay in the community as it changes. Meanwhile, the additional supply would help keep the community open and affordable to a wide range of new entrants.⁷⁴

CONCLUSION

Residents often oppose housing. Some fear that new residential development will drive down home prices, while others fear that new development will drive up home prices. Neither set of concerns should stand in the way of much-needed increases in housing supply. In this response, I have suggested that one set of fears—housing price increases—presents unique normative and empirical considerations that make it both important and feasible to address head-on. Instead of viewing the well-documented lack of a causal link between supply and rising prices as a basis for pruning away arguments, we can instead treat

73. This proviso is necessary to control what otherwise would amount to a moral hazard. Because tenants will be shielded against rising rents—the predicted result of too little supply—they might see no downside to vetoing added housing, or might even wish to drive up the value of their payout to finance a move elsewhere. I thank Kristen Kopko for comments relating to these possibilities.

74. Additional efforts may be necessary to ensure a range of housing stock and price points remains available as the neighborhood changes. See Been et al., *supra* note 3, at 33–34 (discussing approaches that can complement new supply to further address affordability concerns).

it as a lever for addressing incumbent fears in an incentive-compatible way.

Housing unaffordability is one of the defining struggles of our time. When the supply of homes cannot rise to meet demand, our most productive cities hemorrhage human capital as people are priced out of the housing market. The dominant role of resident resistance in suppressing supply presents a pressing, high-stakes puzzle. Infranca's thoughtful and searching treatment of the heterogeneous forces behind incumbent opposition offers an important step forward in thinking about this challenge. My comments here have been brief, exploratory, and tentative, but I hope they have managed to convey the importance of Infranca's inquiry and the depth of engagement that his Article invites. I look forward to the further conversations and innovations that Infranca's work is sure to spark.