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HISTORIC PRESERVATION AND ITS EVEN LESS AUTHENTIC ALTERNATIVE

Lior Jacob Strahilevitz

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Historic Preservation and Its Even Less Authentic Alternative

Lior Jacob Strahilevitz*

At a picturesque country club in Sterling, Virginia, a solemn stone marker commemorates the scores of Civil War Soldiers who died at a Potomac River crossing. A lovely plaque, installed on a riverside boulder, reminds golfers and passersby “Many great American soldiers, both of the North and South, died at this spot. ... The casualties were so great that the water would turn red and thus became known as “The River of Blood.””

There is one small problem with the River of Blood monument. There is no historical evidence suggesting that any soldiers were killed at the spot in question. The closest known Civil War battle occurred 11 miles away. The River of Blood tale appears to have been concocted by the country club’s namesake, who insisted that “numerous historians” had told either him or his people [accounts varied during a single conversation with a reporter] that the golf course was built at the site of a river-crossing conflict. So the dubious plaque remains, near the fifteenth tee at the Trump National Golf Club. (Fandos 2015).

A natural first instinct upon hearing of this apparent fabrication is recoil. There is something troublesome about an inauthentic stone marker and the tale underlying it. Perhaps a false marker like this one leaves people confused about history they ought to understand or makes people mistrust the historical memorials at sites of genuine bloodshed. What motive would someone have to lie about such a thing? It isn’t obvious that consumers demand golfing opportunities where the players must avoid the river in order to spare themselves guilt over desecrating a battlefield, to say nothing of a one-stroke penalty.

And yet... Of all the lies Donald Trump has told, this seems a rather harmless one. There were certainly plenty of Civil War soldiers who did die near the Potomac, even if none of them fell anywhere close to the fourteenth green. Perhaps the stone marker piques the curiosity of some caddies, and sparks their own research into the war. Or it causes a golfer to reflect on the life of a great, great grandfather, who really did die during America’s bloodiest conflict.

This story about the River of Blood implicates a broader question. Is authentic history, in the hands of imperfect human institutions, superior to the kind

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of fake history that is commemorated at the Trump National Golf Club? With reluctance, the author has tentatively concluded that the answer is “not by much.” When society presents authentic historical facts to present generations, especially in a manner tied to historical markers in physical space, it often does so in a manner that is so selective, so simplified, or so beholden to contemporary preferences that its value over contrived history appears to be marginal. At the same time, the costs of historical preservation can be quite significant. Societies that prompt private property owners to preserve their property in a particular way either substantially constrain what owners can do or devote substantial financial resources (via tax incentives, typically) to inducing forms of past-preservation in which many owners would not otherwise engage. Contrived history is cheap and voluntary. “Genuine” history is expensive and often needs to be compelled. Against that backdrop, this essay will reconsider an implicit premise in American constitutional law that is now decades old – the idea that there is a strong state interest to compel the preservation of historic property.

Along the way, the essay will also examine previously ignored aspects of fake history and historic preservation. Real estate developers who embrace contrived history are able to send powerful signals to would-be residents about who is welcome in a particular community. Choices about how to construct a community’s mythology may influence who decides to settle there. A new community in Florida has embraced Trump-style fake history with gusto, albeit with a more transparent admission of the narrative’s fictitious nature. That same community also happens to be one of the most racially segregated places in the United States. This correlation is perhaps not coincidental. And to the extent that the segregation arises by design, the success of that strategy in Florida should alert us to the possibility that more traditional forms of historic preservation, which selectively highlight some aspects of a built environment’s past while ignoring other parts of a community’s history, can also promote residential homogeneity.

Comparing the phenomenon of fake history to traditional historical preservation efforts in cities may help us understand previously underemphasized implications of historic preservation regulation and fair housing laws. Part I of this essay begins with a case study of The Villages, the Florida community in question. Drawing on scholarship from geography and other fields, it shows how the tendency to concoct, embellish, or distort community’s history is widespread and exists in a great many cultures. Part II then examines the costs and benefits of historic preservation requirements in the United States and Part III reviews the Supreme Court’s landmark decisions in *Berman v. Parker* and *Penn Central Transportation Co. v. New York City*.

I. Fake History in The Villages and Elsewhere

The Villages, Florida, is an interesting residential community from a social scientific perspective. Four things stand out about The Villages. First, in percentage terms it is the fastest-growing metropolitan area in the United States. (Fishleder et

al. 2016). Second, it is evidently the largest age-restricted community in the United States. (Ness 2015). Third, The Villages is strikingly homogenous with respect not only to age but to other demographic dimensions as well. Although it is located in a very diverse state, less than one percent of its residents are African American and barely more than one percent of its residents are Latino. (Fishleder et al 2016; United States Census Bureau Villages CPD 2016). The nearest large city, Orlando, is an hour's drive from The Villages, and its population was 28% African American and 25% Latino in the 2010 census. (United States Census Bureau Orlando City CPD). The Villages is therefore one of the whitest parts of the United States. Several other large retirement communities in the United States are also overwhelmingly Caucasian, but not to the extent of The Villages.¹ Finally, The Villages sports thousands of clubs for residents and an abundance of social capital.

The Villages is a collection of numerous gated communities, each with its own swimming pool and community center. Nearly all of the homes in the Villages are single-story, with a collection of ranch-style single family homes and townhouses. Home prices typically range from the \$200,000s to the \$600,000s. The Villages population in 2010 had an adult labor force participation rate of just 15% according to the Census Bureau, suggesting nearly universal retirement. Economic life in The Villages is organized around three pedestrian and golf-cart friendly "downtowns," each of which has its own movie theatre, bars, restaurants, and shops, all catering to the community's elderly residents. These downtowns are not gated and attract some residents from outside the development. Restaurants tend to be very busy at 5:30 pm and largely empty by 7:30. Music is piped into the downtowns from omnipresent speakers, occasionally interrupted by news bulletins from Fox News. Republican presidential candidates run very well ahead of their Democratic counterparts.

The Villages began, rather ignominiously, in 1982, when Harold Schwartz purchased a mobile home park in a rural part of Florida between Orlando and Ocala. (Bartling 2008). During the 1990s, Schwartz took advantage of a Florida-specific institution called the Community Development District, which permitted large-scale real estate developers to form their own quasi-municipal government that could levy taxes and issue tax-favored bonds to raise money for community infrastructure. (Bartling 2007). Schwartz and his son, Gary Morse, then acquired large swaths of land surrounding his mobile home park, land that was previously occupied by watermelon farmers and ranchers, with plans to quickly grow the population from nothing to 100,000 people by 2020. The Villages' development proceeded ahead of schedule; its population actually reached 110,000 people by 2014. (Olorunnipa 2014).

¹ According to the Census Bureau's web site, Laguna City, California, was 84% Caucasian non-Hispanic in the 2010 census, and approximately 90% of Laguna City's population is based in the Laguna Woods Village retirement community. Sun City Center, Florida was 93% Caucasian non-Hispanic in the 2010 census. Sun City, Arizona was 94% Caucasian non-Hispanic in the 2010 census.

Given its very recent formation, the extreme racial homogeneity found among The Villages' population is stunning. Some municipalities that are similarly overwhelmingly Caucasian, like Mentor, Ohio, have been in existence since the 18th century. Over generations, patterns of racial segregation can persist and can affect the residential location choices of subsequent potential homebuyers. Neighborhoods that are known to be overwhelmingly white signal African American buyers to exclude themselves. (Boddie 2010). But The Villages was founded in a very diverse part of the country during an era in which the Fair Housing Act was already on the books. So the mechanisms by which this extreme racial homogeneity arose are less blatant.

The Villages is largely a company town. The Morse family initially owned all the residential and commercial real-estate, as well as all 42 [!] of the golf courses, and other recreational amenities. The development generated \$9.9 billion in revenue from 1986 to 2014, enabling the Morses to amass a \$2.9 billion family fortune. (Olorunnipa 2014). Morse-owned entities contracted with one another, often obligating The Villages homeowners to pay assessments that covered the costs of the golf courses and other amenities. (Bartling 2007).

A visitor to any of The Villages' three downtowns will quickly notice their distinctive retro theming. Mediterranean architecture pervades Spanish Springs, Lake Sumter Landing is designed to look like a Florida beach town set alongside a large manmade lake, and Brownwood brings to mind an Old West cattle town out of West Texas or Arizona. No structures in any of the downtowns clash with the town's respective themes, and the developers went to great lengths to evoke a particular era, mood, and place in each of the downtowns. There is not a single example of modern architecture to be found, and yet all the downtowns are essentially new. Nor are there any residences in the downtowns. Those single story homes are all a car or golf-cart ride away, providing residents with the sorts of low density residential suburban sprawl that they became accustomed to before moving to Florida and the sorts of walkable commercial spaces that new urbanists favor. (Rybczynski 2010).

Fake history is omnipresent throughout the Villages' downtowns. The Villages' developer "hired a design firm [Forrec] with experience working for Universal Studios to invent this make-believe town, including its history, customs, and traditions." (Blechman 2008). Newly constructed buildings sport fake "Established 1792" signs. There are phony disused railroad tracks with old cabooses in town centers, and faded (but not too faded) "ghost advertisements" for old movies or for the saddle sellers of yore who purportedly occupied a building that is now occupied by a different commercial tenant. Plaques in front of numerous downtown buildings weave complex tales of adventure, successes, setbacks, and betrayals, introducing numerous fictitious town founders and other characters. There are 56 fake history plaques scattered through the three downtowns, with sixteen in Brownwood, eight in Spanish Springs, and thirty-two in Lake Sumter

Landing.² The widely-read local newspaper has featured quizzes that test residents about the community's fake history. (The Villages Daily Sun 2016).

Perhaps the developers' most self-referential bit of fake history is a recently installed text at "Paddock Square," the social hub of the newest downtown in Brownwood, where music is performed nightly. An impressive bronze plaque tells the story of the place:

The central plaza of Brownwood is now known as Paddock Square. Once slated for demolition, its historic value was championed by a group of visionary citizens in the 1950's. Today it contains remnants of the earliest roots of the town from its days as a cow camp used by legendary Cracker K.O. Atlas. The original Atlas dog-trot cabin has been relocated here, within the perimeter of what was once the original corral of the Atlas Ranch. Numerous buildings from the earliest days of the settlement, including K.O. Atlas's barn and bunkhouse, still surround Paddock Square.

The grandstands were built in the 1880's to accommodate crowds who came to Paddock Square to attend rodeos staged by William G. Brown after he purchased the Atlas Ranch in 1879. Subsequent city leaders found these raucous gatherings too disruptive to downtown business and later moved the popular events downwind of the town center. The grandstands were left intact and used as seating for civic and theatrical events well into the next century.

Brownwood and Paddock Square opened to the public in 2012. (Gonzalez 2013). The land on which Paddock Square was built was most likely a watermelon farm in the 1880s and the 1950s. (Blechman 2008). Another noteworthy plaque refers to an Ebenezer Matthews whose "dislike of young people was a well-known fact in the community" and who became the target of various practical jokes by local high school students as a consequence. Although Matthews is in that sense the patron saint of a community with no resident children, the historical origins of The Villages' prohibition of child residents is explained on none of the downtowns' 56 plaques.

Notwithstanding the developers' efforts to erase and replace it, the "real" history of the land now occupied by The Villages is interesting. As Amanda Brian points out, there was indeed a cattle industry in 19th Century Florida. (Brian 2014).

² Lake Sumter Landing has 31 unique fake history plaques. Identical plaques for McCabe & McCabe Haberdashery appear outside two different nearby buildings on either side of Old Mill Run. One is adjacent to the Old Mill Playhouse building and the other is opposite Market Square. It is unclear whether the plaques were repeated on purpose. The 56 plaques mentioned in the text exclude plaques commemorating actual history, such as the Sharon Morse Plaque at the Performing Arts Center in Spanish Springs, and two adjacent plaques commemorating the cattle industry and Florida crackers' (cowboys) by the Meggison Road entrance to Brownwood. There is also an additional fake history plaque located next to an unoccupied / façade building that is outside the three downtowns, in the residential portion of The Villages.

At the conclusion of the Seminole Wars, native tribes were forcibly removed from their ancestral lands to make way for white cattlemen. The bloody Seminole wars raged on for decades, and these wars would have provided an interesting backdrop for an alternative fake history of the Villages. Yet the Seminoles and other indigenous Floridians go completely unmentioned in all of the 56 fake history plaques that grace Spanish Springs, Lake Sumter Landing, and Brownwood.³ Indeed, among all of these plaques, there are two plaques that reference evidently Latino residents⁴ -- each of these reference the same nuclear family (the Sanchez family) -- and no apparent references to any other individuals who weren't of European ancestry.⁵ The fictitious story told in The Villages downtowns is therefore an overwhelmingly European American narrative, and it would not be surprising if stories about The Villages' past function as "exclusionary vibes" that influence the residential composition of The Villages present. (Strahilevitz 2011). Under this strategy, The Villages' architecture, fake history, marketing choices, and initial population uses language and imagery to establish a focal point that attracts white homeowners and repels non-white homebuyers. It quickly becomes known as a place where homeowners seeking racial homogeneity can find one another. Traces of African Americans' historic presence in The Villages have been wiped out too.

³ Blechman reports that on the short boat tour that operates out of Lake Sumter Landing, the captain's tour script includes a reference to "Billy Bowlegs," a Seminole chief and "a friend to whites who lived on this shore." (Blechman 2008) Blechman notes that Billy Bowlegs was Holata Micco, who led a band of warriors during the Second and Third Seminole Wars.

⁴ A plaque in Spanish Springs references Maria Portiz Fontana "Silencio" Sanchez, who allegedly lived from 1770 to 1873. As the plaque explains, the "first female resident of Spanish Springs, Maria Sanchez arrived at what was then only a wide spot in the trail in 1788. Accompanied by her husband and their four sons, Maria helped establish the roots of the young community. . . [S]he helped to develop the recipe for the potent local brew known as 'Mosquito Juice' and opened the budding settlement's first tavern, the Blind Mosquito. Maria earned the nickname 'Silencio' by remaining quiet for 60 years after the death of her husband in the Great Fire of 1812."

⁵ It is unclear whether the Sanchez family are meant to be Spaniards or immigrants from Latin America, though their status as a founding family of Spanish Springs suggests the former. There are 69 fictitious individuals who were named on the plaques displayed in The Villages. Besides the Sanchez family, there is also one family whose surname is "Feliu," which is a Catalan surname. The Anglo-European surnames mentioned are Peterson, McCall, Seball, Lasalle, Davis, Van Patten, Metzger, Allan, Brown, Marsden, Christopher, McCabe, Hudson, Louise, Parr, Schmid, Harper, Rose, Blaise, Whitney, Marley, Sennett, Mark, Atlas, Killingsworth, Hewitt, Dzuro, Coggins, Bailey, Wise, Parker, Waggoner, Payne, Mathews, Wilcox, McDonough, Juracko, Spirodan, Shiveline, West, Coggins, Borrowman, Graham, Wahl, Roy, Upton, Krietemeyer, and Benjamin. None of the plaques indicate that any individuals referenced therein are recognizably African American, Asian American, Jewish, or Muslim. Where the national origin of individuals is mentioned on the plaques, the fictitious residents are from Germany (Seball family), New Zealand (Hudson family relatives reside there), England (Graham family), and Holland (Upton family). Several other families are described as having moved to the area from various other cities in the United States.

Included within The Villages is an African American Baptist cemetery that predates the community's status as an age-restricted community. Strategically placed hedges and bamboo plantings render it invisible from the neighboring homes. (Brian 2014).

That said, it would be too easy, and not fully accurate, to tell a cardboard cutout story here. The Villages' residential subdivisions, which occupy land outside its commercial hubs, regularly incorporate Spanish words into their names. So residents might find themselves living in Valle Verde, Hacienda, El Cortez, or Santiago. These naming conventions are consistent with the Spanish Style theming that appears all over Spanish Springs, though, again, the fictitious former residents of Spanish Springs and the non-fictitious residents of the more inclusively named neighborhoods resemble one another demographically.

There are plausibly larger factors at play with respect to the communities' racial homogeneity too. Older Americans are whiter than younger Americans, and among seniors whites are more likely to be able to afford homes in retirement communities that are beyond the reach of seniors without substantial savings. Beyond that, dozens of golf clubs are part of The Villages, and all homeowners pay for access to most of these clubs via their monthly assessments. (Residents wishing to play on a handful of "championship" courses have to pay an additional membership fee.) Given that for much of The Villages' residents' lives golf was the most racially segregated mass participation sport in the United States, one would expect that The Villages would be particularly appealing to Caucasians and particularly unappealing to African American and Latino retirees. Prospective Caucasian homeowners would be more likely to purchase homes in The Villages than African Americans, and even Caucasian buyers who played no golf might be willing to play a premium to live among the overwhelmingly white residents who are attracted to mandatory membership golf communities. "Exclusionary amenities," like exclusionary vibes, thus seem pervasive in The Villages, and they may well trigger the same segregation-promoting dynamics. An exclusionary amenity is a costly club good that is embedded in a residential community where all residents must pay for it. Willingness to pay for that amenity becomes a proxy for race or other demographic factors. (Strahilevitz 2011). It is plausible that The Villages' exclusionary vibes and exclusionary amenities reinforce each other, though identifying the causal relationships and magnitudes is a tall order.

That said, something else important seems pervasive in The Villages too: happiness. In a health survey sent by academic researchers to all identified residents of the community, one that generated a very high 37.4% response rate, residents of The Villages expressed extraordinary satisfaction with their lives in the community. Fully 90.8% of The Villages' residents surveyed rated their satisfaction with life in The Villages as an 8, 9, or 10 on a 10-point scale. (Fishleder et al., 2016). Although any comparison to a baseline will raise problems about representative income levels, senior citizens nationally are much less likely to report such high levels of satisfaction. (Strine et al. 2007).

While residents' high satisfaction in a racially homogenous community is in many respects unfortunate, racial segregation among seniors is probably less

harmful to society than racial segregation among younger Americans.⁶ Residents of The Villages lack school-aged children, so segregation there isn't contributing to school segregation. And residents are mostly involved in economic life only as consumers, so the segregated nature of their local social networks probably does not prevent people of color from enjoying access to employment-related economic opportunities. The racial segregation of Americans in their 20's, 30's, 40's, and 50's is more pernicious.

To be sure, The Villages' fake history itself is unlikely to play a large role in explaining why its residents express such high levels of satisfaction with their surroundings. At least in the short term, the racial homogeneity of The Villages could be itself an alternative explanation for aspects of the community like its high levels of generalized trust and social cohesion. (Putnam 2007). Yet the available data is hard to square with the proposition that presenting community residents with a contrived and phony version of the history of a place significantly undermines residents' subjective well-being. And data from other researchers suggests that some survey respondents prefer fake historical architecture to modernist contemporary architecture, though there are legitimate questions about the external validity of this data. (Levi 2005).

Given this satisfaction, it is worth asking why The Villages' model has not been replicated more widely. Indeed, perhaps it is only a matter of time until residential life modeled on theme park visits becomes the norm. given the success and consumer appeal of The Villages, it is easy to imagine real estate developers embracing fictitious built environment narratives in a manner that is more expensive (because of licensing fees) but has ready-made cultural resonance. Millennial retirees might want to live in a retirement community that looks precisely like Hogsmeade or King's Landing. In such a community, the residents are likely to know the built environment's "historical" narrative well, to care about it, and to view it as central to the community's identity. Can Lancaster, Pennsylvania or Akron, Ohio's residents say the same thing?

The discussion so far has taken Villagers' preferences for granted, but it is worth noting, at least in passing, that audiences where this work has been presented inevitably want to understand or critique their embrace of fake history. These audiences regard what is happening in The Villages as creepy, though the basis for their intuitions vary widely. Perhaps the concern is that fiction has so thoroughly and self-consciously displaced fact – maybe residents embrace this concocted history to assuage subconscious guilt about their having left communities in which they were rooted as adults. Alternatively, maybe what's jarring is that the community seems to be one where "play" has become a full-time pursuit for the residents, crowding out other important values associated with ordinary life. (Hurka

⁶ To the extent that minorities feel excluded from communities like The Villages, this may adversely affect their well-being. (Utsey et al. 2002). There are further interesting questions about whether age segregation is itself beneficial, taking into account the benefits and burdens associated with greater proximity to one's grandchildren. (Uhlenberg 200).

& Tasioulas 2006). It could be instead that by trying to create a planned version of a community that grew and changed organically the community is subtly but powerfully missing important aspects that make it human. (Jacobs 1961). Or maybe the clear racial and evident political homogeneity in The Villages produces a kind of echo chamber among residents that may adversely affect political discourse among a population that votes in very large numbers.

On the other hand, to Villages residents the ability to play in a community that caters to their needs, that is designed specifically for people like them (with golf cart paths, ample public restrooms downtown, easily readable signs, and restaurants that open early and close late), that doesn't regard their aging as embarrassing, and that provides them the opportunity to focus on consumption after a lifetime of working, parenting, and saving seems appealing. Residents might pointedly ask what gives us the right to judge them and the way they have chosen to retire? They have paid their dues, and perhaps when we reach their life stage we will want something similar.

All of this discussion raises some hard questions that will be pursued in the remainder of the essay. First, is there inevitably such a thing as "genuine history," that we can contrast with The Villages' contrived history? And relatedly, do we have reason to believe that fake history is more likely to promote the troubling forms of segregation that have arisen in The Villages? Finally, and subversively, what if Villages-style fake history is a perfectly adequate (but much more affordable) substitute for "genuine" history? That is, if satisfying some abstract preference for authenticity entails limiting how current owners can use and modify their property by requiring owners to comply *ex ante* with a zoning or covenants scheme that requires conformity with a broadly applicable theme, are the limits justifiable? Preserving old buildings can be a very costly endeavor, particularly when hazardous substances like lead paint or asbestos were used in its initial construction. In some extreme cases, governments force building owners to maintain structures that are not economically viable. (J.C. & Associates 2001). Is the game worth the candle?

II. Is All History Fake History?

There is a school of thought that questions whether the presentation of a community's genuine history is a realistic possibility in human society. David Lowenthal is most famous for the claim that "the past is a foreign country." In Lowenthal's view, so many of the objects contemporary society preserves represent a distorted picture of life in the past. Worse, the story is often distorted in the present precisely so that the narrative can be placed in service of contemporary needs and wants. (Lowenthal 1999). Ada Louise Huxtable called historic preservation a "semantic trap," something different only in degree from fantastical communities like Disneyland or Seaside, Florida. (Huxtable 1997). Ethnographic studies of revitalization efforts, such as Jeremy Wells' assessment of historic preservation efforts on Anderson, South Carolina's Main Street, identify a common theme of local stakeholders embracing efforts to create a kind of "spontaneous

fantasy,” with the local architecture reflecting an aspirational account of what life on the main thoroughfare should have been like during the town’s earlier days. (Wells 2010).

As we survey the way that historical sites and buildings are preserved, the arbitrariness of what successor generations decide to emphasize, ignore, embellish, and conceal stands in sharp relief. (Lowenthal 1998a). Nineteenth century Americans bemoaned the fact that the precise spot where the Pilgrims disembarked in 1620 was lost to time, so they found a rock that looked like it could have been the “Plymouth Rock” and moved it to the Harbor under a classical canopy commemorating its importance. (Lowenthal 1998a). Tourists wishing to see The Alamo between 1960 and 2010 might have stopped at the original in downtown San Antonio, Texas, or they may have preferred the reproduction, built in Brackettville, Texas as the set for a John Wayne movie about the Alamo and maintained as a tourist site for the next five decades. (Huxtable 1997). Sam Houston’s Greek revival home in Texas has been transformed by subsequent generations into a “rough-hewn log cabin which Houston himself would have disdained,” but which tourists deem more consistent with their mind’s eye vision of Houston’s home. (Lowenthal 1998a). Hannibal, Missouri, has state historical markers commemorating not only spots where the real Mark Twain lived but also locations where the fake characters from his books supposedly had their adventures. (Daly 2010). Similar “landmarks” exist in Romeo & Juliet’s Verona. (Telegraph 2012). Tour Guides in the Old City of Jerusalem take nuns on a Via Dolorosa that isn’t Christ’s path on the way to the crucifix, but is rather a “more interesting” (and maybe more appealing?) path to follow. (Lowenthal 1998a). Colonial Williamsburg for decades had no references whatsoever to slavery, and its outhouses used to be freshly painted in bright colors – historically inaccurate, for sure, but far easier on the eyes. (Barthel 1990; Handler & Gable 1997).

Amidst these unreliable narratives, shifting standards of what ought to be preserved prevail. Most of the older European societies whose edifices current generations are now spending enormous resources to preserve cared little for ancient structures, and some of them wouldn’t have given much thought to the idea that the past and present were meaningfully different. In the 1500’s St. Peter’s Basilica was razed and then rebuilt, a development that was (as best we can tell) uncontroversial, even for a building of such historic importance. (Lowenthal, 1998b). And with so many readers having walked through the current version, do we have grounds to complain?

The question of which Golden era to commemorate is one that arises across cultures. Americans’ nostalgic sense of New England’s small towns is more an artifact of the nineteenth century than the seventeenth. After the Civil War, a pure, agrarian, and communitarian New England helped show that the prevailing side in the conflict was always destined to emerge victorious. And later in the nineteenth century, as immigration threatened colonial revivalists’ understanding of the American identity the “fictions of New England resisted fact in order to stabilize the socially uncertain present.” (Wortham-Galvin 2010). The fact that the landscape of

nineteenth century New England did not match the vision that revivalists wanted to encounter meant that New England's landscape needed to be remade. And similar questions about which "golden era" should be preserved play out in historic preservation debates in Europe. As Lowenthal explains:

Consider Rouen Cathedral, whose sixteenth-century timber spire gave way in 1822 to a cast-iron replacement unable to bear its own weight. A new spire is now needed. Should it honour the original or the historical continuity embodied in the fraud of a nonweightbearing load? (Lowenthal 1999).

There is no correct answer to the question. The controversy is political rather than controversial. And in most preservation disputes similar issues arise.

Lowenthal does not embrace the post-modernist claim that fake history and genuine history are indistinguishable; neither should we. The Gettysburg Memorial commemorates a spot where thousands of Americans really did die, and those deaths mattered then and now. History we learn in democratic societies typically contains heavier doses of fact than fiction. The typical problem is not that historical narratives are concocted; rather it's that when the preservation domain is scarce land, facts are preserved selectively and the value choices underlying that selection are often obscured.

Yet it is becoming increasingly apparent that, as arguably our greatest living architect has put it, "preservation is overtaking us." (Koolhaas 2004).⁷ We are preserving so much, and so much of what we preserve is banal, that we cannot afford to maintain and inventory everything. For cities like Venice or Bruges or Deadwood, the opportunity cost of preservation is plausibly worth bearing. These locations are centers of tourism whose glory days are a distant memory, and tourist traffic aside they are on the periphery of economic life. But with 27% of the buildings in Manhattan already landmarked and with the borough on pace to landmark the majority of its buildings by 2066 (Gould Ellen & McCabe 2017), there is a danger that preservationist instincts fed by loss aversion impulses crowd out the dynamism that created the wealth that funded the buildings with which society now seems unwilling to part. (Strahilevitz 2005). To ameliorate these problems societies might bind itself to protect no more than a fixed percentage of structures in the city, whereby in the absence of new construction the landmarking of a new property would require the removal of another property from the landmarks registry. (Glaeser 2011).

With respect to the built environment, political factors as well as historical and architectural importance influence what gets preserved and what doesn't. (Noonan & Krupka 2010). As a result, there is inevitably selectivity in local

⁷ A similar sentiment was expressed by a previous generation's greatest architect, Frank Lloyd Wright, who regarded London as "senile." In Wright's view, the best parts of London should be preserved "in a great green park" but the rest of London should be opened up for new buildings. (Lowenthal 1999).

government decisions about which structures should be subject to compulsory preservation. When buildings are protected because of who lived there rather than anything having to do with the structure itself, then political choices and social values inevitably drive decisionmaking. Add in the mix of economic factors concerning what structures are preserved or torn down by their owners, and the foreignness of the past is thrown into even sharper relief. On this view, historic preservation (like decisions about the construction of monuments, questions of who to honor on stamps and currency and airports and freeways, and controversies over the contents of state-mandated history textbooks) become a battlefield for purely symbolic politics that are zero-sum because of the scarcity of commemorative opportunities.

In light of these problems, perhaps it would be much better to preserve buildings at random, to serve authenticity interests, fairness interests, and to leave space for future creativity. That would be a strategy for implementing Rem Koolhaas's thought experiment in Beijing, where he contemplated preserving "everything in a very democratic, dispassionate way – highways, ... monuments, bad things, good things, ugly things, mediocre things – and therefore really maintained an authentic condition." (Koolhaas 2004). If public choices about what is worth preserving are usually flawed, then removing the element of choice may be one way to proceed. The city might decide to require the preservation of a fixed number of blocks that were constructed by a particular generation, but leave the designation of those blocks to chance.

This point can be amplified once we realize that the same sorts of intentional narrative omissions that are on display in *The Villages* – the hedges planted around the African American cemetery, the near absence of nonwhite names from the community's fictitious list of founders and settlers, the erasure of the area's Native American past – are equally present in communities celebrating their more genuine histories too. Stephen Clowney's fascinating study of Lexington, Kentucky shows the city and powerful private actors doing much the same kind of editing, with the result being a built environment that glorifies the actions of historical white figures and conceals the role of African Americans who loomed large in local history. (Clowney 2013). As Clowney points out, privately funded monuments to the Confederacy adorn the city's central gathering place, repelling contemporary African Americans. Thoroughbred Park, a new municipal park proposed in 1989 to commemorate Lexington's horse-racing history, occupied space between an affluent white part of the city and a less affluent black neighborhood. As he tells it, both neighborhoods would be visible from the park and have easy access to the park unless something was done.

Local business interests argued, sometimes forcefully, that the view was not conducive to Lexington's redevelopment efforts and, as a result, the large rolling hillside of Thoroughbred Park was built. The mound was "literally built for the park to effectively hide the African American residential district from view." For anyone approaching downtown from the interstate highway, Lexington's black

neighborhood – and black bodies – remain firmly out of sight, tucked neatly behind the grassy partition. An editorial in the local paper succinctly captured the dynamic; “Though aesthetically pleasing, the park is historically false. ... The park not only ignores the black neighborhood, but also screens it from view. It is a whitewash. It is telling that almost every African American ... instantly recognizes this racial effect.”

Though Clowney’s case study focuses on Lexington, he marshals evidence that similar strategies are employed “throughout the South” to provide current residents and visitors with “deliberately misleading interpretations of history [that] conspire to ingrain ideas about racial hierarchy, cement conclusions about racial difference, and send messages that African Americans are not full members of the polity.” (Clowney 2013).

The selectivity of historic preservation and commemoration operates in more trivial ways as well. Consider the conveniently selective focus of preservationists. Communities of old smelled awful. (Howes & Lalonde 1991). Mud and grit and horse manure and unpleasant body odors were omnipresent. Yet, to the best of my knowledge, there is no constituency for olfactory authenticity in preserved cities. Preservationists want to wander among old buildings and see what previous generations saw. But they do not want to smell what previous generations smelled, nor to feel what previous generations felt. Historic structures should be air conditioned, after all. Nor do contemporary preservationists wish to experience the elevators of old, which were death traps. (Bernard 2014). The version of historic preservation that public tastes demand is a highly sanitized fantasy about the past. “Most of the remote past is wholly gone or unrecognizably transformed.” (Lowenthal 1999).

None of this analysis indicates that the preservation decisions that emerge from this process are inevitably going to be bad ones. While there is much to criticize in Lexington’s approach, Clowney notes that Birmingham, Alabama began to preserve its history in a more inclusive way after African Americans began to comprise the majority of voters there, (Clowney 2013). Robert Weyeneth describes efforts throughout the South to include sites associated with racial segregation on the National Register of Historic Places so that future generations will understand better through the built environment what life under Jim Crow was like for blacks and whites. (Weyeneth 2005). Political processes are not always biased or broken. But the dominant tendencies among preservationists are evident. And those tendencies help make the case for a radical approach built on randomization. (Samaha 2009).

In assessing the social welfare effects of historic preservation, property values are a sensible place to begin, though by no means a completely satisfying analytical approach. Most of the benefits of historic preservation will be felt locally. Historic preservation typically will be a local amenity. That is, if people benefit from having historic structures and neighborhoods preserved, then they will pay more to live proximate to those structures. (Malani 2008). To be sure, tourists and workers

who commute from elsewhere may benefit from historic preservation too, but to the extent that they do, we should expect to see a corresponding increase in the property values of hotel buildings or office towers. If real estate markets are functioning well and buyers and sellers are rational, then the long-term costs and benefits of historic preservation should be capitalized into property values. Markets leave out some considerations, such as existence value, and these externalities render real estate values an excellent though imperfect proxy for the social welfare effects of preservation. Property values also become a poor proxy when the market rewards real estate developers for catering to the preferences of white homeowners who prefer racially homogenous neighborhoods.

With those important caveats stated, what does the empirical literature tell us about the effects of historic preservation mandates on local property values? Digging into the reputable social science, there does not appear to be an absolute consensus in the economic literature as to the effects of historic preservation regulations. Case studies focused on medium-sized cities like Lincoln Nebraska, Baton Rouge, Louisiana, and Johnson City, Tennessee, tend to find small positive effects on property values. (Thompson, Rosenbaum & Schmitz 2011; (Zahirovic-Herbert & Chatterjee 2012; Chen 2013). That said, the most sophisticated work tends to be dubious of the purported economic benefits and concerned about the resulting demographic turnover, especially in densely populated areas. Coulson and Leichenko's study of Fort Worth, Texas found that historic preservation did not affect the residential composition of landmarked neighborhoods, (Coulson & Leichenko 2004) but the same authors' work on Abilene, Texas found that historic preservation regulations did raise property values within the landmarked district. (Coulson & Leichenko 2001). By contrast, McCabe and Gould Ellen found significant neighborhood composition effects in New York City, where the creation of a historic district was associated with subsequent increases in the socioeconomic status of the district's residents, compared to residents of otherwise comparable neighborhoods. Evidence that historic preservation decisions affect the racial composition of New York neighborhoods was weaker and not statistically significant. (McCabe & Gould Ellen 2016).

Studies in larger metropolitan areas are more pessimistic about the economic desirability of historic preservation laws. Heintzelman and Altieri's study of historic preservation regulations in the Boston metropolitan area found associations between landmarking and *reduced* property values, though the magnitude of the effect is small with all controls, around 1%. (Heintzelman & Altieri 2013). An impressive study that employs repeat sales hedonic fixed-effects analysis, the Heintzelman and Altieri paper does a better job of dealing with endogeneity than many of the other localized studies. Similarly, another study of historic preservation in Chicago employed a small but unusual dataset that included measures of structure quality. (Noonan & Krupka 2011). The authors find that landmark designation has no positive effect on property values after city property tax benefits phased out completely. Research that relies on natural experiments, such as the Nazis' leveling parts of Rotterdam, which left historic preservation regulations in place only in the parts that hadn't been destroyed, also tends to be

pessimistic about the economic effects of historic preservation regulations. (Koster, van Ommeren & Reitseveld 2012).

The gold-standard paper on the effects of historic preservation uses the largest market, has the largest data set involving the most land transactions over the longest period of time, and employs the most careful controls. (Been et al. 2016). The authors expected that the creation of a historic district would generate cross-cutting effects because such regulations can enhance beauty and open-space in a neighborhood while limiting redevelopment rights. Consistent with this plausible hypothesis, Been and co-authors find that the effects of historic preservation regulations are negative to negligible in parts of New York where there is significant economic pressure to pursue higher densities (i.e., Manhattan). Outside of Manhattan, the effects on property values are positive – “they rise by about 1.4 percent per year relative to nearby properties.”

A survey of the literature on the economics of historic preservation suggests the following (tentative) conclusions, then. The effects of historic preservation on neighborhood composition appear mixed, although there is some credible evidence to suggest that these regulations are associated with gentrification of neighborhoods. In areas of significant land scarcity, such as urban centers, there is little credible evidence that historic preservation regulations systematically enhance property values. Most of the rigorous evidence in fact suggests that such regulations cause property values to decline. Historic preservation restrictions on land do seem to enhance property values in lower density areas where there is little economic pressure to redevelop property and where such regulations can promote an aesthetically appealing form of homogeneity in the streetscape that might be difficult to achieve through purely voluntary coordination among property owners.

To be sure, property values do not capture all of the potential benefits and costs of historic preservation. Such preservation, when successful, can provide current generations with guidance about how past challenges were addressed, provide present generations with an escape from their current confines, or establish continuity with the past. On the other hand, preserving the past may stifle present generations’ creativity, free up scarce space for future landmarks. The past can become an orthodoxy from which one deviates only at her peril.

III. The Law

In American law it is rather clear that cities and states have a legitimate interest in promoting the preservation of historic structures, even at the expense of property values. Paradoxically, the Supreme Court case in which the right to force the continuation of existing uses is most clearly established is *Berman v. Parker*, where the proposal at issue was a slum-clearance plan designed to wipe out existing uses so that a neighborhood in Washington, D.C. could start afresh. As of 1950, the area slated for redevelopment in Washington was characterized in the following terms by the Court:

In 1950 the Planning Commission prepared and published a comprehensive plan for the District. Surveys revealed that in Area B, 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating. In the judgment of the District's Director of Health it was necessary to redevelop Area B in the interests of public health. The population of Area B amounted to 5,012 persons, of whom 97.5% were Negroes.

To contemporary readers the introduction of the demographic information is unnerving. It is as though the most emphatic proof of the existing built environment's low value is the type of people who live there. In any event, in the view of the Planning Commission, Area B was characterized by an obsolete layout and bundle of structures that was injurious to public health. In the Supreme Court's view, Congress and the District had the authority to condemn both blighted and non-blighted properties within Area B.

The fact that Berman's department store was, as the government conceded, not remotely blighted was irrelevant. As Justice Douglas wrote on behalf of a unanimous Court:

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. ... If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

In this key passage, the Court articulates a broad justification for the police power. City beautification is a legitimate state interest, one that justifies overcoming the objections of an owner of a fine building who seeks to resist its condemnation by virtue of proximity to less sturdy neighboring structures. And with respect to Berman's arguments against being the victim of a collective punishment, the Court concluded that tearing down only problematic structures would do too little to prevent the neighborhood from becoming a slum again in the future, thanks to the

dearth of parks, the absence of sunlight, and other deficiencies. Only a new neighborhood layout could break the “cycle of decay.” In short, Berman’s section of Washington, D.C., to Douglas, called out for government to play the role of the Luftwaffe in Rotterdam, enabling the neighborhood to start from scratch.

Twenty-four years later, the question of the state’s interest in promoting aesthetics in a community was taken for granted, though the emphasis was now on resisting modernization. The Penn Central Transportation Company, which owned Grand Central Station in New York, sued the City of New York over the application of the city’s landmark preservation law to Grand Central. (Penn Central 1978). Under the Law, New York had blocked Penn Central from constructing a tall skyscraper atop Grand Central, one that would have enhanced the economic value of the parcel. Although Penn Central conceded that the landmarks preservation law fell within the city’s police power, and therefore was legitimate, it argued that the Constitution compelled the city to compensate Penn Central for the diminutions in their property value resulting from the landmarks law. The legitimacy of the law’s purpose was not in dispute, but the second and third paragraphs of the Court’s opinion delve into the justification for historic preservation in detail.

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance.....

New York City ... adopted its Landmarks Preservation Law in 1965. ... The city acted from the conviction that "the standing of [New York City] as a world-wide tourist center and world capital of business, culture and government" would be threatened if legislation were not enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character. The city believed that comprehensive measures to safeguard desirable features of the existing urban fabric would benefit its citizens in a variety of ways, *e.g.*, fostering "civic pride in the beauty and noble accomplishments of the past"; protecting and enhancing "the city’s attractions to tourists and visitors"; "support[ing] and stimul[ating] business and industry"; "strengthen[ing] the economy of the city"; and promoting "the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city."

Notice that within the span of a quarter century, the emphasis of city planners had changed from replacing the obsolete to preserving the irreplaceable. To be sure, most visitors to Grand Central regard the structure as one possessing very significant architectural merit. Contemporary Washingtonian policy-makers in the 1950’s did not feel any commensurate fondness for the neighborhood that was slated for destruction in *Berman v. Parker*, a discrepancy likely tied to both the quality of the structures and the perceived qualities of the people who used those structures.

The plaintiff in Penn Central did make one broad argument against the enterprise of historic preservation. It argued that the imposition of historic preservation requirements on it but not on other landowners was arbitrary, but the Court quickly brushed aside this argument:

Equally without merit is the related argument that the decision to designate a structure as a landmark "is inevitably arbitrary or at least subjective, because it is basically a matter of taste," Reply Brief for Appellants 22, thus unavoidably singling out individual landowners for disparate and unfair treatment. The argument has a particularly hollow ring in this case. For appellants ... do not even now suggest that the Commission's decisions concerning the Terminal were in any sense arbitrary or unprincipled. ... [Q]uite simply, there is no basis whatsoever for a conclusion that courts will have any greater difficulty identifying arbitrary or discriminatory action in the context of landmark regulation than in the context of classic zoning or indeed in any other context.

Upon reflection, the Court's response to Penn Central's argument is something of a non sequitur. The company was positing that landmark designations are inherently arbitrary. The Court said by way of reply Penn Central did not argue that the decision to designate the station as a landmark was itself arbitrary. The response seems self-contradictory. The broader argument of inevitable arbitrariness logically entails the specific argument applied to Penn Central's land. In the decades that followed, lower courts followed Penn Central's lead in brushing aside questions about the discriminatory enforcement of historic preservation laws. (E.g., *Mount St. Scholastica* 2007; *Van Horn* 2001). A more thoughtful (and candid) response would have suggested that landmark designation decisions are merely somewhat arbitrary – factors like neighborhood clout and voter preferences play a significant role, but so does perceived architectural merit. Or maybe the real problem is that landmark designations aren't sufficiently arbitrary.

Putting *Berman* and *Penn Central* side by side displays some of the tension that arises in historic preservation cases, though it does not show that the doctrines are contradictory. A competent government can beautify its cityscape by compelling the preservation of pleasing structures *and* by compelling the removal and replacement of displeasing structures. In that sense *Berman* and *Penn Central* fit together coherently. But the tension arises once we begin to see the subjectivity of contemporary societal judgments about what is worth preserving and what is worth destroying. This was the argument of Penn Central's that the Court was too quick to dismiss.

To preservationists, soaring and expensive structures that are used and beloved by elites ought to be preserved, even if they become economically obsolete in their present form. But modest structures in overwhelmingly minority neighborhoods ought to be bulldozed in the name of progress. Combining the power to compel preservation with the power to compel destruction makes the government a mighty editor of the past. Systematically, when society sweeps away

the latter kind of building and forces the preservation of the former, it curates the built environment in a manner that deceives future generations about what life was like in an earlier era. Compare the 27% of Manhattan that is landmarked to the 0.3% of Staten Island that is landmarked. (Gould Ellen & McCabe 2017). What if future generations – perish the thought – decide that the lives of contemporary Staten Islanders were as worthy of commemoration as the lives of Manhattanites? From this perspective, the history that gets presented to the living becomes a history nearly as fake as what’s on display in The Villages. (Lowenthal 1999). When society tries to preserve and protect aesthetic greatness it simultaneously designates winners and losers, and biases about the latter consideration may contaminate the clarity of judgment about the former consideration. (Recall Justice Douglas’s connection between the quality of a neighborhood’s buildings and the perceived quality of its residents.)

Equally troubling is the possibility that these curated choices about what history to preserve subtly signal current generations with information about who is welcome and who is not. In recent years legal scholars have begun studying the important question of how regulations of the built environment, decisions about infrastructure placement in particular, can contribute to residential segregation. (Schindler 2015). Historic preservation can and evidently does send exclusionary vibes too. But we lack an adequate understanding of the mechanisms by which it operates and the sense to which factors grounded in psychology, as opposed to pocketbook economics, explain household location choices.

As a doctrinal matter, it would appear that the evidence canvassed in Part II of this essay is sufficiently mixed to authorize the continued compulsory regulation of historic structures. The best evidence suggests that historic preservation regulations do more economic harm than good in densely packed parts of the country, but they appear to be beneficial in some places, and the possibility that they may be beneficial in a given neighborhood is adequate under the law’s very deferential existing standard. Moreover, a city like New York might conclude that notwithstanding the net economic harms associated with some preservation, these costs are worth bearing for the sake of continuity values that are difficult to price. There may even be good Burkean reasons for preserving things that have stood the test of time – their durability might bear witness to their value in ways that present generations do not fully recognize. At the same time, there is essentially no empirical assessment of the kind of alternative to historic preservation that The Villages represents. Historic preservation may look worse (or, depending on one’s values, better) when it is compared to fake history than when it is compared to a city unmoored from both fictitious and less-fictitious pasts. And if we can imagine an inclusive version of fake history – a narrative that embraces pluralism and difference – the integration-promoting possibilities of fake history become apparent.

That said, the relationship between historic preservation regulations, fake history, and residential homogeneity sketched above suggest that a less deferential assessment of these strategies may be appropriate. Both historic preservation and

the kind of uniformly scripted narrative on display in The Villages aim for an aesthetic homogeneity that may engender demographic homogeneity by design. When the buildings all look alike the people living in those buildings tend to look alike too. Some of the premises taken for granted by the courts since *Penn Central* may fail to withstand a more searching form of judicial scrutiny.

IV. Conclusion

The Villages' developers have gone to great lengths to develop a phony historical narrative for their fast-growing community, one that is embraced not only in retro-architecture but with a detailed and fictitious account of the built environment's past. In so doing, they have swept away any mention of the actual history of the land and replaced it with a stylized narrative designed to appeal to today's elderly home buyers. There is something disconcerting about the inauthenticity of The Villages.

Yet, upon reflection, it is possible that the faux history of The Villages is not all that different from the version of history that is presented to the public as a result of historic preservation regulations in major American cities. There too, aspects of the built environment's history are systematically ignored. Structures inhabited by the poor and by minorities tend to be replaced as soon as market forces dictate changes. Structures inhabited by elites tend to be preserved regardless of what the market demands. The result is a lasting signal about whose history is valued, whose lives mattered, and what historical events constitute successes and failures. The version of our past that Americans encounter via historic preservation regulations is at once sanitized, political, and designed to appeal to contemporary preferences. To the extent that society wants to preserve artifacts from past built environments, preserving structures at random has real advantages over our present approach.

Scholars of land use have paid too little attention to the relationship between the design of the built environment and the characteristics of the people who show up to populate it. The extraordinary and depressing racial homogeneity of The Villages, despite its very recent origins and presence in a very racially diverse part of the United States, suggests that the combination of exclusionary vibes and exclusionary amenities in age restricted communities can be potent even in an era of Fair Housing Act enforcement. Seeing what has happened in The Villages might reveal a fast-forward version of what has happened more slowly and with less extreme results elsewhere, where an existing population dampens the salience of the signals sent by the built environment. Though we cannot isolate the effects of any particular homogeneity-promoting strategy in The Villages, the cumulative effect of multiple strategies is striking and disturbing. It would not be crazy for legal institutions to consider whether some of the techniques that might promote racial homogeneity in The Villages ought to be prohibited or at least curtailed. Indeed, it is tempting to contemplate the inclusionary possibilities of a varied approach to fake history. Imagine Lin-Manuel Miranda as a real estate developer.

Finally, the extent to which residents of The Villages have embraced the community's false history is a topic worthy of further qualitative research. The version of history that is presented to the world through preservation laws is never authentic. A fairer metric is to ask whether the history on display resonates within the community. If American homeowners turn out to like entirely phony history nearly as well as selectively curated history, then a hard question arises as to whether it is appropriate to impose significant financial burdens on a subset of property owners in the name of telling the story of a community in a particular, misleading way. Fake history may be inferior to real but selective history, but it is also a great deal cheaper, and the narrative can be constructed entirely by market forces. In revisiting the question of whether there remains a legitimate societal interest in compulsory historic preservation, it is helpful to ask ourselves: "compared to what?" To answer that question an examination of The Villages social experiment may prove illuminating.

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