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FREDERICK DOUGLASS AND THE HIDDEN POWER OF RECORDING DEEDS

RANDALL K. JOHNSON*

He died in 1895. *He is not dead.*

—Langston Hughes

“Frederick Douglass: 1817–1895”¹

ABSTRACT

This Essay answers a single question: What led Frederick Douglass to accept an appointment as the D.C. Recorder of Deeds, especially at the height of his public service career? A possible answer, which is informed by the historical record and more contemporary accounts, is that Douglass accepted such an appointment for three reasons. The first reason is that the D.C. Recorder has been long recognized as an exemplar of fairness, perhaps due to its ministerial obligations, even when there could be no such expectation with respect to how Black folks are treated. The second reason is this office provided Douglass with a relatively safe position, in economic and political terms, that he used to call for more standard treatment of Black people by various governmental units such as the U.S. Supreme Court. The final reason is the D.C. Recorder collects public information, in the normal course of its business, which validates Douglass’s call for more standard treatment.

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1. LANGSTON HUGHES, *Frederick Douglass: 1817–1895*, in *THE PANTHER AND THE LASH* 31, 31 (1967).

These three reasons, if they are read as a whole, refer to what the Essay is the first to call the hidden power of recording deeds. This power is made up of unnoticed benefits, largely arising from governmental policies informed by procedural fairness, which help to limit racial discrimination. Procedural fairness, by definition, is when U.S. governments refuse to treat similarly situated people in nonstandard ways without adequate justification. One reason for such a refusal to do so is that governments may have ministerial obligations, which limit their ability to exercise any discretion.

The D.C. Recorder has ministerial obligations which were intended to increase economic efficiency rather than to advance racial equality, such as the duty to register property interests upon the satisfaction of certain conditions precedent, but nonetheless ensure that Black people are treated just like everybody else. This office also does work that highlights the implications of failing to ensure standardization, which include unjustified economic losses that stem from adverse selection and other asymmetric information issues. Lastly, the D.C. Recorder shows that any such losses are not solely imposed upon Black folks, especially as many neighborhoods have become increasingly integrated, so harms are not limited to property owners in majority-Black areas. Stated simply, this hidden power is a less-than-salient way to remove “unfreedoms that leave [Black] people with . . . little opportunity of exercising their reasoned agency” even when they suffer from chronic property right violations such as trespasses to land or nuisances.

Part I provides additional information about Frederick Douglass and how he may have understood the various powers that are exercised by the D.C. Recorder of Deeds. Part II explains how to build upon Douglass’s legacy as the first Black D.C. Recorder, especially his call for more standardized treatment, mostly by explaining how this office could make better use of public information that it has in its possession. The Conclusion offers specific suggestions for how to achieve this goal, so as to prevent purchase price discrimination, lien fraud, and deed fraud.

INTRODUCTION

In 1881, Frederick Douglass accepted an appointment to serve as the District of Columbia Recorder of Deeds (D.C. Recorder).² There are no

2. See L. DIANE BARNES, FREDERICK DOUGLASS: REFORMER AND STATESMAN 125–26 (2013) (“Although the Recorder of Deeds was a local, not federal, position, the District of Columbia fell under the president’s jurisdiction and all city officials served at the executive’s pleasure.”). Douglass is likely to have been intimately familiar with this office, or at least its analogue in other parts of the country, due to the importance and ubiquity of recording in the United States. See JOHN G. SPRANKLING & RAYMOND

books or law review articles, however, that focus on the years that he spent registering property interests. Thus, what Douglass did as the D.C. Recorder is mostly lost to history.

My Essay identifies and fills this void. It does so by viewing Douglass as a historical actor.³ And in drawing on accounts of his work as D.C. Recorder, the goal is to explain why Douglass took up such a position.

In the words of Taja-Nia Henderson, whose well-crafted papers often look at Black historical actors, this goal may be achieved by using “the life of [individuals such as Douglass] to tell a larger story about the [African American] collective.”⁴ One way to do so is by asking: “[What] has impacted the lives of historical actors” and, by extension, other members of society?⁵ Another option is to ask: Do power relationships determine what is studied about Douglass and other members of the Black History Month pantheon?⁶

This Essay adopts the first of these options, to answer a single question: What led Douglass to accept an appointment as the D.C. Recorder of Deeds, especially at the height of his public service career?⁷ A possible answer, which is informed by the historical record and more contemporary accounts,

R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 559–61 (5th ed. 2021) (“Anyone holding an estate or interest in land may record a deed or other instrument to give notice of his rights to the world. In essence, the system is a ‘library’ of documents that an attorney or buyer can inspect to determine whether anyone other than the seller claims any interest in the land [and has a right to challenge a deal]. . . . In the United States, land records are typically filed at a county agency, often called the ‘recorder’s office.’ State law determines both the types of documents that can be recorded and how they are organized. . . . A title searcher can review these records to determine if the seller is able to convey good title. Note that some title problems—such as adverse possession—may not be found in the public records, so additional investigation is needed to guard against these risks . . .”).

3. It is well established that Douglass often selected jobs that advanced his civil rights agenda. Advancing this agenda led Douglass to speak “in favor of women’s rights . . . [, sheltering] escaped slaves, and [denouncing] segregation . . .” *Frederick Douglass Statue*, ARCHITECT OF THE CAPITOL, <http://www.aoc.gov/explore-capitol-campus/art/frederick-douglass> [<https://perma.cc/ZF45-2WSU>]. One job that Douglass expressly accepted, as a way of advancing his civil rights work on behalf of Black people, was the position of Haiti’s representative at the 1893 World Columbian Exposition (that is, World’s Fair) in Chicago. See Daniel Hautzinger, *Frederick Douglass’s Defiant Stand at Chicago’s World’s Fair*, CHI. PBS: WTTW (Feb. 14, 2018), <https://interactive.wttw.com/playlist/2018/02/14/frederick-douglass-chicago-worlds-fair> [<https://perma.cc/JM5H-DJA9>] (describing how Haiti named Douglass as “one of its representatives at the Fair”).

4. Taja-Nia Y. Henderson, “*I Shall Talk to My Own People*”: *The Intersectional Life and Times of Lutie A. Lytle*, 102 IOWA L. REV. 1983, 1984 (2017).

5. *Id.*

6. Douglass is one of several prominent African Americans that are celebrated every February. See generally Kay Boatner, *Black History Month*, NAT’L GEOGRAPHIC KID, <https://kids.nationalgeographic.com/history/article/black-history-month> [<https://perma.cc/GN7H-VKJG>] (“Among the [other] notable figures often spotlighted during Black History Month are Dr. Martin Luther King, Jr., . . . Thurgood Marshall, . . . Mae Jemison, . . . and Barack Obama . . .”).

7. Cf. M. Swift, *May 17, 1881: Frederick Douglass Becomes Recorder of Deeds for Washington D.C.*, BLACKTHEN (June 25, 2021), <https://blackthen.com/may-17-1881-frederick-douglass-becomes-recorder-deeds-washington-d-c> [<https://perma.cc/EK58-HSUR>] (“[Douglass’s] posting as Recorder of Deeds . . . was something of a departure from the . . . positions he’d taken before.”).

is that Douglass accepted such an appointment for three primary reasons.

The first reason is that the D.C. Recorder has been long recognized as an exemplar of fairness, perhaps due to its ministerial obligations, even when there could be no such expectation with respect to how Black folks are treated.⁸ The second reason is this office provided Douglass with a relatively safe position, in economic and political terms, that he used to call for more standard treatment of Black people by various governmental units such as the U.S. Supreme Court.⁹ The final reason is the D.C. Recorder collects public information, in the normal course of its business, which validates Douglass's call for more standard treatment of his African American peers.¹⁰

These three reasons, if they are read as a whole, refer to what the Essay is the first to call *the hidden power of recording deeds*. This power is made up of unnoticed benefits, largely arising from governmental policies informed by procedural fairness, which help to limit racial discrimination. Procedural fairness, by definition, is when U.S. governments refuse to treat similarly situated people in nonstandard ways without adequate justification. One reason for such a refusal to do so is that such a government may have ministerial obligations, which could limit its ability to exercise discretion.

The D.C. Recorder has ministerial obligations which were intended to increase economic efficiency rather than to advance racial equality, such as the duty to register property interests upon the satisfaction of certain conditions precedent, but nonetheless ensure that Black people are treated just like everybody else. This office also does work that highlights the

8. See, e.g., U.S. DEP'T OF INTERIOR NAT'L PARK SERV., OMB APPROVAL NO. 1024-0018, NATIONAL REGISTER OF HISTORIC PLACES REGISTRATION FORM, RECORDER OF DEEDS BUILDING § 9, at 5 (2010) ("Douglass, the first African-American recorder, succeeded General George A. Sheridan . . . who had hired copyist Henrietta Vinton Davis (1860-1941) as the office's first African-American employee in 1878."). It must be acknowledged, however, that the D.C. Recorder's list of ministerial duties was not originally imposed by the U.S. Congress to advance racial equality. Instead, these legal obligations were imposed to increase economic efficiency. Douglass was likely aware of this fact but nonetheless understood that the D.C. Recorder's commitment to providing standard treatment still could advance the interests of Black folks. It would not be the first time that Douglass would use existing policies to achieve his goals, such as regularity of treatment, although said policies were never intended to advance the interests of Black people. See THE FREDERICK DOUGLASS ENCYCLOPEDIA 196 (Julius E. Thompson, James L. Conyers, Jr. & Nancy J. Dawson eds., 2010) (explaining that "Douglass always championed working with or within government for solutions to . . . problems").

9. One example of a governmental unit that was specifically called on by Douglass to provide more regularity of treatment for Black folks is the U.S. Supreme Court, especially after the 1883 *Civil Rights Cases*. This call was in keeping with Douglass's nearly life-long focus on issues that affected Black people. See, e.g., FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS 639 (1892) ("My cause first, midst, last, and always, whether in office or out of office, was and is that of the [B]lack man; not because he is [B]lack, but because he is a man, and a man subjected . . . to peculiar wrongs and hardships [without adequate justification].").

10. *OTR Recorder of Deeds*, OFF. OF TAX & REVENUE, <https://otr.cfo.dc.gov/service/otr-recorder-deeds> [<https://perma.cc/BXH9-J3RW>] (explaining that the office, in Douglass's time and as of this writing, served as "the official repository of all land records and general public instruments").

implications of failing to ensure such standardization, which include unjustified economic losses that stem from adverse selection and other asymmetric information issues.¹¹ Lastly, the D.C. Recorder shows that any such losses are not solely imposed upon Black folks, especially as many neighborhoods have become increasingly integrated, so harms are not limited to property owners in majority-Black areas. Stated simply, this hidden power is a less-than-salient way to remove “unfreedoms that leave [Black] people with . . . little opportunity of exercising their reasoned agency” even if their property rights are chronically violated by unrelated third parties that trespass to land or create nuisances.¹²

This Essay substantiates its modest claims by building on local government law research, including the 2010 *Frederick Douglass Encyclopedia* edited by Julius Thompson, James Conyers, Jr., and Nancy Dawson, which shows that this historical figure frequently called for more procedural fairness.¹³ It also indirectly responds to new procedural fairness scholarship, such as a 2021 paper by Shu-Yi Oei and Diane Ring, which

11. See generally *Information for the Public*, KUNGL. VETENSKAPSAKADEMIEN: THE ROYAL SWEDISH ACAD. OF SCIS., <https://www.nobelprize.org/prizes/economic-sciences/2001/popular-information> [<https://perma.cc/5MGR-L8Q7>] (“Akerlof’s 1970 essay, ‘The Market for Lemons’ is the single most important study in the literature on economics of information. . . . Here Akerlof introduces the first formal analysis of markets with the informational problem known as *adverse selection*. He analyses a market for a good where the seller has more information than the buyer regarding the quality of the product. This is exemplified by the market for used cars; ‘a lemon’—a colloquialism for a defective old car—is now a well-known metaphor in economists’ theoretical vocabulary. Akerlof shows that hypothetically, the information problem can either cause an entire market to collapse or contract it into an adverse selection of low-quality products. . . . A key insight in his ‘lemons paper’ is that economic agents may have strong incentives to offset the adverse effects of information problems Akerlof argues that many market institutions may be regarded as emerging from attempts to resolve problems due to asymmetric information. One such example is guarantees from car dealers; others include brands, chain stores, franchising and different types of contracts.”).

12. AMARTYA SEN, *DEVELOPMENT AS FREEDOM*, at xii (1999). The U.S. Congress also has provided more direct ways to protect the rights of Black property owners such as 42 U.S.C. § 1982, which was enacted as part of the Civil Rights Act of 1866 (requiring that “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”). SPANKLING & COLETTA, *supra* note 2, at 420 (“42 U.S.C. Section 1982, part of the Civil Rights Act of 1866, provides additional protection against racial discrimination: All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”). Other U.S. governments, especially in recent years, have built on this work. See, e.g., Kathryn Brenzel, *State Bill Seeks to Eliminate Racial Restrictions in Deeds, the Real Deal* (Mar. 31, 2022), <https://therealdeal.com/2022/03/31/state-bill-seeks-to-eliminate-racial-restrictions-in-deeds> [<https://perma.cc/WUE4-NEKT>] (“The . . . [New York] . . . state Assembly . . . passed a bill . . . [in 2022,] . . . that would require property owners to remove deed restrictions that discriminate against potential buyers based on race, religion, disability, sex, source of income, marital status or other factors.”).

13. See THE FREDERICK DOUGLASS ENCYCLOPEDIA, *supra* note 8, at 211 (explaining that “Douglass uses his rhetorical techniques to counter blatant ‘disparity’ between [B]lack and whites” in his celebrated Fourth of July Speech).

surprisingly calls for less standard treatment of similarly situated citizens.¹⁴ The Essay then concludes by marshaling the historical record and more contemporary accounts, including a 2016 interview with Karen Yarbrough,¹⁵ to identify how the current Recorder could do even more to advance procedural fairness.

Part I provides additional information about Frederick Douglass and how he may have understood the various powers that are exercised by the D.C. Recorder of Deeds. Part II explains how to build upon Douglass's legacy as the first Black D.C. Recorder, especially his call for more standardized treatment, mostly by explaining how this office could make better use of public information that it has in its possession. The Conclusion offers specific suggestions for how to achieve this goal.

I. BACKGROUND

A. 1817–1871

Frederick Douglass, who was born in 1817, was the most visible Black person of his time.¹⁶ The child of a literate female slave, and an unknown white male,¹⁷ Douglass freed himself from bondage in 1838.¹⁸ Once Douglass gained his freedom, after boarding a train from Baltimore to New

14. See, e.g., Shu-Yi Oei & Diane M. Ring, “Slack” in the Data Age, 73 ALA. L. REV. (forthcoming 2021) (manuscript at 3) (on file with author) (arguing that “slack remains important, over and above formal equitable and leniency provisions, and that it should be safeguarded”); cf. Randall K. Johnson, *Why Illinois Should Reevaluate Its Video Tolling (V-Toll) Subsidy*, 106 IOWA L. REV. 2303, 2310 (2021) (“This Essay asserts that the appropriate remedy for human, or electronic processing, errors is not to award state subsidies to wrongdoers. Especially when such subsidies create perverse incentives which discourage [legal] compliance and unjustifiably waste public resources. Instead, better incentives should be put into place to encourage economically and socially beneficial behavior [by everyone].”).

15. See, e.g., Chicago Agent, *A Controversial Referendum: Why Eliminating the Cook County Recorder of Deeds Could Cost More than It Saves*, CHI. AGENT MAG. (Oct. 3, 2016), <https://chicagoagentmagazine.com/2016/10/03/controversial-referendum-eliminating-cook-county-recorder-deeds-cost-saves> [<https://perma.cc/W3PJ-UYQ2>] (“We provide nearly \$94 million in revenue for the county. This small office, with its 159 employees and its budget of \$11 million—that’s what we do for the county. But we can do more We can record the deeds, and we can make sure we get it right [W]e can also make sure people’s property titles and their deeds are protected. We can make sure they have information. We can advocate on their behalf [and hold more rights violators to account] There is so much we can do.”).

16. See Pamela K. Johnson, *Frederick Douglass Was the Most Photographed American of the 19th Century*, NBC NEWS: NBCBLK, <https://www.nbcnews.com/news/nbcblk/frederick-douglass-always-ready-his-close-n517391> [<https://perma.cc/T9QH-EV8U>] (Feb. 3, 2017, 6:23 AM) (explaining that at least one recent publication “identifies [Douglass] as the most photographed American of the [nineteenth] century”).

17. See Randall Kennedy, *The Confounding Truth About Frederick Douglass*, ATLANTIC (Dec. 2018), <https://www.theatlantic.com/magazine/archive/2018/12/the-confounding-truth-about-frederick-douglass/573931> [<https://perma.cc/FDE8-AZ5H>] (“Douglass could barely recall his mother, [a Black female slave] And he never discovered the identity of his father, who was likely a white man.”).

18. See WALDO E. MARTIN, JR., *THE MIND OF FREDERICK DOUGLASS* 14 (1984) (“On 3 September 1838, Frederick escaped from slavery in Baltimore to freedom . . .”).

York City, he held jobs that allowed him to gain insight into the scope of anti-Black bias.¹⁹ One example is Douglass's work as a newspaper reporter and publisher, which were two positions that Douglass held for the rest of his adult life.²⁰

Based on the knowledge, experience, and training that he gained as a newspaper publisher, Douglass was well aware of how few legal protections were provided to Black people as a class.²¹ This point was underscored in an 1857 U.S. Supreme Court decision, which held that Black folks "had no rights which the white man was bound to respect" under penalty of law.²² This infamous holding, which came to be called the rule from *Dred Scott*, was extended by a series of legal decisions over the course of Douglass's life.²³

In addition, in the lead up to the Civil War, Douglass gained new experiences and insights that taught him about how racial discrimination was practiced. For example, when working as a maritime caulker, Douglass had his business interfered with by a racist third party.²⁴ Douglass also was battered by an angry white mob, which objected to Douglass's support for the Abolitionist movement, but no one was ever held to account.²⁵ A third example is when Douglass's allies subjected him to racist double standards, especially during his time as the top law enforcement official in the District of Columbia, which included limiting the rights that Douglass was entitled to exercise as an officeholder.²⁶

19. *Id.* at 15.

20. See Kennedy, *supra* note 17 ("[Douglass] published many arresting columns in magazines and newspapers, including several that he started.").

21. See Javonte Anderson, *Written in Indignation, Frederick Douglass's 'Fourth of July' Speech Held Divided Nation Accountable*, USA TODAY (July 3, 2021, 8:00 AM), <https://www.usatoday.com/story/news/2021/07/03/frederick-douglass-legacy-4th-july-speech/7817064002> [<https://perma.cc/GD34-D37E>] ("Frederick Douglass, a renowned orator, abolitionist and former slave, criticized the United States for celebrating its political freedom while millions of Black Americans were still enslaved.").

22. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

23. See Stephanie Hall, *Frederick Douglass: "I Am a Man,"* LIBR. OF CONG. (Feb. 14, 2018), <https://blogs.loc.gov/folklife/2018/02/frederick-douglass-folklorist-part2> [<https://perma.cc/8D63-RE3V>] ("Douglass correctly predicted . . . that the culture of slave ownership would become the culture of the oppression of freed slaves unless great efforts were made to give freed slaves their rights.").

24. See Kennedy, *supra* note 17 (explaining that Douglass had "his work as a maritime caulker thwarted by racist white competitors").

25. *Id.* (explaining that Douglass "was repeatedly ejected from whites-only railroad cars, restaurants, and lodgings").

26. See THE FREDERICK DOUGLASS ENCYCLOPEDIA, *supra* note 8, at 169 ("Douglass's role as Marshal was reduced under the Hayes administration. During Abraham Lincoln's term, it had become customary for the Marshal to stand next to the President and announce guests at formal White House receptions. Douglass was relieved of this duty. This, critics charged, was a great slight against [B]lack people.").

B. 1871–1881

After his Rochester, New York home was destroyed by a suspected arsonist, Douglass used his deep understanding of U.S. racism to inform his public service work in D.C.²⁷ By doing so, Douglass was able to bridge the gap between public service theory and actual practice. Among the public institutions that benefitted from Douglass’s informed approach to distributing goods and services was a then-new D.C. Territorial Legislature (1871),²⁸ the D.C. Marshal (1877–1881), and the D.C. Recorder of Deeds (1881–1886).²⁹ His experience with these local institutions, which likely informed Douglass’s approach as the D.C. Recorder, will be discussed in the rest of this Section.

During his brief time in the D.C. Legislature, Douglass showed how unequal treatment had imposed an unjustifiably high cost on the Black community.³⁰ However, due to competing demands, Douglass resigned before fully carrying out his civil rights agenda.³¹ But before stepping down from this position, Douglass introduced a bill to ensure equal public school funding.³² This reform tried to ensure that majority-Black institutions were treated the same way, at least with respect to transfer payments, as majority-white ones.

In 1877, Douglass accepted a second appointment to a D.C.

27. See ARCHITECT OF THE CAPITOL, *supra* note 3 (“After his Rochester home was destroyed by fire (which Douglass believed resulted from arson), [Douglass] moved his family to Anacostia in Washington, D.C., and purchased an estate that he would expand to twenty-four acres.”).

28. See CHRIS MYERS ASCH & GEORGE DEREK MUSGROVE, CHOCOLATE CITY: A HISTORY OF RACE AND DEMOCRACY IN THE NATION’S CAPITAL 160 (2017) (“In February 1871, Congress created a single territorial government for a consolidated District of Columbia. The new government was a democratic hybrid, consisting of a presidentially appointed governor, upper Legislative Council, and Board of Public Works alongside a popularly elected lower House of Delegates and nonvoting representative in the U.S. House.”).

29. See MARTIN, *supra* note 18, at 16. It should be noted that Frederick Douglass also held several federal level appointments with the U.S. State Department (1871, 1877 and 1889–1891). And among the quasi-government jobs that Douglass held was as President of the Freedman’s Bank (1874–1875), although he was unfairly blamed for the bank’s inevitable demise. See THE FREDERICK DOUGLASS ENCYCLOPEDIA, *supra* note 8, at 205.

30. See ASCH & MUSGROVE, *supra* note 28, at 165 (“[B]lack leaders in D.C. who had been involved with [public programs like the Freedman’s Savings Bank], including Frederick Douglass, denounced the ‘grand rascals’ who caused [it to fail] and called on the federal government to [make things right].”).

31. See JOHN MULLER, FREDERICK DOUGLASS IN WASHINGTON, D.C.: THE LION OF ANACOSTIA 45 (2012) (“On June 20, 1871, [Douglass] ‘formally announced, that in consequence of imperative engagements elsewhere, he had tendered his resignation as a member of the [D.C. Territorial] Council.’”).

32. *Cf. id.* (“President Grant appointed Lewis Henry Douglass, Douglass’ eldest son, to fill his father’s seat. Lewis served [almost] the entire two-year term, picking up where his father had left off in advocating for, among other policies, the fair and equal distribution of municipal monies to the [District’s] colored schools.”).

governmental post.³³ This appointment as the D.C. Marshal, however, was subject to a series of questionable conditions.³⁴ Undeterred, Douglass accepted all of the conditions and went on to serve faithfully.³⁵ Once in office, Douglass carried out reforms expressly limiting discrimination. The most important of these reforms banned the use of race in hiring and promotion decisions.³⁶

Douglass's third appointment as the D.C. Recorder is the most interesting for purposes of this discussion. One reason is that it shows, exactly, how Douglass was able to use his past experiences with anti-Black bias to inform his work in registering property interests. For example, Douglass knew that recording deeds had a host of benefits because he was—himself—a Black property owner.

Within this context, a brief review of Douglass's D.C. ownership history may prove to be instructive. His first land purchase as a D.C. resident, which was completed despite the presence of a racially restrictive covenant, made Douglass the first Black person to own a tract of land in what is now called Old Anacostia.³⁷ Douglass's purchase initially included only nine acres of land.³⁸ A subsequent purchase, however, expanded Douglass's

33. This appointment, as the D.C. Marshal, was the most contested of Douglass's public service career. See MULLER, *supra* note 31, at 70 (explaining that the U.S. Senate "vote stood 30 in the affirmative and to 12 in the negative, and of those who cast the latter every one disclaimed basing his opposition upon the race or color of the candidate").

34. See THE FREDERICK DOUGLASS ENCYCLOPEDIA, *supra* note 8, at 169.

35. See MULLER, *supra* note 31, at 70 ("It was hinted that should Douglass be confirmed, the established tradition of the U.S. marshal of the District serving as the 'adjunct of the receptions at the White House' need 'not necessarily' be maintained [due to his race].").

36. *Id.* at 86 ("By the late 1870s, and especially through the 1880s, [Douglass and many other D.C. officials] asked for the . . . repeal [of an 1867 Congressional enactment that restricted Black Washingtonians' entry into the police department] because of the increasing difficulty finding suitable candidates [for D.C. law enforcement jobs]."). Douglass also took less direct measures to increase the real freedoms that Black folks enjoyed. See THE FREDERICK DOUGLASS ENCYCLOPEDIA, *supra* note 8, at 169 ("Perhaps the most positive effect of Douglass' service as Marshal was his ability, through patronage, to distribute minor government positions to [B]lack civil servants. During the Lincoln and Grant administrations, these [government] positions formed the cornerstone of Washington's staunchly middle-class [B]lack community.").

37. See *Frederick Douglass Residence (Frederick Douglass National Historic Site), African American Heritage Trail*, CULTURAL TOURISM DC, <https://www.culturaltourismdc.org/portal/web/portal%20/frederick-douglass-residence-frederick-douglass-national-historic-site-african-american-heritage-trail> [<https://perma.cc/Q5JS-GXTL>] (describing that in 1877, Douglass and his family "were among the first African Americans to own a house in this primarily white enclave, which was Washington's first suburb"); see THE FREDERICK DOUGLASS ENCYCLOPEDIA, *supra* note 8, at 205 ("In September 1877, when Douglass was nearly [sixty] years old, he moved his wife, Anna, into an 1850s [twenty]-room Victorian estate at 316 A Street N.E. In purchasing the estate that Douglass named 'Cedar Hill,' he broke a 'Whites Only' covenant, making his family the first [B]lack homeowners in Anacostia . . .").

38. See CULTURAL TOURISM DC, *supra* note 37 ("When the Douglasses bought the estate[,] it comprised nine acres, a house, a barn, and flower and vegetable gardens."). This parcel, which Douglass called Cedar Hill, ended up including twenty-four acres or so.

holdings.³⁹ These combined land holdings, which came to be called Cedar Hill, served as Douglass's local base of operations until his death in 1895.⁴⁰

Douglass also purchased three additional properties in 1877.⁴¹ Each building was located on the corner of Seventeenth Street and U Street in Northwest D.C.⁴² The first house was occupied by Douglass's son, although Douglass is listed as the sole owner of record.⁴³ The other two houses were rented out, so as to generate income and to provide affordable housing for upwardly mobile Black folks.⁴⁴

Douglass's history as a Black property owner, which included more than one negative experience between 1863 and 1872, likely informed his decision to serve as the D.C. Recorder.⁴⁵ By taking this job, Douglass assured that Black property owners would be treated the same as everybody else. Another benefit is that his appointment drew attention to the hidden power of recording deeds.

C. 1881–1886

The office of the D.C. Recorder generates a large number of public benefits, as Douglass acknowledged in his 1892 memoir. These benefits range from ones that are received by Recorder staff,⁴⁶ such as high salaries

39. *Id.* (“One year later, Douglass expanded his property to [fifteen] acres with the purchase of adjoining lots.”).

40. Cedar Hill now serves as the primary base of operations for research on Douglass. *Cf.* THE FREDERICK DOUGLASS ENCYCLOPEDIA, *supra* note 9, at 206 (“Douglass’s widow, Helen Pitts, worked vigorously toward the preservation of Cedar Hill, which today is maintained by the National Park Service as a memorial to Douglass’s life and legacy.”).

41. *See* CULTURAL TOURISM DC, *supra* note 37 (“In 1877, when Douglass purchased Cedar Hill, he also bought three houses . . . as a real estate investment.”).

42. *Id.* (describing these properties as being “located at 2000-2004 17th Street, NW.”).

43. *Id.* (“[Douglass’s eldest] . . . son Lewis Douglass resided at 2002 17th Street from 1877 until his death in 1908.”).

44. *Cf.* Joshua Clark Davis, *Frederick Douglass, Real Estate Developer*, AFR. AM. INTELL. HIST. SOC’Y: BLACK PERSPS. (June 19, 2017), <https://www.aaihs.org/Frederick-douglass-real-estate-developer> [<https://perma.cc/8Q6N-KZA3>] (“[Douglass also] commissioned the construction of a row of five modest houses [that are located between 516 and 524 South Dallas Street in Baltimore, Maryland]. . . . [R]ecent accounts of [why Douglass developed] these properties contend that Douglass conceived of [these residential] properties as a form of low-cost housing to benefit . . . [B]lack families, but primary sources are more ambiguous about [Douglass’s actual economic, political and social] motives.”).

45. *Compare* Greg Livadas, *RIT Team Identifies Frederick Douglass Land Deed*, ROCHESTER INST. OF TECH. (Aug. 14, 2018), <https://www.rit.edu/news/rit-team-identifies-frederick-douglass-land-deed> [<https://perma.cc/KM8Y-296P>] (“Douglass bought land at 28-30 North Clinton Ave. in [Rochester, New York as an investment] in April 1863. . . . Unable to pay the mortgage, [this investment property] reverted to the original owner—who sold the property for nearly twice as much [as what Douglass owed].”), *with* Richard Brownell, *Frederick Douglass’s Career in D.C. Government*, BOUNDARY STONES (Feb. 18, 2016), <https://boundarystones.weta.org/2016/02/18/frederick-douglass-career-dc-government> [<https://perma.cc/T452-TJRY>] (“It wasn’t until his Rochester, N.Y. home was destroyed by fire . . . that Douglass took up permanent residence in the District.”).

46. *See* DOUGLASS, *supra* note 9, at 638–39 (“The office is one that imposes no social duties

and limited public accountability, to others that accrue to property owners and members of the general public.⁴⁷ Perhaps the most important of these benefits is an ability to collect and analyze property rights violation data.⁴⁸

The D.C. Recorder generates all of these benefits, merely, by discharging its ministerial duties to the public at large. These duties include the exclusive authority to register deeds and other written instruments within the jurisdictional boundaries of the District of Columbia.⁴⁹ Ancillary rights, which were originally delegated by the U.S. Congress in 1863, give the D.C. Recorder the ability to “have charge and custody of all the records, papers, and property” that allow it to do legal rights registration work.⁵⁰ The office also is entitled to, at a minimum, a “working force . . . [consisting] . . . of the recorder, deputy recorder, receiving clerk, transfer clerk, delivery clerk, index clerk, composer and copyists[,] [t]he number of clerks [historically] regulated by the amount of work to be done.”⁵¹

Almost all of the D.C. Recorder’s legal obligations are ministerial in nature. These duties, therefore, must be “performed in a prescribed manner and in obedience to a legal authority.”⁵² By perfectly performing its duties, this office ensures there is up-to-date information about local property rights.⁵³

Douglass was well aware of the D.C. Recorder’s ministerial duties and their potential to advance his civil rights agenda, despite the fact that these duties were enacted by the U.S. Congress to increase confidence in the real estate market. So this knowledge is likely to have informed Douglass’s decision to accept an appointment as the D.C. Recorder.⁵⁴ This previously

whatever, and therefore neither fettered [his] pen nor silenced [his] voice in the cause of [defending the legal rights of Black people in the United States.]”); *see, e.g.*, David W. Blight, *FREDERICK DOUGLASS: PROPHET OF FREEDOM* 883 (2018) (describing how Douglass was “employed by the District of Columbia, his salary the result of a fee-based system determined by the work done by himself and his employees”).

47. *See* J. DAVID STANFIELD, JEFF UNDERWOOD, KIRTHIMALA GUNASKERA & CARL ERNST, *TERRA INST., LAND REGISTRATION AND LAND FRAUD IN THE UNITED STATES* 7 (2008) (describing the fact that every Recorder of Deeds, as a general matter, in the United States, “provides constructive notice for the entire world to see the rights and interests that people have in real property”).

48. *Id.*

49. *See generally* An Act to Establish a Code of Law for the District of Columbia, ch. 854, §§ 548–556, 31 Stat. 1189, 1275 (1901) (codified as amended at D.C. CODE ANN. §§ 42-1201 to 42-1218 (West 2002) (repealed, in part, in 2003)) (describing the D.C. Recorder’s nondiscretionary duties, which were intended to increase economic efficiency rather than to advance racial equality).

50. *Id.*

51. *Real Estate Changes: The Boom Has Given the Recorder’s Office Plenty of Work to Do*, WASH. POST, Nov. 11, 1889, at 7.

52. *Ministerial Act*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/ministerial_act [<https://perma.cc/7QNG-A9BF>].

53. An Act to Establish a Code of Law for the District of Columbia § 548.

54. *See generally* *Real Estate Changes: The Boom Has Given the Recorder’s Office Plenty of Work*

obscure ministerial position had the potential to advance Douglass's civil rights agenda by ensuring that members of the general public had access to up-to-date information about who owns which properties, and on what terms, in the nation's capital.⁵⁵ Such property rights information also had the potential to ensure that the market worked efficiently, at least in cases wherein property registries are up to date, as it limits adverse selection and other information issues.

Black property right holders, often, disproportionately benefit from better and more information.⁵⁶ This fact is evidenced by numerous studies, including ones that use property registry data from the eighteenth and nineteenth centuries in their analyses.⁵⁷ These studies find that Black folks are frequently targeted for a range of property crimes, which are subsequently ignored by federal, state, and local governments even when there is evidence of their commission, resulting in losses being imposed on these property owners without any possibility of recompense.⁵⁸

Additional evidence was provided in late 1883, which forced Douglass to spring into action.⁵⁹ This evidence took the form of five related Supreme Court decisions, which were consolidated as the now-infamous *Civil Rights*

to Do, *supra* note 51, at 7 (“To remove any doubt . . . Congress, by the act of March 3, 1867, made valid all deeds and other papers recorded . . . [between the creation of the office and that date] . . . and thus healed any defects that might have existed to disturb titles as to the way they had been recorded.”).

55. Teo Spengler, *Does a Real Estate Deed Have to Be Filed & Recorded?*, SFGATE (Nov. 28, 2018), <https://homeguides.sfgate.com/real-estate-deed-filed-recorded-48046.html> [<https://perma.cc/KH6G-ZPWF>].

56. See, e.g., Deborah Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES (Aug. 27, 2020), <https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html> [<https://perma.cc/ZU5U-MHYJ>] (“In 2018, researchers from Gallup and the Brookings Institution published a report on the widespread devaluation of Black-owned property in the United States The report found that a home in a majority Black neighborhood is likely to be valued for [twenty-three] percent less than a near-identical home in a majority-white neighborhood; it also determined this devaluation costs Black homeowners \$156 billion in cumulative losses.”)

57. See, e.g., Roy W. Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. BLACK STUD. 646, 649 (2013) (“Unlike the large numbers of poor [w]hite men who were able to acquire land . . . in the late 1800s, African Americans who acquired land did so mostly by private market purchases, . . . under the threat of violence, limited access to credit, overt discrimination and the outright . . . refusal of many [w]hites to sell to [B]lack people.”) (quoting Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 526 (2001)).

58. *Id.* (“St. George Tucker, a law professor at William & Mary, recognized in 1796 [that] the easiest way to smother ‘Free [Blacks]’ quest for economic development and power [is for individuals and institutions to] defeat their ability to acquire property.”).

59. See, e.g., HENRY LEWIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* 251 (2019) (“[Douglass] was bold and direct in his determination to fight the counterrevolution against Reconstruction, as expressed in his condemnation of the Supreme Court’s ruling in 1883 that the Civil Rights Act of 1875 was unconstitutional . . .”).

Cases.⁶⁰ These cases held that U.S. governments have a limited responsibility to address racial discrimination, at least in cases wherein the harm arises from the actions of non-state entities such as individuals and private institutions.⁶¹

Using the additional knowledge, experience, and training that he gained by serving as D.C. Recorder, Douglass sought to counteract the negative effects of the *Civil Rights Cases*.⁶² He did so throughout the remainder of his time in office and in the years before Douglass's 1895 death.⁶³ For example, Douglass often disclosed information that his office collected, in the normal course of its business, to show that there are few downsides to government providing standard treatment.⁶⁴ These disclosures also provided a way of substantiating valid trespass,⁶⁵ nuisance,⁶⁶ and intentional interference with contractual relations claims⁶⁷ that are directed—perhaps only—at Black

60. See THE FREDERICK DOUGLASS ENCYCLOPEDIA, *supra* note 8, at 197 (explaining that “[t]he overturn of the Civil Rights Act inflamed civil rights activists, and Douglass saw it as disregarding the object and intent of the Fourteenth Amendment, leaving [Black people] utterly defenseless against all kinds of prejudices.”).

61. See *Civil Rights Cases*, 109 U.S. 3 (1883) (explaining the Congress exceeded its authority, under the Thirteenth and Fourteenth Amendments, in enacting the 1875 Civil Rights Act).

62. See, e.g., *Proceedings of the Civil Rights Mass-Meeting*, U.S. DEP'T OF INTERIOR NAT'L PARK SERV., <https://www.nps.gov/museum/exhibits/douglass/exb/mightyWord/FRDO11107.html> [<https://perma.cc/H3MG-7UVU>] (“On October 22, 1883, the Supreme Court declared the Civil Rights Act of 1875 [to be] unconstitutional. . . . [Later that day,] Frederick Douglass and Robert G. Ingersoll address[ed] the issue.”)

63. See DOUGLASS, *supra* note 9, at 658 (“Inasmuch as the law in question is a law in favor of liberty and justice, it ought to have had the benefit of any doubt which could arise as to its strict constitutionality. This, I believe, will be the view taken of it, not only by laymen like myself, but by eminent lawyers as well.”); cf. Frederick Douglass, *Speech at the Annual Meeting of the Massachusetts Anti-Slavery Society: What the Black Man Wants* (Apr. 1865), reprinted in THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blassingame & John R. McKivigan, eds., 1991) (“What I ask for the [Black man] is not benevolence, not pity, not sympathy, but simply justice.”); cf. Robert S. Levine, *Frederick Douglass and the Trouble with Critical Race Theory*, L.A. REV. OF BOOKS (Aug. 2, 2021), <https://lareviewofbooks.org/article/frederick-douglass-and-the-trouble-with-critical-race-theory> [<https://perma.cc/2WEE-TZL5>] (explaining that Douglass “presented his own dictum on rights in ‘Lessons of the Hour,’ delivered a year before his death” in which Douglass asked that the United States “[r]ecognize the fact that the rights of the humblest citizen are as worthy of protection as those of the highest”).

64. Cf. Davis, *supra* note 44 (explaining that “Douglass celebrated real estate ownership” and often referenced what he learned as a property owner and as a public official, “in several speeches[,] . . . instructing one audience, ‘We must acquire property’”).

65. A valid trespass claim may require the property owner, or someone else with a current right of possession, to show that a third party has entered into their land without consent. See *Trespass*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/trespass> [<https://perma.cc/3RVE-PFNA>].

66. A valid nuisance claim may require an owner to show that a third party interfered, in a way that is substantial and unreasonable, with an owner's use and enjoyment of land. See *generally Nuisance*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/nuisance> [<https://perma.cc/VAZ3-4XXP>].

67. A valid intentional interference with contractual relations claim requires an owner to show that a valid contract was in place, that the defendant knew about it, that the defendant intended to interfere with the contract, that the defendant actually interfered with it, and that the defendant's interference has caused the owner some injury. See *Intentional Interference with Contractual Relations*, CORNELL L. SCH.:

property owners.

It is unclear what legal effect Douglass's actions had on property rights violators and other anti-Black members of the general public. But it is clear that Douglass's call for more standard treatment impacted Black property owners in a profound way: it showed that at least one official believed in the rule of law. As such, it likely encouraged more Black property owners to assert their rights in U.S. administrative, criminal, or civil forums.⁶⁸

What is even more certain is the social effect that Douglass's actions had on Black people without any property. Many of these folks marveled at the fact that one of their own had openly challenged a U.S. Supreme Court decision.⁶⁹ And when Douglass suffered little to no fallout, in economic, political and social terms, even more people took notice.⁷⁰ One result was an increase in the number of Black folks applying for U.S. government jobs.⁷¹

LEGAL INFO. INST., https://www.law.cornell.edu/wex/intentional_interference_with_contractual_relations [<https://perma.cc/9B4T-PRY8>].

68. See Melissa Milewski, *Rethinking the Role of the Court in the Lives of Black Southerners*, AM. HISTORIAN, <https://www.oah.org/tah/issues/2017/november/rethinking-the-role-of-the-courts-in-the-lives-of-black-southerners/#:~:text=While%20these%20civil%20cases%20involving%20black%20litigants%20occurred,southern%20state%20supreme%20courts%20between%201865%20and%201950> [<https://perma.cc/62P3-83NG>] (explaining that “if we widen our lens beyond voting rights and consider participation in government institutions—including participation in the courts—a different narrative emerges”).

Even when [B]lack southerners no longer could exercise the right to vote or act within other government institutions, some remained able to operate within their states' civil courts. . . . [M]any [B]lack civil litigants initiated their cases, making the decision to bring their dispute before a white-dominated forum. . . . While these civil cases involving [B]lack litigants occurred during Reconstruction, they also continued [and even increased in frequency] to take place in the decades after Reconstruction. . . . [Recent] research unearthed 1,377 civil cases with [B]lack litigants across eight southern state supreme courts between 1865 and 1950. . . . In about a third of these cases, [B]lack southern litigated cases against other African Americans; in the other two-thirds, the cases took place against whites.

Id. (footnotes omitted).

69. See, e.g., Marianne L. Engelman Lado, *A Question of Justice: African-American Legal Perspectives on the 1883 Civil Rights Cases*, 70 CHI.-KENT L. REV. 1123, 1135–36 (1995) (“Frederick Douglass delivered a speech about the *Cases* at a well-attended mass meeting held at Lincoln Hall in Washington, D.C. on October 22, 1883. . . . Although Douglass urged the gathering to respond to the decision without bitterness and advocated patient reform over violent revolution, he argued that the duties of the citizenry and their government are reciprocal [so officials must be held to account].” (footnote omitted)).

70. See U.S. DEP'T OF INTERIOR NAT'L PARK SERV., *supra* note 8 (explaining that “[f]or decades, this made the Office of the Recorder of Deeds the focal point of political, racial, and social conflict, as well as a national symbol of African-American accomplishment”).

71. Douglass also took less salient measures to increase the real freedoms that Black folks enjoyed during his life. See THE FREDERICK DOUGLASS ENCYCLOPEDIA, *supra* note 8, at 169. Douglass's close friends and family often were beneficiaries of such measures, along with a host of third parties, which led to charges of nepotism and corruption by his detractors. See, e.g., Blight, *supra* note 46, at 966 (describing how Douglass was criticized for hiring friends and family, just like his white contemporaries did, as the historic “record makes clear that the entire Douglass extended family lived on the considerable sums made in the collective operation of the Recorder's Office, all having received their appointments from

D. 1886–PRESENT

In the years that followed Douglass’s resignation in 1886, in order to open up opportunities for other Black folks to serve as the D.C. Recorder,⁷² a large number of prominent individuals took up this post.⁷³ Among the reasons that this position proved to be so popular was that it “was among a handful of federally-appointed positions open to African-Americans.”⁷⁴ Another reason was that this job “was a patronage plum, highly-coveted because it was highly lucrative.”⁷⁵

As such, the D.C. Recorder came to be viewed as a means of ascent for ambitious Black politicians across the country.⁷⁶ Many of these politicians used the position, or an analogous office in their own state, as a stepping-stone into higher office.⁷⁷ In Illinois, for example, Jesse R. White served two terms as the Cook County Recorder of Deeds before going on to become the state’s longest serving Secretary of State.⁷⁸ Another Cook County Recorder, Carole Moseley Braun, reached even greater heights. Moseley became a U.S. presidential candidate and the first Black woman to serve in the U.S. Senate.⁷⁹

To summarize, Frederick Douglass’s service as the D.C. Recorder yielded both express and less salient benefits. Among the many express

[the Honorable Frederick Douglass]”).

72. See U.S. DEP’T OF INTERIOR NAT’L PARK SERV., *supra* note 8.

73. *Id.* (“In 1936, [D.C. Recorder of Deeds William J.] Tompkins arranged for [several artists] . . . to paint portraits of his ten African-American predecessors . . .”).

74. *Id.*

75. The National Register of Historic Places Registration Form describes the lucrative nature of the position:

[Property owners] were charged by the word, with one-third of the fee going to the copyist and two-thirds to the office. The recorder used the proceeds to pay office expenses and staff salaries and kept the remainder as personal compensation. . . . Douglass suggested that commercial activity increased so much that the Recorder of Deeds had become the most highly-compensated government official after the President.

Id. (footnote omitted).

76. This unfortunate fact, in the view of many, was not to be something to be celebrated. See *id.* (“[D]uring the McKinley era, a resolution was passed stating that ‘the fact that every ambitious [Black] man in the country aspired to the position of Recorder of Deeds was to be deplored’ . . .”).

77. See, e.g., Chicago Agent, *supra* note 15 (explaining that the Cook County Recorder has been a “launching pad” for Black Recorders of Deeds in Illinois like Carol Mosley-Braun and Jesse White).

78. See *Secretary of State Jesse White Biography*, OFF. OF ILL. SEC’Y OF STATE (Dec. 2020), https://www.ilsos.gov/about_us/biography.html [<https://perma.cc/EP39-9LJW>] (“White served as Cook County Recorder of Deeds . . . [after being elected] in 1992 and . . . in 1996.”).

79. See *Biography Carol Moseley Braun*, U.S. DEP’T OF STATE ARCHIVE (Jan. 2000), https://1997-2001.state.gov/about_state/biography/moseley-b_c_newzealand.html [<https://perma.cc/Q6WK-ATV3>] (“[I]n 1988 [Braun] was elected Recorder of Deeds. Toward the end of her first term as Recorder, [she] stood for the . . . Senate and made . . . history when she was elected in 1992 . . .”). Braun, later, became a U.S. presidential candidate too. See *Carol Moseley Braun*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, [https://history.house.gov/People/Listing/M/MOSELEY-BRAUN,-Carol-\(M001025\)/](https://history.house.gov/People/Listing/M/MOSELEY-BRAUN,-Carol-(M001025)/) [<https://perma.cc/7XWY-QHAU>].

benefits that arose from Douglass's time as D.C. Recorder are that Black property owners received the same type, quantity, and quality of service as similarly situated non-Black owners. As such, it also became requisitely more difficult for other officeholders to give less-than-standard treatment to Black property owners. Especially in cases where their office included at least one Black employee.

And in terms of less salient benefits, such as the fact that Black folks saw one of their own occupying a high-ranking government position, there are many that continue in force to this day. For example, there is a "strong identification . . . of the Office of the [D.C.] Recorder . . . with the struggle of [Black people] for political and social rights."⁸⁰ One reason that such a connection persists is that frequent "appointments of prominent [Black folks] made the [D.C.] recorder position a . . . symbol of achievement."⁸¹

When these benefits are viewed as a whole there is clearly power in recording deeds. This power is made up of largely unnoticed benefits arising from governmental policies that employ procedural fairness principles, which may help to limit racial discrimination. For example, the D.C. Recorder has ministerial duties that require relatively standard treatment, which ensures that Black people are treated just like everybody else.⁸² This office also does work that highlights the implications of failing to ensure such regularity of treatment, which includes unjustified economic losses that may arise from adverse selection and other asymmetric information problems.⁸³ Lastly, the D.C. Recorder shows that any such losses are not solely imposed on Black folks, especially since many neighborhoods have become increasingly integrated, so harms are not limited to property owners in majority-Black neighborhoods. In other words, this hidden power is a less-than-salient way to remove "unfreedoms that leave [Black] people with . . . little opportunity of exercising their reasoned agency" in various

80. U.S. DEP'T OF INTERIOR NAT'L PARK SERV., *supra* note 8.

81. *Id.*

82. State regulation is justified because the private sector, historically and as of this writing, often has failed to take steps to fully account for the unjustified cost of racial discrimination in the U.S. housing market. See Jeremy Sicklick, *It's Time for Private Sector to Address Housing Discrimination*, HOUSINGWIRE (Aug. 6, 2021), <https://www.housingwire.com/articles/its-time-for-private-sector-to-address-housing-discrimination> [<https://perma.cc/LAK5-PBUZ>] ("When it comes to obtaining a mortgage and appraisal, there has always been far too much room for human bias."). *But see* Tim Glaze, *Notarize Offers Free Notarizations to Fight Racist Title Language*, HOUSINGWIRE (Feb. 24, 2021, 6:02 PM), <https://www.housingwire.com/articles/notarize-offers-free-notarizations-to-fight-racist-title-language> [<https://perma.cc/4QGN-L228>] ("Digital notary startup Notarize is now offering free notarizations in an effort to eliminate racial covenants in title insurance documents." (emphasis omitted)).

83. See, e.g., Kamin, *supra* note 56 (explaining that research indicates that properties owned by Black people are "consistently appraised for less than those of their [similarly situated non-Black] neighbors" and that such practices "continue[] to drive down home values").

situations.”⁸⁴

II. RECOMMENDATIONS

This Section explains how to build on Douglass’s legacy as the D.C. Recorder, especially his call for more governments to better protect Black folks, mostly by making additional use of the hidden power of recording deeds. It does so by describing how the current officeholder could limit racial discrimination simply by analyzing a broader set of public information that is already in its possession. This information could help to identify and substantiate right violations that otherwise are under-deterred by the use of trespass, nuisance, or intentional interference with business relations claims.

D.C. Recorder datasets, at least as a general matter, do not include any demographic information.⁸⁵ But these missing race, gender, and ethnicity data may be collected from other government sources such as the Department of Motor Vehicles.⁸⁶ Once obtained, these data may be combined with what the D.C. Recorder has on hand and used to do distributional analyses.

One example of relevant and probative data, which could be used to undertake a distributional analysis, is purchase price information. Purchase price data are collected through Real Property Recordation and Transfer Tax Form FP-7/C.⁸⁷ As of this writing, there is information going back to the 1970s. So, it would be possible to do an analysis that identifies every seller that treats Black buyers worse than similarly situated non-Black buyers: at

84. SEN, *supra* note 12, at xii.

85. Cf. Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1, 5 (2019) (explaining that, in terms of the collection of demographic data by U.S. taxing authorities, “omission[s] of race and ethnicity from tax data . . . [are] exceptional relative to other areas of public policy” where race and ethnicity data are readily available, such as in education or healthcare).

86. See generally Cassius Adair, *Licensing Citizenship: Anti-Blackness, Identification Documents, and Transgender Studies*, 71 AM. Q. 569, 593 n.65 (2019) (“A spokesperson for the American Association of Motor Vehicle Administrators sent this statement: ‘Race is a data element that some jurisdictions collect information on but no longer include on DL/ID [(Driver’s License/Identification Cards)] cards. We do not have information on which, if any, jurisdictions include race on their DL/ID cards, and we don’t have definitive information on who included the data or why or when they would have dropped it—those decisions are made by each jurisdiction. Generally speaking, race began disappearing from physical driver’s license cards about twenty-five years ago.’ The archival record, on the other hand, shows that race began disappearing from cards long before the early 1990s in some states and later (or never) in others (Claire Jeffrey, email message to [Cassius Adair], April 11, 2016”).

87. See GOV’T OF D.C., OFF. OF CHIEF FIN. OFFICER, OFF. OF TAX & REVENUE, OFF. OF RECORDER OF DEEDS, REAL PROPERTY RECORDATION AND TRANSFER TAX FORM FP-7/C GENERAL INSTRUCTIONS (2019) [hereinafter REAL PROPERTY RECORDATION AND TRANSFER TAX FORM FP-7] (requiring, in Part H, that consideration and financing information be described in terms of acquisition price and/or cash received by a seller).

least in terms of what buyers have been asked to pay in an arm's length transaction.⁸⁸

88. This approach also could be used to identify situations wherein Black property owners are unjustifiably offered less, in terms of purchase price or bargaining power, than similarly situated white owners in arms-length deals. Consider, for example, Sara Sneath's coverage of purchase price disparities:

The price paid for property transactions in [the mostly Black community of] Mossville was, on average, about [forty percent] lower than those paid in the white communities [by Sasol], according to the analysis by researchers with the University Network for Human Rights. . . . When [this chemical] company began buying out properties, it [also] gave certain property owners the power to negotiate the value of their estates. Most of the houses bought under this type of arrangement were in Westlake, a nearly [eighty percent] white city nearby. But Mossville residents weren't offered the same deal. When Sasol approached homeowners in the predominantly Black community, they valued properties using a set formula and did not allow for negotiation. . . . Homes in the mostly white town of Brentwood were . . . bought through the non-negotiable program. But . . . homes there [still] sold for about as much as homes in the areas where residents were allowed to negotiate. Property sale prices in Brentwood . . . were about [eighty-eight percent] higher on average than sale prices in Mossville.

Sara Sneath, *A Chemical Firm Bought Out These Black and White U.S. Homeowners—With a Significant Disparity*, GUARDIAN (Nov. 17, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/nov/17/the-is-community-black-families-lost-their-ancestral-homes-their-white-neighbors-got-richer> [https://perma.cc/9DQE-URQ3]; cf. Laura Davison & Ben Steverman, *Treasury Plans First Analysis of U.S. Tax Benefits by Race*, BLOOMBERG (Dec. 14, 2021, 1:00 PM), <https://www.bloomberg.com/news/articles/2021-12-14/treasury-plans-first-analysis-of-u-s-tax-benefits-by-race?sref=y8VYjYe4> [https://perma.cc/L3NA-BDBP] ("The U.S. Treasury is launching an effort to examine the distribution of federal benefits and taxation by race, starting with a look at the pandemic relief payments that were due to most American households. Deputy Treasury Secretary Wally Adeyemo, along with Lily Batchelder, the Treasury's assistant secretary for tax policy, wrote in a blog post Tuesday that the analysis of racial data will allow policy makers to 'more easily analyze the demographic and equity effects of a variety of tax provisions, shedding sunlight on policy choices and trade-offs.'"). Similar reforms have been championed, at least by certain segments of the U.S. private sector, as a way to limit discrimination with respect to mortgage approvals or appraisals. See Sicklick, who states as follows:

Rather than wait for the government to level the playing field through regulation, the housing sector should act decisively by leveraging new technologies—such as machine learning and automated valuation models—that can make objective, data-driven decisions. . . . Studies already also show that digital, algorithm-based mortgage solutions can reduce [racial] discrimination in loan pricing against minority borrowers by [forty percent]. . . . When it comes to appraisals, [similar] tools give consumers a fair and accurate valuation of their property so that they can make better-informed real estate decisions without having to rely on a human appraiser. . . . [These relatively low-cost reforms] can be embraced and become standardized across the industry [and, therefore, ensure that Black folks are treated like everybody else].

Sicklick, *supra* note 82. Another option is to make better use of existing laws that prohibit price discrimination in many settings, although courts have been reluctant to extend the reach of such laws. See generally *Will the Coronavirus Spark a Resurgence of Price Discrimination Claims?*, PROSKAUER ROSE LLP (Apr. 8, 2020), <https://www.proskauer.com/alert/will-the-coronavirus-spark-a-resurgence-of-price-discrimination-claims> [https://perma.cc/ERN4-TYXG].

The Robinson-Patman Act is the federal antitrust law that prohibits selling the same product at different prices to similarly situated business customers. . . . See *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). . . . [But, in recent years, the federal] courts started erecting numerous hurdles that plaintiffs must not overcome to bring a successful Robinson-Patman Act claim. . . . [Examples of these hurdles are found in cases wherein the] Supreme Court rejected simple damages measures based on the differences between the prices offered to favored and disfavored customers. See, e.g., *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 564-65 & n.4 (1981).

Id.

Another example of useful data, which also has been collected in the normal course, is lien imposition information. Lien imposition data, at least for the most part, is captured by Notice of Mechanic's Lien Fill-in Form ROD 16.⁸⁹ As of this writing, public data exist from the 2000s. So, again, it would be possible to identify every single person that filed a mechanic's lien in bad faith or in retaliation for Black people fully exercising their rights.⁹⁰

A final example of relevant and probative data, which already is in the possession of the D.C. Recorder, is deed fraud information. These deed fraud data also are captured by Real Property Recordation and Transfer Tax Form FP-7/C.⁹¹ As of this writing, there is deed fraud information going back to

89. See GOV'T OF D.C., OFF. OF CHIEF FIN. OFFICER, OFF. OF TAX & REVENUE, OFF. OF RECORDER OF DEEDS, NOTICE OF MECHANIC'S LIEN (2012) (requiring verification, in the form of a written certification, by any contractor, contractor's authorized representative, or attorney that seeks to enforce a claim as against any property owner). For more on why the bad faith imposition of liens is important, especially because D.C. law does not allow for any challenge to their validity prior to enforcement, see *Clarke v. Huff*, 165 F.2d 247, 248 (D.C. Cir. 1947) (describing mechanic's lien law in D.C.).

90. A possible explanation for why such crimes take place is that chronic tortfeasors are not being properly sanctioned, even in cases wherein serious abuses are brought to the full attention of regulators. Compare Dan Churney, *Loop Lawyer, Condo Owner Alleges Condo Association's Attorneys Defamed Him*, COOK CNTY. REC. (July 16, 2019), <https://cookcountyrecord.com/stories/512765237-loop-lawyer-condo-owner-alleges-condo-association-s-attorneys-defamed-him> [<https://perma.cc/36RH-29AS>] (describing how a series of lawsuits have alleged that "the board [of the plaintiff's condominium association and its] property manager, Sudler and Company, [and Janelle A. Dixon of the firm of Kovitz Shifrin Nesbit] obstructed his ownership rights and engaged in 'malicious and reckless conduct' " over time), with Debra Cassens Weiss, *Lawyer Who Secretly Changed Origination Credits to His Benefit Should Be Suspended, Ethics Panel Says*, A.B.A. J. (May 6, 2019, 7:00 AM), <https://www.abajournal.com/news/article/lawyer-who-secretly-changed-origination-credits-to-benefit-himself-should-be-suspended-panel-says> [<https://perma.cc/T64V-KNUF>] (describing how another partner, Michael Joseph Shifrin, in the condominium law department at Kovitz Shifrin Nesbit "should be suspended [from the practice of law in Illinois] for making changes that added more than \$200,000 to his book of business" through his publication of more than two hundred clearly false statements). However, even if uneven enforcement and regulatory capture did not create perverse incentives, the status quo still would be difficult to change due to a lack of federal subject matter jurisdiction. See, e.g., Randall K. Johnson, *Why We Need a Comprehensive Recording Fraud Registry*, 2014 N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM 88, 89 (explaining that more enforcement by regulators "will not be effective in many cases unless recording fraud implicates federal subject-matter jurisdiction . . . [so new and different] approaches are needed[, such as a modest expansion of the Nationwide Mortgage Licensing System and Registry (NMLS),] to detect and deter state crimes"). See, for example, *Kovitz Shifrin [sic] Nesbit Debt Collection Class Action Settlement*, <https://classactionsreporter.com/settlement/kovitz-shifrin-nesbit-debt-collection-class-action-settlement> [<https://perma.cc/6HWR-DY2K>], describing one of many class action settlements that Kovitz Shifrin Nesbit has recently entered into with Illinois property owners. This lawsuit was filed by class representative Janice McCarter in response to Kovitz Shifrin Nesbit's allegedly chronic, systematic and bad-faith violations of federal, state, and local laws. See also Erin Shaak, *Kovitz Shifrin Nesbit, One Other Accused of Demanding Illegal Fees, Restricting Lake Access*, CLASSACTION.ORG (Nov. 8, 2017, 4:22 PM), <https://www.classaction.org/news/kovitz-shifrin-nesbit-one-other-accused-of-demanding-illegal-fees-restricting-lake-access> [<https://perma.cc/UK3H-YR3J>], describing the fact that "Kovitz Shifrin Nesbit and Kalman Management, Inc. are facing [another] class action alleging the parties unlawfully attempted to collect membership and attorney fees from Loch Lomond homeowners on behalf of a property owners association" in bad faith."

91. See REAL PROPERTY RECORDATION AND TRANSFER TAX FORM FP-7, *supra* note 87 (requiring, in Part H, that consideration and financing information be described in terms of acquisition

the 1970s. So, it would be possible to identify any existing racial disparities.⁹²

This discussion suggests that additional amounts of public value, which is the idea that a public good or service can “satisfy the aspirations of citizens at the lowest possible cost in terms of money and authority,”⁹³ may be generated by the current D.C. Recorder. This additional public value could take the form of dignitary, informational, and efficiency gains. Illustrative examples include improvements in how recording is viewed by the general public (that is, dignitary gains); a better understanding of how recording protects the various interested parties (that is, informational gains); and some acknowledgment of more productive interactions with constituents (that is, efficiency gains). That is to say, the current Office of the D.C. Recorder may do even more if it fully taps into the hidden power of recording deeds.

CONCLUSION

In the event that the current D.C. Recorder decides to tap into the hidden power of recording deeds more fully, or an analogous office wants to do the same thing, then it makes sense to completely describe its reform plan. This description should take care to explain the exact nature of the problems to be solved, such as that Black people are being disproportionately targeted for certain property crimes, and why this officeholder is obligated to limit any such race-based targeting through its execution of a valid reform plan.

Next, each reform-minded officeholder should explain to its staff that federal and state “citizens are the owners of government and public officials owe a fiduciary duty to act in [these taxpayers’] best interest[s].”⁹⁴ As such, it may be a breach of a public official’s duty to treat similarly situated citizens in nonstandard ways without adequate justification. This fact is true whether the recipient of nonstandard treatment is a Black taxpayer, regardless of if they are a U.S. citizen, or a member of another racial group.

Finally, any such officeholder may want to describe nonofficial steps to be taken under its plan. Such an approach could help staffers, and other interested parties such as consumers of Recorder of Deed services, to

price and/or cash received by a seller).

92. Cf. Lisa Parker, *Loophole Helps Criminals File Fraudulent Deeds*, NBC CHI. (Nov. 18, 2013, 6:50 AM), <https://www.nbcchicago.com/news/local/loophole-helps-criminals-file-fraudulent-deeds/2047618> [<https://perma.cc/LJ26-9Q7S>] (“If the crime sounds far-fetched, talk to City of Chicago Treasurer Stephanie Neely. . . . Neely was at work the day her son called to ask her why she had changed the lock on her . . . home. As the details in her case emerged, Neely says she . . . learned a stranger had filed fraudulent deeds on . . . her and . . . her . . . neighbor’s properties.”).

93. MARK H. MOORE, *RECOGNIZING PUBLIC VALUE* 40 (2013).

94. DAVID H. HOFFMAN & JULIET S. SORENSEN, *PUBLIC CORRUPTION AND THE LAW: CASES AND MATERIALS* 49 (2017).

understand what they have to do going forward. It also may lead to fewer complaints, less public opposition, and increased compliance. And, in the process, each reformer fully taps into the hidden power of recording deeds.