

TRANSATLANTIC JUSTICE: SLAVERY
IN THE JUDICIAL IMAGINATION

Hon. Joseph A. Greenaway, Jr.*

CONTENTS

SPEECH GIVEN AT BIRMINGHAM CITY UNIVERSITY SCHOOL OF LAW
NOVEMBER 3, 20213

INTRODUCTION3

LORD MANSFIELD4

Somerset.....5

Issue5

Conundrum5

Ruling.....6

Dred Scott7

* United States Court of Appeals for the Third Circuit

SPEECH GIVEN AT BIRMINGHAM CITY UNIVERSITY SCHOOL OF LAW
NOVEMBER 3, 2021

INTRODUCTION

Throughout the history of humankind, certain challenges have puzzled society. Education, public safety and the economy are issues consistently at the forefront of our collective minds, but no permanent solution appears. However, in the last three hundred years, particularly in the United States and the United Kingdom, the most perplexing and vexing challenge has been race. At its core, race is unsettling because it unearths an intrinsic conflict and oftentimes a contradiction between our words on the one hand and our policies, laws and actions on the other. Are we countries that live up to the lofty ideal of democracy in which we embrace all who seek to join our citizenry or do we systematically exclude persons from the polity on the basis of race?

Many of you are in the throes of your studies. You examine the world as it is. For all its problems, you see some good and some bad. Our respective countries have attempted to eliminate racism and embrace diversity. What is racism? We certainly could have 100 lectures on its origins and progression. At its core, racism relies on the notion of inferiority. Diversity, another exceedingly complex term, is one of the ways society chooses to combat racism.

Each of you has splendid and numerous examples of how we combat racism. One small example, I was both struck and proud that the entire Premier League took a knee against racism and discrimination over a year ago when post-pandemic play resumed in mid-summer. The entire league continues to do so today. Hopefully, the popularity of Ted Lasso in the States will bring the message of fighting racism and discrimination even more resoundingly to all.

Today, I suggest that we take a step back in history to examine how our highest courts addressed racism through the lens of slavery. The crux of the institution of slavery is the subjugation of one's dignity and the enforced capitulation of one's free will. This process inevitably relies on the perceived inferiority of the slave and creates consequential inequality.

My modest objective today is to examine how England and the United States attempted to address this complex topic through the prism of the law at two particular points in time, through two now famous cases, written by two well-respected jurists, each of whom took an entirely different approach. Hopefully, it will help us understand how the law, at times, moves us towards, or away from, achieving our ideals.

I shall examine the words in their judicial opinions and how those words may have affected events, perceptions and the law in the time they lived and beyond.

I am sure you are asking yourselves—Judge, how far back are we going? Our travels will take us to the 1770s in England and Lord Mansfield, the Chief Justice of the King's Bench, and the 1850s in the United States and Roger Taney, the Chief Justice of the Supreme Court of the United States. Each jurist had a very similar task—answer a question that could profoundly affect their nation and the course of history. The question—if a slave moves from a place that allows slavery to a place that does not allow slavery, does that mean the slave is now free? Exactly what they decided and how they each went about it spoke to whom they were as individuals and judges. Why is it important? The study of slavery speaks to the justification of the dehumanization of an entire people for economic reasons

without the responsibility of moral judgments. As tomorrow's leaders, you should hear and understand how the law, as pure and unencumbered as it may seem, can be both steadfast against and responsive to political and economic concerns.

In the United States, every issue that confronts society at one time or another comes to the steps of the courthouse. Judges are asked to resolve complex issues that society cannot resolve on its own. Those resolutions are not perfect. Judges are earnest in their efforts to come to the appropriate resolution, but we are not infallible. Let's take a step back in time.

In the 1770s, England was the most powerful nation in the world. Its hold on commerce was unquestioned. Its dominance of the slave trade was also beyond dispute. Between the Caribbean and the colonies thousands of slaves were in British control. Despite this dominance many sought to end slavery. Clearly there were religious, moral and philosophical reasons to end slavery. There was no uniformity of opinion in the British Empire.

Interestingly, there was no law regarding slavery in England. It was neither permitted nor prohibited under the law. To be sure, slaves existed in England at this time, but not as a matter of law. This was an opportunity to create new law—hence, the *Somerset*¹ case brought before the preeminent jurist in England at that time.

William Murray, Lord Mansfield, has been touted as the best lawyer of the Eighteenth Century and a jurist the equal of Chief Justice of the United States John Marshall. Lord Mansfield was appointed Chief Justice of Court of King's Bench in 1756, at the time England's highest Court. Indeed, his stature is evident to posterity by the fact that the Supreme Court of the United States has cited to his decisions over 330 times, most recently in 2008.

LORD MANSFIELD

As is true of many transformational jurists, Lord Mansfield was ahead of his time. Thought by many to be the founder of modern commercial law, Lord Mansfield's view on a number of substantive areas was prescient. He viewed the influence of money on elections as a threat to democratic institutions, and he understood and recognized that individuals had a right to privacy. One of his biographers (Norman S. Poser)² put it best:

Mansfield believed that the courts should be engines of social change. He saw morality as the basis of all law, and his court the guardian of public morals. He was willing to supplement the reforms enacted by the legislature and, where it deemed necessary, to make new law in order to achieve justice and to protect the weak.³

This view of Lord Mansfield is most telling. How could morality and slavery be reconciled? Certainly, justice would not permit such inconsistency.⁴

¹ *Somerset v. Stewart* [1772] 98 E.R. 499 (Eng.).

² NORMAN S. POSER, *LORD MANSFIELD: JUSTICE IN THE AGE OF REASON* (2013).

³ *Id.* at 4. See also *id.* at n. 8. See generally, Bernard I. Shientag, *Lord Mansfield Revisited: A Modern Assessment*, 10 *FORDHAM L. REV.* 345 (1941).

⁴ *Somerset*, at 510, "So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely

SOMERSET

The *Somerset* case is thought by some commentators to have ended slavery in England. The opinion did no such thing.⁵ It is an example that the essence of any legal opinion is how the issue is framed. But first the facts. Charles Stewart was a Scottish merchant. He held a position of paymaster of customs in Boston. In 1769, he brought his slave, James Somerset, to England. Notwithstanding his status, Somerset was baptized in 1771. Three abolitionists in England acted as Godparents. At the time, some professed that if a slave was baptized that cleared a path to personhood and out of slavery. Two months later, Somerset escaped but was captured by men hired by Stewart. Somerset refused to return to Stewart. He was taken to a ship on the River Thames to be sent to Jamaica and sold at auction. When Somerset's abolitionist Godparents learned of his capture, they petitioned Lord Mansfield for a writ of habeas corpus. The writ of habeas corpus literally means to free the body. The writ demanded that Somerset's captor be hauled into court to explain why Somerset should be forced to leave England against his free will.

Mansfield had gone to great lengths in other cases to avoid the question of the legality of slavery in England. He hoped, much like cases today, that settlement would occur and obviate the necessity of deciding the issue. The slow progress of the case built up momentum and it became a cause célèbre. Both sides not surprisingly argued policy, property and morality interests.

ISSUE

Lord Mansfield framed the question—Whether colonial slavery laws could be enforced in England in the same way, for example, that a marriage contracted in a foreign country would be recognized in England. Specifically, could Stewart capture Somerset, keep him in captivity and take him out of the country against his will?

CONUNDRUM

On the one hand, to legalize slavery would have many consequences contrary to the law of England. On the other hand, setting free 14,000-15,000 men could also have disruptive consequences.

different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged." See also, *id.* at 500, "slavery in its full extent be incompatible with the natural rights of mankind, and the principles of good government..."

⁵ F. Dumont Smith, *Roger Brooke Taney*, 1 TEX. L. REV. 261, 274 (1923), citing Mansfield as a point of reference in a comment on Chief Justice, "for many years after Mansfield's decision slavery existed in the colleries and salteries of northern England. Mansfield simply held that freedom was the natural state of mankind; that slavery could only exist by virtue of positive municipal law, and as there was no such law in England, Somerset was free while on English soil."

RULING

Lord Mansfield was a principled jurist and noted “Compassion will not, on the one hand, nor inconvenience on the other, be to decide, but the law . . .”⁶

Mansfield felt a tension between his rational and humane beliefs and his unwavering support of British commerce and the sanctity of property. He understood the importance of the slave trade to British merchants, yet he knew that slavery could not be justified on any rational or humanitarian ground.⁷

Lord Mansfield issued a courageous opinion. Although he may have had both religious and moral reservations about slavery, he understood that there were two sides to the argument. His opinion, resulting in Somerset’s freedom, spoke volumes when he quoted the oft-used Latin phrase—*fiat justitia ruat caelum*—let justice be done, though the heavens fall.⁸ This is the phrase carved into the beautiful wooden bench in our ceremonial courtroom here in Newark, New Jersey. It is not merely a symbolic phrase to allow the populace to feel good. It is a critical part of our oath as judges.

Apropos of that thought, the following is a quote from the *Somerset* opinion:

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconvenience, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.⁹

Now, what does the ruling mean—if a slave came to England, ran away while in England, he or she could sue for their freedom and win. There were three important takeaways from the opinion. While Lord Mansfield technically could not deem slavery illegal in England, his opinion did note that an English court would not recognize a slaveowner’s control over a slave. Lord Mansfield insisted that the scope of the opinion was merely that Somerset could not be forcibly taken from England since the writ of habeas corpus (freeing the body) protected both blacks and whites.¹⁰

Similarly, the opinion did not order the end of slavery in England and its colonies.¹¹ At best, it can be persuasively argued that the case set England on

⁶ *id.* at 509.

⁷ POSER, *supra* note 2, at 290, 296.

⁸ *Fiat justitia ruat caelum*, MERRIAM WEBSTER DICTIONARY (2021), <https://www.merriam-webster.com/dictionary/fiat%20justitia%2C%20ruat%20caelum>.

⁹ *Somerset*, at 510.

¹⁰ The opinion in *Somerset* left the issue of slavery to the local jurisdictions, see David M. Golove & Daniel J. Hulsebosch, *The Federalist Constitution As A Project in International Law*, 89 FORDHAM L. REV. 1841, 1867 (2021), “The deaccessioning of slavery from the law of nations, in particular, was energized by Lord Mansfield’s 1772 decision in *Somerset v. Stewart* (Somerset’s Case), which proclaimed that slavery could not be reconciled with the law of nature but depended instead on the positive municipal law of a particular locality for its existence.”

¹¹ Although, it did heighten fears that this may be imminent, see POSER, *supra* note 2, at 296. To some extent *Somerset* had the effect of delegitimizing slavery, ultimately with a

a course to engage in a public conversation in which the entire British Empire addressed the economic, political, religious, and moral consequences of slavery. The slave trade ended in 1807 and slavery was ended in the British Empire in 1833 with the aid of reparations of 20 million pounds to all slaveholders (the equivalent of 2.296 billion dollars today). There was no civil war. There was no bloodshed. Were things perfect? Certainly not.

DRED SCOTT

Fast forward. Eighty-four years after the *Somerset* opinion, in a different place and time, Chief Justice Taney faced a legal challenge that literally had flummoxed preacher, politician, and philosopher from the constitutional convention to that very moment.¹² How can a nation at its nascent stage balance what many believed was a moral and religious wrong on the one hand with an economic reality that the nation relied on slavery for its very existence?

*Dred Scott*¹³ is undoubtedly the most infamous case in the history of the Supreme Court. The opinion was penned by Chief Justice Roger Taney from Maryland. Taney had been appointed by President Andrew Jackson in 1835. The position to be filled was a critical one. Taney was chosen to take over as Chief Justice from the venerable John Marshall—the first Great Chief Justice and thought now to be the greatest in the Court’s history.¹⁴

Taney grew up in a family with slaves. As an adult, he owned slaves for a period of time, but freed them. The freeing of those slaves, coupled with cases in his earlier career, might lead the uninitiated to believe he was against the institution of slavery. Indeed, as a practicing lawyer he represented a Methodist minister from Pennsylvania, Jacob Gruber. Gruber was indicted for inciting slaves to insurrection by preaching a sermon addressing the irony of newspaper advertisements itemizing the sale of slaves alongside horses, cows and sheep.

transatlantic ripple effect reaching the slave states in the U.S., *id.* at 1872, “The loss of this bulwark of legitimation, reflected most famously in *Somerset*’s Case, sent supporters of slavery searching for new justifications within municipal law.” See also Christopher Tomlins, “*Law As . . .*” II, *History as Interface for the Interdisciplinary Study of Law*, 4 UC IRVINE L. REV. 1, 10 (2014), noting the impact of *Somerset* by stating. “Lord Mansfield’s decision in *Somerset*’s case, restricted though it was, weakened slavery’s metropolitan foundations.”

¹² Ruth Paley, *Imperial Politics and English Law: The Many Contexts of Somerset*, 24 LAW & HIST. REV. 659, 664 (2006), considering the influence of *Somerset* in the United States, particularly for abolition movements, “*Somerset* has come to enjoy iconic status in the story of emancipation in America for reasons that go far beyond the limited reality of the decision itself. Its place in the history of America and race relations from the nineteenth century to the present day is a cultural phenomenon in its own right—one that is potentially far more interesting and worthy of study than *Somerset* itself.”

¹³ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

¹⁴ See generally, CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (AMERICAN POLITICAL THOUGHT)* (2000), characterizing the Chief Justice as a “towering figure” in United States constitutional law. See also, Smith, *supra* note 5, at 263, commenting on the difference between Taney and his predecessor, Chief Justice Marshall.

Taney's summation in that case does not seem like the calculated words of a defense attorney. His prose seemed to earnestly represent his thoughts at the time. He stated:

A hard necessity, indeed, compels us to endure the evil of slavery for a time. It was imposed upon us by another nation while we were yet in a state of colonial vassalage. It cannot easily or suddenly be removed. Yet, while it continues, it is a blot on our national character; and every real lover of freedom confidently hopes that it will effectually, though it must be gradually, wiped away, and earnestly looks for the means by which this necessary object may be attained.¹⁵

Although these words may appear to portend what Taney's views are, and therefore how he might rule on the subject of slavery, that form of supposition is a fool's errand. Many a lawyer attempts to guess how a judge might think through a problem based on that judge's background or life experience. Such a pursuit is an inexact science that rarely yields reliable results.¹⁶ Hence, the opinion in *Dred Scott*.

Dred Scott presented a scenario frighteningly similar to the *Somerset* case with an entirely different result.¹⁷ *Dred Scott* was a slave, who was married and had one child. He and his family had been bought and sold several times. As a result, they had lived in several states and territories. He argued that since he had been in free states, he should no longer be considered a slave, based on the precedent of *Somerset*.

The *Dred Scott* case came at a tumultuous time in American history.¹⁸ The country was severely divided on the issue of slavery. As new states and territories became part of the country, Congress had to grapple with whether the state or territory would be slave or free. The abolitionist movement was gaining tremendous momentum. The country seemed to be headed for civil war. Taney believed a firm opinion could resolve the question and avoid war. He was wrong.

He put the issue in the case as follows: "The question is simply this: Can a Negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States . . .?"¹⁹

Despite earlier writings to the contrary, Taney relied on a nakedly racist rationale for the key proposition of the case—Blacks are so inferior no whites could

¹⁵ SAMUEL TYLER, MEMOIR OF ROGER BROOKE TANEY, L.L.D.: CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 130-31 (1872).

¹⁶ See, e.g., Smith, *supra* note 5, at 262-63, commenting upon Taney's interactions with African American people, "One of the little incidents that has been noted shows his attitude towards the Negro. He was passing by a slave's cabin in Washington, and saw a tiny colored girl struggling under a pail of water too heavy for her. The great Chief Justice took the pail from the child's hand and carried it to the cabin."

¹⁷ See generally, William M. Wiecek, *Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86 (1974).

¹⁸ See generally, Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97 (2007).

¹⁹ *Dred Scott*, at 403.

have possibly thought them worthy—whether slave or not—of being part of “our” political community.²⁰

Taney used three principal arguments in surmising that Blacks could not be deemed to be part of the political community at the formation of the United States. He started with the Declaration of Independence, the document that colonists relied upon to declare their separation from England. Taney asserted that the now famous words “[w]e hold these truths to be self-evident, that all men are created equal,”²¹ could not have possibly meant what they said. Taney declared “[b]ut it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration”²²

The interesting historical note is that free Blacks lived and fought in the American Revolution. Indeed, the first person to lose his life in the fight for independence of the colonies was Crispus Attucks, a Black man.

The second major tactic Taney employed was invoking the notion of inferiority. The following is a revealing quote from the opinion.

“They [Blacks] had for more than a century before been regarded as being of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit.”²³

Let’s just take a step back from the opinion for a moment. Taney’s comments undermine the fact that free Blacks at the time were already part of the political community. In many states, Blacks voted and were deemed part of that state’s citizenry. His statement about having no rights which the White man was bound to respect²⁴ was unnecessary and gratuitous. Most important, it undercut any Black’s ability to socially or economically participate in society. Lastly, the notion that slavery was actually an institution for the benefit of slaves requires no comment.

(Back to the opinion.) “He was bought and sold and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every

²⁰ *Id.* at 404-05, “The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race.”

²¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²² *Dred Scott*, at 410.

²³ *Id.* at 407.

²⁴ *Id.*

grade and position in society daily and habitually acted upon it in their private pursuits as well as in matters of public concern, without doubting for a moment the correctness of this opinion.”²⁵

This quote is emblematic of Chief Justice Taney’s opinion. He sought in every way possible to leave no stone unturned regarding the issue of whether Blacks could be thought part of the political community and thus citizens.²⁶

Taney’s third tactic was to reference England and the rest of Europe as adherents to his postulate regarding inferiority.²⁷ He stated that “It is difficult at this day to realize that the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. (This is key) but the public history of every European nation displays it in a manner too plain to be mistaken.”²⁸ He stated further: “And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people.”²⁹

Taney’s reference to England and its position on slavery seems to neglect the persistent moral, political, religious, and economic dilemma that England grappled with from the time of the *Somerset* opinion until the abolition of slavery in 1833. Given the *Somerset* opinion, and subsequent actions throughout the Empire, concluding that Blacks could never be contemplated as part of the English citizenry is certainly subject to question.

Dred Scott lost his case. Interestingly, the son of a former owner bought Scott and his family’s freedom and Scott died soon after the opinion was issued. Justice Taney did not save the confederacy. I say confederacy intentionally. The war came a scant 3 years later. You know how it ended. But think of how these events relate to what you did today. As a result of *Dred Scott* and the union victory, the Civil War Amendments to the Constitution were passed.³⁰ The 13th, 14th, and 15th Amendments were explicitly passed to undo the *Dred Scott* opinion. Blacks were free, Blacks could vote, and no laws could infringe on the rights to due process or equal protection under the law.

²⁵ *Id.*

²⁶ Michael Meranze, *Hargrave’s Nightmare and Taney’s Dream*, 4 UC IRVINE L. REV. 219, 236 (2014), commenting on the conflict between race and the Constitution as presented by Taney in *Dred Scott*, “Taney seeks to make the Federal constitutional order coterminous with the entirety of the colonizing process. The history of America, in this telling, was a war of the races and the Constitution simply one moment in that history.... Law—even constitutional law—was a simple symptom of this underlying racial structure. Put another way, Taney aimed to make his constitutional argument by insisting that the Constitution—at least regarding the enslaved and their rights—made no difference at all.”

²⁷ *Id.* at 478, “But with regard to slavery amongst the Romans, it is by no means true that emancipation, either during the republic or the empire, conferred, by the act itself, or implied, the status or the rights of citizenship.”

²⁸ *Id.* at 407.

²⁹ *Dred Scott*, at 407-08.

³⁰ See generally, Paul Finkelman, *Scott v. Sandford: The Court’s Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3 (2007), writing on the historical, legal and political impact of the *Dred Scott* case.

What are the takeaways from today's lecture? Racism is not a new malady that has befallen our societies.³¹ It is deeply rooted in our histories. It is much more insidious than merely calling someone a hurtful name. It goes to the very essence of our community.³² What shall we do, what shall you do when racism rears its ugly head? Speak up. Fight. Engage. Often lost in these cases are the two men involved—James Somerset and Dred Scott.³³ Their courage got the proverbial ball rolling. The rest as they say is history. Be participants. Get involved. Do your part. The constitutions and laws of both of our countries can be changed and amended when need be. Be part of the solution, not a complainer on the sidelines.³⁴

³¹ Laura Kyte, *Admitting A Wrong: Apology for the Historical Injustice of the Dred Scott Case*, 47 B.Y.U. L. REV. 317, 349 (2021), commenting on the implications of the role of the Supreme Court in interpreting the United States Constitution as being 'colorblind.' "The idea that the Court's interpretation of the Constitution is, or should be, colorblind is a myth. Since the time of Justice Harlan's dissent from *Plessy*, the Court has often referred to the Constitution as colorblind. Or, at least that a colorblind Constitution is an ideal that our systems of governance should strive for. However, this fails to take into account the reality that race has played since the founding of our nation. See also, A. Leon Higginbotham, *Race, Racism and American Law*, by Derrick A. Bell, Jr., 122 U. PA. L. REV. 1044-46 (1974), considering how racism is perceived in the American legal and political system, "Despite the millions of words espoused by lawyers, by lawyer-politicians, and sometimes even by law professors proclaiming the progress of American law, among many there still persists the nagging doubt whether legally sanctioned racism of the past and its present impact will be eradicated in this decade or even in this century. Did the nation reach its highest plateau of racial options and understanding in the late 1960's? Will future improvements be miniscule at best, or will the progress of the 1960's suffer a steady erosion?" See generally, DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (1973).

³² *Id.* "The colorblind ideal fails to acknowledge that our nation was founded on a system that rewarded and incentivized slavery, leading to its expansion in the decades that preceded the Civil War. And it ignores the struggle that black Americans have had to continuously fight in order to obtain equality. The Court's striving for an "ideal" of colorblindness inflicts another type of historical erasure. Ignoring the historical role that race has played perpetuates racism by erasing the racial context that remains as a vestige of racial hierarchy without ever directly confronting or changing the systems that built that hierarchy. Asserting colorblindness as an ideal is simply a way to avoid directly confronting racism with anti-racism. "To be a racist is to constantly redefine racist in a way that exonerates one's changing policies, ideas, and personhood." By failing to see color in its interpretation of the Constitution, the Court fails to grapple with the racial inequities it has effectuated through its holdings" (quoting IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 17 (2019)).

³³ See generally, Alfred L. Brophy, *Slaves as Plaintiffs*, 115 MICH. L. REV. 895 (2017)

³⁴ A. Downs, *Racism in America, and How to Combat It*, in *URBAN PROBLEMS AND PROSPECTS* 77 (1970), provides a definition of what constitutes racism in the U.S.: "Perhaps the best definition of racism is an operational one. This means it must be based upon the way people actually behave, rather than upon logical consistency or purely scientific ideas. Therefore racism may be viewed as any attitude, action or institutional structure which subordinates a person or group because of his or their color. Even though "race" and "color" refer to two different kinds of human characteristics, in America it is the visibility of skin color—and of other physical traits associated with particular color or groups—that marks individuals as "targets" for subordination by members of the white majority."