

- Good day, the Virgin Islands. You are listening to the Ability Radio, You and Your Life. I am your host Amelia Headley LaMont joined by my current cohosts, Atty. Archie Jennings. Good morning.

- Good morning, Virgin Islands.

- We are privileged today to have a very special guest join us. His name is Erwin Chemerenski, he's the dean of the University School of Law at Irvine, California. His expertise is civil practice and constitutional law. He is an author of a book, couple of books. One is called, and what I've been reading is The Case Against the Supreme Court and it was also brought to our attention that he just released a book called Closing the Courthouse Door. Professor, good morning.

- Good morning. It's wonderful to talk with you.

- And thank you so much for joining us.

- Yes, I agree. Thank you very much.

- Well, thank you for having me on your program.

- Well, let's talk about your book, The Case Against the Supreme Court, it's very compelling. And there were a couple of questions that you raised. First of all, why should we even care about Supreme Court decisions?

- Supreme Court decisions affect all of us, often the most important, the most intimate aspects of our lives. I intentionally chose to begin the book with the story of a woman named Carrie Buck who was involuntarily surgically sterilized and the Supreme Court upheld that as constitutional because at that Supreme Court decision, 60,000 people in the United States were subjected to involuntary sterilization.

- And that was a case in the early 1900s, right?

- 1927.

- Okay. And so it goes from there, right? I mean, why should we care?

- Well, as I say, we should care because what the Supreme Court does affects all of us so much. It affects with women have the right to abortion, with the people have the right to contraceptives, what schools we go to, what prescription drugs we take, adverse effects they might, you know, that's, my thesis in the book is that the Supreme Court often has failed, often at the most important times in American history. I intentionally chose to begin the book, chapter one, by focusing on race in the Supreme Court. I argued that over, all in the course of American history, the Supreme Court has had a dismal record with regard to racial justice.

- Now the first case that you talked about, the Book case, this involved an individual who the court deemed to be a woman with an intellectual disability and the argument was because she was a person allegedly with a disability, which you said it was highly questionable, they took, you know, the state or I don't recall who the players were, took an extreme step, right?

- In the early 20th century, states all over the country adopted these so-called eugenic laws that allowed for involuntary surgical sterilization, sometimes for those who were perceived as intellectually disabled, sometimes for those who had committed crimes. Carrie Buck's mother had placed her in a foster home. Carrie went through junior high school always at age level. After that, she remained with her foster parents doing chores. When she was 18 years old, she was raped by her foster father's nephew, she became pregnant as a result of the rape, her foster parents were humiliated by her pregnancy, they had her institutionalized, it was called a home and quoting "For epileptics and the feebleminded." She gave birth to a daughter and then the state began proceedings under the eugenics law to have her surgically sterilized. The only testimony against her was from a social worker who said that she'd examined the

baby and quote, "Something didn't look right about the baby." It was then six months old. And some of them administered an IQ test to her. This was their very first form, an IQ test, and said her IQ was low. Many years later, Harvard professor Stephen Jay Gould found her and gave her a modern version of the IQ test and her IQ test did normal. The Supreme Court though, an opinion by the renowned justice Oliver Wendell Holmes, upheld this, saying, quote, and this is a direct quote, "Three generations of imbeciles is enough."

- I think we are still fighting that same fight today. I'm not sure if you're aware of pillow babies where parents of autistic children are trying to have a method of certain medical procedures to maintain the child at a certain weight and height and basically I'm sure that's gonna float up to the Supreme Court one day because they're essentially assuming the child will never be able to operate on their own and they're taking away his freedom of movement and freedom of intellectual creativity.

- It's tremendously disturbing and I have heard of this and parents who try to keep their children through drugs and chemicals from reaching puberty and the idea that anyone can keep a person from naturally developing, from being able to procreate is really troubling. And Buck v. Bell was a case that didn't need to be decided that way. And it was tragically wrong and it's unfortunately representative of many Supreme Court cases that we look back at that were tragically wrong and did great harm to people.

- The other case of course that comes to mind is the Korematsu case and that involved the overhaul of Japanese-Americans placed in Roosevelt's, said President Roosevelt's words, in concentration camps. What surprised me in your book was what the breadth of, not only were people removed from their homes, they were, their bank accounts were taken from them. I mean, the level of detail was quite striking to me.

- The second chapter of the book focused on throughout American history, whenever there's been a crisis, especially a foreign-based crisis, the response has been repression. In hindsight, we realize we weren't made any safer. You point to World War II, a hundred and ten thousand Japanese-Americans, citizens and noncitizens, and seventy thousand of them were citizens, were rooted from their lifelong homes, they were placed in what President Franklin Roosevelt called concentration camps. Some were literally housed in horse stalls. As you pointed out, their bank accounts were seized, if they were farmers, their land was taken away. Not one Japanese-American was ever indicted or convicted of espionage or crime against national security. Race alone determined who was free and who was incarcerated behind barbed wire. And yet 1944, in Korematsu v. United States, the Supreme Court upheld the constitutionality of the evacuation of Japanese-Americans. Justice Hugo Black, we tend to think it was a similar [ inaudible ] said that war is about hardship, these are just the hardships Japanese-Americans are gonna have to endure.

- But they didn't do that for the Germans or the Italians?

- They did to a much more limited extent. There was some evacuation internment of Germans and bit more of Italian-Americans from the east coast but nothing like the systematic internment of Japanese-Americans, the confiscation of their property and the total deprivation of civil rights just because of their ethnicity.

- Well, let's go back to the question of culture or race as you mentioned and then there is also mention of the Dred Scott, or the dreaded Dred Scott Decision, what's your interpretation or, you know, have we made any progress? I think it may take you to our education issue but let's start with Dred Scott please.

- From 1787 when the constitution was written until 1865, that's a period of 78 years, not one Supreme Court case ever limited the institution of slavery. Every Supreme Court case protected the rights of slave owners and ruled against effort to protect slaves. The most infamous of these was Dred Scott v. Sandford in 1857 that declared unconstitutional the Missouri Compromise, it held the slaves were chattels, pieces of property, not citizens at all in the eyes of the law. In 1896, in Plessy v. Ferguson, the Supreme Court upheld laws that required racial segregation. The court announced the infamous doctrine of separate but equal. And from then until 1954, and that's 58 years, the Supreme Court repeatedly upheld laws that

required segregation. You asked, has there been progress? Obviously this wasn't progress. This is a different world than it was in the 1950s, let alone in the 1890s or the 1850s and yet still, one out of four African-American children in this country lives below the poverty level, far less is spent on a black child's elementary and secondary schooling than a white child's elementary and secondary schooling.

- Which brings us to Brown v. Board of Education which as most of us know that, you know, it declared that separate is not equal, correct? And that's my layman's...

- That's absolutely right.

- ...or laywoman's respective. And you were critical of the court with respect to that and I wanna give you that, tell us why.

- We all should applaud Brown. Brown represents the best of what the Supreme Court can do. The reality is that southern state legislatures and southern state courts weren't gonna declare unconstitutional laws that require segregation, Congress wasn't gonna declare unconstitutional laws that require segregation, it was the Supreme Court unanimously saying laws requiring segregation in education are unconstitutional. They should rightly say the court, held separate, can never be equal. But the court then did very little to enforce Brown. In 1955, a year later, the Supreme Court just said, "Well, we'll send all these cases back to the lower courts to create desegregation," and I'm quoting again ",with all deliberate speed." I have no idea what that means, it seems like a contradiction to me. It wasn't until 17 years after Brown in 1971 that the supreme court first prescribed what should be done to achieve desegregation. Things like redraw attendance zones, transfer teachers, choose where to build new schools, busses for students. And then the Supreme Court followed after decisions that really have created separate and unequal schools. From 1968 to 1988, every year by every measure, American public schools became less racially segregated. Since 1988, every year by every measure, American public schools have been more racially segregated. The segregation is occurring in an accelerating rate, so the court gave us the promise of Brown but it's a promise that hasn't been realized.

- What do you attribute the rate of acceleration? You said it was, you know, decreasing and now it's increasing, what happened?

- Well, the Supreme Court deserves a great deal of the blame for that. In Milliken v. Bradley in 1974, the court said there can't be transfer of students across district lines. So you have cities that are almost entirely African-American and Latino surrounded by all white suburbs and you can't move the students from one to the other. In 1991, in a case called Oklahoma City v. Dowell, the Supreme Court said once a segregated school system has been ordered desegregated, the courts have to get out of it even if it means the re-segregation of schools. So effective desegregation orders in so many places, Oklahoma City, Charlotte North Carolina, Tampa, Florida were ended. And then in 2007, the court said school districts can't voluntarily have policies to assign students to achieve desegregation. You put all of these cases together, you see why segregation is increasing every year.

- Now, we come to the question of criminal defense which is certainly a subject of interest. I know in my encounters with students in the public schools here. I'm struck by the concern about police power, what can the police do, what can the police not do. And you indicated that the Warren Court has some credit. Where do we stand on that?

- Let me focus on the Warren Court decision that I think is like Brown, one with great promise, it's the case of 1963, Gideon v. Wainwright. Many people probably saw the movie Gideon's Trumpet with Henry Fonda based on a very famous book by Anthony Lewis called Gideon's Trumpet. In Gideon v. Wainwright held that every person who's facing a possible prison sentence has a right to an attorney at trial. Isn't it amazing that it wasn't until 1963 that the Supreme Court said that? Gideon's promise is unfulfilled because it had no enforcement mechanism, there was no way of forcing state local governments [ inaudible ] especially competent counsel. The Supreme Court has made it so hard to show ineffective assistance of counsel. I have handled appeals for people who I truly believe are innocent and were convicted because of incompetent counsel. I've handled appeals for people who were convicted and

sentenced to death and I believe it was result of having grossly inadequate counsel. And so yes, Gideon gives a right to an attorney but study after study shows that we don't have a mechanism for ensuring competent counsel.

- And it goes beyond paying them certainly?

- Some of it is paying them. It's fascinating to look at the studies that are done that show that if somebody has a court appointed counsel who's paid virtually nothing, the chances of conviction, the chances of a long prison sentence, even death, are so much greater that if a person can afford his or her own attorney. Money really matters in the criminal justice system.

- And some of this has even resulted in some of the children with disabilities being executed. Is that not an issue before the Supreme Court right now?

- The United States Supreme Court has held that people cannot be convicted of a crime, cannot be sentence to death for crimes they committed as juveniles. That was the Supreme Court holding in 2005 and the Supreme Court has said those who are intellectually disabled cannot be put to death but the Supreme Court is still struggling with how do you determine whether somebody's intellectually disabled.

- Correct. Correct. One of the issues when we talk about how does it affect people in the Virgin Islands, one in the main questions I, you addressed at one of the lectures I attended was the status of the Virgin Islands in regard to what the Supreme Court has ruled and how were neither fish nor fowl under the flag of the United States.

- As a result of coming to the Virgin Islands each year, I've had the wonderful opportunity to learn some about its history and to really focus on what's outrageous. People in the Virgin Islands are citizens of the United States but they don't get to vote in presidential elections, they don't have a representative who gets to vote in Congress. Wasn't it one of the basic principles of the Revolutionary War, no taxation without representation? When it comes to the Virgin Islands, Puerto Rico, in Guam, in the Northern Marianas Islands, the United States is really a colonial power. And this too goes back to Supreme Court decisions now in the early 20th Century called the Insular Cases that approved this.

- And we're, status-wise, called a, "Unincorporated Territory." Exactly what does that mean?

- It means the Virgin Islands.

- [ laughs ]

- Puerto Rico has a different status. They're deemed a commonwealth, but in practical effect, as I say, these places that the United States acquired in the late 19th, early 20th century are just colonies of the United States. The United States is a colonial power and there's no indication that that's gonna change. I think some of that is that people aren't aware of it. I think some of it is because the problem of the District of Columbia. The District of Columbia gets representation of the electoral college so to vote for president but they don't have a representative in congress or in the United States Senate and I don't think that's gonna change and some of it's just gone on this way for a very long time.

- Yeah.

- How would you distinguish that? You've mentioned the Insular Cases. And there was, I believe a Supreme Court case brought by a person from American Samoa and it's my recollection, and I, and I didn't have much detail on it, is that the residence of American Samoa are not citizens, they're considered nationals.

- That's correct. And as I say, when it comes to the Virgin Islands, Puerto Rico, Guam, and the Northern Marianas Islands, they all are in some ways territories of the United States. But their residents are United States citizens. The lower courts [ inaudible ] American Samoa, it's different. It's a territory of the United

States, but they don't get citizenship. And that, of course, becomes even more troubling in terms of their ability to move to the United States, but they still pay taxes.

- All right. All right. And I, if my recollection serves me correct, they're, they are, they don't have the same minimum wage laws extended to the residents of American Samoa as, you know, even here.

- It's just a different status. It's long overdue. It's a century overdue to rethink it. I think some of the problem is nobody has a solution for it. There's no move towards statehood maybe except for Puerto Rico, which there's been votes on that, that they're always equivocal. And there's no likelihood of independence. So, we're in a situation that's existed for over a century, but it's a very troubling one. We would be critical of other countries that still maintain colonies early 21st century. People forget, the United States does so, and the Virgin Islands is such a colony.

- That's correct.

- Well, do you think if of the Virgin Islands made a move towards statehood, would that raise the awareness and maybe address the problem of not being fish nor fowl under the US flag?

- I think if the Virgin Islands did this, it would get attention of skeptical that it would be successful because the only way to really give the Virgin Islands or Puerto Rico or Guam or the Northern Marianas Islands their rights is to give them senators and representatives in congress. That would then take a constitutional amendment and I don't think you can get two-thirds of both house of congress and three-quarters of states to do that in part because of the District of Columbia. You can't give the Virgin Islands a representative and senator without giving it to the District of Columbia and because of the racial composition of the District of Columbia and therefore, the political party affiliation of the District of Columbia, there's no way Republicans are gonna give D.C. to senators.

- One of the things that, you know, the Disability Rights Center has done we had talked about just briefly earlier was had a series of broadcast having to do with health. And a real health crisis that we have here is diabetes, and in previous presentation, you had talked about a case, which I read, I'm very proud to say, "The Bartlett Decision" which, well, I'll defer to you on that, but it's not often that [ laughs ] I get lifted out of my seat out of some powerful pros and, you know, the controlling and dissenting, just the mayores dissenting opinion just sent me, but if you can just explain that.

- There are Supreme Court decisions that is hard to believe that I find, when I tell audience about them, they're skeptical. The case is Mutual Pharmaceuticals versus Bartlett. It's 2013. About a woman in New Hampshire who was given a prescription for the pain reliever, Sulindac. Her prescription is filled with the generic form of the drug. She took the drug as prescribed. She suffered a rare known horrific side effect. Two-thirds of the skin in her body burned, blistered, and decayed. Spent months in a medically-induced coma. She's now permanently blind and disfigured. She sued the company that made the generic drug, saying there was a design defect in the drug. The Supreme Court ruled five to four that makers of generic drugs cannot be sued for design defects. They also can't be sued for failure to warn. They can't be sued in Federal Court. They can't be sued in State Court. If she had taken the brand name version of the drug, then she could sue, but of course, most insurance policy, like mine, will provide coverage only for the generic drug when it's available. Over 80% of all prescriptions in the United States are filled with generic drugs. Well, there's a generic equivalent to the brand name drug. Over 90% of the time, the prescription is filled with the generic drug. All of us who take generics drugs, all of our loved ones, they get injured, even horribly so have no recovery. You ask me, why does the Supreme Court matter to cases like this that shows how much it matters.

- I'm speechless. [ laughs ]

- [ laughs ] Of course, along with the health issues, there's also the employment issues in the Virgin Islands. And I think we talked about a little bit, or we were mentioning, about how much these matters are taken out of court and to arbitration and the move afoot by the employers across the nation to have matters, consumer matters. I've been looking, I work with ARP and I've looked at beneficiary matters

where they have 401 case where you go to arbitration. What is about taking away citizen's rights and sending it to arbitration rather than having it go through the court of law?

- You were kind enough to mention my new book, "Closing the Courthouse Door: How Your Constitutional Rights Became Unenforceable." And I talk a great deal in it about the enforcement of arbitration clauses. You rightly point out that arbitration clauses are endemic. They're all over the place. They're in employment contracts without people even realizing it. One of the most famous Supreme Court cases about this, case called Circuit City versus Adams in 2001, involved a person that filled out a form to apply in electronic store. And in the back, in tiny print was, "If you ever had any dispute with Circuit City, you'd have to go to arbitration." And the Supreme Court said that meant he couldn't bring a discrimination claim in court. There in consumer contracts, if you ever look at your iPad or software in order to use it, you have to click that you agreed to the terms and there's an arbitration clause. Twice, just at the end of last week, people told me of doctors who would not see them without their signing arbitration agreements. The doctors are saying that the insurance company require that they do this. The Seventh Amendment says that we have the right to jury trial in civil cases, but when there's arbitration, there's no jury. When there's a trial, there's public. There's often a reported opinion. When there's arbitration, it's secret. I was just told last week about a company that was engaged in very dangerous practices, but it repeatedly goes arbitration, and has the matters kept secret and if he has to pay the judgment, still there's no publicity for what occurs. Unfortunately, the Supreme Court in a series of five to four decisions, just in the last few years, has upheld these mandatory arbitration clauses. I thought this would be an area that would change if Justice Scalia is replaced by Merrick Garland or a democrat, but it's obviously not gonna happen now.

- I was thinking even under environmental areas, there's been a situation in California, Rancho Puerto where this gas has emanated out of the ground over a whole neighborhood and I just recently heard where they were telling me, residents, they have no recourse because of the matters were setup. I assume they had agreed to arbitration where they can go into court when they bought that land.

- As you mentioned, I'm from Southern California. Porter Ranch is just north of Los Angeles and they had a major natural gas leak that many people became ill. It almost meant that many people had to evacuate homes and it's, at this point, unclear with those who suffered, they'll have any recourse at all.

- Well, speaking of lack of recourse, again, in your book, you mentioned or made distinctions between absolute immunity versus partial immunity, what does a person do? What does a citizen do?

- You had mentioned earlier when we're talking about the criminal justice system, the problem with police abuse in the United States. The Supreme Court deserves some of the blame because it made it so hard to sue police officers and prosecutors that violate the constitution. I mentioned a moment ago that sometimes people are just shocked when I tell them things. I think people are shocked when they hear a police officer who commits perjury on the witness stand, even at least the conviction is in person, cannot be sued for money damages. It's called absolute immunity. A prosecutor who knowingly uses perjured testimony, including to convict an innocent person, cannot be sued for money damages. Prosecutors have absolute immunity under those circumstances so there are individuals who were wrongly convicted and spent years, decades in prison without recourse. There's a man in California, Tommy Lee Goldstein, who spent 23 years in prison for a murder he didn't commit. He sued the prosecutor's misconduct and the Supreme Court said the prosecutors were immune. There's a man in New Orleans, John Thompson, who spent 18 and a half years on death row for a murder he didn't commit and the Supreme Court said he could not so.

- What's a citizen to do?

- Well, in these instances, there's not much. I mean, but this is law that can be changed. The doctrines that I mentioned now about absolute immunity could be changed by federal statute where state and local governments can create liability even where federal law doesn't do that. I also think it's gonna become so important to focus on who replaces Justice Scalia and who fills future vacancies because these doctrines are judicially created. I think almost every case we've talked, or at least these ones, were five-four decision.

- Right.

- Mutual Pharmaceuticals versus Bartlett. The cases about how you can't sue police officers. Well, that's all about who's on the Supreme Court so people need to be vigilant in examining Supreme Court nominees. And if there was, we'll continue these to really press the Senate to block them including by using a filibuster if necessary.

- Well, one example I believe that we were able as a, as a community where people of conscience was able to get around was then the Lilly Ledbetter case. Wasn't that the situation where a woman later learned, which is understandable because people don't brag about what their salary or income is, later learned that she was comparably skilled and was making a lot less money purely because she was a woman. And if I'm not mistaken, Supreme Court said it's okay, but as a result of a congressional action, right? That was overturned.

- You're exactly right. Lilly Ledbetter worked for Goodyear for over 18 years and she discovered near the end of her employment that she was paid significantly less than male workers for the same job responsibilities, the same performance evaluation. She went to sue and the Supreme Court five-to-four just [ inaudible ] writing saying she could sue only for the prior six months. She couldn't sue for all of the years of discrimination, even though not only didn't workers talk about it, the workers there weren't supposed to share their salary information. The Congress though passed the Lilly Ledbetter Pay Equity Act, one of the first bills signed into law by President Barack Obama that amends federal employment law to say somebody like that should be able to recover for the entire period of discriminatory wages.

- Now you talked about, again, being barred from monetary relief. I believe you also mentioned in your book something about, "Well, okay, if you don't want money, how about just stopping the action, injunctive relief? And I got the sense that you can't even get that.

- It depends on the circumstances, but again, to mention a case where when I talk about it, even my students don't believe it, the case called City of Los Angeles versus Lyons in 1982. Adolph Lyons was a 24-year old African-American man. He was stopped about 2:00 in the morning by a police officer for a burnt-out taillight. The officers slammed Lyons hands above his head. Lyons complained that the keys he was holding were cutting to the skin of his palm. The officer then put a chokehold on Lyons and rendered him unconscious. He woke, he had urinated and defecated, he was spitting blood and dirt. He was given a traffic ticket for a burn-out taillight and allowed to go. Did some research and discovered at that point, 16 people in Los Angeles had died from police's use of the chokehold [ inaudible ] Africa-American men. He sued the City of Los Angeles for an injunction to stop police officers from using the chokehold unless it was necessary, the officer's life for safety, but the Supreme Court ruled five-to-four that Lyons could not sue because he could not show that he personally was likely to be choked by the police again in the future. The court said a person who wants an injunction has to show that he or she will personally suffer the injury.

- Again, I guess this brings us to "all lives matter." Or "black lives matter."

- It does.

- Situation if there is something where the state or local legislation could put certain things in place to protect themselves from those activities.

- Absolutely and this is something that's quite important that we see a transition of presidential administrations. There's a federal statute that allows United States Department of Justice to sue local police forces if there's a pattern and practice of Civil Rights violations. The Justice Department has sued a number of cities in authority. Usually there's a settlement called a consent decree that requires reform of the department. This occurred quite famously in Los Angeles after the Rampart Scandal. We're shown that officers were planting evidence on innocent people and lying in court to gain convictions and when Los Angeles Police Department is by no means perfect, it brought about tremendous improvements and

reforms. This is going on in a number of other cities. I think one of the questions about the Trump Administration is will they continue to bring these suits against local police forces when they are patterned and practiced of Civil Rights violations.

- Could you go onto a little more detail about the Rampart scandal. I read that this morning and I was little astounded by who was then the police chief who made some pretty inflammatory remarks. Do you, if you recall.

- Sure. I do recall, I ended up doing a very long report on the LAPD as a result of the Rampart scandal. In 2000, a police officer by the name of Rafael Perez was caught substituting flour for cocaine in the police evidence room. He offered to make a deal to get a reduced sentence in which he would tell of the corruption that had occurred and it turns out that Perez and his partner Nino Durden had regularly planted evidence on innocent people and then lied in court to gain convictions. In fact many in the Rampart which is just a neighborhood in Los Angeles, anti-gang [ inaudible ]. To give one example, there was a man by the name of Javier Ovando. He had a verbal altercation with Perez and Durden. They shot him, left him permanently paralyzed, planted a gun on him, and said that was Ovando who had threaten the officers. Well, it turns out that Ovando gets convicted, sentenced to 24 years in prison and then it's revealed that Perez and Durden planted the gun and they were responsible. This is one of many instances. The police chief at the time you refer to as a man named Bernard Parks. He had risen from being a street officer to being chief. Later was city councilman and he was very defensive to the department. He said to me, to my face. I think it's close [ inaudible ] now until you stand up to bullets, you can't criticize the department. And the new mayor replaced him as chief a consent decree was entered with the Justice Department and they were significant reforms in the LAPD, but I think there's still much to do.

- I think our police department as a matter of fact in the Virgin Islands is under consent decree at the present time and we have a couple of consent decrees ourselves. Trying to get injunctive relief, but for the average citizen who faces Civil Rights issues, what do you suggest they can do as citizens organizing to get their protections enforced?

- You begin with the individual person who's civil rights had been violated their access to a lawyer is really important. A lawyer who can give them a candid assessment of is through the ability to sue and it's to recovery that's possible. So it'll make worth doing, this is why access to lawyer is very important. Well, generally I think in terms of trying to reform the system, I think people need to be part of organizations. There's a limit to one person can do to change the law, but there's wonderful organizations in so many areas that are out there fighting for reform. And could be places like [ inaudible ] Union, NAACP Legal Defense and Education Fund, the Mexican-American Legal Defense and Educational Fund, Planned Parenthood, and we go through the long list, but I think people who wanna bring about form can become part of those organizations and I think they're gonna be ever more important in the next few years ahead.

- Tell us a little bit about yourself. I mean what drives you and what brought you to this line of work?

- I grew up in the South Side of Chicago in a working class family. Neither my parents, my brother, sister had ever gone to college. My brother is an electrician in the South Side of Chicago. My sister works in the home, but I was very much inspired to go to law school by the Civil Rights lawyers in the 1960s. I wanted to go be a public interest lawyer. I became a law professor pretty early in my career. I've been a law professor for 37 years now, but still very much see myself as the Civil Rights lawyer.

- How do you stay positive?

- After the election, the students in my law school held a forum and many were very discouraged by the results of the election. And they asked me to speak and I concluded by saying that we really only have two choices; we give in, give up or we fight harder and I think that really means only of choice which means we're gonna have to fight harder and better than we ever have before. I'm not always positive, but I believe that the course of American History has certainly shown tremendous advances with regards to equality and rights. I worry for what the next few years will bring, but I'm still an optimist, I believe over the long term. There's gonna be advances of equality and rights. It's just gonna be harder to get it than I wish.

- Again I was sort of come up in the same area that you did and again inspired by, you know, the civil rights attorneys in those days as well as I'm trying to put my finger on the pulse, are you seeing young attorneys and law students coming through who have that inspiration, who, or maybe there's something we can do to ignite that fire again?

- Absolutely I see it. I had the delay coming to the Virgin Islands because on the Saturday of Martin Luther King Day weekend, my students decided they wanted to have a daylong teaching about the various issues likely to arise, education, reproductive freedom, employment, the environment. And they asked me to be there for it. We had on a Saturday of a holiday weekend over a hundred and fifty people coming. We're a small school. Because the students have a real passion for change and so I think part of our responsibility as experienced lawyers, as educators, is helping to guide the students into constructive things that they can do to really make a difference.

- Send them our way. We did not, I don't think, talked to, let me link about voting rights and I'd be curious as to your take about the status of the 1965 Voting Rights Act, where we are in that regard?

- I think the 1965 Voting Rights Act was one of the most important laws adapted in my lifetime. The Supreme Court has said that the right to vote is preservative of all other liberties. And yet, it remains systematic disenfranchisement of African-American, Latino voters across the country. The Supreme Court made this much worse in the case in 2013 Shelby County Alabama versus Holder where the Supreme Court declared unconstitutional, a key enforcement provision of the Voting Rights Act. It was a five, four decision. It is the first time since the 19th Century in which a Federal Civil Rights law dealing with race is declared unconstitutional.

- My last one is United Citizens. I was so upset when the Supreme Court ruled, can you explain to the general public how that affects basically not only voting but the use of money in the elections.

- You're absolutely right. The case is Citizen United versus Federal Election Commission. It was decided in January 2010. The Supreme Court ruled five to four, that corporations have the right to spend unlimited amounts of money out of their corporate treasuries to get a candidate elected or defeated. It doesn't matter that much at the presidential level because there's so much money, but when you talk about the local level. You talk about the importance of campaign spending in terms of name recognition [ inaudible ] voters. The amount of corporate money that's been spent is enormous and an increases the selection, and it decides the outcome of elections. I was hopeful that Hillary Clinton had won and a Democratic replaced just [ inaudible ] the court would overrule that president. It itself overruled recent Supreme Court decisions but now it seems it's gonna be the law for a long time to come.

- Now, you're here in the Virgin Islands for the District Court, Annual District Court Conference. Could you give us some preview of what are the cases that you're going to talk about that you're going to present in this group.

- I feel so fortunate to get to come here each year for the Annual District Court Conference and each year I do a review of the Supreme Court decisions from the prior term and a preview of what's ahead this year. Let me pick a case that didn't get much media attention but again, to go to your initial question, it can really affect all of us. It's a case called Utah versus Strieff. There is an unanimous tip that there was drug dealing going on in a house in Salt Lake City. A police officer Douglas Fackrell was watching the house. He saw a man quickly go in and come out. The officer stopped the man and asked the man his name. The man answered honestly, said his name was Edward Strieff. Fackrell detains Strieff into the check for an outstanding arrest warrant. It turns out it was an old arrest warrant for minor traffic violation. Fackrell arrest Strieff, he does what's called a search incident arrest and finds the drugs. The question is can the drugs be admitted into evidence? The State of Utah conceded in the Utah Courts and the United States Supreme Court that the stop of Strieff was illegal. Police can stop a person only if there's reasonable suspicion. The Utah Supreme Court, not one of the more liberal Supreme Courts in the country. Ruled five to nothing that the evidence had to be excluded. The Supreme Court five to three reversed. Justice Clarence Thomas wrote the opinion for the court and said, "Once the police found the outstanding arrest

warrant, they could search, the evidence is admissible." This gives police an incentive to illegally stop people knowing that if they find an arrest warrant, they would search the evidence admissible. Just last Thursday I was talking to the inspector general of Los Angeles Police Department which was great concern that exactly this is now going down to Los Angeles.

- So much for the fruit of the poisonous tree.

- Exactly. And that's why the Utah Supreme Court said the evidence had to be excluded. It was an illegal stop and a violation of the 4th Amendment. The evidence was, to use the phrase that you quoted, a very famous one, it was the fruit of the poisonous tree. It was the product of an illegal stop. And yet the Supreme Court said the evidence come in. So, this is gonna encourage police officers to illegal stop people knowing they find a warrant, the evidence admissible. Justice Sotomayor wrote a very eloquent decent, she talked about the large number of arrest warrants that exist. In Ferguson, Missouri about 80% of the adult population was covered by an outstanding arrest warrant. She talked about degrading it as to be stopped by the police. She spoke especially about what it means for communities of color.

- Are there any other outstanding cases that you may present that we don't know about.

- Sure. Well, I'll pick as an example of the case that, well one of probably people don't know about, I'll talk, it's a case that's pending right now. And I mentioned it is a case that I've been co-counseling from the very beginning, it's two companion cases called Bank of America versus City of Miami and Wells Fargo versus City of Miami. Bank of America and Wells Fargo intentionally directed very high-risk undesirable loans to African-American and Latino borrowers. When the foreseeable happened and they defaulted, the banks were closed, not even offering refinancing on the same terms that were available to white borrowers. The City of Miami sued both of these banks under the Fair Housing Act. The Fair Housing Act allows "Any aggrieved person to sue." The City of Miami says it's injured by this, it's hurt because loss of TAX revenue from the foreclosures, the increased cost of policing when there's abandoned homes, the frustration [ inaudible ] in regard to interracial housing. The Federal District Court dismissed the case saying Miami wasn't really injured. The Federal Court of Appeals reversed saying Miami had an injury. And the case was argued in the Supreme Court on Tuesday November the 8th. It didn't get much media attention because people were focused on something else then. But the case is waiting Supreme Court decision. It's gonna be a very important case because similar suits had been filed by other cities across the country including Los Angeles, alleging the same racially discriminatory lending practices.

- What I don't understand is what is there to gain by providing this vehicle only to see it fail? Is there some of other, what am I missing?

- Well, what the banks are saying is that only people, specific individuals who suffered discrimination in the loans are able to sue. What the City of Miami is saying and the United States Department of Justice came on our side, is that the City of Miami is injured and the Fair Housing Act was meant very broadly to allow people to sue, to stop race discrimination, it's hard for an individual borrower whose house was foreclosed to know of the pattern to bring a suit. But Miami can look at this and the statistics are shocking in terms of who this loans went to and who suffered foreclosure.

- There was also a case but again there's no decision yet, having to do with reexamination of a parents right to request reimbursement for services for a child who needs special education assistance. I'm wondering if you have any sense of where that may go or we may assumed, where do you think we are on this?

- That's a case called Endrew versus Douglas Board of Education and the question is what's the obligation of a school system to provide educational benefits for children with disabilities and is it just a very minimal amount or is it enough to ensure the child an adequate education. And even though they had laws on the books for 40 years that are meant to provide quality and educational opportunity for children with disabilities, we still don't have a clear legal standard. The case was recently argued in the Supreme Court. And it's obvious that the justice are struggling and we have to remember for the case

we're talking about this year, there are only eight justices participating, so we always have the possibility of a four, four tie.

- For the, you know, for the identification of our audience, what's the implication of a four, four tie?

- A four, four tie means that the lower court decision stands. It's upheld without a Supreme Court ruling by an evenly divided court. So, whatever the lower court held that's the ruling. So, in the case that I mentioned, Bank of America and Wells Fargo versus City of Miami, it was a four, four tie. City of Miami wins because it won in the lower court. There's no Supreme Court president. The Justices are free to take up the issue again in the future.

- And one last question on educational issues. What's the implication for public schools if the court decides what is the tantamount meaningful education bar in regard to the provision of educational services?

- The question is exactly what you pose. What is the obligation of a school board in a school district. Tried an adequate education for children with disabilities and I think what the Supreme Court says here it's gonna have an enormous effect on the education of children with disabilities all over the country which goes back to your initial question "Why should we care?" Well, if you're a parent with a child with disabilities then the education that child receives [inaudible] entirely what the Supreme Court rules in this case.

- And again, just again, we're back to Civics 101. The police detention cases that you spoke of. The voting rights cases that you spoke of, the education cases, even though it's decided in Washington D.C. via Supreme Court, it does apply to the people who live in the U.S. Virgin Islands.

- It does. Because obviously the Virgin Islands is covered by the constitution and by federal statutes. So everything that we talked about today applies to those who are here.

- Again, thank you, professor. I'm always amazed when you, do your presentations. I'm more amazed when we have these personal conversations and I couldn't be more grateful for you taking the time. To speak to us today, speak to the people of the Virgin Islands.

- My great pleasure and I hope we can do it again when I return next year.

- Yes, and hopefully it'll be to our other fair island.

- I'd love to. That would be my great pleasure.

- Thank you so much. You're listening to Ability Radio, You and Your Life. If you've missed any portion of this broadcast, this broadcast will be posted on our website which is on [drcvi.org](http://drcvi.org). Again, Archie, thank you so much.

- Amelia, great interview.

- Always a pleasure. And thank you so much Professor Erwin Chemeninsky. Good day.