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University of California  
Berkeley, California

Mark Yudof

A Career Teaching Law, Pursuing Equity in Education, and Leading Public Universities

Interviews conducted by  
Paul Burnett  
2015-2017

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Mark Yudof

**Mark Yudof** is the former President of the University of California and Professor Emeritus of Law at UC Berkeley, following his retirement in 2016. A leader in education reform in the 1970s and 80s, Professor Yudof spent much of his career teaching law at the University of Texas at Austin, and participated in historic cases of corporate contract law. He rose to become Dean of the Law School there, Provost of the University of Texas system and, after seven years as President of the University of Minnesota, the Chancellor of the University of Texas. From 2007 until 2013, Yudof reorganized the University of California in the midst of the greatest fiscal crisis since the Great Depression.

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Foreword by Richard C. Blum, former Chair of the Regents of the University of California

I got to know Mark when I was serving as Chairman of the Board of Regents for the University of California. But I first *heard* of Mark through his reputation as a leader of large, complex public university systems like those in Texas and Minnesota. The UC regents had been struggling with a number of challenges with the UC system for years, challenges of leadership, management, structure, and transparency, and the relationship between the regents and the leadership of the UC system had suffered as a consequence.

It was a struggle to land Mark as the new president of the University of California, in part because he had sunk deep roots in Texas, and had returned there after his time in Minnesota only a few years before. After I met with him, and persuaded him of the unsurpassed excellence of the UC system, we both knew he was up to the task.

What the UC system needed in order to overcome its challenges were top-to-bottom changes in how it was run, and Mark delivered. He not only had the guts to make some difficult and at the time unpopular decisions, he also had the charm and the will to work with the regents, the legislature, the UC executive, the staff, the unions, and the students to right a ship that was faltering. He built up the trust of the regents, which allowed him free rein to lead the University of California.

The challenges of the UC system were bad enough all by themselves, and then came the Great Recession of 2008. In a sense, it made the work of restructuring even more urgent and necessary than before. Mark implemented mechanisms of accountability and a spirit of transparency in his administration that reassured the regents and the legislature, and made disagreements about funding easier to resolve. He established clear lines of communication with administrative units in order to keep tabs on what was happening, anticipate problems, and fix things if he could. But his efforts to restructure in a time of tremendous fiscal austerity also placed a target on Mark's back, an undeserved challenge he handled with grace.

What comes out in this oral history is Mark's wit and charm, but also his eminent common sense in his approach to problems. He talks a lot throughout about the nature of leadership and management, but in his characteristic entertaining way, with concrete examples and his own aphorisms. His down-to-earth manner is perhaps partly a disguise of his love of learning, philosophy, and poetry. You will see very early on that he is a consummate teacher. Mark believes in working to change things tempered by a hard-won understanding of the limits of power, institutions, and our own frailties and folly.

You will also learn of his career-long commitment to fairness, diversity, and access at all levels of public education. The Blue and Gold Program, which guarantees access to promising students from lower-income families in California, is surely one of the top achievements of his legacy.

It was a privilege to work with Mark during those years, and California owes him a great debt for his role in perpetuating excellence and access in our public higher education system.

Richard C. Blum, San Francisco, 2018

Interview #1 April 14, 2015

Begin Audio File 1 yudof\_mark\_01\_04-14-15\_stereo.mp3

01-00:00:00

Burnett: This is Paul Burnett interviewing Professor Mark Yudof for the University History Series. We're here at Simon Hall at the University of California, Berkeley, and it's April 14, 2015 and this is audio file one. Professor Yudof, welcome.

01-00:00:23

Yudof: Thank you. Glad to be here.

01-00:00:25

Burnett: I was wondering if you could begin at the beginning and tell me where you were born and where you grew up.

01-00:00:33

Yudof: Okay. I was born in Philadelphia in 1944. I actually didn't encounter my father until, I think, two years later. He was in the military and he was in Western Europe at the time. My parents sort of had a mixed marriage. My father came from a blue collar family. His name was Jack Yudof. He was an electrician and his father was an electrician and one of his brothers and one of his uncles. They were all electricians. There was a lot of anti-Semitism at the time and his union card said John Young rather than Jack Yudof. My mother came, I think it's fair to say, from more of a white-collar family but sort of down on your luck. My mother's father was named Morris Parris and he emigrated to the United States roughly around 1890. And on his way he stopped in Paris and he liked it so much he changed his name to Parris with two Rs. And he earned a dental degree in 1901, I believe. And he was doing pretty well through the 1920s, although he had three wives. There was a lot of flu epidemics and so forth, so he lost two of his wives. But by the 1930s he was in pretty desperate financial shape. And he was an atheist and a socialist. So this was the white collar family and a blue collar family. And, of course, my mother's family was not too hot on my father. They felt she could do better in terms of, I guess, economics or social/economic class or whatever.

01-00:02:31

Burnett: Can I ask you, your grandfather, did he lose investments in the Crash? Is that what led to —

01-00:02:38

Yudof: No, he lost patients and they kept downgrading his office. People couldn't pay him. They put off their dental appointments. That's what happens during an economic calamity. I don't think he was much of an investor. I don't think he was much of a businessman, to be honest. He was a very cerebral type of man, very active in immigrant movements. They used to have these friendship clubs to welcome immigrants from Russia and from Eastern Europe and Germany. Both sides of the family were Ashkenazi Jews. My father's family was from

Odessa. My father's grandfather was from Odessa and my mother's came from Kiev in the Ukraine.

So anyhow, they were married in 1941. The family story is they were married either late in the day of December 6 or after midnight December 7. My father was in the military, and being a Yudof, he was AWOL at the time because they canceled all leaves and he had this wedding set. He drove from Virginia to Philadelphia and they got married, they went to New York for their honeymoon. The next day the headline was Pearl Harbor had been bombed. And he saw the trucks going through Times Square picking up any soldiers in uniform. So he decided it was time to go back to his base. So they had a one-day honeymoon. He went back to Virginia and his outfit had already shipped out. But it being wartime, there were apparently no consequences to him of being AWOL. And my mother moved in with my grandmother, Rose Yudof and Sam Yudof, my grandfather. She spent most of the war years there, although for a while they lived in Oregon, Medford, Oregon. They were newlyweds and Oregon is beautiful, and beautiful flowers. They were from gritty Philadelphia. For them it was just a marvelous experience.

So anyhow, I was born in 1944. My father was not discharged, I think, until early 1946. And he mainly served in a MASH unit, just like the TV show. He was an electrician. You can imagine, if you have a mobile medical unit, keeping the lights on in the operating room and all that was critically important. He never talked very much about it. I know that he was aboard ship for a while and a boat was sunk and he saved at least one sailor, who he met later on. And he was not one of the liberators of the concentration camps but he came in afterwards and he always told me the story, that he held one of the Holocaust victims in his arm and a guy wanted a Coke, he gave him a Coca-Cola to drink, and then two minutes later he died. He always felt some regret. Maybe if he had done something different the man would have survived. I sort of doubt it. But that was his recollection.

So in around the late 1940s, I don't know the exact date, I want to say maybe '48, something like that, '47, '48, we moved to West Philadelphia on Fifty-Seventh Street near Lansdowne Avenue. It was a row house. It was up, I don't know, twenty steps. It had a garden no bigger than my office. And we stayed there until, I think, 1957. And we were near Overbrook High School, home of Wilt Chamberlain and Walt Hazzard and much later on Will Smith.

01-00:06:54

Burnett:

Well, just to back up a little bit. The time that they were in Oregon, your father was just overseas?

01-00:07:06

Yudof:

They were in Oregon together. My father was in the military and he was assigned to a base in Oregon but eventually he was shipped out to Western Europe. He was in a barrack in Wales, which we visited much later. It's all

boarded up. But eventually he made it to France and to Germany. I guess being with a MASH unit he was not an infantryman, he was not one of the forward units. To my knowledge, he never mentioned being shot at or anything. He was in the next wave after the confrontation between the German soldiers and the Americans and the Brits and so forth.

01-00:07:43

Burnett:

Yeah. Well, if it was a MASH unit he was probably pretty close. Close enough.

01-00:07:46

Yudof:

Yeah. He saw a lot of blood and gore in his time.

01-00:07:49

Burnett:

I bet. When your family moved to West Philadelphia, you were there as a child really. Do you have any recollections of the neighborhood?

01-00:08:05

Yudof:

Well, I do. At that time I would say it was lower middle class, middle class, primarily white families. Later on African Americans tended to expand into that area from other parts of West Philadelphia. And unfortunately, that was just the era. There was an exodus of white families. So I do remember that. We played outdoor sports. Wire ball. You would try to bounce a ball off the telephone wires or you would cut old tennis balls in half and play half ball using part of a broom handle to try to swat that. I remember we had a doctor on the corner and we had a pharmacy across the street and a garage. And I can't remember. We had some sort of A&P or Acme facility, a storage warehouse not very far away. I wouldn't say there was a heavy duty anti-Semitism but I do remember being called names by some of the local kids. And our next door neighbors were devout Catholics and I always had the feeling when the priest came to visit he wasn't too hot to see me around. By and large it was fine.

I always had a somewhat distant relationship, to be honest with you, with my father. He was not an engaging sort. He was working very hard with his hands. Usually worked six days a week. But in all my years, I don't ever remember going to a museum, a movie. I remember one baseball game. He just wasn't very interested in children. That was true. I always thought maybe if we had met earlier it would have been different but it wasn't. And I would say he never asked me how I felt, never told me he loved me. He was a good provider. He was a hardworking good provider, but sort of a rough-hewn man. Educated up to the fifth grade. My mother was very protective. It was an okay childhood. I wouldn't call it effusively happy one.

01-00:10:24

Burnett:

And in terms of any contact that your family had with a larger Jewish community or Jewish identity, was that part of your life at all?

01-00:10:37

Yudof:

It really wasn't. My parents were very secular. Later on they sent me to Hebrew school. Except for my bar mitzvah and later on for weddings, I don't think my parents were ever in a synagogue. My mother was raised by an atheist. Spoke Yiddish but he was an atheist. And by that time my grandparents, who at one point had kept kosher and all that, they were very secular, too. So Judaism meant a few words of Yiddish. It meant that at certain times of the year you could have gefilte fish at my grandmother's. But I didn't know the rules of Passover. And I didn't even know there were kosher rules at that time. So it was very secular. People were not ashamed of their Jewish identity but I always had the feeling that it was associated with the old ways and the old country and this was America and this was a fresh start. So maybe a cultural Judaism but not a religious Judaism and not a participatory type of Judaism.

01-00:11:46

Burnett:

Right, right. In terms of the transmission of political identity from your grandmother down to your mother's generation, she was not interested in that or did she have any influence from that?

01-00:12:01

Yudof:

Well, it was interesting. I would say my father, for most of his life, was apolitical. For a very brief period he considered himself a Republican, or at least voted Republican. But that was very brief. He was a Democrat before, he was a Democrat after. He was a working man and things like social security and things were very important. And he identified with the Democratic Party. I never heard him express a point of view on a foreign policy issue or on Israel. Even on the war. He didn't talk about the war at all.

My mother is an amazing person. She's really extremely bright and empathetic, Eleanor Yudof. She claims she was a Democrat since 1936. That's when my grandmother, a big fan of Franklin Roosevelt, that was their guy, that was their savior. None of them had any truck with Herbert Hoover. And they had all these sayings about Coxey's Army and so forth, events whose meaning I never knew until later on. I read these things that happened in the twenties and thirties to them. In 1936 Delaware County voted eight-to-one for Alf Landon. And later that's where we moved. But for a while, I think my mother was one of seven Democrats in all of Delaware County. Now I think they more regularly elect Democrats. I haven't kept track. But she was progressive in most ways but not really outspoken. She was a very devoted housewife. She had gone to a year of college. She's very smart, had done very well. But she told me much later that she decided not to continue in college, she thought it would be too threatening to her husband, who was not a well-educated man. And by modern standards that's shocking but that's the way she felt at the time.

01-00:14:06

Burnett:

Yeah. I imagine it made for an interesting dynamic.

01-00:14:11

Yudof:

Yeah, it did. She basically was very deferential to my father. He was very demanding. His dinner had to be on the table and he wanted to call the shots and he was more volatile. But occasionally she would stand up and back him off and so forth. I would say they had a pretty good marriage. It was stable and no one cheated, to my knowledge. She loved him dearly and vice versa. And they did things together. But it was largely on his terms and apparently she was all right with that.

She'd had a terrible experience. She was partially raised by a foster mother who was not very loving. When she was welcomed into my father's family, that was a great day for her. So I think she just looked at my father and his family as sort of taking her out of a pretty desperate situation.

01-00:15:04

Burnett:

And into a more stable context.

01-00:15:06

Yudof:

More stable, more loving context. Yeah.

01-00:15:08

Burnett:

Any siblings?

01-00:15:10

Yudof:

Yeah, I have a sister. She was born in 1948. She lives in Austin, Texas, today. She's a teacher. And we got along very well. We were just far enough apart, a little over four years apart, that our social lives did not really intersect very much. We both went to local universities and we married in 1965. And I can't remember the exact date but five or six years later Carol Yudof, now Carol Yudof Bonder, married Lou Bonder and they're still married today.

01-00:15:55

Burnett:

And so you were in West Philly until 1957 or so?

01-00:16:02

Yudof:

Yeah. That's right. And West Philly, I guess I should say, it increasingly became a pretty rough neighborhood. You had to be careful. And my mother didn't drive very much. It was a couple of miles to walk to my school. Now, it was not a log cabin. I'm not going to pull that one on you. But it was a long way. You would walk. You had to be somewhat careful. My grandmother lived near Sixtieth and Pine in West Philadelphia. That used to be like a Jewish ghetto for a long time. And it had the kosher butcher and it had all sorts of things. But I remember walking down the street there and a young kid pulled a knife on me and said, "Don't worry, I'm not going to cut you." It got to be —

01-00:16:49

Burnett:

He just wanted your money? He just —

01-00:16:52

Yudof:

He didn't ask for anything. He just pulled a knife and I looked at the knife and he said, "Don't worry. I'm not going to cut you." And I walked on and he walked on.

01-00:16:57

Burnett:

Oh, wow.

01-00:16:58

Yudof:

That was the whole incident.

01-00:16:59

Burnett:

Right. Just a tension that grew on the street. Yeah. And obviously Philadelphia's a multiethnic city and there's a longstanding strong African-American community. And even then in the fifties, there were organizations struggling for changes in the educational system. There was this Fellowship House, Citizens Committee for a Free City College. So there were these kinds of progressive or left-wing organizations that were active.

01-00:17:46

Yudof:

We were totally apart from all that. I just have to say. Growing up in Philadelphia in that area, it was one of the most racially tense environments that I'd ever seen. When a black family wanted — we later moved to Havertown — wanted to move in, they always organized efforts to keep them out.

01-00:18:06

Burnett:

In West Philly or in Havertown?

01-00:18:08

Yudof:

That was in Havertown. The sort of response of the time was you abandon the inner cities. Where the Italians and the Jews, the Irish and so forth have lived, the African Americans and later the Hispanics moved in. But the race relations were terrible. They were just terrible. We had mayors who were — Frank Rizzo, very strong, and carried billy clubs, and he was a former police commissioner. It was very tense and race relations were very bad. North Philadelphia where Judy went to school at Temple, that was a predominantly African-American neighborhood. There was a lot of tension between what you might describe as the privileged students, most of whom were white, at Temple and the surrounding African American community, which in some ways, I guess, resembled Harlem in New York. These were people who didn't have a lot of money and didn't have a lot of opportunity.

01-00:19:06

Burnett:

Right, right. Absolutely. And Havertown was, I understand, a kind of Irish-American enclave historically, at least.

01-00:19:15

Yudof:

That's not my recollection but you may have looked up some data I didn't know. When we moved, we didn't have a lot of money so we moved into a

tract house. Historically it was part of the main line. It had some fancy houses. I don't know if they were Irish or not. But they were standalone houses, which was unusual for that area of the country. Everyone else had twenty feet across in those row houses. But after World War II there was tremendous pressure on housing. Remember the Levittowns were built. So they found a house, and they didn't think they could afford it, in Havertown, a split-level house, I would guess maybe 1600 square feet. Fifteen, sixteen hundred square feet, three bedrooms at an extravagant price of \$17,000. Probably my dad was, I don't know, earning seven or eight thousand at the time. So it was quite a stretch. For years he worked around the clock. But that was sort of his gift to my mother. She loved it there. The family felt safer. There was grass in the front of the house and grass in the back. We didn't barbecue very well but we did occasionally. The elementary school, which I did not attend, was a couple of blocks away. It was an era of trying to escape from these racial tensions, not to confront them. Maybe other people were confronting them but not my — I was a child. But in that context they weren't confronting them.

01-00:20:50

Burnett:

Right, right. And there were these structural forces that were moving people around. Absolutely. It's a pretty neighborhood. It's these kind of separate homes, brick homes.

01-00:21:03

Yudof:

Yeah, they were quarter-acre lots. They were mostly brick. I'm trying to remember. Maybe the back was not brick. And you paid a couple hundred bucks extra and you got some Philadelphia stone on the front of the house. And it was a pretty good area. Although, unlike in Philadelphia, you really did need an automobile. I thought it was funny. When my parents moved there, the theory was that Interstate Ninety-five was coming through that area and you'd be able to get to downtown Philadelphia quickly and get to the airport quickly. Not that they ever took airplanes. When they moved out, which I think was 1989, it had just opened, I-95. It was a full thirty years of litigation, construction, or whatever. It was amazing. But that's one of the things the salespersons were touting. Even though it seemed far out. To get to downtown Philadelphia, City Hall, it was at least forty-five minutes to an hour driving.

01-00:22:08

Burnett:

Yeah, yeah. I guess I-95 runs up the Delaware, so it was even further away than where they had hoped. There's the Seventy-six that goes up Schuylkill.

01-00:22:17

Yudof:

Yeah. I won't go through it, but it was a circuitous route to get to Seventy-six. And my grandmother had moved to the northeast. That was another place people would flee to. And it took an hour to get there and we went once a week to see her. I don't remember very much else about the neighborhood in West Philadelphia. I didn't have any really good friends. Schooling was not much of an issue. I was an okay student in elementary school. I look it up occasionally. Now, of course, it's a predominantly African-American school

but there's still a lot of school pride. I think it functions pretty well. I haven't kept up.

01-00:23:05

Burnett:

You said your mother sent you to a Hebrew school? Or that was just extracurricular?

01-00:23:12

Yudof:

That was a year or two before I was bar mitzvahed in 1957, I think. This was vicarious religion for them. They didn't know any of this stuff and they didn't go to synagogue. So it just meant more walking distance for me. So I would walk back and forth to school but then I would go to Hebrew school, I would study Hebrew. They had a Sunday school, too, I think. And then eventually for the bar mitzvah I had lessons. It was not a good time for Jewish education. Everything was by rote. I understood nothing. I memorized things. They didn't tell me what it meant. I didn't even know what the translations were. I had an elderly man, a very nice man, and he recorded my bar mitzvah portions and I listened and I did it and eventually I was bar mitzvahed. But there was no real engagement. It turned a lot of Jewish people off, future Jewish people off. And maybe because I received no support at home for that stuff.

01-00:24:17

Burnett:

Right. So it wasn't all that meaningful to you at the time.

01-00:24:22

Yudof:

I guess I was happy to be bar mitzvahed but it wasn't very meaningful because I didn't understand it. I didn't understand the language and no one explained the rituals to me. And because we didn't observe any of this at home, I didn't have my parents reinforcing it. Maybe it was just in their crowd de rigueur that the male children would be bar mitzvahed if possible. At that time the female children were not. All that changed later on. My wife Judy was bar mitzvahed at age forty.

01-00:24:55

Burnett:

Right. Wow. So you had moved to Havertown and that's right around the time you were bar mitzvahed.

01-00:25:01

Yudof:

Right. The house wasn't fully completed. So I was enrolled in school and I went to Haverford Junior High School. I don't know how that worked. But in any event, we weren't physically in the house. So for a while she was driving from West Philadelphia, taking us to and from school, which for her — she never particularly enjoyed driving. This was pretty arduous for my mom. And then, of course, we did move in. I guess I transferred in the eighth grade. I wouldn't say my public school career was too stellar to that point. Elementary school is elementary school and I remember flunking handwriting. My mother was actually cheered. She thought that meant I'd be a physician. And then I transferred to Beeber, which is really a rough high school. People were always threatening to beat me up and conk me over the head.

01-00:26:05

Burnett: Oh, my God.

01-00:26:07

Yudof: Some rough elements. I wouldn't call it demographically diverse in terms of race but there were some tough kids there.

01-00:26:18

Burnett: And that's Beeber?

01-00:26:20

Yudof: Beeber Junior High School. Turned out my wife was there also but a half-year behind me or something. But I hadn't met her. And I do remember one class. We took a citywide math test and interesting commentary on the time. The teacher, who was a terribly disagreeable sort, not much of a teacher, she stood up in front of the class and she said, "You'll never guess who got the highest grade on the math test." These aren't her words but she said, "See that schlemiel back there in the last row, Yudof, he's the one who got the highest score." I wouldn't call it positive reinforcement.

01-00:26:57

Burnett: So you didn't have inspiring educational experiences?

01-00:27:06

Yudof: No. And my mother cared some. My father was totally indifferent to the education side. My mother, "That's nice, Mark. You got a bunch of As and Bs." I remember one year they offered me fifty cents an A and then I got too many As and they reduced it to a quarter. I suffered deflation personally.

01-00:27:26

Burnett: Exactly. And so there was a context that was somewhat supportive but you had to be your own driver in that sense.

01-00:27:36

Yudof: Yes. I think they wanted me in school. They didn't want to be called out. I remember one day at Beeber, this only happened once in my life, a kid took my seat in the lunch room and pushed my tray. So I hauled off and punched him. I remember the teacher looked at me, said, "You're just like the Russians." I'll never forget that. Apparently —

01-00:27:55

Burnett: Whoa.

01-00:27:55

Yudof: — because they were considered aggressors. Well, they were aggressors at the time. They had to come in. My mother showed up. They let me off with a warning. I went to see my grandmother and she said, "Should have hit him harder."

01-00:28:10

Burnett:

Right. Yes. I think junior high school seems to be that kind of universal space where there's always at least one challenge. If you're male, there seems to be one and you step-up or you're sort of placed in a category of someone who can be picked on.

01-00:28:27

Yudof:

I think I was. I was very quiet. I was not outspoken. I paid thirty-five cents for my lunch and I was going to sit down and eat it. And this ruffian interfered and wouldn't compromise.

01-00:28:39

Burnett:

Right. So publicly you stood your ground and it —

01-00:28:43

Yudof:

Yeah. I've always had a temper but I usually control it. But on that occasion I didn't. But anyhow —

01-00:28:51

Burnett:

Right, yeah. Your parents were brought in to go through the pro forma process of —

01-00:29:00

Yudof:

Yeah, there was some meeting with the principal or something. I don't remember. I don't think I was suspended or anything.

01-00:29:10

Burnett:

But it was a tough place. And you did well in school by your own lights pretty much.

01-00:29:19

Yudof:

I did okay. I wouldn't say I was an academic leader. Occasionally I would do well in things like mathematics or history. It's hard to say. I'm not an existentialist but it was just something you endured and you did. That's where I was supposed to be; that's what I did. And they told me what courses I had to take. Some of them I liked, mechanical drawing, and other classes they made the boys take sewing. I don't think I did a straight seam the entire time. Now, it didn't help that they didn't give me any instruction on how to do it. And I was afraid of nailing down my hand. It's not so easy with the old-time sewing machines. There was a sort of tacit understanding that I would go to college but there was really no oomph behind it. No one ever said, "Mark, you need to study," or "Mark, you need to do this," or "Mark, you keep up this bad behavior you'll never get into a decent college." So all this was to be endured and suffered and lived but it was not a sort of preordained sort of career path or academic path.

01-00:30:40

Burnett:

Right. And was high school the same? Was there —

01-00:30:45

Yudof:

When we moved to Havertown, one big change was all the kids were really smart. I thought I'd never get out of Haverford High School. And these kids that came in after the war, the baby boomers, a lot of them were very smart and their parents really were pushing them very hard. So it was extremely competitive. That was one difference. There were still bullies. I was beaten up once in Havertown. And called the cops. And I can't remember who got involved. That was not pleasant. That was just the times. We had some crazy teachers, some of whom were masochists and some of whom were quite good. It just varied a lot. Curriculum was uninspiring. At one time I could name every county in Pennsylvania. Why? I have no earthly idea.

01-00:31:36

Burnett:

So they worked on your recall.

01-00:31:39

Yudof:

But I began to do better and I was good at algebra and stuff. I was not good at geometry. That's one of my problems in life. I have a very limited sense of spatial relations. I remember taking the selective service exam years later and they would say, "What is this thing?" And I would say a vacuum cleaner and the answer was gasoline engine. I had no earthly idea. And along the way I scored the lowest score I think ever recorded in Haverford for mechanical ability, three on a scale of a hundred. So it seemed pretty clear to me I was not going in to be an electrician or a carpenter or a plumber. I had no ability.

01-00:32:17

Burnett:

A facility with writing? History classes? Would this —

01-00:32:21

Yudof:

That came later. Yeah. I never did learn to write in high school. A lot of it was multiple choice examinations and stuff like that. I was good at history. I was a good student. My *bête noire* was language. I took French and got Cs in that. Then I didn't take it another year. And that meant some of the schools I wanted to attend I couldn't because they required two years of language. When I got to college I switched to Spanish. I was only marginally better at Spanish. And geometry, as I say, was a real difficult thing for me because I just had no sense of the spatial relations. As you grow older you learn that people have different types of skills and there are multiple types of IQ or intelligence. I was pretty good at the sort of linear-algebraic sort of thing but I was terrible at the creative task of connecting lines and imagining different shapes and so forth.

01-00:33:22

Burnett:

Right. But it sounds to me like for drivers there was almost a peer pressure of the other students doing well. You realized that you were in a tougher competitive environment and you met it?

01-00:33:39

Yudof:

I'd like to say that's true. To be honest with you, I think I probably went with the crowd. I didn't feel the pressure. I didn't feel it at home, I didn't feel it from the peers. But people studied, I studied. People took exams, I took exams. I had a very low energy, low key type of life. I didn't have my heart set on some type of career. If I did, I didn't know the relationship between the career —

01-00:34:12

Burnett:

And the schooling.

01-00:34:13

Yudof:

— and what I was studying and so forth. It's sort of hard to explain. You put someone in an environment and they adapt to it. But it really wasn't, "Gee, I'm surrounded by smart kids. I better be careful, study a little harder for my geography exam." It really wasn't like that. Now, I was a frustrated athlete during that time. I was good at virtually nothing, so that was the problem. So I was fourth string on the football team. I almost never played. I didn't have the best coaching but I still had no talent. And then one day the play went the other way and a sneaky halfback punched me in the stomach away from the play, just because he could. And I was lying on the ground and the coach peered down at me and said, "Yudof, it's a tough league." I remember him saying that. I do remember thinking to myself, "There has to be a better way of earning a living than this. This is not working for me. It really hurts and I'm not any good at it."

01-00:35:15

Burnett:

I know. Yeah.

01-00:35:16

Yudof:

Then I tried out for the baseball team. I did a little better there but didn't make the team. I had all sorts of junk pitches. Served me well as president. Screwballs, knuckleballs, sliders, whatever. I did that. Then I decided, well, I'll go out for the swim team. I almost drowned so I dropped off of that. And then I went out for track. Oh, by the way, my football team was junior varsity. I never got any higher. I went out for track. I said, "They have this little bowling ball they throw." You do the shot put like this.

01-00:35:49

Burnett:

Right, sure.

01-00:35:50

Yudof:

I thought, "This is okay. I can do this." And so the first day of practice I'm out there throwing it, not very far. Again, this was an era no one instructed anyone to do anything. I don't know how anyone sort of excelled at anything because the intergenerational education was extremely limited, at least where I lived. But then the coach announced that the whole team had to run around and around and around the track, even the shot putters. So I dropped off of the track team because I thought I'd just throw this little bowling ball. I wasn't

there to go running around a track for miles at a time. So I had a short-lived athletic career.

01-00:36:30

Burnett:

I'm trying to connect this story to what happens next. So you attend the University of Pennsylvania.

01-00:36:40

Yudof:

Again, I didn't study for the SATs. I had taken the PSATs and I did pretty well on that, particularly in math. I did pretty well but not as well as I thought I should have. And the SATs in my senior year. And it's time to go to college. So the understanding was I would go to a local college because we didn't have any money for this. My parents had not saved anything. And it was not a priority frankly. Maybe for my mom but not for my dad. And I remember one of the biggest fights my mother and father had, and it involved me. And I didn't know what to do. But I got admitted I think to Penn and Temple, I think Dickinson. I may have applied somewhere else. I just don't remember. I was a kid. I might have applied to Yale or something but I had no chance at all because I didn't know what I was doing. My dad threw a hissy fit one night that I had to go to Temple because it was cheaper and I wasn't worth the expenditure or the money to go to a better school. And I was very angry about that. So that was a motivator. I was very angry about that. And I remember being jealous. He had bought my sister an accordion, she's a very talented musician, which was fine but it was about a year's worth of tuition at Penn. That was more of a priority is the way I interpreted it. And so I was angry.

But on the other hand, it jarred me because I hadn't done anything to help myself. So I got into here and I got a job at the University of Pennsylvania Hospital pushing patients around. I took them, with a group of other kids, from x-ray back to their rooms, and from their room to x-ray, occasionally to the morgue. That was not good. And I explored. We had one judge in the family. Anyhow, I made a pitch to a state senator for a senatorial scholarship. So I got a small scholarship. And those were the days, if you worked the whole summer, you could save a fair amount. It wasn't like today where tuition in a private school is \$50,000 or something. So I got the job and I got this small scholarship. I remember the only asset my mother owned really was sort of a whole life insurance policy that was worth \$1,000. And she turned it over to me. Said, "Mark, this is all I have and you can have it." And so I was always one semester ahead. I went through college in three years, primarily for financial reasons. Tuition was \$1,630 a year. So it paid roughly for the first semester at Penn. I lived at home, I worked, I had this small scholarship. And it took me a long time. I never did really forgive my father for that. But he sort of later, in his own way, apologized. He bought me nine symphonies, Beethoven's nine symphonies by Bruno Walter. You're tested in life and he flunked on that occasion.

01-00:40:06

Burnett: Just to be clear. So he was willing to support you going to Temple but then he offered no support for —

01-00:40:13

Yudof: Yeah, they never paid any tuition at all. But it's the way he did it. It wasn't, "I'd love to do it but I can't afford." It was, "This child's just not worth it." And that's what he said. He may have been angry discussing it with my mother. But there are ways to do that. You can meet with your children and say, "Look, I'm glad you're admitted to Princeton. We didn't get a scholarship. We can't afford it. You can get a good education at UC Santa Cruz or Davis and maybe for graduate school something different." It was nothing like that.

01-00:40:44

Burnett: Right. Look, that could be a crushing thing for a father to say that to a son. There must have been —

01-00:40:52

Yudof: He didn't say it to me. I was upstairs listening.

01-00:40:54

Burnett: Oh, my God.

01-00:40:55

Yudof: It was an exchange between my mother and father downstairs. Split level, I was only five steps up in my bedroom.

01-00:41:01

Burnett: But you had other resources to know that you were worth it, right? Something in you. You knew that you —

01-00:41:11

Yudof: I think that's right. And in retrospect, I was partially wrong, too. I hadn't looked for a job. Well, why not? That was stupid. I hadn't pushed to get a scholarship. Why not? But that got the juices in the blood flowing and then I began to take care of myself. So anyhow, off I went to Penn. My father's boss gave us a car, a 1949 Plymouth, sort of like a Sherman tank. Couldn't let it idle in Philly with gas or it was an infinite loop. And I took a couple of people with me. I charged them. I think I charged them, what was it, I think it was a dollar or week or something like that. It was unbelievable.

01-00:41:57

Burnett: To do a carpool?

01-00:41:58

Yudof: Yeah. So I drove every day. I did that. And I commuted back and forth to West Philadelphia where the University of Pennsylvania is located.

01-00:42:10

Burnett: And how much were you working? How many hours a week?

01-00:42:19

Yudof:

I was busy. I would say I was working fifteen, twenty hours a week. And it was good because you could come in. It was a job where they schedules and everyone would sign-up and you could take a class, you could work two or three hours, then you could take another class. So my days were all sort of 8 o'clock to 5 o'clock, 8 o'clock to 6 o'clock. And I didn't have any time. I didn't join a fraternity. I basically didn't join any social groups. I had no activities at all. But it worked out. Since I decided to graduate in three years I was always taking eighteen or twenty hours of class. And the summers were the same thing at that time. They were 8 o'clock to 5 o'clock days. I would take some summer classes and then I'd fill that — so in the summer I'd work more time. I might work thirty to thirty-five hours and take, whatever, four to six hours of classes in the summertime. Yeah. That's what I did.

I guess it was the end of my junior year of high school at Haverford, I met my later-to-be wife, Judy Gomel. So we were dating. It was not a bad life. Judy and I dated and we went to athletic events. We mostly went to movie houses and delicatessens and the library or the Franklin Institute or whatever. It was like having a full-time job is the only way I can describe it because every hour was filled and it was not filled with events.

There were some interesting things that happened there. In the first year I had an English instructor who later went to Carleton College. I wrote a paper, can't remember, it may have been on *The Great Gatsby*. But anyhow, I wrote a paper and he liked the paper. He thought it was well written and he read it to the class. Well, that was a great epiphany for me because it never occurred to me that I could write well. That was one experience. I remember trying to learn Morse code. That was right up there with French in terms of an impossible dream.

And then one day this guy approached me, his name was Ed Rendell. And Ed said, "You want to run on the blue and gold party ticket? We need some townies." That's what we were called. So I said, "Why not?" So my friend Marty Golubitsky, a mathematician now at Ohio State, and I — it was a French ballot. Each party had a hundred candidates or 120 candidates or whatever. Ed, of course, was the number one person on the list. I was number 101 and my buddy was 102. And one week before the elections there was a headline in the *Daily Pennsylvanian*. Blue and Gold party, the party of cronyism and the old guard. I'd only been a member three weeks! Well, we got swamped in the election. It would have taken 92 percent of the vote to get me elected anyhow. But it wasn't even close. But Ed did better in future elections.

01-00:42:34

Burnett:

That's right, yes. He did manage to become governor of Pennsylvania.

01-00:45:34

Yudof:

He became governor of Pennsylvania. Yeah.

01-00:45:35

Burnett: Yeah, absolutely. Penn is an Ivy League institution.

01-00:45:44

Yudof: Yeah. I'm not sure I knew that before I enrolled.

01-00:45:47

Burnett: Well, yeah. I was going to ask you if you were made aware of distinctions between those who were sort of legacy students, for example, and —

01-00:45:59

Yudof: Yeah, I was very aware of that. I was very resentful about that. I met some kids and it was sort of, "I didn't get into Yale, I didn't get into Dartmouth or whatever. But I play lacrosse and I look good and I come from a wealthy family." I'm sure it's unfair but at the time I thought, "Gees, these kids don't have very much upstairs." And I'm here by the skin of my teeth because it's the best school in my area. I felt like it was fine. And I love Penn. To this day I try to support it. What I discovered was that I was a very eclectic person. And so I took astronomy. Of course, I couldn't figure out how they knew the distances to these stars. Then it turned out, I learned twenty years later, they really didn't. Everything I learned was wrong about the distances. And I took Greek thought and I took literature. I was a consummate liberal arts student. I thought it was great. How rich can a society be to offer courses to people like me with all these wonderful things, philosophy. Took a lot of economics, international economics, microeconomics. I thought, "This is really fabulous." That's why, one of my few regrets is that it would have been lovely to stay a fourth year.

I did take some wrong turns. I took the history of music. But being ever astute I thought I was starting with Bach or Mozart and working my way to Hindemith or Mahler or something. It turned out I was starting with Gregorian chants. I thought polyphony would never be invented. [laughter] I almost *died* in that history of music course. But I learned and we finally got to motets and chords and ultimately to Bach and I think we may have ended with Mozart. I'm not sure. I always struggled with the Spanish, although I did somewhat better there. But I thought this is really wonderful. I never regretted it one day. I remember taking a course on Greek literature. I don't think I have it out now but I used to keep the *Odes of Pindar* on my desk, I liked it so much. The tales of Odysseus are greater than his deeds, all by the grace of Homer. And when I learned Russian history, later I went to Russia, I thought, "This is wonderful. These people know so much and they impart it to me." I didn't feel oppressed. Frankly, maybe, again, this is the existentialist in me, I didn't look at it in a consequential sort of way. I didn't say would this advance me to a PhD or a law degree or qualify me for medical school or something? I more or less took whatever I wanted within the area requirements.

01-00:48:59

Burnett: It was knowledge for its own sake.

01-00:49:01

Yudof:

Yeah. My father wanted me to be an engineer and I wasn't good enough at math. I had a terrible math teacher. Those were the years when almost anyone could be selected to be your TA to teach the math courses. This guy was bona fide crazy. And many years later, ten, twenty years later, he shot his thesis advisor. He never got his degree.

01-00:49:24

Burnett:

Oh, my goodness.

01-00:49:25

Yudof:

And then he shot himself. It was very tragic. But the one thing I know, however tragic that was, another tragedy was he couldn't teach mathematics. And I really wasn't that interested in medicine but I was turned off to the sciences and Haverford High School was not that good. My physics teacher was my football coach. Give me a break. So I regret that to this day. I love physics and I read about it and I visited CERN and I read the biographies of the great physicists. But it was carelessly done in that era. At least in my schools it was.

01-00:50:03

Burnett:

Well, I think to this day people are turned off science because there's inadequate educational support.

01-00:50:10

Yudof:

Yeah. One really good science teacher and I might — I don't know. Maybe I wouldn't have had the ability. But I certainly enjoy it and like it.

01-00:50:18

Burnett:

But offered the opportunity, you were really awakened by the possibilities of the liberal arts education. You learned about these —

01-00:50:27

Yudof:

Yeah, I thought this was wonderful. And I thought about getting a PhD. And at that time I was becoming more career oriented. So I remember I visited a very distinguished political science professor, I think, and we talked about it. I'll never forget what he said. I don't know if it's true. But what he said was, "If you're really interested in immortality, then a PhD in political science isn't going to do it." And that's basically what he said.

01-00:50:52

Burnett:

Interesting.

01-00:50:52

Yudof:

I don't know whether I was interested in immortality but I became more interested in achieving. And then I sat back and thought, "Well, what am I good at and what do I want to do? Well, I don't know that I'm good at anything and I don't know what I want to do." And somehow I got this idea in my head that if I went to law school I'd close the fewest doors. This would have been 1965. That you could still go on and get a PhD, which I almost did.

I was admitted to Princeton and Yale in political science or government later on but I decided not to do that. But I said, “Well, you can practice law, you can work in the government, you can be in the business sector, you can be a professor or a teacher in public schools.” So I made a decision mentally. But even then I didn’t really prepare for it. I didn’t take any law courses. I felt, and it turned out I was intuitively right, by writing and by doing my honors paper and by taking a lot of liberal arts, I thought that was as good a preparation for law school as anything.

01-00:52:03  
Burnett:

And so that became the path for you.

01-00:52:08  
Yudof:

Yeah.

01-00:52:09  
Burnett:

You didn’t want to foreclose on any options in terms of — right, yeah.

01-00:52:12  
Yudof:

Right. I didn’t really know what I want to do with my life and I thought, “Well, lawyers have more options in life.” And, of course, I didn’t know that we were heading into the golden age of law. During that sort of unbridled expansion between, say, the 1970 and, I don’t know, late 1990s. Now it’s a much tougher world out there for law. So yeah. And even there I didn’t work that hard. I did my thing and I applied to law schools. I remember I was waitlisted at Harvard but I didn’t know what to do about that. I probably should have pressed it but I didn’t.

01-00:52:49  
Burnett:

Because there’s other things happening in your personal life, too. You’re dating Judy.

01-00:52:54  
Yudof:

Right, I’m dating Judy and we’re planning to get married. She’s going through three years at Temple. We graduated in, whatever, May, June 1965 and July 11 we were married. Took an airplane for the first time, went to a honeymoon in Florida. We stayed at the Fontainebleau Hotel because I had seen *Goldfinger* and I had seen the shots of the Fontainebleau and I thought, “This is really pretty cool. I’m doing that.” And we did and we had a grand time.

Judy’s very smart. She got a very good job. Those were the glory years when she supported me. It didn’t offend my masculinity. I thought it was pretty cool actually. I lived off a long time off of her wages. That was sort of my view.

01-00:53:46  
Burnett:

What did she study and then what did she do?

01-00:53:49  
Yudof:

She was a math major and she was a computer programmer. Very good at it and got a series of very good jobs. But anyhow, the college years I think were

basically happy but not in the sense of today. I had a girlfriend and I had a 1949 Plymouth. I had classes that I enjoyed. I liked being at Penn. I had a few good friends, the mathematician friend that I mentioned, and a few others. One from Havertown, Jay Rosen. Yeah, I don't know of any major events. But you sort of just move along in life. So I applied to law school and went up to Columbia and took an instant dislike to the dean, decided I'm not going here.

01-00:54:39

Burnett:

So you were accepted to Columbia Law School.

01-00:54:41

Yudof:

Right. I got into Columbia and Penn. And I went to Penn. And Penn was great because Penn was a little law school. They had 175 students in each class and it was roughly 500 students, 550 in the whole law school. It was a wonderful environment. And Judy worked, I can't remember, Sun Oil, and Getty Oil. She would do programming about analyzing the — I don't know what you call this. The substructure under the ground to see where you should drill for the oil and stuff. She worked with, whatever, a thirty-two K computer that took up an acre of land.

01-00:55:22

Burnett:

Right, of course. A mainframe. Yeah.

01-00:55:24

Yudof:

Yeah, that was the main — and she had all these little cards. So we graduated. I do remember, my class ring is 1966. I don't know why, at the time I wasn't sure I'd graduate early so I stuck with my original graduation date on my ring, even though I graduated a year early. And then there was law school. I can't say I loved law school but I didn't hate it. And some things were more interesting than others. I was basically a non-participant. Basically that whole part of my life I was very shy. I guess somewhat calculating. I didn't see the odds of sticking my neck out for the professor to chop it off. Of course, then I spent most of my career trying to entice students to participate.

01-00:56:19

Burnett:

Well, can you describe that part of it? Some lawyers hate law school and love practicing law and others love law school but hate practicing law.

01-00:56:38

Yudof:

Well, my views were not that well developed. I came in, I guess, thinking that it would be a breeze. And I remember I was reading *The Red and the Black* by Stendahl and I brought that to, I think, my civil procedure course. And it only took me twenty minutes to realize you better pay attention, this is not going to work. Apparently I must have done some of that when I was in college and it was workable for me. But law school was not. So then I really did get caught up into it and it just seemed to me if I did better I'd get a better job. And I did very well the first year. And did less well the second or third year. I'm not very good at practice rounds and I'm not very good at needless effort. I just

have to be honest with you. So once I had done very well, and I was somewhere in the top 10 percent, maybe even higher in the first year, civil procedure, torts, contracts. And at that time I found a lot of it interesting. A lot depended upon professor. I had a great professor, Bob Gorman, who I'm still friends with today, in contracts. And so I did that. And I did well. Law school was very regimented. I can't remember where I worked. I think I worked for a professor that first year in civil procedure. I remember participating in a criminal trial that he had been retained on a pro bono basis to represent an indigent guy accused of rape. And you might describe my position as being eighth chair or something. I was there but not in charge of anything.

01-00:58:23

Burnett:

Right. A witness.

01-00:58:24

Yudof:

That ended my criminal law career because this guy was caught in the act by a policeman raping a woman. And I had read some Abraham Lincoln and I did some research and I was going to see if the cop could have seen clearly that night and what phase was the moon in, you know? Turned out the whole block had been torn down, so I didn't have that. But, to be honest, this guy really did it. This guy was caught and the victim testified. She was raped. So when he was convicted, I didn't show it, but inside I felt really glad. This man did a terrible thing to this woman. I said to myself, "Rapists deserve counsel." And, of course, some of them are innocent and they need an opportunity to prove that they're, if not innocent, at least not guilty. But it doesn't have to be me. It just doesn't have to be me. I'm not going to spend my time doing this. And the issues in some ways were interesting in criminal law. It's complicated. It's important. But not for Mark Yudof.

And I remember working on a casebook for one of the professors there. My strongest class was labor law, which I always wanted to teach. When I got into teaching there was no opening, so I never did. The problem at this point in time when I went to law school was what I would do afterwards. And it was somewhat constrained. My draft board, I'd already passed their physical examination and their test and all that stuff. They wanted it clear that they had given me a deferment. It was a very unfair system. I got a deferment for undergraduate and law school. And if you were a poor black kid not in college, you were just grist for the — you were gobbled up —

01-01:00:40

Burnett:

Right. You were immediately —

01-01:00:42

Yudof:

— for the draft. It was a very unfair system. And later they had a numerical system. I don't remember getting a number. I don't think I was part of that. And they said, "Look, you got your deferment for six years. Enough is enough. The day you graduate law school we're putting the grabs on you. So I didn't know exactly what to do. And I was not too gung-ho for the war in

Vietnam, I have to say that. I applied for PhD programs, which I mentioned. I was admitted to two of them. And I applied for a clerkship. I really didn't know very many faculty members well. I more or less did it on my own. And I got a clerkship with Judge Robert Ainsworth, Fifth Circuit Court of Appeals in New Orleans. I don't know where we are on our time schedule but that's —

01-01:01:40

Burnett:

This is Paul Burnett interviewing Professor Mark Yudof for the University History. So you're about to explain the clerkship that you got.

01-01:01:55

Yudof:

Sure. I applied to a number of judges and Judge Ainsworth interviewed me over the phone and he explained to me that Brennan's was across the street and Antoine's was catty-cornered and his offices were in the wildlife and fisheries building in the French Quarter. And so when he offered me the job I said, "Judy, this is definitely for me. I don't know about the substance but we'll certainly eat well." And the Fifth Circuit was where a lot of the action was at the time. *Brown* had been badly enforced, *Brown v. the Board of Education*, for roughly a decade. And so there were many school desegregation cases and it was amazingly contentious from Little Rock and so forth. When some of the orders were issued there would be federal marshals that would have to accompany the judges to various places. It was an extremely volatile, racially charged environment with a lot of heroes of the Civil Rights Movement there. So that was part of it. Part of it was the draft and protest about the draft. I remember one case involving a march on a selective service center. And I really hadn't been involved in any of that stuff before. My political involvement, in 1960 I supported John Kennedy and I had a Kennedy hat and button. Still have them actually. Probably should put them on eBay. And I saw him speak in Sixty-Ninth Street in the Philadelphia area. Then I remember the Cuban Missile Crisis. I think it was around the same time as my starting college and I was very upset by that.

01-01:03:43

Burnett:

Yeah, '62. Yeah.

01-01:03:45

Yudof:

And I remember people didn't talk to each other. The buses were silent. Little like the aftermath of 9/11. People were just stunned —

01-01:03:52

Burnett:

Shocked.

01-01:03:52

Yudof:

— by it and shocked by what had — and I mean all people. Even crime went down. It was very strange. And then '62 to '65 is a quiescent period, relatively speaking, at least in my area of the country, on anti-Vietnam demonstrations and the like. Law students pay no attention to the outside world so that was three more years. So my introduction to the anti-war movement and what all that was about came during my clerkship.

Judge Ainsworth was a very honest, good man. He was relatively conservative, more conservative certainly than I. One day we got into an argument and he pointed to the wall. He said, "Okay, Mark, whose name's on that commission?" And the commission was from, I guess, President Kennedy. I said, "Well, Judge, your name is on it." He said, "That's right and that's the way we're deciding this case." And he was troubled by some of the desegregation rulings and some other things. His main claim, I don't know main claim to fame, he was a very good lawyer. But one of his claims to fame was he was called an anti-Long Democrat. Huey and Russell Long were in charge. He used to tell me, he'd say, "Mark, good thing that Capitol dome is nailed down. They'd run off with it." I used to go out and buy po'boy sandwiches for us and bring them back for the judge. So we spent many a long lunch together talking about Louisiana politics and all that. It was sort of fun.

The first day on the job, well, it wasn't my first day, but the first day the judge and I were both in chambers together — I actually arrived when he was away on vacation for a while. He brings a stack of papers. It must have been twelve, eighteen inches high. And he says, "Mark, in an hour," I think an hour or two hours, "they're going to auction off the Bourbon Orleans Hotel, which was three blocks away," or something. And they've come in and the owners have asked for an injunction to enjoin the sale. I guess it was some sort of bankruptcy sale or something. And he said, "I want you to read the file, tell me what to do." Well, my immediate reaction was, first, I didn't take bankruptcy in law school. Second I was thinking, "What damn fool would depend on my judgment? I'm three months out of law school. What do I know?" But it was my first big assignment from the judge. So I sat down and I went through it and went through it, read all the papers and came back, went into his office. He says, "What should I do?" I said, "Judge, deny." He said, "Okay." He wrote deny. I think if I had said grant he probably would have said, "Bring that file in and let me look at it." But I said deny and that was my introduction.

We had wonderful cases. Maybe not wonderful for the nation but wonderful from a learning perspective. We had civil rights lawyers like Arthur Kinoy and some of the leaders of the NAACP that were litigating the major desegregation cases. I met some famous judges, Judge John Minor Wisdom, Judge Tuttle and some others, who were legends during the Civil Rights Era. Worked hard on those cases. Worked on some administrative law cases. I remember I was so proud. The National Labor Relations Board had done some stuff that the judge and I thought was wrong and so we reversed them. I sent them to Jim Freedman, my professor at Penn who later was president of Dartmouth. I was very proud of it. He wrote back that I had set back administrative law by a decade with this decision. That didn't go too well for me.

01-01:07:47

Burnett:

What had you decided?

01-01:07:48

Yudof: I think he thought we were being too intrusive in overruling an administrative agency. Frankly, I don't even remember the case at this point.

01-01:07:54

Burnett: Right, right.

01-01:07:56

Yudof: And my judge was not a fluid writer. So, literally, my co-clerk and I did the first drafts of everything. I'm not saying he didn't change them, own them, and so forth, but it was not one of those chambers where the judge was a wordsmith and we just checked the footnotes and the citations or reread the record or something like that. So I got a lot of writing done.

01-01:08:20

Burnett: I bet.

01-01:08:21

Yudof: So that stood me in good stead. We did a lot of what are called *in forma pauperis* cases, prisoners who wanted out of jail. You had to read them carefully. Most times they were self-serving, inaccurate, not compelling. But occasionally someone had a good point so you couldn't just slough them off. So you read those cases very carefully.

01-01:08:44

Burnett: And what is the title of those types of cases?

01-01:08:46

Yudof: *In forma pauperis*. It's not very nice but you're representing yourself as a lawyer and you can't afford a lawyer. Prisoners, they talk about jailhouse lawyers. They would write a lot of stuff to try to get out of prison. And a lot of it, frankly, was junk but you had to pay attention. Innocent people do get convicted or have their rights violated. You got to look at it. And we did.

01-01:09:20

Burnett: Were there cases of innocent people?

01-01:09:22

Yudof: Not in my chambers. Or they may have been innocent but I didn't detect it. Or as we like to say, not guilty. That's the standard. There are very few of us who are innocent. So there were all sorts of cases. I stayed away from the Louisiana law cases. They're a very complicated area of the law, admiralty law, maritime law because New Orleans is a major port. My co-clerk, who had a Louisiana law degree, she did all that stuff.

And I got to know a lifelong friend, John Watson, who later was a senior partner at Vinson & Elkins in Houston, and other folks. A lot of the people I met, not a lot, but some I've kept up with over the years. Steve Berzon, who's a very distinguished lawyer here in San Francisco, has his own law firm. He was a law clerk to one of the famous trial judges there. He introduced me to

his wife, Marsha, who was very smart and outgoing. Marsha later decided to go to law school and today is on the Ninth Circuit Court of Appeals here. Very distinguished judge. Very good people.

01-01:10:37

Burnett:

And you were a witness to important civil rights cases in the Fifth Circuit court.

01-01:10:43

Yudof:

Yeah. We did a lot of the desegregation cases. This was a tricky area because what had happened is — and people probably would dispute this — that the original *Brown* case and its immediate progeny was not designed to bring about racially balanced schools. That was hoped for but that was not what it was designed to do — the theory was you would stop discrimination. And there are even passages from Thurgood Marshall's argument to say, "Look, you stop the discrimination, you stop sending the black kids over here and the white kids over here." [There were] even some references that you could use neighborhood schools and so forth.

Then after the passage of time it turned out these schools were still segregated, whether they were choice plans or whether they were gerrymandered attendance zones or whether they weren't even gerrymandered but the black people lived over here and the white people lived over there. You had schools that didn't look very integrated. So then there was what Judge Wisdom called the affirmative duty, that it wasn't enough to have racially neutral assignment principles, you had to try to create a unitary school system which by degrees meant a more racially balanced demographic within each school. That was very contentious. Judge Ainsworth was never 100 percent comfortable with that. But the Supreme Court ultimately went that way in the *Green* case and other cases and throughout these choice plans, these attendance zone plans, various pairing of schools and so forth. So there were a fair number of those cases that were argued. And, of course, from a political standpoint, the white southerners who really by and large were in power, you didn't win elected office by being pro-school desegregation. So in my time they weren't George Wallace. I personally didn't confront that problem. But they were pretty cantankerous about slowing this down as much as humanly possible. So that was one set of cases.

Then there were civil rights, these sorts of cases, like the free speech cases and so forth, some of which came out of the war efforts, some of which came out of the civil rights desegregation effort. And those cases came to the court. There were lots of other more garden-variety disputes. And it wasn't in our court, but the Clay Shaw/Jim Garrison — I would call it debacle. That's not what Oliver Stone said in his movie but I would call it a debacle. My conclusion was if Jim Garrison was right, he was right in the same sense that a stopped clock is right. He had no evidence. There's just a certain probability when you take any position that you're right.

01-01:13:31

Burnett: This was the participation in the assassination?

01-01:13:32

Yudof: Yeah, participation in the assassination of President Kennedy.

01-01:13:35

Burnett: That's right.

01-01:13:36

Yudof: I wasn't a part of it. I saw Garrison, I think I saw Clay Shaw. And my conclusion was there was no evidence. The guy had nothing. And, of course, Stone built a whole movie around that LBJ might have done it. Well, I don't know. You can't prove a negative. But on that day and time there was no evidence. And what Stone left out of his movie is, I don't know, it was less than an hour the jury was out. They came back with a not guilty verdict. They apparently weren't too impressed.

And we enjoyed New Orleans. We went to Mardi Gras. We didn't keep kosher at that time. We do now. And so we ate oysters and went to Galatoire's and so forth and had a grand time. Bought ourselves a '68 Oldsmobile for \$3,200 and rode around. And all of a sudden people came to visit us. We had a very good year there.

01-01:14:35

Burnett: Yeah. But with the understanding you were not to settle. You were going there for a year for the clerkship. Were you thinking at any point of relocating permanently?

01-01:14:44

Yudof: Well, when I took the job I had no expectation of that. And I did like New Orleans and I did interview at Tulane Law School and they were interested. I don't think they made an offer because I think I withdrew before that. At least that's my story. Maybe they have a different one. But I felt like I had had a great clerkship but I'd be staying after the party was over. That it wouldn't be the same. That I'd sort of be a hanger-on, that I had a good clerkship with a very respected jurist. And I could teach at Tulane or join a law firm. And it may have been my prejudice, I didn't think it was the most exciting place, New Orleans, for legal practice. There were better places, New York and Los Angeles, so forth. So I made the decision not to stay and I reapplied and thought about going to Princeton for a PhD.

It was very interesting. I thought I'd be drafted. See, what happened during the clerkship was — initially, the way it worked is if you were working someplace you could register with that local draft board and they would pass on whether you would be drafted or not. I thought, but I had no guarantees, that if I was a law clerk to a federal job, they wouldn't want to tick him off by drafting me. But I never got that far. I had had, ever since childhood, a malady that took a long time to diagnose. I had children's migraines headaches and

then adult migraine headaches. And it wasn't diagnosed until I was in my early twenties. And it caused me a lot of pain and incapacity and so forth.

We had a friend, she was a big-time professor I guess at Princeton at the time. Her husband was a renowned neurosurgeon, neurologist. So I went there for some testing. And so we finished up the day and he said, "Well, you have severe headaches but I wouldn't call them classic migraines. I'm not sure exactly what they are. But they're serious but not classic migraines." And he said, "By the way, your electroencephalogram was abnormal." And I said, "You know, my mother always said that, that my brain waves were not normal. What does it mean?" And he said, "I have no earthly idea what it means." I said, "Okay. What's it going to do? Right?" He didn't cure my headaches. I took painkillers or whatever. And I got them for twenty-five more years. And as I'm leaving he says, "You know, I think I'll send your EEG to the draft board." Two weeks later they classified me 1Y. They didn't like my brain waves. So anyhow, so that dropped from the picture. I was fully expecting I would have to serve in the military. I thought about the JAG and stuff like that. But that didn't work. And I don't know what choices I would have had or made. I would have done the best I could.

01-01:17:50

Burnett:

And you said for twenty-five more years. You don't have those headaches anymore?

01-01:17:53

Yudof:

I do not. Apparently as you go through male menopause later in life, they tend to recede. That's my doc's —

01-01:18:01

Burnett:

Because it's a hormonal trigger that —

01-01:18:02

Yudof:

No one really understands these headaches. But yes. It's like an algorithm. The older you are, the less likely you are to have the same incidents and severity of these headaches. I'm sure there's wide variation. But today I rarely get them. Once a year maybe.

So then the question was what to do next. I would say this was characteristic of Mark Yudof. I didn't have any deep compulsion of something I had to do. But I was also a child of my times. The idea of just going to work for a law firm was not something that — I mean, I didn't dislike it, but it just seemed to me I may not want to do that. And I didn't apply for a Supreme Court clerkship. Don't know whether I'd have gotten it. But frankly, I had been the aide de camp for a year. That was enough. I wanted to set my own agenda. So I wanted to be independent and I wanted to do something fun.

So I do what people normally do. I started writing letters, blind letters at the time. So one letter I wrote, I read in the newspaper that President Nixon had

asked the American Bar Association to investigate the Federal Trade Commission. And there was a professor at NYU, Robert Pitofsky, who was the general counsel. So I'm there that summer and I wrote to — said, "Dear Professor Pitofsky," I don't think I retained the letter. I said, "This is going to go on for two, three, four months and you're going to need help. Here's my résumé. I think I have a pretty good record. I was law review in law school," and da-da da-da, "and it's probably going to be hard to find someone who can interrupt their career."

01-01:19:50

Burnett: Right, to do this.

01-01:19:50

Yudof: That they're already working for a firm or they're doing something else. I'm available. Lo and behold, I got an interview and I became the Assistant General Counsel. And I did that for three or four months, and I can describe that. That was fun. But then I wrote a couple of other letters. And there was a guy named Al Bronstein, who was at Harvard. I can't remember. I don't know if he was a professor at the law school or in charge of one of the clinics. Very able man. And he had appeared in our court and I was really impressed with his oral argument. So I wrote, said, "Dear Professor Bronstein," this is the nub of the letter, "I'm available. If there's ever anything interesting in Harvard, let me know." And I didn't receive a reply. Meanwhile I turned down Princeton. Didn't go. And I put O'Melveny & Myers in Los Angeles on hold. And I thought it was a great law firm and if I was going to practice I was going to practice with them in LA.

01-01:20:52

Yudof: And I liked the ambience. I had had a somewhat unhappy experience on Wall Street during law school during the summer. I didn't like the firm. I didn't like the partner who was supervising me.

Yudof: So I wasn't that hot but I thought O'Melveny & Myers they treat people decently. They're great lawyers, great client list. I can live in the Pacific Palisades. It's not that bad. So I put them on hold because they had given me an offer out of law school which they had held open. In fact, it took me like ten years to earn in law teaching my highest offer out of law school from a law firm. It was amazing. My offer when I went into law teaching was, I don't know, \$14,000 and my best offer out of law school was twenty-five in 1968.

01-01:21:51

Burnett: Wow. But that's a significant decision.

01-01:21:55

Yudof: Yeah, it was.

01-01:21:57

Burnett: So you wanted to teach?

01-01:22:01

Yudof:

I wanted to do something else than practice law. I was looking for more fulfillment and more purpose in life. I don't want to make it sound too fancy or too philanthropic or anything. I just was looking for more meaning than that. And I always figured I could go back to law practice. And it's pretty arrogant what I just said. I'm sure I could have found a wonderful life in law practice and meaning, and I'd have found my niche and I'd have served my clients and participated in my firm. But anyhow, as a youngster, that's what I was thinking.

So then what happened? So I didn't have any job at all. So I went to New York and we had an apartment eventually in Washington Square Village near NYU. It was great. We had a great time, Judy and I.

01-01:22:55

Burnett:

I bet.

01-01:22:56

Yudof:

We didn't have any kids. And we went to shows and restaurants and museums. I even worked a little. I had two brilliant law students. One of them is a senior partner. She's a senior partner in a law firm here. Another one's in a big firm in New York. And I worked on it and had a grand time. Because the Federal Trades Commission at that time was the gang that couldn't shoot straight. And my job was to interview the bureaucrats and push them around a little bit. I had great fun doing that. There was all this bad stuff going on in the consumer sector but they would make the people who manufactured ladders, they would make them put little labels on the ladder that the usable length of the ladder was less than the sum of the two halves on an extension ladder. Or most memorably, there used to be an ad, I remember it was some soap manufacturer. The whole screen was a washing machine and they have him in a dirty shirt tied to the center post in the washing machine. And they'd fill up the screen with Tide or All or something and then they'd let it down and the shirt was clean. And they made the company put that this was just a simulation, that he wasn't really inside a washing machine.

01-01:24:09

Burnett:

Right. Just really obvious truth-in-advertising principles.

01-01:24:15

Yudof:

Right. And they got Campbell's soups because they alleged they put marbles in to let the vegetables float to the top. Really big stuff. And so anyhow, I worked on all that. I did the first draft of the report. Everything they needed to cover was there but it wasn't too inspiring. And I met a lot of people. And Carl Fulda, a Texas professor was on it. And then a famous judge, Richard Posner, he was a young lawyer at that time teaching, I think, at the University of Chicago.

01-01:24:50

Burnett:

That's right.

01-01:24:52

Yudof:

And so I did that for a few months and commuted back and forth to Washington. I rode airplanes and hung out and we did the report to the President and he acted upon it. Cap Weinberger was appointed the new FTC chair and he eventually became defense secretary and all that. And then, lo and behold, when I'm going back and forth, I get this letter not from Al Bronstein but from Abram Chayes, a professor at Harvard. And he says, "Dear Mr. Yudof, I've come across a letter that you wrote to Professor Bronstein ages ago. We're establishing a center at Harvard called The Center for Law and Education and we're looking to hire some" — I think they were called research associates at the time. "And if you're interested, contact us and you can interview for the job." Just totally out of the blue. I mean, I don't know, four, five, six months nothing happened and I never did ask Abe how he got ahold of this letter but he did. Maybe we should take the story from there next time.

## Interview 2: June 25, 2015

02-00:00:00

Burnett:

This is Paul Burnett interviewing Professor Mark Yudof for the University History Series. This is our second session and we're here at the law school at the University of California Berkeley and it's June 25, 2015. So Professor Yudof, we last talked about your arrival at the Harvard Center for Law and Education. And can you talk a little bit about how you arrived there and why you were attracted or interested in that center?

02-00:00:39

Yudof:

I may have mentioned this but I really didn't know what I wanted to do with my life, so I cast a lot of bread on the waters. And I was interested in practicing law. I had an offer from O'Melveny & Myers, a very distinguished Los Angeles law firm. And I had been admitted to Yale and Princeton for PhD programs. But I was an inveterate letter writer, so I was writing letters to people and volunteering for things and that's how I ended up in the study of the Federal Trade Commission, which I think we've discussed.

Then just sort of out of the blue, I had written to a man named Alvin Bronstein, a very highly regarded civil rights lawyer and he was affiliated in some fashion with Harvard. And I had written to him much earlier, like in the spring of 1969. And while I was in New York City working on the Federal Trade Commission study for the American Bar Association I got a letter from Harvard. I don't remember who signed it. It may have been Abram Chayes, a very distinguished Harvard law professor who had been legal advisor to the State Department under President Kennedy. And the crux of it was, "We have this exciting new Center for Law and Education and we're looking for people who would be on the staff." I think they called them research associates. "Would you be interested?"

Now, I knew nothing about education law. There was such a course at the University of Pennsylvania Law School but I hadn't taken it. And I can't say it was a burning interest. I had many interests at the time, some international, some domestic. So I got the letter and I interviewed for the job. I met David Kirp, my future co-author, a very distinguished Berkeley Law professor today. Also was a journalist for the *Sacramento Bee*. He was the executive director. Rather a young fellow.

02-00:02:48

Burnett:

He was twenty-four.

02-00:02:49

Yudof:

I don't know, David might have been a year older than I was. I was twenty-four. He might have been twenty-five or something like —

02-00:02:53

Burnett:

He was twenty-four, he said, when he was —

02-00:02:55

Yudof:

Twenty-four. So maybe we're close to the same age. I graduated law school at twenty-three, so by that time I'd have just turned twenty-four. And the Center was headed by Professor Chayes and David Cohen, who I also had never heard of. But David has been for more than forty years a powerhouse education professor, writing historical pieces and mostly analytic social science types of pieces. And absolutely brilliant man. And so I got it into my head that maybe I should accept this offer. And why, I'm not quite sure. I'd always thought that it would be nice to be at Harvard for something. So the Harvard name attracted me. It appealed to my sense of doing good in the world. The Education Law Center was a legal services backup center, which meant that in complicated cases involving education issues, local legal service offices were free to call on the center for additional expertise and assistance in the litigation and whatever it was, drafting papers or doing interrogatories or helping in the oral arguments. And there were other backup centers in other substantive areas of the law. I think that system no longer exists today.

So I really didn't know much about it but I thought it was exciting going to Harvard and I had a very nice office. They had an old building which Harvard had made available on Garden Street. Lovely offices and some of them had fireplaces. It was not far from Harvard Square. And it was part of a whole panoply. There were other centers in the same building. But it turns out to be a who's who of the future of education. Judy Areen, who later went on to be dean of the Georgetown Law School. She was there. Christopher Jencks, who became one of the most distinguished — probably was at the time — social scientists studying the data from the Coleman Report and how do poor kids do in school and how do you enable them to do better. And then there were all sorts of people. Banfield was associated. He was sort of a neo-con, or at least was so viewed at the time. Pat Moynihan I believe was on leave. He would have been something in the Nixon administration. I can't remember. He may have been ambassador to the United Nations or an advisor to the president, something like that. And I could go through other names but it was a very intellectually exciting place. Paul Diamond, who later was one of the gurus of the metropolitan school desegregation movement. He was there. And we had a constant stream of visitors, of high-level law professors. Louis Jaffe I remember was there and visited and Alex Bickle from Yale visited our place.

And so there was a lot of ferment. It was a time when we didn't have all these statutes that covered English language learners and disabilities and Title IX had not yet been enacted for gender discrimination. So Title I of the Elementary and Secondary Education Act had been enacted during the Johnson Administration. So it was a time of great ferment. And the idea at the time was to use law as a mechanism of school reform. And so we had lawsuits that I was involved in involving Title I, which is a compensatory education program to spend more money on poor kids, and it was being poorly implemented in its early years. So we filed a number of lawsuits or participated in a number of lawsuits involving that. There was a concern about

the meaning of segregation. There always was a debate about *de facto* and *de jure* segregation as a matter of law. Segregation that just sort of happened because of urban patterns. That was in the works at that time. Ultimately led to the *Keys* decision out of Denver in the early seventies. School finance. That's how I got involved in the early stages of the *Serrano* suit in California and the school finance case in New Jersey. There were others.

When I say "involved," the level of involvement was varied. Sometimes I was a kibitzer and sometimes I helped with the papers and sometimes it was amicus briefs. We did not have primary responsibility for any of those cases. And I did trek up to Calais, Maine. I remember a district judge, famous one, Judge Gignoux heard the case and we finally settled it. I also remember we had a lawsuit in Providence, Rhode Island, where at least we alleged that they were spending the Title I money meant for poor kids on many things that did not uniquely involve the poor kids. There was a supplanting effect that in effect was becoming general revenue to the school district. And I would say most of those cases were settled one way or another. In part, I think in the early years, the districts had not yet acclimated themselves to the new legal regime. So the errors in spending were pretty egregious. So in most cases we were able to settle these lawsuits and not have to get a final judgment out of a court, although sometimes the court would approve a consent order of one sort of another.

02-00:09:08

Burnett:

They were egregious, but was it that they were not used to this new pattern or the intent of the Title I grants?

02-00:09:17

Yudof:

Yeah, it was the first compensatory education act in the history of the United States and the money would come in. I really do give them, with hindsight, the benefit of the doubt. I don't think they deliberately wanted to do it in but it wasn't clear what they were supposed to do with the money. So in some cases they spent it on everybody, in some cases they recarpeted the principal's office, and in some cases they paid for lunch monitors and so forth. But it took a while, as it often does in education, for the cultural change to sink in, that this really was designed, the idea behind it, was to provide compensatory, something extra, for the poor kids who were thought to need it because they were more at risk. Parents were more likely to be unemployed and poor. Didn't have all the benefits of tutors and trips abroad and all that. Moving from an ideal of everyone is treated equally, which sort of was the underpinning of *Brown*, to an idea that some kids, justice might require in some cases that certain populations have more money spent on them. Later on it became somewhat commonplace. No one today would argue that you can educate English language learners at the same level of expenditure as the general population. It's just more expensive. You need specialists, special curriculum. Usually you have smaller classes, at least if it's working right. That's the way it should be.

So I got very involved and I wrote a series of articles on Title I. And that was good for me because David Kirp was sort of my role model. He's a brilliant writer. And I was a decent writer coming out of college but I really tried to emulate David, not sort of semantically necessarily, but clarity of thought and clarity of exposition and trying to engage the reader. So I wrote a series of articles on Title I, what went wrong and what needs to be done. You know how the law practice is: if you are focused on a type of case for six months, all of a sudden you're the world's expert. So at under twenty-five I was the world's expert on Title I at that time. And then through the doors came other things. Metropolitan desegregation lawsuits. What was the proper definition of *de facto/de jure*? What was the scope of remedies in desegregation cases?

And I obviously got on the school finance bandwagon. We were struggling with it. What is the legal standard? Is it justiciable? Does everyone have the same amount of money spent on them? And the popular formulation at the time was that the wealth of the school district should not be a determining factor in the amount of money that's spent; that it should be based upon, at a minimum, it should be based upon decisions by communities that were equally empowered to make those decisions. And optimally it would take into account differences among students that might justify more or less money being spent on them. But the fact that some school districts had enormous property wealth and others had very little was the core problem. And it had been constantly examined, at least since the 1920s, but it had never really been well resolved. And the philosophy of the day was the minimum foundation programs, that the states would provide a minimum foundation of education. So I'm just using rough numbers but the state might guarantee a five or six hundred dollar expenditure per student, but if a Beverly Hills or an affluent district in Texas or elsewhere wanted to spend more, they could do so. So you can see this is highly philosophical. What is the obligation? Is it minimum, to guarantee a minimum and local communities can go beyond that? Is it equality, literal equality? Is it nondiscrimination? You may not give black people less, may not give women less, you may not give kids living in poor districts less? When you play them all out, they're very different philosophies. This was a time of great churn.

It was also a time of some pessimism in the following sense. That it seemed to be the case that a lot of these programs for poor kids didn't seem to make that much difference. And there weren't that many of them. If you read the Coleman report, they'll say stuff like, "If you know whether they have wall-to-wall carpeting in the home, and you know whether the parents have wall-to-wall carpeting and you know the socioeconomic status of a baby in a crib, and other measures of affluence, you had a pretty good predictor of how well the students would do in school. And unfortunately we haven't totally broken that tie today. And then the question was, well, what do we do about it and what's effective? And it was not entirely clear. There's been a forty-year debate on the extent to which resources matter and it's not an obvious answer. It depends on what the resources are spent on and it depends on the esprit of

the school and the leadership of the principal and depends on the motivation of the parents and the participation of the parents. So anyhow, it was very exciting because we were looking at these things from ground level zero and mostly in a constitutional framework rather than a framework of statutory interpretation or enacting statutes.

So we were whiz kids trying to figure out new constitutional theories. Was wealth a suspect classification? Was education a fundamental right? Does the equal protection clause reach this type of behavior, either state or federal? And then, of course, later on state education clauses were involved. So it was a time of exciting ferment. We had big debates internally —

02-00:15:32

Burnett:

I bet.

02-00:15:33

Yudof:

— over all this and we were sort of feeling our way along because the precedents were not there. I should say simultaneously, and depends on your point of view, unfortunately there was a transition from the Warren Court to the Burger Court and the pace of reform through the United States Supreme Court, in a very uneven nonlinear fashion, was slowing down. So at the time when all this horsepower had been devoted to these issues, beginning in the late sixties and early seventies, and the private philanthropies got involved, particularly the Ford Foundation, the Supreme Court was getting more skeptical about whether this was the appropriate role for the courts, whether it would be efficacious, some of these reforms. And that in part explains the turn to statutes in the seventies. So those were the sorts of things we were doing. And Harvard was an exciting place.

I can't remember, once or twice, I taught an education law course with Professor Kirp. When Kent State occurred and also the bombings in — I think it was Laos at the time. I don't remember. Could have been Cambodia but maybe Laos. There were massive protests on the campus. It was a time when the draft was still in place. People were upset about that. I always was the lawyer. I never went to a demonstration at Harvard. I remember being invited to this concert in upstate New York and I said, "I don't really want to do this." But turned out to be Woodstock. I learned that sort of years later. And people let their hair grow and it was a lot of counterculturalism type of thing.

I remember another issue. I think we did it on our own time. But there was a concern about calling out the National Guard, who really were untrained to deal with a lot of these campus situations and there was a loss of life at Kent State. So I believe I wrote it, or maybe with David, I don't remember, sort of a brief based on precedents, and that there were limits on the authority of state governments to call out the National Guard. It never went anywhere but it was sort of fun to write it. I'm not even sure it's right, looking back, but that's what we did.

02-00:18:11

Burnett:

Well, there was a lot of ferment right on Harvard's campus, too. There was the so-called Harvard Conspiracy, undergraduates pushing for a total reorientation of Harvard education and perhaps education in general. That's March 1969. And there were radicals on campus, such as King Collins, who was —

02-00:18:37

Yudof:

I don't really remember that. I was pretty apart from that. I had my own sense of my obligations. As I said, I was always the lawyer, never the revolutionary. But sure. And I remember classes where the president of Harvard shut down the university. I remember thinking, "Well, now I don't have to grade the papers." There was a lot of ferment. I don't remember a lot of violence. It was a strange time. People would say, I didn't even know them, I don't remember the names, but, "Joe Smith is in town and he's on the FBI list because he's allegedly involved in the bombing of a facility at Wisconsin or something like that." That was just in the ether at the time. It was a very radical time. From a university era when men often wore ties and jackets to class and very traditional dating patterns. There was a sort of revolution in sexual freedom. There were all sorts of huge changes that were going on. Counterculture. Now, many of them became Reagan Republicans later on. The world changes. And I later concluded that, and it may sound too much the cynic, but it was the draft that was motivating a lot of this. Once the draft went away a lot of this ferment toned itself down. Just like, just to be a cynic again, the worst demonstrations when I was at University of California when tuition was being raised. And you can talk about occupation, occupiers, and the top one percent, and affirmative action and social justice for this or that. But a lot of the wind was taken out of the sails. It was amalgamated with the tuition issues. And in that era it was amalgamated with the fact that people were concerned about being sent over to Vietnam. They weren't too gung-ho on the war. They certainly weren't too gung-ho at being shot at. And that was just the era.

02-00:21:02

Burnett:

Right, right. Leah Gordon is an historian who's written a book called *From Power to Prejudice: The Rise of Racial Individualism in America*. And it basically tells the story of the development of the social sciences in the United States after World War II and it's invocation in legal work, that a kind of statistically oriented social science helps to shape legal work on racial inequality and civil rights issues and places much more of an emphasis on individual race prejudice. That becomes the basis of a lot of legal opinion. And prewar social science, pre-World-War-II social science, by contrast, placed much more of an emphasis on political economy, on the structures of inequality in American society. Does that fit with your perception?

02-00:22:11

Yudof:

It doesn't entirely fit. It is true the NAACP pursued a litigation strategy which was group oriented. There's no law school in the jurisdiction. Can you have a separate inherently unequal law school for black students? Is it enough that

you give them a voucher to go out of state and so forth? So they did look at the structure of Jim Crow and the structure of segregation. But a lot of the rhetoric was individual rights. So I'm not sure I agree with her. If you look at the talk of the times, it was that a black child, just individually, one at a time, did not have the same opportunities. So there was an overlay of, yes, we have segregation and that's systemic and institutional, but there was an individual rights thing. Second, it is true, and the title of our casebook, which came out in 1974, which I think was fairly much of a landmark, instead of being divided by legal categories, it was called *Educational Policy and the Law*. So we tried to say: what do we know about the curriculum? What do we know about school finance? What do we know about racial discrimination, gender discrimination, and the like, and how should that inform constitutional decision-making or public policy or statutes and so forth? I think that's true. But even at that time I remember engaging in discussions. I was never of the view that the rights of black children not to be discriminated against and not to be forced into segregated schools should not be dependent on what color dolls they picked out or hard and fast evidence of where they did better. It's conceivable a black child could do better in a predominantly black school with black role models and so forth. But I felt it was a normative moral constitutional issue and could not just be reduced to the numbers. The numbers are helpful and can be helpful, certainly in your remedies and so forth, but I thought those big constitutional issues were more value-laden. I don't think you should be able to send black children to all black schools on purpose, even if they're performing at a half-grade level above the people, the blacks in another community, that are in integrated schools. It's just wrong to assign people by their race. That was always my view. I haven't read this book —

02-00:24:49

Burnett:

I might be misrepresenting her argument, too.

02-00:24:52

Yudof:

It was data driven coming out of the Coleman report and we looked at these issues very carefully and we liked the data. And there were a whole bunch of people like, Jencks and Stephan Michelson, who were refining the data. But the turn to a more institutional racism, I think, a view of it, came a little bit later. And one of the leaders of that was Charles Lawrence, who was at our Harvard Center, who later became a distinguished Stanford professor. I can't remember where he is today. He may be in Hawaii or something. But Chuck was not quite there at the time but later on he became one of the leaders of the critical race movement.

People went in different directions. We had Derrick Bell, who was not really affiliated with the center, but was someone we were in touch with and later was a Harvard and then an NYU law professor. And Derrick's view was you could never really get real equality out of *Brown v. the Board* and the tepid enforcement of it. And so therefore his view was — I don't know, this is

probably an injustice to him — but sort of separate but equal on steroids, where you put more resources and you beefed up the legitimacy and the respect and so forth for African American institutions. And there were many African American leaders, certainly NAACP, who disagreed with Derrick. Interesting enough, I don't remember the exact timing, but he may well have been at Harvard at some of the time that President Obama was there, certainly when Chris Edley was there.

02-00:26:34

Burnett:

Yeah. And I think Leah Gordon's talked about the period '46 to '64. Things change toward the end of the sixties and into the early seventies with respect to the relationship between social science and law.

02-00:26:48

Yudof:

Well, I think that's right. And you have to remember, the sixties heralded in what you might call an administrative law type of orientation. So we moved away from exclusively the NAACP filing lawsuits because kids were segregated or mistreated in one fashion or another. Remember, they were quite successful, deservedly so. But you had the federal government in the Johnson administration trying to put the force of the federal government behind enforcement of, particularly, Title VI and Title VII, employment discrimination. So there were many things going on. There was a move to more of an administrative state enforcement, not just the private attorney general function of the NAACP and later the Mexican American Legal Defense Fund litigating these cases to more oomph for the federal government. And that continues today. It varies by administration but certainly you see that in the Obama administration today. Simultaneously you have the appointment of Chief Justice Burger and a more conservative Nixon administration and the Court, certainly by the mid-seventies, is turning against particularly the metropolitan desegregation remedies, Detroit being the primary example. So there's change in the Supreme Court, there's change in the federal government. There's change in the social science. And there also was a change in attitudes. I think the level of agreement with *Brown v. the Board* was growing by the day. The problem was debates over what it meant and how to properly implement it and who should implement it. All that made, from an intellectual standpoint, a very exciting time at Harvard. And Harvard, both in the Education Law Center, and elsewhere, the Jencks group and the Moynihan group, remember, Moynihan wrote about the black family?

02-00:28:52

Burnett:

Right. Sure, sure.

02-00:28:53

Yudof:

And certainly leaders like Abram Chayes and Frank Michelman at the law school. There was a lot of ferment on the law faculty. There were social psychologists. Tom Pettigrew was there. This was happening across a broad range of disciplines.

02-00:29:12

Burnett:

And, as you said, the Coleman report was important in 1966. There was the Equality of Educational Opportunity survey. Some early critics of this work, because the report suggested that differences in resources between schools for blacks and white children are relatively small, although they favor whites in the south to some degree, and that minority schools have — in other words, what they're finding through their statistical analysis is that it's not just money necessarily.

02-00:29:54

Yudof:

Yeah, that was the message but it gets interpreted and reinterpreted. So clearly, if all you can do is put \$300 a student more in the black students, the evidence was very mixed about how much good it did. The evidence was quite mixed, by the way, on Head Start, too. The Westinghouse report in the late sixties didn't show a whole lot of progress. Nor has there really been a Head Start since then which has shown overwhelming progress, even though there are studies of pre-K [pre-Kindergarten] now, some coming out of the University of Chicago, which are very promising. Show some real significant gains. So the question is what does that mean? Some people would say that you really need to spend much more money and the range or variation was not great enough on poor kids. I wouldn't say just black kids; poor kids, basically, was the issue. It had disproportionate effect on black kids but it was poor kids, so that we really hadn't said, "Well, we're spending \$700 on the average child and we're spending \$1,200 on poor kids." They were much narrower differences. Second, we didn't have good data on how the money was being used. There were classroom inequalities, school inequalities, district inequalities, statewide inequalities, variations among states. That's a complicated factor. And so there were very deep-seated debates, not all of which have been dealt with today. I think, in part, the significance of No Child Left Behind, in my judgment, was whatever criticisms of the law and its implementation, was every child matters and we're not going to accept excuses. Maybe they don't have the best medical care and the neighborhoods aren't as safe as we would like, and maybe there's only one parent in the home, but it's our job — it's refreshing. It's our job to make it all right. And that's basically my philosophy. I don't doubt for a moment those things are very important and the rise of single parent families is not very helpful to all this. It's just not. And we have good data on that. But the kids are not at fault. That's always been my philosophy. It's up to the adults to make it right. Now, I'm not opposed, by the way, to a welfare system that makes sure kids have enough to eat and having a hot breakfast. I'm in favor of integrated services to poor families. So I'm not denigrating the other thing. But at the end of the day we simply cannot accept the excuse that you came to us as damaged goods and we really can't help you. We cannot accept that.

02-00:32:42

Burnett:

Right. And so there are different implications to be drawn, I think, from some of that mid-sixties research on the family.

02-00:32:50

Yudof:

It was done over and over again. The data was tremendous. People made whole careers of reanalyzing the Coleman data. But it did say that the simplistic solution of just adding a couple of hundred bucks in federal money was not going to be the panacea for all this. And, by the way, the school desegregation, which might be, in my judgment, desirable in any number of grounds, was not necessarily the panacea either.

02-00:33:22

Burnett:

Right. So you wrote amicus briefs for a number of cases in the early seventies as an outgrowth of this. Well, perhaps we're getting ahead of ourselves because there's your time at Harvard.

02-00:33:42

Yudof:

Yeah. I don't remember all the briefs at Harvard. And I didn't have primary responsibility for a lot. I remember visiting New Jersey to help a lawyer with a complaint on the first round of what was twenty rounds now of school finance litigation. And that's, by the way, a problem. Some of the naysayers were right. The courts have had a devil of a time enforcing these decrees. I remember doing that. And the Title I cases. I do remember some brief involvement in bilingual issues. Again, it was a constitutional issue then. I don't remember the specific briefs. Oh, I remember one other. I represented Native Americans at some point because they weren't getting a fair shake out of Title I or the Johnson-O'Malley Act. And Indian children are both in reservation schools and they're in public school districts. The way they were treated was problematic in both places.

02-00:34:46

Burnett:

Right, right. I think there was a case, *Lau v. Nichols*, a student was denied additional education because of poor fluency in English.

02-00:34:53

Yudof:

Right. I don't remember working on *Lau* at Harvard.

02-00:34:57

Burnett:

Well, that was later. That was later.

02-00:34:56

Yudof:

*Lau* was the first Supreme Court bilingual education [decision], came out of San Francisco, and involved a Chinese and Chinese-American students. It was interesting. That was an important philosophic decision because what the City of San Francisco said, or the school district said, is "We treat everybody the same." And they made a good case that that's what they did. But if you're of Chinese origin and you have limited English-speaking skills and you don't understand what's going on in class, you're at a marked disadvantage. And the court seemed to be moving toward a standard which said, and they can phrase it indifferent ways, "You need to have functional access to the schools." If they put me in a class and everybody speaks Romanian it's not going to do me any good. And that was a big part of the problem. They didn't come out in

favor of any particular bilingual approach but how could it be equal if people who have a limited grasp of the language are just sort of thrown in? But even that, by the way, has been debated. There's some evidence that immersion techniques work reasonably well or at least no worse than some other techniques.

02-00:36:15

Burnett:

Yeah. This becomes your sort of intellectual cohort at Harvard at this time, right? Working with these folks? I don't want to put words in your mouth. I think someone mentioned the 24 Garden Street crowd. This was a kind of —

02-00:36:39

Yudof:

Never heard that used before but that's right. It was 24 Garden Street. And, as I said, there were, I don't know, three or four centers or something like that, of which the Law and Education Center was just one. It was people working and thinking and conceptualizing about how you get better outcomes for poor kids. And that was a big breakthrough. There were other people that thought about that issue but never on such a sustained basis and, if I may say so, without as many smart people in the fray. And not all of them were on the litigation side. A lot of them were on the social science side. And there were people writing in a more philosophical mode on the education faculties. And in the era, Abe [Abram] Chayes wrote a famous article on public interest litigation where it's not the traditional party structure. It's not Jones sues Smith because you dented my car and it cost me \$800 to repair it; it's more amorphous than that. You want to reform the prisons, you want to reform the mental health facilities, you want to reform the public schools. You think the police department in Baltimore is not doing the right things by the African American community, where you're really reforming institutions. And, yes, there are plaintiffs but it's very different than the interests that typically individuals have. The implications are much greater for whole institutions.

02-00:38:13

Burnett:

And these are structural questions, right? These are not just questions, these are —

02-00:38:19

Yudof:

Yeah, I think that's so. And what I think you see today is the Supreme Court has got uncomfortable. Not all those lawsuits have gone well. It's hard for judges to do some of these things, as we know from all the rounds of *Serrano* and the New Jersey lawsuit. It's not easy. There's a question of institutional competence. It's not just courts. It can be state legislatures. Could be the Congress, it can be the executive branch. But anyhow, the great hope of the time was that public interest litigation, loosely modeled on *Brown* and the reapportionment decisions, which also came out in the sixties — and don't forget this was the era of the Miranda warnings and you can't beat confessions out of people.

02-00:39:09

Burnett: Due process. Right.

02-00:39:10

Yudof: It was a time of institutional reform. But for me I never lost my focus; it's the kids that matter. I don't even care whether they were individually or in groups. And if you had to change the schools that was fine with me. But my interest was in getting a fairer set of opportunities for these children. And then there was debate on what you were seeking. Personally I was never seeking absolutely equal outcomes. They're hard to measure. And who knows? There's so many factors in life. I was just trying to remove the barriers, the obvious — you have less money spent on you, you're a black kid, you get sent to a school with broken windows and less prepared teachers. I thought there was a lot we could do there. Now I think there is, among many progressives, more emphasis about how come the average family wealth of an African American family is lower. That involves a lot of things. Tax policy and economic policy.

02-00:40:15

Burnett: It's dizzying.

02-00:40:18

Yudof: But my main focus was really on opportunity and fairness in allocating resources, which did not mean equal necessarily; it might require more resources.

02-00:40:30

Burnett: Right. Before we move on could you talk a little bit about the work practice at the Harvard Center? Was it partly social? Was this something that people would discuss ideas in different contexts or —

02-00:40:44

Yudof: They would. We came to the office and I was a baby lawyer and I was trying to learn how to do it and I remember it was hard because I had no training. I had been a law clerk helping to draft questions for interrogatories. I don't know. I may have participated in some depositions. I didn't really make much in the way of oral arguments to court. I was always second chair. There were more experienced people to do it. Yeah. But it was partially social but it was part of a very activist era. And David may have mentioned this. It blew up at one point. After a year, for whatever reason, there were people whose contract was not renewed at the center. I don't really remember all their names. I think the issue was their retention more than the philosophy of the lawsuits. I'm trying to remember. What was it? It was a time when Ivan Illich was somewhat in vogue, someone that Governor Brown told me he knew and interacted with. So there was this idea that there's a hidden curriculum and students are being duped into supporting the status quo and, Steve Arons was his name, and to some extent Chuck Lawrence wrote on the subject also. And it's odd. Today that might be more of a right of center issue than a left of center issue. But then it was a left of center issue. So that was a deeper

criticism than Title I monies aren't flowing to the right kids. Some of those folks thought it was sort of an inch-deep program and the revolution would never occur there, which is probably true. And they saw a sort of bias in schools to a factory model and people were taught their place. You don't hear very much of that today but some of it still survived. And there are a whole series of books.

But anyhow, Steve was not renewed, and I don't remember who else was not renewed. And they were absolutely terribly angry by that and they hung banners outside of Garden Street. I can't remember what was on the banners. It may have been a peace symbol or something. And, again, I have to say much of my life I seem oblivious to things. And I felt like I was doing important work and that I was learning a lot. I wasn't fired. I was thought to be one of the — I think, I guess, David — one of the better performers. And so I stuck with David and I taught my class and by 1974, later on, we published the first edition of our casebook. And that occurred. But that was an uncomfortable time. We did move to another building, I remember that. I don't remember where it was. But anyhow, there were deep philosophical disagreements. But I never was quite sure why some of the staff were not renewed, who was considered productive and not productive. My work was more geared to actually helping the legal services offices and helping think through lawsuits and writing complaints and so forth. I did write articles but I think some of the others were more into a deeper level of structural criticism of American education.

02-00:44:38

Burnett:

That may have been a function of the fact that the purpose of the organization changed. So when the Office of Economic Opportunity helped set it up the idea was that it was going to be a research center, full stop, and it very quickly became the backup center model of supporting existing cases.

02-00:45:00

Yudof:

Really? I didn't realize that.

02-00:45:00

Burnett:

Yeah. So some people might have been hired under one rationale and then others under others.

02-00:45:06

Yudof:

Yeah. I think when you view yourself as leading the revolution and the problems as being systematic and epidemic, as well, a little bilingual education suit here and a little desegregation suit there, and fixing up Title I in Maine might not be at the top of your list. I guess you could say I've always been of the view that a lot of good can be done incrementally. And so I thought those lawsuits were important and I think they were important. But you'd have to ask David. I don't remember the exact, other than people were upset that their jobs were not renewed and attached, I think, malevolent reasoning for that.

02-00:45:52

Burnett:

Yeah. And that was also a function of the times, as well, right?

02-00:45:57

Yudof:

Yeah. I think that's right. I sort of gravitated. I wrote my articles, I taught with David, I worked on the litigations. To me it was sort of natural. I stayed away from the university-wide politics. I taught my classes, I met with my students. And I pretty much had a grand time. My mother thought it was hopeless because I let my hair grow long and I was wearing an old Army jacket. She would look and talk to family and say, "Look at my son. He got a law degree from Penn. He's a research associate," later some sort of lecturer, low-level lecturer at Harvard in the ed school. She didn't say this but I could see her shaking her head, "I wonder if this is all going to work out." I think it did color my views in the sense that — and it was more of a product of the times than anything else. I think I'd have been very happy practicing law in Philadelphia or Los Angeles or New York. And I might have had a mid-life crisis where I was tired of defending people's tax returns and negotiating bank loans and suing an antitrust or something. Maybe. I don't know. But my concept was that a worthwhile life should have more public service than that. And I was looking for a compromise. I didn't want to let my family down and I wanted to make a decent living. But it just didn't feel right to just join a law firm, although I must say the salaries they offered me felt right. And so I think that formative period of '69 through '71, when I was on the cusp, really led to a conception of a career that had more public service and law professorings not only seemed to fit that model but it would enable me to continue to do some of the things I believed in, not only in terms of writing but to assist in litigation or whatever. So I continued that. But to this day I think in a different set of circumstances I could have been a practicing lawyer and probably pretty happy at it.

02-00:48:24

Burnett:

Last time we talked about you kind of flirted briefly with criminal law as an idea of a future career. You thought it was —

02-00:48:33

Yudof:

Not criminal law. I never flirted with that.

02-00:48:34

Burnett:

Oh, okay. There was a rape case that you —

02-00:48:40

Yudof:

Yeah, I worked eighth chair, I was a law student, in a rape case. And frankly, even then I was sort of — the guy did it in my opinion and I wasn't that distressed. I felt he deserved a defense and due process. And I didn't want to do criminal law. My views were not well formed. I probably would have done some sort of civil law. Maybe litigation but maybe an office practice. Maybe it could have been real estate law or tax law or bankruptcy or something. Criminal law had no allure. Labor law had some attraction to me. I wasn't aware of how bifurcated the bar was. It was my highest grade in law school. I

thought the issues were interesting. But being a labor lawyer, depends on your position, but the contentiousness can be pretty high depending on where you are and if you're representing the labor unions or management.

02-00:49:40

Burnett:

Right. But the ingredients for what you wanted to do, even though they might have been amorphous at the time, it had to be interesting, it had to be important?

02-00:49:52

Yudof:

Well, that's right. It had to be interesting, it had to be important, it had to have a service component. And, of course, hubris was there, which meant that I had been a law clerk to Judge Ainsworth and I enjoyed it and I saw a side of the law I never would see again. I enjoyed him and I enjoyed the Fifth Circuit and these fabulous cases, everything from Clay Shaw and the assassination to selective service center riots to big labor law decisions, school desegregation decisions. But I sort of made up my mind that I prefer working under my own head of steam and I never applied for a Supreme Court clerkship. I don't know if I'd have gotten it. I just didn't want to be someone's alter ego for another year. And I enjoyed writing opinions and so forth and I felt like a law professor more than a first-year associate at a law firm. Had better control over your agenda. And it worked out that way. I always felt I was lucky to live in an incredibly wealthy society that could afford someone like me and that would pay me money to be an assistant professor and write articles on whatever I felt like writing. I mean who would have thunk it, right? That's pretty incredible. I felt vaguely like an artist during the Renaissance or something, that you had to have an incredible level of wealth to afford to pay people to create a statue of David or a Pieta. I don't say it was like that for me but why would you just pay someone to think and write articles and hang out with young people and argue points of law and philosophy with the faculty. This is really a wonderful society we live in.

02-00:51:43

Burnett:

True. But, as you said, although you have eclectic interests and that's been a hallmark of the nature of your curiosity, you had shown yourself to be someone who was interested in topics very much beyond yourself. So you were very much interested in these —

02-00:52:03

Yudof:

Right. And I think that is true and I thought, "Well, where can I best do that?" There were some law firms, like Hogan and Hartson that did a substantial public interest law, so I don't want to — but it was harder. You're a young associate, you've got to bill so many hours, you've got to serve your clients. I just felt that that side of me, it was more likely I could achieve those things — for a law firm to send me off to litigate the Rodriguez case for two years and continue to pay me would be quite remarkable. Now, later on some law firms did that. The Vinson & Elkins firm in Houston, it cost them millions of dollars to defend my honor on affirmative action. The managing partner was a close

friend of mine and he believed in what we were doing and he did it. So I think attitudes have changed.

I do remember an interview, I probably shouldn't say this, but I interviewed — the best offer I got out of law school was from the Dilworth Paxson firm in Philadelphia. I don't know if he was managing partner but he was really senior and his name was Coleman, James Coleman I believe was his name. Later he became Secretary of Transportation under President Ford, an African American guy. He may have been the first black person to be on the law review at Harvard. I don't remember. He was a really brilliant man.

And I interviewed with him. And he said, "We've got the salary. These are the cases. You'll work in Philadelphia. This is a great firm." This is not his words but mine. "But I don't want to hear about any of that public interest crap. You come here, you work for the clients and you get your work done." And that sort of stuck with me, that, yes, you could do these things but it could adversely influence your career. And, again, I don't want too broad a brush. I'm not saying all law firms and certainly not all of them today. It's always been my philosophy you close as few doors as possible. And I thought being a law professor kept the doors open. Can we take a break for a minute?

02-00:54:22

Burnett:

Sure. Absolutely.

02-00:54:29

Yudof:

David Kirp and I became good friends. We worked on things together and the whole thing was an eye-opener. His writing skills, I mentioned that. I really hung out with — there was a group called the National Welfare Rights Organization. Not entirely but predominantly African American women. Stayed at a black hotel in New Orleans because they still had segregated facilities in New Orleans at that time. Went to New Mexico and represented a number of the pueblos in litigation. And David was extremely supportive and toward the end of the time there he and his then partner and Judy and I went to Europe together. It was our second trip to Europe. We had a grand time. We bought the good food card and we went from place to place. I think it was mainly in England. We went to the West Country and Cornwall and all of that. This was probably a more successful trip. I had mentioned our first trip was 1967 when I determined that I was going to be drafted and we went to Europe, spent all our money, then I wasn't drafted, then we had no money. It was quite an epiphany for me. And so David and I had a friendship and, of course, he left for Berkeley and I left for Texas but we continued to work on our book together. We may have coauthored some articles. I remember we coauthored an article on affirmative action early on and then, of course, later we coauthored at least one other book, I believe. So that relationship went on for many years, often at a distance. Then, of course, I came out to Berkeley and saw him occasionally and once I remember I enticed him to give a speech in

Austin. I think David considered it roughing it going to Texas but I got him out of Berkeley and San Francisco for a while to do that.

02-00:56:36

Burnett:

And can you talk about the transition to the University of Texas? How did that come about?

02-00:56:41

Yudof:

Well, it's strange. I didn't handle it very well in some ways. I decided I wanted a teaching job so I interviewed some places and I went—it may have been in New Orleans. They used to have a pre-associate of law schools meeting where law schools could interview people for jobs. I remember I interviewed at Iowa and I didn't get a job there. I interviewed some other places. And then I made a mistake. I accepted a job at the University of Connecticut. This caused some consternation. And I was perfectly happy to go there. I thought it was a good place and I would have enjoyed it. And then all of a sudden the University of Texas expressed interest, so I went and talked to some people on Harvard faculty and they advised me, "Well, you ought to interview at Texas and if you get the job, then you could withdraw from Connecticut." And I did that but the Connecticut people were very angry about it. I'm not sure to this day I did the right thing but I did ask people what the rules of the road were on that sort of thing. Later in my life I made a decision very differently, when I was offered the job at the University of Texas as president and I had accepted Minnesota. I went to Minnesota and stuck with my original decision, maybe because of that experience. I felt badly they were so upset, although I was a young kid and I don't know what to say. That happens in life. I also interviewed at Rutgers and Ruth Ginsburg, later the justice of the Supreme Court, was the head of the interviewing committee or the search committee and appointments committee, I guess it was. And I liked Ruth a lot but I wasn't so fond of Newark. That didn't work well. And, of course, she later moved to Columbia.

So I got this invitation to come down to interview with Texas and I said to Judy, I said, "Judy, there's no way the University of Texas is going to hire me. They have so many people that want the job as a law professor with such stellar credentials." And I turned down a job previously at Washington University in Saint Louis because they wanted me to be a part-time assistant dean and I wanted no parts of that. Anyhow, so I said, "Judy, here's the deal. It's cold where we are. We're in Boston. Let's book an airfare, we'll stop in Austin, we'll do the interview, we'll go on to Mexico City and we'll have a vacation." And that's what we did. So I went to Texas and they put us up at this sort of motel a couple of blocks from the law school. And I thought, "This is unbelievable. The sky is blue, the weather is warm. It's a beautiful law building."

02-00:59:27

Burnett:

What time of year was this?

02-00:59:30

Yudof:

January. It was freezing in Boston. They towed my car for the eighth time. I never could get the right side of the street straight, what to do in a snowstorm and when they were plowing one side or the other. Although I liked Boston but I thought, “This is like a permanent vacation to live in Austin, Texas.” So we had the interview and that time it was pretty informal. I don’t remember presenting a paper, which is almost *de rigueur* today. So I went through the interview and I didn’t think much of it. I loved the dean, Page Keeton, a major figure in tort law in America, a great dean for twenty-five years at Texas. They took me to fancy restaurants by then Austin standards. Now it’s a foodie capital. It wasn’t back then. And we went on to Mexico City. We stayed at the Maria Isabelle Hotel and we went to a bullfight. We went to Xochimilco and saw the flowers and the floats and went to the Chapultepec Park and the anthropology museum and shopped in the Zona Rosa. This was a time when people really didn’t worry much about personal safety. We just went everywhere. We walked, took peseros, one peso, you went across town and so forth. And had a grand time. And while we were I got a call from the dean that I had gotten the job. I was almost floored. I really did not anticipate it. I couldn’t figure out why they would want me. And so I accepted the job and we went back to Boston. I can’t remember the exact dates. I think I went to Texas in August of ’71.

02-01:01:14

Burnett:

And so it was a prestigious school. You said that you weren’t worthy.

02-01:01:18

Yudof:

I don’t know where it was exactly at that time but Texas is usually top fifteen, twenty, twenty-five law schools in America. Prestigious school. Had Charles Alan Wright, one of the great law professors of the twentieth century was on it, and had others like Page Keeton, who was very highly regarded in all sorts of ways. Meanwhile Judy had gotten pregnant with our first son, Seth, and went to Europe. She was pregnant. I remember we went horseback riding in the west country in England, sent the pictures back to our parents. They almost collapsed in upset because she was pregnant riding horses. I don’t know anything about that. Apparently some people think that’s not —

02-01:02:08

Burnett:

It’s not a good idea.

02-01:02:08

Yudof:

— a good idea. And then we moved. We got into our 1968 Oldsmobile Cutlass two door, which I had bought when I graduated law school. And Judy was always very employable because she was a computer programmer. Judy had supported me through law school. I loved it. And had a good job in Boston in the Prudential Center. I think it was United Fruit. I can’t remember who it was. But she quit her job because she was going to have a baby that January. And we went down. I’m trying to remember. We probably lived in a hotel a couple of days and then we rented a place and then rented a better

place. And we were very happy there. And we built a house, in 1972 we built a house, outrageously priced at \$42,000. And so I remember the first year vividly. I was trying to fit in. I was a little untutored. I remember there was this Yalie on the faculty, sort of smart but obnoxious guy. And I mentioned Justice Taney. Well, it turns out you pronounce it Chief Justice “taw-nee” but I had never heard it pronounced. I came from a family of electricians. So I had moments like that. It was fine but a little, I thought, elitist on the part of my colleague there. I loved my colleagues. We had come back from Paris and they said they would show us the Paris of Austin and we went out to one of these barbeque places and literally they had one fork that was chained to the table, no plates, butcher block paper, and a fabulous barbeque, one of these great Texas barbeque.

02-01:04:12

Burnett:

Legendary.

02-01:04:13

Yudof:

Brisket barbeque places. And I sort of liked them and I liked it. I have to say that even though I had taught at Harvard, my teaching assignments, where I had [to teach a course in] contracts for the whole year, I wanted to do that because my best teacher in law school was a Professor Gorman, Bob Gorman, and I enjoyed the course and I got his notes and I used the same book he did. Then I wanted to teach educational policy and the law. That took an act of God at the time. They had never offered the course. And then the dean insisted I offer a course in sales, which I won't go into, but essentially secured transactions. When you buy a car and if you get out a loan the car company can seize your car if you don't make the payments. It was really boring, even for me, and I was only two cases ahead of the class. My standard technique was to say — students would ask a question, I had no idea of the answer. I would say, “I'll talk to you after class.” And then I hit that door like a speeding bullet at the end of the class. I just never really understood. I didn't even really care who won. That was another problem. But the thing I remember most about the first year, it may sound odd, it was a year of some fear. You're standing up in a class of 120 contract students and later on they would tell me that they were fearful of me. I said, “What are you concerned about? There are 120 of you, there's one of me. I'm up there.” And so I overprepared. I spent hours and hours and hours getting ready for every class. So I would say it was a fairly successful year. I think we got decent evaluations, good evaluations from the students. But it took some getting used to, to be a teacher. Particularly, it's not a seminar with ten people around a table. It's really more like a performance and what are your hypotheticals and what are you going to cover? You never knew what the students would say and you had to bounce, it's Socratic method, you need to bounce off of their ideas and so forth. But eventually I learned to enjoy it, although I never got over the obsessiveness on preparation. I would teach in the morning. If I taught in the afternoon there was a danger I'd spend all day. I wouldn't write

my books and articles and I wouldn't do service and I wouldn't work on other things. I was capable of preparing for class fifty hours a week.

02-01:06:48

Burnett:

Did that help, though, in terms of your research? Because teaching is always more broad than research, right? So there's an encyclopedic preparation that you're doing, I imagine.

02-01:07:07

Yudof:

Yeah, I would say it varied. In contracts it didn't help that much. It was encyclopedic and after doing it for ten years I was declared to be an expert on contracts. Educational policy and the law, I was able to pick out things that I was interested in. The first article I wrote, major law review article, was called "Equal Educational Opportunity and the Courts." And I can't say I got a lot of notoriety but there were elements in my education law course that came from there. It dealt with school finance, school desegregation, and I can't remember, I think one other subject I don't recall at this moment. Trying to show that there was a continuity of equal opportunity in different areas. So that did help. The sales course I probably learned something.

02-01:07:55

Burnett:

But maybe not —

02-01:07:58

Yudof:

But not something I wanted to retain.

02-01:07:59

Burnett:

Right, exactly.

02-01:08:02

Yudof:

But it was a very social place. The place was very friendly, very different than today's faculty. There weren't very many people who were sort of individual entrepreneurs. People invited each other to dinner. There were mostly one-career families. When I joined the faculty I don't think there was a single female on the faculty. I'm not saying it was a golden era if you were a woman or an African American or Hispanic. It wasn't. But we all went out to dinner with each other and when we met socially we did nothing but talk about legal topics, boring our spouses to death. And we lived well. We had a beautiful stone house. What did they pay me? I can't remember. It was something like \$14,000 a year and I had a \$42,000 house and I was happy. I didn't think life got much better. And the weather was outstanding and you could take side trips and go places to San Antonio or Houston or Dallas. Had a grand old time. I enjoyed it.

02-01:09:01

Burnett:

Because in our last session you talked about your character when you were a student and that you were a very shy person. And can you talk about the evolution? Because the way you've been described by others during your time

at Texas is that — people mentioned charm, your personality winning people over. Can you talk about the development of the Mark Yudof persona?

02-01:09:31

Yudof:

Yeah. I don't know. It evolved over time. I still consider myself a shy person. If I were in a room and Barack Obama walked in I probably would not walk up to him and try to introduce myself. I would consider it presumptuous on my part. But I always had a very strong sense of duty, if I can put it that way. That you take on a job, you need to be good at it and you need to master it. So I tried to teach myself to be a good teacher and not to be as nervous and so forth. And I did go into that. I think I was very rough at the edges when I arrived. My former students, all of them have stories. "You really told me that I should consider optometry, that I might not make it in law." And I would say, "I don't remember it but if I said that I'm so sorry. I was out of my mind to say something like that." But I did have a rough Philadelphia edge to me and I thought that what you could say on a subway in Philadelphia you could say in class. And it's not true. Particularly to Texans, who are so civilized at that level. I don't know about the charm. I did have a side to me that always tried to engage people and tried to be more amusing. I just found that, over those years, not just in the first couple, that trying to prove you're the smartest person in the room does not win friends. And, of course, you may not be the smartest person in the room. Six others that are much brighter. And so therefore I found that sort of turning on, being more witty, and more engaging and more charming, it made life better. It made for better friends. And in a way, if you wanted to accomplish something, it made it easier. You can't substitute charm for substance. But if you have both it's helpful. And I leave it to others to assess it. I still have my moments of charmlessness. Remember Baltimore is called charm city, too. But I like Baltimore actually.

02-01:11:46

Burnett:

Right, and Philadelphia is "the city that loves you back."

02-01:11:52

Yudof:

I am a product of Philadelphia and by extension Baltimore and New York and Camden.

02-01:11:57

Burnett:

Yeah. In talking to folks there was a bit of the new Texas at the time, too. Texas itself was changing. Was the law school kind of a mix of people, like insiders and outsiders?

02-01:12:19

Yudof:

Well, it was. There were people, Texans all their life, and gone to the University of Texas Law School and then there were people like George Schatski and Russell Weintraub who went to Harvard and Charlie Wright who went to Yale and I went to Penn and Mike Sharlot. It was a mixture. I would say the *enfant terrible* group, the new group was mostly non-Texans at the time. Like many law schools, went through an evolution from almost

exclusively drawing on their own graduates, and then looked exclusively outward for, whatever, twenty years or so, and then they began pulling back in people from Texas. One of the things I really liked, because it was the new Texas, it was so open. And, of course, Austin is sort of the Berkeley of Texas. It's culturally very different. You have 254 counties and Travis County, Austin is one of the few that voted for Walter Mondale over Ronald Reagan. And it's just different and very informal and so forth. But I couldn't get over how open it was. You see, when I was growing up in high school there was a country club, Llanerch Country Club, a couple of miles away, Jews were not allowed. The only time I went there was on my twenty-fifth anniversary of my graduation of high school. And I thought, "God, I didn't miss much." And the private clubs in Philadelphia, many of them didn't admit Jews. The law firms were divided between Jewish and non-Jewish firms. It was beginning to erode. And there was a [Philadelphia] Main Line group and black people had not been elected mayor of Philadelphia or anything like that. It was very hard. It was old wealth and I was not wealth. I was a kid who was a professor who came from a blue-collar family.

In Texas it all seemed possible. All of a sudden I met people who were in the legislature. Over time I got to know the lieutenant governor well. And later on, of course, I met a lot of those people. I felt they were open to people, I suspect a little like California in the same era. Yes, there were old families and they were regarded but they didn't have a lock on everything. Everyone sort of understood that there was to be this permeating of all the institutions and structures. So I never felt that I was on the wrong side of the tracks. Now, if I had been Hispanic at that time I might very well have felt that way. But at least for a white guy — later on there were problems. I learned there were some people that didn't like the idea of a Jewish lawyer from Philadelphia becoming president of the University of Texas. Not everyone but a couple. But for my purposes it was a very open society. And the cultural stuff was fabulous. I became addicted to the Tex-Mex restaurants and all that stuff and the barbeque. Austin grew culturally but there were no real equivalents of the sort of culture you'd see in New York or San Francisco.

02-01:15:48

Burnett:

For music and things like that?

02-01:15:50

Yudof:

The music was beginning to grow and I did a little bit of that. I've seen Willie Nelson and the Pointer Sisters and, and all, and Jerry Jeff Walker. I did do that. I'm sort of stuck in the sixties and seventies in country music. Garth Brooks is all right but most of the rest I don't listen to.

02-01:16:11

Burnett:

But you were welcomed in Texas?

02-01:16:13

Yudof:

Yeah. And if people had reservations that I was an out-of-stater or wasn't educated there, and as Judy would say, I think she felt immediately this was home. So we didn't feel alienated. And, of course, I was naïve. It never occurred to me that we would. I don't know. We just got in our car and drove from Boston to Austin, Texas. To the extent there was dark underbelly in terms of African Americans, Hispanics, at least for a time I was not fully aware of that despite my experiences at Harvard. I became obviously more aware of that as time went on.

02-01:17:03

Burnett:

Right. Well, we'll continue next time.

02-01:17:05

Yudof:

Okay.

## Interview 3: October 22, 2015

03-00:00:00

Burnett:

This is Paul Burnett interviewing Mark Yudof for the University History series. This is our third session and it's October 22, 2015, and we're here at the University of California Berkeley Law School. Professor Yudof, there are historians who have talked about the period between the end of World War II and the end of the sixties, who have described it as a period of high modernism, which they define as a faith — in the United States and even in the USSR — in science and social science and technology, and a belief that relatively simple, often technical interventions in society on a grand scale can effect broad transformations and solve a lot of society's problems, or at least greatly mitigate them. And that this high modernism begins to unravel in the 1960s and seventies as the consequences of some of these interventions begin to come clear along a wide range of axes. So I'd like to ask you about this with respect to your involvement in cases and your thinking about the legal theory and practice in the early seventies, to reflect on what might be a somewhat analogous crisis in the theory and practice of law during this period.

03-00:01:44

Yudof:

That's a complicated question. And I was somewhat schizophrenic. The reason David Kirp and I put together *Educational Policy and the Law* is because we thought there was an intersection between good policy, good social science, and legal systems. That it doesn't mean you necessarily made decisions on the basis of social science. And I actively opposed interpreting *Brown v. the Board* as explicable only as an effort to improve the plight of black children and test scores. I thought there was a moral principle, as well, and a constitutional principle that was more important. At the same time, the more I got into it, the more difficult it became. There was a crisis. In the Coleman Report, there was a portion of it that said one of the great predictors of student performance was how many square feet of carpeting you had in the home. And that was before hardwood floors came in —

03-00:02:47

Burnett:

Into fashion.

03-00:02:48

Yudof:

— as big a fashion, perhaps, at least in some circles. And that a lot of these interventions had not done much good and that socioeconomic class was a major factor. And I was constantly worried that we really didn't know how to teach poor children effectively. So one the one hand I wanted to know what we know and what more systematic examination of different policies would reveal, whether it was school desegregation or gender discrimination or compensatory education. But over time I think we all sort of felt that the social science was not up to it and the education theories were not up to it and the education schools were not penetrating that black box. So that led me and maybe others to think about how you would devise a policy or structure a

legal division when there was uncertainty as to its impact, uncertainty as to what the social science would do, uncertainty about the best teaching methods and so forth.

In many ways, if you want to understand — I guess it was my tenure article really, around 1973, it was called “Equal Educational Opportunity and the Courts.”<sup>1</sup> It tried to integrate some of the social sciences. It made the point that *Brown* should not be thought of as just a social-science decision and that it was okay to segregate schools deliberately if you could show that the African American students didn’t do better in integrated schools. There was a much deeper moral constitutional principle involved. But it also tried to define equal educational opportunity. Someone called it my Nietzschean period, where I was interested in grand theories. And I was thinking, what are the overarching theories of equal educational opportunity and how do we fit them into this landscape in a situation of uncertainty? So if you read the article carefully, what I’m trying to say is I see school finance reform, poor kids need to get more money spent on them, you should not discriminate between rich and poor districts, and so forth, and school desegregation as part and parcel of a definition of equal educational opportunity. The original desegregation decisions were what I would call a negative definition. And it didn’t say what you were entitled to in the sense that you were entitled to XYZ services but it said that you cannot discriminate against people on the basis of race. A little bit like some of the civil rights acts. It was a negative definition: what you could not do, rather than a positive, what you had to achieve.

Over time the Supreme Court became, I thought, more enamored of a more outcome-oriented, you’re entitled to an integrated education. But that was reading the tea leaves because I felt that some of the decisions were so attenuated and so difficult to defend on traditional original sin. You had segregated schools in 1906 and that’s why you’re segregated today. I thought that’s really where we were headed. And Justice Powell wrote a concurring opinion in *Keyes v. Denver* that said that, and I actually wrote to Justice Powell and said, “You’ve ruined my casebook. I have to reorganize the whole thing.” He went me back an autographed picture, which I have somewhere.

And then I went on to talk about school finance. And it wasn’t so much that you could have equal expenditures on students, but at least one principle was you may not discriminate on the basis of a district or family wealth. But one can imagine other principles, that you were entitled to have your needs met or you were entitled to certain outcomes. But at the time I was skeptical, and frankly I remain skeptical, whether those are really justiciable. I have no problem with Congress doing it. But the idea that the courts could modulate the system in a way that would really provide a “to each according to his needs” sort of standard, spending more money presumably on at-risk children

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<sup>1</sup> Mark G. Yudof, “Equal Educational Opportunity and the Courts,” *Texas Law Review* 51.3 (March 1973).

and the like, I wasn't sure that it could be pulled off from a judicial standpoint.

And then there were others who really wanted equal outcomes and that has many different definitions. But it was very different, it's interesting, than later, No Child Left Behind, and the Bush doctrines and the Clinton doctrines, and my friend, Christopher Edley, and his work. It was not so much that people were proposing that there should be no failure in public schools or that every child would succeed. The idea was that it would be random, by class or by race or ethnicity. So the problem was, just to pick one group, the black students were taking it on the chin. They were disproportionately represented in dropouts. They were disproportionately underrepresented in higher education. They were disproportionately receiving, in many cases, not all but many cases, less money spent on their education. Not all, because they lived in urban areas, some of which were affluent. And I said, "You can't do an equal outcome." That would be noble. And that has changed. We almost don't talk about the race and the social class issues and this idea of worry about whether we really know how to educate the kids. We have this mantra which is sort of "no child left behind" — every child will succeed. Obviously a bit of hyperbole. You hope it's 99.9 percent but it's never going to be a hundred percent. But we were more focused on the discrimination issues. But we weren't to some extent looking at outcomes. But it was very difficult to see how a court could order equal outcomes among demographic groups of the population. Again, not that it's not a noble goal, but how do you enforce such a decree, particularly when you don't have the tools to know how to achieve those ends?

I had a conversation yesterday with a very able person from the Opportunity Institute. We're still talking about the same thing. How do we improve completion rates? Where do we intervene? How do we get around the kitchen table and family discussions and get families to put their children forth for community colleges, for BA degrees, and hopefully PhD degrees and medical degrees and law degrees and all the rest? And so there's a lot that's out there. But anyhow, the attempt at a unified theory did not particularly work. And, of course, I annoyed a lot of people because I thought of the *Keyes* decisions and some of the others as being a house of cards. That you took events that were way back when and you attributed segregation to it, when the reality is the affluent people were rushing to the suburbs. White Flight it was called at the time. And the majority of the school board in Denver at the time was minority. And to say you're guilty of discrimination. Maybe some people really believed that, but I always thought the larger agenda was to achieve integrated schools, as Justice Powell said. I thought that was a noble goal but the legal reasoning along the way — but that's part and parcel of my life. Even when I agree with people's conclusions I frequently don't agree with how they got there and that's true of integration, which I deeply favor. It's true of affirmative action, which I deeply favor. But my reasons are not always the same as everyone else's.

On the school finance side, I tried to stick pretty much with the *Serrano*, later what became the *Rodriguez* case with a negative definition, thou shalt not take wealth into account and not distribute resources based upon wealth, whether deliberate or not, by the way. And it had not yet crystallized in my mind what actually developed in the law, which was as the court eventually, by the mid-seventies, began retreating in metropolitan desegregation cases, and as *Rodriguez* was lost in 1973, the Congress would begin picking particular entry points to help different groups. So you have Title IX dealing with sex discrimination. You have Bilingual Education Act. You had a series of targeted interventions. Title I was beefed up some. And that was the nation's answer. There was no global theory. And the courts, to a large extent, abandoned the reform field.

Part of the pessimism of the period, by the way, is the transition in the country, in the United States Supreme Court. *Rodriguez* might have been winnable in 1968 but in 1973, even though there were precedents that supported us, they were not compelling but they were convenient precedents that could have been used to support a different decision. If you remember, the plaintiff's lost that case five to four in the U.S. Supreme Court.

03-00:12:54

Burnett:

Yeah. It was nonetheless a close decision.

03-00:13:07

Yudof:

Yeah, it was close. But by that time Chief Justice Burger was on the Court. And the other thing I think was bothering the court, *Keyes* was argued the same day as *Rodriguez*. They had had a tiger by the tail with school desegregation. They had had a devil of a time with "one person, one vote," and reapportionment and prison reform and other things, public-interest litigation. So I think it was a combination of some staunch conservatives who felt it was no business of constitutional law or the Supreme Court. But others took a prudential sort of view, that, gosh, can we really make this stick even if we do it? And I have to say, sitting here over forty years later, they may have been right. Because as I watched this in the state, these are devilishly difficult decrees to enforce. They're just hard. They're hard for legislatures, much less for courts.

03-00:14:03

Burnett:

Can I ask you, from your perspective, for those who would suggest that there's an activist role for the courts in spec'ing out remedies, what were some of the plans and what was the optimism around that? What did they think would happen as a result?

03-00:14:25

Yudof:

Well, we thought, and Steve Sugarman, who co-wrote one of the major books on this, we thought this negative definition would work. That it would unleash creativity if you got away from the local property tax and rather extensive reliance on it, with the result that affluent districts spent more money on their

kids. And typically, like in Texas, more state aid went to the affluent districts than to the poor districts. We thought if we could just break that up and say, “This is a logjam like *Reynolds v. Sims*. This is like “one person, one vote.” The legislature is systemically incapable of addressing this because of all the people who sort of bought into the present system and elected under it. That once we said, “Okay, you need another way to shuffle the deck,” that maybe you need to have statewide financing, maybe you had to have, as Coons and Sugarman recommended, district-power equalizing. That a given tax rate in one district would raise the same amount of money in another district, even if their tax base is dramatically different. So it was strictly a “break the logjam” and “no single plan.” And if the legislature wanted to adopt a definition of children’s needs or the optimal school library or what the right curriculum would be, it was all right with us so long as they weren’t distributing money based upon individual family or district wealth. In fact, one of the reasons we did that is to say to the Supreme Court that — I can’t remember the biblical phrase — but that there are many rooms in my father’s house or many houses in my father’s home, something like that. The idea was you wouldn’t be putting the states in a strait jacket. You would just be ruling out one method of doing business. But it turned out it’s the way they’ve been doing business for well over a hundred years and it would have been quite disruptive. But I think it would have been doable.

03-00:16:30

Burnett:

And there was, I guess, a period when the federal district court in Texas made the decision in December, or late ’71, and they had to go through a period in ’72 where they had to do some kind of implementation.

03-00:16:46

Yudof:

Frankly, I don’t remember. It may have been stayed, the order. I do not remember. But the story is an interesting story. I arrived from Harvard. I’m at University of Texas. I had had contact with litigators in New Jersey, California, Texas. Not deep or profound. So I knew some of the players. So I arrived at Texas. I was a young assistant professor. The faculty had approved my teaching the Education and the Law course, the first in the history of the law school. So being young and brash I wrote a letter to Arthur Gochman, the lead counsel in *Rodriguez*, and I said, “Mr. Gochman, I admire what you’re doing. You’re doing good work. And I’m available and I’m free.” And I became co-counsel in the *Rodriguez* case and I would go down to San Antonio and meet with Arthur and help draft the briefs. The trial was before a three-judge court. At that time if you challenged a law of statewide impact you had to have a three-judge court and then there was a direct appeal to the United States Supreme Court, which I believe was also unfortunate because it would have been better, I think, to let this gain some ground and not get such early review. And it was pure happenstance that *Rodriguez* was first in line. No one knew that. And, by the way, I paid all my own expenses, including paying my airfare to Washington for the oral argument. And didn’t meet Mr. Rodriguez until years later.

So I sat through the trial. The Attorney General wrote a brief, said we were all a bunch of communists because he interpreted what we wanted as being equal expenditures on every child. That was not our shtick, to use the Yiddish. Our shtick was, you're distributing funds in a discriminatory way and you're responsible for district expenditures. They're creatures of the state, these school districts, so don't tell us it's not state money. It's all state money. Tomorrow morning you could abolish the property tax. You might have to amend your constitution but you could abolish local property tax, you could abolish school districts. You'd probably have a short-lived political life but nonetheless these are creatures of the state.

So anyhow, the attorney general didn't take it very seriously and the three-judge court. I think Judge Goldberg was the court of appeals judge and there were two district court judges on it, if I remember. And we won in what was a very significant change in the law. And then it went to the United States Supreme Court. And there was a lot of apprehension because the people who were planning the revolution were not happy that this upstart of a case had gotten first in line. But sometimes that's what happens. That's in juxtaposition to the NAACP strategy, where really from *Plessy v. Ferguson*, "separate but equal," through *Canada ex rel. Gaines*, through *Sweatt v. Painter*, through *Brown v. the Board of Education*, *Brown II*, and so forth, the NAACP had a very carefully thought through, intelligent strategy not to try to get everything done on a single day. So, [in *State of Missouri ex rel. Gaines v. Canada*], so Missouri says black kids can't go to law school but, I'll tell you what, we'll pay your tuition to go out of state. And the Supreme Court says, "You can't do that. That's not separate but equal." But they didn't repudiate the doctrine. And if you read *Brown* carefully, they really didn't repudiate it clearly in *Brown*, not until later on. So a more gradual approach, I think, would have helped on this. I'm not sure the result would have been any different on the Supreme Court. And I do remember the oral argument. Listening to the *Keyes* argument and I thought, "This is attenuated. How are they going to win this one?" I thought we had a better chance. It turned out *Keyes* was affirmed and our case was reversed.

I also had a relationship, she was a graduate of UT Law School, with Sarah Weddington, a friend who was a member of the legislature for a while. And Sarah had the abortion case, *Roe v. Wade*, and she won and I remember saying to Sarah, "You're giving me hope. If you can win that one," people, and I agree, take it as a given of our legal system, *Roe v. Wade*. But at the time it was by no means clear that these penumbras and emanations and notions of privacy which had really never been much discussed, that it would prevail. But it did prevail. And, of course, she won her case; I lost my case. She never let me forget that.

So anyhow, we went to the Supreme Court and I did not argue. I sat at the table. And I remember the sign on the table. It said, "Do not call the chief justice 'chief.'" That never would have crossed my mind. And I remember

that Justice Douglass left the bench and I was in a panic. I knew we needed his vote. And it turned out he took milk and cookies at ten o'clock or 10:30 or something, and so he participated in the case. And most of our arguments were addressed to Justice Powell, a former school board member, a swing vote on the Supreme Court. If you read the brief, it's a peculiar brief because our brief is mostly devoted to the proposition, to cases that Justice Powell had decided, that children themselves were a suspect class and you should see *Rodriguez* as a continuum with cases involving illegitimacy and some other issues.

Charlie Wright's brief, and by the way, very unusual for two members of the law faculty to be opposing counsel. A very good friend of mine. I love the man. He supported me. Charlie's brief was a brilliant legal-realist brief, maybe one of the best ever written in the Supreme Court. It said, "You can do this but you shouldn't do this. This is all going to blow up in your faces. The data's not all that good," which it wasn't. "And if you're going to stick your neck out you should be more certain that it'll be a palpably good result for school children." I think probably there were three solid no votes on the Supreme Court. Probably for Powell and Stewart, that sort of, 'be wary of the unenforceability of a decree in this case and the thicket you're throwing the judiciary into,' probably was very influential to at least two members of the Court.

03-00:23:54  
Burnett:

Maybe this is a good time to talk then about your take on legal realism in this period. I think you wrote an article in '78 about a kind of crisis of legal realism and, if I understand it correctly, that legal realism holds that judicial decision-making is subjective and that one needs to rely on some other underlying knowledge or science that can be used to critique it.

03-00:24:33  
Yudof:

This is probably not a good day to get into the intricacies of legal realism. For Charlie Wright legal realism in a sense meant the law is what courts say it is. No more than that. It's sort of a positivist view. For others, you're right, there are people who say, "Well, if you had Wheaties for breakfast instead of Cheerios, that may have influenced your decision." Or whether your child had a hard time in school or a good experience. I think there's a lot of truth. I think what you're looking for is principled decision-making. But if legal realism is, you take into account the consequences of what you do, then I'm a legal realist. Not necessarily saying it's all subjective but it's certainly partially subjective. And that's an argument that's still going on today, I think. And we see it in all sorts of religion cases and we see it in other guises and different justices have different views. In its less vehement form, not that everything's subjective and you can do whatever you want, there have to be some constraints. John Hart Ely, a very famous law professor, said something like, this is not exact, "A good lawyer knows that words can have many meanings and there's not an absolutely dictated result, unlike what some lay people

think. But only a very bad lawyer thinks words are infinitely flexible and you can do whatever you please on whatever occasion you please.” And I agree with Professor Ely on that.

And then what happened was one of the most extraordinary things, if you want to put a closure on this. Of course, the case is famous. Later, I donated my papers to the Texas Law Library. But I would say once a year for ten years I got a call and said, “Professor Yudof, we’re looking into school finance and we know you won your Supreme Court decision.” And I would say, “I didn’t win.” They’d say, “Yes, you did.” I’d say, “Look, I’m the lawyer for the plaintiffs. If I had won I’d be the first to claim it.” It did not sell well with many elites and many non-elites. It’s one of those case where...*Plessy v. Ferguson* really was a terrible blow to equality for African Americans. But a lot of people, including educators, said, “*Rodriguez* is just wrong,” and then you began to see state supreme court decisions and state legislatures respond. Even in Texas that occurred over time. And maybe especially in Texas. So the values espoused in *Rodriguez* resonated and therefore it didn’t have the sticking power that some other Supreme Court decisions, like *Dred Scott*, a disaster, or *Plessy v. Ferguson*, a disaster. It just didn’t have the sticking power. I don’t want to draw analogies but sometimes the Supreme Court is a teacher and leads the way. Arguably, that’s on the women’s rights issues and privacy, equal protection issues for women, and “one person, one vote.” But other times it can fall like a thud if it doesn’t resonate with the deeper underlying values of the American people. This was an occasion where it didn’t resonate.

03-00:28:10

Burnett:

It didn’t resonate. Well, I think you wrote in 1975, and that was early days, right, but you had suggested that perhaps, even though the decision was in the negative, it could be, or there was some evidence that it was becoming, a catalyst for action because the arguments that you made in it were persuasive to *others*, if not to the Supreme Court, and that it laid the basis for other kinds of activities.

03-00:28:38

Yudof:

I think that’s true. And I don’t know what would have happened if the case had gone the other way. We might have had twenty-five years of litigation. We certainly have in New Jersey and California, New York. But I think it was. And I’m not saying if you took a poll. But if you took various elites in the media, in the universities, and maybe in the legal profession, or at least in the professoriate, it was sort of a catalyst. And, of course, *Serrano* was out there, which went the other way, and there were other cases pending in the seventies.

03-00:29:21

Burnett:

Yeah. A lot of historians and commentators have talked about the degree to which a lot of social policy in the United States seems to be undertaken in the

domain of the courts rather than the legislature. In other countries, it would be in the legislative domain completely but there is this draw towards the courts.

03-00:29:52

Yudof:

I think that's true. I think that's been tempered over the last twenty-five years or so with a more — it's hard to characterize. The Supreme Court, you could argue they've been activist in some areas like the First Amendment. I don't want to overstate this, but this type of public-interest litigation has been declining. There was a recent, last few years, decision out of Arizona dealing with bilingual education where Justice Alito made it clear that he had real reservations about this type of intervention in public schools to achieve a public interest outcome as opposed to 'you hit my car and I sue you and you pay \$800 to fix my bumper.' It was just not that type of case. These cases go on. They're broad-scale injunctive relief and so forth. But that's right. There was an old saying, I quoted it in one of the articles, that when there's a problem in other countries they organize a revolution; in the United States they file a lawsuit. And there is something to that. But at least for the progressives, the record has not been totally satisfactory to them in the last several decades. I don't want to get into this but it's not exclusively true. For example, in terms of gay marriage and so forth — so it's not a binary principle. But by 1976 it was clear that a lot of these types of public-interest litigations were not going to be favorable in outcomes from a progressive standpoint. And over that time, for the last forty years, I've had my doubts about whether we really could have pulled it off. And there were other voices, including progressive voices like Derrick Bell, who had real reservations about school desegregation and other things, in part because he didn't think that the courts could implement their orders in an effective way. My problem was there's that issue and there's also the issue of whether we have the knowledge, the wherewithal, to do what we promised to do, which is not something per se invoked by a negative standard: Don't discriminate by race; don't put all the women in a sewing class; don't treat people by their gender roles or whatever. But we've increasingly, as you know, moved away from a negative definition of liberty and more towards, in Isaiah Berlin terms, a more positive definition. I think you can see that in America today. There's a contest in some ways between, loosely, the opportunity folks and the outcomes folks. And there's a lot of mixing in between. But that's a debate that's still going on.

03-00:32:50

Burnett:

And just to retreat back to that period, you're a new assistant professor at University of Texas Law School. Was there any fallout?

03-00:33:09

Yudof:

Well, it was pretty interesting. The faculty was stunned that this young whippersnapper, I must have been — let's see, how old would I have been? I would have been twenty-nine years old, something like that, had a Supreme Court case. Then when they hired Charlie Wright on the other side they were really stunned. How was this going to work? And so I think the faculty on the

whole was stunned and, in a way, pleased. And in '73 I published my big article. In '74 I did one on property taxes, which we talk about. I think the external world at that time in Texas was deeply divided. I don't think the state government of Texas had much truck with my notions. I was, from their standpoint, a liberal Philadelphia lawyer who had benighted the home state. Not everyone felt that way. And then, of course, I had an episode I don't think I've recounted that I signed one of the briefs and you have to give your address because the other side has a reply briefing. You have service. They have to send a copy to you and all that. And so I said, "Mark G. Yudof, University of Texas School of Law," and I gave that address. Have I told you this story?

03-00:34:01

Burnett:

No, you haven't.

03-00:34:42

Yudof:

So I got called into Dean Keaton's office and he was a wonderful man, had a folksy accent, a brilliant man, major torts scholar, and one of the people I admire most in my career. He said, "Mark, the board of regents wants you to come before them, explain yourself in the *Rodriguez* case." I said, "Yeah?" And he said, "I just have one point I want to make with you." "What's that, Dean?" He said, "You're not going." So I didn't go. And I don't know what he told the regents. He was at war with some of the regents, Frank Erwin at the time, I think. And then, I don't know, a month, two months later, I got a letter of reprimand because I had signed the brief with the university's name. And really I only meant it as a mailing address. I think they were right but I don't know why it merited a letter of reprimand. So from then on I would either use my home address or just my address and not the institution. I think I'm the first chancellor of the University of Texas system who, whatever, thirty years earlier was reprimanded by the board. And that's a true story.

So life went on. I got the hang of teaching. I wasn't quite so scared to death. And in '74 I came up for tenure and they had a system. You went from assistant to a full professor so I became a full professor in '74. I can't remember what I had. I think my casebook came out in '74.

03-00:36:18

Burnett:

That's right.

03-00:36:19

Yudof:

With David [Kirp]. And I had two major articles and some other things I had written. And there I was. And thirty years old, full professor, life was good. [laughter] The weather was good. It was very good. Baseball team was doing well.

03-00:36:40

Burnett:

You never found out anything about whether that reprimand was motivated by a really strong insistence that this is Mark Yudof, private citizen, who is assisting in these briefs, or these —

03-00:37:02

Yudof:

I don't think that was primary motivation. I think the motivation was I'd like to get rid of a troublemaker but it was not going to happen. And they didn't do it. Cooler heads prevailed. But I think they didn't like the position I had taken. And it had repercussions later on. I won't go into all of them but when I was being considered for the board of regents, in some conservative circles I was still renowned as the house zealot. Anyhow, I got a unanimous vote in the board of regents to be chancellor. And one of my biggest supporters, closest supporter on the board was Rita Clements, who was spouse of Bill Clements, the former governor. He was not governor at that time. I never asked Rita this but I think she had heard through the grapevine that this guy is not your type of person. People are always mischaracterizing my politics. I just saw it [unequal opportunity in access to education] as a grave inequity that the nation ought to do something about. To me it wasn't a liberal-conservative type of issue; it was sort of a fairness issue. But in other areas my views were probably more compatible with some of those people. Anyhow, it was interesting. That relationship was very strong and, frankly, as chancellor I got along with the Republicans extremely well.

03-00:38:40

Burnett:

Well, this is a time when, going back to that initial question at the beginning of the session, this is a time when the faith and enthusiasm for government planning is being challenged very seriously. There's Milton Friedman, for example, who is a prominent public intellectual in the 1960s. And the basic refrain of a lot of his advocacy is similar to the kind of case that you make in your articles in the 1970s. Not to draw too strong a comparison, but basically that we don't have enough knowledge to govern in the way that you're suggesting. And his typical refrain is, "I am completely aligned with your goals and your motivations in this policy; it's not going to do what you think it's going to do, and here's why."

03-00:39:43

Yudof:

Well, that's right. That was some of my worries, even though I participated in school desegregation cases and bilingual education and Title I and *Rodriguez*. But that was a constant worry. But you're right. Jack Coons and Steve Sugarman, who wrote the book on private wealth and public education, the precursor to what we're talking about actually favored certain types of vouchers. Maybe not exactly what Milton Friedman had in mind but what happens is if you don't trust the professionalism and you don't think government can really manage the outcomes, then empowering people to make choices for themselves, the problem was people were not equally situated to make those decisions. But you're right. There's a crossover effect there. And today you would see it in the charter school movement. There are

only so many ways of making decisions. You can flip a coin, you can have governance by professionals, there's politics, and there's markets. And I think you see that in today's problems: Republicans on the whole trust the markets more and Democrats on the whole trust politics more, and the ability to fashion results.

I had a discussion once, this is more recent, but it gives you some idea of what my thinking is. I said, "I think of myself as conservative in some ways." And I had a discussion. "What does that mean?" Because I'm pro-choice, I'm pro-affirmative action, I'm pro-immigration reform. But what I think it means is I don't have the confidence that many progressives have that the government is competent to solve a lot of these problems. I just don't. And it's not for lack of good intentions and it's not because they're evil. I don't think they know how to do a lot of these things. And it's that wariness about government intervention that I would say is my primary conservative instinct, not that I oppose gay marriage or certain specific issues that typically divide progressives and conservatives.

03-00:42:10

Burnett:

So this speaks to the kind of complexity of your political position at the time. This is 1973, the article in *Law & Contemporary Problems* with Daniel Morgan on *Rodriguez*, "Gathering the Ayes of Texas."

03-00:42:38

Yudof:

That's A-Y-E-S. I was very proud of that title.

03-00:42:40

Burnett:

Yeah. [laughter] "The public must be persuaded of the philosophy that public education, whatever the rights of parents to secure a private education, should not be allocated on an ability-to-pay basis."

03-00:42:54

Yudof:

Right. That was the negative definition. Ability to pay seemed to me very wrong-headed. And most countries around the world, again, there are wide variations, and if you're rich enough you can send your kids to a fancy school in Switzerland. But don't allocate it based upon a local tax, which really goes back to our pioneer days and all that and property being the primary form of wealth and the country being so dispersed. Yeah. I thought that was a good negative principle that did not put on any blinders. That there were other methods of distributing funds that people could debate about. You could do equal dollars for children. You could do it on the basis of need. You could do it on the basis of cost. But I felt that to take a child who was not rich or poor but lives in a family that's poor and say, "You're going to go to a dreadful school and someone else across the highway is going to go to a much better school," struck me as fundamentally unfair. It still happens in America and that's something I still blanch at. I know it gets controversial, but your police protection, your fire protection, your lights overhead, your public transportation, I don't think they should be distributed where poor

neighborhoods get less. I don't know what principle that satisfies of justice. None that I know of. That was my view. Now, I have to admit, I wrote a couple of articles that I was deeply offended by the *Rodriguez* result, more offended then than today. And that was one of the articles that arose out of it.

03-00:44:49

Burnett:

And also, I think there are a number of different formulae, as you said, for organizing the distribution of the costs of education across the public. But I think you were aligned with the notion of a minimum standard, acknowledging that above a certain minimum the market rationale could take over.

03-00:45:19

Yudof:

That's not exactly right. Even today, there are the adequacy troops out there who say, "Oh, we've had it with equality. We're just going to have an adequate education." And I would say, "Well, how do you know it's adequate? What's the data that tells you what's adequate? And why is it that my child gets an adequate education and your child gets an adequate-plus education, even if that means you have a bowling alley?" But I have a lot of trouble, because there's all those old laws. Most of them are based upon a minimum-foundation standard. That's what they claim to do. Now, I think they didn't do it very well, because what they did was they funded it in terms of whatever money they chose to spend. It wasn't a realistic appraisal of what it would take to give your child a decent education. So I have a lot of trouble defining minimum. Frank Michelman wrote an article "Minimum Equal Protection" in the *Harvard Law Review* and I never bought it because I couldn't figure out how he'd know what the minimum was.<sup>2</sup> Both the Achilles heel and the joy of an equality standard is you can have a reference point to someone else. And so I can say, "Well, I'm sitting here in Edgewood. I don't know what a perfect education looks like but you're spending whatever, three times as much, five times as much, ten times as much in Alamo Heights as you are here. We want what those kids are getting." Equal protection sets a standard. And maybe it doesn't always work, but it gives you a reference point. What your political rights or natural rights or civil rights? There may be something for a natural law person, that they must have. But another way of saying it is, "Well, I want the same right to vote as Joe over there. I want the same right to testify, to hold property, to enter into contracts." This is one of my adages, I guess. Much of jurisprudential debate can be divided into two principles. One is the sameness principle, I want equal treatment, and the other is the difference principle. And you see that in virtually every civil rights movement. So take women's rights. You have voices within the women's movement that say, "Look, we want to be in the armed forces and we want to fly jets and we want to be in the fire departments and we want to sit on boards and be judges and so forth. We want equality, we want equal pay." And there

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<sup>2</sup> Frank Michelman, "Foreword: On Protecting Poor Through the Fourteenth Amendment," 83 *Harvard Law Review* 7 (1969).

are other voices that say, sort of, “That’s fine. That makes sense. But we have distinctive voices, that women are not the same. They’re different. And their distinctiveness needs to be recognized.” I think the civil rights movement, the same thing. Sometimes you want absolute equality and sometimes you say, “No, you’re not capturing the distinctive nature of whatever, Latino families.” And that’s a debate that goes on, the sameness and the difference principle.

But in this context I had a lot of trouble with sameness meaning minimal adequacy because I couldn’t figure out how they were going to define it and I feared that over time it would be denigrated, that they would set it at a reasonable level in year one and by year ten they’d decided to put their money into Medicare stuff or whatever and the kids would suffer and there were no reference points to keep them on point.

03-00:49:06

Burnett:

Right, and with respect to the social science research that was inconclusive that differences make a difference —

03-00:49:17

Yudof:

That was part of my argument. People would say, “Well, dollars don’t necessarily lead to greater outcomes. They’re not necessarily end-all for children.” And I’d say, “That’s fine. Then you should have no trouble giving up some of those dollars.” I didn’t know what to say. That may be true. How you spend the money is vitally important. And people who say you can’t just throw money at the problem, they’re absolutely right. You can’t. But the point was there was a basic inequity and I wanted the poor kids in their districts to have the same discretion to offer things as in the affluent districts. And it seemed to me crazy for the people who had all the money to say money doesn’t matter. Why are you fighting this lawsuit?

03-00:50:01

Burnett:

Yeah. That was the conclusion of others who were involved and they said the same thing, that all this means is that we haven’t proved that there is a difference. There may be no difference but it struck them as clear that these differences did make a difference.

03-00:50:16

Yudof:

That’s a useful starting point. And who knows what makes a difference in test scores and stuff like that. It’s hard to know and hard to trace. I just felt that American people had voted. People move to the suburbs all the time to get what they consider a better education. Now, it may be the peer group, I understand that, and it may not be the teachers. It may be this; it may be that. And, look, if we had a national defense policy that would defend Boston and not Philadelphia, that did grate on me. But when you went beyond some sort of principle of non-discrimination, I was very worried about the capacity of the courts and the government to sort of make it right. And I think the history of Title I is like that. The studies of Title I are not encouraging. They have never been encouraging. And there are all sorts of reasons. Maybe you didn’t

fund it enough and maybe no one picked up these kids after the third grade or whatever. I'm sure all programs are imperfect but, nonetheless, over a very long period of time, in terms of retention rates, graduation rates, college-going rates, it seems to have a modest impact on criminality. But it's not going well. It's just not going well.

One of the more interesting episodes of my life occurred in the mid-seventies when I was appointed to the Tax Board of Equalization in Austin, Texas. That was a city council appointment. And basically their job was to hear appeals from taxpayers. So if you had a home and it was at that time appraised at \$92,000 and you thought it was worth 75,000, you could appeal. And if you were a business, the same thing. We didn't see many cases like it. But at that time the property tax applied to certain sorts of goods, automobiles and jewelry and so forth. So what happened is I was good friends with Page Keeton, who I believe had stepped down as dean at that time. Ernest Smith was the new dean. And I was contacted by the then-mayor, Carol McClellan. I believe she was mayor. I'm not a hundred percent. But, anyhow, about serving on the Board of Equalization. And I thought, "Why not? This will be interesting." So I was appointed to the board and I decided, like always, I wanted to be chair and another guy wanted to be chair. We flipped a coin. I won. Or you might say I lost. I became chair.

And so we had these hearings. And I was amazed, talking about the incompetence of government. I was so amazed. The old west Austin homes, the old original part of the city, some beautiful homes in a beautiful neighborhood had very low appraisals because what the appraiser did was he took the cost of replacing the home and then depreciated it. So if you had really a gem of a home, and highly sought after, they might at that time have sold for \$200,000, let's say, it might be appraised at \$52,000 because it was seventy-five years old and they had a depreciation schedule that had nothing to do with the market value. Meanwhile, the working-class folks, an electrician or plumber's family living in a modest home, in a tract house in South Austin, if they paid thirty-five, forty thousand dollars for their home they got hit right on the chin for the full thirty-five or forty because the house was virtually brand new and they had comparables in the neighborhood and no depreciation. So I thought that was really unfair and that bothered me a lot.

And the other thing I thought was unfair was some of the businesses I thought had taken advantage of the system. And also the appraisal methods were so primitive. They would assess jewelry stores by the square foot of jewelry. Can you imagine? Doesn't matter whether they're Timex watches or the Hope Diamond. And then there was a great game with the automobile dealers where there were certain tax days and they would drive their cars into the countryside. They weren't set up to look at the paperwork to say what cars the dealership had acquired. They were taking photos from helicopters and they were flying all over central Texas to try to find where the dealers had hidden the cars.

The other thing that I found difficult was the Board of Realtors refused to cooperate. We had access to the Multiple Listing Service but because they hadn't consented to its use other some doctrine or other you couldn't say, "Wait a minute. You just listed your house for \$79,000 and you're claiming it's worth forty." You couldn't do that. They refused to cooperate. So a lot of things happened.

So one of the things I found out is we had subpoena power. So I subpoenaed the Board of Realtors. Boy, that did not go over well, particularly at my synagogue with all the realtors there. But I subpoenaed all the records and said, "We're going to be able to rely on this." And, by the way, the asking price is not the selling price but there are statistical methods. It doesn't work today when you get more than you ask for, apparently, but back then you might say, "Well, the average house sells for 15 percent below its asking price," or something like that. It wasn't perfect but it was better than nothing.

So what happened was I got all those records and I used them to raise a lot of the appraised values in the West Austin part of town where the rich people had gotten this cushy deal because of the depreciation. I was young and I was foolish and I was pretty tough in those meetings. A lady came in to show me some tract of land and to show me why it wasn't worth what we said it was. And she had this huge diamond on her hand. I said, "I can't see the map. The diamond's in the way." I shouldn't have said that. But it was. And it made the front page of the — they began covering me every day in the newspaper. And I mean above the fold. And, of course, the progressives in the community, they loved it. And in a way it was. In this particular dispute I really was on their side.

So a number of things happened. So one thing that happened is I wasn't reappointed to the Board of Equalizers — first of all, I lost my chairmanship. The other two decided that they wanted a new chairman, which was fine. He was a good guy. And I wasn't chairman, I wasn't reappointed. And then I got a petition in my office asking me to run for the city council. So I went in to see Dean Smith. I guess I was flattered. I said, "What do you think about this? Can I be a law professor and be a member of the city council?" And he said, "You do what you want but I don't think it's a very good idea." And it was a terrible idea in terms of time and just swirling controversies that I'd be continuously involved in. In Austin the big issues were growth issues and there were builders and developers and environmentalists and so forth. So anyhow, that was my short career then.

But then I really delved into the property taxes and made it a major component of my course in education law because if you don't understand the inequities of the property tax it's hard to really understand how the system really operates. And part of it had to do with whether the appraisals were fair, whether the assessed values were fair. And the system was strange. And then when I did my research it turned out that taxpayers had almost no viable

means of relief. I won't go into the technical details. But it was also impossible to win a lawsuit. So I wrote an article that said the Supreme Court ought to be ashamed of itself. It's impossible to win a lawsuit in Texas. You've got all these barriers. One of the doctrines which I particularly loved was in order to get your appraisal revised you had to enjoin the collection of the rolls. You had to stop the collection of property taxes in the whole district or municipality in order to get your one property an adjustment in value from say \$42,000 to 38,000 or something. And I rightfully said that's ridiculous. The Supreme Court, friend of mine, Chief Justice Greenhill, wrote an opinion. I don't know if he was chief justice but he was on the court and he wrote this article, once again the taxpayer lost. And he dropped a footnote and said, "Professor Yudof has made some criticisms of the way we handle these tax cases," and he cited my article.

One of the things people don't know that I touched, three or four years later, the legislature revised the property tax system to fix many of the things so the taxpayer at least had a chance to win at his or her case. And they tried to clean up some of the craziness in the appraisal systems. They would specialize in saying, "Your house is worth \$100,000 but our appraisal is only for 25." Well, that means nothing. If everyone's appraisal is at twenty-five the question is, is the original appraisal accurate? Because if it's not, the mere fact that it's below your real appraisal value doesn't mean anything. It just means the tax rate's higher. Right? That's all it means. There are two variables there. And I think I testified some and gave some advice. I was really pleased with that.

I had one other venture I'll mention in the legislature during that period, which made a lot of money for other people. I was teaching contracts. And this is ridiculous with these cars. You have a lemon car and you can never do anything about it. They don't fix it, you're out. So I sat down. He helped me draft it, Russ Weintraub, a senior contracts professor, but he, of course, didn't touch it. So I co-drafted this lemon law, that you had so many times to fix it, then you could return the car and you get your money back minus whatever depreciation for the time you used it. And Lloyd Doggett, one of a handful of progressives in the legislature, he introduced it. So there was a hearing and I went down there and the room was filled with lobbyists. There must have been fifty of them there. The only person testifying for the bill was me. I don't remember anyone else there. And, of course, it got killed in committee. They thought it was such a ridiculous law, that you would try to protect consumers of durable goods like this. And I taught a seminar on consumer protection. It was too boring. And I stopped. But it was my one foray into it. And the *Consumer Reports* people sent someone down to Texas and they talked to me and some other faculty members. I guess years later that type of consumer protection became more in vogue, but at the time people hated it. But, as I said, I think the law firms were grateful for the business.

03-01:02:04

Burnett:

But you did, at least in the Board of Equalization experience, if you weren't convinced about how workable certain policies might be in terms of the machinery of government, that influenced you a little bit as you learned more about how things turned in local government and —

03-01:02:31

Yudof:

I did learn a lot. That was an area. You weren't talking about educational outcomes. It's an imperfect science but it is a form of science to appraise a house. People buy and sell houses all the time. There are comparables and there are unique properties and so forth. And it's not that hard. In fact, one of my theories is, I don't know if you would buy it — I put a lot of pressure on that and other people began to say this is preposterous the way the property tax system goes and they began to use computers to do it, where you could do all the comparables and where you could do the square footage and you could have more meaningful depreciation schedules and you could put in the Multiple Listing Service data and all the rest of that. And California and Texas and other states began to do it and have more accurate appraisals. I'm convinced that's one of the reasons for Prop Thirteen, that the more accurate the appraisals and the better the system worked, and you didn't just reappraise every four years or three years, and you actually got closer to the true market value of the property, the more upset the taxpayers became.

03-01:03:44

Burnett:

And that led to the tax revolt.

03-01:03:46

Yudof:

I don't say it's the only reason but I think it was a contributing factor, that if you have a very small office and you can only assess a quarter of the properties every year. And, of course — this is more symbolism than anything else — you still have a budget to meet. If you assess every four years you may have a higher tax rate because you didn't adjust the property values upward. But when people saw those appraisals getting perilously close to home I think that was a factor. That plus the perennial problem, what do you do with farm property and what do you do with elderly couples who don't want to be forced out of their home because of the tax bill? But all those equity issues could have been handled differently. I did write an article, which fortunately no one ever finds, saying what I really thought of Prop Thirteen, which I viewed as more of a sales tax than a property tax. It's ongoing. That's like a property tax. But since it no longer has anything to do with the value of the property, it's taxing you on the basis of what you paid for the property, essentially, when you have a bona fide transfer, not within families apparently. So it's more like a tax on jewelry or a stereo than it is a wealth tax, which is what it was designed to be.

03-01:05:09

Burnett:

Right. You did give a brief overview of *Educational Policy and the Law* last session. And it's something that's gone through multiple editions. But it is an

interesting casebook because it's an unusual casebook. Can you talk a little bit about what your goals were with David Kirp?

03-01:05:39

Yudof:

Well, David was a large part of the inspiration and David was teaching the course at Harvard when I arrived and the following year we co-taught it together. So I owe a lot of my involvement to David and David's an extremely perceptive, brilliant man. When I looked at the casebooks in the area they were organized by legal category. You have contracts with teachers, you have expulsion of students, you have behavioral codes for teachers at that time. You have school desegregation cases. I felt that that wasn't the right organizing principle. The question was what are the big policy issues in education and what bearing, if any, does the law have on them? So we gave it a lot of thought.

And so the architecture of the book, the first chapter was really why is it you can compel students to go to school at all, and that's everything from John Stuart Mill to John Dewey and so forth. It's a loss of liberty; it's a loss of parental control. If you can be compelled, *Pierce v. Society of Sisters*, do you have a right to opt out to go to private schools? And then there are a bunch of subsidiary issues, like if you have a right to go to private school how much can the state regulate it? Is there a right to home education? And if there is, what are its dimensions and do the kids have to take tests? How do you assess that? And, of course, later on it was charter schools and all sorts of things. But it was really a liberty view. What is the theory for curtailing the liberty of families and children, mostly families? And what's the rationale? Why are they there? Is it because we want them to be self-sufficient? Is it because we want them off the labor market? Is it because we think it'll reduce criminality? Good for the economy? Good for your own well-being and along many dimensions? And it turns out the rationale for compulsory education is very important to what policies you can adopt later on. So that was that chapter. At the time I think it had a lot of cases on regulation of parochial schools and public support of parochial schools and the like. We tried to look at the whole system and raise provocative questions, like if affluent and religious people have a right to send their kids to private schools, should the state subsidize that for poor kids? It was sort of a precursor to charter schools and all that.

Then in chapter two there were student rights cases. Can kids wear armbands protesting the Vietnam War to school? *Tinker v. Des Moines*. What about school newspapers? What about teaching evolution or not teaching evolution? What about school prayer? So the second chapter, if you look at the heading of the chapter, is a chapter about socializing children. What can you and can't you do? What are the rules? So it turns out you can't compel the flag salute. It turns out you can't engage in school prayer except after school or something like that. The standards have changed. And then it got into the hidden curriculum. Is it designed to socialize kids? Not a bad idea. They are heathens at that age. To learn to wait in the lunch line and not to eject someone from

the seat that they sat in and to be somewhat disciplined about showing up for things on time and so forth. So what it tried to examine was, from the standpoint of patriotic socialization, be a good American, religious socialization, Darwinism, whatever. A lot of curriculum changes. Secular humanists have challenged school curricula on occasion around the country. They'd say that the curriculum leaves God out. They have some real objections and they don't like some of the books you read. I did do books. Can you toss books out of the library and so forth? But I viewed it as a larger issue of, once you figure out why the students can have their liberty curtailed and they're in school then what, if any, are the limits of socialization? And that turns out to be very hard. If it's a civics courses, okay, but apparently a compulsory flag salute is not. And why is that? What does that mean?

And then we did the student rights in the same way. I viewed it not as just student rights, which is what it is. Often student rights are oppositional to the curriculum. So it's a school in Iowa and they're proud of their sons and daughters who are serving in the military and they don't feel that they're politicizing stuff and you have this group of people who are protesting the war in Vietnam, they wear their armbands and the question is can they do that? Can they have a counter-message? There was a famous case about "bongs for Jesus," a speech given by a student in an auditorium who was disciplined for it.<sup>3</sup> The concept of rights is not irrelevant but for me was another limit on socialization in the schools is what kids are allowed to do. Can they wear t-shirts saying black lives matter? If they want can they wear 'President Obama' or 'Mitt Romney for President' buttons? Are there limits on communications? And there are dress codes and there are all sorts of things. So we did that and we did the same thing for teachers.

Because some teachers would claim that academic freedom included the ability to pick the books that students could read, a position I always rejected because I've always felt that we did not compel students to go to school for a teacher's idiosyncratic views, that she prefers Hemingway to James Fenimore Cooper, a reasonable position, by the way. Why were they there for her to do her thing? Why couldn't the school board or the principal or someone select the curriculum and so forth? And so we got into academic freedom and issues like that and teacher rights. And at the time, there's less of it today, but there's a long history that pregnant teachers were not allowed to teach and women who were in open convertibles with males, they were disciplined.

03-01:12:59

Burnett:

Right. Morality clauses.

03-01:13:01

Yudof:

Yes, and gay people. I'm not saying all of it, but a lot of that's abated. But that also is a sort of counterweight. If the school's message is don't be a single

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<sup>3</sup> *Morse v. Frederick*, 551 U.S. 393, 2007.

mom, if that is their message, I don't know, and you have a single mom who's a pregnant woman, then symbolically it communicates something different than what the school is trying to convey. And then there's the question of government speech, which is embedded in there. Who really owns the school newspaper? Whose is it? And I thought the Supreme Court got it right — most of my colleagues disagreed with me — that there's no constitutional right to insert your views in the *Stars and Stripes* or the school newspaper. Indeed, not even the *Washington Post*. The First Amendment is not designed to deal with that type of government expression. If they cede the publication over to the students then, pursuant to that delegation, there's a problem in them trying to censor the students. But if it really is their paper — by the way, this comes up in the campus newspapers all the time, and there I've been an advocate of giving it to the students. I don't want responsibility for what they say. So I always favor giving them the full panoply of First Amendment. Not that we had to necessarily, depending on who paid for the newspaper and how it worked, but I thought it was prudent both educationally and constitutionally to let the students completely call the shots on what went into their newspaper. So anyhow, that was chapter two.

Chapter three was due process but it was really about the process by which people are disciplined and the process by which there was cooperation with police, with authorities. And this has really gotten big. My students love that chapter. Can you search the lockers? Can you search automobiles? Can you have zero-tolerance laws, which I think are a very bad idea, by the way. And what happens to a teacher? Is the teacher entitled to a hearing if she or he is disciplined or fired or something?

And then the rest of the book is mostly the policy issues. In the original book it was gender discrimination and it was race discrimination, bilingual education. It's greatly expanded and now we have undocumented students, we have immigrants. And those chapters are rather fulsome, primarily because there are so many statutes. At the time it was easier to do because there were very few cases and they were almost all constitutional decisions.

And then there was an innovative chapter on governance, which actually Steve Sugarman and I taught this year. I haven't taught it in many years. But this idea of how should and are schools governed. And that has everything from elections to professional school boards to markets and voucher plans and charter schools, to the role of the federal government, Title I, No Child Left Behind. It's very interesting because people gravitate towards governance reforms when they object to what's going on. So when someone says, "I want the community to decide on the curriculum," or someone says, "I don't want the state telling my school board what to teach," they're tied to substantive issues but in some ways they're saying there's a better way of doing this that's more responsive to my group or all groups in their opinion. And that's very interesting. That doesn't make its way into the law school curriculum very often. And in fact, at one point I wrote a whole book, a case book called

*Education Governance* because I thought it was so interesting. Do you have to own property to vote? Do you have to be able to recite the Constitution to vote? And the role of professionals and roles of superintendents and role of bureaucracy. But it was too boring even for me. It's filed somewhere at the University of Texas Law Library. I never tried to publish it. I probably could have gotten two or three adoptions, counting my mother.

03-01:17:28

Burnett:

[laughter] But you're absolutely right. It's perennially an issue in education of who runs things and there's this real insistence that local control is better. And at the same time we have not federal but national standards now for education.

03-01:17:51

Yudof:

Right, and that's hotly debated.

03-01:17:52

Burnett:

And it's hotly debated.

03-01:17:54

Yudof:

The Common Core, which I think makes sense and is not really a curriculum. It is more suggestive than mandatory. But this nation is deeply committed to not having a national curriculum. And that has ramifications for the role of the Department of Education and then you have the accreditation agencies that are involved. But we have had a lot of mandatory state laws, we have local district control in some areas. And like in areas of New York at one time and other places, they speak of the people in the surrounding area to the school having more of a say in who's hired and what the curriculum is. So we have a big debate. And the people who feel they're losing want a different governance system. And by the way, that is very unusual in the world. There's a saying that at ten o'clock in the morning you know exactly the lesson that every third grader in France is reviewing that morning. That it's a national curriculum and it's very rigid. The French don't seem to have as much problem. But in America we have a long history of distrust of government and individual rights and our system has evolved a lot differently.

03-01:19:10

Burnett:

Absolutely. And what seems to be remarkable about that text, and you can correct me if I'm wrong, is that it really lays out a wide range of the social and economic and political considerations of the law in question with respect to education. And there's even one piece, it's not included in subsequent editions, but it's kind of a limit-case of the view of education as social control/indoctrination. I think the title is something like "The Student is the" — insert pejorative term for African American — of this structure.<sup>4</sup> And it's a kind of an extreme explanation or view of the student as a coerced individual.

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<sup>4</sup> J. Farber, "The Student as Nigger," in David Kirp and Mark Yudof, *Educational Policy and the Law*, (Berkeley: McCutchan Publishing Corp, 1974) 130-31.

03-01:20:15  
Yudof:

We're partly captive of the times. You always are. And so it was a time of great churning in the sixties and seventies. There were people like Ivan Illich and Goodman, Holt, and others. And they were all over the lot. Didn't necessarily mean I endorsed this view but I thought it was interesting. In subsequent editions there was a case involving Ebonics and whether there was an African American dialect and whether that should be treated under the Bilingual Education Act in a certain way. So it has evolved. But it was so much in the ether of the time, what I would say there are very strong reformist, occasionally nihilist elements out there among education philosophy types. I thought the students ought to be exposed to that and that's what we did. The book has stabilized somewhat now but we have obviously a lot more space on immigrants. There are many more Title IX-type decisions. We have more space for that. If you want your book adopted you want it to touch on recent developments. I'm always tempted to stop things around 1937 but we haven't done that.

The other thing which I think is not as well pronounced. We wrote a lot of essays in the book. If you look at the first edition, a lot of it we just wrote ourselves. So that's very unusual. Most of these textbooks at the time were just cases followed by two questions and here was, as I say, the chapter on school contracts and here was the chapter that dealt with student rights. To me legal realism was giving it a realistic context. When you suspend a child from the school it has an impact on that child's life, that family, his or her prospects. But it also, if you do it or you don't do it, it has an impact on the school culture. And a lot of that has changed. Even the language has changed. We now call it equity and inclusion. I guess equity and inclusion is the preferred phrase. The nomenclature's changed. It's English language learners and not bilingual ed students. And the evolution of language mirrors, I think, the evolution of thinking in this country about some of these issues. And of course not everyone agrees, hence the big debates about people who come to the country and weren't lawfully admitted. What do you call them? You can't watch a news channel without people taking different sides on that issue. And some of it's history now. A lot of the desegregation cases are important from an historic perspective, and *Brown's* certainly important. But the battles over school choice plans and metropolitan desegregation, it's largely over. More or less the country's been declared to be unitary, even though the schools are highly segregated. I don't know what to say.

There was an article in Denver recently, very interesting. Denver is a highly segregated district now because they had a busing order that was two-way busing. The whites had the money to move out and they didn't want to be bused so they moved out. Then when metropolitan desegregation was rejected by the Supreme Court in the seventies it was almost inevitable that Detroit would become a majority minority school district. I'm trying to remember his name. I don't remember. But people writing that in some areas of the country we are more racially impacted than we've ever been. In other areas of the

country we're not. But depending on your views, I think that's problematic because we didn't do school finance reform in many cases. We have poor kids locked into poor districts, often racially impacted. What's the plan? What's the plan to help these children?

03-01:24:54

Burnett:

Yeah. No, absolutely. It seems the Court seemed to have stopped at the experiments and decided that *de jure* segregation is obviously unlawful but we have *de facto* segregation at this point.

03-01:25:13

Yudof:

Right. And we can quibble about the terms. There have been discriminatory housing problems. There is job discrimination. But at the end of the day, if the school board never passed a resolution and never sorted kids by race, the districts are still racially impacted. And by the way, it's controversial in African American communities. My friend Derrick Bell, who's passed away, Derrick was of the view that it was racist to say a black child can only learn sitting next to white children. There are others in that community that took a different point of view of that. But anyhow —

03-01:25:50

Burnett:

And that's where community choice or leaving it at the local level, that becomes more important.

03-01:25:54

Yudof:

Yeah, but community choice can result in more segregation. There are multiple variables here.

03-01:26:00

Burnett:

Absolutely.

03-01:26:01

Yudof:

And if in one area of the world the community would choose a bilingual program and in another they would have the NRA put on a program. Communities differ, to state the obvious.

03-01:26:16

Burnett:

No, absolutely. A couple of things. Well, I should ask you, in the mid-seventies, you now have tenure and you're a full professor. You have some research leave in the '75 to '76 school year.

03-01:26:37

Yudof:

That's the only research leave I've had in my whole career.

03-01:26:39

Burnett:

Is that right?

03-01:26:40

Yudof:

I've had one semester and about two weeks. So I was going great guns and the dean put this on me. I had applied for a Fulbright and had applied to be

housed as a fellow at Warwick, University of Warwick. And I think the day I arrived in Warwick I got the letter from the Fulbright people telling me that I had a Fulbright to Denmark. I hope it's gotten better since then. A little late. So I went off to England. We'd had a son, Seth, in 1972. Adorable little tyke. Big tyke now. And so I went to England. It was a great adventure. We lived in a place called Hampton on the Hill, which was outside of Warwick. Warwick had the famous Warwick castle and we weren't far from Coventry, where they made Jaguars, which at that time were beautiful. But when I said to an English friend, "Should I buy one?" he said, "Are you crazy? You need two Jaguars because one's always in the garage." That was an era of considerable difficulty in the automobile industry there. I taught a few classes. I was used to energetic Socratic method and I didn't see that in the eyes of my students there. Warwick had some wonderful people. Patrick Atiyah, who later went to Oxford, and William Twining, who wrote a famous book on legal realism and Karl Llewellyn. It had some wonderful faculty. We lived in a little tiny cottage. We had raspberries or something growing on the property next to a herd of cows that were mooing around, and it was a very good experience. I was paid my American salary. And at that time, people may not remember, England was really a poor country at that time. I felt a little like the ugly American imperialist because once a week we went to the best restaurant in town. It wasn't that expensive by American standards but it was the type of thing that many of my colleagues went to once a year on their anniversaries of birthdays and so forth.

I'm trying to remember what I worked on. I worked on some articles there. I probably worked some on the next edition of the casebook. We were not far from Stratford-on-Avon so we went there and went to Broadway and Chipping Campden and some of that area west of London, the Cotswolds, that's so beautiful. My parents came out. My father had been stationed in Scotland in World War II so we went to his old barracks, which was still standing, and Judy's mother came out. So we had a grand old time. I also got it into my head that I'm there, I should do something different. So I wrote a couple of articles, I think just two, for the *Christian Science Monitor*. I went to some of these comprehensive high schools and interviewed the principals and walked around. Frankly I didn't have a good impression. I said, "Well, what percentage of your kids go on to higher education?" The principal said, "Well, I think three or four years ago we had one of our students do that." It was a time before the opening up of the English higher education system. The polytechnics were moved up to universities. I don't know how it all works today. But it was pretty much elitist higher education, A-levels and O-levels and all that.

And we had gone to Germany to buy — it was outrageously expensive — we bought a Mercedes 240D diesel, for \$9,200. And we brought it back. And that was an adventure because we were always driving on the wrong side of the road with the steering wheel on the American side. And it was particularly difficult at car parks, as you tried to pull the ticket out and then run around.

You were on the wrong side. Had to pull the ticket out, get back in your car, and drive through. So that was interesting.

And I made some friends there. Lord Woolf, who later became the Lord Chief Justice, and someone who later became the attorney general of Great Britain. In later years I used some of those ties. I established in the eighties really the first real study abroad programs for American law schools, where you would take certain courses and you would get full credit back home in your home institution. That took almost an act of God, certainly the American Bar Association. I had to bargain over that and so forth. And some of those people, it was with Queen Mary College at University of London and later it expanded to some other colleges, as well. And that was good. That was very good. It was rough going in the eighties but I used some of those ties in the seventies to get that done. And eventually it took hold and a lot of people — not a whole lot of people but more schools did it. There were study abroad programs all the way but the idea that you could actually take a block of courses preapproved by the faculty and transfer the credits back was a revolution.

03-01:32:19  
Burnett:

Right. Well, especially if law is nation-based. Is that —

03-01:32:24  
Yudof:

Well, that's right. That was part of it. There were complications. For example, law was an undergraduate thing. I think it still is in England. So a lot of those courses we didn't think were tough enough for our graduate students, law students. And if you took the graduate school, there were LLM programs in England, they tended to be for foreigners. They tended to be people from the old British Commonwealth who'd come in from some nation in Africa or some place, Ceylon or something, and you would get an LLM. You had a home law degree and you'd get one. And so we actually had some courses created and they were in some LLM programs and some undergraduate programs. But it was tricky. And you're right, you didn't want them studying English contract law. It was just too similar. But fortunately they have a lot of international law courses, private and public. And we had some but not enough. So we emphasized that in the curriculum. And comparative law. There were areas that made sense. EU law, European Economic Community, EC law.

03-01:33:30  
Burnett:

And having that background was fruitful and value-added for the home institution.

03-01:33:36  
Yudof:

Yes. And I think it broke up for the boredom of the third year of law school and it was useful. I can't remember but at one time I calculated that a third of all the law students at UT had taken this or one of our other smaller programs and it was a selling point for people to come to UT because at that time the

other law schools — again, you could go abroad but it typically would extend your stay in law school.

03-01:34:10

Burnett: It wasn't integrated into the curriculum —

03-01:34:11

Yudof: Right, exactly.

03-01:34:12

Burnett: — in a useful fashion. In terms of, and especially given that you didn't really do it again, could you talk about the intellectual benefits for you or for a scholar, changing venue like that, going to a different country?

03-01:34:29

Yudof: It was difficult because, frankly, it's not the most welcoming environment. I can count on one hand the number of dinners I had with members of the faculty. And I saw the European system. A lot of people lived in London and showed up at Warwick two days a week. And I didn't have a strong sense of community. They were all independent actors. On the other hand I was exposed to William Twining, one of the great students of legal realism. I can't remember his name but there was an eminent jurist at Edinburgh who I got to know well. I felt I learned from them. But it was not really a community. Most times I felt we were really off on our own. We met some ex-pats over there and people I tripped across later in their careers. And I don't know. Warwick may have been different than if I had been at Oxford or Cambridge. I don't know. But it was a red brick university, actually a pretty good one. And the faculty, by and large, was pretty distinguished. But the interactions were difficult.

03-01:35:49

Burnett: Just to close off the 1970s. In 1979 you wrote a short piece for the NYU [New York University] *Education Quarterly*. It was kind of a reflection on all of the ferment, as you described it, surrounding constitutional law and education policy. And you argued that we need to have a much more expansive notion as legal scholars of what the law is with respect to education. Looking at not just the federal level, not looking at how the First Amendment applies to this or that, or not looking at due process, there are all kinds of rules and laws that apply to education. Could you talk a little bit about that reflection that you had?

03-01:36:54

Yudof: It was part of my notion of the law in context, that's it's not just a theoretical exercise. Some would say I'm a mere consequentialist. Consequences matter to me. And so I was part of the effort to get away from just strictly thinking of things doctrinally, but trying to look at them *in situ*, in the sense of how does it play out, and that you have to look at not only the interplay of those forces but the interplay of different sorts of legal regimes. I think kids should be able to wear black armbands to school but that has consequences for the

disciplinary system and for the role of parents and so forth. And it may have consequences for the curriculum and so forth. That was probably my last real foray into legal realism. I think Nixon once said we're all Keynesians. I think we're all legal realists, we just don't always share the same definition of that. And at that point, just to step back a little, I was getting concerned at how I was going to spend the next thirty years of my life writing more articles and books and how did I want to live my life. And I had begun working on the First Amendment, teaching constitutional law. I taught it in the mid-seventies for the first time and I was thinking, "Is this all there is?" And I liked Texas a lot but was it my goal in life to end up at Harvard or Chicago? I wasn't quite sure. And so a lot of things happened. I visited here in the seventies, '77.

03-01:38:47

Burnett:

Berkeley, right.

03-01:38:48

Yudof:

And that was, by and large, a good experience. The sense of community was not as strong then as it is now. There was still the residual antipathy, frankly, between the student body and the faculty left over from the glory days of the Free Speech Movement in the sixties and so forth. I had a good experience. The students were very affirming. It wasn't too flattering. They liked visiting professors since they hated a number of people on the regular faculty. On the other hand, I was subbing for Jesse Choper, a brilliant professor, outstanding teacher, and I never felt I quite measured up to Jesse, and he later became dean. At that time Judy had a miscarriage.

03-01:39:37

Burnett:

I'm sorry.

03-01:39:38

Yudof:

And we went to Hawaii and we had fun. I was not given a job offer, even though I was told — who knows — they had Steve Sugarman and Jack Coons. They didn't need people who had my particular skill set. The building was even more foreboding than it is today. I could figure out no way to get in without coming through the trash cans. It was the worst building. Texas was much better in physical dimensions than this and Harvard was better and later I found Michigan better. But anyhow, I had a good experience. I made some friends here, like Jan Vetter and, of course, Jack Coons. Coons was always trying to get me to be adventuresome. He came to my office one day and climbed up on my desk and invited me to go to Yosemite with him and I told him when they open the Yosemite Hilton I'll be there. And Bob Mnookin, I don't remember. Bob may have moved to Stanford by that time. But anyhow, there was great intellectual ferment here. But I had some issues. And I went back to Texas and I continued to write articles. I appeared at UNESCO meeting in Paris around 1980. I wrote an article on the Human Rights Covenants of the United Nations. I was sort of looking for other stuff to do. And I continued over that time to have contact with the Childhood and Government Project and its spinoffs here at Berkeley and Larry Tribe and I

were out here for the summer. I think I mentioned that earlier. And Larry and I discussed government expression. This is twenty-five years before the Supreme Court had ever heard of it and that inspired me to do some work on it and eventually to publish *When Government Speaks* in the early eighties.

The big event, just to put an endpoint on this, would be in 1979 Ernest Smith had been dean for five years and he decided to step down. Really a wonderful man but he was never totally comfortable in administrative role. He was a professor and really a darn good one. And there was a blow-up at Texas. What happened is there was a list that the faculty approved. I never realized it but the faculty made the god-awful decision to put me on the list to be dean. And I was not my favorite candidate. I had another man, George Schatzki, who I thought would be a splendid dean. He was my candidate. And to make a long story short, President Rogers rejected the whole list, appointed a man named John Sutton. There was great angst and a couple of professors left. But Sutton was a wonderful man and he brought calm and quiet and reason to the place. But anyhow, a few days into his deanship, or maybe even before he became dean, he came to me and said, "I want you to be the associate dean for academic affairs." Really a smart move on his part because I was one of the faculty choices. George Schatzki was leaving. He couldn't be the choice. And he wanted to have a united administration. He was a good academician but I was more into that stuff than he was. And so that's how I became associate dean. And we'll talk about it later but there had to be some peacemaking. The Law School Foundation, some of the leading lawyers in the state that raised money for the law schools, some members were partly behind this counterrevolution and the rejection of the list. So there were fences to mend for a period of time.

03-01:43:30

Burnett:

That's right. Well, we'll pick that up next time.

03-01:43:32

Yudof:

Thank you.

## Interview 4: November 6, 2015

04-00:00:00

Burnett:

This is Paul Burnett interviewing Mark Yudof for the University History Series. This is our fourth session, November 6, 2015, and we're here at UC Berkeley Law School. Professor Yudof, we were just starting to talk about your appointment as Associate Dean for Academic Affairs in '79 at the University of Texas, that was somewhat difficult or controversial. Can you talk about how that came about?

04-00:00:39

Yudof:

My appointment was not that controversial. What had essentially happened was there was a search committee and the faculty advanced the names of a number of people, including my name. I think we discussed that. And anyhow, the president did something rather unusual. And without going into all the circumstances, President Rogers chose off of the list and that greatly riled the law faculty and a couple of people left at that time. John Sutton, a man who I greatly admire, a Texas law graduate, a specialist in legal ethics, John was appointed dean. And early on his administration, and I don't remember, probably weeks or certainly no more than months, he asked me to be his Associate Dean for Academic Affairs. Well, I guess the honest truth is I was a more productive scholar than John, although he did some very good work. The thinking was that would be a way to bridge the gap between the administration and the faculty. And I had never thought about that. And I did that. And my job was interesting. I advised the dean on all the academic matters and mostly, not always, he took my advice. I mentored the younger faculty members who needed to produce their books and articles to get tenure. And I dealt with mostly the internal stuff and John was in charge of the Law School Foundation and the university administration, all that stuff. My job was not primarily to worry about budgets and things but to worry about the welfare of the faculty and to make sure that they were productive. So that's what happened and I served in that job for five years. John and I became very good friends. And I think John's agenda always was that I should become dean, which happened in 1984. He wanted to show the foundation trustees and everyone else that I didn't have horns and I was a reasonable man. That was pretty uphill.

04-00:03:03

Burnett:

Can you talk about that a little bit? Why?

04-00:03:07

Yudof:

I was just joking, uphill because people make assumptions. And I'm a Jewish lawyer from Philadelphia, educated at Penn [University of Pennsylvania]. Maybe I was a big-time lefty. I was the guy who worked on school finance litigation and bilingual education litigation. I was the fellow who thought that the administration of the property tax left a great deal to be desired. So there were a lot of conceptions about who—or I would argue misconceptions about what sort of person I was. And at that time in Texas, I wouldn't say it was

always decisive, but it mattered. And so I got to know the trustees of the foundation very well. They were the heads of some of the leading law firms in Texas. Former Governor Allan Shivers was chair of the life trustees. There were people like Kraft Eidman, who was managing partner at Fulbright & Jaworski, Harry Reasoner, a very, very prominent lawyer at Vinson & Elkins in Houston, and so on. And I did get to know them and I did get to appreciate them and that they were not evil and they didn't really want to interfere with the law school. They were there to help. And I think they learned to appreciate me. And I thought that was a masterful stroke by Dean Sutton. He passed away not too long ago. We remained very close friends for a very long time, although I didn't see him all that often. But he really was totally devoted to the institution. I don't think he particularly wanted to be dean but he saw himself as a bridge to the new generation, which was people like me and Michael Sharlot and Bill Powers, who later became dean and president of the university. And he did quite a good job at that and brought stability to the place.

04-00:05:03

Burnett:

And could you talk a little bit about what is special about the scholarship at the law school compared to other institutions? Does it have anything to do with the nature of the economy of Texas? Is there a specialty in oil and gas law, for example?

04-00:05:25

Yudof:

Well, there's a variety. I would say the faculty did more than I would have liked of doing some of the Texas version of whatever it is, civil procedure or evidence. One element of it was serving the bar and the people of Texas. And a lot of that was fairly descriptive, although very, very useful work if you're trying lawsuits in Texas and you want to know how to do a jury charge. Some of it was specialized. We always had a large oil and gas component. We had professorships in that area with people like Ernest Smith who was dean from '74 through '79, who was a specialist in that area. We had water law courses, obviously a major concern there, now a major concern virtually everywhere. So you had some of that. You had dilettantes like me who were interested in law and policy. You had legal historians. And then you had Charles Alan Wright, perhaps the most prolific legal scholar of the twentieth century. And Charlie wrote, I can't remember how many volumes, twenty volumes on civil procedure with some co-authors. But he wrote a big chunk of it. And he had a classic hornbook on federal courts and a casebook. And Charlie was encyclopedic. I used to say that it depressed me to go by his office. They then had typewriters and I could hear him typing away. And I thought, "I can't copy the Manhattan phonebook as rapidly as Charlie composes great legal books." So it varied.

And unfortunately there was a contingent that was not very productive at all. And that happens at many law schools. But your superstar scholars or your star scholars are usually no more than 20 percent of the faculty. And one of

my jobs as academic deans was to try to encourage those who had not been productive over a long period of time to produce more articles and books. A rational person could does the world need more of this literature? I said it's like painting the Brooklyn Bridge. If you're hired to paint the Brooklyn Bridge, you're supposed to paint it. If you don't think that's a worthwhile life then find another job. But you shouldn't accept money to paint the bridge and then not do it. And the job of a law professor is to write articles and books. It can be very abstract and theoretical. It can be law and economics. We had Dick Markovits there, who did very good work there. The right articles and books to be effective with the students in class, to help serve our students, to play community service roles both within the institution and outside. And it's okay if you don't believe in those things. It is okay. But you shouldn't be accepting the money and you shouldn't accept the appointment; you should go on and do what it is that you're more passionate about in life.

04-00:08:24

Burnett:

So that was kind of an across-the-board lack of productivity as opposed to someone doing too much service to the bar versus scholarship.

04-00:08:33

Yudof:

Well, I didn't mean that as an across-the-board comment on the whole law school. I was talking about a philosophy. It varied. Some people did tremendous bar service. I had a friend, Jack Sampson, who was incredible in terms of drafting the family law statutes of Texas, aiding that process and analyzing what needed to be done. It was just incredible work. I never had any doubts about that. But often, I hate to say it, but the five or six people you were most offended by didn't do any of that. They weren't good teachers and they weren't good scholars and they didn't do the service work. And a lot of times the people like Bob Hamilton, Charlie Wright, Russell Weintraub, who were terrific, they were terrific along all those dimensions. They weren't shirking any of those responsibilities. It's a variation of "if you want something done you go to a busy person." And that's the way it was.

04-00:09:29

Burnett:

Did that shape your attitudes towards what you perceived — another context completely — as perhaps an overarching concern with academic freedom or a misplaced concern with academic freedom in the courts?

04-00:09:51

Yudof:

My views on academic freedom are complicated. We can get into this. At one level I never got over my blue collar upbringing and I felt why should academics be treated specially? Why not postal workers? And I think other people have rights of free speech, have intelligent things to say. So at one level I always blanched that there were special rules, which is part and parcel of academic freedom. And in fact, one of the reasons for the decline of academic freedom is the expansion of the First Amendment. We do protect the postal worker today and the government employee and so forth so that the special protections of academic freedom are not as robust as they used to be,

in part because the general law of freedom of expression has expanded to a much wider class of people.

I also felt that it was important that you be able to — and I never had a problem. I wrote on what I wanted. I picked the subjects, I said whatever I pleased, I didn't pull any punches. And that's the way I thought it ought to be. But I thought sometimes people would misuse academic freedom. If you didn't pick up the trash on time you violated somebody's academic freedom. If you wanted to raise the parking fees someone would say you violated their academic freedom. Academic freedom was never designed for students. They have other rights. But academic freedom was for teachers to teach in their classroom and to write their articles without fear of retribution and so forth. So I thought it got bastardized and that was something that bothered me.

And, in fact, I just gave a little talk on this to the Association of Law Schools. In fact, academic freedom as a constitutional doctrine has declined. And I don't want to get into all the reasons for that. But if you're hired to teach calculus and you show up in class and say, "I hate calculus. Instead I'm going to teach you about basket weaving in the sixteenth century," I think you can be fired. In public universities, you have curriculum set by the departments and the provost and so forth. I don't think you have complete freedom. By the way, it'll probably get in me in trouble. I think that's true at Berkeley. I think the department says you're teaching geography and this is the components of the course. Now your views on all that are fine but I don't think you ought to be able to substitute one course for another. That's hyperbolic and extreme. But these are not always easy questions and many cases when high school teachers say, "I want to pick the books the students reads." Well, that's hard. It's compulsory education. And the school board could choose to do that. That would be fine with me. But if they say, "Here's the reading list," my view is that's the reading list and you have to abide by those decisions. Public entities with public governing bodies can make curricular choices.

04-00:13:03

Burnett:

That seems a very central theme to your research and your work, this question of probing the limits of liberty in the law and in practice. What is the limit or the extent of individual liberty in all of these different instances?

04-00:13:26

Yudof:

I'm not a libertarian and I always thought that was a classic problem. And I did a lot of reading in John Stuart Mill and others, and Isaiah Berlin and trying to figure this out. I am very heavy on the liberty side but it doesn't mean you have the liberty to drive the wrong way on a one-way street or to demonstrate your religion by engaging in ritual murder of another person. So obviously there have to be limits on all this and probing what those limits are. I frankly, on academic freedom, got annoyed at what I consider the excessiveness of some of the arguments and I once wrote a joke article, which some people thought was actually plausible, about why professors could choose the paint

colors that were painted on the walls, as it was important to their well-being and self-satisfaction, job definition. And that was academic freedom. Some of my colleagues didn't like that article much. That was one of the two joke articles I wrote.

04-00:14:36

Burnett:

[laughter] What was the other joke article?

04-00:14:37

Yudof:

I said I had discovered a file of some unpublished opinions in a state supreme court on school finance reform. And they should have known. I named all the justices after great cartographers, mainly sixteenth and seventeenth century cartographers. I think I got this from Nabokov. And what I was trying to do was to say, "Well, here is the progressive point of view, and here's the neo-con, and here's the libertarian." It was really just an exercise in showing how different people viewed school finance reform. And here were the legal realists, the consequentialists, and so forth. And I had great fun. I don't know that it was ever cited. But ten years later I got a call from a grad student at Harvard who wanted to know what state it was and did I still have the file.

04-00:15:35

Burnett:

Brilliant. I think we can talk about this at a number of different points. I was certainly going to talk about it with *When Government Speaks*, is the importance of reading widely and the importance of humor and play, a certain kind of intellectual play in the work that you've done. I don't know. Is this common when law professors write monographs? I can go through the list for *When Government Speaks*, the range of sources that you cite, but it's pretty broad.

04-00:16:22

Yudof:

Right. I was a big believer — it comes out of the *Educational Policy and the Law*, the casebook — that law as a standalone set of principles in a framework was not in my judgment sufficient for the types of things I wanted to do. If I were teaching students how to represent an indigent prisoner who was on death row, even there I think I would probably look more broadly but there would be more reason to focus on the legal principles. So I viewed my role as something of a synthesizer, if I may put it that way. And I felt these other systems of thought, whether they would be in philosophy or economics or political science, public policy or wherever, were worthy of respect. I remember I did a major article on implementation theory and the law, relied on Aaron Wildavsky, who was I think at that time dean of the public policy school here at Berkeley. I thought that was a useful role to play and that came out of my legal realism. And in that respect Carl Vellen wrote some anthropological works. So I would say that does describe me. On the other hand I was very hell bent that *Brown v. the Board of Education* was not a social science decision; it was a moral decision based upon the Fourteenth Amendment, but by and large understanding the world around you in terms of knowing what you're doing for a legal environment. And I still think that's

going on and I'm very pleased. I think some of the work by Cass Sunstein and others on behavioral economics is very important work. If you want to set up pension plans, if you want to set up consumer protection or you want to set up environmental protection, knowing how people think is extremely important. You shouldn't just sit at your desk as a lawyer and make it up. And so I do feel that way. So that was my role and you see that bridging function in a lot of the work that I did, whether it was implementation theory, what happens when a court decision occurs or a bill becomes a law. How does it impact the Ford Motor Company, how does it impact individuals, how does it impact the public schools? What do we know about how legal decisions get translated into the operational environment of whatever institution? And it's easier to figure out for individuals than institutions.

The jocular side, I don't know, I always had that side. I didn't tell many jokes in my books, I don't think. But it was a way of letting off steam. And let's just say there were at least two occasions when I wrote articles which are of questionable judgment. One was on academic freedom; one on school finance. I tended to use the humor more in my administrative roles. My theory was that if you can create a climate that people feel comfortable with you, that you can exchange jokes and you're amused and you eat pancakes together, maybe that can get you through some of the really tough times when you have harsh and tough decisions to make. That there's no reason that everybody ought to be on edge the whole time. There are enough challenging times. And so that was part of the philosophy. That started as an academic associate dean and then dean and for all the other jobs. And the other part of it is I never really felt very hierarchical about it. I did expect if I'm president of something, I tell someone to do something, that they do it. But I didn't think I had a corner on good judgment or wisdom or anything. And I thought the more people felt they could confide in me and exchange ideas with me, the stronger my administration would be and so forth. So anyhow, in the scholarship I didn't tell many jokes.

Ultimately that led to an article in the late eighties which is based on a Wallace Stevens poem, "Tea at the Palaz of Hoon." I love Wallace Stevens' poetry. It's virtually the only poetry I like, to be honest. And "The Idea of Order at Key West," another one. I tried to weave that into this idea of narrative. And you can see this is probing. People were writing a lot of articles that said everything's a story. Story can be subjective. So instead of saying this is a legal principle you say it's a story of XYZ, which means all bets are off, it's all subjective, anyone can say whatever they want. And I didn't think that was true. On the other hand, I thought that narrative was important. So what I tried to show there is that law often involves choosing narratives. So you have an alleged rapist, and the rape victim obviously has a story of a heinous crime — let's assume he was guilty — heinous crime being committed and the circumstances and the impact on her life and her family's life. It's horrible. But the rapist also has a story. He was brought up in a bad family and by a single parent and he was a junkie or whatever. And my

sympathies are with the rape victim. I made that very clear. So sometimes you have to prefer one narrative to another. It's not just all subjective. You just don't say, "Well, everyone has a story. Let's let the rapist go." I don't believe that for a second. It should be rooted in the law and in morality but sometimes you have to grapple with different narratives and you have to choose.

04-00:22:21

Burnett:

Given that you are reading widely in the 1970s and eighties, there is this post-structuralist turn, that philosophers, scholars are talking about things that had hitherto been considered to be objective reality and describing them as narratives, as you said, right? At what point did that —

04-00:23:00

Yudof:

Well, I had problems with some of it. I didn't reject all of it by any means. I can't think of the word I want to use. But certainly we had a tendency to take facts and to sort of ossify them and to turn them into set pieces that sometimes were very much untrue. So I think it was healthy to have that discussion. But this idea that a text could mean virtually anything and that a reader of a text, it's just his or her interpretation, there is no meaning to be gleaned, that it's not a useful question to ask what did the author mean, it just ran counter to all my instincts. And I come from frankly a Talmudic background. I'm not a Talmudic scholar but an interpretive background and I taught constitutional law, taught the Uniform Commercial Code. These are documents and interpretations. I'm certainly not an originalist by any means. But the idea that you could just make up anything I found very difficult. That caused me to have lots of arguments. And frequently, by the way, it was used in a fairly arbitrary way. Since it can mean anything, it might as well mean what I say it means. So if letters of marque and reprisal seem to deal with piracy but your quest in life is to outlaw the death penalty, somehow you see that language as supporting your position. So it's only neutral in a very strange sort of way, in that it delegitimizes the other side by saying your reasoning is no more powerful than mine because the words have no natural meaning.

04-00:24:40

Burnett:

When did this turn become apparent to you either in the law or just in — I imagine it was first emerging in all kinds of discourses other than the law.

04-00:24:55

Yudof:

I would say probably in the eighties. You saw a lot of this, critical theory in English departments and elsewhere. And I'm not saying they didn't make contributions — I don't want to be misquoted on this — but the idea that words are infinitely flexible, as John Hart Ely said, only a very bad lawyer thinks that. That doesn't mean they have to necessarily pigeonhole and cabin every thought that you have. I think it was Edmund Burke said — this is a real bad paraphrase — people argue that they should be free to do as they please. Before giving in to that we ought to find out what it pleases them to do. And so even though I was very sensitive to open, textured, social science and law amalgamation and all that, the idea that anything would go, that words could

mean anything, that there were no limits on freedom, that academic freedom could be extended to the parking lot, when I felt the principles were being bent to the point of breaking, then in one way or another I yelled and complained.

04-00:26:26

Burnett:

So my question is, how do you encounter these different kinds of texts? Do you have a network of colleagues and scholars who are also thinking along these lines, or “Hey, have you read Foucault?” [laughter]

04-00:26:43

Yudof:

Sure, sure. I was into the Frankfurt school of Marxism at one time and I read Marcuse.

04-00:26:50

Burnett:

When was that?

04-00:26:53

Yudof:

Probably in the late seventies. I was always slow. One of the answers to your question is, I’m so far behind that you can find out what the trends were because I’m not on the cutting edge. It was a combination. I had very smart colleagues. One of the things I loved about law teaching is I had smart colleagues and smart students and I felt I learned from them. Roy Mersky was our law librarian and his belief was in order to be a great law library you need to have philosophy books and economic books and so forth. It wasn’t just collections of law books. You read the *New York Review of Books*. You saw citations in other people’s work. I took philosophy in college. I remember even at Harvard, John Rawls was the most highly regarded modern philosopher, at least at that time. Maybe still is. And so you would read him and of course he drew on the philosophic traditions. And then I always had a sort of kamikaze approach to all this. I would try to read *Prolegomena to a Modern Metaphysics* by Kant and so forth, that I always deluded myself I really understood. But rather than always taking classes I would just pick up a copy and read it. I later did that with Maimonides because everyone told me he was impenetrable. I think they were right, by the way. So they came from various sources. I always thought having a law school embedded in a large university setting, I mean, we have colleagues in the government department and philosophy department, sociology, anthropology. I always thought that was very positive. I was never as fond of a professional model where the law school is downtown near the courts, which is great, but isolated from the rest of the university.

04-00:29:02

Burnett:

Were there formal or informal opportunities to meet folks either within the law school itself, like colloquies, or workshops, those kinds of things?

04-00:29:17

Yudof:

Sure, and increasingly people had joint degrees. They had PhDs and JDs. I didn’t, but they did. Yeah, and I remember Charles Lindblom, a great Yale

political scientist came to the University of Texas Law School. And we had people like Dick Posner who at the time was the advocate for law and economics, later to become a judge. Guido Calabresi was very good at this and his views on tort law and the law of accidents and so forth had a lot of non-legal stuff in it. Yeah. And occasionally I would go on campus and there were other departments and lectures and so forth.

04-00:30:06

Burnett:

During the eighties here there are two big monographs that you put out, one with long-time collaborator David Kirp and Marlene Franks and the other is just you, *When Government Speaks*, in '83. And I think that was a good kind of setup to talk about this book. Can you talk about the impetus for the writing of the book? When did you start thinking that you wanted to write that book as a project?

04-00:30:46

Yudof:

You talking about the *Gender Justice* book?

04-00:30:47

Burnett:

No, *When Government Speaks*.

04-00:30:49

Yudof:

It really started in the seventies. To be truthful I had some conversations with Larry Tribe, who was out at Berkeley. I don't remember exactly when. Maybe it was when I was here as a visiting professor. And Larry is a brilliant, brilliant man and spins off ideas like a machine gun. And I thought about it. The idea came from a sort of simple inquiry. If you were rewriting the First Amendment today, which said Congress shall make no law abridging freedom of expression and other parts, too, how would you rewrite it? And I thought to myself, "Well, the lesson of the twentieth century is Joseph Stalin and Goebbels and other dictators around the world who have no respect for freedom of expression but who also seek to dominate the public schools, the radio, the television." We didn't have the Internet yet. And it's sort of incomplete, because just as preventing people from speaking out and engaging in exchanges of views can stifle the population and make them less able to engage in democratic choices and so forth, if the government is propagandizing and trying to stop it at the source, that is you never speak out because you never thought about it because you learned all the stuff when you were in school — so the theory was that government expression could be dangerous. Of course, the government controls the curriculum. Will they turn out people who are uncritical of the government, who are only pro-capitalist and don't look at other alternatives? And we still fight about all these things now. So it started with what would the First Amendment look like. And I also thought to myself it's sort of like a baseball game where the umpire calls balls and strikes but also participates. How could you ignore the massive level of government participation and communications? Whether it's *Stars and Stripes* or whether it's a press release from President Obama, whether it's a publication from the Department of Defense, I can go on and on. We probably

spend as much money on communication as we do on national defense, on tanks and planes and so forth. And I thought you can't have a complete theory of the First Amendment unless you try to take into account the proper role of government.

When I wrote the book it turned out it was very difficult to think of ways to cabin or curtail government expression without it leading to absurd results. So I examined a lot of different doctrines and I said they might be thought of as limits on government speech. So, for example, academic freedom and then which view of it you take gives you more flex in the joints and the government in a public school or university can't dictate exactly what you say. Student rights. You can wear an armband even if the administration is pro-Vietnam War, to protest it. And there are various doctrines that, in their impact — due process. If the government says, "Paul, you're a shoplifter," and they put it up, let's say, on a board at a post office — at least at one point we had due process guarantees that said you could contest if this stigmatizing interfered with your liberty and you could have a hearing or something to say, "I didn't do it." So there were a series of doctrines that I thought had an impact of curtailing government speech. And then we had the one more-or-less firm limit, which is the establishment clause. Government speech is not supposed to be school prayer. And then you get into more complicated issues of evolution and secular humanism and so forth. So that was primarily what the book was about. It was well received.

Today we live in a different era. I probably should write the book again. Maybe I'll get it right this time. The government speech doctrine today largely insulates the matter from judicial review. So in a famous case, the government decides to put up a monument. Let's say it's a monument to World War I veterans and someone objects and says, "You can't do that. That's my tax money. You're spending it on this and I don't approve," or "You need to put up my monument, which is a monument to the World War II veterans." By and large the Supreme Court is moving in the direction that once you describe it accurately, hopefully, as government speech, then you can't seek to control it. And I think that has to be the answer, although there's a lot of debate about when it is government speech, because government only speaks through people. So is the teacher engaged in government speech or is she engaged in personal speech and how does all that work? Is it a student newspaper or is it a school district newspaper? All these things matter. So I got fascinated with those issues. But what I didn't see coming was that it was a sort of doctrine that would inoculate the government from having the speech challenged by others. That's the way it's evolved in recent times.

04-00:36:51  
Burnett:

Can you talk a little bit about how that has come to be?

04-00:36:59

Yudof:

Well, maybe for the sake of posterity, just to simplify all this. Paul, we hire you to write for the Berkeley alumni magazine. And what we do is we say, “Paul, what we’d like you to do is write an article singing the glories of the provost. He’s a great guy and we want everybody to know that. And you’re hired and we’re paying you to do that.” And you write an article, because you’re passionate about it, about dog hunting in North Carolina. Hunting with dogs, not hunting dogs. Hunting with dogs in North Carolina. And I say, “Paul, you’re fired.” And you file a lawsuit and say, “You violated my academic freedom.” And this is simplistic. Doesn’t happen very much. But the idea would be that this publication is an official organ of the government and that we can pay someone to produce what we want for that publication and you don’t have independent speech rights. On the other hand, if you wanted to give a speech on this subject at a university mall or something like that, your First Amendment rights would be protected. So the question is the government has to be at some level able to get its own messages out and sometimes people, for a variety of reasons, will object to that and then the question is when do they prevail. To me the most famous case involves a student newspaper and the court divided very closely. The majority said you can tell student editors what to say because it’s really a school district publication. They pay for it, they give credit. The dissent said, “Oh, no, you got it wrong.” If you look at all the documents, they delegated this responsibility to the students and it operates more like the *Washington Post* than it operates like government expression. And now we’ve had a number of cases along those lines.

04-00:38:53

Burnett:

And one of the points you made in the book, it seems, is that the First Amendment has been interpreted as a protection against government power, not for it. And you write “it would be standing the world on its head to think that the extension of First Amendment rights to private sector organizations requires the constitutionalization of government expression in order to counter the distortions brought about by private institutions. Governments, particularly the federal government, are not fledgling communicators needing protection by the community’s excesses. They may pose more of a threat than do corporations.”

04-00:39:36

Yudof:

Yeah, I don’t know if that’s changed. The internet age has completely stood that on its — but at the time I was thinking of Goebbels and I was thinking about overreaching and Ceausescu in Romania and I was thinking of propaganda and the government and I was thinking wasn’t that as big — I think I used at the time the term falsifying consent, falsifying the consent of the governed. I was worried that government overreaching in communications would sort of load the dice in terms of perpetrating the current regimes and power and all that. And that’s been an argument. Some school critics have said that. And I’ve said there’s no direct way to stop it because it’s hard to define propaganda. If you want public schools, someone has to choose the

curriculum. But the more we protect private speech the more it offsets the government speech. The more we protect academic freedom the more it offsets the government's role. The more we have open courtrooms to observe criminal trials, potentially the more that can offset the government's party line and so forth.

Today it's bizarre because, then, we had three or four TV channels and we had the government. And today I would say that you've had a balkanization of communications. It's very different. If you're progressive, if you're conservative, if you're African American, if you're Jewish, you can find your own channels somewhere on some cable system. And so there's great diversity. Maybe some people disagree but I see great diversity in there. Labor unions and there are corporations and we're obviously always arguing about who has more money and who's legitimate. I'm not sure that the nature of government domination is as great as it was twenty-five years ago, thirty years ago. I sometimes worry that there's no center, no core. There's a reason we have common schools. And if we don't have something in common, if we don't have a common history, if we don't agree on the need to teach algebra or whatever — I worry a lot about that. That you can see fractures in how this works. Today every person is a publisher. That was not true in 1983.

04-00:42:03

Burnett:

And there are other scholars, scholars of communications. In the last few years there's Eli Pariser's book, *The Filter Bubble*, which is about how search engines tailor your searches based on your preferences, with the consequence that you're just being fed news that you're already predisposed to like and prefer. And it closes off exposure to different ideas. And so rather than having kind of the "miracle" of this diversity of sources, the technology itself has kind of inculcated insularity in the public sphere.

04-00:42:46

Yudof:

Yeah, I think there's a lot to what you're saying, to what he says there. Again, what I was worried about is, if the government gets to Walter Cronkite and President Johnson puts out press releases and goes on speaking tours, that they could be dominant in some fashion. Maybe that was never true but it's so much less true. Look at President Obama and President [George W.] Bush before him and President Clinton. They were not dominant because there are so many sources of information. And then people are self-selecting. If you're a neo-con you may only tune into Fox and if you are more liberally disposed then maybe MSNBC or whatever. Or you may tune it out and you're interested in classical music or old movies or whatever. So that selection process makes that sort of domination much less possible. But the danger, I think, is the opposite of what I was worried about. We live in an opposite era of Stalin and Goebbels now. We live in an era where everything is so Balkanized that it's hard to find the principles on which we agree sometimes. And you can be self-selecting and not exposing yourself to people who don't believe in the things you believe in.

04-00:44:01

Burnett:

Right. At play in the book there's the scholarly discussion that one of the government's roles is to protect and encourage a public sphere, right? To in a sense create a self —

04-00:44:18

Yudof:

And that's one of the reasons you can't come down too hard on it. So you have *West Virginia v. Barnette*. So basically the Jehovah's Witnesses do not want to say the Pledge of Allegiance for very good reasons in terms of their own religion's view. And that, for some technical and tactical reasons, that's expanded to everyone. So it's not just a religious objection. But the Court says we can have a civics course. Well, why is that? What's a civics course going to say? The Bulgarians got it more right than the Americans? Of course it's not going to say that. I had this discussion in class. Even if the communities control the curriculum and let's say you're in the Southwest or in a Hispanic community, it takes a very different view, let's say, of the treatment of Mexican Americans in the Southwest or maybe the Mexican-American War. I don't know, or of any number of other issues. They're still going to have to articulate a perspective on those. You have to choose unless you'll give up the whole enterprise of a common school. And you may make good choices or bad choices and there may be debates about where the power should reside at the federal level, the state level, the local level, the school level, the parent level, or whatever. But someone has to decide that and to say the government doesn't have a communications role — you can only say that really in this case if you abolish public schools. And then what do you do about the military and the police departments and the press releases and all that? So it's a complicated question.

04-00:45:48

Burnett:

You talked about the impetus being Goebbels and Stalin. But in the book there are these more local and national issues in the United States in the seventies. One of your big examples was the Advertising Council.

04-00:46:10

Yudof:

Yeah. If you're anti-Smokey the Bear you're in real trouble. And if you didn't want to buy bonds from Kate Smith you're in real trouble, right? I don't know if you're in real trouble but you're certainly not hearing the anti-Kate Smith point of view. [laughter] Yeah. I tried to go out through history. I went to the Creole Committee in World War I, and I looked at some of the things that the Roosevelt Administration did in World War II because it's interesting to watch the government try to sell its policies.

What I would say is that's the job of government. If you're going to go to war you're supposed to try to persuade the population you're right. If you're President Obama and you want to do Affordable Healthcare Act, isn't it your job as president to stand up and say to the people of America, "These are the reasons why this makes sense and there'll be plenty of people that disagree with me but I think this is good for the country. This will extend the scope of

coverage, and so forth?” You can’t disable government from communicating. So it becomes a very difficult problem to articulate principles of limitation that do not compromise the essential functions, communications functions of government.

04-00:47:19

Burnett:

But it was *so* politically thorny in the 1970s. George Shultz and Kenneth Dam wrote *Economic Policy Beyond the Headlines* in ’77. They were talking about this dramatic expansion in the federal government and the ways in which, for example, the Department of Agriculture would be promoting, using government money to promote its own expansion of its own programs.

04-00:47:43

Yudof:

All right. Yeah, and I always had a lot of problems with that and I’m not sure I ever got a satisfactory solution to that. Look, we have a scandal now. I think it’s a scandal. I read about it. The military spent ten million dollars paying for patriotic things to occur on the football fields of the National Football League. Well, why is it a scandal? It’s fine to be patriotic. I hope I am. I would like to be. But the idea is that somehow you’re rigging the process of informed consent by the governed if you’re deliberately paying people to — just like if you pay them to write op-ed pieces espousing your parties perspective on one issue. So we’ve always had a lot of trouble. California had public money spent to support bond issues and the California courts actually said, “You can’t do that,” and you can’t today. So you can’t be the supervisors in San Francisco and you have a pending bond issue — you can do whatever you want privately but you can’t take public money to buy advertising time to support the bond issues. So there are literally thousands of examples. It just seems to never end.

So then the question is how do you distinguish between legitimate activities, President Obama saying, “Look, this is what we need to do in Syria, this is what we need to do in healthcare, this is what we need to do, Cuban policy or whatever.” He needs to lead! To lead is to speak. And on the other hand, there are agricultural expenditures that are designed really to create a constituency for their own programs and nothing more.

04-00:49:32

Burnett:

We could understand, and this as an example from your book, that in an age when there’s no draft, it’s an age of an all-volunteer army, the government has a right to recruit, in a sense.

04-00:49:47

Yudof:

Exactly. Yeah.

04-00:49:48

Burnett:

So you can imagine a recruiting office in a shopping mall. But today the US Army works with videogame companies to produce enormously seductive video games.

04-00:50:00

Yudof:

Yeah, the scale is different and that's part of the problem here. And we always have recruiting offices and we had what they called — what did they call them? One-minute men? Three-minute men? Something like that. In World War I they would go into movie theaters and they'd give you a little speech on World War I because in some circles World War I was not that popular, particularly in parts of the Midwest. But the scale is so much — now there's the Internet. Now, the military, if it wants, can advertise at the Super Bowl game and they're paying people to do patriotic exercises. But how are they supposed to recruit soldiers unless they can communicate with the public? And, again, not everyone will agree with them but I don't think they're under any obligation to publish the fatality rates every time they put on a commercial to encourage young people to apply to the Marines.

04-00:50:53

Burnett:

Yeah. Although with drugs, I suppose, we require drug companies to give their side effects of their drugs [phone ringing].

04-00:51:03

Yudof:

Well, American policy on regulating private speech, constitutional policy, it's been inconsistent. Years ago there were limitations on drug advertising. Drugs, particularly prescription drugs, were never advertised and now they're advertised. And then they have smiling people happily going through the field and some voiceover saying, "And this drug, by the way, could lead to instant death, decapitation, loss of the left leg." And then we have required speech and you got to put out a little brochure that has the side effects and so forth.

In the United States we have banned recreational use of opiates and stuff like that. And presumably you can't advertise for recreational use. But we've also put warnings on cigarette packages and there are bans on certain types of advertising. Well, let me put it this way. Smoking is a lawful activity but we regulate speech around smoking. Not reporting for the draft is an unlawful activity and we have protection from *Eugene Debs* on, for people who speak out against military service. You need a Ouija board to follow all this stuff. And that was part of my theme. It didn't emerge as a major theme in the book but it's certainly amazing in America all the types of speech we do censor and don't talk about: the waving the bloody knife before the jury; the limitations on aluminum siding sellers and the cooling off period; drugs and cigarettes and so forth. It's just not true that all speech is free. That's another one of those principles that's just never been the law of this country. Solicitation of murder is not free speech and whatever else it is —

04-00:53:29

Burnett:

Well, we recognize, and maybe this is the voices from social-science research, we recognize that there is the kind of simple nineteenth-century liberal model of the isolated individual with perfect command of their faculties is complicated by people who are — there are vulnerable populations. So we want the law to protect people from manipulative speech.

04-00:54:02

Yudof:

And we want to be paternalistic sometimes. But, again, if you're going to outlaw prostitution you can't protect solicitation as free speech. If you want to deal with bank robbers and murderers and their conspirators, now maybe they have to take an act toward their goal. It's a complicated area. I'll give you one I've been focusing on recently which is like this: racist speech, anti-Semitic speech, homophobic speech. People often say, "Now, wait a minute. What we need to do is to define free speech versus hate speech." And I say, "Hate speech is constitutionally protected." I hate it in a way, right. I don't believe in racism; I'm deeply opposed to it. I don't believe in disparaging Latino people in this country, whether they're immigrants or non-immigrants. I certainly don't believe in homophobia and so forth. But the fact is it is constitutionally protected and I would argue it can be extremely harmful. There's another good example. So we treat it not like cigarettes, which is not political. We treat it as political speech and we have cases that protect the Ku Klux Klan and all the rest of that. The variations are immense and it's not just harm, because there are countries around the world — there's a recent decision in France saying that the boycott and divestment movement against Israel at its roots is anti-Semitic. I don't know what they did. They fined somebody or whatever they did. That's an unimaginable decision in the United States because even if it is anti-Semitic, it's constitutionally protected if it's speech, as opposed to throwing a rock through a window or other things. So we have a very strange relationship with speech. In fact, I don't have time to write the book but I often thought mapping the speech we do not protect would be as illuminating as mapping the speech we do protect.

04-00:56:22

Burnett:

That does sound like a great book. So the book was well received, *When Government Speaks*. And I heard from others that it's actually still an important book.

04-00:56:41

Yudof:

Well, thank you. I did get a report from UC Press. I think I've sold six copies in the last year. But I got ten people who looked at it. And my mom isn't buying any more copies.

04-00:56:56

Burnett:

Right, she's refused.

04-00:56:57

Yudof:

Yeah.

04-00:56:57

Burnett:

It comes out in '83 and then you've got one more year as Associate Dean for Academic Affairs. And then you become Dean of the School of Law. You succeed Sutton.

04-00:57:21

Yudof:

And around this time *Gender Justice* was published also.

04-00:57:24

Burnett:

It is. It is in, I think, late '85, '86. And was that a collaboration you're working on concurrently with David Kirp and —

04-00:57:35

Yudof:

Yeah, and Marlene Franks.

04-00:57:37

Burnett:

And Marlene.

04-00:57:38

Yudof:

Yeah, it is interesting. David was the lead author and I was not. It was not like *When Government Speaks* when it was all Mark Yudof. And it actually was an extension from my perspective, I'm not sure about David's extension of my views on liberty. The original idea for the book was it was not necessarily about justice, gender justice being sameness, that men and women would be treated exactly alike, although in many dimensions they are, civil and political rights and so forth. But it was a deeper view, that there should be equal liberty, that the ability of women to make life choices should be equal to that of men. And our perception was that was not true. So in some domains that would be more or less standard equality, like the ability to vote or being paid the same wage for the same work and so forth. But in other dimensions, if women were to have choices that involved how their pregnancies were treated and availability of daycare and other things that would enable them to make a wide range of life choices and sort of not be boxed in by who they were. And it's a very thorny question. [phone ringing]

So I was interested in this equal liberty, that formal justice alone would not be enough to create equality for women. And we were mainly focused on women and not so much gays and transgender and so forth. And it's a complicated subject and all these interesting elements to it. During the Jim Crow era we had separate bathrooms for African Americans, separate waiting rooms, separate parts of the bus where they were supposed to, African Americans, sit down, all of which was atrocious and outrageous. But we still have separate bathrooms for men and women today. If you had a basketball team, a football team, a volleyball team, a swimming team, and you had an African American swimming team and a Caucasian swimming team it would be clearly unconstitutional. Should be. But we have men's swimming team and women's swimming teams, men's golf teams and women's golf teams. Women's soccer teams and so forth. Maybe a hundred years from now all that will be gone. I have no idea. But whatever is going on there was a different sensibility about that and so therefore we picked our spots, the public military academies, Citadel and so forth, cannot keep women out and so forth. But there are many areas of life that people will say, "Well, sure. For whatever reason, we need women's tennis teams. More women will be able to compete," and so forth. So it's different. So you're trying to figure out what's going on. But one way you could rationalize it is to say what you're trying to do is give women the same choices with regard to athletic outlets and scholarships at universities.

And, again, I would argue the job market and politics and the board rooms and so forth, so it seemed like it was more of a liberty principle than a formal equality principle. If you just imported the law from race relations you would not end up at the point that even someone as progressive on the issues as a Ruth Ginsberg or like that, she would not end up at the same stopping point for women and men as for blacks and whites. So that was what the book—it was a little thin book. It got some notoriety. It got a favorable review in the *New York Times*. And it got some criticism. And frankly, I think a lot of the evolution of the law since that book has been consistent with the positions we took, although you'd be hard-pressed to say we caused it.

04-01:02:17

Burnett:

Can you talk about the nature of the criticism? What did people take issue with?

04-01:02:26

Yudof:

Well, to be honest, I don't remember. There were some people who thought the formal equality was the right way to go. There were people at the time, Gilligan I think was her name, who were talking about a women's voice. And so we talked about this before, this tension between the principle of justice as sameness or equal treatment, and the principle of justice as recognizing the distinctiveness of a group, whether it's women or African Americans or Latinos or gays or whomever. And we didn't really fit into either one of those camps very logically. What we were trying to say is that the name of the game of public policy — we were more concerned with public policy and not necessarily just law — was we should be facilitating and enabling women to make choices. And, by the way, that also didn't always fit comfortably with things like the Frankfurt School of Marxism, where people would say that the game is rigged. "Women, because of the toys that they're given when they're young, because of the interactions with their parents and so forth, cannot imagine themselves in these roles. And if you will, they've been brainwashed. And therefore, to say they can make choices" — I always had a hard time with that. I didn't doubt that some of that was true but to me it's always totalitarian when they say you're not competent to make choices because of the way you were brought up and therefore we'll make them for you. It's the "therefore" that gives me the trouble. You think you prefer chocolate but if you really were enlightened you would prefer vanilla ice cream, so we're going to give you vanilla ice cream. So it's a real problem, the socialization elements, but it's also difficult to know what government policies would be. And we thought the government policy should be whatever we can to facilitate and enable men and women to make choices for themselves.

04-01:04:38

Burnett:

Right. Is there a *When Government Speaks* side to this, as well? For example, if it's clear that in the late eighties and early nineties there was a Barbie doll, and you pulled the back of her back and she would say, "Math is hard." Right?

04-01:04:55

Yudof: I didn't know that.

04-01:04:57

Burnett: Yeah. And if you think about that as kind of one of the aspects —

04-01:05:00

Yudof: I don't know. That probably is changing somewhat. But let's assume that's all true. Then the question is you have a thirty-year-old woman who wants to make some choices in life, or a twenty-year-old. To be a math major or not to be. It's sort of hard to say you rejected being a math major because of this Barbie Doll and your parents telling you you couldn't do math, and therefore, despite the fact that you want to study history, you're a math major. That's the problem.

04-01:05:30

Burnett: Oh, right. No, not in the sense of requiring someone to make a choice but in a *When Government Speaks* sense, would there be a role for government to —

04-01:05:44

Yudof: Yeah, I would think so.

04-01:05:44

Burnett: — have a counter-narrative.

04-01:05:47

Yudof: To me that would be quite legitimate. It'd be controversial. I think that's legitimate. Can't the government say you should not discriminate by gender? Shouldn't the government say little girls can do math and not just little boys? I think so. And if that were in the public schools. I was in the public schools when they had rigid gender roles. I took mechanical drawing and woodshop and the women took sewing and I don't know what else. I think that's wrong, quite wrong. And saying to the government, to the public schools, women can be capable in all these areas, we're putting the onus on you to draw out their talents and interest them in these subjects. I'm fine with it. I have no problem. Someone else might, if I were a part of a religious group that didn't see women in those roles. But I think that shouldn't detain us from a government policy in the area.

04-01:06:47

Burnett: So a midpoint between the kind of Freudo-Marxist line of "you're all brainwashed" but also recognizing that if someone is to make a free choice they need to be aware of those choices.

04-01:07:03

Yudof: I think that is part of it. We have this problem all the time. This was a big problem in *Yoder v. Wisconsin*. The Amish parents do not want their Amish kids going to school, I can't remember, beyond age fourteen or the eighth grade or something like that. They want to protect their way of life. Their way of life is religiously based and that's perfectly appropriate. But how are they

ever going to dream about being ballet dancers or computer programmers and lawyers and physicians if their world has been curtailed? It's a very hard problem because, on the one hand, do you destroy the Amish communities by forcing that on them? On the other hand, do you risk that these children will never really make liberated choices about their life? And that's an obvious example but it's true of every family. Families nurture and they constrain simultaneously.

04-01:08:06

Burnett:

Yeah, families and these subunits of communities that may have a different view of what liberalism is, for example.

04-01:08:15

Yudof:

Yes. But, by the way, I'm not sure. One of the things I look at in the book is how effective these communications are. I don't know that Barbie saying she can't do math, how effective that is. That doesn't mean it's a good idea but it's complicated to figure out. It's not even obvious that when you show people pictures of rotting teeth they brush more often. People can be very stubborn in their views. We focus on these communications but it's not always clear they're efficacious.

04-01:08:47

Burnett:

Yes. Let's say that there is this liberty principle at work in choices that men and women have today. We have a persistent problem with the underrepresentation of women in senior positions in science and engineering professions and it's not, arguably, because of overt discrimination. But the reasons for that are still — people are writing books and books about that.

04-01:09:26

Yudof:

Yes, it's very controversial. My view is it's not appropriate to accept a genetic explanation for any of these inequalities. I seriously doubt whether they're true. But even if they were true it's no right way to run public policy. But that does leave you with these disparities and the question is how you address them and that turns out to be not an easy issue to address.

04-01:09:57

Burnett:

Right. And the freedom to choose in those cases one can think of — they were trying to address like the access to childcare and those kinds of things that men have not had to take responsibility for —

04-01:10:10

Yudof:

Right. And also, by the way, you can go to the other side. Because a woman chooses to raise her children at home she should not be disparaged by the feminists. They may have chosen other paths and God bless, that's perfectly appropriate. And to say that her choices were rigged, that may be, but all our choices are rigged in a way based upon our background, our education, our parents, our peer group and so forth. So it's very hard. But what you do about it is the hard part of it.

04-01:10:36

Burnett:

Right. And that's what the book is about. It's taking a lot of the scholarly work and thinking about what you are able to do at a public policy level, what are you able to do in a legal level to address —

04-01:10:52

Yudof:

Right. And I think there are many nations around the world that do a much better job of child leave policies and so forth. Anyhow, that was our philosophy and it was one that didn't want to be in a straitjacket of women and men have to be treated in all cases exactly equally because men haven't been giving birth to children recently to my knowledge. And it's sort of emphasizing the role of each individual woman to make her own choices but recognizing that there are real problems in these structures which can limit choice.

04-01:11:33

Burnett:

Right, and just trying to structure things that maximize choice. I think one example was instead of subsidizing daycare you would give a flat amount to people so that you would not be penalizing people based on the kind of family arrangements that they had made. I'm not sure if that's —

04-01:11:53

Yudof:

Yeah, I'm not sure. I don't remember the specific proposals. There are many different ones out there and some of them have come to pass and some of them have not.

04-01:12:02

Burnett:

We talked about David Kirp. Can you talk about Marlene Franks a little bit?

04-01:12:08

Yudof:

I really didn't know her very well. I think Marlene was a graduate student of David's and she was doing such outstanding work on the book that it made sense for her to be a co-author. I only met her once or twice, talked to her on the phone some. But I really didn't know her.

04-01:12:28

Burnett:

Okay. So this comes out in '86 and it makes a splash and there's a positive reception and negative reception but it has also stood the test of time.

04-01:12:48

Yudof:

I think so. I just can't say it's a standard reference on gender discrimination.

04-01:12:57

Burnett:

So perhaps we should move on to — I'm going to track things kind of simultaneously. You're now dean at the University of Texas School of Law. Can you talk about your approach to working with the faculty? Now that you're dean how does your role change?

04-01:13:20

Yudof:

Well, at first I should say that there was a dean selection process. John Sutton decided that he was going to step down after year five. And so far as I know I was just about the unanimous choice. There were some other able people like David Epstein and so forth but I was clearly the faculty's choice. I had made peace with the administration and Peter Flawn was now the president, and a long-time friend now, of the University of Texas. And I got to know very well Preston Shirley and Kraft Eidman and Morris Atlas and other really tremendous people who were on the board of trustees and the [Law School] Foundation. So I must say, in my career, frequently when I'm just about the only candidate is when I do the best in these selection processes. And so I was selected, to no one's surprise, and I negotiated a dowry. I got some money for some more positions for the law school and some money for various types of activities.

And I had a very good student advisor, Ed Clark, who was a close buddy of Lyndon Johnson and had been his ambassador to Australia, headed a law firm in Austin. And he said, "Mark, you need to make a big splash right away." So I went to the Houston Endowment months after I was dean and my wife Judy, it was her fortieth birthday, she had broken her arm. So it must have been 1985. So she had this cast from the tip of her thumb up to her shoulder. She went with me and it was a very gracious old-time Texas man who headed the Houston Endowment. And he tripped over himself to make her comfortable and all that. We walked away with the largest gift in the history of the law school, five million dollars. But they wanted to name a building after Jesse Jones, who was the founder of it, and I didn't have a building. So I decided that we would have the Jesse Jones Hall, which would contain the Tarlton Law Library. And you might ask what was the difference. Well, it probably was only six microns difference between the outer wall of the Jesse Jones Hall and the inner wall of the Tarlton Law Library. But we did that. There was some consternation by the development people at UT but we got that done.

That helped me do one of the things I was proudest of as dean and I did it early on, to establish a research program for the faculty that was regularized. I had been exposed to that when I was a visiting professor at Michigan in 1983. I thought it was good for productivity, good for the reputation of the law school, and I got Doug Laycock, now at the University of Virginia, married to Terry [Teresa] Sullivan, the president of the University of Virginia. Doug helped me. We devised a plan where if you were a productive member of the faculty and you taught seven semesters, you had the eighth semester off, a sort of research leave. And that worked out extremely well. And it was a little more rigorous than the old-timey programs because if you were completely non-productive you didn't get a research leave. And you needed to be seven semesters in residence. If you were gallivanting around the world that was great, and teaching at Chicago or visiting at the London School of Economics that was great but it didn't count towards your research leave. So using that money and other money we did that. And that was a pretty heady time. I

thought we were making progress. It had strong support in the faculty and the board of trustees.

And soon afterward President Flawn decided to step down and Bill Cunningham became president. He was the business dean and we were good friends. And over the years I worked with him on a number of issues, including racial harassment and some others. That was a ten-year run at the law school and we did the research program. We hired a lot of people, did some lateral hires.

04-01:17:48

Burnett:

The five million dollar gift, was there a question of getting matching funds from other sources?

04-01:17:54

Yudof:

Not for that particular gift but then President Flawn had this campaign of matching funds. But I must say, I really, in my *métier*, when you give me the rules of the game, to manipulate them. So I had a very distinguished guy, Ken Roberts at Exxon. So Ken would give us \$10,000. Exxon would match three-to-one. That was \$40,000. Then I would match two-to-one from the profits from continuing legal education at the law school. So then we had eighty. And then the university matched one-to-one. So for every \$10,000 Ken would give we had a sixteen-to-one payback. So inevitably two years later, with President Cunningham firmly in the saddle he called me one day to throw me out of the matching program, that I was sucking up all the air and all the money. It was sort of, "Well done, Mark. You're out."

04-00:18:53

Burnett:

A little too successful.

04-01:18:55

Yudof:

I don't remember how much we raised but someone told me the other day maybe it was eighty million. I don't remember. It was a lot of money for the time. But that was mostly for scholarships and also to support the research program. Of course, there was no public institution in Texas that had a real sabbatical or research leave program of the sort that we have here at the University of California. So this was a big breakthrough to get that done. And I had seen it work at Michigan and that's what I wanted to do. And I think that's what moved Texas up along the ranks of the law schools.

04-01:19:29

Burnett:

How did you know about the Michigan plan?

04-01:19:31

Yudof:

A visiting professor there. I talked to the dean. Terry Sandalow was a friend, acquaintance there, and he would explain how the program worked there. They had gotten an endowment going back, I think, to the 1930s. And it's odd. I thought Michigan was a great place but I thought it was too chilly. Of course, I ended up in Minnesota and that's really chilly. But anyhow, I talked

to the faculty members and saw how they used it. And, of course, I had been at Berkeley in 1977. So I had two experiences with institutions that had these types of programs and one of the things I tried to do was to get rid of some of the loopholes, that you were spending money on people who essentially wouldn't do research, wouldn't publish.

04-01:20:25

Burnett:

So you created incentives. You really tried to reward the kind of —

04-01:20:29

Yudof:

Sure. Reward people who taught at the institution and who had a track record of publishing. It wasn't just the A-team. But if you hadn't published in thirty years, I wouldn't say it's impossible but you had an uphill climb to persuade me to give you a research leave when you showed no signs of scholarly life for a long period of time.

04-01:20:53

Burnett:

And for junior scholars, as well? They often need support at the beginning.

04-01:20:59

Yudof:

I can't remember how that worked. I don't remember. It could be. I don't think I had any rigid rules. They, of course, were already motivated by the desire to get tenure and so forth. There was a three-year tenure clock. So they would have been close to a research leave if they just stayed the three years and got tenure. I just don't remember. We did have summer grants and so forth. We tried to help the junior faculty.

04-01:21:29

Burnett:

A lot of people hate development work, avoid it like the plague. And some people tolerate it and some people like it. Where do you fit on that scale?

04-01:21:40

Yudof:

I was in the like it category. My other big hit, I don't know if I described it, with Joe Jamail. Did I describe that to you?

04-01:21:46

Burnett:

Tell me a little bit more about that.

04-01:21:48

Yudof:

Well, Joe and I had worked on the Pennzoil suit together and he talked about my sense of humor. We're going up there and I said, "Joe, I don't even know how you can walk around the courthouse. You should be so embarrassed." He said, "Mark, what should I be embarrassed about?" You have to know Joe Jamail. And I said, "Because your friend Jim Kronzer has a [endowed] chair at the law school and you have nothing. You can't even hold your head up here." You know what he said? He said, "How much does the whole damn law school cost?" I said, "Okay, we'll talk." And Joe was brilliant. He and John Jeffers and Irv [G. Irvin] Terrell won and I was the dilettante on the Pennzoil suit. And then after some stage or other he wanted to make, I think, a six-million-dollar gift. So I called his office and his assistant says, "Joe says

meet him in his office tomorrow.” I said, “Yeah, I’ll be there.” And she calls me the next day and says, “Joe is not at the office. He’s at the — ” I don’t remember the name. It’s something like the Cowgirl Bar. I’m thinking, “Oh, my God.” So I arrive at the Cowgirl Bar. The taxi driver can’t find it. Of course, I can’t find it — and the first thing I notice is that all the windows have black paper. I think, “This is not good. This is not good.” So I go into the bar. Joe’s there at the bar and all these people with cameras. So, I don’t remember the show but it’s America’s richest people or something like that and they’re doing a show on Joe. Of course, he’s made a lot of money, very unbelievably successful lawyer. And I said, “I told him I wanted my good friend Dean Yudof to come.” So we talked and I’m trying to stay away from the bartenders and the cameras are rolling. I’m thinking, “I’ve got to explain this to Judy when I get home.” And I said, “Here, Joe. Here’s the papers.” And I give him the papers and I finally get to leave and I call the next day and I talk to his assistant. I said, “I need to talk to Joe about the papers I gave him and see if he’s interested.” And she says something to the effect, but in much kinder words, “You are an idiot. No one gives papers to Joe Jamail in a bar. He lost them.” So I had them printed out again and I made arrangements and I went to see him. And it was the start of many gifts. And he gave the six million dollars to the law school and he gave a lot more money to the university. I have a professorship in my honor at the law school and he upgraded it to a chair. So there’s the Yudof Chair at the law school. But he’s been generous to athletics and nursing. He’s been a major, major donor to the University of Texas. So that was the story of Joe Jamail.

04-01:24:41

Burnett:

It’s personal relationships a lot in that kind of world.

04-01:24:46

Yudof:

Yes. And I actually enjoy doing that. I had a friend named Julius Glickman and I know he had won a big lawsuit and I’m in the lobby. I guess it’s for his clients. He’s got this book of all these major victories he’s won, tens of millions of dollars, and I’m adding it up in my mind. And I went in and I said, “Julius, boy, you’ve really been quite successful here.” He said, “Yeah.” And anyhow, he gave a chair to the law school.

04-01:25:11

Burnett:

You’re almost teasing them into — [laughter]

04-01:25:14

Yudof:

I did. Yes. There’s a certain civility in Texas which I really got to like a lot, and self-deprecating humor but also sometimes deprecating. So I did enjoy it. And I tried all sorts of things. I remember I wanted to raise scholarship money. You can’t use their real names. So I began writing letters to people and I thought I was so clever. I would look them up and I would think about them when I knew them in law school and I would try to psych them out in these letters. So let’s say I had a John Jones and I think I’ve got this guy nailed. So I wrote this letter to John Jones but by mistake my staff sent it to a

John Jones at another law firm rather than the right one. Mail comes back, I have a \$25,000 check for a scholarship. A week later I get a letter back. Then I said, “Well, I’m on a hot streak here. Let’s send it to the real John Jones.” A week later he turned me down flat. Therefore my psychology —

04-01:26:24

Burnett:

Right. Your strategy, your development strategy—

04-01:26:27

Yudof:

I did write an article, which I don’t know if anyone could ever — my coming out of my amusing development experiences. It was called “A Mime is a Terrible Thing to Waste”

04-01:26:40

Burnett:

We should definitely get that in there in the appendix. [laughter] Well, let’s pick up next time and talk about—there’s some committee work you did and of course talk about the involvement in the cases and how the cases in the eighties fit into or are part of your career.

04-01:26:57

Yudof:

Yes. I was busy in the eighties with cases. My last really major article, of which I’m proud, was this “Tea at the Palaz of Hoon” in 1989, I think that was. After that I did some additional editions of my casebook but I can’t really say that I was a full-time legal scholar anymore. I was just busy doing other things.

04-01:27:22

Burnett:

Absolutely.

04-01:27:22

Yudof:

And then we’ll talk about the presidential selection process in ’93, ’94. It’s worth learning about. Okay.

## Interview 5: February 11, 2016

05-00:00:00

Burnett:

This is Paul Burnett interviewing Mark Yudof for the University History Series. This is our fifth session and it's February 11, 2016 and we're here at the law school of the University of California, Berkeley. So last we talked, we were getting into the early nineties. But before we do that I think it might be — You were involved in some extremely important court cases. And I don't want to go down too far into that but I wondered if you could tell us a little bit about the *Pennzoil v. Texaco* case and your involvement in that.

05-00:00:56

Yudof:

Well, my involvement with *Pennzoil v. Texaco* was really quite serendipitous and turned out to be very interesting. And I got a new kitchen out of it. I think Joe Jamail got \$300 million or something like that. My background was largely as a civil rights lawyer, and largely unpaid. So in the *Rodriguez* case I paid my own way to Washington. I paid my own way to San Antonio for the hearings. Then I got involved in bilingual education and paid my own way. I think I had one case involving free speech rights of a dismissed professor from what was then Southwestern University in San Marcos. I think I had one contracts case and I charged the outrageous fee of fifty dollars an hour and I made a thousand dollars and then it went away. And I moved somewhat away from that, having invested a lot of energy and time in *Rodriguez*. I would say I was leading a fairly quiet life as a lawyer, professor, associate dean, later dean of the University of Texas Law School.

I did teach contracts for many years and I had all these weird hypotheticals and I think people remembered them. One of the weird hypotheticals was a contract formation case. What if the parties, you're not sure whether they intended to be bound or whether they were just negotiating. So I had this mini-delegation come to my office, two distinguished attorneys, Randy Hopkins, John Jeffers, I think, and I didn't even know Joe Jamail was on the case. And they came to my office and they said, "Would you like to work on this case? It's in Delaware, and we're suing Texaco because we think Getty Oil sold the company twice, once to Pennzoil and then for a higher price to Texaco. And I actually turned it down. I said, "I'm busy. I teach contracts but I've had only a handful of contracts cases my whole career." So I said, "Why don't you go see the senior guy down the hall?" Really, and he was more experienced. But they came back. And anyhow I said, "Okay, I'll do it." And I didn't know it would be one of the cases of the century, \$10 billion. It was in Delaware. And they wanted an injunction to prevent the merger from going forward with Texaco, to unscramble the eggs. And so I took the case. Fortunately they had a senior partner at Baker & Botts who was not involved who advised me on what to charge. I was always flunking the legal fees stuff. I was never charging enough. So I took the case.

To make a long story short, I worked on a jury charge. I helped at a charge conference before the judge on the jury charge. I helped out Randy Hopkins and others on the brief. And then I didn't have the time. I think by that time I was dean. So I would go down to Houston for the trial one day a week. And you have to imagine how much it hurt. They were willing to pay me to be there all the time but I just didn't have the time. My obligations to the university came first. So I did that. I flew Southwest. They would have flown me first class but I couldn't find a first class that would get me there. So there I was on the people's airlines, the company plane, Southwest. And it was pretty exciting with Joe Jamail doing part of the examination of witnesses and John Jeffers and Irv Terrell, all terrific lawyers. And then, to make a long story short, the jury came back with a tremendous verdict. I think it was around ten billion dollars, which was way — today there are verdicts like that but then it was quite extraordinary. And for the second time in my career I was associated with this and we were taking their appeals to the appellate court and ultimately the Texas Supreme Court. By that time my good friend Harry Reasoner had been added to our team, a brilliant appellate and land trial lawyer, but he was at the appellate stage here. And once again Charlie Wright was signed up by the other side. So it was the second time across the faculty lounge we had these major cases. And David Boies, who's a very strong practitioner, was representing Texaco. Somehow they got it into federal court, got to the US Supreme Court, they reported out the — so I always said to Charlie that I was fifty/fifty in cases with him and I was quitting. I thought that was as good as it was ever going to get.

And then after that I had a series of cases. I won't bore you with all the details. And they were largely remunerative. I didn't win but I was part of the team that won a big case. So before I was a civil rights lawyer, and almost overnight, I was — not a real litigator — but when you have a bet-the-company case, Mark Yudof was one of the people you thought of. So I represented US Steel, I represented Avis against other Avis people. I twice represented Enron. I lost one, won one. This was before Enron even had the name Enron, one of the cases. Well, one of the most memorable was *City of Austin v. Houston Lighting and Power*. And they had a power plant that Austin helped pay for, a nuclear power plant. It was way, way over budget. The city felt that Houston Lighting and Power was responsible for this. And John Hill, who had been attorney general, he was lead counsel for the city. I once again was the dilettante kibitzer on the briefs and the charge to the jury and all that. We got poured out. It was a difficult case. Roy Minton was on the other side, a brilliant lawyer, and he won the case. For me it was difficult because representing a city government is not easy. We would go in and meet with council members and say, "Here's the strategy. Now, please be quiet about this because you don't want the other side to know." The next morning I'd read about our strategy in the newspaper. Anyhow, I did that. So that was a less successful effort.

Another case involved a building with asbestos in it and it had been sold by Prudential to another business entity. So it wasn't a private entity. And they had inspected the premises and no one knew there was asbestos there. It was in the early stages of it. And they had lost in the trial court and we managed to get that reversed largely because it wasn't an unknowing consumer. When you send your own engineers in to check and you're a commercial firm, it's a very different footing than if you sell a poor homeowner a house with asbestos and don't reveal it. It's just a different thing.

So I did a series of those cases, a property-tax case involving Enron in the mid-nineties, and then I was involved in an arbitration which was not public, probably the last case I handled, which was Conoco and DuPont. And DuPont had owned Conoco. They got a divorce. They decided to go their own ways. There was a poorly drafted document about who would get the various tax credits and so forth. So I was called in.

I have to say, if you want an aside, it scared the life out of me. My tax professor at Penn was Bernie Wolfman, and he was then at Harvard. And Bernie, superb lawyer, he calls me on the phone and he says, "Mark, I'm so happy to be working with you. It's going to be great fun. You'll fly out to Cambridge." And I'm thinking to myself, "Tax was one of my worst classes in law school for grades. It's going to take Bernie thirty seconds to figure out that I am a contracts lawyer but I know nothing about tax." And all I can say is God was smiling on me. We settled the case. I went my way. I never did have to meet with Bernie. What was he going to say? He's thrilled to work with me but he's going to find out I'm an idiot when it comes to tax? But we did that. And of course there are many stories. You actually build support in the bar for the law school. You have to keep within reason. If you're a practicing lawyer you should not be a dean or a law professor. But having some entrée, it made me, I felt, sharper in my classes and I thought that it helped me raise money. And I didn't get much criticism. Later on people wanted me to do stuff when I became provost and president of this or that, and I just said, "I'm not doing any cases because no matter what the case is a third or more of my constituency will be upset that I am on whatever side I'm on."

I remember before I went to Minnesota a very distinguished lawyer called me. He wanted to sue 3M, one of the stalwarts of the Minnesota economy, and he wanted me to join in the lawsuit against them. I said, "No, I think I'll pass on that."

05-00:10:39

Burnett:

Right. So it's political a little bit sometimes.

05-00:10:42

Yudof:

I tried to maintain my integrity. I probably gave up some money along the way but so be it. So that's roughly the story of my — that's my brief litigation career, with great high points and a mixed record on the one loss column.

05-00:10:55

Burnett:

Right. I just wanted to follow-up on your statement about how doing this work helped you raise funds. What was the connection there?

05-00:11:06

Yudof:

I meant the lawyers. They found I wasn't just a pointy-headed progressive lawyer teaching abstractions. So it helped. When you're in the trenches with them you get another level of respect. I'm not saying they didn't respect legal scholarship or what the law school was doing. But you meet more people and they say, "Well, Mark may teach his classes and he may be interested in jurisprudence but, by God, he also helped us with the jury charge and the strategy in this lawsuit." I never sold myself, nor would they have accepted me, to say, "Mark, it's your turn to cross-examine the witness." That would not have worked. I had no experience in doing that. So it helped on the development side for a variety of reasons. And if I must say, we did raise a fair amount of money, not exclusively from that source. Alums contribute for a variety of reasons, and non-alums sometimes. And I thought it made me sharper in class because when I taught contracts I had a better idea of strategies of the parties and a better idea of how it might appear to a judge and jury or to an appellate court, whereas most of my knowledge up to that point was largely theoretical. I read articles and books and I prepared for class and I answered questions but it was not what I would call a balanced view, both in the trenches and in the more abstract stuff.

05-00:12:44

Burnett:

Do you find that the students — I imagine they appreciated that. One of the things they're looking for is someone who's been in the trenches and they want that kind of practical experience to come to the fore in teaching.

05-00:12:57

Yudof:

They do. And your job is to do both. You want them to have that practical side. But they're going to be on the practical side for most of their careers. You also want them to have some conceptual knowledge and analytic abilities and so forth. And the students were wonderful. When I lost the *Rodriguez* case generally people were on my side at the law school. I wasn't representing the Ku Klux Klan or something. I was coming out for better education for poor children. And then I'll never forget in *Pennzoil* when I won, they had a whole presentation. They gave me a beach chair to rest on and it was labeled "con law scholar." They gave me an empty can of Pennzoil, which I think I have. It may be in this office somewhere. But I've kept it all these years.

05-00:13:45

Burnett:

[laughter] That's fantastic.

05-00:13:46

Yudof:

I was making the newspapers. I don't know if it's good or bad. But if the students see their professors in the newspaper representing somebody and they say, "Wow, I know that guy. He must be a real lawyer as opposed to one of these pointy-headed academics." So on the whole I thought it was a positive

experience. *Rodriguez* was difficult because part of the establishment was so opposed to it. I didn't make universal friends. *Pennzoil*, some people wrote me letters but basically it was commercial litigation and most people felt, "Well, lawyers represent either side." And obviously it wasn't an ideological thing with me. I thought we were on the right side and we ultimately won and we settled, I think, for three billion dollars, about which, by the way, I had hesitations. Once I got into the fight it really got my adrenaline flowing. So when Joe told me he was going to settle, I thought, "Oh, my God, why are we going to settle for three billion?" But he was probably right. There would have been additional years of litigation—

05-00:14:48

Burnett: Appeals.

05-00:14:48

Yudof: — and difficulty levying on the property. I'm sure Joe made the right decision.

05-00:14:54

Burnett: Right. This period also seems to coincide with a couple of shifts. One is, in the popular culture, this increasing romance with law, right, that it's more dramatic. You're getting these bigger cases with larger settlements and there's an incredible demand for law education so more students are applying. And this becomes an issue a little bit at the University of Texas Law School because you have so many students applying. And there was a question in the early nineties, I think, about limiting the enrollments.

05-00:15:43

Yudof: That is true. People come to law school for different reasons. Some can't find themselves, some of them want to save the world and represent poor folks or the elderly or healthcare issues. Others are more commercially oriented. There's no one size fits all. But there was an avalanche of applications because we had been through the golden age, which I think is now over, for the practice of law. If you were a pretty decent lawyer and you graduated or practiced, say, between 1950 and mid-1990s, the law was good to an awful lot of people.

There is one side story you'll probably appreciate. I learned not to make jokes with the media. But I got a call from *The New York Times*, "Why do you have so many applications?" and I said, "Well, we're a great law school, we have a great faculty," and da-da-duh-duh, blah, blah, blah. "It's all good stuff and it's all pretty interesting." And then I decided to make a joke. And I said, "*Or* they could be watching *LA Law*. Good pay, good cases, good food and good sex," something like that. It's not exact. They printed it and then it was reprinted and people took out all the other stuff. It said, "Law students coming to UT and other law schools for the good sex and the good food." Not much reaction from the alums. I probably got eight or ten letters that said, "Look, I'm a graduate. Where is the good food and good sex? I missed out on this."

05-00:17:10

Burnett:

So there was a certain amount of media and communications education as part of these experiences.

05-00:17:17

Yudof:

Right. Good judgment comes from bad judgment. And we talked about reducing the size of the law school. But at the time the economics didn't work well, without getting into the mundane of how we were funded and tuition. I got control of tuition when I was dean later on, so we kept a portion of all the tuition, which was something very new. And it is very difficult. When things are going well, they open new law schools, they expand their classes. When I was at Texas we rarely had a class of under 500 or 525 and today I think it's somewhere around 350. So there's been a very significant reduction. That is true of many law schools. It's not true of Berkeley. But I constantly hear from people who tell me that their entering classes are much smaller, there are not as many people applying and so forth.

05-00:18:13

Burnett:

And I think there's also a change in the market demand. Recently there have been claims about students graduating law school and not finding a job as a lawyer.

05-00:18:25

Yudof:

Right. And that's a problem. That's a big problem. I always tell people when they say, "What about that?" I say, "Well, first of all, that's the market now. Who knows? The market's coming back today. Who knows what it will be when you're ready?" And I said, 'Your job is to get good grades to be the best lawyer you can possibly be.' And there is always room for good lawyers." Now, that may be working for a nonprofit or an NGO or it may be working for the government or it may be a law firm. But law firms have changed a lot. The fee structures are different. It used to be you were an associate and then maybe, after so many years, you came out for partnership and different firms had different traditions. New York law firms were very tough on the partnership requirements; others were less so. But today there are a lot of non-equity partners. I believe they're tougher on those things. I'm not saying it's over. There's always room for the great lawyers but it's a tougher industry today with more questions being asked about the bills and so forth. And somehow it translates to the students because a firm that might have hired twenty people, a large firm, maybe would hire ten. And the partnership track might have been seven or eight years and now it's ten or eleven. And the probability may go down and they may never offer you an equity partnership. There was always the allure, of course, of public defender offices and civil rights organizations. And to this day I think one of the reasons I chose law is because I felt I had more freedom to do those sorts of things than if I had been someone in a law firm going to a managing partner or a senior partner and saying, "I'd really like to work on the XYZ case and, by the way, it pays nothing but it's an important case." And I think it worked out for me. That's what happened.

05-00:20:18

Burnett:

I think you mentioned in a different interview years ago that, for students, many come in wanting to do something that comes from an idealistic place but they find very quickly that for every one civil rights-oriented law position there are ten corporate-law jobs and that's just the basic economics.

05-00:20:44

Yudof:

I don't know what the ratio is today but I would say that may be a reality check because the best of these jobs with the hotshot district attorneys or public defender's office or the NAACP or the Mexican-American Legal Defense Fund, they have powerful legal operations and I'm sure they have way more applicants because they have a different sort of compensation that's not monetary. Jerry Brown would say the "psychic compensation." Also, you have to remember they're young and students change. Students come in and they want to do international law and that can be very tough. There's private international law and public. All of a sudden they take a tax course or they take a course on securities and they get interested in it. And then there's life. You show up at the law firm, you declare yourself a securities lawyer, and they assign you to the tax section. And you're six months into the job and you worked on a tough case and they declare you an expert in tax. Twenty-five years later you're still a tax lawyer. So life is filled with that serendipity.

05-00:21:56

Burnett:

So in addition to taking time to do these corporate law cases, you're also advising the legislature in the early nineties.

05-00:22:08

Yudof:

Yes. I was not testifying very often. I did once testify and I had this idea that if you had a defective car you ought to be able to return it. I think I got one vote in the committee from Lloyd Doggett. I made a lot of money. The room was filled with a hundred lobbyists, lawyers, and so forth. Now it's not considered that radical but I just felt if the car wasn't working why should you have to keep it? And I got beaten on that. But then afterwards I advised on tort reform. It's not my area of specialty but they knew I was not an advocate on one side or the other and it was always private. The chair of a committee might call me in and they'd say, "Mark, what do you think about this?" Both sides of the aisle, by the way, conservatives and liberals, just to ask. So I did that and I was very close to Lieutenant Governor Bob Bullock. I advised extensively on school finance. Well, I got out of the litigation arena. I had a major influence. And, frankly, the best school finance plan I think I've seen is one that I helped devise. It was called ninety-five and ninety-five, and we were going to equalize up to the ninety-fifth percentile and we were going to write off the tail end because it just cost too much money. And in my opinion, the Supreme Court of Texas blew it and declared it unconstitutional because it was imperfect. And within five years they had watered it down and watered it down. The state would have been much better off had they adopted my original plan. I don't know, but I suspect even the justices who voted that

way, if they had seen what was coming down the line. Of course, the justices were replaced; they were more conservative on this issue. So I did do that.

Being the dean was a very good job because I could influence things without being so much in the public eye and without it being a newspaper article all the time, just occasionally. And I enjoyed it. I also felt that was good. This is a theme of my career. I think you need to prove yourself to the legislature in many ways. That you're serving their sons and daughters and grandsons and granddaughters, that you're doing a good job and take your teaching seriously. But I also think you're a resource and that it's a public law school and a member of either party ought to be able to come to the law school and say, "Dean, I'm interested in a tax bill or I'm interested in tort reform or whatever you're interested in. Do you have an expert who can help?" And I followed that through when I was president here at the University of California. I worked hard on that issue. Because the more they think you're serving a broad public purpose, which is good anyhow, but it also makes them more sympathetic to why it is that people should spend such large sums of money on a legal education or a university education.

05-00:25:11

Burnett:

Yes, the basic orientation of the state university is public service.

05-00:25:16

Yudof:

Yes. And I think that comes out of Wisconsin in the 1930s. And we tried hard at Texas and UC does wonderful things. And sometimes you don't get the full credit for it and sometimes it's controversial. But it's very constructive to be in the business of serving people. I remember some of the federal judges came to me and many of them were very conservative. They wanted the law school to create a criminal defense clinic for death penalty cases in Texas. And I was a little worried because people divide on that issue. But these judges, they had to do their jobs. They wanted qualified attorneys to represent the defendant on death row. They wanted the best legal work possible for them. And that clinic's still in existence and has been quite successful. But it was not just an uprising of progressives; it was sort of an uprising also of very savvy conservative judges who may have favored the death penalty in theory but they wanted the adversarial system to work. They wanted someone on the other side who could raise the appropriate points in the defense of the defendant.

05-00:26:41

Burnett:

And when you spoke of advising the Texas legislature you had this — is it a ninety-five/five plan? Ninety-five —

05-00:26:49

Yudof:

That was the 95 percent. It was to equalize up to ninety-five/five percentile. Life is imperfect and I felt — and it was automatically adjusting every year. So it would pull up all the poor districts in Texas but it didn't cap it at what the most affluent district was spending because then it was billions and

billions of dollars and I knew the legislature would never do it. That was the plan that was declared unconstitutional. It was self-adjusting. It was not to the last penny equality but it was almost there. And I thought and continue to think to this day that it was a big mistake to declare it unconstitutional.

05-00:27:28

Burnett:

So that was the '90, '91 reform that was rejected by the Texas legislature or is that later? Because I think in '93 there was an article that said that you had advised the legislature on a five-option plan, where you gave them sort of five different approaches?

05-00:27:48

Yudof:

I just don't recall that. Bob Bullock and I had a close relationship and he really was in charge. I love Ann Richards. And she was pro-reform but they didn't have the horsepower in the governor's office to do this. So it was really led by Lieutenant Governor Bullock and he brought in the House members. But I was at almost all the meetings. He would say, "Well, what do you think of that plan, Yudof?" And I would say, "Well, Governor, this is what I think." But after they blew my plan out of the water I'm not sure he was so gung-ho on my advice. But I did do that.

05-00:28:26

Burnett:

We're still in the early nineties here. There are some changes in the personnel, in the administration. Cunningham is selected to be the chancellor of the UT system. And according to many articles and sources you were thought to be in line for the president of the University of Texas. And so I'm wondering if you could talk about that search and how that went.

05-00:29:00

Yudof:

Yes. I had a great loyalty to the University of Texas. When we had the blow-up over dean selection I had offers from Northwestern and USC. And then later on, I didn't have offers, but I was on a short list at Penn and Columbia to be dean. I think probably I had a reasonable shot at one or both of those. But I stayed. And I was the favorite. Cunningham was my friend and he was the chancellor. I think he even printed up invitations to an event to congratulate me on being the new president of UT Austin. I don't know that I was overly confident but there seemed to be an alignment of the stars.

And then in essence I lost the five-to-four vote. That was not public knowledge, but I lost the five-to-four vote. And it was sort of grating in a couple of ways. And I won't name any names. But one way it was grating is I was viewed by some people as too liberal a candidate, and a Jewish lawyer, Northeast. One regent privately was quoted as saying the university wasn't ready for a Jewish lawyer to be president. He later apologized to me, a few years later. And then there were others who thought I was too conservative. I wouldn't be good for the humanities and so forth. So I lost some of Ann Richard's appointments to that. And Ann, who was on my side, she didn't work the board very much, I don't think, at least not to my personal

knowledge. So I lost. I guess I was pretty devastated at that point. And talked to a lot of people. The *Texas Monthly* ran articles about what a travesty it was that they selected Bob Berdahl, who was then provost of Illinois. And Bob really is a genuine progressive in more ways than I am and I think that surprised the board. They may not have done all their homework. I don't think politics should matter anyhow, so don't misunderstand me.

05-00:31:00

Burnett:

Right. No, of course.

05-00:31:01

Yudof:

So I'm sitting there trying to decide what to do and I had been dean about ten — well, I don't know at that time, maybe nine years. And I loved the job and I loved the faculty and the students. It's a fabulous job. I just couldn't see being Page Keeton, who was one of my predecessors, who went twenty-five years. My jokes get stale and my best ideas are out there. I needed to do something else. So I did some soul searching and I actually was contacted by a large Houston law firm about being a partner there. I never really gave them an answer or much of one. I interviewed to be provost at Duke.

Meanwhile Cunningham says to me, he says, "Have you ever thought about being provost at UT?" And I said, "No." To make a long story short I went to Duke at the end of one week, interviewed. I don't know what would have happened. Then President Berdahl decided to make me provost and I accepted and then the following Monday I withdrew from the Duke search. So that began my career in higher-level administration.

And it may have been good for me. It's always in hindsight. But I was a law dean and I was sympathetic mainly to the humanities and social sciences. That's what I knew. But as provost you deal with engineering and you deal with fine arts and the liberal arts and natural sciences and architecture and so forth, nursing. And I thought I learned a lot about the university by being provost for three years. It's a difficult job. I said to people, I said, "Being provost you're the 'Abominable No-Man.'" If the answer's yes the president gives it. If the answer's no he says, "You do it, Mark. You tell them that we're not going to fund that," or do that or give them another faculty slot or whatever.

I could tell you a little bit about the provost job. There are a number of things that went on. I was hell-bent to improve the student's plight. So I decided I was going to fix up all the classrooms, or at least the ones that needed it. And I went about it my typical way. I got the suppliers to put a bunch of chairs in the main library that would be the seating for the classrooms and I had the students vote on the seats they liked the best. So I did that. And I tried to do little things. I noticed in the pond area that people ate their lunch and there was no place to sit. I said, "I'm the provost. Put the seats out there." I brought the first sort of coffee shop to the main building. I tried in small ways and

larger ways. I established the Academy for Distinguished Teachers. I thought the research faculty was always well-recognized but the great teachers were not. So I got some people together, we selected the first class, and then I turned it over to the professors themselves. That's still going on. So you can put it on your résumé. I'm a member of the Academy of Distinguished Teachers." And that was good. It was a way of reward.

Then, before almost anyone else had decided they needed some small classes — optimally everyone should have a little bit of a law school experience, a Socratic seminar of some sort. So I did this program, I can't even remember what I called it, but a freshman seminar program. And so we did that. It was in addition to your regular load. And we didn't really pay you. And I don't know how much money it was but we would give you so many thousands of dollars of equipment for the university for your computer or for books or I don't know what. It might have included travel, professional travel. I'm not sure. We had a lot of these, hundreds of these. And I expanded the universe of people who could teach them. So I wanted to tap into, and I did, into the library and other places. And if you came forward with a proposal and you were a librarian whose day-to-day responsibilities were ordering books or curating it or being at the public service desk or whatever, you had the opportunity. It brought out such creativity by the faculty. I taught in it also. I had one colleague who taught a course that was called "Red" and it talked about red shifts in the spectrum, it talked about Bolsheviks. I don't remember what else. Anything else that had the word red in it. My friend Teri Sullivan, who is now president of Virginia, she did a fabulous seminar on credit cards and how they worked and what to look out for. That was extremely popular. She's a very gifted teacher. So we did all that. And then years later I read that Stanford and other places were doing something like this. But somehow they didn't realize that it had been done elsewhere first. So I did that.

Then I was very interested in accountability. We had budget hearings and so forth but we didn't really have accountability. So I made them put certain data down. What's your persistence rates, your graduation rates? How much research are you bringing in? I can't remember. I got Marsha Kelman to do all these models. It was primitive but it had a lot of accountability stuff to answer the question, like in New York, how are we doing? How am I doing? And then we had meetings. And I assigned each vice provost a particular set of colleges and we would bring the dean in and we'd put them through the wringer, but not just the wringer. We tried to get into their heads and understand where they wanted to take the college. And we tried to understand what the data showed and we tried to use that in allocating resources.

And another thing I was hell-bent to do — there is a long history of discrimination against women in the professoriate in America. And we had some very qualified women who had been effectively long-time lecturers, many of whom had published articles, who were effective teachers, particularly in the humanities. So with the president's blessing I just did it, I

don't remember the exact mechanism, but effectively we gave a large group of these women, and they were almost all women, tenure, saying, "This is just not fair." This is like a caste system. They're sort of trapped, whereas they normally would have gotten real tenure-track teaching jobs but they arrived at the university at a time where, realistically, that generally was not available to women. So we did that. And that I did get some pushback. But anyhow we got it done and I felt it was the right thing to do and it happened.

05-00:38:12

Burnett:

Well, you seem to set this whole approach in context in a 1992 article that you wrote for the *Chronicle of Higher Education*. A bit off the subject, but you were writing about the fears of a privatization of the university. So can you talk about what you saw on the wall at the beginning of the nineties, what was happening in the university?

05-00:38:40

Yudof:

Well, I feared that the state contributions would go down, which really happened in the next twenty-five years or so. And then I figured what are the implications of that? Well, if you look at who has access to research funding, it's not nearly as good in the English department as it might be in the biological sciences or electrical or civil engineering. That was part of the picture, just by virtue of what they were doing and whatever NSF or others would put their money. And I was obviously dean of the law school and I raised a lot of money. We had a matching program and a year into it the president tossed me out of it because I was eating up all his funds. And I thought this is not good. It's not that I'm against contributions and private support but it has disproportional effects across the university. And it had all sorts of implications at the business schools and the law schools and some of the sciences, which would almost inevitably do better. And there was a show, *LA Law*, but there was no Sanskrit law show that was popular that I know of or sociology. So I was worried that long-term it would actually take governance more out of the control of the regents and the legislature simply because there would be great dependence on private resources which were not distributed in a rational way but according to people's preferences, which is fine. It's their money. So that's what I was worried about at that time. I guess I had gotten too many letters. Someone would give artwork to the university or establish a chair in water law at the law school or something and I'd get letters from someone in the humanities that say, "When are you going to wise up and tell the donors to give to the Spanish department?" And the fact is that's very hard to do. These people, it's their money; they have preferences. They're not a tabula rasa that you write on. But that was an indication of the problems and at some level they were right.

What you've seen in recent years is a tendency at many of these universities, is to put less in the way of state funds into some of these areas where there's a lot of private support and give more of the state funds to whatever, to the humanities and social sciences. So that's what's happening.

By the way, the same thing is true of other aspects. Who can pay the high tuition? Are you going to charge \$40,000 to someone who wants a PhD in philosophy? You have an alignment. You have where the public wants to invest, where the research dollars are, where there's private fundraising. And all of it dictates some priorities, which strictly speaking are not sort of holistic priorities of the board of regents, the president, or the chancellor, or even the legislature.

05-00:42:01

Burnett:

Well, one of the key pieces of that *Chronicle* article is that you talked about we need to have, I think you called it a compact, with the public, that the public trusts us to be the institution we've been charged to be, and in exchange for support of these areas that perform an important public purpose, the university should, as much as possible, be accountable. It should be able to say what it's doing, how it's doing it, and I see that as fitting into some of your agenda as executive VP and provost at that time.

05-00:42:46

Yudof:

That was my agenda. It was '94 through '97, and I felt even then that there was a withering of state support. And there was not as much trust as there was in 1955. And they had big controversies. At Texas there were controversies over desegregation and liberal professors and so forth. But we needed a new deal, to coin a new phrase. And we needed to be more accountable and show that we were treating their kids well and show what research we were bringing in, show what the multiplier effect was for the state economy. And in return for that service and for the educational function and other types of service, that there would be better state support. Even then I thought, as I said, the shine was somewhat off of higher education. And probably in later articles I wrote about it. A lot of that is systemic because it's related to demography. I never forgot, I read a book later on by my friend Peter Schrag. And Peter had written a book called *Paradise Lost*. And he noted that in most elections in California, frankly until President Obama ran, people who did not have children under the age of eighteen were a majority of voters in election after election after election. I think he was looking at statewide data. It obviously would vary by district. And so you have an aging population. You have a demographic where the older people who don't have school-aged children anymore, if they ever did, are more likely to vote. It's democracy. I wish the younger people would vote and so forth. But all that to me was in the air in the '94 to '97 period before the Great Recession and a lot of other things happened. And so I think that was my career.

[David] Letterman was on TV, so I had a top ten list which I published underground: top ten reasons to be provost. I don't remember all of them but number three was you got free tickets to "Librarians on Ice" and other types of events, entertainment opportunities. Number two was no one knows what a provost does in the outside world. That's useful. And, of course, my number one, being a smartass, was they sent all your mail to Utah.

[laughter]

But I bridled a little bit at that job. I was very influential. President Berdahl trusted me to do a lot of things. We bought computers for the faculty and so forth. And I learned a lot. But I was not a good prospect to be a long-term provost.

05-00:45:38

Burnett:

Well, this is also at a time, late eighties, early nineties is kind of the peak period, I suppose, or one of the peak periods of the Culture Wars. In your career you have been concerned with access to education but there was also a kind of backlash against some of the university policies that encouraged diversity of the student population or even diversity among the faculty and that's something that you encountered, as well. And so I'm wondering if we could switch gears a little bit and talk about the *Hopwood* case, which impacted you a little.

05-00:46:26

Yudof:

Sure. I got involved in a number of things in that regard. I'll start with *Hopwood*. Now, I hired a crackerjack African-American woman to be the assistant dean at the law school and we had an affirmative action program at the law school. We had actually had it since the seventies. One of the myths is that you never get an affirmative action program unless someone threatens you. Well, the faculty was not threatened in the seventies with law suits or anything else and they did it. And it was divided, although it was overwhelmingly pro. And we did it and central administration did it. And *Bakke* had come down. To make a long story short, a lawsuit was brought on behalf of Cheryl Hopwood and I was very concerned because, just to be honest, I did not want a random assistant attorney general of Texas defending affirmative action suits. So initially I got Sam Isaacaroff, was at Columbia, now at NYU, who was on the faculty to work on the case with an able assistant AG. But I wanted a lot of horsepower. And later on Harry Reasoner, God bless him, gave us his resources and the resources of Vinson & Elkins, millions and millions of dollars, to defend the university. And we got the permission of the attorney general to do that.

But what had happened in the interim, to make a long story short, is I hadn't paid much attention to what the admissions committee was doing. And the rules of *Bakke* are that all the applications have to be considered simultaneously. You can't have a separate pile for African-Americans or Hispanics or Native Americans. And the committee had such confidence in the judgment of my assistant dean they turned it over to her. They weren't passing on it as a committee. And she would go through the minority applicants and she would say, "Mary Smith looks splendid. John Jones, not likely to do well here," whatever one has more outside activities, whatever one comes from a poverty background more than someone else, whatever the criteria were. And that violated the *Bakke* rules. So we went into the trial court

and the trial judge, Sam Sparks, declared it unconstitutional. Harry, being a very good lawyer, Harry said, “Okay, it’s unconstitutional. We’ll fix it.” So we drafted a new policy with new procedures and Judge Sparks said, “That’s fine. It comports with *Bakke*. That’s fine.”

Then it goes up to the court of appeals and we ran into a buzz saw, both en banc and in the three-judge panel. They not only agreed with Judge Sparks on the initial plan but they disagreed with him on the new plan and in effect said you may not take race into account. So then we were prepared to go to the Supreme Court but a man named Dan Morales was attorney general. He later went to jail, by the way. I don’t remember for what. And Dan, for whatever reason, said he was opposed to affirmative action and he refused to appeal the case to the Supreme Court, to petition for a writ of certiorari to the Supreme Court. And so the Supreme Court denied cert with a dissent by — I remember a dissent by Justice Ginsburg. I don’t remember if anyone else joined her. So we lost control of it because the attorney general would not stick by us. And this, by the way, is a problem in recent history. What do you do when you have a state law or you have a state practice or whatever that the person in charge of making the decision on the appeal of the petition or whatever doesn’t want to go forward with it? A knotty problem. So we lost and it was pretty devastating because it only applied in the Fifth Circuit Court of Appeals area. I think it was Texas and Louisiana, maybe Mississippi. So only three out of the fifty states were not allowed to have affirmative action. And we lived with that for quite a while but it decimated our ability to recruit the students.

The other thing I did, President Cunningham liked to call on me to do various things. I actually did stuff on free speech zones and when you could use loudspeakers and so forth. The students were very helpful in that. So we dealt with those issues. But the other was, racial harassment codes were very much in vogue during those days, so of course he appoints me to head the committee. So not many of them reached the courts but all of them that did were declared unconstitutional. You can’t say, “You make me feel unwelcome on the campus and so forth.” Maybe in very extreme cases. Same problem in Title IX. Maybe in extreme cases that will sell but you really can’t come in and say, “Professor so and so says he’s opposed to affirmative action,” or he says, “I think black leaders are wrong or right on this and that.” And then you come in and you say, “You’ve undermined the educational opportunity there.”

05-00:51:50  
Burnett:

The climate.

05-00:51:53  
Yudof:

The climate. It’s a speech issue. If you punch someone in the nose and you don’t admit them to courses, there are all sorts of circumstances where you can’t do that. So I didn’t know what to do. So Charlie Wright was nagging me. He said I shouldn’t have done it at all. He felt that all the racial harassment codes were unconstitutional. So I won’t get into it but I drafted a

very precise sort of tort approach based on intentional infliction of mental distress and I spent hours and hours doing it. And the idea was that it only would be operative in the most extreme cases where you intentionally tried to injure, let's say, for this purpose, black students with your work and there were some other conditions which are hard to meet. And to my knowledge no one ever was able to use it and then the university repealed that. The vogue was off for the racial harassment codes. It's still out there today at Yale and other places, where they say it's an unwelcoming climate. But as long as there's free speech implications, particularly at public universities and voluntarily at private universities, it's hard to make it stick. Having said that, a woman brings a lawsuit and says this fire department is not hospitable to women. But it can't just be pure speech and it can't just be once or twice. It has to be a pattern and some other things. So that was my big foray into that. And it was not successful. Well, maybe it was successful. We were not sued for adopting a code that could not be constitutionally enforced. It gave some satisfaction to the students but I was never really happy with the resolution that I came up with that was neither fish nor fowl, as we say.

05-00:53:43

Burnett:

It is the time of the Culture Wars and so things get completely charged. And I remember there was one article written by Linda Chavez of the Manhattan Institute. So there are now conservative campus organizations and conservative think tanks that are weighing in on these issues. And I think she accused you, because you defended affirmative action, "You, Mark Yudof, do not think that Hispanics and blacks are your equal." Right? So that stuff is happening in the media.

05-00:54:16

Yudof:

I'm glad I never read that article. I have complex views, as many people do. Of course they're our equal. And it is not easy to be a black male in particular in America and it certainly wasn't back then. I have a view of affirmative action. My view is not the same as everyone else's, as you might expect. I was always less enamored of the diversity argument because diversity came out of the Powell opinion [in *Bakke*] and out of Harvard's admissions process. And I favor diversity but it's not what's really going on in affirmative-action programs. If you really favor diversity why don't you have affirmative action for Bulgarians? We probably have very few of them in our higher education institutions. And people say, "Well, that's ridiculous," and I say, "That is ridiculous. So why is it we should have it?" "Well, it's the history of discrimination. It's the fact that you don't want to have a caste system in America. You want people to have a reasonable opportunity to compete for real jobs, to own homes, to have adequate healthcare, to vote, and all the rest of it." It's a very pragmatic typical Mark Yudof approach. It's because in the large, consequentially speaking, I think the families are better off, the students are better off, but I think the country is better off that we have Hispanic and African-American judges and corporate leaders and NGO leaders and police officers and judges and all the rest of it. And I didn't, practically, on the

ground, know how that was going to happen without affirmative action. That was my simple answer. And I never saw anyone come up with a solution that was satisfactory. We tried using income surrogates. It works better for low-income Hispanics than for African Americans. It is very important to this country — we see it today with the inequality discussions — it is very important that, at a minimum, you have a genuine equal-opportunity doctrine. If you want to go further than that and have a social safety network or progressive tax system, that's fine, too. But that's part and parcel of affirmative action.

That discussion was very difficult all around. It made many of the affirmative action students, and we never told them who was admitted that way, but they said, "Do I really belong here? Did I have lower test scores and so forth?" And, of course, often they did. Let's face it, you wouldn't need affirmative action if you used test scores and grades and they were randomly distributed. And that was unfortunate. They felt very uncomfortable. And then, among some Caucasians, it made them feel that my son or daughter would have gotten in but for that or that it really is a sign, like apparently you tell me Ms. Chavez said, of a recognition of somehow the inferiority of these groups or otherwise they wouldn't need this help. And there are many other arguments about this. But when you're allocating places in a class, the combination of test scores and grades are the best predictors we have. People like interviews and violinists and all, but they're not great predictors of performance. What's behind a weighted test score and grades is way behind in prediction. But my answer is sometimes in life and in a polity, there are more important things than predicting performance in universities. There are issues of social justice, there's fairness, there's the interests of what best serves our democracy in the long run. So I don't write much about affirmative action because I feel I'd be criticized from both sides. The people who have different reasons wouldn't like my reasons and the people who are opposed to it would say, "There he goes again."

05-00:58:30

Burnett:

Well, looking at your career, you did spend a lot of time and energy — because in essence what you're saying is that affirmative action is necessary because the socioeconomic factors that produce that inequality are in essence too thorny or intractable to give you the kind of natural distribution that you would normally have or otherwise have.

05-00:59:00

Yudof:

Well, I think that's right. I would agree with that. I never believed in these genetic theories; I thought they were pernicious. And I think modern science — I'm a dilettante — Steven Pinker's a friend of mine and I read some of the stuff by others. But now we know about the plasticity of the brain, and take my word for it, you do not want to be poor the first twelve years of your life. You may measure different IQ differences but it's not necessarily because it's all genetic. The brain evolves. It's an organ and the conditions under which it

evolves are important. I'm not an expert but I did at one point read that literature and I was very taken with the idea that it's not all set in stone when you're two weeks old.

When I first got into the business of equal educational opportunity in the Coleman report, you could predict a child's performance in school by whether they had wall-to-wall carpet in the home. Today I guess they'd predict it if you have oak floors. But back then it was wall-to-wall carpet and they could predict it on the basis of whether one parent had any college at all and other factors like that. It's disgraceful that that should be the case. And the idea that you would put the onus on the youngsters to me is totally unacceptable. And I think that is on hold. With all its flaws, the No Child Left Behind Act, and before it Title I, Elementary and Secondary Education Act under President Johnson, agree with that set of assumptions. Whether their interventions work properly we can all debate, but they start with the assumption that it's time to stop blaming the children.

05-01:00:38

Burnett:

Absolutely. So it seems that what happens in the end at Texas and many other universities — well Berkeley goes through it, as well, and then later the whole University of California system, what ends up replacing this system is this whole-student approach. Is that correct?

05-01:01:04

Yudof:

The holistic review. Yeah, we're sort of jumping ahead. I do like the holistic review because I feel even though I think they're the best predictors, I do think it matters whether your mom had cancer while you were in high school or whether you're a great novelist or climbed a mountain or went to help Paul Farmer in Haiti or whatever. But that's not so much because it's a better predictor; it's because we have an interest in admitting the right people and the right people have a variety of interests in community service and in other things. And I like violin players. Heck, I even like some accountants. But it's not a false sense that when you look at these other factors that greatly assist you in saying where will you rank in class in your sophomore year; it is because, again, it's a limited good and limited supply and the question is what are the most intelligent policies to create an entering class. And that's what I focused on.

05-01:02:11

Burnett:

To keep the same time period, to talk a little bit about personal life, in 1993 you went on a trip and I'm wondering if you could talk about some of that. Apparently you went on a visit to Israel and you were also given an award, too.

05-01:02:38

Yudof:

I can't remember which one that was. It may have been the Tree of Life award.

05-01:02:42

Burnett: That's right.

05-01:02:43

Yudof: And they planted a tree. I had never had any exposure to Israel at all at that time. My friends spoke when they gave me the award and they went on and on and on. It was a total embarrassment for me. I don't remember if my mother was there. She's probably the only one who would have liked it. Yeah. That was there. Even at that time I was a supporter of the State of Israel but it was not a major factor or passion of mine at that time. I just had other interests. I was involved in education reform in this country and affirmative action. I had other issues that captivated me.

05-01:03:29

Burnett: And your wife Judy is also involved in philanthropic work, as well?

05-01:03:34

Yudof: Yeah, Judy was the first woman ever elected president of United Synagogue, which is the international conservative Judaism movement. It's not conservative in the American sense of conservative. It's conservative in terms of ritual and Jewish law and so forth. I was very proud of her. She was president of our synagogue. She did not win reelection unanimously. I voted against her. She'll tell you that story. Yeah, and she was bat mizvahed I think at age forty. She grew up in an era when women were not expected or even allowed, I guess, to fully participate and she did some wonderful things. That was a little later on. She was much more active in Jewish community affairs than I was. I felt that in my various jobs, having deans and boards of regents and so forth, was more than adequate for my meeting quotient.

05-01:04:42

Burnett: [laughter] Yes, you're obviously stretched pretty thin in a lot of these time periods here. Now, during this time that you're provost you're also in demand. So there's a little bit of headhunting going on. Do you want to talk about that?

05-01:05:03

Yudof: Yes, I don't remember it all very well. I'll tell you the story. I don't mind having it on the record. I was getting a lot of letters. And, frankly, a lot of them I couldn't make up my mind, I never answered, which must have meant I wanted to stay at Texas. I remember when I lost the vote for president, I had a discussion with the University of Illinois but it never went anywhere. I guess they were pretty unimpressed. And then I did interview at the University of Iowa. And it's a great place but it was simply not in the cards for us. And Judy hated the president's house. That didn't help. And they picked a wonderful person, Mary Sue Coleman. And I withdrew from that. I really don't remember the others. So anyhow, I was provost and I went to see the president. And, of course, I really would have liked to have been the president of the University of Texas for a variety of reasons: I liked the place, I understood the place, I knew the politicians, I had former students in the legislature, I liked the Tex-Mex food, I had lifelong friends [from when] I

arrived as an assistant professor. Participants in our synagogue. I thought it was a wonderful place. And I didn't want to sell my house. I liked my house. And so forth. So I went to see President Berdahl and he was having, he would admit, some — I don't know if disagreements is the right word — but some rubbing of shoulders or something with the board of regents and the chancellor at the time. So I just said, "I can't be provost forever. Are you planning on staying?" And he said, "Yes."

So I don't know why I did it, you never know in hindsight, but I had a letter from the University of Minnesota and I finally responded. And so they did their sorting and so forth. What I remember is there were three names on the list. So I'm in Austin and I get a communication that one of the three candidates has withdrawn. And then I go up to Minnesota and another candidate withdrew, so there's just me. And they have Goldy Gopher meet me at the airport and they have photographers. I'm on the front page. You can find it. It's embarrassing, the *Star Tribune*, front page, above the fold, picture of me and Goldy Gopher meeting me at the airport. And so they put me through the wringer. I'm in a big auditorium there, Coffman, I think I was, and there are thousands there. And they have Bob Bruininks, who I later appointed provost, who's taking questions and throwing some out. Of course if he felt they were hostile or inappropriate I never saw them. And he asked me these questions and I did that I don't know how long, at least an hour, maybe two hours. And it was simulcast to all the campuses. There are four campuses and you could watch this on TV. The media's there and so forth. And then I go see the governor, Arne Carlson, and that was a hoot. Arne was a very independent thinker, a sort of moderate Republican. He probably would dislike my saying that but he was not a typical Republican. He was really his own person in a hundred different ways. Sometimes disagreeable. I liked him. My type of curmudgeon. And I go into his office and there's this pile of books on his desk. He looks at me, he says, "I've been reading all the stuff that you've written." Or, I don't know "all" but maybe a lot of the stuff. And I recognize, well, there's the *Penn Law Review* and there's the *Texas Law Review* and there's *When Government Speaks* and so forth. He says, "It's okay. It's okay." And he wasn't effusive. He said it was something like okay or fine or not disqualifying. I don't know what he said. So they offered me the job and I accepted it and told the president and so forth.

Then I don't know how much later, I just don't remember, maybe a month or two later I'm guessing, and President Berdahl had accepted the job as chancellor at Berkeley. I had declined to put my name in at Berkeley. I'm not sure of all the reasons. How I might have gotten the impression that Berkeley might be a contentious place I'll never know. But anyhow, I never put my name in. And I was surprised, to say the least. So I got back to my office and then within — he announces that and I get a call from a man named Don Evans, who's chair of the board of regents, good friend of later President [George W.] Bush, then-Governor [George W.] Bush.

05-01:10:25

Burnett:

The chair of the board of regents of which?

05-01:10:28

Yudof:

University of Texas. And Don says, "I want you to come out to Odessa, Midland. I don't think he'd had a vote but he said, "My sense is the board would like you to be the next president. We can put you on a list of one as the candidates and then, whatever, thirty or sixty days you'll be president. And when President Berdahl leaves you would take over." I said, "Well, that's very nice. I'm very flattered. I do have this problem that I've accepted the University of Minnesota." And I said, "You have another problem. You can't just go selecting your president. You have a faculty that you need to consult." So I know what happened. An hour later a very good guy, philosopher, chair of the faculty senate, he calls me and says, "I think the faculty would be very enthusiastic about you," or words to that effect, that this would not be treated as a palace coup or something. Some people opposed me to be provost but I think I had done some good things for the faculty. So apparently, I don't know what the vote would have been in the faculty senate, but there was significant sentiment on my side. I went home, I talked to my wife. Oh, and I also heard from B. [Bernard] Rapoport, another regent. I talked to my wife. I guess he was a future regent at that point. But anyhow, I talked to my daughter, came in the next day and called Don and said, "I can't fly out to Midland. I feel like I've given my word." I mean, I had met with the governor. I was on every newspaper. There was no one left on the list. I had said yes. So I kept the university commitment. You know, it was very hard. I loved Minnesota but I would not have had to sell my house, leave my friends. It would have been a more comfortable gig just to stay where I was. But I just ethically could not bring myself to say, "You know, you've had your celebrations, you recruited this guy from Texas, and forget about it, I'm staying at Texas." And I didn't have a clause that said you're out if you get an offer from Texas. We had a football coach at Minnesota very briefly who had a Notre Dame clause and when he got an offer from Notre Dame he just left. I won't name him but a very famous coach, very good coach.

05-01:13:05

Burnett:

Yes. There's lots of news about the kinds of contracts that coaches get.

05-01:13:11

Yudof:

So anyhow, I left and there were some goodbye parties. And had my picture taken with then-Governor [George W.] Bush and he wrote on it. I don't think it's here. It said, "Once a Texan, always a Texan." And I went off to Minnesota with my family.

05-01:13:28

Burnett:

People were really sad to see you go. And it's got to be one of the worst cases of timing in the history of employment I think. [laughter]

05-01:13:44

Yudof:

It was. How do I say this? It's a really good job. It's a Big Ten school. It has wonderful educational standards and a medical complex and the whole thing. But I didn't have any connection with it. It's not like the University of Pennsylvania, my alma mater, had called. They had me fly up secretly and I looked at the campus. I had never been on the campus of the University of Minnesota. So it was not really on my radar screen. So I didn't give that a second thought. But the point of the matter is I might easily have waited till the next year to go looking for another opportunity. I didn't have a sense that this was my last opportunity to be president of something. I just didn't. And I was sort of open-minded about it. The people were wonderful but the climate could get a little chilly sometimes.

05-01:14:47

Burnett:

You mentioned when you talked about moving to Texas back in the early seventies that that was a huge boon and now you're —

05-01:14:55

Yudof:

I'm back in it. I don't know. When I didn't go to Northwestern, I thought Chicago was too cold. I was tired of them towing my car. In Boston I could never get it right which side of the street I was supposed to park on in the snowstorm. And there I was in Minnesota. It made Chicago look like a beach vacation. But we had a good time there and they're wonderful people. It's a wonderful institution. So it's interesting. It's such an interesting state. But anyhow, the chairman of the board of regents was Tom Reagan and he was a chief of staff to a man named Jim Oberstar, a very, very influential, long-time member of Congress from northern Minnesota, the Iron Range, as it's called. And so he actually makes me the offer I think while I'm there and he hands me a piece of paper with my salary and some other things on it. And he says, and this is so Tom, he's a rough and tumble guy, very wily, very smart, "I'm going to be waiting down at the bar for your answer." In higher education, anything that might happen often does. So I'm in there and I'm looking at this and it was, by modern standards, not a high salary but I thought it was a better salary than I was making at Texas. I don't know. I didn't really ask for anything special. They have a pension plan, I had one. They had a health plan. I used whatever everyone else had. And like everyplace else I worked, it is an at-will employment contract. The general philosophy of my employers was if you don't hear from me at 10:00 in the morning you've got your job all day. I never had a contract. They appoint you, they have expectations, but I was dismissible at any time for cause, not for cause. So I don't remember how I did it, whether I went down to the bar, he came back up to the room, but I accepted.

Then we moved there. It was very interesting. We had to live, I think, in an apartment because the president's house was being redone. And that was very sensitive because one president, Ken Keller, effectively lost his job over renovations. And I always felt he got a bad rap. You get the internal university billing system and everything cost eight times what it would cost if you'd

done it on the outside. He put in a new kitchen, which it needed if you were going to entertain guests. But anyhow, the public was outraged and when they were outraged he was in Hawaii and there was all sorts of stuff. And sometime later he left. So it took a while to get in there. It was a very nice house near to the river, although we couldn't see the river.

The big story at the time was we keep kosher at home, so Judy gets a rabbi, I think from Chabad, I can't remember, to kosher the kitchen. And of course he brings a blowtorch. I guess he felt too many gentiles had touched it or something or too much pork or something. And he proceeds to melt the Jenn-Air in the kitchen. So this is a story. People were more amused than upset that this crazy new president wanted a kosher house and this rabbi melted his Jenn-Air with a blowtorch. But that's what happened.

And I was very well-received. We joined two synagogues because there's a friendly rivalry between St. Paul and Minneapolis. So we belonged to one synagogue on each side. And I had never really realized how beautiful it was there. It's right along the Mississippi River there. With all the lakes it's just a beautiful, beautiful place. And I arrived and, as always, when the old president leaves there was some consternation there. There was a big tenure blow-up at Minnesota, so I stayed out of that, let them settle it. They were mad at Tom Reagan and the regents. They wanted to change some of the tenure rules, the faculty ones. They actually had a very close vote to unionize the faculty at Minnesota shortly after, which, by a couple dozen or so votes did not pass.

It was difficult. I arrived in the president's office, it turned out that President Hasselmo had used his own desk, so I was a president without a desk. And he didn't move out until the last day, so this posed some difficulties. Some people wanted to stay on, some of whom I wanted to be my vice presidents, and others just immediately fled the ship when I arrived and that took some time to straighten out. But in general I was greeted quite warmly and I met with legislative leaders. I would say it wasn't as much when I was at Texas but I was down at the state capital fairly frequently, beautiful state capital, I might say, and got to know many of the leaders. At that time the leaders were Democrats, Democratic Farm Labor Party. I got to know the future governor, Tim Pawlenty when he was minority leader in the House.

People wanted an immediate strategic plan and I just said, "It's too soon. I don't know enough about this place." The major initiative there was I felt that there were strategic objectives that they needed to pursue that they had not. So I felt they were not well-positioned in molecular biology, so I made that a major initiative. They are well-positioned in agriculture but I thought that needed to continue. Later I had an initiative at the journalism school, which was very famous, which at that point was on hard days for a variety of reasons. Wireless technologies and so forth. I felt the university had not strategically invested in some areas. And I also felt that for people to be proud of the university and to do a good job, the place could not look like a dump,

not to put too much — so I created a Beautiful University Day. We agreed to avert our eyes while they threw out unusable equipment without filling out twenty-three forms to do it. I can't remember. We planted 20,000 trees and shrubs and so forth. And I, acting dictatorially, said, "We are not going to put up with this graffiti. I'm just not going to tolerate it." I said to the building and grounds people, "When it goes up you've got one-week to get rid of it. I don't care what you do but I want it out," particularly on the bridge, the pedestrian walkway across the river to get from one side of the campus to another. And we did. We cleaned it up. They had stopped washing the windows. I said, "We're going to wash the windows. We don't have to wash them once a week but wash them." The dean of dentistry wrote to me, said he didn't know he had a view of the downtown until we washed his windows. So I had a number of strategies.

And bless Arne Carlson, he was very supportive. I negotiated with his support the biggest bond issue in the history of Minnesota. It was roughly a quarter of a billion dollars. They were going to tear down some of these historic buildings. And I wanted no part of that so I got money for historic renovations. So we saved a lot of the grand old buildings. I got the architecture school, some people from there, the dean to help me figure this out. And we saved them. And I'm so glad we did. A campus without a history when it has such a distinguished history, and some of these buildings were designed by very eminent architects. Sort of like here in Berkeley. You don't want to tear them down. Even though it's not efficient, it would be cheaper to put up ticky-tacky whatever, but I didn't want to do it. And I put in the new accountability system.

05-01:23:06  
Burnett:

Well, that's significant, I think. I know that's part of that mission that you had thought out in the early nineties and it's something you were doing a little bit at Texas, as well, I think.

05-01:23:23  
Yudof:

Yes, I felt, the same deal. I want the legislature behind us; I want the people of Minnesota behind us. I worked hard on the graduation rate and my successors, Bob Bruininks and Eric Kaler have also worked hard. The graduation rate is way up at the University of Minnesota. The campus looks good. They built the molecular biology building and they positioned themselves better. The journalism school went off on a different track and now I think it's approaching its former eminence. It's doing great. Unlike UC, and we'll get to UC later, I really felt more guidance was needed on the academic priorities. Because UC I thought, "God, these chancellors, the faculty, the researchers, the medical complex, they really know what they're doing. They may not have enough money, they may have problems, but I'm not going to second-guess them on the priorities." In Minnesota I second-guessed because I felt that they really needed a stronger sense of direction. And I was gratified. Bob Bruininks did a study when he was my successor; he came up with the same

priorities, maybe one or two additions. Oh, design was one of them. I loved design. So now it's a school of architecture and design. I didn't do that. But I did establish a design program. And by design I mean designing everything. To me life is a design problem, whether it's your coffee mug, your house, whether it's the ergonomics of your computer, or whether it's even jobs. It's all design.

05-01:25:01

Burnett:

Well, so the bond issue was partly for the cell and molecular biology program, I think.

05-01:25:06

Yudof:

I don't remember all of the components. Some of it was new buildings. That was a new building. Some if it was to redo old buildings. And they would submit lists, it says, "We need a new electrical system or air changing system." I said, "We're not in the air-changing or electrical-system business. We're in the program business. Tell me what you want to do inside the building and then I will tell the legislature." And that's the way we did it. It was very interesting. I'm a big fan of Cass Gilbert. I tried to get him on a stamp but I never succeeded. One of the great architects of the twentieth century, early twentieth century. I had them search around and they actually came up with a drawing for part of the campus that was never implemented from 1910 and they put it up on the wall. And it [had been stored] with steam pipes. And we later redid that area of the campus and I didn't like the plans and I would bring the architects in. I said, "Look, that's what Cass Gilbert said. I want you to handle it like he did because your designs are terrible compared to what he" — and we finally got it right. And then I had historic tours and the historic preservation. But the irony was later on they send me a notice that they want those drawings by Cass Gilbert back because they're afraid I won't take good care of it. These are the people who put it with steam pipes. Not these same people. But until I decided it was worth saving and I hung it in the president's office — and I, of course, took the position, "Over my dead body will you get this back. You'll have to trust me." And then it turned out where Cass Gilbert had done his wonderful design they had built a parking garage with a fabulous view of the Mississippi River. So I said, "The cars have had the good view for long enough. We're going to have a student residence hall and it's right up there on that wall." People seeing this can't see it.

05-01:26:59

Yudof:

It's named Yudof Hall and it replaced that building and now the students have a view of the river and the downtown and not the cars, and I thought that was a fairer solution. And people knew how passionate I was. They usually name a building after a former president. I chose the residence hall and they offered me this one.

05-01:27:19

Burnett:

You're approaching things in a more deliberate manner, I suppose. In terms of cell and molecular biology, I suppose that was in the air at the time.

05-01:27:35

Yudof:

Well, I kept reading about, at that time, the DNA and who would get there first and all that stuff. I never read about the University of Minnesota in that. And in the fifties it was one of the top medical schools in the country. They did some of the early heart transplants. Earl Bakken and others were responsible for the implants, heart implant stuff. And I just felt they needed to be pushed. And so I pushed. And maybe it was hubris or arrogance. I think it worked out well. People seem to remember the beautification of the university more than anything else. I have to tell you that. So that's fine. Being proud of where you are and having visitors come to your campus and saying, "This is a beautiful place. We ought to walk around." Or, "This is a good place for our children to go to school." That was exactly what I wanted. I guess it was maybe an early Giuliani thing, like the broken windows. Not exactly the same. But I thought if we can't even paint out the graffiti and we can't wash the windows and we can't plant grass and we don't have shrubs and trees how can we do all the other things? And so we did them.

05-01:28:51

Burnett:

Yes. Get the basics done. Well, perhaps we could stop there.

05-01:28:58

Yudof:

Sure.

## Interview 6: July 6, 2017

06-00:00:05

Burnett:

This is Paul Burnett interviewing Mark Yudof for the University History series, and it's July 6th, 2017. This is our sixth session. And we're still at the University of Minnesota. In looking over your statements to the press, and the articles that were being written by you, and there was a quote that stood out. I think it's a recurring theme in your understanding of your role, and maybe you can correct me on this. You said, "I think a lot about the World War II generation. They did some things wrong — Civil Rights, issues of gender, but they also defeated Hitler, educated themselves and their children, built an infrastructure we still rely on. What will the legacy of the baby boom generation be, a bigger car than anyone else, a second home?" So there is this sense that there needs to be a profound and committed investment in education, and that's important to you. Can you talk a little about your approach to building up the University of Minnesota when you got there?

06-00:01:30

Yudof:

Okay. Well, I should start by saying that statement, perhaps, reflects my own culture. There's a word in Hebrew, *tikkun olam* — words in Hebrew — which means "to repair the earth." And the idea, I think, is you're supposed to repair injustices and help people who are impoverished, and leave the place a little better than when you arrived. It's not just personal aggrandizement, and doing fun things in your own life. So my philosophy at Minnesota, I wasn't deeply involved in K through 12 at Minnesota, other than through the lens of the University of Minnesota. In Texas, I had been one of the leaders of the school finance reform. I had represented students and other groups. When you become a president, you make too many enemies by taking sides in that way.

So my interest in K through 12 really was not so much as sort of reformer, also I was the new kid on the block. I didn't really understand the politics and culture of Minnesota. But obviously, I wanted the university to get the very best students, and I didn't want it to be stratified by race and income; I wanted the diversity, and so forth. So we did work on those issues, and I did speak at a number of high schools. The toughest issue at that time, they had something called "general college," which was sort of a back-door entrance to the university, if you didn't have good grades, good test scores. But the data was mixed. Those young people didn't necessarily do well; they didn't transfer necessarily to the other programs. And, of course, when you're looking at national rankings, it didn't help to have a group with low grades, relatively low grades and scores at university. But it did provide a lot of opportunity. So I never could find my way clear to try to abolish it. One of my successors did, but I didn't because I was so ambivalent about it. I thought we could do better, but on the other hand, I thought it was a good idea to have some safety valve for young people who hadn't done well in college, and who perhaps could catch up later on.

My philosophy of education for the University of Minnesota was obviously a little different. I felt that in some areas, Minnesota had missed the grand opportunities of the fifties and sixties and seventies, and had not a clear sense of priorities. When you're in a university, it's very easy to treat everyone alike; that's what your children want. They usually think they should be treated better, but if you treat everyone alike, your weakest departments, your strongest departments and so forth, you tend to get along better than if you say, oh now, we're not going to replace Professor Snodgrass over here in the Chemistry Department, but we are going to replace Professor Jones over here in the Sociology Department.

So I thought about that hard. And I was being pushed hard to have a vision for the university. And I said, "Look, I just arrived. You're not supposed to have a whole vision for a university three months on the job." But ultimately, I came out with a group of priorities. One of them was, I felt that we had not been a major participant in the molecular biology revolution; we had not been a major player in DNA and the mapping of the DNA, and so forth. So we had a molecular biology initiative in the new building. We had to merge a bunch of departments; medical school and the university, and there was some resistance to that. I said, "That's fine. You don't have to merge. But if you can't see your way to have one department, I can't see my way to recommending the building." And lo and behold, they figured out a way to do it. Then there was a question of how new faculty would be appointed in those departments, and I certainly didn't want control in my office, but I didn't want fiefdoms.

06-00:05:52

Burnett:

Right.

06-00:05:53

Yudof:

So what I did was, I essentially established a committee of national scholars in the biological sciences, and you had to get your nominees through that committee. That was very important. Agriculture was a natural; Minnesota was one of the biggest agricultural states. It had been very active. It had some very distinguished people operating in the plant genome area. It was sort of doubling down on that; it fit the economy of the state, it fit our expertise, it fit our historical record. It fit the agricultural services that we provided across the state. I wasn't always popular with the hog farmers, because I didn't serve pork at Eastcliff, you know? But I tried to make up for it by consuming a lot of pancakes, a lot of batter, a lot of flour and eggs. [Laughter] You know, that was good for some folks, at least. And then there were others, the wireless technologies were just taking hold. We did some investments there, and then there were some other areas — later on, one of the areas was journalism, which was really — I mean, again, it was a failure to adapt. We were teaching the old journalism. In the new journalism, we weren't even where we are today, but it was pretty clear with the internet. I guess eventually we had Facebook and Twitter and all the rest of them, that just teaching people to write in print media — those are very good skills to have, and it's very

important. But it's by no means the whole horizon out there. So there were some radical changes that were made there. The faculty really did it, but I have to admit, I lit a fire under them to get it done.

06-00:07:41

Burnett:

And of course, at this time there is a concern with budgets and state cutbacks. In 1999, Jesse Ventura becomes governor. I think what I recall of him is that he was kind of like a libertarian figure.

06-00:08:03

Yudof:

Well, that's right. I got along pretty well with Arne Carlson; not always an easy man to get along with. Very smart man. I told you my stories, he had read my work before I showed up there.

06-00:08:15

Burnett:

Right.

06-00:08:16

Yudof:

He helped move my bags around, and we got the largest bond issue approval in the history of Minnesota. I think it was \$249 million. So we got along great. And then, of course, he didn't run again. I can't remember whether there were term limits, but he had served a couple of terms and he didn't run again. Surprisingly, in the three-party race, Jesse Ventura, who was mayor of a small town and a former professional wrestler, he won in a three-way race. He got less than 40 percent of the vote, but he got more than the Republican and more than the Democrat, and he was elected governor. I think he got a lot of young people's votes because they thought having a wrestler as a governor was a cool idea, you know? Then a couple of weeks into his new term, he announced that if you're smart enough to go to college, you're smart enough to figure out how to pay for it. That didn't go over too well with the young people who were — you know, for understandable reasons, pretty supportive of scholarship arrangements.

I would say at a personal level, we got along fine. I had him over to our house. I remember — I mean, a very colorful man. And by the way, you could underestimate him. He's not a well-educated man; he went to community college. You wouldn't call him erudite in any sense. But he's canny. And he has a certain — he's no fool. He really does understand how things work. I think that's how he won his race. Anyhow, he came over, and he told me he was going to Japan, do a commercial visit when he was governor, I said, "That's great." He said, "I haven't been there since I wrestled." I said, "Well, that's interesting." I said, "You were paid to lose, weren't you, governor?" He said, "Yeah, I was paid to lose." I said, "Well, how did you get the Japanese come out and watch you lose a wrestling match? Why should they care?" He said, "Mark, it was very simple. I was in my robe, I went down to the central arena, I went between the ropes, I took my robe off, and I had a t-shirt with a mushroom-shaped atomic bomb cloud on it." I said, "Governor, you know, that would do it. I'm fairly surprised you got out alive with that sort of

antagonism.” And there were numerous other stories; he explained how he would use a razor blade to cut his forehead in certain sorts of fights. But at a practical level, he and I were at odds. Not interpersonally at odds, but we were at odds.

He, as I think you suggested, had libertarian tendencies. That worked itself out in public policy, like I remember he vetoed a law that would have required people to turn off their sprinklers when it was raining. And his view was, for God’s sakes, they can figure that out for themselves, right? Then he was famous — I don’t know if it’s true or apocryphal, that in his cabin in the woods, and many Minnesotans like the woods and have their cabins up north — he had a sign that said, “We don’t use 9-1-1.” And he did pack — he said he packed firearms. But when it came to the state budget, he was miserly, I guess is what I’d say. It was very difficult, because he was an independent. And the Democrats and the Republicans jointly held all but one vote in the whole legislature. He only had one ally, if I remember correctly, for the Independence Party. But anyhow, so some years they split it up one third-one third-one third. It was the weirdest budget. The Democrats got a third, the Republicans got a third, and the governor got a third.

So anyhow, he wasn’t doing much for education. And it’s always hard to explain. People think that public education, the price should never go up. And if it goes up, they think you’re putting in rock climbing walls and taking the kids on vacations to Fiji, or something like that. A lot of it is just the cost of doing business. You know, you pay the faculty a couple of percentage points more, you pay the union members a couple of percentage points more. The price of books in the library goes up. You have debt service, and so forth. A lot of it is redistributive, which people don’t really understand. That’s what America, until certain the 1960s, and still to a large extent today, you charge some people more to give other people a discount. So if you charge \$5,000, your average tuition might only be \$3,000, because you’re making some people pay full freight and you’re allowing others to go for free, usually based upon income.

So he didn’t really oppose the tuition going up, if I remember correctly. But he was parsimonious with increases for the university. And of course, I wanted to make the place better, right?

06-00:13:35

Burnett:

Yes.

06-00:13:36

Yudof:

I wanted to participate in the biology revolution and the wireless revolution. And I wanted to build the journalism school and enhance the undergraduate experience. I wanted to get the students through. At that time, we had to do some things to get students through more rapidly; they were taking forever to get through for a variety of structural reasons, most of which we corrected. So

we clashed heads. So at one point, the Pioneer Press had our pictures, and the headlines said, “Why can’t these two bald guys get along?” And they did a poll. I didn’t want a recount, but I was about 3 percent ahead of Jesse in the poll.

So that’s pretty much the story. I could tell you other stories about Jesse. He was very much a Libertarian; he’s always very much in the face of the establishment. You know, I remember once we had some event at the governor’s mansions to celebrate some organization or cause, and he just showed up in his jeans and so forth. He was very much in the face of the traditional business community and the professional organizations, and so forth. He was just his own man.

06-00:14:52

Burnett:

Perhaps foreshadowing things to come.

06-00:14:54

Yudof:

Perhaps. It’s hard to know.

06-00:15:01

Burnett:

You’re in ’97, and I think you announced the Marshall Plan for Minnesota, or that we ought to have a Marshall Plan for Minnesota.

06-00:15:18

Yudof:

Well, I did say that, because that was my frustration. You know, I had participated in the school desegregation wars. I had participated in the school finance wars. No matter how you slice it, and this was pre-Leave No Child Left Behind, and all that, I felt that poor children, vast numbers of whom were Hispanic and African American, Native American and so forth, Asian American children, were being left behind in the schools. And I felt, based on my research, that we did not have a good grasp how to produce better outcomes. So it was partly not just we need to throw money at it, but the experimental model that produces an atomic weapon, or an experimental model that produces a vaccine or a new drug, we needed to figure out how it is that we could educate poor kids who may come from a ghetto or a barrio, or may have one parent in the home, all sorts of things in their lives which don’t make it any easier, but it’s nonetheless the responsibility of the nation to bring them along. Otherwise, you end up with a permanent underclass, and you end up with a lot of unhappy people. It depends on your vantage point. I think it’s a matter of moral justice, but you could talk in terms of who’s on welfare and who pays taxes and so forth from ninety different angles. It makes sense not to have a group of people who are left behind.

So that’s what I meant when I — it wasn’t so much a university program, as to say, you know, we have to take this more seriously. We do a lot of talking about this.

06-00:17:07

Burnett:

Well, it seems — that's a kind of human capital argument, right, that people make. In fact, that human capital theory comes out of the Marshall Plan, right, and understanding the Marshall Plan that you —

06-00:17:21

Yudof:

And out of the University of Minnesota. The fellow — there was an agronomist there, I think, that was very influential in developing — and I've forgotten his name. But one of the early books on human capital was a book by a Minnesota professor.

06-00:17:38

Burnett:

Right. So it seems to be an argument, because it comes out of economically conservative circles, it has a real value because you can get people on board to support state investment for the future. It's supportive of research and R and D [Research and Development], but also the cultivation of the next generation. So for you, it's a moral thing. But it's also savvy, I think, in that you can get more —

06-00:18:15

Yudof:

To comment on your human capital point, I think that's valid. People at different points in the political spectrum will say that it's efficient; it'll increase the GNP [Gross National Product], and it will reduce welfare payments and so forth, if people receive a fair shot at education and get educated and get good jobs, and lead productive lives, and tend to be healthier, and to participate in voting, and all the rest. I think that's true. I don't dispute that. I don't want to trivialize it either, though, that if you're going to compel students to go to school, and they happen to be in inner cities and the property values aren't that high, and they have some real challenges in their neighborhood and in their personal relationships and putting food on the table, that there is a human dimension to it, which I think is very important also.

06-00:19:09

Burnett:

Yes, absolutely. So in early 2001, for the Ventura budget, he approved one of the lowest increases in funding of higher education in Minnesota State history, 2.2 percent, with one of the largest state budget surpluses in Minnesota history, \$56 million. And for your proposal, you wanted four times as much money as he was willing to give you. How did you close that gap in understanding?

06-00:19:51

Yudof:

Well, we didn't close it entirely. Some of it was aspirational. Part of it you do by judiciously cutting your budgets, or by allocating money elsewhere. And like any university, we had our share of bureaucracies and things that were not efficient, and sinecures that shouldn't have been sinecures. Then we raised tuition some. Then you also go out and you raise a lot of money, at least you try to. And we did. We had the \$1.3 billion campaign. I like to say — I mean,

I participated in it, but Minnesota has a marvelous, well-oiled machine for raising money. A very able man, Jerry Fischer, headed the enterprise. So I smiled, shook hands and gave an occasional speech. But Jerry and his minions were the people who largely got it done. I mean, the problem is this: unlike in much of the corporate world, all money is not green for the same purposes. So usually when people give you money — first, they wanted an endowment. So if you raise \$1.3 million, if most of it's an endowment, you can see that that's going to add, whatever, \$50, \$60 million a year to your budget. So it's not like you've increased your budget by 50 percent, or 25 percent. It's very important, but it's not like that. And also, they want it, usually, for things that they think are important and supplemental to the core mission. It's for a chair in Engineering, or it's for a Law program in some area that the person's interested in, like, the humanities or a poetry program, or it might be in the arts. But you can't go to donors and just say, look, we didn't get enough money from the state, will you pay for the copying machines and the assistants, and for painting the bricks? They're usually not too enthused about that. They want something that's supplemental, incremental and often new and innovative.

But we did that. In the long run, it helped. Minnesotans are magnificent. For a state with roughly 5 million people, the amount of giving is astounding. It really is quite remarkable. They're a very philanthropically devoted type of people in Minnesota.

06-00:22:09  
Burnett:

Well, you seem to downplay your role. "You smiled and shook hands," but I think you have a reputation for building relationships with people, for being somewhat of a rain maker, able to come into a situation and build relationships with folks, because I imagine in fundraising, although someone might have a particular interest to support, that you can shape that to some degree?

06-00:22:40  
Yudof:

I think that's right. I think there's a lot of misunderstanding among people who don't do fundraising. First, a lot of it is personal. And you're right, I built personal relationships at Texas when I was a law dean. I didn't do much as provost; that's not the provost's role. I go to Minnesota, there was a well-established group of donors, the Nelson family and others, the Carlson family, but many, many others. And you build relationships with them, and they understand it. They're all adults. We're not two random people in the street. They're supporting the university; I'm the president. I think it's important to explain the university to them and listen to what they have to say, and hopefully encourage them to give additional dollars.

06-00:23:27  
Yudof:

The second thing is, though, they're not a blank slate. Someone's always writing to the newspapers and saying, "Well, why did you accept the money

for this art and ping-pong ball project? I need a scholarship, and we could have used it in the English Department.” I’m sure you could have. You do have some role interacting with donors, and I don’t want to say it’s zero. But they made a lot of money somehow, these people. Or at least they inherited a lot of it. And they have thoughts about the world and what they want to do. So you just can’t come in and say “I know that you’re interested largely in the Liberal Arts, but I need money in the architecture school.” So it’s a give-and-take process.

06-00:24:09

Yudof:

Third, I think sometimes we don’t guide them very well. I think sometimes we get too dependent on endowments and building for the future. It’s a very human instinct to have bank accounts and savings accounts. And sometimes the cash up front, I think, in the long run — that’s part of the human capital argument we discussed earlier — getting more money up front sometimes is what you need to do. If you can hire six wonderful electrical engineers because you have the cash to do it, rather than having an enormous [endowed] chair but only being able to hire one off the income from the \$2 million chair, sometimes that’s the best way to go. I think many times, academics are unimaginative, and nearly always wanting to go for the endowments rather than for the hard cash in the here and now.

06-00:25:01

Burnett:

There was a certain amount of political lobbying as well. You appeared before the Senate Higher Education Budget Division, and described what you were going to do in exchange for more support. You had a kind of bargain, when you would come to people who were concerned about budgets and concerned about finances. How did you sell yourself and the university?

06-00:25:31

Yudof:

Well, you start with the proposition that, I thought, the historic contract, if you will, between public universities and states had frayed. You know, they gave you money, you kept the tuition low, you offered a first-class education, you did research. You interacted with the various constituencies, including industrial constituencies and agriculture. You tried to do some good in the world by dealing with issues of poverty and food safety and health, and so forth. And it was fraying. They wanted a free ride. And they were shifting more of the cost to the students. And that’s continued to this day, by the way. And so I was interested in renewing the contract. And what I was trying to do was — and I also along the way held a summit on economic development at which I even got Governor Ventura to speak — I said to them, we can be a part of the economic development of Minnesota, part of the next ten, twenty, thirty years. Yes, there are these great enterprises: 3M and St. Jude’s [St. Jude Medical, Inc.], and the other medical device company up there, Medtronic. But you’re only as good as your research and so forth, today. So what I was trying to say is, we could position it economically, we could take care of your kids, even take care of more of your kids. Keep the tuition reasonable. Get

those graduation rates up, which we did through a variety of mechanisms. They liked it there at university, and they like Dinky Town. Even I liked the pancakes, but I wouldn't stay an extra year for the pancakes.

So I was trying to renew that agreement. Then what is it you're promised in the legislature? You can promise whatever you want. But what they're really looking for, is this someone I could trust in a leadership role? So you're trying to be authentic and trying to say what you do, and you're trying to be honest, and you're trying not to over-promise. I mean, a lot of universities over-promise on the economic development side. You're out there in some rural county in Texas, and you say I'm going to bring a medical school here. Well, you don't have a prayer of bringing in a medical school. A medical school will require more money than there is in the entire county. So you have to be very careful to create reasonable and not unreasonable expectations.

So that's what you try to do. Having said that, their job is different than my job. They're sitting there thinking, well, what are the matching funds in Washington for Medicaid or Medicare, or whatever their matching funds are for? What are my obligations for keeping the highways system up in the state? What am I going to do with the kids who need dental care, and so forth? So their framework is different than mine. I'm trying to maximize many things within the framework of, here's the University, here's the people of Minnesota—they're looking at a people who need multiple services, and multiple interests and how to maximize it. So that's what you do. And I thought I really had that confidence, even through the athletic scandal, which came later on, which was not easy to achieve.

06-00:28:59

Burnett:

It seems that what you're saying is that a key element of leadership is empathy, really trying to understand the people that you're dealing with, what their needs are, how their needs might be in harmony or in conflict with what you're trying to achieve.

06-00:29:20

Yudof:

Well, I have some empathy. I mean, someone had to stand up for the University. That's true. I would go in and — [coughs] I had some of the weirdest private sessions in Minnesota, I'm not sure why. One legislator, I walked in and he turned on a little TV set. It was a man that was dancing in a tutu, and a ballet thing. I thought, what does this have to do with my budget? Then other times, I was asked for marital advice or legal advice, or stuff like that. But you know, they're all individuals. They're not only looking at the budget, but obviously they're looking at politics and they're worried about their families. They're human beings, just like anybody else. They have their securities and insecurities, and so forth. But I think empathy is always a part of it. When you can't hear the other argument or the other side — it doesn't necessarily mean you agree — or you can't see the conflicts with which they're presented, it's really a problem. And I think that's true of the faculty,

it's true of the students, it's true of the staff, it's true of scientists — you just go on and on.

06-00:30:25

Burnett: Right.

06-00:30:29

Yudof: If you don't really hear — and that's different from sympathy. Sympathy is more paternalistic, I think, in my opinion. But empathy's harder to achieve, by the way. You know, someone jumps in front of me in line when I'm waiting for my In-N-Out hamburger — empathy is not always what I feel.

06-00:30:50

Burnett: No. And most people don't feel that way. Especially with In-N-Out. So you're dealing with legislators, and you're also appealing to the people. At least that was according to the press. This was the “barnstorming the state,” was the phrase.

06-00:31:04

Yudof: I did that. I did that.

06-00:31:03

Burnett: And so you went around the state and kind of lobbied against Ventura's budget.

06-00:31:10

Yudof: Well, I didn't do it that directly.

06-00:31:12

Burnett: Right.

06-00:31:14

Yudof: I lobbied for the university.

06-00:31:16

Burnett: Right.

06-00:31:17

Yudof: And I had some very good advice, a fellow by the name of Tom Swain, he was one of my vice presidents, sort of “Mr. Minnesota,” who held all sorts of positions, and in his nineties was mayor of a city there. And so I went to a lot of small towns. I mean, it's easy to get hung up on the Twin Cities, because if you look at the metropolitan area, I think roughly 60 percent of the five million people in Minnesota are in the St. Paul-Minneapolis area, including the suburbs around, and not just from the inner city. But I went all over the state. You know, I went to Mankato, and I went up to Duluth. I went to places we had campuses. I went to places we didn't have campuses, where they were angry at me because we didn't open one, or we had closed one. I tried to do as much of it in the summer. I wasn't to be honest with you too fond of some of those towns, you know, near the Canadian border in February. You know, it

wasn't quite my cup of tea. And they were wonderful people. And I felt like — and you hear this all the time — I felt like I was sort of getting out of the beltway and meeting the real people. I mean, I really did enjoy meeting them. And it was fun. They were important in the political process. But it's a lot of work to do that, you're out of the office a lot. You don't have an avatar to do the stuff at home while you're out there.

06-00:32:43

Burnett:

Well, you like to take the temperature. And that seems to be the way that you approach things. I think one of the reasons for the freshman seminar, getting ahead of ourselves, is that you wanted to teach to understand a little bit about what the students are going through.

06-00:32:57

Yudof:

Yes, and I did that at Minnesota. I taught. Yes, it's true. And you get into the urban areas, the suburban areas, and parts of the big cities. You learn a lot about people, and what their interests. You visit the high school, you figure out what their concerns are. I did that at UC. At Minnesota, I had seminars. It was an eye-opener for me. You know, I had people roller skating into my class; I had never seen that before. Some of them I followed for years. One of them won a Marshall Scholarship. But also, you could see the frustrations. I remember once, I would start every class the same and I would say, "How has the university oppressed you this week?" "Well, I was putting some chalk on the sidewalk, and they erased it." I said, "All right, I'll look into that. What were you writing, by the way?" Then someone said — I can't remember what college this student was — but he says, "You know, at the Humphrey School, they have Senate soup. I want Senate soup in my college, also." I said, "I am your Senate soup president. I can take care of this, with all my power." So I look into this issue, and I write a letter to the head of Facilities, and said, "We need Senate soup in all the buildings. My students want Senate soup. That's where they stand." Next thing I know, the general council writes to me and says, "I have been referred by the Facilities head. There's a guideline ruling, rule," or something, "in Washington, D. C. The Senate soup can violate people's rights because some people are allergic." And I write back, I said, "That can't be but one in a hundred. Why don't we post a sign, 'The soup is Senate: if you don't like it bring your own.'" Of course, you're helping ninety-nine, and only one is —

06-00:34:51

Burnett:

You can't win. You can't win.

06-00:34:52

Yudof:

I'm a consequentialist and a utilitarian to the core. I thought, well, it's — "No, no, no, no, no." So I went back and I had to sheepishly say, "With all my power, I could not get Senate soup." And I think they removed it from the one college that it was in. So the net effect of all this was negative, from that student's perspective, at least.

06-00:35:08

Burnett:

[Laughs] But perhaps illustrative of how universities function sometimes. So you had, I think, achieved a lot, considering the pressure from the governor's office, and also just you're trying to marshal your desire to help improve educational outcomes to invest in the long-term health of the University in a context of severe budget constraints, and so on. That must have been very difficult, then, to find out about an emerging scandal, and actually a number of scandals, with athletics, for example.

06-00:36:00

Yudof:

Yeah. We could go into that. I would say one of the things you want to do is, you want to re-establish pride in the campus. So I had a rule, that Facilities had one week to get rid of graffiti anywhere on campus. We were to be graffiti-free. And we had a "Beautiful U Day," we threw out old machines, and we planted — I can't remember — ten or twenty thousand trees or bushes. And we painted and we restored the historic buildings. If you don't have pride in where you live and where you work, you're not going to have pride, period. And you know, it's surprising, once you did it, everyone said, "That's right." It wasn't a liberal-conservative issue; you know, I didn't even have any problem with that. They didn't even complain about what it cost. I mean, they were so happy to go to a place that was pleasant. So that was part of it.

But part of the pride is other things: how do you do from a research standpoint, and how do you do from an educational standpoint? How do the students do it, the undergraduates in particular? And your athletic programs. And Minnesota was — how do I put this mildly — they had not been a major sports power in many years, particularly in football. I can't remember the last time they'd gone to the Rose Bowl, but 1960 or thereabout. And they had wonderful ambitions, the people of Minnesota, many students, not all, but some faculty and so forth. And we had a basketball coach who had taken the basketball team, men's basketball team to the Final Four. And so they were very proud of him. And he was a real role model for a lot of people. He was successful. He was African American. He was articulate. He won on the court. He was respected by other coaches, as far as we could tell. He had a ten-year contract, which his lawyer had drafted; I wasn't there for that. I never would have drafted quite the same level of protection. That was one of the problems later on.

So anyhow, then what happens is, I get a call. I remember I was in Florida at the time, a reporter at the Pioneer Press, and she says, "We have proof that papers or assignments were being written for the students by a woman." And she is — I mean, she did it, but she says she did it at the instruction of the coach and other people. She was whistle-blowing; she had had a falling out with the basketball program, or something. So I said, it was just my wont in life, being a lawyer, I said, "Well, I'd like to see all of this, and we will investigate immediately." Of course they weren't going to share it with me.

They were giving me the — I mean, they wouldn't give me enough details to be able to respond. And it probably would have taken me weeks and months anyhow, to gather the data. They wanted to publish the story. And I measured it. The headline for that story in the Pioneer Press was larger than the headline for Hiroshima in World War II. And it was a big, big deal.

So I hired two people; one of whom was a well-known NCAA investigator type in private practice who had been recommended, who was very skilled at these types of investigations. Because the way it works is, the NCAA, at least at that time, really had very few investigators. The University had to investigate itself. That's the way it worked. Then you were expected to self-impose penalties, then whatever, a year later or something, the NCAA would review the whole thing and tell you whether the penalties were sufficient, or whether the investigation was sufficient, and so forth.

06-00:40:08

Yudof:

The other person I hired was a former assistant U.S. attorney. As time went on, they gathered evidence. But a lot of people refused to give evidence, because universities have no subpoena power. If they decide they're not going to show up, or they take the Fifth Amendment, there's nothing you can do about it. There's no compulsory process at all. And people forget that. We don't have access to bank records; we don't have access to anything other than what's in the university's files, or what people choose to tell us.

So I became very suspicious. But being a lawyer — and I think I made a mistake here, to be honest — I felt that the facts were too inconclusive. We did not have the goods on Clem Haskins, the coach. I felt that the program was small. There were not that many people associated with it. It was very hard for me to believe that something of this scale could have gone on for so long without the involvement of the coach. But I really felt I didn't have the proof.

So I let it go, I let it go, and then the head of Government Relations came to me in summer, and said, "Mark, you've got to do something. We can't field this basketball team with Clem Haskins there." So what I did was, I bought him out.

06-00:41:25

Yudof:

Because the contract — I don't want to go into legal tech — but it was bulletproof. I mean, it was the most ridiculous contract the university could sign. It was ten years earlier, he was the great hope. And then, of course, what happened, the Justice Department got involved, which was unexpected. They subpoenaed his bank records, and he had evidence of his making the payments to the person who was involved in the scandal. And we sued him and we had a multi-year settlement, and got, I think, all or most of the money back again.

But meanwhile, I was fileted. No one took account of the fact that we don't have criminal or civil processes, that I didn't draft the contract and it had certain things laid out in it. But I think in retrospect, I was too legalistic. I would have been better off firing him, then he would have sued for his money, maybe, and then we would have had the ability to get subpoenas and look at his bank records, and other things. But I should have done that. But it's hard to give up the habits of a lifetime, when you feel like whatever your suspicions, there's a matter of due process and all. I thought I didn't have the goods on him. I never did until the federal government got involved, and that's what happened.

06-00:42:46

Burnett:

And this is not the only athletic scandal in United States history. This is something that happens over and over again. Perhaps it has a cultural significance; there is this university that is supposed to be the beacon of truth, it is supposed to be relative meritocratic and egalitarian, and there's — I don't know, is it —

06-00:43:12

Yudof:

I don't know where to start in this. I mean, this would be a very long discussion. I mean, part of it is — and the problems are not all sports, and it's much less in women's sports. Although I had a women's sports scandal at Minnesota, too, so I'm the unhappy exception. But when you're recruiting these kids, some of them are not really academically prepared. That's why early on, I favored I'm not allowing freshman to play on any of these teams. I felt, let them get their academic feet wet, you know. And I was talking about men's sports, women's sports, volleyball, basketball, swimming, football and the whole thing — let's not let them play for a year. It never got anywhere. That's not the way the world works.

Second, a lot of them are poor. That's another problem. We could have a long discussion about that, but you know, a lot of these violations are really for level-playing-field problems. You know, someone buys lunch for someone at a restaurant, or gives someone a ride home, or something like that. And the fear is that the poorer universities don't have the fans and the fan base, and the money and support, and so forth, to do that. But from my standpoint, they look pretty trivial. My women's basketball coach was accused of buying a chicken on the way to a recruit's house, cooking it with the mama for the female basketball recruit, and they ate the meal. And at the end of the meal, she reimbursed the — the mother reimbursed the coach for the cost of the chicken. The float on the chicken, that is, the six hours without interest, was an NCAA minor violation. I thought it was crazy! I mean, it's just nuts.

But anyhow, I mean, a lot of our athletes are not from middle-class or well-to-do families. So that's a problem. Sometimes there's a problem of isolation on the campuses. And we could go on and on, but we're not going to fix the amateur athletics today. But then, of course, there's the pressure on the

coaches to win. We all say we want — we do want integrity. We do want all these things. And I was insistent upon it. But the Lord smiles upon you when your football team is in the top ten, and your basketball team is winning, or the women's basketball team is the national champion, so forth. That's just the way it is.

06-00:45:44

Burnett: There's a lot of money involved.

06-00:45:45

Yudof: Your applications go up. I'm not sure long run it helps you financially; I think it probably levels out over time. But certainly people read about a national championship team, and they may be more likely to apply to your institution.

06-00:46:01

Burnett: And it's an important — speaking of pride — point of pride for alums, and it factors, I imagine, into giving. And then there's also just how — I mean, you can tell how important athletics are by the salaries for the coaches. And that's another thing that feeds into the executive compensation scandals that are numerous, and at many universities. And you always that find coaches are in the top tier —

06-00:46:29

Yudof: Well, when I was hired at Minnesota, virtually the same day after the football coach was hired, Glen Mason, and he was paid three times what I was paid. And it made *Sports Illustrated*, one of my two appearances — not on the cover unfortunately — but two appearances in *Sports Illustrated*. So people wrote to me and said, "Well, what do you think about that?" And I said, "Well," I said, "When people will pay to attend the Regents Meeting like they will to attend the football game, then I want my salary raised." I don't know what to say. I mean, it's not fair. It's not fair that he's paid more than an elementary school teacher, in my view. In my view of justice, I would pay elementary school teachers more. What they do is more important for the country, and more important for the next generation. But I don't know how you get away from that. Because you're in a competitive market. And your coach will go coach somewhere else if it's not a competitive salary.

06-00:47:22

Burnett: Right. Exactly. And that foreshadows conversations about executive compensation, and so forth. So that was — it must have been — it probably occupied a lot of your time, and you had all these other priorities for the university, it must have been —

06-00:47:40

Yudof: It made it very difficult, because you're playing defense. And, you know, a lot of what goes on — I avoided it, but a couple of predecessors back in Minnesota, they fixed up the house, put in a kitchen, the cost got out of control, and all of a sudden that was a big scandal. And I was always worried

about that, that someone would march out from the Facilities group and put in a new silver faucet that I really didn't need, and all of a sudden there would be newspaper headline that I'd spent a thousand dollars on a faucet, when I hadn't even known about it. So I was very careful about that stuff. And a lot of that was done before I officially took over. That's the new coin of the realm. Old houses need to be fixed up, but you try to do it between presidents so no one gets tagged with it. The only other alternative is to sell it, which I'd also be in favor of under the appropriate circumstances.

06-00:48:37

Yudof:

And so the football scandal was like that. I didn't really have anything else, I think, quite of that magnitude. And I was doing well, I think, because my initiatives were broad-based, and I considered myself very pro-student. I wasn't always popular with the old guard, the administrators to the universities, because I made a lot of changes there. And the board was very supportive, although the board were too political, and the chair who hired me — I can't remember — a year or so later he was deposed by the board, and a new person was elected. Virtually every two years, I guess, we had a new chair. And Minnesota is not opaque at all. I had an annual review, and the reporters were outside of the room in which I was being reviewed, and the review was written. Virtually nothing was done behind closed doors.

06-00:49:46

Burnett:

Can you tell me about how the transition to Texas begins to unfold? Because you're there, and —

06-00:50:00

Yudof:

Well, I was perfectly happy at Minnesota. I would have continued with my plans, and probably come up with some other ones. My provost, Bob Bruininks, who later became president, he announced he was stepping down, so I had some recruiting to do for various positions. And you have to know something of the history; Charles Miller, a friend of mine who was chairman of the Board of Regents at Texas. And I had known Charles going back to school finance days. I had been on some gubernatorial panels, and I can't remember, Charles may have been on one, or chaired one, I don't remember. And he and I were friends. And he was one of the architects of No Child Left Behind. He and I had remained in touch.

And then what happened in 1993 was, I had lost the presidency of University of Texas by a five to four vote, I'm told.

06-00:51:11

Burnett:

Right.

06-00:51:12

Yudof:

That was a closed session. And Robert Berdahl was appointed at that point, and I was his provost for three years, and then I left for Minnesota. So there was always a crowd in Texas that was, if I may say, pro-Mark Yudof. I don't

know that they were numerous, but they were influential. And I had been told — I don't know if it was true — that Governor [George W.] Bush was one of those people. And Charles Miller, who was very influential with Governor [George W.] Bush, and at this time with President [George W.] Bush, and helped put together with Sandy Kress and others No Child Left Behind. I can't remember the contact; I think he called me on the phone and said, "How would you like to come back to Texas as Chancellor? We have a search going on." And I said, "Charles, that was my home for thirty years, and I'm interested. But I can't go through a beauty contest." I said, "I'm really not being aloof about this, but I just can't do it, because I have alumni, and I have regents and faculty and students, and so forth. I have a lot invested here. They have a lot invested in me. To appear in a beauty contest where there are three or five of us on a list and we all interview, and I may or may not get the nod. I understand that, and you should get the best person you possibly can. But if you want a beauty contest, I'm not interested. If you want me, offer me the job. If you don't, and if you decide to go the more open route" — which is fine, because I wasn't really pressing for the job. I was happy where I was, although I don't think I'd have stayed that much longer. I'm not big on jobs that last more than six or eight years. I probably would have stayed a couple of years more.

06-00:53:00

Yudof:

So that was the call. And then I don't remember all the things that went on in between then, what interviews there were. But ultimately, and there was a list of finalists with only my name on it at Texas. And lo and behold, I won. I usually win when I'm the only one on the list. If there's more than one, I frequently have a problem. So that's how. And there's no real big inauguration like there was at Texas. You know, the governor handed me a mace in front of a thousand people, and all that. You know, we had a little party. Charles said, "Go out and do good." And he was a very effective chair. I mean, really extraordinary man. Still alive. Good man. Brilliant. So arm in arm, we marched forth to do good at the University of Texas.

06-00:53:47

Yudof:

Why don't we take a break here?

06-00:53:48

Burnett:

Sure.

[break in audio]

06-00:53:50

Burnett:

So it seems that Minnesota didn't want you to go without trying to pull you back. There were hundreds of calls, and roses, apparently — this is according to the press — and pleas, both public and private, for you to stay; that people were really attached, it seems.

06-00:54:10

Yudof: People were very nice. I think there are some people still angry at me over the athletics thing. Some thought I never should have moved at all, and others thought that I was too slow, and so forth. There were elements of that in the media. But yes, I mean, there were a number of private individuals, board members, and so forth. But one of the things I don't really believe in is, taking advantage of one of these opportunities to make more money. So I kept saying — I mean, they were going to pay me more money at Texas — but I don't want you [the University of Minnesota board] to try to match the offer to keep me, either I'm going to stay or I'm going to go. And then if I stayed and you decide to pay me more, that's fine with me, obviously. But I just don't believe in using that as advantage. The same thing was true when I moved from Texas to California. Maybe it's self-serving, but I think in both cases, they probably would have matched whatever the other institution was offering. But I didn't want to do that. So I really kept my own counsel.

I think the strongest part of it was, we had such strong ties there. We had friends from when I was an assistant professor in the early seventies. We knew the town. I could easily have ended up all or most of my career at Texas. I mean, I moved to Minnesota, I wanted the opportunity to be president. I didn't like being number two; you know, I didn't like being the guy who gave the speeches when rain was expected, or demonstrations, or whatever. I felt I could make those decisions myself. But if I had been picked as president in 1993, I don't know, but I probably would have stayed there for five or ten years, and that might have been the end of my administrative career, or maybe not.

06-00:56:06

Burnett: Well, people, it seemed, were sorry to hear that you were going. And there were editorials talking about your accomplishments. "He trimmed the bureaucracy and redirected resources, repairing a broken relationship between the faculty and the regents. He snared major capital investments from the legislature. He charmed the university's donors, and they responded with a fundraising surge."

06-00:56:34

Yudof: Oh, that's very nice of them to write all that. My mom and my wife probably even believe it, you know.

06-00:56:39

Burnett: That's right. [Laughs] But there was the pull of family and friends from Texas. And I think you also spoke about the additional — at the time — spoke about the additional challenge of the job. It was a big challenge.

06-00:56:53

Yudof: It was, you know, Texas — it depends on how you think. Minnesota is a fabulous place. But Texas had, at that time, I think, fifteen campuses. So the budget was bigger. And the aggregate for all fifteen campuses — they did more research, they had more medical facilities and so forth. In conventional

terms, it was a bigger job. I don't know that I thought about it that much in those terms. I was worried that it was a system job, because I'd always had a campus job up until then. That's a big transition. I was worried that I was devoting too much of my career in the public sector and none in the private sector, which I really hadn't explored. I'd had some opportunities along the way, but for one reason or another, they didn't pan out. It wasn't that I really preferred the private sector, but I'd never really been an officer at a private university.

So I would say it was — and my sister and her family lived there. So there were a lot of personal tugs back into — it was sort of like going home, although that's difficult to do, sometimes. So I did it, despite some of these pleas. And Governor Ventura wrote to me.

06-00:58:12  
Burnett:

Did he?

06-00:58:14  
Yudof:

That was very nice, yeah. I think his chief of staff made him do it. But he's not a gushy sort, Governor Ventura, you know?

06-00:58:21  
Burnett:

No, I don't get that sense, either. So you bid farewell. And you took a trip with your wife, Judy, didn't you? Between the stages? Did you go?

06-00:58:33  
Yudof:

I'm trying to remember. I don't remember. That would have been in 2002.

06-00:58:37  
Burnett:

Yeah. To China? Did you go, is that your China —

06-00:58:39  
Yudof:

It could be we went to China. I don't remember. Because we had done a lot of trips. When we were in Minnesota, we did a couple of trips to China. And then I think at least two to Scandinavia; Minnesota having a large Scandinavian population. We'd been to Sweden and Norway, and so forth. Yeah, I don't remember. I do remember an around-the-world trip when I wasn't made president of Texas in 1993. A group of alums bought Judy and me an around-the-world trip, you know, to assuage my pain. Pretty good. That assuaged a lot.

06-00:59:21  
Burnett:

Well, Judy had been made president of the United Synagogue of Conservative Judaism, is that right?

06-00:59:27  
Yudof:

Yes.

06-00:59:27

Burnett: And right — a couple of years before, something like that?

06-00:59:31

Yudof: It was while we were at Texas, I think.

06-00:59:32

Burnett: Oh, okay.

06-00:59:33

Yudof: She was the first woman to head it. And it was established by Solomon Schechter. Conservative has a different meaning in Judaism. It means more traditional service, although gender-integrated. We have gay rabbis and so forth and so on, female rabbis, lesbian rabbis and cantors, and so forth. So it has a particular meaning. Yeah. And you know, I always used to say I was her arm candy, I would go to some of these events, and it was good to see her on the spot. And we went to Israel a number of times. Of course, they fawned over Judy and left me eating kosher hamburgers by the pool, which was fine with me. That worked out cool.

06-01:00:16

Burnett: And so she was able to continue in that role as she went back to Texas, because that was more of a national —

06-01:00:22

Yudof: Yes, I think that was. I can't remember, but I think it may have. She was in, roughly, four years in office.

06-01:00:26

Burnett: Oh, okay.

06-01:00:30

Yudof: I think it bridged part of Minnesota. You'd have to ask her.

06-01:00:31

Burnett: Okay.

06-01:00:32

Yudof: I don't remember. And part of Texas. And then she's been on the board for a very long time.

06-01:00:38

Burnett: And so in June —

06-01:00:41

Yudof: And President Bush put her on the Holocaust Memorial Board, too.

06-01:00:43

Burnett: And June first, 2002, you agree to become chancellor of the fifteen-campus University of Texas system. It's got a massive \$6.5 billion budget, so this is a

big change. How did you approach the task? I understand you brought some of your team from Minnesota with you, is that right?

06-01:01:09

Yudof:

Well, let me think. By the way, I did meet Governor Perry, that was part — it was, I think, very smart of Mr. Miller to bring me in to see the governor. He didn't really give him the choice, I don't think. But we met, and we got along, and that was fine. I didn't bring many members with me. I brought Tanya Brown, who had been with me at the University of Texas Law School and then moved to Minnesota. She was my chief of staff at Minnesota. And I think she was vice chancellor for administration at the University of Texas.

06-01:01:51

Burnett:

Right.

06-01:01:52

Yudof:

And Geri Malandra came and she held a number of posts. But she was my accountability guru and later was also provost. And then she came, I think those were the two key.

06-01:02:10

Burnett:

Yeah.

06-01:02:11

Yudof:

And then Teresa Sullivan, a really gifted administrator, brilliant scholar, I recruited her from the University of Texas to be the provost. One of the impressions I had was, we didn't have very many people who had ever been a classroom at the system level. That's a problem with almost all university systems. Whatever your views are, the balance between regular people and academics and the skillsets you need, having almost no one at the system level that has been part of the academic process, I think, is a problem in terms of empathy, understanding and all the rest. So Terri came, I wasn't able to keep her that long. I think a year and a half or whatever later, she went to Michigan as provost. She's currently president of the University of Virginia and she's stepping down after a very successful eight or nine years there.

So those were key members of the team. And I brought in someone from West Virginia as the Financial Affairs person. And then I did inherit some very good people. Oh, and I brought in a new person as the head of medical affairs, which is very big in Texas, because Southwestern Medical School and the hospitals there, MD Anderson, Houston Health Sciences, San Antonio and so forth, Tyler — it's a huge medical institution in addition. I brought Ken Shine in who had been former Dean of Medicine at UCLA. I probably brought more people in from the outside than I did transfer them from Minnesota.

- 06-01:03:56  
Burnett: And I guess moving some people up from within? You kind of promote — I think you — maybe I misunderstood it — you promoted some people from within the University of Texas system to key positions, like Ed Sharpe, Tom Scott?
- 06-01:04:13  
Yudof: No, I think that's not right.
- 06-01:04:15  
Burnett: Okay.
- 06-01:04:16  
Yudof: Ed ultimately left. He was provost, and we got a new provost.
- 06-01:04:19  
Burnett: Oh, okay.
- 06-01:04:20  
Yudof: And Tom Scott, I believe he was replaced also in Government Relations. I'm sure I did move up some people, but it doesn't immediately come to mind.
- 06-01:04:29  
Burnett: Okay.
- 06-01:04:30  
Yudof: They had a new general counsel eventually, a very able man. And Randa Safady who I recruited to replace Shirley Bird Perry. I don't know, I guess she's called one of the most effective, almost legendary heads of development. And she's been offered jobs virtually everywhere. And she likes Texas, and I put her in that position and overpaid her, and here she is.
- 06-01:05:01  
Burnett: What was on the horizon for you as an immediate task? There were some problems, there were some scandals, but what did you see as the most important issue?
- 06-01:05:13  
Yudof: There were a number of issues that I was concerned about. And one was, we really weren't getting fair shake from the legislature. Legislature at that time had a rule, I think it was in the budget bill or something, that the state took half of our indirect-cost recovery on research grants and put it into the general treasury, in effect. And that wasn't good, because you have an indirect cost rate to cover your expenses, then you lose half of it. By definition, you're losing money on every single research contract that you do. And the legislature had to control the tuition. You know, it was episodic, you never knew what they would do. They didn't want to tackle the issue very often. The tuition, I thought, was low, but below what was defensible.

So getting control of tuition was another part of it. I wasn't so much concerned about imposing priorities on — it wasn't like Minnesota — I felt the priorities were pretty well articulated, certainly from the University of Texas at Austin and for the medical complexes. But I thought we needed to give some boost to the research enterprise. So with James Huffines, who succeeded Charles as chair of the board for two terms, and James was one of the most effective chairs in the history of the University — we tried to pour money into Facilities and Laboratories. And we had something called a Stars Program, where we tried to attract stars. And I hate to admit it, sitting here in my office in Berkeley, but I was looking at some of the turmoil at that time in California, and some of the contentiousness between then-President [Robert C.] Dynes and others, and I thought, well, how can I take advantage of this? And one of the ways you can do that is by trying to pick off some stars by having special allocations for their salaries and for their buildings and laboratories, and all that. So I did that.

I was trying — and it's harder, because it's a bigger university than University of Minnesota. You know, many of these schools were different stages of development in terms of selectivity in choosing students, in terms of research budgets, and so forth. So and it's a big state. So we were trying to balance all those things out. I was always concerned with graduation rates, but from a system standpoint, that was very hard to influence. I did push hard for some scholarship, nascent scholarship, that was somewhat like the Blue and Gold program, which we later adopted at UC, of having an income cutoff. But not all the campuses would go for it. And I tried to do some efficiencies, things that could be done more efficiently at the center. And sometimes those succeeded and sometimes they didn't.

06-01:08:16

Burnett:

Well, one of the things, when you were interviewed at the time, you were asked, what were the problems with high-level administrators in big universities? And your answer was, "Arrogance. The key rule to campus administration is service."

06-01:08:37

Yudof:

Yeah.

06-01:08:36

Burnett:

"And the other piece of it was to tie a request for money to specific outcomes." That was really a —

06-01:08:41

Yudof:

Well, Charles and I were avid on that. I mean, arrogance is a problem. People who don't want to look at the evidence is a problem. People who think that God gave them the gift for always being right without consulting other people, without reading anything, or thinking about anything. So, I mean, of course. But, you know, there's a lot of arrogance to go around in various

constituencies. There's political arrogance, and faculty arrogance, foundation arrogance, and so forth.

But I was very keen to say, as part of this compact, as part of this revision of the original notion of the states and the public universities, where it was basically trust. You know, "give us your children, give us your money, and we'll take care of it. Don't make us file all these ridiculous reports," and so forth. I felt that we needed to file reports, that we needed to say, how well were we doing? When did our kids graduate? And how much money did they owe when they graduated? And did our faculty win prizes? How are we doing in competitiveness for faculty salaries, or whatever. And our research stature, I mean, there is an endless array of variables you might — and no one of which is definitive. To see correlation is not necessarily to see causation, as we all know.

So I embarked on that. Geri Malandra was a key part. She had done some of that at Minnesota. We had had some — there was a lot of opposition at Minnesota to it. They were keen on accountability for other people, but not for themselves. And I thought it helped me with the legislature. They'd say, "well, how are you doing with Hispanic enrollment," or whatever. I'd say, "Well, that's on page 97 of our report." Sometimes it was like an inoculation. They'd say, "You're hiding this data." I would say, "It's been online for five years. What do you mean, hiding?" You know, I mean, I always found the best place to hide something from the legislature was to put it online, or to put it in a book.

06-01:10:50

Burnett:

That does help deal with — because there would have been pressure, I think. There were reports in March, 2003, I think, basically saying, the honeymoon is over. The legislators called you up and —

06-01:11:06

Yudof:

Yeah, that was an article which I didn't agree with.

06-01:11:08

Burnett:

Oh, okay.

06-01:11:08

Yudof:

But that's fine. Yes, someone said that. I don't know if the honeymoon had ever begun, and I didn't think it was over. I mean, my relationships before and after that were identical. But we had the accountability. And we won the tuition fight. I'm using "we," I mean, it was really the Speaker of the House who was critical, Tom Craddick and Charles Miller, and other people. We got to keep all our indirect costs. We got tuition to a reasonable level. We continued to set aside for scholarships. We did the research program for whatever you said, \$1 or \$2 billion —

06-01:11:46

Burnett: 1.6, yeah.

06-01:11:48

Yudof: — worth from the available University fund to increase the profile. We had bid on the Los Alamos National Lab; that involved a lot of work. It was disappointing; they encouraged us, the Department of Energy, to apply. Then at the end of the day, they said, “Your application is great but you’re not as experienced as the University of California.” I thought that was really almost duplicitous. I mean, everybody knew that they were experienced. So they asked other people to apply. But then, of course, I did an end run, went to California, and they reported to me.

06-01:12:24

Burnett: It all worked out.

06-01:12:24

Yudof: Well, they sort-of reported to me; they’re pretty independent. So those were the sorts of things — I didn’t have — being a system job, it’s interesting, if something was wrong with athletics at San Antonio or Austin or someplace, by and large that was for the president to handle. The board would get involved with things like the Austin football coach, and there were certain hot-button issues. But by and large, a lot of things that came across my desk at Minnesota came in my capacity, not as head of the four campuses, but as head of the Minneapolis-St. Paul campus. So there were other people. You mentioned, there’s a story about that. You know, there was a big scandal at that time about loan officers, scholarship and loan officers at universities. I don’t know how deep it ran, but the allegations were — some of which I’m sure were true — most people were invited to go to the Bahamas, or they went out on golf outings, or they got free pizza, something like that. And that in all the pieces of paper that come across the desk of the head of Scholarships and Loans, certain lenders were preferred. And there were ways to do that to others so that students were more likely to borrow from some lenders than others. So the allegation was, someplace was rigged. Then Attorney General Cuomo in New York went after a lot of the stuff nationwide [the Cuomo investigation was in 2007].

And we had one such incident, I didn’t investigate it. But it was at Texas. Very well-known guy. Apparently he had accepted some pizza. And President Powers fired him and fixed it. Then I got a call one day through my general counsel from the Attorney General in New York; he wanted me to sign a Consent Decree with the Attorney General of New York. To be honest with you, I was outraged. I said, “What does this guy have to do — ” So I called in the General — “with us. He’s in New York!” I said, “What’s the source of jurisdiction?” He said, “We have some New Yorkers enrolled at the University of Texas Pan Am.” I said, “Are you kidding me? That’s going to do it, that I have to” — so I called then Greg Abbott, now the governor of Texas, and I said — he was Attorney General — I said, “Greg, just for my

recollection, were you elected Attorney General of Texas?” He said, “Yeah, that’s true.” And I said, “I’ve got this guy up in New York that wants me to sign a Consent Decree on the student loan issue.” I said, “Here’s what I propose. You get any investigators you want, and you look at whatever you want to look, and you propose an agreement that you want with the University of Texas, and we’ll sign it.” And of course, I had to sell it to Bill Powers. He also needed to sign it, too. “And if I’m sued by the Attorney General of New York, will you defend my honor?” He said, “Sure, I will.” And that was the end of the whole thing. I never heard from the Attorney General of New York again. Greg came up with some perfectly reasonable things to do. We signed, we did it, it was over.

06-01:15:33

Burnett:

Well it’s a massive, complicated story, that basically, with respect to allowing the University of Texas to set tuition, there was a bit of horse trading, wasn’t there, that, I think you offered free tuition to needy Texans in exchange for the regents’ power to set the UT tuition rates?

06-01:16:00

Yudof:

Well, that’s what I wanted to do anyhow, but yes, sure. My idea of tuition, at least under the current structure, it should be redistributive. And in California, this Blue and Gold program, I can’t remember what I put into the — \$60,000, \$65,000 family income, which was higher than the average family income. Half of all Californians, by definition, wouldn’t pay tuition no matter what their grades. If they got in, and they might get more money, but if they got in, they weren’t going to pay, and that was the idea for Texas. But having said all that, just to be really candid with you, the Speaker just said, “It’s going to be in there, or I’m not going to sign off on all these Senate bills and gubernatorial bills,” and all that. The governor was supportive, Governor Perry later sort of recanted, said he was sorry that he supported it. I wasn’t. There have been numerous moves since then to take that authority back.

But it’s easier to — how do I put it — it’s very hard to dislodge an existing law.

06-01:17:07

Burnett:

Right.

06-01:17:07

Yudof:

Or a variant of that, it’s very hard to pass a new law. The status quo was always the preferred position for any political system. Maybe it’s entropy, I’m not sure. But anyhow, it’s still in the law now. And I don’t know what happened to the accountability measures. We did strategic planning and accountability. I think the research initiative has really grown. It’s larger now than it was back then.

06-01:17:40

Burnett:

And the tuition hikes did help pay for some of that, I imagine, right?

06-01:17:42

Yudof: Yes, and they're reasonable. They're still — I believe they're lower than California at the moment.

06-01:17:50

Burnett: Yes, that makes sense.

06-01:17:52

Yudof: Yes, it's a different beast than California in terms of the financial framework, and so forth.

06-01:17:58

Burnett: Annual tuition in 2003 was \$2,700. And it was about \$5,000 by 2014, so ten years later.

06-01:18:11

Yudof: And I don't remember, but it may be \$8,000 or \$9,000, something like that, \$10,000 today.

06-01:18:16

Burnett: And you got a lot more autonomy, because under the old system, the state was dictating how all of the money was spent. And you had a lot more autonomy with the —

06-01:18:29

Yudof: Well, I was trying to do that. So there's no constitutional autonomy in Texas. There is a version of it in Minnesota, and a stronger version of it here in California. Yeah, it's difficult. As I said, all money is not green. The more restrictions, the more difficult it is to govern the place. I did write an article which turned out to be true — the gifts aren't randomly distributed across the university. They're not giving to the humanities at Texas as strong as they are in the same proportion as my domain, the law school, or Bill Cunningham's, the business school. So you start with the giving being disproportional in some areas, based upon the income level of the graduates and so forth. Then, where are the federal grants? You know, I mean, I doubt whether the Chaucer scholars are getting what the laser-beam folks are getting. So it goes on and on and on. So when you take the flexibility out of the system, it's not so much overt favoritism in the sense of you're trying to advance your own private purposes. But you're trying to make a whole university work, under circumstances where there's really not a level playing field in terms of the sources of funding.

06-01:19:49

Burnett: Right. Well, perhaps we'll stop there, and we'll continue next time.

06-00:00:02

Yudof: Sure. Okay.

## Interview 7: August 15, 2017

07-00:00:15

Burnett:

This is Paul Burnett interviewing Mark Yudof for the University History series. This is session seven, and it is August 15, 2017. So, Professor Yudof, we last left off talking about the University of Texas system and the challenges that you were facing there. I'm wondering if you could talk a little bit more about the ten-year plan, the \$1.6 billion plan launched in 2006. In keeping, I think, with your leadership style, you're interested in building out the system, you're interested in the large projects. Can you talk a little bit about how that was set up?

07-00:01:07

Yudof:

Well, the \$1.6 billion, it came from the available university fund, and it was, to a significant extent, large extent, based upon projects proposed by the then-fifteen campuses. I guess the core part of it is I had spent a long time, particularly as provost at University of Texas–Austin, hearing from scientists and engineers and others that a lack of physical space was a big impediment to their doing research and being competitive for grants and attracting new talent and graduate students and all the rest. So a large part of it was going into the building. There were certain restrictions on how those funds could be spent, and I thought it was a good idea. The second thing was, just to be candid — you never know what life brings — I had read that the University of California was having some problems, and I thought there may be some people who want to relocate. So, it went into engineering buildings and I remember a nursing building and similar sorts of things. Alas, it was not particularly focused on the humanities because the sort of rationale was people who needed space for experiments and so forth. It was also supplemented by other funds. We had a STARS program, which was startup packages for new faculty, and the idea wasn't just to be ground into the cloth of the budgets of the universities and part of every startup package for a new professor, but it would be when they're going after stars, it becomes very important. If you're going after a neuroscientist, you may have to put millions of dollars into equipment and guarantee graduate students and space and so forth, not to mention travel money and conferences to attract that person to the institution. It wasn't just the salary. People sometimes get that wrong. I mean, salary's not insignificant, but people want to establish their lab, and the startup packages have a lot to do with that. So that was the thought behind it, and I thought it was very successful. We were trying to increase the amount of federal and state research funding and funding from private institutions and attract more talent to the faculty, and that was the nub of it.

07-00:03:44

Burnett:

In the history of funding institutions at the national level, there was this refrain of funding the peaks: take the institutions that are at the top and give them the resources they need. With the whole University of Texas system, was there a redistributive imperative to build up some of the smaller, weaker institutions? How did that play out for you?

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Yudof:

Well that's a profoundly important point. There's a real tension. You see it in federal programs also. You don't want all the money going to California and Massachusetts and New York. There are good universities elsewhere, and you want them to participate and grow and build and become greater universities. So that's true. I could have put all the money in MD Anderson, Southwestern, UT Dallas and UT Austin. From a certain efficiency standpoint, that would make a lot of sense, but it was important to develop El Paso and Midland–Odessa and Arlington and San Antonio and other places in the system. So I have to admit it was somewhat redistributive because we just, politically and as a matter of fairness, could not just sink all the money into what were then the leading campuses in the system. And University of California later on had similar sorts of problems. I mean, it's got stronger universities, and six or seven of them are really currently among the elite universities in the world, but you have to build the others as well. So, there's always a balancing act.

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Burnett:

In that time that you were at the University of Texas, again, this time as the chancellor of the system, you had to balance all these different imperatives. As you moved towards the end of your time there, was there a sense that the market turbulence was starting to become an issue, or was that later that that hit?

07-00:06:04

Yudof:

Well, I'm a little slow on the uptake in economic developments. I had an inkling that we were headed for a recession. I could see it at UTIMCO, which is the investment management company at Texas, I could see it in the *Wall Street Journal* and so forth, but I never dreamed it would be of the magnitude that it turned out to be. I knew in personal terms that I thought many of these mortgages on homes were goofy. I didn't understand why people could put nothing down and pay interest only. I didn't understand why banks would grant mortgages to people who had submitted no documents. And I always avoided it in my own life. Every mortgage I had was a fixed mortgage; I didn't want it going up and down, and I didn't understand the rationale. I mean, I understood that they wanted to get people in the homes, but from a financial standpoint I didn't understand them. But I never dreamed until I read about it later about how, if you took those principles writ large, it was an economic catastrophe for the country. I think a lot of people were like that. It was a time, by the way, of a lot of follow-the-herd mentality. The banks were competing with each other, and you didn't want to be left out by being a stickler for the details. And now, of course, everybody blames only the banks, but I remember every year, President Clinton, President [George W.] Bush, they'd brag about homeownership and so forth, the Congress and others were pressing for easier mortgage terms so that people would have greater home ownership. There were a lot of culprits in this, and I don't think the ultimate history has been written. But I really didn't anticipate how bad it was. I do remember there was an astute young woman, and I should have listened to her, who told me — this was at Texas — she worked in one of our investment

oversight groups, and she said, “I’m selling everything I have.” I probably should have done that. She sold just before markets went down to the nine, ten, eleven thousand or whatever they went down to. And of course, she was right, but as you know, it’s very hard to know which alarmist to listen to. There are always alarmists at all periods of time, but she was right on.

07-00:08:36

Burnett:

A theme, I think, to your leadership, and I think the leadership of any leader of a university during this period, is responding to calls for transparency, financial transparency. I think in 2003 there was an announcement that the UTIMCO information would be made public, and there was this controversy over use of the University of Texas investments. Can you talk a little bit about that story and how that impacted you? Did that influence you?

07-00:09:11

Yudof:

Sure. A couple things to be said. Frequently when people make an objection based upon you weren’t transparent or you didn’t abide by due process — they really hate the decision, whatever the decision was — it’s really a surrogate for an objection to the outcome, and so if the faculty didn’t like what you were doing, it was always you didn’t consult them enough, even if you had consulted them enough. So that was my experience. I learned that as a lawyer, that you really had to deal with both, the process and the substance.

It’s complicated in the investment world. It’s not really my world. But what happened at that time was there was a diversification of portfolios in higher education and foundations and so forth because it was the era of private equity and hedge funds and other types of alternative investment vehicles. I’m no expert; there are a variety of them. Many of these endowments had just invested in stocks and bonds, essentially, and there was a fear of the great unknown to go in these alternative investment strategies or to use devices like puts and calls and other complicated devices because you felt you had an obligation to preserve the corpus for posterity. So, there was nervousness in the legislature, and this was true around the country, and there were skirmishes around this in California and other states. So the legislature was with people who, frankly, did not have much of a grasp of investment strategies. They said, “Well, we want to know more about the hedge funds and the private equity,” a perfectly reasonable request, “and including information that you have as a customer that they don’t make public.”

Well, the problem with that is it’s sort of pre-Copernican. People thought that the University of Texas was the center of the investment universe, which is not really true, even though it was a very substantial endowment. The problem with it is they wouldn’t deal with you. In other words, if you said to one of these hedge funds — the hedge fund has a strategy. They’re shorting shoemakers. Of course, they’ve got some idea of what’s happening in the shoemaker market, or they’re going long in some other area, or they have an absolute return hedge fund with ways that they think will protect you in a

down market and give you modest returns upmarket. They don't want to share it with the world. That's their internal intelligence. They don't mind reporting how well they did — although even that can be a problem because typically there's a J curve and they lose money before they make money. But nonetheless, they would just deny access to these funds, and in fact, that happened when this bill was pending, and we got other funds saying, "Well, we're just not going to deal with you. We like you as a customer, but we have plenty of people willing to invest that aren't going to go blabbing to the legislature, hence to the newspapers and so forth."

So, what we tried to do when we got — I actually got a friend of mine, a very able lawyer, David Beck, now a member of the board of regents, a fair-minded, brilliant man, to work on it, to work out something that would provide a lot of disclosure, and so you could know how well it was doing, what the returns were, and so forth, but not actually have to reveal their investment strategies, which is what they fundamentally objected to. And we got that done.

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Burnett:

And you did explain that in the press, although it was held to be a reversal of a position on the disclosure, and you explained that disclosure provides free and valuable information to the competitors of these companies.

07-00:13:24

Yudof:

It was an unusual position for me, because I'm a pro-disclosure guy, but sometimes in a market — Coca-Cola doesn't want to give the formula away for its soft drinks. It was difficult for me, because my natural inclination is, sure, look at it. If we make money and you want to pat me on the back, that's fine; if we made a bad decision to invest, shame on me or my responsibility or my investment managers, okay, but you just couldn't do that in this case. So that's the story.

07-00:13:57

Burnett:

Moving ahead — that was in 2003, 2004 — there was an article in 2007 that Governor Perry was proposing an exit exam for degrees, and since 2001, the University of Texas system had been a pioneer in the use of standardized testing and then posting results online. Was it the Collegiate Learning Assessment test?

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Yudof:

Right.

07-00:14:28

Burnett:

Can you talk a little bit about that kind of transparency and how that's important to university leadership?

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Yudof:

Well, I have to say I was always skeptical about the exit exams. That's what professors are for, and universities. You're supposed to give grades in the

classes. And I was skeptical about what they would test for. It's complicated. One person is studying to be an optician and another person to be a Chaucer scholar, and someone else wants to be an electrical engineer — exactly what is going to be the centerpiece of this examination? I think it was just borrowed from the K–12 sector where Texas had such types of examinations.

What I did think was worth measuring — and it was somewhat controversial, particularly on a couple of the campuses — was how do we know that the universities are adding value to students? And let's start out, if you're a person who has very high SAT or ACT scores, did brilliantly in high school, is in an upper-middle-class family, gets to travel in the summer, has had tutors and so forth, the amount of added value, even at a great institution, at least as you can measure it, is not probably that much. These people are doing fine to start with. So if you start in the ninety-eighth percentile of all students, there's not much — I mean, I'm sure they learn a lot at Yale, but there's not much added value, at least in these conventional terms.

But I was mainly concerned about the poor students. Are there some institutions and some practices which are so demonstrably better for helping to move them up that they exceed their predictors? Maybe they were admitted with modest scores and modest grades or whatever, but they do better than they were predicted to do. Which schools do that, and how do they practice it? The resistance came from the higher-SAT campuses, but the results were actually very interesting. I think it was at the time Midland–Odessa had the most value added, and I suspected El Paso also. So, I thought it was a fair question to ask. People sometimes get confused. If you admit great students, they're going to come out fine no matter how badly you treat them, usually, because they already have all these advantages, so the real question is the value added. How have you improved their cognitive skills and other skills over the course of a three-, four-, five-year degree? And I wanted to know the answer to that, so we administered the test. I have to say, we never got markers that I considered satisfactory where I could turn around and say, why don't you do what this campus is doing, because we can directly connect the rise in achievement for these low-income or low-scoring students — and they're not the same, obviously. We never got where we were able to do that. Variables were too tangled up and too complex. But we did it, and, as I said, that test has remained somewhat controversial.

But I think we need to worry about accountability measures in higher education. We just can't take the president's word for it or the word of the professors or whatever. And again, a lot of it is self-fulfilling prophecy. If you go to Princeton and you have terrific credentials and you do well at Princeton, it's not surprising you get a good job. And you can take credit for it. That's fine. I'm sure Princeton has a wonderful set of professors and wonderful programs, I'm not denying any of that, but it's hard to really figure out exactly whether that success was enabled, and there are some surveys now that seem to show that if you go to a good state university you're going to be in as good

of shape, at least from the standpoint of income, as if you went to one of the elite Ivies or liberal arts colleges.

07-00:19:09

Burnett: When you came in, when you came back to the University of Texas system and you brought in — is it Geri Malandra?

07-00:19:18

Yudof: I did.

07-00:19:19

Burnett: Was she responsible for — ?

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Yudof: She was in charge of the accountability reports. Geri was with me at the University of Minnesota. She was the vice provost. I made her — I can't remember her exact title, whether it was a vice president at the time. I think initially it was not. But I'm a believer that your organizational chart has to reflect your priorities, so I wanted an office on accountability. I actually originally wanted to put it in academic affairs, but strangely, bizarrely, Academic Affairs didn't want them. I don't know what they were afraid of, but they didn't want her and the whole enterprise, so I had it report directly to me. I was arm-in-arm with Charles Miller, who was one of the architects of No Child Left Behind and rather active in the school finance reform and many other things — brilliant man — and Charles was hell-bent that we'd get better accountability, that when Ed Koch asked, "How am I doing?" Someone could ask the University of Texas, "How are you doing?" And I would have an answer beyond pontification that we have a great leader.

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Burnett: Well, there was another piece of it, too, wasn't there, that the data was going to be used to improve student outcomes. Was that something that she was particularly interested in?

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Yudof: Yes, but that just proved to be very difficult to isolate. There are input variables — how much are you spending, who did you hire, what are the students who you recruit? There are process variables — how you treat them in the interim and the structure of the curriculum? And then there are output variables, and the output ones are very difficult. You may make a lot of money, you may also be a tremendously effective person in human rights or a nongovernmental organization, you could even become a librarian. It doesn't mean you're a failure in life that you chose a career that doesn't necessarily maximize income. You might be an artist. So it gets very, very tricky on the outcome side. So I was never satisfied, even though I did it at all these institutions. I also did it at University of California. I felt we owed it to the people of the state and we owed it to the students, the parents — indeed, we owed it to the faculty — to do this, but I never felt like we actually could describe an education production function that we were able to really alter.

The other thing I've found, and it gets to transparency, and I may have said this earlier, but I would send the legislature, the head of the various committees the accountability report. We put it online, we'd give them a heads-up, and so on and so forth. And there was no better place to hide information because they'd never read it. They might have a hearing where they'd harp on you and say, "Why don't you do this?" "How many African Americans do you have in this program?" Or "Have you been hiring women in traditional engineering and science departments?" Or "Do your Hispanics graduate at the same rate as the total student undergraduate population?" All very good questions, but I tried to provide answers to those questions, to be factual about it, and I didn't find it changed any of that. There's something in politics that the people who raised those issues — not always, but sometimes — felt they had to stir things up a bit, and they weren't anxious to hear that it was on page seventy-three of the accountability report.

07-00:23:01

Burnett:

I guess they're performing the accountability piece by asking the question. They need to demonstrate that they're keeping people —

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Yudof:

Yes, I think that's true, but often it was accompanied by "You're hiding this." That's what I objected to. I understand that, and you ask in the hearing, it gets covered in papers, that may be good from your perspective, but frequently is "You're not really 'fessing up to this." Well, I tried to 'fess up as best I could. As the saying goes in Texas, I wanted to surrender, I just needed to know where to turn myself in.

07-00:23:35

Burnett:

Well, reflecting back on your time, that was a real — I don't want to put words in your mouth, but it sounds like that was a real end goal in your career — one of them — to be the chancellor of the entire UT system. Reflecting on it, can you talk a little bit about what you feel were the major successes and setbacks and challenges that you faced?

07-00:24:05

Yudof:

Well, I had a number of goals. I mean, you always want to keep the place solvent, and you want to make sure you're not misspending the money, which inevitably in a large institution there's some of, and you want to make sure that you absolutely adhere to the audits and legal principles and so forth. I just was adamant. I never ever tried to overturn an audit. I only remember objecting to one because I thought it was too weak-kneed. The auditor hadn't been tough enough on the institution. So that was one of the things, and that, I thought, went pretty well. They had some problems after I left in the audit office, but at least to my knowledge I was very hard on that.

On the accountability things, I also believed in accountability. We were a public institution, the taxpayers were paying a chunk of the bill — not as much as I would have liked, either in California or Texas or Minnesota — and

people should know how we're doing. And if they criticize us, it should be informed by facts, and if we did something well, that also should be informed by facts. That part went pretty well. The part of figuring out how it all worked and being able to successfully navigate that we had some sort of silver bullet for helping low-income poor kids in the Rio Grande Valley because we had seen it down at Midland–Odessa or El Paso or someplace, that — it just turned out to be too complicated. So I would say that was not successful; that was more of a hope. I didn't sell it that way, but that was one of my hopes.

A third thing was — you mentioned this before — I really did have a passion for trying to improve K–12 education, and I thought universities should have some role in it. I hadn't been able to do much at the University of Minnesota because of circumstances and the strengths and weaknesses of the campuses, but at Texas I tried to do that. It was there when I arrived, but I supported it. We had a school in East Austin for low-income, mostly Hispanic and African American children, which was very successful. I knew I couldn't change the world, that we were a few drops in a bucket of need, but I thought by example, we could lead the way. And I don't remember them, but we had six or seven million dollars in grants and we tried to use it in a way that would improve education for low-income students. I thought that's what universities should do. I'm less sure — sometimes universities are asked to run public schools, things like that. I don't know they have the management skills. But we're research institutions, and you quoted earlier that I mentioned we needed a Manhattan Project. Well, I thought universities should be part of where the Manhattan Project is. What do we know about poor kids and what do we know about how they learn, and how do we become more successful, and how do we not blame them for outcomes which are not satisfactory? So that was another goal of mine.

You try to better integrate the system, and that's very hard, and I would not say I was totally successful at Texas. Particularly UT Austin was always bristling that they didn't want to be just thrown in with fourteen other institutions. It was, in terms of traditional undergraduate, graduate program, nonmedical program, it was among the nation's and the world's leading universities, and they just bridled at being forced into these molds. It was very difficult to say I want you to do this, except at the University of Texas at Austin. Politically, it was very difficult. I remember someone came into my office and proposed that they call University of Texas at Austin the University of Texas without the hyphen and the location, but all the others should have a hyphen and a location, and my reaction was, “Are you kidding me?” There are — whatever there were at that time — twenty million Texans, and eighteen million of them will be incensed that there's only one real University of Texas, and all the rest are pretenders with hyphenated names and their location. So, creating an integrated system is hard. I wrote an article on it at one point. I still consider it an open question as to whether systems are successful. A lot of the promises have not been met, and they're deadly difficult to administer, and see conflicts between the head of the system and

the campuses. It happened in Texas, it happened in California, it happened in North Carolina. It's not uncommon. And some of the gains are overstated. It did not go necessarily more easily in the legislature, and you did not necessarily do away with parochial concerns because you had one voice, because the one voice often deteriorated into many voices, and even if it didn't, legislators are not fools; they understood where the money was going.

I think those are the major issues. You are never satisfied with your rate of progress. We didn't move along as rapidly in the research agenda as I'd hoped. I always worried about the graduation rates; at some of the schools it was, by my lights, very low. But you also must be realistic, a system head is not on the ground on a campus. It's not easy to move the levers.

07-00:30:18  
Burnett:

Well, let me reverse the lens, and instead of talking about how you coped with making a great university system, I'd like to ask you, somewhat in the abstract, about what it takes to be a great university system leader. Based on what you said, a great leader, you might want to pick someone with business acumen. You were talking about solvency, you're talking about a lot of financial constraints and considerations. And you have come out of the law profession, you're a legal scholar, an expert in contracts law. Can you talk a little bit about the formation of Mark Yudof with respect to this kind of talent for large-system administration?

07-00:31:17  
Yudof:

Well, I should begin by saying that good leaders come in all shapes and sizes and colors and ethnicities, and from various disciplines. One of the best I knew was a fellow who led Penn State, and he was a flautist. He played the flute, and he was brilliant. Bart Giamatti was one of my heroes, and he was president of Yale and then went on to head up Major League Baseball, and I could go on and on. And then there are people with exclusive academic credentials who have not done well. I always thought law was helpful because a lot of things had a legal dimension, but I didn't have expertise in other areas where it probably would have been useful.

There were a couple of things that you need to understand. One, I guess, is you're only as good as the people you appoint, so that's one. It's always a tricky question, but it's usually a good idea to try to defer to them, but at some point, you can't if they make a mistake or did the wrong thing. So the quality of people, and there's a great tolerance in higher education of people who are good people but they're marginal administrators and they just hold on for years and years and years. So that's one point.

The second point is you can't just delegate everything. I found that I needed good information flows, and sometimes it was difficult to get that out of the vice presidents or vice chancellors. They themselves were not in a good position. So I had my own list of the deputy assistant of whatever

administrative unit who really understood how the place worked, how the budget worked or how the admissions system worked or how the health plan was run. And I would tell my vice chancellors and all, “I’m going to talk to these people. And I’ll tell you; I’m not going to hide it. If you want to be there, it’s okay with me.” But that’s the only way I feel that I really know what’s going on, how facilities is working and so forth.

So, you need good information flows. You have to understand that universities are flat organizations, and they’re more like Silicon Valley, flat organization of talented people — I don’t want to pick a company — than they are like General Motors in the 1950s. They’re not hierarchical. Not only do they have wise things sometimes — not always — to tell you, but these people are necessary. It’s not self-implementing. It’s not a military regime. So, I would put the faculty in that category in a big way. You need to consult with them because it’s the right thing to do, and they often have very good insights. But even if that weren’t wholly true, you don’t go anywhere without them. So, you need to engage them and not pick fights with them and so forth. I think some university leaders don’t understand that. Board of regents, I felt transparency was the best policy, and a lot of presidents don’t do that. I tried to be as transparent as possible with something I was thinking about, something that was going wrong, something that was going right, my plan for next year, whatever the issue was. And I usually started with a chair and maybe some places vice chair, but eventually it went out to all the committees and so forth.

You don’t want to be keeping secrets from the board of regents. You just don’t. And you don’t want to try to roll them over. They want what you want. They want respect and they want to be engaged, and if you disrespect them and you don’t engage them and you keep secrets, it’s not going to work out in the long run. And people don’t understand that. A lot of people haven’t worked with boards in a constructive way, a lot of academics. They understand the need to consult the faculty, which is crucial, but they don’t understand the need to consult with your own board of regents. And I may have said it, but I always said I never lost a vote in the board of regents, and the reason for that was not because I was always right, but that I could always count. I came close on one or two occasions when a regent surprised me with his or her opposition — but by bringing them in, I know what I can move and not move, and I wasn’t fond of heroic statements where I lost the vote. I’d rather pull it down and try another path or just say, well, it’s not going to be here.

I used to give speeches on this topic, so I’ll give you one last example. I always said the unwritten constitution was as important as the written one. Presidents have all sorts of power; boards have all sorts of power. One of the key things is knowing when not to exercise it. Probably it’s written somewhere the president could be the chief admissions officer or make financial aid decisions or even overrule the faculty on tenure. That would be

genuinely stupid, inappropriate, and it'd probably reach the wrong decision. And boards can do virtually anything — they can change their own rules — but they shouldn't. So, I think that having a commonsense approach to these things — and I wrote about this recently for a volume by Paul Trachtenberg and Gordon Gee that's due out soon, I wrote a little chapter. But in the context of delegation, but knowing when to play the trump card — which, by the way, you can't play all the time or the place goes to hell in a handbasket —

07-00:37:31  
Burnett:

It ceases to be a trump card.

07-00:37:34  
Yudof:

Trump card being "I'm in charge around here, who do you think you are?" I think that's extremely important. It's based upon — I guess maybe whatever peace exists in the world is also — a certain amount of self-restraint and not pushing your authority or even power to the limit.

07-00:37:55  
Burnett:

Yes, walk softly. What you've described in a leadership style is an active search for the right kinds of information from the right people, and that's not necessarily in the official hierarchy, so that's a process that you learned on the job, that when you started with an organization you would gradually begin to feel out who really knows what's going on at facilities, and then you would develop those contacts. And basically, as a leader, it's less of an active decision-making, pushing things forward, but more of a reception of what's going on and guiding it.

07-00:38:42  
Yudof:

I think it varies. I think in general what you said is true. I tried not to have an abrupt style of leadership and just try to issue orders. I do think that's right. I also felt that eyeball to eyeball in my office with the appropriate people was really the way to go, instead of only reviewing paper. I mean, I like paper. I'm a lawyer; I like to actually see the proposal or the plan for the new building or whatever, but I thought eyeball to eyeball was very important, which is tough when you have twenty-some regents. But you can do it by bringing your vice president for communications in, or your student affairs vice president or your chief business officer or whatever. Sometimes when I pushed in that way, not that often, but I was utterly convinced that we had to move in this direction and there was resistance, I would at the end of the day say I made a decision. I can think of two like that. One was on the pension funds, where I finally overruled my own people, and it was at some cost, because they had been very courageous in how they dealt with it. But I felt —

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Burnett:

This is at UC or at — ?

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Yudof:

At UC. I felt it was unfair to low-income workers. I didn't get any credit from AFSCME for that, but that's why I vetoed it, and that reflects my upbringing,

blue-collar family and all that. And the other was the Blue and Gold program at UC. I would say those were the two priorities. At Texas, I would say there was a lot of resistance to the accountability, and I pushed that. There was a lot of resistance to the Collegiate Assessment Exam, and I pushed that through. There was not much resistance to the research initiative because almost everyone saw the gravy train coming their way. But there were times when I just said we need to do that. So, I would say it's a mixture of the two. I don't know. Other people will have to judge. Maybe I didn't use that authority often enough, that sort of top-down authority, but that's the way I saw the problem.

07-00:41:15

Burnett:

Well, is it perhaps something like when you develop these communication channels and you understood the way things worked, it would also allow you to identify sclerosis? Because I think you are a strategic leader, so you have an idea of where you would like to go with the university, and you could, by communicating with the various departments and understanding there's stuff that's just not moving in a particular area as much as you need it to or as others need it to.

07-00:41:45

Yudof:

Yes, and I think that's right. By the way, it's not easy to fix that, because universities left to their own devices will fire no one, they will just wire their way around them and double the salary by hiring someone competent to do what is not being competently done. And that caused some resentment. One of the things that caused resentment was I had a two-day rule. My predecessors, at least some of them, were famous, could take two months to answer a letter that we got, and I felt it was important to do it in a timely way. So I had a forty-eight-hour rule, and I sent them threatening emails. They didn't like that. And I could tell who wasn't paying attention to the paperwork. And some of them were very good people. It wasn't just people who weren't doing other things weren't doing this, but they were busy or they weren't paper people or whatever. So I did that, and I found it, in general, hard to get my vice presidents to move ineffective people out. And maybe I should have been tougher on that, but you hesitate to think you understand all the permutations within a department.

I should also say one risk of the way that I view the job that I had to deal with is the people who should come to the assistant vice president for something wanted to come to the president to air their views. You can't run the whole university yourself, that's why you have delegation. It became particularly difficult because particularly AFSCME, but to some extent a number of other unions, they really wanted to talk to the boss. And I could really understand that. In fact, when they didn't like what I was doing, they wanted to talk to the chair of the board of regents because the idea there, if you can persuade that person, you have someone who really has the authority to make whatever decisions they were pushing for. But you can't run a university that way. There are twenty-some labor unions, not to mention all the student groups,

faculty groups, and so forth. You couldn't do the job. If Governor Brown approved every out-of-state travel request of every professor in California, he can't do his job, which is to be governor of California. So, I had that policy mainly for internal purposes, but I had to be a little bit leery when those on the outside wanted to skip over the whole hierarchy and come right to the president.

07-00:44:35

Burnett:

Well, there's much more to say about that. We're getting a bit ahead of ourselves in the timeline here. But I wanted to ask you in general about leadership, your experience, and where you got some of this formation, because as you said, not every academic develops this kind of understanding. You moved in many circles fairly early on. Is that a fair thing to say, that you had experience in the private sector and encounters working on these big cases, and you understood other kinds of cultures, other kinds of domains, or is that a stretch?

07-00:45:16

Yudof:

Well, that's true. I think I was a slow learner, but I did learn. I was not neurotic about it, I don't think. Maybe others think so. I celebrated my fortieth birthday after I was dean of the University of Texas Law School, and I made plenty of mistakes. I came up with a great scheme to increase the endowment of the law school, and I forgot to consult the head of the Law School Foundation, and he called me. So I made a lot of errors, but as the adage goes, out of bad judgment comes good judgment. I think that's true. That's why I think sometimes it is difficult. We have business people and military people who are terrific leaders. We have some who haven't done very well. Just like you have academics who are terrific leaders and some who are, in my judgment, pretty poor. But I felt at the end of the day I knew how universities worked, with all their foibles and all the shared governance and all the student groups and the staff and so forth and so on. I learned that very gradually over time. When you're dean of a major law school, you're almost like being president of a small institution. You do a lot of things yourself, and you're consulted. It's almost better preparation to be a president or chancellor to be a dean than it is to be a provost.

On the other hand, when I became a provost at Texas, I learned a lot about the culture of the rest of the university. I used to joke about it, that if you were a liberal arts college, they reveled in being mistreated, and when I didn't mistreat them they didn't know how to handle it. Others — the engineering departments felt if their pay was \$200 behind Wisconsin — this is at Texas — they were being brought to their knees as an academic department in the average salary. So, I learned a lot about the other disciplines. The architects are different than the engineers, and the physical scientists are different, and so forth and so on. So, you learn a lot about the different disciplines. And really, there are marked differences. There are political differences, there are organizational differences. If you're department chair of electrical

engineering, they really covet that position, want to stay on, and maybe hope to be a dean of engineering someday. In many of the humanities, whoever gets the short straw is the chairman that year, and often they want to leave the job as quickly as possible so they can get back to teaching their classes and writing their books. And I could go on and on. They have cultural differences, and the haves and the have-nots and so forth. And I learned a lot about that. It's really the gist of my program at Texas for the research endeavor was based upon what I did as provost. And by the way, as provost, part of my accountability, I made each college do a report to me on what had happened that year, where they were, and the dean had to come in and defend his budgets and his activities and the college's activities. So, I listened to discussions of why they had difficulty recruiting or what the scientific achievements were or the social science achievements, and I learned a great deal. So, I would say that's true.

I did move in other circles because I was a lawyer involved in some big cases. I didn't really move in corporate circles. I was very briefly on a corporate board. I'm not a corporate type. But I had had exposures to legislators, even as dean of the Texas Law School, and that continued because I had these relationships. And sometimes that was annoying to other people, like when the lieutenant governor, Bob Bullock, who gave me that gavel up there, he told me, "Mark, I'm giving you a new building," bypassing the whole university's legislative process. That was not popular, but I got the building. They always said of Joe Kennedy that he was a terrific Securities and Exchange Commission head because he had done all that stuff, he knew where to look for it. That was sort of my career. I had spent so much time trying to get around senseless university rules I could detect it in others.

07-00:50:22

Burnett:

Well, I think that's a valuable insight. So it's mid-2007, and you may have been aware of the rumblings at another major university system in another state. When did you first become aware that there was trouble brewing, let's say, in the University of California system when you were at Texas?

07-00:50:53

Yudof:

Well, I guess there's two things. I read the newspapers, that's all, and I read that there was a big to-do, much of it, in my opinion, now that I've learned more about it. You'll consider that the Dynes administration was concealing payments to professors and others, withholding information and not putting it out to see the light of day. I didn't know it was misconceived, I just read about it in the *New York Times* and *Wall Street Journal* and in the *Chronicle of Higher Education*, and so forth. When President Dynes had been appointed, I didn't know there was any trouble, but I did get a call from a search firm, and that was my first year at Texas, and I said, "Are you kidding? I barely unpacked my bags. I'm here at the University of Texas. I'm not leaving after one year." And by the way, years earlier I had been called by Berkeley—again, a search firm. Doesn't mean it was serious. And I declined then to be

considered because I thought the job was too contentious — something that hasn't changed. Once, I told my mother, "Mom, I'm chancellor at Berkeley," and she said, "That's great, son," then I'd actually have to do the job for the next seven years, so. So, the first inkling I had, I guess, was from the newspapers, and that was around the time that I put together the research initiative, which, by the way, James Huffines, then chair of the board, was a major factor, and he wanted some sort of signature program too. And as always, we agreed and we got together and we did it.

07-00:52:50  
Burnett:

Sorry, that was when? When did you put together the plan?

07-00:52:53  
Yudof:

I don't remember the exact date, but maybe 2006 at Texas, something like that. So, it was in the aftermath of actually having read about California. It actually influenced it. There were two ironies in this: one is that I ended up at the institution from which I was trying to steal professors, and I ended up at the institution that was trying to get the rest of the management contract for the Los Alamos National Lab.

And then — and I don't want to give you names, but as the Dynes administration, or at least his responses to this crisis of not revealing all the financials and payments to, I don't know, physicians, professors — much of which, by the way, was part of the practice plan — I began getting calls from the University of California indicating some dissatisfaction at the pace with which President Dynes was moving. Not asking me to do anything, but I did get some calls. And then later on I began getting other calls, which were more part of a recruitment thing, and I also had a lunch or a drink or something at the Four Seasons in Texas. Someone flew in to see me. Not a member of the board of regents.

So, by '07, '08 — again, I had no role in it, and I really didn't have any knowledge other than what I read — it seemed likely that the University of California at some point, not clear the exact date, was going to make a change in leadership and that at least in part, or large part, maybe, it was tied to this alleged scandal.

07-00:55:12  
Burnett:

And I think Dynes announces that he is stepping down in August of 2007, and then there's an interim unofficial person, Rory, who is put in to actually kind of run things for a while.

07-00:55:36  
Yudof:

He's sort of the executive —

07-00:55:38  
Burnett:

Wyatt. And so, there's this kind of limbo period as they're trying to adjust to what's happening and trying to make a decision. So that's why I asked you about your style of leadership and why you would have been attractive to the

regents, who do eventually make an offer to you in 2008. Can you talk a little bit about the process for you? From your perspective, what happened?

07-00:56:16

Yudof: Of my recruitment, you mean?

07-00:56:16

Burnett: Of your recruitment, yeah.

07-00:56:18

Yudof: Some of that is confidential, I have to tell you.

07-00:56:20

Burnett: Okay.

07-00:56:23

Yudof: I had the feeling that they wanted a good manager, and their perception was I fit the bill as a good manager. To some extent — I don't want to overstate this — but at least there were allegations made that too many of the decisions were now being made at the board level because they didn't trust President Dynes and his administration. Even though the board was moving to push President Dynes to move on, there was a concomitant critique of the board that was out there, a challenge to its legitimacy. And in general, it is a bad idea. If you don't like the CEO, you fire him. That's true of a bank, that's true of a university, a nonprofit. You don't try to run it from the boardroom. That's just not the way. It never works well, in my opinion. So, you get a new CEO until you find one you like and you respect, and you want disclosure and you want to review the big decisions. But you cannot literally run a complicated university from the boardroom, or a complicated corporation or anything else, or a museum, for that matter.

I think the perception was, on their part, that I was a long shot, and I think that's true. I've often wondered why I did. Peter Schrag once asked me, "Do you regret making the decision?" And I finally decided no, I don't regret it for a variety of reasons, but it was a fairly tough five years. I was sixty-four years old. Every year, they were setting aside deferred compensation. I have no doubt — I may be wrong, it may be personal hubris — I had no doubt that the board would have matched whatever salary was being offered by the University of California. Plus, Texas didn't have an income tax, which would be 5 or 7 percent of your gross income. And I knew the players. I knew the governor and I knew the former governor, the comptroller was a personal friend, and I'd hung around many of the legislators for years and years, and I could go on and on. And I knew the alumni and the movers and shakers in Texas. I'd been chancellor six years, or was in the sixth year, and my plan was to stay another year or two and then go back to the University of Texas law school. I was pretty happy as a law professor, and I probably get a year to retool to teach, and I teach my law classes, and eventually I would retire. So that was the plan.

I think what influenced me, without going into all the details, was it was the great University of California. In my opinion, still to this day — most people would agree — from an academic standpoint, a research standpoint, it was the best public university in the world. It was better than University of Texas or Virginia or Michigan or wherever, and I thought it would be a wonderful thing to have such a talented institution. And it was in that respect. Wherever I was, I'd walk around a corner and I would be genuinely amazed at what the students and the faculty were doing. So that was one part of it.

I also thought — and I was sort of into a rhythm at Texas — I thought it would be challenging. I said to friends who tried to persuade me to stay in Texas there was one more mountain to climb. I was thinking of a large hill. I didn't realize with the Great Recession that it was going to be Kilimanjaro or Everest or something like that. So, I thought that would be good. I tried to answer all the questions. I tried to get answers to my questions in the process, and I felt that they had a lot of management problems, they had too many people. But they had hired someone named Katie Lapp, who's now at Harvard, the chief executive VP for business there — very talented woman — and she had already started most of the reforms. Reducing the number of employees and dealing with certain facilities issues and bonding issues, and was doing it very capably, so I felt like it was a management problem but it was doable. And I was well aware of the shared governance. I didn't know quite how it worked at the system level in California, but there were surprises later on, and I would say the chief surprises were when you have a board that is so large, board of regents, it just operated differently than the boards in Minnesota and Texas, which were much smaller.

And we had our crises and issues and all. But it's difficult to manage. It's not an ideal board size when your total membership is in the mid-twenties or something like that. So that was one surprise. The second surprise, I guess, was the labor unions were friskier. And I had been in a really heavily pro-labor state in Minnesota, but I didn't think people would protest at my home and track me down when I gave speeches. The level of contentiousness and so forth was much higher than I expected. The only surprise from the faculty governance — it was not much of a surprise — but my experience at Texas was that the real power of the faculty was in the faculty senates, campus by campus. And the faculty senates do have power at the University of California, but for historic reasons, the overarching entity is the faculty senate at the system level. I had never dealt with a body quite like that that represented all the campuses. It wasn't a big problem for me, but it was different than what I expected. And then of course the Great Recession. And I didn't know about the pension plan, or at least I hadn't focused on it, so I didn't know that our budget would go down a billion dollars and that we'd be billions and billions of dollars in the hole on the pension and would have to reform it. So, there were a bunch of surprises.

07-01:04:04

Burnett:

Because it is complicated, we can sort of treat things both chronologically and kind of each major thing one by one. But going back to the initial offer and acceptance, is there an element of — because it clearly wasn't the money. You could have stayed —

07-01:04:26

Yudof:

We should explain that to the newspapers. They're still making inquiries about my pension, and I sort of asked a reporter, "You hold a great job. Would you move without somehow improving your life?" But apparently markets are incomprehensible.

07-01:04:44

Burnett:

What I meant to say is it's not just money, and there were elements of the job that were less attractive in the sense of some of the things that you outlined, never mind the things that would come later, but that it was going to be a challenge, it was going to be difficult. So was there an element of service to it, of getting "the call?"

07-01:05:07

Yudof:

I think it was partly an element of service. It was partly an element of, "gee, I'll have something different to do next year," and it was an element of "holy cow, this is the University of California!" I would say there were elements of all that in the decision. But of the previous roughly thirty-seven years, I can't remember, but like thirty-one or thirty-two had been spent in Austin, Texas. That's where our friends were, that's where our synagogue was, and unfortunately, we sold our house when we went to Minnesota. But it really was home. And there was some dislocation. When I was in Austin, I worked in a historic landmark building called O. Henry Hall, and O. Henry had been there once when he was tried for thievery or something. He didn't own it. He was probably incarcerated there for a brief time. And I could walk around downtown Austin and it was pleasant and I knew everyone, met the local business leaders for lunch occasionally and so forth, lawyers. One of the things I wasn't wild about was what I considered a somewhat antiseptic atmosphere of a high-rise building in downtown Oakland. That took some adjustment, too. I was a mile from the capitol in Austin, and I was in the heart of the community. And Oakland's a fine place, I'm not knocking Oakland, but I just didn't have the same feelings for it.

07-01:07:18

Burnett:

Well, it sounds to me like Texas was home for you.

07-01:07:20

Yudof:

Yes.

07-01:07:21

Burnett:

I mean, it sounds like the Texans adopted you in some ways.

07-01:07:26

Yudof:

And I tried. I went to a barbecue place in Oakland —

07-01:07:31

Burnett: And it was a Texas transplant?

07-01:07:33

Yudof: No, it wasn't very good. It was not a Texas transplant. My son says you leave Austin and you spend the rest of your life searching for Austin food. I told that to Margaret Spellings, the president in North Carolina, and she laughed. But it's true. So that was an adjustment, and then I can't remember all the episodes, but we lived in various homes. There wasn't a lot of stability in it because one of my early decisions, very early, was I wasn't moving into the president's house in Kensington, because to make it livable required millions and millions of dollars of repairs, and I just wasn't going to have that newspaper story or spend money that could go to other things. So, we were in a couple of rental places, we were in a hotel for a while, purely vagabond sort of existence.

07-01:08:33

Burnett: I'm sure you had to talk with Judy about the move and — was it, I imagine, a dislocation for her as well?

07-01:08:44

Yudof: It really was. And Judy is terrific about that. We talk it through, but she's always 110 percent supportive. She might have wanted to blow the whistle on this particular decision, and I would have respected that and I would not have come if she said, "I really don't want to do it." That would have been the end of it. Again, we were settled, I didn't need a job, and I'd done a lot of the things I wanted to do, and I was not trying to be ambassador to Luxembourg, and —

07-01:09:25

Burnett: When you make these decisions, you go all in, right? You sell your home. You're not coming back to Texas. Or was there a consideration at that point?

07-01:09:34

Yudof: No, there wasn't. Different people do these things differently. Well, I should give you the sequence. We sold our home in Texas when I went to Minnesota because I didn't know how long. I thought I might be there forever. I didn't know. I certainly didn't think I'd come back to Texas. The idea of renting a big house for years and years didn't strike me as sound, and so we sold it. When I came back to Texas, there was a chancellor's mansion, so when I was recruited by California, there was nothing to sell. We didn't have any property. And we had bought a place in Florida, which we still own, which was a getaway sort of place. And so yeah, but I think it's a mistake if you don't go all out.

I have a very good friend, a very good man, Benno Schmidt, he's president of Yale, and he was criticized — and I don't know the details — but for staying too closely connected to New York City, and I don't remember everything. But the point is, when you commit, you're committing to a community, and if

I were commuting from Texas, or I had a house in Austin that I went to for two-week vacations, you're too open to the criticisms that you're not seriously devoted to the institution, even though you're working very hard and making the best decisions you can make. And in Benno's case it was a little silly because he was a train ride away. It wasn't cross-country. But in any event, I always felt that way. And in general, until I came to California, where the house was in such ill repair and so forth, in a pretty docile way I moved into these mansions, which the public thinks is great and the gravy train, but which most presidents and spouses hate. It's too big. There's only two of you. It may or may not be in the right location. Everyone knows where you live for demonstrations. And every time they change a faucet, you get some crew out from the university that charges internally three times what any normal plumber would charge, and they put in something heavy duty because you have so many people going through the house, and then they say the president's extravagant; he put a \$600 faucet in. You'd rather have your own place and pay for your own faucet. That's my view.

But anyhow, I do think you have to throw yourself in it. And it's interesting, people are different. Terry Sullivan, president of Virginia, just announced she's stepping down. She at some point had a condo in Austin. I don't think that's ridiculous. She threw her heart and soul into that job and did it extremely well. But she spent many of her formative years, and her children's and her husband's, in Austin, so they had a condo there.

07-01:12:49

Burnett:

I think it's fair to say, and historically accurate to say, that the issue of executive compensation at the University of California was an old one and had gone back at least until the early nineties, when David Gardner retired with a pension that had just started paying out as tuition was beginning to rise. There were crowded classrooms, there was rising student debt, and so there's — the big word is “optics,” right? And the press gets a hold of this, and especially the *Chronicle* is now coming out with starting to publish university salaries as part —

07-01:13:30

Yudof:

And *Sac Bee* does that. Yeah. I don't know what to say about that. They have a limited understanding of the world. What I was paid, to be honest, was less than I would be paid as a senior associate at a law firm in Houston. I'm talking about the University of California. That's just flat-out true. And if you took the taxes into consideration, the fact that Texas would have matched the California offer, I'd have made probably more money in Texas, long run, because I didn't get a raise in five years, because the optics were never considered to be good. At the exact salary I started was the exact salary I ended up with. Was I well paid? By my lights, I was. I'm not denying that.

07-01:14:15

Burnett:

You took a cut, didn't you?

07-01:14:18

Yudof: I don't think I took a cut from Texas.

07-01:14:20

Burnett: Oh no, but you took a cut at UCOP [University of California Office of the President] —

07-01:14:21

Yudof: Well, I furloughed myself 10 percent, and the people who were criticizing me, I had furloughed 4 percent, and got almost no credit for it. It was the only progressive furlough of any of the state institutions that I know of, at least. All the rest were flat. Everyone gets the same. I just don't know what to say. It's Wonderland. When I talk to these reporters, I feel like saying, "You've never heard of markets?" I feel like saying sometimes, "If the *New York Times* offered you a job, it's a better newspaper than yours, so would you move for a big pay cut? Would you negotiate your salary, would you negotiate your retirement?" Part of the problem is they're young, they never think about retirement, and their world does not include markets, because they're at the low end of it. So, I don't know what to say. But my friend Michael Drake, I think his salary at Ohio State is three times what we paid him to be chancellor of UC Irvine. And he's the same man. He's a brilliant man, a very good leader, and he's worth it at Ohio State. That's the market. The market was depressed.

07-01:15:34

Burnett: Well, one of the things that happens, too, at that time is executive compensation is going up at private universities, and it's tied to their fundraising capabilities. So Judith Rodin at Penn and at a number of other institutions there's higher salaries that's coming with an assumption about a rainmaking capability, a fundraising capability, a development capability. And at the University of California, historically it had been the state that paid for these things, and there was considered to be —

07-01:16:04

Yudof: Yeah, I think there's something to that, but I think there's just a lot of envy and why should you be paid more than I am? I'm, whatever, I do a great job as a staffer here or there. I think there's something to it, and it's a public — and look, the optics are never right. I don't mean to be defensive, but tuition is often going up; the state budget is often going down. Even if that's not true, someone is going to say, "Wait a minute. You're trimming the art history program at Santa Barbara. How dare you do that and give yourself a 3 percent pay raise?" That's always true. In other words, you can find a counterstory, or you can run a story of some student who's from a very poor family and is just scraping by when Mom and Dad make \$25,000 and so forth. I don't know what to say. I'll be truthful with you: in the chancellor searches I lost a lot of good people based on compensation. I could not get them.

07-01:17:13

Burnett:

I think the press — because executive compensation is a perennial issue in the press, and articles I've read recently — since you left, there were some articles about executive compensation at the University of California. And they actually mentioned, of these positions that were high paying, most of them were at the medical school, deans of particular [medical specialties], and if you want the very best for that institution, which is the very best, you have to pay the market rate.

07-01:17:47

Yudof:

Right. I'm not saying we don't overpay some people. Far be it from me to say that. But these people are in demand, at least the best of them are. We've lost people, and certainly chancellors. And by the way, it's not just private universities, it's publics. Henry Yang, a very distinguished chancellor at UC Santa Barbara, was chair of the AAU, the big association of the most prestigious universities. He was at that time the lowest-paid member of the sixty schools. So, we're not just talking about Harvard and Chicago and Yale and Penn and so forth, Stanford, we're talking about Illinois, and we're talking about Indiana and Ohio State and Wisconsin and Texas, and I could go on and on. Florida.

And I think, by the way, it's a really odd thing — you may not want to hear about this — it has a lot to do with the salary scandal. I think that a big chunk of it was just normal incentive pay for physicians, which you have to do because all the other medical providers do it, so forth. How many patients you saw, did you treat them right, was there satisfaction rates, did you not mess up their IVs and cause problems, and so forth. But the artificial downward pressure on the wages, I think, led some to be more secretive. So, the age of really criticizing executive salaries really blossoms *after* the scandal of the mid-2000s, because in an effort to disclose everything, then the populism that drives this kicked into full gear. I still think the board should always approve the salaries. I still think you need to be transparent.

But realistically, it led to a backlash when many of the salaries [were made public] — so if you're an employee and your employer says, "Gosh, I can't pay you that salary, but I'll tell you what I'll do, I'll buy you a life insurance policy," or "Here's a car allowance" or whatever, that is a way of circumventing those rules. And by the way, when I heard about all this at Texas, I put in new rules for our board of regents. On the other hand, by the way, I think it's silly to think the board of regents, with 180-something thousand employees, should improve them one at a time. And I think, like on the incentive programs today, there's a board or something that makes the decisions about all of this, about physician-incentive plans, and I don't think the board should be responsible to look over 22,000 medical salaries and try to say, "Well, why did Dr. Snodgrass get his 6 percent raise and Dr. Johnson only got a 6.2?" It just can't work that way. You just can't govern that way.

07-01:21:35

Burnett:

A recent — was it last year, and the Senate in Canada was audited and they discovered \$1 million in irregular uses of funds to pay for trips by the senators, and it was too lavish or whatever. The \$1 million was discovered with a \$24 million audit, and so I think there's a certain amount of —

07-01:22:03

Yudof:

Yeah, no one ever talks about that. But, you know, we need audits. I'm not denying that. You never know what you're going to find until you get in there. So it is complicated. I was never at a place where it was as salient as California, and that's an interesting — and it may be that you're right, it's the history of a public university, well-funded. But I can tell you, even today, the salaries, not so much the docs or the Nobel laureates or that, but the leadership of these campuses. And that's one of the reasons why so often they go internally. We have good people internally, so I'm not knocking them, but it's hard to go outside, often, and get someone who's willing to work at those salaries. I know law school deans who were paid approximately what I was paid as a president of the University of California. That's just true —

07-01:23:07

Burnett:

And coaches.

07-01:23:07

Yudof:

— but no one asks that. And then they ask the magical question: were you worth it? Well, only two answers to that: no, which is not, probably, the answer you want to give, or yes, I was worth it, in which case you're a self-aggrandizing grandstander.

07-01:23:23

Burnett:

Well, Peter Schrag wrote an article in 2007 saying that the executive compensation was real and that it was about \$20 million out of a multibillion-dollar budget. And it wasn't such a big deal compared to the compensation at comparable universities. But he did say, I think, that it was symptomatic of a problem with bureaucracy and that there were perhaps unnecessary layers of bureaucracy. Or are those two things disconnected?

07-01:24:01

Yudof:

No, I think they're connected. Peter's a very smart guy, and he's probably right. The bureaucracy gets a hold of these things, and they just run with it. I don't really know, but my guesstimate is that President Dynes was blindsided that no one had ever come to his office to discuss this whole set of issues and that he personally was not aware of how the \$20 million was being distributed or so forth. And the bureaucracy gets control and they do things.

That's another thing: I always thought that sometimes the bureaucracy needed to be reined in to save the real bucks and that some of the rest of it was penny ante that was making the newspapers. You want to know of mis-spending ten cents in my view, but the really big bucks were elsewhere in terms of bureaucracy. You talk about optics, there's also — I don't know what to say

about it, but the individual events, the optics are something newspapers want to report on, and that's just true. We have, at UC Office of the President, roughly fourteen, fifteen hundred employees, so I think we had a holiday party, and I don't remember, we did it at a site, and it may have cost something like \$8,000 to rent this for 1,500 people and their families, so it was roughly five dollars [per person], and we got roasted in the *San Francisco Chronicle*. But the biggest part of the roast was this was where Jerry Brown had his wedding reception. So how can the University of California afford —? And no one ever said, "Would you spend five dollars a person on a Christmas party and maybe another five dollars for some sliced turkey and so forth?"

07-01:26:08

Burnett:

Well I was going to say, in the more recent articles since you left as president, when you took the total number of the executive compensation and then you divide it among all of the students, you end up with a free pizza in the fall semester and the spring semester.

07-01:26:28

Yudof:

Yeah, that's always true. Again, we should always do the right thing. And by the way, I'm the biggest fan and the biggest critic of the media. I teach the First Amendment, I will defend them to the death and all, but sometimes they say silly things, and that's tolerable, because sometimes they say very important things.

07-01:26:45

Burnett:

Right, exactly, and it's another layer of our democratic accountability, absolutely. In Richard Blum's oral history about this period, he describes the scene before you arrived, and he described the University of California system as balkanized. There were these silos of operations that led to duplication, and that people who weren't managers were managing, and that the University of California needed a dynamic strategic vision, and so he and others found you. So, they saw in you someone who was going to have a strategic vision, and that's why I asked you about this time at Texas, that there was this — you had developed a reputation at Minnesota and at Texas as someone who could lead with a vision. So, two parts to this: one, what was your encounter with, not just the culture, but structure at the UC system, and how did you develop your strategic vision with respect to it?

07-01:28:01

Yudof:

I can say a couple things about that. I think Dick Blum was right about the balkanization. And you could see it because everyone wanted to have their own chief of staff and their own communications person. They didn't trust other people to handle any of this, so it was awfully top-heavy. Again, Katie Lapp, with Dick's encouragement and others on the board, made great strides, so I don't want to overstate my role in any of this. And so yes, and I couldn't believe how long it took to get things done. It was pretty insufferable, and the fact that many of the bureaucrats had learned that they could outlast the president. There were also some very good people there. Some people were

mad at me because I did criticize the bureaucracy, including one of my future chiefs of staff. She was incensed. But there really was a problem, in my view. And saying bureaucracy's a problem, that's part of Max Weber, right? It's not that they're individually evil or unintelligent; it's that in combination things don't work out well sometimes, and sometimes you need a bureaucracy. So, I continued that paring process and tried to restore some leadership at the center, although by inclination, I believe in subsidiarity or decentralization. I never felt I was smarter than the campus people. I felt I wasn't on the ground. So, I was not one who wanted to centralize authority, but there's a big difference between consciously empowering people at the local level and helping them and indifference and no leadership. So that's one part of it.

Another part is I felt the job was different than at Texas and at Minnesota. There, I tended to gravitate toward the academic priorities. At Minnesota, I felt that Minnesota had missed the genetic revolution; that the journalism school, which was once great and now was great again, had lost its way; that the campus was dirty and people didn't enjoy being there. But basically, my priorities were academic priorities — and some for the students, not just the faculty. And at Texas I felt we needed some initiatives, and some were academic related, the research initiatives; some were accountability initiatives; we needed a strategic plan and some other things. I felt like at California, the strategic problem was to get out of the way, that the real great work was being done on the campuses by the students, the faculty, the staff, and that we were perceived, sometimes incorrectly, sometimes correctly, as an impediment to their doing their jobs as well as they could do them. So, it wasn't that I sat back and said to myself, now let's see, where is UCLA and San Diego in the computer science era or wireless era or astrophysics? It's such a great university from an academic standpoint, my attitude was always the leadership, the faculty, the grad students, they'll figure this out. I'm not worried about this. They know the directions they need to go.

So, it was figuring out a value-added approach. What could the system do, the Office of the President, that would add value and coordination and get out of the way of it? And I did some things like, believe it or not, the continuing legal education program was at the system level. That's ridiculous. We don't have any professors, we don't have a campus, really. So, I can't remember where I put it. I think I went with UCLA. And then we had a study abroad program, which was supposed to be economies of scale, which had not worked out. It was run from the system level, and I put that I think at Santa Barbara. So if you look at some of the early moves, I was actually shedding functions of the office of the president rather than trying to add functions to that. I thought we'd had years and years — it was sort of like a museum of relics: since none of these centers of activity ever seemed to die, you could just recount who had been the presidents over the last fifty years and which were their projects which were still functioning, although largely unnoticed, but very costly. So I would say the vision was more structural, more toward improving relationships with the board of regents. Transparency. But it was

not academic leadership like, “gee, if we could manage the Los Alamos National Lab, that would do this or that for science at the University of Texas.” A very different type of plan. It also, I think, fit with what Dick was interested in. He wouldn’t want me tromping all over Berkeley or UCSF from an academic, a research, a teaching — they know what they’re doing. And I never really got into that, other than to defend them when people made criticisms of teaching loads or whatever, or the research.

07-01:33:51

Burnett:

Well, that’s I think what Richard Blum said about you, was that he saw you as a manager: this guy can manage, and he brought you in to do that. And before I continue with that thought, I wanted to remember that in the Dynes case, when you mentioned he was blindsided, one of the things that came out of the Blum interview was that the chief financial officers, as he put it, did not report to the chancellors; they reported to the provosts, and he felt like that was a structural problem. Is that something that you were in conversation with him about? So, they didn’t know where the money was going, or is that an exaggeration?

07-01:34:37

Yudof:

Well, I don’t remember, to be honest with you, but that has been a hobby horse of mine for a long time. There are a lot of people out there say you can’t have more than ten direct reports, you don’t know what you’re doing, da-da-da-da, and I always found that I needed more direct reports. The last thing in the world I wanted was an Ehrlichman<sup>5</sup> to whom everybody reported and I didn’t get to hear about any of this. So, I was flabbergasted. At Texas, the chief budget officer reported to me, the executive vice president for business affairs reported to me. How the heck am I supposed to know what’s going on? Now, having said that, they still might have been blindsided, because it isn’t always clear to me that even the financial people are aware of all these things that are buried deeply in the bureaucracy of their practices that are unearthed and then someone vehemently objects. The recent contretemps over balances, and my reaction to that is — and apparently the state auditor agrees — we could be more transparent, and that’s fine, but nothing nefarious. When you’re running a \$30 billion system now, \$150 million or whatever it is in balances is not a whole lot, and then it turns out they’re not all balances, that they are committed to various projects and they’re holding money, so you’re down to 38 million. Should you report it accurately, publicly? Absolutely. Is this a scandal? Absolutely not. The only scandal is their insufficient balances. There should be more balances for a rainy day. There were no balances. Campuses had some balances, but not the central administration very much when the Great Recession hit.

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<sup>5</sup> John Ehrlichman, White House Counsel and Domestic Affairs Advisor to US President Richard Nixon, 1969-73.

07-01:36:26

Burnett:

I may be going a bit backwards in the sense that we're talking about these structural changes that you made, but this is a theme that I want to bring out in this session in particular, because you were dealing with the Great Recession. This comes during your time there, and it's significant? So, there's a \$16 billion deficit for the state of California, and there's close to a billion-dollar deficit for the university system. Can you talk a little bit about how that unfolded for you? We'll pick it up next time, but can you just introduce us to when this dawns on you, what the reaction is, when the financial impact of it became clear to you and how you reacted to that?

07-01:37:23

Yudof:

I don't remember the exact time, but it must have been early in the first year, the academic year, 2008 to 2009. We were beginning to hear things from the governor's office, Governor Schwarzenegger and others, that there would have to be massive cuts to balance the budget. At that time, I don't believe there was any prospect of a tax increase. The people didn't want it. They were suffering. People were losing homes, and there was unemployment and so forth. So, I would say it was pretty early on when I said, "What am I doing here? This really is bad." And then it took a little while longer, but we reinstated employee and employer contributions to the retirement plan, but Dick Blum and others on the board had been on this for years — as had the faculty, interestingly enough. And at the very time we were cutting roughly a billion dollars out of our budget, we needed to put another billion dollars a year into the retirement plan to try to stabilize it, even with the employee contributions and the — if you wanted to stabilize it, you needed a lot more money than that would generate. Fortunately, you had time to do it. The lesson is when you have nineteen years without any contributions, the markets don't always go up. I could have told them that. And the board had put its head in the sand, and some others did as well.

So, I would say it was pretty much in the fall of 2008 that it hit me how desperate it is. And Katie Lapp and I decided we needed some breathing room. This really hadn't been done, I don't think, since the 1930s. We needed time to figure this out, and seeing what piggy banks we could raise and what additional funds to get and what could be cut without compromising the academic programs and losing the best professors and all that. So, we came upon this idea of a furlough. There were other state agencies which were — I don't remember the sequence, but either considering it or pulled the trigger on it. I think we were one of the first to do it. And gosh were there screams! There were a lot of people who understood it, but some people felt very entitled: how dare you? I don't know what to say. But if you spent two cents on some program they didn't like or you gave a raise to Professor Johnson in the art history department, "why couldn't that be used to pay down the deficit?" Well, there wasn't enough money is part of the answer, and another part of the answer is we need Johnson and we need the cuts. So, it was in the fall of that year.

And the understanding of our budgets was poor. One of my first meetings of the board of regents, I explained the budgets to them because in their previous analysis they had mixed together restricted and unrestricted funds. Well, you can't do that, because you can't take the money that National Institutes for Health give to UCSF for cancer research and pay for a history professor. You can't do it without going to jail, so you really have to understand both your restricted and unrestricted funds. It was not clear to the regents, that's all I want to say; although it may have been clear to Dick [Blum] — he was on top of this — certainly to Katie [Lapp]. But I did a whole presentation [for the Board of Regents of the University of California] — it's historical — where I stood up and said, "This is how budgets work in universities, and you can't treat [restricted and unrestricted funds the same way]." This was the same mistake they frequently make on these free balances. You get a grant for \$100,000 to do a library project of some sort, you only use twenty-five this year, and the other seventy-five goes into an account. Sometimes that account is at the Office of the President, and sometimes it's on campus or elsewhere, but it doesn't mean that we can take the \$75,000 and give it to the sociology department. So, the understanding of the budgets was weak.

Dick [Blum] had made giant strides in understanding our capital budgets, which were also were pretty screwed up. They gravely underestimated our capacity to support new buildings, which was a problem because we needed new buildings and we needed to fix the old ones. Fortunately Katie was there, so we had a valuable asset, but I never felt she had all the support she needed, just to be honest about it. We needed more people with her skills. And we acquired them. She hired them. That was the situation. So the question when I came to work in the morning wasn't the question you hope to ask, which is: how do I really make the university a better place today? How will the students be more comfortable? How will they graduate sooner? How can we enhance their experience? How do we recruit talented professors and programs from around the world? The question was: how do we preserve the great University of California when its budgetary circumstances were really dire?

## Interview 8: October 12, 2017

08-00:00:32

Burnett:

This is Paul Burnett interviewing Mark Yudof for the University History series. This is our eighth session, and it's October 12, 2017, and we're here in a very smoky Bay Area at the University of California, Berkeley. Last session we started to talk about coming to Berkeley, what you encountered here, and we talked around some issues, but we didn't really underscore the fact that this was a crisis at the university. Just to give some context, when you came in, there was a University of California senate report with recommendations of how to manage the crisis: to raise tuition \$3,000 immediately, consider the privatization of parts of the University of California, and basically some conclusion that the Schwarzenegger budget would force the University of California to raise tuition to \$18,000 a year or fall apart. So that was kind of what you were looking at. Can you describe how you encountered that and how you were going to deal with this crisis?

08-00:01:54

Yudof:

I should start by saying I didn't realize, when I made the decision to come to UC, that the crisis was as deep and as monumental as it was. I think my family thought I was crazy. I had a good job. In spite of all the news reports, the compensation was pretty much a wash with what I was being paid at Texas, once you take taxes and everything into account. So from a personal standpoint, it may not have made any sense. I felt like I wanted one more mountain to climb, and I was very attracted to the fact that this was the great University of California. And if you're in the public university business, being a chancellor or president of the system is a monumental thing to take on and very gratifying. And I never lost sight of that. The students are great, and the faculty won Nobel Prizes and won Pulitzer Prizes. It's a terrific place from the standpoint of scholarship, ingeniousness, and creativity.

I came in, and then lots of bad things began to happen. The budget was cut, give or take, a billion dollars. Then, as I think I've mentioned, the pension plan was in crisis because there had been no employer or employee contributions for nineteen years. So it was clear that at some point in the future, unless we did something, we'd run out of money to pay the people who had earned their retirement, and obviously compromise the recruitment of additional faculty and staff. It was really a multibillion-dollar crisis. The state budget was cut by, I don't know, 25, 30 percent, and we had to figure out some way to pump more money into the retirement plan. Those were the immediate things.

When you have a crisis, my experience in education is they blame the authority who's closest. So the poor dean of liberal arts at Columbia in the sixties, he was viewed as guiding President Johnson's Vietnam policy, [break in recording] was blamed for the Vietnam War. And as I had to work out the solutions, everyone was blaming me. So we did a number of things. We did

cut the budget some. Cutting the budget at the Office of the President was already in process; I want to be clear. I supported it, but Regent Blum, who was then chairman, and Katie Lapp, who was the chief financial person, and many others, had worked on that. We were letting people go at the system, we were reducing the campus budgets so that we largely left it to the chancellors to manage that with the faculty governance and other groups. The labor unions, with whom I had always had very good relations historically, coming from a union family, were mad at me because they wanted a contract, as if I was inventing the crisis, and I wasn't. So I had to be firmer than certainly I would have been in more fulsome times.

That was the situation. We did furloughs. I got no credit for it, but we did a graduated furlough system. The idea was that the lowest employees would have a 4 percent reduction in their compensation, and the highly paid people, like myself, took a 10 percent cut. So the first thing I did was to cut my own salary by 10 percent, and I don't remember the cutoff points, but the people making the most money in the university all had to absorb a cut. I think I did that in the summer; by September the faculty was up in arms. It had gone on too long — one month. It's political. It's just a political process. People want to cut everyone else but them, and they feel that if you're representing the low-wage employees, they shouldn't suffer, and I agree with that, but to save the place — and that became my overarching theme — I didn't feel I was in the business of vast new initiatives and spending. And presidents historically have had initiatives, and many of them work well, some did not. I just thought that was a luxury I didn't have, because every dollar I spent was a dollar that was not on the campuses, and they desperately needed it.

Tuition was a very controversial issue. I don't think we ever got up to \$18,000. I think we're even today \$13,000-plus, a recent tuition increase. But there seemed to be no choice. And Governor Schwarzenegger understood that. He knew tuition was going up. I can't say he endorsed it, but I can say he totally expected it and was not a critic, because we were desperate to pump more money into the system — although we had fulsome financial aid, with a third of all the tuition increase going into scholarships, and then later on we did the Blue and Gold program that essentially went into the middle class. We were the first to get into the middle class, but I can't remember if it was sixty or seventy thousand, and then it went up from there, which is higher than the state's median income. Tuition isn't everything — there are other expenses — but we tried to protect the poorest of the students — the first-generation, the students of color, the low-income students, and the like. I was scrambling to do that.

You don't have many friends in that atmosphere. I went to the [University of California] senate one day and said, "Look, we're going to have to do some drastic things. What's your plan?" And we went around the room, and they told me one at a time that it was my problem to figure out; they didn't have a plan. And I can understand that. You're sitting there, what are you going to

tell, the English department at your own campus that you recommended not filling positions or you recommended a furlough? I got some cooperation from the leadership there. Mary Croughan, a year into it, became the chair. She was pragmatic and understood the realities. So you absorb a lot of blows. As I say, it's better to be a Dwight Eisenhower than a Herbert Hoover, and everyone feels that there's some painless way to do it that does not involve their personal finances, and that was just not true. It was impossible to do. Our costs are in personnel costs. We were not deeply in debt on our buildings and capital cost. We provided the scholarships. But it was a very difficult time.

08-00:09:08

Burnett:

We're thinking back to that time. This is of course a question of the California budget, right? And really the collapse of the markets. I think in the air at the time was not a lingering but a revival of a kind of Keynesian countercyclical narrative that this is a crisis now and that federal government had stepped in, I think, by that point, with TARP [Troubled Assets Relief Program] and so on. And so I imagine that folks were thinking, "Can we just preserve the status quo until things come back again?" Because this is a boom-bust economy; California's like that. Were those the kind of narratives, or did everyone pretty much understand, but just didn't want to give up their personal situation?

08-00:10:02

Yudof:

Well, I can't say everyone, but I'm saying a lot of the leaders, certainly the student leaders, the union leaders, the faculty leaders — and I don't want to be global about this, but most of them were defending their constituents, as you'd expect. And maybe some of them thought it would just pass. People were urging me to borrow billions of dollars. I don't know who would lend us billions of dollars for operating cost. It was a combination. I woke up each morning saying, "I need to preserve and protect the University of California. That's my job." In another era I would have had exotic initiatives in the humanities or in the sciences and so forth, but at this point we had to hang on to what we had, and then hopefully the crisis would abate — as it did a number of years later — and California would still have that wonderful world-class platform on which to build further. I didn't know when it would end. I never predicted that it would be as deep as it was going to be. And we weren't getting a lot of help. Governor Schwarzenegger was very supportive, but he had to cut the budget. He did not have many votes — and I'm just speaking truthfully — in the legislature. Many of the Republicans had sort of disowned him or at least didn't believe in many of his initiatives. The Democrats didn't want to see cuts but didn't see how they could appropriate more money. That's just the way it was, not unlike Washington today. So that was the story.

Every time I did something, what I tried to do — and I don't know if it was successful — was not to cut the core activities, which were essential. I did reduce pay, and that was always designed to be a temporary thing. I knew that wouldn't last or we wouldn't be competitive for faculty. We raised the contribution of the employees and we put more money in from the system

level that we could ill afford, but we put it in. We looked seriously at our healthcare issues with healthcare costs are very high at the University of California. Typically the university contributes 80 or 90 percent of the cost, which is virtually unique among universities at that high a cost except the very most affluent universities across the country. So we tried to do that. We did not have a big exodus of faculty. We kept those numbers. We were threatened with that. But of course, part of the problem was, unfortunately, was that it was a national problem. So except for the very wealthiest of the private institutions, it wasn't as if the University of Texas or Michigan or Virginia and so forth were in great shape to raid our faculty and do things.

08-00:13:05

Burnett:

And even the privates too were hurting.

08-00:13:07

Yudof:

And most of the privates. I can't speak for the Stanfords and Harvards and Yales of the world. Maybe they had their traumas too. I'm sure they had some. But that's a very thin layer of private universities. That doesn't represent all of private higher education in America, because there are lots of liberal arts colleges. You know, the Gettysburg and Lafayettes of the world, and Arkansas and Oregon and so forth, places that really had great financial difficulties like we had.

08-00:13:39

Burnett:

Can you talk a little bit about the pension situation? What was your reaction when you heard the full story, and what was the explanation?

08-00:13:49

Yudof:

My reaction was: You've got to be kidding me! Markets always go up? Where do you learn that in the history of financial markets? So at one point, roughly nineteen years earlier, our investments were going well, so the regents decided there would be no faculty, staff, or university contribution. Well, that's just unsound. You keep it going. In fact, they even put — you might remember this — 2.5 percent wanted some sort of 401(k) or something like that, a 405 type of thing, looking forward to the day. And that was mandatory that you contribute to that. That would be a further cushion. But that really wasn't enough.

So my first reaction was: Who's in charge around here? Who would do such a thing? In the good times, you use that to build the endowment and to keep the whole thing going; in the bad times you weather the storm. That's what you hope to do. Well, that hadn't been done. And I have to say, on this issue, the faculty played a leadership role. The faculty always thought that it was — or at least from the time I was there, and I don't know how many years before — that it was a mistake not to have employer and employee contributions. Who operates a pension system like that? But the unions were opposed. They always thought I was paid too much, I was hiding the money. I won't say all the unions, but many of them. I think at the end of the day, we had pension

reform without a revolution. I think the faculty was pretty smart about it, and the staff. I met with their leaders. They didn't like it, but they could count.

08-00:15:35

Burnett:

Right. Well, was this the 1999 policy? Because there is a story — I think about a year later, in 2010, 2011 — there's an executive revolt. Thirty-six execs in the administration sign a letter threatening to sue the university.

08-00:16:02

Yudof:

Well, this is a sorry story also, with a lot of blame to go around, but sometime — I don't remember, fifteen years earlier or ten years earlier — the Board of Regents asked — and I don't know technically how it was done — but effectively it would have lifted the cap on pensions. They voted to do it subject to IRS approval, and for ten years or longer, whatever it was, there was no IRS approval, and the general counsel changed, and the president changed, and the administration. I didn't even know there was such a pending request. So all of a sudden the IRS said, "Oh, it's fine with us. Why don't you do it?" So the argument was that it was sort of self-executing, that the regents had adopted this subject to regental approval. And of course the approval came mid-storm. Then thirty-some people, who I think were somewhat ill-advised — that is my view, even though I have friends who signed it — said, "No, no, you're bound to pay it." And I looked at that nine ways, and I thought a number of things. I thought in a crisis, a university is entitled to preserve itself. I thought there were legal arguments that the board had not made a final approval, and there were certain procedures which hadn't been followed. But I think there's litigation pending today from people who feel that they're entitled to a larger pension because of that prior regental rule. It's hard to fault the board that passed it during the good times, but we all forgot about it. I didn't forget about it; I never knew. You have turnover; you know, it's twelve-year terms. I don't even know if there was any member of the Board of Regents who actually remembered this. The financial officers didn't know about it. I decided my job was to preserve the university and that, if necessary, we would not do it. The optics were terrible, in a terrible time, to get your highest-paid employees more and bigger pensions. And if we got sued, we got sued, and the courts would sort it out, and obviously we would abide by any court order. But here we are, sitting years and years later, and to my knowledge — there may be a pending suit, but it hasn't been sorted out yet by the courts.

08-00:18:26

Burnett:

So this is an ongoing thing.

08-00:18:28

Yudof:

It wasn't a lot of money, by the way. It was a lot of money in a literal sense — I don't remember. It was \$50 million in additional costs — but to raise pensions when you're cutting people's salaries and cutting back and doing all these other difficult things to do that for your most well-off class of retirees

and potential retirees, I just thought was unthinkable from an optical and probably from a legal standpoint.

08-00:18:57

Burnett:

And as the crisis progressed, there were some complaints about some salary increases, and that was I think mostly with the medical school, I think that kind of domain.

08-00:19:14

Yudof:

I don't know about that. I, frankly, treated the chancellor shabbily. There wasn't a chancellor that got a raise in the five years that I was president. I didn't get a raise; none of my officers got a raise. Now, when you hire new people, you need to go back to the market. We always were very low, and it made recruitment difficult. Nobody realizes that, they think everybody wants to be a chancellor and all, but I know many candidates that dropped out when I was considering hiring chancellors, because I was offering them less money than they were making at their current jobs. And some of them were deans and provosts; they weren't presidents and so forth. We got good people, but it was nonetheless difficult, and we had to be inventive about it because many people, once they heard about these salary limitations, just were not interested. There's a cost in that. There's a cost in faculty recruitment. People want to tell a terrible story that everybody's in it just for the money. No, but most people don't move to a new job to take a pay cut.

08-00:20:21

Burnett:

There were complaints about your compensation, but in the press they reported on the salaries of public university presidents, and I think Gordon Gee topped out the list at \$1.7 million at Ohio State.

08-00:20:40

Yudof:

Yeah. Henry Yang at [UC] Santa Barbara was chair of the AAU, the prestigious group of research universities. I think he was dead last among the then sixty or so university chancellors and presidents. But Henry's a good example. Henry is a team player for the University of California. He's still there, doing an outstanding job, and he stayed without any pay raise. My successor, Janet Napolitano, was able to give them reasonable raises. That was long overdue. I don't know what to say about my salary. It's still controversial. The *LA Times* thinks so. But we negotiated it in 2008, and that's what we negotiated. If they had offered me half of my salary at Texas, it would have been a difficult decision for me and my family. I didn't want to make money, but I didn't want to lose a whole lot of money. That was my philosophy going into those negotiations. There's a story you can write all the time: money is short and somebody got a raise; money is short and tuition went up. Well, it'd be a lot shorter without good leadership and without having competitive salaries and without dealing with the question of how do you preserve this great university.

08-00:22:03

Burnett:

Well, the Crash engendered a lot of anger, and this is the beginnings of the Occupy movement, and it was everywhere, that people were angry. There was a generation coming up that was told that it was going to be the first to do worse than their parents, and this sense of downward mobility, and so there was some anger. Can you talk a little bit about the experience of that?

08-00:22:32

Yudof:

Well, the anger was manifest. We always had people stand up before the Board of Regents and say, "My mother cleans restrooms and makes twenty-some thousand dollars a year, and you're raising tuition." I always took down their names and we always looked into it, and not one of them would [be required to] pay the tuition increase. Not one. But, I don't know, people have different views of that. Some people think there's a sense of entitlement. I think they were hurting. Their homes had been foreclosed upon; Mom or Dad or both had lost their jobs or had reduced pay. There was this idea that I was expected to do better in the world than my parents and grandparents. I had a lot of empathy for them. But it manifested itself in terrible ways. I was trapped in a car at UCLA during protests. I was accompanied by police officers because they were trying to physically get to me. I was chased across a tennis court to get to a waiting car. We were locked in buildings a number of times. And people are opportunistic. If you are an Occupier, if you're part of some parts of the labor movement or whatever, it's like today. These causes become aggregate causes. The students who wanted the revolution in a sense had more adherents when they had thousands of students who were deeply unhappy about tuition, who might not have been there had it not been for the tuition increase, but all of that got rolled into one. I had to have a lot of security. I went to give a speech at a Jewish community center. I was surrounded by fifty protesters, and they called radio and TV stations. And I thought, I mean, I'm giving a private speech to a group organized around religious values. But I learned my lesson. I had to — something I'd never done in my life — I had to have drivers drive me to all these places. I couldn't drive myself. I had to arrange for security. I didn't do it; I had people. We hired a chief security officer for the system. It was a serious problem. And they didn't want to listen or discuss, and they didn't just want to demonstrate. They often were physically threatening, and they certainly were bombastic in their approach. That was my reality for many years. I had to arrive at regents meetings hours earlier because otherwise I couldn't get into our own meetings. We always had exit plans. We had spent an average of \$100,000 a regents meeting on security. I would say at the height of it, a third to a half of all regents meetings were interrupted. At some point the chair read a set statement three times, that if you don't allow us to do our business, we're going to force you to exit, and that happened innumerable times.

And when I first got there, I went out and I wanted to meet with the students, and the cops went crazy because they felt that I was in physical danger, so I stopped doing that. I didn't like that. My mother said to me, when I told her

about all this, she said, “Mark, haven’t you explained that you’re an educator?” You know, I’m not president of the United States. I don’t have responsibility for the economy. I can’t tell the governor or the assembly or the senate what to do. They’re political bodies with the full range of authority that political bodies have. But somehow they felt those protests were in order. Not surprisingly, particularly ASCME [Association of State, County, and Municipal Employees], got more assertive about these things because we were unwilling or unable, really, to give them what they wanted — which probably they deserved. It wasn’t a question of what they deserved; it was a question of what we could afford. The other problem is we didn’t control the flow of money, so every time I gave a group a raise, it was the campuses that had to absorb the financial cost of that, and the question is, where would they get the money to do it?

08-00:27:18

Burnett:

And Chancellor Birgeneau’s residence was threatened. There were some fires started, and there were objects thrown.

08-00:27:26

Yudof:

You know, and that’s not our students, but it’s the anarchists who come on the campus, and that occasion, they outfoxed the police, on that one occasion. They were carrying torches and they tried to set the place on fire with the chancellor and Mary Catherine, his wife, in it. That’s outrageous. But those were more people, in my view, taking advantage of the angst on campus. And being genuinely representative of our students, I don’t think they were.

08-00:27:56

Burnett:

And there were moments in the press reports when you joined protests and you and a number of your administrators joined the students and went out with them to share.

08-00:28:14

Yudof:

We did that often. We tried to say, but it’s hard for young people to grasp, and certainly other groups had the problem. We tried to organize, they weren’t really protests, but we went to the capitol often, and we would visit the offices, and we would have a tent outside. We’d bring alums. We were student leaders and faculty leaders, and we would try to lean on them, but truthfully, they were in a tough place. The legislature was looking at dental care for poor kids versus more money for the University of California versus a thousand roads that needed to be fixed. They had their own pension issues, as you know, and Governor Brown and the assembly and the senate dealt with that subsequently. They had all sorts of issues. It wasn’t as if they were just being biased toward the University of California. That wasn’t the case.

08-00:29:18

Burnett:

When we talked about Texas, you had been there a long time, you’d had time to build up relationships with legislators. You had some strong relationships at

the legislature. Here, you didn't have time, it seems, and yet there were some allies in the legislature. Could you talk about that a little bit?

08-00:29:46

Yudof:

Well, it was hard to get many allies who would vociferously speak out, but there were some. I developed pretty good relationships early on. Darrell Steinberg was my friend, and he was pro tem, and Speaker was a good friend. I don't think it ever really got personal with members of the legislature. I spent a lot of time there. I told you my routine, you know: meet the legislature, stop at In-N-Out, come back home.

08-00:30:20

Burnett:

[laughs] That's a good routine.

08-00:30:23

Yudof:

That was my routine. So I worked hard at that, and I think it was fine. Maybe other presidents had this problem, I don't know, but it was never ad hominem, and I didn't see any personal — just like I had good relationships with Governor Schwarzenegger and his staff, and he tried to be helpful. I remember at one point he said we ought to spend more on universities than prisons and he wanted a constitutional amendment. It turned out no one was willing to introduce that in the assembly or the senate. I can't say none, because these are big bodies, but certainly with the leadership there was very little personal animosity, and certainly I didn't have it for them. I thought they were smart people trying to do the best that they knew how to do. And I did try to impress them. I brought the [UC] Davis marching band to the capitol, and we did a rendition with me leading of "Bad Romance" by Lady Gaga. I thought maybe the irony wouldn't be lost on them.

08-00:31:41

Burnett:

Is there video of this? Do we have it? [laughs]

08-00:31:42

Yudof:

I don't know. It's the only time I've ever led anything resembling an orchestra or a band, and I think I was up for the occasion, now that I think about it.

08-00:31:52

Burnett:

Supplemental material for the oral history.

08-00:31:52

Yudof:

And Lady Gaga was the latest pop singer I knew anything about, you know. So that was the story. It also is a different process. The process at that time — and I don't know about today — was very truncated. Typically in Minnesota and Texas, you had a strong chair of whatever, the education committee, or budget or finance committee, or multiple committees, they held hearings, and then they made recommendations, and then it went to the leadership and then ultimately to the full body, whatever body it was, and then the governor accepted it or vetoed it or if he had line-item authority he would line-item it. It's very truncated, because here, I spent a lot of time with the legislature, but

at the end of the day it was basically the leadership of the house, assembly, and the senate and the governor who sat down in a room, maybe over many days, and they determined the ultimate budget. It was not the normal democratic process. You hear a lot about this in Washington. I think the system is a good system if people would abide by it. These people are all elected, and they have points of view, and you have committees, and committees dig in and do their work, and they make recommendations and on and on. But it was very truncated. The endgame was always those three people that would be meeting. I can't really say, but my impression was Republicans were pretty much out of it because they were the minority party, so it was really the leadership who made those decisions. Now, they had to report back to their members, and the governor, of course, was accountable to the people and ultimately ran for reelection, but it was in a way a very closed thing. So we always waited with bated breath to see what would finally come out, because we didn't have a lot of hints from the committee process.

08-00:34:04

Burnett:

Well, I was thinking of the Blue and Gold program which you started, and it covered folks with family income — originally it was \$60,000 was the cutoff — \$60,000 family income, you pay no tuition, and then it was raised to seventy. And then there was an argument that this is kind of punishing that lower part of the middle class that is just over that 70k a year. There was a reaction to that. John A. Pérez, I think, came up with the Middle Class Scholarship. Can you talk about your relationship to that?

08-00:34:44

Yudof:

There's always a cliff effect. Some people are in, whatever, the 30 percent tax bracket, and some are in the 43. There's always some sort of a cliff. It may be nuanced, but you have to draw lines. And if everyone came for free, you wouldn't have enough money to run the university. It went to seventy thousand after the sixty — it may be higher today; I'm not sure. That was higher than the state's median family income, so it meant that more than half of all families in California would benefit from it. And it was sort of a surety program. What I learned in Texas was people who are low-income and don't have a lot of connections to higher ed, they need certainty, so what we tried to do was say, "Look, apply for your Pell Grants, apply for your Cal Grants, apply to the Rotary Club or wherever else you're getting financial support, and if you come up short we'll make up the difference." And we didn't have a FAFSA form or anything like that. We said, "Bring your parents' tax returns in." There was a problem for independent students — that's another issue. But for those that are dependents in families. And if you're below that level, you get a scholarship. We're not going to find out who pays alimony and who doesn't and whether you own real property in Sonoma or whatever, we're just going to make it straightforward. There aren't too many people making less than \$70,000 who have extensive holdings. And by the way, there were scholarships above that too, but that was the guarantee program. And it turned out, I think it's around 60 percent of all UC students get scholarships. And the

numbers show that it worked. We have the highest percentage of Pell Grant students anywhere. We have a huge percentage of first to go to college. It actually opened the doors. We had always had open doors, but it got better because we were getting more of the low-income and more of the first generation to go to college. We were doing better particularly among Hispanic applicants.

So what is unfair — and I said this publicly — is if you have a firefighter married to a teacher and the two of them jointly bring in a hundred and whatever, thirty or forty thousand dollars a year. They might apply for scholarships, they might get some, but they weren't doing well under my proposal. But again, they weren't doing well under the Pell Grant proposals too. I did not object to John Pérez's proposal for the middle class, and giving them some relief, but if you push them hard enough — the middle class is the backbone of this country, and you can tax Warren Buffett all you want, and Michael Dell and Bill Gates — if the middle class isn't paying some sort of tax, then you don't have enough money to run the government, because they're so numerous. And that was the problem we confronted. To make it free for everyone, we couldn't operate the place. I don't actually believe in a free education entirely — I think people ought to be invested and pay something — but it wouldn't bother me if the poorest families don't pay very much and it was a graduated scale, but we've never done that in this country. And what I said is what you're doing here is if you keep tuition down and if you try to raise that level, the families making \$800,000 and a million dollars a year are getting a free ride. Why? Why should a polity do that, with scarce resources and lots of low-income kids, lots of Hispanic kids, lots of African-American kids who desperately need the money. It just doesn't work once you lose focus on the evil that you're trying to confront. And it is an evil to raise costs for the middle class, but it is a bigger evil to deny admission altogether. Not that you deny them admission, but they either never applied or got in and chose not to come for financial reasons.

08-00:39:12

Burnett:

So access is built into the DNA of the University of California as well, right? This is part of the Master Plan, to have an escalator up.

08-00:39:24

Yudof:

Well, that's right. I had lots of ideas, and Chris Edley and I went to the executive office building in Washington, and we had ideas about how to handle this. The fairest system might be that most people go for free, and then depending on your income and employment and so forth, that later on you pay a small percentage of your income. That's Australia and some other places. But we couldn't make that happen.

08-00:39:54

Burnett:

In terms of the political will?

08-00:39:56

Yudof:

Yes, the political will. I say we got a lot of sympathy from the House leadership and some quarters of the Obama White House, but we could not get them to bite on that. We had ideas about how to issue bonds and — I don't want to get into the complexities of it. But there are more intelligent schemes than we have for making sure that the poor are not denied. But when we have so many Pell students — some of our campuses 35, 40 percent Pell students now, and they're, give or take a little, under \$50,000 a year in income, that's an amazing performance for such an elite university.

08-00:40:36

Burnett:

And I understand that some students got behind that, that there were reports of students who were backing a plan. And it sounds kind of like, you know, in the volunteer military, you would get college paid for if you do some certain number of years of service. It's a version of that in the sense that you're docked 5 percent of your pay for twenty years to pay back your student loan.

08-00:41:02

Yudof:

Right, and if you're driving a taxicab and you don't have much income or you're unemployed, you know, but if you end up as being a manager of a hedge fund, maybe it's time to pay the 5 percent. There are complexities. We don't have access to tax returns. You needed to have a treaty with the federal government, and someone would need to look at it. I didn't want to look at it. I wanted the Department of Education to handle that. I didn't want people to say there was any danger of leaking personal tax records and all. I wanted the Treasury or Department of Education, and we do that, by the way, with — I can't remember the statute, but we do that with certain forms of alimony, or child support payments I guess it is. But it's complicated, and we just weren't ready for it.

We also had relatively low debt. When I was president, the average debt of students who had any debt was about \$20,000 a year. I think it's closer to 30 today. That's not chicken feed, but that is not remotely like the hysterical newspaper stories of people owing hundreds of thousands of dollars. We didn't have tuition like the Ivy League has tuition. We were a different kettle of fish. [phone rings] Maybe that's my callback from the White House ten years ago. [laughter]

So that was my philosophy. That was also part of the plan, that while the university suffered, up to the state's median income, there wouldn't be much suffering for — now, again, I don't want to overstate this. If you have one parent at home and you have very little income and you have to pay for your books and your residence halls and stuff — but it was the best we could do. And by the way, there was some opposition to it internally. I finally pushed it through. Now it's up there with the Magna Carta and the Bill of Rights; anyone who would touch the Blue and Gold program is in deep trouble.

08-00:43:01

Burnett: The naming of it was astute as well. Your alums —

08-00:43:05

Yudof: I wasn't into getting national headlines, but I thought of this way before various governors around the country and the candidates for president and so forth. I don't really care that much, but it's amusing to me to see ten years later they're coming up for plans very similar to what I advocated for. And maybe I should have gone on the speaking circuit, but it wasn't very important to me. What was important to me was to get the plan working.

08-00:43:38

Burnett: You're dealing with the anger and frustration of students, of parents, of the American people, in a sense, and the people of California —

08-00:43:51

Yudof: Faculty.

08-00:43:51

Burnett: Faculty. Everybody's unhappy, in a sense, and that was part of the times. And you had to think of strategies to get through this period, but also, I think, to make some somewhat permanent changes to the structure of the university. Speaking of the pension reform, Dick Blum said, "When we brought Yudof in, he was the only one who could take that on." This is something that had been burning and smoldering for a while. And you started to look at the structure of the university. Can you talk about what was wrong structurally? Would it have needed to be changed anyway, regardless of a crisis?

08-00:44:37

Yudof: I think so, but you know that old hackneyed adage about a crisis is a terrible thing to waste. I didn't use it to get even with anyone, but there were changes. We needed to downsize the Office of the President. Although in my last couple of years, it was beginning to slip, and I was just about to act on that when I decided to step down. Because bureaucracies have, as whoever said, certain tendencies, and it doesn't go away; you have to be forever alert. It also, by the way, was disheartening. You throw a Christmas party, holiday party for the staff and they put it on the front page of the newspaper that, you know, for fifteen hundred people a \$10,000 Christmas party. So I had my officers, including me, contribute. We paid for it. We stopped using any funds. Even funds designated by donors to be used for such purposes we did not use. I don't know.

08-00:45:44

Yudof: The structural changes. I felt that not enough attention had been given to whether a UCOP initiative added value. And I tried to drum that. I said, "We're not smarter. We're not on the ground. We don't know the campuses as well as the people." We have very few academics in the Office of the President, usually me and the provost and maybe a couple of others who once or twice had teaching appointments. So under the value-added approach, I

began trying to cut back on programs or to give them back to the campuses. If we were going to have a study abroad program, how was it doing, were we competing with the campuses, was it operating the way it was supposed to operate? We did continuing legal education, and I said, “Why? Why would you have continuing legal education? We don’t even have a law school in the Office of the President.” So there were a number of things we gave back to the campuses, and maybe I should have given more, but I did what I could to say it’s not a playground where we have to have our own toys to play with or life is not good. Our basic work is to facilitate the work of the campuses and to hold them accountable. That’s part of our legal role with the Board of Regents. So downsize the center, either cancel out or — a number of programs, international programs, nothing was happening, and we were spending a lot of money. So I did a lot of that.

08-00:47:23

Burnett:

Well, just to ask about that. Were those legacy programs that someone had started it and it had an original —

08-00:47:29

Yudof:

I talked about a museum of priorities, that with all the goodwill in the world, twenty-five years earlier some president had started something, and it just went on and on. And it was an additive effect; every president had new programs but never really got rid of the old one. It was not a zero-sum game. So I tried to deal with that. Then, I would say with mixed success, I said, Well, what efficiencies could we have? Could we have a payroll system for everyone, which was way over budget and way over time? This is post my time, but nevertheless, it didn’t work out as cleanly as I thought it would. Can we have health insurance for all the campuses? That proved to be extremely difficult, in part because we had very bad advice from the people who were running the program on the actuarial data and so forth. But you could think of, particularly in the financial area, certain things. If you were starting from scratch, would every department have their own systems, computer systems, and would every campus have its own financial systems? And there are complexities. UCSF [University of California, San Francisco] is not the same as UCLA [University of California, Los Angeles], and UCLA is not the same as Merced. And I would say I had mixed results there, in part because the expense turned out to be great, in part because our people weren’t always looking as carefully as they should, and in part because there was cultural resistance on the campus. They didn’t want our accounting systems, and you were dependent on those very people to achieve it. I actually, toward the end of my term, had an even more circumscribed view of where the system could add value. There were certain things I think we did pretty well. We did the rules through the senate on the faculty and retirements, and we negotiated the contracts with labor unions, but there were other areas where I think it’s very difficult to have that right mixture. It’s sort of like a federalist system, where you have certain things that you think the federal government should do, the

states, and the localities, but as many have written, it's more like a marble cake than a layer cake.

08-00:49:47

Burnett:

So there were some centralizing initiatives. Is it UCPath, is that the pay system that's out of Riverside?

08-00:49:55

Yudof:

Yes, that's right. And that's had — I hope it works out — a difficult history, because, as I said, it's way over budget and way over time, and it's being implemented on some campuses but they'll phase into others. I don't want to say it was a mistake, but it certainly did not meet my expectations, although, again, it was just beginning when I was president. We thought maybe there was a role in online education. It was terribly difficult to take a course at San Diego if you were a student at Davis, and we thought that having more of a system-wide presence online would facilitate our own students getting credits and maybe make it easier for outsiders to come in. I put a little bit of money into that. They made some real progress, but to this day I think online education is basically a campus activity. So I would say I tried, and I cut out to me what the most obvious things that weren't working. Some of the other initiatives worked and some of them did not work out as well as I had hoped.

08-00:51:06

Burnett:

So when folks talk about duplication, they're talking about that UCOP was doing something that the campuses were also doing, or was there duplication within UCOP as well that needed to be addressed?

08-00:51:24

Yudof:

My sense, but I could be wrong about this, was more that if you're in the Academic Affairs Office at UCOP, you think you should do academic affairs. Well, every campus has a provost and a chancellor and an academic senate and so forth, so there's a tendency to review everything and to try to impose your best judgment on what the campuses were doing. I didn't like that. I thought not only duplication of effort, but there was no reason to think we would do it better. Why would you think we would do it better? So that was the primary problem. In the bureaucracy, we cut and we cut at UCOP, it was hard for me to know what was duplication of effort. When you have silos and you have stuff that comes out of Academic Affairs but it needs to be reviewed by the financial people, and then the Student Affairs people need to weigh in on the impact of students and all, there probably was some duplicated effort, but universities are very flat organizations. They're not like the old General Motors, much less the Marine Corps. They're very flat organizations, and it's hard to coerce, so what you need is cooperation and jawboning and seat time and all the rest of it. But I'm sure there is duplication at UCOP. That comes, by the way, of keeping people on too long even when their function seemed to disappear. It's not in the academic ethos to say, "You're redundant, in the sense that maybe you're a good person and do good work, but it's just duplicative of what we're doing elsewhere." It's hard to get

the bureaucracies to do that, and the president doesn't oversee every office there. By the way, the universities have the same problem. It's not that they get a pass on all this.

08-00:53:22

Burnett:

And I think you spoke about that last session, the need to deal with some of that and the ways in which it wasn't being dealt with by the people who'd come up through the UC system. So there are about 2,068 folks at UCOP when you come in; it goes down to about 1,200. Those are people who had come to the end of their time. And then by the end of the term it's back up to around fourteen, fifteen hundred.

08-00:53:53

Yudof:

Right. And I was about ready to get into that in some way. Because you have to delegate. There's no other way to do it. I can't evaluate every outfit at UCOP that wants to add a person or whatever. Yes. And I think President Napolitano did that. She did more position control, and she's been splendid in that and many other ways as well. Yeah, it creeps. You see it in the federal government. There are two trends you always see: someone comes in and cuts the departments to the bone, and then some new president comes in and says, "I want this and I want this," and if you need people to do it, then it grows, and then somebody else comes in and says, "You're too fat." That's one, and the other is this federalism problem. If someone comes into the FBI and says, "We have too much authority in Washington. What we need to do is strengthen the regional offices," and they strengthen them, and then someone else comes in and says, "You know, those regional offices don't have enough accountability. We're out of control; we'd better centralize." It's called complexity theory. [Burnett laughs] I can say that, but that's just the nature of the beast, and it never ends.

08-00:55:08

Burnett:

We did talk about some of the centralizing initiatives, but there's a number of decentralization efforts under the Yudof presidency. There's a couple of things that seem to be structurally off, and one was that over time, spending per student at different campuses was out of whack. Can you talk a little bit about what that problem is, how it evolved, and how you dealt with it?

08-00:55:42

Yudof:

You know, it's a hard problem, because it's easy to say "Why should a Merced student have any less money than a Berkeley student?" And there's some fairness in that. I don't deny that. But the reality is that the Berkeley professors are better paid. I don't care what those charts show, but Berkeley is often competing for more expensive professors, and they're doing more research, and that's expensive. It's not just the research money, but you have to have the professors on the payroll, you have to have the graduate students, you have to have the facilities and so forth. And the campuses are different ages. Berkeley had an enormous problem with buildings that were seismically unfit. Some of them are closed and taken down, some of them are repaired,

some of them are abandoned and sort of in purgatory for a while until we can figure out what we can afford to do. So the campuses are not equally situated. Also, the percentage of graduate students, and they're more expensive, and professional schools. I could go on and on. It's sort of mindless — "everyone gets the same" — but I did make some adjustments in those policies. I mean, I tried to be attentive, but there are differences, and we did do some equalization. We came up with different formulas, and there was squawking. The winners felt good about it, and anyone losing some cash from the center was not as happy about it. So we made adjustments to try to make it fairer, but you have to recognize you can't just swoop down and say, "Expenditure per student will be \$23,400 on every campus" and have it be successful.

08-00:57:33

Burnett:

Was that rebenching that you were — ?

08-00:57:36

Yudof:

Yes.

08-00:57:37

Burnett:

I was surprised to read in the press that Davis was originally the highest recipient in terms of spending per student.

08-00:57:47

Yudof:

I just don't recall, sorry.

08-00:57:47

Burnett:

That was interesting. And there were other things, too, because you're right in the sense that each campus is unique and has had a different evolution. So UCSF, for example, gets most of its money from tons and tons of grants. It's just this research powerhouse. And that actually led to an initiative on the part of the chancellor, who felt that there needed to be attenuated ties with the UC system. [laughs] Can you talk a little bit about that?

08-00:57L27

Yudof:

Yes. First, UCSF is special. Raising tuition did them no good at all. When you're talking about — I don't remember the size of the medical school there, but it's probably under a thousand — raising tuition even 5 or 10 percent has no significant impact, and they would just as soon keep it less expensive to attract the best students. Truth be known, the money, it's not only research but the care that is provided in the hospitals and by the physicians, reimbursements from whatever, from Medicaid, Medicare, from private insurers and so forth. That's a huge part of their budget. So the whole thing is different. It's not like the English department. The faculty's salaries are often not primarily paid from state funds; they're paid from the care that's provided by those physicians. They get very little in the way of state funds. It's pretty low for the whole system, but UCSF probably gets half as much money as a percentage of the budget as the other campuses.

Sue Desmond-Hellmann was a refreshing new leader for UCSF, and she did a lot of things to improve their efficiency. She got the hospital built, new hospital. I think it's fair to say they thrived under her leadership. But she was listening to folks saying, "Why can't you be more like USC [University of Southern California] or some other places where you're really not as accountable to the Board of Regents and you really run your own show? And she didn't mean personally; she meant you could have your own board there and so forth. One thing I've discovered in life is you can spend a lot of time trying to move around the black boxes and get nowhere by saying the answer to our problems is in a restructuring of governance. It's in the constitution, the governance of the University of California. You've got the speaker; you've got the superintendent of public instruction; you've got the lieutenant governor on the board; you've got regents that are there. We're not going to turn the world upside down and establish a new board for UCSF. If we were on a blank slate, maybe there could be movement in that direction. And we're not a private university. Even though they're only paying 5 percent of the bills, the taxpayers say, "Wait a minute, we built this place over all these years," and now you want to be free of what I call public accountability. So it just was not to be. Sue made some governance changes, which I think were all good, but at the end of the day — to be honest with you, I didn't make many phone calls. It was going nowhere. I told her that — the structural stuff. Everything else she was doing was really first-class, but I just couldn't see how it would work. Every time someone says, "Let's take one of our campuses private," I don't know what that means. The taxpayers built a lot of the buildings; they built it over 100 years, 150 years. The legislature's not going to do it. The people are going to vote for a constitutional amendment to set a campus free? I wasn't going to waste a lot of time, but I also wasn't going to campaign against it because I knew it would never happen.

08-01:02:17  
Burnett:

So there's other things that you were looking at in terms of decentralization, basically, returning some of the funding that UCOP gets to the campuses. Can you talk a little bit about how that evolved?

08-01:02:34  
Yudof:

Well, I was trying to rationalize the process. They did have some formulas and all, but it seemed not to be a rationalized process. The finance people helped me and we tried to rationalize it more, but with glide paths and so forth to ease it. I thought for the University of California it shouldn't be a game of chance in terms of who gets what from the system. And technically the money really flowed to the University of California Office of the President from the legislature, and then it was up to us to divvy it out. To this day I don't think they have a legislative formula, which I think is good. So I was sort of embarrassed that to me it looked like a process which was historical and jury-rigged that we couldn't defend. I frankly don't remember what the resolution was, but it was difficult with the campus leaderships, but eventually we came up with a series of reforms to make the process more rational.

08-01:03:44

Burnett:

At the beginning of your time there, the word was that the chancellors had no real financial authority, and not much knowledge of the finances. I don't know if that's an exaggeration or not. It sounds like it. But does that change? Is there — ?

08-01:04:05

Yudof:

Well, it's better. It's not great. Look, that's universities. The English department thinks that the dean of liberal arts is hiding money and really likes the political scientists better, and the dean thinks that the provost and the president are giving all the money to engineering. I never heard anyone say, "Boy, that's fair." I spent a lot of time with the chancellors trying to educate them of what our outflows were and what our inflows were and how we allocated the money, and it turned out a lot of the programs I had problems with were mostly pass-through programs, programs that we didn't really run, we just divvied the money up. We were the recipient of the funds, but we divvied them out to the campuses. Or they were campus-based, in the sense that we were giving research grants to professors on campus and so forth. So it got better, but I think if you talked to most chancellors today they'd still say, "We're not getting a fair shake from UCOP." And it's probably been that way ever since the system was created, shortly after we brought the southern university into the system.

08-01:05:21

Burnett:

As the crisis marches on, in 2011, 2012, it gets to some degree better, and now Schwarzenegger is out and Jerry Brown is in. Is there a change in the relationship?

08-01:05:37

Yudof:

I think so. My personal opinion, I think he's been a fantastic governor, so I'd start there. But he's a piece of work, as Jerry would probably admit. Jerry was interested: did I have too many police officers? I remember him leaning over and saying, "Why do you have eight hundred police officers?" "I don't know." So I came back a couple weeks later, said, "Jerry, we only have three hundred for ten campuses, including the hospitals and everything. It didn't seem excessive to me." He wanted to know about teaching loads, and that's complicated. You don't judge a legislator by the amount of time they spent on the floor of the assembly or the senate. The fact is, these professors are mentoring students and they're grading papers and they're writing their books and articles. And maybe some of them aren't teaching enough, but others are teaching plenty. It's not something you could do with a meat cleaver type of thing. So I remember he came to the office and we talked about that for a couple of hours. I don't know that I persuaded him, but, see, he was much more into — "weeds" is the wrong word — but into important issues that Governor Schwarzenegger sort of left up to us. And he didn't always act, but he always wanted to engage in conversations about them and pushed us to get our numbers together and try to figure out how we were doing. I think, and maybe the governor would disagree with this, I think he worried a lot about

inefficiencies in the university. I think he worried a lot about compensation issues, both for leaders and for faculty, teaching loads. So I think he brought a bit more skepticism to it than Governor Schwarzenegger did. And actually, we got along fabulously. We spent a lot of time together. And the difficult issue was tuition. He didn't want to raise tuition anymore, and he came to my house when I had a broken shoulder and we talked about that. So for the last few years we didn't raise tuition at all, even graduate and professional schools, which was problematic for us. I think President Napolitano, she reached an agreement with him. I think they're more on an even course. It's a little like the pension plan. When times were good, we didn't raise tuition at all, and when times were bad we raised it 10 percent. That's not sustainable. What you need is to treat it like a piggy bank. Costs go up routinely, there's inflation, and then there are other factors. And our inflation is different than the national inflation, because we have a different basket of goods. "Steady as you go" is the much sounder policy, and it looks to me that's what the governor and President Napolitano achieved, and I applaud them for that.

08-01:08:33

Burnett:

When he said "No more tuition hikes," is that Prop 30? Is that the tax reform plan? He puts a tax bump to take some of the heat off of the universities.

08 01:08:48

Yudof:

I don't know what his motives were. I can't really speculate. I supported Prop 30, which is very unusual for me. I'm a big believer in presidents and chancellors staying out of politics unless it is immediate. I understand taking a position on the Dreamers or I understand taking a position on the Pell Grants or research accountability or whatever. But I did that, and I actually stood with him at a press conference to support him. He did put some more money into higher ed, but his base was much lower than we would have preferred the starting base. So in the initial years after that, the money got better, but it did not really make up for the loss of tuition. I informed the chancellors that I didn't think we'd get a tuition increase for quite a while, so to make their plans accordingly. I don't know what the quid pro quo was in his mind. I just don't know.

08-01:09:49

Burnett:

Well, it avoided a quarter-billion-dollar cut, and so that forestalled some —

08-01:09:55

Yudof:

And we got some additional money. But my recollection — it may be hazy — is there was no specific number. That may have been after the fact.

08-01:10:06

Burnett:

I think so.

08-01:10:07

Yudof:

But when he was pushing for that Prop 30, we did not have a deal that in return for the support of the university that we would get X, Y, and Z. There

was no such deal. I just felt that if the state coffers improved somewhat, that our chances were better, but that was just about as far as it went.

08-01:10:33

Burnett:

So there's a tuition truce, basically, for 2012 and 2013, and on through your time there; there's no tuition hike in that period. So can you talk about your impact in that time? Because there was a lot of reaction to the emergency, and there was a lot of thought about restructuring the university to put it on a more sustainable footing. And you were not alone in that; you had a lot of help. Now, more broadly, as you're thinking about transitioning out, when does it occur to you that you want to step down? Did you have a plan, it was to commit to five years, or?

08-01:11:34

Yudof:

I should say a lot of the restructuring had taken place, as you've mentioned, and we were emerging from the financial crisis, and it had been a wearing five years. When I accepted the job I think I was sixty-four; I may have been sixty-nine when I stepped down. And I was doing well. The regents wanted to keep me. I attended the first meeting where they were talking about successors, and they flat-out asked me to stay and they would call off the search, and I declined the honor of all that. I felt like I had done my core job of preserving the university. I thought that we had not had an exodus of our great professors. I thought we were doing pretty well with low-income and other students. UCOP had been restructured, the relationship with the campuses was better, and we no longer had investigations of the Board of Regents for interfering with the prerogatives of the president. The accreditation agency was satisfied with what we were doing. I just thought it had been time. You have to remember, it wasn't just five years, I had been six years at Texas and five at Minnesota, so it was sixteen years of being on the hot seat, and I just thought it was enough. I was getting a bit tired. Then it turned out, a month afterwards — it's not the reason I quit or stepped down — I had open-heart surgery. Sometimes in your bones you just feel it's right. I was doing well. I really knew the lay of the land with the legislature. I had a good relationship with the governor. Not an easy one — he's a guy with very smart and strong opinions on things. But I thought in terms of the board, we'd settled most of the negotiations with the major labor unions and so forth, I thought it was a good time personally for me to step down, and then it turned out fortuitously, in terms of my health, it turned out to be a good time. But I can't honestly say it was a health reason that led me to step down, but days later it was clarified for me with the surgery. And I always had a philosophy that you don't overstay your welcome. I've seen many times very popular presidents for five or eight years or whatever — so many bad things can happen. Someone can be embezzling money, and someone's watching child pornography on a university computer, or there's some mismanagement of the student health offices. It's an enormous enterprise. It was \$22 billion when I was there; I think it's closer to thirty today. You're always playing a lot of defense because you never know what's going to happen. And you can see

that with President Napolitano and my predecessors. There's always a crisis. There's no free ride. Just like being a big-city mayor or a county supervisor, there's always something going on that you have to straighten out and someone's blaming you for. I just felt, in terms of my own life cycle, that it was time to get out.

08-01:15:08

Burnett:

But you didn't disengage entirely. You prepared a report for the regents in May, and you described much of what we've talked about, but there's also a phase of Mark Yudof the public intellectual where you write a number of pieces. One is about the California education crisis and what you see as the need for a national strategy. Can you talk about why you wrote that?

08-01:15:43

Yudof:

Sure. I believe in the role of a public intellectual, although I often say you better check your First Amendment rights in when you become a university leader, because whenever you speak out — I mean, just imagine, whether the issue is reproductive rights or the environment or global warming or whatever, you're almost guaranteed to alienate at least a third of your constituency, if not more. So I tried to be circumspect. I had written an earlier article, which you may not have seen, where I sort of predicted that the compact with public universities — I gave the speech at Berkeley in 1990, I think, never dreaming I'd be president here — saying I thought public universities were in trouble, Getting a smaller share of the pie, and Medicare is growing and the demand on resources, and then the haves and have-nots within the university — people give more money to law schools than engineering, than unfortunately they give the humanities and other things. So that was the predicate, I think, for the later actions that I was worried about. But then I felt that nationally we didn't have a coherent higher education policy. I just don't think so. And it's not a question of fault; they just can't agree. They agree on giving money to poor kids. They agree that you need to report crimes committed on your campus. They agree that you ought to abide by OSHA [Occupational Safety and Health Administration] and make your lab safe. You ought to abide the Fair Labor Standards Act and not take advantage of your employees. You ought not to discriminate under the Civil Rights Act. But in terms of a coherent national policy, it doesn't exist. And I had taken one foray at that at the time of the president's TARP [Troubled Asset Relief Program] policy by trying to get buildings built for public universities, to create jobs but also to have some long-term payoff. And for a variety of reasons, higher education, including me, could not get our act together, and it never emerged. But when I look at the national picture, I thought we have a hodgepodge of tax credits and Pell Grants, and it's not clear what we want out of our higher education. We don't have real accountability because we can't agree on what we expect them to do.

08-01:17:59

Burnett:

What the measures are, yeah.

08-01:18:01

Yudof:

Yes, it's fine to say they do well in the job market, but still, that's a measure, but there are a lot of different measures. We sort of backed into the role of major universities as national labs, unlike the experience in Europe. And I thought the financing was patchwork. It's just patchwork. I wasn't in favor of, necessarily, any one scheme, but I thought having a system where basically people pay very little and a percentage of their income later on, subject to ability to pay, maybe with some blackout-type jobs — you're doing a great job in public service as a teacher or a police officer or whatever — would be a good idea. So I was writing about that, and I got a lot of sympathy in Washington from leaders, but that's a heavy lift, to try to get — and it hasn't been done to this day. Think of the Department of Education. Try to think of a really strong national leader in higher education. There have been very few in the Department of Education. The Department of Education basically is geared to K-12, and it's basically geared to the student loan programs and the Pell Grants and the veterans' grants, all the rest. There is not a coherent national policy. Margaret Spellings, I think, with her commission [Secretary of Education's Commission on the Future of US Higher Education, *A Test of Leadership*, 2005], gave that a real Herculean try, but as a nation we have not agreed. There are places in Western Europe — I'm not saying their universities are better, I'm just saying in places like France and in Great Britain and Australia and other places where they've tried to have a more coherent national policy. What is it we want to produce? Do we want more research? If so, we need to have a different method of financing it that meets certain costs underlying basic costs to support it. If we really want more poor kids to go to college, how would you entice universities to do that? It's one thing to entice the students to apply; it's quite another thing to have the resources to educate them. We just don't have such a policy. And there's a fear — maybe it's right — that too much domination by the federal government will lead to endless bureaucracy and a lack of creativity and innovation. So that's the risk. And that was Clark Kerr's position. That's why he wanted the money to go to the students during the [Lyndon B.] Johnson era and not go to the universities. It may be time to revisit that. So what is it we want? Do we want research? Do we want poor kids to go to college? It's hard to emphasize certain job skills, because despite what people say, they have no idea what those job skills would be. Michael Dell at the University of Texas did not take a course, I guarantee it, in home computers. The course didn't exist, and the industry barely existed. I wanted to rethink all that and so I do what academics do. I wrote a lot of articles in my time, so I wrote on it. I don't think we're any closer today. And it's complicated by the stature of the great private universities. Do you give money to private universities? You do for research, and they can get it for Pell Grants, but how do they fit in in terms of the government model? A lot of countries around the world have very nascent private universities. I wouldn't say nonexistent, but even Oxford and Cambridge are — I don't know what you call them — state-assisted or — supported or something. Do you leave them out in the cold and not support them, and therefore you're bolstering their competitors? Do you give the

money to sometimes affluent private universities, which can be accused of being an elitism of sorts? It's complicated. But I thought there was a time for a thoughtful dialogue, and we have not had it in this country. I just do not see it. I didn't see it in the sixties, in the seventies, and I don't see it today.

08-01:22:13

Burnett:

Well, I think you wrote in this 2013 article, your analogies were the Morrill Land-Grant Act, the GI Bill, the National Defense Education Act, and the Pell program, and in at least three out of the four of those cases there was a national crisis, or the perception of a national crisis, that unified enough people to make it go forward. It seems that we have a slow-burning education crisis here.

08-01:22:44

Yudof:

Yes. [Abraham] Lincoln, like always, is special, and there was a crisis, but it didn't have anything to do with the Morrill Act, and he did it anyhow during the crisis. You know, he's an extraordinary leader, and an extraordinary law, and brought a revolution. And that really was, I think, the type of national planning that I have in mind.

Many of the other things were really designed for the consumers. We have GIs coming out; they need to be educated. We have poor kids, and President Johnson says, "We need to figure out a way to get grants," and later Senator [Claiborne] Pell and other people. We have Fulbrights and we have other things. So the emphasis seems forever on the consumption side, that the world would be perfect, or near-perfect, if access were easier, if we had more scholarship money, if we had fewer barriers. And I'm in favor of removing the barriers, more access and more money for low- and middle-income students, but that's not a plan. That deals with the consumption side. Will they have the wherewithal to educate these kids? If we're going to do research, do they have the buildings, do they have the graduate students, the professors, the staff to pay for what the government won't pay for? What is the outcome that we're looking for? [Dwight D.] Eisenhower's outcome was he wanted more scientists and engineers, and I guess he wanted more teachers and so forth, and that was the Sputnik crisis, and we're falling behind the Russians and so forth.

Think of the last election: all the discussion was really on the consumption. President [Donald] Trump did not opine much on higher education, but Senator [Bernard "Bernie"] Sanders and Secretary [Hillary] Clinton were really trying to think through how we make college more accessible: that is, to increase consumption among people who have difficulty affording higher education or are genuinely poor. There really wasn't much on the other side. Now, we have all sorts of movements in this country. We have competency-based education, and we have an emphasis on improving performance in the schools, and we don't want to leave any child behind and all that. But when I read No Child Left Behind — it's K-12 — there's very little on how you build

up the capacity and a whole lot on how you break down the barriers. I want to break down the barriers, but I think we need to have a coherent concept of the outcome of all this and how you build a higher education structure responsive to the specific goals the nation wants to achieve.

08-01:25:47

Burnett:

So not just college and career readiness for those that are attending higher education, but is the college ready, and do they know where they're going?

08-01:25:57

Yudof:

I suppose so, and how do we do a good job with those students? And there's a lot of emphasis on that at the local level, places like Georgia State and University of California and elsewhere. And job readiness is very important, and finances are very important, but what do we expect to get out of higher education? What are our national expectations? I think we have a hard time agreeing on that, and we also are distrustful. Losing "we" very loosely, but people are often distrustful of federal interventions.

08-01:26:31

Burnett:

When you wrote this one article in particular, you said that the compact is broken, that there used to be a faith that public education would yield some kind of national benefit — and it was an instrumental university, it was agricultural mechanical colleges that would then produce the next smart generation of farmers and industrialists and so on. And that theme has continued.

08-01:27:06

Yudof:

A lot of it is in jeopardy. The compact is broken down. I very rarely had telephone calls from legislators asking me about a public policy issue. It was budgetary issues, it was unionization issues, it was "Why do you have a balance here or a balance there?" They were in the consumption side — are the students getting a fair shake and are they paying too much and all — but not into the — I never had a real discussion on the research university. I don't ever remember having one on that until they needed the treatment at one of our hospitals. That's part of it. Then I think you have the rise of the Millennials and a different form of accountability. You know, in the old days I imagine someone came in with a \$100,000 check and said, "You know, President Jones, you're a wise man. Put it wherever you need it." Boy, I had none of those discussions. They had ideas for what the donors wanted to achieve, and they wanted accountability and reports and all the rest of that. That creates some tension.

Then with the Great Recession and the job market and all of that, it's hard to know how much, but there is some loss of faith in higher education being a ticket to the middle class or higher, or to the good life. Now, you got to take that with a grain of salt. People think they're paying too much, but they think they're paying too much for their cell phone too. And I often ask people who might espouse that, I said, "Are you telling your daughter or your son that

they should just blow off college, just take their high school degree and make their way in the world?” Almost none of them are. The American people are not stupid. They can be very smart about those things. And that’s certainly true among low-income people. You ask them, they understand it. They’ve been turned down for jobs. They know that that piece of paper, whatever its relevancy, it’s necessary. So I think it’s a combination of loss of the absolute faith that maybe the baby boom generation had in the efficacy of higher education. It’s a crowding out of resources; it’s the aging of the population. People are living to eighty and ninety, so more and more people have resource needs for medical care and nursing home and so forth.

08-01:29:49

Burnett:

And those costs are increasing faster. The cost of education is relatively flat, comparatively flat.

08-01:29:56

Yudof:

The tuition goes up more, but the actual cost doesn’t. There’s a substitutionary effect, and state resources are going down, then the cost to the consumer goes up, but the cost of producing the credit-hour is relatively flat over the last decade. Those may all fit into it, but personally I think that the worth of higher education is not being eclipsed, but I think a lot of families are stressed financially. That’s one factor. I think there’s a crowding effect in terms of priorities, of state priorities for funding. And then you never escape the demography. And I have written about that too. An aging population has — it’s not they hate higher education; they have different priorities. And my problem with that, among other things, is a generation we desperately need to educate are the low-income people, the people of color, and there’s too much, to my taste, for “Why should we pay for the other people’s children?” That to me is despicable. I think all those things are factors.

08-01:31:22

Burnett:

Absolutely, and that’s something that’s come to the fore in recent years as well. I can’t help but wondering, having read some of the things that you’ve written and listened to some of the things that you’ve said, that there’s almost something personal in terms of the impact that education and higher education has had on you, your education. You write, after we [just] talked about the instrumental side of things, you write, “The nation’s interest in quality higher education is not limited to defense, economics, and technology; it resides as well in the softer qualities that are ingrained and absorbed on a campus, traits necessary to preserve and nourish a great society: opportunity, diversity, citizenship, a cultivated fascination with the march of ideas, an appreciation for the grace notes of life, like a fine painting or a subtle poem.”

08-01:32:17

Yudof:

Did I write that? That’s well written.

08-01:32:19

Burnett:

It is. It is. And I would say that I think it's very difficult to write like that and not mean it, so [laughs] I want to ask you about that.

08-01:32:32

Yudof:

It comes from my own life, where education opened the doors that I otherwise — I'd have been like the rest of my family, probably an electrician, and a pretty happy middle-class family. Part of it is my experience in college and law school. I was not narrowly attuned to any specific career path, and I thought it served me well. I think on my desk — I don't see it at the moment — I keep the poems of Wallace Stevens there. I used to keep the odes of Pindar, which I like very much. And I thought I learned a lot about human beings and about empathy. I think culture is important. It's the exogenetic heritage, not what's in your genes but what you learn while you're living. And I thought, we shouldn't be barbarians. I think the great civilizations, whether it's Greece, Andalusia under Islam, elsewhere, had what amounted to houses of wisdom and culture. And every time I met with a group of business people who said, "We need more engineers" and all, I'd say, "That's fine. How many of you have engineering degrees?" and always over half of them had liberal arts degrees. So it's both an appeal to let's avoid complete vulgarity and cherish — and I don't mean just Western values; I mean cultures of all sorts, whether it's Latin America or Africa or Asia. So it's better human beings and happier human beings and more aware human beings. I think it's important, and it serves you, and it is instrumental, even though that's not its purpose. So that's the way I feel. And that's another fear that I have. You can get so job-oriented that you can teach someone to put a bolt on a car, and then next thing you know there's a robot doing it. What we need are flexible, critical minds, and people who absorb culture and enjoy the great civilizations over thousands of years. That is my strong feeling. I always tell students who want to go to law school, I say, "The first thing you do is I recommend you not take any law courses as an undergraduate. You'll have three years of it." Then I say, "Learn how to think, learn how to write, and take what interests you." I mean, I took Greek thought and astronomy for crying out loud, and most of my astronomy turned out to be wrong, so [laughter] George Blumenthal tells me. But nonetheless, I enjoyed it at the time. Yeah, so that's where that comes from. It has a liberating impact on the spirit, even if we can't guarantee a job. We should try to get you jobs, but you miss the multiple dimensions. And the data, you can talk about cause and effect, but if you're looking at personal happiness and stable relationships and your health and civic participation, they all improve once you factor in level of education.

08-01:35:59

Burnett:

Professor Yudof, I want to thank you for taking the time to sit and talk with us.

08-01:36:02

Yudof:

Thank you. I really appreciate it.