Jesse Choper:

*Jesse Choper: Scholar of Constitutional Law and Dean of Berkeley Law School*

Interviews conducted by
Martin Meeker
in 2018 and 2019

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Jesse Choper

Courtesy of Berkeley Law
Jesse Choper is the Earl Warren Professor of Public Law (Emeritus) at the University of California, Berkeley, School of Law, where he was also dean. Choper was born in Wilkes-Barre, Pennsylvania, in 1935 to immigrant parents from Lithuania. He was educated at the University of Pennsylvania Law School, and alongside his studies served on the law review and lectured at the Wharton School. Following his graduation in 1960, he served as law clerk to U.S. Supreme Court Chief Justice Earl Warren. He has authored numerous influential books and articles on constitutional law, including the role of the Supreme Court, the religion clauses of the Constitution, the eleventh amendment, as well as casebooks on constitutional and corporate law.

This autobiographical oral history covers the full sweep of his life and work as a legal scholar, educator, and administrator. In this interview, Dean Choper talks about his upbringing and evolving relationship to Judaism; his education and teaching experience and philosophy; his clerkship for Chief Justice Warren; the numerous complex issues he faced as faculty and dean of the law school; the issues behind his books and articles on constitutional law, including freedom of religion, the establishment clause, contraception and abortion, individual rights, federalism, and separation of powers; reflections on changes over the past several decades to the Supreme Court, tenure, and approaches to constitutional law; and his role on the California Horse Racing Board.
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Interview 1: January 16, 2018

01-00:00:00
Meeker: Today is the 16th of January, 2018. This is Martin Meeker interviewing Jesse Choper for the University History Series in oral history. This is session number one, and we are here at Professor Choper’s office, in Boalt Hall, at the UC Berkeley School of Law. The way that we begin these interviews is the same for everyone and that is: tell me your date and place of birth.

01-00:00:46

01-00:00:51
Meeker: I’ve been mispronouncing that name my whole life, I think!

01-00:00:57
Choper: You would not be alone.

01-00:00:59
Meeker: [laughing] Okay.

01-00:01:01
Choper: People have at least four different versions.

01-00:01:03
Meeker: Tell me a bit about the circumstances into which you were born.

01-00:01:07
Choper: Well, both of my parents were immigrants from what my mother used to call Russo-Poland, because the property changed hands periodically. I’ve actually looked it up, and it now is Lithuania, so that’s where my parents were born. They both came here during the First World War, about 1916-1917, I would say, and both families came in pieces. They did not know each other in Europe. My mother [Dorothy] lived for a while in Boston with relatives, and she worked in a retail shop—I think selling women’s hats she once told me. My father [Edward] came, and he came, again, with a large family in pieces, and he had about seven or eight siblings, all of whom were put into the dry goods business of one form or another, by the oldest brother, who died of cancer when he was in his early fifties. So they came to different cities, where they opened up little shops selling women’s dress goods. In those times, a lot of women sewed their own clothing, and they would sell things like sheets and pillowcases and drapery materials, and so forth, and so on. One of them was in Wilkes-Barre. I believe that he was there at the time he got married in about 1933. They were both older. My father was forty, I think. My mother was in her—she often had different dates for when she was born. [laughter] But I think she was about thirty-five years old, I think, thirty-eight years old when I was born.
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So anyway, my father died when I was four and a half years old, so I have some memory of him; there’s no question about that, but it’s very vague. He died of an overdose of a brand-new drug at the time, sulfa. This is before antibiotics, in 1940. He had a very unusual, but not unknown, reaction to it, and it just destroyed his liver. It was as simple as that. So she was left—and my father, at this time, owned three-and-a-half stores, one with his brother, three by himself. My mother tried to run these things, for a while, with the help of a brother that she brought in from New York—also an immigrant who knew nothing at all about business. I used to go into the store from the age of five and a half and I would help out and work in different ways. During summers I would sometimes be there full-time, and on weekends, Saturdays—they weren’t open on Sunday in those days. So I was being groomed for this business, not so much by my father, but by his younger brother who was my legal guardian and lived about sixty/seventy miles away. He bought some of the stores from my mother, so that was my growing up outside of home. I always did well in school.

01-00:05:37
Meeker: Before we get to school, let me turn the clock back a little bit.

01-00:05:40
Choper: Go ahead.

01-00:05:41
Meeker: Choper—was that the family’s name in Europe?

01-00:05:44
Choper: It was. It’s a very odd name, I know, but I’ve looked it up. I remember my uncle, my father’s brother, used to kid me when I asked him, “Where did our name come from?” “Oh,” he said, “that was the name in the old country. It came—your ancestors, I remember,” he was a kidder, and he said, “they were bootleggers.” So the fact is I looked it up many years later, and there it was. I still get the chills when I think about seeing it there—and it said that they were in the distillery business. [Laughing] So they distilled liquor. I don’t know if there was any bootlegging involved, but he was a kidder, so that’s where the name came from. Very unusual. I’m sure it’s still true. I’ve never met anyone or run into anyone in this country, or anyplace else, with that name who wasn’t related to me in some way. So it is a very odd name.

01-00:06:49
Meeker: Your mother’s maiden name?

01-00:06:54
Choper: Resnick, R-E-S-N-I-C-K [spells], which was a relatively common name. It’s a diminutive of Resnikov, which is also a Polish-Russian name.

01-00:07:10
Meeker: Did your parents, or in your father’s case your mother, describe why your father or her family moved to the United States?
Choper: I think to live a better life, and in part to avoid being drafted into the Russian army, for the men. I think both of those.

Meeker: Do you know why America was their destination?

Choper: [laughing] I think it was the land of milk and honey. They left behind some relatives, all of whom died in the Holocaust. I don’t know exactly—I never did ask that question—why? The question is, where else one could go? There were some Jews who went to China. There were some who went to Canada. But I think probably the first one ended up here, and the others followed.

Meeker: What did your mother teach you about the Jewish tradition in your family?

Choper: Well, my father, as I understand it, or my grandfather, whom I met, at one time or another, all four grandparents, but they were all quite elderly. None of them spoke English at all, not a word of English. My mother spoke with a distinct accent, but when I think back it was pretty good what she did. His family had been business people. Her family, she often said, “Oh, your grandfather was one of the great rabbis in Poland,” and so forth. So [my father] was not religious at all.

Meeker: Your father.

Choper: Yeah, observant. I think they belonged to a temple when they got married, and so forth. But my mother came from a fairly religious family, observant family. For example, when my father died, she went to work on Saturday. She wouldn’t write anything, nor would she cut any of the material. See, these funny distinctions that are drawn. And I knew both families, my father through this uncle of mine, and from my mother. My mother’s family virtually all lived in New York. My father’s family lived in different cities around the Northeast.

Meeker: Did you ever learn what attracted them to Wilkes-Barre?

Choper: Wilkes-Barre. I think that’s the way it’s pronounced.

Meeker: [laughing] Well, you grew up there. You should know.

Choper: Yeah, well—no, no, you get it in different ways even when you grow up there. But it’s most frequently referred to as Wilkes-Barrah, because it was named...
after two members of the English parliament, John Wilkes and Isaac Barré, but Barré was with what they call an apostrophe, an acute accent at the end. I don’t know how you pronounce that. He must have had a French background of some sort, so anyway, it’s Wilkes-Barre. Anyway, how did he end up there? Yes. One of the brothers would survey cities, of about that size, places like—one uncle in New Brunswick, New Jersey; Allentown, Pennsylvania; Easton, Pennsylvania; Binghamton, New York; Chester, Pennsylvania. And each time one of the sisters got married, they’d bring the brother-in-law into the business, and so forth, and that’s the way it worked out. So they picked out places where there appeared to be a lack of undue competition for this sort of business. They went around and looked at these cities.

01-00:11:48
Meeker: Can you describe what the town was like when you grew up?

01-00:11:53
Choper: Yeah. A lot of people don’t know about Wilkes-Barre, but there was a city up the road that everybody knows about, for some reason, called Scranton. And indeed, they have the same airport—it’s called the Wilkes-Barre/Scranton Airport.

Well, Wilkes-Barre/Scranton was the center of the anthracite coal-mining industry in the United States. That was what’s called hard coal. Out in western Pennsylvania, Pittsburgh, they had a lot of bituminous coal, and a lot in West Virginia called soft coal. Anthracite coal, which was very hard to mine, it was hard coal which was very deep, and it was mined right in these towns. And a lot of the customers were from a coal-mining background. This was before oil and gas, so it was a great home-heater, anthracite coal, because it burned cleanly, whereas soft coal was very dirty, and [anthracite] took a long time to burn, so that’s why it was a coal-mining town. With the advent, after the Second World War, of oil and gas, it became a depressed industry, which is remains, in some fashion, today, although—things change. There are some shoe factories that were open there. The great difficulty was opening factories that employed men mainly. Planter’s Peanuts was founded there.

I’m thinking of the little things that made this town of mine recognizable. It had a very substantial Jewish community, with three temples in this little town of 68,000 people, I think, which were the three levels of the religion: Orthodox, Conservative, and Reform. My mother went, originally, with my father, to the Conservative temple. But when my father died, she moved from where we lived—we lived in a suburb called Kingston, Pennsylvania. I remember we lived in an upper duplex, and she had to move out of the place when he died, quite suddenly, within a period of about a month. So she moved out of Kingston, which a good many of her friends lived in. A large number of
the immigrant Jewish population lived there. And all of them—they were doing pretty well.

So she moved out, and we moved to Wilkes-Barre, which was the major place. I lived in half a dozen apartments. She kept moving all the time. I don’t really quite know why. [laughing] I got used to moving, sometimes only a year at a time. So I went to one school as a first-grader, and then went to a different school second through sixth, and then seventh through twelfth I went to the local high school. They were all public institutions; they were all public schools, and I thought I got a pretty good education. I didn’t know any better, but I thought I got a very good education in those schools—it certainly was adequate!

Meeker: In retrospect, how do you think your mom held up, dealt with the death of her husband?

Choper: Well, you know, it’s hard for me to judge that, but I would say she did pretty well. She did what she had to do. I admire her a great deal. She was a relatively attractive woman. I think she was quite pretty, personable, and men would want to date her there. She turned it down for some years, altogether, because she felt she had to take care of her children—and I guess running the business, and so forth. I was told that I was not too welcoming to these men either. [laughter]

Meeker: You had siblings?

Choper: Yes, I had a younger brother [Larry Choper, nee Chase]. He’s three years younger; he was just a year and a half old when my father died. He died a year ago, and we were totally different. It’s not that we didn’t get along, but we just had different circles of friends, and I think he was the victim of being my brother in schools. I remember learning he had a very high IQ, but he went off in a different direction. He moved to New York. I graduated from the small college, which I can tell you about—you’ll lead me into it. He started there too and then quit after a couple of years. He was never into school. As I say, in retrospect, I think he suffered, “Oh! You’re Jesse’s brother.” That doesn’t help you, so he took off in his own direction. He went to New York to be an actor, and he did some little parts. It’s not an easy life, but he was also entrepreneurish, and he opened up an answering service for entertainment people, and he loved that. I visited him a number of times and he introduced me to some people—they were relatively big names at that time—who were customers of his. He did well for a while. He was put out of business, in effect, by an answering machine—that was the first step, and then it’s all over after that. He died a pauper. I would have done more for him if I could have
improved on what he was doing. First of all, he was semi out of it, and at the end totally out of it — dementia.

I have two sons, and he was an *ideal* uncle. He was everything that I wasn’t. All over the place, playing pinball machines with them, taking them into New York. He had a knack for telling stories which were untrue, how he knew all these people. [laughter] And I remember they would go and visit him, at a certain age, both sons, in New York. And I remember with either one or the other, I said, “Now, Larry’s going to tell you a lot of things about this, and some of them are—some he’s done this, but he didn’t know a lot of these people he talks about.” Well, they came back, and they’re saying, “You know, Larry knows all these people!” He was so convincing. He also convinced them that he fought in the Vietnamese War. I knew he’d never—I say we weren’t close, but we were close enough to know that if you went off in the army, he would have owned up.

01-00:20:57
Meeker: It sounded like he led a very imaginative existence.

01-00:21:02
Choper: Yeah!

01-00:21:06
Meeker: I’m trying to get a picture of the circumstances, and so I know that your father passed away, and your mother tried to continue his business, although it sounds like—

01-00:21:16
Choper: With a lot of assistance. She sold off a couple of stores, and there were always resentments between her and my father’s family, as things go when money is involved. Maybe that’s what put me out of interest in making a lot of money. I don’t know why.

01-00:21:40
Meeker: When you were raised, did it feel like your family wanted of material items? Did you have any financial insecurity growing up as a result of your father’s death?

01-00:21:52
Choper: No. I didn’t—I never felt that way. No, and as I say, we certainly were not poor. I was in a lower economic class than most of my friends. But that never bothered me; at least at a conscious level it never bothered me. As I indicated, when I was growing up, and in the store and thinking that this was it; I was going to go into business. And my father’s brother, Uncle Joe, he had big thoughts for me, and so forth.

01-00:22:42
Meeker: Were most of your friends growing up, were you friends with them through high school or through Jewish communal institutions?
Meeker: Can you tell me about the Jewish community center, what transpired there?

Choper: Yeah, it was—well, I belonged to a high school fraternity that met there in the Jewish community center. You’re bringing me back a long way! [laughing] And I, for one reason or another, I always was active in this little chapter of this national Jewish—it was mainly eastern United States, thirty-five different cities had these chapters, New Jersey, and I became president of the chapter, and then president of the national fraternity. I had a direction in that way.

Meeker: What was the name of this fraternity?

Choper: Upsilon Lambda Phi.

Meeker: And was it mostly around service or socialization?

Choper: Both.

Meeker: Both, okay.

Choper: Yeah, as they do, they had a service part that was, I would say, a minor part. But we would have charity sorts of events. I remember I used to go door to door selling stuff for—I forget, chances to win something, and the proceeds of the sales were going to go for—oh! They had, that’s right, the national fraternity had a pet [project]—muscular dystrophy, which at the time was before it became really popular, what they call, I don’t know if you know, Lou Gehrig’s disease. It’s a terrible thing. Yeah, so that was the national charity, which we did a lot of work for.
Meeker: Do you recall what it was that was passed down or communicated to you through these communal institutions? Were they largely secular, but then there were certain values or traditions that they taught you? What did you learn about your Jewish identity in the context of these institutions?

Choper: Oh, in the Jewish identity—well, I think I didn’t mention to you—because I went to public schools, my mother also sent me to religious school. That was after school. So I would go from four thirty to seven thirty, four days a week, to religious school. That was in the basement of one of the temples there. And so I was on, what I would call, a rabbi track. I don’t know if you know what a bar mitzvah is, but when you’re thirteen years old—I not only did what you were supposed to do, but I led the whole service, the adult service for the thing.

Meeker: In Hebrew too?

Choper: Oh yeah, oh yeah, yeah. Yes, it’s a language then, in particular—this was before Israel was around—it was not spoken anyplace, it was just read. So we learned the language some, in Hebrew class, I guess it was called. But otherwise—I forget, obviously, everything that those classes—about biblical history. But it was all religious, and all with some significant connection to the Jewish religion. But not exclusively; you studied other religions as well.

Meeker: In any of these classes or these communal institutions, was there anything communicated about what might be considered Jewish values?

Choper: Not specifically. A lot of the holidays we were told about, and they commemorated various sorts of Jewish history, the days through the desert and—I forget. [laughter] But I knew—I can’t say that I remember a great deal of Jewish history. And my mother spoke—I think I said her brother who came and ran her store, who knew nothing about this [running a business], he lived with us for a while, and he managed her store in Wilkes-Barre. They often spoke in Yiddish to one another, so I can understand it pretty well, and I can hack it out. I can even hack out German, because [Yiddish] is a mix of all kinds of languages, but I think the dominant one is German. So when it came to picking a language in school, we had German, Spanish, and French—and Latin. I was, from early times, a very practical person. I am, to this day, an extremely practical person. When my younger son decided to study philosophy in college, I told friends, and they laughed at me. [laughing] So I joke, at other times I joke and say, “Just like his father,” when I know nothing about it.

[side conversation deleted]
Meeker: What did it mean then, to be on the rabbi track?

Choper: Yes, I was. That’s where I was told that I was going to go, when I was ten, eleven, twelve years old. I don’t know that I was enthusiastic about it, but at the age of about—I got off of that. Today, I’m what they call a secular Jew. I identify as being Jewish, but I don’t—I didn’t at all go to religious things when I first stopped, because I thought it was hypocritical. But now my wife, who’s not Jewish—my first wife was Jewish and she would go—but my second wife, she likes to go to those things too. She’d go with a lot of Jewish friends here in the East Bay. So I’ve been to plenty of Jewish services, and the Passover—I don’t know if you’re familiar with that? Passover, what they call the Seder [and] at that I’m often there the only one who can read Hebrew, which is funny. But anyway, that’s where I’ve ended up.

Meeker: The Second World War broke out when you were in elementary school.

Choper: Yeah, I remember very well.

Meeker: Can you tell me what that was like? Did it reach into Wilkes-Barre?

Choper: Oh yeah, oh yeah. Well, it was 1941, so I think I would have been in the beginning of the second grade, and there was all this talk, when I got to school that Monday, about Pearl Harbor. I didn’t know what they were talking about. I did not know until then—at least that’s my recollection. What was your question?

Meeker: Just what was your experience of the home front during World War II when you were a child? These are formative years, from the age of six to—

Choper: Yeah, yeah, yeah, they were. I remember we had patriotic songs about the Germans and Japanese and the Italians. What else did we do? We certainly sang the “Star-Spangled Banner,” “God Bless America” I think, every day in both places. At home we had air raid wardens. Sometimes they had tests, and you couldn’t put up your blinds in the evening. My mother got the local newspaper, and I used to read it in the morning before I went to school. And I remember reading about these things. I remember names like MacArthur, and the Japanese in Corregidor, and how they were going in—and I’d read it. I didn’t fully absorb it. We were being pushed off this island and pushed off that island, and so forth. And I remember the German front.

Meeker: Did any of your relatives go off to war?
Choper: I had a couple of cousins who were off to the military. All of my uncles were too old. I think some of them were in the reserves of some sort, but I don’t remember that clearly. Again, I didn’t see them. My mother was the second youngest of all [of them]. So my aunts and uncles were all a good deal older than I was, as were my cousins, most of them. So how else? The war affected our business very much. I remember it was very hard to get merchandise to sell, on the one hand. On the other hand, you could sell anything that you got. That carried my mother through, a long way, the five years of the war. After that, things slowed down. The business failed, finally, and it was taken over by her brother, because he had no place to go. Anyway, as I say, after the war was over, then the coal mining started going down, so it became a depression city, so it was not a happy place, I’d say.

Meeker: Do you recall when you first learned about the anti-Semitism of the Nazis?

Choper: I think very young, because I heard it about my mother. I didn’t have any real conversations, certainly, with my father. But I lived there and I saw her every day, and she would often talk about her sister that she had lost back there. I think that’s about it, of talking about personal losses.

Meeker: You know, people come to learn of the full scope of the Holocaust over a period of time, I think. Do you recall when you first were able to fathom what had transpired?

Choper: Oh yeah. Oh, I understood it. I understood it during the war. You know, there were always leaks of information of what was happening. Some people would escape from the concentration camps and come back and tell it. So no, I had a very clear idea of it. Oh yes; no question about it. I think it solidified my identity, my ethnic identity. Although I should say that there was certainly anti-Semitism in the public school that I went to, kids. I remember I had to fight one kid. [laughing] I was not a fighter, but he challenged me, and I did. We had a fistfight after school, some place, everybody circled around. I remember that. I didn’t get bashed up too much. I don’t know. I thought I held my own—I didn’t win, that’s for sure.

Meeker: And this was because he was—?

Choper: Yeah, yeah.

Meeker: Do you recall the kind of things that he would have said?
Jewboy—I forget. It was on the playground, and there I played with all my friends who were—regardless. Religion wasn’t, in elementary school, I didn’t have any connection with anybody on the basis of religion. There were kids on the block that I knew, that I met, some of them were Jewish, some of them were not.

You said you moved around a lot. It sounds like you jumped schools.

We did move a lot, but I jumped schools only once.

Oh, you did? Okay.

Yes. My first grade I had one school, two through six in the second school, and then the third school in a big high school, which was, I guess, in the western part of the city.

Do you recall the name of the second through sixth grade school that you attended?

The five years that I went to sixth grade? Yeah, Franklin.

Franklin, Benjamin Franklin.

Yeah, Benjamin Franklin, I would imagine. I never knew—I imagine it was!

Who knows! There were a few other Franklins running around.

Yeah, Franklin School, it was on Franklin St.

I know that as your academic career goes along, you start to show great aptitude. You referred to this in the sense that your brother had to operate under the shadow of your academic achievements. Were you starting to show that aptitude in elementary school?

Yeah. I was—as I say, I always did well in school.

What did you particularly gravitate to? Were there certain subjects that you were more interested in than others?
Choper: I certainly was intimidated by the sciences and by upper mathematics, but I did them all—and I got As in them all. Did I understand them all? I don’t know that I did, but I did enough. I’ll tell you one interesting thing. I do remember—I forget whether it was the second or third grade—I remember the teacher’s name was Miss Lecture, and she was explaining some—I think it was in arithmetic, something, whether it was multiplication—something like that. And I thought about it, and so forth, and it occurred to me—and I say it in a different way as to what went through my head, but this was the basis of it. “You know, you could have explained what you just said this way,” is what I was thinking. For some reason, that’s sort of the seed of my saying, “You know, it would be interesting to be a teacher.” I’ve never said it in those words or anything, but that was it. I can still see her at the board, gray haired, nice woman.

Meeker: For your classes, did you need to apply yourself? Or were these things that were coming pretty easy to you?

Choper: Easy. Yeah, as I say, some of them came almost instinctively or intuitively. And some, like when it came to algebra, that I had to think about. It went on pretty much like that through college too.

Meeker: Did you do a lot of reading outside of school?

Choper: Yes. Always, I was always a reader. I was always reading stuff.

Meeker: Was there anything in particular? Any subjects?

Choper: Yeah, I went through the whole children’s section of the library. I would bring home the books; you could only take four. I’d read them. I only lived a block and a half. And yeah, I cleaned out the whole children’s library.

Meeker: Once you finished that, did you move on to young adult or adult writings?

Choper: No. I was always busy with stuff in high school. So I don’t remember bringing home library books. [laughing] I don’t have a memory of that. I was always busy every night, meetings of this, or I remember I would spend—after dinner I would be, when I was president of the fraternity, I would be writing letters, the same letter, to twenty-five chapters, and stuff like that.
Oral History Center, The Bancroft Library, University of California Berkeley

01-00:44:36 Meeker: Well, let’s talk about high school. What was the name of the high school you went to?

01-00:44:39 Choper: Meyers. Elmer L. Meyers High School.

01-00:44:43 Meeker: Who was Elmer Meyers? Do you recall?

01-00:44:44 Choper: [laughter] I don’t know.

01-00:44:49 Meeker: Where was this?

01-00:44:50 Choper: It was about a fifteen-minute walk from where I lived, and I went with a group of my friends. We’d meet every morning and walk off to school.

01-00:45:02 Meeker: Were there several high schools in your town?

01-00:45:05 Choper: There were two. The other was on the other side of town. It was called G.A.R. [G.A.R. (Grand Army of the Republic) Memorial High School] I forget what that stood for. So that was the high school.

01-00:45:32 Meeker: Was there any kind of diversity within your high school?

01-00:45:38 Choper: Oh yeah. Oh yeah. There was religious and ethnic diversity. Yeah, I would say that the high school was probably, again, 10 percent Jewish and lots of Italians, lots of Polish people, Germans. I think those were the main ethnic groups, generally.

01-00:46:09 Meeker: Did people tend to sort themselves out according to these white ethnic identity groups?

01-00:46:17 Choper: Not in the high school. After high school, after school, that’s when that happened. In the school, I had a lot of non-Jewish friends. Friends, you know, that you talk to and meet, you consider them your friends.

01-00:46:40 Meeker: Was there any racial diversity in your school?

01-00:46:45 Choper: I think there was—well, I know there was one black fellow. But I don’t know what sort of diversity that is, in the high school. Maybe there was another
one—I don’t know. It was not a time for, an era of Hispanics, at least in that area. But one black fellow who came from the other part of town, I guess. I don’t know where the small black community lived. I guess some of the families may have been in the coal mines too. I don’t know. You’re obviously conscious of a different color, but I don’t think I ever heard a bad term about blacks in that school. The one black fellow was treated like everybody else, in my recollection.

01-00:47:59
Meeker: You’d mentioned that moment of anti-Semitism in your elementary school that forced you to get physical. Did you ever experience any of that in high school?

01-00:48:22
Choper: I was aware of it, but I can’t say that I ever experienced it.

01-00:48:26
Meeker: How would you have been aware of it?

01-00:48:36
Choper: Well, my mother talked a lot about anti-Semitism. I read about it. I can’t remember exactly from when, but for most of my life—that I was a member of a minority. And the Second World War imprinted that pretty strongly, as you can imagine. But it never was at me directly, but I certainly knew about it. I certainly knew about it.

01-00:49:25
Meeker: You know, I actually just did this other interview with a gentleman who is probably ten years younger than you, was raised in Los Angeles, and he described his mother encouraging not to share his religious background when asked by other kids at school.

01-00:49:53
Choper: Yeah, I was never told that by my parents. And I never denied being Jewish, but I never advertised it either. I’m ashamed of that—to this day. It has taken me a long time to get over that. You know, just in conversations, when one would have the occasion to say it, not that they were called upon to say it, on occasion, I rarely brought that up. That is interesting. I certainly thought about it—not hard. Today, I bring it up all the time. Why? Well, there are a whole bunch of reasons. Everything is different. But even when I do today, I do so understanding what I was saying—it’s sort of like interesting, you said that so easily. [laughing]

01-00:50:59
Meeker: Did you date in high school?

01-00:51:02
Choper: Yes, but not exclusively—but almost exclusively with people that I met through the Jewish community center. I remember I did date this one girl who was not Jewish—and you know, I liked her. [laughing] We never had any
problem about that, I don’t think. I’d go pick her up at her house, and so forth. I forget how that one dissolved.

Meeker: But you don’t recall any objection from your family or hers?

Choper: Well, let me say this. My mother never objected to anything about me, you see? That’s my recollection. No, and I never wanted to hurt her. I thought that she was—I knew it. As the years passed, I knew what she was doing at the time. Oh, when I misbehaved as a kid, which was not often, but she would get very upset, and so forth, and made me feel very bad, from guilt. I felt very guilty about it, not that she hit me or anything. I don’t think she ever hit me at all, or spanked me. I don’t ever remember—maybe. I don’t know, I don’t remember it. I forget where I started this story.

Meeker: Well, I was just asking if there was any objection to your dating a non-Jewish girl or not.

Choper: Oh yeah, no. No. I don’t know that she knew about it, but I don’t think she would object. When I started—when I got serious with my first wife, my mother would come to visit, and we certainly didn’t have anything resembling a kosher home, or anything like that. No, my mother was extremely tolerant that way, externally, at least. How she felt inside, I don’t know. My guess would be she felt—well, “whatever you want, that’s fine with me.”

Meeker: Did you ever feel any pressure to grow up more quickly than your friends who hadn’t lost their father?

Choper: I never felt it, but I did it. [laughing]

Meeker: What did that mean? What did that look like for you?

Choper: I’ll tell you a funny story. When my father died, he died in New York, because he was, at the very end, taken to New York to a bigger hospital. And my mother’s younger sister—she was no kid either. But my mother’s sister came to stay with us. After my mother came back from the funeral—my father was buried in New York. We didn’t have a bedroom for her, but there was a folding bed, and I remember she slept in the folding bed, and I was up before she was one morning. I walked into the living room where the bed was, and she said, “Sit down, Jesse.” My aunt—Rose her name was. “Well, Jesse,” she said, “you are now the man of the family.” Well, that’s had a deep psychological impact on me. And I felt that that’s the way I had to act. Maybe not every move, but that was there.
Meeker: How did that impact you?

Choper: Well, I’m sure it’s had a big impact. [laughing]

Meeker: Well, can you tell me a little bit about how you might have lived differently?

Choper: From responsibility, to be responsible. So I think that had a great impact on me. I always was responsible. I felt responsible for my brother, and I felt responsible always for doing the right thing, for whatever that is. Someone once said, “Who determines what is the right thing?” Well, I do. But even if it was not the thing that I prefer to do, nonetheless it was the right thing.

Meeker: In high school, were there any teachers who identified your skills and aptitude and really encouraged you to—?

Choper: No, again, I’m sure I was the teacher’s pet, in some ways, in a lot of these classes, because one thing I keep—I’ve repeated it ten times—but I always got good grades. Well, I mean good grades—I mean top grades. But no, the fact is I was not going to go to college. What I wanted to do, at that stage of my life, was go out and make a lot of money. That was the message that I got from my Uncle Joe, and that was fine with me, and I wanted to.

And how did I go to college? The principal at the high school that I went to came to me one day and said, “Would you come and see me?” “Yes. No, I didn’t do anything.” [laughter] [He] said, “They’re going to have a math contest next Saturday, at the Wilkes gym, which was the college gym, in a big place, “Would you go and represent our school?” I said yes. I went, and in fact I lived almost across the street from this gym, and they gave each of us a problem, they collected it. There might have been twenty in the space of a day, and at the end there must have been—I don’t know, seventy kids there, or something like that, thirty-five. No, it couldn’t have been seventy, but it could have been kids from sixty high schools around. It was a big—Wilkes-Barre itself was only seventy/eighty thousand. But the surrounding area had another seventy thousand maybe, so there were a lot of schools.

And so they had collected the answers, and they said, “Will everyone keep your seats? We’ll announce the winners.” Maybe fifteen minutes later they came back and they said, “Would the following five people please come to the coach’s office?” So I was one of the five—five, three, I don’t know. Anyway, I was one of them, and they said, “You’re the winners, and you get—the reward is a full-tuition scholarship to college.” And so they said, “And here are the collegers.” They named it: Wilkes, which is the one that—I was there; Kings College was a Catholic school right in the same town; University of
Scranton, which was up—also a Catholic school; Penn State, which at the time had a very good football team, as I remember, but I never remembered it as a good school; and the best of the five, which of course I didn’t know at the time, was University of Pittsburgh. And they said, “It’s a full tuition four-year scholarship.” So the look on my face must have been the look on my face at the time. I said, “Well, Wilkes—I can live right across the street, simple, easy. I’ll take Wilkes.” That was it.

So I went to Wilkes College, and I picked my own major. I may have spoken to my uncle, and I said I was just going to take accounting. That seemed like a respectable profession to enter. I often say my whole life was serendipity. Nothing pre-thought. So, as in high school, I did very well in college, and I was the valedictorian of the class. And so while I was there, I was pulled out one day by the debate coach—the oldest was—I think I was still a freshman, and he had a very good—I think the school had a very good debating team. They competed with the best schools in the country. “How would you like to do that?” “Well,” I said, “okay.” It was just like that! And he was an English teacher, and he took a fatherly interest in me, and we finished second—or it was second and a third, we either finished second and I was the third leading speaker at the West Point Tournament, which was the big national tournament. They came from all over the country, or at least the eastern part of the country—at least Illinois, I know the big competitor was some school outside of Chicago. And anyway, so we won this big prize.

So I was on my way to be an accountant. I was offered a job—now, Wilkes was a small school. I never did tell you, it was a college that was accredited only for about a half a dozen years. You’ve heard of Bucknell? Wilkes was Bucknell Junior College from 1933, but I think in 1948 they opened this branch in Wilkes-Barre, and pretty soon they got its accreditation. I started in ’53, and I think that it had been three years accredited. Anyway, so the people would come to interview. The accounting department, I don’t know, for whatever reason or another, had a decent reputation. And at the time I did an interview with a company that was then named Price Waterhouse, which was the number one—today they’re among the top ones, but it was the number one. They offered me a job for the summer, summer intern—or no, an intern, a semester intern.

Meeker: This is while you were still a student?

Choper: While I was in my fourth year. And so I worked there, and I worked in New York City. I worked in Syracuse for a couple of weeks, the coldest time in my whole life. I’ve been in cold weather since then, but that was freezing! [laughing] And then they offered me a full-time job, and I was there, in New York, when the partner did that, and I said, “Well, I want to tell you something before I take this job. I’m Jewish.” “Oh yeah, we have Jewish
accountants.” I said, “Okay.” [laughing] So I accepted the job. And I came back and I told this English professor. I came back, and finally he said, “You don’t want to do that.” I said, “Well, why not?” “You ought to go to law school,” he said.

“You don’t want to do that,” meaning—?

Yeah, go be an accountant. I thought—you know, sounds good to me. New York, I enjoyed that. So he said, “No, you ought to go to law school.” How little I knew. I said, “I understand that when you go to graduate school,” I didn’t know if it was graduate—I knew law and I knew law school—but I said, “You can also teach undergraduate classes?” He says yeah. And I said, “Well, I’ll tell you what. If you can get me a place that’ll let me teach part-time, I’ll do that.” So he did all the applications. You wouldn’t believe this man—and we became—I say, he took a very fatherly interest in me. I got to know him, I got to know his wife, and had dinner at his home, and so forth, and so on.

What was his name?

Arthur Kruger. He was English literature, of all things.

Was he also a part of the Jewish community?

Yes, he was. He was, and he grew up in Philadelphia and taught at some other schools, I think, before this, and I was in his course—I think. I’m not sure. [Narrator note: I was not in his class.] Anyway, but he pulled me out because of this debating. So I said that, and so he filled out all the applications! I never picked one—can you imagine that? And the only thing I did is I went and took the LSAT, the Law School Admission Test. I had to drive to Bucknell. That’s where they were giving it. And I was accepted at four or five law schools, I forget, that he—all of the ones he applied to: Harvard, Yale, Columbia, Penn. For some reason, I think there was a fifth, but I can’t remember it. What I do know is that the question became, “Well, how about the teaching?” Well, Harvard didn’t say anything. Yale said they would get me a job in a school, not a college, in New Haven, that had accounting. I forget what it was. I don’t remember Columbia either—but Penn had the Wharton School. And I said, to Kruger. “Well, if I can teach in the Wharton School at the same time, I will go to Penn.” And I should say, I went and did that and it’s the best—I never regretted that decision for a moment.

And so the teaching was important simply as a source of income? Or—?
Choper: No, it was nice as a source of income. No—I wanted to teach!

Meeker: Is it in part because you wanted to maybe keep your options open, and so you could still potentially pursue—?

Choper: I wish I could answer that! Nothing instrumental about it at all. Something I would like to—I enjoy doing.

Meeker: Where did you first have a positive experience in the classroom as a teacher?

Choper: When I was in high school, some of the parents would hire me to tutor their kids, and I remember at least there were two. I remember explaining how to do these math problems to them, and I—now, this is my own, now I’m putting glitter on the memory. [laughter] But I remember this one kid—I can see him, but I don’t remember his name at all, a dark-haired kid. And I could see how the lights lit up for him as I explained it. And then came back and asked him to do it again, and he’d halt, and I’d help him again. Once again, I just remember it. It’s not that I remembered it after that in any conscious way, but I enjoyed that, and I got a great deal of satisfaction—that’s the word—out of that process. And I felt appreciated too, and I think he appreciated it. He got some satisfaction out of it. So that solidified—I don’t know if it solidified it or whatever, but it probably did. Therefore, so I taught at the Wharton School.

So I went and used to teach there in the morning from eight to ten. I used to get up—and for me, I never liked to get up early—and I used to get up real early and go off there. It was about a fifteen-minute walk from the building there to the law school building. We didn’t have classes till ten o’clock. I used to get back at ten anyway. I really enjoyed that. I taught the first year, only one class, and then I started teaching two classes. And I enjoyed that. I went to all three years of law school, and I did, again, very well in law school. For the first time that I could remember I was not first in the class. I was second in the class. The guy who was first—there was a difference between him and me, and between me it was about—the number of points was about twenty-five people, so he was way up there! My classmates would say to me, “You are first among the mortals.” [laughter] And he became a very famous national guy, arguing cases in the Supreme Court, and so forth.

Meeker: Is that Tony [Anthony G.] Amsterdam?

Choper: Yeah. How did you know that?

Meeker: Oh, it was from those oral histories.
Choper: Oh yeah, yeah. That’s Tony Amsterdam. And we became friends, although I haven’t seen him in years. But he came back to Penn to teach. He taught at—I forget where he started but he went to NYU. His wife—they got her a job there too. I haven’t seen him in twenty years. He became deaf, I think, also very hard. But I haven’t heard about him.

Meeker: So when you were teaching, while at Penn and the Wharton School, I guess the students must have been just a few years younger than you, at most?

Choper: Yeah. Oh yeah, that’s right. No, they were, four years younger.

Meeker: Was there anything that you had learned, do you think, growing up as the man of the household, that allowed you to assume the role of a teacher with some authority, do you think?

Choper: I’ve never thought about that for a moment. No. That’s not uncommon to have graduate students teaching undergraduates. So no, I don’t think so. Maybe, but I certainly never thought about it.

Meeker: Did you have a full class? Or were you more like a teaching assistant?

Choper: I had about thirty students in each of my sections. Each would go once a week to a lecture by a Wharton professor. This was a whole new thing for me. I never understood that. I didn’t understand it at all when I went, and then they would come back. But I would go over—I prepared my own classes.

Meeker: Had you traveled much growing up?

Choper: Growing up?

Meeker: Yeah.

Choper: No. Travel—no, I didn’t travel at all.

Meeker: Well, you said in college you spent some time in New York on the Price Waterhouse—
Choper:

Oh yeah, we debated at Notre Dame. I think that was as far west as I got. They had a big tournament there, the Notre Dame tournament. Yeah, I traveled. I remember that. I remember the overnight train that we took to Notre Dame, up to Dartmouth. We debated there. That's also a long way up—almost as far as Notre Dame.

Meeker:

Was it relatively easy to adjust to life in Philadelphia?

Choper:

Yes. I had a friend who was two years older than I was, who grew up in Wilkes-Barre, in the greater Wilkes-Barre area. How did I meet him? Because we came from totally different classes and everything. His father [J. Harold Flannery, Sr.] was a trial court judge, and [my friend, J. Harold, Jr.] was called Nick Flannery. He was going to Penn Law School. He was two years ahead of me, and he had an apartment with three other people. I guess I talked to him, and he said, “Yes, you come and live in our apartment,” which I did, with three other people. There were two bedrooms, and three guys that won’t mind, and you became pretty friendly with those people. So I lived there the first year. Nick, of course, left. He graduated. Penn opened up a new dormitory [and] I had my own room. We remained good friends, although I don’t see them very often, with a bunch of people—five, seven, eight people on the floor where I lived, and it was a three-minute walk from the law school, had its own cafeteria.

Meeker:

How sophisticated do you suppose your understanding of law was upon enrolling at Penn?

Choper:

Very little, except for the debating.

Meeker:

Had you studied American civics? Did you pay attention to what was going on in the Supreme Court?

Choper:

No.

Meeker:

No. Just a few years earlier the Brown decision had come down, which was—

Choper:

I heard about it. No, no, I started from nothing in most of these areas. [laughing]

Meeker:

Well, what do you suppose the significance of the law was to you then in—?
Choper: It opened up a totally new way of thinking for me. It was absolutely transformative.

Meeker: What do you mean by that?

Choper: It made me, for example, give up my religion. Why? It wasn’t rational. You couldn’t prove it. I’d say that to this day. My best friend here, who died a few years ago, who was my best friend for fifty years—he was fourteen years older than I was, but we had similar backgrounds. He came from New York. He went to City College. I don’t know if you know anything [about that], but then it was quite a place for upward mobility. And he was a very smart guy, I thought. His name was Sanford Kadish, K-A-D-I-S-H. I don’t know if I mentioned him in the other things. We agreed with most things. He was a shade more liberal than I was. He grew up in this Jewish sort of liberalism, but I remember the one thing we disagreed upon was whether there was a God. I would call him a militant atheist. And I said, “I don’t understand. You can’t prove it one way or another. How can you be an atheist?” So I’m an agnostic myself. Why? Because of clear thinking and logic. If I’ve got a god, it’s logic. [laughing] Does that shock you?

Meeker: No. I’d like to actually ask a really naïve question. What is the inherent connection between the law, and evidence and ability to prove something?

Choper: Well, it’s a total connection. What do you do in law? What you’re trying to prove, whether you’re a trial lawyer or not, what you’re trying to prove is compliance with the law. And you’ve got to do it in a logical way. You can’t say, “Well, if it were this way, it would be better.” No, no, no. What’s the law? And even if you do the constitutional law, and indeed, I taught corporations too, and that’s become mainly statutory. That was a good experience too, although I was a very popular teacher here. And I got teaching awards. And I would be teaching corporations and con law in the same year, and they became oversubscribed. And the first thing I used to say is, “Anyone who’s had my other course,” whatever it was, con law, corporations, the other way, I said, “Leave. This is the same course; it’s just different cases.” And it was! I thought it was the same course. So that’s what I—it’s my best strength—there’s a lot of good reasons, good consequences. You know, getting along in life, sometimes it makes it more difficult—particularly in marriage. I don’t know if you’re married, or not, but logic just does not help these things. [laughter]

Meeker: You might win an argument on the facts, but not on the grounds. [laughing]
Choper: No, you don’t win, you don’t—you can, like in a trial too, you can make the best argument. You lose because the judge rules against you. [laughing] It’s very simple. And that’s what happens in marriage—it’s very similar. They’re very similar. It depends who the judge is. Anyway, that’s a whole other story.

Meeker: [laughing] Well, I’d like to go back to what you say to your aspiring students about these being the same classes. What do you mean by that? How could constitutional law and corporate law be the same?

Choper: I’ll tell you. I’ll tell you exactly why, because I wasn’t teaching—I did not teach them the rules. That’s no big deal. These are very smart kids, very, very smart that come here. They learn the rules. What they’ve got to learn—and I’ll tell you a little vignette. They started a fundraising thing to name a room in my [honor], and it was all started, really, by a fellow named Herb Lurie, who made a hundred thousand dollar contribution to this as the first person. I remember him as my student, and I’d seen him a couple of times when I was fundraising. I went to see him, and he became successful. He worked for one of the big money firms in New York. So I got to know him; I got to know him better this way. About a year ago, I said, “Herb, let me ask you a question.” I said, “I’ve often wanted to ask you, why, what was it that I did that caused you to make a contribution like this?” And he said, “Well, you taught me to think clearly.” I said, “You know something? That’s it! That’s what I’m trying to do.” And what clearly means is to clear out all of your preferences and everything else, so it’s logic. Does it come together, does it come clearly? So I said, “That’s the nicest thing that you could have said to me. That’s exactly what I was trying to do!”

Meeker: Is this how the law was taught to you at Penn?

Choper: Well, no one ever said it that way. But the best teachers, the great teachers that I had there, yeah! Oh, that was a whole new life for me. It turned my whole sense of thinking around. It made me think clearly for the first time in my life, I guess. It made me think clearly, as a process to get along in life, I guess. Yeah, think clearly.

Meeker: Who or what do you attribute that to?

Choper: Several teachers, several teachers. One of them ended up teaching here and became a good friend—a fellow named Paul Mishkin. But I had a bunch of very good teachers. I had another teacher named Noyes, N-O-Y-E-S Leech, L-E-E-C-H. Also, a very different style of teaching, but that’s what they were getting at. They would give you one hypothetical and say, “Well, yeah, but
what’s the difference between this one and this one?” That was the question, what’s the difference between those two? What’s the logic? In the end, a lot of this is values. At the end, in constitutional law and in corporation law, it comes down to values, because you can have a very clear picture of two different results. And well, why did you decide this way, then the other way? Logically, you could decide it either way. Well, the quick answer is well, you must like one better than the other. If you can’t do it through logic, you’ve got to do it through whatever is not—emotion, or what you think is right. What you think is right, not so much logically. Right? But what you think is right.

Meeker: Well, that’s interesting, because you were just describing how it was logic that you learned in law school.

Choper: Yes, think clearly.

Meeker: But it sounds like there’s still room in your decision-making process for—

Choper: Values.

Meeker: —emotion and values.

Choper: That’s right. And try as hard as I can, to put those out—and I’m confident that most members of the Supreme Court, at least at some stage of their development, do so as well. They end up saying, “Yeah, but in the end, you’ve got your values.” Your values mean your upbringing, whatever you’ve learned along the way, your experiences in life—yeah. In the end, that’s what—there are two ways—that’s why you get five justices see it one way, four see the other way. That’s why there are the parties—you could say party X has one set of values, some of them have, within the party—we see it, right? And another has another set of values, has another value, an alternate value. And my values have changed over the years somewhat, somewhat. And sometimes you can’t be affected by it. I say to myself, don’t be affected by this. This president [Trump] makes it very hard, for me at least—some people just hate him! Oh, my wife just hates him! He can’t do anything right. Well, I mean, that’s not true, I don’t think. But nonetheless, I take great pleasure when I see clearly that he is dead wrong. [laughing]

Meeker: You know, in describing values, it seems it’s almost like a discovery process, and the way that you’re talking about it, it seems like this discovery process really happens, in a major way, while at law school.
Oral History Center, The Bancroft Library, University of California Berkeley

Choper: Well, it triggers you to understand that you are developing values or you have developed values. I think that’s true.

Meeker: If somebody sat you down at the end of law school, do you recall what you might have said in answer to the question: What are your values?

Choper: Yeah, I think so.

Meeker: At that time in your life.

Choper: You’d have to give me a choice of saying—what are my general values?

Meeker: Sure.

Choper: The Golden Rule. I like those values. But they don’t give you the last answer either. They again, they give you a process.

Meeker: And the process here is the legal process?

Choper: Yeah, it doesn’t mean that what I would do unto others is such a good thing either! [laughter] Some people wouldn’t think so, I guess. Or what you want being done to you. People have different values for that.

Meeker: You had mentioned Leech and Mishkin at Penn. Do you recall anything, in particular, about what you learned or how you learned in those classes?

Choper: Clear thinking. Mishkin, in particular, he would not stop pushing you and pushing you and pushing you, to what you were saying, to show you where you were going. I remember one time—I can’t remember the details—but it was just amazing the way he did that to me in class. Noyes Leech, in a very soft, quiet way also would give you a hypothetical. “Well, how about—if this is what you think, how about this?” “Yes? Well, then I think that.” I remember once Mishkin just pushed me down to seeing that well, that’s just the way I feel about it. [laughing] That’s values. I do remember that one day. I can’t remember exactly how it went, but he made me understand that.

Meeker: That’s almost like getting to a square root, or something, isn’t it?
I guess, if you get to underneath a square root, I guess. I’m not a mathematician.

I remember when I was a clerk for [Earl] Warren, there was a justice—there were four liberals—just like it is today. Four liberal-leaning, four conservative-leaning, and a middle guy. One of the conservatives was a man named John Harlan, H-A-R-L-A-N. I don’t know if it was during the time I was there or afterward, a couple of years afterward, reading one of his opinions. I remember getting done with it and thinking it through, and I say, “Well, he’s right, right, right—I just disagree with him.” [laughing] I just disagree! I disagree with his values. I don’t recall the opinion, no.

Yeah, I think you had referred to this—it was a dissent, wasn’t it?

Yes, I think it was a dissent. If I said that before on this, then it was. Yeah, it was a dissent. I just disagree. And I have said many times, and over the years I have some greater basis for being able to say, about justices over the years, I would say of all the great ones: Holmes, Brandeis—Harlan—was the best lawyer. He was the best logician. And I remember, in one case, in one area, it involved—I guess it involved birth control. Birth control, abortion—they begin to fuzz over with me today, as to which it was. But in the birth control case, I felt that he departed from that. He grew above that, in reaching his own decision on birth control.

He grew above the logic?

He grew above his own logic, that’s right. Yeah, that’s right.

Maybe he let his values get ahead of logic?

Yeah, that’s correct. It was an opinion; I think it was on birth control. In finding that yes, there was a right to birth control. Me? To this day, I think there should be birth control, don’t misunderstand me, but maybe my values are different.

So I think it was on birth control. I say I believe in that, I believe in it strongly, but when I used to teach it, see, I used to say, “Why? There’s nothing in the Constitution about that. Are you making up your own rules, Mr. So-and-So?” There came a time, particularly on abortion, in which I would get in a lot of trouble with the women in the class. Thank God I don’t teach today! And
that’s all right. I would try to explain. I believe, myself, in abortion, but the fact is I’m wobbly about its being unconstitutional, because of logic. Anyway, I won’t get into that.

01-01:36:50
Meeker: Well, we can get into that at a later date when we’re talking about what’s going on at Berkeley, because teaching a changing student population is something that would be interesting to talk about.

01-01:36:59
Choper: Oh yeah! Yeah, it is. It’s a changing world, probably for the better, in the end—and I accept that too. I don’t like to be one of these old fogeys who says, “Oh, they don’t—this is terrible,” and so forth. On the other hand, I am now a moderate. A person who can see clearly both sides of the issue and come to the decision that there’s something in between—not the extremes—which ought to govern us.

01-01:37:46
Meeker: You know, back to law school, how would you have described yourself then?

01-01:37:52
Choper: A liberal.

01-01:37:55
Meeker: What do you think that would have meant at that point in time?

01-01:37:58
Choper: It would have meant that you were—that’s a good [question]. Very much favoring individual rights—and I am that way to this day. In my books I say that is where the court ought to be involved. But there ought to be rights that are there in the Constitution, not made-up ones. We live in a democratic society, democratic political system. You know what Churchill said about democracy? He said, “It is the worst of all systems, except for all the others.” And he was right. That’s exactly right. Very flawed, democracy has lots of flaws in it. People do things without thinking clearly, without being logical. They follow their emotions, and they impose their emotional feelings on other people. That’s what democracy does—majority rules. It’s those who have the majority of emotions, at a particular time, that get it through. But nonetheless, it’s better off than giving it to any single person, no matter who you like or don’t like.

01-01:39:55
Meeker: So when you were talking about developing this sense of rationality in the context of law school. I don’t know if idealism is opposite rationality, but was there any kind of—?

01-01:40:30
Choper: It’s not opposite, but it’s not the same.
Meeker: It’s not the same. Was there any young, idealistic lawyer in you, at Penn? This is the late-fifties, the civil rights movement. The lunch counter sit-ins are just starting.

Choper: Yeah, probably. Yeah, I was an idealist.

Meeker: Was there any part of you that wanted to become an attorney to make the world better?

Choper: No. I never thought of it that way. No. I was too selfish. I did what I thought I really enjoyed doing. That’s an honest answer.

Meeker: Well, that’s fine. And so what was that though? That was that you wanted to—what was the goal then? What was the selfish goal, I guess?

Choper: To do something that I really liked, and teaching is something that I got a great deal of satisfaction out of. And to put some of my thoughts about stuff into articles, and hope that maybe they’ll get some—have some practical value. Because I’m a very practical person.

Meeker: Well, that’s good. Why don’t we stop there for today?

Choper: Good, thank you.
Interview 2: February 20, 2018

Meeker: Today is Tuesday, February 20, 2018. This is Martin Meeker interviewing Jesse Choper for University of California history. This is interview session number two, and we are here at his office in Boalt Hall Annex. Let’s begin. It’s been a month or so since our last session, when we focused on family background and upbringing, and your undergraduate education—and a bit about your time in law school at the University of Pennsylvania. A few things just to follow up on that period of time, before we get you into your clerkship with Chief Justice Warren. I know that you served on law review at Pennsylvania.

Choper: I did.

Meeker: Can you tell me about what that experience was like for you? How did you get on board, and what kind of work were you doing on law review?

Choper: Well, in those days, you got on exclusively on the basis of your grades. And I wrote, as a second-year student, a couple of what we called notes about cases, case notes—and I probably still have copies of them someplace. In the third year, they elected officers. I forget exactly how the officers were elected—I think by the, yes, by the outgoing staff, at least the senior editors of the outgoing staff. And I was elected to be research editor. I was ranked second in the class. The guy who ranked first would ordinarily separate about twenty positions in the class. His name was Anthony (Tony) Amsterdam. He was first in the class by a large margin. And I do remember that all of the officers, five or six of us, I guess, were married. I was the only single one. But many times, working there, late at night—after midnight some nights, Tony and I were the only two. And I think I once said to him, “You know, we’re the only two unmarried people here that can stay this late.” And then I realized that he’s married! [laughter] So that was funny—I remember that to this day. He got divorced, got remarried, he had to leave because of his wife, and he teaches at NYU today. Anyway, that was the law review.

Meeker: So the law review, you produced a final issue, I guess, at the end of your third year, right? It was a publication.

Choper: No, the law review comes out five/six times a year.

Meeker: Oh, it did? Okay. All right.
Meeker: So you were involved in the editing.

Choper: I was involved in editing, yes.

Meeker: Do you recall, at the time, what you were interested in seeing, what your criteria was for what would be a good, publishable law review article?

Choper: Well, the subjects were probably suggested by the authors, and then the staff approved of them, the editors of the [review] approved them. We looked for things that were interesting and not preempted; that is, taken and discussed already by somebody else. I want to tell you, it gets harder and harder as the years go by. [laughing] And you look at law reviews today, the major ones in particular, and the articles, for a lot of people—particularly people who are active lawyers—absolutely useless! I mean, they are at a level of philosophy, and so forth, so that they’re good for other academics who are interested in that. But even some academics—when you, even in my own area, it is not law that the Supreme Court puts out, it’s just legal theory, which has never been my great—I remember I used to, once my younger son studied—he finished at Cal, and he started at BU, Boston University. Anyway, some of my friends would say, “What is he studying, majoring in?” I said, “Philosophy, just like his father,” which was a joke! [laughing] Because I knew nothing about it.

Meeker: You know, in this distinction you’re making between law review articles at the time, that were law, right?

Choper: And that’s it! That’s a good way of putting it. [laughing]

Meeker: Law review articles today, which, according to your characterization, would be more about theory, critical social theory application, and that sort of thing.

Choper: Yes, yes, yes, yes.

Meeker: What is the distinction—how would you distinguish between the two?

Choper: Well, what I would distinguish between the two is that the audiences are very limited. And they are of value, almost exclusively, to other academics, and not to practicing lawyers.
Meeker: How are the questions academics are asking different than the questions that a lawyer would ask?

Choper: There is an awful lot of the association with interdisciplinary work, law and philosophy is a lot, law and sociology there’s a lot—that’s a lot of what is taught in a law school today. We have interdisciplinary courses all the way—we must have eight or nine different cross-discipline courses here, some of them with sciences—that’s just very different than what used to be.

Meeker: At the time when you were at Penn that year, editing law review, did it seem to you, at the time, that the field was wide open, that there were a lot of important issues that still could be weighed in on, in the way in which you’re talking about?

Choper: Oh, absolutely. I think there are still issues. In my particular area, in particular, constitutional law—trying to assist the Supreme Court in thinking about things, to the extent you can assist them, is extremely valuable, in my judgment. But it’s not done today. It’s very rare, in which it’s done, particularly among the more prestigious law schools—I can’t think of a better adjective—but the top-ranked law schools, high-ranked law schools. That’s what I think.

Meeker: So was that, maybe, the goal when you and your colleagues were editing law review at Penn, would be to produce documents that would be useful to—?

Choper: Yeah! Critical of what the law then was, whether it be constitutional law or tort law—or whatever kind of law. And how the law should evolve, how it should be changed. Why is the existing rule of liability, under certain circumstances, a good idea? Or why should it be changed?

Meeker: Were there any particular areas of law in the context of law review that were animating to law students at the time?

Choper: Well, constitutional law is sort of the sexy thing, but it changes over time. Then, changes in the common law—torts, contracts, etc. Today, economists, a combination of law and economics, very, very strong. And again, today it’s cross-disciplinary work. That is the thing that seems to attract—it does attract, not seems to, it attracts the sort of thing that major law reviews are interested in.
You know, in the short interview that you did [in 2004] for our Earl Warren Law Clerks Oral History Project, [The Law Clerks of Chief Justice Earl Warren: Jesse H. Choper] you made an interesting characterization of this period, the late 1950s in the United States. You called it both a golden period and a golden era. I’m curious what you might have been referring to, looking back to that era?

Well, the courts, the Supreme Court has always been involved in some of the most important social and political issues of the day. And the Warren Court, which I guess you could say I was there for that, although it was not the height of the Warren Court and its progressiveness. That occurred, actually, after the Warren Court, but there were two or three big issues: one had to do with race, and that was a series of years—it was just revolutionary insofar as the country was concerned. And I mean that for all parts of the country, not just the South, but all parts engaged in racial issues. The other was the communist scare, and all of the free speech issues that developed out of that. Chief Justice Warren was a leader, joined by several others, and sometimes by all of them—but rarely, such as Brown v. Board of Education was—that one was probably a unique accomplishment, and it’s written up all over how the chief worked on that and worked on that, and delayed it, and it was right at the beginning of his service there.

Right. So a lot of those First Amendment political speech cases were 5-4, 6-3; they weren’t unanimous.

Yes. And finally, some of the race cases began to get dissents, or at least concurring opinions, even when I was there. I don’t remember now exactly, but the first one—that was not unanimous. They tried to keep unanimous with that, despite the fact that there were some justices who had real reservations about it. Those who were—like Felix Frankfurter, naturally—or at least by experience—very wary of the ultimate power of the court, because in their judgment they saw it terribly misused before the New Deal. They saw that Frankfurter was involved in that, all these New Deal programs being knocked off, and so forth. So it took a lot of work on behalf of Warren to keep that going on.

So you said that there were the race cases, the first amendment cases and—?

Those were the big ones, the free speech cases stimulated by the rise of communism in Russia, and there was plenty of it here as well, in this country. They didn’t win all those cases, and they were 5-4.
Meeker: You know, in law school this is the tail end of the—McCarthy had already been personally disgraced by that point.

Choper: Yeah, he was gone, yes.

Meeker: I think dead by 1960. Where were you, as a student at the time, as a law student? Where were you on that? I’m beginning to be a lot more curious about this period in time. I’ve just started reading Arthur Schlesinger’s *The Vital Center: The Politics of Freedom*. In it, he makes a pretty strong argument for, basically, liberal anti-communism.

Choper: That’s where I was. I was way to the left.

Meeker: What does that mean?

Choper: That meant that in many ways the justice on the Court, that I admired greatly, was Hugo Black, who said—freedom of speech is absolute, it’s absolute. I don’t know if I have this in the other [interview] or not. But I once had—his law clerks—and he only had two clerks. The law clerks had their own little dining room, and you got to know each other pretty well, and we visited socially as well. Anyway, they knew how much I admired Black. They once said, “Would you like to have lunch with him?” “Oh my goodness, of course!” Which I did, with him and his two law clerks. I remember—I don’t know what possessed me to say it at one point—but he talked a lot about things. He had been a member of the Ku Klux Klan, back in his days as a senator in Alabama. You had to do it, politically, and the court was also under great criticism from the American Bar Association at that time, which was then quite a conservative organization. We talked about that, I remember. And he said, “Of all the organizations, I have ever belonged to,” he said this deep southern accent and he seemed like a very old man—which he was. He was probably in his late seventies at that point. [laughing] And he said, “Of all the organizations that I’ve ever belonged to—come on, including the Ku Klux Klan—the one I am most ashamed of is the American Bar Association.” [laughter] I’ll never forget that. That was really funny.

I worked on a case involving the Sunday closing laws—I think I may have mentioned that before—and the question of religion. I took a view that Black disagreed with. The chief wrote—I drafted the opinion for him, and it’s the way he wanted it to come out. And Black’s law clerk—he told me that Black asked to see me on it, which I did. I went to his office, and I explained to him what I was saying. And I said, “I relied on your case.” I forget the name of it now. And he says, “Oh no, what you’re doing is what the *dissenters* to that opinion had the view of.” [laughing] “They were the dissenters, not me.” So
anyway, it was a different—just a different time for everything. Everything was much smaller, on being on the court.

Meeker: So when you were talking about a golden era, do you think of it as the golden era of jurisprudence?

Choper: Well, it was the court at its height. Change and height. Yeah, great social change, and, in fact, permanent social change. The communists didn’t win all the cases, by any means. As I say he was often in the dissent, particularly in the earlier years. Less so when I was there, and then generally the whole movement, and the threat, and Russia came down. But even to this day we have an American Communist Party, I think. Don’t we?

Meeker: I believe so.

Choper: Are they still around? Yeah, I think—

Meeker: And we certainly have Russia.

Choper: Yeah, we’ve got Russia. Yeah, we do—again.

Meeker: Right. Well, let’s talk about your period as clerk for the chief justice. I believe it was the dean at the law school, Jefferson Fordham, who facilitated your introduction?

Choper: He did. I think he had a lot to do with it. In those days, the law school told you who they were putting your name in for. They didn’t ask—you didn’t do it yourself. It was, again, a totally different thing. Today, young law students going looking for clerkships, they apply all over the place and they do the choosing, and so forth. But here, they sent three students up to, nominated them to a number of Supreme Court justices. Jeff Fordham, whom I came to know quite well after I became dean—or maybe even before, when I got into academia—he was a southerner. But he was one of the very few southerners who supported the desegregation cases. And the chief—you know, he had a memory about that. When Fordham made a strong recommendation for me, he was influenced by that, and influenced by a law clerk that he had had from Penn before, who was now teaching at the law school, and he put in a good word for me as well. I think he called him, or something like that, and said, “What do you think of this guy?” And my background appealed to Warren—very, very different, because again, most of the—not most, but all of the people, the Supreme Court clerks, very, very different background.
Meeker: What about your background was different, do you suppose? There’s different ways of looking at it, right?

Choper: Yeah, I went to a tiny college, no great distinction. I came from a socioeconomic background—well, I guess there were some of those. I was much less deeply or broadly educated than any of the other clerks I served with, and that is largely true to any of the other colleagues—to this day—all the colleagues I have. Now, I try, current affairs, or something—that keeps me pretty interested. But I know—I talk to others who—with a much greater breadth of interest. I thought that my socioeconomic background appealed to Warren, and I think that Fordham told him that, that I was on full scholarship, and I was teaching a couple of classes each semester in accounting, which again, shows the narrowness of my interests—and that appealed to him, because it’s similar to his own personal background.

Meeker: When you met with him and were working with him, did he ever ask you about your background? Did he ever seek it on his own?

Choper: I don’t know that he ever asked me, but it was talked about. He used to take us to lunch, the three of us. We had three law clerks at the time, and the chief had a third law clerk because it had a lot of extra work involved with it. It ended up with four- or five-hour conversations, with the four of us, the three clerks and the chief. Yeah, things would come up, and this just came out in the course of conversations.

Meeker: You know, I imagine at a place like the halls of the Supreme Court, you’re going to see a lot of multi-generational privilege there, individuals whose great-great-grandfather graduated from Harvard, and—

Choper: Yeah, some, some. Yes.

Meeker: How did the chief justice respond to that? Was that something that he thought was just part of the normal way of things, or was he seeking to alter that through his own work?

Choper: Alter—?

Meeker: Alter generational privilege. Was he, by bringing you along, did he want to break that up and—?
Choper: No, I don’t think he thought in those terms. I think it helped me get the job. I do think it helped me get the job, that I came from a limited background, limited socioeconomic background, son of immigrants.

Meeker: Did you meet him prior to getting the offer?

Choper: No. No. I didn’t meet him before. He took me on the basis of the recommendations of those people that we’ve just talked about.

Meeker: And you arrive, and then you are serving with Murray [H.] Bring, who was the second-year [clerk]?

Choper: Yes, there was a second-year clerk, and Joe [Joseph W.] Bartlett was the other first-year clerk.

Meeker: Joe Bartlett.

Choper: And they were also quite different. Murray Bring came from, I think, a relatively modest background. He came from NYU. Joe Bartlett came from—his grandfather was chief justice of the Massachusetts court. I’m sure we talked—I did a lot on that. So he was very different, and he and I shared a room, and the other senior clerk had—that’s just the way the offices were arranged. So Joe and I—I mean, we’re there every day, cross-talking and everything. It was a lot of fun with him. He got a big kick—and he was kidding me all the time, you know, about where I came from, and so forth.

Meeker: Who is this, Bartlett was?

Choper: Yeah, Joe Bartlett.

Meeker: Can you tell me what a typical work day would have been like as a law clerk?

Choper: Yeah, a typical work day was we never showed up too early. I would say maybe nine thirty. Maybe one time the chief, I guess heard—I think he was there early for some reason one morning, and one of us wasn’t there, and he complained about it. Anyway, that was it. A typical day was we’d just go to work on our stuff, and we did three sorts of things. We used to take all of the cases, and all of what they called *in forma pauperis* cases, of which there was only one copy in those days. We used to have to put it around. This was
before Xerox machines at all, photocopies. I forget exactly the process. There was a way you could run it through with a roller.

02-00:29:22
Meeker: Right, a Gestetner machine, or something like that?

02-00:29:25
Choper: God, I can’t think of the word of it.

02-00:29:28
Meeker: Oh, like a Mimeograph, or something?

02-00:29:27
Choper: Yeah, yeah, yeah, that’s right, that’s right. They just came out one sheet at a time. So anyway, so we spent a lot of time on that, writing out memoranda that were then circulated to the justices. They could always call for the record, and they could see it. But mainly, I think they relied then, particularly, on the in forma pauperis cases.

02-00:30:03
Meeker: So as a clerk to the chief justice, was your job description different than the clerks for the associate justices?

02-00:30:10
Choper: It was different only in the sense that we prepared the initial in forma pauperis case memos. I remember once the phone rang on Joe Bartlett’s desk, right across—as far as where you were sitting here, a little farther. And he said, I forget what he said, “Joe Bartlett,” or “Bartlett,” and you could hear the voice on the other side, and it was sort of a drollish voice, and Joe said, “Come on! You’re not him.” And I could hear it, and I said that’s—I went over and I said, “That sounded just like Tom [C.] Clark,” who was one of the justices. [laughing] So he was really embarrassed by all of this, subsequently. Anyway, so I forget what your question was, but—

02-00:31:17
Meeker: I was asking you to walk me through the work day.

02-00:31:19
Choper: Yeah, the work day. Yeah. We went down for lunch at a special room for law clerks only. I had not been a lunch-eater in those days, but I went down to the lunch, and that was really a good experience. We usually had, once a week we would have a distinguished local person come in. Each of the other justices would come down one day, and you could ask a lot of questions. And we had, I think I mentioned, I’m sure—we had one fellow who was a really, he was not a middle of the century/modest with his elders [fellow], and he would ask anything. He would get all kinds of questions, and so forth. It was really gutsy. He clerked—he was from Yale. I forget his name, and he clerked for [Associate Justice] Charlie Whittaker. And his clerk, Dean Acheson, was just a very gutsy guy, and he would ask questions of the justices that you couldn’t
ask—no one else would ask. We had people, Dean Rusk, who was then Kennedy’s secretary of state came over to see us.

Meeker: Was he a cabinet secretary?

Choper: He was a cabinet secretary. But someone asked him this question, I think it was, “What do you think of Richard Nixon?” And I’ll try to give the best imitation that I can. He said, “Well, I—you know,” I mean, the guy was stuck for words for a moment. Then he said, “I just hate him!” [laughter] What was his name?

[side conversation deleted]

Meeker: In ’60 were you for Kennedy?

Choper: Was I for Kennedy? Secondarily. I was for the other fellow from Illinois. Oh, he ran twice for president. He was a wonderful speaker who had been the governor of Illinois. [Adlai E. Stevenson]

[side conversation deleted]

Choper: So he was the one I was in favor of; but when Kennedy was elected, of course there was no issue for me. This was Kennedy against Nixon. It was the first time. So I told you, I had occasion to meet Kennedy once, and this is a very—do you have that?

Meeker: Right, in the previous interview you mentioned it. It was at a party.

Choper: “Where is Harvard?” he said, when we were going to that party, that’s right.

Meeker: I understand that, I guess, during the year that you were clerking there, I saw some figure that about 2,200 cases actually come through the door of the Supreme Court. Is that right?

Choper: Is that what they had that year? Now they have 6,000-7,000. I think there were more than 2,200, including the IFP cases.

Meeker: IFP?

Choper: In forma pauperis.
Meeker: Okay. Of whatever that number was, I believe there were about 150 decided that year.

Choper: Yes, those were the days. They’ve cut that in half now.

Meeker: So now there’s more that come in, but fewer that are decided?

Choper: Exactly.

Meeker: What has changed, do you suppose at the Court, from those days?

Choper: What’s changed? It is, in my judgment, the Internet. The ability to knock out the stuff, change it, blink and bling, and then all of a sudden you’ve got—yeah, two opinions or—Occasionally, you’d get a very, very long opinion by Frankfurter or somebody else. Now there are more. There’s, I think, 7,000-8,000 considered today.

Meeker: Seven to eight thousand, but then there are fewer decided.

Choper: Yeah, fewer—sometimes there are very, very few, even down to about sixty, I think, at one time.

Meeker: Right, so what changes? Why are there not more cases decided?

Choper: I think they spend more time on each case. That’s what I think. And these are the cases, yeah, that they’ve taken. I think they are conscious of the fact that they can only decide so many, and that they don’t want to rush it, and that their opinions are much longer, as a rule. Oliver Wendell Holmes, it was said that he wrote his opinions standing up on the—sort of pieces of furniture where you can—

Meeker: A podium, or something.

Choper: A writing desk.

Meeker: Right, right, yes.

Choper: I think it was called a writing desk. So that’s the explanation I have.
Meeker: Those 150 cases that were decided.

Choper: My term—is that right?

Meeker: Yeah, I believe so. What was the disposition of those? Were there opinions written for each of those 150, or is that a smaller subset?

Choper: Virtually, no virtually all. Some of them may have been very short, and sometimes very short. And a lot of them were not those that caught the public’s attention, and that’s still true today. They decide a lot of statutory interpretation cases, not constitutional cases. And they’re important—they’re important not only to the litigants, but to people in a particular industry, which is true to this day. If you look at the statutory interpretation cases, they can be very, very dull! [laughing] In terms of what I would call sex appeal, they’re just very dull little kinds of interpretation of statutes—but they are important. They are important to some people, and if you get a conflict between two circuit courts, then the chances are very high that they will take that case up. Or if the government, the U.S. government has a—they put in a memorandum, friend of the court, saying we think you ought to take this case. The solicitor general—they act as a very strong filter. They don’t do it very often. When they do—I forget the number of cases, but it’s well up over 75 percent, that if they say take it, the court takes it.

Meeker: Interesting. As these cases come in, as they cross your desk, you made this distinction between those that were constitutional and those that were statutory.

Choper: Yes, and we divided them up, the three of us divided them up to write the memos. In the constitutional ones, we had our own little specialties too.

Meeker: For the constitutional ones, did each and every one of those cases seem like it might have the power to be transformative, precedent-setting, or were there just a few cases each term that you knew, in advance, could be transformational?

Choper: Well, the communist cases were. They were, yeah, they could make a big difference. Those were the big ones, the race cases and the communist cases. There were some criminal procedure—[what] we’d call criminal procedure cases, and, yes, we had a big one. I must have had this in that other [interview] too.
Was this one that you worked on? Was it the Times Film Corp.? Is that the one?

No, no, no. This had to do with the question of if you had an illegal search and seizure—if you had one by federal officials, then the court had, for many, many years said that if the product of the—and these were very controversial. The issue was controversial—they are to this day. And that is because it’s pretty clear that the evidence is going to convict the defendant, but nonetheless, if it was seized illegally, the rule at the time for federal cases was that they can’t put it in. It’s inadmissible. The big case during that year was a case in which they held that that—oh, my goodness—that it applied to the states. I’m pretty sure that that is the case. You don’t recall this?

Well, the one that it sounds a little bit like is the Boynton v. Virginia, but that was interstate commerce.

No, no, no. That was a race case.

Right.

Okay. So, it was a free speech case—that’s what the court took it up as. And I was driving—I used to give, since I lived on the way to the chief’s apartment, when sometimes his chauffeur was unavailable or we could stay late, or whatever, and he would ask me—his secretary would call. Mrs. [Margaret K.] McHugh, she was one of these—she ruled the office—you’ve got to get past Mrs. McHugh! And so she called me and said, “The chief justice wonders if you could take him [home].” I said, “Of course.”

So we’re driving along, there’s a lot of traffic, and it’s slow-going, and so we get to talking. Oh yeah, it was a Friday. And so—and they had decided—they were in conference where they decided the cases. And for some reason, I guess maybe—the chief used to call us down afterwards and told us what happened at the conference, but he didn’t. He had to go someplace early—I forget exactly what it was. That was the reason I was taking him home. So this was a First Amendment case, an obscenity case, as I recall. And I said, “Well, Chief,” he used to tell us everything that’s going on, in strict confidence. And I said, “What about this case?” And he said, “Well, we’re all over the lot on it.”

I remember that the evidence had been—it was a little issue in the case, that is hardly ever argued, that it was illegally seized. And so I said, jokingly, “Well,” yeah, and now I remember, I said, “Forget the First Amendment,” I didn’t say forget, just kidding him, “Why don’t you just overrule Wolf against Colorado?” That was the case that said that an illegal search and seizure, if by
state officials, that was not excludable evidence. And he sort of did something, you know, rubbed his chin, he says, “Well, Jesse, I’ll tell you something, but you’ve got to promise—don’t tell anybody else.” That’s not the sort of thing—inside, you could do anything. He said, “Tom Clark,” who was quite a conservative justice, “he thinks that he can get Black to join him in something on this, and I think we may be able to do that.” Well, I never told anybody. I didn’t tell my co-clerks or anything. I don’t know why exactly, but because it was unclear, and Clark didn’t want it known and talked about, and so they overruled it, and that was going in—that’s right.

Meeker: Do you recall the case now? The name of it?

Choper: The case they overruled was Wolf against Colorado. I can get it for you.

Meeker: Yeah, let’s put it in the record.

[sound conversation deleted]

Meeker: You were providing a kind of a behind-the-scenes story about maybe how some rationale emerged for a particular decision on obscenity, but tied to the exclusionary rule. What was the case, again, that was decided?

Choper: It was Mapp against Ohio, Mapp with two Ps.

Meeker: And that’s 1961.

Choper: That’s 1961. And the opinion was written by one of the conservative justices of the court, and they were broken up just like they are today, but he voted to exclude evidence that was illegally seized by state officers, overruling a prior decision called Wolf against Colorado, which said that the exclusionary rule applied only to the federal government. That is to say by federal searches and seizures, and not to the states. I think I’ve talked about the chief saying that we’re going to do this, and that—well, when the case came down, it was the way he said. And Justice Black, who did not like the exclusionary rule very much, he joined it. He joined the opinion, but he wrote a separate opinion, which had a very different rationale than the one that he joined, so it was clear that he joined the opinion simply to make five justices and [have] it be opinion of the Court. So he was a very crafty fellow, and it’s clear that he did it, it seemed to me, because his nemesis on the court, Felix Frankfurter, had written the earlier case and he was much more conservative on most issues. He did not want—look, it was the New Deal. He saw the power of the court, and he never got over that.
You know, this case sounds kind of interesting, because the way you describe *Mapp v. Ohio* was—the headline would have been as an obscenity case, right?

It was an obscenity case to begin with, and they couldn’t get their act together. They couldn’t get five to do it. You know, they were all over the place on obscenity, too.

And so then it becomes not an obscenity case, or a precedent-setting obscenity case—

No, no. It had nothing to do with obscenity, the opinion.

Right, and it ends up becoming an exclusionary-rule case.

That’s correct.

How often does that happen? How often does a case go in?

Rarely. I would just say rarely. If it happens once a term, that’s unusual.

Well, then back to this conversation you were having with the chief in the car.

Yes. And he didn’t want to tell the rest of the clerks, and I don’t know why, because that’s the only time, I think, that I understood that to go on. I think that he was not sure that Clark would do it, or could get it done, or that Black would go along. So the last thing he ever wanted was—and I guess the majority ended up, the chief and the others who got Clark’s vote, I guess they maybe agreed that they were not going to tell their clerks. I can’t remember asking anybody, any other clerk after the case came down whether they knew about this or not, except in their own offices. And Warren was writing no opinion in the case.

Correct me if this interpretation appears wrong, or if maybe it seems right, but people talk about legislation as sausage-making sometimes.

Yes.

Usually Supreme Court decisions shouldn’t be thought of in those terms.
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02-00:53:33
Choper: They weren’t trading votes.

02-00:53:36
Meeker: Well, I don’t know if this was trading votes as much as it was the messy work of getting to some resolution.

02-00:53:44
Choper: I think that goes on, that it can be messy. I think, for example, you can see it in opinions, that they get someone’s vote. But they say, “I’ll give you my vote, but you can’t say this, you can’t say that. You just say this.” And they do it because they want to have five, which establishes a precedent. That’s the answer. So this particular situation—and I am speculating, in which Black was able to stick it to Frankfurter—it reeked of that to me. Clark did it on his own. I do remember this, too. Frankfurter delayed and delayed. He had a dissenting opinion. I think he was going to write—dissenting opinions are not assigned to anybody. You can write—usually the dissenters agree that someone should do it. But anyway, he did it, he didn’t do it, and he didn’t do it—and the chief would come back and say, you know, we have talked about this, as to when this case is coming down. We talked about it in a conference today. And Frankfurter said, “Oh, I just can’t do it.” Douglas, who was a very outspoken—“Oh, come on Felix, you’ve had that dissent written for years!” [laughter] And finally Harlan took it over, because Harlan said, “Oh, let me settle this,” and he did. Harlan, with Frankfurter and Whittaker joined dissenting.

02-00:55:53
Meeker: Was it interesting to you that Frankfurter becomes one of the more conservative members of the court, even though he starts out—?

02-00:56:04
Choper: He was a great liberal. He was a great liberal legislator—no he wasn’t a legislator, he was a Harvard Law professor, a close advisor to FDR and he was one of the founders of the New Deal. No, it’s not, because when you think about—this is very consistent. When you think about the fact that the New Deal was pummeled by the Supreme Court at a particular point—he said that was not a good thing, and he was—you’ve got to give him some credit. He was consistent. In having a limited role for the Court, with one exception: religion. He was very liberal in interpreting the religion clauses.

02-00:56:54
Meeker: Interesting. Well, can we talk a bit about the religion, particularly the Sunday closing law cases? I know that you’ve talked about some of this in the previous interview, but I went back and read through your interview, and this, of course, comes up again with your Minnesota Law Review article.

02-00:57:24
Choper: The first one.
Meeker: Yeah, I guess the tenure article, as you describe it, right?

Choper: Yes.

Meeker: Which is not the exact same thing, but it certainly touches on First Amendment establishment issues. So the Sunday closing law cases; these are a series of cases. There was *McGowan v. the State of Maryland*.

Choper: Yeah, there’s four of them. That was a big one. McGowan against Maryland was the principal case.

Meeker: Right, and then there was Brownfield v. Brown.

Choper: Braunfeld.

Meeker: Braunfeld.

Choper: Well, that was, there was a difference between—that one is the one that was the free exercise clause. And the question was whether the Orthodox Jews could get an exemption to work on Sunday, because they couldn’t work on Saturday. The McGowan case was whether this violated the establishment clause, the Sunday closing law cases. And I guess, this may have been—the court held, I think over one dissent, that this did not violate the establishment clause. That’s the case in which Black called me in on, by the way. [laughing]

Meeker: Well, all of these were decided together, were they not?

Choper: They were, yes, but they all involved the Sunday closing law cases. Several had little opinions, but the two major opinions were McGowan and Braunfeld against Brown, which was the free exercise clause, and I said it was not a violation of the free exercise clause, did I not?

Meeker: You did.

Choper: Yes. I think the chief tended to agree with that—he agreed with it, he put his name to it. And the establishment clause was McGowan, so yeah, that’s right. We found no violations at all. And working on those cases did influence me.
Meeker: How did you get to those opinions? I’m curious, because thinking about your upbringing, and in school and having to recite prayer—

Choper: Yes, that’s a good—that’s right.

Meeker: And having that—right? And that felt probably coercive in some ways.

Choper: It did.

Meeker: Yet, that didn’t inspire in you—the first chance that you would get to have a major influence on this kind of law, you come down on the side that was perhaps contrary to that, or not? Or am I seeing this wrong?

Choper: No, you’re not saying it wrong. It’s interesting. You’re asking me to go back in what was my head working on at the time? Everything you’ve said is accurate. What is it that caused me to go the other way in these cases? Well, the establishment clause cases, this was the establishment of a religion. But the fact is the Sunday closing law cases—the Sunday closing law was originally for religious purposes, but it became perfectly clear, by the time this rolled around, that religion had nothing to do with this! This had to do with business, and it had to do with the opening of large retail discount stores out on the freeway, and so forth. Or—there weren’t any freeways in those days, but out on the new roads. In New Jersey, I remember. You’d drive out there and go and get it on Sunday, because you couldn’t get it in Pennsylvania on Sunday. But you could go wherever it was—maybe Maryland, I forget. I guess it must have been Maryland and the unions were very much opposed to this because they could end up with their employees having to work seven days a week.

Then on the religion case, the freedom of religion: How could I say that this didn’t violate the free exercise clause? Because I couldn’t find a principle that I thought would limit the discretion of the court, and to this day I happen to agree with that, even though it’s sometimes my strong feeling, about not giving the court a great deal of discretion in deciding cases according to their own guts, but on the basis of what I—the key word for me is principles. I couldn’t find a principle that would work. Under what circumstances could you ask any, could you say that any time you have a bona fide religious belief you can get an exemption—believing you should kill your first born. You know, it’s just not true. It can’t happen as a practical matter, and you can give the court an awful lot of discretion in deciding those cases—and I didn’t want to do that. Does that make any sense to you?
Meeker: Well, it makes a lot of sense.

Choper: That’s all—that’s it. That was conflict for me.

Meeker: Well, what I’d like to hear more is that it seems like, in this case, there’s a couple of different ways of looking at the world that you had to wrestle with. And that is, one, your opinion on and your understanding of judicial restraint, the role of the courts.

Choper: Yes.

Meeker: Another one is the role of religion in American life.

Choper: Yes.

Meeker: And it feels like on this one, the paramount value was judicial restraint, that there was no good principle for the court to act on this issue.

Choper: Yes. When I subsequently wrote my articles on religion, I differed from this. I thought that I came up with something that was as close to real principle, to do the free exercise, to say that under certain circumstances, if everything here is present, you are entitled to an exemption because of your religion. That’s right. I’d have to go back and read what I wrote to have all of that come back. [laughter]

Meeker: Well, it’s really fascinating.

Choper: I am that way, to this day. You know, we have a very controversial clash between—Trump, that’s it. Now, I think Trump—I just read today, that at least the ratings put him [as] the worst president we’ve ever had. Well, I don’t know enough about all of them. But he, nonetheless, it seems to me that—I’ve said this a number of times. Look, he was elected. He was elected—if they can find out something, that the election was rigged, the fact that the Russians are trying to influence our election—nothing new about that. You don’t think we try to influence other elections all over the place? Federal officials wouldn’t be doing their job if they weren’t doing that! And so, and that’s the sort of thing that I say. Sometimes it’s very, very hard, particularly in the community in which we live, to say things like that. If they can get Trump for something, that’s fine. They can impeach him, that’s fine. I hope they can.
They’re not going to—not yet. That’s not even close. They’d have to have one big election in both houses of Congress before they can do it.

Meeker: Do you mind if we go back to the Sunday closing laws? You know, one question that I had when thinking about this is that I think that there’s a part of American jurisprudence today, that one of the principles is if the law can protect the minority group, then the law should protect the minority group. In these closing laws, the minority group, in particular, were conservative or Orthodox Jews.

Choper: Yeah, Orthodox Jews.

Meeker: Who felt that there was a dissonance between—

Choper: Now, no one said they had to do it, it just meant that they had to give up a day’s wages.

Meeker: Right.

Choper: That’s right. I know that’s easy to say.

Meeker: Well, I wonder if it would come up today. Would there be a part of jurisprudence that would say this is a historically discriminated-against minority group. We need to try to protect them, and whatever concerns we have—?

Choper: If you can show deliberate discrimination, yes. The law is clear, and I believe in that too. But this was not any deliberate—these Sunday closing laws were not passed to discriminate against Jews. They could have given an exemption if they wanted to, and today—again, I’d have to go back and read what I’ve written. I would say that they may be entitled to an exemption, but you have to meet a lot of criteria before you do it.

Meeker: But at the time, then your notion would have been that—?

Choper: At the time, I couldn’t see the principle. Look, we’ve got at least three major religions with different days of rest. Muslims were not a very controversial group in those days, but everybody knew about them, and that Friday was their day. All of those issues I’ve addressed, but that is what influenced me at the time. I couldn’t find a principle. I abandoned that in my subsequent
writing. There was a principle, but it was a much—here it was an inflexible principle, except if you can show deliberate discrimination.

Meeker: So when you wrote the initial draft of that decision—which I understand that you did, right?

Choper: Yeah, that was clear to me at the time. I had personal regrets, but it made sense to me at the time.

Meeker: So was this a conclusion that you came to, and you go to the chief, and you give your outline of what you think it should say, or is it vice versa?

Choper: We wrote what were called bench memos when a case was taken and then set for argument. But you asked what do we do—then we had to write bench memos too, for every case in which they did, we did something with it. I believe that we made a specific recommendation as to how he should vote, but let me put it this way: It would have no final influence on him what I had to say. That is clear. He gave us great discretion in what we said in the opinions. I must have said this in the [earlier interview]—the principles are dense, so I felt not uncomfortable about it.

But I could tell you cases in which he went the other way from what I had to say. I remember one once had to do with state regulation of interstate commerce, and I thought I had just—after all, I just had this in law school! I knew everything about it. And I wrote this long memo, saying we should grant review and what we ought to do in this case. And then they didn’t, and we’d ask him after he told us about the results in the conference, and so forth. And I said, “Well, what about my memo?” I didn’t say that, but that’s what I raised with him—“Oh Jesse, I read that. I read it carefully. You know, every time we take one of those cases, we just screw it up.” [laughing] He said, “I’m not taking it—the law may not be all that good. It may be flawed—it’s not terrible, you know.” But he said, “We wouldn’t get it together.” See, very savvy with things like that. I think he felt that way about the religion cases too.

Meeker: In what way?

Choper: It was a matter of principle with him. He once said, in his own way, he said, “I hate to strike down laws that are enacted for the public interest.” Now, if you take that literally, it doesn’t make much sense. But I knew what he meant, and what it meant is if there’s a strong interest, and not a strong reason on the other side, he said there’s a presumption in favor of what the electorate does. I guess I feel that way too, even though I don’t like what the electorate does lots of the time. It’s there. I should say this: I have changed my mind about the
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electoral college. I think that’s a bad idea. Having said that, forget it, because you’d have to amend the Constitution. Can you imagine amending the Constitution on that? No way on God’s earth. So that’s it, that’s what the Constitution—I respect the Constitution, whether I agree with it or not.

02-01:14:53
Meeker: You know, speaking of big constitutional issues, it appears during this period of time, apropos of the Mapp case, right?

02-01:15:04
Choper: Yes.

02-01:15:04
Meeker: It appears that there’s a rethinking and expansion of what applies to the federal government that now begins to be applied to the states as well.

02-01:15:20
Choper: Oh yeah! But by the Court you mean?

02-01:15:23
Meeker: Yeah.

02-01:15:24
Choper: Oh yeah, they’ve gone almost—yeah, they went all the way. They said full incorporation of most provisions of the Bill of Rights.

02-01:15:32
Meeker: So this was something that was just happening at the time?

02-01:15:34
Choper: I like that too!

02-01:15:35
Meeker: Okay.

02-01:15:36
Choper: Why? Because it was a principle, and particularly at the time. But yeah, that’s right. They didn’t start this way; it depended on how you get a majority. Yeah, I agreed with that change. That was a principle, even though I don’t agree with all of the reasoning of it.

02-01:16:05
Meeker: Well, this was something that was just in progress when you were there, right? This process of full incorporation hadn’t been completed.

02-01:16:13
Choper: No, it was just in process.

02-01:16:15
Meeker: At the time were you aware of what was happening?
Choper: Yes. They were applying more and more provisions to the states before I got there, as I recall. I put a lot of weight on principle, and I don’t think it’s a good idea—the opposite of principle, in this, is balancing. You say, “Well, we balance this side to that side.” Well, I would say that balancing—yeah, you know what balancing means—it means how do you feel about this issue? And I don’t think that it’s consistent with our system, to let that happen.

Meeker: That’s an interesting perspective.

Choper: It’s the same thing that I tend to agree—if they say freedom of religion, then it’s freedom of religion. Freedom of speech? I’m almost an absolutist on that. You see all of this stuff going on today, right here on the campus, and the problems that the chancellor’s having and I don’t think that it’s absolute, and I don’t think that you can’t put some limits on it that don’t have anything to do with whose speech it is, that you have rules, and so forth, and so on. And I think these are complicated questions, as to applying them, but I do—I’m an almost-absolutist on freedom of speech. But there are limits to it, particularly when it involves enormous amounts of money in order to preserve it. That’s difficult, because fortunately for me, we’ve got both sides now, that are pretty much pushing this. I get very angry about the way that they’re trying to use Berkeley, to show that we’re going to put limits on free speech. It’s going on all over the country, but there are certain things they call time, place, and manner restrictions on speech. As Holmes once famously said, “The First Amendment doesn’t say you can holler fire in a crowded theater.” He was a great wordsmith. So, I think that’s true, and I don’t think you can force public agencies—Berkeley, whatever it is—to expend enormous sums of money in order to stop riots. I think that’s true. There’s a limit; that’s what I think.

Meeker: During this era, in the early sixties, you talk about your emphasis on principle, in the face of maybe countervailing forces that are engaged in some negotiation or balance or relativism, maybe.

Choper: Relativism, yeah. That’s good, in the political process that’s fine. That’s the way you’ve got to do business. You can’t have high principles, absolute principles—you’ve got to make deals. But that should not be in a court.

Meeker: Did you feel like other justices, maybe those on the more conservative side, were less interested in maintaining principles and were more open to relativism at that time?

Choper: The conservatives?
Meeker: Yeah.

Choper: No, I think they were pretty principled. The four real conservatives there were Frankfurter—he was pretty principled. I’m sure he didn’t like a lot of those laws. You know, he was also a Jew, and an immigrant Jew—and it was a flag-salute case, I think the first flag-salute case. He wrote one of these famous things that he was a member of one of the most despised—I forget the words—religions around, he said, but nonetheless, we’ve got to respect the principle.

Meeker: Okay. Let’s talk about your move to the University of Minnesota Law School.

Choper: Yes.

Meeker: How does the year wrap up for you on the Supreme Court? Is there a big going-away party that happens? Does everyone just say good-bye and go their different ways?

Choper: You mean among the clerks?

Meeker: Yeah.

Choper: I can only tell you about my time—no, you said good-bye, but a lot of us kept in touch with one another. I still keep in touch some—I exchanged e-mails with Joe Bartlett not long ago. Murray Bring, I sort of lost track of—but for some time, we used to have reunions of all of the chief’s clerks, over the years. I got to know quite a few of them, some of them fairly well.

Meeker: You had, I believe, already been hired by Minnesota when you got the clerkship.

Choper: That’s before I got the clerkship. Yes, my third year in law school, at the end of the first semester, they had the hiring conference, and I went to it. It was in St. Louis, I remember that. A terrible snow storm, in which I had to take a train from Philadelphia to St. Louis because the airports were closed down. Anyway, I interviewed with a bunch of schools at the convention, and then some of them invited me out to interview more, and I had a number of offers. I interviewed with Berkeley, and they said they would not hire someone right out of law school. They had a strict rule about that—they actually offered to get me a job as a clerk to a man named Roger [J.] Traynor—I don’t know if
you know that name. He was a great justice on the California Supreme Court. And I said, “No, I don’t want to do that. I want to go into teaching. That’s what I’ve decided to do.” So anyway, that was one. I remember that very—having ended up there, I do remember it. So the two best schools that I had offers from were Wisconsin and Minnesota, I think Minnesota was probably ranked a little higher in those days, and I felt at the time that there were only seven or eight law schools better than that, then there was a group of six or seven more, and they were in that group. And I was single at the time, I could not see myself going to Madison, Wisconsin or Charlottesville, Virginia. They offered me a job as well.

Meeker: University of Virginia?

Choper: University of Virginia. It was interesting—I got turned off from Virginia. I couldn’t see that. They only had one Jew on the faculty, who became the commissioner of Internal Revenue afterwards.

Meeker: On the entire faculty, or on the law school faculty?

Choper: Law school faculty. The person who was in charge of the appointments committee—they used to call it, I think, recruitment committee in those days, after I had done all my interviewing, he called me in his office and he said, “You know, we are going to make you an offer. I just want to say this to you—are you Jewish?” And I said, “Yes, I am.” By this time I think I was not practicing, or anything, but I said yes. And he said, “Well, we do have one Jew on the faculty—Morty [Mortimer M.] Caplin.” That was his name, Morty Caplin, great tax guy who was a graduate of the Virginia law school. I met him there earlier in the day, and he had this heavy southern accent. [laughter] He didn’t sound Jewish to me. It was really funny, and he had white shoes. Anyway, so he said, “You know, that country club where we went for dinner last night, where we took you to dinner?” “Yes.” He said, “Well, they don’t admit Jews or Catholics.” That, and as I say, I was single at the time—I figured what am I going to do in a little town like Charlottesville? That put Virginia out of the case. Minnesota had this group of young faculty, and Wisconsin was stodgier, and so forth, I thought. And they did a great recruiting job; the dean in particular was very nice to me, and so I said I’d go to Minnesota.

Meeker: And the Twin Cities is more of a metropolitan area than Madison anyway.

Choper: Oh yeah, that was for sure. Absolutely.
Meeker: Even though you weren’t engaged as much in Jewish communal life, was that something that was important for you?

Choper: In my personal life, did you say?

Meeker: Yeah.

Choper: No, it wasn’t—it was important, but it certainly was not determinative. No, it wasn’t determinative. I liked the people in Minnesota. It was a young group of faculty that interviewed me, and the dean was no youngster, but he was so active, and they really wanted me, and I said yes. Oh, and they would give me a year off if I got a clerkship. That was a condition of all of these schools, and they did. Then when I got the clerkship, oh, other schools came wanting. I said, “No, I can’t talk to you.”

Meeker: Oh really, so after you—?

Choper: I couldn’t do that. No. Berkeley, in particular. California, land of milk and honey, and so forth, and so on. And I said, “No, I can’t do that. I’ve promised to go to Minnesota.”

Meeker: Was it clear what you were going to be teaching when you arrived at Minnesota?

Choper: Yes. It was not constitutional law. I think I was able to teach corporation law, which I started teaching first. I taught constitutional law only in my very last year there when a vacancy occurred.

Meeker: So even though you were already becoming an expert in constitutional law by that point in time—?

Choper: Well, I’m not an expert. Yes, I had been a Supreme Court clerk, I’d been around there, and I was more and more interested in it.

Meeker: Well, at least First Amendment law, the article on religion in schools was a pretty major article, I think, and that comes out in 1962 [Jesse H. Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329 (1962)]
02-01:30:22
Choper: But that’s after I was a clerk.

02-01:30:23
Meeker: Right, right. Well, you didn’t start teaching constitutional law until later.

02-01:30:31
Choper: Yeah, they had someone teaching it, and that was fine with me. When you say it was my tenure article, I want to tell you I was given tenure before that article came out! It was a different era. [laughing] But Minnesota too, was different that way. I was a successful teacher with them, and I guess they felt that I would do something with scholarship, which—I think I wrote two pieces there, two pieces, yeah.

02-01:31:10
Meeker: Well, the one that I’ve read is the “Religion in the Public Schools: A Proposed Constitutional Standard.”

02-01:31:13
Choper: Yeah, that was my first article.

02-01:31:19

[side conversation deleted]

02-01:31:41
Choper: Yeah, that got some action from other schools. I started to get offers from other places.

02-01:31:50
Meeker: How did you come to write about this? I know that your area of teaching was corporate law, and this is First Amendment.

02-01:32:01
Choper: Well, I had written the Sunday closing-law cases. That really got me into the religion thing, which had a natural appeal, I guess, to begin with—but that was it. That was it. And if I wanted to write an article, that’s one that—I struggled with that, those Sunday closing law cases, as I told you, and that’s why I wrote that article.

02-01:32:26
Meeker: And the struggle, it sounds like, was that you felt like there was no clear constitutional standard?

02-01:32:36
Choper: That’s correct.

02-01:32:38
Meeker: Was this a key genre within legal writing? To propose a constitutional standard on a key issue?
Choper: Well, I don’t know about that. I would say my articles always did make a proposal, at least the early ones. I think that the kind of law-review writing, in those days, were people who came up with better approaches to the problem that a Supreme Court was taking. Yeah, improved ones. And that’s, as I say, that’s not the genre today.

Meeker: When you were at the Supreme Court, did it seem like the justices and the clerks were hungry for this kind of clear standard that they could draw upon?

Choper: No, no. No, I didn’t think so. No, they did have a split on activism, the Court reaching out or the Court giving strong presumptions to the legislative process—on everything. I agreed with that, but not everything. I felt that—and this is the book that I wrote—of why there is a difference between personal liberties, and, for example, the separation of power at the federal level and states’ rights. I felt the states were very strongly represented in the political process, but not most of the individual rights. They were there because you could not get a statute to say that sort of thing. And therefore, it seemed to me, that that’s why the freedom of the press, freedom of religion, freedom of speech, those that are clear, I agreed with. What I don’t agree with is subsequent ones, in which—for example, I believe in choice, very strongly, but I think the abortion cases were simply wrong. I certainly believe in contraception, but I think the abortion cases were wrong. That’s a case I worked on.

Meeker: So that would have been the Poe v. Ullman case?

Choper: Exactly. Poe against Ullman.

Meeker: Yeah. Why do you think that it was wrong? Yeah, you mention say Roe v. Wade, or Poe v. Ullman—?

Choper: Because what is the constitutional right? What is it? It’s not freedom of religion—it’s not one of the specified rights. It is the due process clause. I believe that the due process clause means process. This is a substantive right, not a procedural right. I believe that to this day. If, on the other hand, you do have a given right, then I think the Court ought to enforce it vigorously, because if it’s a minority right, that’s the only kind of protection—that is presumptively the only kind of protection that you get, is from the Court. But if it’s not protected specifically, then amend the Constitution! Well, abortion is just so controversial. Birth control, I imagine you could have gotten a constitutional amendment if you had to. [laughing]
Meeker: What was your opinion on the concept of the right to privacy, as it was emerging?

Choper: Yeah, it’s a nice thought. I believe in privacy, but privacy means whatever you want it to mean. So that is substantive due process. You’re creating a right that’s not listed in the Constitution. Now, a famous opinion, by Justice [William O.] Douglas who said emanations form a lot of rights—well, everything is emanations. That’s—*emanates* is what you want to see.

Meeker: But that was taking jurisprudence too far?

Choper: To me it is, to this day it does. Yeah. And the Court is, for the most part, pretty—where they give much more discretion than I would is in balancing the specific rights. See, I think if it’s there, then look—there was another very famous statement by Justice Robert Jackson, in which he said, “You know, the Constitution is not a suicide pact.” [laughing] It doesn’t mean that any event, the other way of saying you can’t holler fire in a crowded theater—it’s not crazy. But I think presumptively, you’ve got to do it if the right is there.

Meeker: So your article on religion in schools.

Choper: Yes.

Meeker: I just read it, and I think it’s very cogent.

Choper: Thank you.

Meeker: It’s very clear, and it seems like the exact kind of document that a judge or justice could put on their desk and say, “Okay, as these cases come in, I can use this as a key.”

Choper: They’ve used it a couple of times. Tom Clark, my buddy, he used it in an opinion.

Meeker: Oh, he did?

Choper: As a matter of fact, he took a piece of a paragraph, word for word. He never cited it, but someone else cited it someplace along the way, but he didn’t. I’m sure it was one of his law clerks [who] did that, and they just pulled it out and
never cited me. But you can read it—it’s word for word about two or three sentences.

02-01:40:12
Meeker: Well, I don’t know what exactly the lifted quote would have been, but I’d like to read one quote, which is from the very beginning from it, and ask you to talk about it in response. [reading] It says the standard is “for problems concerning religious intrusion in the public schools, the establishment clause of the first amendment is violated when the state engages in what may be fairly characterized as solely religious activity that is likely to result in (1) compromising the student’s religious or conscientious beliefs or (2) influencing the student’s freedom of religious or conscientious choice.”

02-01:40:59
Choper: Yeah. You know, I polished that a little bit in future writing, but that’s basically it.

02-01:41:12
Meeker: What was your thought process, your research process, in going from being on the ground in the Supreme Court, and the Sunday closing law cases, really wrestling with these, to getting to a point where you felt secure and compelled to write a definitive statement like that you could really get behind?

02-01:41:42
Choper: Well, I thought long and hard about that, and at the fringes I’ve changed it a little bit, but I don’t quite know how to answer the question. It was something that I set out to do. I was going to tell the Court what they ought to do in cases like this, and I did the best that I could.

02-01:42:21
Meeker: Did you have a methodology that you would employ, in really, really learning the law in this area, and then—?

02-01:42:31
Choper: My methodology was I—this is in 1960—I read everything written on it. Everything, and I still, at least in a lot of editions of this book—no, this is the book—but it’s still there, some crazy little student article from someplace, or Houston Law Review, or something like I don’t know what, but that’s it. And I tried very hard to always give credit, to give a footnote to where I got something like that from.

02-01:43:19
Meeker: How would you, as you’re reading everything that’s been written on First Amendment law around the establishment—?

02-01:43:27
Choper: Yeah, I continued—I certainly don’t read it all anymore.
Meeker: Well, did the process of distilling that all down to such a clear statement, how did you decide what was going to help you?

Choper: I took notes, and then when I wrote it I had a clear idea of what I was going to say. I didn’t quite know how to say it, and I am a very, very slow writer—painstakingly slow, but I did it. And I usually only do one draft—well, a second—there’s a little polish. But I would, on a piece of scratch paper, just take the sentence and then change it, and so forth, and then I’d put it down.

Meeker: Do you spend a lot of time considering what pieces of evidence are going to be most convincing to the readership of something like this?

Choper: I don’t quite follow what you mean.

Meeker: Well, you’re writing here on the First Amendment, and you could be drawing something from an obscure Supreme Court case from the nineteenth century or a very well-regarded law review article. How do you decide what kind of source material is going to serve your ends best?

Choper: I read everything! [laughing] Today, you [can’t] do that. You can’t read everything—it’s multiplied fifteen/twenty times—maybe more, with articles, and so forth. But I read everything back then, and I would take notes, and I had different—as I recall—I’ve thrown them away—different cards for different—an area, and so forth, or maybe it was different pages. I don’t know. But then I would write it from that.

Meeker: One topic that you ruled out, from the beginning, in this article, was funding of religious education.

Choper: That’s another article. That’s the second major article that I ever wrote.

Meeker: Okay, so you were just holding off to talk about that.

Choper: Yeah, I think that’s in the California Law Review. [Jesse H. Choper, The Establishment Clause and Aid to the Parochial Schools, 56 Calif L. Rev. 260 (1968)].

Meeker: Okay. Well, we’ll talk about that again.
Meeker: Okay. What kind of response did you get to this article?

Choper: Good.

Meeker: Say from other legal scholars, what kind of response did you get?

Choper: It was—again, it was a much smaller community, and I know I sent those—you sent your reprints out to people, and I sent it out to the leading people. I remember a very famous law professor at Harvard, Paul Freund, wrote back a nice note, saying this was a nice thing and a good article, “I liked it a lot,” and so forth, and so on. Even though he was more inclined to balance than I was, in his work. He was probably the most famous constitutional law professor of his day, although—he was a smart guy. I don’t say that—I got to know him when I taught at Harvard, but he certainly was not prolific. He wrote one or two big articles, and that’s it. And I remember a man at Berkeley named David Louisell, just the way—L-O-U-I-S-E-L-L [spells] was a long-time—he wrote back a note saying, “Yes, that’s the best of all the wrong articles.”

Meeker: What did he mean by that?

Choper: He meant he disagreed with it. So in many ways, that was a very big compliment that he gave me.

Meeker: What kind of disagreements did you hear? What did people tend to disagree with in the article? On what point did they disagree?

Choper: Well, for example, the very famous dean of the Harvard Law School, named Erwin [N.] Griswold, once wrote an article and just took an opposite view. He said kids in schools—they’ve got to be tough. And that was the point. That was the point. This is America. That was part of it, too. It’s the work of the political process, this is what we think, it’s our values, and you’ve got to—I’m talking for him now. He said I don’t mean persecuting people, but you know—there’s an old Yiddish expression, which translated roughly is: It’s tough to be a Jew. That was his attitude. [laughter]
Choper: Yeah.

Meeker: And basically that there should be a looser definition of standing, because we can’t—

Choper: Looser than it was?

Meeker: Well, in some cases, people might not step forward and contest the way that things have been run.

Choper: Yes, yes, yes, yes, yes. That’s right; they’re intimidated. And therefore—I am writing an article, it’s over there. I’ve been writing it for years and years, and it’s called “Third-Party Standing,” the article. It’s interesting that you picked that up. There must be very little that I wrote on standing, I think maybe a page or two, but it says if you’re a believer in individual rights—which I am—those rights that are there in the Constitution, then we ought to make sure, as much as we can, that they become asserted. And in the public schools too, if you do that in the public schools, you can be intimidated and made fun of, all of that stuff, so let other people do it then, who would step forward in your place. And that means the third party had the rights to assert, someone should have the rights to assert—a person should have the right to assert the rights of a third party, if the third party can’t do it themselves.

Meeker: How important is the role of children in this?

Choper: A lot! Children are much more—less gutsy, at least they were in those days. [laughter]

Meeker: Do you think any of this article entailed a rethinking or turning away from what you were wanting to say through the Sunday [closing law] cases?

Choper: I think in the Braunfeld case—I wrote this article right after Braunfeld. I was always uncomfortable, as I told you, with the Braunfeld case. But well, I’ve said my piece on it. I felt, at the time, that principle had to prevail. I found that sometimes you have to—it has to give way, under very limited circumstances, to a new principle. We ought to have a new principle, but it has got to be a principle that doesn’t let a majority of five people on the Court determine what is the policy in the country.

Meeker: You had mentioned this article was paraphrased in a Clark decision.
Choper: Yes.

Meeker: What other legacy or use did it have? Did it appear in any other court decisions around this issue? Was it applied?

Choper: I don’t know how often. I think I remember Justice [Sandra Day] O’Connor once, in subsequent years, later cited it. I think—well, I told you about Harlan, didn’t I? He quoted from it and then went on for a couple of pages to explain why it was wrong. I forget. It’s been cited two or three times by the Supreme Court.

Meeker: Did you feel like you were successful in the article, in the sense of providing a standard that then was applied in some fashion?

Choper: Well, the standard itself has never been fully adopted. It’s just too strict.

Meeker: It is?

Choper: So let me just think how—so I hoped that it would be adopted. I’m not disappointed that it’s not. I appreciate the fact that it’s recognized periodically.

Meeker: So it becomes influential, but maybe not a model that was adopted.

Choper: Yeah, not—yes, yes, exactly right. I think—oh yeah, [William J.] Brennan once cited it as well. But Clark, as I say, he didn’t cite it. I think Brennan actually cited it in a concurring opinion to the Clark majority opinion.

I think it’s in that case in which he did it. It was religion in the public schools. I’m pretty sure that was—wait, wait, wait—I’ve come up with the name of the case.

[leafing through pages of a book]

[side conversation deleted]

Choper: Oh, what case? Oh, it’s a case called Wallace against Jaffree. J-A-F-F-R-E-E. It authorizes a minute of silence, and so forth. [reading aloud] It says, “Although a distinct jurisprudence has enveloped each of the religion clauses, their common purpose is to secure religious liberty. Our goal should be,” and then she [Sandra Day O’Connor] quotes me, “to frame a principle for
constitutional adjudication that is not only grounded in the history and language of the First Amendment, but one that is also capable of consistent application to the relevant problems.” That’s what she cited. That’s what she cited. That was from that article. I guess the other article, the other one, it had to do with the political process, that the Court ought to take no role in disputes between the federal government and the states. That one has gotten some action too. And once I fell one vote short of getting it adopted, but it wouldn’t happen.

Meeker: Adopted as a Supreme Court precedent?

Choper: Yeah, yeah. And there it was cited. Let me see what else I can find. Choper, here it is. Federalism, 171. Let’s see, if I can, what that is. No, that’s not it, 210? [interruption in recording]

Meeker: One last question about that, and that is, what is your thought on this proposed standard today? Do you think it’s something that you still stand behind?

Choper: Yes.

Meeker: Do you think it’s appropriate, given the context?

Choper: Yes, yes.

Meeker: So no major revision to the standard?

Choper: No. No, once made up, that’s all.

Meeker: And that’s because it appeals to a principle, yes?

Choper: That’s correct. And I haven’t given a lot of thought to this in recent—it’s just there. I did—I thought it through. Colleagues of mine often accuse me of being stubborn. Well, it may well be that I am, but reaching the conclusion was done. I did all the thinking. There have been occasions that I’ve had some real question about my conclusions—very, very few, for better or for worse. [laughing]

Meeker: Well, maybe at some point we’ll be able to talk about some of those occasions of questioning. [laughing] But for this one, why don’t we wrap up today.
Choper: Okay.
Interview 3: February 26, 2018

Meeker: Today is Monday, February 26, 2018. This is Martin Meeker interviewing Jesse Choper, and we are here at Professor Choper’s office in the Boalt Hall Annex. This is interview session number three. Last time, we wound up with you newly arrived at the University of Minnesota Law School. And you were there from 1961 to 1965?

Choper: Four years, yeah.

Meeker: Four years, and while you were there you wrote and published the article that has been described as your tenure article, the “Religion in the [Public] Schools: A Proposed Constitutional Standard.”

Choper: Yes.

Meeker: Published in the Minnesota Law Review in 1962.

Choper: Yes.

Meeker: So we spoke about that article a bit last time, and I was asking about the context for its creation and the research that went into it, and I have one follow-up question about that. So I went back and just read your follow-up article, which was “The Establishment Clause and Aid to Parochial Schools,” which came out in 1968—so a few years later.

Choper: I wrote one article in between that.

Meeker: On that topic?

Choper: No. It was co-authored with a colleague of mine there named Yale Kamisar. You’ll have me—what the article was about, I forget.

Meeker: I have your CV. “The Right to Counsel in Minnesota: [Some Field Findings and Legal-Policy Observations].”

Choper: Oh yes, yes, yes. He was appointed to an American Bar Association committee to study the right to counsel, and he asked me if I would go on it
with him, and I said okay. He was quite a well-known fellow. I don’t know if you’ve ever heard of him before, but he’s now at Michigan. He’s an emeritus there. But he was my collaborator on the books too, that I did.

03-00:02:37
Meeker: The case law books.

03-00:02:37
Choper: Yes. Yeah, the first one was called Lockhart, Kamisar, and Choper. [William B.] Lockhart was the dean of the Minnesota Law School, who had a contract with the biggest publishing company there, which happens to be in Minneapolis. Anyway, yeah, so he and I were very close, but he went—we separated. I went to Berkeley, and [Kamisar] went to Michigan, but we kept in touch and we still talk to each other once in a long while. Anyway, that’s Yale Kamisar.

03-00:03:14
Meeker: What was the argument of that article that you two wrote together?

03-00:03:19
Choper: On the right to counsel?

03-00:03:21
Meeker: Correct.

03-00:03:22
Choper: We did a lot of interviewing, and sought to determine what they thought the need was without counsel, and whether they got along with it, and so forth. This was at a time when there was no constitutionally guaranteed right to counsel. I think it was a few years later that it was first established for relatively serious crimes, and then it was expanded a little bit. And we would ask people what they thought of it. The fact is, I don’t fully remember what it was. But it was not so much an article that took a position of any sort—it was more a report. That is what we were doing it for, the ABA committee.

03-00:04:22
Meeker: It sounds like this is an issue that was in the air, so to speak.

03-00:04:25
Choper: Oh, a big one! Oh, a very big one.

03-00:04:30
Meeker: And so those trained in law, the first step in figuring out the answer is probably to get a sense of what the law might say about the topic.

03-00:04:40
Choper: Yes. I believe that one might have a right to counsel in certain serious crimes. But I don’t recall the exact—it wasn’t until the early sixties, a case—the name I forget [Gideon v Wainwright]—in which they established a right to counsel, and then expanded a little bit beyond that. But I think they finally came down
to any crime that would carry a criminal penalty—incarceration—more than a fine. You know, the story is that at the time, criminal procedure was taught as a part of constitutional law. And if you look at a couple of our early books, that was a big chapter, and that was Yale Kamisar’s specialty, probably one of the two or three best-known people in the country on that. So he did that part of the casebook, obviously. I did not, of the three of us that did it. But I keep up with it, somewhat, even today, because it’s a constitutional issue. But it’s out of my teaching bailiwick altogether, and has been so for many, many years.

03-00:06:22
Meeker: Criminal procedure has since been spun off into its own—

03-00:06:26
Choper: Oh! It’s a big deal today, yes.

03-00:06:28
Meeker: Right. Sorry for jumping around a bit, but this is an aside. That was something that was interesting in reading through Herma Hill Kay’s oral history, where she was describing, really the evolution of law courses, whereby some shrink, either in what they’re covering or maybe in the number of classes that are offered in it, because there’s a declining interest in it.

03-00:07:04
Choper: In a particular subject?

03-00:07:08
Meeker: Yeah.

03-00:07:08
Choper: Yeah, I think that’s true. She taught in one that had declining interest—conflict of laws.

03-00:07:14
Meeker: Right, and I think that’s what she was talking about.

03-00:07:15
Choper: Yeah, that’s what she was talking about. Yeah. It was a course that was important! Its importance has not diminished. What’s diminished is the range of courses that we’ve got. I often only semi-jokingly say, “We have more courses than we’ve got students to fill them with.” And that’s true. We have so many courses, we have now set a minimum before we will permit a course to be offered. You have to have a minimum number of people in it. You know, there’s some fudging on that, obviously. But it used to be, I think, twelve, for the JD, the original—the first degree in law. So I said there’s just more and more. It just expanded all over the place. All over the place. Herma would be the expert on that, in many ways, because of the expanding number of courses having to do with women and all of the ramifications of their protection by the law.
Meeker: Yeah, the extension of law into race, gender, sexuality—you name it.

Choper: Yeah, yeah. That’s right.

Meeker: You know, so I’d mentioned that I had a follow-up question about the religion in schools article.

Choper: Yes.

Meeker: And this follow-up question came from reading your article, “The Establishment Clause and Aid to Parochial Schools.” At the beginning of that article, you talk about the two types of jurisprudence around the Establishment Clause. One of those types was the first type, which you had written about in that first article, and you had said that, “Although litigation continues to arise, the Court’s pronouncements, despite some criticism, seem largely to have resolved the matter.”

Choper: Now, which matter is it? Of religion in the public schools?

Meeker: Right, which—

Choper: Well, it has basically resolved the guiding principles. You still get a few cases now and then. You have a question?

Meeker: Well, I guess it’s just a comment on it. This article comes out, and it’s quite a good article, and I think that you had said that it was assigned fairly regularly in law schools, and such.

Choper: Some, yeah. I forget.

Meeker: But you had also said that it wasn’t cited all that often in—

Choper: By the Supreme Court.

Meeker: Right.

Choper: Because it is fundamentally normative and it doesn’t deal with practical questions. A lot of my articles are these long titles with a colon in between.
They are: here is the subject; this is the way it ought to come out. And indeed, today, that’s much more common, but it wasn’t so common in those days, in which I advocated new positions. The biggest thing that I advocated was in the book that got this big prize, on separation of powers and federalism, the difference between the three national branches—or the two national branches really, and some about the third too. The Court can be involved in that, in which the Congress passes a law trying to restrict the jurisdiction of the Court. But that’s few and far between. Anyway, and I make this very strict distinction, which I tend to do—as I’ve said before—on what is justiciable, which is just a word for saying what the Court should take, and what it shouldn’t take and leave to the political process. So I forget where I started my response here, but it’s always been normative. Almost everything, of any significance, has been normative. And even, I think, little times when I gave talks—which I’ve written about—on equal protection and various kinds of discrimination, it always ended up with something beyond just reporting what the law is. [laughing] I guess I couldn’t resist, even if it was in a very brief aside, saying what the law really ought to be under these circumstances, or at least to point out what the real difficulties were. There was one I remember, I think I gave a talk at Kentucky. I think it’s published in the University of Kentucky law journal—on equal protection and discrimination. And I had some ideas on that too. I think I gave a talk at Cornell in Cornell Law Review, which was, again, a speech they asked me to give it on a particular topic. I wouldn’t have picked it. I used to do that chapter in a casebook, so I’d given it a lot of thought, and I’ve taught it all the time.

03-00:13:34 Meeker: These articles, as evidenced, just to begin with by the religion-in-the-schools article and then the parochial schools article—they are both very clear, and your recommendation is very clear, logical, well supported—not convoluted.

03-00:14:03 Choper: [laughing] I hope not! Well, if you think so—you’re a layperson. You’re a layman.

03-00:14:11 Meeker: Yeah, not an attorney. I’ve read a bit of law, but I’m certainly not an attorney. How did you get to the point in these articles of being able to offer such a clear and concise recommendation?

03-00:14:32 Choper: I wouldn’t have written the article, see, if I didn’t have one in mind. It’s as simple as that. In fact, I’ve changed my mind about one thing or another, even though my friends tell me that I’m very stubborn. I do, I change my mind a little—maybe on little points. [laughing] But the reason that I wrote the article was that I felt I had something to recommend in that particular area.
Meeker: There’s a tendency in academia to sometimes resist cogent answers. [laughing] And to always allow the extreme case to become the rule. In these two articles about the Establishment Clause and the First Amendment, is that something you had to wrestle with

Choper: I had to certainly wrestle with certain pieces, a few pieces of it. And I don’t remember whether it was you that I talked about this [with], but at one point I wrestled and wrestled and wrestled, and could not come up with a principled answer for reaching the result—not a lot, but some—in these particular cases.


Choper: Yeah, the church/state book. One of the reviewers of the manuscript—I don’t know where he was from, and it’s anonymous, but he said—his major criticism was, he said, “Well, this will be unacceptable to every interest group,” what you would call the separationists or the softer people, who are hostile to religion, “those committed to civil liberties and those committed to judicial restraint. It’ll please neither group of people.” My answer would have been—and it was a smart-alecky answer—would have been, “Yeah, that’s why I wrote the thing!” Because it tries to consider everyone’s point of view, and I’d take some on some, and some on the other. And in the preface to the book I say I quoted it. I didn’t have his name anyway, but I said, one reviewer of the book said this, and I quoted it! And I said, “I’m sure he’s right. As a matter of fact, there are some conclusions that I’ve reached, there were some applications of the principle—I don’t like the application either. I don’t like the outcome. I wish it were different. And I’m telling it exactly the way I felt, too. But I struggled with it, and I could not come up with a way to find a—we’ve gone over this before—a principled principle, if you will, that would cover it. So yeah, I didn’t agree with it either.

Meeker: That’s so interesting. It really says a lot about your approach to scholarship.

Choper: Yeah, it says a lot about my approach to life, I’m afraid, too. On lots of political things, and so forth. Our current situation with the president—look, I don’t agree with a lot of the things that he does. And I obviously didn’t vote for him—not obviously, but I didn’t vote for him. And he’s unique in many ways, and I don’t mean that in a positive way. Having said that, I keep saying, “He is the president.” And so far, he hasn’t done anything that’s going to get him out of office, which is a political thing anyway. He’d be impeached. So I say I disagree with what he says, but that’s the reality. You’d better learn to live with it. [Antonin] Scalia—you know, Scalia once said, in a talk when some student, I think, raised his hand and said, “Well, what about this?” And
he said, “Look, get over it,” he said. [laughter] He didn’t say we were wrong, or whatever. He was thinking of the case [2000 election and Bush v. Gore] and he said, “Get over it.” You’ve got to get over it till you can change it. I don’t say you should like blue dresses or pants instead of brown ones—that’s not a matter of principle. That’s a matter of taste—that’s the opposite of principle. I’m shouting at you!

03-00:20:47 Meeker: Well, and this research is based, then, on principle, in what you’re talking about.

03-00:20:51 Choper: My effort is to come up with principles for resolving these very difficult questions, because although I am willing to give the Supreme Court, the justices, very substantial power—much more than a lot of people would want—but I also try to look for is limits on that power. Period.

03-00:21:22 Meeker: Well, so then let’s talk about this parochial article from ’68, and then we’ll come back and talk about your arrival at Berkeley in ’65. So just in review, you outline your argument very clearly—in italics. [laughing]

03-00:21:41 Choper: Oh yeah, there are several principles, and I call them the something principles—yes.

03-00:21:45 Meeker: And just to quote, it says, “In brief, my proposal is that governmental financial aid may be extended directly or indirectly to support parochial schools without violation of the Establishment Clause, so long as such aid does not exceed the value of the secular education service rendered by the school.”

03-00:22:09 Choper: That’s correct.

03-00:22:11 Meeker: It’s interesting—even in this article in ’68, you situate it in between these two extremes.

03-00:22:16 Choper: That’s correct.

03-00:22:20 Meeker: Absolutism and neutralism.

03-00:22:23 Choper: That’s right.

03-00:22:25 Meeker: Could you walk us through that, what those two extremes represented?
Choper: Well, neither extreme is practical. It’s just not practical. If you say, like what are called the separationists, you say, the government can’t do anything that aids religion. And then the response is, “Give me a break!” If the cardinal of the Catholic Church gets hit by a car, you can’t take him to a public hospital, so that’s one example.

Meeker: I think the example you used was a church burning down.

Choper: Yeah, the church burning down—that’s an even better model. [laughter] You’ve got to put out the fire! That’s right. So the question is well, where do you draw the line? Can you build the church? That’s almost to the other extreme. And the argument can be made: look, we subsidize all kinds of buildings, public buildings that the public uses, and some for only members of the public. How about buildings for indigents? Let’s say, housing. We do that all the time. So you’re discriminating against religion if you don’t do that, and that’s right. At a certain point, it seems to me, that you’ve got to draw the line, and the line that I draw is that you can’t do it, for the reasons that I said. That’s the line.

Meeker: How did you get to that line? How did you discern what the proper way to respond to each of the concerns of the absolutists and the neutralists might be?

Choper: I guess the easiest way is to give illustrations of what would happen under their approach to this thing. It doesn’t wash. You can’t do it. It’s inconsistent with reality. I don’t know how else to express what I’m saying. You can’t do that. I wish I remembered the one that I said I struggled and struggled—I don’t know if it was in this one or the Free Exercise Clause. But yeah, I think it was on the Free Exercise Clause, and that is when you grant an exemption from a general government regulation for religion. And it arose out of my working on the Sunday closing law cases. And I should say that [Earl] Warren had a view on that. He didn’t tell us what it was, the people who were working on it—but we learned later, in just conversations with him, that he had a view on it. Once I guess I was writing a draft of the opinion on the Free Exercise, and I had to come out that way anyway, but I began to see it that way. It’s a chicken and the egg. What came first? He said so, or I decided that’s the way it could be, because I couldn’t find any principle—the easiest one was, well, you exempt the Jews. And don’t forget I’m coming from a quasi-Orthodox upbringing, and made an exception out of myself lots of times. You know, for missed classes for holidays, and so forth. I forget what I was going to say.

Meeker: You were talking about this exemption clause, or should an exemption be made?
Choper: One of the responses was, “Well, it’s just Sunday and Saturday as well. What about the Muslims?” That was the obvious one at the time. And if you did research, even at that time, you could find all kinds of bona fide religious objections to doing work on this day or that day, or what have you. And that goes to the article that I wrote on how do you define religion for purposes of the protections of the Constitution? That’s an impossible question! That may well be the one that I said I don’t like it either, but I can’t come up with anything else. So that is what has always been a driving force in my thinking about these things.

Meeker: You know, I do have one question about the solution that you came up with.

Choper: Go ahead. You wouldn’t be the only one.

Meeker: Well, this is just one of those kinds of maybe outlying ideas, and that’s this—based on this notion about not exceeding the value of secular educational service. Establishing value or cost—

Choper: Establishing values?

Meeker: Value in terms of cost.

Choper: Oh! Not easy. I must have said something about that, but I know it’s not easy. No, I left it—you know, some things I left to them. There are all kinds of ways, off the top of my head—what’s left of it here. You’d say, well, they have to be accredited. Now, it differs from state to state, which was a perfectly good objection, and I was not about to have exactly what it ought to be. But if you have to spend this amount of money for an accredited school, well, I saw no reason why you couldn’t do that for a parochial school too. Yes, because it was obvious that they were teaching this, and so forth. Suppose they start teaching arithmetic with, instead of balls, three balls and four balls, and so forth, they say three crucifixes? I just didn’t get into that, you know? But it seems to me that you have to use some good judgment in that.

Meeker: You know, parochial schools, largely because of lower labor costs, can perhaps be less expensive per pupil than public schools.

Choper: No question.
Meeker: In this formulation, would then parochial schools be given less per student, because to give them as much would mean funding—?

Choper: I wouldn’t say so. I would say that if a clergyman wants to teach a course in arithmetic and does it well, the fact that he is willing to work for less shouldn’t penalize them. That’s what I would say. I’m sure someone could say well, what about this and what about that? And I’d say—yeah, but—because that would be discrimination against religion.

Meeker: Are these the kinds of conversations that you would have with people who were reading your work?

Choper: These are the kind I have with myself. In trying to figure it out. I tried to explain—put it in writing—as much as I could, the things that I’m saying. You can’t say everything. I mean you’d never finish it. But I assumed that I was pretty clear in what I had to say, and the best measure was the value of what they were doing. The fact they—parochial schools—could do it on the cheap, I would say that’s their business.

Meeker: Did you seek input from your close colleagues when you were writing these articles?

Choper: Some, periodically, and in the preface I thank some specifically. I remember once I went to a faculty lunch or something like that, and I brought up the idea—or no, the faculty used to have coffee in the afternoon and I had a lot, thinking about—I never ate lunch, so I didn’t see them at lunchtime. Anyway, so I went down during the faculty break there, they had one a day, and about a half a dozen, eight—the whole faculty was only about twenty-five/thirty people. So I raised the question. There was a discussion for a while. I forget how it came out. I don’t know that I found it helpful, although I do remember one colleague made a point about something, and I think I thank him for that in a footnote. His name is—he’s still around here—Meir Dan-Cohen. He’s an Israeli originally, although I’d say he was a secular Jew now. But anyway, he came up with it, and I said this—the first thing to do is say no, they can’t be right. I hadn’t thought about it, so how can it be right? But more and more, I said yeah, that’s a pretty good point. And I felt I ought to say so and that it was not mine. Yeah. I don’t know if that answers your question.

Meeker: It absolutely does.

Choper: But I didn’t do it on much. Now, after I had a draft of the article, I gave it to three/four people. They looked it over very carefully, made some suggestions.
I don’t know that any were as poignant as the one that Meir did. He showed me something that I hadn’t thought of myself. The others were saying, “You ought to sharpen this up.” “You’re unclear about this a little bit.” But there weren’t too many changes. In those days it was, particularly then, I only wrote one draft. I still write them in longhand today, and I still write them the same way, on a piece of scratch paper on the side. And I work out sentence by sentence, and I change it and change it—and I write it down. And for the first couple articles, boy, that was the sentence! And it just went on from there. I had a pretty good idea of the sequence—an outline of what I was going to say when. And I had lots and lots of notes that I’d been taking over the years.

I appreciate that picture into your writing methodology. I think that’s useful. There’s another question I have about the parochial schools article, and it’s both a question that’s specific to the circumstance that you were writing about, but also much broader too. And that’s this kind of question around the intentions of the framers. And also the context of the work—of the time that the framers were writing about these issues. So just to start out with, at the time, public schools didn’t exist in the same way that they did, say, in the 1960s.

Yes, oh yeah.

And so the extent to which states were supporting public education, it likely would have been education that had some religious element to it, correct?

I’m not quite sure of the question. There was no public education in the eighteenth century. But as things progressed, we had public schools and we had private schools, and some of those private schools, in fact a dominant number, were religious—Catholic. Although in some states they were Protestant schools. Minnesota, for example, is a pretty good example. So the question then becomes, should there be aid? And the first case that came down, I think, was not until the fifties or sixties, long after public education came in. There were a number of cases in state courts, lots of cases—I read them all. I may have cited one—I don’t know if I cited any. There’s a limit to what I can cite, but I read them, tried to understand them, and I’d take notes on them. So—

Well, it seems like it all begins with Everson [v. Board of Education] in ’47, right?

That was the first case, yes. That’s exactly right—thank you—on aid to parochial schools. And it involved paying for school busing to schools, and the question was could you provide busing to the parochial schools as well as
the public schools? And that was a good case to, it seems, to put my principled efforts to work. I found it very difficult to say that if you’re putting them on a bus to go to school, and you want to pay for the bus, there’s no—unless they’re giving religious courses on the bus or something like that—it’s purely secular. It’s just to try to protect the children from the—I forget—the difficulties of traffic. So that, for me, was an easy—for me it was an easy case.

More difficult is what happened when they got them in the schools. I’m repeating myself now, but they had to teach them secular courses. I don’t know what the state, maybe in Mississippi or something. But around the country there was a certain basic curriculum that you had to teach, whether it’s reading, writing, and arithmetic, or something more than that, I don’t know. It seemed to me that the religious schools were teaching that. As I say, you can teach, the hypothetical, say—well, you can teach religion with arithmetic, if you want to. And I would say the value of the secular services. I don’t care if they’re counting beads or religious beads or regular beads, non-religious beads—they’re learning that.

So it’s the same thing that happens when you put out a fire in a church. That’s the clearest. I’d talk to people, “You want to avoid the spread of fires. Yeah, well, suppose the church is sitting half a mile—which they might well have, out in the country—would you not put out the fire?” Well, it’s not hard to push away on stuff like that. Well, they said, “Yeah, all you can do is get the people out and let the church burn. That’s okay.”

03-00:41:29
Meeker: Well, that’s the absolutist perspective.

03-00:41:29
Choper: Yeah, that is an absolutist perspective. [laughing] That’s right.

03-00:41:32
Meeker: But there would, perhaps, even be a public expenditure of resources for getting the people out.

03-00:41:36
Choper: Of course there would, that would affect the church, that would help the school not burn down.

03-00:41:44
Meeker: What do you think the role of history, in terms of trying to understand the context—?

03-00:41:53
Choper: Oh, the original understanding? I’m sorry.

03-00:41:55
Meeker: Yeah.
Choper: Well, I said that in one of the books. I said you can’t do it. It’s just too hard to determine. First of all, who made this history? Wholly apart from the drafters of the Constitution—the Amendments, of course, had to be approved by three-fourths of the states. How the hell do you figure out what their intention was? You can come up with something general—and I try to respond to that. I forget which article, whether it was one of the two that I did. I think it was probably the—

Meeker: It was the parochial article.

Choper: Was it the parochial school [article]?

Meeker: Well, do you mind if I quote something?

Choper: I don’t mind at all; it’s my own stuff.

Meeker: I’d love for you to comment on it. I think it’s super-interesting! You say, “History should furnish the informed perspective needed to fashion a rational constitutional standard that serves several purposes, including the cognizance of the evil consequences feared by the framers, appreciation of values presently cherished, and capability of consistent application to the relevant problems. Too strong a reliance on history and experience, given their detailed inconsistencies which cannot be rationalized on principled grounds, result only in ad hoc, unreasoned rulings.”

Choper: Yeah, I really think that’s true. What can I say? Ask me a question about that.

Meeker: Well, maybe what was the inspiration to include such a strong statement?

Choper: Because there were certain members of the court who were focused on that, on what the original understanding was. And we still have one today, and that’s Clarence Thomas. And we had Scalia, who fudged a number of times, as all of them, from the beginning of history have fudged at certain times. And I consider if I’d ever been up there, I would not have been fudging. [laughter] How’s that?

Meeker: Okay, good.

Choper: Unless I say, “I changed my mind.” But for some—I keep throwing the same word at you—principled reason. “I’ve changed my mind.”
03-00:44:39
Meeker: Well, that’s interesting. So the reason that this kind of statement is included in there is thinking about your audience?

03-00:44:48
Choper: Yeah, well, let me put it this way. If I had a single audience, I’d tell you it wouldn’t be very many people. It would be the justices of the United States Supreme Court. Period. That would be my audience, because they are the ones who are making the law. And they are making it. You can’t avoid that. My efforts were to try to persuade—whatever you want, that sounds very self-important—but to try to show why this particular principle is one, Justices, you ought to adopt. That was my audience. That’s it!

The fact that I was doubtful that I could persuade them—but nonetheless it was the best I could do—I put it down anyway, even though I couldn’t persuade them.

03-00:46:10
Meeker: When you wrote this article in ’68, to what extent was this question around funding parochial schools—?

03-00:46:20
Choper: Big time!

03-00:46:20
Meeker: It was a big-time concern of the Supreme Court?

03-00:46:22
Choper: Oh, my goodness! I think I told you that at dinner, in which Kennedy showed up? This was the first time they had a reunion of the clerks like this. In 1961, Warren had been on the Court seven years by then, and a lot of law clerks came out. One of the law clerks knew the Kennedy family real well—that was Joe Bartlett, and he arranged for the president to come. So when he came in, and Warren was so taken by it, I remember he said, “Mr. President, welcome here.” He says, “Well, hello Mr. Chief Justice. I’ve had more constitutional problems than you had this week,” which had to do with aid to parochial schools. A lot of things I’ve forgotten, but that one I clearly remember. That’s almost a direct quote. He said, “I’ve had more constitutional questions than you’ve had this week.” Everybody knew what he was talking about, because that was the big issue. It was the first big attempt to pass a federal statute that gave some meaningful aid to parochial schools, religious schools, as well as public and private schools. And Kennedy, in particular, was caught in this—the first Catholic [president].

03-00:48:24
Meeker: And I think he was opposed to that extension of aid, if I’m not—

03-00:48:28
Choper: I don’t remember. That could well be.
Meeker: Well, you quote him, actually, in the beginning of the article.

Choper: Did I? Kennedy?

Meeker: Yeah. Well, I’m curious of what you think about the quote, what it signifies. I think it was right here in the beginning. [reading] [sound of pages turning] Right. You say, “On this basis, President John Kennedy declared in 1961 that, ‘a clear prohibition of the Constitution,’ forbade the allocation of federal funds for parochial schools.” So again, this is the same period of time that you’re talking about.

Choper: Yeah, see I don’t remember that at all. But that was it. He was between, as they say, a rock and a hard place. I think he probably wanted to extend it, personally. But he felt that he’d catch a lot of flak as a Catholic.

Meeker: When you’re writing this and publishing it in ’68, did it seem that the court was pretty divided on the issue?

Choper: Yes. But the country was divided, and the court was divided. Yeah. I forget the case where it—exactly where it came from. Oh, in ’68—was that when it was finally passed, aid to parochial schools?

Meeker: Oh, I don’t know. That’s when the article comes out.

Choper: I think Johnson had the first big program of aid to parochial schools, and he was president—Kennedy was president till [‘63]. It was ’65. I was writing it and working on it at that time. It’s also something I had in mind for a long time.

Meeker: When it was published in ’68, what kind of response did it generate?

Choper: I don’t know. I think it got cited, and so forth, by a few people. But I’ve forgotten.

Meeker: Well, did you feel like it had much impact on jurisprudence?

Choper: That’s a fair question. No. No. When you say—did it have very much impact on the Supreme Court? That’s jurisprudence for me.
Meeker: Right.

Choper: It was cited by law review articles, and that’s fine. I was happy with that, but I had hoped that—you know the phrase, hope springs eternal. I had hoped that it would influence the Court in some way, but I don’t think they ever cited me or anything on the aid-to-parochial-schools issue.

Meeker: You know, it’s interesting. I would imagine that given you being a constitutional scholar the ultimate achievement would probably be having your work cited by a justice in a winning decision.

Choper: I guess that’s true! It could be losing, I don’t think—[laughing]

Meeker: Right, or a losing [decision], if it’s a good dissent.

Choper: If they cite it for a winning—if they use it, if it gets incorporated into law, that’s fine. I came close in one—a couple of justices who were willing to go along with something, and they cited my article. I think it may have been aid to parochial schools. I’m sure I could find it pretty quickly, if you like. That was on my casebook.

Meeker: It was on your book, okay.

Well, we’ll talk about that book at a later date. Before we wrap up today, why don’t you tell me about making your way from Minnesota to Berkeley in 1965. I know that you had previously had conversations with UC Berkeley about coming out here, is that right?

Choper: When I first went into teaching, they interviewed me at the convention. I think I did mention this. They said, “Well, we really like you,” or whatever it is. They said, “But we do not hire people right out of law school.” I was still a third-year law student. They said, “I’ll tell you what. If you sign up with us, we will get you a clerkship with Roger Traynor.” I didn’t even think about it. I knew who he was, and I thought gee, but that’s not what I want to do. I can’t teach, clerking on the California Supreme Court. But, I was willing to put it off a year to be a law clerk on the Supreme Court. So that was the story.

Meeker: So then you’re at Minnesota for—?

Choper: Four years. I loved it there.
Why did I leave? It was not easy. At the time, in my third year there and then my fourth year, I had offers to go to Yale, several of the best schools—schools that I thought were better. Harvard never made me an offer, but Yale did. Columbia didn’t—who else did? Oh, Stanford, which I should say was a very highly regarded school, but I didn’t think it was as highly regarded—oh no, it was more highly regarded than Minnesota. It was not as highly regarded as *this* school at the time. But that’s history, unfortunately. [laughter] And so I felt that there were about seven schools that were better. That doesn’t mean that Minnesota was eighth, but there was a group of maybe another eight or ten that were in the next bunch. Stanford, I probably would have gone to Stanford, but for one reason—and that was I was teaching corporations and constitutional law, and they were filled—all of the schools were a lot smaller then. They had no *opening* in that. So I didn’t really think about it too hard. And at Yale, I began to appreciate California. Yale was a great school, but a fellow law clerk of mine—one year before, but I got to know him in an overlap period—he saw me there while I was interviewing and he said, “Don’t come here. They don’t treat young faculty very well.”

At Yale. I didn’t know how to think about it then, they had a recent, very bad history of denying tenure to almost everybody that went through. But in any event, I went up to New Haven and I figured out how far it was to get to New York. So I didn’t go there. As I say, I don’t know what I would have done there. But where else? Columbia no, NYU I didn’t think was in the top group then. Harvard, Yale, Columbia. Michigan maybe, Michigan probably was. I think they, many years ago, when I was at Minnesota, made me an offer when Yale Kamisar went [there], a year later maybe, or something like that. And I just—I didn’t think I wanted to go there.

So anyway, but Berkeley then turned around and I came out, and it struck me as a great place. It was a great school, and California—the people, it was other people on the faculty. A young group of people, two people in particular: one is Mike [Ira Michael] Heyman. He had been a Warren clerk a couple of years before me, so I knew him from the past. And Ed [Edward C.] Halbach, who was really—he wasn’t dean, but he was acting [as] the dean; their existing dean assigned all the important work to him. So anyway, I liked him a lot, and it seemed to me this would be a great place. I remember going on a plane back. I was sitting with my wife, and I said, “You know, I think,” I don’t know that they made me any offer. Yeah, they did! They voted me an offer while I was there.
03-00:59:51
Meeker: No kidding.

03-00:59:51
Choper: Yeah, it was a different era. But by this time, I’d written a couple of articles, and so I said, “You know, I’m really thinking about this.” And she got annoyed—I don’t say angry. “So why didn’t you tell me that? I thought you wouldn’t want to go there at all. I would have looked at houses, and so forth.” So anyway, that’s the way it worked out. I do remember leaving Minnesota for the Berkeley visit when it was fifteen degrees below zero, changing planes at that time—some place in the middle of the country, but it improved to about 15 degrees above zero. [laughter]

I remember when they took me riding around here, we went up in the hills at some point to dinner at the home of the dean, who lived on the other side of the hill. I remember going up that, driving, so seeing him drive up. Or driving from the top of Marin [Avenue], up Marin, down, and it kept entering in my mind—how the devil do they do this in the snow? [laughter] So that was it, and I’ve often said I’ve never regretted it. The first year I wasn’t part of the things that were going on there, and I remember I said to my wife, I said something on that and she said, “Well, maybe we ought to think about going back.” I said, “No, you never go back.” So but very soon thereafter, I’d say by the end of Thanksgiving, I was happy.

03-01:02:02
Meeker: And so you start fall semester 1965?

03-01:02:05
Choper: Yes. And they let me teach both corporations and constitutional law.

03-01:02:12
Meeker: Well, and you were also brought in, I believe, with tenure.

03-01:02:15
Choper: I was. I had tenure in Minnesota.

03-01:02:17
Meeker: Okay. Were you a full professor in Minnesota?

03-01:02:21
Choper: Yes. Again, this is a different era, but yes.

03-01:02:26
Meeker: Well, I think I was reading Mike Heyman’s oral history, where he talks about, I believe, during this period of time, tenure decisions in the law school did not go through academic personnel.

03-01:02:43
Choper: That’s right. We had them bamboozled at that time. [Meeker laughs] The stuff about the accreditation with the ABA, and so forth. Oh yeah, no, it was wholly
different then. We didn’t have to deal with the budget committee. You know what the budget committee is here?

Meeker: Well, tell me.

Choper: Well, the budget committee is the most powerful group of people on the campus. I would say apart from the chancellor, and then, only then, he or she has got to be damn careful before they overrule the budget committee. And the budget committee is the committee that mainly approves of faculty, faculty hiring.

Meeker: And tenure decisions too.

Choper: And ultimately tenure decisions, yes.

Meeker: And hence their power.

Choper: And hence their power. And the fact of the matter is that at one point when I was dean we denied tenure to—this was the worse experience that I had—three people, one male and two females. And the male walked away. He’d been a former student of mine—and he just didn’t write, all right? And the other two had done very little writing. I did not take an active role in the decision, of the tenure decision by the faculty, but they voted against them. Two women, and I remember the two women appealed it. And one of them took it to a campus committee. And I remember very well, we hired an alum named Jerry [Jerome B.] Falk, who still practices law in San Francisco, to represent us. Anyway, the committee came out and they said, “Well, we think we ought to do this,” meaning, to give tenure. And well, I—when the first faculty meeting on that came about—and I agreed to it. The lawyer said they’re going to sue you, you go into court, and so forth, maybe—it doesn’t look good. So I actually came in, and the first faculty meeting right after, I broke down crying when I reported to them. I felt that I, in some way, deserted them, because I did make the decision that we should change the faculty’s mind, because of fear that we would lose in litigation. So that was the worst period of my being dean.

Meeker: Well, we’ll spend more time on your being dean. We got through this a bit circuitously by noting that you arrived here with tenure.

Choper: I did. I was given tenure at Minnesota during my first year. I hadn’t written anything yet! I mean I hadn’t published anything. But that was the way we did
business in those days. They got someone that they really like, and they took him.

Meeker: [laughing] How strongly do you feel like you were recruited for this job? Did faculty here spend a lot of time—?

Choper: When I came out for the Boalt job?

Meeker: Correct.

Choper: Well, again, it was a different world. Today they come out for one day, maybe an evening before, and that’s it. We spent two or three days here, and saw every regular faculty member in his or her office, or at a lunch or something like that. And it was just totally different. Entertained all the time at people’s homes—all the time. Dinner a couple of nights, and so forth.

Meeker: By this time Boalt had two female faculty—I think Barbara [Nachtrieb] Armstrong might have been an emeritus.

Choper: Yeah, she was still here, but she was an emeritus faculty, that’s right.

Meeker: And Herma Hill Kay.

Choper: Herma and another woman. She was treated like a regular member of the faculty. She taught tax, which was her major area—Babette [B.] Barton her name was, known as Bobbie Barton. It’s B-A-B-E-T-T-E. She was a graduate of Boalt, and a very, very highly regarded taxation specialist. I don’t think she practiced law at all—she may have consulted, I’m sure. But I don’t remember all of the details. But she was not a regular tenured member of the faculty.

Meeker: Did the presence of at least these three women signal to you that Boalt was maybe different than any other—?

Choper: No. No, although it was. Well, it wasn’t different than any other one, but it was different than most. Yeah, I knew that. I knew the first really prominent woman, apart from Barbara Armstrong, the first real scholar was a woman in Chicago [Soia Mentschikoff]. I think that she—Herma, of the women in major law school faculties—we certainly had none at Minnesota.

Meeker: I think Herma studied under this woman in Chicago.
Choper: Yes, yes, yes. She did. That’s right. So you know who I’m talking about. She was a regular, major scholar in the country.

Meeker: But this didn’t then mean that Boalt was different culturally?

Choper: More progressive, you mean, or something?

Meeker: Or more progressive, yeah.

Choper: That came not too long after I came here. We were very, through Herma, picky, particular, and probably correctly. The women that we hired had a wonderful—I voted for them when we hired them. They had wonderful records, but it just didn’t turn out in the scholarly end. One was a student of mine, although an older woman, Marge [Marjorie] Shultz.

Meeker: Marge Shultz. One last question for today, and that is my guess is that Boalt was going through the hiring process in spring of ’65, right?

Choper: When I was hired?

Meeker: Yeah, well, you go through the hiring process the previous spring or something?

Choper: No, the fall.

Meeker: The previous fall.

Choper: Yeah. As I say, I came out here to interview right during the Free Speech Movement.

Meeker: Okay. Well, that’s what I was just going to ask you about.

Choper: [laughing] Yeah, and the law school was very much involved in the Free Speech Movement, in terms of defending, I guess, defending and maybe on the other side too. We had some pretty conservative members of our faculty at that time. But Mike was one of the great defenders, and Dick [Richard M.] Buxbaum was even more so, I think, one of the defenders.
Meeker: Well, I think the dean at the time, Frank [C.] Newman, also was a supporter to some degree?

Choper: Yeah, he was. Yeah.

Meeker: At least in his oral history he claims to be.

Choper: No, no, no. That’s true. I’m sure that’s true.

Meeker: What did you think of all this going on here? Did it attract you to Berkeley?

Choper: No, it didn’t attract me nor did it detract me. I answered that real fast, but I think that’s true. No. That’s life. That would be my attitude at that time.

Meeker: Did it seem interesting to you? You’re a constitutional scholar. Did it seem to you like these were important issues that would be at least interesting to observe up close?

Choper: I cannot say I ever thought of things that way. Yeah, the only thing that I was more conscious of was the diversion that this provided. After I came here, and I was on—you can take a look at the committees; I forget what they were. I was on committees right away. And I supported, at one point, both sides of the thing, when I thought the issue—I can’t remember now, the details—was right. There was the Left faculty and the Right faculty on the campus. I consulted with both of them, because I believed in that aspect of it they were right, and on the other aspect they weren’t. And I’ll tell you, the same thing was with the Vietnam War. I often say that I was the last academic supporter of Lyndon Johnson. Why? Well, I guess I was, like many people, fooled by the fact that these people—you know, his cabinet was made up of some of the biggest thinkers in the country. Very strong people. They were Kennedy’s basic selection.

Choper: And [Robert S.] McNamara was no slouch.

Meeker: No, he wasn’t, he certainly wasn’t, nor was—and a guy who was one of our graduates. He didn’t graduate, but he went to law school here—what was his name? From Georgia. He was the secretary of state under Kennedy. Dean Rusk. He went to this law school. He went to this law school two years. The
War [World War II] started, he didn’t graduate—that’s another. I finally gave him a degree. I didn’t tell you this before?

03-01:17:05
Meeker: No, no, no. I don’t know about this.

03-01:17:08
Choper: Yeah, I finally gave him a degree, and I had a big flap with the faculty on that. I took him to the faculty, that’s what I did. This was when I was dean. And I took him, and I figured, “Dean [Rusk]—the guy’s the secretary of state. He retired, and I find out that he was here in law school. And this was during the Vietnam War, and the young faculty, in particular, they gave me a lot of crap, I’ll tell you that! You know, he’s a—what was he? A war criminal, that’s what he was. Yeah, Dean Rusk, and so forth. So I went through, and we finally gave it to him, and then I had a second situation like that, in which a woman who was two years here also—oh, my goodness! She ended up on the California Supreme Court and was a good friend of mine.

03-01:18:13
Meeker: Oh, is that Rose Bird?

03-01:18:14
Choper: No, no, no. Rose Bird was a graduate of ours.

Kay [Kathryn M.] Werdegar just retired after a long time on the [California] Supreme Court, and that’s another nice story, how I got to meet her. We’re still good friends. So she finished first in the class, in her first two years here. She was the first woman selected to be editor-in-chief of the law review. And then her husband, who was a physician, he got a job in Washington, which he went—in those days, she went with him and finished up at George Washington, where she was also first in the class. Anyway, with her, as dean, I figured she didn’t get a Boalt degree. Why? She didn’t do three years here. That was the rule in those days. Today, you can do the third year by doing internships, and so—but not [then]. And so this time I figured—I don’t know how the faculty can turn her down, but I didn’t want to have another—the next time for graduation I just put her name in and went out—no one ever knew the difference. [laughter] Yeah, I just put her name on the list to get the degree.

03-01:20:04
Meeker: That’s great!

03-01:20:05
Choper: And to this day, we’ve been on programs together, and so forth, and she talked at my retirement—no, it wasn’t a retirement dinner. It was something they gave me that was very nice, about four years ago. She tells more or less the same story—“He’s the one who’s responsible for me being a Boalt graduate!”
03-01:20:34
Meeker: That’s great! Why don’t we end there for today? We’re just getting started with Berkeley, so there’s a lot more to talk about.

03-01:20:41
Choper: Okay. Once again, I appreciate what you’re doing—I really do.

03-01:20:46
Meeker: Thank you.
Interview 4: May 8, 2018

Meeker: Today is Tuesday, May 8, 2018. It's been a couple of months since you and I spoke. This is Martin Meeker interviewing Jesse Choper, and this is our fourth session together. So yeah, a little time has passed and you've traveled to the four corners, including Africa in the intervening months. But I'm happy to get started again. The last session we focused on two things: one was the second of the main articles you wrote around religion in the public schools that came out in 1968, and then we also talked a little bit about your arrival here on campus in 1965. So I want to pick up there, and I want to ask you a bit about what the law school faculty was like when you arrived in 1965, in terms of—I know that during, I think '59 to '66 it had almost doubled—

Choper: Big growth, yes.

Meeker: —in the number of professors here. And that can often be an exciting time, but also tumultuous. And with more people there might be a sensibility that we’re not just all faculty—we represent different factions of the faculty.

Choper: I obviously can’t speak for the how the older people on the faculty felt when a bunch of young Turks came in, but I can tell you how I think we felt, and that was we felt very close. I think, if you take active, full-time faculty or near full-time faculty, there weren’t more than twenty when I first came. I think that—maybe low twenties. And there was a protocol. The protocol was everybody entertained you in their home, and that just doesn’t happen today. [laughing] Even the interview thing was two days, two and a half days, I think. Now, we haul them in early in the morning, send them home in the afternoon. That’s it. Late afternoon. But the faculty was very close. I think we probably entertained, in our home, in small dinners, that spouses did the cooking—I don’t know about 100 percent. Ninety-five percent we—that was the big part of our social life, and people were very, very close. Now we’ve got about seventy-five/eighty people on the faculty, so it’s totally different right now. Fifty years—there’s differences in anything. [laughing]

Meeker: In these first couple of years when you were on the faculty, and you had mentioned the young Turks, your generation.

Choper: Yes.

Meeker: And then also the older generation. Were there substantive differences between those groups?
Yes, I think there were. I think the whole legal profession was much more
conservative in those days than it gradually became. And I do remember this was
a time of student unrest. It started in 1964. That was just a year before I got here.
It was the year that I was interviewing here. I think it blew up in October, and I
came here, I think, maybe in January to interview—not a bad time to come from
Minnesota—where I was perfectly happy—to here. I think some of the older
faculty were used to doing things the way they were always done. But very rarely
were there any harsh words—oh, occasionally. I remember people stomping out
of faculty meetings, and so forth. I remember one in particular was Mike Heyman,
who was one of the young Turks. They voted down something that he wanted to
do, and he stomped—he was a guy with a temper. I don’t know if you ever met
him or not.

I didn’t, no.

He was a fellow with a temper, and sometimes when he was chancellor—I think it
was an adopted temper. He pulled it out periodically. He became a very good
friend, a close friend. So we used to celebrate Passover with them each year. That
was the way that it was. But sure, there’s always some—always some resistance.
That’s why I want to say, I try very hard not to be too judgmental about the new
wave, even though, as I say, I’m not way out there on the left anyplace. Here, I’m
considered to be a conservative; in the Bohemian Club I’m considered to be a
liberal. So I figure I’ve got to be doing something right. But I do remember
certain very strenuous faculty meetings. Occasionally people would slip—I
remember once an older colleague of mine opposing someone who was going to
be hired to the faculty. And I don’t know, this fellow, other older faculty guy said,
“Oh, that’s just,” what did he say? “Japanese scholarships,” or something like that
about his writings. And we had a Japanese fellow on the faculty. I was amazed!
He was a senior guy on the faculty, a fellow named Sho Sato, and I think he was
the first Asian American who—he was in the camps actually. Anyway, it just sort
of passed.

Well, in this era it’s not just at the law school where the generational divide is
highlighted. In the larger culture there’s a pretty substantial generation gap, if you
will. It sounds like you maybe felt part of neither one, or you didn’t—?

I felt progressive on certain issues, but more conservative on others. But in
particular, I felt a need to be respectful of the older folks. And I wasn’t
electioneering or anything, and I’d just come here. But that is the way I’ve always
felt. My friends say that I’m very stubborn, that I wouldn’t change my views.
Well, I didn’t agree with them. I thought I did. I may not have changed what I
thought, but I sometimes had to change what I did in order—particularly when I
was dean.
Meeker: I’ve read in one instance that some of the generational difference had to do with an earlier generation, so those who were already professors in the fifties having more experience in terms of practicing law, like actually being working attorneys.

Choper: Yes.

Meeker: Versus those who came later on—and you would have been a part of this group who didn’t have that kind of background.

Choper: Yes, yes. That’s correct. There used to be practicing lawyers, and they didn’t feel like you could teach law—I know there were some senior faculty who really resented the fact that I was teaching courses that I had never practiced, like corporation law, which was a major area of mine, at least in teaching. And we had one senior faculty member—we became friendly after a while—but I know he just looked down on me, very much so. [laughing]

Meeker: What did you think of that position, that position that in order to teach law you should have some experience practicing it?

Choper: I think when I came it was a time of transition between teaching people the law, over to teaching people how to be thoughtful lawyers. That was the difference. I think I picked that up from some of my professors in law school, who were much more theoretical than—we were not there to learn the law when I went to law school; it was to learn about legal reasoning, and what is clear thinking, and so forth. But that was a change. And today, we don’t get very many people who’ve had any experience in practice. I think the ideal still would be a couple of years in practice—two, three, four years in practice. As I look at it, and I look at the people we’re hiring now, and I think they run the gamut from philosophers—and I use that in a very broad way, kidding—and those who have had real practical experience. And we have courses that reflect that, within such a wide variety of courses. And I guess we have some teachers who also are different on that.

Meeker: You know, another generational difference—and this might even be comparing you to a younger generation, and maybe you in comparison to the generation of people you were teaching as students—is this idea that the reason to study law transforms, not only in the way in which it’s done, but the basic reasons. So though before maybe the reason to study law was to support and appreciate the system of law we have in this country, whereas later on there’s some related idea where people study law because they see it as another avenue of social change.

Choper: Yeah, I think that’s true. I think there are people who want to go out and practice law, and they practice corporate law, and so forth. And there are other people who
are basically philosophers, and they have no interest in practicing law at all. Teaching law, some of them are, or reforming law some of them.

04-00:12:41
Meeker: I know that Sanford Kadish lamented what he recognized as the rise of the anti-lawyer. [laughing] That’s really somebody who learned law so they could beat the system. Did you notice that happening in terms of your students?

04-00:12:59
Choper: When you say *beat the system*—?

04-00:13:02
Meeker: Well, this is interesting, right? So I was thinking about what do I mean by that? I think it means having an end goal in mind, and using whatever means necessary to get to that end goal. It could just mean being a really good attorney, working within the legal system to get where you want, or it could possibly mean things like—I remember studying the Angela Davis trial.

04-00:13:49
Choper: Oh yes.

04-00:13:49
Meeker: And one thing that happened, for that, was that public opinion was really riled up, and fear of what that public opinion might do also was enhanced, so that very possibly could have impacted what happened in the courtroom. So the attorneys in that case would have used legal means to get her declared innocent, but they were not beyond using extralegal means to establish a circumstance.

04-00:14:17
Choper: Yeah, I understand. Now tell me the question again.

04-00:14:20
Meeker: Well, so the question is—

04-00:14:28
Choper: I don’t think we’ve ever—as an institution—approved of doing things the Angela Davis way. Practicing lawyers may well be taking positions that they don’t agree with, and that was one of the big reasons that I decided I did *not* want to practice law. I didn’t feel comfortable doing that. I understood it intellectually, and so forth. I remember once when I was at Minnesota I got my first referral, a consulting case, for which I charged $30 an hour. And boy, that was a lot of money in those days! And I just was uncomfortable, and I never, except once—and I paid the price for it—I never took a consultation in which I was uncomfortable, in which I had to argue the wrong side, the side that I didn’t think should win, even though that’s not what good lawyers do, so long as they do it honestly and they make the best honest arguments they can make. That’s what we teach.

I tried never to teach results. I would frequently push people to what *should* be the law. What is the deficiency of this approach to it? And then someone would turn
around and start an argument and I’d say, “Be able to look at the deficiency in that way.” So the answer is very much—the ultimate result is a question of values. Take a look at the U.S. Supreme Court, the way they’re split the way they are. These are honest people. I fully believe that. Maybe that’s Pollyanna, but I fully believe that. They’re doing the best that they can, but they’ve developed ideas as to the way things ought to be in the law, and today there’s a big imprint of public policy in it too, social policy. I’m more skeptical about that. It’s very hard to separate what your whole background, all that you’re thinking about. You take this—not the feminist thing—what do they call it? “It’s Time,” or what do they call the—?

04-00:17:09
Meeker: Oh, the #MeToo movement.

04-00:17:10
Choper: Me Too, yeah. You know, I certainly believe in equality, and I certainly understand a whole background of seeing the world differently. But you can push a proper idea too far. That’s not me. I think some of this is nuts, myself!

04-00:17:39
Meeker: Well, you know, one of the things I was getting at, and maybe you just answered that, but I think about maybe some young aspiring attorneys enrolling in Boalt in the late sixties and early seventies who, in fact, come not only from a radical but maybe even a revolutionary perspective, where they want to know the law so they can actually undermine it.

04-00:18:00
Choper: Yes, there were some. We had students like that.

04-00:18:03
Meeker: Like Dan [Daniel M.] Siegel might have been one of those, right?

04-00:18:05
Choper: That’s right. He was a student of mine.

04-00:18:06
Meeker: Yeah. What did you think of students like that?

04-00:18:11
Choper: I don’t remember the details, unfortunately, but I was absolutely flabbergasted at his revolutionary views: you’ve got to do bad before things get good. Well, I don’t believe that; I never have. It’s not that I’ve not changed—I sort of go like this, then I come like this again. Sometimes whoever’s in power—you begin to—I sympathize with authority. Not easy. And I tend to defer to it a lot, even though I don’t like some of the things that they’re doing. We see that today with this president. I don’t know what your views are. But he was elected, and he was elected legitimately.
Meeker: So this idea of sympathizing with authority, that’s an interesting view that I suspect is more widely shared than it’s admitted to. [laughing]

Choper: I don’t know.

Meeker: Is that something that you see as a common thread that you—?

Choper: You know, I just haven’t ever tried to put that all together. And I shouldn’t say I never, but I’ve certainly never attempted to think it through. I think there are two sides to so many issues.

There are two sides to so many issues. That’s what totally transformed my thinking when I went to law school. Who is right? Who is wrong? Only time will tell a lot of those things. Predicting the future is not very easy, and being self-confident about doing this and doing that is not my style. I’m not a fan of that.

Meeker: To switch gears a little bit, you had mentioned a bit about the culture of the law school at the time, where people got to know one another, they would eat dinner at each other’s homes.

Choper: Yes.

Meeker: Did you participate in the Faculty Club or any formal organizations?

Choper: I have never eaten lunch, as a regular proposition. Even to this day I don’t eat lunch. But the first year I came here I thought I ought to do that just to get to know the faculty. And so when we used to have our—your own table, and so forth, that people would gather around and eat lunch for a while, but I stopped that very quick—but we used to have Saturday. The faculty, almost all of them would come here Saturday, and we’d go out to lunch together some other place, down by the wharf I remember we would go, and different places. So the faculty melded together. I bet 85 percent of the faculty showed up to those things. And we know there was only—say there were twenty people, there were fifteen, sixteen people some days.

Meeker: That’s remarkable. I can imagine how rare it would be today to get fifteen or sixteen faculty together in one place.

Choper: I think that’s right. Another feature was that we have so many women now in the law school, and they have other responsibilities that prevent them from doing that.
I admire them. This is a transitional period, I feel. There’s some of them thinking—there are going to have to be adjustments. They’re being made, and maybe the “Me Too” thing is part of that too. I’m not disrespectful of that; I just don’t agree with it. I think I’m a middle-of-the-roader. But I see the value in it.

Meeker: So you mean the changes in terms of just schedules and commitments?

Choper: Oh, parental care, and so forth. I’ve seen young women faculty members, years ago—and they were not being fully supported by their husbands, and I objected to that, because I objected to it not even as a matter of principle, but because it wasn’t doing the law school any good. I used to say to these young women, I’d say, “You know, you’re in a transitional period. I feel for you.” But we can’t have different standards, I thought, for appointing people, or certainly for giving them tenure.

Meeker: I’ve read accounts of Barbara Armstrong’s teas. Did you ever attend those?

Choper: No. She was still here when I came, and I remember just where she had her office. I would occasionally run into her and talk to her, but she was quite senior then. And so I—no, I was not a part to her teas.

Meeker: You know, there was one issue that I read of, and that was—and I don’t know if this is— you tell me if this is significant or not—and that was the return of the JD degree in 1967. Is that something that you would have noticed?

Choper: Yeah, it’s certainly understandable, but I resist change. That is a terrible trait, but I’ve got it, all right? Now, that doesn’t mean I ignore it, but so my law school I got at LLB at the time. It [the JD] came maybe five/ten years after I graduated. Everyone says, you know, send in your—get a JD. I never did. I don’t have a JD. [laughing]

Meeker: Well, what’s the difference between the two?

Choper: There isn’t. [laughing] The thing is law—except for the United States and now Japan—I don’t know, there may be some others—was an undergraduate—you studied law like you studied psychology. But then, when law schools began to be more demanding in being able to get in, they required you to have a bachelor’s degree of one sort or another. But when they gave the LLB, that was just like getting a bachelor with a major in psychology. So then they changed it to JD.
Meeker: Well, maybe one thing to talk about in terms of that is the role of a professional school on a campus that prides itself in its letters, arts, and sciences.

Choper: Yes, yes, yes, yes, yes. They’ve melded over the years. That’s why we’re not, any longer, truly a professional school. We are studying law the way you might study physics. You know what I mean?

Meeker: Yeah.

Choper: And it’s a matter of policy and analysis, and how better to change the law, and how can we improve the law, and how can we improve our society? Major changes from fifty-five, or whatever it is, fifty-six/fifty-seven years ago.

Meeker: Perhaps it’s related to that sort of applied approach of the fifties in terms of where the faculty were at that point to an approach in which you’re really thinking about things as an intellectual discipline, right?

Choper: Yeah, and it took a transition to do that, yeah. No, I agree.

Meeker: Well, if you have any thoughts on that transition, I always appreciate a reflection.

Choper: We’re always in transition of one sort or another. We had people on the faculty before I was here who were very conscious of urging changes in the law. Probably the most successful, or whatever, was Prosser—do you know that name? William [Lloyd] Prosser, Bill Prosser, whom was not here when I [arrived] but anyway, he really transformed the law of torts. There were people at Yale who transformed the law of contracts with new approaches to the way things ought to be done—and it’s evolving, and it continues to—the law and its processes. We’re always trying to improve it, just like everything else. Just like science.

Meeker: You returned to Wilkes, which was your undergraduate college, in 1967 for an honorary degree?

Choper: An honorary degree. Yeah, that’s right. I gave the commencement talk, I think.

Meeker: Okay. Can you tell me a bit about that experience of going back there? Do you remember much about it?
Choper: Well, it was my home town. I was happy to get a trip paid for to go back and see my friends and everything. I do remember getting the degree, maybe not clearly. [pause to think]

Meeker: But you were still a pretty young man at that point to get an honorary degree.

Choper: Yes. Well, it was a small school. As I said before, I always got good grades and did well in school and everything like that, and it just sort of followed. And I came and was on a law faculty like Berkeley, they recognized that there was something special there.

Meeker: Do you remember having any interactions with students when you went back there?

Choper: No. Maybe there were—I don’t think so.

Meeker: Let’s talk about teaching. So I know that you’ve taught a variety of courses over the years, but primarily it’s been contracts and Supreme Court.

Choper: Corporations.

Meeker: Corporations, sorry. Not contracts.

Choper: Contracts, I don’t know anything about.

Meeker: What typically would a student learn of constitutional law and the role of the Supreme Court, those kinds of issues?

Choper: What I tried to teach them was get them to think as to what the law ought to be, and what goes in to making that decision. And the fact is that in the end, in most controversial issues of constitutional law, it ends up being—and they come to a conclusion, they vote, they’re greatly influenced by their own values and their own upbringing, and to admit that is simply to admit reality. It is not saying that this is just another part of the legislature. I may have talked about this before, but to make decisions—what, when can we permit discrimination against certain groups of people? That’s the Equal Protection Clause, and those are Civil War amendments. And if I’ve said this before and you can recall it, stop me, but there is not a law that we’ve ever, that you or I have ever heard of, that treats everybody equally. Did you find that a surprising statement?
Choper: You do. Well, then tell me about a law that treats everybody exactly the same. Forget age.

Meeker: Right.

Choper: Okay, that’s a special category.

Meeker: [laughing] What do you mean by everybody, I guess. That’s maybe where I would need to go, because I think about—

Choper: Well, that’s what it means. Everybody.

Meeker: Well, you know, yeah, I just go down to something very basic like voting. But of course there’s citizenship requirements, and then also some people lose the right to vote if they have been convicted of felonies.

Choper: That’s right. So some people do, and some people don’t. It took a long time to have all the people voting. It took a Civil War fought—I don’t know about voting, as such, but that’s the ultimate remedy. Around me people say well, you can’t go through a red light. I say, well, of course you can go through a red light. You can do it in an ambulance; you can do it with a police car. I would say this in class. So you’ve got to decide which kinds of discriminations are not good, and if you want to be an originalist, it would be—well, it’s perfectly clear—it’s race. That’s what it was. And then you say well, how about affirmative action? That’s race too. Can you do that? And there’s a big difference of opinion as to whether you can, even though it is treating people unequally. It took a long time to get women to be treated equally—even to give them the right to vote. It was, I guess, maybe twenty-five years ago, I guess, in which they finally said well, this is what you call a suspect category, in which any reasonable basis for the discrimination cannot be justified. It’s good, but you’ve got to show there’s a compelling justification—these are legal terms. But as I say, there’s nothing that’s absolute, and this requires lawmakers to make value judgments. That’s what legislatures do, and that’s ultimately what constitutional courts do.

Meeker: When you were teaching this—I’ve seen different titles for different classes.

Choper: I’ve never taught anything that goes beyond corporations or constitutional law. Oh, I’m sure you can come up with something.
Meeker: Well, I saw one course called *Supreme Court Jurisdiction and Practice*. Is that constitutional law?

Choper: Did I teach that?

Meeker: Well yeah, it was introduced in 1969, but I don’t know if it was something that was—

Choper: A summer course.

Meeker: Okay, that would have been more like a focused summer course.

Choper: Yeah, that’s just a variation. Just a variation of the theme.

Meeker: Were there not several people interested in constitutional law when you arrived?

Choper: Oh yeah, yeah, there sure were.

Meeker: How did you jockey to have the—?

Choper: Well, we needed more than one person to teach it. [laughing] I’m trying to think. Who were the people who taught constitutional law? Oh yeah, somebody just left, who’d been a regular constitutional law teacher, to be the first teacher of constitutional law—I think he became the first dean at the [UC] Davis law school. So who else? Mike Heyman taught some constitutional law when I came here, but that was not his big area. There were certainly people who were teaching it, but I’m not coming up with it now.

Meeker: So how did you teach it? How did you come up with the syllabus?

Choper: Well, I guess I started with my own course when I was a student. And I grew from there. Of course I had a casebook. I put a lot of thought into that, and even the first edition of the casebook was three of us, but we all knew everything about each other’s stuff. I’m trying to think. I did not teach constitutional law in Minnesota until my fourth year; I taught corporations and I once taught their federal jurisdiction. No, that was con law. I forget. I still have on one of the shelves here the original constitutional law casebooks that were around at the time that I was there. And I looked at them. I used to spend *days* preparing for my first class. I had copious notes, which I still have someplace here. I don’t know why
I’m not throwing them out. When I’m gone, that’s the first thing they’re going to throw out, my notes. But I used to make my summaries of the case—we called them briefs of the case—and the questions that I would ask, and so forth. But then it became freewheeling in the class after that. You’ve got to change with the times in some way, in which I’d say, “Well,” I’d say, “Here’s the case we have for today. Miss Jones, what do you think? Right or wrong? Was it correctly decided or not?” And then we’d just go from there.

Meeker: Really?

Choper: Yes, that’s what I would do. Now I spend more time, in the last years and only make little changes. First of all, classrooms have the screens, and so forth, and so on. So I actually got my own screen in which I just showed what my questions were, and put them up there, put some—these are the factors, and so forth. I put them up, so I was trying to act modern. [laughter] And I still have the pointers here, but that’s what I’d say. I’d say, “Who should have won this case?” That’s it. And why. “Well, because of this?” “Well, suppose this.” And to try to get people to understand the complexities of what’s behind the law. There’s no answer, in the end. I remember church and state was my big thing, and they all thought I was Catholic because I was in favor of aid to parochial schools. I wasn’t Catholic. It was really surprising! I didn’t have a Jewish name or anything like that, and so they said, “I thought you were Catholic.”

Meeker: To go into a class like this and engage in the Socratic method, which is what you’re describing—

Choper: Yeah.

Meeker: To hash out a case and to revisit the arguments, it requires both sides to be extraordinarily well prepared in order to have a meaningful fact-based discussion.

Choper: Yes, they read the cases. They can see what the court’s opinion was. Sometimes, particularly in corporation law, there are very few dissenting opinions in the books. I’d just ask them what they think. What should be the law?

Meeker: Well, and so for the constitutional law course did you assign the casebook? Is that what—?

Choper: Oh yeah. Oh yes.

Meeker: And I believe the casebook includes just case material, right? Just decisions.
Choper: No. The novel thing about our book was—and I pushed this hard. Because I was part of the first edition—we called it *Cases, Comments, and Questions*, and we put them all in the book. And we were the only book—certainly in constitutional law or surely in corporation law—that did that. They used to just have the cases. But we used to take the best pieces out of the writings, and say here’s what commentators have said you can take a look at the very first edition. It’s not very much different than that. And I was a big believer in that.

Meeker: You were including the cases, but you were also including comments written by you and your coauthors.

Choper: Our own comments—and also comments were by other people. Or our own writings. But not the law. And we’d ask questions about both the cases and the comments, the commentators. Comments was a short form of commentators. We took the best of the literature. It was an enormous job.

Meeker: Enormous job because?

Choper: Reading it all! Yeah, reading it all. I think the first edition I read *everything* that had been written on it in the law reviews. Up until a couple of editions ago, I guess—you go back and look at some St. Louis University law journal, but I found something that I thought had a good idea in there, and I put it in.

Meeker: Law journal articles are notoriously long. Many pages in length.

Choper: Yeah, they are.

Meeker: And so you would edit these down?

Choper: Oh, we’d take pieces of it, yeah. We weren’t trying to do the whole article, but we were trying to take the key out of it. Key points.

Meeker: It’s interesting. To me, it’s structuring a conversation, the publication you’re talking about. So you have the primary source material, if you will, which are the decisions.

Choper: Yes, or the secondary source material, which is the commentators.

Meeker: Did you ever actually print the laws that were at stake?
Well, the laws are usually recited in one way or another, in the opinion. They start with the facts of the case: these are the facts. This law says you can’t go more than seventy-five miles an hour. That’s the law. And then you put a fact situation and say, “Well, suppose there was an emergency,” and so forth. Push me more—

My wife was pregnant and—

That’s right. That’s right. That’s right.

That comes in the commentary, right? Or even in the decision.

Yes. That analysis would come in both.

When you were having these conversations in class.

Yes, with the students.

With the students. Were you looking for anything in particular, such as—was it just really based on the merits of what they were arguing? Or were you hoping that they would tie to specific things in the readings?

I was trying to get them to engage in logical thinking, clear thinking

This fellow who was, oh, he was in the eighties here. He made the big contribution toward this room-naming thing. It started with $100,000. I remembered him. I’d seen him, raised some money from him before when I was dean. But I just had this email from him. He became a very, very wealthy guy. He came from nothing. And he made this contribution. This is just a few years ago when I saw him. I said, “What prompted you to do that, Herb?” And he said, “Well, you taught me how to think clearly.” Logically or clearly. And I said, “You know, that’s the biggest compliment you could give me, because that’s exactly what I wanted people to do, to think, to try to see both sides of a problem.” I don’t know what to add beyond that. That is what I was trying to teach them. So as I say, they would argue one side; I’d argue the other side. They’d switch it around, and I’d come over and argue the other side.
Meeker: You know, when I think of logical thinking, I think of the revolution in thinking that came with the Age of Reason, historically. And one of the greatest American contributions to that I think might be *The Federalist papers*.

Choper: They are, in trying to understand what they intended to do with the original Constitution.

Meeker: One of the interesting things about them is that they are appealing to logic, which would have been different than previous generations appealing to the church or God or divine power.

Choper: Yes.

Meeker: That wasn’t where authority came from. Authority came from reason: what is logical?

Choper: That’s it! I’m with it.

Meeker: But I still wonder: how do you teach that? How do you teach that and instill that in people?

Choper: By taking a specific question and just running through it, digging deeper and deeper into the answer to the question.

Meeker: Did you start to see, in the late sixties and early seventies, any modification or change to how one would arrive at a logical decision?

Choper: I heard you. I don’t know if there was any change in the process. [side conversation deleted]

I guess my understanding of what we’re talking about is that I don’t think there is. It’s not changeable. You can see new insights into it, just like science. You think this and all of a sudden something comes up and you get it twisted a little bit, qualify it. But I think you’ve got to try to think it through as much as I can.

Meeker: So logic is found in the process, in the methodology.

Choper: Yes.
Meeker: Which is constant questions?

Choper: And consistency, yes. Logic as opposed to emotion. Those are the two extremes. I mean—not extremes. Those are the two competitors. You can do something on the basis of your gut. I don’t like that. I just don’t think that’s right. What do you mean you don’t think it’s right? What makes right? I remember once I was talking to someone, and I said, “Well, you always try to do the right thing.” And they said, “Well, who determines what the right thing is?” Well, that opened my eyes! I hadn’t thought of that before. I thought—the fast answer is the golden rule. I sort of like that. But you’ve got to see things through clearly, and there are two sides to everything! Two sides to capital punishment, to whatever. Sometimes it’s pretty clear that one side is contrary to societal values, and we always ought to be prepared to examine the societal values. But in the end, it’s simply a question of you try to do what everything in your thinking leads you to believe is correct, given all the situations. For example, and again, take abortion. That remains one of the great big constitutional issues we have in this country. As a policy matter, I come out on the side of choice, although I have always had a great deal of difficulty in determining when life begins, because I don’t think you can. You can give it a definition, but there’s not the clear answers when life begins and it doesn’t begin, I guess, or when it ends maybe. But even that we don’t know, whatever.

I think you have to have an open mind and treat things, examine them, and logically come to a conclusion, even though the conclusion you come to may not be the one that you like. That’s what I believe myself, but I also think that that’s the way we ought to make—we ought to conduct life, when the issue is one of forcing people to do certain things, saying you can’t do this. That’s what law is about I should say. So it’s about coming to the conclusion as to what’s the best rule, and it shouldn’t be what, in constitutional law at least—it shouldn’t turn on one person’s values, although it does. A person’s got to try to think as clearly as they can. I know I’m not making a lot of sense on this.

Meeker: Well, maybe a way to talk about it is undoubtedly you would have encountered students who resisted approaching things in this logical, reason-based framework.

Choper: That’s right.

Meeker: And they had a moral belief in the rightness of something.

Choper: That’s correct too.

Meeker: And these could be people either on the left or the right end of the spectrum.
Choper: Yes, always.

Meeker: And they wanted to bend the law to accommodate their moral position rather than changing their own position if it didn’t play out logically.

Choper: Yes.

Meeker: That might happen in terms of abortion or any other number of things.

Choper: Yes, yes.

Meeker: How, as a teacher, would you work with a student as you’re trying to get them to think more logically?

Choper: I try to get them to realize that the answer that they’re giving is not so easy. That’s all. That’s a very simple way of putting it. But there are alternative answers. How do you get to the—as I say, I know I experienced this before, myself, in thinking how should—what should the rule be? And at a certain point, in my writing, I would come to conclusions that I thought I wished that I could come to a rule. I wish that I could arrive at a rule which produces all the results that I like. But if I can’t do it, then I can’t do it, and therefore, it ought not to be the rule. I think I was sitting here with you looking through a book, put in the preface of the book, in which one of the reviewers said, “Well, this will satisfy nobody, and don’t even print it.” And the notion was yeah, it doesn’t even satisfy me. I wish that I could have come up with a different result for certain things, but I couldn’t.

Meeker: Let me ask you about something that I think starts to become more popular amongst the students, and that’s legal clinics.

Choper: Yes.

Meeker: I think when you have a lot of students who do, in fact, want to practice law, they’re looking for real world experience, and then I imagine a lot of young students coming to Berkeley in the early seventies want to have high impact, social impact kind of work.

Choper: Yes. They want to do good. They want to make the world a better place, by their definition of it.
Meeker: Did the law school feel that that was an appropriate approach, and something that the law school should spend time helping students with?

Choper: Well, I imagine most people did, but I don’t know that all would. I mean, you say the law school.

Meeker: Well, I guess I’m trying to think about what the approach of the law school would be to that desire amongst students.

Choper: I would say it depends on the individual faculty member what they want to emphasize.

Meeker: What did you think of that kind of part of education, clinical work?

Choper: Oh, the clinical work? I was resistant in the beginning, because I thought that we were spending valuable resources on things that they could do on their own after they got out of law school, and that we ought to spend all the time getting them to think like lawyers, or think logically. But I saw how some of them, some of the clinics were used for not simply learning how to do it, but confronting intellectual questions in the process, I guess. Or maybe I’ve just—that’s the way I’ve accepted it. I was not willing to spend money, when I was dean, on clinics. And I was succeeded by Herma Kay. She was much more into that, and I respected it. She and I disagreed on a lot of things, but I think we fully respected each other’s views, and so forth. Good friends.

Meeker: I would like to talk a little bit about some of the service activities that you were engaged in here. You were on any number of committees, and it’s hard for me to separate the wheat from the chaff here in terms of what were the really important ones. There’s curriculum policy, there was grading, there was student participation. There was the moot court, there was clerkship, there was law review. And then at the university level there was privilege and tenure, other committees. And then there were also broader professional committees. [laughing] Do you have a sense, looking back, say, to this period of time before you were dean, what the more important on-campus activities would have been for you?

Choper: Well, one was the Privilege & Tenure Committee, I know, because that was a law question, and I learned a lot from those things, from those cases. I learned how difficult it was to make decisions in respect of people’s futures. And I remember, to this day, believing that this fellow was right, but he couldn’t prove it.

Meeker: What do you mean?
Choper: My gut told me he was right, and I voted against his alleged violation. I forget what department he was with. It wasn’t in the law school. But I sensed from appraising him as a person that he was right—maybe that’s the way to describe it. I told him that. I said, “You know, I really do think that you were right in this, but I can’t vote against,” this was a, “I can’t vote against the decision of the dean,” or whatever it was, “because I just don’t think you’ve proven it, that this is what was going on.”

Meeker: What was at stake here? Was it a tenure decision, or was it a disciplinary matter?

Choper: I think it was a disciplinary matter of some sort.

Meeker: Well, so basically this is an example here of the difficulty in applying your methodology.

Choper: That’s right. That’s right. I couldn’t. I’m filling in the blanks, but the attitude of the dean, who was being charged with—I guess maybe firing this guy. It wasn’t a tenure case, but it was a privileges case. He may have been a lecturer. And the fellow came across as much more sincere, but that was just my instinct. That’s what I thought. And it wasn’t proven. I can’t do better than that. I can raise the level of my voice. [laughter] But so that’s right. That was one, yeah, that was one situation like that.

Meeker: Did you do much work in terms of thinking about law school curriculum and committee work?

Choper: Yes, I did a lot of thinking about that.

Meeker: I know that there was a period of time—I think around 1970—that the requirements changed so that only the first year was specifically prescribed.

Choper: Yeah, compulsory, yeah.

Meeker: Which meant more time for electives, which I assume also would have—

Choper: I think it was, when I first started, we had many more required courses beyond the first year. Everybody had to take corporations, everybody had to take constitutional law. They were both second-year courses. Gradually, we lightened—yeah, we did that.
Meeker: Well, tell me about the process and the reasoning behind that.

Choper: Well, the reasoning behind it was, first of all, there’s what the students want. And I never thought that that was absolutely useless. I wanted to listen to that. But nonetheless, I still came up with my own conclusions as to whether it was valuable, a valuable use of time—whether it is the proper thing for the three years that a law school should be. The problem is, after the first year, a lot of students got it. They got what this was all about. A fairly small percentage didn’t get it till after the second year. Well, and I think if they didn’t get it by then, the third year, it’s useless to try to get them to get it. So, again, I resisted change. Although I had ideas as to how it ought to be—I had my own ideas from the beginning how to change things.

I came in thinking that we ought to pay more attention to student writing, clarity of writing. Some of the smartest people, the students, and they’re just no good at clearly expressing their views on paper. And actually, my first year as dean, we put in a program like that. It was a bust. Why? Because the faculty didn’t want to have to read all these papers. [laughing] And go over it, and so forth. I used to do that when I was teaching. I would take exams that they wrote, and I would make all sorts of comments about the answers to the questions, and so forth. I spent a lot of time on that. Almost all of it at home, at night. [laughing] So you try to bribe the faculty, say well, you can have a small section, but you’ve got to read the papers. They were given papers. It worked for a year or two, and then nobody wanted to do it anymore. Why? It took too much time away from scholarship—and, I was not unsympathetic to that either. The question is, what’s the best use of the faculty’s time?

Meeker: You know, in thinking about this reduction in the number of compulsory classes to the first year—

Choper: Yes, yes.

Meeker: Like you said, that opens up two years then for more—I don’t know if electives is the right term.

Choper: Yes, electives. That’s what it is.

Meeker: Elective classes. And you’re getting more classes on topics that the professors want to teach, as well as it sounds like paying attention to what the students want to have as well.
Choper: Yeah, that’s right. We used to have an unwritten rule about it. You’ve got to do your duty by teaching one basic subject, and then teach whatever the hell you want!

Meeker: You said that constitutional law was not a first-year course then?

Choper: It wasn’t a first-year course. It became a first-year course some years after I—yeah, it wasn’t.

Meeker: So were you teaching any first-year courses?

Choper: No. When I first came here?

Meeker: Yeah.

Choper: No, I taught two courses—constitutional law—oh, I once taught, was it here? No, in Minnesota. Securities regulation. See, that was an offshoot of corporation law, and the big securities regulation guy was a fellow, an older faculty member here—he had a casebook. But he always thought I was a young, untutored interloper—Dick Jennings, Richard [W.] Jennings his name was. And we became friends at the end. He once told me a very sad story about his upbringing, and so forth. Lived till he was ninety. I don’t know if I’m answering your questions or just musing along here. Don’t hesitate to stop me.

Meeker: Well, it seems like that this curriculum change would have had long lasting and pretty broad implications in terms of the kind of law that students are taught.

Choper: Yes, it has.

Meeker: And so I think about this from my perspective. I have a PhD in history, and I went to a program where there wasn’t a real solid curriculum. I think there were two courses I had to take, and they were more historiographic courses, in terms of courses that you would take in the history of history, or the different styles of history. But as an American historian, there wasn’t a sequence of five courses in American history, plus constitutional history that you would have to take. It was much more wide open than that. And in retrospect, I kind of regret that. I feel like I didn’t get the grounding of the knowledge in just American political history, if you will, that I should have gotten.
Choper: Yeah, yeah. Maybe better off if they told you what you ought to learn, because you didn’t know yourself.

Meeker: Well, you know, and I learned interesting things, but those are things that I could have gone off on my own and learned too. I don’t know. Were these kinds of conversations happening in meetings of the faculty, to try to determine—is this the right path to move in?

Choper: We had committees that did that. In a way, it came in backwards. You hired faculty, particularly if they were lateral appointments, because of their reputations as scholars, not as teachers. The notion was the competition of the law schools let people do whatever they wanted. So who are we? But again, it’s not black and white. But mainly you say well, there was a notion you’ve got to teach one basic course, but that went by the boards. And people are pretty much teaching what they want to.

Meeker: Okay, so these were not decisions that were made in curriculum committee with a great deal of planning?

Choper: Not in my time. It may have been made then, but it seemed to me that it was much—we were much more pragmatic about things, and look—I’m sure I said this before. I’m a very competitive person. I was very competitive when I was dean. I wanted to be ranked as high as we could get in the rankings, and the way to get that is to get great scholars to come here. And some of the greatest scholars were not very good teachers, at least by majority view. Some people loved them, I guess. So that scholarship was something that we thought we could appraise, and the faculty did. And the person gets nationally recognized, you do that. If it was someone who was way up there, I didn’t care what the subject was. That was my view.

Meeker: Were you then bringing in some people with esoteric or novel areas of expertise?

Choper: Well, not in my time. The faculty made big decisions as to what sort of people they wanted. The dean didn’t have, particularly in a smaller faculty, the dean didn’t have much influence. I used to get a kick—I remember one of colleagues once, when I was dean, in the parking lot I ran into him. He was talking to somebody, he said, “Oh,” he said, “Come here. I want you to meet my boss.” And I said, “No, no. They could fire me any time they want. I’ve got to satisfy them.” [laughter] I didn’t do it just because I wanted to be liked. I wanted to do it because we wanted to keep good faculty, and you’ve got to stretch—interesting, you talk about courses, you’re talking about intellectual things. You know what the biggest fights were? Offices.
Meeker: [laughing] Okay.

Choper: Territory. It brought out the worst in my colleagues. Terrible, terrible. I remember that. I pushed to have a neutral rule for the territory. That when you got here is when you—not that that was the best rule, but it was the one that those were here voting for it—they liked that. They could have—an office opened up, the senior person could—and we still do it to this day.

Meeker: What is the process then?

Choper: The process is that they say, well, so-and-so is retired, and his office is empty. Who wants it? And the senior person—and they may have changed that. They should. But sometimes you bring in someone from the outside, and they want a big office. So you’ve got to make an office for them.

Meeker: How long have you been in this office?

Choper: Well, since the building was made—this is the building that I raised the money for. It’s called the North Addition, and that also had a story. I want to tell that to you.

Meeker: Yeah, please do.

Choper: It’ll only take a minute. It’s funny. So they started giving away offices. They started on a system of offices, and I looked around at the time and I thought—I should say, I was always—sort of admired the offices, and I had—in the interim, I had an office up in the tower, the other building. What do we call it; it’s got a name. I raised the money that got them the name.

Meeker: Up there on the corner.

Choper: Yeah, yeah. At the corner, that’s right, the big—there’s six/seven floors. And I had one of the top offices, while this building was being built, so they were shifting offices, and I had this big beautiful office, view of the Bay—the whole thing. I could actually see the racing at Golden Gate Fields from there if you’d put my binoculars on. I was big into the horse racing at that time. So when this building was opened, the question was they started—there was a committee to take care of the offices. The committee started by giving offices by seniority at Boalt. Well, a lot of people wanted it up in the new tower. They were very nice big offices. This one was new too, and it was not our building before. So I took a
look at this office, and I could see that this was a very desirable office if you
didn’t go up in the tower. So I wrote a note to the chairman of the committee—I
don’t know if we had emails in those days. I think so, maybe, by that time. I said,
“Well, in what position is the person who raised all the money for this?”
[laughing] He’s still here. He’s a colleague of mine. And he wrote back—I guess
he must have talked to the committee or something like that, and he said—he said,
“Well, you should get a higher pick of the offices.” I said, “I’ll take this one.”

Meeker: [laughing] Let’s talk about one last issue before we wrap up today, okay?

Choper: Sure.

Meeker: And that is admissions. I’m thinking about the period, roughly ’65 to ’75 at this
point.

Choper: Sixty-five to ’75. I remember that very well.

Meeker: Yeah, so there are a couple of things. For most of that time, the student body size
of the entering class was—

Choper: Pretty much the same.

Meeker: Pretty much the same, in the mid-200s.

Choper: Yeah.

Meeker: And then it jumps substantially by 1975 to over 900. Is that correct, or is that
wrong?

Choper: The size of the faculty.

Meeker: No, no. The size of the enrollment class.

Choper: When I first came there were two sections, I think, or maybe that’s all, and as
many students as there were, you got assigned alphabetically to this section or that
section, and that was the end of it. Then we began to have more—again, refresh
me on the question. What did we do with the size of the class?
Meeker: Right. There’s two questions here, so let me sort them out for you. One is that say, from ’65 to about ‘70/’71—

Choper: Sixty-five was when I came here, to ‘71.

Meeker: Yeah. So your first five years here, first five or six years, the class size for each entering class of first-year students is roughly the same. It’s in the mid-200s, a little plus and minus here.

Choper: Yes, 270 I thought, usually, we had.

Meeker: Yeah, like maybe 230 to 270 or something. The one thing that changes in that period of time is the number of people applying quadruples.

Choper: Yes, yes.

Meeker: And the first question is how did that impact the student body, in terms of teaching and advising these students?

Choper: What grew was the number of courses. All right? That required more faculty. We didn’t want to change the size of the faculty. There was, I think, pretty much—excuse me, we didn’t want to change the size of the student body. And we have, basically, succeeded in doing that. We don’t have—we’re still a mid-size school. It’s not like Harvard or Michigan, NYU, Columbia—they must admit about 400 students. The very small schools are Yale and Chicago, and we’re sort of in the middle, maybe like Virginia. So what we did is we kept enlarging the faculty, and keeping up with the courses, which produced a situation in which we had more sections, and they had to teach something. I don’t even know what we have today, to tell you the truth, as to whether in the first year—I think we did put in small sections for every first year that was—I was instrumental in that, that we ought to have—I wanted the faculty to do more, as I told you before, with the small sections, and teach them how to write, which I think is the great defect, at least in my time, as we sent them out of here, they couldn’t write. But we just kept growing in order to get people to teach these courses, and that was in order to stay up with the Joneses, with the other schools. Our student-faculty ratio, among the best schools, is one of the highest—to this day. And we get penalized for that in the *U.S. News & World Report*, and in resources, in particular, we get to spend—our resources are much less. It’s also hard to measure resources, you know?

Meeker: Right.
Choper: The university picks up—although less and less. They’re trying to push it off—again, I don’t follow these things too clearly. But your question is how did we feel about enlarging the size of the faculty?

Meeker: Well no, it’s actually more how does a university deal with increasing numbers of hopeful students applying for admission? Do you keep the numbers low, or do you try to expand to accommodate more qualified students?

Choper: To have more qualified students, to have more, you have to admit more students.

Meeker: Right.

Choper: We did want to admit more. We did want to have a bigger student body. We just give them many more courses, and have many more faculty. Am I being clear about this?

Meeker: Well, I guess maybe I need to be a little clearer on the numbers. Because what I believe happened was you have, for a time, a sharp increase in the number of people applying for admission.

Choper: Applying, yes, and that changes with the times. The state of the economy has a lot to do with it.

Meeker: Right, but then the question is: how do you respond as a law school to the increasing demand? And certainly there have been ups and downs in that. But how does the law school respond to that? Does the law school respond by keeping the number of admissions low? Or does the law school say it’s our obligation to train more attorneys?

Choper: No. We do not. We’re pretty strong. I think we continue to be strong—at least that’s what the figures show—on not having more regular first-year students admitted, and most of them stay over to the third year. We do admit another thirty students—again, it used to be the rule, in the second year. I favored that, because we make mistakes. So they went to Hastings, and they burned it up at Hastings. We’d take away the top students every year, as transfer students.

Meeker: Oh, really?

Choper: And they’re much better than the average second-year student, at least in their participation. The others are jaundiced by then. They know it all.
Meeker: [laughing] What does Hastings think of that practice?

Choper: Not happy. But that’s just—it goes with the—Hastings, Golden Gate, the local schools, and then you get some transfers from top schools too, periodically, but they’re personal reasons. They’ve got to be here because they have a sick parent or something like that.

Meeker: So the last question, in terms of admissions, is by the mid-1970s Boalt becomes, what I understand, to have the highest percentage of minority students—

Choper: We did for a while. Maybe we still do; I don’t know.

Meeker: Yeah, next to Howard University law school to the point of having between 20 and 30 percent minority enrollment.

Choper: Yes, that’s right. I said I was willing to draw them out of a hat, but I don’t want to admit them on the basis of race. That was my view till I became dean. Then I felt I had an obligation, with the rest of the faculty, to defend it. I’ll tell you one of the best stories is that some big donor calls and he says, “My son is applying to the law school. What can you do?” I said, “Well, I don’t touch this. I don’t touch it.” And I didn’t. And I had faculty members who thought that that was a bad idea. I said, “No, I just don’t believe in that.” Then I had a situation in which the father calls and he says, “My kid wasn’t admitted.” And he said, “He’s got a good record,” and everything like this. “Why didn’t he get admitted?” And I said, “Well, the applications have been such that we get higher and higher quality.” And I looked up the average admission, the average LSAT admission at the time that the father went to school. And I said, “You know, I admit that the minority students are not as high on their records as some of the non-minority students. But I want to tell you, Joe, that the average is much higher than in your class that was admitted.” [laughing] That made an impact, I thought. Because things have changed. That’s just not the way it goes. I didn’t have the greatest LSAT score either. I remember that.

Meeker: Well, if you think about just the population of the United States, or of California, in particular, you’re going to have more applicants, therefore—

Choper: Yes, and we get a lot of out-of-state applicants too. We used to have a quota on that that we wouldn’t take—and I don’t know what we do now.

Meeker: Do you have a sense, by the mid-seventies, when close to a third of the student population is non-white—so you have a sense of how—?
Choper: Well, non-white, of course, includes Asian. They have better records than the whites.

Meeker: Right. Well, I think that was in percentage terms. These were African American, Latino, Asian American, and American Indian.

Choper: Yes. Yes, yes, yes.

Meeker: Did the presence of so many non-white students have any impact on the life of the school, the life of Boalt?

Choper: Well, that’s a very hard question to answer.

Meeker: Or what kind of impact did it have, I guess?

Choper: All of the minority groups have their own organizations. Once again, my gut—when you choose people on the basis of what I consider to be improper criteria—it must be because I suffered. I suffered discrimination myself because of my religion, when I tried to get a teaching job. But I’ve always been uncomfortable with that. And I once said, “I’d be willing to admit on the basis that you get a big pool. I don’t care how big. A big pool with a cutoff of our regular—just pick them at random after that. See what happens. That’s fine with me. We could probably get more if we lowered the requirements to get into the pool, we’d have more people with lower averages. That’s all right. But I don’t want to pick them by race or religion.” And to this day I’m very strong on that, although I’m the first to admit that affirmative action has done a lot of good, and that we would not have brought in students who came here and did very well, both academically and certainly out in society, and using what they learned here to try to make it a better society. But still, it bothers me that we used criteria that were beyond the capacity of the individual to determine their futures. Again, it’s a rationality which governs me. It gets me in a lot of trouble, even to this day, with my wife and stuff like that.

Meeker: Did the changing demographics of the student population impact at all the way in which you taught or what you taught?

Choper: I don’t know if it was the student population or just aging. I think that students wanted—students did not like the Socratic method. In early days, they had no choice. What is it—[Professor] Kingsfield? What was his name? The movie.

Meeker: Oh, The Paper Chase.
The Paper Chase. I was never like that. I would open up, after the first x number of years I would say. “Look, I’m going to ask you questions,” I’d say, “I don’t know the answers. That’s not important. What I want to do is get you to think clearly.” I don’t know if I put it that way or what, but I know—I said, “I can’t answer a lot of these questions.” Sometimes they’d say, “Well, what do you think?” Some student. “What do I think? I think that’s a tough question.” [laughter] And I think I got away—despite the fact that a lot of students didn’t like the process, they nonetheless gave me good ratings. So that was the best thing that I could get out of it. Now, there were always some. And if you don’t think I read—all of us read all those student ratings of our courses. They’re anonymous. They grade this way, one to seven, and you get a lot of sixes and sevens, and so forth—and then you get someone with a two. Well, you can’t please all the people all the time. I think Lincoln said that.
Today is Monday, June 25, 2018. This is Martin Meeker interviewing Jesse Choper, and this is our fifth session together. We are again at his office in the Boalt Hall Annex on the UC Berkeley campus. So as I mentioned off-tape, we’re going to focus today on your book titled: *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court*. And this was an award-winning book and widely reviewed—and we’ll get to the reviews soon. But the reviews were, I think, very interesting, because they all really delved deeply and cared greatly about your arguments within the book. And we’ll talk about some of those in a moment. I’m wondering if you can maybe provide an overview narrative of the writing of a book. A book like this is not made in a day or written in six months. Can you tell me how it rolled out over the long term?

Well, I guess the earlier question is how did I come to this approach, which is different. It’s certainly not the prevailing approach to say that there should be no judicial review of federalism or separation of powers. So again, for me that’s a hard question. I know that I was always very interested in protecting individual rights. The difficult thing was to determine how best to protect individual rights. I just sort of developed the idea that this judiciary is extremely powerful, and it was taken seriously now, by the time I started writing this book, which I should say I was thinking about it for a long time and making notes for a long time. And the fact is that I began writing it in 1968, and I never finished it until 1980. Other things came along, and so forth, and so on.

And in fact—but I really felt as I moved along—I felt more strongly in the point of view that I was going to be arguing. Because on the one hand, I was very strong on individual rights. On the other hand, I was very concerned with limiting the power of this—you can call it whatever you want—anti-majoritarian group called the Supreme Court. Now, we have a lot of anti-majoritarian provisions, and provisions in the Constitution—and traditions. I came to the view that whereas we should give the Court the power to reach in, if you will, or speak up or whatever, when it does not appear that the provision of the Constitution will be given adequate protection by the legislative process when it failed. And in fact, when the Court declares something unconstitutional, it says well, we don’t care about the legislative process. This violates the Constitution. But there had to be limits to it. It had to be protective of individual rights, and it was those rights, I felt, where the individuals could not adequately protect themselves.

There are some rights that tend to get greater protection than others, just as a matter of the nature of things. For example, the Bill of Rights ordinarily protects people who cannot prevail in the legislative process. However, if a provision of the Constitution *can* get a fair run in the legislative process, then it seemed to me
that it was not a good idea to have this Court come in in the absence of certain specific prohibitions in which the legislative process was told no. So I then developed this idea of a difference between individual rights, and federalism and separation of powers. And I said in those situations the states are very well represented in the legislative process as a group. They used to have the filibustering, in which one person could stop the whole thing. And then they beat that down a little bit, but nonetheless, to get something through the legislative process—I don’t want to say the majority generally rules, but basically it rules in one fashion or another, except for individual rights. And there, the only recourse in enforcing the Constitution and valuable rights, some of which I think are more critical than others—such as the freedom of speech. But I figured they are not adequately protected, and they need the protection of a branch—whatever you want to call it, antidemocratic/undemocratic/not responsible to the people/very difficult to overturn. Look how difficult they made it to amend the Constitution. We see that three-quarters of the states—it’s become impossible for anything of any controversy.

So that was the guts of what I wanted to say. I wanted to say the Court ought to have a limited power, to be used only when needed. And I also didn’t think it was needed in fights between the president and the Congress. You see it going on, sort of, right now, between a president and a Congress. At least—pretty much. And the president is limited in what he can do, and the Congress is limited in what it can do. But if they clash, they tend to take care of themselves. But the minorities that can’t take care of themselves—so that’s the guts of it.

Meeker: Do you recall when you first started to develop these ideas? Were you considering these questions, say, when you were a law clerk for [Earl] Warren? Or was this something that started to unfold a bit later?

Choper: I think it sort of began when I was a law student. And it ripened somewhat under Warren, who at the time, I should say had a somewhat similar view—although he changed about—I was there in the 1960s, say, and he changed in the seventies. We had a case involving birth control, which had been—went back to the 1930s, and particularly in New England—Massachusetts, Connecticut. They had these provisions on the books saying that you couldn’t have birth control, except for preventing something or other—I forget what it was exactly. But it became very controversial. And we had a case—the earlier major case also came from Connecticut. Justice [Felix] Frankfurter wrote, who was not on our side of the five to four split at the time—and they were split, although there was a middle person, just like there is [Anthony] Kennedy today. When I was there it was a justice named Potter Stewart, who was a moderate, very much like Kennedy.

[side conversation deleted]
Yeah, but there was a case beginning in the thirties from Connecticut [Poe v. Ullman, 1961], and then this case came along. And the Court was not in the business then—they’d rejected substantive due process. That was the whole feature of the New Deal, to limit the power of the court. They were striking down all of these anti-Depression statutes, and so forth, and so on. So this case came along, and they were up in the air, you know. They really had a difficulty making up their minds. The birth control notion had a certain ring to it that you ought to be able to have this, only a few states didn’t permit birth control. So to make a long story short, the fact of the matter is that the Connecticut statute was never enforced. But it worked. It was a deterrent. I’m struggling, as you can see.

Well, just to get us back on track about this, and so the question really was maybe examples of decisions or other legal matters that you encountered that inspired you to move in the direction that was formally articulated in this article.

Well, Warren, no question, was a liberal. But on this case, Frankfurter, who was the leader of the conservatives on the Court at the time—and he was an old New Dealer, that didn’t want the Court knocking down everything. And so he wrote this long concurring opinion saying, “Well, there’s no need for us to decide this case on the merits. Why? Because it’s not being enforced. And therefore, unless and until they really start being active on this—” and there were ways for women to get around it too, particularly if you went outside the state. But anyway, so he wrote this opinion, and it was an avoidance sort of opinion, and the chief didn’t know what to do, and he was thinking about it and thinking about it. And he said to me, at one point he said, “You know, I don’t know. I think it’s a terrible statute, but it’s,” he said—[laughing] actually, I’ve written about this someplace. But he said, “Well, I went along with Frankfurter on this,” he said, “because I just hate to strike down a law that was passed in the public interest.” That’s almost a direct quote. Which identified his remembrance of what the Depression Court did. So he just hated to do that. [laughing] And he didn’t, for some time, until I think the Griswold case [1965] he finally jumped over and joined—my recollection was it was Arthur Goldberg who wrote the—was it?

So anyway, that’s the way I felt—that influenced me, that the power of the Court has got to be limited. And it shouldn’t be, it shouldn’t be—the limitation should not be well, what we think is really important, and so forth and so on. We ought to have strict criteria, and those criteria ought to be found in the Constitution. And if they’re not there, then I don’t want to do it, even though I may be very—for example, the abortion cases. I thought they were wrong for that reason. I was pro-choice, although I would admit that the logical part of me said, well, I don’t know. Recall where I was started?

You were beginning to give your perspective on the abortion cases.
Choper: Oh, on abortion, on abortion. Yeah. The other question is when human life begins.

Meeker: Right.

Choper: There’s no answer to that. Whatever it is, it’s the way you define it, and it’s defined by human beings, not by logic. So that always troubled me, and what I wanted to do is ensure that those rights that are mentioned in the Constitution are pretty vigorously enforced, and that takes guts, because most of them end up being unpopular decisions. And I thought they ought to preserve their ammunition, I think—there’s another word I use in the book. I can’t even think of it now. But preserve it for when it’s really needed. So that influenced me a lot, as again, I thought, clashes between the president and the Congress, and between the states and the national government—they can take care of themselves.

Meeker: Well, it’s interesting. It sounds like you objected to, say, Roe v. Wade on federalism grounds, that—

Choper: No. I objected to it because there was nothing in the Constitution that talked about a right to birth control. They made it up. That’s why. Fortunately, in my judgment, they don’t do that too often. Very, very, few—there’s a handful of make-ups, but the big ones were abortions and birth control, and another one was what originally was called one man/one vote, which also was up my year, although it wasn’t decided my year. They put it over. But there’s nothing in the Constitution that talks about one person—in fact, there’s so much in the Constitution that means otherwise. A lot of people couldn’t vote. They started by saying—I think they said three-fifths of a vote for every slave, in determining the populations. They were going to be credited under the Constitution. So that’s where I came from.

Meeker: When you started to develop these ideas and articulate them, say in conference papers, did you feel like you were really running against the grain?

Choper: Oh yes! [laughing] Oh yeah. I only got affirmative recognition by the Supreme Court in one case, which I’m sure I could find—I forget exactly what it was about, but they cited my article. The justice that I admired the most—he dissented. [laughing] John Marshall Harlan—who I thought was the—he was there on the Court when I was there, but he was, in my time anyway, the best lawyer there. He was a very, very careful person, moderate, didn’t ordinarily believe in substantive due process, but occasionally did it.

Meeker: What about colleagues or other people, other law professors around the country when you started to present these ideas? How did people respond to you?
Choper: I gave a bunch of talks to law professors, I remember. I remember once at Georgetown I guess it was. And I gave this talk summarizing what I had done, and so forth. And I said, “It’s sort of a crazy idea. It’s an unusual idea.” Well, one guy said, “No, I think it makes a lot of sense to me.” But that was the exceptional reaction to it, because it was radical. It told the Court all of a sudden that it has got to stop deciding a lot of cases, and by the time that I wrote this, the judicial review was ingrained in our system, in what is one of the great—and I think it is one of the great features. But—they are not, it’s not simply—and this is a phrase used—a super-legislature. The Supreme Court ordinarily tells the majority what it cannot do, when it declares a law unconstitutional, no matter what the law is. The law could be just—it could involve only states’ rights, but it says—well, under those circumstances I believe the states can battle it out. As I say, they’re well represented—and that was the thrust of what I was saying. And there some good reviews, and there were—first of all, reviewers are there not to be praiseworthy. That’s in the business; to find the shortcomings. And people found them, but it was very, very rare that I thought that they hit on something that was a soft point.

Meeker: When you’re developing what becomes the book, were you starting to encounter more and more Supreme Court decisions that, in particular, were overreaching in terms of federalism or separation of powers kinds of cases?

Choper: Well, there were very few with separation of powers. Usually they managed to get rid of the case in some way. But federalism, of course, that was what the whole New Deal was about, was the question of the extent to which the federal government could pass laws telling the states what they’ve got to do—people in the states, and the states, in effect.

Meeker: Were there any contemporary concerns, say, in the 1970s that were motivating you and responding to these cases and saying, “Gosh, I hope the Court doesn’t take it?”

Choper: No, I always wanted the Court to come out my way. But I did not expect that this sort of thing would prevail. I was a lot more pessimistic about its being adopted by the Supreme Court than some other people. As I say, the kind of person that says well, it makes a lot of sense to me. But it made sense to me. It is, but it’s very controversial. It’s different, and it’s not the way the world works.

Meeker: You know, about this time, about the time that you publish the book, there is a simultaneous movement in the legal field that would be called originalism.

Choper: Yes.
Meeker: Were you aware of that when you were writing this?

Choper: Yeah, I wrote some words on that in the book.

Meeker: What did you think of it? What was your perspective on it?

Choper: My perspective was, of course, that I just don’t think that you can or ought to go back and play around with what they intended. The difficult question is how did what they intended apply to contemporary circumstances? Because they never thought of that. All sorts of illustrations of that. One of the very earlier ones was wiretapping, tapping phones and so forth. And you say, well, they weren’t thinking about that. So it just seemed to me that it’s not enough to say—I often said, you know, no one ever got any action out of the Supreme Court when you say well, there’s nothing in the Constitution, I think. But this is just wrong. Well, no one accepts that. The notion is the Supreme Court does have a limited jurisdiction, limited power. But in the main, that power is determined by the Court itself—most of the time. Very rarely do you have it overturned in some way.

Meeker: Which was your fourth proposition that you introduced in the book, which was it should be left up to the courts to decide the domain of the judiciary.

Choper: It should be up to the courts to decide—

Meeker: The proper domain of the judiciary, like that—I think that was your fourth point.

Choper: Did I? [laughing]

Meeker: Yeah. It was the judicial proposal, that the Supreme Court is the final arbiter of court power.

Choper: Yeah, yeah, that’s right. Yeah, no, that’s right.

Meeker: Were you at all worried that writing about judicial restraint would be misinterpreted by those who were engaging in originalism as supporting what they’re trying to do, which was a different kind of judicial restraint, I think?

Choper: Yes. Now, was I aware of the fact? Yeah, I do think that what the Framers had in mind is very important. But there comes a point in respect to particular problems that they’d never thought about it. Not only didn’t they think about it, but they
couldn’t think about it, because it just wasn’t there. You know, you take the question of aid to parochial schools, which was a very hot issue for many, many years. At the time of the Constitution, where were virtually no public schools. There were private schools, and public education was a thing that’s just beginning to grow. So you just can’t, in my judgment, figure the answers out on the basis—a lot of contemporary problems that are on the basis of what was the original intent. And then they argue like hell, you know, about what the original intent is. But to tell you this—one of the—the biggest case in which originalism played a big role, in modern times, was, I often say, the high and low point of originalism.

05-00:31:36  
Meeker:  What was the matter?

05-00:31:46  
Choper:  I think it may have had to do with the Bush against Gore election, but I’m not sure. But the Court split five to four, and the majority opinion, which was written by Scalia, was almost exclusively based on originalism. And the dissenters, in the main, found that no, this was—they said the original intention was not to limit it the way Scalia wanted to. So I said it was the high point of originalism because all the justices spent a great deal of time on original intent. The difficulty was that the results that they reached were the way they usually voted—the five conservatives voted the one way; the four liberals voted the other way—in the main. But what was special about the case was, a case of some controversy, to have originalism be the major grounds for reaching the result. Does that make sense to you?

05-00:33:24  
Meeker:  It does. Yes, it does.

05-00:33:28  
Choper:  So that’s why I just don’t think you can do—

05-00:33:33  
Meeker:  The more that I’m speaking with you, the more that I’m realizing that there’s probably a problem with my own interpretation of your book and its place in the literature. And that is that I see—there are those who are proponents of originalism.

05-00:33:55  
Choper:  Yes.

05-00:33:56  
Meeker:  And they talk about it in the same breath as they would critique an activist court. Therefore, they would talk about originalism in the same breath they would critique an activist court.

05-00:34:10  
Choper:  Yes, that’s right. That just can’t make up rights themselves. Like abortion.
Meeker: Right, and so therefore, they would be advocates of judicial restraint. And so that makes me question the proximity of what you’re arguing in your book to what that camp is arguing in their arguments that also lead to some version of judicial restraint. I think it’s a different version of it, is what I’m realizing now.

Choper: No, it is a very different—unfortunately, the originalists—the case, Bush against Gore was—I think I wrote an article on this. They all went off on originalism, but the general ideological split on the Court reached their result. So your question was—I can’t, I think originalism is important to look at the beginnings of it. It should influence what we’re talking about, but it can’t give you the answers. Even Scalia once, I remember, wrote a decision in which the question was, yeah—the police through a device so that they could look inside the house. I think it was that they could smell it or something like that. But to make a long story short, they found growing marijuana. I’m quite sure that was the case. [Kyllo v. United States] Scalia—Yeah, searching the house, that’s right. I think they figured the temperature—they could get the temperature out of the house. That’s right.

Meeker: Okay, so it would be like a sensor.

Choper: Yeah, and so I think even Scalia said, “We, as the original proposition, concede that you could go through a building with technology and find out what it was, but,”—and then he went on and decided the case.

Meeker: Let me talk a little bit about the reception of the book. First of all, how did it do? Were you pleased with the number of copies that it sold, just in terms of getting your ideas out there?

Choper: Well, first of all, I had written a couple articles that touched on this, but they were pretty much all substantive, as I recall—religion. But then I would give talks, and I’d publish the talks, even before the book came out, I guess. What was the question again?

Meeker: Were you happy with how the word got out about the book—the number of reviews, the number of copies sold, that kind of thing.

Choper: Yeah, well some of the reviews were a lot better than others. I’d say if you want the good ones, you could see they figured it out, but they all had their qualifications. Yeah, there were very, very few really thought that—I think a lot of people thought it was provocative, and it makes a certain amount of sense. The problem was it went too far. It wasn’t just judicial restraint. There’s a presumption of constitutionality. I said no—I don’t think you ought to presume that freedom of speech has not been violated. That’s silly, because it’s very, very
rare that people, with majority support, are stopped from having freedom of speech. I think Frankfurter, again, he once said that the free speech clause, he says, was not there to protect nice people. [laughing] Or something to that effect.

05-00:39:19

Meeker: Well, it is a provocative book, in the sense that you were making a very cogent and strongly worded suggestion to the highest court in the land that they—

05-00:39:35

Choper: That it ought to limit its role.

05-00:39:36

Meeker: Yeah.

05-00:39:38

Choper: More. Yeah, I don’t think I thought of it that way, but well—

05-00:39:46

Meeker: I assume you would have hoped that it could have some kind of impact, right?

05-00:39:54

Choper: Yeah. I’m at root a very practical person, but not in my scholarship. That’s interesting. This I thought—I was just doing what I thought to be the right thing, and talking about the way I think the Supreme Court ought to operate in respect to constitutional decisions. I often said statutory interpretation—that’s a very different issue. Why? It can be changed by an ordinary act of Congress. In the footnotes it says yeah, but it’s not so easy to change a statutory decision. Very, very, hard. You can just see it, in the middle of all of the ramifications of it and the Congress—it’s hard to get something through to Congress.

[side conversation deleted]

05-00:41:25

Meeker: You were considering the judicial implications.

05-00:41:27

Choper: Oh, the judicial implications.

05-00:41:28

Meeker: Whether the judiciary would take on this challenge you’d posed to them.

05-00:41:36

Choper: Yeah. I don’t think that I believed that I had some really good chance, really decent—not even a reasonable chance of the Court adopting this point of view. There was one case in which they actually cited it, for the particular position, but then they fudged on that case later on.

The justices hesitate greatly to approve something that they think ought to be unconstitutional, words of the Constitution to the contrary notwithstanding. That’s what’s called substantive due process. It’s one thing to say before you can deprive
people, certainly of life or liberty or property, you have to give them a fair procedure. What’s fair? Well, the Court’s going to have to decide that for itself. But it’s another thing to say well, this is something that the legislature did. No one’s saying that they’ve paid them off or anything like that. [laughing] We see it today! See, my wife drives me nuts about Trump. I said, “Look, I don’t like him, but we lost the election. That’s our system.” If he really cheated in some significant way, then you can get him out of there. But it’s very hard to impeach somebody, as we’ve seen.

Meeker: One of the things that readers have brought up is, in particular around the first prescription, the individual rights proposal, and there’s some question about the degree to which you would define individual rights, like what would qualify under that rubric and what would fall outside of it? And I think at some point in the book you even suggested that it was a difficult thing to be able to define what you meant by individual rights in terms of that’s what the Court should be properly focused on.

Choper: Yeah, no—I think that the individual rights—look, there are three kinds of laws. Some laws are challenged because the national government doesn’t have the power. It is a government which has limited power, and the question is who determines the limits? I don’t know quite where I’m going actually. [side conversation deleted]

Protecting those who do not get a fair shake in the political process. Now, determining what is it—well, I’d say it’s the ones that are mentioned. Lots of times they don’t get a fair shake, the vote trading and all sorts of things. But the question is the outcome, and if the outcome simply is to award national power to the—if the outcome of the political process is to elect a particular president who tends to ignore conventional values, well—we’ve got a way to get rid of him. There’s nothing in the constitution that specifically says that he can’t do this, unless he starts saying that it’s only Muslims—well, that’s free exercise of religion. That’s a pretty easy one, and they keep trying to avoid that, so he stuck in a lot of non-Muslim countries in one of his things [the travel ban], and we still don’t have the full answers to that.

Meeker: So the idea is that individual rights are in some ways self-evident, so these are instances in which the majority seeks to clip the wings of minority groups.

Choper: Yes. Yes, that’s right. That’s right. And sometimes it’s clearer than others. But, for example, equality—we believe in majority rule, in a way. But when a majority rules, they can really dump on a lot of people despite their individual rights that are protected in the Constitution, like freedom of religion, freedom of racial discrimination, slavery—et cetera. They were all enacted; these were all laws that
were enacted. And they were enacted fair and square, in the sense that they went through the procedures needed to pass a law.

05-00:47:46  Meeker: Take the travel ban as an example. I guess there’s some question amongst those who read the book in terms of what the reviews said of—let’s say you take this travel ban. So clearly there is, in its first articulation, it was only Muslim countries, although not all Muslim countries who were impacted by it.

05-00:48:09  Choper: Yeah, yeah.

05-00:48:14  Meeker: But it was also a policy that came from the executive branch.

05-00:48:18  Choper: Yes.

05-00:48:20  Meeker: So what principle would take precedent in your formulation? Does the Court rule on the individual rights component? Or does it stay out of it because it doesn’t want to disrupt the separation of powers?

05-00:48:38  Choper: Yeah, I would say the Court has got to make the determination of whether the individual right exists, and was it violated? Because if it doesn’t protect those rights, they’re not going to be protected. They don’t have—the minorities, and you look at them—freedom of speech, freedom of religion—you don’t get laws that shut everybody up. You just don’t get them. They shut up a certain kind of—and so forth. And usually laws don’t, in some ways, penalize large religions. It’s only the smaller religions that are—whatever. So I think that this powerful ability, a majority of nine people, whatever it is—it doesn’t have to be nine, but nine has been for a long time—that a majority can tell the political process, “You can’t do this. You can’t do it.” I think that ought to be very limited, and it ought to be only when the people who are hurt by what they perceive to be a violation of the Constitution—these are small minorities. The only way they will get protected is by the Court.

05-00:50:13  Meeker: There were other readings of the book, particularly in terms of restraint around federalism, and especially separation of powers. And one of the reviews speculated that if the Court stood back from weighing in on any separation-of-powers issues, the power is all going to go to the executive branch.

05-00:50:48  Choper: Well, because it’s one person, and the legislative branch is lots of people. But the president has lots of limits on what he can do. For example, he can’t spend any money unless it’s authorized by Congress. And if he starts trying to put people in jail, then that’s an individual right. Whereas, if the executive branch infringes on the Congress, and they don’t like it, Congress can pass a law or withhold funds.
And if they do like it, as when you have the two houses of Congress and the president of the same political party. You’ve got to live with that—except, except for individual rights. Does that respond?

Meeker: Yeah, it does. It’s interesting, because in essence, what I hear you saying, is that you would reject a lot of these critiques of the book because within the book itself you can find the answers to those critiques.

Choper: Well, I think so. I admit that it’s not perfect. I admit a lack of perfection more so in the religion stuff, which I think—very, very difficult.

Meeker: I guess that’s maybe another question. So looking back on this book, do you have your own critiques that you’ve developed over time, whereas if you revised it or rewrote it you would have done something differently?

Choper: No. On the basic point, that’s what I believed in and it—it took me a long time to come to the conclusions that I did. I started writing that book in 1968. It took me twelve years to finish it—that’s not to say I didn’t do anything else. I wrote articles, and so forth. But I worked hard on it, and I had notes all over. [laughter] There’s those books over there in the corner. Those are just my notes and stuff like that. I wrote the bulk of it when I had a sabbatical in England, in London, and I worked hard then, and it was the first sabbatical I had ever taken, but I went to work on this book and I did most of it. I didn’t get it all done there.

Meeker: What was the context for that sabbatical? Were you invited by a particular university to go spend time with them?

Choper: I wouldn’t say I was invited, but I was permitted to—friends of mine who were there would come, and they gave me a small office in one of the colleges—God, I’m forgetting, but one of the colleges in London. I could find out, but I did almost all the work at home. We rented a place from a Yale faculty member who was an Anglophile, and he bought this place in—I don’t know if you know London at all, and this is a long time ago, but it was a wonderful location, and it was one of these—on an off-street. It wasn’t on the fancy squares, but it was on an off-street of the fancy squares called Montpelier, Montpelier something or other, Walk or something, and it was a very narrow building with six floors, but you know they were half-floors all the time. My first wife who ultimately died at the age of fifty-eight, but she was ill much of the time.

But I divided the day into three, and I would get up very early in the morning. I had a son at that time. I would get up, send him off to school—it’s interesting, isn’t it, to think about the fact that we sent him on his own buses and everything then, for about forty-five minutes. I got him in a good school, through friends of
mine, so I got him breakfast and got him off—and I think I made a sandwich for him, got him off to school. And then I would sit down, about six o’clock, maybe six thirty, and when he was gone, and I would work one-third of the day, and then just wrote. And I’m a very slow writer, and it’s all in longhand. I think I had someone, I think I hired someone to type it. And I finished most of it—I’m forgetting a little bit now—but at a certain point—I had a lot more notes for different subjects, but I figured this is getting too long, and I cut it off, and sent that book around for review, to presses, and finally the Chicago press said that they would take it, which was a very good press.

05-00:58:01
Meeker: Were there other presses that declined?

05-00:58:04
Choper: Oh yeah! Oh yeah. I’m sure I must have sent it to three or four—but at least three or four presses: Harvard, Yale, Chicago, Columbia—I don’t know, I think so, anyway. Yeah, sure.

05-00:58:21
Meeker: Do you recall what the reasons they gave were?

05-00:58:31
Choper: I don’t recall. I may be mixing that up with another one, with my religion book. That one I had some very interesting rejections. But one of which I quoted in the book—it said, “You won’t please any of the people because all of them will have different points of view on this. The thesis will be unacceptable to every existing interest group – those who are religious, to those who are hostile to religion, those who are committed to civil liberties, and those who are committed to judicial restraint.” And I was tempted to say, “Well, I thought I was doing something right doing that.” But anyway, I don’t know that the others turned it down, but Chicago said yes, and I said okay, that’s fine.

[side conversation deleted]

05-01:00:47
Meeker: Interesting. I know that this was a long time ago, and so I hesitate to ask this question. There was a review by Henry [P.] Monaghan in the Harvard Law Review.

05-01:00:59
Choper: Okay, yeah, a very smart guy.

05-01:01:02
Meeker: Do you remember much about it? It begins with this hypothetical ruling that would have been done, he said, according to what you would have proposed.

05-01:01:14
Choper: Yes, I don’t remember that. But he was someone I knew fairly well, and he’s at Columbia, and I thought well, that’s the way it is. Everyone’s not going to agree with this thing. I knew that from the beginning it was very radical.
Meeker: Did you feel like people, most people got what you were arguing for?

Choper: Understood it?

Meeker: Yeah.

Choper: Oh, I think they understood it, I just don’t think they agreed with it.

Meeker: [laughing] Okay. What would have been, then, the counterpoint? What do you think that people would have said in terms of supporting the status quo at the time?

Choper: Supporting the status quo?

Meeker: Yeah.

Choper: Look, this is 1980, right? So we’ve been at this almost two hundred years. It’s worked pretty well so far—why make this radical change?

Meeker: Interesting. Did you ever engage with judges much on this point? Did you ever have any exchanges with judges who said, “Hey, this is great, but I could never do this.” Or, “I’m trying to practice this, but it’s hard.” Was there ever any engagement with people who would have been in a position to actually move in this direction?

Choper: I don’t think I moved anybody. What I do think is that some people, who were inclined—this is the one case I say in which they cited it—and another one was they didn’t cite it, but the dissent was written by John Harlan, and he said, “Well, it’s apparent that the majority,” it was in a Warren opinion. He said, “The majority is relying on this book, this theory,” or whatever it is—I forget what he said. I could find it. And then went on to destroy it, you know, and why it was all wrong, and so forth.

Meeker: [laughing] Well, this did win the Order of the Coif [Book Award]—

Choper: Yeah, yeah. It’s every three years, every three years they gave the best book in law—and I co-won it with a fellow who was a very close friend of mine, and he had an approach that was not against mine. I forget why he actually disagreed with it. His name was John Hart Ely, E-L-Y.
Meeker: Right.

Choper: He was a good friend of mine. Those were the two books that won the award.

Meeker: Well, that’s pretty remarkable. Of all the books in law published over a three-year period of time.

Choper: [laughing] Yes, professionally, that’s my biggest accomplishment.

Meeker: What was this order?

Choper: The Order of the Coif? I don’t know. You can Google it and could find out. [An honorary scholastic society]

Meeker: [laughing] Okay.

Choper: I think it’s just a name given by those who decided they wanted to give an award like this every three years, the best book written—and if you look at the people who—I haven’t looked recently, but boy, there’s some really good people that have gotten this thing, so I was flattered! That’s the biggest accomplishment I’ve ever—that was it! Winning that award, that was recognition. That was recognition by some committee, but they felt responsible to do the right thing, and so forth, and they’ve given it only to really good people, really—again, I haven’t looked at it recently.

Meeker: You know, in history departments a professor writes a good book and oftentimes you’ll get graduate students who want to study with that person. It’ll attract grad students to the department. Did anything ever, like that, happen here?

Choper: Not really.

Meeker: Young people weren’t reading the book and they wanted to work with you?

Choper: No, I don’t think—we kept the students busy enough reading what they had to read.

I was also a very successful teacher, so the fact that I had views—I don’t think that bothered them, but I never revealed the views anyway unless they were in writing. Whatever a student argued, I would say well, what about this? In effect,
I’d argue the other side of it. Or the best thing I could do was to get students to argue with one another. That’s what I felt was the best accomplishments. And I do remember that happening sometimes, in which that was just wonderful. I’d go to this one and this one, because I didn’t have much to add to the arguments that they were making or it was the sort of thing that I might have asked myself. So—I tried to get the students to understand that there are—every legal question has different points of view, and the different values underneath, and in the end, it’s just a question of values.

Meeker: Did you ever use this book in any of your courses?

Choper: I once had a seminar—I’m just trying to think if it was this book or my religion book, in which I used it—a couple of chapters. Yeah, once, but in a small seminar in which they knew exactly what they were buying into it, and it was pretty good. I liked it. It was a good seminar.

Meeker: You know the California Law Review review of it, I thought, was quite interesting, by John [E.] Nowak.

Choper: Oh yes! He was at Illinois.

Meeker: Yeah. I thought it was pretty insightful, and maybe I’ll just end my questioning on this today quoting that.

Choper: It was generous, I thought.

Meeker: Well, he said something that I found to be quite interesting, and he says, “Even if one disagrees with Choper’s proposals concerning justiciability, the reader will find study of this text more than worth the necessary investment of time due to the detailed examination of the modern democratic process. For this reason, I have assigned the book to a constitutional law seminar and I have found it most helpful in educating the students about the democratic process they so love to look down upon.”

Choper: Yeah.

Meeker: I think that’s interesting. Was that any motivation in writing it? There’s the argument, but also within the book itself is a very astute and exhaustive analysis of how government works.
Well, I tried to learn as much as I could about it. My hobby was looking at politics, and so forth. I love that stuff! So this was not something that—it was something that I was, myself, as a general proposition, interested in, politics, and the political process and how it works. And there were some people who felt that I had flaws in that, that it doesn’t work quite the way I said it did. I forget who they were, where they are, but you see the reviews. I don’t know if you—I said that the best ones were the ones we put on the book cover, which the—I didn’t do it, but the publisher did—I remember there was a very prominent court of appeals judge, Carl [E.] McGowan, the D.C. Circuit, and he—he had a wonderful thing to say about it. I was flattered.

Meeker: I wonder if I have that review. I’d have to look through my lists here.

Choper: He’s quoted. Here’s my book.

[looking at the book, side conversation deleted]

Choper: On the hard cover. Yeah. Yeah, I was very much flattered by his thing.

Meeker: Well, I think that does it for my questions in terms of the book. Is there anything that I didn’t ask you about, or anything you’d like to recall about that particular chapter in your life?

Choper: Well, it’s clear to me that that made—in terms of reputation, by outsiders—not by my students or anything—I think that that’s the thing that gave me the biggest recognition, is to win that award. I can’t think of anything else.

Meeker: Did that play a role at all in your elevation to the dean of the law school a couple of years later?

Choper: No.

Meeker: That was something entirely different?

Choper: No, that went a long time after that. That was because of my activity in administrative things here, serving on committees, and so forth, and spending a lot of time on that.

Meeker: Well, that will be the next chapter that we cover, is your term as dean—or your two terms as dean rather, because there were two five-year terms.
My closest friend ultimately, for fifty years here, was a man named Sanford Kadish. I was dean from ’82 to ’92. He was from ’75 to ’82. In 1975, I was one of the people nominated to be dean. And I was writing that book during that time, and I had—I was flattered. I was very young that first time around. Let’s see, in 1975 I was only forty years old, and I thought about it quickly, and then I said, “No, I’ll never finish this book if I do that.” And he insisted. I called him in Israel where he was on sabbatical, and he insisted. “No,” he said, “I don’t want you to withdraw.” And I said, “No, I am going to withdraw because I just don’t think that now is—if I’m ever going to be dean—now is the time.” So I didn’t.

So it sounds like the right decision.

Oh, it was the right decision. No, it was. It was. I became dean seven years later, in ’82. That was after the book was published and got the award. So—but as I say, that’s the biggest—that is the biggest thing that I had. I don’t think it had anything to do with my getting to be dean—it was an element. An element. In those days, it was important to be a scholar. It isn’t anymore—probably for good reason. It’s just a different kind of job.
Today is Wednesday July 17, 2018. This is Martin Meeker interviewing Jesse Choper, and this is interview session number six, and we are back here in his office in the Boalt Hall School of Law, the North Addition Building. So what we’re going to focus on today is your two terms as dean of the law school here, and you started as dean in 1982, and you completed both terms in ’92. I’d like to actually start out by asking you to provide some commentary on at least the two deans who preceded you, both of whom who had their tenures as deans also in difficult and trying and exciting times for the law school.

They sure did. For the whole campus.

For the whole campus as well. Why don’t we start by talking about Edward Halbach? Can you tell me just a little bit about him?

Yes, I can tell you a lot about him because they were both very good friends. Ed Halbach—if I start repeating stuff that I told you in other contexts.

So he was not the dean when I came here; the dean was a man named Frank Newman, who’d been here for a long time on the faculty and then became dean. And he did not like being dean. It was not his sort of work. He was a very smart guy. Administrative law was his big area. But I think he was mainly interested in public policy, and I want to use the word quirky. For example, I once said to him—I think perhaps when I was dean, and he had been a member of the California Supreme Court and resigned. He didn’t like it; that was not his thing. He came back, and we were walking into or out of a faculty meeting, and he was a much more to the left than I was. And I said, “You know, Frank, you really come up with some of the most interesting comments.” And they were interesting comments. I didn’t say this—they sort of looked at it from a very different perspective than, I would say, not the usual logical thinking of law process at least was back in those times. I said, “They’re very, very good, but fortunately, you’ll never get enough votes to win.” [laughing] Which was true too. So anyway, he was dean. They didn’t have terms in those days. The man before him was a very famous guy named William Prosser, a very famous scholar, and it was a long time ago—I think he was dean for about sixteen/eighteen years, and I had met him one time.

Anyway, so Frank didn’t like it, and Ed Halbach then, I would say, was no more—he was born in 1930. He was five years—or ’31 maybe even—older than I was. But there was a group of young people about that age, of which I guess I was
the youngest. I don’t know, maybe five to seven years older than I was—and we used to have a group of, I forget exactly how many—half a dozen—I forget, another faculty member [Roman Degman], very heavy smoker and a very heavy drinker, and he finally died. I don’t think he died of—what do they call that? Sclerosis? But he once said, he said, “You know, I’ve got about three fatal diseases I’ve caught now. Unfortunately, none of them have to do with my drinking.” [laughter] Or he said—ironically—nothing had to do with that. So he was another, and there was a fellow who was the very first dean at [UC] Davis, who came from here—maybe he was the second dean at Davis, and he came back from—he was a member, but he lived in Davis and he stayed at Davis after he was dean. We had this group, and we used to meet at each other’s homes, and the men used to cook. That was the deal. Anyway, so I was not much of a cooker, and I remember this buddy of mine who was a great cook—he cooked my time. But it was with wives and everything, and we became very good friends, all of us in a group. So Ed Halbach—he was probably the leader of the thing. And after that, he had five children. I still see his wife. He only died recently.

[side conversation deleted]

You asked me about Ed Halbach. He was a—and Frank Newman decided after five years he didn’t want to do it anymore, resigned from his being dean. He’d resigned from the California Supreme Court. [laughing] That was his style. So Ed became the interim dean for a year, and when we went out to hire a new dean—this was 1966. Am I right? I was thirty-five, ’65—I was thirty when I came here, and he was five years or four years [older]—so he was a thirty-four-year-old dean, so certainly the youngest dean of any major law school around. Ed was chair of the search committee when Newman left. And the long and the short of it is that we went through, and one fellow did accept the deanship. I remember he taught at the University of Chicago Law School—nice man. And I think the day before he changed his mind.

So Ed had been acting dean in the meantime, and everyone just said, “Ed’s so good,” so he became dean, and he was a very good dean. The faculty at that time had expanded greatly from about when I came, maybe eighteen or twenty, and it went up to maybe forty by the time—and we got big allocations from the university. They wanted—people wanted more—lawyers were coming around, although we never increased the size of the admissions. We admitted, effectively two hundred and—roughly—seventy students each year, sort of a middle range of the major recognized, the fifteen major law schools. We’re in the middle. There are a couple of really small ones, and a couple of the big ones, the well thought of ones with a lot more, like Harvard or Michigan or NYU—an enormous number of people. So Ed was the first really active dean after he came here.

06-00:10:08

Meeker: Your description of Halbach—you said he was a very good dean. What does that mean in his particular context? What made him a good dean?
Choper: He was very good with all of the faculty, even though a lot of the older guys—we had one—we had two women on the faculty, actually. One was the very first woman in any major law school in the country. She was already, when I came here in 1965, retired—and I met her.

Meeker: That was Armstrong.

Choper: Yeah, Barbara Armstrong. That’s exactly right, good. [laughing] I thought I did that one before, that’s right. I remember just where her office was, down the [hall] from where the dean’s office still is. Then we had Herma Kay, who was also here—died about a year or two ago. She was a year or two older than I was. She came right out of law school. She was a law clerk for a well-known California Supreme Court justice named Roger Traynor—I don’t know if his name has come up at other times—who himself was close to the law school because he had been a student and then taught at the law school for some time before he went to the Court. So she had clerked for him, but she did not get a U.S. Supreme Court clerkship—those things didn’t happen in those days. Women weren’t Supreme Court clerks. And so she came here—she was here. There were several other people here that I—I remember almost all of them, some of the old-timers. I remember a man named—and I’m sure you’ve done an oral history, it’s been done—Adrian Kragen, K-R-A-G-E-N. He was a great Cal man through and through. He was an undergraduate at Cal, a big sports fan, practiced law for some time, and then went to—came into teaching. Tell me where I was going.

In the hiring process, the faculty does the hiring—in my day, in my day. And we used to—there used to be—oh, there was also Mike Heyman. He was here when I came here, and I knew him from before because he had clerked for Earl Warren a couple of years before I did, and we used to have these reunion dinners. And I met him there when I was still teaching in Minnesota, and he and Ed Halbach were the two people who ran in the law school while Frank Newman was dean. It’s as simple as that—and Frank certainly didn’t care about it. That was his privilege. [laughing] And he was free to do his work and not be responsible. He did some entertaining, but that was about it. So those were the people that were here, and again, you’re saying who else was here?

Meeker: Well, no, I was—

Choper: Oh, about the deans.

Meeker: Yeah, just what—in terms of Halbach, you described him as a good dean.

Choper: A good dean.
And it’s interesting. You’re setting up this thing where it sounds like Halbach was actually really at the helm, although—or he was really running the ship but wasn’t at the helm, for a long time. [laughing]

No, no. He was at the helm, but the faculty had—was very independent and faculty meetings could get very hot. I remember Mike Heyman, who had a big temper, he just walked out of the room, left the meeting once, you know, so angry. He was way to the left, and the people on the right, you know, we were probably just a little left of center. So I had never been one who kept my mouth shut about a lot of things. I used to throw my two cents in, but always with respect for the seniors there.

So what does a good dean do? A good dean keeps the faculty happy, gets money from the administration—and Ed was really the first one who at least took a shot at fundraising. First of all, it was unnecessary before. They got whatever they wanted! I remember Ed would say, “You know, if the chancellor,” whomever it was, I could probably remember now, but, he said, “any time you need anything.” Because Cal was like that; this campus had all the money it needed. And it rapidly became nationally famous—particularly through the sciences, but through the liberal arts too.

And the law school was very separate from the others; we had special rules. We weren’t members of the Academic Senate. They believed, and we didn’t disabuse them of believing, that the American Bar Association—they wouldn’t let us do certain things that the others had to do. [Meeker laughs] I forget exactly what they were. So Ed did that. He would appoint the committees—deans would appoint the committees, but very carefully try to make sure that nobody was excluded—not one side or the other. And I think everyone recognized that was the right thing to do. As I say, we could rip people apart in faculty meetings, and I don’t think I’ve ever known, in that group, people to carry a grudge. We ate in everybody’s home—everybody entertained. That’s unheard of today.

We’re just—first, too big, and now the wives—and that’s what it was. They were stay-at-home wives, and they cooked. Ron [Ronan E.] Degnan is the guy that I’ve been talking about, the fellow who was a—an alcoholic. I think it’s fair to say that. He was a functioning alcoholic, and he—he would cook all the food, even for his wife. But we would eat at everybody’s home, and we used to drive up to Davis, because we had a very good friend who—the first dean at Davis was a faculty member when I came here, or at least when I was hired. And his name was Ed—well, if you look up the name of the first [law school] dean at Davis. [Edward L. Barrett, Jr.] I can’t think of it. This was the law school—this was the second law school. I do believe it was, yes, I’m quite certain. And then the one north of here, toward the coast, opened a new UC Campus.

Oh, Santa Cruz?
Choper: That’s right—which is it?

Meeker: Santa Cruz, I said.

Choper: Santa Cruz, that’s right. That was the first one that was open here—I think I came the first year that Santa Cruz was open. I remember I used to give talks up there, because they didn’t have a law school, but they had a political science guy who I think is still alive, and I remember driving back and forth. Those were the days—on crappy roads, pre-freeways. And you know, it was a ride! It took a while. So—what do deans do? I’m still answering the question. Am I doing any good with that question?

Meeker: Yeah, I think you did. What was the important element that a dean like Halbach would have had to deal with in terms of the administration?

Choper: He got everything he wanted, as I said. It was a rich situation. He got everything he wanted. Need more faculty? Yeah, sure, go ahead—hire a few more. We had—it was a small space. This building got bigger and bigger and bigger each time, and—I told you about the dedication ceremony for the opening of the new addition over here, which is called the South Addition? I wasn’t there; I didn’t make it. It must be now, I don’t know, eight years ago. They gave out t-shirts, and they said, “Boalt Hall: Under Construction Since 1959.” [laughter] It used to be down in the middle of the campus—we’d been there ever since Mrs. Boalt contributed some money to have a building of our own.

Meeker: So what it sounds to me, like what you’re saying in terms of Halbach—he had this friendly and collegial, but not always on the same side of the equation, faculty group.

Choper: Yes, yes sir.

Meeker: And he figured out how to manage those divergent interests.

Choper: Magically. He was just a—he was such a terrific dean.

Meeker: Tell me about Sanford Kadish.

Choper: Kādish [pronounced with a long a] Kadish was fourteen years older than I am. He had come here as a visiting professor when I came and interviewed. I should preface it by saying he was my closest friend here for fifty years. He died about
three years ago, at the age of ninety-three. And in my judgment at least, as sharp as he was—I used to keep—we used to have dinner. He was part of this group, by the way, particularly because since he knew the guy who had gone to Davis—did Sandy start teaching at Davis? Well, he didn’t start teaching here; I know that. But maybe he did. You can check all these things, if that means anything, in the footnotes. [laughing] That’s what you do—in a law review article anyway. Even if you want to be accurate you say, well, the facts were—and so forth. I guess people understand that, the age of the interviewees. He was a bit more liberal than I was politically. He was New Yorker. I don’t think his parents were born in this country either, and he told me some about his parents, and so forth. But we just sort of clicked together, and when, in ’65—

06-00:24:22
Meeker: So Kadish was dean from ’75 to ’82.

06-00:24:32
Choper: Exactly. Seven years.

06-00:24:33
Meeker: Why was he elected to dean in ’75?

06-00:24:42
Choper: The competition was among three people. Mike Heyman was the other. Big one. The third was Herma, Herma Kay—I am quite sure. It came down to Kadish and me. I did not want to be dean then. Why? Well, for two reasons: one was that I wanted Kadish to be dean. I just thought he would be—he was the natural person to be dean. He was a very smart and wise man, but he was also—they all used to call me stubborn, but he adhered to his principles when he was dean. When he didn’t, he was totally uncomfortable with it. And I had just begun to finish a major article, and I remember I had a very good friend with whom I—[whistling] taught with at Minnesota. We were of the same age, the same young families, and everything. We were very close friends. His name will come to me in the course of this. Yes, it just came—Terry [Terrance] Sandalow. S-A-N-D-A-L-O-W [spells]. His son, who remained here, is a newscaster on one of the—maybe if you listen to the—

06-00:27:32
Meeker: Like Marc Sandalow?

06-00:27:33
Choper: Marc Sandalow. That’s right. I remember when he was born! [laughter] So he was a—keep reminding me of the question.

06-00:27:48
Meeker: Well, I feel like what you’re about to tell me is that this had something to do with your book.

06-00:27:54
Choper: I said, no—I said two things. I said, “First of all, I want to vote for Sandy Kadish for dean.” And the second one was I want to finish this book, because Terry
Sandalow had the same thing—and he never did finish his book. Was he a dean? I think he may have been a dean, where he went, and that was Michigan. We were losing some people. The Minnesota faculty, they were getting raided very much because the dean was supposed to be, apparently—named William [B.] Lockhart—he was very, very good at persuading people, young people, to come there. I remember he certainly did me, and so did the people around him. He was very, very nice to me—always. So I said, no, Sandy ought to be dean first. I want to finish the book, and he’s also my good friend—and I think he really wanted me to be dean. I remember I—he and I were put up and there was going to be a vote on it. I called him—I don’t know the year—in Israel. He was doing something in Israel at the time. [Meeker laughs] And I finally got him, and it was very, very hard to do. No emails, by any means. And I remember when I finally got him on the phone, he called me back and he said, “Boy, you are a persistent person!” And I told him, I said, “You’ve got to do it,” and I told him the reasons why. And I think he understood, and he became dean. And it was a great decision. Look, there are very few deans who serve for a number enough years who remain very popular among the faculty—it’s very few. I’ve observed it. Sometimes—the dean we had recently, who I—named Chris Edley, who I thought was the best dean we had ever had—although the incumbent is, I think, pretty good too—I don’t pay that much attention. But some faculty complained about Edley. But once again, tell me what I started to say.

06-00:31:04
Meeker: Well, I think you were talking about the qualities of what makes a—

06-00:31:08
Choper: Oh, what makes a good dean. Yeah, and Edley was a very liberal person politically, but he was very, very careful to be fair to everybody—very, very careful to do that. And I think that the incumbent is like that too, Erwin Chemerinsky.

06-00:31:38
Meeker: You had mentioned that Kadish struggled sometimes with what he had to do as dean, in conflict with, maybe, his values or his belief system?

06-00:31:49
Choper: Yes. He articulated them in a faculty meeting.

06-00:31:57
Meeker: Can you remember some examples of issues that he struggled with?

06-00:32:05
Choper: Affirmative action. I was a faculty member when it first came about. There were three votes against it among maybe twenty-five people. He was one. I was one. And a man named John [T.] Noonan was one. I don’t know if you ever heard of John Noonan; he must have done an oral history. He was probably the most prominent Catholic lawyer in the country. He came here after I did, but he was four or five years older than I was.
Meeker: He specialized in canon law.

Choper: Canon law. He was one of the country’s great—maybe the greatest expert in canon law. He just died recently at the age of ninety—a good number, and we keep that. [laughing] And he—it’s true of all people that age. He started running down. I watched it, a lot. He was—oh, he ended up being a judge on the Ninth Circuit. Yeah, he was appointed to the Ninth Circuit, and he was very much against the death penalty. As I say, a very, very observant Catholic. Not a—he was a modern Catholic, in that sense. So when it came to contraception; he was against contraception. No—he favored contraception, but he disfavored abortion. His wife is still alive, I’m quite sure. I see her once in a while at something. [laughing] It’s sad, I’ll tell you, the way the memory just gets shot. So anyway—bring me back where I was. You were asking me about—?

Meeker: You know, the things that Kadish might have struggled with, and you had mentioned affirmative action and his vote.

Choper: Yes, yes. There were two things that we—that he was a guy of great principle, and I admired him for that. Affirmative action was one, and—well, it’s all the same. It’s not just race, it was gender too. And he was just very strong about those things. Those are the couple of things that we disagreed with. Sandy was a confirmed. Otherwise, we agreed on everything. We really did agree on everything, and we used to go out after his wife died, after I got divorced. I’ve stayed at his house for a while when I got divorced. And you know, he was the guy that I—he took care of me, even though we were all good friends with—as was Ed Halbach. Mike Heyman was already off toward the administration very soon. Mike was a guy—he was a—Mike was a guy, I’d say, very, very quick-tempered. I saw him when he was chancellor once, and he chewed me out once in a dean’s meeting. I think I was just shaking my head about something he said. Oh yes, he also had just quit smoking. I remember that very well. And someone came up after me and said, “Gee, what did you do to him?” I said, “I don’t know. We’re good friends. That’s why he felt he could get away with it, I guess.” [laughter] To me, because he knew he wasn’t going to alienate me.

Meeker: Why did Kadish step down in 1982?

Choper: Oh, I think he felt it was enough. I think he just had enough. I don’t think he liked it all that much.

Meeker: Tell me about the process by which you became dean in 1982.
It was between, I think, as I said—Mike, I think was off. It was Herma, Mike Heyman, and me. And I—there was a vote, which I found out was—I don’t know, I think two to one. I remember once talking to a political figure. Maybe I was raising money from him or something like that for the law school, and I was telling him about that. I said, “You know, it’s not easy.” “How did you become dean?” He said, “Two to one? Boy, I wish I could get votes like that.” [laughter]

So but here it was fairly close. I mean not fairly—two to one. I think it was an advantage to me—well, I don’t know what it was. I was very active on committees and everything like that. Very, very active. There’s nothing—I’ve said this publicly on a number of occasions, even in the presence of my wife, and I always qualify it by saying, in the years in which it was—before I knew her. I said, “The law school has been the closest thing to my whole life.” My children weren’t there, my wife wasn’t there—the longest and closest thing. And I guess—I can’t say I—I still feel very, very grateful to being able to be here, being able to be in California.

I can tell you a story when we came out here, when I got the offer at Minnesota. When I first got out of—no, I was still in law school, 1960. I was in my third year, third and last year of law school, in which I wanted to go into the teaching world. Okay. So there was a way of doing—you know, it was much less formal than it was now. There used to be a law school deans convention, I guess—or maybe it was the law school faculty national conventions, law faculty, law.
used to ride in a bus with, took the bus with—what is his name? He was—he was the secretary of state, just a young man. He would come in with his son or daughter—the guy with a fairly heavy German accent.

Meeker: Kissinger?

Choper: Yeah, that’s right. Kissinger—exactly! He and I would get on a bus together. I don’t know if I talked to him or not, but I knew he was coming down to the same place that I was, and so I just decided that this is it. What happened to me one day? I just turned around, and the weather was so bad and—I was asked to interview here. This was the year at Harvard. Anyway, I said, “No, I’m coming back,” which I did, and I’ve never regretted it for a minute.

I had three offers when I was in Minnesota to go elsewhere. I loved it there too—cold weather or not. That didn’t bother me. Cold weather didn’t bother me. And I had an offer—I think—I thought at the time there were only about six or seven schools better than Minnesota. Harvard, I don’t think ever made me an offer. Yale—I went to Yale to interview there, and they did make me an offer. I decided I didn’t want to do it. Stanford made me an offer. Stanford was not then what it is today. I thought—the [Berkeley] law school was certainly better, and I think the university was better as well, back in that day. I liked the weather at Palo Alto and everything, but they wanted me to teach a wholly different set of courses. I said, “I’m not going to do that.” Harvard, Yale, and Stanford—well, those are the three schools. So—and Berkeley came along, I came out there. I remember you couldn’t go nonstop from the Twin Cities to San Francisco, so I left, it was thirty degrees below zero. We got to where they change planes in the Middle West but it was cold there too, wherever it was. And then I got here—Ed Halbach met us at the airport. That’s unheard of today. That was the way it was. With his wife in the car, he took us back to Berkeley. He was going to show us where we might live, you know, and so forth. [laughing] I remember he took us up to Grizzly Peak to show us the view and everything. I remember coming down Grizzly Peak, and I thought to myself—Jesus, this must be terrible in the winter! [laughter] Then I realized it was the winter.

So when we were flying back on the plane, I said to my wife, “You know, I think I may go there.” And she got—I don’t know if she got angry, but she got annoyed. She said, “Why didn’t you tell me that? You just said you wanted to go out and see California for the first time,” and so forth—or, “[for the] second time with me.” She said, “I would have looked around at houses,” or something like that. And I said, “Well, so I made up my mind.” That was it. It took me a while. Oh, I do remember, too—it was about a week/ten days. It was wintertime, and I remember getting stuck in a snow bank someplace, and the car got stuck and the back wheel was spinning around in some way on the ice. I’m not very dexterous about anything. I put my hand on the tire, to try to stop it with my hand. [laughing] That was stupid, and I grabbed it back. And I said, “This is it!” And I went back in my
house, and before we called someone to tow the car I said, “Let’s go to Berkeley.” Which I did, and I say I’ve never regretted it, I don’t think. That’s it.

06-00:49:46
Meeker: So you know, it’s 1982, and clearly there’s a great opportunity for you to become dean. So 1982, there’s already been all sorts of difficulty here at the law school, particularly around issues like affirmative action. There’s a lot of activism. These are things that you can anticipate will be a challenge to you, in the event that you become dean. Did you wrestle with this in advance? Did you come to a decision that said, “Yes, I’m willing to take the bad with the good?” How did you think about that?

06-00:50:48
Choper: I didn’t think much about it. I was ready. I’d already been in teaching 21 years. I started teaching in 1961, and this is what, ’82 to ’87, right?—when there was plenty going on here. Five years I was dean—I never had a major problem along those lines. I can’t do better in explaining that. I know that the second five years, I must have had at least—at least—between six and eight sit-ins in my office.

I remember the first one very well. I was not prepared for it. I was very upset. They came into my office; I sat there; I did not leave my desk. I remember one woman—my window was open there, just in the same room here, and this woman was—a loudmouth woman whom I got to know pretty well later in life, sitting on the window sill, half in/half out the window. And she kept mocking me, and so forth—I forget what. I just kept my mouth shut. I wasn’t going anyplace. I figured I’d wear them out.

And I got a call from a fellow who was—he was an assistant chancellor. He’s still around—John Cummins. Do you know him? Everybody—he’s done everything around here. He was then from the chancellor’s office, and he said, “I’m going to send in the police pretty soon.” And I said, “No, no. I don’t want any police in the law school.” [laughing] That was my thought. He said, “No, no. You don’t understand. They want the police to come in, and they want to get arrested.” I said, “Oh?” I guess I was a babe in the woods—I don’t know. [laughter] I wish—I said, “What? They want to get arrested?” And then it made sense to me after a while. They want to be martyrs. So they arrested them, and they carried some of them out, and so forth. So the office became empty, everyone had gone home. And I sat there for a while, and I didn’t know what to do. I was separated at the time. Was I separated? I think so. I didn’t have any place to go—I just sat there for a while. And finally I decided I’d better get out of here. No sense staying—I’m not going to have to go do anything. The secretaries are gone, the assistants are gone—everyone’s gone. Anyway, that’s what happened. Ask me another question about that—I’ll answer it. I went home, came in the next day.

06-00:55:46
Meeker: These were—these protests, these sit-ins—these were focused primarily on faculty hiring, is that correct?
Almost exclusively—and I shouldn’t say almost. Exclusively. We already had had the biggest minorities affirmative action program of the major law schools in the country, I believe. But they wanted more women. This was in my second term—we had already hired several black and Hispanic members. The women were the last to get the big push on—and they did. I just gave up. That’s all. I said, “Maybe my standards are too high.” My standards were very formal ones. I don’t like—to this day, in terms of making, for example, how the Supreme Court votes—I like rules. I don’t like to make decisions—I said I would accept the situation in which we have a—put a designated number, and put them in a hat and pull them out—I’ll do that. I said, “I just don’t want to just do it with person to persons.”

But I lost that; the faculty voted otherwise, and I respected it. And I enforced it when I was there, when I became dean. I did things that I would not have voted for. But I felt like that was not my role anymore. I did not represent my own views; I represented the views of the faculty. This is what they want. I would talk—I remember once I gave this long talk against hiring this particular person. I think it was the first time I had a big difference of opinion with the faculty. They voted against me! [laughter] I must say, I wasn’t annoyed. I was sort of amused. I said boy, this place, which I think was the right thing to do, is run by the faculty. That’s not true anymore. There are too many faculty. A lot of committees—it’s much more bureaucratic than it was when I was dean.

Do you recall what your objection to this one candidate was?

Yeah, she wasn’t good enough! I don’t remember—her objective criteria didn’t match up. I came to the conclusion, by the way, sometime after, some years later—I was wrong. My colleagues, my friends, always say you are a stubborn person. I’m not stubborn as an original proposition, but if I make up my mind, that’s it. After I’ve thought it through enough, that’s enough. I don’t know if that’s altogether true, but that’s what I’d like to think. I know I’ve said this to you a number of times: I’m a person of principle. I don’t—for laws or for places of responsibility, I’m uncomfortable with one thing one way/one thing in another way. That’s certainly the way I feel about making rules.

So you talk about objective standards, for instance, when you’re hiring faculty. What might some of those objective standards have been? Like what was most important to you in judging a candidate?

Their grades in law school and who recommended them. That’s the most recent evidence of academics. After a while it became what they taught, although certainly in my early deanship it didn’t make any difference. We hired on the basis of the best people who had the strongest records—and the strongest recommendations. So periodically we would get recommendations of people who
did not have super top-of-the-line records. I can remember one in particular—I
don’t think we hired him. Somebody else did—I think Harvard probably hired
him. [laughing] And I was always surprised, you know? He was a very smart guy.
He never published very much at all, which was true of one—at least one—we’ve
always had one person like that, who’s the sage. The one who says all of the wise
things, when it comes to making points, all right? I’m sorry—again—let’s have it
again.

Meeker: Well, you were describing the qualities that you look for in a candidate.

Choper: The qualities—it’s the objective qualities. And as I say, originally we put that
ahead of filling academic needs. After a while, academic needs—teaching which
courses, and so forth, became a much bigger issue, because there were a lot more
courses and we were hiring more people. And after I became—after I stopped
being dean, I went to faculty meetings, but after a number of years I never said
anything.

I felt—I don’t know enough. I don’t have the—why did I not talk up at faculty
meetings for or against people? Because I felt that the young people were the ones
who were going to have to live with these new appointees for a long time—not
me. I did not retire—’92 I stopped being dean and I didn’t formally retire until
2015—that’s twenty-three—is that twenty-three years? I guess it is. But in the last
seven or eight years, I just did very, very little. I would serve on committees early
on, but after a while I said it’s their law school. It’s not my law school anymore—
particularly after I went past what used to be the retirement age. Here it was sixty-
eight. And I felt I was—you know, I think that—there’s good and bad for that, but
once again—a rule. You get some good and you get some bad—tenure, that’s
tenure. I’ve never believed in tenure strongly. I think earlier there’s a presumption,
but no one ever gets denied tenure—here. Very, very few people get denied
tenure. We hire them; we give them tenure—some of them never produce very
much at all after that. Today there’s a bigger pressure to write, not simply by
colliegality.

Meeker: What’s that?

Choper: But some of our very strongest faculty members would publish one thing—that’s
all you had to publish in those days to get tenure. A fellow named Jan Vetter, I
don’t know if you—he’s now, he’s a little older than I am, but he was the sage.
Oh, he was the wise man. Sometimes, I found it very difficult to understand what
his reasoning was, but he was one of these people who knows everything. You
would tell him, you’d talk about literature, whatever. Me, not me; I’m a very
narrow person, very narrow. So I admire that a lot.
Meeker: Would you look back at the hires, from the era in which you were dean, and do you have thoughts on whether as a group they have been successful?

Choper: I think some of them are very, very good. Once again, more recently I haven’t followed it very, very closely. I look at what they do. Now, with the Internet, you read announcements—we’ve got this person, and this person is—or one of our younger faculty, they just got this award. They get that award. I look at what the award is for, and there are different ones for different things, but some of them I think enough to say—I send them an email. And I think that—sometimes I’m surprised! They read it, and they’re thankful about it! Martin, you know, I know this sounds something or other—I don’t have a lot of self-confidence, to this day. I’m amazed at some of the things that—the extent to which people think I was pretty good. [laughter] I was very good. I’m—I don’t know what that comes from.

Meeker: Well, you have a very esteemed publishing record. You have many decades of teaching for which you won awards.

Choper: I was. I was a very successful teacher, from the very beginning. And I was a very successful fundraiser when I was dean, and I really—I can’t think of a better word. I don’t really mean resent—I regret that that is often the biggest thing that a lot of them hang on to the fact when I was dean I raised—I was the first one—Ed started it, Ed Halbach. Sandy Kadish—he did it with no great enthusiasm. He did it—he sort of did what he had to do. Me? I wasn’t in the office more than thirty days when I realized that if there were—this is a great law school. I’m not going to all of a sudden make this a great law school—it is! [I realized] that I could do two things to really improve things. One, I did—and that was fundraising. The need for money became very, very clear. It was not the era of Ed Halbach; that’s for sure. You couldn’t go to the chancellor. I can relate stories about going to see the chancellor for more money. And the other thing was, the first one was—

Meeker: You were telling me about your proficiency at raising money for the law school.

Choper: Yeah, raising money—that I was successful at. I also mean acquiring very good faculty! I did a lot of that. I’m proud of the people. A lot of them became be pretty damn good! And that was one of the biggest things that I did as dean. I knew that there were two things, and I can’t think of the other one. I knew the one thing I thought of was fundraising. The other thing was improving Boalt’s place in the rankings.

Meeker: Well, maybe the other one was encouraging faculty teaching of law writing—was that one of them?
Oh yeah, I did. To this day it’s true, in a way, that the faculty’s ability to send out people who were going to be lawyers, who could write clearly—the attitude always was, yeah, they go to law firms, those law firms—especially the big law firms. They straighten them out right away. Stuff like that. But yeah, yeah—I was unsuccessful at that. I wanted all—I wanted the faculty, and it wasn’t anywhere near this size anymore, to teach one course, take one small section here and teach it so as to keep in touch with the student body. But I think—no one did that. Ed did. Ed kept teaching. He was a glutton for work! I don’t know how the devil he did it and raised five children. [laughing] He was something. And his wife, Jan, who’s still alive, I really—and she was a year older than he was—wonderful woman. She was a fantastic hostess—that’s what they did in those days. Things have changed. Set a standard that no subsequent dean’s wife could meet; that’s for sure. [laughter] Yeah.

Meeker: Do you have anything to say about Herma Hill Kay’s appointment as dean?

Choper: Yeah. She was the first woman to be dean. Is that right—here?

Meeker: That’s correct.

Choper: She was the only—the second woman to be a member of the faculty. The one—I can’t think of her name anymore. It’s gone, came and gone. Anyway, she was very close to her too. What was her name?

Meeker: Barbara Armstrong.

Choper: Barbara Armstrong, who was a very early—there was a woman on the Chicago faculty who, obviously a woman on one of the great law school faculties who also was there—I certainly can’t think of her name anymore, but those were the two senior women. This one was second. Herma, I’m quite sure, went to law school at Chicago. Did she?

Meeker: Right. I think you’re right.

Choper: All right. So she was a protégé of this woman. But Herma didn’t want to know about the fact that she was a woman; she wanted no part of that. And she would, you know, we’d have a faculty softball game—we used to have every year. The faculty played the law review. She was here learning how to hit a ball. She was an extremely hard worker, and she did so many things, you know, just not—she was in demand by every organization that needed a woman to do it—so she was something! And we were always good friends—always good friends. She would
say such nice things about me, so many times—I’ll just say one about a book—remind me again. She sure wouldn’t vote with me! [laughter] That’s all right, but that—that was the old faculty. We respected one another. I remember someone once asked her one of these things—“Well, what are the three books you’re going to read over the Christmas vacation?” Or something like that. And she named one, two—and then she named my book! [laughing] Yeah, she died before I really knew she was ill—fairly quickly, I think. I learned after that she had not been—she had an office two doors down from me. I used to see her frequently.

06-01:16:39
Choper: On this floor, in this building?

06-01:16:39
Meeker: Yeah, yeah, on this floor. I forget who was in between us, but there was someone in between. So yeah, and she would come in. She often—she came in very early and left early. In the end she had a driver and would come in, and so forth. She lived in San Francisco. She’d been married three or four times, finally found a very nice man much older than she, and we all—we used to go out periodically, socially, with the wives, and so forth. He was a very nice man.

06-01:17:25
Choper: Did she reach out to you much when she was dean to get advice on any particular issues?

06-01:17:35
Meeker: Not that I can recall. If there were, there were very few. There may have been, there may have been, but I don’t recall any.

06-01:17:48
Meeker: Do you have any final thoughts on your ten years as dean? We’ve talked about some of the main contributions in terms of hiring and fundraising.

06-01:18:00
Choper: Yeah, I—I don’t have any, not that I can remember.
Interview 7: February 6, 2019

07-00:00:00
Meeker: Okay, we are rolling! Today is February 6, 2019. This is Martin Meeker interviewing Jesse Choper, in his office in Boalt Hall, UC Berkeley School of Law—and this is interview session number seven.

Are they just completely going to get rid of the name Boalt Hall?

07-00:00:31
Choper: No. There are going to be some—well, the name Boalt, I think, it will remain for a couple of things. I just read in the dean’s emails, particularly the names of chairs that were given by Mrs. [Elizabeth] Boalt. And the irony is that Mr. Boalt was the one who discriminated against Asians; Mrs. Boalt was never found guilty of that. But in today’s world, that’s just the way it goes. So the dean finally made a compromise, in which he said he was going to remove it from the—because it was never the official name of the school. But we have it on the names of grants given for chairs—or something like that. I forget exactly what it was. I know mine and Herma’s [Herma Hill Kay]—oh yeah, he cut it off. My—I don’t know, I think I’m the last living—that made the cut. [laughter]

07-00:01:53
Meeker: Okay!

07-00:01:55
Choper: So anyway, I’ve got to do that.

07-00:01:57
Meeker: Well, you were the Earl Warren—

07-00:01:58
Choper: Yes.

07-00:01:59
Meeker: I guess—is that the dean or is that the professor?

07-00:02:03
Choper: No, that was the—I was the Earl Warren Professor, it was called, of Public Law. I know that’s why somebody put the name on it that way, because of old rules at the time—and then I always retained that. You know, I’m one of his great admirers, and a hero of mine—Warren.

07-00:02:31
Meeker: Well, you certainly carried on his memory, that’s for certain.

07-00:02:35
Choper: Yeah, I—I was reading something again. Oh, there’s a—books come out about Warren, and I just read the most recent one, maybe a year ago it came out. You know, oh, Warren and—it was called Eisenhower and Warren [Eisenhower vs.
Warren: The Battle for Civil Rights and Liberties]. You know, (a) I enjoyed reading it generally; (b) I always learn something new from those things that I don’t think I forgot. I think on that, my memory—if it wasn’t jogged at the time, it wasn’t there, so I didn’t know that about him either. I forget what. You know, he had quite a—like everybody, he had a checkered career. He was a pretty—he was a pretty conservative—he started as a pretty conservative guy and got in subsequent trouble about it in later years, especially with the Japanese exclusion.

Meeker: Right.

Choper: Did I ever tell you what he told us about the Japanese exclusion? He told us a story. You know, he’d—

Meeker: Please go ahead. I don’t think you recorded it here.

Choper: So we used to have an annual dinner for him, his clerks gave, as I said. And he then would have a lunch afterwards for the clerks and their—whomever, their spouses, their—whatever they brought. In the beginning, we said wives, but later on—whatever it was. So he would give a few talks after the lunch, a few items, say—just give a few words after. And he said, “Do you have any questions?” And there was this one spouse, you know—gutsy people. They asked him about the Japanese. She asked him about, “What about the Japanese exclusion?”

And he—I’m sure he’d been asked this before, and he stepped back, or he sat back and he said, “Well,” he said, “let me tell you a story, an illustrative story.” He said, “When someone first asked me this I said, ‘Joe, suppose when you were a young man, you decided that you wanted, that you had to do—you were assigned a job in Japan. This is during—prior to the Second World War, and you were there in Japan, and your wife came over and your children. You found it very difficult over there. For you, it was fine. You had a job. But your wife, she couldn’t belong to this club or the other club. And your children were made fun of in school, and onto that thing. Then, you’ve been there now for six/seven years from the US—or maybe fifteen years. War broke out between the United States and Japan. Joe, whose side would you be on?’”

So that was his point. The Japanese, they—oh, it was a sneak attack on Pearl Harbor. A number of people died, and so forth. And he never—and then—oh, he also said, “The Japanese,” this is Warren, “had been discriminated against here. They couldn’t,” that’s right, this was earlier in my recitation of this. He said, “The Japanese, they couldn’t get good homes, particularly in California. They lived sort of in what we now call ghettos. Their kids were made fun of when they went to school. And we couldn’t figure out, since they were so—forget the kids—since they were so set apart from everybody, they were not part of the community. No one could really tell us whether they—you know, or no one, so we couldn’t trust
anyone to say these people are loyal to the United States, even though some of them had military [experience] in the war, we couldn’t tell.”

And he said, then he said, “You know,” and I’m quite sure I’m right when I say this, he said, “There were bombing[s], there were—planes came in off the coast of Oregon, and maybe someplace else as well. Submarines were spotted out in the Pacific. So that was it. I made up my mind.” I think there was political pressure too. He didn’t mention that too much. But he’s never said that he—I can’t think of the right word. He never said he didn’t do the right thing on this. He said, “I regretted it.” Or no, “I regret it now.” But he was a very proud guy, and he never—he came pretty close once to saying I was wrong. I don’t even know that he ever said, “I apologize for it.” But I think he thought of a word, which was true, and that he would be willing to say that he regretted it today. We do a lot of things that we regret later; that was one.

07-00:09:42
Meeker: Do you recall if those assembled at this dinner felt that was a satisfactory answer? Did the woman sit down and accept what he had to say?

07-00:09:52
Choper: Oh, you mean that—what would you do, or whose side would you be on?

07-00:09:58
Meeker: Well, I mean—no, maybe that is what I’m asking. [laughing]

07-00:10:00
Choper: I think she—I think she didn’t follow up on her question. She did not follow up. I thought it was—and you can use whatever adjective you want. I just thought—I thought it was rude! [laughing] You know, to do this, for her to ask that. But he did his best to answer it, and I think I’ve heard him tell that story pretty much the same way. I remember the punch line. “Whose side would you be on?” [laughing] The notion being they had—the Japanese had good reason to be on the Japanese side, because they were mistreated. That’s the story.

07-00:10:43
Meeker: Interesting. Well, let’s jump around a little bit.

07-00:10:48
Choper: Sure.

07-00:10:49
Meeker: And I’ve got an agenda for this conversation today.

07-00:10:52
Choper: Yeah, you sent me a pretty detailed—go ahead.

07-00:10:53
Meeker: Yeah, it’s not too detailed, but it’s just a list of a few things, including—the first thing I’d like to talk to you about is some of your publications after the time that you were dean.
Choper: Yes, yes.

Meeker: Then a few other points that we can get to. But you know, a couple of your publications include an edited anthology called, *The Supreme Court and Its Justices*; and then, I believe, a new case law book called, *The First Amendment: Cases, Comments, and Questions*.

Choper: Oh! Well, I, the—I’ll answer the second one first, because it’s easy. What *The First Amendment: Cases, Comments, and Questions* is was simply a—taking some chapters, a few little adjustments maybe, from the big book—what we call the big book. So that was—that was the publisher’s idea, and I said sure. At one time we had four books, I think. They originally had a condensed version, they had this—that was before the Internet, so they’re trying to—that’s the publisher. They had all the rights to that. I think they probably asked for our approval, but you know, why not?

Meeker: So it was a more focused version of your larger case law book?

Choper: I don’t know that it was more focused.

Meeker: Okay.

Choper: I just—I think it was just taken right out. And it may be that the fellow who did free speech, because I did not do that; I did only the religion. He teaches now, [trying to remember name] [Frederick] “Fred” Schauer. [retrieving the book] Let’s see where it takes us. He was one of the leading scholars on the First Amendment in the country. We were very, very lucky to get these other people. [turning pages] Fred Schauer—yeah, he’s a distinguished professor of law at [University of] Virginia. So he—and he and I did the First Amendment book. I did the religion, and he did the free speech, which was a major part of it. I think I said, at one point, you’d better, “I want to give you two-thirds of the royalties.”

Meeker: You know, it’s interesting. Around that period of time, it was when I was in college. And the First Amendment and free speech in particular, but also the separation clause being part of that, seems to go through ups and downs in American history, periods in which it’s more broadly and widely appreciated, periods in which people are questioning whether it should actually exist at all.

Choper: The speech clause?
Meeker: The speech clause in particular, but—

Choper: Yes, what was the other one—the religion clause?

Meeker: Yeah, the religion clause. And I’m not sure those happened at the same time.

Choper: Well, the speech clause is—I mean there’s much more to, greater complexity to the speech clause. When I used to teach that subject—and I taught it many, many times. I mean, it’s part of the con law course and some First Amendment courses that I used to give occasionally. But anyway, I always struggled with that.

Meeker: Yeah.

Choper: Boy, I mean—the religion clauses I had under my belt, in my head. I knew what my shortcomings were of my theories, and so forth. But that speech—and it gets more and more complicated all the time. And—

Meeker: Why did you struggle with it?

Choper: With the speech clause?

Meeker: Correct.

Choper: To master it?

Meeker: Yeah.

Choper: It was more complicated than my—the size of my brain would do! [Meeker laughs] I mean, I—boy, when I used to teach it, and I—even at the peak, my prime, when I used to spend—the other stuff, I could spend fifteen/twenty minutes going over my notes for a class. The speech clause only—oh, at least forty-five minutes just in teaching that course. It’s very, very complicated. You know, speech is not absolute—and there’s a lot of disagreement as to how broad it ought to be. I believe it ought to be very, very broad. And particularly for speech that other people don’t like. General speech that everyone likes, you don’t need any constitution to protect that. It’s—I think it was [Felix] Frankfurter, and I’ve said this someplace, said—he said, “The First Amendment was not there to protect very nice people,” or something to that effect, which is true. So I am a near absolutist on the speech clause.
You know, so in 1991, I think that was about the time that there was an effort to pass, I believe, a constitutional amendment banning the burning of the flag.

Yeah.

Was this book released in that context on purpose, do you think?

Oh yeah, yeah, yeah. Oh yeah. See, I had no—I had an immediate—it’s a regretful reaction. It is very similar to these athletes who take a knee—what is it, during the “Star Spangled Banner,” or whatever it is. Do I, am I—well, I’m sympathetic. I change my mind—I’ve opened my mind a little bit about that. What’s his name, the athlete—?


Yeah, Kaepernick, who—I saw him play football, and he was a really good quarterback. And he had a lot of guts! And boy, he’s paid the price. [laughing] He has paid the price, because a lot of the big things that you get there are determined by the owners, and the owners are not the players or anybody else. So he’s suffered financially and otherwise. So nonetheless, I certainly think he had the right to do it. There’s an old saying: your right ends, or something—at my nose. And if you hit me, that’s one thing. It’s part of the—I forget the phrase, but—[see below: your rights end where my nose begins]

You know, there continue to be pretty violent, actually, battles over free speech here on campus, the last year or two.

Oh yeah. Oh boy—I follow them!

What were you thinking when you followed that?

I thought quite a bit about it.

Okay.

And I thought on the one hand, you know, there are all kinds of regulations of speech. The biggest, which is called time, place, and manner—time and place are not too difficult to figure out. But manner—what the hell does that mean? So I was very sympathetic to the speakers. But the practical side of me, and my
feelings about this campus, were quite sympathetic to the Chancellor [Carol Christ]. So you know, that’s the sort of decisions that she made, that were under enormous pressure from not only the political sides, the financial side, and so forth. I mean, I know I, on a much more limited basis, experienced that when I was dean.

07-00:20:36
Meeker: Right.

07-00:20:37
Choper: And so I do think that these speakers, who came in here deliberately to Berkeley, you know to Berkeley—it’s Berkeley! This is where they want to get the press. And so—or they’ve just got big egos. I forget names of some of—some of them are true rabble-rousers.

07-00:21:08
Meeker: Yeah.

07-00:21:10
Choper: Berkeley becomes a, you know, a place to do it at, and to thumb their nose at Berkeley and try to put us in a difficult position. So I don’t know—I haven’t come to any—I just don’t think they ought to go broke in protecting that. I think they ought to charge them—and I think she does that. I could sometimes look—I don’t think they publish a lot of the details. How much are you charging him? What did it cost? How much, because it’s not—it doesn’t pay for everything, it just pays for some extraordinary expenses, way off the budget—or maybe she budgets some of it. I don’t know.

07-00:21:50
Meeker: What did you think of the arguments being made by those who wanted to prevent that speech, not based on manner grounds but on content grounds?

07-00:22:05
Choper: On what?

07-00:22:06
Meeker: Content grounds.

07-00:22:08
Choper: Very difficult. I would say—yeah, I know that your rights end where my nose begins. So you know, if you say something that produces—there’s a phrase: clear and present danger. It’s not the best phrase. We have another phrase, which also is not—today, the classic test, they say it’s got to have—it has to be directly related to a compelling government interest. Well, that’s good. It sort of says we want to protect a lot of it. But who determines what is—first of all, what is a compelling interest? I think the answer is very simple: five people on the Supreme Court determine it. In the end, if it’s a real issue—I mean if it’s an issue that they want to take.
Meeker: Have you been surprised that it seems that it’s mostly people on the left who are, at this point, more willing to limit free speech, for fear that the speech will make people uncomfortable or feel unwelcome?

Choper: Yeah, that’s right.

Meeker: Those kinds of objections.

Choper: Martin, I’ll tell you something—at my age, nothing surprises me!

Meeker: [laughing] Okay!

Choper: And I—that’s something, a bit of an overstatement, but I’ve seen it before. You know, I mean the—I saw it in the free speech movement. When I first came here, I got involved, as I said—on both sides! I’d agreed with one side and didn’t agree with the other. So I think there’s a strong presumption in favor of free speech, but I don’t think—and I’m repeating what I said: It is absolute.

Meeker: Tell me about this edited anthology. This was a little bit earlier, in 1987. I guess you’re probably asked to do these things fairly often, and I think you might have had a chapter in there on Earl Warren.

Choper: Yes, well that was—it was, I’d—I think I never really turned anything down about him. To this day, not that anyone’s asking me; there’s not much. I get a phone call sometimes from somebody, except I don’t come in till noon—too late to get printed in the paper.

Meeker: [laughing] Right!

Choper: But I don’t care about that anymore.

Meeker: What did you want to accomplish with that book, do you recall—with the Supreme Court justice book?

Choper: Some publisher asked me to do it. I—they had some other people for some—when they asked me would I do Warren, oh, I said yes. That’s simple. That was my reaction. Now, was I part editor of that book too? I said that I would do it. Was this all the Supreme Court clerks, or just the Warren clerks?
Meeker: I can’t remember.

Choper: I have it here. What’s the name of the book?

Meeker: Yeah, you do have it here. *The Supreme Court and Its Justices*, so I think it was—

Choper: No, it was all of the justices.

Meeker: It was a number of the justices, yeah.

Choper: I think I got *other* people to write some of it. And I think that the—whomever it is, the editors, I think they were a couple of political science professors, as I recall. They had some ideas too. They had—they’d look over who’s writing about these people and whether they’re still alive or not, and they would go and ask them. But I think I made some suggestions. It was on the Warren clerks that I really got involved, and that was one of the—

Meeker: The oral history project.

Choper: The oral history project. [*Law Clerks of Chief Justice Earl Warren*]

Meeker: Right.

Choper: That was, yeah, I was the principal—

Meeker: Instigator! [laughing]

Choper: —organizer for that. Yeah.

Meeker: Yeah, did you have a chance to read those—many of those interviews when we finally released them?

Choper: I’m sure I read it all.

Meeker: Yeah.

Choper: No, I’m sure I read it all. And—it’s in a book here, right? And I have a book—?
Meeker: Well, we might have given you your transcript, but I don’t know if you’ve seen all of the transcripts. I’ll have to find out.

Choper: Well, I have it someplace, you know. Yeah, some—yeah, I read stuff, old stuff—lots of stuff!

Meeker: Well, so then in 1995—

Choper: I read—I just spent a lot of time finding a law review, a law review—a published review of a speech that a guy made reviewing my book. And I was reading something here about all of this. And I said—gee, I want to see what that thing said. So—here it is.

Meeker: Ah!

Choper: Boy, I’ll tell you, it took a long time to find that.

Meeker: Right! Well, this probably—you probably brought this out because you talked about it in the interview that you were just reviewing.

Choper: Oh, maybe that’s right. So maybe I said yeah, Carl—

Meeker: Yeah.

Choper: First, I had trouble remembering his name. He was a very well-known judge, whom I met. I don’t know that I—I’ve been on so many organizations and traveling, that I forget in what context did I meet Carl McGowan. And I did, and he was a very, very sweet man—and a very highly respected judge, so I was really pleased when he was willing to write a review of the book. And people don’t—most people don’t write reviews unless they, you know, they want to—especially a judge like that, he didn’t want to rip it up.

Meeker: Right.

Choper: So—he said a lot of nice things about it. I liked it; I’m going to read it! I haven’t read it again. [laughter]

Meeker: Good!
07-00:29:03  Choper: That’s why it’s sitting right here.

07-00:29:05  Meeker: Well, let me ask you about your second major research book, and that was: *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses*, 1995.

07-00:29:17  Choper: Yeah.

07-00:29:19  Meeker: So you had written an article in the 1960s that was a major article, in which you talked about recommendations for interpreting the separation of power clause.

07-00:29:32  Choper: That’s the—

07-00:29:34  Meeker: That’s the—oh gosh, I’ve probably got it in here somewhere.

07-00:29:37  Choper: Yeah, that’s the big book: *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court*?

07-00:29:41  Meeker: Well, no, no, no. Your first article from 19—

07-00:29:44  Choper: Oh, article—oh, a law review article.

07-00:29:45  Meeker: Yeah, your law review article.

07-00:29:49  Choper: Was on—

07-00:29:51  Meeker: It was on the religious clause. Oh gosh, here we go.

07-00:29:58  Choper: Yeah, the religious clause is easy—it’s the speech clause that I thought—go ahead.

07-00:30:04  Meeker: [looking through materials] Let’s see here—well, I guess it’s the aid to parochial schools—that was that big article.

07-00:30:11  Choper: Yes, that was a big article, but that’s religion.

07-00:30:12  Meeker: Yeah, right—it was your 1995 book, and that’s what I was asking you about.
Choper: Yes.

Meeker: So I guess—how did your ideas evolve from that article, written in 1963, the: “Religion in the Public Schools: A Proposed Constitutional Standard,” then followed up by the California Law Review article about aid to parochial schools in 1968, [“The Establishment Clause and Aid to Parochial Schools”]. You did—so I guess what I’m asking, to back up, is that you wrote two major law review articles on religion in the Constitution in the 1960s.

Choper: Yes.

Meeker: And then in 1995 you publish your second major book, that also is on the religion clauses. What inspired you to return to that topic and write about that again?

Choper: I guess I was asked by a publisher if I would do that, then I did. Who published that thing? Maybe it was the same publisher. Yeah, University of Chicago Press.

Meeker: Why don’t you open it up and look at the table of contents for me?

Choper: Okay. [reviewing book] Let me read the personal note. This tells you a lot.

Meeker: Okay!

Choper: I don’t want to read it to you—it’s three pages. [reading abbreviated excerpts from “Preface: A Personal Note” in Securing Religious Liberty] “The first experience I can recall involving separation of church and state, seventh grade, high school, at chapel—they began by reading from the Bible, the students reciting the Lord’s Prayer. This was contrary to my religious training and beliefs, so I responded in a variety of ways. Sometimes I remained silent throughout. Other times I repeated most of the prayer but stopped before the final line, as I saw my Roman Catholic friends do.” [aside] To give me a way to cut down the whole thing. [laughing] “Occasionally I participated fully in the prayer ceremony, although I often assuaged my guilt feelings by garbling some of the words.” [laughter, continues reading] “In any event, twelve years later when my law school course in con law considered the materials on religion, these earlier personal recollections [generated] a special interest on my part and influenced my thinking about how the religion clauses should be interpreted. As fate would have it, a substantial part of my clerkship with Warren was spent dealing with church-state issues.” Which I did, and one of the Sunday Closing Law Cases involved freedom of religion, free exercise, and “my initial reaction was that these regulations violated both of the religion clauses. Further reflection, however,
(powerfully influenced by my law school training to search for neutral principles,”
blah, blah, blah. “My own evolving belief this was especially important
eventually caused me to come to the opposite conclusion.”

07-00:33:43
Meeker:  Right. And that was in the Sunday—?

07-00:33:48
Choper:  It’s one of the few times—yeah, I do recognize that I can change my mind.

07-00:33:55
Meeker:  And in that passage right there you’re referring to your position in the Sunday
closing laws case, right?

07-00:34:00
Choper:  Yes. Yes, and I did not want, I think, to grant an exemption to the Orthodox Jews.
I do remember that. I believe—I forget what we did. What did we do?

07-00:34:33
Meeker:  I think that’s correct. That was the winning—that was the prevailing decision.

07-00:34:41
Choper:  All right. So, I began to rethink that a little bit, and I saw that you could not have
a flat-out rule, principle/rule—I use those words interchangeably, rule or
principle—under my prior thinking. So I struggled, for a long time, trying to
figure out how I could best achieve my adherence to principles and rules, and how
I could best achieve, at the same time, an adequate protection of religious
minorities. That’s it. And that’s what the—you know, it’s right in the first words
of the Constitution, “[Congress shall make] no law respecting an establishment of
religion, or prohibiting the free exercise thereof...”

07-00:35:55
Meeker:  Yeah.

07-00:35:57
Choper:  What does that mean, that’s the question. What does that mean? Because I don’t
think they recognized—I guess that’s what I think, that there was going to be a
clash between these two parts of the clause. And different justices of the Supreme
Court have taken different positions about that. Even [Supreme Court Justice
Antonin] Scalia, once, once—he said once about originalism. But on the religion
clauses, I think he also came to some conclusion that his original understanding,
and so forth, wasn’t going to tell the story. I forget where it was now, but I know
we have that—we did that. Did I ever mention what Scalia once said about me?

07-00:36:58
Meeker:  No! [laughing]
As I mentioned to you, we spent almost a week together being the only two constitutional law people at a big conference in—not in Switzerland. [pause to think]

A European country?

Yeah, oh yeah, I think it’s a—

A Scandinavian country?

A Scandinavian country.

Sweden, Norway, Denmark?

Sweden.

Sweden.

Exactly. This was Lund, Sweden, in southern Sweden. And it was a very fine university there with a law school, it was a school which included law. And we used to—I got the invitation, like most of these things do, it depends on who you know. [laughing] So we used to have—a man used to come and teach here about five/six weeks—maybe more, maybe closer to a whole semester, and I got to know him, from Sweden. And he also got to know Scalia, because I think he also did something with him. But anyway, we were the two Americans that were invited to this big conference that he had, and—for three or four days. That’s when I got to know Scalia real well. We used to take these long afternoon walks together, and so forth. I mentioned that he was one of the funniest jokesters. Would you believe that? Now he’s such a—and he—so we, it wasn’t a debate. It wasn’t scheduled as a debate. It was supposed to be a discussion between him and me. And it was virtually clear that it was on our difference of views. And I think—I forget who spoke first. But he said, “Well,” he said, “Whatever Professor Choper says, you know, he is the best of all of the people who are wrong.” [laughing] Or something to that effect.

What do you think he meant?

I think he meant that it was the position that gave him the greatest problem, in disagreeing with, of all the people that he disagreed with, all of the academics. He
himself, you know, had been an academic. Two schools he taught at Chicago and Virginia. That’s how, I guess, I think I first met him.

07-00:39:57
Meeker: So what was it that he said about you?

07-00:40:02
Choper: I was the best of all of the people who had the wrong idea.

07-00:40:08
Meeker: [laughing] Okay.

07-00:40:11
Choper: Or something to that effect. Yeah. Well, I thought—I remember stopping him and saying, “Mark that down!” Or something like that.

07-00:40:21
Meeker: Yeah, that’s funny. Do you think that your ideas had changed from the 1960s, on the religion clauses, to the 1990s when you published this book, or was it more a further clarification?

07-00:40:47
Choper: I don’t think that there has been any major change in my thinking. Do I think that there can be little glitches? I remember once someone gave me a question someplace—I had trouble answering it, and this is when I had all my wits about me! So I think I said, “Well, that’s a good point.” You know—no one’s perfect. [laughing]

07-00:41:24
Meeker: Well, you know, I’d like to also ask you about this potential opportunity to be solicitor general of the United States.

07-00:41:31
Choper: Oh yeah.

07-00:41:33
Meeker: Will you talk about that? That was in—

07-00:41:35
Choper: Will I?

07-00:41:35
Meeker: Yeah, that was in the Clinton Administration, correct?

07-00:41:38
Choper: Yes.

07-00:41:42
Meeker: First, what is the position of solicitor general?
Choper: He represents the government in all—I think in all statutory and constitutional cases that the Supreme Court handles. He represents the government, in taking the government’s position before the Supreme Court, both in terms of writing the briefs and in terms of arguing the cases. And I had no great interest in writing the briefs, but I wanted to argue the cases that the Supreme Court took up.

Meeker: And there have been some pretty exceptional figures who have been in that role over the years.

Choper: Oh yeah. Yeah, there were a couple in my time there who—I used to take off time from doing my work to go down and hear the argument. One was an old-timer, left-wing guy, whose son became a court of appeals judge whose name escapes me at the moment.

Meeker: Okay.

Choper: And the other was the then-Solicitor General of the United States Archibald Cox, whom I got to know some when I taught at Harvard. He was a classic Boston Brahmin, but he was, I must say, he was a really great advocate—very, very good at it. I greatly admired him.

Meeker: So this was a position that you were under consideration for during the Clinton Administration?

Choper: I was under consideration for it a number of times. But never—it, politics were involved in a lot of that, that’s number one. Number two is I’d never argued a case before the Supreme Court. In a way, it was a long shot. But it was more than just a fantasy, like being on the Supreme Court. That, of course, would have been my real—that’s what you think about when you start letting your mind wander for a little bit—or your imagination, I mean. But that, I thought I had a chance.

And I had a fellow who was very well connected, a former student, and an active alum here in California, in the Bay Area, who said, “I’ll get you that job.” No, first he told me he was going to get me on the Supreme Court. I said, “Yeah, forget it.” [laughter] But he had—he was probably the biggest Democratic fundraiser in Northern California. I can’t think of his name now. A very—I have it. I could get it for you sometime, maybe look it up and get his name. And we became friends. [Duane Garrett] And he had—he ended up jumping off the Golden Gate Bridge one day.

Meeker: Oh really.
But—he was a very proud guy, and I don’t know, I thought—something he was afraid of. I think it wasn’t true, as his wife once said. But anyway, he did that. And—his name is on the tip of my tongue, but I can find it. And he said he’d—“I’ll get you to be Solicitor General.”

So I think once or twice we came fairly close, and then once he said, “You’re in it. It’s between you,” this was—and Clinton is our president. He said, “It’s between you and,”—it was someone who, not this guy, but somebody who was pushing for me, who I forget—but someone with real influence. And I subsequently learned—and he said, “You’re in, I think. We’re just there.” And oh yeah, I know who exactly—who it was. And there was a colleague of mine—I’m hesitating, because I don’t know that I want to put that on the record, but I don’t care really. He is now a—I think he is an Senior Ninth Circuit judge named Willie Fletcher. William [A.] Fletcher. And he was a colleague of mine, and I was—he came up for tenure two or—three times, I think, all of them when I was dean. And as I said, in this stuff, I deferred to the faculty on that. But occasionally I would think—I don’t think the scholarship merits getting to the faculty.

The long and the short of it is that he finally did get through in the third effort, and he learned about this. I don’t know who told him or what. The guy who was my sponsor came back to me and said, “You know, you’re not going to get that. Someone who has—who knows Hillary [Clinton] real well, killed it for you.” So how did he know Hillary? They were classmates at Yale Law School, so he knew her, and I think his argument was that I’m too conservative. You know, the liberals think I’m too conservative; the conservatives think I’m too liberal. So what can you do? So that was it. And it’s very unusual for me to carry a grudge, but I carry that—I wouldn’t, I actually—I never said a word to him. I didn’t want to tell him how—but he knew, from the way I would just go the other way when—not openly. Some people would make a thing about it. I didn’t. And then he—and he kept going up, got onto the Ninth Circuit. And I don’t know, I’ve seen him occasionally. As a matter of fact, I just saw his wife the other day at my gas station.

So I don’t know what the beginning of the story was, but that was my chance to become solicitor general. It was—it was, as they say, in the bag. But you know, it’s never in the bag till you’ve got the bag in your hands.

What would you—what kind of solicitor general do you think you would have been? What would you have brought to that job?

Well, I had a big—I was always—I knew how to argue, as I did with students in class. I knew the cases very well. I sometimes read about how these great advocates, you know, spend weeks preparing for the argument—and maybe months. [laughing] I don’t know that I could have prepared that much. I could
maybe wing it, I thought. I’ve argued a couple of cases. Never in the Supreme Court.

I was supposed to argue one in the Supreme Court if my client lost in the Court of Appeals. I used to get retained for consultations, and they always wanted me to consult on a brief and stuff like that. And—but this time, this—I forget how I got to know him or whatever it was, but he said, “We’re going to get this case to the Supreme Court.” He said, “Argue it for us in the,” it was either the Seventh Circuit or the Tenth Circuit. I forget which one. I said, “Okay. I’ll argue to the circuit court.” He said, “If it gets there, to the Supreme Court, I think we’ve got a good chance.” He said, “You can argue in the Supreme Court too.” Oh, then I said, “Okay, I’ll argue it.” So that’s—it’s a lot of preparation going into that, that I didn’t want to do, but I did. [laughing]

And I remember very well; it was the Tenth Circuit. I argued cases in the Seventh Circuit too, but it was in the Tenth Circuit, because I had this theory that could win it. I was always afraid it was too complicated, and so forth. But a guy who was on the Tenth Circuit then—I can get his name—he teaches at Stanford now. [Michael W. McConnell] He taught at Chicago Law School and went to Stanford, and I still see him once in a while. And he was a clerk to somebody. But he was on the Tenth Circuit, and he resigned from the Tenth Circuit, so he went into teaching. I guess he didn’t like it. But he taught at Chicago Law School and went to Stanford, and I still see him once in a while. And he was a clerk to somebody. But he was on the Tenth Circuit, and he resigned from the Tenth Circuit, so he went into teaching. I guess he didn’t like it. And as I started explaining a little bit, explaining and—and then he looked down and he said, and I remember he always said, “Dean Choper,” I liked that. I wasn’t dean at the time. [laughing] But he said, “Is what you’re saying…” and he just spelled out my argument. And I said, “Yeah, that’s exactly what I’m saying.” And he just spelled out my argument. And I said, “Yeah, that’s exactly what I’m saying.” And he sat back—and you know, I thought I had a shot at winning that from that. He voted against me. [laughter]

07-00:52:47
Meeker: Do you recall what the case was or what the issue was?

07-00:52:52
Choper: I could find it.

07-00:52:55
Meeker: Okay.

07-00:52:55
Choper: Let me—

07-00:52:56
Meeker: Maybe just write it into the transcript.

07-00:53:00
Choper: Rector v. City and County of Denver, 348 F.3d 935 (10th Cir. 2003)

Then one other time I was going to argue before the Supreme Court; they promised I’d get it. If I argued the case before the 7th Circuit that was in the Chicago—and so I argued the case to the court of appeals, and the law firm that
hired me said, “This is going to go to the Supreme Court.” I thought it had a good chance, and I won the case in Chicago. It was—again, I forget whether it was two to one—whatever, I won it. [Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir. 1996)] And then they said, “Well,” they said, “I know the other side will go up to the Supreme Court.” They said it was another big case, they thought it would to the Supreme Court. But the Supreme Court denied certiorari, denied review.

07-00:54:19
Meeker: Wow!

07-00:54:20
Choper: So I talked myself out of—I argued myself out of going to the Supreme Court, because they took my view, which I thought—it was the right view. I would—only once in my whole life I argued a case that I was embarrassed about. I think it was the case that I just told you about. A friend of mine, a guy I got to know, he said, “Oh, you’ve got to do it. You’ve got to do it for us,” and so forth. He had this case. And I did, and I embarrassed myself and I said I’d never do that again. I didn’t believe in what I was arguing, so I concocted this argument which—I can’t think of his name now, Mike—[McConnell]. I’ll give you his name. I’ll get that. So anyway, that’s my story.

07-00:55:08
Meeker: Well, you had said a few moments ago that you—the dream would have been to be on the Supreme Court.

07-00:55:14
Choper: That’s a dream, yeah.

07-00:55:15
Meeker: Did you ever have any ambition of being appointed to a lower court?

07-00:55:20
Choper: No.

07-00:55:20
Meeker: Either an appeals court or state supreme court?

07-00:55:22
Choper: No, no, no. I had some opportunities.

07-00:55:27
Meeker: Okay.

07-00:55:28
Choper: People said they’d put me up for the state supreme court. I think I said no each time, and I figured out why. You go to there—you’ve got to go through a lot of boring stuff in these cases. [Meeker laughs] Preparing right for it, and these people are—the state’s—the California Supreme Court is a very good supreme court. At one time I guess I knew all of those people too. The last one I know was the woman who was a Boalt graduate, who just retired.
Meeker: Oh, [Kathryn M.] “Kay” Werdegar?

Choper: Kay Werdegar. We became good friends. She went to Berkeley as an—oh, she went to the law school for the first two years, and then her husband, who is a very prominent physician of some sort—he’s still around. Nice guy. He got a big job in—someplace. And she said, “No, I’ve got to go with him.”

Meeker: So you never were on the Supreme Court, but you got even a better appointment.

Choper: Oh, the [California Horse] Racing Board.

Meeker: The racing board! [laughter] You were—

Choper: Yeah, that’s right. That was—believe me, yeah, the Racing Board I wanted much more than an appointment to any of the courts of appeal.

Meeker: Well, so you were appointed to the racing board, the California Horse Racing Board, in 2006.

Choper: Yes.

Meeker: But your interest in horse racing goes back further than that. Do you remember the first race you went to?

Choper: Yes. [pause to think] It was, the first race I went to—I came here in ’65. I’d say it was in ’68/’69. I had a colleague—[Lawrence A.] “Larry” Sullivan, and he said to me—I want to tell you, this is so out of keeping for me, for me to take a weekday off from my work to go to the races. But I—he was such a nice guy. You know, I can tell you, to this day—I always liked to gamble. But so I said, “Okay.” So I went and I began to see how complicated it was to try to—the whole industry, and particularly how to pick a winner. So I started reading about it a little bit, just a little bit. And I got—and he then said, one day he said, “You know, my old friend from college,” that’s right, who was a total character himself, he said, “He’s got box seats there at the races. Let’s—do you want to go again?” So I said, “Yeah, I’ll go.” And I went, and I—it was the betting that really got me. The notion of how you pick a winner, and I did—and I got hooked on it.

And he—I used to go, I remember once I went forty—more than forty Saturdays. There was no Sunday racing in those days, in the state, till later. And I used to—I went to the races, and they did not have Internet or anything like that, so if you
wanted to see the races up here in Northern California—and I went down to Southern California occasionally to do it. But you know, I’d go to places—the county fairs, Golden Gate Fields, of course, is easy. But you know, driving around there all the time and coming home late in the afternoon. My wife was not happy about that, but I loved it. I did it.

So very early on another colleague of mine took an interest in this thing about my interest in horse racing, and someone said—“Hey, there’s this California Horse Racing Board,” which I learned about. I guess they wanted a—so I said, “Really?” He was a very close—he had worked for some years. His name was Preble Stolz, and he said, “Do you want to get on the racing board?” And I said, “Yeah! Oh yeah, I could?” And he said, “Oh yeah, it’s no problem. No problem.” That was his word. And he—about four or five days later he came back and he said, “You know, a lot of people want to get on that racing board. It’s not as easy as I thought.”

So I tried two or three times, with different kinds of connections to people—most of whom I knew at the racetrack, and they all had connections, and a lot of them bragged about their connections, and so forth. [Meeker laughs] But so I gave up on the thing, and I got out of it and I got busy. There was something else I took on, and I said I can’t do this—another board. And one day I went down to watch the races at the Fresno County Fair, just drive down. That’s where they were racing at that time. So I went there, and someone introduced me to this fellow named John Harris, who is still alive although not doing well. And—you ever hear of Harris Farms?

07-01:02:22
Meeker: Yeah, Harris Ranch?

07-01:02:22
Choper: Yeah, Harris Ranch. That’s the John Harris. So once again, serendipity. We—he wanted me to go to the races with him because I’d met him up here. And he said, “You’ve got to come down,” and I stayed at his house. He’s got this very elaborate place about half an hour away from Fresno, and we went to the races. And I think I did that a couple of times. Drove back. And he tried to get me on the board. He tried a couple times, and we talked occasionally. He’d call me occasionally about stuff generally. He was a very active Republican, but he was—what’s totally out of fashion today, he was sort of a centrist Republican. And we agreed on a lot—and we used to go to dinner together before the—and then he got on the racing board.

To make a long story short; I got on the racing board. People knew about it, that I wanted to do it, and then I said to hell with it. I spent too much time screwing around with this! [Meeker laughs] And I got a call one day from someone in the—someone in the governor’s office. So—it was a message. Again, it was before the Internet—I think, or before I really used it. So I figured well, this seems like it would be a phone call worth calling back. So I called her back, and
she said, “Would you like to be appointed?” She wasn’t a student of mine, but she said she knew my name. I used your case book—at Hastings or wherever she went to law school, and she was very important in Schwarzenegger’s office. And she said, “There’s an opening on the California Horse Racing Board. Would you, I know you—” “That’s right,” I said. And I thought—I don’t know that I want to go through this and get my hopes up again—and I told her that. “No,” she said, “you ought to do it.” I’m sorry—[adjusting microphone] “You ought to do that. Do it,” she said. She indicated she had a lot of trouble to convince Schwarzenegger, whom I never met—never to this day. I haven’t met him. I met every governor since I came to teach at Berkeley—the first was Pat Brown. But I never met [Schwarzenegger] at all. And she called back and she said, “Yes, we’re going to appoint you to the board.” I’d heard that once before from somebody, years before. I got all, you know, excited about it. I said, “Well, that’d be very nice. I’d do it, and I really appreciate it.” I found out why she did it. For some reason, I think she—I think I told you, knew about me, and she thought it would be a good idea. And I met her later at the meetings, and then—a very nice woman. I forget her name.

07-01:06:17
Meeker: Was this the chief of staff?

07-01:06:21
Choper: Well, if you told me her name, I would know.

07-01:06:22
Meeker: Hold on one second, because she was sort of an interesting figure.

07-01:06:29
Choper: I don’t think she—this is—the year I first got on the board—’71 or—

07-01:06:39
Meeker: Two thousand six.

07-01:06:39
Choper: Two thousand six? She was—

07-01:06:51
Meeker: Susan [P.] Kennedy?

07-01:06:54
Choper: No.

07-01:06:54
Meeker: Okay.

07-01:06:56
Choper: Oh, I know—see, I remember that name real well. You give me another—if you can—how much of the staff you can get there, but she was pretty high up. I think, as I recall, Susan Kennedy was largely a political sort of person. But she was more—but she was high on the staff. Pat—no, names are gone.
Meeker: Yeah, it would take me a while to find something, I think.

Choper: Well, you’re probably better at it than I am, but I don’t want you to take the time.

Meeker: [laughing] Well—

Choper: I can Google, you know?

Meeker: Why don’t you talk to me about what the California Horse Racing Board is, what does it do?

Choper: What does it do? Well, it does a lot of things, but it basically regulates major parts of the industry of horse racing. And the major item that we would have, time and again, was the use of drugs on the horses. We would also get—and I totally deferred to the very—I think, they really have a terrific staff, and the staff has terrific advisors on this. So I deferred. I listened to what was good about the drug, what was not good about the drug, and so forth. And our principle concern was, our number-one concern was the safety of the horses. Why? There were horse lovers on the racing board, and there were more people like me who knew that the more fatalities that we had all the time, the more difficult it was going to be for this industry to succeed. So I, being the pragmatist that I am, that’s what I did.

But I used to listen, and there were some—there were some very smart people on that board. I want to say almost to a person, I really respected them. I liked them all, even those I didn’t respect. [laughing] And that was very few—one guy in particular, who never read material—I’ve seen that. He wasn’t serious about it. He wanted to be on the racing board, but didn’t take it seriously. So—see, I go off on these tangents. So the question is—?

Meeker: Well, you were telling me about the work that you were doing on the board.

Choper: Oh, what I do! So—that was the drugs. The other big thing was the assignment of dates. It became pretty simple after the other racetrack in Los Angeles closed down, the name of which I forget, but it was a big one. [Hollywood Park]

Meeker: Oh, right.

Choper: What’s that?

Meeker: Down near the airport.
Oral History Center, The Bancroft Library, University of California Berkeley

Choper: Yes, yes. I used to go to meetings there, or something there, or go to the races. And it was very close to the airport. That’s right. It closed down, and it left us with only two—and they are the two major, two of the—if not the two major, they’re—certainly with New York, they are major race—

Meeker: So Santa Rita, I guess?

Choper: Santa Anita.

Meeker: Oh, Santa Anita—that’s right.

Choper: [laughing] Yeah, Santa Anita and the one outside of San Diego. [Del Mar] What do you call that? I can get the name—I can certainly get the name for you. So your question was—?

Meeker: Well, what else, what—so you said you were assigning the dates.

Choper: Oh the dates.

Meeker: Yeah.

Choper: Well, the competing tracks pretty much would reach an agreement, and I remember I’d see the agenda two days before, and they’d say, “Well, but they’re still meeting. They haven’t reached any [agreement].” And periodically, we just had—we were given the obligation/responsibility to say no. We’ve got this one and we’ve got this one. But our chairman—and all of the chairmen were very good. The one who continues to be chairman, I don’t even know if he’s—but his name is Chuck [Charles] Winner. Anyway, he was terrific. He would meet with the competing racetracks and finally get agreement. They asked me to be chair half a dozen times. That’s a full-time job. I said I’ve already got a full-time job.

So Chuck was just a hard worker. John Harris was the chairman for a while. He went to all the racetracks. So I—I couldn’t. It became a full-time job. Yeah.

Meeker: Were there ever any interesting issues that came up around betting and wagering?

Choper: Sure. One of the big ones was that—the big one was the takeout.

Meeker: Okay.
Choper: That is to say—it’s not easy to win money at the racetrack, not only because of determining which horse is going to win. But it’s the fact that the odds are against you, because there’s so much taken out—taken out for all kinds of things. Taxes is one. The expenses of the industry, largely, are another. And, I would say, they probably return maybe eighty-two cents on the dollar to the betters. Well, that’s—I’ll tell you, that’s not—and someone else takes some more, and that’s about it. The horsemen, they’ve got to get money out of that. The jockeys get money. The expenses are—I could also get you—I’m trying to think of the—I’ll look at an agenda when I’m going over the thing. Look over an agenda of the meeting, as they still send it to me, and—

Meeker: Yeah, so the issue then was trying to figure out a way to increase the payouts, or to decrease the takeouts?

Choper: Increase the income—that’s right. The—all of the participants who took part in the takeout, dividing it up, how much it ought to be—you know, they’re all fighting with each other, and we had to make decisions about that.

Meeker: Well, it’s interesting. I mean you have the closure I guess of Bay Meadows up here—is that right?

Choper: Bay Meadows was the one that closed. Bay Meadows closed. That’s done.

Meeker: Yeah, and then also the one in Los Angeles that you had mentioned.

Choper: Yes, over there too. They still have casinos, the one in Los Angeles there [Hollywood Park], but they don’t have horse betting.

Meeker: Do you think there’s a good future for horse racing in California?

Choper: At a time I thought that there wasn’t, but they came—you know, they—Yogi Berra once said, you know, predictions are very difficult. He said, especially, he said, when they involve the future. [laughter]

Meeker: Right.

Choper: So it is—I thought it’s a dying industry. I know Chuck Winner, who again, the chairman, I’ve said this too, and he said, “You may be right, but it’s not going to be the takeout. It’s PETA [People for the Ethical Treatment of Animals].” PETA is the organization for protection of animals. And they are, that organization, is
one of the biggest thorns that racing has. They’ve resulted in our changing all kinds of rules, about the jockeys beating the horses. Jockeys get fined, they get suspended if they—Those are things we also used to—we handled appeals from—we were sort of a, I guess in a way, except for high-falutin legal issues, we were the Supreme Court for the racing industry. So that’s the sort of thing we did, and I stray a lot, but go ahead.

07-01:16:55
Meeker: Well, that’s great. I wanted to get you to talk about that. Just in conclusion of that particular topic, do you still go to the races?

07-01:17:08
Choper: Very rarely. I have to do it more. And there are reasons for that. There are two major reasons. One is the grandchildren, in a word—all right? And the second is if I—I used to go regularly with a former student of mine, who I renewed with at the races once, and we became very friendly. And he’s a very good—still practices law here in Berkeley. Ay, ay, ay, I can’t think of his name, but I’ll figure that in too. [William Berland] And we used to meet on Saturday morning, at eight o’clock in the morning, in his office, which is right near—a five-minute drive from the racetrack, and they’re building more offices there. And we would spend four, four and a half hours.

But then there became Internet betting, so we used to bet the races here and the races in Southern California, which they tried to alternate, so the bettors had enough time to place their bets in each of the things. Because if you wait till the very end—every industry, you think it’s not—very complicated. Today they have what is called robobettors, and these are people who figure it out on a computer. Not who’s going to win, but what the odds were. And you’d go out, and you’d work—I used to work all the time, figuring it out and everything, and I’d go down and—what you don’t want to do is make your bet too late. If the bell rings and the gate opens, that’s it. So you know, I used to—and I sat down, it’d take you two or three minutes to go up, get to the window. There was a time there were lines—not any more, unfortunately. Now they have machines. Sometimes they screw you up too, in some way, or you’ve got to learn how to use them. [laughing] So you know, I had to go up three minutes before then these days. So—and then I want to go back and watch the race, so that’s another minute or two to—so I try to, two minutes. The horse would be going off at 7-1 when I bet it with two minutes left. By the time I got done, it was in half. If I took—I knew it was going to happen, but if I got 7-2 that was all right.

07-01:19:54
Meeker: Because all of the robobetting that’s happening, so it’s not as fun as it used to be.

07-01:19:57
Choper: They had it down to the split second, before the gate opened, which stops the machines. You can imagine the complexity of trying—you know, machines, the betting machines. That’s really something.
Meeker: Did you—did you have a favorite racetrack to go to?

Choper: A favorite racetrack.

Meeker: Or did it even matter?

Choper: Yeah—it really didn’t matter. It depended on convenience and—I still have gone—last year I did it, to Pleasanton. Why? My wife used to come occasionally, and they treated—I don’t know if they would still, but they treated me very well. The best seats in the place, the best food upstairs in the—you know, the number one room, especially when I was on the board. And, they would come and argue before us too! [Meeker laughs] They and their lawyers would—some of them are lawyers themselves. So yeah, Pleasanton—I used to go to Pleasanton. At one time, as I say, I went to all of them—I used to drive up to Sacramento.

Meeker: Were those to the fairs, or were there established tracks?

Choper: Fairs, yes. Now, Golden Gate—see, they want all the races; they want all the dates they can get in Northern California. And the major competition is the fairs. The fairs also have very good representation in the legislature. You know, an interesting phenomenon. So you’ve got to work hard at it!

Meeker: You wouldn’t, from somebody who doesn’t know anything about it, you wouldn’t think that scheduling dates should be such a political football, but it sounds like it was something that took a lot of your time.

Choper: Yes. Oh yeah! No, I spent, I would say or guess, if I had to travel to the—it was two days a week, on the dates of the meetings. That was your question, how—yeah, two days I would spend going over it. One would be on the airplane ride down, and the other would be—I always felt I was cheating my work. [laughing]

Meeker: But it sounds like it was a bit of a labor of love, huh?

Choper: Yes—especially when you won! [Meeker laughs] There’s an old saying. You know, the best day in the world is a winning day at the races. You know what the second-best day is? A losing day at the races. [laughter] That’s—oh, there are all sorts of saying from the races, yeah.

Meeker: Well, why don’t we wrap up.
Choper: Okay.

Meeker: And you know, it’s traditional to ask, at the end of an interview, if there’s any topics or things that we didn’t cover that you wanted to.

Choper: No, I don’t think so.

Meeker: Okay.

Choper: I mean—probably, but I can always—you’ll see the changes that I’ve made.

Meeker: Right.

Choper: When you get a chance—I don’t know. I hope to get the, whoever—very good interpreter who types it for you.

Meeker: Right, a good transcriber, right.

Choper: And so, if I think of anything I can always—particularly if it’s an error or missing, I’ll put it in. But you’ll see what I’ve put in, and if you think I’ve done more—just scratch it out if you think I’ve screwed it up.

Meeker: Great. Well, do you have any final thoughts?

Choper: On—?

Meeker: On just the interview, anything that you’d like to say in conclusion?

Choper: No, as I said, I’ve had—I know I’ve had two others. I looked—I thought I had a third, but it wasn’t that. No, I’ve enjoyed it! My only thought is it is very important to hit the right time of one’s life. I’m sure there is some experience you have from that. That is the critical thing, because the memory begins to just get like—just the rest of the body. [laughing]

Meeker: Right. It’s a very good point, and it’s a point that I make always to people that I teach about oral history. But if you can’t get it at the best time, you’ve got to get it at some time, I think.
Choper: Yeah, well—that’s your business. I was thinking of the best time, and the best time is—yeah.

Meeker: Well, thank you very much. I will have this transcribed—

Choper: Thank you!

Meeker: And then—

Choper: I want to put on the record, because as I said, I’ve done at least three of these, and this has been far and away—I’ve said it publicly—far and away the most thorough.

Meeker: Thank you very much. I appreciate that, and I’ve enjoyed it myself and learned a great deal.

Choper: Good.

Meeker: And happy to work with you to try to get this great and interesting history recorded.

Choper: Thank you.

Meeker: Thank you.

[End of Interview]