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WILLAMETTE LAWYER

Last fall, Oregon Gov. John Kitzhaber announced he would no longer carry out executions, saying that Oregonians need to have a statewide conversation about the

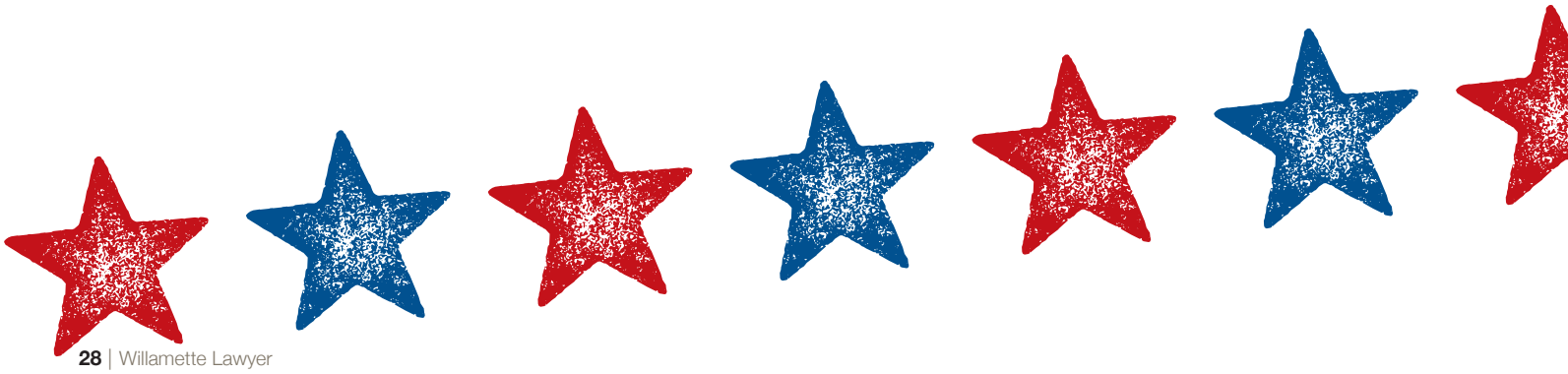
DEATH PENALTY.

Steven Krasik JD'79 has that conversation every day.

HOW LOUDLY SHOULD MONEY TALK?

Fred VanNatta BA'60 and John DiLorenzo BS'77, JD'80 were key players in an obscure legal fight that may yet upend Oregon politics.

By Lee van der Voo



The man who opened the floodgates of Oregon politics to unlimited amounts of money — even before Citizens United, the U.S. Supreme Court's controversial ruling on the subject — has a lanky build and a salt-of-the-earth manner that belies his reputation as a rock star lobbyist. At the height of his 45-year career, Fred VanNatta BA '60 managed a Republican Governors Association conference and counted the NBA and NFL as clients. Recently retired, his day job includes lobbying legislators on behalf of the Oregon Anglers and the Professional Land Surveyors of Oregon.

But get VanNatta started about VanNatta v. Keisling, the landmark 1997 Oregon Supreme Court case that bears his name, and it's clear where his true passion lies.

"I am a strong supporter of grassroots politics and the initiative and referendum system," said the former chairman of Willamette's Young Republicans Club. "In Oregon, the effort usually has been to give the unions an advantage. Limits on campaign expenditures would tilt the field against the small business community."

Attorney Dan Meek is equally passionate about campaign financing — but he's 180 degrees from VanNatta. For the past 15 years, Meek has waged a losing battle to toss VanNatta v. Keisling on the scrap heap of failed political ideas. In a recent lawsuit before the Oregon Supreme Court, he asked the justices to reopen the case and overturn it. They declined to do so, but the decision seems to carve out a new path for the court to take it up again.

At issue was whether Measure 47, which restricts campaign contributions and lays down other election rules, should become law. Voters approved it in 2006 but rejected its companion, Measure 46, which would have amended the Oregon Constitution to allow campaign contribution limits.

Because voters rejected Measure 46, the state never codified Measure 47. But a little-noticed clause in Measure 47 foresaw such an outcome. That clause, Section (9)(f), says that if the measure is found unconstitutional, it should nevertheless exist as a dormant law, lying in wait for a constitutional change or for VanNatta v. Keisling to be overturned. Lower courts have allowed the state to avoid codifying it.

In an unusual legal argument, Meek — who wrote both measures — said Measure 47 should become law until a court rules it unconstitutional.

Left to right: John DiLorenzo, Dan Meek, Fred VanNatta

"Where is the finding that it was unconstitutional when it was adopted? There is no such finding," said Meek. "You have to have the litigation that says what part of Measure 47 is unconstitutional. And no one has challenged it."

The Oregon Supreme Court heard oral arguments in Meek's lawsuit, Hazell v. Brown, in January. The justices issued their decision in early October.

Yet the outcome of the case creates new avenues for supporters of campaign finance limits enacted into law. Invited by the defendants to throw out Measure 47 entirely, the court ruled the measure is legal, but dormant. That means new litigation or a ballot measure that wiped out VanNatta vs. Keisling could clear the path for Measure 47, or the legislature could pass a bill to make parts of it law.

Should it ever spring to life, Measure 47 would shake Oregon's political foundation by limiting contributions and expenditures, controlling the use of personal wealth in campaigns, calling for new disclosures in ad funding and new spending reports, and offering cover for employees whose bosses solicit them for contributions. It also would dissolve war chests that campaign committees spend years building, sending surplus campaign funds to the state treasury.

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Campaign contribution limits have a checkered history in Oregon. In 1908, voters limited the amount of money candidates could spend — and, in some cases, accept — and created a voters pamphlet so all political candidates could affordably argue their case. The Oregon Legislature repealed those limits in 1973 and instead decided to limit expenditures amid vigorous debate about campaign finance at the federal level. In 1976, the U.S. Supreme Court ruled expenditure limits on candidates for federal office were unconstitutional. Predictably, Oregon's limits didn't survive.

In 1994, voters passed Measure 9, which restricted contributions in state elections. Measure 6, which voters passed the same year, ended out-of-district donations.

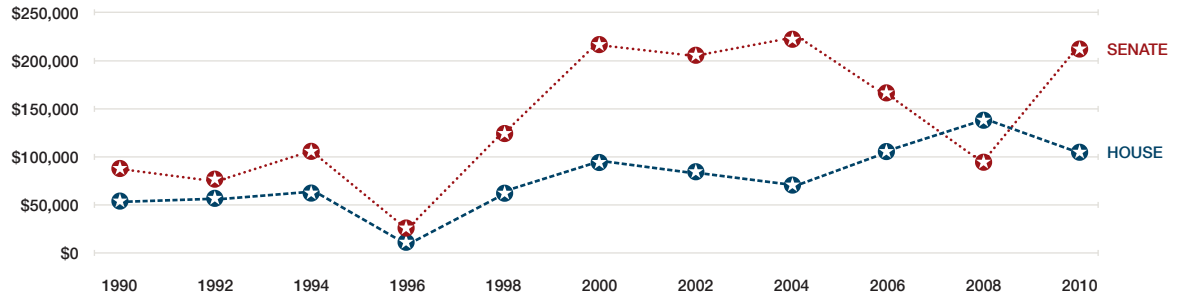
VanNatta was particularly bothered by both measures' impact on small businesses, which he claims were likely to be bested by unions that could use employees and volunteer labor in lieu of cash to influence issues. He and a cadre of silent supporters set their sights on litigation challenging the measures. They recruited John DiLorenzo BS'77, JD'80 as attorney and raised money for a lawsuit through the then newly-formed Center to Protect Free Speech.

In a surprising turn, the Oregon Supreme Court ruled in VanNatta v. Keisling that campaign contributions are a form of speech. (The U.S. Supreme Court ruled similarly in 2010, when the justices said that in Citizens United v. Federal Elections Commission the First Amendment prohibited the federal government from restricting independent political expenditures by corporations and unions. Limits still apply to direct contributions to candidates and political parties in federal races). Since the VanNatta v. Keisling ruling, Meek noted, the amount of money in Oregon state races has steadily risen. In the 2010 general election, contributions topped $77 million. That's up from $4 million in 1996.

"I was appalled at this decision," Meek says. But he says it wasn't until 2006 that he and his supporters, concerned about ever-increasing campaign expenditures, were able to bring the issue to voters.

A solitary practitioner who lasted only six months at a big law firm, Meek says money in politics blunts the will of the citizenry. Indeed, a 2009 study by Common Cause Oregon found that 83 percent of the money in state elections in 2008 came from corporations, unions and political action committees, dampening the influence of individual donors. Meek, who made his career suing utilities on behalf of ratepayers, funneled the proceeds into campaign reform

Average contributions in Oregon legislative races, 1990–2010 (in 2010 dollars)



Source: National Institute on Money in State Politics

efforts and other causes. He and his supporters have made campaign finance reform a priority since the VanNatta ruling, spending $700,000 for the Measure 47 campaign with the help of well-known political strategist Joe Trippi, who worked pro bono as the campaign's media manager.

Meek is comfortable taking a principled, if unpopular, stance. Always on the side of the consumer or the aggrieved, he's in his element beating back corporate influence. Raised as a non-Mormon in the Mormon community of Pocatello, Idaho, Meek was born a contrarian, one of only a few children who didn't go to church four times a week. After attending the University of Wyoming for debate, he says he benefitted from Stanford Law's "hick quota," although he took four years to finish law school because he kept running out of money.

Since settling in Oregon, Meek teamed with attorney Greg Kafoury and anti-nuclear advocate Lloyd Marbet to push for the closure of the Trojan Nuclear Plant in the mid-'80s. More recently, he has become involved in the Occupy movement.

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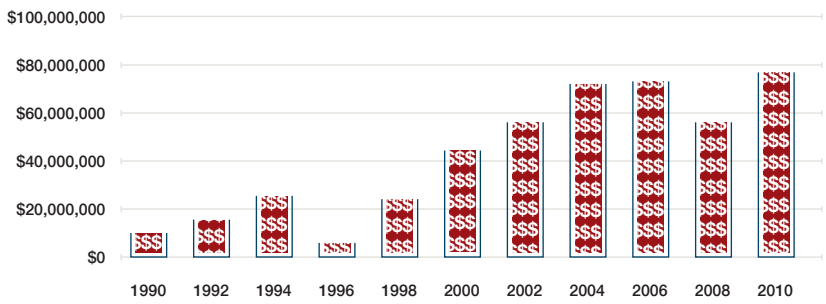
Since the VanNatta ruling, the amount of money in Oregon politics has ballooned. More than $20 million was spent on the governor's race alone in 2010, approximately five times the amount spent on all state elections in 1996, the last time campaign contribution limits were in place. That growth has far outstripped the rate of inflation.

The idea that money buys influence seems evident in some giving patterns. In Common Cause Oregon's 2009 report, the organization noted some donors simply wait until after the election to make contributions, then give to the candidate who won. Some hedge their bets and give to both candidates in a race, or give to one and then the other if their first pick loses.

Critics say Oregon is wide open for ethical conflicts. The state allows legislators to pay job-related expenses with campaign funds, including suits, cars and office space. Campaign contributions also serve as a back door on state gift rules, since lobbyists can use them to pay for legislators' meals without having to report those expenditures as gifts. And candidates with well-funded campaign coffers are expected to tithe to their parties, which then use them to help win contested races.

Meek says voters have sent clear signals they want limits on such financial exchanges. After all, they've approved them three times. Three years ago, after the Oregon Government Ethics Commission tightened lobbyist spending on legislators, VanNatta again went to the Oregon Supreme Court to challenge the state's gift rules. The justices ruled, however, that while contibuting money to a campaign is an expression of free speech, accepting such contributions can be regulated.

Total state election contributions (in 2010 dollars)



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Not surprisingly, VanNatta defends VanNatta v. Keisling and frowns on opposition to Citizens United, noting that, "we've had unlimited corporate contributions in politics available in Oregon for … nearly 20 years. It has not been the end of Western Civilization." DiLorenzo says money helps candidates and the public debate ideas — even though the cost of those debates can be astronomical.

"When you compare it to the amount of money people spend advertising Tide or McDonald's hamburgers, it's nothing," he says. "We are nowhere near a threshold to be worried about … And if (we're) spending the majority of our ad dollars on matters of public concern, God bless us."

Both the state and DiLorenzo argued before the Supreme Court that there wasn't any real basis to reopen the VanNatta case. The Oregon Department of Justice said Measure 47 is constitutional, but should stay dormant until the VanNatta ruling is overturned or the constitution shifts. DOJ attorneys argued that the Secretary of State and the Attorney General correctly interpreted the deferred-option clause. DiLorenzo said Measure 47 is unconstitutional and wanted the court to declare it invalid. The justices declined to do so. Measure 47 now lies dormant, awaiting the next legal challenge.

But DiLorenzo, a seasoned lobbyist, said he'd prefer the Legislature just get rid of Measure 47. Among the practical concerns is that so much has changed since its approval. No one is quite sure how the VanNatta case would fare in a future constitutional challenge, should it come, but DiLorenzo said he didn't see any signals in the Supreme Court's decision. One thing is certain, though. "If somebody ever does a wholesale re-examination of VanNatta, they're going to have to do it with Citizens United in mind," DiLorenzo said. ■