BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PHILLIP D. MORSMAN, BRIGITTE MORSMAN and DOUG SHEPARD,
Petitioners,

vs.

CITY OF MADRAS,
Respondent.

LUBA No. 2003-170

FINAL OPINION
AND ORDER

On remand from the Court of Appeals.

Michael F. Sheehan, Scappoose, represented petitioners.

Robert S. Lovlien, Bend, represented respondent.

HOLSTUN, Board, Member; DAVIES, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED 08/02/2005

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Holstun, Board Member.

INTRODUCTION

This annexation case has a long history. It involves what is commonly referred to as a triple majority annexation. Under the triple majority annexation process that is authorized by ORS chapter 222, a city is authorized to proclaim an annexation without an election in the area to be annexed upon receipt of the consents of a majority of the property owners in the area to be annexed who own more than half of the property to be annexed representing more than half the assessed value of the property to be annexed.

In *Morsman v. City of Madras*, 45 Or LUBA 16, *aff'd in part rev'd in part* 191 Or App 149, 81 P3d 711 (2003) (*Morsman I*), we remanded the city's initial attempt to annex a large area located north of the current city limits. In *Morsman I*, we rejected petitioners' argument that the challenged annexation violates the "reasonableness test," which the city is obligated to apply to annexations under *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952) (hereafter *PGE v. Estacada*). However, we sustained petitioners' first assignment of error and concluded that the city erred by failing to apply city comprehensive plan annexation criteria that govern annexations or, if the city has no such comprehensive plan criteria, by failing to apply the statewide planning goals in approving the disputed election. 45 Or LUBA 19. We also found that the record suggested that the city may have offered improper inducements to secure some of the needed property owner consents, and directed the city to address that issue on remand.

Petitioners appealed our decision in *Morsman I* to the Court of Appeals. In *Morsman v. City of Madras*, 191 Or App 149, 81 P3d 711 (2003) (Morsman II), the Court of Appeals held that our rejection of petitioners' *PGE v. Estacada* "reasonableness test" argument was premature. The court explained that because LUBA found that the city must provide notice, hold a hearing and adopt a decision that applies applicable land use standards, that process and decision making should precede any ruling on whether the disputed annexation satisfies the "reasonableness test." Because the required city land use hearing and decision making could discover "facts that, while not

indicating noncompliance [with land use standards], nonetheless render the annexation unreasonable under *[PGE v. Estacada]* standards," the court ruled LUBA's ruling on the reasonableness issue was premature. *Morsman II,* 191 Or App 155.

While the appeal of *Morsman I* was still pending before LUBA and the Court of Appeals, the city commenced local proceedings and approved a slightly modified version of the annexation. That decision was appealed to LUBA. In *Morsman v. City of Madras,* 47 Or LUBA 80 (2004) (*Morsman III*), petitioners argued for the first time to LUBA that the triple majority method of annexation that the city employed in approving the disputed annexation violates Article I, section 20 of the Oregon Constitution and the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution. We found that petitioners waived that argument by failing to raise it in *Morsman I*. We then directed a limited remand, finding that the record showed that the city improperly conditioned phased property tax inducements to five property owners to secure their consents to the annexation and that two other property owners were offered improper promises of future planning and zoning decisions to secure their consents. We rejected all of petitioners' remaining arguments, including their arguments that the annexation violates the *PGE v. Estacada* "reasonableness test."

Petitioners appealed our decision in *Morsman III* to the Court of Appeals. Petitioners alleged seven assignments of error at the Court of Appeals, challenging various aspects of our decision. The Court Appeals rejected six of those assignments of error, but sustained one of them. *Morsman v. City of Madras*, 196 Or App 67, 100 P3d 761 (2004), *rev den* 338 Or 374, ___ P3d ___ (2005) (*Morsman IV*). In *Morsman IV*, the Court of Appeals concluded that LUBA erred in finding that petitioners' constitutional challenges to the triple majority method of annexation were waived, and remanded "for LUBA to consider that matter in the first instance." 196 Or App 79. Those constitutional issues are all that remain to be decided in this appeal, and we now consider petitioners' constitutional challenges.

ANNEXATION UNDER ORS CHAPTER 222

As we explain later in this opinion, one of the more important factors in analyzing constitutional challenges to annexation statutes is the structure of the statutes. We therefore outline below the sections of ORS chapter 222 that govern city annexation of contiguous territory. The below outline both reflects and belies the overall complexity of the ORS chapter 222 annexation provisions.

A. Annexation Initiation

ORS 222.111 provides two ways to initiate city annexation of contiguous territory. First the city's legislative body may initiate an annexation "on its own motion." ORS 222.111(2). Second, an annexation can be initiated by "owners of real property in the territory to be annexed." *Id*. Electors apparently do not have a right under ORS chapter 222 to initiate city annexation of contiguous territory.

B. Approval of the Proposed Annexation

With several exceptions, ORS 222.111(5) requires that the city council submit the proposed annexation to (1) the voters of the city and (2) the voters living in the area to be annexed.[1] Those elections may be held simultaneously or at different times. ORS 222.111(6). We describe the exceptions to the ORS 222.111(5) requirement for voter approval of city annexations of contiguous lands below.

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[1] ORS 222.111(5) provides:

> "The legislative body of the city shall submit, except when not required under ORS 222.120, 222.170 and 222.840 to 222.915 to do so, the proposal for annexation to the electors of the territory proposed for annexation and, except when permitted under ORS 222.120 or 222.840 to 222.915 to dispense with submitting the proposal for annexation to the electors of the city, the legislative body of the city shall submit such proposal to the electors of the city. The proposal for annexation may be voted upon at a general election or at a special election to be held for that purpose."

1. City Council Decision to Dispense with an Election in the City

Once a proposed annexation is initiated, unless a city's charter requires a vote by city voters on a proposed annexation, the city council may simply dispense with submitting the proposed annexation to the city voters. ORS 222.120(2). The choice is left to the city council, and there are no statutory standards that the city council is obligated to apply in making its choice regarding whether to hold an election within the city on the annexation question. If the city council chooses to dispense with an election within the city, it must "fix a day for a public hearing before the [city council] at which time the electors of the city may appear and be heard on the question of annexation." ORS 222.120(2). Although ORS 222.120(2) gives the city council a general and unilateral option to dispense with an election in the city, it does not give the city council a general and unilateral option simply to dispense with an election within the area to be annexed. The only exceptions to the ORS 222.111(5) requirement for an election in the area to be annexed are noted below.

2. Island Annexations

ORS 222.750 authorizes what are commonly referred to as island annexations.[2] While an ordinance or resolution that approves an island annexation is subject to referendum, a prior vote by the city electorate or by the voters in the annexed territory is not required.[3]

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[2] ORS 222.750 provides:

> "When territory not within a city is surrounded by the corporate boundaries of the city, or by the corporate boundaries of the city and the ocean shore or a stream, bay, lake or other body of water, it is within the power and authority of that city to annex such territory. However, this section does not apply when the territory not within a city is surrounded entirely by water. Unless otherwise required by its charter, annexation by a city under this section shall be by ordinance or resolution subject to referendum, with or without the consent of any owner of property within the territory or resident in the territory."

[3] Although ORS 222.111(5) expressly references the health hazard annexation provisions at ORS 222.840 to 222.915 as providing an exception to the ORS 222.111(5) requirement for a vote on an annexation within the city and the annexed territory, it does not expressly reference the island annexation provision at ORS 222.750. Nevertheless, nothing in ORS 222.750 reasonably suggests that a prior vote by city electors or the electors in the annexed territory is required, and the language subjecting island annexations to the possibility of a referendum makes it reasonably clear that prior approval by city voters and voters in the annexed territory is not required for island annexations.

3. Health Hazard Annexation

The statutory procedure for approving annexations to abate health hazards does not require approval of such annexations by city voters or by the voters in the territory to be annexed. ORS 222.840 to 222.915. ORS 222.111(5) expressly exempts such annexations from any requirement that city voters or the voters in the territory to be annexed be given an opportunity to vote on the proposed annexation. *See* n 1.

4. Double Majority Annexations

If a double majority consisting of (1) all the owners of land in the territory to be annexed and (2) 50 percent of the electors in that territory consent to a proposal to annex contiguous territory, no election is required in either the city or the territory to be annexed. ORS 222.125.[4] ORS 222.170(2) authorizes a second type of double majority annexation (majority of electors and majority of land owners in the area to be annexed), under which an election within the territory to be annexed is not necessary.[5]

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[4] ORS 222.125 provides:

> "The legislative body of a city need not call or hold an election in the city or in any contiguous territory proposed to be annexed or hold the hearing otherwise required under ORS 222.120 when all of the owners of land in that territory and not less than 50 percent of the electors, if any, residing in the territory consent in writing to the annexation of the land in the territory and file a statement of their consent with the legislative body. Upon receiving written consent to annexation by owners and electors under this section, the legislative body of the city, by resolution or ordinance, may set the final boundaries of the area to be annexed by a legal description and proclaim the annexation."

[5] Under ORS 222.170(2):

> "The legislative body of the city need not call or hold an election in any contiguous territory proposed to be annexed if a majority of the electors registered in the territory proposed to be annexed consent in writing to annexation and the owners of more than half of the land in that territory consent in writing to the annexation of their land and those owners and electors file a statement of their consent with the legislative body on or before the day:
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> "(a) The public hearing is held under ORS 222.120, if the city legislative body dispenses with submitting the question to the electors of the city; or
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> "(b) The city legislative body orders the annexation election in the city under ORS 222.111, if the city legislative body submits the question to the electors of the city."

5. Triple Majority Annexations

The final exception to the ORS 222.111(5) requirement that city annexation of contiguous territory be approved by the voters of the city and voters of the annexed territory is provided by ORS 222.170(1).[6] This is the triple majority annexation method that petitioners contend violates Article I, section 20 of the Oregon Constitution and the Equal Protection Clause of the U.S. Constitution.

EQUAL PRIVILEGES AND IMMUNITIES UNDER THE OREGON CONSTITUTION

We first consider petitioners' argument under Article I, section 20 of the Oregon Constitution, before turning to their equal protection challenge. *Sterling v. Cupp*, 290 Or 611, 614, 625 P2d 123 (1981). Petitioners rely heavily on *Mid-County Future Alt. v. Port. Metro. Area LGBC*, 82 Or App 193, 728 P2d 63, *adhered to as modified* 83 Or App 552, 733 P2d 451, *rev dismissed* 304 Or 89 (1987). *Mid-County* concerned a challenge to the statutory triple majority annexation method provided in ORS chapter 199, which applies to local government boundary commissions. Under that triple majority annexation process, an annexation that was initiated by the boundary commission after it received consents from a triple majority of property owners in the annexed territory required a public hearing, but did not require an election in the city or the area to be annexed. The boundary commission could proceed to approve the annexation

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[6] Under ORS 222.170(1):

> "The legislative body of the city need not call or hold an election in any contiguous territory proposed to be annexed if more than half of the owners of land in the territory, who also own more than half of the land in the contiguous territory and of real property therein representing more than half of the assessed value of all real property in the contiguous territory consent in writing to the annexation of their land in the territory and file a statement of their consent with the legislative body on or before the day:
>
> "(a) The public hearing is held under ORS 222.120, if the city legislative body dispenses with submitting the question to the electors of the city; or
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> "(b) The city legislative body orders the annexation election in the city under ORS 222.111, if the city legislative body submits the question to the electors of the city."

following the public hearing.[7] The Court of Appeals held that this method of annexation without an election in the territory to be annexed violates Article I, section 20 of the Oregon Constitution:

> "The city urges that, when the 'triple majority' provision is viewed in the context of the various methods of annexation, it becomes apparent that the provision does not grant to landowners any privilege not granted to nonlandowners on equal terms. However, as we view the statutory scheme, it is only when we examine all of the methods of accomplishing 'minor boundary changes' that the true one-sidedness of the 'triple majority' process becomes apparent. Although landowners and nonlandowner electors alike have the right to petition the boundary commission directly for annexation, ORS 199.490(1)(b) and (c), the consent process goes a step beyond. It permits a 'triple majority' of the landowners, regardless of whether they are electors registered in, or even residing in, the territory to be annexed, to decide in favor of annexation, submit their consents to the governing body and thereby foreclose the election process if the proposed annexation is approved. No similar privilege is accorded to electors who are not landowners. The state's justification for denying that privilege to nonlandowners is, presumably, its interest in eliminating the administrative burden of an election 'where consent procedures had already established that annexation was the clear will of the property owners in the affected territory.' *Peterson v. Portland Metropolitan Boundary Comm.*, [21 Or App 420, 429, 535 P2d 577 (1975)]. Applying the 'balancing' test described in *Olsen v. State ex rel Johnson*, 276 Or 9, 19, 554 P2d 139 (1976); *see also Planned Parenthood Assn. v. Dept. of Human Res.*, 63 Or App 41, 56, 663 P2d 1247 (1983), *aff'd* 297 Or 562, 687 P2d 785 (1984), we conclude that that justification is not sufficient when it is weighed against the privilege to vote in a matter of general concern to electors registered in the territory to be annexed and that the 'triple majority' provision violates Article I, section 20, of the Oregon Constitution." 82 Or App 199-200.

Based on the Court of Appeals' decision in *Mid-County*, LUBA subsequently found that the triple majority method authorized by ORS 222.170(1), the same statute that is at issue in this case, also violates Article I, section 20. *Storey v. City of Stayton*, 15 Or LUBA 165, 176 (1986).

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[7] There are some differences between the statutory scheme at play in *Mid-County* and the statutory scheme set out in the current version of ORS chapter 222. However, with one possible exception, none of those differences appears to be material, and we do not discuss them further. The one possible exception is that under the statutory scheme in effect in *Mid-County*, the required triple majority of consents had to be filed *before* the boundary commission initiated the annexation. Under ORS 222.170, the consents may be submitted *after* the annexation is initiated, up until the day (1) the city council orders an election in the city, or (2) the public hearing is held when the city council dispenses with the election in the city. We discuss this difference in the statutory schemes later in this opinion.

The continuing validity of the holding in *Mid-County* was recently called into serious question by the Court of Appeals' decision in *Sherwood School Dist. 88J v. Washington Cty. Ed.*, 167 Or App 372, 6 P3d 518 (2000) (*Sherwood School Dist*.). That case involved statutes that provided residents of an affected school district a right of remonstrance when school district boundary changes are proposed. If sufficient remonstrances were filed, the boundary change had to be approved by the electors in the affected school district. Under those statutes, the efforts of the residents of a subdivision in Tualatin to have the subdivision removed from the Sherwood School District and added to the Tigard-Tualatin School District had been thwarted by remonstrances. In 1995, the legislature adopted a statutory amendment that had the effect of legislatively approving the boundary change. Sherwood School District electors and others challenged the 1995 legislation on several grounds, including Article I, section 20. The Court of Appeals rejected the school district's Article I, section 20 challenge. In doing so, the Court of Appeals included the following discussion of *Mid-County*:

> "Our decision in *Mid-County* is not to the contrary. At issue in that case was the constitutionality of a statute that permitted the annexation of an area without an election upon the satisfaction of three conditions: (1) that half of the *landowners*--not the residents--in the affected area provided written consent to the annexation; (2) that those landowners owned more than half the land in the affected area; and (3) that the value of those lands represented more than half of the assessed value of all lands in the affected area. The plaintiffs, residents who did not own land in the affected area, challenged the constitutionality of the statute under Article I, section 20. We held that the statute was unconstitutional, but we did so because, on balance, the interest of the state was simply not sufficiently compelling when weighed against the right to vote in annexation matters that ordinarily is available to residents of an affected area. *Mid-County*, 82 Or App at 199-200. The sort of balancing test that this court employed in *Mid-County* has since been explicitly abandoned. *Hale [v. Port of Portland*, 308 Or 508, 524, 783 P2d 506 (1989)] ('This is a test drawn from federal equal protection doctrine (and akin to 'balancing') that for the purposes of Article I, section 20, has been suspended by our more recent decisions.'). *Mid-County* no longer can be regarded as good law. We therefore conclude that the trial court did not err in holding that Section 22 does not violate Article I, section 20." 167 Or App 388 (emphasis in original).

As petitioners correctly point out, the court's decision in *Sherwood School Dist*. determines that *Mid-County* applied an Article I, section 20 test in reviewing the triple majority statutes at issue in that case that is no longer applied by Oregon's appellate courts. It is possible the Court of Appeals could still find that the triple majority method of annexation at issue in *Mid-County*, or the one that is at issue in this appeal, violates Article I, section 20 under the test the court now applies. We therefore consider whether the triple majority method of annexation that is provided by ORS chapter 222 violates Article I, section 20, under the test the Oregon appellate courts now apply in analyzing Article I, section 20 challenges to statutes. The Court of Appeals described its approach in analyzing Article I, section 20 challenges in *Withers v. State of Oregon*, 163 Or App 298, 306, 987 P2d 1247 (1999):

> "In order to make an Article I, section 20, equal privileges and immunities challenge to a statute, a plaintiff must show:
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> > '(1) that another group has been granted a 'privilege' or 'immunity' which [plaintiff's] group has not been granted, (2) that [the statute at issue] discriminates against a 'true class' on the basis of characteristics which [the class has] apart from that statute * * *, and (3) that the distinction between the classes is either impermissibly based on persons' immutable characteristics, which reflect 'invidious' social or political premises, or has no rational foundation in light of the state's purpose.' *Jungen v. State*, 94 Or App 101, 105, 764 P2d 938 (1988), *rev den* 307 Or 658, *cert den* 493 US 933 (1989) (citations omitted)."

Petitioners' entire argument in support of their claim that they are members of a true class that has been denied a privilege that another class has been granted is as follows:

> "The first question under Article I, Section 20 analysis described above is whether voters resident in the proposed annexation area constitute a true class. The class of resident voters was not created by ORS 222.170(1) and so is a true class." Petition for Review 22.

ORS 222.170(1) extends a right to property owners in the annexed area that it does not extend to resident voters. A triple majority of property owners in an area to be annexed is given the unilateral right to consent to a proposed annexation and thereby make an election in the area to be

annexed unnecessary. We understand petitioners to claim to be within a class of electors who reside in the area to be annexed who do not own property. They do not have a right to consent to an annexation, and thereby enable the city council to approve the annexation without an election in the affected area. We conclude that resident voters are just as true a class as the class of residents of a particular geographic area.[8] *Withers*, 163 Or App at 307-8; *Sherwood School Dist*., 167 Or App at 386. We also agree with petitioners that the right to consent to annexation, and thereby empower the city council to approve the annexation without a vote in the territory to be annexed, is a "privilege," within the meaning of Article I, section 20. *Mid-County*, 82 Or App at 199.

The only remaining question is whether that different treatment of property owner and electors under the statutes runs afoul of Article I, section 20. That question is analyzed differently, depending on whether the different treatment involves a suspect classification or not.

> "To say that disparately treated true classes are protected by Article I, section 20, does not end the matter. Depending on what type of true class is involved, the legislation or governmental action may or may not be upheld in spite of the disparity. In that regard, the cases draw a distinction between 'suspect' classes and other true classes. The former classes are subject to a more demanding level of scrutiny, and legislation or government action disparately treating such classes is much more likely to run afoul of Article I, section 20, than is legislation or government action that disparately treats a nonsuspect class." *Tanner v. OHSU*, 157 Or App 502, 521, 971 P2d 435 (1998).

Unless the consent privilege that ORS 222.170(1) extends to property owners involves a suspect classification, there need only be a rational basis for extending that privilege to property owners, while not extending a similar privilege to resident electors who do not own property.

Suspect classifications are not necessarily limited to those with immutable characteristics; they may also include classifications based on "characteristics [that] are historically regarded as defining distinct, socially recognized groups that have been the subject of adverse social or political

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[8] Although petitioners do not expressly allege that they are resident voters, we will treat the above quoted language from the petition for review to implicitly include that allegation. The city does not dispute that petitioners are resident voters or that resident voters are a true class.

stereotyping or prejudice." *Tanner*, 157 Or App 522-23. Petitioners do not argue that property ownership is an immutable characteristic, but they spend almost five pages of their petition for review arguing that property ownership is a suspect classification based on historical preferences to landowners. If one goes back to Roman times, as petitioners do on page 22 of their petition for review, there can be no doubt that political power has historically been skewed in favor of property owners. Even in the early days of this country, property ownership was a requirement for both the franchise and the exercise of many other political rights. But we are unconvinced by petitioners' suggestion that historical discrimination against those who do not own real property, and in favor of those who do, retains the kind of significance and relevance in this country in the 21st century that justifies treating classifications based on property ownership as suspect classifications. There obviously are modern examples of laws that favor real property owners over those who do not own real property. And we are not so naive as to believe that some governmental and individual discrimination against persons who do not own property and rent their living space does not exist today. But the question is whether the class of persons who do not own property is "the subject of adverse social or political stereotyping or prejudice," such that property ownership is a suspect classification under Article I, section 20. Petitioners cite us no cases that hold that it is. We conclude that it is not.

Based on our conclusions above, the triple majority method of consenting to annexation must only have a rational basis and is not subject to the heightened scrutiny that is applied in cases that involve suspect classes.

> "To survive rational basis analysis, it must be shown that 'the classification involved bear[s] some relationship to a legitimate end.' *Withers*, 163 Or App at 309. In conducting the analysis, we are not limited to the purpose of the statute as reflected in its language or legislative history. Instead, we determine whether there is *any* rational basis for the legislation. *Southern Wasco County Ambulance v. State of Oregon*, 156 Or App 543, 552 n 4, 968 P2d 848 (1998), *rev den* 328 Or 330 (1999); *Kmart Corp. v. Lloyd*, 155 Or App 270, 277, 963 P2d 734 (1998).
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> "A 'legitimate' legislative end similarly is broadly construed. The authority of the legislature to choose an objective for legislation is 'plenary,' subject only to the

> limitations that the state or federal constitutions impose. * * * That is because the state constitution does not grant the legislature authority but, rather, only limits it. * * *" *Sherwood School Dist*., 167 Or App at 386-87.

Petitioners do not really make any attempt to argue that the triple majority method of annexation bears no rational relationship to a legitimate state purpose. In *Mid-County* the court provided the following description of the state's purpose in extending the consent privilege to landowners:

> "The state's justification * * * is, presumably, its interest in eliminating the administrative burden of an election 'where consent procedures had already established that annexation was the clear will of the property owners in the affected territory.'" 82 Or App at 199.

While property owners are not the only ones who are affected by an annexation, they clearly have a significant stake in the question. And in many cases, if not most cases, those property owners will also be voters. While it is possible to debate the wisdom of the classification involved in the triple majority method, it is rationally related to a legitimate state purpose. *See Sherwood School Dist*., 167 Or App at 387 (statute eliminating power of remonstrance in specified school district to resolve longstanding dispute rationally related to a legitimate legislative purpose).

Petitioners' equal privileges and immunities challenge to ORS 222.170(1) is denied.

EQUAL PROTECTION UNDER THE 14TH AMENDMENT TO THE U.S. CONSTITUTION

A. Introduction

At the outset we note that petitioners contend that *Mid-County* found that the triple majority method of annexation at issue in that case violated both Article I, section 20 and the Equal Protection Clause of the federal constitution. We do not agree. In *Mid-County* the court certainly cited and relied on cases that were decided under the Equal Protection Clause ("[o]ur reasoning is supported by the analysis under the federal Equal Protection Clause"). 82 Or App at 200. However the court's holding in *Mid-County* does not extend beyond the Article I, section 20 challenge:

> "Because resolution of this case would not be complete without resolving the state constitutional ground, and because we reverse on that ground, we do not reach petitioners' alternative contentions." 82 Or App at 196.

Turning to petitioners' equal protection challenge, there are two well-accepted general propositions that are in play in almost all equal protection challenges to annexation schemes that provide different methods of annexation, where some of those methods call for elections and some of those methods do not. The first general proposition is that there is no federal constitutional right to vote on questions of incorporation and annexation, and federal courts extend great deference to state legislatures in crafting the state laws that govern municipal incorporation and annexation. The case that is often cited for that principle is *Hunter v. Pittsburgh*, 207 US 161, 178-79, 52 L Ed 151, 28 S Ct 40 (1907):

> "We think the following principles have been established by them and have become settled doctrines of this court, to be acted upon wherever they are applicable. Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing the Federal Constitution which protects them from these injurious consequences. The

> power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."[9]

Similarly, there is no state constitutional right in Oregon to vote on a proposed annexation. *Mid-County Future Alternatives v. City of Portland*, 310 Or 152, 166, 795 P2d 541, *cert den* 498 US 999, 111 S Ct 558, 112 L Ed 2d 564 (1990). Therefore, it is clear that as far as the federal and state constitutions are concerned, the Oregon Legislature is free to enact statutes that allow annexations to be initiated and carried through to completion without any election, either in the territory to be annexed or in the city that annexes that territory.

The second general proposition arises because state laws frequently do require or authorize elections in conjunction with at least some annexations. Even where there is no federal constitutional requirement to provide an election on a matter, the U.S. Supreme Court has held that where the right to a general election on a matter is extended to the voters by state law, the state's authority to restrict or limit the franchise is narrowly circumscribed.

In *Kramer v. Union Free School District*, 395 US 621, 23 L Ed 2d 583, 89 S Ct 1886 (1969), the Supreme Court applied strict scrutiny and held that a statute that restricted the right to vote in school district elections to owners and renters of real property and to parents of children enrolled in the public schools violated the Equal Protection Clause. The Supreme Court subsequently held that restricting the franchise to property taxpayers in municipal bond elections violates the Equal Protection Clause. *Hill v. Stone*, 421 US 289, 44 L Ed 2d 172, 95 S Ct 1637 (1975); *City of Phoenix v. Kolodziejski*, 399 US 204, 26 L Ed 2d 523, 90 S Ct 1990 (1970); *Cipriano v. City of Houma*, 395 US 701, 23 L Ed 2d 647, 89 S Ct 1897 (1969). The Court summarized its holdings in *Hill*:

> "The basic principle expressed in these cases [*Kramer*, *Cipriano*, and *City of Phoenix*] is that as long as the election in question is not one of special interest, any

[9] *Hunter* is actually a due process case rather than an equal protection case. Nevertheless it is frequently cited in discussing rational basis review under the Equal Protection Clause. *Green v. City of Tucson*, 340 F3d 891, 901 (9th Cir 2003).

> classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest." 421 US at 297.

Based on these cases, a number of courts have applied strict scrutiny and ruled annexation statutes unconstitutional under the federal Equal Protection Clause, where those statutes improperly restrict a right to vote on annexations under state law.

Applying these two principles in the annexation cases we have found, the controlling issue reduces to deciding whether the statutory scheme improperly restricts a statutory right to vote (so that it is analyzed as a voting rights case) or simply provides alternative methods of annexation, some of which do not require elections (so that it is analyzed as a multiple annexation methods case). *See Kaltsas v. City of North Chicago*, 160 Ill App 3d 302, 307, 513 NE 2d 438 (1987) ("[t]he pivotal question to be answered is whether the issue * * * is one of voting rights as urged by the plaintiffs or municipal boundaries as suggested by the defendants"). If the statute is characterized as presenting an alternative methods of annexation case, rational basis scrutiny is applied and the statute almost certainly will not run afoul of the Equal Protection Clause. If the statute is characterized as presenting a voting rights case, strict scrutiny is applied and the statute almost certainly will run afoul of the Equal Protection Clause.[10] Unfortunately, the complexity of and variations in annexation schemes often allows them to be characterized either way, leading to results that are not always easy to explain.

B. Voting Rights Cases

One unusually clear case of an improper direct limitation on the right to vote is *Mayor and Council of City of Dover v. Kelly*, 327 A2d 748 (Del 1974), where the city's charter assigned different weight to votes in an annexation election, with resident electors receiving one vote and property owners receiving one vote for each $100 of the assessed value of their real estate. That

[10] *But see Green v. City of Tucson*, n 1, in which the Ninth Circuit applied rational basis scrutiny to a statutory scheme that permitted nearby cities in certain urban areas to foreclose an election to incorporate a new city by withholding their consent.

provision was found to violate the Equal Protection Clause because it impermissibly assigned different weight to different votes.

Hayward v. Clay, 573 F2d 187 (4th Cir 1978) presented a somewhat closer question. Under the South Carolina statutes at issue in *Hayward*, an annexation proposal was initiated by 15 percent of freeholders in the area to be annexed.[11] A vote of the electors in both the city and the annexed area was required to approve the annexation. However, prior to that vote or concurrently with that vote, a majority of the freeholders in the annexed areas was also required to approve the annexation in a referendum. *Hayward* involved a concurrent vote in which a majority of the freeholders voted against annexation in their referendum, but a majority of the voters in the annexed area and the city voted in favor of the annexation. The court applied a "substance over form" analysis to reject the county's argument that the freeholder referendum in *Hayward*, while conducted simultaneously with the election in that case, was actually a condition precedent to the election in the city and in the annexed area, and therefore did not burden the voters' franchise. The court held that the statute "in effect * * * grants to some individuals – who are identified on the basis of ownership of realty – the right to nullify a vote for annexation by the electorate at large." 573 F2d at 189.

Seattle v. State, 103 Wash 2d 663, 694 P2d 641 (1985), concerned a statute that authorized annexation upon petition by 20 percent of the voters followed by a majority vote in an election. While such a petition was pending, the legislature amended the statute to permit 75 percent of the property owners or the owners of 75 percent of the assessed value of property to file a petition to terminate the annexation proceeding. The court held that the amendment violated the state and federal Equal Protection Clauses because it granted a veto power on the basis of property ownership:

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[11] Under the South Carolina statute, freeholders were allowed a vote for each piece of property they owned.

> "The state may not restrict the vote to property owners either directly, through limitations on the right to vote, or indirectly, by giving a particular class the power to prevent an election." 103 Wash 2d at 673.

Curtis v. Board of Supervisors, 7 Cal 3d 942, 104 Cal Rptr 297, 501 P2d 537 (1972), a case that was cited by the court in *Seattle*, reached a similar conclusion. In that case the relevant statutes allowed incorporation proponents to file a petition for incorporation. Then an agency applied statutory standards to approve the incorporation. The proponents were then required to circulate a petition for incorporation that was signed by 25 to 50 property owners. If 25 percent of the property owners owning 25 percent of the value of the property in the area to be incorporated signed the petition, the Board of Supervisors was required to hold at least two hearings. The relevant statute provided:

> "If upon the final hearing the board of supervisors finds and determines that written protests to the proposed incorporation have been filed with the board, signed by qualified signers representing 51 percent of the total assessed valuation of the land within the boundaries of the proposed incorporation, the jurisdiction of the board of supervisors shall cease; no election shall be called and no further petition for the incorporation of any of the same territory shall be initiated for one year after the date of such determination."

The court in *Curtis* analyzed the statue as one that conferred to landowners the "power to halt an election" in the area to be incorporated and to thereby "prevent all qualified voters from casting their vote." 7 Cal 3d at 955. The court found that the statute was one that burdened the right to vote and therefore must survive strict equal protection scrutiny. *Id*. The court ultimately found that "no compelling state interest requires that nonlandowners be excluded from the group empowered to decide whether an election to incorporate a city be called * * *." *Id*. at 961.

With the above summary of cases that have found the disputed statutes improperly restricted a constitutionally protected right to vote, we now turn to some cases that have viewed the relevant statutes as merely presenting alternative methods of annexation.

C. Alternative Methods of Annexation Cases

Statutes that are structured so that the choice between a process that will lead to a vote and a process that will not lead to a vote is made at the beginning of the process fare better than statutes that allow the right to vote to be eliminated after the annexation process has begun. For example, in *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 145 Wash 2d, 42 P3d 394 (2002), *vacated in part* 150 Wash 2d 791, 83 P3d 419 (2004) (*Grant County*), the relevant statutes provided two annexation procedures, one that required an election and one that did not. The annexation procedure that did not require an election was initiated by a petition signed by a specified percentage of property owners who owned a specified percentage of the value of the property to be annexed. The court applied rational basis scrutiny and concluded that the landowner petition method of annexation that simply assigned no role to the voters in the area to be annexed was rationally related to legitimate legislative objectives and rejected the equal protection challenge. In doing so, the court explained its different decision to apply strict scrutiny in *Seattle v. State* as follows:

> "We held that [the statute at issue in *Seattle v. State* was subject to strict scrutiny] because it effectively burdened the right to vote by granting property owners the power to prevent an election by filing a petition. *Seattle*, 103 Wash 2d at 670-72. However, in dicta, we noted that several other jurisdictions have found no infringement on the right to vote where the statutes 'merely grant property owners the right to initiate the annexation procedure,' distinguishing such cases from those in which voters made the final decision. *Seattle*, 103 Wash 2d at 670 (citing *Berry v. Bourne*, 588 F2d 422, 424 (4th Cir 1978) (where challenged procedure does not involve or contemplate election, there is no unconstitutional limitation on right to vote); *Doenges v. Salt Lake City*, 614 P2d 1237, 1239 (Utah 1980); *Torres v. Vill. of Capitan*, 92 NM 64, 582 P2d 1277, 1283 (1978) (holding that petition method of annexation did not infringe on right to vote where none of state's annexation methods involved elections); *Township of Jefferson v. City of West Carrollton*, 517 F Supp 417, 420 (Ohio 1981), *aff'd*, 718 F2d 1099 (Ohio 1983) (finding that statute which allows property owners to petition for annexation did not involve voting rights even though residents could vote on annexation under alternative statutory provision). *See also Carlyn v. City of Akron*, 726 F2d 287, 289 (6th Cir 1984) (finding no infringement on voting rights where statute did not provide voters any final authority on annexation); *Goodyear Farms v. City of Avondale*, 148 Ariz 216, 714 P2d 386, 391-92 (1986) (holding that rational basis

> review was proper because Arizona petition method of annexation did not infringe on right to vote).
>
> "Similarly, in this case, the final decision on annexation rests not with the voters in an election but with the legislative body of the municipality. Thus, because the petition method of annexation does not burden the right to vote, this case is distinguishable from Seattle." 145 Wash 2d at 719-20.

In another case, *Adams v. City of Colorado Springs*, 308 F Supp 1397 (D Colo 1970), the relevant statutes distinguished between areas where less than two-thirds of the perimeter of the area to be annexed was contiguous with the annexing city and areas where at least two-thirds of its perimeter was contiguous. In the first instance (less than two-thirds contiguous perimeter), an annexation could be initiated by a petition of one-half the property owners or a petition by a specified number of voters. If the annexation was initiated by property owner petition, the voters could petition for an election. In the second instance (at least two-thirds contiguous perimeter) an annexation could be initiated by a petition of one-half the property owners or a city council resolution and so there was no right to petition for an election. The court refused to treat that statutory scheme as presenting a voting rights case, applied rational basis scrutiny, and rejected the equal protection challenge.

Berry v. Bourne, one of the cases cited by the Washington Supreme Court in *Grant County*, concerned statutes that bear some similarity to the triple majority procedure provided by ORS chapter 222. The South Carolina statutes at issue in that case created a procedure that allowed petitions for annexation to be filed by three-fourths of property owners owning three-fourths of the value of the property to be annexed. If such a petition were filed, the city could approve the annexation without any vote at all. Other state procedures for annexation required a vote. The court specifically distinguished this statutory scheme, which it found simply authorized an alternative procedure that did not require an election, from the statutory scheme in *Hayward*, which the court described as requiring an election. *Carlyn v. City of Akron*, another case cited by the court in *Grant County*, involved a similar statutory scheme. The Ohio statutes in that case allowed annexations to be inititated by (1) property owners or (2) by the annexing city followed by vote. In

either case, the final decision on the annexation rested with the board of county commissioners and approval standards were applied. The court rejected an equal protection challenge.

A third case cited by the court in *Grant County, Township of Jefferson v. City of West Carrollton*, involved an annexation by a city that under an Ohio statute was initiated by a majority of property owners. After the annexation was initiated, the board of county commissioners held a public hearing, and the annexation could be approved without the need for an election. Another statutory procedure called for an ordinance by the annexing city, an ordinance by the county and a vote of the area to be annexed. In rejecting plaintiffs' argument that the statutes presented a voting rights case, the court explained:

> "Unlike a voting rights case where the vote or referendum is the final act triggering the acceptance or rejection of the annexation * * * the signing of a petition seeking annexation, under the procedures followed with reference to the subject property, is only a necessary condition precedent to bringing the issue to the county commission, which said body then makes the decision, after a full hearing, at which persons may appear to speak either in support of or in opposition to the issue * * * of whether the annexation should or should not be granted. In legal effect, the signing of the petition seeking annexation has no more effect on the ultimate decision of the county commission to allow an annexation, than does a grand jury indictment upon the ultimate decision of a petit jury to convict or to acquit a criminal defendant. In a constitutional sense, the Ohio law, which does not call for a vote among the residents of the township to be effected, would be just as constitutional if it took only the signature of one property owner in the area to be annexed to start the annexation procedure, as opposed to the signature of a majority of the owners." 517 F Supp at 421.

We now turn to ORS 222.170(1).

D. Does ORS chapter 222 Present a Voting Rights Case or an Alternative Methods Case?

From the above-discussed cases it is clear that the more cleanly and clearly statutes that authorize different annexation methods segregate the annexation methods that can or do require an election from those that do not provide for an election, the more likely the statues will not be viewed as presenting a voting rights case. As the Washington Supreme Court emphasized in *Grant County*:

> "Under [the statutes,] the petition method is an alternative to an election method, whereby a majority of residents vote to annex a particular property to a city. In the case of non-code cities, the Legislature has specifically provided that the election method 'shall be an alternative method, not superceding any other.' * * *" 145 Wash 2d at 716.

It also seems important in some of those cases whether the final decision in all annexations is made by someone other than the voters. In other words, whether the election in the election annexation method is the final decision on the annexation, or whether the election is essentially advisory.

On the other hand, when it is not clear at the time an annexation is initiated whether it will ultimately be subject to an election before the annexation can take effect, or the relevant statutes appear to grant a right to vote on an annexation but also allow the election to be foreclosed at some later point in the annexation process, those statutes are much more likely to be analyzed as a voting rights case.

ORS 222.170(1) does not cleanly separate the triple majority method of annexation from other methods of annexation under the statute that can or must lead to an election. Ironically, the statutes in *Mid-County*, which is the case petitioners rely most heavily on, seem to make a far cleaner statutory distinction between methods of annexation that require elections and those that do not require an election. As we have already noted, under the triple majority method of annexation provided in that case, the consent of the triple majority had to be filed *before* the annexation was initiated by resolution of the boundary commission. *Mid-County*, 82 Or App at 195 n 1. From start to finish under the triple majority method of annexation that was at issue in *Mid-County*, there simply was no right to vote in an election on the matter. Notwithstanding that the statutes seemed clearly to establish alternative methods of annexation, some that required elections and some that did not, and notwithstanding that the court recognized the permissibility of such alternative schemes, the court found the triple majority method of annexation in *Mid-County* to unconstitutionally impinge on the resident electors' right to vote:

> "As respondents have noted, courts have approved statutory schemes containing alternate methods of annexation, some of which provide for election and some of which do not. [*Carlyn*; *Adams*]; *Weber v. City Council of Thousand Oaks*, 9

> Cal 3d 950, 109 Cal Rptr 553, 513 P2d 601 (1973). *However, no cases are cited, and we have found none, that have upheld a statutory scheme that provides that a binding election can be foreclosed by the voice of the landowners in the territory*." 82 Or App at 200 (emphasis added).

We are not sure what the court meant by the above-emphasized sentence. *Weber* did not concern statutes that provided property owners a right to petition or consent in a way that could lead to annexations without a vote.[12] *Weber* would seem to have little bearing on whether the triple majority statute at issue in *Mid-County* is unconstitutional. *Adams* and *Carlyn* did involve property owner initiated annexations, which under the relevant statutes could lead to an annexation without a vote, whereas an alternative procedure would have required a vote. In *Adams*, as far as we can tell, the landowner petition at issue in that case did foreclose an election and was "binding" ("no election is permitted and no right to vote is provided" "the city must annex the area"). 308 F Supp at 1399. In *Carlyn* the board of county commissioners was the final decision maker under both the voting and nonvoting annexation methods. Therefore, under the statutes at issue in *Carlyn*, an "affirmative" vote under the voting alternative did not "bind" the county commissioners to approve the annexation, although a negative vote apparently did "bind" the county commissioners, in the sense the annexation could not be approved or considered again "for at least five years." *Holcombe v. Summit County Comm'rs*, 62 Ohio St 2d 241, 242, 405 NE 2d 262 (1980) (cited in *Carlyn* 726 F2d at 290). Although there are differences between the statutes at issue in *Carlyn*, *Adams* and *Weber* and the statutes at issue in *Mid-County*, each of the statutory schemes ultimately had the effect of granting a right to vote on a proposed annexation in certain circumstances but either foreclosing or not granting that right to vote in other circumstances.

Given the Court of Appeals' statement in *Sherwood School Dist*. that "*Mid-County* no longer can be regarded as good law," we seriously doubt the Court of Appeals would reach the

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[12] The statutes in *Weber* authorized cities to annex sparsely populated areas without a vote, unless the owners of half the property constituting half the value of the property in the annexed area filed a protest. In the event of such a protest, the annexation was terminated.

same conclusion if it were reviewing the statutes in *Mid-County* today. 167 Or App at 388. In *Sherwood School Dist*., the Court of Appeals instead emphasized in its Equal Protection Clause analysis that there is "no constitutional right to vote on * * * boundary changes." 167 Or App at 390. The amended statute in *Sherwood School Dist*. legislatively foreclosed the possibility of a referendum election concerning a geographically specific school district boundary change. The present case involves ORS 222.170(1), which operates to make an election an unnecessary precondition for a city decision to annex territory where a triple majority of property owners approve of the annexation. In both cases, the possibility of an election is foreclosed in limited, specified circumstances. The court's voting rights analysis carefully distinguished cases where there "was an election, and the government entities unlawfully imposed qualifications on who could vote *in that election*." 167 Or App at 392 (emphasis in original). The court ultimately concluded that a legislative decision to amend the law so that the voters in one geographic area were denied a potential right to vote on a boundary issue, whereas voters in other geographic areas retained a potential right to vote on such boundary issues, did not implicate a fundamental right to vote and served a rational purpose.

Regardless of the constitutional propriety of the statutes that were at issue in *Mid-County*, the statutes that are before us are more problematic, and we now turn to those statutes. Unlike the statutes at issue in *Mid-County*, the statute that governs the annexation at issue in this case, ORS 222.170(1), does not require that the triple majority of consents be filed with the government before the annexation is initiated. Therefore, under ORS 222.170(1), an annexation could be initiated and then the property owner consents could be filed at a later date. If an annexation proceeded in this manner, the city council would be empowered to complete the annexation process and annex the property without a vote in the annexed territory, notwithstanding that an election in the territory to be annexed was at least a possibility at the time the annexation was initiated. That statutory

structure for allowing property owner consents to make an election unnecessary resembles the statutory schemes that were found to violate the Equal Protection Clause in *Curtis* and *Seattle*.[13]

Notwithstanding the similarity of the statutory schemes, we do not apply the reasoning in *Curtis* and *Seattle* to the triple majority method of annexation that is authorized by ORS 222.170(1). Petitioners claim repeatedly through their petition for review that ORS 222.111(5) gives them a "right to vote" on a proposal to annex property where they live and describe ORS 222.170(1) as authorizing property owners to "veto" that right. However, the language of the statute simply does not support either of those claims. Those statutes were set out earlier, but we set out the relevant parts of the statutes again here.

> "The legislative body of the city shall submit, *except when not required under ORS 222.120, 222.170 and 222.840 to 222.915* to do so, the proposal for annexation to the electors of the territory proposed for annexation[.]" ORS 222.111(5) (emphasis added).

> "The legislative body of the city need not call or hold an election in any contiguous territory proposed to be annexed if more than half of the owners of land in the territory, who also own more than half of the land in the contiguous territory and of real property therein representing more than half of the assessed value of all real property in the contiguous territory consent in writing to the annexation of their land in the territory and file a statement of their consent with the legislative body on or before the day:
>
> "(a) The public hearing is held under ORS 222.120, if the city legislative body dispenses with submitting the question to the electors of the city; or
>
> "(b) The city legislative body orders the annexation election in the city under ORS 222.111, if the city legislative body submits the question to the electors of the city." ORS 222.170(1).

The "right" to an election that ORS 222.111(5) grants to the residents of an area proposed for annexation is not a general or absolute right; it is an expressly limited and conditional right. There is no right to an election in a health hazard annexation pursuant to ORS 222.840 to 222.915.

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[13] There is of course one potentially important difference. We do not read ORS 222.170(1) to *preclude* an election. Rather the statute makes an election unnecessary. In both *Curtis* and *Seattle*, the land owner objections had the legal effect of terminating the annexation proceedings before the election could be held.

There is no right to an election in a double majority annexation under ORS 222.120. There is no right to an election in an island annexation under ORS 222.750. And there is no right to an election in triple majority or double majority annexations under ORS 222.170. There is only a conditional right to an election on annexations that are initiated by the city council or by petition of property owners under ORS 222.111(2). By its terms, under ORS 222.111(5), petitioners have no right to an election on an annexation proposal if a triple majority of property owners files their consents on or before the times specified in the statute. If that happens, it is clear under ORS 222.170 that no election must be provided and the right to an election that would otherwise have been granted under ORS 222.111(5) never comes into existence. If those consents are filed, petitioners have no right to an election and the annexation may proceed to conclusion without an election in the territory to be annexed. But property owner consents that are filed under ORS 222.170(1) do not have the legal effect of "nullifying a vote," "preventing an election" or "halting an election," as did the landowner protests that were at issue in *Hayward*, *Curtis* and *Seattle*. ORS 222.170(1) simply gives the city council the *option* of proceeding to finality on an annexation without an election, if the city council wishes to do so. ORS 222.170(1) simply makes an election unnecessary; it does not foreclose an election or prohibit the city from submitting the proposed annexation to the voters in the territory to be annexed, notwithstanding that a triple majority of the property owners in the territory to be annexed consent to the annexation.

Admittedly, the way ORS 222.111(5) and 222.170 are structured permits petitioners to make the arguments they make. Based on *Hayward*, *Curtis* and *Seattle* we likely would agree with petitioners that this would be voting rights case and would require strict scrutiny if statutes permitted the triple majority of consents to be filed and thereby *terminate* an election *after* the city council submitted the proposal to the voters in the territory to be annexed. On the other hand, if the statutes required that the triple majority of consents be filed *before* an annexation is *initiated* under ORS 222.111(2), we believe there is almost no doubt the statutes are properly viewed as simply providing alternative means of annexation. So the critical question comes down to whether ORS

222.111(5) *must* be viewed as a statute that grants a right to an election that ORS 222.170(2) then authorizes a triple majority of property owners to take away. We do not agree that the statutes *must* be viewed that way. We instead read ORS 222.111(5) and 222.170 together to create alternative methods of annexation. Under one alternative, an election is required. Under the other alternative, an election is not required. Because this is not a voting rights case, strict scrutiny is not applied under the Equal Protection Clause.

As we have already concluded in our discussion under petitioners' Article I, section 20 challenge, that distinction passes rational basis scrutiny. Such an annexation scheme does not violate the Equal Protection Clause.

Petitioners' first assignment of error is denied.

Our disposition of petitioners' first assignment of error neither adds nor detracts from the city's obligations under our remand in *Morsman III*. The city's decision is remanded.