Changing the Plan: The Challenge of Applying Environmental Review To Land Use Initiatives

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The environmental review and initiative processes are two key tools used in land use decision making. The environmental review process protects communities from unintended adverse consequences of land use decisions, while the initiative process allows voters to assert direct control over planning decisions when lawmakers have failed to uphold their interests. However, there is a tension between the two processes: the environmental review process deliberately imposes constraints on decision makers enacting laws, while the initiative process is intended to eliminate constraints on voters’ ability to directly enact laws. As a result, states have made a trade-off: either land use decisions can be made by initiative but environmental review laws do not apply, or environmental review laws apply to land use decisions but those decisions cannot be made by initiative.

This Article contends that both versions of the trade-off are problematic. The first results in a double standard: a land use regulation passed via ballot initiative is entirely exempt from state environmental review laws, even though the exact same regulation, with the exact same potential adverse impacts, would be subject to those laws if passed legislatively. The second form of the trade-off results in voter disenfranchisement: environmental review is preserved, but at the cost of barring voters from using the initiative for land use issues that may be literally in their backyards.

Using the contrasting approaches of California and Washington as a lens to focus the analysis, this Article provides a comprehensive analysis of the textual, structural, and policy justifications underlying the trade-off between environmental review and the initiative. The Article challenges the assumptions about the incompatibility of the two processes, and argues that the expertise necessary for effective environmental review and the public participation at the

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heart of the initiative process are not irreconcilable goals. Modifying each process to accommodate the other not only would better reflect the balancing of interests at the core of land use law, but can also serve to correct underlying weaknesses of each.

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INTRODUCTION

Land use laws—the means by which communities manage the use of land—are among the most routine decisions made by municipalities.1 Every day in cities and counties across the country, zoning boards approve plans for new subdivisions, city councils pass ordinances authorizing mixed-use developments, and building departments issue permits for new construction. Yet as routine as these decisions are, they present complex issues involving wide-ranging planning objectives and competing land use demands.2 To balance conflicting interests, communities incorporate a variety of legal mechanisms into their land use decision making.3

This Article focuses on two of the most important of these legal tools: the initiative process and the environmental review process. The initiative process allows citizens to propose a law and vote on it, thereby enacting legislation directly without interference from—or oversight by—elected officials.4 Rooted in progressive principles, the process emphasizes self-determination and public participation by voters.5

The environmental review process, on the other hand, is focused on bringing scientific expertise into the law-making process. Environmental review ensures that before regulations are enacted, the environmental impacts are considered, either through the preparation of environmental assessment reports or by requiring compliance with baseline environmental standards.6

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2. See, e.g., SALSICH & TRYNECKI, supra note 1, at 12–13 (describing the “land use triangle” of competing interests of landowners, regulators, and members of the public in any particular land use decision).

3. See MANDELKER ET AL., supra note 1, at 33 (discussing “a host of . . . legal devices” used to implement land use decisions).

4. The initiative is permitted as a matter of state law in twenty-four states; it is also available in more limited form as a matter of local law in some states that do not make it available as a matter of state law. See THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 2–3 (2009); Tari Renner, Local Initiative and Referendum in the U.S., INITIATIVE & REFERENDUM INST., http://www.iandrinstitute.org/Local%20I&R.htm (last visited Feb. 25, 2013). See infra Part II.B for a more detailed explanation of the initiative process.

5. See, e.g., CRONIN, supra note 4, at 51–54 (discussing these and other goals of the progressive proponents of the initiative); see also infra notes 70–81 and accompanying text for a further description of the initiative process.

6. The scope of environmental review laws varies by state: in some states, such laws only apply to a limited category of administrative actions by the state government. See Daniel P. Selmi, Themes in the Evolution of the State Environmental Policy Acts, 38 URB. LAW. 949, 956 (2006) (describing North Carolina’s environmental review law, which applies only to “the funding or use of state lands”). In other states, including California and Washington, the scope is much broader: environmental review applies not only to administrative actions by state government, but also to legislative actions by local
setting standards for the identification and mitigation of environmental impacts, the process emphasizes deliberation, expertise, and compromise.

In the context of land use law, the two processes collide. While the environmental review process deliberately imposes constraints on decision makers who are enacting laws, the initiative process is designed to eliminate constraints on voters’ ability to directly enact laws.\(^7\) Faced with the seeming incompatibility between the public participation at the heart of direct democracy and the expertise needed for effective environmental review, states have made a trade-off between the two processes: either land use decisions can be made by initiative but environmental review laws do not apply, or environmental review laws apply to land use decisions but such decisions cannot be made by initiative.\(^8\)

Although all states with the initiative process and environmental review process make this trade-off,\(^9\) California and Washington provide the starkest
governments, as well as private actions that require government approval. Id. at 957. In addition to state environmental review laws, local laws often incorporate environmental standards into planning decisions. See John R. Nolon, In Praise of Parochialism: The Advent of Local Environmental Law, 26 HARV. ENVTL. L. REV. 365, 365–66 (2002).

7. This underlying tension is reflected in the disparate characteristics of the two processes. For example, the environmental review process involves experts analyzing complex issues over a period of several months, or even years, and also features negotiation and compromise, with the opportunity for nuanced decision making. See Selmi, supra note 6, at 988. In contrast, the initiative process requires a yes-or-no decision, with little or no opportunity for compromise, by voters who not only may not have any particular expertise in the initiative’s subject matter but whose most readily available source of information is paid advertisements. See generally CRONIN, supra note 4, at 70–77 (discussing weaknesses of the initiative process when it comes to voters’ understanding of ballot issues); David L. Callies et al., Ballot Box Zoning: Initiative, Referendum and the Law, 39 WASH. U. J. URB. & CONTEMP. L. 53 (1991) (discussing general features of the initiative process); DAVID S. BRODER, DEMOCRACY DERAILLED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY (2000) (discussing weaknesses of the initiative process).

8. A companion to the initiative process is the referendum process, which allows voters to repeal legislation already passed by the legislature. CRONIN, supra note 4, at 2. Most states, including California and Washington, make a trade-off between the referendum process and the environmental review process similar to that made with regard to the initiative process (i.e., either the referendum is permitted for land use matters and environmental review laws do not apply, or environmental review laws apply to land use matters and the referendum is not permitted). To the extent states make the same trade-off, the discussion herein is applicable to the referendum as well.

9. The majority of states making the trade-off take Washington’s approach: environmental review laws apply to land use matters and use of the initiative is not permitted. See, e.g., Dan Gile & Associates, Inc. v. McVer, 831 P.2d 1024 (Or. Ct. App. 1992) (holding that the initiative cannot be used to pass a rezoning regulation because such an action violated state statutory law governing land use decisions). Other states take the California approach and allow the initiative for land use matters and do not apply environmental review laws. See, e.g., Garvin v. Ninth Judicial Circuit Court, 59 P.3d 1180 (Nev. 2002) (holding that the initiative can be used to enact a zoning amendment and overruling a prior decision that held to the contrary). The trade-off in these states is on a lesser scale than that in California, because no other state has a state environmental law as far-reaching as the California Environmental Quality Act (CEQA). Yet, a trade-off nonetheless occurs, since allowing use of the initiative means that any environmental review that occurs at the local level through the normal legislative land use process is foregone in these states. Finally, a small number of states make both types of trade-offs because they apply different rules to the initiative and referendum: for example, in Arizona, use of the initiative for land use matters is not permitted, thereby preserving environmental review;
example of the either/or choice states have made. Despite similar underlying legal regimes—both states constitutionally reserve the initiative power to voters and rely heavily on the initiative process, and they have two of the most rigorous environmental protection laws in the country—California and Washington have reached opposite conclusions on how to integrate the initiative process and environmental review process into land use decision making.

In California, if a land use regulation is passed via ballot initiative, it is entirely exempt from the state’s environmental review law, even though the exact same regulation, if passed legislatively, would be subject to the law. As a result of this double standard, initiative sponsors can evade the rigorous requirements of state environmental protection law and deny voters “the very information that would have been required had any other ‘decision-making body’ been faced with the [matter].” For example, when Venoco, an oil company operating an oceanfront drilling and refinery operation near Santa Barbara, wanted to expand its refinery, it submitted an application to the local government. As the application went through the local land use approval process, however, it became clear that modifications would likely be required under state law to mitigate the project’s adverse environmental impacts on coastal wildlife and ecosystems. Rather than continuing with the application process, and the attendant environmental review, Venoco submitted the

however, use of the referendum for land use matters is allowed, and as a result, no environmental review applies. See Queen Creek Land & Cattle Corp. v. Yavapai Cnty., 501 P.2d 391, 394 (Ariz. 1972) (reasoning that allowing use of the referendum for land use issues does not raise the same concerns as use of the initiative because notice and hearing have already been accomplished when the law being put to a referendum was initially enacted legislatively).

10. WASH. CONST. art. II, § 1; CAL. CONST. art. II, § 8.
12. See Nicholas Riccardi, Firms Turning to Environmental Law to Combat Rivals, L.A. TIMES, Nov. 14, 2011, http://articles.latimes.com/print/2011/nov/14/local/la-me-development-ceqa-20111114 (explaining that California, Washington, and New York are the only three states with state environmental laws that apply to private development); see also Selmi, supra note 6, at 951 n.20 (“[W]hile NEPA’s primary concern was government projects, much of the focus of the little NEPAs has been on government approval of private projects.”) (internal citations omitted).
13. See, e.g., DeVita v. Cnty. of Napa, 889 P.2d 1019 (Cal. 1995) (holding an initiative amending the county’s general plan to preserve agricultural land was not subject to CEQA). See infra Part III.A for a complete discussion of the California approach.
15. The proposed expansion fronted the Pacific Ocean shoreline and was located next to a seal rookery; the proposal would have permitted the addition of an “extended reach” operation, where the drilling equipment extends from the shore to offshore reserves, as well as continuous active drilling twenty-four hours a day. Opening Brief of Appellant, Brown v. Venoco, Inc., No. 1305637, 2010 WL 770958, at *1–3 (Cal. Ct. App. Feb. 2, 2010) [hereinafter Venoco Petitioner Brief].
16. See id.
expansion proposal to local voters as a ballot measure.\footnote{17} Even though it was the exact same proposal, with the exact same adverse environmental consequences, because the expansion was now proposed via initiative, if passed, it would be entirely exempt from the state environmental review law.\footnote{18}

In contrast, in Washington, environmental review of land use decisions is preserved, but at the cost of barring voters from using the initiative for virtually all land use matters.\footnote{19} Thus, in a state where voters can use the initiative to enact laws legalizing marijuana and permitting physician-assisted suicide,\footnote{20} they cannot use it to decide land use matters that are often literally in their backyards. For example, when residents of Clallam County learned about backroom negotiations to sell government-owned oceanfront property, which had been set aside for a future state park, to foreign investors for a private golf resort, they felt the legislative process had failed them.\footnote{21} The residents therefore proposed a ballot measure to change the zoning of the oceanfront parcel to allow only public parks, thereby deterring the sale and preserving the land’s status as a future-status park.\footnote{22} However, voters were not permitted to decide the matter: Washington’s environmental review law has been interpreted to require that land use decisions be made legislatively, regardless of whether the substance of a land use initiative would comply with the state’s environmental standards.\footnote{23}

\begin{footnotes}
\footnote{17}{See id. at *2; see also Michael Hiltzik, Oil Company Spending Lavishly to Get Around Carpinteria Law, L.A. TIMES, Feb. 21, 2010, http://articles.latimes.com/2010/feb/21/business/la-fi-hiltzik21-2010feb21 (discussing Venoco’s attempt to avoid local environmental and land use laws through use of an initiative).}
\footnote{18}{See Venoco Petitioner Brief, supra note 15, at *48. Voters, however, stymied the oil company’s attempt to take advantage of the ballot-box loophole: the measure was defeated, 70 percent to 30 percent. See Measure J2010: Paredon Oil and Gas Development Initiative, City of Carpinteria, LEAGUE WOMEN VOTERS CAL. EDUC. FUND, http://www.smartvoter.org/2010/06/28/ca/sha/meas/12010/ (last visited Feb. 26, 2013). Where Venoco failed, however, other corporate initiative sponsors have succeeded; see infra notes 171–75 and accompanying text for an overview of this problem as well as a description of Wal-Mart’s successful strategy of using the ballot-box loophole to evade environmental review of its new stores in California.}
\footnote{19}{See, e.g., City of Seattle v. Yes for Seattle, 93 P.3d 176 (Wash. Ct. App. 2004) (holding that the initiative could not be used to enact a creek restoration regulation because the regulation was implicitly preempted by the state’s Growth Management Act (GMA)). See infra Part III.B for a detailed discussion of the Washington approach.}
\footnote{22}{Id.}
\footnote{23}{See Save Our State Park v. Bd. of Clallam Cnty. Comm’rs (SOS), 875 P.2d 673 (Wash. Ct. App. 1994) (holding that the residents’ proposed initiative was not within the scope of the initiative power because it dealt with a land use issue covered by the GMA, which implicitly preempts use of the initiative). Whether because of the public controversy caused by the initiative battle or because of the downturn in the global economy at around the same time, the foreign investors backed out of the real estate consortium and no replacement investors were ever found. See Mark Higgins, 2 Backers Quit}
This Article argues that both the California and Washington approaches are flawed, and that a trade-off between the environmental review process and the initiative process is neither necessary nor appropriate. While the two processes are not without their faults, each brings something unique and valuable to land use decision making. The initiative allows voters to cut through bureaucratic red tape and can serve a useful counterbalance to pro-development legislatures, while environmental review can protect communities from unintended adverse consequences of land use decisions. By modifying each process to accommodate the other, the goals of each—expertise and public participation—can be accomplished without completely sacrificing either one. Furthermore, a middle ground may serve to correct underlying weaknesses of each by making voters more informed decision makers and streamlining environmental review to reduce unnecessary bureaucracy.

Part I begins with an overview of the environmental review process, focusing on the relevant laws in Washington and California; it then introduces the initiative process. Part II analyzes the constitutional, statutory, and policy grounds for the trade-off, using Washington and California to illustrate the contrasting approaches states have taken. Part III challenges the assumptions underlying the trade-off and argues that the expertise necessary for effective environmental review and the public participation at the heart of the initiative process are not irreconcilable goals. Part IV proposes alternatives to the status quo that would allow for use of the initiative for land use decisions while also applying environmental review, and suggests such an outcome best reflects the balancing of interests at the core of land use law. California and Washington are used as a lens to focus the analysis, but the discussion herein is relevant to analyzing the legal regimes in any state considering how to balance the environmental review process with the initiative process for land use decisions.
I. AN OVERVIEW OF THE ENVIRONMENTAL REVIEW PROCESS AND THE INITIATIVE PROCESS

A. Environmental Review of Land Use Decisions

Land use decisions—such as rezoning a particular area from residential to industrial use or granting a permit to build in excess of applicable square footage requirements—are matters largely governed by local regulations. However, because land use decisions have a myriad of environmental impacts, and such impacts may spill over into other communities, local land use decisions also must often comply with state laws designed to address environmental concerns. State laws addressing environmental impacts of land use decisions fall into two general categories: (i) state environmental protection legislation and (ii) state growth management acts (GMAs).

Sixteen states, including Washington and California, have state environmental protection legislation modeled on the landmark National Environmental Policy Act (NEPA) of 1969. Like NEPA, these state environmental protection laws (state NEPAs) are designed to “embed environmental considerations into the [government] decision-making processes” by requiring that before a government agency take an action or approve a project that may have a potential impact on the environment, it must prepare an environmental assessment, usually in the form of an environmental

28. MANDELKER, supra note 1, at 34. Originally an outgrowth of nuisance law and intended to separate incompatible uses, land use law today encompasses wide-ranging planning objectives and addresses complex land use demands to achieve the goal of balancing conflicting interests. See Euclid v. Ambler Realty Co., 272 U.S. 365, 386–90 (1926) (upholding a zoning code that established separate zones for residential, industrial, and commercial uses against constitutional challenge under the Due Process Clause of the Fourteenth Amendment). Local governments derive their land use powers largely from the police power, which is delegated to them by state enabling acts. See John R. Nolon & Mary C. Stockel, Expanding Traditional Land Use Authority Through Environmental Legislation: The Regulation of Affordable Housing, 2 HOFSTRA PROP. L.J. 1, 3 (1988).

29. See Plunkett, supra note 26, at 215 (identifying states that require local governments to consider the environmental impacts of land use decisions). Land use decisions may also have to comply with federal environmental laws, such as the Endangered Species Act. See A. Dan Tarlock, Land Use Regulation: The Weak Link in Environmental Protection, 82 WASH. L. REV. 651, 658 (2007) (“Activities such as the filling of a wetland or the development of the habitat of a listed endangered species require a federal permit in addition to compliance with all state and local regulations.”). While federal and state laws have been the primary driver of environmental review of land use decisions, local zoning regulations themselves increasingly incorporate environmental protection requirements. See CHRISTOPHER DUEERKSE & CARA SNYDER, NATURE-FRIENDLY COMMUNITIES: HABITAT PROTECTION AND LAND USE 4 (2005). See also Nolon, supra note 6, at 411 (highlighting the importance of local land use decision-making in setting environmental policy); Nicholas A. Robinson, SEQRA’s Siblings: Precedents From Little NEPA’s in the Sister States, 46 ALB. L. REV. 1155, 1162–67 (1981–82) (discussing state law approach to environmental decision making).

30. Selmi, supra note 6, at 951–54. The District of Columbia, Guam, and Puerto Rico also have legislation modeled on NEPA. Because there is no federal mandate regarding what such state laws address, they vary greatly in their coverage. Id.
impact statement/report (EIS or EIR), identifying the potential environmental impacts of the proposed action.31

GMAs address many of the same environmental concerns as state NEPAs, but rather than focusing solely on environmental impacts, they address a broad range of comprehensive planning concerns.32 Typically targeted at urban and suburban sprawl,33 GMAs articulate a set of goals and policies at the state level and require that all local planning actions be consistent with these goals. Thirteen states, including Washington (but not California), have statewide GMAs.34

1. Environmental Review Laws in California

The first state environmental law to be enacted after NEPA,35 the California Environmental Quality Act (CEQA),36 is one of the most rigorous environmental laws in the nation.37 Even critics of CEQA generally

31. The terms EIS and EIR are functionally equivalent; state environmental laws vary in which term is used. See, e.g., CAL. CODE REGS. tit. 14, § 15362 (2013) (defining EIR under CEQA); WASH. ADMIN. CODE § 197-11-400 (2013) (defining EIS under the State Environmental Policy Act (SEPA)). The type of environmental assessment required may not rise to the level of an EIS depending on the particular state law, as well as what type of activity is being considered for approval and the level of certainty about potential impacts, something less than a full-blow EIS may be all that is required. See Selmi, supra note 6, at 958; see also Robinson, supra note 29, at 1157.

32. While state NEPAs can be categorized as purely environmental laws, GMAs have a dual nature as both environmental laws and planning laws. See Quintin Johnstone, Government Control of Urban Land Use: A Comparative Major Program Analysis, 39 N.Y.L. SCH. L. REV. 373, 418–19 (1994) (noting that GMAs typically have “multiple objectives,” including protecting the environment, preventing urban sprawl, assuring adequate supply of residential and commercial property, and planning for appropriate infrastructure).

33. See id. at 417. In many respects, GMAs resemble the environmental zoning regulations that many individual localities have adopted on an ad hoc basis. GMAs are distinguished from these types of environmental zoning laws, however, because GMAs are typically state laws and rely on “a more varied set of legal controls” to achieve both comprehensive planning and environmental protection goals. See id.

34. Jerry Anthony, Do State Growth Management Regulations Reduce Sprawl?, 39 URB. AFF. REV. 376, 376 (2004). In addition to the thirteen state GMAs, there are also a handful of regional GMAs administered without state oversight. Johnstone, supra note 32, at 421–22.

35. CEQA was signed into law by Governor Ronald Reagan in 1970. RONALD E. BASS ET AL., CEQA DESEQUICKBOOK 6 (1999).

36. Entire law school courses and treatises are devoted to CEQA, as well as SEPA in Washington; thus, this section does not attempt to provide a comprehensive treatment of the laws. The goal is simply to highlight aspects that are most relevant to understanding their tensions with the initiative process. For more detailed information about California and Washington’s environmental review laws, see BASS ET AL., supra note 35; STEPHEN L. KOSTKA & MICHAEL H. ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (2d ed. 2008); RICHARD L. SETTLE, THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT: A LEGAL AND POLICY ANALYSIS (1987); Eric S. Laschever, An Overview of Washington’s Growth Management Act, 7 PAC. RIM L. & POL’Y J. 657 (1998).

37. See Riccardi, supra note 12 (noting that of the three states that are commonly considered to have the most rigorous environmental laws in the nation—California, Washington, and New York—California’s law is the most “stringent”); see also Rainwater and Stephenson, supra note 14, at 400 (calling CEQA “perhaps the most ambitious of” the state environmental laws modeled on NEPA); David
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acknowledge its significance.38 The law has been “credited with helping preserve swaths of the Sierra Nevada, Mojave Desert and [Pacific] coastline,” as well as preventing the Golden State from “becoming like one of those other states people run away from when they’re coming to California.”39

Two key characteristics—breadth of coverage and depth of coverage—set CEQA apart from NEPA and most other state environmental protection laws.40 CEQA’s breadth is due to the fact that it applies not only to administrative actions by state government, but also to legislative actions by local governments, as well as private activities, to the extent that a government approval is required to conduct those activities.41 Specifically, CEQA applies to “projects,” which are defined as “the whole of an action” that may result in physical change to the environment,42 and which are either undertaken by a public agency or involve the issuance of a permit from a public agency.43

Waite & C. J. Laffer, Weather Report: Recent Trial Court Decisions Have Held That the State Can Regulate Greenhouse Gas Emissions Under CEQA, L.A. LAWYER, Jan. 2010, at 22, 22 (“During the last four decades [since 1970, when CEQA was enacted], California has been at the forefront of cutting-edge environmental and land use regulation.”).


40. Note that much of the substantive information about CEQA is found in the CEQA Guidelines, which are issued by the California Natural Resources Agency, and found at CAL. CODE REGS. tit. 14, §§ 15000–15007 (2013). The Guidelines are not binding, but are given “significant weight” in interpreting CEQA’s provisions, and California courts rely heavily on the Guidelines when interpreting CEQA. See Rainwater and Stephenson, supra note 14, at 400–03; see also Laurel Heights Improvement Ass’n of San Francisco v. Bd. of Regents, 764 P.2d 278, 282 n.2 (Cal. 1988) (noting that courts should afford “great weight” to the CEQA Guidelines unless they are “clearly unauthorized or erroneous” under CEQA); BASS ET AL., BASS ET AL., supra note 35, at 9 (“The State CEQA Guidelines, adopted by the Resources Agency, are the primary rules and source of interpretation of CEQA.”).

41. Friends of Mammoth v. Bd. of Supervisors, 502 P.2d 1049 (Cal. 1972) (holding that the government approval of a land use permit for a private development is a “project” under CEQA, despite no clear language in the act at that time indicating that CEQA applied to private development projects). The Friends of Mammoth holding was codified the year after the decision, and CEQA now specifically provides that it is applicable to private actions that may result in a physical change to the environment to the extent they require issuance of a permit or approval from a public agency. See CAL. PUB. RES. CODE § 21001.1 (West 2013) (“The Legislature further finds and declares that it is the policy of the state that projects to be carried out by public agencies be subject to the same level of review and consideration under this division as that of private projects required to be approved by public agencies.”).

42. CAL. CODE REGS. tit. 14, § 15378(a). The impact may be “either a direct physical change in the environment, or a reasonably foreseeable indirect change in the environment.” Id.; see also CAL. PUB. RES. CODE § 21005 (providing an overview of the required discussion of significant environmental impacts in an EIR); No Oil, Inc. v. City of Los Angeles, 529 P.2d 66, 76–77 (Cal. 1974) (holding that an impact need not be momentous, permanent, or long-enduring to be considered “significant,” so long as it is more than trivial).

43. CAL. PUB. RES. CODE § 21065; CAL. CODE REGS. tit. 14, § 15378(a). The term “project” is intended to refer to the underlying activity that has the potential to cause environmental impacts, not simply the government permit necessary to go forward with it. CAL. CODE REGS. tit. 14, § 15378(c). See also Younger v. Local Area Formation Comm’n, 146 Cal. Rptr. 400, 409 (Ct. App. 1978) (explaining
“Public agency” is defined to include any “state agency, board, or commission,” as well as any city or county.44

However, the broad reach of CEQA is limited by several exceptions. First are categorical exemptions: certain types of governmental activities for which a categorical blanket determination has been made that the benefit of applying environmental review is outweighed by the cost of burdening the everyday workings of government with an additional layer of bureaucracy.45 For example, the sale of “surplus government property” is exempted from CEQA.46 The second exception is for ministerial actions (as opposed to discretionary actions):47 CEQA does not apply to actions which are based on fixed, objective standards and involve little or no personal judgment about the desirability of a proposal, such as the issuance of a building permit.48 Finally, a catchall category of statutory exceptions encompasses a variety of activities where the requirement of CEQA compliance is considered to be outweighed by other considerations, even though the activity may pose a significant threat to the environment.49

In addition to its breadth, CEQA is distinguished by its depth. Under NEPA and most other state environmental protection laws, government agencies are required to go through the process of preparing an EIS, but they are not required to take any substantive actions as a result of those findings.50

that under the reasoning of Friends of Mammoth, “project” refers to “activities culminating in physical changes to the environment”) (citations omitted); infra notes 123–27 and accompanying text. Furthermore, an activity cannot be broken into smaller parts if the intent is to avoid triggering CEQA. See BASS ET AL., supra note 35, at 21 (“In considering whether an activity is a ‘project’ an agency must look at all of the parts, components, and phases of the activity.”).

44. CAL. PUB. RES. CODE § 21063. CEQA thus encompasses administrative or executive actions at the state level, and legislative as well as administrative and executive actions at the local level. See id.

45. CAL. CODE REGS. tit. 14, § 15300.

46. See id. § 15312 (exempting the sale of surplus government property if certain criteria are met).

47. See CAL. PUB. RES. CODE § 21080(b)(1).

48. See CAL. CODE REGS. tit. 14, § 15268. For example, the issuance of a building occupancy permit would be considered a ministerial decision, since the public agency issuing it simply considers whether the building meets the required standards in the building code, and must issue the permit if those standards are satisfied. See id. This exception “implicitly recognizes that unless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless exercise.” Mountain Lion Found. v. Fish & Game Comm’n, 939 P.2d 1280, 1287 (Cal. 1997); see also Friends of Westwood, Inc. v. City of Los Angeles, 235 Cal. Rptr. 788, 797 (Ct. App. 1987) (“No matter what the EIR might reveal about the terrible environmental consequences of going ahead with a given project the government agency would lack the power (that is, the discretion) to stop or modify it in any relevant way.”).


50. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) (“Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.”). See also BASS ET AL., supra note 35, at 5–6
Thus, even if the EIS reveals drastic environmental impacts that would occur as a result of the proposed project, under NEPA and most state environmental protection laws, the project can go forward.

In contrast, CEQA not only imposes the procedural requirement in the form of an environmental assessment, but also imposes a substantive mandate: projects are not to be approved “if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.” Thus, if an EIR identifies significant environmental impacts of a project, CEQA requires that those impacts be addressed through substantive changes to the proposed project. Unless mitigation measures or alternatives to the project are adopted—or such changes are shown to be infeasible because of “[s]pecific economic, social, technological, or other considerations”—the project can be denied.

2. Environmental Review Laws in Washington

a. SEPA

Like California, Washington has a state environmental protection law, the State Environmental Protection Act (SEPA). Similar to CEQA, SEPA is both broader and deeper than NEPA and most other state environmental protection laws. SEPA applies to any “major actions significantly affecting the quality of the human environment.”

("[U]like CEQA, NEPA does not contain an explicit directive requiring federal agencies to avoid or mitigate impacts disclosed in an [EIR]."); Selmi, supra note 6, at 982 ("SEPAs that create an obligation to act on . . . alternatives [set out in the EIS] differ markedly from NEPA, which imposes no substantive constraint on agency decision making.").

51. In California, the EIS is called an EIR. BASS ET AL., supra note 35, at 69.

52. CAL. PUB. RES. CODE § 21002. See also CAL. CODE REGS. tit. 14, § 15021 (discussing the duty to minimize environmental damage and balance competing public objectives); Mountain Lion Found., 939 P.2d at 1298 ("CEQA’s substantive mandate that public agencies refrain from approving projects for which there are feasible alternatives or mitigation measures is effectuated in section 21081."); Sierra Club v. Gilroy City Council, 271 Cal. Rptr. 393, 398 (Ct. App. 1990) (”Unlike the ‘essentially procedural’ National Environmental Quality Act . . . CEQA contains substantive provisions with which agencies must comply.") (citations omitted).

53. See CAL. CODE REGS. tit. 14, § 15091(a) (discussing findings the lead agency must make if it decides to carry out a project that may result in significant environmental impacts).

54. See id. In practice, project applicants are rarely faced with an all-or-nothing choice; rather, by requiring discussion of mitigation measures and alternatives, CEQA creates a process by which a developer is brought to the table to address the most problematic parts of a project. See Robinson, supra note 29, at 1171–73. See also Selmi, supra note 6, at 986 (noting that the environmental studies conducted are typically the starting point for negotiation between public agency and project proponent); Laurel Hills Homeowners Ass’n v. City Council, 147 Cal. Rptr. 842, 845–46 (Ct. App. 1978) (noting that although a project can be denied approval if mitigation measures are not adopted, only feasible mitigation is required).

55. See WASH. REV. CODE §§ 43.21C.010–43.21C.914 (2012). The enabling regulations applicable to SEPA are found in the Washington Administrative Code. See WASH. ADMIN. CODE §§ 197-11-010 to 197-11-990 (2012).

56. In some ways, Washington’s law is even more stringent than CEQA. For example, SEPA, unlike CEQA, contains an express stewardship provision, requiring that all state agencies act to “[f]ulfill the responsibilities of each generation as trustee of the environment for succeeding generations.” WASH.
of the environment”\textsuperscript{57} undertaken by an “agency.”\textsuperscript{58} As in California, this mandate covers not only administrative actions of the state government, but also legislative actions by local governments, as well as private actions, to the extent they require government approval.\textsuperscript{59} Just as CEQA is limited by numerous exceptions within the act, the broad application of SEPA is limited by a multitude of exceptions, including categorical exemptions for certain activities which have been determined to be unlikely to have an effect on the environment.\textsuperscript{60} Finally, SEPA, like CEQA, imposes a substantive mandate as well as procedural one.\textsuperscript{61} While no particular substantive result is required under SEPA, local governments must act on the results of any environmental assessments conducted pursuant to it, and mitigate the adverse environmental impacts where possible.\textsuperscript{62}

\textit{b. GMA}

In addition to SEPA, Washington also has a GMA. Enacted in 1990, Washington’s GMA has a dual nature as an environmental review law and a statewide coordinated planning law.\textsuperscript{63} Its goals are both to prevent

\textsuperscript{57} REV. CODE § 43.21C.020. SEPA also contains a provision providing that Washington citizens have a right “to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.” Id. No similar provision appears in CEQA in California.

\textsuperscript{58} WASH. REV. CODE § 43.21C.030(2)(c). An EIS is only required under SEPA if the major action will have a “probable significant, adverse environmental impact.” Id. § 43.21C.031. “Significant” as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.” WASH. ADMIN. CODE § 197-11-794.

\textsuperscript{59} As with CEQA in California, SEPA does not apply to legislative actions by the state legislature; however, it does apply to legislative actions by local governments. See WASH. ADMIN. CODE § 197-11-714(1) (defining “agency” to include any state or local government entity “authorized to make law, [and] hear contested cases . . . except the judiciary and state legislature.”).

\textsuperscript{60} See WASH. ADMIN. CODE § 197-11-704. SEPA further subdivides “actions” into “project actions” and “nonproject actions”; the former involve a decision on a specific project, while the latter involve “big picture” decisions, such as the adoption or amendment of legislation, including zoning ordinances. See id. The procedural requirements under SEPA applicable to both project and nonproject actions are similar. See STATE OF WASHINGTON DEPT OF ECOLOGY, SEPA ONLINE HANDBOOK § 4.1 (1998), available at http://www.ecy.wa.gov/programs/sea/sepa/handbk/hbtoc.html.

\textsuperscript{61} See WASH. ADMIN. CODE §§ 197-11-800 to 197-11-890.

\textsuperscript{62} See King Cnty. v. State Boundary Review Bd., 860 P.2d 1024, 1030 n.4 (Wash. 1993) (“While SEPA is primarily procedural, this court has also permitted agencies to make substantive decisions on the basis of environmental information adduced during the SEPA process.”).

\textsuperscript{63} See Moss v. City of Bellingham, 31 P.3d 703, 708 (Wash. Ct. App. 2001) (“SEPA does not demand a particular substantive result in government decision making; rather, it ensures that environmental values are given appropriate consideration.”) (internal quotation marks omitted); see also W. Main Assoc. v. City of Bellevue, 742 P.2d 1266, 1269 (Wash. Ct. App. 1987) (“[U]nder SEPA, . . . [public agencies] must consider environmental impacts in ruling on . . . [land use] applications . . . . [A]ny governmental action may be conditioned or denied on the basis of adverse impacts disclosed by SEPA’s environmental review process.”) (citations omitted) (internal quotation marks omitted); WASH. ADMIN. CODE § 197-11-660 (setting out general criteria for the imposition of mitigation measures).

\textsuperscript{64} The multiple objectives of GMAs can “create problems as to which objectives should receive priority and as to how possible inconsistencies among objectives should be handled.” Johnstone, supra note 32, at 418. See also Richard L. Settle & Charles G. Gavigan, The Growth Management Revolution
“uncoordinated and unplanned growth and to encourage conservation and wise use of land.” The GMA requires counties and cities to develop comprehensive growth plans in accordance with a set of standards articulated in the act, as well as designate environmentally sensitive “critical areas” and enact development regulations protective of those areas. The comprehensive plan and regulations are used as the standards for future development. No state agency is required to approve the plans developed by local governments, but regional hearing boards hear petitions of noncompliance, which may be brought by any interested party.

B. The Initiative Process and Land Use Decisions

The initiative process is starkly different than the legislative process, and intentionally so. Rather than electing legislators to make decisions about what laws should be passed, the initiative allows voters to enact laws directly. Popularized in the early 1900s, when state legislatures were perceived as being controlled by special interests and “robbed . . . of their representative


65. Most cities and counties are subject to the GMA’s requirements; however, municipalities with populations or growth rates below certain cut-offs are not required to comply with the GMA unless they choose to. See GMA: Successes and Challenges, supra note 64, at 11, 14.

66. Local governments also must coordinate with each other as necessary to implement the standards set forth in the GMA. See WASH. REV. CODE §§ 36.70A.040(1)–(3), 36.70A.100.

67. Laschever, supra note 36, at 662–63. For a general overview of the mechanics of the GMA and the mechanics of the development regulation provisions in particular, see King County v. State Boundary Review Board, 860 P.2d 1024, 1027–28 (Wash. 1993) and Skagit Surveyors & Engineers L.L.C. v. Friends of Skagit County, 958 P.2d 962, 964–65 (Wash. 1998). Counties must also adopt urban growth boundaries that surround cities within them, which must be updated every ten years. GMA: Successes and Challenges, supra note 64, at 13.

68. See GMA: Successes and Challenges, supra note 64, at 13–14. The comprehensive plan can be amended once a year; the regulations can be updated more frequently. Id.

69. See id. at 11. Cities or counties that fail to comply with the act’s requirements can be sanctioned and funding from the state can be withheld. WASH. REV. CODE § 36.70A.340.

70. See Robert H. Freilich & Derek B. Guemmer, Removing Artificial Barriers to Public Participation in Land-Use Policy: Effective Zoning and Planning by Initiative and Referenda, 21 URB. LAW. 511, 512–13 (1989). The initiative is a form of direct democracy, along with the referendum and recall. See id. at 516. Both initiatives and referenda allow citizens to vote directly on whether legislation should be enacted; the difference is that an initiative proposes a new law, while a referendum is a vote whether a law previously passed by the legislature should remain law. See id. at 512–13. The recall is used exclusively to remove elected officials from office, not as a means of passing legislation. CRONIN, supra note 4, at 2.
character, “71 the initiative was conceived as a much-needed antidote to corrupt representative government.72 By allowing voters to directly control the lawmaking process, supporters of the initiative hoped not only to bypass legislatures controlled by special interests, but also to achieve the loftier goal of “maximiz[ing] the potential of the individual”73 by giving voters direct involvement in the law making process.

In order to avoid the perceived evils of representative lawmaking, however, the initiative process sacrifices many of its protective aspects. For example, representative lawmaking provides an opportunity for negotiation and compromise by lawmakers, and permits legislation to be considered in the context of the “big picture”; in contrast, the initiative puts a laser focus on a single issue and requires a stark yes-or-no choice.74 Lawmakers often consult experts before enacting legislation and can take as long as necessary to debate the merits of an issue; in contrast, an initiative sponsor is not required to be an “expert” on the subject proposed, no particular documentation about the effects of a proposed initiative is required, and the timetable applicable to laws passed via the initiative is typically more compressed than the legislative timetable.75

Because the initiative lacks many of the safeguards of the legislative process, it has been criticized as an inferior law-making process, leading to ill-advised decisions by uninformed voters.76 Furthermore, critics contend that use of the initiative has been usurped by the very special interests it was intended to remedy.77 Participation in the process, other than the actual vote, requires money—usually a lot of it.78 Those who defend the initiative today recognize

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71.  BRODER, supra note 7, at 27.
72.  Id. However, the progressive supporters of direct democracy did not necessarily intend to completely undermine or replace the legislative process; the goal was to “re redeem” representative democracy by offering a counterbalance. See CRONIN, supra note 4, at 54.
73.  See Freilich & Guemmer, supra note 70, at 518.
74.  BRODER, supra note 7, at 81–82; see also Freilich & Guemmer, supra note 70, at 516–21 (discussing pros and cons of initiative process and legislative process in the context of land use decisions).
75.  BRODER, supra note 7, at 80.
77.  Callies et al., supra note 7, at 61–62. Many of the organizations that once supported direct democracy as part of progressive movement, such as labor unions and the National Municipal League, now generally disfavor it. CRONIN, supra note 4, at 204.
78.  See BRODER, supra note 7, at 83–84. The term “initiative industry” has been coined to describe the multi-layered business of signature gatherers, polling agencies, consultants, and others involved in initiative. Id. at 163. See also Stahl, supra note 76, at 44 (“Minorities have not been very
that the initiative process has its flaws, but still see it as a necessary antidote to legislative lawmaking, which has its own weaknesses. In this view, the initiative process and representative lawmaking are two separate, but parallel, systems. While the initiative process offers a different procedure for enacting laws, substantively, voters should not be able to do any more by initiative than what a similarly situated legislative body could do.

Today, twenty-four states make the initiative available to voters as a matter of state law. While an exhaustive analysis of the initiative process is beyond the scope of this Article, three characteristics of the process are particularly relevant in the land use context. First, to satisfy constitutional separation of powers requirements, the subject of an initiative must be legislative, not administrative, executive, or quasi-judicial. Citizens voting on an initiative are taking the place of a legislature; thus, voters are limited to doing what a legislature could do—i.e., enacting legislative acts.

successful using the initiative to their advantage, as the process is weighted in favor of highly educated, affluent voters with access to money, media, and organization.

97. See Selmi, supra note 76, at 307 (advocating that the initiative is a corrective and safety net to the legislative land use process, but acknowledging that it is not the “preferred” decision-making method); see also Freilich & Guemmer, supra note 70, at 516 (explaining that because representative and direct democracy “differ in the political values they strive to maximize and the political evils they seek to minimize,” the initiative can serve a valid function in the land use system while not unduly impairing the goals of the system). In the land use context, the initiative process can serve as a useful counter-weight to pro-development pressures that may skew legislative decision making. See infra note 196 and accompanying text.

98. See Freilich & Guemmer, supra note 70, at 544, 553.

99. See Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach, 103 Cal. Rptr. 2d 447, 458 (Ct. App. 2001) (“The power of the people through the statutory initiative is coextensive with, not greater than, the power of the Legislature.”); Philadelphia II v. Gregoire, 911 P.2d 389, 394 (Wash. 1996) (“A fundamental limit on the initiative power inheres in its nature as a legislative function reserved to the people.”) (citations omitted).

100. INITIATIVE & REFERENDUM INST. AT THE UNIV. OF S. CAL., I&R FACTSHEET: WHAT IS THE INITIATIVE AND REFERENDUM IN S. CAL. (2013) [hereinafter I&R FACTSHEET], available at http://www.iandrinstitute.org/Quick%20Fact-Handouts.htm. The initiative power in these states is either granted to voters by state legislation or reserved to voters in a state constitutional provision. See infra notes 93–94 and accompanying text. The initiative is also available at the local level through home rule charter powers, even in some states where it is not available at the state level. See I&R FACTSHEET.

101. For more on the initiative process, see CRONIN, supra note 4; see also DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984) (analyzing voter participation in the context of initiatives).

102. City of Eastlake v. Forest City Enter., 426 U.S. 668, 668 (1976) (holding that use of the referendum by voters in Ohio for a land use matter did not violate federal due process, because the land use matter at issue was a rezoning, which was characterized as legislative in Ohio); see also Callies et al., supra note 7, at 70–71 (discussing the impact of the holding in Eastlake). The legislative/non-legislative distinction is usually traced to Bi-Metallic Inv. Co. v. Bd. of Equalization, 239 U.S. 441, 445–46 (1915) (holding that no procedural due process is required for legislative acts, but it is required for non-legislative (specifically, administrative) acts).

103. See, e.g., AFL-CIO v. Eu, 686 P.2d 609, 627 (Cal. 1984) (“[A]n initiative which seeks to do something other than enact a statute—which seeks to render an administrative decision, adjudicate a dispute, or declare by resolution the views of the resolving body—is not within the initiative power reserved by the people.”).
 Legislative acts are permanent and general laws, based on broad policy considerations, enacted by legislative bodies. Non-legislative acts are typically performed by other branches of government and involve the implementation of established policies or the specific application of law to an individual or limited group. While distinguishing the two is usually straightforward, in the context of land use, the line can be unclear. Land use is one of the few areas of law in which legislative bodies, such as a city council or board of supervisors, perform both legislative and non-legislative functions. For example, a city council may enact comprehensive plans—a legislative act—and also decide variance applications—a non-legislative act. Thus, the identity of the deciding body is not necessarily determinative of whether a land use action is legislative or not. In addition, particular land use decisions themselves have dual natures. For example, a rezoning has both legislative and non-legislative characteristics, leading to a split in how states categorize it. As a result, the very same act is a permissible subject for the initiative in some states, but impermissible in others.

A second key characteristic of the initiative is that the level of deference accorded to its use differs depending on whether it is vested in citizens through

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87. See Carter, 269 P.3d at 151–53.

88. See, e.g., id. at 159 (noting some land use “decisions are more difficult to classify, as they involve acts in the gray area between the clearly legislative and the clearly executive”); see also Garvin v. Ninth Judicial Circuit Court, 59 P.3d 1180, 1184 (Nev. 2002) (“[A]lthough the legislative-administrative dichotomy is often vague, that vagueness gives courts leeway in balancing two competing interests: protecting government from unwarranted harassment and protecting benefits to be won through direct legislation.”).

89. See Freilich & Guemmer, supra note 70, at 532, 535 (discussing cases where local legislative bodies, much more frequently than state legislatures or Congress, serve dual roles). See also Horn v. Cnty. of Ventura, 596 P.2d 1134, 1139 (Cal. 1979) (noting that the fact that a legislative body made a final determination on a particular land use action was not dispositive of whether the decision was adjudicative or legislative).

90. A comprehensive plan is intended to control “the use of land and buildings throughout the entire territory of an area . . . according to present and probable future conditions.” 8 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25:86 (3d ed. 2012). A variance “allows a landowner to engage in the use of the land that the zoning ordinance prohibits” or “grants the landowner an exception from strict compliance with physical standards.” Id. § 25:179.30.

91. Zoning may be considered non-legislative because a rezoning may apply to only a few individuals (the property owners in the area being rezoned), but it may also be considered legislative because a rezoning is also applicable to future property owners in the rezoned area, and thus typically based on long-term considerations. See Carter, 269 P.3d at 159.

92. In California, for example, rezoning is categorically a legislative action. See Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565, 566–67 (Cal. 1980) (creating a bright-line rule categorizing rezoning as legislative; the court recognized application of the rule may not be in accord with the substantive effects of the particular action, but reasoned that for purposes of judicial economy, such a rule was necessary). In other states, rezoning can be characterized as either legislative or non-legislative, depending on the particular facts at hand. See, e.g., Carter, 269 P.3d at 159; Fasano v. Bd. of Cnty. Comm’rs, 507 P.2d 23, 26–27 (Or. 1973), overruled on other grounds by Neuberger v. City of Portland, 607 P.2d 722 (Or. 1980).
state legislation or in the state constitution. Where the initiative power has been reserved to voters in the state constitution, it receives a high level of deference, even where it conflicts with other constitutionally protected rights or statewide statutory regimes. In contrast, where the initiative power has been granted via state legislation, it is treated less deferentially when it comes into conflict with state constitutional provisions or other statewide statutory regimes considered to outweigh the initiative right.

A final and related issue raised by use of the initiative concerns the doctrine of preemption—whereby the legal authority of a higher level of government supersedes the legal authority of a subordinate level of government. Because land use initiatives are typically local initiatives, they are typically preempted, if at all, by state law. Such preemption may be express or implied. Express preemption occurs when state law expressly contains language barring local regulation on a particular topic. More often, however, state law is silent and courts are left to determine whether the state law implicitly preempts use of the local initiative. Implicit preemption will be found if the state law occupies the entire field or involves a matter of statewide concern, as opposed to a purely local matter. However, even if the state law

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93. Both California and Washington reserve the initiative power to the people in their state constitutions, and the courts in both states have been accordingly deferential to the people’s exercise of the initiative power. See, e.g., Assoc. Home Builders, Inc. v. City of Livermore, 557 P.2d 473, 477 (Cal. 1976) (holding that courts must “jealously guard” the people’s right to use the initiative, and “apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled”); Futurewise v. Reed, 166 P.3d 708, 710 (Wash. 2007) (“[The initiative is] deeply ingrained in . . . [Washington’s] history, and widely revered as a powerful check and balance on the other branches of government.”); Save Our State Park v. Bd. of Clallam Cnty. Comm’n (SO3), 875 P.2d 673, 677 (Wash. Ct. App. 1994) (noting that the initiative is “one of the foremost rights of the citizens”). However, California and Washington differ as to which people the initiative power is constitutionally reserved. See infra notes 99–102, 137–39 and accompanying text.

94. See, e.g., Elkind v. City of New Rochelle, 163 N.Y.S.2d 870, 875 (Sup. Ct. 1957) (“Government by representation is still the rule. Direct action by the people is the exception.”). Those who would attempt to use the initiative power in these states do not enjoy a presumption of validity, but instead must show “some constitutional or statutory grant of power” to justify its use. See id. Where the initiative is not vested in voters at all at the state level (i.e., neither the state constitution nor state law authorizes use of the initiative), it may be vested in voters as a matter of local law; in such circumstances, the initiative is given even less deference. See infra notes 137–39 and accompanying text.


96. See The Essentials of Preemption, supra note 95.

97. See, e.g., MINN. STAT. § 471.633 (2013) (explicitly preemption local regulation of firearms, except regulations relating to the discharge of a firearm).

98. See The Essentials of Preemption, supra note 95. See infra note 104 for discussion of contrasting views on what topics are considered to be a matter of statewide concern.
does not occupy the entire field, it may still implicitly preempt the local initiative if it delegates authority to act exclusively to the local governmental body. 99 Implied preemption on this ground is based on the principle that since the state may choose to completely preempt the field, it may also partially preempt the field by not allowing use of the initiative, while still allowing local legislative action. 100

II. ENVIRONMENTAL REVIEW OF LAND USE INITIATIVES IN WASHINGTON AND CALIFORNIA: THE CONSTITUTIONAL, STATUTORY AND POLICY REASONS FOR THE TRADE-OFF

A. California

In California, the trade-off between the initiative process and the environmental review process has resulted in a double standard: Land use proposals approved by initiative are not subject to CEQA, even though the exact same proposal would be subject to environmental review if passed legislatively. Thus, regardless of how severe the environmental impacts may be, if the measure is enacted by initiative, CEQA is simply inapplicable.

The structural basis for the inapplicability of CEQA to initiatives is the fact that the initiative power in California is constitutionally reserved to voters at both the state and local level. 101 As a constitutionally reserved power, there is a strong presumption against any limitation on voters’ exercise of the initiative at either level. 102 Since any proposal passed via the initiative, at either the state or local level, is based on powers reserved in the state constitution, it is structurally equivalent to laws passed by the state legislature. 103 Because of

99. See, e.g., Comm. of Seven Thousand v. Superior Court of Orange Cnty. (COST), 754 P.2d 708, 716 (Cal. 1988) (“[U]se of the terms ‘board of supervisors’ and ‘city council’ in . . . [state law addressing transportation issues] gives rise to a strong inference that the Legislature intended to preclude exercise of the statutory authority by the electorate.”); Snohomish Cnty. v. Anderson, 868 P.2d 116, 118–19 (Wash. 1994) (holding that referendum may not be used if state law uses language delegating authority to act to the local legislative body). Accord SOS, 875 P.2d at 649 (state law preempting initiative power).

100. See COST, 754 P.2d at 720 (“If the state chooses . . . to grant some measure of local control . . . it has authority to impose procedural restrictions on the exercise of the power granted, including the authority to bar . . . [use of] the initiative.”).

101. See CAL. CONST. art. II, § 11 (reserving the initiative power to voters in every California county and general law city). The initiative power of voters in charter cities is also considered reserved by the state constitution because of a separate constitutional provision allowing charter cities to adopt a charter for governance, and providing that the provisions of the charter will trump conflicting state laws with regard to “municipal affairs.” See CAL. CONST. art. XI, § 5.

102. See DeVita v. Cnty of Napa, 889 P.2d 1019, 1027 (Cal. 1995) (“[I]f doubts can be reasonably resolved in favor of the use of [the] reserve initiative power, courts will preserve it.”) (citations omitted). The DeVita court went on: “[R]egardless of the wisdom of the initiative . . . the [California Constitution] guarantees the[] right . . . absent the clear indication that the Legislature intended to preempt that power pursuant to a statewide purpose.” Id. at 1040 (citations omitted).

103. See id. at 1039–40 (holding that the state planning act does not implicitly preempt use of the initiative); Assoc. Home Builders, Inc. v. City of Livermore, 557 P.2d 473, 480–81 (Cal. 1976) (holding
the strong presumption against preemption, only where state legislation contains an explicit statement of preemption, or where there is overwhelming evidence of an implicit intent to do so, will preemption of the initiative be found.\footnote{104. See \textit{COST}, 754 P.2d at 708 (holding that provisions of state transportation law concerning development fees for highway projects implicitly preempted use of the initiative because it addressed a matter of statewide concern and delegated authority to act exclusively to local legislature). The state law was of statewide concern, not purely local, because the "primary purpose [of highways] is to carry through traffic and provide a network . . . for travel between cities rather than within cities"; moreover, the state law used the terms "city council" and "board of supervisors" in describing who had authority to act, and such terms "give[] rise to a strong inference that the Legislature intended to preclude" use of the initiative. \textit{See id.} at 715–17 (internal quotation marks omitted). However, the threshold for what will be considered a matter of statewide concern has subsequently been clarified as being very high. \textit{See DeVita}, 889 P.2d at 1030 (explaining implicit preemption will not be found "merely because some elements of statewide concern are present"; rather, the state’s regulatory interests must be "fundamentally incompatible" with use of the initiative). Furthermore, the "mere possibility" that use of the initiative may frustrate the goals of a state law is insufficient to lead to the conclusion that it is a matter of statewide concern. \textit{See id.} at 1038 (refusing to find implicit preemption simply because voters could use the initiative to pass regulations incompatible with the state planning law; if such a result occurs, "some way out of the impasse will have to be found. . . . [A]t this point, however, the system is not being put to so severe a test").}

However, California courts have not had to rely on nuanced implied preemption analysis to find that the initiative process trumps environmental review; the language of CEQA supports a finding of its inapplicability to initiatives. In \textit{Stein v. City of Santa Monica}, a landlord group challenged the validity of a rent control initiative on the grounds that the measure had not gone through environmental review under CEQA.\footnote{105. \textit{Stein} v. \textit{City of Santa Monica}, 168 Cal. Rptr. 39, 39 (Ct. App. 1980).} Unsympathetic to the landlords’ alleged environmental concerns, the court held that initiatives are outside the scope of CEQA.\footnote{106. \textit{Id.} at 40.} The court explained that CEQA only applies to “projects,” which it defined as (i) discretionary actions (ii) undertaken or approved by a government entity (iii) that may result in physical change to the environment.\footnote{107. \textit{See id.} at 39–40.} In the case of an initiative, the court held that all three requirements are not met: the only action by a government entity is ministerial, not discretionary—the city council simply counts the signatures, and if it there is the requisite number, it must place the measure on the ballot.\footnote{108. \textit{Id.}} A voter voting on the measure is a discretionary action, but that fails to satisfy the requirement of government entity involvement.\footnote{109. \textit{See id.} at 40 (rejecting the argument that voters should be considered “agents” of the public agency that approved the measure for the ballot).} Thus, since the rent control
initiative failed to satisfy the definition of “project,” the court held it to be outside the scope of CEQA.\textsuperscript{110}

However, other decisions have suggested that CEQA is not inherently incompatible with use of the initiative. For example, in \textit{Friends of Sierra Madre v. City of Sierra Madre}, the California Supreme Court held that although CEQA is inapplicable to voter-sponsored initiatives, initiatives sponsored by a government entity are subject to CEQA.\textsuperscript{111} In \textit{Sierra Madre}, a city council-drafted initiative had been placed on the ballot to amend the city’s historic preservation ordinance; by using the initiative, the city hoped to take advantage of the \textit{Stein} holding and avoid the expense of CEQA compliance for what it viewed as a minor administrative correction.\textsuperscript{112} However, the court held that unlike the voter-sponsored initiative in \textit{Stein}, a government-sponsored initiative does involve discretionary action by a public agency: the public agency has \textit{chosen} to draft the initiative and place it on the ballot.\textsuperscript{113} Therefore, CEQA was applicable.\textsuperscript{114}

Perhaps cognizant of a tension in its disparate treatment of citizen-sponsored versus government-sponsored initiatives,\textsuperscript{115} the court in \textit{Sierra Madre} identified several additional justifications for CEQA’s inapplicability to citizen-sponsored initiatives. First, the court suggested that applying CEQA to citizen-sponsored initiatives presents logistical difficulties. It is not immediately apparent, for example, how the electorate could fill the role of “lead agency,” which is required under CEQA to prepare studies, hold

\textsuperscript{110} Id. at 40–41. The court also cited language in the CEQA Guidelines providing that a “vote of the people” is not a project. Id. While acknowledging that the Guidelines are not binding, the \textit{Stein} court found that the “vote of the people” exemption further supported its holding: if the actions of a public agency with regard to an initiative are merely ministerial, and therefore not within CEQA’s scope, the Guidelines simply clarify this by defining them as “not projects.” Id. at 40. The vote of the people exemption in the Guidelines was subsequently amended to codify the holding in \textit{Stein}. See CAL. CODE REGS. tit. 14, § 15378(b)(3) (2013) (providing that a “[p]roject does not include . . . the submittal of proposals to a vote of the people”).

\textsuperscript{111} Friends of Sierra Madre v. City of Sierra Madre (Sierra Madre), 19 P.3d 567, 570–71 (Cal. 2001).

\textsuperscript{112} Id. at 573–74.

\textsuperscript{113} Id. at 581–84.

\textsuperscript{114} Id. at 584. The court pointed out that the seemingly contrary exemption for “vote[s] of the people” in the CEQA Guidelines is nonbinding and entitled to lesser deference than the actual language of CEQA, and therefore should be interpreted as referring only to citizen-sponsored initiatives. See id. at 582–83.

\textsuperscript{115} As a result of the holding in \textit{Sierra Madre}, the exact same initiative will be subject to CEQA if sponsored by a government entity, but exempt if sponsored by a citizen group. See id. at 584. While this would seem to put a public agency at a disadvantage if it wanted to sponsor an initiative to compete with a citizen-sponsored initiative, the practical result is likely to be a shift in tactics: instead of placing council-drafted initiatives on the ballot and being burdened with CEQA compliance, cities are likely to simply find sympathetic citizen groups to propose the city’s preferred initiative. See id. (noting that “mandatory CEQA review for city- or county-generated initiatives that may affect the environment need not silence the voices of cities and counties on controversial issues”).
hearings, and account for the costs of compliance. Second, the court noted that environmental impacts of initiatives can be assessed through means other than CEQA; for example, the Election Code gives local legislators a thirty-day period to request a report addressing the potential impacts—environmental or otherwise—of a proposed initiative. Third, requiring CEQA compliance for government-sponsored initiatives accords with voter expectations, because voters will assume that any government-sponsored measure has complied with all state law requirements; the court reasoned that voters will not necessarily have the same expectation about citizen-sponsored initiatives and “therefore, will consider the potential environmental impacts more carefully.” Finally, if CEQA’s requirements are viewed as procedural, not substantive, the act should be inapplicable to the initiative process, since under California law, voters utilizing the initiative are not required to comply with procedural requirements applicable to legislators enacting laws.

Whatever the merits of these justifications for CEQA’s inapplicability to the initiative process, they stand in tension with another line of decisions holding that CEQA is applicable to certain types of citizen votes. The votes of the people at issue in these latter decisions were not typical initiatives, but rather initiative-like measures required to be put to a citizen vote pursuant to state law. In Younger v. Local Area Formation Commission and Fullerton v.

116. See id. at 582. See also Lee v. City of Lompoc, 18 Cal. Rptr. 2d 389, 394 (Ct. App. 1993) (raising similar concerns). The lead agency may charge project applicants a fee to cover the costs of compliance. CAL. PUB. RES. CODE § 21089 (West 2013).

117. See Sierra Madre, 19 P.3d at 582. See also DeVita v. Cnty of Napa, 889 P.2d 1019, 1039–40 (Cal. 1995) (suggesting the reports provide a reasonable “compromise” between the goals of environmental protection and voters’ initiative rights). The reports provide a maximum thirty-day window for reports to be submitted to the county board of supervisors after the date the county election official certifies that the ballot petition has the required number of signatures. See CAL. ELEC. CODE § 9111 (West 2013). Once the report has been prepared and presented, the ballot measure must either be adopted as-is within ten days or be ordered for election. Id. § 9116. For an example of a section 9111 report, see Cnty. ADMIN. OFFICE, MENDOCINO COUNTY TOMORROW BALLOT INITIATIVE ELECTION CODE 9111 STUDY (2009) [hereinafter MENDOCINO 9111 STUDY], available at http://www.co.mendocino.ca.us/administration/pdf/9111_STUDY_.Document.pdf.

118. Sierra Madre, 19 P.3d at 583.


120. See Sierra Madre, 19 P.3d at 582. Characteristics unique to the initiative process, such as the signature requirement, the airing of election ads, and debating of public opinion in lead-up to the election, are considered to accomplish the same goals that procedural requirements, such as notice, hearing, and the preparation of studies do in the legislative land use process. See San Mateo Cnty. Coastal Landowners’ Ass’n v. Cnty. of San Mateo, 45 Cal. Rptr. 2d 117, 127 (Ct. App. 1995) (“[N]one of the procedural requirements imposed on the legislative body by the planning law can be presumed to limit the right to amend the general plan by initiative.”) (citations omitted); DeVita, 889 P.2d at 1033 (“[S]tatutory procedural requirements imposed on the local legislative body generally neither apply to the electorate nor are taken as evidence that the initiative or referendum is barred.”).

121. The merits (and flaws) of these justifications are discussed in Part III infra.

122. See Younger v. Local Area Formation Comm’n, 146 Cal. Rptr. 400 (Ct. App. 1978) (analyzing whether a citizen vote required under state deannexation law must comply with CEQA);
Board of Education, two cases dealing with such citizen votes, the courts recognized that a “project” under CEQA is something more than just a discretionary action undertaken or approved by a public agency that may result in physical change to the environment. Rather, a project is “the whole of an action” and “the activity which is being approved.” Although the discretionary action of a public agency is the triggering event for CEQA’s applicability, that discretionary action—such as the “granting of a conditional use permit[,] a piece of paper”—is not really what CEQA is concerned with. Rather, CEQA’s focus is on the underlying activity that may adversely impact the environment; the end result permitted by that piece of paper or the outcome of a citizen vote, these decisions suggest that it should be considered a project to which CEQA applies.

Fullerton Joint Union High Sch. Dist. v. Bd. of Educ., 654 P.2d 168, 180–81 (Cal. 1982) (analyzing whether a citizen vote required under state education law when new district boundaries are created must comply with CEQA). The fact that Younger and Fullerton involved a vote of citizens exercising authority under a state statute, as opposed to a vote of citizens exercising the constitutionally granted power of the initiative, may explain why neither the Stein nor Sierra Madre courts considered these decisions relevant. See Stein v. City of Santa Monica, 168 Cal. Rptr. 39, 41 (Ct. App. 1980) (rejecting Younger as “[o]bviously” distinguishable, but providing little explanation); Sierra Madre, 19 P.3d 567 (Cal. 2001) (failing to mention either Younger or Fullerton). However, the author would argue that the Younger and Fullerton decisions are relevant because of their broader understanding of CEQA’s scope; that analysis does not depend on whether the vote of the people is an exercise of state statutory authority or the initiative power. See infra notes 145–48 and accompanying text.

123. In Younger, a group of citizens petitioned for deannexation from San Diego County; under state law, the deannexation had to be approved by a majority of voters in a special election. 146 Cal. Rptr at 403–04. The citizen vote was one of several steps required before a deannexation petition would be granted; at another step, the petition had to be approved by the Local Area Formation Commission. Id. Supporters of the deannexation claimed that the proposal should be exempt from CEQA because the citizen vote fell outside CEQA’s definition of project, since no discretionary action by a public agency was involved. Id. The court rejected this argument, holding that the deannexation itself was the end result that CEQA was concerned with; simply because it would be brought about through a citizen vote, involving no discretionary action by a public agency, did not necessarily mean CEQA was inapplicable. Id. at 405, 407. Thus, as just one of a series of “activities [that] may culminate in [the] project which will change and affect the environment,” the citizen vote could not serve to exempt the entire proposal from CEQA. Id. at 409–10. The court also noted that even apart from the fact that the process as a whole should be considered a project to which CEQA is applicable, CEQA was applicable to the deannexation because one of the other steps in the process (the commission approval) was a discretionary action by a government agency. Id. See also Fullerton, 654 P.2d at 180 (citing Younger in its holding that a citizen vote required under a state education law to establish new school district boundaries was not exempt from CEQA because it “constitute[d] an essential step culminating in action which may affect the environment”).

124. Younger, 146 Cal. Rptr. at 405 (emphasis added) (citing CEQA Guidelines).
125. See id. at 409.
126. See id. at 407 (noting that the rights of voters pursuant to the state deannexation law should be “read in conjunction” with CEQA); see also City of Livermore v. Local Agency Formation Comm’n of Alameda Cnty., 230 Cal. Rptr. 867, 871 (Ct. App. 1986) (“CEQA and its guidelines focus on the ultimate impact of a project.”).
127. While the courts in Younger and Fullerton rejected the argument that the citizen vote should be exempt from environmental review, they did not make a trade-off prohibiting use of a citizen vote to preserve environmental review. Rather, the courts held that the citizen vote could be held, but only after
In Washington, the tension between the initiative process and environmental review process results in the opposite trade-off than that made in California: the initiative cannot be used at the local level for the vast majority of land use matters but environmental review is preserved.

1. SEPA

Washington courts have never definitely addressed whether SEPA is applicable to local land use initiatives. There has been little need to do so since enactment of the GMA in 1990 since, as will be discussed below, the use of the initiative for essentially all land use matters is preempted by GMA. However, one pre-GMA decision did consider the interplay of SEPA and the initiative process, and suggested, in dicta, that SEPA should be applicable to initiatives.

In Lince v. City of Bremerton, a Washington appellate court found a rezoning initiative preempted by the state zoning enabling act, but noted that if the initiative had been otherwise valid, “substantial SEPA issues would be raised.” Despite potential logistical difficulties that might be raised by applying the state environmental law to voter initiatives, the court suggested that at least an initial inquiry into environmental impacts of an initiative might be necessary under SEPA. The appellate court echoed similar dicta by the trial court, which had noted that “there is even more reason that attention be clearly called and focused on the environmental considerations involved, if any” when voters are legislating directly, rather than indirectly through the representative process. The court suggested that if an initiative concerns a topic to which SEPA would be applicable in the legislative context, SEPA should be applicable in the initiative context as well, and necessary modifications should be made to make the two processes compatible.

The trial and appellate court decisions in Bremerton provide a rare judicial recognition that a trade-off between the initiative and environmental review process is not the only option. However, subsequent decisions have not pursued environmental review of the proposal was completed. See Younger, 146 Cal. Rptr. at 411; Fullerton, 654 P.2d at 180–81. The two decisions are thus rare examples of judicial acknowledgement that a trade-off between the environmental review process and initiative process is not the only option. See infra notes 129–32 and accompanying text for another such example from Washington.
this line of reasoning because of the courts’ interpretation of the state’s other environmental protection law, the GMA.

2. **GMA**

Although there is no express statement of preemption in the GMA, the Washington courts have relied on a “textual, structural and policy” reading of the GMA to find that it implicitly preempts use of the local initiative for virtually all land use matters.\(^{133}\) The textual basis for implicit preemption of the initiative rests on the fact that the GMA delegates authority to the city or county “legislative body” in many provisions, while simply delegating to the “city” or “county” in other provisions.\(^ {134}\) Although the term “city” or “county” has been interpreted to mean the city or county corporate entity, which encompasses both voters and the legislative body, the term “legislative body” has been interpreted to mean only that entity.\(^ {135}\) The Washington courts have held that because the act primarily uses the term “legislative body,” the GMA delegates authority exclusively to that body, thereby implicitly preempts use of the initiative by local voters.\(^ {136}\)

The structural basis for finding that the GMA implicitly preempts use of the local initiative rests on several grounds. First, although the initiative is constitutionally reserved to voters in Washington, unlike California, it is specifically reserved only to the people of the state.\(^ {137}\) Thus, only use of the initiative at the state level is constitutionally protected; voters using the initiative at the local level are not exercising a constitutional reservation of power, only a grant of authority from a municipal statute (typically, a local charter). Since laws passed by local initiative in Washington are enacted by voters acting on power vested in them through local law, they are subordinate to the local governmental body.


\(^{134}\) See Whatcom Cnty. v. Brisbane, 884 P.2d 1326, 1329 (Wash. 1994) (citing relevant sections of the GMA using these terms).

\(^{135}\) See 1000 Friends of Washington, 149 P.3d at 621 (“[W]hen the state legislature instructs a local governmental body to implement state policy, the power and duty is vested in the legislative (or executive entity), not the municipality as a ‘corporate’ entity.”).

\(^{136}\) See Snohomish Cnty. v. Anderson, 868 P.2d 116, 118 (Wash. 1994) (“[T]he Legislature is presumed to be familiar with judicial decisions of the Supreme Court construing existing statutes,” and thus be aware that “case law define[s] ‘legislative authority’ and comparable terms in statutory contexts to mean the council and/or mayor only, and not to permit referendum rights.”).

\(^{137}\) See WASH. CONST. art. II, § 1 (“The legislative authority of the state of Washington shall be vested in the legislature . . . but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature.”). See also Maleng v. King Cnty. Corr. Guild, 76 P.3d 727, 728 (Wash. 2003) (“One of the foremost rights of Washington State citizens is the power to propose and enact laws through the initiative process. ‘The passage of an initiative measure as a law is the exercise of the same power of sovereignty as that exercised by the Legislature in the passage of a statute.’”) (emphasis added) (internal citations omitted).
to state statutes like the GMA and SEPA, as well as state constitutional provisions.\textsuperscript{138}

Washington courts have also found structural support for implied preemption because the GMA requires local governments to implement the policy set out in the act, rather than merely permitting local governments to do so at their option.\textsuperscript{139} Since the initiative is a form of permissive action—voters cannot be required to put a matter on the ballot and cannot be required to vote a certain way—the courts have reasoned that the GMA must implicitly preempt it.\textsuperscript{140} Other structural aspects of the GMA, such as requirements to convene public hearings, adhere to specific timelines, and prepare studies, have also led courts to conclude that the GMA implicitly preempt use of the local initiative, since it is unclear how voters could comply with such requirements.\textsuperscript{141}

Finally, as a policy matter, a finding of implicit preemption has been justified on the grounds that the GMA concerns a matter of statewide concern—coordinated planning on a statewide level.\textsuperscript{142} Allowing use of the initiative could threaten this goal because an initiative might strike down or add to the requirements mandated by the GMA.\textsuperscript{143} Thus, a finding of implicit preemption ensures the act’s effectiveness is not undermined by piecemeal citizen legislation.\textsuperscript{144}

\begin{itemize}
\item \textsuperscript{138} See 1000 Friends of Washington, 149 P.3d at 630–31 (explaining that state legislative acts (constitutional provisions, legislation, or statewide initiatives/referendums), trump any inconsistent powers granted by a local charter through the local legislature or local initiatives/referendums); see also Snohomish, 868 P.2d at 119 (explaining that the initiative and referendum power granted to local voters in county charters is subordinate to the GMA because the state constitution specifically “relegates home rule charters to an inferior position vis-a-vis ‘the Constitution and laws of this state’”).
\item \textsuperscript{139} See, e.g., WASH. REV. CODE ANN. § 36.70A.040 (West 2012) (describing the population and growth rate criteria as to which counties and cities are subject to the GMA’s requirements).
\item \textsuperscript{140} Cf. City of Port Angeles v. Our Water–Our Choice!, 239 P.3d 589, 599 (Wash. 2010) (explaining that where the grant of power to a municipality under state law is merely permissive, use of the initiative is not preempted).
\item \textsuperscript{141} 1000 Friends of Washington, 149 P.3d at 622; see also Snohomish, 868 P.2d at 118 (concluding that that the “duties assigned to the ‘legislative authority,’” such as convening meetings and establishing processes, “cannot be carried out by initiative or referendum”).
\item \textsuperscript{142} See City of Seattle v. Yes for Seattle, 93 P.3d 176, 181 (Wash. Ct. App. 2004); see also 1000 Friends of Washington, 149 P.3d at 619 (“A major component of the GMA is coordinated, countywide planning.”).
\item \textsuperscript{143} See City of Seattle, 93 P.3d at 181; see also Snohomish, 868 P.2d at 120 (“Permitting the referendum would jeopardize an entire state plan and thus would extend beyond a matter of local concern.”).
\item \textsuperscript{144} The Washington Supreme Court has also justified its finding that the GMA implicitly preempts the initiative by pointing out that if the state legislature disagreed with the courts’ understanding of the legislature’s intent, the legislature could have expressly amended the GMA to clarify whether it preempts the initiative or not. See 1000 Friends of Washington, 149 P.3d at 625 (“[A]t some point that [legislative] silence itself is evidence of legislative approval.”).
\end{itemize}
III. QUESTIONING THE ASSUMPTIONS BEHIND THE CALIFORNIA AND WASHINGTON APPROACHES

While courts in Washington and have correctly identified tensions between the initiative process and environmental review process, the conclusion that a trade-off must result does not necessarily follow. The flawed assumptions underlying these trade-off approaches in California and Washington are laid out and challenged below.

A. California

1. Initiatives Are Outside the Scope of CEQA

By its terms, CEQA applies only to “projects,” which are defined as discretionary actions or approvals by a government entity that may impact the environment. Because initiatives fail to satisfy this definition, CEQA has been held inapplicable to them. However, this textual analysis of CEQA deconstructs the act in a way contrary to the underlying intent of the act. CEQA is not concerned with discretionary actions per se; it is concerned with the results of those discretionary actions. The act of a local legislature issuing a piece of paper approving a rezoning does not directly cause potentially adverse environmental impacts; the buildings that are built, the soil that is moved, the wildlife that is disturbed as a result of a rezoning do. Using the discretionary action of a public agency as a trigger for CEQA applicability simply provides a practical way to get at the underlying activities. If the same underlying activities would result from something other than the discretionary action of a public agency (i.e., from an initiative election), then that action should also be considered within CEQA’s scope, and the definition of “project” should be adjusted accordingly.

2. CEQA’s Drafters Did Not Intend the Act to Apply to Initiatives

Courts in California have cited the CEQA Guidelines exemption for “votes of the people” as evidence that the California Public Resources Agency, the agency responsible for interpreting CEQA, intended the act to be

145. See supra notes 107–12 and accompanying text.
146. Id.
147. See supra notes 123–27 and accompanying text.
148. While arguing that courts have interpreted “project” too narrowly, the author recognizes that until the statutory language of CEQA is adjusted, courts will be constrained by the act’s definition of “project.” See Citizens for Responsible Gov’t v. City of Albany, 66 Cal. Rptr. 2d 102, 108 (Ct. App. 1997) (“Since the provisions of CEQA apply only to ‘projects,’ the scope of the act is governed in significant part by the meaning of that term.”); see also Friends of Mammoth v. Bd. of Supervisors, 502 P.2d 1049, 1056 (Cal. 1972) (“CEQA [is] to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”). See Part IV.A for suggested reforms to address this issue.
inapplicable to initiatives. However, the two primary reasons motivating the drafters to create an exemption for “votes of the people” four decades ago fail to support the continued existence of the exemption today.

The first reason for exemption is the fact that CEQA was originally only applicable to non-legislative actions of state agencies. Since CEQA only applied to non-legislative actions, it was thought to be inapplicable to initiatives, as initiatives can only be used for legislative matters. Today, however, CEQA applies not only to non-legislative actions of state agencies, but also to the legislative and non-legislative actions of local government entities. For example, a rezoning, which is categorically a legislative action, is subject to CEQA when the decision is made by a local legislative body. Yet the exact same action is exempt from CEQA if the decision is made via initiative because of the courts’ reliance on the outdated intent of the drafters.

The second reason for the “vote of the people” exemption was the drafters’ concern that requiring CEQA compliance for initiatives would put too great a burden on voters’ rights to utilize the initiative. The exemption was drafted at a time when most initiatives were grassroots efforts and the initiative industry was barely in existence. If CEQA had been made applicable to initiatives such groups might have been vulnerable to opponents using the act as a delay tactic and roadblock. Furthermore, if CEQA compliance were required, initiative sponsors would potentially be responsible for the costs of

149. Friends of Sierra Madre v. City of Sierra Madre (Sierra Madre), 19 P.3d 567, 581–82 (Cal. 2001). The California Public Resources Agency is the former name of what today is the California Natural Resources Agency.
150. Telephone Interview with Norman Hill, former Assistant Sec’y. for Res., Cal. Res. Agency (Feb. 14, 2012) [hereinafter Hill Interview]. Thus, CEQA originally used the term “state agency” where it now uses the term “public agency.”
151. Id.
152. See CAL. PUB. RES. CODE § 21063 (West 2013) (defining “public agency” to include “any state agency, board, or commission” or “any county, city and county, [or] city”); id. § 21080 (providing that CEQA is applicable to the following local legislative actions: “the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps”) CEQA remains inapplicable to legislative actions at the state level. CAL. CODE REGS. tit. 14, § 15378(b)(1) (2013).
153. CAL. PUB. RES. CODE § 21063.
154. Hill Interview, supra note 150.
155. Id.; see also Callies et al., supra note 7, at 60–61 (noting that initiatives were infrequently used until the 1970s, and it was only after the passage of Proposition 13 in the late 1970s that the state “saw the advent of an initiative industry”).
156. Hill Interview, supra note 150. The concern about CEQA being used as a delaying tactic by parties not primarily motivated by environmental concern has been raised in the non-initiative context as well. See Save the Plastic Bag Coal. v. City of Manhattan Beach, 254 P.3d 1005 (Cal. 2011) (involving a CEQA challenge to a city’s plastic bag ban brought by a corporate coalition of plastic bag manufacturers). However debatable the ethics of such plaintiffs, the California Supreme Court has expressly upheld the validity of mixed-motive CEQA lawsuits. See Save the Plastic Bag Coal., 254 P.3d at 1014–15 (holding that CEQA action is permitted, even if the manufacturers motivations were partly, or even primarily, driven by economic concerns, not environmental concerns).
compliance, making access to the ballot contingent on sponsors’ financial resources.\footnote{157}

Although these may have been valid concerns four decades ago, in light of subsequent events—the explosion of the initiative industry,\footnote{158} the money required to simply get on the ballot,\footnote{159} and the increasing use of the initiative by well-funded special interest groups and major corporations\footnote{160}—they simply no longer reflect reality. Requiring that initiative sponsors budget for the cost of CEQA compliance may impose an additional burden, but it is a rational burden and far from the only financial burden that initiative sponsors face if they choose to use this method of lawmaking.\footnote{161}

3. Adequate Safeguards Compensate for Lack of Environmental Review under CEQA

California courts have cited several safeguards that may compensate for the inapplicability of CEQA to initiatives. The first is the local legislature’s ability to request reports about an initiative’s impact pursuant to Elections Code section 9111 (section 9111 reports).\footnote{162} Cited approvingly as a compromise between protecting voters’ initiative rights and ensuring that local governments and voters are informed about possible consequences of an initiative, section 9111 reports give local governments a thirty-day period during which they may commission relevant city agencies to report on the impacts—environmental or otherwise—of a proposed initiative.\footnote{163}

The compromise, however, leaves much to be desired. Unlike environmental review under CEQA, section 9111 reports are not specifically targeted at environmental impacts; in fact, no specific guidelines at all are

\footnote{157} Hill Interview, supra note 150.  
\footnote{158} See Broduer, supra note 7, at 163 (discussing the businesses that have developed to support the initiative industry, such as paid consultants, signature gatherers, pollsters, and others).  
\footnote{159} Initiative sponsors must be prepared to pay for significant costs, such as signature gathering, lobbying for endorsements, and campaign advertising. See id. at 84; Callies et al., supra note 7, at 61–62. In statewide elections, at least $1 million is necessary to put a statewide initiative on the ballot; far more may be required for the measure to win. See Broduer, supra note 7, at 84.  
\footnote{160} See Broduer, supra note 7, at 163–65; see also infra notes 175–78 and accompanying text (discussing Wal-Mart’s systematic manipulation of ballot box loophole to evade environmental review for its new stores in California).  
\footnote{161} See Younger v. Local Area Formation Comm’n, 81 Cal. App. 3d 400, 482 (Ct. App. 1978) (“[T]he people of the State of California can and do impose rational limitations, related to a legitimate state object, on the submission of a proposal to the people via the ballot box.”). An alternative to having initiative sponsors pay for the costs of environmental review would be to require the local governments to pay for such costs. However, at a time when local budgets are being slashed and municipalities across the country are facing bankruptcy and other forms of financial distress, see infra note 163, the author would argue against such an approach, unless state governments adequately fund it.  
\footnote{162} See CAL. ELEC. CODE § 9111 (Deering 2013) (authorizing counties to request such reports); id. § 9212 (authorizing cities to request such reports).  
\footnote{163} Id. § 9111; see also DeVita v. Cnty. of Napa, 889 P.2d 1019, 1039–40 (Cal. 1995) (discussing the potential of section 9111 reports to compensate for the lack of CEQA review of initiatives).}
provided in section 9111 to guide the preparation of the reports. The reports must be prepared within a thirty-day window and no funding source is provided, limiting the extent of scientific analysis and consultation with outside experts that can be accomplished. Furthermore, section 9111 reports are reporting tools only: an initiative sponsor is not required to take any action as a result of the report, even if it indicates that the initiative would have dire environmental impacts. Finally, since the report is not required to be included in ballot materials sent to voters, unless it is publicized by media or other interested parties, it is unlikely to actually serve the purpose of informing voters about the initiative’s consequences.

In addition to section 9111 reports, the campaign process itself has been cited as a safeguard compensating for the lack of environmental review of initiatives under CEQA. Through the public airing of the issues during the campaign, voters will supposedly be exposed to information about the potential negative impacts of the initiative, environmental and otherwise. As a result, “the spectre of a few voters imposing their selfish interests upon an objecting city and region has no basis in reality.”

Today, however, that “spectre” is increasingly a reality. The “extent to which one may be heard in an election too often depends on the size of one’s pocketbook,” and the outcomes of elections are often directly tied to the financial resources of initiative’s sponsors. Unlike the CEQA process, in which a project sponsor cannot spend its way out of the legally mandated

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164. See CAL. ELEC. CODE § 9111; id. § 9212. The local agency may also be guided in the contents of the report by specific questions asked by the local government body. See, e.g., MENDOCINO 9111 STUDY, supra note 117.

165. In light of the severe budget cuts and financial distress facing local governments in California, municipalities are unlikely to have the resources required to provide comprehensive environmental review, even if there were adequate time to do so. See Thomas Ferguson & Robert A. Johnson, Municipal Bankruptcy: The Lessons of California, L.A. TIMES, Jul. 31, 2012, available at http://www.rooseveltinstitute.org/municipal-bankruptcy-lessons-california.

166. See infra notes 227–29 and accompanying text.

167. See CAL. ELEC. CODE § 9086 (describing what must be included in the ballot pamphlet provided to voters, with no reference to section 9111 reports); CAL. ELEC. CODE § 9111(b) (“The report shall be presented to the board of supervisors within the time prescribed by the board of supervisors, but no later than 30 days after the county elections official certifies to the board of supervisors the sufficiency of the petition”; there is no other requirement that the report be provided to any other parties, such as voters.).


170. See id. at 578 (Richardson, J., dissenting); see also CRONIN, supra note 4, at 215 & n.20 (citing studies indicating that the higher-spending side wins 78 percent of the time in statewide initiative elections).
environmental review, a deep-pocketed sponsor of an initiative can outspend anyone who would try to publicize information about the initiative’s adverse environmental impacts. Furthermore, because no environmental review has been conducted, opponents of the initiative may have little or no data to demonstrate its adverse impacts, unless they have the funds and time to conduct their own environmental studies. Voters may not intend to pass initiatives that are harmful to the environment, but depriving voters of information about environmental impacts means that they are more likely to unintentionally do so.

Even more troubling is the fact that initiative sponsors could actually avoid an election altogether, and still take advantage of the CEQA exemption for initiatives. As a result, even the possibility that voters may be informed about the initiative’s consequences through the campaign process is eliminated. Wal-Mart has employed this tactic with great success: by proposing an initiative for a new store and gathering sufficient signatures to force a special election on the matter, Wal-Mart puts local governments in the position of deciding whether to adopt the measure as-is, or putting it on the ballot for a special (read, expensive) election. Faced with severe budget shortfalls, local governments often choose to simply approve the initiative as-is rather than pay for the cost of an election. The adoption of the proposed initiative by a city council—even without an election—is considered a ministerial action, and thus is exempt from CEQA. As a result, Wal-Mart gets a new store,
exempt from any environmental review under CEQA, without even going through an election campaign.

A final safeguard is that although a land use regulation passed via initiative will not be subject to CEQA, subsequent land use approvals are likely to involve discretionary actions by public agencies and therefore be subject to environmental review under CEQA. For example, a land use initiative that rezones a particular area from commercial to residential will not be subject to CEQA, but subsequent individual projects proposed for the rezoned area will be. However, land use initiatives are not limited to “big picture” regulations like rezoning. Initiatives can be drafted on a project-specific basis and made as detailed as necessary to eliminate any future discretionary actions by the local government that could potentially trigger CEQA. Furthermore, the lack of CEQA review for “big picture” initiatives can result in a land use regime overly favorable to environmentally undesirable activities that would not have occurred had the “big picture” regulation been subject to CEQA in the first place.

4. CEQA Merely Imposes Procedural Requirements Not Binding on Voters

As noted above, because voters utilizing the initiative are not bound by procedural requirements applicable to legislators, the California Supreme Court has suggested that CEQA’s procedural requirements, such as the preparation of environmental assessments, do not apply to the initiative process. Even if this justification were accepted as a general principle, in the context of CEQA, the argument misses the mark. California courts have repeatedly recognized that CEQA is both procedural and substantive. The procedural...
mechanisms in CEQA, such as the preparation of environmental assessments, are inextricably linked to its substantive goal of ensuring that adverse environmental impacts are minimized and mitigated. Since voters utilizing the initiative are substantively limited to only that which a similarly situated legislative body could do, they should also be bound by CEQA’s dual substantive/procedural requirements.

5. Logistical Difficulties Prevent Environmental Review of Initiative

California courts have identified numerous logistical difficulties in integrating the initiative process and the environmental review process, such as inconsistent time limits and the poor fit if the electorate were to serve as lead agency under CEQA. While it is true that the logistics of the two processes are somewhat inconsistent, these are not insurmountable obstacles. Both CEQA and the Elections Code could be amended to accommodate the other process: time limits could be adjusted, the definition of lead agency could be modified, and provisions could be added to address responsibility for the cost of CEQA compliance.

B. Washington

1. The Statutory Language of the GMA Preempts the Use of the Initiative

Despite admitting that the GMA is “not a model of consistent clarity,” Washington courts have relied on a textual analysis of the GMA and its use of the term “legislative body” to determine that it implicitly preempts use of the initiative. Putting aside the logical inconsistency in the courts’ textual analysis, the reliance on the statutory language gives undue influence to the

for Responsible Growth, Inc. v. City of Rancho Cordova, 150 P.3d 709, 733 (Cal. 2007) (“The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. The EIR’s function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account.”).

185. See Mountain Lion Found. v. Fish & Game Comm’n, 939 P.2d 1280, 1298 (Cal. 1997) (“CEQA’s substantive mandate that public agencies refrain from approving projects for which there are feasible alternatives or mitigation measures is effectuated in . . . [CAL. PUB. RES. CODE §] 21091. Under this provision, a decision-making agency is prohibited from approving a project for which significant environmental effects have been identified unless it makes specific findings about alternatives and mitigation measures.”) (citations omitted). See also CAL. CODE REGS. tit. 14, § 15021(c) (2013) (“The duty to prevent or minimize environmental damage is implemented through the findings required by Section 15091 [requiring the preparation of an EIR].”).

186. See supra note 116 and accompanying text.

187. See infra Part IV.A and accompanying text for suggested specific amendments to both CEQA and the Elections Code.


189. See supra notes 133–35 and accompanying text.

190. The GMA uses the terms “legislative body” as well as “city” or “county”; since the latter terms encompass both voters and legislative bodies, an argument could be made that use of the initiative
legislature’s word choice. When a legislature is drafting a bill, its focus is likely on the substance of the legislation, not on whether the initiative or referendum may be used for the subject matter covered by the legislation; as the Washington Supreme Court itself has conceded, the particular word choice may just be “happenstance.”\textsuperscript{191} While more recent decisions have retreated from purely textual analysis of the act,\textsuperscript{192} any lingering reliance on the text of the GMA to support implied preemption of the initiative is misplaced.

2. Voters Are Ill-Equipped to Decide Land Use Matters

Because voters lack the expertise of planners and legislators, Washington courts have voiced a concern that they cannot adequately appreciate the complexities of land use issues.\textsuperscript{193} Voters may fail to recognize not only adverse environmental impacts, but also other long-term impacts, such as negative tax implications.\textsuperscript{194} Planners and elected officials, “responsible for the long term well-being of the entire community,”\textsuperscript{195} are therefore arguably better suited than voters to decide land use issues.

However, legislators are not always guided by their “expertise” when making land use decisions. Much has been written on the inherently political nature of the “growth machine” and the structural bias of local government in favor of development.\textsuperscript{196} Whether this is the result of community-minded

is therefore not implicitly preempted by the GMA. \textit{Cf.} 1000 Friends of Washington, 149 P.3d at 623; (rejecting this argument, and reasoning that the various terms are merely used interchangeably). Even if the terms are used “interchangeable,” the courts have failed to provide any justification—other than retreating from overreliance on textual analysis—for why the meaning of the “interchangeable” terms favors one term’s definition over the other term’s definition. \textit{See id.} at 622 (noting that a “laser focus” on the text alone should not be determinative of whether the GMA implicitly preempts use of the initiative).

\textsuperscript{191} \textit{Id.} at 620, 623 (noting that “clear statutory language” as to whom authority is delegated under state law “is often absent, as legislation tends to focus on the substance of the field being legislated upon, and not on how the legislation fits within the larger constitutional structure of government”).

\textsuperscript{192} \textit{Id.} at 623 (retreating from a textual reading of the GMA that would give a “monolithic meaning” to word choice; “language is simply one of many tools that this court has used to determine relevant legislative intent”); \textit{see also} Save Our State Park v. Bd. of Clallam Cnty. Comm’rs (SOS), 875 P.2d 673, 679-80 (Wash. Ct. App. 1994) (recognizing that the reliance on the legislature’s word choice may cause an “erosion” in initiative and referendum rights, but nonetheless relying on it to support its holding that the particular land use initiative at issue was preempted by the GMA).

\textsuperscript{193} \textit{See} SOS, 875 P.2d at 678 n.6 (“[R]ezone[ing] decisions require an informed and intelligent choice by individuals who possess the expertise to consider the total economic, social, and physical characteristics of the community.”) (quoting Leonard v. City of Bothell, 557 P.2d 1306, 1311 (Wash. 1976) (en banc)).

\textsuperscript{194} \textit{See id.}

\textsuperscript{195} \textit{See} supra note 76, at 315 (“[A]s a result of politicization, planners in many cases have become overly favorable toward development requests.”); \textit{see also} MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 82-83 (1992) (describing the “growth machine” tendency of local legislators—as well as planning experts—to make land use decisions overly favorable towards developers); Stahl, supra note 76, at 41-42 & nn.170–71 (land use decisions are “often conducted like
motivations, such as increasing the tax base to support other needed infrastructure, or due to political motivations, such as the need to appease special interests and campaign supporters, this pro-growth bias undercuts the assumption that legislators are always more responsible actors motivated solely by their “expertise.” Allowing the initiative can thus serve as a structural counterbalance and a corrective measure to pro-development special interests that may have captured the legislative land use system.\textsuperscript{197}

Furthermore, even if legislators and planners were motivated only by their expertise, disallowing the initiative because of voters’ lack thereof elevates “efficiency and expertise in government over citizen participation,”\textsuperscript{198} and paternalistically “implies that the average citizen cannot decide the development future of his or her community.”\textsuperscript{199} While compelling arguments may be made that efficiency and expertise should be so elevated, especially in the case of broad policy issues with statewide (or nationwide) implications,\textsuperscript{200} such as immigration policy or tax reforms, local land use presents a different situation. Land use issues are often literally in voters’ backyards and part of their day-to-day life; on such matters, voters may be just as much “experts” as local legislators.\textsuperscript{201}

private business transactions between the city government and developers, from which the public is excluded’); Freilich & Guemmer, supra note 70, at 517 (noting that “the monied developer has been acknowledged as the principal threat to responsible and independent representation” in the context of legislative land use decisions).

\textsuperscript{197} This is not meant to suggest that the anti-development position is the better response to land use decisions; in many cases, in fact, the anti-development position may be detrimental to the overall well-being of the community. Nonetheless, the author would argue that the initiative, in a limited form, should be made available to voters for land use decisions as a tool “which may be used to tear through the exasperating tangle of traditional legislative procedure and strike directly toward the desired end.” Amador Valley Joint Union High Sch. Dist. v. Bd. of Equalization, 583 P.2d 1281, 1289 (Cal. 1978) (citations omitted).

\textsuperscript{198} See Freilich & Guemmer, supra note 70, at 514.

\textsuperscript{199} Selmi, supra note 76, at 324. Disallowing the initiative is also arguably inconsistent with the Washington courts’ support of the GMA’s extensive provisions for public participation. See Leonard v. City of Bothell, 557 P.2d 1306, 1311 (Wash. 1976) (noting the extensive amount of public participation allotted for in the state zoning law and SEPA; forty-nine public meetings and hearings had been held on the particular proposed land use legislation in the case). If voters are already permitted such extensive involvement in the GMA process, they are likely capable of handling limited use of the initiative as well. Cf. 1000 Friends of Washington v. McFarland, 149 P.3d 616, 624 (Wash. 2006) (holding that the GMA “[r]equiring so much public input into the development of the regulations and the comprehensive plans” supports a finding of implicit preemption of the initiative).

\textsuperscript{200} See BRODER, supra note 7, at 242.

\textsuperscript{201} See Selmi, supra note 76, at 324–25. Furthermore, in the case of local land use initiatives, some of the other criticisms lodged against use of the initiative process at the state level—voter apathy, massive spending on advertising, use of paid signature gatherers to put special interest issues on the ballot—are less applicable. Id. at 300–02.
3. Use of the Initiative Would Undermine the GMA’s Goal of Coordinated Planning

As noted in Part I.A.2.b, the GMA has a dual nature as both an environmental protection law and a planning law. In finding that the act implicitly preempts use of the initiative, the Washington courts have focused on the GMA’s role as a planning law and the negative consequences that use of the initiative would have on its goal of coordinated statewide planning. And in fact, unrestrained use of the initiative for matters covered by the GMA could jeopardize this goal. Therefore, the author agrees that the GMA should implicitly preempt use of the local initiative for matters touching on statewide planning concerns.

However, the conclusion that the GMA therefore preempts all land use decisions does not necessarily follow. The GMA does not give local lawmakers just one option for how to structure their land use regimes. Cities and counties are free to make a wide variety of choices, reflecting the unique concerns of their communities, as long as they satisfy the basic coordinated planning standards set forth in the GMA. Involving the electorate in the land use decision-making process may create logistical complications, but it would not undermine the GMA’s goal of coordinated planning if its scope were appropriately limited.

4. Logistical Difficulties Prevent Integration of Environmental Review and Initiative Processes

Finally, like the California courts, courts in Washington have identified numerous logistical difficulties in integrating the initiative process and the
environmental review process. These difficulties include the inconsistent timelines of the two processes, the fact that comprehensive plans can only be amended on an annual basis, and the poor fit if the electorate were to try to fill the role of “city” or “county” under the GMA.\textsuperscript{208} As with the logistical difficulties identified in California, these are not insurmountable obstacles. The Election Code, as well as the GMA and SEPA, could be amended to accommodate the other process: time limits could be adjusted; limitations could be imposed on the types of initiatives permitted; and the role of voters, initiative sponsors, and local governments could be clarified to take into account the different procedures that may be applicable when the initiative is used for land use decisions.\textsuperscript{209}

IV. Integrating Environmental Review into the Initiative Process

As demonstrated above, the trade-offs made in California and Washington are based on flawed assumptions. The initiative process and the environmental review process—and their goals of public participation and expertise—are not as irreconcilable as courts have assumed. Public participation is not only at the heart of the initiative process, it is also one of the primary goals of environmental review laws like CEQA, SEPA, and the GMA.\textsuperscript{210} And the expertise provided by environmental review is valuable not only to legislators, but also to voters: to truly achieve the initiative’s goals of empowering citizen lawmakers, voters should have access to the same information about environmental impacts that legislators have.

This Part identifies alternatives to the trade-off that would achieve these dual goals and allow the initiative to be used for land use matters while also providing for meaningful environmental review. Accommodating both processes in the land use context will require modifications to each. While the modifications may curtail the extent of voters’ initiative rights and limit the scope of environmental review, a slightly diluted initiative power coexisting with a slightly diluted environmental review is preferable to preserving one process at the cost of eliminating the other. Furthermore, modifying each process to accommodate the other may also serve to correct some of the

\textsuperscript{208} See supra notes 139–41 and accompanying text.

\textsuperscript{209} See infra Part IV.B for suggestions as to specific amendments.

\textsuperscript{210} See, e.g., Laurel Heights Improvement Ass’n of San Francisco v. Bd. of Regents, 764 P.2d 278, 282–83 (Cal. 1988) (“If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. . . . The EIR process protects not only the environment but also informed self-government.”); WASH. REV. CODE § 36.70A.140 (2012) (requiring that counties and cities covered by the GMA “establish . . . a public participation program identifying procedures for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations”); Glasser v. City of Seattle, 162 P.3d 1134, 1138 (Wash. Ct. App. 2007) (“The principal purpose of SEPA is to provide decisionmakers and the public with information about potential adverse impacts of a proposed action.”).
underlying flaws in each process. For example, an environmental review process that has been streamlined to accommodate the shorter timetable of the initiative process also may serve to reduce duplicative or overly burdensome aspects of the environmental review process that have been criticized in other contexts.211 Similarly, an initiative process that has been modified to require that summaries of environmental assessments be provided to voters also may serve to address general concerns about voters being inadequately informed about initiatives.212

Environmental law and land use law, as well as the election laws that govern use of the initiative, are all primarily matters of statute; thus, the focus in this Part is on legislative reforms.213 The recommendations herein are specifically targeted at modifications to the current regimes in California and Washington, but the underlying analysis is applicable to all states. For states that do not permit use of the initiative for land use matters, the alternatives demonstrate that whatever other considerations weigh against use of the initiative for land use matters, inability to apply environmental review should not be considered a bar. For states that allow the initiative for land use matters but have been unable or unwilling to integrate environmental review into the process, the recommendations below can provide guidance about how to adjust their own legal regimes to better accommodate both processes.

Finally, although this section attempts to reconcile the two processes, the proposals below err on the side of preserving environmental review where a trade-off with the initiative process appears inevitable. While the initiative can be a valuable tool for land use decision making, the author agrees with the majority of commentators who find that “[d]irect democracy is not the

211. See infra note 216 and accompanying text.
213. Although courts have some leeway in their interpretation of statutory law, the extent of judicial solutions to the trade-off is constrained by the inconsistent statutory regimes. See Skagit Surveyors & Eng’rs, L.L.C. v. Friends of Skagit Cnty., 958 P.2d 962, 974 (Wash. 1998) (explaining that the role of courts “is to interpret the statute as enacted by the Legislature, . . . not rewrite the statute”); 1000 Friends of Washington v. McFarland, 149 P.3d 616, 628 (Wash. 2006) (“The legislature certainly could decide that local ordinances implementing the GMA should be subject to local referendum. But it is for the legislature, not the courts, to amend GMA procedures.”). The courts in both California and Washington are also constrained by years of precedent interpreting statutory provisions in a manner not allowing for coexistence of the initiative process and environmental review process. Another possible solution to the trade-off would be for voters using the statewide initiative to amend the relevant state laws. 1000 Friends of Washington, 149 P.3d at 621 (specifically inviting voters to do so: “[t]he people of the state as a whole are the proper electorate to check the legislative action at issue in these cases [GMA]—by way of a statewide vote on that underlying legislation”). However, for the various reasons discussed supra notes 76–78 and accompanying text, the initiative is ill-suited for the kind of complex statutory changes that will be required to integrate the two processes; drafting such an initiative, let alone winning an election campaign, would present a significant challenge.
preferred decision-making system” in the land use context.\textsuperscript{214} Or as even a supporter of the initiative has put it: “[t]he initiative process is like 190-proof alcohol . . . A little goes a long way.”\textsuperscript{215} Therefore, where use of the initiative cannot be balanced with meaningful environmental review, the author would advocate an approach closer to that of Washington than California.

\textit{A. Modifications to the California Approach}

In California, amendments to both CEQA and the Election Code would ensure that environmental review under CEQA applies to initiatives, albeit in a modified version. In making these amendments, lawmakers should keep in mind the reasons that initiative sponsors seek to take advantage of the ballot-box loophole to avoid CEQA compliance and the slow pace, high expense, and unnecessary bureaucracy of environmental review under CEQA.\textsuperscript{216} While requiring environmental review of initiatives will necessarily add a layer of bureaucracy, any reforms should take these concerns into account and minimize delay and expense to initiative sponsors to the extent compatible with effective environmental review.

To rebut any textual argument that initiatives are outside the scope of CEQA, two key statutory changes are required. First, since CEQA only applies to “projects,” the definition of “project” in CEQA must be amended so that it is clear that voter-sponsored initiatives fall within that definition. Second, the “vote of the people” exemption in the CEQA Guidelines must be eliminated or amended. The first change is needed to address the fact that CEQA currently defines “project” as a discretionary action by a public agency.\textsuperscript{217} Since the only actions taken by public agencies with regard to initiatives are ministerial ones, initiatives do not fit within this narrow definition.\textsuperscript{218} However, if the definition were amended to clarify that in addition to discretionary actions by public

\begin{itemize}
  \item \textsuperscript{214} See Selmi, supra note 76, at 307–08 (advocating for the use of direct democracy for land use decisions while recognizing that it is a “blunt” tool that makes compromise virtually impossible). Particularly because there is no easy “fix” to the unintended consequences of legislation adopted by initiative—in many states, initiatives can only be repealed or amended by another initiative—a measure of caution is advisable when using the initiative for land use matters. See, e.g., Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317, 322 n.8 (Cal. 1990) (“One not inconsequential impact of the enactment of a municipal initiative is the statutory requirement that any future amendment of the initiative ordinance be submitted to the voters for approval.”).
  \item \textsuperscript{215} See supra note 7, at 207 (quoting former Oregon secretary of state Phil Keisling).
  \item \textsuperscript{216} See, e.g., Riccardi, supra note 12; Deukmejian et al., supra note 38. See also Lara Cooper, Carpinteria Voters Give Resounding No to Venoco’s Measure J, NOOZHAWK (Jun. 9, 2010), http://www.noozhawk.com/noozhawk/article/060810_venoco_measure_j/ (noting that Venoco utilized the initiative “after years of wading through the city’s planning process”). Concerns have also been raised about the threat of litigation under CEQA. See Riccardi, supra note 12 (“Though there are other ways to derail projects through litigation, CEQA challenges have become notorious.”). However, the perceived threat of CEQA litigation is likely exaggerated: studies indicate that less than 1 percent of matters subject to environmental review under CEQA end up in litigation. See BASS ET AL., supra note supra note 35, at 142 (citing Association of Bay Area Governments study).
  \item \textsuperscript{217} See supra notes 107–12 and accompanying text.
  \item \textsuperscript{218} Id.
\end{itemize}
agencies, “project” also includes citizen-sponsored initiatives, such measures would then squarely fall within the definition of “project” and there would no longer be a textual basis for CEQA’s inapplicability. The second change—eliminating or amending the “vote of the people” exemption in the CEQA Guidelines—logically follows once the definition of “project” has been amended to include initiatives. If initiatives are projects, and CEQA is applicable to them, then an exemption for “vote[s] of the people,” in the form of initiatives, is no longer necessary or appropriate.

Once these key definitional changes have been made, additional amendments to CEQA would be required to reflect the fact that the mechanics of the process will occur differently in the context of initiatives than in the context of legislative proposals. For example, CEQA provisions that refer to a “lead agency” or “decision-making body” would have to be modified to address the fact that in the initiative process, voters or initiative sponsors will take the place of the legislative body that would normally fill these roles. The amendments would vary depending on what the specific provisions require. Where voters or the initiative sponsor could reasonably fulfill the role of lead agency, only slight modifications may be required. For example, the requirement that the “decisionmaking body . . . consider . . . the EIR,” could be modified to simply provide that the EIR be made available for public review. Similarly, the provision permitting a lead agency to charge a fee for costs incurred in preparing environmental assessments could be modified to clarify that in the case of initiatives, the sponsors are responsible for the cost.

Where voters or the initiative sponsor could not reasonably fulfill the role, such as the requirement that the lead agency prepare an EIR, language could be added to make it clear that the “lead agency” in case of initiatives is the government entity that would be considered the lead agency if the proposed law or approval were going through the legislative process.

A decision would also need to be made about what point in the initiative process an environmental assessment under CEQA is required: after the initiative has been certified for the ballot but before an election is held, or after an initiative is approved by voters but before it can be enacted into law. Applying environmental review after an election, but before the initiative is enacted into law has the advantage of efficiency: only those measures that actually receive a “Yes” vote would require CEQA review. However, this

219. Since an initiative only involves ministerial actions by public agencies, a provision could be added to CEQA negating the ministerial act exemption in the case of citizen-sponsored initiatives. See CAL. CODE REGS. tit. 14, § 15300.2 (2013) (negating categorical exemptions under certain circumstances).

220. Id. § 15050(b).

221. CAL. PUB. RES. CODE § 21089(a) (West 2013).

approach would not provide voters with any information they could use in their decision-making process.\footnote{223}{Post-election environmental review would also raise the same difficulty as preelection review with regard to the prohibition on any changes to a ballot measure once submitted to a public agency for certification. \textit{See infra} notes 225–27 and accompanying text.}

Preelection environmental review is preferable since it would ensure that voters have the benefit of environmental review when casting their votes. While the amount of time needed to complete environmental review may not be compatible with the amount of time currently set forth in the Election Code for placement of the certified measure on the ballot, applicable time periods could be adjusted to allow for a streamlined form of environmental review under CEQA.\footnote{224}{A possible model for such streamlined review could be the 2011 amendments to CEQA, which provided for streamlined review for qualifying infill projects and “environmental leadership development projects.” \textit{See S.B. 226, 2011–12 Leg., Reg. Sess. (Cal. 2011) (infill projects); A.B. 900, 2011–12 Leg., Reg. Sess. (Cal. 2011) (environmental leadership development projects).}} However, a greater difficulty presented by preelection environmental review concerns the substantive requirements of CEQA. Unlike the legislative process, where proposed land use regulations or approvals can be modified extensively from their original form before being enacted into law,\footnote{225}{And may be required to be modified under CEQA.} initiative measures cannot be amended or changed after they have been certified for the ballot.\footnote{226}{\textit{See, e.g.}, \textit{Native Am. Sacred Site & Envtl. Prot. Ass’n v. City of San Juan Capistrano}, 16 Cal. Rptr. 3d 146, 148 (Ct. App. 2004) (noting the trial court’s conclusion that a compromise “implementation agreement” reached through negotiations between initiative sponsor and local legislative body, occurring after ballot proposal had been certified with required number of signatures, was invalid because no changes are allowed to a proposed measure after submitted to city for certification). The reason is that voters’ signatures have been gathered for a proposed law exactly as set forth on the certified measure; if it were to be changed post-certification, no matter how minor the change, one cannot be certain that the requisite number of signatures would have been collected. \textit{See CAL. ELEC. CODE §§ 9007, 9034 (West 2013)} (providing that the language of a ballot measure cannot be altered once it has been certified for the ballot); \textit{see also} Cody Hoesly, Comment, \textit{Reforming Direct Democracy: Lessons from Oregon}, 93 CALIF. L. REV. 1191, 1233 (2005) (noting that if government officials could change the language of a ballot measure after it was certified but before it was placed on the ballot, that would not comply with California law and would convert the initiative into a form of indirect democracy).} Thus, even if preelection environmental review demonstrates drastic negative environmental impacts of the initiative, under current law, the initiative cannot be revised to mitigate for those impacts—even if the initiative sponsor agreed to the changes.\footnote{227}{Even initiative supporters have criticized this aspect of initiative law. \textit{See BRODER, supra} note 7, at 213 (“If somebody points out something that you hadn’t noticed before, everyone would be better served if you could fix that along the way.”) (quoting an initiative industry lawyer).}

One possible response to this situation would be to amend the Election Code to require that any measure being circulated for signatures include a notice that the measure, as being circulated, is subject to change to ensure compliance with CEQA. Alternately, the timelines set out in the Election Code could be extended to allow for a “cooling-off” period of several weeks after a land use initiative petition has been submitted with the required number of signatures.
signatures but before it has been certified.228 During this period, initiative proponents and local legislative authorities would have the opportunity to negotiate compromise legislation that could potentially lessen the environmental impacts of the original initiative. Although the initiative itself could not be modified, initiative sponsors would be free to withdraw the initiative if they negotiate compromise legislation.229

However, even if no substantive changes to the initiative were permissible as a result of preelection environmental review, modified CEQA compliance would still have positive effects. First, it would remedy the current situation, wherein voters are deprived of the information about potential environmental impacts that legislators would have if they were voting on the matter.230 If environmental review were conducted prior to the election, a summary of the environmental assessment could be included in the ballot initiative materials mailed to voters, so voters could consider such information when casting their ballots.231 Even if few voters actually read the documentation, it would be available for the press and other interest groups to distill to voters.232 Second, requiring preelection environmental review of initiatives would eliminate the double standard that currently exists under California law. Oil companies like Venoco and multi-national corporations like Wal-Mart would no longer be as incentivized to use the ballot box to avoid complying with environmental laws.233

228. See id. at 210–12 (citing Commission on Campaign Financing 1992 report making a similar recommendation for all types of initiatives, not just land use initiatives).

229. Unlike an initiative, currently exempt under CEQA, such legislation would be subject to CEQA; however, the greater assurance of passage of the law through the legislative process might sway initiative sponsors to forego the CEQA exemption for initiatives and an uncertain (and potentially costly) election. See id.

230. Depriving voters of information to which legislators would be entitled if they were making the same decision exacerbates the oversimplification and under-explanation that are weaknesses of the initiative process generally. See supra notes 76–81 and accompanying text. Even the California Supreme Court, with its highly protective stance on initiatives, has acknowledged that “‘[a] great number of voters undoubtedly have a superficial knowledge of proposed laws to be voted upon’ . . . ‘[o]ften voters rely solely on the title and summary of the proposed initiative and never examine the actual wording of the proposal.’” Taxpayers to Limit Campaign Spending v. Fair Political Practice Comm’n., 799 P.2d 1220, 1236 (Cal. 1990) (quoting State ex rel. v. Richardson, 85 P. 225, 229 (Or. 1906) and Schmitz v. Younger, 577 P.2d 652 (Cal. 1978) (Manuel, J., dissenting)).

231. See Mark August Nitikman, Note, Instant Planning—Land Use Regulation by Initiative in California, 61 S. Cal. L. Rev. 497, 529–31 (1988) (requiring initiatives to comply with CEQA to qualify for the ballot, even if voters cannot modify the measure to mitigate adverse environmental effects, will educate voters and reduce the likelihood of initiative sponsors using the process to avoid CEQA).


233. Although the number of projects and approvals subject to CEQA that are litigated is only a small percentage of the total, the perceived threat of litigation may be precisely what makes the act so effective. See BASS ET AL., supra note 35, at 153 (citing Association of Bay Area Governments study on CEQA’s effectiveness).
Finally, if amending CEQA to make it applicable to initiatives is not currently politically feasible, the Election Code alone could be modified to provide greater opportunity for informal environmental review. For example, the provisions concerning section 9111 reports could be modified to explicitly provide that local governments should consider potential environmental impacts of an initiative in such reports and that they should be guided by CEQA standards in doing so. The current thirty-day time period for completion of the reports could also be extended to give local governments a greater opportunity to evaluate potential environmental impacts if they chose to do so. Finally, a summary of the environmental impacts disclosed in the section 9111 report could be included in the ballot initiative materials, so voters can consider such information when casting their ballots.

B. Modifications to the Washington Approach

In Washington, while the GMA has been the primary barrier to use of the initiative for land use matters, SEPA also presents a potential barrier. Modifications will be required to both the GMA and SEPA, as well as the Election Code.

As an initial matter, although SEPA has never definitively been construed to preempt use of the initiative, to avoid any ambiguity, it should be amended to clearly indicate both that it does not preempt use of the initiative and that it is applicable to initiatives. More crucially, the GMA should also be amended to clearly state that it does not completely preempt use of the local initiative. The Washington courts have relied on a finding of implicit preemption in finding that initiatives are not permitted for land use matters; if the GMA were amended to explicitly state that it does not preempt use of the initiative, the preemption argument would be extinguished.

However, some limitations on the use of the initiative may be appropriate in Washington and other states with GMAs that would not be necessary in California and other states without GMAs. The goal of the GMA is not only environmental review of land use actions but also coordinated statewide planning; unconstrained use of the initiative would almost certainly interfere with the latter goal. Thus, certain land use decisions, such as development

234. See infra notes 241–42 and accompanying text.
235. The current budget crisis facing many local governments would remain an obstacle to truly effective 9111 reports, even if more time were permitted to compile them. See supra note 162. Thus, any amendments to the Election Code or CEQA imposing additional requirements on local governments should be accompanied by provisions addressing how the local government will pay for such actions.
236. See supra notes 129–32 and accompanying text.
237. The Washington courts have in fact expressly invited lawmakers to make such an amendment. See 1000 Friends of Washington v. McFarland, 149 P.3d 616, 625 (Wash. 2006) (suggesting that the failure of the state legislature to do so “is at least some evidence that the legislature believes this court accurately divined its intent” to implicitly preempt the initiative for matters covered by the GMA).
238. See supra notes 142–44 and accompanying text.
regulation failing to satisfy GMA standards for “critical areas,” should still be beyond the scope of the initiative.\textsuperscript{239} While use of the initiative will be limited under this approach, it strikes a better balance than the current outright ban on use of the initiatives for all land use matters, regardless of whether the proposal would actually be compatible with the substantive requirements of the GMA.

Additional amendments to both GMA and SEPA will be required to reflect the fact that the mechanics of the environmental review occur differently in the context of initiatives than they do in the context of legislative proposals. Many of these amendments would be similar in substance to the suggested amendments to CEQA set out in Part IV.A. For example, adjustments to the various meeting and process requirements set out in the GMA would be necessary to clearly identify the roles of various parties. Amendments to the Washington Election Code will also be required to ensure that its provisions, such as applicable timetables, are adjusted to accommodate the completion of environmental review.

Finally, modifications will be required to ensure that use of the initiative is not overly burdened by duplicative requirements in the GMA and SEPA. Just as the GMA and SEPA provide that the acts’ requirements are to be integrated where possible for legislatively made land use decisions,\textsuperscript{240} similar safeguards will be needed to ensure that initiative sponsors are not faced with conflicting or redundant environmental review requirements as a result of being subject to both laws.

\textbf{CONCLUSION}

The statutory reforms set out above require that institutional inertia be overcome and that the necessary political will be found to make what are admittedly logistically complex changes to multiple statutory regimes. The proposals may therefore be criticized on the ground that in states like California, legislators may be unwilling to do anything that could be perceived as diminishing voters’ power to use the initiative,\textsuperscript{241} or which would run counter to the current trend of reforming CEQA to be less widely applicable,

\textsuperscript{239} Alternatively, if the subject matter of a proposed initiative falls within the scope of the GMA, both the GMA and the Election Code could be amended to provide that such an initiative will only be put into effect if it is determined to be compatible with the coordinated planning provisions of the GMA. A determination of such compliance could be required either before the election is held; or if there is concern that would take too long, the measure could go on ballot with a caveat that no initiative covered by the GMA will become effective, even if it receives a yes vote, until post-election certification is completed to assure that it does comply with GMA.

\textsuperscript{240} See WASH. ADMIN. CODE § 197-11-228 (2012) (providing that GMA and SEPA processes are to be integrated, and authorizing combined documentation and analysis under the acts).

\textsuperscript{241} See BRODER, supra note 7, at 212 (noting that legislators act out of self-preservation when it comes to limiting the initiative power, and may find it preferable to leave the power untouched—and stay in office—than be accused of taking away a constitutionally reserved right of voters).
not more. Furthermore, in states like Washington, it might be contended that legislators will be naturally disinclined to add what may be perceived as a complication to the environmental review process by allowing voters to get involved through use of the local initiative.

While such criticisms are grounded in legitimate concerns, there are countervailing reasons to believe the reforms suggested herein are achievable. In California, legislators have shown willingness to set limits on use of the initiative: on at least two prior occasions, state legislation has been proposed to allow for greater environmental review of initiatives. Although both of these previous efforts failed, there are reasons to think that another attempt might succeed. In the twenty-plus years since the last legislative effort to make CEQA applicable to initiatives, the initiative has been increasingly used by special interests like Wal-Mart to not only avoid environmental review under CEQA, but to force the land use prerogatives of a minority on an entire community. Furthermore, despite generalizations about the sanctity of voters’ initiative rights, voters themselves have repeatedly indicated they are willing to accept limitations on use of the initiative.

In Washington, by giving voters only a limited ability to utilize the initiative, the statutory changes suggested herein ensure that the initiative
cannot be used to frustrate the statewide planning goals of the GMA. Furthermore, local governments are already required to involve the public at many stages of the GMA and SEPA processes; they are thus well positioned to handle any additional complications resulting from the involvement of the public through a limited use of the initiative as well. Finally, while even limited use of the initiative may result in decision making that is less efficient, more time-consuming, and subject to less oversight by “experts,” if citizen-lawmaking is something that we as a society value, those may be the unavoidable costs.248

Reconciling the environmental review process and the initiative process should “not be thwarted merely because compliance therewith is difficult.”249 Even if the political will is currently lacking to change the status quo, by identifying the current unbalanced approaches and suggesting alternatives to the trade-off, this Article lays the groundwork for future reforms. Environmental review laws such as CEQA, SEPA, and GMA are “attempt[s] by the people to shape their future environment by deliberation, not default.”250 And the initiative process, while “never intended to be used . . . as a vehicle for granting special interests a free pass from government oversight and regulation,”251 is a means by which “the people [can] govern themselves in a democracy unfettered by the distortions of representative legislatures.”252 By modifying each process to better accommodate the other, the goals of both expertise and public participation can be achieved and the weaknesses inherent in each process can be tempered.

248. See Selmi, supra note 76, at 306–08; see also Carter v. Lehi City, 269 P.3d 141, 157 (Utah 2012) (“Efficiency is hardly the hallmark of our constitutional system of government. The framers built our government as ‘a bulwark against tyranny,’ not a model of efficiency.”). Particularly in states like California and Washington, where the initiative is deeply ingrained as part of the law-making process, making accommodations to permit use of the initiative for land use decisions accords with the legal traditions in those states.
250. Id. (quoting Stempel v. Dep’t of Water Res., 508 P.2d 166, 172 (Wash. 1973)).
252. Carter, 269 P.3d at 149.

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