



DOUBLE NEGATIVES

**and Other Drafting Ambiguities
Impede Public Understanding of Ballot
Proposals to Change Existing Law**

The 2022 Connecticut statewide ballot included a proposed amendment to the Connecticut Constitution “to permit the General Assembly to provide for early voting.” The proposal passed by a margin of approximately 21 percent among those who voted on the proposal. (The secretary of the state website indicates that the total number of votes cast on this proposal was less than the total number of votes cast for United States senator, governor, secretary of the state, and other statewide offices.)

In 2014, Connecticut voters failed to approve a proposed amendment to the state constitution “to remove restrictions concerning absentee ballots and to permit a person to vote without appearing at a polling place on the day of an election.” The Office of the Secretary of the State issued a press release in October 2014 advising Connecticut voters that a “Yes” vote would not result in any immediate change to Connecticut voting laws, but would “permit the General Assembly to loosen our current restrictions on absentee voting and potentially enact some form of early voting, as 35 other states have done.” The 2014 proposal was voted down by approximately 52 percent of votes cast on the proposal. (As in 2022, the total number of votes cast on this 2014 proposal was less than the total votes cast for the 2014 gubernatorial

candidates.) Some of the “No” votes may have resulted from concerns that passage could have automatically allowed voting without any personal appearance at a polling place on Election Day. There may also have been concerns that a “Yes” vote could increase voter fraud. Some have theorized that the wording of the 2014 proposal was confusing, causing many voters to refrain from casting any vote on the proposal, for or against. The 2014 voters may not have been familiar or comfortable with a “no excuse” absentee ballot concept. A “No” vote may have been considered the safer option in case of doubt (since it preserves status quo).

In the ensuing eight years, a narrower and less confusingly worded proposal to amend the Connecticut Constitution’s restrictions on early voting eventually made its way through the General Assembly. The 2022 proposal did not refer to absentee voting (only in-person early voting) and clarified that a “Yes” vote would authorize the General Assembly to consider early voting legislation. Unlike in 2014, “no excuse” absentee voting was not part of the 2022 proposal.¹

Proposals to amend state constitutions and to pass statewide referenda are clearly difficult to draft and difficult to explain

to prospective voters, in a manner that is succinct, accurate, and neutral. Some have suggested that statewide voter proposals be drafted to require not more than an 8th grade reading level.² By way of very rough comparison, the Consumer Product Safety Commission generally prefers product safety warning labels to be drafted at no higher than a 6th grade reading level, although the commission recognizes that “the 8th grade level is considered ‘plain English.’”³ One recent study suggests that Connecticut’s 2022 early voting proposal required a 12th grade reading level.⁴

New Mexico undertook a similar “redo” for what should have been a less controversial and largely nonsubstantive, cosmetic amendment to its state constitution. In 2002, New Mexico voters failed to approve an amendment that would have repealed a 1921 New Mexico constitutional prohibition against foreign-born individuals ineligible for US citizenship (and corporations majority-owned by such individuals) acquiring any interest in New Mexico real property (a so-called “alien land law”). In 2002, 49 percent of voters approved the proposed repeal; afterwards, concerns were raised that some who voted against repeal did not understand the substance of the proposal or the impact of a “No” vote. Sponsors of the 2002 propos-

al might have thought the proposal was noncontroversial, in part because the New Mexico constitutional provision arguably had been effectively superseded by a series of US Supreme Court decisions in the late 1940s striking down similar types of prohibitions applied to foreign-born individuals lawfully within the United States who (due solely to their race, ethnicity, national origin, or similar characteristics) were ineligible for U.S. citizenship.⁵ In addition, the New Mexico legislature had enacted a statute in 1975 that effectively overrode the 1921 New Mexico constitutional alien land law provision.⁶

When the 2002 New Mexico proposal was redrafted and resubmitted to New Mexico voters in 2006, it passed with close to 70 percent voter approval. The 2006 “redo” proposal in New Mexico was presented as having the affirmative or positive purpose of “protect[ing] the right of all persons to acquire and possess real property.” In contrast, the original 2002 proposal

was described as the proposed repeal of Section 22 of Article 2 of the New Mexico constitution, “which mandates that unless otherwise provided by law, aliens who are not eligible to become citizens, and corporations majority-owned by such aliens, are prohibited from acquiring any interest in real property in New Mexico.”⁷ The 2002 proposal therefore described an existing constitutional provision that would have been repealed by a “Yes” vote—an affirmative vote with a purpose of a fundamentally negative nature (an overturning purpose). Some voters opposed to the existing constitutional provision may have mistakenly voted “No” in 2002, thinking that they were voting against the existing constitutional provision. Similarly, the Connecticut 2014 unsuccessful voting proposal was described in part as a proposal to remove certain absentee ballot restrictions from the state constitution.

Florida also failed to repeal an alien land law provision in its state constitution in 2008 (the proposal was voted down by 52 percent of voters), but a subsequent 2018 proposal passed with approximately 62 percent of voters supporting the proposal. Some speculated after the 2008 defeat that Florida voters may have thought they were being asked to permit undocumented immigrants to own Florida real property.⁸ The 2008 proposal asked Florida voters to decide whether to delete “provisions authorizing the Legislature to regulate or prohibit the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship” (so that a “Yes” vote would have removed certain provisions from the Florida constitution and certain powers from the Florida legislature). The 2008 proposal was not well publicized and had been characterized as “obscure” and “very complicated.”⁹ Florida law may also limit the number of words that may be used to describe a proposed constitutional amendment.¹⁰ Interestingly, the Florida alien land law repeal eventually approved by Florida voters in 2018 linked the repeal to two unrelated constitutional amendments;¹¹ the purpose of the 2018 proposed alien land law repeal was simply described as “[r]emov[ing] discriminatory language related to real property rights.”

Some of the drafting and voter education lessons that may be learned from these recent unsuccessful and successful statewide ballot proposals may also apply to technical advice drafted by lawyers, accountants, and other professionals for clients who are not well-versed in the relevant substantive legal or regulatory principles. ■

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NOTES

- 1 See Resolution Act Nos. 19-1 and 21-1. Resolution Act No. 21-2 (a no-excuse absentee ballot proposed amendment to Section 7, Article Sixth, of the Connecticut constitution) requires 2023 General Assembly approval in order to appear on the 2024 ballot. See also *Soto v. Connecticut General Assembly*, (Super. Ct. Docket No. HHD-CV22-5075490S), motion to dismiss granted December 15, 2022 (Noble, J.).
- 2 See, e.g., S. Reilly and S. Richey, *Ballot Question Readability and Roll-off: The Impact of Language Complexity*, 64 *Political Research Quarterly* 59 (2011).
- 3 See 87 Fed. Reg. 8640, 8663 (Feb. 15, 2022) (footnote and citation intentionally omitted).
- 4 See Ballotpedia, 2022 ballot measure readability scores, available at https://ballotpedia.org/Ballot_measure_readability_scores_2022 (last accessed April 18, 2023).
- 5 See, e.g., discussion in Blumrosen, A., *Constitutional Law—Equal Protection—Validity of State Restraints on Alien Ownership of Land*, 51 *Mich. L. Rev.* 1053, 1055 and n. 9 (1953) (generally discussing the constitutionality of state alien land laws and noting that Connecticut and six other states gave resident aliens the same real property ownership rights as citizens); cf. Turrentine, J., *Connecticut Restrictions on Ownership of Real Property by Nonresident Aliens*, 58 *Conn. B.J.* 325, 332-336 (1984) (concluding that it was “highly improbable that a constitutional attack on the overall validity of Connecticut’s common law restrictions [on ownership of land by nonresident aliens] would succeed”).
- 6 See NM Stat. Section 45-2-111(B). For a similar Connecticut statute, see *Conn. Gen. Stat. Section 47-7a* (enacted in 1985 and originally codified as Section 47-58a). See also Turrentine, J., *Connecticut Restrictions on Ownership of Real Property by Nonresident Aliens*, n. 5 *supra* (summarizing Connecticut common law and statutory restrictions

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ACTION RECOMMENDATION 5

The CBA shall present at least one CLE program focused on diversity and inclusion at the Connecticut Legal Conference.

H. The CBA shall encourage diversity and inclusion in CBA publications (hard copy and electronic).

1. Implement strategic actions to increase diversity and inclusion in CBA members responsible for editorial policy and content of publications.
2. Ensure the inclusion of content of publications relating to the Diversity and Inclusion Policy.

I. The CBA shall encourage diversity and inclusion in CBA events (e.g. annual awards dinners, luncheons, receptions, etc.) including:

1. Diversity of planning and award nominations committees.
2. Diversity in speakers.
3. Diversity of award recipients.

J. Develop tracking and reporting of progress in diversity and inclusion efforts, including:

1. Encourage robust participation and tracking by CBA entities, using the resources and support provided by the Committee on Diversity and Inclusion and encourage greater promotion of the reporting process by CBA leadership and accountability by entities that require significant improvement in their diversity and inclusion efforts.
2. Provide widespread dissemination of a biennial CBA Diversity Report to CBA leadership and to all CBA entities and through posting on the CBA website.

K. Encourage CBA entities to develop and enhance mentoring of young lawyers and law students, and are designed to advance diversity and inclusion within these CBA entities.**II. PROMOTION OF THE CBA DIVERSITY AND INCLUSION PLAN ACCOMPLISHMENTS**

The CBA Diversity and Inclusion Plan accomplishments shall be promoted through various means, including the following:

- A. Develop and prominently post on the CBA website information about successful diversity and inclusion programs and activities.
- B. Contribute content to pertinent legal and diversity publications to showcase CBA diversity and inclusion accomplishments.

ACTION RECOMMENDATION 6

The CBA shall actively promote in all possible media, diversity and inclusion advancements.

Thank you for reviewing the CBA Diversity and Inclusion Strategic Plan. Please send your comments to DEI@ctbar.org by June 30, 2023 so that they may be timely reviewed and considered as the CBA DE&I Committee undertakes its review of the CBA Diversity and Inclusion Strategic Plan. Your involvement and input are crucial in this process, and we thank you for your thoughtful consideration. ■

NOTES

- 1 The CBA Diversity and Inclusion Policy, adopted unanimously by the House of Delegates on March 23, 2015, provides as follows:

The Connecticut Bar Association is committed to diversity in its membership, officers, staff, House of Delegates, Board of Governors, executive committee, sections and committees, and their respective leaders. Diversity is an inclusive concept encompassing gender, gender identity, race, color, ethnic origin, national origin, religion, sexual orientation, age, and disability.

We are a richer and more effective association because of diversity, as it increases our association's strengths, capabilities, and adaptability. Through increased diversity, our organization can more effectively address member and societal needs with the varied perspectives, experiences, knowledge, information, and understanding inherent in a diverse relationship.

- 2 CBA Constitution, Article II (Purpose).

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on real property ownership by nonresident aliens and supporting enactment of Connecticut legislation to repeal such restrictions; the article observed that as of its writing "Connecticut [was] one of only four States that still recognize[d] this ancient restriction").

7 See Constitutional Amendment 4 appearing on the 2002 New Mexico general election ballot, summarized at www.nmlegis.gov/Publications/New_Mexico_State_Government/Constitutional_Amendment/Constitutional_Amendments_2002.pdf (Last accessed April 18, 2023).

8 See, e.g., summary of Amendment 11 appearing on the 2018 Florida general election ballot contained at www.floridabar.org/the-florida-bar-journal/amendment-11-property-rights-removal-of-obsolete-provision-crimi-

[nal-statutes/](http://www.floridabar.org/the-florida-bar-journal-statutes/) (Last accessed April 18, 2023).

9 See E. Delcorto, Repeal of alien land law long overdue, some say, *Naples Daily News* (Oct. 24, 2008), copy available at <https://archive.naplesnews.com/news/politics/elections/repeal-of-alien-land-law-long-overdue-some-say-ep-401019129-344350812.html> (Last accessed April 18, 2023).

10 See D. Cave, "In Florida, An Initiative Intended to End Bias is Killed," *New York Times* (Nov. 5, 2008), copy available at www.nytimes.com/2008/11/06/us/06florida.html (Last accessed April 18, 2023).

11 The 2018 Florida proposal (known as Amendment 11) bundled the proposed alien land law repeal with amendments to remove an obsolete high-speed rail provision and to repeal a prohibition against legislative amendments to criminal statutes applying to prosecutions or punishments for crimes committed

before such amendments. See also *Detzner v. Anstead*, 256 So.3d 820 (Fla. 2018) (per curiam) (rejecting challenges to (*inter alia*) Amendment 11 and holding that the bundling of three unrelated proposals in Amendment 11 and the ballot language summarizing Amendment 11 did not cause Amendment 11 to be defective; the Florida Supreme Court therefore ordered Amendment 11 to appear on the November 2018 general election ballot). All three of these constitutional amendments were proposed by the Florida Constitution Revision Commission. (See n. 8 *supra*.) Ballotpedia scored the title and summary of Amendment 11 at grade levels 16 and 15, respectively. See [https://ballotpedia.org/Florida_Amendment_11_Repeal_Prohibition_on_Aliens_Property_Ownership_Delete_Obsolete_Provision_on_High-Speed_Rail_and_Repeal_of_Criminal_Statutes%27_Effect_on_Prosecution_Amendment_\(2018\)](https://ballotpedia.org/Florida_Amendment_11_Repeal_Prohibition_on_Aliens_Property_Ownership_Delete_Obsolete_Provision_on_High-Speed_Rail_and_Repeal_of_Criminal_Statutes%27_Effect_on_Prosecution_Amendment_(2018)) (Last accessed April 18, 2023).