

XI. WHAT COUNTS AS A VOTE

What Counts as a Vote?

A Report of the Task Force
on Legal and Constitutional Issues

National Commission on
Federal Election Reform

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As the confusion last year in Florida revealed, states and localities employ a variety of sometimes inconsistent standards to determine what counts as a vote. Does a chad have to be completely detached; detached at all but one, two, or three corners; or merely dimpled? What if a voter circles the chad's position instead? What if a voter punches a chad for a particular candidate and also writes in that candidate's name in the separate write-in portion of the ballot? Punch card systems pose all these questions and optiscan and paper ballots pose still more.

We have surveyed all 50 states and the District of Columbia to analyze the prevalence of various approaches to counting. Our research indicates that states now employ three different schemes. The most common is a general intent-of-the voter standard. Well over half the states employ it in one form or another. The Colorado scheme is typical. Colo. Rev. Stat. § 1-7-309 states that “[v]otes shall not be counted if ... for any reason it is impossible to determine the elector's choice of candidate or vote concerning the ballot issue” and the Colorado Supreme Court has acted consistently: “a ballot cast by a qualified elector should be rejected only if the elector's intent cannot be ascertained with reasonable certainty.” *Moran v. Carlstrom*, 775 P.2d 1176, 1180 (Colo. 1989).

The next most common approach is an objective standard. Nearly 20 percent of states employ it with all or some of their voting technologies. The Hawaii scheme is illustrative. For both paper and optiscan ballots, it gives a detailed series of graphic examples of acceptable and unacceptable marks. A voter must (i) draw two lines that intersect somewhere within the choice-box on a paper ballot, Haw. Admin. R. § 2-51-80, (ii) make any mark within the choice-dot on an optiscan ballot, *id.* § 2-51-85.1, and (iii) punch a chad out completely in a punch card, *id.* § 2-51-83(e), to make a vote count.

The least common approach is a hybrid standard. Only a few states employ it. The Texas scheme illustrates how it works. Its punch card provision reads as follows:

- (d) Subject to Subsection (e), in any manual count conducted under this code, a vote on a ballot on which a voter indicates a vote by punching a hole in the ballot may not be counted unless:
 - (1) at least two corners of the chad are detached;
 - (2) light is visible through the hole;
 - (3) an indentation on the chad from the stylus or other object is present and indicates a clearly ascertainable intent of the voter to vote; or
 - (4) the chad reflects by other means a clearly ascertainable intent of the voter to vote.

- (e) Subsection (d) does not supersede any clearly ascertainable intent of the voter.

Tex. Elec. Code Ann. § 127.130(d)-(e)(West Supp. 2001). We characterize this scheme as hybrid because it combines aspects of both the intent-of-the-voter and objective approaches. Although the intent of the voter clearly trumps in the end, Texas does try to constrain the discretion of the person counting punch card votes by giving some objective guidelines.

Some cautions are in order. First, although for every state we have both contacted elections officials and researched the code, administrative materials, and court cases, we cannot claim to have a solid idea of how the counting process works in practice. In some cases, when we asked officials in the office of the Secretary of State how particular things were done, we were told that no one had ever previously asked the question. Since it seems improbable that the simple issues we raised had never occurred in practice, we concluded that there is often some gap between the top election office and the field. Election officials somewhere in the state were surely making these decisions but largely on their own.

Second, the gap worked in the other direction as well. Even when the top elections officials knew how a particular issue should be handled, there was often no guarantee that field workers would know. In some states, field workers do receive detailed instruction on how to count ballots but we have no reason to believe that that is the case everywhere. In some other states, top elections officials told us that field workers were given a copy of the appropriate state statutes, but in our reading those same statutes gave no real guidance at all.

Third, the relevant legal materials were often incomplete or unclear. The law in a few states, for example, clearly indicates a particular approach but describes it purely in terms of a technology—e.g., paper ballots—that we have reason to believe the state no longer employs widely, if at all. In a few other states, the legal sources are silent or contradictory on critical counting matters and election officials were unable to furnish any authoritative guidance.

In short, our survey is best approached as a general guide to the prevalence of particular approaches rather than as an authoritative statement of how each state approaches things. In a few cases, in fact, we had so little confidence in our understanding of how the state counted votes that we declined to categorize it with respect to some or all technologies.

State	Intent	Hybrid	Objective
Alabama	✓		
Alaska	✓ (nonpaper ballots)		✓ (paper ballots)
Arizona	✓		
Arkansas			
California			✓
Colorado	✓		
Connecticut	✓ (absentee ballots)		✓ (paper ballots)
Delaware	✓		
District of Columbia	✓		
Florida			✓
Georgia			✓
Hawaii			✓
Idaho	✓		
Illinois	✓		
Indiana		✓	
Iowa	✓		
Kansas	✓		
Kentucky	✓		
Louisiana		✓	
Maine	✓		
Maryland	✓		
Massachusetts	✓		
Michigan			✓
Minnesota	✓		
Mississippi	✓		
Missouri		✓	
Montana		✓	
Nebraska	✓		
Nevada			✓ (punch card and optiscan)
New Hampshire	✓		

State	Intent	Hybrid	Objective
New Jersey		✓	
New Mexico	✓ (absentee ballots)		
New York		✓	
North Carolina	✓ (other)	✓ (punch card)	
North Dakota	✓		
Ohio	✓		
Oklahoma			✓
Oregon	✓		
Pennsylvania	✓		
Rhode Island	✓		
South Carolina	✓		
South Dakota	✓		
Tennessee	✓		
Texas	✓ (other)	✓ (punch card)	
Utah	✓		
Vermont	✓		
Virginia	✓		
Washington	✓		
West Virginia	✓		
Wisconsin	✓ (other)	✓ (paper ballots and write-ins)	
Wyoming	✓		