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Gregory Stuart Smith

Statutory Preference for Straight-Ticket Voting in Counting Crossover Ballots—*Hendon v. North Carolina State Board of Elections*

The right to vote is a fundamental right.[1] Inherent in that right is the constitutional privilege of having one's vote counted in a manner consistent with the intent with which it was cast.[2] In determining how to count an ambiguous vote, "the object should be to ascertain and to carry into effect the intention of the voter, if it can be determined with reasonable certainty."[3]

In *Hendon v. North Carolina State Board of Elections*[4] the United States Court of Appeals for the Fourth Circuit examined the constitutionality of a North Carolina statute declaring that a ballot marked in both a straight-party circle and in the individual circle of a competing candidate of another party was to be counted as a straight-party vote.[5] The court of appeals determined that the statute was contrary to the equal protection clause of the fourteenth amendment,[6] reversed the district court's decision,[7] and remanded the case for a determination of a counting procedure that would reflect better the intent of crossover voters.[8] The court, however, refused to order a recount of the ballots cast in the election,[9] declaring its decision to be prospective only.[10]

The *Hendon* court implied that a counting procedure replacing the one held unconstitutional could count crossover votes cast for individuals as either "neutralizing" or "controlling" the straight-party vote for the candidate's opponent. This note examines the merits of each of these counting techniques and concludes by proposing a "striking" system of vote-counting that combines elements of both methods. The proposed striking system better ensures that the voter's intent will be counted accurately.

Hendon, an incumbent Republican representing North Carolina's eleventh district in the United States House of Representatives, lost a reelection bid in November 1982 to Clarke, a Democrat. The election was close, with Clarke receiving 85,410 votes, or 49.93 percent of the total votes cast, and Hen-

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1. As the Supreme Court remarked in Wesberry v. Sanders, 376 U.S. 1, 17 (1964), "No right is more precious in a free country, . . . other rights, even the most basic, are illusory if the right to vote is undermined."

2. The right to have one's vote counted correctly was afforded constitutional protection in United States v. Mosley, 238 U.S. 383 (1915).

3. G. MCCRARY, AMERICAN LAW OF ELECTIONS § 530, at 393-94 n.2 (4th ed. 1897).

4. 710 F.2d 177 (4th Cir. 1983).

5. N.C. GEN. STAT. §§ 163-151(5)(b), -170(6)(b) (1982 & Cum. Supp. 1983).

6. U.S. CONST. amend. XIV, § 1 provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

7. The district court's decision in *Hendon* was not published, but can be found in the Record at 47.

8. *Hendon*, 710 F.2d at 183.

9. Hendon, an incumbent Republican, lost his seat in the House of Representatives during the November 1982 election in North Carolina's Eleventh Congressional District. The results are described in more detail *infra* notes 11-17 and accompanying text.

10. *Hendon*, 710 F.2d at 182.

don tallying 84,085, or 49.16 percent.[11] The number of ballots marked for both Hendon and the straight Democratic party ticket was significant.[12] Recognizing that a recount could swing the election if enough crossover ballots were counted differently,[13] Hendon contested the election.

Four methods of voting had been used during the 1982 election in Hendon's district—paper ballots, mechanical lever machines, an electronic punch card system (CES), and an optically scanned paper ballot system (Airmac).[14] The counting of the crossover ballots varied among the voting methods. No crossover ballots existed among the paper ballots because separate congressional ballots, unaffected by straight-party voting, were used. The mechanical lever machines counted votes in a manner contrary to the statutory requirement. The machines counted the specific vote over the general party vote and gave no readout indicating that a straight ticket ever was voted.[15] Because neither of these voting methods adversely affected Hendon, they were not challenged. The CES and Airmac systems counted the straight-party vote over contrary individual votes; Hendon challenged the total in the five counties where they had been used.[16] After being denied a recount, first by all five county boards of elections and then by the state board on appeal, Hendon filed

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11. FEDERAL ELECTIONS 82: OFFICIAL ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 67 (1982) [hereinafter cited as FEDERAL ELECTIONS 82]; *Hendon*, 710 F.2d at 179. A Libertarian candidate received the other 1552 votes. A plurality vote is sufficient to win a general election for Congressman.

12. Although the total number of votes cast in the election was 171,047, FEDERAL ELECTIONS 82, *supra* note 11, at 67, the dual ballots would have to have been cast within the challenged areas of the five disputed counties to have affected the outcome (the total vote within these counties was 31,732 for Clarke, 33,096 for Hendon, and 537 for the Libertarian candidate). Nevertheless, evidence was presented from the Republican observer in one precinct (Boyd) in one of these counties (Transylvania) that he had "personally observed approximately 150" crossover votes for Hendon in the 500 ballots rejected by the machine. These ballots later were counted for Clarke when they were fed into a replacement machine. Record at 77, *Hendon*. Although no workers in other precincts observed Hendon crossover votes in numbers approaching 150, none experienced machine breakdowns as serious as in the Boyd precinct. The one-third ratio was not uncharacteristic of that found elsewhere. *See, e.g., id.* at 81 (12 of 33 observed ballots contained were Hendon crossovers in Brevard precinct, Transylvania County); *id.* at 82-83 (two of six were Hendon crossovers in Little River precinct). At least six precincts in Transylvania County alone had Hendon crossover votes observed among machine-rejected ballots. *Id.* at 105. Because a recount was denied by the court of appeals, however, it never will be known exactly how many dual ballots existed, or whether the counting method used in 1982 altered the election results. *See also infra* note 21.

13. Hendon would have had a plurality vote if 1326 dual ballots were declared void ("neutralized") or if 663 dual ballots were counted in his favor under an "individual vote controls" method of counting.

14. Each county in North Carolina is free to choose the method of voting to use. N.C. GEN. STAT. § 163-161 (1982); H. LEWIS, COUNTY GOVERNMENT IN NORTH CAROLINA 199 (1982). The CES method electronically counts votes punched in a card by the voter, while Airmac optically scans ballot marks made with a special pen. *Hendon*, 710 F.2d at 179. CES is examined in detail in Record at 139-40, 155-67, *Hendon*. Airmac is examined *id.* at 136, 143-48.

15. Defendant's Brief at 8, *Hendon*. If Hendon had been granted a recount, Clarke could have challenged the votes counted by mechanical lever machines as violative of his equal protection rights. If Clarke were successful, the number of votes voided from Hendon's tally in these counties could have offset the number Clarke lost in the CES and Airmac counties. Because the mechanical lever machine did not even indicate crossover ballots, however, such a recount would be impossible.

16. *Hendon*, 710 F.2d at 179.

1983 and 1985 actions[17] in federal district court.

Hendon's claim[18] challenged the constitutionality, both facially and as applied, of three sections of North Carolina's election statutes.[19] The first section required that a ballot marked both generally for straight-party and specifically for individual opposing candidates be counted as if it were purely a straight-party ballot.[20] This "counting" statute was challenged as violative of the equal protection clause, because its "arbitrary" classifications allegedly served no legitimate state interest. Hendon argued that the section facially violated the equal protection rights of voters who did not intend their party vote to prevail over their individual vote for that particular office.[21] He also noted that individual write-in votes for candidates on the ballot prevailed over conflicting straight-party votes, while marked votes for candidates on the ballot did not.[22] Finally, Hendon argued that because the crossover ballots were counted differently in precincts using one type of machine than in precincts using a different type, the section violated the equal protection clause as applied to his supporters casting dual ballots in precincts using CES and Airmac systems.

The second section, which required that split-ticket voters mark each candidate individually,[23] also was challenged on equal protection grounds. Hendon argued that forcing a split-ticket voter to vote individually for every candidate he desired was facially unconstitutional because it was a statutory incentive against splitting tickets that unfairly discriminated against crossover voters, particularly in light of the statutory five minute maximum on voting when others are waiting.[24] He also argued that this voting procedure was inequitably applied in the 1982 elections. In precincts using CES and Airmac systems, each crossover voter had to vote individually up to fifty-four times to cast a single crossover vote and vote in every race.[25] In other precincts, however, crossover voters merely had to mark their ballot twice—once in the

17. *Id.* 42 U.S.C. §§ 1983, 1985 (1976).

18. Hendon was joined in his suit by his campaign committee and a registered voter from the eleventh district. The suit was filed against the various election boards and their members who had denied Hendon's recount requests. Clarke, the victorious Democratic candidate, later was allowed to intervene as a party defendant. Plaintiff's Brief at 2, *Hendon*.

19. A statute is facially unconstitutional if it is inherently inconsistent with constitutional tenets, whereas a statute is unconstitutional as applied if, while not facially unconstitutional, it violates the constitution as it is put into effect in a particular situation.

20. N.C. GEN. STAT. §§ 163-170(6)(a), -151(5)(b) (1982).

21. *Hendon*, 710 F.2d at 181.

22. The anomaly probably grew out of the traditional tendency to view ballots as written documents, with hand-written statements prevailing over print for purposes of determining intent. *See* G. MCCRARY, *supra* note 3, § 543, at 402-03. This distinction was removed after the *Hendon* case began; the statute was modified to allow straight-party votes to override all conflicting write-ins as well. N.C. GEN. STAT. § 163-170(5)(d)(2) (Cum. Supp. 1983). Another section, *id.* § 163-151(6)(d) (1982), reiterates this instruction as it applies to candidates already on the ballot whose names are written in. Both statutes were declared unconstitutional in *Hendon*, 710 F.2d at 182.

23. N.C. GEN. STAT. § 163-151(5)(a) (1982).

24. *Id.* § 163-150. The five minute time limit is discussed in greater detail *infra* notes 98-103 and accompanying text.

25. Plaintiff's Brief at 14, *Hendon*. The number of individual votes necessary to split a ticket and vote for all of the offices ranged from a low of 41 to a high of 54 in the disputed counties.

Democratic circle and once for Hendon. Hendon contended that no compelling state interest justified placing this additional burden on split-ticket voters.

Finally, Hendon alleged that violation of the technical requirements of North Carolina General Statutes section 163-140 amounted to a denial of due process.[26] The most notable violations were Haydon County's failure to publish a sample ballot prior to the election[27] and the absence of split-ticket instructions printed in "heavy black type" on the CES and Airmac ballots.[28] Hendon sought three remedies: a declaration that the statutes were unconstitutional; an injunction staying North Carolina's Board of Elections from certifying Clarke as the victorious candidate; and an order for a recount of the ballots in the regions challenged.[29]

Although the district court in *Hendon* initially granted a temporary stay of certification,[30] it eventually dissolved the restraining order and dismissed the case, finding no constitutional infringement.[31] In an unpublished opinion,[32] the court agreed with Hendon that the right to have one's vote counted fairly is constitutionally protected.[33] Although the court stated that state laws have a "presumption of validity" against equal protection attacks,[34] it agreed with plaintiff's argument that the proper standard of review should be strict scrutiny and that encroachment on voting rights can be justified only when a compelling state interest exists.[35]

Despite its agreement with plaintiff on the standards to be applied, the trial court disagreed with plaintiff as to their application. The court rejected plaintiff's equal protection arguments and applied the traditional three-part test, examining the character of the statutory classifications, the individual interests, and the governmental interests involved.[36] The court did not find the classifications in the first two statutes (counting and voting procedure) particularly invidious or discriminatory, either facially or as applied. The court sug-

26. *See Hendon*, 710 F.2d at 182. The fifth amendment provides: "No person shall be . . . deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V. The fourteenth amendment precludes such deprivation by states. U.S. CONST. amend. XIV.

27. Record at 85, *Hendon*.

28. Plaintiff's Brief at 16-17, *Hendon*.

29. *Hendon*, 710 F.2d at 180. Hendon did not assert the second desired form of relief—injunction against certification—beyond the district court level. *Id.* at 180 n.3. Hendon did not ask the courts to determine who had been elected. The Constitution confers that function on the House of Representatives. U.S. CONST. art. I, § 5, cl. 1.

30. Record at 36, *Hendon*.

31. The *Hendon* case moved quickly through the adjudicative system. The election was on November 2, 1982. After seeking a recount through the elections boards, Hendon received the temporary stay on November 22. It was dissolved, and Hendon's claim was dismissed by the district court on December 6. By January 11, 1983, oral arguments were being heard by the United States Court of Appeals for the Fourth Circuit; the decision, however, was not handed down until June. *Hendon*, 710 F.2d at 177.

32. Hendon v. North Carolina State Bd. of Elections, No. A-C-82-357 (W.D.N.C. filed Dec. 6, 1982), *reprinted in* Record at 47, *Hendon*, *rev'd*, 710 F.2d 177 (4th Cir. 1983).

33. *Id.*, slip op. at 9, *reprinted in* Record at 55, *Hendon*.

34. *Id.*, slip op. at 8, *reprinted in* Record at 54, *Hendon*.

35. *Id.*, slip op. at 11, *reprinted in* Record at 57, *Hendon*.

36. *Id.*, slip op. at 10-11, *reprinted in* Record at 56-57, *Hendon* (citing Dunn v. Blumstein, 405 U.S. 330, 335 (1972)).

gested that the challenged statutes were not unconstitutionally discriminatory because, in each separate precinct, the voters were treated alike.[37] Furthermore, all voters in the State were charged with a duty to become familiar with the ballot form and voting procedure before entering a voting booth.[38] Even if the classifications were discriminatory, the court found that a compelling state interest existed. North Carolina's desire to "permit the voters to vote without undue delay; to count the votes within a reasonable time and to prevent fraud and illegal procedures"[39] outweighed any infringement on the expression of voter intent. The district court rejected the due process argument asserted against the third statute because it believed that the technical violations in *Hendon* constituted "lesser legal wrongs" that did not amount to "patent and fundamental unfairness."[40] Although the trial court admitted that "valid arguments . . . against the wisdom of the present statutory rule" existed, and remarked that "if this Court were a member of the General Assembly serious consideration would be given to voting to repeal" the statute, it concluded that the statute could not be overturned on constitutional grounds.[41]

The court of appeals unanimously reversed the district court's decision. Although it agreed with the lower court's statement of the applicable standards of review,[42] the court of appeals disagreed with its application of these standards. The appellate court first examined the North Carolina counting statute and declared its preference for straight-party candidates facially unconstitutional.[43] The court accepted as persuasive precedent two decisions from other jurisdictions declaring similar statutes unconstitutional.[44] The *Hendon* court approved the reasoning of the United States District Court for the Virgin Islands in *Melchoir v. Todman*[45] that such statutes exhibit a legislative preference unrelated to voter preference and discriminate unlawfully against independent candidates.[46] The *Hendon* court also cited with approval the following New Hampshire Supreme Court language in *Murchie v. Clifford*:[47] "The legislature may enact the method by which a man shall vote, but cannot direct how the ballot he casts shall be counted."[48] Stating that no case

37. "All voters in each individual precinct are treated alike, using the same voting methods under the same rules. The rules for casting and counting votes apply the same to each candidate in the individual precincts . . . ." *Id.*, slip op. at 10, *reprinted in* Record at 56, *Hendon*.

38. "It is the duty of the indivdual voter to read and familiarize himself or herself with the ballot instructions prior to casting his or her ballot." *Id.*, slip op. at 15, *reprinted in* Record at 61, *Hendon*.

39. *Id.*, slip op. at 11, *reprinted in* Record at 57, *Hendon*.

40. *Id.*, slip op. at 14, *reprinted in* Record at 60, *Hendon*.

41. *Id.*, slip op. at 15, *reprinted in* Record at 61, *Hendon*.

42. Specifically, the court noted the constitutional right to have one's vote counted as cast, the strict scrutiny standard of review, and the compelling state interest requirement. *Hendon*, 710 F.2d at 180. *See supra* text accompanying notes 33-35.

43. *Id.* at 180-81.

44. Melchoir v. Todman, 296 F. Supp. 900 (D.V.I. 1968); Murchie v. Clifford, 76 N.H. 99, 79 A. 901 (1911).

45. 296 F. Supp. 900 (D.V.I. 1968).

46. *Id.* at 901-02, *cited in Hendon*, 710 F.2d at 180.

47. 76 N.H. 99, 79 A. 901 (1911).

48. *Id.* at 101, 79 A. at 903, *quoted in Hendon*, 710 F. 2d at 180-81.

"holding to the contrary has been called before our attention,"[49] *Hendon* declared the statute's classification discriminatory. Employing the district court's three-part equal protection test, the court of appeals found that the character of this discrimination, when combined with the strong individual interest in the voting process, outweighed any state interest.[50] Furthermore, the court found that the state's interest was not compelling, but "arbitrary."[51] The court of appeals remanded the case to the district court to determine a counting procedure to replace the automatic straight-party vote and noted that either a rule voiding the vote on that office ("neutralization" method of counting) or a rule automatically giving the vote to the specifically voted individual candidate ("individual vote controls" method) would be constitutional.[52]

The appellate court also examined the other two statutes challenged. The statute requiring voters seeking to split tickets to cast individual ballots for each candidate was found to be facially constitutional, but was remanded for a reexamination by the district court of its constitutional validity as applied.[53] Recognizing the equal protection problems of varying the difficulty of casting split-ticket votes with the type of machine used, the court of appeals declared that the statute would be unconstitutional as applied if the State were unable to show that the means used were the least burdensome to voters seeking to split their ticket or that some rational state interest justified an added burden.[54]

The court then examined the violations of the technical requirements of the third statute.[55] Because the violations were caused by "simple negligence" rather than an intentional effort to erode the voting process and because there was "no evidence of confusion or deception," the failure to provide a sample ballot in one county and instructions in bold-face type in others did not amount to a denial of due process.[56]

Thus, the court of appeals declared the first statute (counting) unconstitutional, reserved judgment on the constitutionality of the second (procedure for splitting tickets) as applied, and held the technical violations of the third statute insufficient to raise a constitutional question. The court refused to grant Hendon the injunctive relief desired, however, stating that limiting election remedies to prospective relief was justified because plaintiff had foregone an opportunity to challenge the constitutionality of the statutes before the election.[57] A contrary decision would "permit, if not encourage," every candidate to gamble on his election and challenge the statute only if he lost the

49. *Hendon*, 710 F.2d at 180.
50. *Id.* at 180-81. *See supra* note 36 and accompanying text.
51. *Hendon*, 710 F.2d at 180.
52. *Id.* at 183.
53. *Id.* at 181.
54. *Id.*
55. *Id.* at 182 (examining the application of N.C. GEN. STAT. § 163-140 (1983)).
56. *Id.*
57. *Id.*

election.[58]

Despite the *Hendon* court's belief that the legislative branch should not control how ballots are counted,[59] it is evident that North Carolina's General Assembly has done so for at least fifty years.[60] The current statute, enacted in 1955,[61] may have been enacted specifically to tighten the majority party's control in the representative bodies.[62]

Election law is by its very nature political. Although some rules of election law are so self-evident that they may be politically neutral,[63] most voting regulations will either help or hinder certain candidates.[64] It should not be surprising that members of state legislatures vote out of self-interest when regulating election tabulations.

Adoption of the "straight-party-vote-controls" counting statute in 1955 appears to have been an example of self-interested voting by majority party legislators. North Carolina originally followed the common-law majority rule,[65] which "neutralized" votes for offices on which a ballot was marked both for one candidate through a straight-party vote and for a competing candidate individually.[66] The rule was codified in the early statutes governing elections.[67] In 1939, however, North Carolina amended its voting laws to provide that such dual votes would be counted for the individually marked candidate.[68] It is difficult to discern why the 1939 individual-vote-controls statute was passed, except perhaps to make it easier for voters to mark their individual choices.[69] The supremacy of the democratic party through the 1940s[70] no doubt helped downplay the statute's political significance.

It is less difficult to determine the reasons for the enactment of the current statute in 1955. The 1952 reelection of a Republican in North Carolina's Tenth Congressional District following a campaign in which he demonstrated the ease with which tickets could be split caused some consternation among Democrats and prompted the introduction of the straight-party-vote-controls

58. *Id.*

59. *See supra* text accompanying note 48.

60. *See, e.g.*, Act of Mar. 20, 1933, ch. 165, § 23, 1933 N.C. Sess. Laws 145, 172-74.

61. Act of May 4, 1955, ch. 812, 1955 N.C. Sess. Laws 750.

62. *See infra* notes 71-74 and accompanying text.

63. *See, e.g.*, G. MCCRARY, *supra* note 3, § 692, at 501 (describing the rapid passage of state secret ballot laws once the idea was imported from Australia in the 1880s).

64. Perhaps the most glaring example of election laws which help majority party candidates is the territorial lines drawn in redistricting plans. Legislators are acutely aware that these laws benefit the majority party, and voting on redistricting plans historically is split along party lines.

65. *See* G. MCCRARY, *supra* note 3, § 532, at 395.

66. Plaintiff's Brief at 6, *Hendon* (citing 1928 sample ballot).

67. Act of Mar. 20, 1933, ch. 165, § 23, 1933 N.C. Sess. Laws 145, 172-74.

68. Act of Mar. 16, 1939, ch. 116, § 2, 1939 N.C. Sess. Laws 131, 131-32.

69. Although one could argue that the passage of this act in a General Assembly controlled by the Democratic Party would contradict the idea that politicians vote on election laws out of self-interest, the partisan circumstances surrounding the passage of its replacement as soon as the law was seen to affect election results mitigates this argument.

70. Trilling & Harkins, *The Growth of Party Competition in North Carolina*, in POLITICS AND POLICY IN NORTH CAROLINA 82 (1975) (Republicans had no hope of directly influencing state politics through the 1940s).

bill.[71] Although North Carolina does not maintain an official legislative history, newspaper accounts published in 1955 indicate the strong partisan nature of the bill's enactment.[72] The bill was entitled, "An act to . . . simplify and clarify the procedure to be followed in voting a split ticket,"[73] but it did much more than simplify and clarify existing law. Passage of the bill reversed the existing law and made North Carolina's vote-counting procedures unique among the various state methods.[74]

Despite the potential of voting and counting procedures to influence elections, legislatures have been able to retain control over these procedures because courts traditionally have refrained from reviewing election laws. Election law challenges have been considered political questions and, therefore, inappropriate for judicial review.[75] Placing the conclusory label "political" on an issue does not reduce its legal significance; the need for protection of minority political interests continues. Nevertheless, the political question rationale has been used "to prevent review of a multitude of political sins."[76] Such deference to self-interested legislative bodies is particularly surprising given the fundamental nature of the right to vote.[77]

Unfortunately, the district court and the court of appeals continued to cling to the doctrine of judicial restraint and returned control over counting and voting procedures to the legislative branch. The district court used the political question rationale to support its statutory presumption of validity despite doubts concerning the statute's wisdom. Although the court of appeals declared unconstitutional the statute preferring straight-party counting, it did so in part because it had not been shown contrary precedent,[78] which did in fact exist.[79] If the court of appeals in *Hendon* had known about these contrary cases, it might have used their holdings to justify an exercise of judicial restraint, even though the cases generally were outdated. In addition, even

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71. Charlotte Observer, May 3, 1955, at 8A, col. 2, *reprinted in* Record at 113, *Hendon*.

72. *See, e.g.*, Charlotte Observer, May 3, 1955, at 8A, col. 2 (Republican representative criticizing bill as depriving voters of voting their intentions), *reprinted in* Record at 111, 113, *Hendon*; Raleigh News & Observer, Apr. 9, 1955, at 10, col. 5 (article titled "Democrats Act to Plug up Political Leak").

73. Act of May 4, 1955, ch. 812, 1955 N.C. Sess. Laws 750.

74. North Carolina is the only state that counts crossover votes for the straight-party candidate. According to a survey by the Council of State Governments, 21 states statutorily provide for straight party voting. THE BOOK OF THE STATES 1982-83 at 104. Of those states, all but North Carolina count the specific vote over the general party vote. *See* Plaintiff's Brief at 5, *Hendon* (statutes from all 20 other states digested). Other states that do not govern statutorily straight-party voting presumably follow the common-law "neutralization" counting method. *See supra* notes 65-66 and accompanying text.

75. *See* R. CLAUDE, THE SUPREME COURT AND THE ELECTORAL PROCESS 1 (1970) (from 1944 to 1969 the Supreme Court ruled on more election-related cases than it had in the previous century); Note, *Minority Party Access to the Ballot*, 1971 DUKE L.J. 451, 451.

76. Comment, *The Application of Constitutional Provisions to Political Parties*, 40 TENN. L. REV. 217, 228 (1973).

77. *See supra* note 1

78. *See supra* text accompanying note 49.

79. *See, e.g.*, Snowden v. Flanery, 159 Ky. 568, 575-76, 167 S.W. 893, 897 (1914); *In re* Mead Township Election, 11 Pa. D. 451, 451 (1901); Gainer v. Dunn, 29 R.I. 239, 242-44, 69 A. 851, 852-53 (1908).

though it determined that North Carolina's counting statute was unconstitutional, the court suggested two alternate methods of counting crossover ballots. The court's failure to delineate a specific replacement counting method meant that the legislature's control over ballot counting had not been removed, but only limited. Although the choice of counting methods was remanded to the district court, the legislature could control its decision by enacting its preferred choice of the two alternatives.

The court of appeals also used the doctrine of judicial restraint in upholding the voting procedure statute, even though it imposed an added burden on split-ticket voters. The court stated that, even if the statute were discriminatory, it would be justified if a rational (rather than a compelling) state interest existed.[80] The court also noted that judicial restraint was a factor in its failure to order a recount despite the fact that the unconstitutional statute may have affected the election.[81]

The court's refusal to grant injunctive relief[82] is most justifiable on grounds of judicial restraint, because "few remedial measures . . . cut quite as deeply to the core of both federalism and representative government" as federal court invalidation of state elections.[83] Although an unconstitutional statute's effect on an election's outcome has been suggested as the most appropriate instance for federal court intervention,[84] filing suit in a timely manner consistently has been a prerequisite to federal court consideration of invalidation as a remedy.[85] Had Hendon challenged the statute prior to the election, he probably would have been granted a recount.

The *Hendon* court's exercise of judicial restraint with regard to the constitutionality of the voting-procedure statute is less justifiable. The court remanded the case to the district court for a determination of the statute's constitutionality as applied, noting that the procedure least burdensome to voters should be used unless an overriding state interest exists.[86] The court qualified that standard in two ways. First, it noted that the least restrictive system would not be required if the State demonstrated a "rational" justification for an alternate system.[87] By requiring merely a "rational" rather than a "compelling" state interest, the court implied that the least restrictive system

80. Athough a compelling state interest is required to meet the strict scrutiny standard of facial unconstitutionality, the voting procedure statute was upheld as facially constitutional. *See supra* text accompanying note 53. Thus, a rationality standard was found to be sufficient to prove the constitutionality of the statute as applied.

81. *Hendon*, 710 F.2d at 182.

82. *Id.*

83. Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections*, 49 N.Y.U. L. REV. 1092, 1095 (1974).

84. *Id.* at 1128.

85. *Id.* at 1111-14. Although admitting that strict adherence to the timeliness of the filing prerequisite "may seem incongruous or unduly harsh at first blush," Professor Starr believes that it is fair to deny plaintiffs injunctive relief when the only reason such an extraordinary remedy is necessary is because of a "lack of industry" by the plaintiff. *Id.* at 1113. Starr makes an exception when the illegality of the challenged provision cannot be determined prior to the election despite due diligence, *id.*, a situation not present in *Hendon*.

86. *Hendon*, 710 F.2d at 181.

87. *Id.*

generally would not be imposed on an uncooperative legislature.[88] Second, the court implied that, at most, the State might be required to alter its machines to count all votes in the same manner, but could not be required to alter them to count all votes in the manner least restrictive to split-ticket voters. The court, however, ignored the fact that the neutralization method of counting is inherently more burdensome to straight-ticket voters than the individual-vote-controls method, and suggested both as legitimate alternatives. The court's approval of the neutralization method of counting indicates that the voting procedure need not be the least burdensome system to split-ticket voters as long as the extra burdens are borne equally in each precinct.

The *Hendon* court not only declined to examine the differing burdens of the two proposed counting methods, but also left to the "sound discretion of the district court" the task of determining which method was preferable.[89] Both methods, however, are insufficient to protect the constitutional rights of candidates.

The general theory supporting the individual-vote-controls method of counting is that the specific intent enunciated by the voter should control over his general intent. This theory "would appear to recognize the intent of the voter,"[90] especially given the general principle that a ballot should be construed as effective to cast a valid vote whenever possible.[91] The individual-vote-controls theory has been implemented without problems in other states[92] and, perhaps most importantly, is the least burdensome method to split-ticket voters, who need only mark their exceptions to a straight-party vote to have all of their votes counted as intended.

This same advantage also makes the theory politically unpalatable. A system allowing stray marks to count for straight-party opponents invariably will be opposed by beneficiaries of straight-party votes. Just as the 1939 individual-vote-controls statute was replaced by Democrats in 1955 with a straight-party-vote-controls statute, judicial adoption of an individual-vote-controls method probably would invite Democratic challenge. This group would prefer a neutralization method of counting, which at least voids the stray votes for straight-party opponents. Because the neutralization method of counting apparently was declared constitutionally permissible by *Hendon*, its enactment by the legislature would prevent or override district court adoption of the individual-vote-controls method.

The theory underlying the neutralization method of counting is that the crossover voter has cast more votes than he was allowed for a particular office;

88. *Id.*

89. *Id.* at 183.

90. *Id.*

91. G. MCCRARY, *supra* note 3, § 530, at 393-94 n.2. Because the voter did not intend to vote for more than the allowed number of candidates, reconciliation of his conflicting marks should be attempted to discern his true intent. *See also* N.C. GEN. STAT. § 163-170 (1982): "No official ballot shall be rejected because of technical errors in marking unless it is *impossible* to determine the voter's choice." (emphasis added). By this analysis "neutralization" should be used only as a last resort.

92. *See supra* note 74.

therefore, his vote must be voided.[93] The cases followed by *Hendon* both implemented the neutralization counting method in place of the straight-party-vote-controls statutes declared unconstitutional.[94] The neutralization counting method has strong mathematical appeal because it favors neither candidate. Another argument favoring neutralization of ambiguous votes is that courts should not endeavor to determine voter intent when it cannot be known with any reasonable degree of certainty.[95]

Unfortunately, the neutralization theory places an added burden on split-ticket voters.[96] The neutralization method of counting, like the straight-party-vote-controls method, allows split-tickets only if the voter makes a separate mark for each candidate.[97] When a large number of offices are included on the ballot, requiring individual votes for each candidate imposes an unnecessary burden on split-ticket voters and is a statutory incentive to vote a straight-party ticket.

This incentive is heightened by the five minute limit on time spent in the voting booth when others are waiting.[98] Statutes requiring individual votes for each candidate may be unduly burdensome because they "require the voter to deal with substantial numbers of partisan races . . . in addition to the non-partisan choices and other local votes in a maximum of 300 seconds."[99] Studies have confirmed that time limits discourage split-ticket voting when individual selection of candidates is required.[100] Facing "long and compli-

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93. For example, by voting for the party candidate as well as a crossover individual, a voter would have cast too many votes in an election in which only one candidate was to be elected.

94. *Hendon*, 710 F.2d at 181 n.4.

95. This argument assumes that the voter's intent was just as likely to have been to cast his ballot for the straight-party candidate as for the separately aligned individual. Defendant's Brief at 5-6, *Hendon* (presumption should be that voter understood instructions).

96. *Hendon*, 710 F.2d at 181. The court noted that split-ticket voting was easy in counties using the mechanical lever machine and its individual-vote-controls method of counting, whereas it was quite difficult in Airmac and CES districts, where split-ticket voters had to vote individually from 41 to 54 times (depending on the county in which they resided). If all three machines were programmed to use the neutralization method of counting, the disparity between counties would disappear, but the disparity in the ease of voting between straight-party and split-ballot voters would persist.

The significance of this difference is illustrated by the *Hendon* election. Voters in Rutherford County who wished to vote for every Democrat except Hendon's opponent were forced to mark 54 spaces on the ballot (53 Democratic spaces and Hendon's space) because Rutherford County's CES machine counted ballots using the straight-party-controls method. Fifty-four marks would also have been required to get all votes counted if Rutherford County had used the neutralization method. Under the individual-vote-controls method of counting, however, the crossover voter would have had to make only two marks, one in the Democratic party circle and one beside Hendon. Thus, the latter clearly is the least restrictive method to split-ticket voters.

97. Under both the neutralization theory and the straight-party-vote-controls theory, once the voter marks the straight-party circle he has exhausted his right to vote for other candidates.

98. N.C. GEN. STAT. § 163-150 (1982). *See* Plaintiff's Brief at 16, *Hendon*. The "time factor" issue was excluded properly from consideration by the court of appeals, as it had not been raised at the district court level. Defendant's Brief at 8 n.1, *Hendon*. On remand, however, it may be possible for the district court to consider this interesting and important argument. The legislature should examine closely the time-factor issue's effect on split-ticket voting in drafting a replacement counting statute.

99. Plaintiff's Brief at 16, *Hendon*.

100. In the Ohio Democratic primary election of 1972, " '[t]he option of individual voting [for delegates] was virtually ignored,' " with voters choosing slates of candidates. Even well-known

cated ballots, . . . the voter, under [general] state law, is often allowed no more than three minutes or so to record his decisions. Under these conditions, it is easy to understand why voters take the path of least resistance."[101]

In North Carolina, the five minute rule apparently is not being strictly enforced.[102] Enforcement of the rule, however, is not the only burden placed on voters. The rule is listed in the North Carolina Precinct Manual[103] and its mere publication to voters by poll workers may have a chilling effect on their desire to vote individually. Just as important is the potential for abuse if the five minute rule were to be enforced more strictly.

Despite the clear incentive against split-ticket voting inherent in the neutralization counting method, *Hendon* affirmed its constitutionality. Thus, neutralization of crossover votes remains a viable alternative to the statute declared unconstitutional in *Hendon*. The best system of counting votes, however, would be a "striking" system, under which votes for crossover candidates are counted only if the voter affirmatively strikes through (votes against) the crossover candidate's straight-party opponent.[104] With more complex voting machines, on which striking through a name is impossible, additional levers or circles could be provided on the right side of a candidate's name for affirmative votes against the candidate. The striking procedure would use *both* counting methods proposed by the *Hendon* court, with the individual vote controlling if the straight-party vote were crossed out for that particular office, and the votes neutralized if it were not.

The proposed striking system would avoid the unduly burdensome requirements of individual split-ticket voting inherent in the neutralization method of counting, but would require a voter to demonstrate clearly his intent to depart from the straight-party ticket in individual races. The striking method of counting is only slightly more burdensome than the individual-vote-controls counting method and provides little room for arguing that a

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political leaders failed to draw significant individual votes due to time restrictions. COUNCIL OF STATE GOV'TS, MODERNIZING ELECTION SYSTEMS 27 (1973) (quoting OFFICE OF FED. ELECTIONS, A STUDY OF ELECTION DIFFICULTIES IN REPRESENTATIVE AMERICAN JURISDICTIONS: FINAL REPORT (1973)).

101. *Id.* at 27.

102. Defendant's Brief at 17-18, *Hendon* (affidavit of Executive Secretary-Director of the North Carolina Board of Elections stated that he has "instructed all county elections officers that the five-minute voting time . . . shall not be strictly adhered to" and that it has not been imposed on a voter since a deliberate attempt to stall the voting process in 1968).

103. H. TURNBULL, PRECINCT MANUAL/1974 at 60 (1974).

104. Striking through a party candidate's name and voting for his opponent has been judicially determined to illustrate the voter's intent to vote for the latter, *see, e.g.*, Tuthill v. Rendleman, 387 Ill. 321, 56 N.E.2d 375 (1944) (opposing write-in candidate); Johnstun v. Harrison, 114 Utah 94, 197 P.2d 470 (1948); Frantz v. Hansen, 104 Utah 412, 140 P.2d 631 (1943) (opposing party candidate). It, however, has not been codified or incorporated as a specific voting system, as is suggested by this note.

Even in the absence of formal adoption of the striking system, split-ticket voters in paper ballot districts are likely to be able to use the method to give effect to their crossover votes. Although paper ballot straight-party votes in 1982 did not negate crossover votes for Hendon, they did negate crossover votes for candidates for lower offices. Striking would ensure that these individual votes were counted. For other types of ballots, however, the striking system would be unavailable absent its express incorporation as a specific voting system.

crossover voter cast his individual votes unintentionally. Although not perfect,[105] the striking system could provide a workable compromise between the interests and concerns of majority and minority parties.

GREGORY STUART SMITH

105. The proposed striking system still would void crossover ballots lacking a strike through the straight party candidate who is opposing the individually marked candidate. This result may be contrary to voter intent. *See supra* notes 90-92 and accompanying text. *But see supra* notes 93-95 and accompanying text.