SAVE OUR STATES

Extended Remarks on the Constitutionality of the National Popular Vote Compact

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As Minority Counsel of the Senate Subcommitee on the Constitution 45 years ago, I wrote the dissenting report on electoral college reform. This followed hearings at which such notable figures as George Will, Theodore White, and James Michener wote and testified in opposition, joining such constitutional scholars as Martin Diamond, Walter Berns and Judith Best. The Senate vote that eventually ensued in 1979 was the first direct Senate vote on a constitutional amendment to replace the Electoral College with Direct Election of the President. The amendment, sponsored by Senator Birch Bayh of Indiana, not only failed to secure the necessary 2/3 vote but failed even to garner a majority vote of the Senate, with the junior Senator from Delaware among those in opposition. That vote remains the latest congressional word on the subject with the Electoral College continuing since then to produce what Professor Diamond (who sadly passed away immediately following his oral testimony) characterized at the time as "nearly 200 years of tranquil elections with unambiguous and legitimately-accepted outcomes."

But with the National Popular Vote Compact (NPVC), change has again been proposed. The NPVC would enact an interstate compact to take effect upon a sufficient number of states joining the compact which possessed a majority of all electoral votes (270 of 538). There are at

present 16 states and the District of Columbia with a combined 205 electoral votes that have approved the compact over the past 16 years. Each signatory state commits itself to casting its electoral votes for President, not as before in accordance with the preferences of its *own* voters, but in accordance with the preferences of voters from *other* states as well, in accordance with the *national* popular vote. But unlike the Senate debate a half-century ago, it is *now* maintained by NPVC supporters that a transformed Presidential selection process can be achieved *without* a constitutional amendment, *without* a 2/3 vote of the Senate, *without* a 2/3 vote of the House of Representatives, and *without* the ratifications of 3/4 of state legislatures. And also *without* the kind of national consensus for change demanded of an actual amendment to the Constitution. And indeed *without* anything resembling a national *debate* on whether it is in the best interests of our nation to alter the process by which since our Founding the United States has selected its highest public officer, the head of its executive branch, its commander-in-chief, and the 'leader of the free world.'

In short, we are moving toward important constitutional change by non-constitutional means and *without* almost everything that would ordinarily accompany fundamental change to the "supreme law of the land"--- widespread news coverage and front-page headlines; empassioned editorials and dueling letters-to-the-editor; statewide rallies and marches; packed legislative hearings; positions being demanded of political candidates; and declarations of support and opposition from diverse organizations. In other words, debate and discussion indicative of an American people engaged in serious-minded deliberation and reflection about the future of their constitution and country.

Allow me to offer what I view as the principle constitutional concerns raised by the NPVC. Perhaps some of these observations will be added to the 131 supposed 'myths' surrounding the NPVC that proponents have already allegedly "refuted" on its website.

First, the most obvious and overarching concern is that the NPVC would effect *constitutional* change by *non-constitutional* means. By a shortcut and by sleight-of-hand. A shortcut compelled by the absence of any genuine national consensus in favor of the proposed changes and thus the remote prospect that these could ever be achieved through the

amendment process by which past fundamental changes to our electoral system were achieved. These include notably women's suffrage (19th Amd); the right of emancipated persons to vote (15th Amd); standards of congressional apportionment (14th Amd); the popular election of senators; (17th Amd); the 18-year old vote (26th Amd); the prohibition of poll taxes (24th Amd); and even earlier reforms of the Electoral College itself (12th Amd).

The NPVC is characterized also by constitutional sleight-of-hand. Despite not being an amendment to the Constitution but simply an agreement among what is likely to be a minority of states, the NPVC would alter critical constitutional provisions and concepts by simply replacing understandings that have prevailed for 240 years with more "contemporary" understandings. The relevant nomenclature would remain intact— "states" "federalism" "republican form of government" "electors" "democracy" and "electoral college"-- but with each "reimagined" by the NPVC. While a creative approach to constitutional change, not very appealing to those Americans who view their Constitution as an *enduring* law and its express procedures for change as controlling. For just as Congress cannot summarily revise the Constitution, neither can the states, much less a minority of these. As the Supreme Court has held in striking down state term limits for Members of Congress, "allowing the several States to adopt term limits . . . would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or an individual state, but rather-- as have other important changes to the electoral process— by the amendment procedures [of Article V]." (*U.S. Term Limits vs Thornton* 1995).

Second, instead of employing the Constitution's amendment provisions to effect constitutional change, NPVC proponents instead avail themselves of the Compact Clause (Art I, § 10, cl 3), which provides, "No State shall, without the consent of Congress . . . enter into *any* Agreement or Compact with another State." Because the Supreme Court has held that "any" does not truly mean "any" (*Virginia v Tennessee* 1893), the Court has been obligated since then to distinguish between compacts of essentially local interest and impact, that do *not* require congressional consent, and compacts of broader national interest and impact, that *do* require such consent. These standards are not altogether clear as to when congressional approval is

required and when it is not. But more fundamentally, the Court has never suggested that the compact process offers an alternative to the constitutional amendment process and thus may be employed to annul fundamental aspects of the Constitution. Yet, the NPVC insists that the Electoral College can be replaced absent *either* a constitutional amendment or even a compact securing the "consent of Congress."

In this regard, it should be understood that if the Court has been unclear or silent as to the implications of the Compact Clause for the NPVC, this largely derives from the reality that neither the Congress nor the Court has ever before been confronted with a proposed compact of the sheer breadth and transformative constitutional impact of the NPVC. In its scope, its procedures, and its substance, it is without precedent. It is like no other compact—one that could never have been contemplated either by the Framers or by past generations of Supreme Court Justices.

Unlike earlier compacts, the NPVC does not concern matters such as drainage disputes along state boundaries; reciprocal taxes; joint toll-bridge projects; marine fishery agreements; or driver's license coordination practices. Rather, the NPVC concerns: (a) constitutional institutions and procedures by which Presidents have been elected since the founding of the Union; (b) the fundamental character of that Union, including whether it is compatible with a system of Presidential election, in which some states are governed by the rules of the Constitution and others by the rules of the NPVC; (c) the nature of state constitutional sovereignty, in particular, whether a state may agree to cast its electoral votes on the basis of the electorates of other states; (d) the propriety of distinctive balloting, voting, and suffrage laws and practices of the fifty states in the context of a single national election; and (e) constitututional questions pertaining not only to the "Compact Clause," but to the "Guarantee Clause;" the "Electors Clause;" the "Equal Protection" Clause; and the amendment process; as well as to outcome-determinative state constitutional provisions. These issues are appropriately resolved not by compact or even by Congress, but by the Supreme Court in giving reasonable meaning to the language of the Constitution.

While there may be uncertainty concerning which compacts do and do not require congressional consent, there can be no uncertainty that the amendment provisions of Article V comprehensivelyy define how the Constitution may be altered and it does not reference state agreements or compacts. Pursuant to this Article, the States and the Congress may *propose* amendments and the States must *ratify* all such amendments. Moreover, the Court declared in one early decision that, "compacts may not be used to *alter* the constitutional structure of government." *Pennyslvania v Wheeling* 1855. While this would seem to be a rather obvious proposition on behalf of a document containing its own express rules for change, it is significant nonetheless in clarifying that the Compact Clause does not constitute an alternative to the amendment process.

Similarly, the Court has held that a compact cannot diminish the constitutional role of the *national* government. *US Steel Corp. v. Multistate Tax Commission* 1978, further clarifying that the Compact Clause is not a secondary amendment process. This limited precautionary language is not surprising given that a state entering into an *interstate compact*, although typically exercising an aspect of its *own* constitutional authority, may at the same time be impinging upon the authority of the national government to regulate "interstate" concerns. The absence of parallel language concerning diminishment of the "constitutional role" of *state* governments likely reflects the relative *remoteness* of an interstate compact producing such a result. More to the point, however, the Supreme Court does not speak exclusively on behalf of the national government but on behalf of the Constitution, including its Union of States. And the NPVC, by its unraveling of the "Great Compromise" of the Constitutional Convention of 1787 (under which both congressional and electoral college representation were predicated upon both population and statehood) is not only unprecedented in its scope and constitutional impact, but singular in its adverse effect upon non-signatory states, smaller states in particular. As Professor Michael Greve has remarked, "[an understanding of the Compact Clause] that celebrates the exercise of state sovereignty in derogation of the Constitution and at the risk of diminishing both political accountability and the rights of non-compact states, is federalism beyond all recognition."

In sum, the NPVC not only *circumvents* the constitutional amendment process (by reliance upon the compact process), but then proceeds to *circumvent* the compact process as well (by disclaiming the need for congressional consent of what would be the most far-reaching and consequential compact by far in American history). It is thus grounded upon an attempted *double* circumvention of the Constitution.

Third, the Electoral College is the present-day legacy of actions taken during many eras of American history, including the "Great Compromise" of 1787, the adoption of the Twelfth Amendment in 1804, periodic congressional debates on the Electoral College, and, perhaps most importantly, the attitudes of twenty generations of Americans, who have undergone 59 Presidential elections, and maintained throughout the present system of Presidential selection. Efforts both to preserve, and to alter, the Electoral College have been hard-fought and the stakes well understood by all sides. Yet despite this history, NPVC drafters now propose to dismantle the Electoral College, not by constitutional amendment, but by a compact. How does the NPVC propose to do this? Essentially, by treating fundamental and venerable constitutional concepts and understandings as essentially empty vessels to be refilled with updated concepts and understandings. What is have replaced in this process has endured precisely because it was in *accord* with the intentions and purposes of the Framers and the Constitution they crafted.

Consider the following concepts and understandings that would each be transformed by the NPVC when joined by as few as 11 states and the District of Columbia:

> (a) *"Each State shall appoint in such Manner as the Legislature thereof may direct, a Number of Electors."* (Art II, § 1)— In the place of traditional understandings of this provision-- that a state may allocate its electoral votes in a variety of ways as determined by its legislature, including on the basis of *state-wide* or *congressional- district wide* popular votes, or even on the basis of a state legislative determination (a method nearly without precedent for the past two centuries)-- the NPVC instead *obligates* a signatory state to allocate its electoral votes on the basis of how the electorates of *other* states have cast their popular votes. Never before has this been done. And never before has any state been *obligated* by compact (or otherwise) to cast its electoral votes on behalf of a Presidential candidate who had been *defeated* by its own electorate. Yes, perhaps this provision could have been made more clear about the limits of the legislature's discretion to allocate electoral votes in this manner, but it also could

have been made more clear that electoral votes could not be allocated by the legislature on the basis of a coin flip, an auction, or a statewide lottery. That none of these procedures was precluded is simply because no Framer could reasonably have viewed such procedures as reasonable or even conceivable. Just as none could have envisoned that Michigan might someday choose to give *greater* weight in allocating its electoral votes to New York's and California's electorates than to its own. The "creativity" of the NPVC in maintaining the nomenclature, but not the substance, of the Electoral College, and thus circumventing the historic constitutional amendment process merely underscores the continuing wisdom of giving meaning to the Constitution in accordance with the reasonable purposes and intentions of its Framers. Which was to allocate the electoral votes of each state on the basis of votes cast by their own citizens.

(b) *"Electoral College"* (Art II, § 1; 12th Amendment)— The NPVC also maintains the nominal language of the Electoral College, conferring the Presidency upon the candidate receiving the most state-by-state electoral votes. But it replaces the electoral vote tallies of fifty-one independent statewide elections with a single hypothetical national election, in which NPVC-signatories would allocate their electoral votes on the basis of a fictional national election instead of their own actual state elections. Thus, no matter what the Presidential vote outcome in Indiana, for example, Indiana would be obligated to cast the entirety of its electoral votes in accordance with the national popular vote, influenced far more by New York and California than by Indiana itself. As a result, the many strengths and virtues of the Electoral College (see § d) would either be compromised or nullified. What would remain is a misshapened Electoral College, one in name only, not that of the American constitutional and historical experience.

(c) *"The United States shall guarantee to every State in this Union a Republican Form of Government.*" (Art IV, § 4)— Such a "Form of Government" has traditionally been defined by a variety of attributes but most prominently by a system of "representative self-government." The element of "representativeness" is typically guaranteed by elected legislators and executive branch officials who are responsible for exercising the authority of state government and the element of "self-governance" is typically guaranteed by democratic methods of selecting these legislators and officials. The NPVC insstead would establish a *diluted* and *compromised* "Republican Form of Government" in connection with the single most important electoral decision undertaken by the citizenry of each state, their selection of the President. Concerning again the principle of "representativeness," under the NPVC, the electorates of New York and California would far more greatly influence Indiana's allocation of electoral votes than would the electorate of Indiana. And concerning again the principle of "self-governance," under the NPVC, the votes of "we the people" of Indiana in

Presidential elections would routinely be subject to nullification by the votes of "we the people" of New York and California.

(d) *"Federalism"* (10th Amendment)-- A principal characteristic of American federalism has always been the central and independent role played by the states in the Electoral College. The Electoral College was conceived as reflecting both democratic and representative values *albeit* within a distinctively federal framework— combining the product of fifty-one independent and democratic state elections to produce a single overall national outcome. Practical strengths of the Electoral College have been viewed over time as encompassing the deterrence of sectional and regional presidencies; the avoidance of plurality presidencies and runoff elections; the disincentivization of third party candidacies and coalition governments; the containment of balloting mishaps and ballot recounts to within a single state; the facilitatation of elections whose winners will be known promptly afterwards; the broad legitimization conferred upon prevailing candidates; the encouragement of broadly-based Presidential campaigns; and limiting opportunities for national outcomes to be affected adversely by localized instances of corruption. All while preserving the constitutional balance between national and state power. The Electoral College has been called the "Framers' Gift" by Professor Michael Morley. It is not a perfect system or one that offers a panacea for all that could possibly go wrong in an election among 160 million voters, but to paraphrase Professor Martin Diamond again, for 240 years, the Electoral College has worked well through representative, democratic and federal institutions to ensure "tranquil elections with unambiguous and legitimately-accepted outcomes." This is hardly an insignificant legacy.

(e) *"State"* (Art II, § 1; 12th Amendment)-- Even the concept of American statehood would be redefined by the NPVC, in particular, by its erosion of state sovereignty in a significant realm in which state authority remains vital. NPVC-signatory states, (1) promise to condition their electoral vote allocations upon the decisions of the electorates of other states; (2) promise to restrict their own powers to modify their own electoral laws, including powers expressly conferred by the 'Elections Clause' of the Constitution; and (3) promise to abide by a variety of reciprocal restraints upon their electoral decision-making authority and judgment. Furthermore, the inevitable outcome of replacing fifty-one statewide elections by a single national election will be a growing uniformity of voting, balloting, and suffrage laws and practices, enacted, enforced, and adjudicated by the federal government. In the process, as states devolve into 'precinct' status within a single national election, their separateness, independence, distinctiveness, and sovereignty will be further and substantially diminished.

(f) *"Equal Sovereignty"*—There are constitutional doctrines aimed at ensuring the "equal sovereignty" and "equal footing" of the states. Are such doctrines consistent with Presidential elections conducted under two sets of rules,

signatory-states abiding by the rules of the NPVC and non-signatory states by the rules of the Constitution? The former will cast their electoral votes on the basis of the national electorate while the latter will cast their electoral votes on their own state electorate. How surprising would it then be if signatory and non-signatory states broke down increasingly along partisan lines, along red and blue lines? Would this be consistent with the "best interests" of what is already an increasingly-divided and politically-polarized nation? Will either the signatory or the non-signatory states view the policies and practices of the other as fully "legitimate?" Will the distinctive of these alternative approaches give rise to further state divisions and contentiousness? And given that a majority of all electoral votes (if not necessarily a majority of states) will belong to the 'signatory-states faction, how diminished and attenuated will be the role of non-signatory states in the Presidential selection process? Most of all, given the paucity of serious national debate concerning the the NPVC, do we have any serious understanding of the practical consequences of the NPVC for the Constitution and the remarkable Nation it brought into being?

(g) *"Electors"* (Art II, § 1; 12th Amendment)— An "Elector" for purposes of Presidential elections is a state citizen empowered to cast an electoral vote on behalf of that state. It is largely an honorific role but it is given formal recognition by the Constitution. Even this institution would be distorted by the NPVC. For Electors would no longer be responsible and accountable, as they are now, to the electorate of their own state. Instead, all Electors would be "faithless electors," routinely casting electoral votes for candidates and parties which may have been badly defeated by the electorates of their own states.

(h) *"Democracy"*— Proponents of the NPVC are free to declaim that its enactment is indispensable for a more "democratic" America, but generations that have valued the Electoral College are no less supportive of democratic principles. However, they have also taken into consideration the federal *balance* provided by the Electoral College in securing limited constitutional government, electoral legitimacy and accountability, and the stability of American political institutions. Moreover, they may have also viewed askance the "democratic" prospect of 3rd, 4th, and 5th parties, highly-sectional Presidencies, and the greater likelihood of plurality presidencies under a system of Direct Election. While Direct Election certainly reflects *one* democratic form, so *too* does the Electoral College. A system built upon the foundation oFfifty-one democratic elections hardly reflects a repudiation of democratic values but rather an affirmation of meshing these with the values of federalism and decentralization.

Fourth, 'Equal protection,' 'equal dignity, and 'equal weight, are all constitutional concepts that pertain to individual rights in the electoral process. The Supreme Court held in *Bush v Gore*, the 2000 decision resolving the Presidential ballot-counting controversy in Florida,

that "[w]hen the State legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental and one source of its fundamental nature lies in the *equal weight* accorded to each vote and the *equal dignity* owed to each voter." Such *intra-election* equality is relatively easy of achievement where there are fifty-one separate elections, for disparities arising within any one of these elections will tend to be relatively uncommon and susceptible to state remedy. Where, however, state elections are aggregated into a single national election, the rule of *Bush v Gore* will be considerably more difficult of application for electoral disparities are certain to arise along state lines in great number. We do not know for certain whether or how *Bush* will apply in the NPVC context for the simple reason that the United States has never before held a single national election. But, it is not difficult to understand why the 'equal weight' and 'equal dignity' concerns of *Bush v Gore* would not also be pertinent for the NPVC election, unless the Supreme Court was prepared to count together in the same electoral bucket apples from Washington, oranges from Florida, and soybeans from Minnesota. In short, disparities in state electoral laws and practices are of little national consequence under the Electoral College in which each state administers its own election but becomes of considerable national consequence when such elections are replaced by a single national election .

Variances in the size of the electorate in the fifty states may be attributable to differing state demographies, differing levels of voter interest, differing weather patterns, differing geographical distributions, or differing down-ballot candidates and issues. They may also be attibutable to differing laws concerning suffrage for teenagers, felons, legal and illegal aliens, or unregistered voters. Or they may be attributable to differing laws and practices concerning voter registration, voting machines, voting deadlines, voter identification, absentee voting, straight-ticket voting, ranked-choice voting, ballot-outreach efforts, third-party ballot access, and countless other policies that currently distinguish a diverse Union of fifty states. The unfairness of aggregating apples, oranges and soybeans in a single election is obvious but so too is the complexity and cumbersomeness that would arise in the course of rendering equivalent the electoral standards of fifty-one states. Likely, this would be achievable only by the enactment of uniform federal rules, some or all of which might be applied to non-signatory as well as to

signatory states. As Professor Norman Williams has observed, "the NPVC almost assuredly would produce a series of political and legal crises, along with the accompanying litigation that inevitably form a part of such imbroglios, that would make the 2000 election look like child's play."

Fifth, in addition to the specter of *Bush v Gore*, there is a related concern. As already noted, if a state such as Georgia joined the Compact, it would be committing itself to cast its electoral votes in accordance with the national popular vote tally even if those results were contrary to its own popular vote tally. But even more dubiously, this result would be mandated even if the national popular vote tally was *largely* or even-*exclusively* the result of electoral laws and practices of other states that had been specifically *repudiated* by the people of Georgia. Perhaps, for example, unlike Georgia, New Jersey allowed felons or non-citizens or 17-year olds to vote. Perhaps, also unlike Georgia, Maryland allowed election-day registration or accommodated post-deadline ballots. Or perhaps unlike Georgia, Illinois adhered to questionable ballot-integrity rules or simply possessed a higher threshhold for practices, such as vote 'harvesting,' that posed higher risks of fraud or corruption. It is difficult to imagine an approach that more thoroughly compromises first principles of a "republican form of government"-- that Georgia not only be obligated by the NPVC to cast its electoral votes for a Presidential candidate rejected by its own voters but a candidate who prevailed only on account of more liberalized voting rules that had also been rejected by Geoorgia voters. Illinois thus gains electoral advantage by its more relaxed attitudes toward combatting vote fraud, as do New Jersey and Maryland for their more "tolerant" and "inclusive" suffrage policies. The NPVC would not only undermine the *process* of independent state elections but also the *substance* of democratic state decision-making.

Put another way, the NPVC might well lead to a 'race to the bottom,' at least until state election laws and practices could be jettisoned and "federalized." The more lax the enforcement of voting rules, the more lenient the attitude toward voter registration, the more "tolerant" the atttude toward defining the state electorate, the greater the influence of that state under the NPVC. It warrants reemphasis-- where Presidential elections are conducted on a state-by-state

basis, as under the Electoral College, they are localized and their trials and tribulations do not impact the elections of other states. Where, however, state elections are conjoined within a single national election, a competitive and contentious relationship arises as advantage is gained by those states with more "permissive" practices. As a result, state-by-state variations, idiosyncracies, experiments, historical curiosities, and diverseness that may previously have been iewed as *healthy* features of our federalism become instead matters of national *concern*. By and large, these tensionsdo not arise where each state controls *only* and *fully* and *independently* its *own* electoral processes.

Sixth, *"The outcome of every election in this State shall be determined solely by the vote of electors casting ballots in the election"*. (Constitution of Michigan, Art 2, § 7)-- There is a counterpart of this provision in most other state constitutions, to which every state legislator must take an oath of office in addition to that taken to the federal Constitution. The term "solely" is defined as "exclusively; entirely; without another; and alone." And therefore under the Michigan Constitution (and most others as well), the "outcome of every statewide election must be determined "exclusively, entirely, without another, and alone" by the votes of those who have cast ballots in the "election" of that state," which not unreasonably is understood to refer to elections occurring *within* Michigan, and *within* such communities as Kalamazoo, Battle Creek, Flint, and Sault Ste Marie, *not* within elections occurring within New York, California, Chicago, or Boston. The NPVC is plainly incompatible with this provision of the Michigan Constitution. Which state constitutional framer of 1789 or 1889 or 1989 could have reasonably foreseen that such an *obvious* and *innocuous* provision-- that state elections are determined by state voters-- would ever become a matter of national dispute and controversy?

Moore v Harper

Finally, mention should be made of the Supreme Court decision in *Moore v Harper* earlier this year, addressing two related constitutional provisions:

> [Elections Clause] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature

> thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. [Art I, § 4, cl 1]
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> * * *
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> [Electors Clause] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. [Art II, § 1, cl 2]

The first of these provisions, the 'Elections Clause,' was directly at issue in *Moore*--whether under this clause the Supreme Court of North Carolina (not obviously the "Legislature" of that state) had a legitimate constitutional role in determining the "Manner" of holding elections for members of Congress. The case arose on appeal of a congressional redistricting plan approved by the state legislature, but then reversed by the State Supreme Court on the basis of alleged gerrymandering. Plaintiff, the Speaker of the North Carolina House of Representatives, argued that the 'Elections Clause' references only the "Legislature" as having a role in the redistricting process while defendants urged a broader understanding of the Clause that encompassed also the state judiciary.

The Supreme Court held that the 'Elections Clause' "does not insulate state legislatures from the ordinary exercise of state judicial review."

> [Rather, the] State Legislature's exercise of authority [under the Elections Clause] must be in accordance with the method which the State has prescribed for legislative enactments . . . Nowhere in the Federal Constitution [can] we find provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted . . . Although the Elections Clause expressly refers to the 'Legislature,' it does not preclude a State from vesting congressional redistricting authority in a body other than the elected group of officials who ordinarily exercise lawmaking power. [States] retain autonomy to establish their own governmental processes . . . Whatever authority was responsible for redistricting, that entity remains subject to constraints set forth in the State Constitution . . . The Legislature acts both as a lawmaking body created and bound by its state constitution and as the entity assigned particular authority by the Federal Constitution. Both constitutions restrain the legislature's exercise of power . . . The 'legislative power' is the supreme authority *except* as limited by the constitution of the State . . . The Legislature acts both as a lawmaking body created

> and bound by its State constitution and as the entity assigned particular authority by the Federal Constitution. Both constitutions restrain the Legislature's exercise of power.

In reaching these conclusions, the Court also noted that the second provision above, the 'Electors Clause,' is "similar" to the 'Elections Clause' and that "we have found historical practice particularly pertinent when it comes to [both] the 'Elections Clause' and the 'Electors Clause.'" Even the dissenting Justices acknowledged that the two clauses were "parallel."

How then is *Moore* relevant to consideration of the NPVC? Just as the legislature's exercise of state constitutional authority under the 'Elections Clause' to "prescribe" election practices is not free of ordinary state constitutional 'checks and balances,' including that of judicial review, neither presumably is the legislature's exercise of state constitutional authority under the "similar" and "parallel" provisions of the 'Electors Clause' to "direct" the selection of state *electors*. Rather, both federal constitutional provisions confer authority upon legislatures, but an authority to be exercised within the context and structure of their state constitutions, and not by the "Legislature" in a vacuum. States thus must act in accordance with, and not in defiance of, their own constitutions. As Justice Kavanaugh remarked in concurrence, under *Moore*, state laws governing federal elections are subject to ordinary state court review and a state court's interpretation of state law in a case implicating the Elections Clause is in turn subject to federal court review," not out of 'disrespect for state courts' but out of '*respect* for the constitutionally prescribed role of State Legislatures.'"

While the Supreme Court in *Moore* does not directly address the 'Electors Clause,' it does nonetheless imply strongly that the clause is subject to a common understanding with the 'Elections Clause'-- here, most relevantly, that state legislatures are not 'free agents' under these provisions, but, as with all else they do, subject to their *own* constitutions and to the 'separation of powers' and 'checks and balances' principles of these constitutions, including that of state judicial review. As a result, state constitutional provisions such as those providing that the "outcome of every election in [the] State shall be determined solely by the vote of electors casting ballots in the election," must seemingly be accorded respect just as are exercises of judicial review by state courts.

In short, NPVC proponents cannot disregard state constitutional barriers posed by the entirely unremarkable and pedestrian proposition that only the voters of *Michigan* may "determine" the elections of *Michigan*, just as only the voters of Montana, Missouri, and Minnesota may "determine" the elections of Montana, Missouri, and Minnesota. In the final analysis, it would be karma and cosmic justice if a compact as dismissive and disdainful of state sovereignty and federalism as the NPVC was ultimately to run aground of principles of state constitutionalism and judicial federalism.

Conclusion

Also worth noting in *Moore* is the Court's reminder that it has "found historical practice particularly pertinent when it comes to the Elections and Electors Clauses." See also, *Pocket Veto Case* 1929, "We have long looked to 'settled and established practice' to interpret the Constitution." In this regard, I reemphasize the followings:

> (a) There has been no moment in our nation's constitutional history or experience in which any state has ever been obligated to cast its electoral votes on the basis of popular votes cast outside of the electorate of that state;
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> (b) There has been no moment in our nation's constitutional history or experience in which any state has ever been obligated to cast its electoral votes on behalf of candidates defeated by the relevant electorate of that state;
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> (c) There has been no moment in our nation's constitutional history or experience in which some states of the "Union" have adhered to the rules of an interstate compact and other states of the "Union" have adhered to the rules of the Electoral College;
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> (d) There has been no moment in our nation's constitutional history or experience in which the Electoral College has not governed the conduct of American presidential elections, in particular in its focus upon independent and separate electoral vote determinations within each state;
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> (e) There has been no moment in our nation's constitutional history or experience in which the electoral votes of a state have been allocated on the basis of an agreement or compact entered into by that state or any other state; and
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> (e) Finally, to gain further insight and perspective on "historical practice," an interested person might wish to review the Congressional Record from the summer of 1979 to assess the intensity and passion, the intelligence and insight,

and the civility and respect shown by participants on both sides of the Senate debate on the Electoral College and Direct Election. Such a person might also wish to reflect upon why not a single Senator of any partisan, political, geographic, or professional background asserted during that debate that an interstate compact represented an alternative to the constitutional amendment then under consideration. Finally, such a person might wish to review the debates of the Constitutional Convention of 1787, constitutional reforms of the Twelfth Amendment in 1804, and our Nation's experience with the Electoral College during its 59 Presidential elections.

For state legislators, there will be few if any votes you will cast that will be more critical for the future of your state, your nation and your fellow-citizens than your vote on the NPVC. Your most careful, conscientious, statesmanlike, and non-partisan consideration is warranted.

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