Judging Power Plays in the American States

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Around the country, officials in "purple" states are waging high-stakes battles in which they alter government institutions for partisan advantage. Lame-duck legislatures have divested newly elected executive-branch officials of their power, and governors have unilaterally claimed new authority over appointments or elections. In other instances, state officials have boldly leveraged existing powers: one governor line-item vetoed the state legislature's entire operating budget, and another state legislature impeached its entire supreme court. If federal officials are playing "hardball," state governments are playing hand grenades.

Commentators to date have largely viewed these developments in political terms, as evidence of eroding democracy. This Essay, prepared for a symposium on "Reclaiming—and Restoring—Constitutional Norms," urges another lens: the recent power plays raise significant, justiciable questions of state constitutional law. Indeed, state courts have begun to decide these cases, despite apparent misgivings and dissenting opinions regarding the conflicts' political nature.

The Essay describes this growing body of case law and identifies its common features. Zooming out from the outcomes of the lawsuits, the Essay highlights a set of more systemic implications: power play litigation is dialogue-forcing in a state realm that needs dialogue. In addition to providing healthy friction against power plays, state litigation spurs media coverage, social movement mobilization, and public conversation about constitutions that are otherwise low salience and about power plays that transpired quickly. This litigation-fostered dialogue also serves the separation-of-powers value of bringing multiple different perspectives and modes of argument to bear on state decision-making. In flagging this benefit, the Essay does not attempt a full normative analysis or attempt to weigh these benefits against inevitable costs. It simply suggests that, as the full picture takes shape, we should be watching to see whether adjudicating power plays can help to foreground the role of state constitutions in state governance.

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Introduction

For all the talk in recent years of "partisan warfare"[1] and "hardball"[2] tactics on the national stage, state governments have been giving their

1. Legal scholars and political scientists alike have used this descriptor. For examples, see SEAN M. THERIAULT, THE GINGRICH SENATORS 12 (2013); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 277 (2011) ("Politics is partisan warfare: that is our world."); Sean Theriault, *Polarization We Can Live With. Partisan Warfare Is the Problem.*, WASH. POST: MONKEY CAGE (Jan. 10, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/10/polarization-we-can-live-with-partisan-warfare-is-the-problem/ [https://perma.cc/7MRK-3P3E]. *See also* FRANCES E. LEE, BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE (2009) (describing "partisan battles").

2. For the initial development of the concept, see generally Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) (defining hardball as "political claims and practices—legislative and executive initiatives—that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings"). For subsequent elaborations, see Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QUINNIPIAC L. REV. 579, 581 (2008) (proposing to "redefine constitutional hardball as attempts by political actors to make significant changes to the constitutional order or to extend and further entrench an existing one"); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 921–22 (2018) (developing two sets of criteria for constitutional hardball and describing its partisan asymmetry). A related concept is Eric Posner and Adrian Vermeule's idea of "constitutional showdowns." *See generally* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 998 (2008) (defining the term as "(1) a disagreement between branches of government over their constitutional powers that (2) ends in the total or partial acquiescence by one

national counterparts a run for their money. State-government officials in multiple states have engaged in high-stakes "power plays."[3] Some have been high profile: legislatures in North Carolina, Wisconsin, and Michigan have used lame-duck sessions to dramatically limit the power of incoming governors and attorneys general, or to attempt to do so.[4] Similar events in other states have received less attention: the Minnesota Governor zeroed out the operating budget of the state legislature, for example, and the West Virginia legislature impeached all members of its supreme court.[5] These developments have in common a willingness by state officials to alter or strain the institutions of state government—the so-called "rules of the game"[6]—for short-term political advantage. If the national branches are playing constitutional hardball, the states are playing hand grenades.

Much of the reaction to these developments has, understandably, engaged them through the lens of political theory. Scholars and journalists have opined that these hardball tactics bespeak democracy in crisis.[7] Others have suggested policy platforms that Democrats should propose in reaction to the (largely, but not exclusively) Republican maneuvers.[8] Some scholars

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branch in the views of the other and that (3) creates a constitutional precedent").

3. *See infra* subpart I(A) (defining power plays). A number of recent news articles have used this label, although not in precisely the way I do here. *See, e.g.*, Jonathan Oosting, *Snyder the Wild Card in Michigan GOP's Lame-Duck Power Play*, DETROIT NEWS (Dec. 14, 2018, 5:51 AM), https://www.detroitnews.com/story/news/politics/2018/12/14/snyder-michigan-republican-power-play/2292140002/ [https://perma.cc/BSD2-JT64]; Mitch Smith et al., *Behind the Scenes in Wisconsin: A Republican Power Play, Months in the Making*, N.Y. TIMES (Dec. 7, 2018), https://www.nytimes.com/2018/12/07/us/wisconsin-republicans-power.html [https://perma.cc/38K5-6CNL].

4. Richard Fausset, *North Carolina Governor Signs Law Limiting Successor's Power*, N.Y. TIMES (Dec. 16, 2016), https://www.nytimes.com/2016/12/16/us/pat-mccrory-roy-cooper-north-carolina.html [https://perma.cc/7ED8-TRJB]; Kathleen Gray, *Snyder Tackles Most Controversial Lame-Duck Bills Passed by Lawmakers*, DETROIT FREE PRESS (Dec. 29, 2018, 6:00 AM), https://www.freep.com/story/news/politics/2018/12/29/snyder-signs-vetoes-lame-duck-bills/2436679002/ [https://perma.cc/BLZ4-9GEH]; Patrick Marley et al., *Scott Walker Signs Lame-Duck Legislation Without Vetoes Curbing His Democratic Successor's Power*, MILWAUKEE J. SENTINEL (Jan. 21, 2019, 6:05 PM), https://www.jsonline.com/story /news/politics/2018/12/14/scott-walker-signs-lame-duck-bill-curbing-powers-his-successor/2238900002/ [https://perma.cc/F3Z8-BYAV].

5. *See infra* subsection I(A)(1)(c).

6. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 681 (2011) (quoting DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990)).

7. *See, e.g.*, Jedediah Purdy, *North Carolina's Partisan Crisis*, NEW YORKER (Dec. 20, 2016), https://www.newyorker.com/news/news-desk/north-carolinas-partisan-crisis [https://perma.cc/YAA2-ZL6Z].

8. *See* Jacob T. Levy, *The Democrats' Best Response to Republican Power Grabs*, N.Y. TIMES (Dec. 11, 2018), https://www.nytimes.com/2018/12/11/opinion/wisconsin-michigan-democrats-hardball.html [https://perma.cc/CWZ8-BU25] (discussing reforms Democrats should urge in response to Republican maneuvers). On the partisan asymmetry, see Fishkin & Pozen, *supra* note 2, at 936–37.

have noted that, while the broader pattern is "potentially insidious," it bears remembering that "[p]ressing the rules for full partisan advantage has long been part of democracy."[9]

This Essay urges consideration of another dimension of the recent power plays: they present important, justiciable questions of state constitutional law. Indeed, the lack of academic commentary on the legal aspects of state power plays belies a growing body of case law in state courts. This Essay's descriptive aim is to shine light on how power plays are unfolding in these state laboratories. It explores eight power plays in seven states over the past two years and describes how state courts are deciding the resulting cases. State legislatures, governors, and arguably courts have engaged in power plays, and their moves have implicated state constitutional clauses regarding the separation of powers, the governors' executive power, and the protocols for electing or appointing state officials, among others. Some power plays are clear constitutional violations, while others occupy gray areas. State-court decisions on these matters have ranged from ordering the political branches to mediation to reaching broad constitutional rulings, and several variants in between.

Yet some state judges, both in majority and dissent, have worried that power plays are "ill-suited for judicial resolution."[10] And litigants on the losing side of the ensuing cases may have questions about whether the litigation was appropriate or wise. These concerns and others might cause one to wonder: is it a mistake for state courts to decide the fate of power plays or for litigants to call upon them to do so?

It is too early to provide a full normative response; the developments discussed herein are still unfolding. Surely power play litigation will implicate costs as well as benefits, and for many stakeholders, the result of any given case is what will matter most. In this Essay, prepared for a symposium on "Reclaiming—and Restoring—Constitutional Norms," I focus on a set of more systemic potential benefits of power play litigation that have special application at the state level. Power play litigation is dialogue-forcing in a state realm that needs dialogue. Whereas state constitutions sometimes seem forgotten, adjudicating power plays may bring state constitutions more squarely onto the radar of state officials and communities, and foster deliberation and dialogue about state government in

9. Matt Glassman, *Republicans in Wisconsin and Michigan Want to Weaken Incoming Democratic Governors. Here's What's the Usual Partisan Politics—and What Isn't*, WASH. POST: MONKEY CAGE (Dec. 11, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/12/11/wisconsins-and-michigans-legislatures-are-trying-to-weaken-incoming-governors-should-you-be-worried/?utm_term=.f22294d76b6a [https://perma.cc/WK8L-WM2K].

10. Ninetieth Minn. State Senate v. Dayton, 903 N.W.2d 609, 623 (Minn. 2017); Cooper v. Berger, 809 S.E.2d 98, 127 (N.C. 2018) (Newby, J., dissenting) (arguing that the controversy was a "nonjusticiable political question").

a legal register rather than an exclusively political one. In addition, insofar as power play lawsuits involve actors who were otherwise not involved in the decision at hand—litigants, civil-society groups, and judges—adjudication of power plays also serves the separation-of-powers value of bringing varied constituencies into the mix of state decision-making.[11]

The Essay proceeds as follows. Part I elaborates on the definition of power plays, catalogs recent examples, and identifies common features of both the power plays and ensuing judicial decisions. The goal is to frame power plays as a class of cases that can be the subject of continued study. Part II discusses deliberation-forcing benefits of power play litigation that have special application at the state level. This Part's aim is to surface a systemic benefit that might be overlooked by those viewing these cases individually, rather than to try to cash out these benefits against countervailing costs. A conclusion observes that extant state adjudications provide only incremental interventions against power plays and raises questions for future work regarding the possibility of other approaches.

I. State Power Plays and Their Drivers

Bitter state politics are not brand new,[12] but recent accounts have depicted state governments as less prone to the bitter interbranch squabbles that have plagued national politics.[13] State officials have underscored, as a

11. *See* Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 752 (1999) (articulating a concept of the separation of powers in which "every shift in governmental function or task can be reconceived, not simply as a shift in tasks but also as a shift in the relative power of popular constituencies"); Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1122 (2011) (book review) (describing the value of "multiplicity" as an important feature of the separation of powers).

12. Dramatic intragovernmental conflicts occurred in the nineteenth century. Bitter feuds led to two competing Supreme Courts in Kentucky, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 151–52 (2004), and various legislative "attacks" on state judiciaries occurred during the Jeffersonian and Jacksonian periods, JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 49–56 (2012) (describing these conflicts). Rhode Island's Dorr Warr, a constitutional crisis in which the state temporarily had two competing governments, provides an extreme example. *See generally* GEORGE M. DENNISON, THE DORR WAR (1976) (providing a history). Even in recent years, there have been instances of officials revising the rules of the game for political advantage. *See Don't Let Senate Seat Be Vacant*, BOSTON.COM: BOS. GLOBE (Aug. 21, 2009), http://archive.boston.com/bostonglobe/editorial_opinion/editorials/articles/2009/08/21/dont_let_senate_seat_be_vacant/ [https://perma.cc/P9JV-DY8U] (describing the Democratic Massachusetts legislature's 2004 divestment of then-Governor Mitt Romney's power to make appointments for vacant U.S. Senate seats); Glassman, *supra* note 9 (describing actions by North Carolina and Alabama to limit the powers of their Lieutenant Governors).

13. *See, e.g.*, NAT'L CONFERENCE OF STATE LEGISLATORS, STATE LEGISLATIVE POLICYMAKING IN AN AGE OF POLITICAL POLARIZATION 21 (2017) [hereinafter NCSL REPORT]; Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEXAS L. REV. 43, 55–56 (2018).

point of pride, that they are "not D.C.,"[14] and have often steered clear of dysfunction.[15] Is something changing?

Political scientists and legal scholars alike have exhaustively documented the rise of polarization and related phenomena nationally. Here, I will simply draw out a few factors important to the power plays I describe. First, political parties in many states are both highly polarized, meaning that median legislators from each party are ideologically far apart,[16] and well sorted, meaning that each party has a relatively consistent ideology.[17] Furthermore, scholars have chronicled the rise of "partisan warfare"[18]: intense competition and animosity between the parties that seem particularly palpable in power plays.[19] In North Carolina, for example, political insiders

14. NCSL REPORT, *supra* note 13, at 17.

15. For an account of this outlook—and its demise—in Texas, see Lawrence Wright, *America's Future Is Texas*, NEW YORKER (July 10, 2017), https://www.newyorker.com/magazine/2017/07/10/americas-future-is-texas [https://perma.cc/G8TS-EEUN] ("While George W. Bush was governor [of Texas], between 1995 and 2000, a cordial détente between the political parties prevailed. The lieutenant governor, Bob Bullock, and Speaker Laney were both Democrats, and, when Bush ran for President, they became exhibits in his argument that he would be a bipartisan leader."). By 2003, the Democrats were repeatedly decamping out of state to avoid a redistricting vote. *Id.*

16. Boris Shor and his colleagues have documented these trends extensively, beginning with Boris Shor & Nolan McCarty, *The Ideological Mapping of State Legislatures*, 105 AM. POL. SCI. REV. 530, 531, 546 (2011). Data updates are available on their website, Boris Shor & Nolan McCarty, *Data*, MEASURING AM. LEGISLATURES, http://americanlegislatures.com/data [https://perma.cc/PC5E-NTAT] (last updated May 2018). For an accessible primer, see Boris Shor, *How U.S. State Legislatures Are Polarized and Getting More Polarized (in 2 Graphs)*, WASH. POST: MONKEY CAGE (Jan. 14, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/14/how-u-s-state-legislatures-are-polarized-and-getting-more-polarized-in-2-graphs/ [https://perma.cc/69FN-8843]. In roughly half the states, polarization is higher than in Congress, which, as the leading study's author put it, "is saying a lot." *Id.*

17. *See* MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS 4–5, 8 (2009) (discussing the modern alignment of party and ideology in American politics and the impact on voters' attitudes and behaviors); Gerald C. Wright & Nathaniel Birkhead, *The Macro Sort of the State Electorates*, 67 POL. RES. Q. 426, 427 (2014) (describing the change "from the chaotic relationship between state partisanship and ideology of the 1970s and 1980s to the much greater alignment of 2000 and beyond"). As Morris Fiorina puts it, "If you are a conservative (liberal), there used to be people like you in the other party, so the other party wasn't all bad. Now it is." Morris Fiorina, *Americans Have Not Become More Politically Polarized*, WASH. POST: MONKEY CAGE (June 23, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/06/23/americans-have-not-become-more-politically-polarized/ [https://perma.cc/R76D-MCAL]. For a longer treatment, see generally MORRIS P. FIORINA, UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING & POLITICAL STALEMATE, ch. 4 (2017) [hereinafter FIORINA, UNSTABLE MAJORITIES], discussing party sorting in American politics.

18. *See supra* note 1.

19. *See, e.g.*, Rick Pearson et al., *Rauner–Madigan War Leads to Exodus of Lawmakers from Springfield*, CHI. TRIB. (Sept. 20, 2017, 5:00 AM), http://www.chicagotribune.com/news/local/politics/ct-durkin-illinois-general-assembly-turnover-met-0920-20170919-story.html [https://perma.cc/N2PV-M4JH] (describing "the new evolution of partisanship" in which "a willingness to work across the aisle and compromise is viewed as weakness," and how the

describe the 2016 lame-duck developments as "more polarized and more acrimonious" than they had ever witnessed, even during earlier bitter times.[20]

The fact that the recent power plays have all occurred in "purple" states—those in which elections tend to be close calls—suggests another contributing factor. When an election is up for grabs, political actors have incentives to engage in fierce, zero-sum, us-versus-them behavior.[21] State officials may feel they should try to preserve power at all costs rather than losing it to the other side.[22] And, as Part II describes further, weak constitutional norms in the states may fail to create counterincentives to the pursuit of political advantage.

The remainder of this Part describes the power plays that have transpired. Subpart I(A) addresses the defining traits of a power play and discusses concerns that power plays raise. Subpart I(B) describes how state courts have reacted to power plays.

A. Definitions and Concerns

This Essay defines power plays as actions that alter or aggressively leverage institutional power and do so for partisan ends, in either of two senses: that the actor would not make the same institutional argument if the parties were reversed,[23] or that the actor is undermining apparent majority

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"hyperpartisan era of winner-take-all politics" has prompted many lawmakers to leave the state legislature altogether).

20. Jason Zengerle, *Is North Carolina the Future of American Politics?*, N.Y. TIMES MAG. (June 20, 2017), https://www.nytimes.com/2017/06/20/magazine/is-north-carolina-the-future-of-american-politics.html [https://perma.cc/WQ9K-PEWF].

21. *See* Frances E. Lee, *Legislative Parties in an Era of Alternating Majorities*, *in* GOVERNING IN A POLARIZED AGE: ELECTIONS, PARTIES, AND POLITICAL REPRESENTATION IN AMERICA 115, 137 (Alan S. Gerber & Eric Schickler eds., 2017).

22. *See* FIORINA, UNSTABLE MAJORITIES, *supra* note 17, at 106–07 ("Given this uncertainty about the electoral future, you might as well go for broke even if you suffer the consequences in the next election."). There are other possible explanations. As Richard Primus writes, "Norm shattering is contagious. The more the President does it, visibly, the more other actors in the system will do it, too." Richard Primus, *The Republic in Long-Term Perspective*, 117 MICH. L. REV. ONLINE 1, 19 (2018), https://repository.law.umich.edu/mlr_online/vol117/iss1/1 [https://perma.cc/V2QN-K978]. So perhaps national hardball feeds state power plays. Another explanation may lie in the increasing connection between state and national policy debates. *See* DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED 42 (2018); Alex Garlick, *National Policies, Agendas, and Polarization in American State Legislatures: 2011 to 2014*, 45 AM. POL. RES. 939, 941–42 (2017) (finding greater polarization on issues with national resonance). This phenomenon, in turn, may impede "meaningful accountability or representation" in state government. David N. Schleicher, *Federalism Is in a Bad State*, HARV. L. REV. BLOG (Oct. 12, 2018), https://blog.harvardlawreview.org/federalism-is-in-a-bad-state [https://perma.cc/44RR-AJ6P].

23. Like constitutional hardball (and constitutional showdowns), this category inevitably involves blurry lines. *See, e.g.*, Fishkin & Pozen, *supra* note 2, at 922 (describing constitutional hardball as "necessarily fuzzy at the edges"); Posner & Vermeule, *supra* note 2, at 994 (describing "the idea of a constitutional showdown" as one where "there are many related ideas that share no

preferences for self-entrenching purposes.[24] Power plays bear a close family resemblance to the more familiar concept of what legal scholars have termed "constitutional hardball": practices that flout widely agreed upon constitutional understandings without violating the law outright.[25] The Republican-controlled Senate's refusal to consider President Obama's nomination of Chief Judge Merrick Garland "stands as a classic example of constitutional hardball."[26] Power plays to date have more commonly entailed both changes to institutional power and actual law breaking, or at least serious constitutional claims, but the two types of conduct are cousins at the least.[27]

In the past two years, at least eight significant power plays along these lines have occurred in seven states around the country. The remainder of this discussion draws out common themes in these developments. Subpart I(B) then catalogues judicial reactions.

1. Altering Institutional Power

a. Legislative Revision: North Carolina, Wisconsin, and Michigan.— One way officials can alter institutional power is through legislation that changes the formal powers of a branch or office. In recent years, the most pronounced examples of this come from the legislative divestment of executive power during lame-duck sessions. In the wake of elections in which members of the opposing party won executive-branch offices, state legislatures in North Carolina, Wisconsin, and Michigan held sessions in which they removed, or attempted to remove, substantial power from newly elected governors and attorneys general.

First, after the 2016 elections in North Carolina, the Republican-controlled legislature in North Carolina made a series of "unusually

single common property or defining feature").

24. *See generally* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 502 (1997) (describing "legislative and cross-temporal varieties" of entrenchment and critiquing them "on majoritarian grounds").

25. Tushnet, *supra* note 2, at 523; *see* Fishkin & Pozen, *supra* note 2, at 920–26 (building on this definition).

26. Fishkin & Pozen, *supra* note 2, at 917.

27. *See id.* at 921, 923 (stating that hardball can occur either when a "political maneuver . . . is reasonably viewed by the other side as attempting to shift settled understandings of the Constitution in an unusually aggressive or self-entrenching manner" or when an action "violates or strains constitutional conventions for partisan ends") (emphases omitted). As noted above, the main difference is the assumption that hardball is not unlawful or justiciable. Two other smaller differences are that power plays always have partisan (rather than institutional) ends and do not involve aggressive *substantive* interpretations, though that line can blur. *See id.* at 921 n.25 (stating that hardball may alternatively "advance the institutional interests of [a] branch or chamber"); Tushnet, *supra* note 2, at 535 ("Political actors can play constitutional hardball with substantive principles.").

aggressive"[28] efforts to limit the power of the newly elected Democratic Governor, Roy Cooper.[29] The events began when outgoing Governor Pat McCrory called the legislature into special session to deal with disaster relief.[30] But "minutes" after that session concluded, Republican legislative leaders called themselves into an additional special session to begin hours later; as of that time, Democratic legislative leaders reported that they had not been told what the additional session was about.[31]

Within 48 hours, the legislature approved measures that reduced the total number of gubernatorial appointees from 1,500 to 425.[32] They also required legislative confirmation for the governor's cabinet, a move McCrory called "wrong and shortsighted," but signed into law.[33] In addition, the new laws limited the governor's power to oversee the state elections board: rather than appointing three members of a five-member board, the governor would now make four appointments of an eight-member board, the legislature would make the other four,[34] and Republicans would chair the board in even-numbered (i.e., election) years.[35] In addition, the new laws limited the new governor's role in education: it transferred responsibilities over K–12 education from the governor to the superintendent of public instruction (an office to which a Republican had just been elected) and took away the governor's appointments to the trustees of the state university system.[36]

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28. Alison Thoet, *What North Carolina's Power-Stripping Laws Mean for New Gov. Roy Cooper*, PBS: NEWS HOUR (Jan. 3, 2017, 3:57 PM), https://www.pbs.org/newshour /politics/north-carolinas-power-stripping-laws-mean-new-gov-roy-cooper [https://perma.cc/KUA9-96T3].

29. *See, e.g.*, Trip Gabriel, *North Carolina G.O.P. Moves to Curb Power of New Democratic Governor*, N.Y. TIMES (Dec. 14, 2016), https://www.nytimes.com/2016/12/14/us/politics/north-carolina-governor-roy-cooper-republicans.html [https://perma.cc/F5SQ-2GYU].

30. WBTV et al., *Lawmakers Pass Disaster Relief Fund, Move on to Other Sessions*, WFMY NEWS 2 (Dec. 15, 2016, 10:00 AM), https://www.wfmynews2.com/article/news/politics/lawmakers-pass-disaster-relief-fund-move-on-to-other-sessions/83-368699104 [https://perma.cc/9UAL-3LMM].

31. *Id.*

32. Craig Jarvis, *McCrory Signs Second Measure Whittling Cooper's Power*, NEWS & OBSERVER (Dec. 20, 2016, 5:43 PM), https://www.newsobserver.com/news/politics-government/state-politics/article121885658.html [https://perma.cc/24ES-FRQF]. The legislature had previously increased the number of appointments for McCrory from 400 to 1,500. David A. Graham, *North Carolina Republicans Try to Curtail the New Democratic Governor's Power*, ATLANTIC (Dec. 14, 2016), https://www.theatlantic.com/politics/archive/2016/12/north-carolina-special-session-republicans-roy-cooper/510731/ [https://perma.cc/ML6A-GTNR].

33. Amber Phillips, *North Carolina's Outgoing GOP Governor Just Stuck It to His Democratic Successor*, WASH. POST: FIX (Dec. 19, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/12/19/north-carolinas-outgoing-gop-governor-just-stuck-it-to-his-democratic-successor/ [https://perma.cc/6L2P-QLPW].

34. S.B. 4, 2016 Gen. Assemb., 4th Extra Sess. § 138B-2 (N.C. 2016).

35. *See id.* § 138B-2(f) ("In the odd-numbered year, the chair shall be a member of the political party with the highest number of registered affiliates . . . . In the even-numbered year, the chair shall be a member of the political party with the second highest number of registered affiliates . . . .").

36. *See* H.B. 17, 2016 Gen. Assemb., 4th Extra Sess. §§ 115C-11, 143A-44, 143A-44.3, 115C-

Finally, the laws deprived Cooper of the ability to appoint a majority of members to the state's Industrial Commission, a workers' compensation board, by allowing McCrory to fill existing vacancies and by lengthening one commissioner's term.[37] The totality of these changes generated protests and negative media attention, but legislators defended their actions as "majority rule."[38]

Two years later, Wisconsin and Michigan took a page from North Carolina's "playbook."[39] In both states, the Republican party retained its legislative majority in the 2018 elections, but Democrats were elected governor and attorney general.[40] In fast-moving sessions—Wisconsin's bills, spanning hundreds of pages, were released late on a Friday afternoon and voted on overnight Tuesday[41]—the lame-duck legislatures moved to limit executive power.[42] In Michigan, the most controversial changes to executive power either died in the legislature or were vetoed by the governor. In Wisconsin, after issuing public statements characterizing the laws as neutral, good-government measures, Governor Walker signed the bills into law. (The

75.6 (N.C. 2016) (transferring gubernatorial power over K–12 education to the superintendent of public instruction); *id.* at §§ 116-31, 116-233 (modifying trustee appointments for the state university system).

37. *See* N.C. S.B. 4 § 99-77 (modifying the terms of the industrial commissioners).

38. Craig Jarvis, *North Carolina Governor Signs Bill Limiting His Successor's Power*, GOVERNING (Dec. 19, 2016, 1:00 PM), http://www.governing.com/topics/politics/tns-mccrory-cooper-bill.html [https://perma.cc/XJ2M-6S6L].

39. Tara Golshan, *North Carolina Wrote the Playbook Wisconsin and Michigan Are Using to Undermine Democracy*, VOX (Dec. 5, 2018, 1:10 PM), https://www.vox.com/policy-and-politics/2018/12/5/18125544/north-carolina-power-grab-wisconsin-michigan-lame-duck [https://perma.cc/CP3U-E4JT].

40. Tara Golshan, *Tony Evers Elected Governor of Wisconsin: Democrats Finally Unseat Scott Walker*, VOX (Nov. 7, 2018, 1:41 PM), https://www.vox.com/2018/11/7/18055426/midterm-election-results-wisconsin-governor-tony-evers-winner [https://perma.cc/7UGM-PXMK]; Kathleen Gray, *Dems Make Gains in Michigan and Congress, But Blue Wave Falls Short*, DETROIT FREE PRESS (Nov. 7, 2018, 6:58 PM), https://www.freep.com/story/news/politics/elections/2018/11/07/democrats-michigan-house-senate/1835284002/ [https://perma.cc/TN82-P7VY]; Maayan Silver, *Policy Changes To Look For With Wisconsin's New Democratic Attorney General*, WUWM 89.7 (Nov. 22, 2018), https://www.wuwm.com/post/policy-changes-look-wisconsins-new-democratic-attorney-general#stream/0 [https://perma.cc/Z3AZ-XM3K].

41. Katelyn Ferral, *What Happened While You Slept: A Guide to Wisconsin's Lame-Duck Legislative Session*, CAP TIMES (Dec. 5, 2018), https://madison.com/ct/news/local/govt-and-politics/what-happened-while-you-slept-a-guide-to-wisconsin-s/article_2b2bb8a3-9166-5ada-9a0a-be3e7deb4486.html [https://perma.cc/PV2H-KXEN] (providing a timeline of legislative developments). On Michigan's timing, see Steve Carmody et al., *Bills Continue to Fly Through Lame-Duck Session in Its Final Week*, MICH. RADIO (Dec. 18, 2018), https://www.michiganradio.org/post/bills-continue-fly-through-lame-duck-session-its-final-week [https://perma.cc/ZLQ4-UTY8].

42. Shawn Johnson & Laurel White, *Wisconsin Legislature Works Overnight to Approve Limiting Gov.-Elect Tony Evers' Power*, WIS. PUB. RADIO (Dec. 5, 2018, 8:40 AM), https://www.wpr.org/wisconsin-legislature-works-overnight-approve-limiting-gov-elect-tony-evers-power [https://perma.cc/5BY5-84EU].

day before signing, he exercised a power taken away from the governor under the new legislation, making a tax-incentive deal with Kimberly-Clark to prevent the closure of a local plant.[43])

The Wisconsin law most relevant here, enacted as Act 369, alters institutional power in numerous ways. Like the North Carolina law, it limits the governor's influence over a key state agency.[44] The Wisconsin law also changes institutional power in a different way: it makes many executive-branch decisions, from the promulgation of administrative rules to the attorney general's decision to "compromise[] or discontinue[]" state-initiated lawsuits or settle lawsuits the state defends, subject to a permanent veto by a legislative committee.[45]

In Michigan, too, proposed bills would have stripped long-standing power away from the newly elected Democratic leaders in favor of power held by Republicans. For example, one proposal would have reallocated power over education-related decisions. The state constitution vests "[l]eadership and general supervision over all public education" to an elected eight-member Board of Education.[46] The November 2018 election created a Democratic majority on the board.[47] Two lame-duck bills would have established a "shadow" board of education called the Accountability Policy Commission, appointed primarily by the (outgoing) governor and legislative Republicans.[48] The Commission would have been charged with various education-related tasks, like assessing public schools and creating Public Innovative Districts, immune from certain state regulations.[49] Another lame-duck bill would have transferred power from the elected secretary of state to a new elections commission.[50]

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43. *See* Jessie Opoien, *Scott Walker Strikes Last-Minute $28 Million Deal to Keep Kimberly-Clark Plant Open*, CAP TIMES (Dec. 14, 2018), https://madison.com/ct/news/local/govt-and-politics/election-matters/scott-walker-strikes-last-minute-million-deal-to-keep-kimberly/article_29e525a4-807b-5a9e-b48b-33f06b7621ef.html [https://perma.cc/NK2H-ETBC] (noting that Governor Scott Walker used a provision of state law unavailable to his successor to allow Kimberly-Clark to receive $28 million from the state of Wisconsin "in exchange for keeping open a facility").

44. *See* S.B. 884, 2017 Leg., Reg. Sess. § 82m (Wis. 2018) (restructuring the Wisconsin Economic Development Corporation).

45. *Id.* §§ 26, 36.

46. MICH. CONST. art. VIII, § 3.

47. Koby Levin & Erin Einhorn, *As the Michigan State School Board Shifts to Democratic Control, Meet the Two New Members*, CHALKBEAT (Nov. 7, 2018), https://chalkbeat.org /posts/detroit/2018/11/07/meet-the-two-new-members-of-the-michigan-board-of-education/ [https://perma.cc/9XR9-JV75].

48. Ron French, *Republican Bills Would Snatch Power Over Michigan Schools from Democrats*, BRIDGE (Dec. 4, 2018), https://www.bridgemi.com/public-sector/republican-bills-would-snatch-power-over-michigan-schools-democrats [https://perma.cc/347H-9TV6].

49. HOUSE FISCAL AGENCY, LEGISLATIVE ANALYSIS: PUBLIC INNOVATIVE DISTRICTS AND PUBLIC INNOVATIVE SCHOOLS 1, 3, 4 (2018).

50. S.B. 1250, 2018 Leg., Reg. Sess., at 4–5 (Mich. 2018).

b. Power-Claiming: Florida, Wisconsin, and Maine.—Power plays can also occur when an actor unilaterally claims a new power without pursuing formal legal change. Governors in Florida, Maine, and Wisconsin have taken actions that fit this description.

In 2017, the Florida Governor claimed authority to appoint justices for supreme court terms that arguably began after his own term ended.[51] At the time of the dispute, Democrat Andrew Gillum (who narrowly lost) was polling closely with now-Governor Rick Desantis.[52] The public viewed the choice of the appointer as having high stakes for the court's future.[53] In public statements, outgoing Governor Rick Scott initially asserted that there would be a brief period of hours when the seats were vacant (due to mandatory retirements) while his successor had not yet been sworn in.[54] Voters had rejected in 2014 a constitutional amendment that would have given the governor this appointment power explicitly.[55]

In Wisconsin, then-Governor Scott Walker claimed discretion over whether to hold special elections after vacancies arose in districts that were viewed as partisan toss-ups.[56] Before he was sued, Walker simply argued the elections would be a waste of taxpayer money, without addressing the constitutional and statutory provisions that appeared to make the elections mandatory.[57]

51. Emily L. Mahoney & Steve Bousquet, *Rick Scott Starts Process to Pick Supreme Court Justices. Political, Legal Fights Loom.*, MIAMI HERALD (Sept. 12, 2018, 7:08 PM), https://www.miamiherald.com/news/politics-government/state-politics/article218255400.html [https://perma.cc/LD89-BJZT] (describing the timing of the Governor's proposed nominations).

52. *Id.*

53. *See, e.g.*, Alan Greenblatt, *The Arcane Question That Will Decide the Fate of Florida's Supreme Court*, GOVERNING (Nov. 2017), https://www.governing.com/topics/politics/gov-rick-scott-florida-justices-supreme-court.html [https://perma.cc/7XPY-HGET] (discussing public responses to the dispute over judicial appointments).

54. *See* Mary Ellen Klas, *Who Gets to Appoint 3 New Florida Justices, Rick Scott or the Next Governor?*, TAMPA BAY TIMES (Nov. 1, 2017), https://www.tampabay.com /news/courts/Who-gets-to-appoint-3-new-Florida-justices-Rick-Scott-or-the-next-governor-_162229946 [https://perma.cc/5ZU2-VPAV] (relaying outgoing Governor Rick Scott's statement at a press conference that "I'll appoint three more justices the morning I finish my term").

55. Mary Ellen Klas, *Amendment Asks Florida Voters to Let Outgoing Governor Name Judges*, MIAMI HERALD (Oct. 29, 2014, 6:42 PM), https://www.miamiherald.com/news/local/community/broward/article3451513.html [https://perma.cc/QB9D-DFVL].

56. *See* Shawn Johnson, *Deadline Nears For Elections Scott Walker Doesn't Want To Hold*, NPR (Mar. 28, 2018, 11:52 AM), https://www.npr.org/2018/03/28/597584471/deadline-nears-for-elections-scott-walker-doesnt-want-to-hold [https://perma.cc/38BD-9XXQ].

57. Alan Greenblatt, *Citing Costs, Some GOP Governors Refuse to Hold Special Elections*, GOVERNING (Feb. 14, 2018, 3:00 AM), http://www.governing.com/topics/politics/gov-republican-governors-special-elections-florida-wisconsin.html [https://perma.cc/VA7Y-9PDY].

In a third example, outgoing Maine Governor Paul LePage refused to implement a voter-approved Medicaid expansion.[58] Governors often have discretion regarding the implementation of initiatives, as they have with other state laws. Outright refusals to comply, however, amount to a unilateral claim of a new power.[59]

c. Bold Uses of Existing Power: Minnesota and West Virginia.—Even when no formal institutional change or obvious illegality is afoot, a power play can occur when officials leverage their existing powers in aggressive and novel ways.

In this category, Minnesota's Democratic Governor Mark Dayton in 2017 made an unprecedented use of his (undisputed) line-item veto authority:[60] he struck out the majority-Republican legislature's entire operating budget.[61] Dayton said he did this to "bring [legislative leaders] back to the table to negotiate" after the legislature enacted what Dayton described as an "extremely destructive" tax bill that they insulated from his veto.[62] He explained that he would be willing to call a special session to restore the legislature's funding, but only if they acceded to specific demands.[63]

Another bold use of existing power came from West Virginia, where the legislature last year impeached its entire supreme court at once. In late 2017, investigations revealed that Allen Loughry, a Republican justice of the state supreme court, had spent unseemly amounts on renovations to his chambers[64]

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58. Kevin Miller, *LePage Says He'll Go to Jail Before He Lets Maine Expand Medicaid Without Funding*, PORTLAND PRESS HERALD (July 13, 2018), https://www.pressherald.com/2018/07/12/paul-lepage-says-hed-go-to-jail-before-he-expands-medicaid/ [https://perma.cc/HJ84-ZB6Z].

59. To be sure, deeming these examples as involving the claiming of "new" powers requires a judgment about the content of the governor's existing powers. In that sense, there is some blurriness between this category and the one that follows, in which actors assert existing power in bold ways.

60. *See* Ninetieth Minn. State Senate v. Dayton, 903 N.W.2d 609, 623–24 (Minn. 2017) (describing the veto as "unprecedented in the history of Minnesota").

61. Briana Bierschbach, *Where the Standoff Between the Governor and Republican Legislative Leaders Goes from Here*, MINNPOST (Sept. 25, 2017), https://www.minnpost.com/politics-policy/2017/09/where-standoff-between-governor-and-republican-legislative-leaders-goes-here/ [https://perma.cc/EM9A-9WJX].

62. Allegedly without Dayton's knowledge, the legislature had added a provision to the State Government bill that would have eliminated all funding for the state's Department of Revenue if Dayton did not sign the session's budget and tax bills. Dayton wrote that the addition "shatter[ed] whatever trust we achieved during the Session." Letter from Mark Dayton, Governor of Minn., to Kurt Daudt, Minn. Speaker of the House & Paul Gazelka, Minn. Senate Majority Leader (May 30, 2017), https://www.leg.state.mn.us/archive/vetoes/2017_sp1veto_ch4.pdf [https://perma.cc/G9XE-KTJ5].

63. *Id.*

64. *See* Kennie Bass, *Waste Watch Exclusive Investigation: WV Supreme Court Spending Examined*, WCHS (Nov. 13, 2017), https://wchstv.com/news/waste-watch/waste-watch-investigation-wv-supreme-court-spending-examined [https://perma.cc/YA7N-8B94] (cataloguing

and had made repeated personal use of state property.[65] A Democratic legislator proposed impeaching Loughry in January 2018; that went nowhere.[66] But once Loughry was federally indicted and "control of the court appeared up for grabs," the governor and state legislature gained interest.[67] The governor called a special session in June 2018 to investigate potential impeachment. One justice, Menis Ketchum, resigned before impeachment.[68]

The legislature voted to impeach the four remaining justices "just after midnight on August 14, the exact cutoff point at which the power to replace justices before the November elections moved to the governor, as opposed to voters in a special election."[69] One justice, Democrat Robin Davis, announced her resignation effective August 13 to ensure the public could select her successor, stating that she could not "allow the finalizing of [the legislative majority's] plot to come to fruition."[70] The governor promptly appointed prominent Republicans to the two seats vacated by the resignations, stating the court "need[ed] true conservatives . . . with honor and integrity to restore the trust" that had been lost.[71] The appointees ran as incumbents in the midterm elections and won.[72] Loughry ultimately resigned in November 2018, and Governor Justice named his replacement.[73] At that point, the court's partisan balance had changed from a 3–2 Democratic advantage to a 4–1 Republican advantage. In the skeptical account, the impeachment was a carefully timed power play.[74]

Loughry's expenditures, which exceeded $350,000).

65. *See* Campbell Robertson, *A Coup or a Couch? What's Behind the Impeachment of West Virginia's Supreme Court*, N.Y. TIMES (Aug. 14, 2018), https://www.nytimes.com/2018/08/14/us/west-virginia-impeachment-supreme-court.html [https://perma.cc/RUW3-SZ6W] (detailing the investigation).

66. *See id.* (noting Delegate Mike Pushkin's earlier, failed resolution).

67. *Id.* (describing the view of Delegate Pushkin).

68. Brad McElhinny, *Justice Davis Announces Retirement from State Supreme Court, amid Impeachment*, METRONEWS (Aug. 14, 2018, 8:29 AM), http://wvmetronews.com/2018/08/14/important-announcement-scheduled-at-supreme-court/ [https://perma.cc/MD46-LMEG].

69. Kevin Townsend, *A Supreme Court Impeachment Fight That's Already Under Way*, ATLANTIC (Oct. 31, 2018), https://www.theatlantic.com/politics/archive/2018/10/impeachment-west-virginias-supreme-court/574495/ [https://perma.cc/B499-WSKE].

70. Justice Davis Statement, Robin Davis, Justice, Supreme Court of Appeals, W. Va. (Aug. 14, 2018), http://www.courtswv.gov/public-resources/press/releases/2018-releases/aug14b_18.pdf [https://perma.cc/N8P9-ACAZ].

71. Brad McElhinny, *Governor Justice Names Armstead, Jenkins to the Supreme Court*, METRONEWS (Aug. 25, 2018, 12:11 PM), http://wvmetronews.com/2018/08/25/governor-justice-names-armstead-jenkins-to-the-supreme-court/ [https://perma.cc/NL86-HEPR].

72. The special election was held on the same date as the November 2018 general election.

73. Jeff Jenkins, *Hutchison to Take Seat on State Supreme Court*, METRONEWS (Dec. 12, 2018, 2:22 PM), http://wvmetronews.com/2018/12/12/hutchison-to-take-seat-on-state-supreme-court/ [https://perma.cc/T4CY-93FR]. Hutchison will serve the remainder of Loughry's term, which expires in 2020. *Id.*

74. *See, e.g.*, Brad McElhinny, *Former Justice Robin Davis Sues over WV Supreme Court Impeachment*, METRONEWS (Sept. 26, 2018, 2:07 PM) (quoting Davis's complaint arguing that

2. Partisan Ends and Entrenchment.—In addition to the changes they work to institutional power, the events above are significant—and count as power plays—because they involve one or both of two concerning tendencies: government action for partisan ends and government action that flouts democratic input.

First, in many of the cases (excluding the Maine initiative dispute and Minnesota veto), it is hard to see any direct objective of the action beyond disadvantaging the opposing political party. Rather, the official conduct appears to fit Justin Levitt's definition of "tribal partisanship," in which "[t]he exclusive focus is the intent to aid one's own team or injure the other side."[75]

Second, most of the recent power plays (including the Maine initiative dispute but excluding the Minnesota veto) thwart recent expressions of popular will. In seven of the eight examples described above, the actor initiating the power play endeavored either to strip power from a recently elected official, to stop a question from reaching voters, or to override a citizen initiative directly.

As an aside, the analysis in this Essay does not hinge on whether one thinks that these traits make power plays categorically bad. For a host of reasons, one might reach that conclusion—perhaps power plays entail a lack of public interestedness, bad faith, or an absence of Rawlsian fairness,[76] and perhaps they sow costly government dysfunction and escalating rancor.[77] Still, where partisan warfare can secure a very important substantive goal, even if indirectly, one might sometimes conclude that the ends justify the means. The dialogue-enhancing benefits I describe in Part II do not hang on this normative question.

"the impeachment process was not an effort to uncover misfeasance, but instead a power grab designed to remove Justices with whom the Delegates disagreed and to remake the Court in the Delegates' and the Governor's desired image") (internal quotations omitted).

75. Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1798 (2014) (defining the term to describe scenarios where "policymakers may favor public action purely because the policy in question is perceived to benefit those with a shared partisan affiliation, or because the policy in question is perceived to injure partisan opponents, wholly divorced from—or stronger yet, contrary to—the policymaker's conception of the policy's other merits").

76. *See generally* JOHN RAWLS, A THEORY OF JUSTICE 112 (1971) (describing the famous "veil of ignorance" approach to fairness). On the role of this principle as a constitutional design tool for restraining self-interested behavior by government actors, see generally Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001).

77. *Cf., e.g.*, David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 40–45 (2014) (describing commentators' concerns about congressional dysfunction and noting the erosion of "ordinary norms of cooperation and constraint" at the federal level).

B. Judicial Reactions to Power Plays

The eight power plays noted above have given rise to at least eight decisions, seven of which ruled against the power play—though some are still pending appeal at the time of this writing and thus subject to change. To facilitate Part II's discussion, I briefly group them here based on (1) the basis for the court's holding, and (2) the extent to which they addressed the political nature of the conflict.

1. Constitutional Bases.—Five of the cases centered on separation-of-powers principles and related structural provisions, and three others hinged on distinct provisions.

North Carolina. Starting first with the separation-of-powers cases, the North Carolina Supreme Court held unconstitutional the legislature's restructuring of the state's elections board on separation-of-powers grounds.[78] The court relied upon the state constitution's express separation-of-powers clause and its take-care (or "faithful execution") clause.[79] The court acknowledged the legislature's power to create agencies "with a reasonable degree of independence from short-term political interference and to foster the making of independent, nonpartisan decisions."[80] It concluded, however, that the legislative restructuring of the elections board unconstitutionally interfered with the governor's take-care-clause obligations.[81] The court reasoned that the governor would lack adequate "control" over the board because half of the members of the board would be unlikely to support (or might be "openly opposed to") the governor's policies; the governor had "limited supervisory control over the agency"; and the governor had "circumscribed removal authority" over its members.[82]

Wisconsin. A state trial court recently ruled that Act 369 violates the state constitution's requirements of bicameralism and presentment, as well as the separation of powers.[83] The court held, inter alia, that the statute's

78. Cooper v. Berger, 809 S.E.2d 98, 114–15 (N.C. 2018). A lower court had quickly rejected the original law's legislative appointments; the revised law that made it to the supreme court, enacted over Governor Cooper's veto, provided for gubernatorial appointments of members in equal numbers from each party and from party-created lists, and prevented Cooper from selecting the executive director, charged with being "the chief State elections official." *Id.* at 101; *see also* Lindsay Marchello, *Court Says Merged Elections/Ethics Board Is Constitutional*, CAROLINA J. (Oct. 31, 2017, 7:35 PM), https://www.carolinajournal.com/news-article/court-says-merged-electionsethics-board-is-constitutional/ [https://perma.cc/7FDP-ZQEK] (describing the revised legislation and an interim judicial decision that deemed it nonjusticiable).

79. *Cooper*, 809 S.E.2d at 115–16.

80. *Id.* at 113.

81. *Id.* at 113–14.

82. *Id.* at 114.

83. *See* Serv. Emp. Int'l Union, Local 1 v. Vos, No. 2019-CV-302, slip op. at 29, 40 (Dane Cty. Cir. Ct. Mar. 26, 2019), http://www.wispolitics.com/wp-content/uploads/2019/03/

legislative veto provision violates the bicameralism, presentment, and quorum requirements set forth in the constitution and explained in prior case law.[84] It further held that the statute's shift of litigation authority from the attorney general to the legislature violates the separation of powers and the constitutional power of the attorney general.[85] The state supreme court recently asserted jurisdiction over the case, over a dissenting opinion.[86]

Maine. The Maine case, too, relied on the governor's take-care duty, but interpreted it to prevent the governor from overriding the citizen initiative expanding Medicaid.[87] Since the citizen-initiated bill had undisputedly become law, the court reasoned, the Maine constitution's clause requiring the governor to "faithfully execute" the laws of the state barred him from declining to implement it.[88] The governor had argued that the lack of funding for the Medicaid expansion justified his refusal, but the court avoided that constitutional question by determining that there were, in fact, available state funds sufficient to cover immediate expenses.[89]

Minnesota. A conclusion of available funding was also crucial in the Minnesota litigation. The state legislature had argued, and a lower court had agreed, that the governor's veto of its operating budget effectively destroyed a coequal branch of government in violation of the state constitution's separation-of-powers requirement.[90] After ordering the legislature and

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190326RemingtonDecision.pdf [https://perma.cc/ECQ7-RAWF]. There have been three additional legal challenges to the extraordinary session laws. One suit quickly led to judicial rejection of a provision limiting early voting. *See* Todd Richmond, *Federal Judge in Wisconsin Strikes Early-Voting Restrictions*, SEATTLE TIMES (Jan. 17, 2019, 1:21 PM), https://www.seattletimes.com/nation-world/nation/federal-judge-in-wisconsin-strikes-early-voting-restrictions/ [http://perma.cc/D9J6-MUNZ] (quoting the judge's statement that the illegality of the new provisions was "not a close question"). Another pending suit is rooted in the state constitution's timing requirements regarding legislative sessions. The plaintiffs in that case prevailed in the trial court, see League of Women Voters of Wis. v. Knudson, No. 2019-CV-84, slip op. at 14 (Mar. 21, 2019), https://courts.countyofdane.com/documents/2019CV000084-DOR4554665.pdf [https://perma.cc/C85B-KZ7E], but a court of appeals stayed the ruling, League of Women Voters of Wis. v. Evers, No. 2019-AP-559, slip op. at 8 (Wis. Ct. App. Mar. 27, 2019), http://www.wispolitics.com/wp-content/uploads/2019/03/190327Stay.pdf [https://perma.cc/RE4Y-PB99], and the state supreme court accepted the case on an expedited schedule. *Id.* A third lawsuit alleges that the extraordinary session legislation violates the federal constitution. *See* Complaint, Democratic Party of Wisconsin v. Vos, No.3:19-cv-00142 (S.D. Wis. Feb. 2, 2019).

84. *See* SEIU, slip op. at 23 (Dane Cty. Cir. Ct. Mar. 26, 2019).

85. *See id.* at 27.

86. Serv. Emp. Int'l Union, Local 1 v. Vos, No. 2019-AP-622 (Wis. Apr. 19, 2019), https://www.courthousenews.com/wp-content/uploads/2019/04/wis-seiu-order.pdf [https://perma.cc/VWN2-GQBZ] (order asserting state supreme court review).

87. *See* Me. Equal Justice Partners v. Comm'r, No. BCD-AP-18-02, 2018 WL 6264120, at *14 (Me. Business & Consumer Ct. Nov. 21, 2018).

88. *See id.* at *6.

89. *See id.*

90. Ninetieth Minn. State Senate v. Dayton, No. 62-CV-17-3601, 2017 WL 3537616, at *14 (Minn. D. Ct. July 9, 2017).

governor to attempt mediation, which failed,[91] the supreme court upheld the veto.[92] The court relied on filings that had revealed discretionary carryover funds to conclude that the legislature had not been "effectively abolished" in violation of the separation-of-powers clause.[93] The court avoided the question of whether the veto was unconstitutionally "coercive," stating the parties could address that themselves through "the usual political process of appropriations" in the next legislative session.[94] (The legislature voted to restore its budget early in the following legislative session, and Dayton agreed to sign the measure.[95])

West Virginia. Last among the separation-of-powers cases, one of the impeached justices in West Virginia brought a lawsuit, and the acting supreme court (recall the regular justices had been impeached or resigned) ruled in her favor.[96] The court concluded that it had the power to review the impeachment—a contested proposition, to be sure.[97] The court further held that the legislature had violated the constitutional separation of powers by basing the impeachment on judicial-conduct issues that the state constitution's Judicial Reorganization Amendment committed exclusively to judicial regulation.[98] The court also held that the legislature violated the petitioning justice's due process rights by failing to follow legislative procedures for impeachments.[99] Both houses of the state legislature initially

91. Ninetieth Minn. State Senate v. Dayton, 903 N.W.2d 609, 616 (Minn. 2017).

92. *Id.* at 625.

93. *Id.* at 622–23.

94. *Id.* at 624.

95. Jessie van Berkel, *Minnesota Legislature Votes to Restore House, Senate Operating Budgets*, STAR TRIBUNE (Feb. 22, 2018, 10:38 PM), http://www.startribune.com/legislative-funding-bill-clears-first-hurdle-at-conference-committee/474858193/ [https://perma.cc/L2DR-AW37].

96. State *ex rel.* Workman v. Carmichael, 819 S.E.2d 251, 289 (W. Va. 2018).

97. *See, e.g.*, Laurie Lin, *Our Addiction to Adjudication*, DAILY MAIL WV (Nov. 1, 2018), https://www.wvgazettemail.com/opinion/daily_mail_opinion/daily_mail_columnists/laurie-lin-our-addiction-to-adjudication-daily-mail-opinion/article_4e9fd201-79c5-5c4b-b12e-34cc7bf86a96.html [https://perma.cc/TS4A-JFAC] ("[I]n a stunningly ill-advised decision, the state Supreme Court has claimed to be able to reverse the impeachment of its own members"); *cf.* Nixon v. United States, 506 U.S. 224, 226 (1993) (holding that a challenge to a Senate rule of impeachment procedure was nonjusticiable).

98. *See Workman*, 819 S.E.2d at 281 (noting that "[t]he power to promulgate administrative rules is expressly conferred upon this Court under the Judicial Reorganization Amendment").

99. *Id.* at 260–61; *see also* Matt Harvey, *West Virginia Circuit Judges Sitting as Justices Block Workman Impeachment Articles*, WVNEWS (Oct. 11, 2018), https://www.wvnews.com/news/wvnews/west-virginia-circuit-judges-sitting-as-justices-block-workman-impeachment/article_b4e277f1-701e-5305-912c-2bf54d40a400.html [https://perma.cc/7MJ4-URAX] (summarizing the acting supreme court's ruling).

announced they would ignore the acting court's ruling,[100] and the drama continues to evolve.[101]

Three other cases relied on provisions other than the constitutions' separation of powers provisions.

Wisconsin. First, the judge in the Wisconsin special-elections case held that the relevant constitutional and statutory provisions made a special election mandatory. The Wisconsin constitution states that "[t]he governor shall issue writs of election to fill such vacancies as may occur in either house of the legislature,"[102] and that "[t]he legislature may declare . . . the manner of filling the vacancy, where no provision is made for that purpose in this constitution."[103] A state statute, in turn, provides that a legislative vacancy "occurring before the 2nd Tuesday in May in the year in which a regular election is held . . . shall be filled as promptly as possible by special election."[104] As discussed further below, the judge rejected as "absurd" the governor's argument that the statute applied only to vacancies arising after January 1 in an election year and not those occurring even earlier.[105]

Florida. The Florida appointments case, too, was decided on the basis of a more specific constitutional clause. The Florida Supreme Court rejected Governor Scott's position in an unsigned order in October 2018.[106] The court agreed with the petitioner, the League of Women Voters, that the constitution places the appointment power with the new governor, as Scott eventually

100. *See* Erin Beck, *No Impeachment Trial Planned, But WV Lawmakers Aren't Backing Down*, REGISTER–HERALD (Oct. 12, 2018), https://www.register-herald.com/news/state_region/no-impeachment-trial-planned-but-wv-lawmakers-aren-t-backing/article_8353ccce-98ca-59a7-acb0-8d6c35d86ec9.html [https://perma.cc/E3V6-Z6DK] (quoting members of each house stating their initial intentions to move forward with the trial).

101. The West Virginia House of Delegates has filed a petition for certiorari in the United States Supreme Court, arguing that the acting court's decision violated the federal Constitution's Guarantee Clause. Petition for Writ of Certiorari at 3, Carmichael v. West Virginia *ex rel.* Workman, No. 18-1189 (Mar. 11, 2019); *see also* John Raby, *US Supreme Court Asked to Review W.Va. Judicial Impeachments*, AP (Jan. 8, 2019) (discussing the petition). The legislature has also introduced a constitutional amendment to suspend judicial pensions until the decision is overruled. *See* Jeff Jenkins, *Amendment Would Withhold Retirement Fund Payments Until Controversial Impeachment Ruling Overturned*, METRONEWS (Feb. 11, 2019, 6:15 PM), http://wvmetronews.com/2019/02/11/amendment-would-withhold-retirement-fund-payments-until-controversial-impeachment-ruling-overturned/ [https://perma.cc/8UZK-8XPG] (describing the proposed amendment).

102. WIS. CONST. art. IV, § 14.

103. *Id.* art. XIII, § 10.

104. WIS. STAT. § 8.50(4)(d) (2017).

105. Ed Treleven, *Judge Rules that Scott Walker Must Call Special Elections for Two Vacant Seats in Legislature*, WIS. ST. J. (Mar. 23, 2018), https://madison.com/wsj/news/local/courts/judge-rules-that-scott-walker-must-call-special-elections-for/article_68657ff3-cc36-5151-ade1-8824439aaac1.html [https://perma.cc/J5MU-ZFCU].

106. League of Women Voters of Fla. v. Scott, No. SC18-1573 (Fla. Oct. 15, 2018) (per curiam) (order granting petition for writ of quo warranto).

conceded.[107] (That part of the ruling was not the end of the legal or political turmoil; the court also ultimately decided that the judicial nominating commission could begin its work before a vacancy occurred,[108] and critics have argued that process is politically tainted.[109])

North Carolina. Finally, in another case arising out of the North Carolina legislation, a state superior court rejected limitations on the governor's appointments to the Industrial Commission based on the exclusive privileges prohibition in the state's constitution. Following *Cooper v. Berger*,[110] the court first held that the legislation violated the state's separation-of-powers clause by depriving Governor Cooper of appointees who "share his policy views and priorities."[111] The court also concluded that the provision extending the term of one of outgoing Governor McCrory's appointees "was intended to reward one person, and only one person, with a special, extended term," and "was not intended to promote the general welfare of the State."[112] Accordingly, the court held that the provision violated the state constitution's exclusive privileges clause. [113]

2. Political Questions?—These decisions have expressed varied views on the political nature of the dispute before them. The North Carolina Supreme Court expressly concluded, over a dissent, that the case did not present a nonjusticiable political question because the separation-of-powers violations alleged were not matters of legislative discretion.[114] Rather, the majority held that they presented constitutional issues that the court had "a duty to decide."[115] The Maine trial court likewise concluded that "determining whether the Executive Branch has faithfully executed the law, and ordering compliance if it has not, is a quintessentially judicial

107. *See id.* at 901 (opinion of Lawson, J.) (noting Governor Scott's agreement).

108. *See id.* at 900.

109. *See Editorial: Restart Selection Process for Florida Supreme Court Justices*, TAMPA BAY TIMES (Oct. 19, 2018), https://www.tampabay.com/opinion/editorials/editorial-restart-selection-process-for-florida-supreme-court-justices-20181016/ [https://perma.cc/9LTE-PB37] (describing changes to the judicial nominations process and asserting that "[e]ven a pretense of a nonpartisan screening process for judicial appointments is long gone"). Because the Governor must choose from among the commission's nominees, the commission's composition and process may be more practically significant than which Governor possesses the appointment power.

110. 809 S.E.2d 98 (N.C. 2018).

111. Cooper v. Berger, No. 17-CVS-6465 (N.C. Super. Ct. Nov. 5, 2018) (order and judgment).

112. *Id.*

113. *Id.*

114. *Cooper*, 809 S.E.2d at 110.

115. *Id.* The court at the time had a 4–3 Democratic majority, and the court divided 4 to 3 along party lines. For information on the court's voting patterns, see Mitch Kokai, *Partisan Election Battle Masks N.C. Supreme Court's Collegial Character*, CAROLINA J. (Oct. 30, 2018, 4:02 AM), https://www.carolinajournal.com/opinion-article/partisan-election-battle-masks-n-c-supreme-courts-collegial-character/ [https://perma.cc/Z2XX-9G2J].

function,"[116] though it declined to address broader questions about the relationship between appropriations and the faithful execution obligation. The acting West Virginia court, too, expressly rejected a political question argument on the ground that "when our constitutional process is violated, this Court must act when called upon."[117] That court went further than others in lamenting the nature of the conflict, stating that "[i]f we do not stop the infighting, work together, and follow the rules; if we do not use social media for good rather than use it to destroy; then in the process, we will destroy ourselves."[118]

The Minnesota Supreme Court expressed the most misgivings about deciding a politically tinged conflict. As noted, it initially ordered the legislature and governor to participate in private mediation so that judicial resolution would not be necessary.[119] And though it ultimately upheld the governor's action in the immediate conflict before it, it noted that the related question whether the veto was unconstitutionally coercive was "ill-suited for judicial resolution" because it would require the court to interfere with a "quintessentially political process" and "choose between the Governor and the Legislature."[120]

II. Laboratories of Deliberation: A Benefit of Power Play Litigation

A full normative evaluation of power play litigation is both premature and beyond the scope of this Essay. There will surely be costs as well as benefits: Even though, as Helen Hershkoff has argued, the "passive virtues" make less sense in the context of state courts,[121] there is still the worry that state courts will reach partisan outcomes,[122] and in turn, that they will

116. Me. Equal Justice Partners v. Comm'r, No. BCD-AP-18-02, 2018 WL 6264120, at *6 (Me. Business & Consumer Ct. Nov. 21, 2018).

117. State *ex rel.* Workman v. Carmichael, 819 S.E.2d 251, 261 (W. Va. 2018).

118. *Id.*

119. *See* Ninetieth Minn. State Senate v. Dayton, 901 N.W.2d 415, 417 (Minn. 2017) ("Prior to Judicial Branch vindication of the people's constitutional right to three independent, functioning branches of government, the other Branches should have the opportunity to resolve this dispute. We therefore require the parties to participate in good-faith efforts to resolve this dispute through mediation.").

120. Ninetieth Minn. State Senate v. Dayton, 903 N.W.2d 609, 623–24 (Minn. 2017). The Florida court arguably took a different approach to defusing the case's political implications, ruling initially by means of a short, unsigned order. *See* League of Women Voters of Fla. v. Scott, No. SC18-1573 (Fla. Oct. 15, 2018) (per curiam) (order granting petition for writ of quo warranto).

121. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1876–1905 (2001) (illuminating how the premises underlying federal justiciability limits often do not apply in the context of state adjudication and arguing "that state courts, in configuring their state justiciability doctrine, ought not feel bound by Article III or its radiating prudential concerns, but should rather consider the special needs of state and local governance").

122. *See* Michael S. Kang & Joanna M. Shepherd, *Judging Law in Election Cases*, 70 VAND. L. REV. 1755, 1760, 1779 (2017) (describing literature concluding that both law and politics affect

undermine the rule of law or countenance "democratic erosion,"[123] further raise the temperature of judicial selection battles,[124] or fuel rather than stem power plays. This Essay does not deny the seriousness of those concerns or attempt to cash them out. Instead, in the spirit of the Symposium's focus on constitutional norms, this Part focuses on three overlapping potential benefits of power play litigation for state democracy. First, even if one believes that judging is partly affected by partisanship, power play adjudications may foster the rule of law in clear cases. Two other, perhaps overlooked, benefits apply regardless of a court's outcome: power play adjudications may improve deliberation and accountability and help develop state-level structural constitutional law.

A. Fostering the Rule of Law

First, and most briefly, some fraction of power plays present simple legal questions. That suggests a benefit to state government of adjudicating them: it can foster a widely shared understanding of the rule of law.[125] Envisioning this benefit does not require imagining an entirely apolitical judiciary; even scholars who conclude that partisanship affects judging find that law matters in clear cases.[126]

Consider in this light the Wisconsin Governor's effort to avoid a special election. In public statements, then-Governor Walker had simply asserted that special elections were a poor use of taxpayer dollars.[127] In court, however, the Governor had to justify his choice in legal terms. In doing so, he did not deny that the state constitution obligated him to call an election promptly for certain vacancies, but rather argued that the phrase "before the 2nd Tuesday in May" in the year of a general election excluded vacancies that occur even earlier (in the prior year).[128]

judging).

123. TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 96–97, 219 (2018) (positing that "a politically aligned bench" may be willing to "indulge . . . antidemocratic initiatives" if the judges' "own policy preferences are furthered").

124. Tom Ginsburg, *Democratic Backsliding and the Rule of Law*, 44 OHIO N.U. L. REV. 351, 363 (2018).

125. In other words, requiring government officials to abide by constitutional rules is a fairly common principle even among those who have divergent intuitions about what else the rule of law might require. *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 7–8 (1997) (exploring purposes and elements of the rule of law).

126. *See* Kang & Shepherd, *supra* note 122, at 1779 (finding that "law matters for judicial decisionmaking even when political considerations are highly salient," and identifying "case strength" as an explanation for judicial decisions favoring the opposite party).

127. *See* Johnson, *supra* note 56 (quoting the governor's position that holding special elections would be "a waste of taxpayer's [sic] money").

128. *See* Defendant's Response to Plaintiffs' Petition for Writ of Mandamus at 9–11, Newton v. Walker, No. 18-CV-0519 (Dane Cty. Cir. Ct. filed Mar. 7, 2018) ("Under Wis. Stat. § 8.50(4)(d), the Governor has a positive and plain duty to call a special election only when a vacancy occurs in

That interpretation, concluded one of Walker's own judicial appointees, "flies in the face of reason and applicable statutory principles," as well as the statute's plain text.[129] Initially, Walker appealed.[130] After losing a bid to stay the lower court's ruling, however, Walker conceded that he would not win in court and scheduled the special elections.[131]

To be sure, this simple rule of law benefit will not apply to all or even most power plays. Others exist in constitutional gray areas of varying opacity. And some seem lawful, like West Virginia's delay in impeaching its supreme court; there, critics of the *Workman v. Carmichael*[132] decision would argue it is the acting supreme court that engaged in the power play. I turn next to benefits that obtain regardless of a case's disposition.

B. Improving Deliberation and Accountability

Irrespective of outcome, state-court adjudication can improve the deliberation regarding power plays, expand the range of stakeholders who engage in such deliberation, and increase the accountability of all involved actors for their decisions.[133]

First, adjudication enhances deliberation and accountability of the power play actors themselves. This may entail legal remedies if a court reaches an adverse judgment. But, as important, the process of adjudication involves accountability in the sense of being called to answer, in the register

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the year of a general election from January 1 until the 2nd Tuesday in May.").

129. *See* Ed Treleven, *Judge Orders Gov. Scott Walker to Hold Special Elections*, GOVERNING (Mar. 23, 2018, 10:00 AM), https://www.governing.com/topics/politics/tns-walker-wisconsin-special-election-judge.html [https://perma.cc/5G9Y-MW72] (quoting the judge's ruling from the bench). As the court explained, under the governor's interpretation, there would only have been a four-month window in each two-year period in which special elections would be required; a legislator could die shortly after taking office without triggering a special election. *Id.*

130. *See* Rich Kremer, *Walker Says He Dropped Special Elections Appeal Because It Was Clear He Would Lose*, WIS. PUB. RADIO (Mar. 29, 2018, 6:35 PM), https://www.wpr.org/walker-says-he-dropped-special-elections-appeal-because-it-was-clear-he-would-lose [https://perma.cc/R5AE-KEHH] (discussing Walker's initial decision to appeal and his later decision to drop the appeal due to a low chance of success in court).

131. *Id.* A Democrat won the special election, only to eventually lose in the general election. Liz Welter, *Andre Jacque Wins Senate District 1 Seat*, GREEN BAY PRESS-GAZETTE (Nov. 7, 2018, 12:03 AM), https://www.greenbaypressgazette.com/story/news/local/door-co/news/2018/11/07/wisconsin-election-andre-jacque-wins-senate-district-1-seat/1905950002/ [https://perma.cc/YUN7-Z796].

132. 819 S.E.2d 251 (W. Va. 2018).

133. The idea of courts as facilitators of dialogue is present in both constitutional law scholarship and social movement theory. *See, e.g.*, JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 141 (2011) (characterizing courts as both responding to and prompting social change); Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 14 (2008) (arguing that oral dissents spur democratic deliberation). On the connections between constitutional law scholarship and social movement theory, see Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 878 (2013) (book review).

of law, for one's actions.[134] The litigation process slows down decisions that are often made very quickly[135] and requires officials to provide legal justifications for their choices. As in the case of Wisconsin's special elections and Florida's judicial appointments, those justifications may be quite different from the ones offered in political discourse or media appearances.[136]

Adjudication also enhances deliberation by the public. Power plays may occur too quickly for meaningful public debate. But when a power play becomes a lawsuit, it more readily becomes the topic of sustained journalistic coverage.[137] The slower pace of litigation also allows more time for interested stakeholders to process the arguments and organize around them.[138] Particularly where state civil-society checks are otherwise weak and state-level media outlets shrinking,[139] a lawsuit can serve as a catalyst for action around events that might otherwise get little attention. The litigation process helps foster the "democratic churn"[140] needed for states to be vibrant sites of civic engagement.

The adjudication of the power play in North Carolina may illustrate these dynamics. In the two-year period following the lame-duck session, multiple challenges to it worked their way through the North Carolina courts. These lawsuits spawned sustained media attention, both in national and state-level outlets; many dozens of stories reached members of the public. The combination of the lawsuits and the stories helped to mobilize opponents of the power play, as social movement theory predicts[141]: The lawsuits and legal

134. *See* Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCE 115, 120 (Michael W. Dowdle ed., 2006) (describing the traits of "a *legal* public accountability regime"); *see also* Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1260 (2003) (defining accountability as "being answerable to authority that can mandate desirable conduct and sanction conduct that breaches identified obligations").

135. *See, e.g.*, WBTV et al., *supra* note 30 (laying out timeline of North Carolina legislation); Ferral, *supra* note 41 (summarizing timing of Wisconsin legislation).

136. *See supra* subsection I(A)(1)(b) (relaying the public statements and legal positions of Governors Walker and Scott).

137. *See* Gwendolyn M. Leachman, *From Protest to* Perry*: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1696 (2014) (collecting literature showing that litigation garners more attention than other organization strategies and finding, through original empirical work, "that litigation received more media coverage than any other LGBT movement tactic").

138. *See, e.g.*, Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 689 (2012) (discussing high-profile impact litigation as creating fundraising and media opportunities).

139. *See* Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 110 (2018) (describing the limitations of state-level civil society and media outlets).

140. Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 10 (2010).

141. *See* NeJaime, *supra* note 138, at 897 (describing the ability of court-based tactics to garner the support of elites, which impacts constitutional norms).

arguments provided "framing" for those movements, offering a legal vocabulary for dialogue.[142] Both of these effects—mobilization and framing—were evident once legislators introduced a constitutional amendment to reinstate the changes the supreme court had struck down.[143] Indeed, by the time that amendment had reached the ballot in November 2018, a bipartisan group of former state officials, including Governor Pat McCrory (who had signed the lame-duck bill), came out in opposition, characterizing the amendment as an affront to the separation of powers.[144] Notably, these dialogue-prompting features of adjudication apply even if one believes—plausibly, as the dissent urged—that the North Carolina Supreme Court's opinion was wrong on the merits.[145]

Just as the process of adjudication can prompt deliberation, so too can the product. A judicial decision in either direction—striking down a power play or explaining why the court cannot do so—can serve as a "prod" or "plea"[146] to external audiences. A decision might itself articulate public values that political actors and the public can further develop.[147] That approach seems present in the lower court opinion in North Carolina's Industrial Commission case, in which the court described the disconnect between the narrowly interested government action and the general welfare.[148] Or a court might narrowly reject a power play while emphasizing the legislature's prerogative to change the law, like the Maine Supreme Court did;[149] or narrowly approve a power play while urging the branches to

142. *See* Kirk Ross, *Taking Back North Carolina*, AM. PROSPECT (Oct. 8, 2018), https://prospect.org/article/taking-back-north-carolina [https://perma.cc/L8CX-BU7Z] (discussing popular movements arising in the context of North Carolina's power play).

143. *See id.* (describing the proposed amendments); *see also, e.g.*, James B. Hunt Jr. et al., *We All Served as NC Governor. And We Oppose This Power Grab.*, NEWS & OBSERVER (Nov. 1, 2018, 10:26 AM), https://www.newsobserver.com/opinion/article220944890.html [https://perma.cc/N8Q9-RG4K] ("The courts struck down as unconstitutional previous attempts to accomplish such power grabs through legislation, for violating the 'separation of powers' clause of the N.C. Constitution. The 'separation of powers' clause ensures that no one branch of government—legislative, executive or judicial—attains too much power.").

144. Hunt et al., *supra* note 143.

145. Cooper v. Berger, 809 S.E.2d 98, 120 (N.C. 2018) (Martin, C.J., dissenting).

146. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 354 (2011).

147. *See* Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 14 (1979) (arguing that while the essential role of a judge "should be seen as giving meaning to our public values and adjudication as the process through which that meaning is revealed or elaborated," other government agencies play a role in performing this function).

148. *See supra* notes 116–19 and accompanying text (discussing the North Carolina Industrial Commission case).

149. *See* Me. Equal Justice Partners v. Comm'r, No. BCD-AP-18-02, 2018 WL 6264120, at *8 (Me. Business & Consumer Ct. Nov. 21, 2018) (noting that the governor was required to implement the initiative and noting that "any deficiency in the funding mechanism for MaineCare expansion must be solved by the Legislature").

reconsider, as the Minnesota Supreme Court did.[150] Any of these approaches can "promote[] consideration of the underlying visions of right, responsibility, and social order" that the court espouses or intimates.[151] At the state level, in sum, judicial decisions may serve as an essential prompt for discussion among political and social actors about what particular institutions or procedures do and should entail.

C. Developing Structural State Constitutional Law

Adjudicating power plays offers an additional, related benefit: it promotes the development of state constitutional precedent.[152] As other scholars have observed, state constitutional jurisprudence is often under-developed.[153] Commentators usually focus this lament on individual-rights provisions,[154] but expanding legal precedents on state constitutional structure is also a worthy cause.

One reason that commentators advocate the development of state constitutional law is the federalism-infused goal of "reflecting the unique character and values of a state's populace."[155] If one accepts this argument, it could conceivably apply to structure as it does to rights. State constitutions are not uniform in their approach to the structure of government, and at least some of those structural choices are based on beliefs about the allocation of powers that will work best in that state or on responses to instances of dysfunction or corruption.[156] A scenario in which state courts fail to interpret and thus give bite to such distinctive structural choices seems to miss an important opportunity for each state to go its own way.

150. *See supra* notes 97–102 and accompanying text (discussing the Minnesota line-item-veto case).

151. Ewing & Kysar, *supra* note 146, at 356.

152. For influential calls for greater attention to state constitutional law, see William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490–91 (1977); JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 2 (2018).

153. *See, e.g.*, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 780–81 (1992) (describing the "relative infrequency" of state constitutional decisions and "a general willingness among state supreme courts to engage in any kind of analysis of the state constitution at all").

154. Describing this literature, Judge Sutton writes: "One article after another talks about the second-tier status of state constitutional claims and the infrequency with which they are raised." SUTTON, *supra* note 152, at 9.

155. Jim Rossi, *Assessing the State of State Constitutionalism*, 109 MICH. L. REV. 1145, 1154 (2011) (book review) (describing this as "the predominant normative theory").

156. *See, e.g.*, Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. (forthcoming 2019) (manuscript at 16–23) (describing the origins of the plural executive structure in various states).

But even for those who reject the idea that any state does or should have its own distinctive character,[157] greater elaboration of state constitutional structure is important to the accountability of state officials. The neglect of state constitutional law, both by courts and state-level interpretive communities,[158] raises the possibility that officials will have less incentive to prioritize legal compliance over political gain.[159] Professor Justin Long, for example, has described "the weakness of state constitutions as meaningful checks on highly motivated political actors, even in the face of seemingly clear text."[160] Other state constitutional law scholars, too, have noted that even when the state constitution or implementing decisions have a clear meaning, there often is a gulf between that meaning and actual state practices.[161] To be sure, a society could go too far in the direction of constitutional restraint, subordinating contemporary preferences to senseless legalisms—but states seem far from that excess.

If developing state constitutional law is beneficial—a point I will explore more fully elsewhere[162]—then adjudicating power plays may be a salutary step. The political salience and mobilization surrounding these lawsuits has attracted substantial media attention and legal interest at both the state and national levels. The stakes of the litigation and its success in some states may serve as a newfound reminder to commentators inside and outside the academy, state departments of justice, and state bars to prioritize and disseminate state constitutional understanding.

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157. *See* Gardner, *supra* note 153, at 816–18 (rejecting the notion that state constitutionalism reflects the unique character of a state's polity).

158. I will examine the present and future of state interpretive communities in separate work. *See* Miriam Seifter, *Our Unwritten State Constitutions: In Search of an Audience* (on file with author).

159. This is not to suggest that incentives for legal compliance are overwhelming even when a constitution is salient. Frederick Schauer argues that, in the common scenario in which government officials do not face direct legal sanctions for illegal conduct, "rational officials will engage in a complex calculation" in which the expected policy or political popularity of a contemplated action may sometimes outweigh its expected illegality. *See* Frederick Schauer, *The Political Risks (if Any) of Breaking the Law*, 4 J. LEGAL ANALYSIS 83, 85 (2012). The scarce presence of state constitutional law would seem to further decrease the constitution's role in this ex ante analysis.

160. Justin R. Long, *State Constitutional Études: Variations on the Theme of a Contemporary State Constitutional Problem*, 60 WAYNE L. REV. 69, 70 (2014).

161. *See, e.g.*, Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 909 (2003) (stating, in the context of constitutional fiscal limits, that "[t]here is an enormous gap between the written provisions of state constitutions and actual practice"); Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 PITT. L. REV. 797, 800 (1987) (describing legislative noncompliance with procedural requirements in state constitutions).

162. *See* Seifter, *supra* note 158.

Conclusion

This Essay has identified power plays as an emerging pattern in state governance and described the resultant, emerging case law. Amidst an inevitable set of both costs and benefits of these adjudications, the Essay has highlighted one notable benefit: irrespective of the outcome of individual cases, adjudication can force dialogue about the constitutional boundaries of state government.

One question this Essay has not considered is whether other legal theories available to state courts might inform their adjudication of power plays. Although most of the judicial decisions described in Part II of this Essay rule against power plays, none limits power plays as a class. Future work in this area might consider the broad latitude that state courts, as common law courts, have in considering matters like context and bad faith; the longstanding requirement that all state spending serve a "public purpose";[163] and the provisions in state constitutions that establish voting rights[164] and emphasize public participation.[165] Such research might also consider state courts' potential to build on arguments at the federal level that actions taken for partisan purposes lack the "fair play" that due process requires[166] or otherwise fail to constitute a legitimate government end.[167] Any

163. *See generally* Dale F. Rubin, *Constitutional Aid Limitation Provisions and the Public Purpose Doctrine*, 12 ST. LOUIS U. PUB. L. REV. 143, 148–54 (1993) (describing the origins of the of public purpose doctrine in the states). A handful of cases have considered the intersection of the public purpose doctrine and partisanship. *Compare* People v. Ohrenstein, 565 N.E.2d 493, 494 (N.Y. 1990) (declining to resolve the lower court's conclusion that using public funds to pay political campaign staff was unconstitutional), People v. Ohrenstein, 531 N.Y.S.2d 942, 958 (N.Y. Crim. Ct. 1988) (ascertaining "a clear line of precedent that partisan political activity is a private function, not a public purpose for which State funds may be constitutionally expended"), *and* Schulz v. State, 654 N.E.2d 1226, 1230 (N.Y. 1995) (finding it clear that using public money to fund political campaign materials would violate the doctrine), *with* Ethics Comm'n v. Keating, 958 P.2d 1250, 1256 (Okla. 1998) (upholding the governor's use of public funds to travel to partisan fundraisers), *and* P.R. Indep. Party v. Commonwealth Elections Comm'n, 20 P.R. Offic. Trans. 607, 616 (P.R. 1988) (upholding public funding of partisan primary elections).

164. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 91 (2014) ("Virtually every state constitution confers the right to vote to its citizens in explicit terms.").

165. *See, e.g.*, James A. Gardner, *A Post*-Vieth *Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELEC. L.J. 643, 648 (2004) (describing protections for electoral processes and political participation found in many state constitutions); Elissa Berger, Note, *A Party that Won't Spoil: Minor Parties, State Constitutions and Fusion Voting*, 70 BROOK. L. REV. 1381, 1407 (2005) ("Compared to the federal Constitution, state constitutions are extremely specific regarding their dedication to political participation.").

166. Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 660 (2017) ("Due process embodies the principle of fair play, and fair play is an appropriate concept to employ as a constraint on excessive partisanship.").

167. *See* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 385 (2017); Justin Levitt, *Intent Is Enough: Invidious*

such doctrine would need to grapple with the principle that the state legislatures and executives receive deference in defining and identifying public purposes and governmental interests.[168]

In the meantime, we should not overlook the state constitutional debates playing out before us. Commentators should study and engage with these conflicts in a legal and not merely political register. The litigation will inevitably have costs, and state courts alone will not "save" state democracy.[169] But fostering a richer state constitutional dialogue has important potential, both in the short-term and into the future.

Partisanship in Redistricting, 59 WM. & MARY L. REV. 1993, 2010 (2018) (arguing partisan gerrymandering "punish[es] or subordinate[s] citizens based on their partisan preferences").

168. For an early formulation, see MONTGOMERY H. THROOP, A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS AND SURETIES IN OFFICIAL BONDS § 567 (1892) (stating that public officers' actions are presumed to be conducted in good faith).

169. Masha Gessen, *Autocracy: Rules for Survival*, N.Y. REV. BOOKS (Nov. 10, 2016, 5:26 PM), https://www.nybooks.com/daily/2016/11/10/trump-election-autocracy-rules-for-survival/ [https://perma.cc/7XX6-SHPT] ("Institutions will not save you."); Dahlia Lithwick, *Lawyers Aren't Wizards*, SLATE (July 21, 2017, 4:09 PM), https://slate.com/news-and-politics/2017/07/lawyers-and-the-constitution-alone-wont-save-us-from-donald-trump.html [https://perma.cc/VLA2-4D7X].