LEGAL CIVIL WAR

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In an era of partisan polarization in which each side sees the other as illegitimate and a threat to the nation and its values, the term "civil war" is often brandished, from state and federal immigration battles to abortion access to election disputes. Civil war, as used in these contexts, does not necessarily raise the specter of armed confrontation between rival armies but does suggest divisions so deep that they threaten the nation's ability to endure. This Essay introduces the concept of a legal civil war to describe conflicts within a country where rival factions defy the established rule of law and strive to set the terms for a new governing regime. The Essay changes the focus from violence to defiance of the rule of law; and provides a new paradigm for understanding what a rupture in the legal order entails and what reimposition of the rule of law requires. The Essay draws on examples from the fights over slavery and equal rights to illustrate how legal rupture and its repair constitute powerful and recurring themes throughout American history.

To analyze the form a modern American legal civil war might take, we observe that all civil wars, whether violent or not, start with ruptures in the rule of law. Drawing on the law of war, we then define a "legal civil war" as occurring when organized factions refuse to accept the legitimacy of the other's claim to authority—and where the two sides go beyond rhetoric to active interference with the opponent's otherwise legitimate actions. The interference, which, in accordance with the law of war, may justify a military response, becomes a legal *civil war when both sides defy the other in ways that cannot be resolved within the legal system. The legal civil war, whether or not it ever becomes violent, then ends with the reimposition of a legal system that creates a foundation for future governance of the polity.*

Three contemporary issues pose the potential to spark a legal civil war. The first is the possibility that no clear winner emerges from a contested election, and the other side rejects the legitimacy of the person sworn into office and refuses to treat the actions of the declared winner as authoritative. The second involves immigration, which has become an arena for pitting state against federal authority. The third involves abortion: What would happen if states defy a federal law that either bans or requires access to abortion or the state shields an abortion provider for acts that would be considered crimes in a second state?

This Essay, in focusing on the concept of legal civil war, distinguishes ruptures in the established system of governance from disagreements resolved within the legal system. Legal civil wars involve battles between sides, each of which represents a sizeable faction or controls a government entity, and which deny the legitimacy of their opponents' authority and seek to impose their will on the polity as a whole. Once such a conflict creates a rupture in the established legal order, war will not be waged through legal process, but rather as a conflict where resolution involves the reimposition of a legal system that the country as a whole views as legitimate.

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INTRODUCTION

In April of 1861, Confederate forces fired on Fort Sumter, South Carolina in what is commonly thought to be the beginning of the first American Civil War.[2] A century and a half later, in January of 2024, Governor Greg Abbott of Texas proclaimed that "the federal government has broken the compact between the United States and the States"[3] in failing to defend Texas from a foreign "invasion" of "illegal immigrants." In denying the validity of federal authority, the Governor announced he was therefore dispatching the Texas National Guard—in defiance of long-established federal supremacy over immigration issues—to secure the border.[4] Governor Abbott's actions sparked warnings about the start of a second American Civil War.[5] In anticipation of the 2024 election, commentators used the term "civil war" in addressing a possible response to disputed election results or claims that one side or the other acted inappropriately in casting a state's electoral college results.[6]

The historical commentary attributing the start of the first American Civil War to the military action against Fort Sumter and the more recent warnings describing Governor Abbott's actions and predicting conflict over the 2024 election raise the question of what civil war means. An 1861 case, *The Parkhill*, described civil war in terms of "opposing hostile factions, each

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[2] *Civil War Begins*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Civil_War_Begins.htm [https://perma.cc/8MMM-GT66] (last visited Mar. 20, 2025).

[3] Mark Joseph Stern, *GOP Governors Invoke the Confederate Theory of Secession to Justify Border Violations*, SLATE (Jan. 26, 2024, 11:40 AM), https://slate.com/news-and-politics/2024/01/texas-border-greg-abbott-gop-governors-confederacy.html [https://perma.cc/2UHE-G24W]. We capitalize the term "Civil War" or refer to it as the "American Civil War" to distinguish the military conflict that occurred between 1861 and 1865 from what we are terming "legal civil wars."

[4] Governor Greg Abbott, *Statement Regarding the Border* (Jan. 24. 2024), https://gov.texas.gov/uploads/files/press/Border_Statement_1.24.2024.pdf [https://perma.cc/MD39-88Y6]; *see* United States v. Texas, 144 S. Ct. 797 (2024) (allowing Texas to enforce its law pending further court consideration). That further consideration came one week after the holding was released on March 26, 2024, when the Fifth Circuit Court of Appeals held that Texas failed to demonstrate it was likely to win on its arguments in favor of a preliminary injunction, recognizing that the federal government had a dominant interest and a regulatory framework for controlling immigration into the United States. United States v. Texas, 97 F.4th 268, 278 (5th Cir. 2024). Given the outcome of the 2024 election, political valances shifted, and now the Texas Army and Air National Guard are working in concert with the federal government (U.S. Customs and Border Protection officials) to patrol the borders. Press Release, Office of the Texas Governor, *Texas Partners with Trump Administration on Border Security* (Jan. 31, 2025) (available at https://gov.texas.gov/news/post/texas-partners-with-trump-administration-on-border-security [https://perma.cc/6DQQ-Y93D]).

[5] Katherine Fung, *Greg Abbott's Fight with Biden Sparks Warnings 'Civil War' Has Begun*, NEWSWEEK (Jan. 26, 2024, 10:34 AM), https://www.newsweek.com/greg-abbotts-fight-biden-spark-warnings-civil-war-has-begun-1863910 [https://perma.cc/B74H-X25G].

[6] Arianna Coghill, *Trump Backers Are Talking Up Possible Civil War*, MOTHER JONES (July 26, 2024), https://www.motherjones.com/politics/2024/07/trump-vance-civil-war-gop-political-violence/ [https://perma.cc/UPX9-DXR4]; *see also* Bruce Hoffman & Jacob Ware, *Opinion: Is the US on the Brink of Another Civil War?*, CNN (Mar. 16, 2024, 1:40 PM), https://www.cnn.com/2024/03/16/opinions/us-brink-of-civil-war-hoffman-ware/index.html [https://perma.cc/Y7ZT-S8TK] ("Three months into 2024, it seems dire predictions of political violence are now commonly issued both by the country's extreme fringes as well as from the mainstream.").

contending for an exclusive administration of government"[7] and other cases have added the idea that civil wars occur when these hostilities significantly interfere with government operations.[8] Such actions, within the context of the law of war, then justify the use of force and raise the specter of armed conflict.[9] While the prospect of Americans firing on other Americans commands horror, we think it misses what these conflicts are really about: a breakdown in the rule of law.[10]

"Civil war" involves the challenge to an otherwise duly authorized governing authority.[11] When the legal system works, it resolves such disputes in accordance with the rule of law in ways that command the respect, if not necessarily the agreement, of the country.

What happens, however, when different factions within a country reject the legitimacy of the established legal order and defy the otherwise duly authorized actions of public officials? In short, what happens if the Governor of Texas defies the Supreme Court and interferes with federal border enforcement? Or if New York refuses to extradite an abortion provider whose conduct was illegal according to the law of another state in defiance of a federal ruling to do so?[12] Or if some states refuse to implement an Executive Order that the state attorneys general reject as outside the scope of the President's authority?

We argue that these actions raise the specter of "legal civil war," that is, a rupture in the rule of law.[13] A legal civil war, like a civil war that results in armed conflict, starts with an opposing

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[7] The Parkhill, 18 F. Cas. 1187, 1189, 1190 (E.D. Pa. 1861) (distinguishing civil wars with hostile factions and no "established government" from civil wars "where an organized hostile faction is contending against an established government"); *see* Texas v. White, 74 U.S. 700, 726 (1868) (determining that even though Texas operated under a different constitution during the Civil War, Texas "did not cease to be a State, nor her citizens to be citizens of the Union" during the war and "all the acts of her legislature intended to give effect to [the ordinance of secession] were absolutely null"), *overruled on other grounds by* Morgan v. United States, 113 U.S. 476, 496 (1885).

[8] *See, e.g.*, The Brig Amy Warwick, 67 U.S. 635, 641–51 (1862) (explaining that civil wars disrupt the regular operations of government, such as the courts being open and able to conduct business).

[9] *See infra* discussion in text at notes 28–29.

[10] The "rule of law" is generally considered a system in which government actors and citizens abide by a set of legal norms. *See, e.g.*, Brian Z. Tamanaha, *Vertical and Horizontal Dimensions of the Rule of Law*, 73 EMORY L.J. 1215, 1218 (2024) (alteration in original) ("Most theorists would agree that the 'rule of law prevails . . . where all individuals and all groups [including government officials] recognize an obligation to comply with law and act accordingly.'").

[11] *See, e.g.*, David Armitage, *Civil War Time: From Grotius to the Global War on Terror*, 33 AM. U. INT'L L. REV. 313, 323–24 (2017) ("[W]e have a case of civil war: 'When a party is formed in a state, who no longer obey the sovereign, and are possessed of sufficient strength to oppose or when, in a republic, the nation is divided into two opposite factions, and both sides take up arms, this is called *civil war*.'") (quoting EMER DE VATTEL, THE LAW OF NATIONS 644 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., 2008) (1758)).

[12] In February 2025, pursuant to a state criminal indictment, Louisiana sought the extradition of a New York doctor who had prescribed abortion medication to a Louisiana resident. Lorena O'Neil, *Louisiana Attorney General Signs Off on Extraditing NY Doctor in Abortion Pill Case*, LA. ILLUMINATOR (Feb. 12, 2025, 4:29 PM), https://lailluminator.com/2025/02/12/extradition-doctor/?utm_source=substack&utm_medium=email [https://perma.cc/CY4A-NWGD]. New York's governor refused the request; New York has a shield law protecting abortion providers and the governor has ordered state officials and law enforcement authorities not to cooperate with the request. Pam Belluck, Benjamin Oreskes & Emily Cochrane, *Abortion Provider Won't Be Extradited to Louisiana, N.Y. Governor Says*, N.Y. TIMES (Feb. 13, 2025), https://www.nytimes.com/2025/02/13/nyregion/abortion-extradition-louisiana-doctor.html; *see* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 47–48 (2023). As of the time of writing, there is no federal order in the case.

[13] Not all ruptures in the legal order, however, are civil wars. Coups, for example, have been defined as "illegal and overt attempts by the military or other elites within the state apparatus to unseat the sitting executive." Jonathan

faction that disputes the legitimacy of the opposing faction's exercise of governmental authority and significantly interferes with ordinary governmental functions.[14] A "legal civil war," whether accompanied by violence or not, is accordingly a dispute over who gets to make the law and apply it, with the conflict disrupting the existing legal order, as the two sides refuse to accept a legal resolution within the established order as dispositive. In accordance with this definition, both the firing on Fort Sumter and Governor Abbott's interference with the operation of the U.S. Border Patrol can be considered *provocations* that threaten legal civil war. The firing on Fort Sumter then became a legal civil war when President Lincoln, in turn, chose to respond by seeking to preserve the Union by force. In accordance with our definition, therefore, two rival factions (the Union and the Confederacy) each asserted the right to resolve the legal validity of secession on their own terms, and each denied the legitimacy of the other to do so, either through the Union courts or the Confederate legislatures. South Carolina then interfered with the operation of the Union army at Fort Sumter, and President Lincoln responded to the provocation by going to war, ultimately resolving the validity of secession by extralegal means and reimposing the rule of law with the acceptance of the Confederate states back into the Union and the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments as a new foundation for the governing authority of the United States.[15]

Governor Abbott's actions in dispatching the Texas National Guard to the Mexican border and in interfering with the operations of the U.S. Border Patrol also denied the validity of federal action, in this case, the United States's assertion of the exclusive right to manage the border.[16] Nonetheless, Governor Abbott's pronouncement of the legal authority to take unilateral action did not itself constitute an act of civil war. Like South Carolina's declaration of secession,[17] or a Governor's or state attorney general's claim of a right to ignore federal law such statements are a claim of legal authority to defy existing law. The acts of the Texas National Guard in interfering with the U.S. Border Patrol went further; they *were* provocations that could justify a federal use of force.[18] The Biden Administration, however, responded by going to court.[19] So the references to civil war were overblown; there was a challenge to federal authority

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M. Powell & Clayton L. Thyne, *Global Instances of Coups from 1950 to 2010: A New Dataset*, 48 J. PEACE RES. 249, 252 (2011). Coups differ from civil wars in that "coup perpetrators must come from within the central state apparatus, while civil wars commonly include vast segments of the general population," coups are focused on the overthrow of the existing legal regime, while civil wars may have other purposes, such as autonomy or secession or protection of the status quo, and coups typically involve an usurpation of power as a sudden, quickly resolved, event rather than a protracted conflict. Clayton Thyne, *The Impact of Coups d'État on Civil War Duration,* 34 CONFLICT MGMT. & PEACE SCI. 287, 289 (2017). Issues about coups and tyranny are beyond the scope of this article. *See also* TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 10 (2017) ("[T]he Founding Fathers sought to avoid the evil that they . . . called *tyranny*. They had in mind the usurpation of power by a single individual or group, or the circumvention of law by rulers for their own benefit.") (emphasis in original).

[14] *See supra* note 7 and accompanying text.

[15] *See infra* discussion in text at notes 47–49.

[16] *See supra* note 4 and accompanying text. *See also* Rosa Flores, *2 Children and a Woman Drowned in the Rio Grande, Authorities Say, Days After Texas Blocked the Feds Amid Migrant Crisis*, CNN (Jan. 15, 2024, 7:06 AM), https://www.cnn.com/2024/01/13/us/us-mexico-border-drowned-migrants/index.html [https://perma.cc/HL4C-ZBH4] (describing interference with the U.S. Border Patrol).

[17] *See, e.g.*, Texas v. White, 74 U.S. 700 (1869).

[18] *See supra* notes 7–9 and accompanying text.

[19] *See* Lauren Sforza, *Supreme Court Temporarily Blocks Texas Law That Allows Police to Arrest Migrants*, THE HILL (Mar. 4, 2024, 7:34 PM), https://thehill.com/regulation/court-battles/4508051-supreme-court-temporarily-blocks-texas-law-that-allows-police-to-arrest-migrants/ [https://perma.cc/N9US-T8F7] (describing a federal legal challenge to a Texas state law).

but not a rupture in the rule of law.

After defining the concept of "legal civil war," the Essay considers the alternatives available to resolve or diffuse it. It argues that a legal civil war, which by definition involves the rupture of the legal system, can only be resolved by the imposition of superior power. That imposition could occur by force, as the federal government did in federalizing state National Guards to enforce the Supreme Court's decision in *Brown v. Board of Education*,[20] or it may involve wearing the other side down, as the South did in winning Northern acquiescence to its defiance of federal law in disenfranchising Black voters following the end of Reconstruction.[21] In these cases, the rule of law was restored, in the face of wholesale defiance, at the point when the losing side submitted to the assertion of superior authority.[22]

The argument proceeds in three parts. The first explores the meaning of a legal civil war. The second turns to look at historical conflicts that raised the prospect of legal civil wars; a central goal of this Essay is to explore how the country has dealt with these threats of legal civil war. The third part turns to contemporary events, analyzing three arenas that threaten existing governing authority and thus raise the specter of a new legal civil war.

This Essay, in focusing on the concept of legal civil war, distinguishes *ruptures* in the established system of governance that signal the start of a civil war from disagreements that the legal system routinely resolves. Legal civil wars involve *wars*—battles between two sides which deny the legitimacy of the other and seek to impose their will on the polity as a whole. Once such a conflict creates a rupture in the established legal order, winning involves the imposition of a legal system through an assertion of superior power (military or legal). Only with the acceptance of these legal terms by the country as a whole, however, can the rule of law again prevail.

I. DEFINITIONS OF LEGAL CIVIL WAR

One of the foundational definitions of civil war is from the "Lieber Code," promulgated by jurist Franz Lieber as a statement of military conduct obligations during the Civil War.[23] Civil

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[20] 347 U.S. 483 (1954); *see* Joel K. Goldstein, *Judicial Supremacy in a Federalism Context Through the Lens of* Cooper, 41 U. ARK. LITTLE ROCK L. REV. 161, 171–73 (2019).

[21] *See* Daniel Farbman, *Redemption Localism*, 100 N.C. L. REV. 1527, 1534 (2022) (describing the "thirty-year attritional war to blunt, mute, and ultimately snuff out the power and voice of Black voters across the South"). Southern resistance to Reconstruction involved considerable violence but the ultimate resolution was not a product of the assertion of military force. *See infra* discussion in text at notes 42–77.

[22] *See infra* discussion in text at notes 42–77. In offering this definition of what constitutes a legal civil war, we are mindful that not all legal conflicts between states, or between states and the federal government, qualify as legal civil war, and that many violent conflicts, even if they involve armed factions or rogue governmental actors, are not necessarily a threat to the legal order. We are also aware that conflicts in which each side denies the legitimacy of the other side's assertion of authority can last for decades without resolution and that the imposition of a new legal regime, even when successful, does not necessarily last forever; the Southern states, for example, imposed a new legal order after the end of Reconstruction that differed in notable respects from the Union-imposed order during Reconstruction. If the conflict persists without resolution, however, it constitutes a challenge to the nation as a single, functioning democracy governed by the consent of the governed because compliance with the rule of law is a manifestation of that consent.

[23] John C. Dehn, *Why a President Cannot Authorize the Military to Violate (Most of) the Law of War*, 59 WM. & MARY L. REV. 813, 833 (2018). For a discussion of the origins of the Lieber code and its importance, see Martin S. Lederman, *The Law (?) of the Lincoln Assassination*, 118 COLUM. L. REV. 323, 368 (2018). Lederman notes that the "Lieber Code addressed a 'dazzling array of questions.'" *Id.* (quoting

war was said to happen when there "is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government."[24] While civil war remains undertheorized,[25] it is often described as occurring when conflict significantly interferes with the operation of government functions.[26] Treatise writers on the law of war observe that when such interference occurs, it justifies the use of force.[27] In this sense, the Civil War is said to have begun with the attack on Fort Sumter because the attack interfered with the operation of the federal fort, justifying the Union's use of force, and thus the outbreak of the armed conflict that characterized the war.

Historians often treat the outbreak of hostilities as marking the start of a civil war,[28] but armed conflict is neither necessary nor sufficient to define the concept of legal civil war.[29] Instead, civil wars necessarily involve a disruption of the rule of law with "opposing hostile factions, each contending for an exclusive administration of government," that interfere with the ordinary exercise of governmental function.[30] The interference (and its resolution) might stop short of armed conflict but still qualify as civil war. Under this conception, a legal civil war requires three steps:

> 1) Opposing factions that claim to exercise legitimate governmental authority on behalf of the whole;
> 2) Use of that authority to deny the legitimacy of an opposing faction's otherwise seemingly duly authorized exercise of authority;
> 3) In such a way that defies or obstructs ordinary governmental function.

Legal civil wars, because they begin with a rupture of the legal system—that is, a disruption of the legal system's ability to resolve the dispute[31]—therefore end with the reimposition of a legal system that creates a foundation for future governance of the polity. That happens in one of three ways that parallel the ways that violent conflicts end: first, one side defeats the other and

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JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 287–96 (2012)). "In light of Lieber's expertise in international law, much of the Code consists of descriptions of the 'limitations and restrictions' that the customary laws of war impose on the conduct of war." *Id.* (quoting Executive Order 100 of April 24, 1863 "Instructions for the Government of the Armies of the United States in the Field," sec. I, art. 30). On the influence of the Lieber Code, see, for example, Gideon M. Hart, *Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions*, 203 MIL. L. REV. 1, 4 (2010). *See also* Alexander H. Mindrup, *The Lieber Code: A Historical Analysis of the Context and Drafting of General Orders No. 100*, 1 THE CARDINAL EDGE 1, 1 (2021).

[24] Executive Order 100 of April 24, 1863 "Instructions for the Government of the Armies of the United States in the Field," sec. X, art. 150 [hereinafter The Lieber Code].

[25] Anne Orford, *Reviewing Civil Wars: A History in Ideas*, 115 AM. J. INT'L L. 781, 782 (2021).

[26] *See supra* note 7 and accompanying text.

[27] *See, e.g.*, U.N. CHARTER art. 51.

[28] *See, e.g.*, Wolfram Lacher, *How Does Civil War Begin? The Role of Escalatory Processes*, 3 VIOLENCE: INT'L J. 139, 154 (2022).

[29] *See infra* notes 30–31 and accompany text.

[30] The Parkhill, 18 F. Cas. 1187, 1190 (E.D. Pa. 1861); *see supra* notes 7-8 and accompanying text.

[31] We use the word "rupture" to refer to a breaking of the established order or an abrupt separation, particularly between opposing factions. *See, e.g.*, *Rupture*, VOCABULARY.COM, https://www.vocabulary.com/dictionary/rupture [https://perma.cc/D4T4-PJJA] (last visited Mar. 23, 2025) (defining rupture as "the state of being torn or burst open" or as "a personal or social separation (as between opposing factions," or as to "separate or cause to separate abruptly")).

then successfully imposes a new legal order on the losing side through the assertion of superior power. As we will show below, this is what happened at the end of the Civil War with the victorious Union adopting a new legal order for the country as whole.[32]

Second, the two sides continue to defy each other's authority until one side gives up.[33] At that point, the side that has continued to resist the other obtains the ability to impose its preferred legal order on the territory it controls, with the war ending when the other side explicitly or through acquiescence accepts the legitimacy of that legal regime. As we discuss in the next section, this describes the end of Reconstruction, with Southern resistance wearing down the North, and the Supreme Court ultimately ratifying the reimposition of white rule and de jure segregation in the South as part of the law of the United States.

Or third, the dispute persists indefinitely, with neither side accepting the legitimacy of the other's actions, and the conflict ends because of a shift in power independent of the source of the conflict. Before the Civil War, for example, free states opposed to slavery defied enforcement of the fugitive slave laws through procedural means.[34] The Southern states did not accept the legitimacy of the Northern rulings and eventually enlisted federal authority to contest the actions, but this conflict persisted for decades, with neither side accepting the other's legitimacy until it was finally resolved by the abolition of slavery itself.[35] In short, it ended not through resolution of the issue of the right to recover the enslaved per se but because other factors (the Civil War) changed the legal framework in which the issue was contested.[36]

Of course, all three of these resolutions could produce express agreements: an agreement to surrender and accept the other side's legal regime, to permit secession creating two separate countries, or to accept a federal solution in which each state has authority to decide the issue on its own. Such express agreements then establish the terms of the prospective legal order that will determine future questions of legitimacy, resolving the rupture.

Within our proposed definition of legal civil war, the notion of "faction" requires a definition. In "Federalist No. 10," James Madison defined a faction as a group "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[37]

In warning about factions, what Madison most feared were groups that sought to advance their own interests at the expense of other interests and the common good. That means not just a group representing some interests at the expense of others (*e.g.*, unions v. employers or ethnic or religious divisions),[38] but a group striving to gain exclusive control of public entities (*e.g.*, a state

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[32] *See infra* Section II.A.

[33] Although this Essay focuses on two-sided conflicts, there could be more than two factions warring at once. In accordance with our definition, there is nothing in principle that prevents a legal civil war involving multiple factions. In the contemporary American context, however, multiple party conflicts are unlikely because of the degree of partisan polarization.

[34] *See Fugitive Slave Acts*, HISTORY.COM (June 29, 2023), https://www.history.com/topics/black-history/fugitive-slave-acts [https://perma.cc/HE9G-GTX7] (describing the responses of most Northern states, which "refus[ed] to be complicit in the institution of slavery . . . [and] intentionally neglected to enforce the law. Several even passed so-called 'Personal Liberty Laws' that gave accused runaways the right to a jury trial.").

[35] *See infra* Section II.B.

[36] *See infra* Section II.B.

[37] THE FEDERALIST No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

[38] Hoffman & Ware, *supra* note 6 ("[W]e are closer to civil war than any of us would like to believe' because of a toxic mix of political extremism and polarization, social and cultural tribalism, the popular embrace of conspiracy theories, proliferation of guns and well-armed militias and the erosion of faith in government and the liberal, Western democratic state." (quoting BARBARA F. WALTER, HOW CIVIL

government, the Supreme Court, or the executive branch) in order to exercise the power of those entities to advantage one group at the expense of or to the exclusion of others—and to the detriment of the interests of the community as a whole. Analyses of civil war indicate that conflicts between factions, each claiming to exercise governmental authority to the exclusion of the other, tend to last longer and become more intense than rebellions provoked by an inflamed mob or sparked by a single claim of injustice.[39]

II. HISTORICAL RESOLUTIONS OF LEGAL RUPTURE

Over the course of American history, innumerable conflicts have threatened to produce—or have produced—legal civil war. These include many of the conflicts over enslavement that preceded the Civil War and many conflicts over the status of former Confederates and their opposition to racial equality that followed the end of armed hostilities in 1865.[40]

This Section uses three historical conflicts to show how once a legal rupture occurs, the resolution always involves the imposition of a new legal order.[41] First, the Section discusses how the Civil War, as a legal civil war, ended not with the cessation of hostilities but with the imposition of a new legal order during Reconstruction that abolished enslavement and recognized the citizenship of the formerly enslaved. Second, the Section discusses how the white South launched a new legal civil war that, with the end of Reconstruction and favorable Supreme Court decisions, won acquiescence to the reimposition of white rule in the South. Third, the Section discusses how some legal civil wars, to a greater degree than violent civil wars, can persist without resolution for decades.

A. RESOLUTION THROUGH POWER

Reconstruction involves the most obvious example of a winning side imposing a new legal order on the nation as a whole. The Civil War, as a legal civil war, ended not with the cessation of hostilities but with the adoption of constitutional amendments that created a new legal order for the nation.

The Thirteenth Amendment, which abolished slavery, was ratified in 1865.[42] That didn't stop former Confederates—who sought to regain power and to restrict the freed people's rights through a mix of violence, terror, and new laws securing the availability of a low-paid labor force, forbidding miscegenation, and limiting political participation.[43] Many Northerners saw

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[39] *See e.g.*, Lacher, *supra* note 28, at 143–44 (describing how factional violence can "transform the political landscape by promoting the emergence of new identities, deepening societal rifts or drawing new ones, and bringing about the formation of new political actors," thus escalating conflict).

[40] *See infra* Sections II.A, B, and C.

[41] *See infra* Sections II.A, B, and C.

[42] *13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, NATIONAL ARCHIVES (May 10, 2022), https://www.archives.gov/milestone-documents/13th-amendment [https://perma.cc/5V82-N7NW].

[43] While some Black Codes existed before the Civil War, state legislatures passed them in a flurry in 1865 and 1866, in direct defiance of federal legislation and the Constitution. *The Southern "Black Codes" of 1865–66*, TEACH DEMOCRACY, https://teachdemocracy.org/online-lessons/brown-v-board-50th-anniversary/southern-black-codes [https://perma.cc/GDV2-VBSM] (last visited Mar. 23, 2025). These laws represented the South's continued efforts to retain Black people as a slave labor population. They created significant penalties for unemployment, loitering, and vagrancy with the intent to coerce freed slaves to

these Black Codes as a "blatant attempt to restore slavery" and these laws "provoked a storm of protest among many Northerners."[44] Union military governors and the Freedmen's Bureau declared the South Carolina and Mississippi Black Codes of 1865 invalid and they never took effect.[45] These provocations energized the North. The "Radical Republicans" swept Congress and took control of Reconstruction, overriding Andrew Johnson's vetoes.[46] Congress passed the Civil Rights Act of 1866, to enforce the Thirteenth Amendment,[47] with passage of the Fourteenth Amendment following the same year,[48] and then the Fifteenth Amendment, ratified in 1870, that sought to secure the right to vote for the formerly enslaved.[49]

These amendments and their supporting legislation imposed a new legal order on the South and created a new legal foundation for the country. Congress required that the seceded states ratify the Fourteenth Amendment and adopt new state constitutions.[50] The U.S. military oversaw the elections to the conventions that adopted the new constitutions, and Congress required that eligibility to vote for convention members extend to all men, including the formerly enslaved, but not to disqualified former Confederates.[51] These measures constituted the true end of the Civil War: the repair of the legal rupture caused by disagreements over slavery and secession through the creation of a new legal framework that recognized equal rights.

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remain on their masters' plantations or to allow their arrest and the penalty of forced labor being imposed on them. *See* Kim Gilmore, *Slavery and Prison—Understanding the Connections*, 27 SOC. JUST. 195, 198 (2000); *see also* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, *1863–1877* 228 (Henry S. Commager & Richard B. Morris eds., 2014) ("[T]he vagrant contemplated was the plantation negro." (quoting JOHN W. DUBOSE, ALABAMA'S TRAGIC DECADE 55 (James K. Greer ed., 1940))).

[44] *The Southern "Black Codes" of 1865–66*, *supra* note 43.

[45] *Id.*

[46] The U.S. Congress, under Republican control, passed a series of civil rights acts designed to implement the Fourteenth Amendment and protect the formerly enslaved. *Id. See generally* Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, A Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381 (2009) (providing a comprehensive description of the Congressional efforts to secure equal rights following the Civil War).

[47] 42 U.S.C. § 1981. *See* Curtis, *supra* note 46, at 1388 (describing the act as passed in response to the Black Codes).

[48] *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 326 (2007) ("These Black Codes were a major impetus to the Civil Rights Act of 1866 and the Fourteenth Amendment.").

[49] *See* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 376 (2001). The Congress that framed "the Fourteenth Amendment itself . . . had a broad view of Section 2 of the Thirteenth Amendment. We know this because they adopted the Civil Rights Act of 1866, which swept far beyond merely prohibiting slavery and involuntary servitude . . . . At the very moment that they were proposing another "enforcement" clause in the Fourteenth Amendment, they were speaking loud and clear [that] the parallel enforcement clause of the Thirteenth Amendment meant. . . . more than mere remedial legislation." Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 823 (1999). Of course, "[i]n the Civil Rights Cases, the Court held that Congress lacked power under the Thirteenth and Fourteenth Amendments to enact the Civil Rights Act of 1875, which prohibited discrimination in public accommodations." Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 490 n.237 (2000).

[50] Harrison, *supra* note 49, at 376–77.

[51] Curtis, *supra* note 46, at 1397–98 ("Former rebels who had taken an oath to support the Constitution and who had supported the Confederacy were not allowed to vote for the Constitutional Conventions.").

B. RESOLUTION THROUGH ACQUIESCENCE

White Southern Democrats opposed these terms from the beginning, and as Reconstruction waned, they waged a successful legal civil war to defy the terms of the new order and reimpose exclusive white rule.[52] They succeeded because, over time, the "Union," that is, the federal government, looked the other way at Southern defiance, with the federal courts ultimately ratifying the evisceration of Black voting rights.

The former Confederates, who ultimately accepted the end of the formal system of enslavement,[53] never accepted the premise of equal rights for the formerly enslaved. The Ku Klux Klan waged a campaign of terror and violence against the new Republican governments, targeting their meetings and assassinating their supporters.[54] Although private parties launched the initial attacks, the Klan acted on behalf of white people who sought to defy the new civil rights laws and regain control of Southern governments.[55] The Klan and other such private groups constituted a "faction" that sought to deny the legitimacy of the new legal order, interfere with vital parts of it such as the right to vote, and reassert exclusive white rule.[56] The legal rupture came when white Democrats regained control of state governments, starting in the early 1870s, and used that control, in step-by-step fashion, to defy the new legal regime, restrict the Black vote, and ultimately impose white, one-party rule on Southern state governments.

In North Carolina, for example, this faction gained control of the legislature in 1871, impeached the Republican governor who had declared martial law in an attempt to contain the Klan, and gained control of state government by 1877.[57] Under the new government, in a manner foreshadowing measures adopted in Georgia[58] and North Carolina[59] following the 2020 elections, the state legislature replaced elected officials with appointed County Commissioners, who could gerrymander voting districts and discretionarily exempt people from poll taxes.[60]

These laws culminated in what has been described as a "thirty-year attritional war to

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[52] *See generally* HEATHER COX RICHARDSON, HOW THE SOUTH WON THE CIVIL WAR: OLIGARCHY, DEMOCRACY, AND THE CONTINUING FIGHT FOR THE SOUL OF AMERICA (2020). Eric Foner explained how "Northern Republicans came, for a time, to associate the fate of the former slaves with their party's raison d'être and the meaning of Union victory in the Civil War." ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION, 1863–1877 (1990). When Southern whites controlled Southern states following the end of Reconstruction, they did so as Democrats, championing white supremacy and what in many states became one-party rule. See *infra* notes 61–62 and accompanying text.

[53] FONER, A SHORT HISTORY, *supra* note 52, at ch. 9 (describing Southern Democrats' embrace of a "New Departure" that grudgingly accepted Reconstruction (and with it the end of slavery), but not the end of white supremacy).

[54] *See, e.g.*, FONER, RECONSTRUCTION, *supra* note 43, at 279, 342–44, 425–44 (describing the violent tactics).

[55] Curtis, *supra* note 46, at 1399–1400 (describing violence as "intensely political").

[56] FONER, A SHORT HISTORY, *supra* note 52, at ch. 9 ("In effect, the Klan was a military force serving the interests of the Democratic party, the planter class, and all those who desired the restoration of white supremacy.").

[57] Michael Kent Curtis, *Race as a Tool in the Struggle for Political Mastery: North Carolina's "Redemption" Revisited 1870-1905 and 2011-2013*, 33 LAW & INEQ. 53, 81 (2015).

[58] *See infra* text accompanying notes 115–117.

[59] The North Carolina measure has been invalidated by the courts. *See Three-Judge Panel Rules in Favor of Cooper in Fight over New State Elections Board*, CAROLINA J. (Mar. 12, 2024), https://www.carolinajournal.com/three-judge-panel-rules-in-favor-of-cooper-in-fight-over-new-state-elections-board/ [https://perma.cc/N9HV-E2Z4].

[60] Curtis, *supra* note 57, at 82.

blunt, mute, and ultimately snuff out the power and voice of [B]lack voters across the South."[61] Over time, Southern Democrats—"[s]eizing temporary legislative majorities through violence and ballot-box stuffing," establishing literacy tests and requiring poll tax payments—used government power to disenfranchise Black people and entrench one-party rule.[62]

The campaign of defiance worked because the federal government acquiesced. The Republicans lost control of Congress in 1875, and with their defeat, the federal will to overcome Southern resistance waned.[63] The Presidential election of 1876 ended with the appointment of a Republican President, Rutherford B. Hayes, and withdrawal of the last federal troops from the South.[64] Shortly thereafter, Congress passed the Posse Comitatus Act, which has been described as "the Democratic Congress's *coup de grace* to military Reconstruction."[65] The statute prohibited the U.S. military from engaging in civil law enforcement, eliminating the military role "as the enforcer of the Reconstruction amendments and federal laws designed to protect the civil rights of emancipated [B]lacks."[66]

Arguably, however, the true coup de grace came from the federal courts.[67] In *United States v. Cruikshank*,[68] the Supreme Court overturned the convictions of members of a white mob that had slaughtered scores of Black people, narrowing the scope of federal ability to enforce the protections in the Fourteenth Amendment against private individuals.[69] In *United States v. Reese,*[70] the Court declared unconstitutional parts of the Enforcement Act designed to enforce the Fifteenth Amendment and protect the right to vote.[71] The decisions have been said to give "the Klan and other white terror groups the greenlight to use terror and violence to bring down Reconstruction"[72] and to gut "the central law protecting African-Americans against both public and private lawlessness, corruption, and mob violence."[73] The point of "rupture" in this legal civil war came as Southern Democrats used state power to disenfranchise Black people across the South, acts that ultimately nullified the Fourteenth Amendment's promise of equal

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[61] Farbman, *supra* note 21, at 1534.

[62] J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667, 679 (2008); *see* Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851, 856–57 (1982) ("These devices resulted in the immediate, nearly total disfranchisement of blacks in the South.").

[63] Butler, *supra* note 62, at 856.

[64] Sheila Blackford, *Disputed Election of 1876*, MILLER CENTER, https://millercenter.org/the-presidency/educational-resources/disputed-election-1876 [https://perma.cc/TF5D-M7W3] (last visited Mar. 21, 2025).

[65] Andrew Buttaro, *The Posse Comitatus Act of 1878 and the End of Reconstruction*, 47 ST. MARY'S L.J. 135, 136–37 (2015). The Posse Comitatus Act (the Latin translation is "power of the country") prohibited the use of the federal military as a posse to intervene when the Southern states tried to establish Jim Crow laws in the prior Confederate states. *Id.*

[66] *Id.* at 137.

[67] *See, e.g.*, Orville Vernon Burton, *The Creation and Destruction of the Fourteenth Amendment During the Long Civil War*, 79 LA. L. REV. 189, 192 (2018).

[68] 92 U.S. 542 (1875).

[69] *See id.*; Burton, *supra* note 67, at 233, 239.

[70] 92 U.S. 214 (1876).

[71] *Id.* at 214; Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870)) (codified as amended at 42 U.S.C. §§ 1981–82 (2012)).

[72] David H. Gans, *Court Reform and the Promise of Justice: Lessons from Reconstruction*, 27 LEWIS & CLARK L. REV. 825, 839 (2023).

[73] Burton, *supra* note 67, at 231.

citizenship and the Fifteenth Amendment's guarantee of the right to vote. "In effect, step by step, through a series of decisions, the Court ratified the ability of a political minority to replace majority rule by force, fraud, and later laws designed to disenfranchise American citizens of African descent."[74]

Within the context of this new, national legal order limiting federal power generally and the ability to address private conduct, in particular,[75] the Southern states were able to first, impose one-party Democratic rule starting in the 1870s, and then use their newfound power to reestablish white supremacy through the adoption of Jim Crow laws that mandated racial segregation. The Supreme Court ultimately ratified the new racial order's "separate but equal" statutes in *Plessy v. Ferguson*.[76] With *Plessy*, the South's defiance of the post-Civil War federal effort to create a multi-racial democracy had not only prevailed but became the law of the land.[77]

C. NO RESOLUTION AND PERSISTENT CONFLICT

The two previous sections present clear examples of victors imposing, at least for a time, a new legal order—one through force and the other by acquiescence. At other times, conflict simply persists without resolution. In such cases, neither side accepts the legitimacy of the other's position, and either or both interfere to some degree with the other's otherwise legitimate exercise of governmental authority in ways that constitute ruptures in the legal order. Resolution of the conflict may not necessarily occur—or it may occur in ways that turn on issues other than the immediate source of the dispute.

Enforcement of the fugitive slave laws, an issue from the time the Constitution became effective in 1789, involves such an issue. The controversy started with the words of the Constitution itself:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, But shall be delivered upon Claim of the Party to whom such Service or Labour may be due.[78]

The constitutional provision, however, left open the question of enforcement. From roughly 1800 to 1842, the matter was largely entrusted to local officials, allowing different results in different parts of the country, as each state adopted its own procedures to govern efforts to

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[74] Curtis, *supra* note 46, at 1425.

[75] *See* Alexander Tsesis, *Into the Light of Day: Relevance of the Thirteenth Amendment to Contemporary Law*, 112 COLUM. L. REV. 1447, 1448 (2012).

[76] 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[77] The South's victory was so complete that early twentieth century historians in the North as well as the South treated Reconstruction as "an era of corruption presided over by unscrupulous 'carpetbaggers' from the North, unprincipled Southern white 'scalawags,' and ignorant Blacks unprepared for freedom and incapable of properly exercising the political rights Northerners had thrust upon them. After much needless suffering, the South's white community banded together to overthrow these governments and restore 'home rule' (a euphemism for white supremacy). All told, Reconstruction was the darkest page in the saga of American history." FONER, A SHORT HISTORY, *supra* note 52, at Preface.

[78] U.S. CONST. art. IV, sec. 2, cl. 3.

reclaim fugitives.[79]

Legal rupture occurred after the Supreme Court rejected that approach in 1842, reaffirming the constitutionality of the Fugitive Slave Act of 1793 and striking down Pennsylvania's personal liberty law.[80] The result set the stage for an increasing federal role in overseeing the return of fugitive slaves, and in 1850, Congress passed the Fugitive Slave Act of 1850, which increased federal authority "to settle disputes among the states by creating a federal law requiring the return of escaped enslaved persons."[81] Free states responded by defying the law. In 1850, seven resisted by enacting "'personal liberty laws,'" which typically included procedural protections for the enslaved person and their champions[82] and were admittedly designed to obstruct and frustrate slave recovery.[83] By 1860, sixteen of eighteen Northern states had adopted such statutes, which "interposed state authority against the federal government."[84]

Wisconsin went so far as to free abolitionists who had rescued an alleged fugitive slave, Joshua Glover, from a Milwaukee jail.[85] The Supreme Court issued a writ of error, but the Wisconsin Supreme Court refused to acknowledge it.[86] Four years later, the Supreme Court overturned the Wisconsin ruling,[87] but within two weeks "the Wisconsin legislature issued a joint resolution taking notice of the decision and then rejecting it," maintaining that the Constitution "'secures to the people the benefits of the writ of habeas corpus.'"[88] Wisconsin effectively delayed, obstructed, and frustrated the Supreme Court's efforts to enforce the fugitive slave laws.[89]

The Wisconsin defiance, similar actions in other states, and the personal liberty laws

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[79] H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 L. & HIST. REV. 1133, 1136–37 (2012) ("Regarding fugitive slaves, the settlement worked out in Congress between 1791 and 1800 had three components. First, it made fugitive slave reclamation a local affair, determinable by either a state or federal magistrate at a summary judicial hearing. Second, the details of reclamation—what procedure would guide the magistrate or what evidence would be considered sufficient—were left to judges' discretion or further legislative instruction. Third, the transit of slaves, free blacks, and the protection of free blacks from kidnapping were left to the states to decide as internal police matters. Between 1800 and 1842 or thereabouts, this settlement held despite pressure from both abolitionists and slaveholders.").

[80] Prigg v. Pennsylvania, 41 U.S. 539, 542 (1842); Baker, *supra* note 79, at 1157 ("[*Prigg*] eviscerated the decades-old constitutional settlement and replaced it with a new regime predicated on national supremacy.").

[81] Alejandra Caraballo et al., *Extradition in Post*-Roe *America*, 26 CUNY L. REV. 1, 31 (2023).

[82] *Id.* at 3.

[83] *Id.*

[84] Baker, *supra* note 79, at 1169.

[85] *Id.*

[86] *Id.* at 1170.

[87] *Id.* at 1171; *see* Ableman v. Booth, 62 U.S. 506 (1859). For a detailed description of the events leading up to *Ableman* and the challenge to federalism it represented, see ALISON LACROIX, THE INTERBELLUM CONSTITUTION: UNION, COMMERCE, AND SLAVERY IN THE AGE OF FEDERALISMS 384–418 (2024).

[88] Baker, *supra* note 79, at 1171 (quoting S.J. Res. 4, 12th Leg. Sess. (Wis. 1859)).

[89] *See Abelman*, 62 U.S. at 507–14 (summarizing the Wisconsin efforts to delay and frustrate Booth's prosecution). Ultimately, the Supreme Court of Wisconsin yielded to the authority of the United States and accepted the Supreme Court's mandate. *See* Ableman v. Booth, 11 Wis. 498 (1859). However, the Wisconsin court never accepted the reasoning of the Taney Court. Thus, in a collateral matter, the unconstitutionality of the Act was assumed. *See* Arnold v. Booth, 14 Wis. 180 (1861). *See also* Robert M. Cover, *Review: Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression by Richard Hildreth, New York: 1856*, 68 COLUM. L. REV. 1003, 1008 (1968) (discussing Supreme Court Justice Joseph Story's analysis in *Prigg v. Pennsylvania* of state efforts to nullify federal law).

demonstrated "subterranean resistance" to the fugitive slave laws, with the conflict becoming more intense—and more visible—over time. Striking down one law, as the Supreme Court did with Pennsylvania's personal liberty statute in 1842,[90] did not prevent new states from enacting similar laws. No case better symbolizes the increasingly entrenched nature of the conduct than *Dred Scott*.[91] Dred Scott, who had been enslaved, had travelled with his owner to free states and territories where slavery was forbidden. He argued that after living in such states, he should be treated as free. The Supreme Court, in rejecting his case, stated flatly: "The Constitution of the United States recogni[z]es slaves as property, and pledges the Federal Government to protect it."[92]

Historian David Blight concludes that "the Dred Scott case . . . stoked the fear, distrust and conspiratorial hatred already common in both the North and the South to new levels of intensity. . . . Dred Scott was the point of no return."[93] For abolitionists, the case underscored "that the pro-slavery South would stop at nothing, constitutional or otherwise, to preserve and spread slavery."[94] The Supreme Court contributed to the conviction on both sides that no paths remained to compromise.

The rupture that occurred with the combination of federal insistence on enforcement and free state insistence on defiance could not end without resolution of the broader issue of slavery itself. Until that issue was resolved, the persistent conflicts over the return of the enslaved from free states demonstrate the way such conflicts continued. Each side denied the legitimacy of the other and each side interfered with what the other side viewed as the lawful exercise of governmental authority. The conflict over enforcement of the fugitive slave laws demonstrates how such conflicts can persist for decades without resolution, contributing in this case to the hardening of the factions that fought the Civil War.[95]

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[90] *See supra* text accompanying note 80.

[91] Dred Scott v. Sandford, 60 U.S. 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[92] *Id.* at 395.

[93] David W. Blight, *Was the Civil War Inevitable?*, N.Y. TIMES (Dec. 22, 2022), https://www.nytimes.com/2022/12/21/magazine/civil-war-jan-6.html.

[94] *Id.*

[95] While this article describes the ending of legal civil wars through the restoration of the rule of law and resolution of the specific issue provoking the dispute, issues of racial equality nonetheless recur in every era. We thus described the Civil War as ending legally with the South's acceptance of the Thirteenth Amendment, its resistance to Reconstruction ending with the Union's acceptance of the South's neutering of the Fourteenth Amendment and the imposition of Jim Crow, *see* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 40 (2017), and the South's "massive resistance" to school desegregation ending with acceptance of the illegality of de jure segregation, *see* Mark Golub, *Remembering Massive Resistance to School Desegregation*, 31 LAW & HIST. REV. 491, 494 (2013). These conflicts persist after resolution of the particular dispute, albeit without a rupture in the rule of law. Recent controversies over the birthright citizenship clause in the Fourteenth Amendment are one illustration of this ongoing conflict. The Fourteenth Amendment included birthright citizenship to reverse *Dred Scott* and underscore that all persons born in the United States were citizens irrespective of race. *See* Amy Howe, *A History of Birthright Citizenship at the Supreme Court*, SCOTUSBLOG (Feb. 5, 2025, 9:57 AM), https://www.scotusblog.com/2025/02/a-history-of-birthright-citizenship-at-the-supreme-court/ [https://perma.cc/3MT5-7RAJ]. The ACLU observes that "[e]very attack on birthright citizenship, from the 19th century until now, has been grounded in racism." *Briefing Paper: President Trump's Attack on Birthright Citizenship,* ACLU (Jan. 21, 2025), https://www.aclu.org/publications/briefing-paper-president-trumps-attack-on-birthright-citizenship [https://perma.cc/HEZ8-7MB6].

III. LEGAL CIVIL WAR ON THE HORIZON

Underlying all of the legal ruptures described in this Essay and those looming in the future is the issue of authority. That said, the issues today are different from those causing the Civil War in the following ways:

First, the use of armed force in a nuclear era will be different. A modern civil war involving all-out armed hostilities would be quickly ended by whichever party controls the U.S. military.[96]

Second, the Civil War involved a conflict between regional factions tied to two fundamentally different economic systems.[97] Although the United States today has divisions between prosperous cities and economically stagnant rural areas, there is no regional economic conflict today comparable to the continuation of enslavement.[98]

Third, the factional conflict underlying the Civil War concerned the exercise of national power to either protect or dismantle slavery.[99] Today's conflicts, in contrast, often involve frustration with partisan gridlock, sparking calls for authoritarian responses.[100]

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[96] Sporadic violence, however, could easily occur. *See* Select Committee to Investigate the January 6th Attack on the United States Capitol, U.S. HOUSE OF REPRESENTATIVES, https://www.house.gov/committees/committees-no-longer-standing [https://perma.cc/G8N2-7ECZ] (last visited Mar. 4, 2025).

[97] Greg Timmons, *How Slavery Became the Economic Engine of the South*, HISTORY.COM (Apr. 2, 2024), https://www.history.com/news/slavery-profitable-southern-economy [https://perma.cc/G72F-839U] ("By the start of the war, the South was producing 75 percent of the world's cotton and creating more millionaires per capita in the Mississippi River valley than anywhere in the nation. Enslaved workers represented Southern planters' most significant investment—and the bulk of their wealth.").

[98] Richard Pildes describes today's economic conflicts as class-based, with conflicts concerning issues such as trade, immigration, environmental issues, and globalization rather than conflicts about the economic foundations of different parts of the United States. *See* Richard H. Pildes, *Political Fragmentation in the Democracies of the West*, 37 BYU J. PUB. L. 209, 239, 251–52 (2023).

[99] *Causes of the Civil War,* PBS, https://www.pbs.org/opb/historydetectives/feature/causes-of-the-civil-war/ [https://perma.cc/ZKR3-LML9] (last visited Mar. 22, 2025).

[100] *See* Amie Parnes, *Americans Want Civility and End to Gridlock, Says Survey*, THE HILL (June 21, 2024, 10:04 AM), https://thehill.com/homenews/campaign/4733094-voters-civility-partisan-gridlock/ [https://perma.cc/R5BZ-MDUX] (describing widespread support for authoritarian measures); Laura Silver & Janell Fetterolf, *Who Likes Authoritarianism, and How Do They Want to Change Their Government?*, PEW RSCH. CTR. (Feb. 28, 2024), https://www.pewresearch.org/short-reads/2024/02/28/who-likes-authoritarianism-and-how-do-they-want-to-change-their-government/ [https://perma.cc/25N9-CU7Q] (showing polls with support for unilateral executive action (whether at the state or national level) that opposing groups might view as unlawful or authoritarian). As of this writing, numerous articles describe a looming constitutional crisis. *See, e.g.*, Joan Biskupic, *Analysis: As Trump Team Overhauls Government, a Constitutional Crisis Looms*, CNN (Feb. 10, 2025, 7:52 PM), https://www.cnn.com/2025/02/10/politics/constitutional-crisis-trump-overhaul-analysis-biskupic/index.html [https://perma.cc/2TBL-F9HF]. Some have asserted that the existing effort to take over the operation of executive agencies in defiance of statutory provisions is a coup. Joyce Vance, *Call It What It Is,* CIVIL DISCOURSE WITH JOYCE VANCE (Feb. 12, 2025), https://joycevance.substack.com/p/call-it-what-it-is [https://perma.cc/4BQN-87QE]. *See* definition of coup *supra* note 13. Others place more weight on the Trump Administration's threatened defiance of court orders in defining coups or the more capacious concept of a constitutional crisis. *See, e.g.*, Charlie Savage & Minho Kim, *Vance Says 'Judges Aren't Allowed to Control' Trump's 'Legitimate Power*,' N.Y. TIMES (Feb. 9, 2025), https://www.nytimes.com/2025/02/09/us/politics/vance-trump-federal-courts-executive-order.html; Tom Hals, *As Trump Pushes Legal Boundaries, Judges Hold the Line*, REUTERS (Feb. 10, 2025, 6:24 AM), https://www.reuters.com/legal/trump-pushes-legal-boundaries-judges-hold-line-2025-02-10/ (After a federal judge blocked Elon Musk, head of the Department of Government Efficiency, from access to Treasury Department systems, Musk stated, ignoring Article III of the U.S. Constitution's provision of lifetime tenure for federal judges: "I'd like to propose that the worst 1% of appointed judges, as determined

Finally, despite many modern moral and cultural divisions, there is no contemporary issue that has the moral salience of enslavement.[101] While many of today's conflicts continue to involve race, and while the conflicts involve intense cultural disputes,[102] these divisions do not turn on any issue as divisive as the abolition of enslavement in mid-nineteenth century America.[103]

The divisions in the United States today take a different form. The conflicts, particularly those posing the greatest threat of legal civil war, are between those who believe in the mission of mainstream institutions and those who have lost confidence in them.[104] These divides reflect cultural divisions,[105] particularly cultural divisions tied to status threat,[106] linked to the weakened relative position of white men,[107] greater inequality, and increasing diversity.[108] Moreover, today's much more fractured media environment feeds social and political extremism[109] as custom-tailored networks stoke fear and distrust—and partisan factionalism.

These divisions suggest that the potential for legal civil war will come from a crisis in authority; the inability of mainstream institutions to retain sufficient legitimacy to govern and to counter the rising claims for authoritarian power. A 2022 survey by the University of California found that over 40 percent of Americans agree that "having a strong leader for America is more important than having a democracy."[110] Three looming divisions illustrate the threat of legal civil war: election disputes, state and federal conflicts over the control of the border, and abortion.

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by elected bodies, be fired every year. This will weed out the most corrupt and least competent."). Both coups and constitutional crises are outside the scope of this article. For an argument that current controversies can be cast in factional terms, see Thomas B. Edsall, *Their Target Is 'the Very Core of Modern American Liberalism,'* N.Y. TIMES (Feb. 11, 2025), https://www.nytimes.com/2025/02/11/opinion/trump-vought-musk-second-term.html (arguing that "Trump's success in demonizing liberals and Democrats — casting the left as a grave threat to a substantial segment of the electorate — has proved crucial to his decision to turn regulatory and prosecutorial powers into instruments of revenge.").

[101] *See, e.g.*, William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 666 (2011) ("[R]eligious leaders often justified slavery as part of the social order to which religion should defer, but they also deployed Bible-based arguments to support the notion that the Word of God sanctioned the slavery of Africans.").

[102] The issue of abortion is perhaps the most intense. *See infra* text accompanying notes 144–161.

[103] *See* Naomi Cahn & June Carbone, *Embryo Fundamentalism*, 18 WM. & MARY BILL RTS. J. 1015, 1016–19 (2010) (discussing theological differences about whether embryos should be considered human beings).

[104] Richard H. Pildes, *Democracies in the Age of Fragmentation*, 110 CAL. L. REV. 2051, 2052 (2022) (arguing that "when democratic governments consistently fail to deliver on the issues many citizens care most about, it can . . . spawn demands for authoritarian leaders").

[105] Mark Medish & Joel McCleary, *Dancing in the Dark: Steps to Avoid a Constitutional Coup in the 2024 Election*, WASH. SPECTATOR (Jan. 8, 2024), https://washingtonspectator.org/dancing-in-the-dark/ [https://perma.cc/SX2F-ZJSD].

[106] Christopher S. Parker & Howard Lavine, *Status Threat: The Core of Reactionary Politics*, POL. PSYCHOL., at 1 (Mar. 2024) (unpublished manuscript) (on file with authors) (finding that "status threat is a major source of the increasing fractionalization of American society and politics").

[107] Pildes, *supra* note 98, at 237.

[108] *See, e.g.*, Diana C. Mutz, *Status Threat, Not Economic Hardship, Explains the 2016 Presidential Vote*, 115 PROC. NAT'L ACAD. SCI. E4330, at E4331 (2018).

[109] Pildes, *supra* note 98, at 279.

[110] Anne McMillan, *The Global Assault on Rule of Law*, INT'L BAR ASS'N (Sept. 14, 2022), https://www.ibanet.org/The-global-assault-on-rule-of-law [https://perma.cc/4CVL-WFAG].

A. ELECTION DISPUTES AND THE ASSERTION OF POWER

Election disputes are among the most intractable. Such disputes are almost inevitably zero-sum: if one side wins, the other necessarily loses. In an era in which the parties are highly factionalized, so are the disputes over who wins. In polls taken prior to the 2024 election, almost half of the electorate (49%) anticipated that there would be violence.[111] In 2023, 60% of Republicans reported that they thought the 2020 election was stolen.[112] Election disputes pose the threat not just that the election will be contested, but that even if the outcome is fairly clear, the losing side will not accept the result, thereby threatening the legitimacy of the winner.[113] Uncertainty in election results is always a possibility, as demonstrated by the close vote in the 2000 presidential election, which turned on a difference of fewer than two thousand votes in Florida.[114] In the wake of the 2020 election, however, states adopted measures that make uncertainty in the results more likely.[115] Georgia, for example, removed the elected Secretary of State as the Chair of the State Election Board and allowed the state legislature to oversee the Board.[116] The Board, by questioning results in "underperforming count[ies],"[117] could slow down a final count, preventing the Electoral College from certifying a winner, and creating the opportunity for the House of Representatives to decide the election. In the House, each state delegation has one vote,[118] and even if each state voted for the popular vote winner in that state,

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[111] Anthony Salvanto, *CBS News Poll on Jan. 6 Attack 3 Years Later: Though Most Still Condemn, Republican Disapproval Continues to Wane,* CBS NEWS (Jan. 6, 2024, 10:04 PM), https://www.cbsnews.com/news/jan-6-opinion-poll-republican-disapproval-wanes-2024-01-06/ [https://perma.cc/FQ53-YJBW].

[112] Philip Bump, *Six in 10 Republicans Still Think 2020 Was Illegitimate*, WASH. POST (May 24, 2023, 4:34 PM), https://www.washingtonpost.com/politics/2023/05/24/6-10-republicans-still-think-2020-was-illegitimate/. In 2024, Trump claimed that 82% believed that the 2020 election was rigged. *Fact Check: Trump Says 82% of Americans Think 2020 Election Was 'Rigged*,' WRAL NEWS (Mar. 6, 2024, 10:31 PM), https://www.wral.com/story/fact-check-trump-says-82-of-americans-think-2020-election-was-rigged/21316494/ [https://perma.cc/5WMN-JQAL].

[113] *See, e.g.*, Tim Reid, *Trump Predicts the End of U.S. Democracy if He Loses 2024 Election*, REUTERS (Mar. 16, 2024, 7:39 PM), https://www.reuters.com/world/us/trump-predicts-end-us-democracy-if-he-loses-2024-election-2024-03-17/.

[114] Bush v. Gore, 531 U.S. 98, 100–01 (2000).

[115] Will Peebles, *Does Georgia's New Election Law Allow Republicans to Overturn Election Results? No.,* SAVANNAH MORNING NEWS (Apr. 8, 2022), https://www.savannahnow.com/story/news/2021/04/07/georgia-new-election-law-republicans-overturn-results-senate-bill-202/7092460002/ [https://perma.cc/2KNF-W78T]. Congress did pass the Electoral Count Reform and Presidential Transition Improvement Act of 2022, making it harder to refuse to certify the vote. *See* S. 4573, 117th Cong. (2022).

[116] Peebles, *supra* note 115 ("A provision . . . allows the board to intervene with 'underperforming' county election boards and replace them."). Georgia took other actions as well. On August 6, 2024, the Georgia State Election Board passed a rule requiring election boards in each county to conduct a "reasonable inquiry" before certifying election results; on August 19 the state board passed an additional rule allowing "local election officials to request and review an expanded number of documents before certifying an election." Marni Rose McFall, *Lone Democrat on Georgia Election Board Issues 'Chaos' Warning*, NEWSWEEK (Sept. 9, 2024, 11:40 AM), https://www.newsweek.com/republican-majority-eleciton-board-democrat-chaos-warning-georgia-1950822 [https://perma.cc/SX2F-ZJSD].

[117] *See* Peebles, *supra* note 115. *See also* Jeff Amy, *Georgia Secretary of State Says It's Unconstitutional for Board to Oversee Him, but Lawmakers Differ*, AP NEWS (Jan. 23, 2024, 8:29 PM), https://apnews.com/article/georgia-elections-secretary-brad-raffensperger-qr-code-d240dedd33fc787254a2ca80a0ee35e5 [https://perma.cc/RQ44-37PY].

[118] *What Happens if No Presidential Candidate Gets 270 Electoral Votes,* NATIONAL ARCHIVES, https://www.archives.gov/electoral-college/faq#no270 [https://perma.cc/AL3P-W2KT] (last visited Mar. 20, 2024).

that procedure in 2024 would have favored the Republican candidate.[119]

Alternatively, either party might attempt to adopt procedures that award the Presidency to a candidate who does not win a majority of either the Electoral College or the popular vote.[120] If the Democrats had regained control of Congress in 2025, for example, they could have made "oath-taking insurrectionists" ineligible to hold office—and deny the courts jurisdiction to review their decision.[121] Or the loser could simply refuse to accept the result, encouraging defiance of the election outcome.[122]

The institution in the best position to avoid a legal civil war is the Supreme Court, as the Court did in *Bush v. Gore*.[123] It resolved the 2000 election on the basis of a nakedly partisan 5-4 vote,[124] without fundamentally undermining the legitimacy of the winner.[125] The legitimacy and esteem accorded to the Supreme Court is weaker today than in 2000.[126]

Instead, the effect of an unpopular and widely disputed Supreme Court decision may set the stage for legal civil war *following* the inauguration of a new President. The likelihood of resistance, of course, increases in the face of contested election procedures, such as the ones suggested above, or perceptions that the new administration's actions are illegal or illegitimate.[127] These actions could take the form of protests, bomb threats, swatting,

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It only happened once—in 1824. *1824 Presidential Election*, 270 TO WIN, https://www.270towin.com/1824_Election/ [https://perma.cc/RR2A-S673] (last visited Mar. 22, 2025).

[119] *See, e.g.*, Kyle Kondik, *Republicans Retain Edge in Electoral College Tie*, CENTER FOR POLS. (Mar. 1, 2023), https://centerforpolitics.org/crystalball/articles/republicans-retain-edge-in-electoral-college-tie/ [https://perma.cc/NHL3-32PP].

[120] *See, e.g.*, Brynn Tannehill, *There Are Four Postelection Scenarios, and Not One Is Good,* NEW REPUBLIC (Mar. 22, 2024), https://newrepublic.com/article/179966/four-2024-post-election-scenarios-trump [https://perma.cc/3L4A-P6XP]; LAWRENCE LESSIG & MATTHEW SELIGMAN, HOW TO STEAL A PRESIDENTIAL ELECTION (2022).

[121] The Supreme Court, in *Trump v. Anderson*, held that "responsibility for enforcing Section 3 [of the Fourteenth Amendment] against federal officeholders and candidates rests with Congress and not the States." No. 23-719, slip op. at 12 (2024) https://www.supremecourt.gov/opinions/23pdf/23-719_19m2.pdf.

[122] *See, e.g.*, Reid, *supra* note 113.

[123] 531 U.S. 98 (2000).

[124] Steven Hess, *Presidents Trumping the Courts: Considering Alternatives to the President As Judicial Nominator*, 90 GEO. WASH. L. REV. 761, 764 (2022) (in *Bush v. Gore*, "the Supreme Court effectively decided the presidential election in a 5–4 decision").

[125] David W. Moore, *Eight in Ten Americans to Accept Bush as "Legitimate" President*, GALLUP (Dec. 14, 2000), https://news.gallup.com/poll/2212/eight-ten-americans-accept-bush-legitimate-president.aspx [https://perma.cc/P6Z7-ZPGR] (even though only a scant majority of Americans approved of the Court's decision to halt the recount, 80% of Americans accepted Bush as "legitimately" the President).

[126] Public approval of the Court is at an historic low, with a sharp partisan division of approval/disapproval ratings along party lines. Jeffrey M. Jones, *Supreme Court Approval Holds at Record Low*, GALLUP (Aug. 2, 2023), https://news.gallup.com/poll/509234/supreme-court-approval-holds-record-low.aspx [https://perma.cc/E929-8LSF]; *Supreme Court*, GALLUP, https://news.gallup.com/poll/509234/supreme-court-approval-holds-record-low.aspx [https://perma.cc/L4NU-ZDUN] (last visited Mar. 24, 2025).

[127] Sasha Pezenik & Josh Margolin, *The Top Threats Facing the 2024 Election*, ABC NEWS (Feb. 2, 2024, 6:02 AM), https://abcnews.go.com/Politics/2024-election-face-complicated-array-threats-dhs/story?id=106879560 [https://perma.cc/44QN-4TN4]. And, indeed, while there have been no broad-based challenges to the legitimacy of the Presidential vote in 2024, there have been allegations that voter suppression influenced the outcome. Greg Palast, *Trump Lost. Voter Suppression Won.*, HARTMANN REPORT (Jan. 24, 2025), https://hartmannreport.com/p/trump-lost-vote-suppression-won-c6f [https://perma.cc/W2K7-6RSR]. *See also* Rachel Selzer, *A Stress Test for Democracy: Will the North Carolina Supreme Court Allow a GOP Candidate To Steal a Seat on the Bench?* DEMOCRACY DOCKET (Feb. 14, 2025), https://www.democracydocket.com/analysis/a-stress-test-for-democracy-will-the-north-carolina-supreme-court-allow-a-gop-candidate-to-steal-a-seat-on-the-bench/

cyberattacks, or other disruptive actions.[128] The point of legal rupture would arise if political actors supported the disruptors. Governors who provide police protection for protestors, for example, would arguably be interfering with federal authority if they prevented federal officials from arresting the protestors.

These actions might encourage further violence, cyberwarfare, or harassment of government officials. Such a rupture would require the reassertion of authority. A President could federalize the state National Guard or use U.S. troops pursuant to the Insurrection Act, which "makes the president the sole judge of whether a given situation warrants invoking the act. In other words, an insurrection is whatever the president says is an insurrection."[129] However, the President, if seen as resorting to authoritarian measures, could trigger increased resistance and perceptions of federal illegitimacy.[130] Such an assertion of force would accordingly reimpose the rule of law if it not only succeeded in restoring peace but also discredited those contesting the Administration's legitimacy.

B. IMMIGRATION DISPUTES AND AUTHORITARIAN RULE: WILL DISRUPTION PRODUCE ACQUIESCENCE?

In January 2024, immigration eclipsed inflation as voters' first priority in the 2024 election.[131] The partisan fight over the border has become a central issue in political jockeying to command public support, with 82% of Trump supporters versus 39% of Harris supporters saying immigration is very important to their vote.[132] In predicting attitudes toward immigration and support for deportations, racial resentment is the biggest factor, and status threat, that is, white Americans' perception of a loss of status,[133] a close second in predicting attitudes.[134]

[https://perma.cc/XKF4-U62F] (describing unscrupulous efforts to overturn a North Carolina judicial election that would affect control of the North Carolina Supreme Court).

[128] *See* Tom Dreisbach, *FBI Agents, Prosecutors Fear Retribution from Jan. 6 Rioters Pardoned by Trump*, NPR (Feb. 6, 2025, 5:00 AM), https://www.npr.org/2025/02/06/nx-s1-5287708/trump-pardoned-jan-6-rioters-prosecutors-fbi-police [https://perma.cc/58HH-Q85E]; *U.S. Grapples with Rising Threats of Political Violence as 2024 Election Looms*, PBS NEWS HOUR (Aug. 12, 2023, 12:08 PM), https://www.pbs.org/newshour/politics/u-s-grapples-with-rising-threats-of-political-violence-as-2024-election-looms [https://perma.cc/YR98-SAT7] (describing the fatal shooting of a man who threatened to assassinate President Joe Biden); Rachel Kleinfeld, *Political Violence in the United States Is Rising – and It Might Be Up to Americans to Say "Enough!",* JUST SECURITY (Sept. 16, 2024), https://www.justsecurity.org/97864/political-violence-us-enough/ [https://perma.cc/2BMK-PVRV] (detailing the response to an attempted assassination of presidential candidate Donald Trump).

[129] Laura Barrón-López et al., *The Potential Impact of Trump's Extreme Deportation and Immigration Agenda,* PBS NEWS HOUR (Feb. 12, 2024, 6:45 PM), https://www.pbs.org/newshour/show/the-potential-impact-of-trumps-extreme-deportation-and-immigration-agenda [https://perma.cc/9FSS-LPDT].

[130] Steven V. Miller, *Economic Threats or Societal Turmoil? Understanding Preferences for Authoritarian Political Systems*, 39 POL. BEHAV. 457, 470 (2016); *see also* Luca Tomini et al., *Standing Up Against Autocratization Across Political Regimes: A Comparative Analysis of Resistance Actors and Strategies*, 30 DEMOCRATIZATION 119, 120 (2022).

[131] *January Harvard Caps / Harris Poll: Immigration Is Now Voters' Top Concern*, PR NEWSWIRE (Jan. 22, 2024, 10:30 AM), https://www.prnewswire.com/news-releases/january-harvard-caps--harris-poll-immigration-is-now-voters-top-concern-302040797.html [https://perma.cc/W9L6-VQDA].

[132] *In Tied Presidential Race, Harris and Trump Have Contrasting Strengths*, PEW RSCH. CTR. (Sept. 9, 2024), https://www.pewresearch.org/politics/2024/09/09/issues-and-the-2024-election/ [https://perma.cc/J837-G3FF].

[133] *See, e.g.*, Mutz, *supra* note 108, at E4330 (referring to status threat as "issues that threaten white Americans' sense of dominant group status").

[134] Parker & Lavine, *supra* note 106, at 8; *see also* DARREN W. DAVIS & DAVID C. WILSON, RACIAL RESENTMENT IN THE POLITICAL MIND at vii–xv (2022) (distinguishing racial resentment from racial prejudice and

The prospect for a legal civil war lies in the clash between the President and governors. While immigration has historically been the exclusive province of the federal government, both Presidents and governors have or could use the language of "invasion" to justify extraordinary measures—measures that deny the legitimacy of the ordinary order and call for a reallocation of power with implications that extend between the control of the border per se.

For example, Donald Trump announced in December 2023 that, if reelected, he planned to use dictatorial powers to close the border.[135] Stephen Miller, the author of Trump's first-term immigration policies, described plans to use state National Guards to conduct large-scale deportations.[136] Polls found that 86% of Republicans and 25% of Democrats supported Trump's plans for mass deportations.[137]

Trump's evocation of dictatorial powers to enforce immigration laws—and to take other authoritarian measures[138]—evokes the specter of legal civil war; so did Abbott's threat to defy the Department of Homeland Security and perhaps the Supreme Court.[139] Some states have refused to cooperate with deportation actions, typically by "declining to honor immigration detainers, precluding participation in joint operations with the federal government, and preventing immigration agents from accessing local jails."[140] Other groups, including Latino elected officials, employers, community leaders, and churches, have voiced opposition to the mass deportation initiatives and some have proposed massive resistance, through strikes and boycotts.[141] Active resistance in turn could provoke increasingly militarized responses, such as a declaration of martial law.[142] To date, however, the conflicts have taken place primarily

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linking resentment to beliefs that nonwhites violate traditional values by taking advantage of unearned resources).

[135] Arianna Coghill, *Trump Says He Won't Be a Dictator...'Except for Day One,"* MOTHER JONES (Dec. 6, 2023), https://www.motherjones.com/politics/2023/12/trump-dictator-day-one/ [https://perma.cc/3K24-X5D3].

[136] Barrón-López, *supra* note 129; *see also* Zachary B. Wolf, *Trump Explains His Militaristic Plan to Deport 15-20 Million People*, CNN (May 1, 2024, 5:10 PM), https://www.cnn.com/2024/05/01/politics/trump-immigration-what-matters/index.html [https://perma.cc/2BJ4-JB7Y].

[137] Andrew Rafferty, *Scripps News/Ipsos Poll: Majority Supports Mass Deportation of Undocumented Immigrants,* SCRIPPS NEWS (Sept. 18, 2024), https://www.scrippsnews.com/politics/path-to-the-white-house/scripps-news-ipsos-poll-majority-supports-mass-deportation-of-undocumented-immigrants [https://perma.cc/RB35-QRT7]. *See also* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties not Powers* 2311 (Harv. L. Rev. Pub. L. Working, Paper No. 121, 2006) (NYU L. Sch. Pub. L. Rsch. Paper, Paper No. 06–07) (maintaining that separation of powers may not be as important as separation of political parties).

[138] *See* Emily Bazelon & Mattathias Schwartz, *How Trump Could Punish His Enemies*, N.Y. TIMES (Oct. 3, 2024), https://www.nytimes.com/2024/10/03/briefing/how-trump-could-punish-his-enemies.html.

[139] *See, e.g.*, Joseph Nunn, *Biden Can Federalize the Texas National Guard—but Shouldn't*, BRENNAN CTR. FOR JUSTICE (Feb. 7, 2024), https://www.brennancenter.org/our-work/analysis-opinion/biden-can-federalize-texas-national-guard-shouldnt [https://perma.cc/6H2V-BPV8].

[140] Christopher N. Lasch et al., *Understanding "Sanctuary Cities*,*"* 59 B.C. L. REV. 1703, 1704 (2018); *see also* Isabella Murray & Selina Wang, *Democratic Governors Discuss Going on Offense, Playing Defense Against Trump*, ABC News (Dec. 10, 2024, 5:21 PM), https://abcnews.go.com/Politics/democratic-governors-discuss-offense-playing-defense-trump/story?id=116641722 [https://perma.cc/UW9J-YK8N].

[141] Stef W. Kight et al., *Inside Trump's Plans to Deport Millions from the U.S.*, AXIOS (Nov. 6, 2024), https://www.axios.com/2024/02/11/trump-promise-deport-millions-migrants-reality https://perma.cc/KN8B-WHPV]. And the ACLU has declared, "General strikes, economic boycotts, and worker walk-outs will be critical tools to demonstrate that Americans will not sit idly by while a constitutional crisis is perpetrated." Anthony D. Romero, *Despair and Resignation Are not a Strategy: How to Fight Back in a Second Trump Term*, ACLU (Mar. 6, 2024), https://www.aclu.org/news/civil-liberties/election-strategy-fight-back-second-trump-term [https://perma.cc/4TK8-62TX].

[142] Brett Wagner, *Trump Said He Plans to Declare Martial Law. Here's What That Would Look Like*, S.F.

in court with the Trump Administration suing New York and Illinois for failing to cooperate with immigration enforcement.[143]

Both draconian enforcement measures and resistance to them could be perceived as illegitimate and both could set up interference in the ordinary operation of the federal or state governments. The winner in these battles is likely to be the party with the greater ability to discredit the other, through resistance, obstruction or acts such as large-scale deportations that the other side eventually accepts.

C. ABORTION AND PERSISTENT CONFLICT

A third arena for legal civil war is abortion. At its most divisive, it involves a clash between those who treat life as beginning at conception, and those who believe decisions about abortion belong exclusively to the pregnant person. Yet, such divisions have not always been partisan ones; a half-century ago, Republicans were slightly more supportive of legalizing abortion than Democrats.[144] And the divisiveness of abortion is not just about abortion itself, but rather about a larger set of issues that include understandings about sexual morality, the relative status of men and women, and the role of religion in the public square.[145] Today, as cultural polarization on these issues overlaps with partisan identification, abortion has become a political marker that combines symbolic power with real-world impact on women's lives. This combination has hardened partisan divisions about the issue[146] and made resolution of the legal divide over abortion about more than the abortion issue itself.[147]

Existing conflicts start with the Supreme Court decision in *Dobbs*, which in removing a federal constitutional basis for abortion access,[148] purported to return the issue to the states[149]—and created innumerable opportunities for legal civil war. These possibilities include conflicts between the federal government and the states, and between the individual states, as each governmental actor seeks to enforce its own view of the acceptability of abortion.

The most obvious sources of legal civil war would come from national action—either banning abortion nationwide or guaranteeing access to abortion on a national basis. Members of Congress, for example, have routinely introduced nationwide abortions, including bills to limit it to the first fifteen weeks of pregnancy[150] while litigants seek to ban the availability of abortion

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CHRON. (Jan 31, 2024), https://www.sfchronicle.com/opinion/openforum/article/trump-president-martial-law-18636319.php.

[143] Josh Gerstein, *Trump Administration Sues New York over Sanctuary Policies for Undocumented Immigrants*, POLITICO (Feb. 12, 2025, 7:55 PM), https://www.politico.com/news/2025/02/12/trump-new-york-sanctuary-immigration-lawsuit-00203976 [https://perma.cc/7YJ7-6ETY].

[144] *Abortion Trends by Party Identification*, GALLUP, https://news.gallup.com/poll/246278/abortion-trends-party.aspx [https://perma.cc/NA4A-NHLP] (last visited Mar. 22, 2024).

[145] For a full account of these divisions, see NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE ch. 6 (2010).

[146] Hannah Hartig, *About Six-in-Ten Americans Say Abortion Should be Legal in All or Most Cases*, PEW RSCH. CTR. (June 13, 2022), https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2 [https://perma.cc/B4M5-MQ6V].

[147] *See* Siegel, *supra* note 49, at 328.

[148] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 215–16, 248–52, 300–01 (2022).

[149] *Id.* at 292.

[150] Julie Tsirkin et al., *For the First Time in Years, Sen. Graham Hasn't Introduced a National Abortion Ban*, NBC NEWS (Feb. 27, 2024, 5:00 AM), https://www.nbcnews.com/politics/congress/first-time-years-sen-graham-hasnt-introduced-national-abortion-ban-rcna140581 [https://perma.cc/SFB8-

pills on a nationwide basis.[151] Denying access to abortion would invite wholesale defiance. Some abortion-supportive states have adopted constitutional provisions guaranteeing access to abortion, "shield laws" for those who provide access to abortion, and robust acknowledgement of the importance of abortion access to women's health, including the need for state subsidization of abortion access.[152] These states are unlikely to prosecute or cooperate with federal prosecutions of those who violate such proposed national bans and may also look the other way at underground networks that provide abortion pills or services.[153]

Alternatively, Congress might enact a law permitting abortions under a scheme similar to that set out in *Roe v. Wade*,[154] and a state with a ban on abortion might refuse to allow access to abortion, shutting down abortion clinics or prosecuting doctors and patients who provide such services—federal law notwithstanding.[155]

Both types of national measures are likely to cause legal civil war; that is, state actions that deny the validity of the national measures and widespread defiance—direct or indirect—of the terms. And judicial actions are unlikely to receive much deference in objecting states. Widespread efforts to undermine such national laws would be the norm, further galvanizing partisan actors.

Without national action, state laws will vary dramatically. Indeed, such laws currently range from bans on abortion other than to save the life of the pregnant person to guarantees of abortion access that may include subsidization of patient costs and shields for those who provide access to abortion.[156] Different state and federal laws that regulate state actions may conflict and provide knotty jurisdictional issues and the potential for legal civil war over issues of enforcement.[157]

For example, with respect to interstate travel for abortion, Idaho could refuse to obey a federal court order requiring the release of a mother who drove her daughter to Oregon for an abortion and was convicted of violating Idaho's abortion trafficking law.[158] Or, as discussed earlier, New York—which has a shield law that prohibits state cooperation with out-of-state law enforcement relating to reproductive care[159]—could refuse to recognize an otherwise lawful

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[151] *See* All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507 (N.D. Tex. 2023); *see also* Robert A. Levy, *No Constitutional Authority for a National Abortion Law,* THE HILL (July 11, 2022), https://thehill.com/opinion/congress-blog/3552965-no-constitutional-authority-for-a-national-abortion-law/ [https://perma.cc/B55S-EA62] (arguing that Congress has no power to protect abortion access); Naomi Cahn, Alan Morrison & Sonia Suter, *As President, Harris Could Not Easily Make* Roe v. Wade *Federal Law, but She Could Still Make It Easier to Get an Abortion*, THE CONVERSATION (Aug. 5, 2024, 8:36 AM), https://theconversation.com/as-president-harris-could-not-easily-make-roe-v-wade-federal-law-but-she-could-still-make-it-easier-to-get-an-abortion-225619 [https://perma.cc/PNV8-E8LD].

[152] *See e.g.*, Greer Donley & Caroline Kelly, *Abortion Disorientation*, 74 DUKE L.J. 1, 72–74 (2024); David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 4 (2023) (foreshadowing interstate divisions over abortion).

[153] *See, e.g.*, Pam Belluck, *Abortion Shield Laws: A New War Between the States*, N.Y. TIMES (Feb. 23, 2024), https://www.nytimes.com/2024/02/22/health/abortion-shield-laws-telemedicine.html.

[154] 410 U.S. 113 (1973).

[155] June Carbone & Naomi R. Cahn, *The Court's Morality Play: The Punishment Lens, Sex, and Abortion,* 96 S. CAL. L. REV. 1101, 1148–49 (2023) (describing entrenched opposition to abortion).

[156] *See supra* text accompanying note 152.

[157] The Supreme Court set the stage for complex struggles "of novel interjurisdictional legal conflicts." Cohen, *supra* note 152, at 4.

[158] IDAHO CODE ANN. § 18-623 (2024); Matsumoto v. Labrador, 701 F. Supp. 3d 1032, 1042 (D. Idaho 2023) (issuing preliminary injunction against the law).

[159] *See supra* text accompanying note 12; S.B. S9077A, 2021-2022 Legis. Sess. (N.Y. 2022); Cohen,

request from a federal court in Louisiana to extradite an abortion doctor indicted in Louisiana. The courts ordinarily resolve these issues,[160] but it is entirely possible that Idaho and New York will, much like Wisconsin in the lead-up to the Civil War,[161] simply defy federal court orders.

In sketching these possibilities, we can imagine a federalist resolution, one that simply leaves abortion to the states with the major factions accepting the legitimacy of different state approaches. We suspect, however, that genuine acceptance is unlikely. Instead, we find more probable that persistent conflict, much like the nineteenth-century conflicts over the fugitive slave laws, in which neither side accepts the legitimacy of the opposing faction's actions endures, and that such conflict can be managed for decades within a federal system without a larger rupture undermining the rule of law more generally. We envision a more permanent resolution only when the larger factional divide that makes abortion a marker of political identity—and makes the ability to impose sectarian religious values in the public square a political flashpoint—reaches its own resolution on terms that go beyond abortion itself.

IV. CONCLUSION: THE RULE OF LAW UNDER FIRE

The concept of legal civil war provides a new framework for analyzing the factional disputes that underlie contemporary battles. Within these factions, neither side recognizes the legitimacy of the other's duly authorized action, posing a danger to the country as a whole. This Essay has used the numerous conflicts surrounding the Civil War to show how a legal civil war challenges the legitimacy of the rule of law and ends with the imposition of an altered legal system.

Fundamental to this analysis is recognition that legal civil wars involve a challenge to the legitimacy of the rule of law and produce legal ruptures in which neither side recognizes the legitimacy of the other's duly authorized actions, leading either to direct confrontations or to paralysis as the two sides undermine each other.[162] The threat to the perceived legitimacy of governmental actors in turn increases the role of factions that each see the other as dishonest, immoral, or posing a threat to the country,[163] justifying use of extralegal means. Such factions pose the dangers that Madison warned against, with one group seeking power to the exclusion of

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supra note 152, at 47–48.

[160] *See, e.g.*, Idaho v. United States, No. 23-727 (Jan. 5, 2024), https://www.supremecourt.gov/docket/docketfiles/html/public/23a470.html [https://perma.cc/SQ4V-5F24] (granting certiorari and allowing Idaho to continue to enforce its near-total abortion ban even in medical emergencies in violation of federal law). The Court later dismissed the writ of certiorari as improvidently granted, Moyle v. United States, 603 U.S. 324 (June 27, 2024), which restored the stay on Idaho's law and reinstated the lower court order allowing abortions in medical emergencies under EMTALA. Since the case had gone up to the Supreme Court on a preliminary injunction issue, it is back before the Ninth Circuit on the substantive matter of whether EMTALA's mandate that hospitals must stabilize patients in emergency situations, including the need for emergency abortion, supersedes Idaho's strict abortion ban. An en banc panel of the Ninth Circuit heard oral arguments on December 10, 2024. *See* United States v. Moyle/Idaho, Nos. 23–35440, 23–35450 (9th Cir. Mar. 13, 2025).

[161] Ableman v. Booth, 62 U.S. 506 (1859).

[162] *See* Pildes, *supra* note 98, at 214 (observing that fragmentation of political authority produces difficulty in "sustaining legitimate authority").

[163] *As Partisan Hostility Grows, Signs of Frustration with the Two-Party System*, PEW RSCH. CTR. (Aug. 9, 2022), https://www.pewresearch.org/politics/2022/08/09/as-partisan-hostility-grows-signs-of-frustration-with-the-two-party-system/ [https://perma.cc/6ZE4-SVWK]; Philip Bump, *More than Half of Partisans See the Other Party's Policies as a Threat to the Country*, WASH. POST. (Dec. 5, 2017, 12:33 PM), https://www.washingtonpost.com/news/politics/wp/2017/12/05/more-than-half-of-partisans-see-the-other-partys-policies-as-a-threat-to-the-country/.

the other or acting to advance their own interests at the expense of the country as a whole.[164] And political actors may see the perceived illegitimacy of mainstream institutions as an opportunity to increase their own power.

In dealing with such ruptures in the rules of the law, we highlight the history of the United States that has involved many such ruptures,[165] and the three ways that such conflicts can end.

First, one party can impose a result on the other through the assertion of superior power. The rupture ends when both sides accept the results as legitimate, ratifying the new legal order. Executive, legislative, or judicial fiat may thus resolve an immediate issue, but the victor's ability to govern will depend on acceptance of the legitimacy of the result.

Second, a party can create a de facto resolution through disruption of an established legal order that ultimately produces acquiescence to the preferred legal order of the disruptor. In the face of state-based resistance to mass deportations or state-based assertions of a right to enforce immigration policies, the result may depend on whether the disruptors establish a fait accompli, such as delaying the deportations until the party seeking to impose them leaves office.

Third, such disruptions of the legal order can persist without resolution. A national abortion ban, for example, would almost certainly trigger massive resistance and evasion. Giving the states the power to enforce their own laws, by contrast, creates interstate tensions leading to repeated clashes over the right to travel, extradition, and the practice of medicine. But conflicts between the states, while leaving the permissibility of abortion unresolved at the national level, need not produce direct conflicts that disrupt the operation of the country more generally. Sometimes, containing a rupture may be more effective than attempting to settle it for the country as a whole.

While the term "civil war" has been bandied about in ways that summon images of armed conflict, the larger challenge today comes from factional disputes that undermine the legitimacy of those with authority and produce partisan gridlock or partisan obstruction that interferes with the ability to govern. Today's conflicts will not amount to legal civil war to the extent that the legal system can contain and resolve them. The possibility, however, of outright defiance of the law is real, triggering factional clashes that the law cannot resolve. This essay defines the concept of legal civil war to distinguish the rupture of the legal system from other types of conflicts, and to emphasize that once the legal system has ruptured, nonlegal means are necessary to restore the rule of law. The ultimate restoration of the rule of law, however, requires reestablishing shared values and institutional legitimacy that reinforce each other.

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[164] *See* THE FEDERALIST, *supra* note 37.

[165] *See supra* Section II. For another dramatic example, see Paul M. Thompson, *Is There Anything "Legal" About Extralegal Action? The Debate over Dorr's Rebellion*, 36 NEW ENG. L. REV. 385, 386 (2002) (describing the rebellion in Rhode Island in the 1840s to extend the right to vote).