

Law That Holds the Line: Preserving the Potential for Utopia Through Hauntological Hermeneutics and Common Law Legal Precedent

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Abstract

Much has been said on the necessity of civil disobedience and the need to reject the excuse of passivity based in a false sense of powerlessness. But those in the legal profession, who have the opportunity to develop and interpret our laws, have an added responsibility that is their necessary fitting response to current political oppression. While the legal wins that strive for Justice must remain a beacon for forward fighting, additionally—and perhaps more importantly—we must embody what Ernst Bloch calls an “anticipatory” view of our legal work towards utopia. In the face of likely, if not inevitable, legal losses we must take a dedicated defensive position. Such protection of the ground we can hold, and the future we can begin to create, must take root in the dichotomy between the deconstructibility of law as an institutional force and the undeconstructability of Justice as utopian ideal. By use of Jacques Derrida’s paradox of deconstruction as Justice, legal professionals may make hermeneutic and strategic use of the “slack” of the law: finding these cracks that allow for the preservation of the potential for future utopian Justice in our legal precedent. This protective positioning parallels Bloch’s idea of “educated hope,” that arises out of political, rather than epistemological, necessity as a praxis of commitment to the

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realization of concrete utopia. This work is not merely conservation but cultivation: a supplanting of future potential in the here and now. Whether by defensive lawyering or dissenting opinions, this recognition of, and response to, our impending losses in the pursuit of utopia is not a kind of abstract wish fulfillment, it is work.

Keywords: justice, law, common law, deconstruction, utopia

The practice of law is largely the practice of interpretation, and this essay attempts to argue that a practical, or concrete, utopian practice of law is possible if we take the work of hauntological hermeneutics seriously; if we listen to what the specter of Justice calls for, and work to make it so. Such work is not easily accomplished, in part because Justice—like Utopia—can never be truly reached, but also because the likelihood of such progress rightfully seems rather slim in light of the current legal and political climate. But in a common law system, like that of the American legal system, the ability to invent the precedent of the future through our present work can preserve the potential for utopian progress even in the worst of political circumstances.

This essay begins with a discussion of John D. Caputo's explication of Jacques Derrida's writings regarding, (1) the deconstructibility of the law, and (2) the undeconstructibility of Justice—a utopian ideal. This ideal may be made more real through Derrida's paradox of "Deconstruction as Justice," in which the utopian imperative may find form in our world through the interpretation and creation of legal precedent. This praxis takes place in the "slack" of the law, that being the space for reform.

Notably, this work is risky: With every attempt to answer Justice's open-ended call via our re-interpretation of existing precedent "we take what has proven itself in the past and put it at risk."² More importantly, the very *possibility* for such work is at risk in America today. The opportunities, spaces, and slack in the law that must remain flexible to allow for movement toward the call of Justice, are being ever further restricted in today's age of canonized restrictive interpretative constitutional lens, rising fascism, and the growing actualization of the unitary executive theory through President Donald Trump's second term.

Turning to the work of Ernst Bloch, as detailed by Ruth Levitas, this essay attempts to argue that a concretely utopian stance requires us to carefully consider our current position, recognize and reconcile with our impending legal losses, and use this anticipatory mode to engage in work that preserves the slack as it stands in the hopes of ensuring the potential for future utopian interpretations of our present precedent.³ Utilizing the concept of the concrete utopia, this interpretative work can be seen as anticipatory rather than compensatory. Such work is not merely conservation but a kind of cultivation—a supplanting of future potential in the here and now. Yet, before one can construct and cultivate a garden of concrete utopian legal interpretation and

² John D. Caputo, "The Call of Justice and the Short Arm of the Law," in *Hermeneutics: Facts and Interpretation in the Age of Information* (Pelican Books, 2018), 214.

³ Ruth Levitas, "Educated Hope: Ernst Bloch on Abstract and Concrete Utopia," *Utopian Studies* 1, no. 2 (1990): 13-26.

practice, it is helpful to begin a bit more abstractly with Derrida's notes on deconstruction.

Derrida tells us that everything is deconstructible, including the law. "To a great extent, the force of law is the result of the fact that it has been constructed."⁴ The law's "mystical authority" as the concept of a collection of words that governs a given population's conduct is derived from a "historical construction," that "the law has force because it exists, because it happens to be the law and has been for as long as we can remember; in other words because of custom."⁵ This presumed authority, as propelled by the force of custom, relies on the law's continual reference to and reliance on itself as a self-executing social construct, always recursively returning to its base authority as "the law." While there are "origins" to the law outside of this assumed authority, such founding moments are "by definition beyond the opposition of legal and illegal."⁶ Sticking to the American context of this essay, the "Founding" of America constitutional law is exemplary. After the shoving off of British colonial rule, the Founders of the Constitution creditably declared the foundations of America's governmental system, its foundational texts, and its associated constitutional rights as the "new law" of the land because: (1) the people and political bodies of colonial America would no longer defer to the Crown its expected, customary, and "legal" authority over them; and (2) the force of British law and rule could not overcome the actual force of the American revolutionary army and its allies so as to impose the rule of the empire. This example of a "revolutionary" creation of new law and power is not given to lionize the so called "Founding Fathers," The American Revolution, or the founding principles of America's creation, but rather by reference to the real violence of the American revolutionary war we see that this declaration or ringing in of an era of "new law" was an action outside the bounds of the law itself (as decrying the King was inherently an act of treason under British rule) and only made real by a reliance on tangible power and violence—both to actualize the rejection of British rule and to enforce the new rule of the American Republic. Said more succinctly, the origination of law is "‘interpretive violence’, that is, a hermeneutic violence which acquires a real violence, in which the law is proclaimed *as* the law."⁷

This "American" form of law, just like the British rule and common law in place in the American colonies before the revolutionary period, has continued on and

⁴ Caputo, *Hermeneutics*, 203.

⁵ *Ibid.*, 203.

⁶ *Ibid.*, 204.

⁷ *Ibid.*, 204.

carried itself throughout generations “by the common consent to accept its value, to ‘believe’ (*credere*) in its value, like giving the currency credit.”⁸ In the last 250 years, America has continued to believe in the custom of our sovereign law, originally conceptualized in our Constitution and its Amendments, because we collectively agree and ascribe to it such authority.

This same circular practice, of reliance on the law because it is and has been the law, can also be seen in the legal system most American courts use to both interpret the Constitution and enforce our nation’s law. The legal system of “common law” was in fact a British system of legal practice that the Founding generation kept in practice in their new nation (likely because many of the Founders were lawyers already practicing in this vein), and we have seemingly kept the system in place because, well, it’s the custom, it’s the law. The “common law” is a noncorporeal body of law, nonreliant on comprehensive compilations of legal rules and statutes, that bases judicial rulings on uncoded case law and on “precedent,” meaning “judicial decisions that have already been made in similar cases.”⁹

Our Constitution, codified statutes, and the judicial rulings of their appropriate interpretations and application to various situations via the common law system, hold authority because we agree to say they are the law; standing only because we say so. By this understanding, then, nothing—not even our most hallowed laws—are without the potential for deconstruction.

Through this theory, if everything—including our law—is deconstructible, Derrida’s surprising description of “Justice” as something *undeconstructible* seems to suppose that the contrapositive must be correct: if everything is deconstructible, then Justice, if undeconstructible, must be nothing—but that does not mean there is nothing to it. Importantly, “[t]his nothing is telling us something.”¹⁰ Justice, as something undeconstructible, has no form in the here and now, but it calls to us from somewhere, somehow: “It is an interpretive imperative—not an Imperious Voice, but a spectre we are not even sure is there.”¹¹ In part, discerning what Justice calls to us through this voice is itself a challenging feat of interpretative work. Justice, as a kind of spectral apparition—“the promise of a coming justice”¹²—requires incredible skill

⁸ Ibid., 204.

⁹ *The Common Law and Civil Law Traditions* (The Robbins Collection, University of California, Berkeley School of Law, 2010), 1, accessed March 1, 2026; <https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf>.

¹⁰ Caputo, *Hermeneutics*, 193.

¹¹ Ibid., 194.

¹² Ibid., 195.

to distill because “what [could] demand[] more of our powers of discernment, than communicating with a ghost?”¹³

Derrida’s own declaration of Justice as a concept, if not the only concept, that can resist deconstruction suggests that (although such an argument would seem all too Platonic or Idealistic to expect from the father of deconstructionism) Justice perhaps edges on something akin to an Absolute Truth.¹⁴ It seems that it is for this very reason that Derrida is adamant that Justice cannot have a form, that is a kind of “may-being,” a specter which takes dedicated and delicate work to decipher.

Arguably, is through such hauntological hermeneutic work of engaging with the voice of “nothing” that we attempt to interpret the call of Utopia. Derrida’s undeconstructible concept of Justice, without caporal features, can be called a form of Utopia because, like Utopia, Justice “does not exist. Justice is always coming, always promised, but it never quite arrives, not as such.”¹⁵ It is akin to what Bloch describes as the “dreams of a better life,”¹⁶ that can be discoverable in art, and literature, and music; Justice, then, is the vehicle which “ventures beyond the present reality”¹⁷ as the utopian element of the law.

Yet still, accepting Justice as a form of Utopia is both unsatisfactory, and potentially a disservice to the hermeneutic work necessary for its interpretation, if we do not also examine the direction of these utopian or Justice-oriented calls. Bloch explains that “because the function of utopia is not just to express desire, but to reach forward and be the catalyst of a better future, [we must] also [be] critical of the content of theses wishes.”¹⁸ As such, just as “not all utopian imagining is as good as any other”¹⁹ and we must take on the critical project of weighing the better and worse interpretations of what Justice calls for. While Derrida edges towards, but does not quite name, Justice as a kind of higher principle or Absolute Truth that our interpretative work must be in search of, many others have given greater shape to what exact form of society the call of Justice beacons us towards. To provide a full survey of such scholastic work would be outside the scope of this work as this essay does not seek to center on a definitional argument of “justice,” but rather hopes to serve as an outline of a descriptive application of Justice as an interpretative act to the realm of

¹³ Ibid., 196.

¹⁴ Ibid., 195.

¹⁵ Ibid., 194.

¹⁶ Levitas, “Educated Hope,” 14.

¹⁷ Ibid., 14.

¹⁸ Ibid., 14.

¹⁹ Ibid., 14.

law and lawmaking. Still, certain examples of seminal definitions of “justice” are provided here to guide the following discussion.

Firstly, and perhaps most famously, Dr. Martin Luther King Jr., in “Letter from a Birmingham Jail” provides a succinct test: “How does one determine whether a law is just or unjust? A just law is man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law . . . Any law that uplifts human personality is just. Any law that degrades human personality is unjust.”²⁰ Here, Dr. King also points to the man-made nature of the law, asserting its deconstructibility. Since “segregation distorts the soul and damages personality . . . it is morally wrong and sinful.”²¹ Seeing as “sin is separation,” togetherness or equality is akin to morality.²² Such mortality is akin to the “law of God,” and justice is akin to the call or action of bringing forth into existence a society with laws that are attune with the law of God. For Dr. King, “law and order exist for the purpose of establishing justice and . . . when they fail in this purpose they become dangerously structured dams that block the flow of social progress.”²³

Additionally, Dr. King describes the work of the Civil Rights Movement as a “mighty struggle to rid our nation of racial and economic injustice.”²⁴ Justice, when discussed alongside utopia, is also often in conversation with such economic contentions. Such themes can be seen in Thomas More’s *Utopia*. The described island of “Utopia,” is as a society which has very few laws,²⁵ has no need for lawyers,²⁶ and has rooted out the “cause” of many crimes—there is no money, no private property, everything is held in common, and everyone’s needs are supplied. Conversely, petty-thieves in More’s contemporary England are sentenced to death for the crime of stealing food, even if done as a means of survival. His central critique is plainly stated: “[I]t [is] not right nor justice that the loss of money should cause the loss of man’s life.”²⁷ More too ties his understand of justice to the authority of a higher power, a power even higher than the divinely anointed King, as More writes: “God commandeth us that we shall not kill. And be we then so hasty to kill a man for taking

²⁰ Martin Luther King Jr., *Letter from Birmingham Jail*, (Penguin Classics, 2018).

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Sir Thomas More, *Utopia*, trans. Ralph Robinson (New York: Barnes & Noble Books, 2005), 112.

²⁶ Ibid., 113 (“But in Utopia every man is a cunning lawyer, for (as I said) they have very few laws, and the plainer and grosser that any interpretation is, that they allow as most just.”)

²⁷ Ibid., 25.

a little money?”²⁸ Such that, if God has forbidden the killing of fellowman, and yet the law of the land can define and defend such killings to be lawful, “then by this reason follow that the power of God’s commandment shall extend no further than man’s law doth define and permit?”²⁹ By emphasizing the incongruency between the law and God’s commandments, More points to violence, separation, degradation, and death that the authority of the law, although deconstructible, can inflict under its real power. Conversely, in More’s titular island of Utopia—outside of any dedication to following God’s commandments—the matter of preventing pretty theft, and the need for punishments for such crimes, is well enough provided for already: Their society is such that no man should have the material need to steal.

This is not to argue that Justice, for the purposes of this essay, is definable as something inherently economic, equal, or theologically driven. Nor does this essay attempt to suppose that justice is the achievement of a perfect society whose man-made codes perfectly align with the moral law or God’s law: Such a claim would improperly focus on an absolute end goal, rather than on our current reality and the rhetoric needed for the pursuit and production of any similar societal goals through our law. This essay works to describe, rather than define, Justice. Such a description, as informed by Derrida’s conception of Justice, allows us to see Justice as a form of Utopia, viewable as a process rather than a proper noun. Therefore, these definitions are only provided to color what the direction of that process might be toward, even if these “Absolute Truths” can never be fully achieved under this essay’s conception.

Then, as stated, Justice, like Utopia, can never exist as such. And yet, its call from elsewhere and elsewhen can impact us in the here and now. The potential for shaping our present by and through this call can be found in the described paradox of the deconstructibility of the law and the undeconstructability of Justice, such that we can begin to perceive the praxis of “Deconstruction as Justice.”³⁰

Because “the law, inasmuch as it has been constructed, historically founded and instituted, is always and in principle deconstructible,” it is through this very basis that it is changeable, reformable, moldable.³¹ The deconstruction of the law allows for its reconstruction into laws that are *more* just, or closer to what Justice calls for us to interpret into existence. Derrida explains that such Deconstruction as Justice takes

²⁸ Ibid., 35.

²⁹ Ibid., 35.

³⁰ Caputo, *Hermeneutics*, 204 (“We deconstruct the law in the name of justice, which calls for just laws, even as no law is ever up to what justice calls for.”)

³¹ Ibid., 204.

place in the “slack” of the law,³² the spaces where law can be deconstructed to let the undeconstructible in, the crack in the concrete, the distance between the law and Justice, the current and the utopian.

But this practice of identifying and utilizing potential avenues of change to push toward what Justice calls for is doubly difficult. What makes the law distinct from other potential vehicles for utopia is a distinction of form. While Justice is “not a closed, calculable, programmable system but an open-ended call,”³³ the law, as we believe in it, is built on a sense of calculability (such that we call it “the rule of law”). This distinction between law and Justice, the calculable and the incalculable, is clearly apparent in practice. The law often does not calculate a just outcome and “the decision between just and unjust is never ensured by a rule.”³⁴ But in its application, the law, although deconstructible, is built on calculable rules: standard levels of scrutiny,³⁵ multi-factor tests of review, and, by our common law system, a constant reference to past precedent which can be argued to be outcome determinative of present cases. While the law is deconstructible, Justice is undeconstructible. While the law is rigid, Justice is fluid. While the law is built from past precedent, Justice pushes us towards the always coming but never arriving future.

These paradoxes and dichotomies indicate the delicate balance that an attempt at concretely utopian legal praxis must be predicated upon. The slack, the space for our reform, only exists between the possible and the impossible, the incalculable and the calculable, the here and now and elsewhere and elsewhen—of both our past precedent and our possible future. The interpretative call to action, deconstruction as Justice, takes place between these especially small spaces. Specifically, in America’s common law system we must work to create present, justice oriented legal interpretations out of the interpretations and judgements made by those of the past; therefore our utopian pursuit lies in this double-space, in the interpretations of interpretations.

But even with the small spaces for possible utopian action identified such deconstruction toward the utopian and toward Justice can only be truly achieved—and can only carry hope—if we act in a concretely utopian orientation and recognize the

³² Ibid., 205.

³³ Ibid., 207.

³⁴ Ibid., 207.

³⁵ Courts traditionally review the constitutionality of challenged state actions are under three levels of scrutiny: basis review, intermediate scrutiny, and strict scrutiny. The level of scrutiny applied depends on several factors of the case and could include which specific constitutional right was allegedly infringed, if the state action was allegedly applied with discriminatory intent, or where an allegedly unconstitutional restriction applies.

real, practical challenges that currently face our pursuit. The slack is shrinking. The cracks which allow for deconstruction as Justice are being closed.

As stated, the law as an interpretative practice is a *given* condition of its ontic structure and methodological practice. But our law's existing progressive precedent has been a *made* condition, and has never been promised. The recent past of recognized protections against restrictions on personal liberties, legal emancipation and autonomy, and the expansion of fundamental rights, have been shaped largely by Justice minded people, lawyers and non-legal workers alike.³⁶ The arc of history does not bend towards Justice but rather has been actively bent by hermeneutic listeners to Justice and by believers in a more just utopia. As better said by Bloch, it is "human activity" that plays a central role in choosing which possible futures become actual.³⁷ But plainly put, such a future is at risk.

In our current legal and political climate, the "real possible futures"³⁸ for the foundations of our legal system, are particularly dark. A simple count of the current American Supreme Court justices tells you there will be inevitable legal losses for legal democracy ahead.³⁹ The fall of federally protected abortion-rights and the landmark case of *Roe v. Wade*⁴⁰ was foretold well before the release of the Court's final decision—not by oracle on high, but by the basic reality of the high Court's makeup.⁴¹ Similarly predictable was President Donald Trump's and his second administration's disregard for the rule of law and the sovereign power of the judiciary in pursuit of his political retribution campaign, immigration policies, and rollbacks of government

³⁶ For examples of such historical figures see "Civil Rights Leaders." NAACP, February 11, 2022. <https://naacp.org/find-resources/history-explained/civil-rights-leaders>.

³⁷ Levitas, "Educated Hope," 14.

³⁸ *Ibid.*, 15.

³⁹ Currently the United States Supreme Court is made up of six conservative Justices (Chief Justice Roberts, Justice Gorsuch, Justice Alito, Justice Thomas, Justice Kavanaugh, and Justice Barrett) and three liberal justices (Justice Sotomayor, Justice Kagan, and Justice Jackson). The ultimate holding of a case is determined by a majority of the Justices, often resulting in 6-3 or 5-4 splits. See Quinn, Martin. Supreme Court political leanings: Justices by ideology, July 3, 2023.

<https://www.axios.com/2019/06/01/supreme-court-justices-ideology>.

⁴⁰ 410 U.S. 113 (1973).

⁴¹ In fact many predicted the overturning of *Roe* many years before the Supreme Court's official ruling in *Dobbs v. Jackson Women's Health Organization* which overturned the previous legal precedent that had enshrined the right to abortion as a matter of privacy. See What happens if *Roe v. Wade* is overturned? (published 2020). Accessed March 2, 2026, <https://www.nytimes.com/interactive/2020/10/15/upshot/what-happens-if-roe-is-overturned.html>.

oversight on the financial sector,⁴² all actions which then-candidate Trump promised to pursue if elected President.⁴³

To ignore this truth is an ignorance which Justice cannot bear. And yet it must be said that to observe the legal codification of our oppressive political reality through law and regulation in real time is a ripe cause for depression and disheartenment with the process of deconstruction as Justice. For instance, the functional dismantling of Section 2 of Voting Rights Act of 1965 (originally enacted shortly after the murder of Dr. King and which is/was often considered the crowning achievement of the Civil Rights Movement) by the Supreme Court in *Louisiana v. Callais* has laid the grown work for increased, unregulated, and largely unchallengeable racial gerrymandering by state legislatures across the country.⁴⁴ But a distinction must be made between engaging with the possibilities of our impending legal losses, and what Jose Estaban Munoz describes as relentless focus on the present that may lead to “disabling political pessimism.”⁴⁵

To acknowledge our losing position is to contend with what Derrida would describe as our “future present,” our here and now, but also our likely tomorrow.⁴⁶ This is our reasonably foreseeable future, and if we could not reliably predict this period the world would be chaos. This contention is juxtaposed and yet simultaneously imposed within Derrida’s description of the “absolute future,”⁴⁷ as related to what Bloch’s calls the “Novum,” the part of reality which is coming into being on the horizon of the real—the elsewhere, the elsewhere.⁴⁸ This absolute future, perhaps a utopian future, is something contained *in* politics and law, but not contained *by* politics and law.⁴⁹ It is this possible future which allows these concepts and institutions of law,

⁴² Ariana Baio, “What Order? Trump Team Ignoring 1 in 3 Major Judicial Rulings against Them, Analysis Finds,” Yahoo! News, July 21, 2025, <https://www.yahoo.com/news/order-trump-team-ignoring-1-152550741.html>.

⁴³ Yasmin Abusaif and Douglas Keith, “What Courts Can Do If the Trump Administration Defies Court Orders,” Brennan Center for Justice, May 1, 2025, <https://www.brennancenter.org/our-work/research-reports/what-courts-can-do-if-trump-administration-defies-court-orders>.

⁴⁴ Just days after the Supreme Court’s ruling defanging Section 2 of the VRA, the Louisiana State Legislature approved a mid-cycle redistricting map which eliminated one of the state’s two majority-Black districts. See, Cochrane, Emily. Louisiana approves map eliminating a majority-black district - The New York Times, May 29, 2026. <https://www.nytimes.com/2026/05/29/us/politics/louisiana-redistricting-map-majority-black-district.html>.

⁴⁵ Muñoz, José Estaban, Joshua Takano Chambers-Letson, Tavia Amolo Ochieng’ Nyongó, and Ann Pellegrini. *Cruising utopia: The then and there of Queer Futurity* (New York: New York University Press, 2019), 8.

⁴⁶ Caputo, *Hermeneutics*, 213.

⁴⁷ Ibid., 213.

⁴⁸ Levitas, “Educated Hope,” 17.

⁴⁹ Caputo, *Hermeneutics*, 214-15.

governance, and all others to be continually reinvented and transformed. As Bloch describes it, “this [is the] location within but on the edge of real.”⁵⁰

But the “unpredictability of what is coming is not meant to provide an alibi for not calculating the possible outcome.”⁵¹ We have been in seemingly “unprecedented times” for some time now, and it is within these crucible moments that we must be the most careful. For although the absolute future is open, as Bloch describes, “it is not unconstrained”⁵² as it stands—it is through our present actions that we might shape the future present towards the just vision of our desired absolute future, but as such the absolute future’s possibilities are dependent on our present actions. This recognition of our future present, and the reach toward the “real possible future” is what Bloch describes as concrete utopia, as it is precisely a concrete utopian’s anticipation of the future which simultaneously affects it.

As stated, we know what we can expect in our future present—it is more than reasonably foreseeable. In the rise of global fascism and by observing the Supreme Court’s continual capitulation to the Trump administration and other far right legal theories intended to consolidate power in the executive branch largely for the benefit of the corporate class, we can count on the American Supreme Court to continue to churn out decisions that only further entrench systems of capital punishment, capitalism, and careen us toward the climate crisis. Importantly, we must anticipate not only such rulings individually, but their transcending potential impact on our absolute future, as each present ruling shapes the constitutional common law precedent of the future.

To recognize these present conditions, and anticipate their effect on our legal precedent, is not simply the end of our work, but the beginning of a strategic position. We are losing and by the practical implications of the law’s use of precedent as its interpretive tool our losses affect our ability to win in the future, as each case becomes entombed in the body of our nation’s case law. By anticipating how the current, and reasonably foreseeable, legal climate might impact our present—and therefore future—precedent we gain a greater understanding of how we can shape our real-possibilities in the absolute future by the use of our precedent as a kind of time-traversing-paper-trail. This work is not meant to dwell on the daily wins and losses, but anticipate, and make use of our defeats to defend the possibility for future wins. It is a forward fighting, albeit from a losing position in our current circumstances.

⁵⁰ Levitas, “Educated Hope,” 17.

⁵¹ Caputo, *Hermeneutics*, 214.

⁵² Levitas, “Educated Hope,” 15.

Importantly, in our present moment, concrete utopian action may take place through a concentrated effort to *preserve* the potential for future utopian interpretation in our present legal precedent.

To put a finer point in this distinction, we might begin by making note of the difference between preservative, anticipatory, concrete utopian legal work, and conservationist, reactionary, and abstractly utopian legal rhetoric. The concrete utopian work as discussed, by its essence, according to Bloch, cannot be reactionary. For our interpretative work, if done concretely, cannot be considered a reaction to the present, but an anticipation of the present future, as concrete utopia is “anticipatory rather than compensatory.”⁵³ Reactionary legal strategy itself is a backwards looking perspective, attempting to respond to an opponent’s first tactic without looking forward to the next. Some have argued that such a short-minded perspective has plagued progressive spaces, specifically in terms of reproductive rights, as many believe the push for congressional codification of bodily autonomy came too little too late, as the writing had been on the walls since the ascension of the modern conservative majority on the American Supreme Court in 2018, or perhaps since the constructive efforts to dismantle *Roe v. Wade*’s⁵⁴ trimester protection scheme outlined the ruling of *Planned Parenthood v. Casey* in 1992,⁵⁵ or even since the use of admittedly shaky science to establish the trimester/viability standards outlined in *Roe* in 1973.⁵⁶

Similarly, we must make a clear distinction between preservative work and conservative work. To simply maintain or codify the status quo is not utopian nor in the face of our present reality can such a stance be considered concrete. In part, such work often fails to “play ball” with the particular circumstances of a losing position. Heels that are dug in the ground will only hold for so long, and even still, it makes it all the harder to take a step forward. Often, a “just” attempt at conservation of classically progressive issues in our present precedent fails to reconcile with the deconstructibility of the law. As Derrida describes, when we pound on the table and say, “this is the law,” we must confess that we are pounding in no more than our interpretation.⁵⁷ Often these misguided protectionist standpoints seek to secure a current policy by relying on precedent that is next up on the chopping block. This might be best expressed in the dichotomy of dissenting and concurring opinions of liberal and conservative American Supreme Court justices. Justice Elena Kagen,

⁵³ Ibid., 15.

⁵⁴ 401 U.S. 113 (1973).

⁵⁵ 505 U.S. 833 (1992).

⁵⁶ 401 U.S. 113 (1973).

⁵⁷ Caputo, *Hermeneutics*, 208.

although often arguing for what would be considered a “more liberal” outcome, characteristically takes a conservative methodological approach to her writing and reasoning, often using her separate opinions to dismantle the majority’s argument in great detail to defiantly declare that whatever newly defunct protection, policy, or law is actually, or at least was, sufficient to withstand constitutional scrutiny.⁵⁸ While this produces powerful dicta, the discussion does not read well for future use as the particular law at issue, now rendered unconstitutional, will likely never again be before the court for review and the case’s particular and material facts will almost certainly never repeat. As such this work is a kind of compensation, not creation.

Conversely, conservative Supreme Court Justice Clarence Thomas takes no issue with making big swings, often ignoring the issue described in the majority’s concurrence and writing constitutional jurisprudence as he hopes to see it used in the future. Looking to Justice Thomas’s concurring opinion in *Trump v. United States*, his opinion rested little on the issue of presidential immunity, but focused on the legality—or rather illegality—of appointed special prosecutors all together.⁵⁹ This standalone, nonminority opinion was then used three months later by Federal District Court Judge Aileen Cannon to dismiss special prosecutor Jack Smith and the federal charges against President Trump for his alleged mishandling of classified documents.⁶⁰ Because the alleged mishandling of classified documents at President Trump’s Mar-a-lago resort occurred after the completion of his first term⁶¹ even the incredibly broad umbrella of presidential immunity granted via the majority opinion in *Trump* would not have saved Trump’s skin in the subsequent case.⁶² Yet still, Justice Thomas’s writing continued to advance the line of scrimmage, establishing another line of argument that allowed then-former president Trump to avoid prosecution or legal repercussions, thus ground work for future arguments against presidential accountability. Plainly put, these legal conservatives do not preserve that status quo, they push it and our legal precedent to their liking.

⁵⁸ See e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2385 (2023) (Kagen, J., dissenting).

⁵⁹ *United States v. Trump*, 144 S. Ct. 2312, 2348 (2024) (Thomas, J., concurring).

⁶⁰ “Judge Cannon cited three times in her decision a concurring opinion by Justice Thomas in the Supreme Court ruling in which he questioned whether there was a legal basis for naming special counsel.” Madeline Halpert, Ana Faguy and Anthony Zurcher in Milwaukee. “Trump Classified Documents Case Dismissed by Judge.” BBC News, July 15, 2024. <https://www.bbc.com/news/articles/cz5rpdrxevro>.

⁶¹ Goitein, Elizabeth, “Government Classification and the Mar-a-Lago Documents.” Brennan Center for Justice, December 19, 2022. <https://www.brennancenter.org/our-work/research-reports/government-classification-and-mar-lago-documents>.

⁶² *Trump*, 144 S. Ct. at 2343 (majority opinion).

We cannot expect either of these forms of legal work, reactionary or conservative, to meet the burden of concrete utopian praxis, as both fundamentally are at odds with Derrida's description of Justice as "an imperative, an open-ended call to be brought to bear in particular and ever-shifting and unpredictable circumstances."⁶³ In simple terms, reactionary work does not anticipate the next shift, and conservative work attempts to constrain the status quo in the present, particular, and soon to be passed, circumstances. Conversely, a concrete utopian praxis of preservation attempts to protect what precedent may be applied to the unpredictable, the incalculable, and unreachable by anticipating our present future and its attacks. To say that Justice is a call is to describe "the open-ended demand that the law remain flexible, plastic, pliable, reinventible, exposed to what is coming."⁶⁴ One cannot expect to know how those in the absolute future will use our present precedent for utopian, Justice oriented work, we can only anticipate that they will need it, and thus be called, by the interpretative imperative of Justice, to preserve it.

But importantly, this posture of preservation is not meant to push off or obfuscate the responsibility of those in the present. This is not stagnation of our interpretative imperative of Justice, it is in each instance a strategic decision. This work, the interpretation, the negotiation, between the deconstructible and the undeconstructible, the calculable and the incalculable, the present future and the absolute future, takes a great amount of discernment and is never finished. Whether by defensive lawyering, dissenting opinions, or the extraction of deliberate concessions in each case, this recognition of, and response to, our impending losses in the pursuit of utopia is not a kind of abstract wish fulfillment, it is work. It is not merely conservation but cultivation: a supplanting of future potential in the here and now. It is the concretely utopian, anticipatory, appropriate response to the here and now, with an eye towards the elsewhere and elsewhen. Derrida agrees that justice deferred is justice denied, but both Derrida and Bloch may instruct us that Justice preserved is the potential for Justice ensured. "So let's get practical. The interpretive imperative is a call for action."⁶⁵

⁶³ Caputo, *Hermeneutics*, 212.

⁶⁴ *Ibid.*, 213.

⁶⁵ Caputo, *Hermeneutics*, 215.