

NOW, VOYAGER: DEIXIS AND THE TEMPORAL PRAGMATICS OF STATUTES

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The word “now” is like a bomb through the window, and it ticks.¹

INTRODUCTION

You come across a fortune cookie. The fortune inside reads: “The plans you now have are going to succeed.” Unsure when *now* is, you are left wondering which of your goals will be successful. There are three possibilities. First, *now* references some fixed point in the past—be it the moment the fortune was first conceived, printed, enclosed in its cookie, or shipped from the factory. All goals you had at that moment will be successful, but you have no guarantees as to goals made later in time, including goals at the time of reading the fortune. Second, *now* references the moment you first read your fortune. All goals you have at that moment will be successful, but you have no guarantees as to goals you may make later in time. Third, *now* references any moment you read your fortune. Whenever you read the fortune, no matter how many times you read it, you are guaranteed that all goals you have at that moment will be successful.

A legal journal would be a strange place, indeed, for an article discussing the hermeneutics of fortune cookies. But this interpretive problem has reared its head in the context of statutory interpretation, most recently in *Carcieri v. Salazar*,² decided by the Supreme Court in 2009. This Comment analyzes the interpretive problem *now* presents in statutory language and gauges methods to resolve the ambiguity. After beginning with the word’s ordinary meaning and finding it to offer no real guidance, this Comment concludes that, absent clear indication of the word’s meaning from legislative history, only a purposive or pragmatic determination can provide a solution.³ What is significant about *now*—and what forms the crux of this Comment—is that the resolution of the signification of *now* relies on what we think a statute really is.

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¹ ARTHUR MILLER, *AFTER THE FALL* 42 (1964).

² 129 S. Ct. 1058 (2009).

³ *Now* appears to be a “stop word” in both Westlaw and LexisNexis, so it is difficult to provide an accurate figure of how many times *now* appears in federal and state codes.

Ordinarily, in interpreting the plain meaning of a word in a statute, we look to our general knowledge of the language and the broader world: is a tomato a vegetable or a fruit,⁴ or what does it mean to use a firearm?⁵ Every once in a while, we are confronted with words that take on specialized meanings when used in statutes—for example, *shall* or *person*.⁶ This is only natural, as statutes take place within a specific linguistic community. But determining the reference of *now* depends not on the meaning of a word among lawyers or the general public, but rather on the *form* of statutes generally and on the parameters of the statute as a medium of communication. The ultimate question this Comment analyzes, one which was before the Supreme Court in *Carcieri*, is whether a statute containing *now* should be interpreted as of the moment the legislature spoke (i.e., enactment) or whether it should be interpreted as of the moment of the statute’s interpretation (i.e., years or decades later). While the Court’s reasoning in *Carcieri* seems uncomplicated, it merits a closer look for at least two reasons. First, because its practical result has been called “unfortunate”⁷ and has been accused of “overturn[ing] nearly 75 years of settled Indian trust land law,”⁸ the ideas behind the decision—theories of statutory interpretation and, more broadly, of what (or *when*) a statute really is—warrant discussion.⁹ And

⁴ See *Nix v. Hedden*, 149 U.S. 304, 307 (1893) (finding it to be a vegetable, of course, because it is “usually served at dinner in, with, or after the soup, fish, or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert”).

⁵ See *Smith v. United States*, 508 U.S. 223, 228-29 (1993); see also Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 23-24 (Amy Gutmann ed., 1997) (discussing *Smith*).

⁶ See 82 C.J.S. Statutes § 498 (2010).

⁷ G. William Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri “Fix”*: *Updating the Trust Land Acquisition Process*, 45 *IDAHO L. REV.* 575, 593 (2009).

⁸ Nat’l Cong. of Am. Indians, Resolution #NGF-09-022, *To Call upon the United States to Defend All Indian Trust Lands of All Indian Tribes from Any Third Party Claims and to Seek Legislation to Address the Supreme Court Decision in Carcieri v. Salazar*, at 2 (2009 Mid-Year Session), available at http://www.ncai.org/fileadmin/ncai_events/midyear2009/NGF-09-022.pdf.

⁹ This Comment never attempts to rationalize or decry the practical result of the Supreme Court’s decision; that is better left to those better acquainted with the situation and is far narrower a focus than this Comment attempts. Instead, analysis here looks to *Carcieri* only for the Justices’ reasoning, not their final, case-specific conclusions. For an illustration of the problems the decision has already spawned, see Bureau of Indian Affairs, U.S. Dep’t of the Interior, Transcript of *Carcieri* Tribal Consultation, No. 1-158724 (July 8, 2009), <http://www.bia.gov/idc/groups/public/documents/text/idc-001871.pdf>. For a similar discussion that raises, but never resolves, the question of whether successors-in-interest to tribes that were federally recognized when Congress enacted the Indian Reorganization Act (“IRA”), 25 U.S.C. §§ 461-479 (2006), are covered by the IRA, see United Keetoowah Band of Cherokee Indians (Dep’t of the Interior June 24, 2009), available at http://www.keetoowahcherokee.org/documents/06242009_ASIA_UKB.pdf. If not, the Cherokee Nation of Oklahoma, which has a tribal jurisdiction spanning fourteen counties in northeastern Oklahoma and over 280,000 enrolled members, was not federally recognized in 1934.

second, because it tackles difficult interpretive questions extending into all areas of law governed by statute, it offers a useful window into the Court's understanding of statutory interpretation.

At the heart of *Carcieri* is what linguists call "deixis" (and philosophers call "indexicality"). Defined, deixis is "[t]he way in which the reference of certain elements in a sentence is determined in relation to a specific speaker and addressee and a specific time and place of utterance."¹⁰ We interpret words like *I*, *you*, *here*, and *now* not by their dictionary definitions, but by the context of the utterances in which they are contained. Likewise, the reference of *now* is unclear without looking to that context. For example, *now* on July 4, 1776, references July 4, 1776. And *now* on January 15, 2010, references January 15, 2010. In contrast, July 4, 1776, references *only* July 4, 1776, no matter when it is spoken. The context of the utterance (its form over its substance) supplies the interpretation of *now*, whereas a specific date can be understood without resort to context.¹¹ Interpretation of *now* is made more difficult in recorded language, where it may be uttered and heard at different times. Does *now* reference the moment the utterance is produced or the moment it is heard? For diaries, it is generally the former; for answering machines, it is generally the latter.¹² It is precisely this problem that was before the Supreme Court in *Carcieri*: what is the referent of *now* in statutory language—the date of enactment or the moment the statute is invoked?

Part I introduces *Carcieri*. Part II works to define *now* through the concept of deixis, and specifically time deixis. Part III explores two theories as to how this ambiguity is resolved (in non-statutory contexts) and compares those theories to legal theories of statutory interpretation. Part IV analyzes the plain meaning of *now* in statutory language, considering what the statute, as a distinct medium of communication, tells us about its temporality and concluding that no single plain meaning exists. Part V looks to communicative norms that have developed—which may aid in interpreting *now*—reiterating that judicial precedent offers no real guidance in this matter and looking instead to non-textual tools. Part VI concludes that, given the characteristics of *now*, textual tools generally fall short. Absent clear legislative intent in favor of one interpretation, only by making a pragmatic determination or a broad determination of the statute's purpose can courts interpret *now*.

¹⁰ P. H. MATTHEWS, *THE CONCISE OXFORD DICTIONARY OF LINGUISTICS* 89 (1997).

¹¹ Leaving aside A.D. and B.C., whether this is Gregorian, Julian, or some other calendar system, etc.

¹² Alan Sidelle, *The Answering Machine Paradox*, 21 *CAN. J. PHIL.* 525, 535 (1991).

I. *CARCIERI V. SALAZAR*: ASKING “WHEN IS NOW?”

At the time of European colonization of New England, the Narragansett occupied much of what is now the state of Rhode Island.¹³ In 1709, following the devastation of King Philip’s War (1675-1676), the Narragansett were placed under formal guardianship by the Colony of Rhode Island.¹⁴ In 1880, in an attempt to assimilate the tribe, Rhode Island convinced the tribe to relinquish tribal authority pursuant to a “detrribalization” act.¹⁵ The Narragansett sold all but two acres of their remaining reservation land.¹⁶ In the early twentieth century, the tribe sought assistance from the federal government.¹⁷ Federal officials declined to assist, stating that the tribe was under the jurisdiction of Rhode Island, not the federal government.¹⁸

In the 1970s, the Narragansett filed suit to recover its ancestral land, claiming the State had misappropriated tribal territory in violation of the Indian Non-Intercourse Act.¹⁹ Following enactment of the Rhode Island Indian Claims Settlement Act,²⁰ the tribe received title to eighteen hundred acres of land in Charlestown, Rhode Island.²¹ And in 1983, the federal government finally recognized the Narragansett.²² In 1988, at the tribe’s behest and pursuant to section 465 of the Indian Reorganization Act (“IRA”),²³ the Secretary of the Interior took the eighteen hundred acres into trust on the tribe’s behalf.²⁴

In 1991, the tribe’s housing authority purchased thirty-one additional acres of land adjacent to the eighteen hundred acres.²⁵ Following litigation related to whether planned construction of housing on the land had to comply with local regulations, the tribe requested that the Secretary take the additional land into trust pursuant to section 465 of the IRA.²⁶ In 1998, the Bureau of Indian Affairs notified the State of Rhode Island that the Secretary intended to take land into trust on behalf of the tribe.²⁷ The State, its

¹³ *Carcieri v. Salazar (Carcieri III)*, 129 S. Ct. 1058, 1061 (2009).

¹⁴ *Id.*; see also ERIC B. SCHULTZ & MICHAEL J. TOUGIAS, KING PHILIP’S WAR: THE HISTORY AND LEGACY OF AMERICA’S FORGOTTEN CONFLICT 75 (1999).

¹⁵ *Carcieri III*, 129 S. Ct. at 1061.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1061-62 (citing 25 U.S.C. § 177 (2006)).

²⁰ 25 U.S.C. §§ 1701-1716 (2006).

²¹ *Carcieri III*, 129 S. Ct. at 1062.

²² *Id.*

²³ 25 U.S.C. § 465 (2006).

²⁴ *Carcieri III*, 129 S. Ct. at 1062; Town of Charlestown, R.I., 18 IBIA 67, 69 (1989).

²⁵ *Carcieri III*, 129 S. Ct. at 1062.

²⁶ *Id.*

²⁷ *Id.*

governor, and the Town of Charlestown unsuccessfully appealed this decision to the Interior Board of Indian Appeals.²⁸ They then appealed their case under the Administrative Procedure Act²⁹ to the District Court for the District of Rhode Island.³⁰

Section 465 of the IRA expressly authorizes the Secretary to take land into trust on behalf of “Indians.”³¹ Section 479 of the Act defines “Indian”:

The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.³²

The State of Rhode Island, its governor, and the Town of Charlestown contended that the phrase “members of any recognized Indian tribe *now* under Federal jurisdiction” in section 479 of the IRA, coupled with section 465’s grant of authority, authorized the Secretary to take land into trust *only* on behalf of those tribes federally recognized at the time of the IRA’s enactment—June 18, 1934.³³ Under this reading, the Secretary acted outside his authority in taking land into trust on the tribe’s behalf, as the tribe was not “under Federal jurisdiction” on June 18, 1934.³⁴

The Secretary interpreted the statute to permit “trust acquisitions for tribes recognized and under federal jurisdiction at the time the request for a trust acquisition is made.”³⁵ Under this interpretation, the referent of *now* is the “time the request for a trust acquisition is made.”³⁶ Unlike the word’s static reference under plaintiffs’ interpretation, *now* in the Secretary’s inter-

²⁸ *Id.*; see Town of Charlestown, R.I., 35 IBIA 93 (2000).

²⁹ 5 U.S.C. § 702 (2006).

³⁰ *Carcieri III*, 129 S. Ct. at 1063; see *Carcieri v. Norton (Carcieri I)*, 290 F. Supp. 2d 167 (D.R.I. 2003), *aff’d sub nom. Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007) (en banc), *rev’d sub nom. Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

³¹ 25 U.S.C. § 465 (2006). It reads, in relevant part:

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

Id.

³² 25 U.S.C. § 479 (2006) (emphasis added). Section 479 also defines what constitutes a “tribe”: “The term ‘tribe’ wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.” *Id.*

³³ *Carcieri I*, 290 F. Supp. 2d at 179 (emphasis added) (quoting 25 U.S.C. § 479) (internal quotation marks omitted).

³⁴ *Carcieri III*, 129 S. Ct. at 1061 (internal quotation marks omitted).

³⁵ *Carcieri v. Kempthorne (Carcieri II)*, 497 F.3d 15, 26 (1st Cir. 2007) (en banc), *rev’d sub nom. Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

³⁶ *See id.*

pretation is dynamic, or, as some courts have termed it, “ambulatory,” meaning it references the moment the statute is invoked.³⁷

The district court, the First Circuit, and the Supreme Court all approached the interpretive problem differently.³⁸ And while the district court and the First Circuit both held in favor of defendants, they did so under very different analyses.

A. *The District Court*

The district court concluded that “[t]he plain language of § 479 does not impose [the] limitation” that plaintiffs had argued for.³⁹ The court held that the first part of the definition of “Indian” contains two separate requirements: (1) that an individual be a “member[] of [a] tribe[] in existence in 1934”; and (2) that the “tribe subsequently attain[] federal recognition.”⁴⁰ That recognition occurred after the IRA’s enactment was not relevant to the district court.⁴¹ The tribe easily satisfied the first requirement because “[t]he Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications.”⁴² The second requirement, too, was easily satisfied as the tribe had attained federal recognition in 1983.⁴³ Therefore, the Secretary had not acted *ultra vires* in taking land into trust on behalf of the tribe under the IRA.⁴⁴ Under this analysis, *now* references the date of enactment (June 18, 1934). So long as the Narragansett existed as a tribe in 1934, the tribe falls under the scope of “Indian” and “tribe” as defined in section 479 of the IRA because federal recognition is no more than “recognition of a previously existing status.”⁴⁵

³⁷ See, e.g., *Larson v. Am. Title & Ins. Co.*, 52 So. 2d 816, 818 (Fla. 1951). There are perhaps other axes along which *now* may be said to be ambiguous. For example, imagine the same provision, including “now under federal jurisdiction,” as contained in a statute in which other provisions grant federal recognition to a closed set of tribes. Does *now* reference all tribes federally recognized at the time of enactment or only those receiving federal recognition as a result of that particular statute?

³⁸ Other arguments before the courts, which did not focus on the interpretation of *now* in section 479, are not discussed here.

³⁹ *Carcieri v. Norton (Carcieri I)*, 290 F. Supp. 2d 167, 179 (D.R.I. 2003), *aff’d sub nom. Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007) (en banc), *rev’d sub nom. Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 180 (quoting Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177, 6178 (Feb. 10, 1983)) (internal quotation marks omitted).

⁴³ *Id.* at 181.

⁴⁴ *Id.*

⁴⁵ *Carcieri I*, 290 F. Supp. 2d at 179 (quoting *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994)) (internal quotation marks omitted).

B. *The First Circuit*

The First Circuit reached the same result as the district court, though it held differently as to the referent of *now*.⁴⁶ While the district court found the term unambiguous, the First Circuit found the Act's text to be "sufficiently ambiguous in its use of the term 'now.'"⁴⁷ The First Circuit described the interpretive difficulty:

One might have an initial instinct to read the word "now" in the statute as the State does, to mean the date of enactment of the statute, June 18, 1934. Congress certainly has used the word "now" in this way.

Any such instinct quickly disappears upon further examination, however. This is not a case that can be resolved by looking to the plain meaning of the term "now" standing by itself. "Now" means "at the present time," but there is ambiguity as to whether to view the term "now" as operating at the moment Congress enacted it or at the moment the Secretary invokes it. Indeed, Congress sometimes uses the word "now" to refer to a time other than the moment of enactment.⁴⁸

Because *now* "[did] not itself have a clear meaning," the court turned to context, but found context, too, to be ambiguous.⁴⁹ Another section of the Act stated "now or hereafter," but the same definition of "Indian" included a specific, unambiguous date (i.e., June 1, 1934), and so good intratextual arguments existed for both sides' interpretations.⁵⁰ Nor did policy considerations tip the balance.⁵¹ The court turned to legislative history, but found that it also "[did] not clearly resolve the issue."⁵² While it was clear from a 1934 hearing that the phrase "now under federal jurisdiction" was intended as a limitation, whether or not it was intended as a temporal limitation was less clear.⁵³ Instead, the focus may have been a limitation on status: "If the purpose was to exclude those who might later be dropped from federal jurisdiction, it would make more sense to measure status as of the date benefits were sought, not as of the date of enactment of the statute."⁵⁴

⁴⁶ Compare *Carcieri v. Kempthorne (Carcieri II)*, 497 F.3d 15, 22 (1st Cir. 2007) (en banc), *rev'd sub nom.* *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009), with *Carcieri I*, 290 F. Supp. 2d at 181.

⁴⁷ *Carcieri II*, 497 F.3d at 22.

⁴⁸ *Id.* at 26 (citations omitted).

⁴⁹ *Id.* at 27.

⁵⁰ *Id.* (quoting 25 U.S.C. § 472 (2006)) (internal quotation marks omitted).

⁵¹ *Id.*

⁵² *Id.* at 28.

⁵³ *Carcieri II*, 497 F.3d at 28.

⁵⁴ *Id.* at 29. Both are, in fact, temporal limitations. The question is whether the inquiry is limited to the time of enactment or to the time of invocation. The court also raised the possibility, which was not raised by any of the parties, that the phrase instead was a limitation on individual Indians, not on tribes, and so *now* would be irrelevant. *Id.* After argument before the Supreme Court, Justice Stevens espoused

The court applied the doctrine set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁵⁵ since it found the statute ambiguous.⁵⁶ In *Chevron*, the Court held that if Congress's intent is "clear," the court must "give effect to the unambiguously expressed intent of Congress."⁵⁷ Having found the statute ambiguous, the First Circuit proceeded to *Chevron*'s second step.⁵⁸ Where Congress "has not directly addressed the precise question at issue," and an administrative interpretation exists, "the court does not simply impose its own construction on the statute."⁵⁹ Instead, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."⁶⁰ Because the Secretary's interpretation of section 479 was "rational and consistent" with the language, policy, and legislative history of the IRA, the First Circuit adopted that interpretation, holding that *now* referenced not merely the time of enactment, but any time at which the statute is invoked.⁶¹

C. *The Supreme Court*

The Supreme Court reversed the rulings of the two lower courts.⁶² The case generated four opinions, with Justice Thomas writing the majority opinion,⁶³ Justice Breyer concurring,⁶⁴ Justice Souter (joined by Justice Ginsburg) concurring in part and dissenting in part,⁶⁵ and Justice Stevens dissenting.⁶⁶ Like the district court, Justice Thomas found the text of the IRA to be unambiguous.⁶⁷ Looking to a 1934 copy of *Webster's New International Dictionary*, the majority found that *now* meant "[a]t the present time; at this moment; at the time of speaking."⁶⁸ The majority took this to mean that *now* unambiguously referenced the time of enactment, June 18,

this view in his dissent. *Carcieri v. Salazar (Carcieri III)*, 129 S. Ct. 1058, 1076 (2009) (Stevens, J., dissenting).

⁵⁵ 467 U.S. 837 (1984).

⁵⁶ *Carcieri II*, 497 F.3d at 30.

⁵⁷ *Chevron*, 467 U.S. at 842-43.

⁵⁸ *Carcieri II*, 497 F.3d at 30.

⁵⁹ *Chevron*, 467 U.S. at 843.

⁶⁰ *Id.*

⁶¹ *Carcieri II*, 497 F.3d at 30 (quoting *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987)) (internal quotation marks omitted).

⁶² *Carcieri v. Salazar (Carcieri III)*, 129 S. Ct. 1058, 1063 (2009).

⁶³ *Id.* at 1060.

⁶⁴ *Id.* at 1068 (Breyer, J., concurring).

⁶⁵ *Id.* at 1071 (Souter, J., concurring in part and dissenting in part).

⁶⁶ *Id.* at 1072 (Stevens, J., dissenting).

⁶⁷ *Id.* at 1065 (majority opinion).

⁶⁸ *Carcieri III*, 129 S. Ct. at 1064 (alteration in original) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1671 (2d ed. 1934)) (internal quotation marks omitted).

1934, and, therefore, the Secretary had acted outside his authority in taking land into trust on behalf of a tribe not federally recognized at the time of enactment.⁶⁹

Justice Breyer, in his concurrence, concluded that, “[l]inguistically speaking,” the statute’s language alone was not determinative, but that *Chevron* could not save the Secretary’s interpretation because “Congress did not intend to delegate interpretive authority to the Department [of the Interior].”⁷⁰ He looked, instead, to legislative history, which he found to favor plaintiffs’ interpretation.⁷¹

Justice Souter, joined by Justice Ginsburg, concurred in part and dissented in part. He mostly agreed with Justice Breyer’s concurrence, but found that “[n]othing in the majority opinion foreclose[d] the possibility that the two concepts, recognition and jurisdiction, [might] be given separate content,” and would have remanded on that point.⁷²

Justice Stevens alone bypassed interpreting *now*, finding the majority’s reading “curious . . . because it turns ‘now’ into the most important word in the IRA.”⁷³ He reasoned that, although there might have been a temporal limitation on the definition of an individual “Indian,” there was no such limitation on the definition of “Indian tribe.”⁷⁴ “Indians,” in his reading, included both tribes and individuals.⁷⁵ Because the Narragansett are a tribe, the Act imposes no temporal limitation upon them.⁷⁶

The majority’s conception of statutes assumes that, in the usual case, *now* references the time of enactment—the point in time at which the legislature “spoke.” Justice Breyer’s concurrence is not so rigid. It at least allows for the possibility that statutes may vary in their use of *now*, but concludes that, in this instance, *now* indeed references the time of enactment.

In the final tally, we are left with the following results:

	Enactment	Invocation	(Determinant)
D.R.I.	x		Plain meaning
First Circuit	x	x (held)	<i>Chevron</i> deference
Thomas	x		Plain meaning
Breyer, Souter, Ginsburg	x (held)	x	Legislative history
Stevens	?	?	Avoids question

⁶⁹ *Id.* at 1068.

⁷⁰ *Id.* at 1068-69 (Breyer, J., concurring).

⁷¹ *Id.* at 1069.

⁷² *Id.* at 1071 (Souter, J., concurring in part and dissenting in part).

⁷³ *Id.* at 1076 (Stevens, J., dissenting). Commentators have focused their attention on this aspect—perhaps oddity—of the case. See, e.g., Matthew L.M. Fletcher, *Decision’s in. ‘Now’ Begins Work to Fix Carcieri*, INDIAN COUNTRY TODAY, Feb. 25, 2009, <http://www.indiancountrytoday.com/home/content/40290987.html>.

⁷⁴ *Carcieri III*, 129 S. Ct. at 1072 (Stevens, J., dissenting) (internal quotation marks omitted).

⁷⁵ *Id.* at 1076.

⁷⁶ *Id.* at 1072.

The remainder of this Comment analyzes the adequacy of the methodologies used to arrive at these results. It concludes that determining a single plain meaning of *now* on textual grounds will ordinarily be impossible. And so, absent a clear demonstration of legislative intent, courts should interpret *now* only by making a determination based in statutory purpose or pragmatism.

II. DEFINING *NOW*

Imagine you happen across a bottle, floating in the ocean, which contains a note reading, “Meet me here at noon tomorrow with a stick about this big.”⁷⁷ Who is me? Where is here? When is tomorrow? How big should the stick be? Without answers to these questions, the note is nearly meaningless.⁷⁸ We meet deixis.

What is deixis? Its etymology is illustrative; the term derives from the Greek word for pointing or indicating.⁷⁹ Defined, it is “[t]he way in which the reference of certain elements in a sentence is determined in relation to a specific speaker and addressee and a specific time and place of utterance.”⁸⁰ It “concerns the ways in which languages encode or grammaticalize features of the context of utterance or speech event.”⁸¹

For example, *now* is deictic. Its meaning seems easy enough to grasp. Now is, well, *now*. Accounting for all its applications becomes trickier, though. If you say *now* at 8:00 to your friend beside you, you mean 8:00, and your friend understands you to mean 8:00. Likewise, if you say it an hour later, you mean 9:00. But what if you write *now* in a note left on the kitchen table, intending that your friend read it an hour later? Does *now* reference the time of writing or the time of reading? In the case of *Carcieri*, if Congress writes *now* in a statute in 1934, and the statute is invoked in 1991, does *now* reference 1934 or 1991?

Those expressions that are “inherently deictic” are said to be “semantically insufficient to achieve reference without contextual support.”⁸² Support comes from “the mutual attention of the interlocutors and their ability to reconstruct the speaker’s referential intentions given clues in the environment.”⁸³

⁷⁷ This example is taken from CHARLES J. FILLMORE, LECTURES ON DEIXIS 60 (1997) (internal quotation marks omitted).

⁷⁸ But imagine it instead reads, “Meet John Doe at 123 Main Street at noon on March 13, 2010, with a stick four inches long and one inch in diameter.” Suddenly it makes sense.

⁷⁹ STEPHEN C. LEVINSON, PRAGMATICS 54 (1983).

⁸⁰ MATTHEWS, *supra* note 10, at 89.

⁸¹ LEVINSON, *supra* note 79, at 54 (emphasis omitted).

⁸² Stephen C. Levinson, *Deixis*, in THE HANDBOOK OF PRAGMATICS 97, 101, 103 (Laurence R. Horn & Gregory Ward eds., 2004).

⁸³ *Id.* at 103.

Interpretation of deictic information is complicated when one lacks sufficient knowledge of context. For example, consider a sign posted on an office door reading “back in two hours.”⁸⁴ You understand the message, but the most important aspect of the message, the two hours, remains a mystery unless you know when the note was written. Through deictic expressions (“indexicals”),⁸⁵ “utterances are thus ‘anchored’ directly to aspects of the context.”⁸⁶ Where relevant aspects of that context are unknown, the anchor is no help at all.

Descriptively, the literature speaks of only a limited number of categories of deixis: traditionally, *person*, *place* (or *space*), and *time*.⁸⁷ “Person” deixis relates to “the encoding of the role of participants in the speech event in which the utterance in question is delivered,” especially the personal pronouns *you* and *I*.⁸⁸ “Place” deixis includes words like *here*.⁸⁹ Finally, “time” deixis is about “the encoding of temporal points and spans *relative* to the time at which an utterance was spoken (or a written message inscribed).”⁹⁰

Time deixis includes adverbs of time—*now*, *then*, *soon*, *recently*, *today*, *tomorrow*, *yesterday*, and so on—and verb tense.⁹¹ It presents little interpretative trouble in everyday conversation, where, for example, *now* is spoken and heard simultaneously—what has been called “deictic simultaneity.”⁹² In this context, there is little risk of confused interpretation. But with a recorded⁹³ utterance, where an instance of *now* may be uttered and inter-

⁸⁴ This example is taken from FILLMORE, *supra* note 77, at 59 (internal quotation marks omitted).

⁸⁵ The terms *deixis* and *indexicality* largely refer to the same concept but are associated with linguistics and philosophy, respectively. Levinson, *supra* note 82, at 97; *see also* Christopher R. Green, “This Constitution”: *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1610-12 (2009) (proposing a theory of textualist semi-originalism based on the presence of indexicals in the Constitution). This Comment uses *deictic expressions* and *indexicals* interchangeably.

⁸⁶ LEVINSON, *supra* note 79, at 55.

⁸⁷ *Id.* at 62. Two other, less traditional, categories are *discourse* (i.e., *text*) and *social* deixis. *Id.* Fortuitously, this footnote already contains an example of discourse deixis: *supra*. *See generally* FILLMORE, *supra* note 77, at 103-25 (discussing *discourse* and *social* deixis). One observes social deixis in the *tu-vous* (“T-V”) distinction in French and other languages. *See generally id.* at 114-16.

⁸⁸ LEVINSON, *supra* note 79, at 62 (emphasis omitted).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 62, 74. While tense in statutory interpretation is a fascinating question, it is purposefully omitted from this Comment. *See* 1 U.S.C. § 1 (2006) (“[W]ords used in the present tense include the future as well as the present.”).

⁹² LEVINSON, *supra* note 79, at 73.

⁹³ “Recorded” applies equally to written or sound recordings. Any use of the word “recording” herein may refer to either or both.

preted at different times, this ease of interpretation falls apart, while interpretation of July 4, 1776, does not.⁹⁴

To analyze a deictic term, we must distinguish between the *encoding time*, “the time at which the message is sent,” and the *decoding time*, “the time at which the message is received.”⁹⁵ In the “canonical situation of utterance” (i.e., face-to-face conversation) encoding time is identical to decoding time.⁹⁶ But where an utterance is recorded, encoding time and decoding time are separated. It is necessary to choose between them in order to interpret the utterance.

Understanding how an indexical functions is different from understanding an indexical’s meaning. A deictic term’s reference depends upon the context in which it is used.⁹⁷ A proper name, like Tokyo, does not. We can define Tokyo as “the capital of Japan,” and, leaving aside other objects identified by the name Tokyo, this is always true. When I say *I*, the author of this Comment can perhaps define it as “the author of this Comment,” but this is certainly not always true. When others say *I*, they generally do not refer to the author of this Comment.⁹⁸ If they do, I (the author) may be thrust into an existential crisis. Professor David Kaplan posits that “the meaning of the [deictic] word provides a rule which determines the referent in terms of certain aspects of the context.”⁹⁹ Thus, the meaning of an indexical is not its reference.¹⁰⁰ Just because Mary refers to herself as *I*, this does not mean that *I* means Mary. After all, the meaning of the word does not change as different individuals utter it; rather, only its content changes.¹⁰¹ Instead, the indexical’s meaning is represented by a rule (e.g., *I*

⁹⁴ Leaving aside obvious and easily-resolved concerns (e.g., A.D. or B.C., Gregorian or Julian, etc.).

⁹⁵ FILLMORE, *supra* note 77, at 61. Professor David Kaplan largely bypasses the problem of *now* in recorded utterances, but he does include the following in a footnote, including an intriguing suggestion:

There are certain uses of pure indexicals that might be called “messages recorded for later broadcast”, which exhibit a special uncertainty as to the referent of “here” and “now”. If the message: “I am not here now” is recorded on a telephone answering device, it is to be assumed that the time referred to by “now” is the time of playback rather than the time of recording. Donnellan has suggested that if there were typically a significant lag between our production of speech and its audition (for example, if sound traveled very very slowly), our language might contain two forms of “now”: one for the time of production, another for the time of audition.

David Kaplan, *Demonstratives: An Essay on the Semantics, Logic, Metaphysics, and Epistemology of Demonstratives and Other Indexicals*, in THEMES FROM KAPLAN 481, 491 n.12 (Joseph Almog, John Perry & Howard Wettstein eds., 1989).

⁹⁶ LEVINSON, *supra* note 79, at 73.

⁹⁷ *See id.* at 54.

⁹⁸ *See* Kaplan, *supra* note 95, at 492 (“If you and I both say ‘I’ we refer to different persons.”).

⁹⁹ *Id.* at 490.

¹⁰⁰ *Id.* at 520 (explaining that an indexical’s “reference is *no* part of [its] meaning”).

¹⁰¹ *Id.*

means “the person speaking”), and that meaning does not change with context.¹⁰²

And so what is the meaning of *now*? Poet Jorge Luis Borges put it nicely, as usual: “everything happens to a man precisely, precisely *now*.”¹⁰³ The word’s reference moves through time, corresponding to the present moment.¹⁰⁴ That *now* means “the time of the utterance” seems uncontroversial.¹⁰⁵ This is not radically different from the definition put forth in *Carcieri*: “[a]t the present time; at this moment; at the time of speaking.”¹⁰⁶ This definition accounts perfectly for all occurrences of *now* in face-to-face conversation. But assuming that “the time of the utterance” encompasses *only* the encoding time presents a problem. How, then, does one explain “I am not here right now” on an answering machine?¹⁰⁷ Or how does one explain an example offered by Justice Breyer at oral argument in *Carcieri*: “What about a poster that says ‘Give blood now.’[?]”¹⁰⁸ Surely the poster’s designer wishes the reader to give blood after reading the poster, not to walk away because the poster (referencing encoding time) no longer applies to him. Following Kaplan’s theory, the meaning of *now* is a rule.¹⁰⁹ That rule must explain those utterances in which *now* references decoding time, as well as those referencing encoding time, unless we are to say that they are two separate words, which seems patently wrong. “The time of the utterance” works, then, so long as we acknowledge that this includes both encoding time and decoding time. But then how do we decide between these two times in interpreting a particular incident of *now*?

III. INTERPRETING *NOW*

Knowing what *now* means is important, but it gets us nowhere if we cannot predict when *now* references encoding time and when it references

¹⁰² *Id.* at 520, 523 (“[T]he linguistic conventions which constitute *meaning* consist of rules specifying the referent of a given *occurrence* of the word . . . in terms of various features of the context of the occurrence.”).

¹⁰³ JORGE LUIS BORGES, *The Garden of Forking Paths*, in *Labyrinth: Selected Stories & Other Writings* 19, 20 (Donald A. Yates & James E. Irby eds., 1964).

¹⁰⁴ It must be impossible to escape descending into deixis in describing indexicals. “The present moment” means the moment that you, the reader, read this line, whenever you read it, however many times you read it.

¹⁰⁵ See, e.g., Eros Corazza, *Temporal Indexicals and Temporal Terms*, 130 *SYNTHESE* 441, 443 (2002) (“The character of ‘now’ is represented by a function like ‘The time of this utterance’”); Sidelle, *supra* note 12, at 527 (“An utterance of ‘now’ refers to the time of the utterance.”).

¹⁰⁶ *Carcieri v. Salazar (Carcieri III)*, 129 S. Ct. 1058, 1064 (alteration in original) (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY, *supra* note 68, at 1671) (internal quotation marks omitted).

¹⁰⁷ See Sidelle, *supra* note 12, at 535.

¹⁰⁸ Transcript of Oral Argument at 4, *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) (No. 07-526).

¹⁰⁹ See Kaplan, *supra* note 95, at 490.

decoding time.¹¹⁰ Two articles put forth theories to explain how we interpret *now* in recorded texts. Professor Stefano Predelli emphasizes the utterer's intent.¹¹¹ Professor Komarine Romdenh-Romluc finds problems with this view, emphasizing instead more publicly-accessible indicators.¹¹² The two theories map nicely to legal notions of statutory construction—intentionalism and textualism, respectively.¹¹³

Predelli theorizes that “written and recorded messages are to be evaluated with respect to the intended context of interpretation, which need not coincide with the context of utterance.”¹¹⁴ The context important to interpretation is not the context of the utterance, but rather the context in which the utterer *intends* his message to be interpreted.¹¹⁵ As an example, Predelli offers a note reading “I am not here now,” which the author writes at 4:00 but intends to be interpreted at 6:00.¹¹⁶ The intended reader arrives home at 6:00. That the intended reader reads *now* at 6:00 instead of at 4:00 should not alter its interpretation.¹¹⁷ It still references 6:00. It should be interpreted within the context intended by the author.¹¹⁸ The author's intent controls.

Intentionalism, as a theory of statutory interpretation, looks to the “actual or presumed intent of the legislature enacting the statute.”¹¹⁹ This approach, focusing on the actual intent of the enacting legislature, has much in common with Predelli's theory (not to put too much faith in nomenclature, Predelli even calls his theory “intentionalist”).¹²⁰ Statutes may be well suited to such an approach given that some guide to that intent (i.e., legislative history) often accompanies statutory language.¹²¹ On this point, there is, of course, great debate among legal theorists. Many question the very idea

¹¹⁰ Kaplan states that *now*, referencing decoding time, may be analyzed as a “message[] recorded for later broadcast.” *Id.* at 491 n.12 (internal quotation marks omitted). The utterance is deferred. One is “arranging to make an utterance at a later time, or, if one likes, *deferring* an utterance,” and “[t]he genuine utterance(s) will occur when someone [receives] the message.” Sidelle, *supra* note 12, at 535. The relevant parameters are those in the context of *genuine utterance*, which may contextualize encoding time or, in the case of deferral, decoding time, depending on the utterance. *Id.* But under this view, to interpret correctly it is still necessary to know first whether the utterance has, in fact, been deferred. *See id.*

¹¹¹ Stefano Predelli, ‘*I Am Not Here Now*’, 58 ANALYSIS 107, 115 (1998).

¹¹² Komarine Romdenh-Romluc, *Now the French Are Invading England!*, 62 ANALYSIS 34, 40-41 (2002).

¹¹³ *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 (1990).

¹¹⁴ Predelli, *supra* note 111, at 115.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 113-14 (internal quotation marks omitted).

¹¹⁷ *See id.* at 115.

¹¹⁸ *Id.*

¹¹⁹ Eskridge & Frickey, *supra* note 113, at 324.

¹²⁰ Stefano Predelli, *Intentions, Indexicals and Communication*, 62 ANALYSIS 310, 310 (2002).

¹²¹ *See* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 30 (1949).

of legislative intent,¹²² or at least find the use of legislative history problematic in principle or in practice.¹²³ Others find the idea of legislative intent coherent and consider legislative history a useful tool in ascertaining that intent,¹²⁴ even one more consistent with “the Constitution’s democratic purpose.”¹²⁵

Romdenh-Romluc finds flaws in Predelli’s view, concluding that a theory that interprets *now* to reference the utterer’s intended context of interpretation must be inaccurate.¹²⁶ Such a theory may hold true where the context identified by both audience and utterer coincide, but it fails to account for instances in which they differ.¹²⁷ There are two candidates for the context in which to interpret *now*: the utterer’s intended context and the context as understood by the audience.¹²⁸ Where Predelli opts for the former, Romdenh-Romluc opts for the latter, concluding that “indexical reference is determined by the context indicated by the cues the competent and attentive audience . . . would reasonably take the utterer . . . to be exploiting.”¹²⁹ These cues may take the form of “[the audience’s] beliefs, interests, and history; conventions that affect [the utterer’s] utterance; previous conversations between [the utterer] and [the audience]; and so on.”¹³⁰ When an individual records “I am not here now” on an answering machine, *now* unambiguously references the time at which a caller hears the message, because “[t]he caller will take [the utterer] to be exploiting the convention that an answering machine message refers to the time when it is heard by the caller, thus identifying the time at which he has called as the referent of ‘now.’”¹³¹ Naturally, Romdenh-Romluc does not posit a requirement of a

¹²² See, e.g., Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930). But see Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 428 (2005) (defending the use of legislative intent in statutory interpretation).

¹²³ See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 62 (1994) (“Am I not a notorious opponent of legislative history? That is indeed my position, and it grows out of a belief that becoming accustomed to mining the debates for clues creates some profound and unwelcome changes in how judges see laws.”); Scalia, *supra* note 5, at 31-32 (“As I have said, I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law. What is most exasperating about the use of legislative history, however, is that it does not even make sense for those who *accept* legislative intent as the criterion. It is much more likely to produce a false or contrived legislative intent than a genuine one.”).

¹²⁴ See, e.g., Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 424 (1988); Solan, *supra* note 122, at 428.

¹²⁵ STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION* 95 (2008).

¹²⁶ Romdenh-Romluc, *supra* note 112, at 36-37.

¹²⁷ *Id.* at 37.

¹²⁸ *Id.* at 38.

¹²⁹ *Id.* at 40-41.

¹³⁰ *Id.* at 38.

¹³¹ *Id.* at 39 (first internal quotation marks omitted); cf. Alain Trognon, *Speech Acts and the Logic of Mutual Understanding*, in *ESSAYS IN SPEECH ACT THEORY* 121, 122 (Daniel Vanderveken & Susumu

single interpretation across all uses of a particular medium. Besides those conventions affecting the utterer's utterance, the audience's "beliefs, interests, and history" play a role in interpretation, as do previous conversations between the utterer and the audience.¹³²

Returning to statutory interpretation, textualism looks to "the literal commands of the statutory text."¹³³ Professors William Eskridge and Philip Frickey identify stricter and "less ambitious" forms of textualism, the former understanding a statute's text as "the sole legitimate interpretive source," and the latter using statutory language not as a replacement for legislative intent or purpose, but rather as "the best guide" for discerning that intent or purpose.¹³⁴ As Justice Scalia puts it, "We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."¹³⁵ This emphasis on "objectivity" and the "reasonable person" has much in common with Romdenh-Romluc's "competent and attentive audience."¹³⁶ The intent to be gleaned from the text and "the remainder of the *corpus juris*" are the "cues the competent and attentive audience [(i.e., the interpreter)] would reasonably take the utterer [(i.e., the legislature)] to be exploiting."¹³⁷

Romdenh-Romluc finds fault in a theory that places so much emphasis on the intent of the speaker.¹³⁸ The usual objection to intent-based theories is that "[h]earers have little access to what people have in mind apart from the interpretation of what they say. So interpretation would be a problem that hearers could not solve if they had to know what a speaker intended in order to . . . interpret the speaker's utterance."¹³⁹ But while answering machine messages rarely come with a guide to their interpretation (would they need to?), a guide to the legislature's intent often does exist (setting aside, for now, criticism of legislative intent). Therefore, Romdenh-Romluc's conclusion—that the hearer cannot access the speaker's intent—may have

Kubo eds., 2001) ("[R]esearchers have pointed out that mutual understanding was less a result of internal thinking processes than an exteriorized activity exploiting the 'objective' properties of the interaction as resources for solving the problem of mutual understanding."). *But see* Predelli, *supra* note 120, at 312-14 (responding to Romdenh-Romluc and others).

¹³² Romdenh-Romluc, *supra* note 112, at 38.

¹³³ Eskridge & Frickey, *supra* note 113, at 324.

¹³⁴ *Id.* at 340-41.

¹³⁵ Scalia, *supra* note 5, at 17 ("[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; or, exactly, the meaning which the subject is authorized to understand the legislature intended." (alteration in original) (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION 57-58 (Boston, Little, Brown, & Co. 1882)) (internal quotation marks omitted)).

¹³⁶ *See* Romdenh-Romluc, *supra* note 112, at 40-41.

¹³⁷ *See id.*; Scalia, *supra* note 5, at 17.

¹³⁸ Romdenh-Romluc, *supra* note 112, at 37.

¹³⁹ Christopher Gauker, *Zero Tolerance for Pragmatics*, 165 SYNTHÈSE 359, 362 (2008).

less weight in the interpretation of statutes, given the atypical features of the communication between the Congress and the courts.

But textualists have countered such arguments before: the legislature as a collective whole is the speaker, not a combination of individual legislators; there is no collective intent, so legislative history represents only the individual intents of individual legislators.¹⁴⁰ Legislative history, unlike the statute's text, never underwent the Article I enactment process.¹⁴¹ Furthermore, "[e]ven if there were such a thing as congressional intent, and even if it could be divined, it wouldn't matter. What matters is what Congress does, not what it intends to do."¹⁴² On this view, the cues and conventions exploited by the speaker—understood by and accessible to all—should govern, not the legislature's "intent."¹⁴³

Following Romdenh-Romluc, we should not have to look to the legislature's intent to interpret *now*. Our understanding of the statute as a medium, like our understanding of the answering machine as a medium, should provide some answer. The majority opinion in *Carcieri* contains a description of *now* from *Black's Law Dictionary*, which hints at this, that "[n]ow' as used in a statute *ordinarily* refers to the date of its taking effect."¹⁴⁴ The next section asks whether this description is accurate and looks to see whether, in fact, the statute as a medium appears to have any canonical temporality.

IV. CONVENTIONS AFFECTING THE UTTERER'S UTTERANCE: THE PLAIN MEANING OF *NOW* IN STATUTORY LANGUAGE

"Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language."¹⁴⁵ Besides the good jurisprudential reasons for beginning with the plain meaning of *now* (and to avoid being that unfortunate soul who wrote the foregoing in a petitioner's brief to the Court), the Supreme Court decided *Carcieri* on plain meaning grounds. And so the plain meaning of *now* (indeed, if one

¹⁴⁰ See, e.g., Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 813 (1998); see also Easterbrook, *supra* note 123, at 68 ("Intent is elusive for a natural person, fictive for a collective body.").

¹⁴¹ Kozinski, *supra* note 140, at 813.

¹⁴² *Id.*

¹⁴³ Romdenh-Romluc never speaks to the particulars of the American legislative process, and so it is uncertain whether she would consider legislative history to form part of these cues.

¹⁴⁴ *Carcieri v. Salazar (Carcieri III)*, 129 S. Ct. 1058, 1064 (2009) (alteration in original) (quoting BLACK'S LAW DICTIONARY 1262 (3d ed. 1933)) (internal quotation marks omitted). For some reason, the Eighth Edition of *Black's* no longer includes any discussion of *now*.

¹⁴⁵ Scalia, *supra* note 5, at 31 (quoting Brief for Petitioner at 21, *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (No. 87-2084), quoted in *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 530 (1989) (Scalia, J., concurring)) (internal quotation marks omitted).

exists) is at the crux of this Comment. In particular, however, because the ordinary meaning of *now* speaks to the parameters of legislative expression (and not just to the meaning of a word as we understand it to interact with other words in a particular statute), we begin by asking whether the medium of statutory expression itself offers any single plain meaning.

To revisit the holdings of the three courts in *Carcieri*, the district court and the Thomas majority found that *now* unambiguously referenced encoding time as used in the IRA: “[T]he susceptibility of the word ‘now’ to alternative meanings ‘does not render the word . . . whenever it is used, ambiguous’”¹⁴⁶ And yet they reached opposite results on what the plain meaning was. The First Circuit and Justices Breyer, Souter, and Ginsburg were less sure that a single plain meaning existed.

It is possible, however, that the debate in *Carcieri* has very little to do with the plain meaning of *now*. If the word’s meaning encompasses both encoding time and decoding time, then both sides agree as to its meaning. Because meaning is not at issue, but rather reference, a dictionary—the traditional tool for determining meaning—is unhelpful, as it only contains the indexical’s meaning (i.e., the rule), about which there is no disagreement, and not the word’s reference in a given situation. That said, this Comment proceeds as if “plain meaning” means “plain interpretation”—hopefully this does not go beyond the plain meaning of “plain meaning.”

What is most interesting about the plain meaning of *now* in a statute—and what sets it apart from nearly all other interpretive problems—is that inquiry into the word’s plain meaning necessarily implicates the temporal parameters of the legislative utterance (i.e., the statute as a medium). How do we know that *now* in “I’m not here now, please leave a message,” as heard on an answering machine, references decoding time and not encoding time? We know it because of context, yes, but we also know it specifically because of the context of the medium by which the message is conveyed, not by recourse to a dictionary. That *now* is used in this particular way *on an answering machine* supplies our reference.

In the law, the same generally goes for wills. The usual rule is that the word *now* in a will relates to the time when the will becomes operational (i.e., at death or at probate) because of the type of medium we understand a will to be.¹⁴⁷ For example, in *In re Corigliano’s Estate*,¹⁴⁸ the court noted:

¹⁴⁶ *Carcieri III*, 129 S. Ct. at 1066 (quoting *Deal v. United States*, 508 U.S. 129, 131-32 (1993)).

¹⁴⁷ See, e.g., *Sussex Trust Co. v. Polite*, 106 A. 54, 57 (Del. Ch. 1919) (noting that case law “justif[ie]d] the application of the words of the will to the state of the property at the testator’s death”); *Tate v. Tate*, 128 S.E. 393, 395 (Ga. 1925) (“[A] will only speaks from the death of the testator. The maker of a will, though dead, then speaks through his will. The words used by him must be construed in the sense which they would bear if spoken by him at the time his will takes effect. The word ‘now’ refers to the time when the will went into effect.”); *Luers v. Luers*, 124 N.W. 603, 604 (Iowa 1910) (agreeing that “the word ‘now’ must refer to the time of the testator’s death”); *Jacobs v. Pinkston*, 121 P.2d 996, 997 (Okla. 1942) (“While there is a diversity of view in the decisions involving phrases containing the word ‘now’ we think that since a will is considered to be republished each day of its existence (unless and

The rule both in England and New York is that wills are ambulatory instruments speaking as of the date of death rather than the time of execution. Thus, should a testator bequeath “all I possess” this would include property owned at the date of death. Does the insertion of the word “all I *now* possess” change that meaning?¹⁴⁹

The court concluded that the addition of *now* did not change the meaning, absent affirmative evidence otherwise.¹⁵⁰ And in *Appeal of Allen*,¹⁵¹ the court stated: “The word ‘now’ must refer to the time of the testator’s death, and the business was that in which he was at that time engaged, to-wit, the dyeing business . . .” (last wishes of a “dyeing” man).¹⁵² Though, as always in the law of wills, this is only a presumption, which can be rebutted where a court understands the testator’s intent to indicate otherwise.¹⁵³

But what about a statute? Does a statute normally reference encoding time (i.e., the moment of enactment) or decoding time (i.e., the moment of interpretation)? To resolve the plain meaning of *now*, if one exists at all, it is first necessary to determine the temporality of the statute.

until revoked) that it can be considered to speak of the term ‘now owned by me’ as applying on the date of decease as well as on the date of execution.”); *In re Lusk’s Estate*, 9 A.2d 363, 365 (Pa. 1939) (“The word ‘now’ was intended to relate to the time when the will became operative.”). See generally 2 FRANK S. RICE, PROBATE REPORTS ANNOTATED 485-87 (1898) (discussing the rule that a will is operational at the time of death). Formerly, at common law, the rule was a bit more complex:

As to real estate, [the will] was supposed to speak (or operate) only on such lands, etc., as the testator held at the date or execution of the will, but as to personalty, it operated upon all he owned at the time of his death. Although, generally, as testamentary instruments they were construed as speaking from the time and event by which they became consummated, the death of the testator, there was no invariable rule, except as determined by the species of property bequeathed or devised.

Id. at 485; accord *Fidelity Trust Co.’s Appeal*, 1 A. 233, 235 (Pa. 1885). This rule was generally altered by statute, so that references to both real and personal property were treated identically. See, e.g., *McElroy v. Trigg*, 177 S.W.2d 867, 867 (Ky. 1944); *Hodgkins v. Hodgkins*, 108 N.Y.S. 173, 174 (App. Div. 1908); *Fidelity Trust*, 1 A. at 235.

¹⁴⁸ 165 N.Y.S.2d 239 (Surr. Ct. 1957).

¹⁴⁹ *Id.* at 240.

¹⁵⁰ *Id.* at 242.

¹⁵¹ 17 A. 453 (Pa. 1889).

¹⁵² *Id.* at 453.

¹⁵³ See, e.g., *U.S. Trust Co. of N.Y. v. Nathan*, 187 N.Y.S. 649, 650 (App. Div. 1921) (noting that a will included the clause “according to the law of distribution of the personal property of an intestate now in force in the state of New York” (internal quotation marks omitted)), *aff’d*, 135 N.E. 894 (N.Y. 1922); *Ranney v. Ranney*, 7 Ohio Dec. 105, 111 (Cuyahoga C.P. Ct. 1897) (stating that “[t]he intent of the testator is to be carried into effect”), *aff’d*, 19 Ohio C.C. 77 (Cir. Ct. 1899), *aff’d*, 63 N.E. 1133 (Ohio 1901); *Gibbs v. Barkley*, 242 S.W. 462, 465 (Tex. 1922) (explaining that the use of *now* in a bequest to children “all now of Leon county” referenced the time of the writing of the will (internal quotation marks omitted)).

A. *In Favor of Encoding Time*

Let us assume, as the Supreme Court majority concluded, that the plain meaning of *now* is *encoding time*. Why should that be so? The best argument in favor of presuming that *now* references encoding time is the surplusage canon: that words in a statute are to be construed so as not to be surplusage.¹⁵⁴ Using section 479 of the IRA as an example, compare the following:

[1] The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction¹⁵⁵

[2] The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe . . . under Federal jurisdiction¹⁵⁶

If *now* in example (1) is taken to reference decoding time—the time of interpretation—the result is the same as example (2), as if *now* had never been included.

Following this logic, a Nevada case construed “now prescribed by law” in a statute to reference encoding time, because “[w]e cannot reject the word ‘now’ as used in the statute as surplusage, because of a well known rule of statutory construction that each and every word of a statute must be given its meaning.”¹⁵⁷ *Carcieri* includes similar language: “Instead, Congress limited the statute by the word ‘now’ and ‘we are obliged to give effect, if possible, to every word Congress used.’”¹⁵⁸

In fact, as if to weed out the ambiguity (thereby implicitly recognizing that such ambiguity exists), New York, by statute, attempted to limit interpretation of *now*’s reference to encoding time:

The term now in any provision of a statute referring to other laws in force, or to persons in office, or to any facts or circumstances as existing, relates to the laws in force, or to the person in office, or to the facts or circumstances existing, respectively, immediately before the taking effect of such provision.¹⁵⁹

¹⁵⁴ BLACK’S LAW DICTIONARY 1484 (8th ed. 2004) (“[T]he court must give effect to every word, reading nothing as mere surplusage.”).

¹⁵⁵ 25 U.S.C. § 479 (2006).

¹⁵⁶ Adapted from *id.*

¹⁵⁷ *Buckingham v. Fifth Judicial Dist. Court*, 102 P.2d 632, 636 (Nev. 1940) (quoting Nev. Comp. L. § 4860) (first internal quotation marks omitted).

¹⁵⁸ *Carcieri v. Salazar (Carcieri III)*, 129 S. Ct. 1058, 1066 (2009) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

¹⁵⁹ N.Y. GEN. CONSTR. LAW § 34 (McKinney 2003); *accord* *Leach v. Auwell*, 138 N.Y.S. 975, 979 (App. Div. 1912) (strictly following this rule of construction).

One might expect this to apply in all instances for one of two reasons. Either the legislature would take special notice of the statutory meaning of *now* and use it accordingly, or the courts would harshly strike down any interpretation of *now* as referencing decoding time, even where such an interpretation was clearly intended.

In *Buffington v. State*,¹⁶⁰ the Court of Claims of New York did follow the rule, but without citation to it.¹⁶¹ The court was confronted with a statute reading: “Any existing highway which is improved or reconstructed under the provisions of this chapter shall continue to be maintained by the state or municipality *now* having jurisdiction over such existing highway.”¹⁶² The court held that *now* in the statute referenced the moment the law became effective.¹⁶³ The apparently rigid rule held. But the presence of a statutory rule of interpretation has not always proved effective. For example, in *Moskowitz v. LaGuardia*,¹⁶⁴ the court eschewed the interpretive rule in favor of a “more cogent test[] of the legislative purpose.”¹⁶⁵

But leaving aside canons of construction and statutory interpretive rules, there are two possible explanations for assuming that *now* in a statute references encoding time: (1) because we are told so; or (2) because we believe so. The first refers to the conscious theories of others; the second refers to some intuition about language or about the temporal pragmatics of statutory language.

Treatises, as a general matter, lend some credence to analyzing *now* as referring to encoding time. The Seventh Edition of *Sutherland Statutes and Statutory Construction* notes that “[t]he word ‘now,’ when it refers to the operation of a statute, refers to the date the statute takes effect, but if it refers to the substantive matter of the statute it is usually interpreted retroactively.”¹⁶⁶

Black’s Law Dictionary, cited by the majority in *Carciere*, says nearly the same thing: “[n]ow’ as used in a statute *ordinarily* refers to the date of

¹⁶⁰ 152 N.Y.S.2d 716 (Ct. Cl. 1956).

¹⁶¹ *Id.* at 721.

¹⁶² *Id.* (quoting N.Y. UNCONSOL. LAW § 7274 (McKinney 1942)) (internal quotation marks omitted).

¹⁶³ *Id.*

¹⁶⁴ 48 N.Y.S.2d 174 (Spec. Term 1944).

¹⁶⁵ *Id.* at 178. The statute reads:

The salaries of the attendants and the librarian of the county court of Kings county are hereby equalized and fixed at the same amount per annum as is *now* paid to attendants and the librarian of the supreme court in such county. The salaries of the attendants of the county court of Bronx county are hereby equalized and fixed at the same amount per annum as is *now* paid to attendants of the supreme court in such county. Such compensation shall be paid monthly, out of the amount appropriated for the support of the county court in such counties, respectively, or from any other contingent fund.

Id. at 175 (emphasis added) (internal quotation marks omitted).

¹⁶⁶ 2 NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 33:5 (7th ed. 2009) (footnote omitted).

its taking effect.¹⁶⁷ This does not foreclose the possibility that *now* in a statute may reference decoding time; it only recognizes a general trend. The majority opinion in *Carcieri* emphasizes “ordinarily.”¹⁶⁸ The majority does not appear to be laying down a per se rule of interpretation; rather, they seem to be establishing a rule that *ordinarily* applies.

Intuition is perhaps a likelier source for the presumption that *now* in a statute references encoding time. It does, after all “play[] a major role in judicial as in most decision making.”¹⁶⁹ Intuition can explain the conclusions that first appeared in those cases later cited by treatises. The First Circuit in *Carcieri* addressed this intuition, noting that “[o]ne might have an initial instinct to read the word ‘now’ in the statute . . . to mean the date of enactment of the statute.”¹⁷⁰ That said, whether that intuition is correct is a separate matter.

On the one hand, intuition may be informed by what is understood to be the temporal nature of a statute. *Now* on an answering machine normally references decoding time; perhaps *now* in a statute normally references encoding time. On the other hand, this intuition may be informed instead by the general nature of discourse. In the most familiar form of communication (i.e., face-to-face conversation), encoding time and decoding time occur simultaneously.¹⁷¹ Were recorded language the default, one might expect languages to have one word referencing encoding time and another referencing decoding time.¹⁷² But since recorded language is not the default, different words do not exist. Based on experience in conversation, one takes the ordinary character of *now* to be “the time at which the speaker is producing the utterance containing *now*.”¹⁷³ In conversation, there is generally no interpretive ambiguity. When one analogizes a statute (a less familiar form of communication) to face-to-face conversation (the more familiar form of communication), the ordinary meaning—“the time at which the speaker is producing the utterance containing now”—is applied to the statute and yields the conclusion that *now* in a statute must naturally reference encoding time.

¹⁶⁷ *Carcieri v. Salazar (Carcieri III)*, 129 S. Ct. 1058, 1064 (2009) (alteration in original) (quoting BLACK’S LAW DICTIONARY 1262 (3d ed. 1933)) (internal quotation marks omitted).

¹⁶⁸ *Id.*

¹⁶⁹ RICHARD A. POSNER, HOW JUDGES THINK 107 (2008). Nothing disparaging is meant by the use of the word “intuition.”

¹⁷⁰ *Carcieri v. Kempthorne (Carcieri II)*, 497 F.3d 15, 26 (1st Cir. 2007) (en banc), *rev’d sub nom. Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

¹⁷¹ See LEVINSON, *supra* note 79, at 73.

¹⁷² See FILLMORE, *supra* note 77, at 61.

¹⁷³ LEVINSON, *supra* note 79, at 73 (internal quotation marks omitted).

B. *In Favor of Decoding Time*

Let us now, for argument's sake, assume the opposite—that *decoding time* is the more natural choice. Why should this be so? To begin with an example, consider the following (much-abridged) excerpt from an amendment to the Social Security Act (SSA):

A recipient of benefits based on disability under this subchapter may be determined not to be entitled to such benefits on the basis of a finding that the physical or mental impairment on the basis of which such benefits are provided has ceased, does not exist, or is not disabling only if such finding is supported by—

(A) in the case of an individual who is age 18 or older—

(i) substantial evidence which demonstrates that—

.....
(II) the individual is *now* able to engage in substantial gainful activity¹⁷⁴

Common sense, perhaps, intuition, or what-have-you, leads to the assumption that *now* in this provision references not the time of the statute's enactment, but rather the time of an entitlement hearing (i.e., decoding time).

Case law supports this. In *Difford v. Secretary of Health and Human Services*,¹⁷⁵ the Sixth Circuit found “that the plain meaning of statutory references to ‘now’ or ‘current’ compels a consideration of an individual’s ability to perform substantial gainful activity at the time of the hearing.”¹⁷⁶ But even there, debate over *now* and *current* focused on whether review should be limited to the time of an earlier termination of benefits.¹⁷⁷ No one argued that *now* should refer to the time of enactment; instead, all parties and the court assumed *now* referenced not encoding time, but rather decoding time.¹⁷⁸ One can only imagine that such a claim—that *now* should reference the time of enactment—would be immediately thrown out of court as absurd. That unquestioned assumption—that *now* in the SSA must reference decoding time—is itself interesting because it is good evidence that not only can a statute reference decoding time, but also that it does not seem peculiar when *now* does indeed reference decoding time.

¹⁷⁴ 42 U.S.C. § 1382c(a)(4) (2006) (emphasis added). The last line, including *now*, is repeated two more times in that section. See 42 U.S.C. § 1382c(a)(4)(A)(ii)(I)(bb), (a)(4)(A)(ii)(II)(bb).

¹⁷⁵ 910 F.2d 1316 (6th Cir. 1990).

¹⁷⁶ *Id.* at 1320 (quoting 42 U.S.C. § 423(f) (Supp. III 1985)).

¹⁷⁷ See *id.*

¹⁷⁸ *Id.*; see also *Aikens v. Shalala*, 956 F. Supp. 14, 18 (D.D.C. 1997) (noting that the plaintiff in *Difford* argued the relevant time was the time of the hearing).

1. *Now Versus Currently*

That *now* can reference decoding time does not mean that it ordinarily should. But consider a synonym of *now*, *currently*, which evidences the same interpretive ambiguity,¹⁷⁹ and which has nearly always been understood to reference decoding time.

In only a handful of cases have interpreters construed *currently* to reference encoding time. Perhaps the leading case came in interpreting a state constitution. In 1984, California amended its constitution, adding: “The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey.”¹⁸⁰ Fifteen years later, the California Supreme Court wrote:

“Currently” is potentially ambiguous, in that it could refer to 1984, the time of its use in section 19(e), or to the time at which prohibited casinos are purportedly authorized. We adopt the former view. To declare, “The Legislature has no power to authorize . . . casinos of the type . . . operating in Nevada and New Jersey” in 1984, addresses an evil that was knowable and, in fact, known at the time the anticasinio [sic] provision was added, that is, the kind of casino then existing in those states. By contrast, to declare, “The Legislature has no power to authorize . . . casinos of the type . . . operating in Nevada and New Jersey” from time to time, addresses an evil, if evil it be, that is altogether unknown and unknowable. That the amendment drafters or the voters intended only such an attenuated effect is unlikely.¹⁸¹

The Arkansas Attorney General followed similar logic in an opinion interpreting an Arkansas statute, which read: “The Medicaid expansion program shall be a separate and distinct component of the Medicaid program currently administered by the Department of Human Services and shall be established as follows”¹⁸² As in the California case, *currently* was understood to reference encoding time.¹⁸³ The Arkansas Attorney General’s opin-

¹⁷⁹ “I am currently in Paris” on the back of a postcard likely references encoding time (though one can imagine situations where this may not be the case). “I am currently out of the office” on an answering machine references decoding time. And consider the following statute: “The Secretary shall work with all appropriate Federal departments and agencies to avoid duplication of programs and services *currently* available to Indian tribes and landowners from other sources.” 25 U.S.C. § 3744(b) (2006) (emphasis added). How do you interpret *currently* here?

¹⁸⁰ CAL. CONST. art. IV, § 19(e). That this is a constitution, not a statute, may be meaningful. Perhaps our conceptions and intuitions about the language in a statute and a constitution differ. For example, while a statute acts prospectively and is used to effect change, a constitution’s purpose is to provide stability. I make no claim here that such a difference exists or that such a difference has any effect on the temporal language used in those documents. *But see* Green, *supra* note 85, at 1662-64 (arguing that *now*, along with other indexicals, in the Constitution ties interpretation to the time of enactment).

¹⁸¹ Hotel Emps. & Rest. Emps. Int’l Union v. Davis, 981 P.2d 990, 1004 (Cal. 1999) (quoting CAL. CONST. art. IV, § 19(e)).

¹⁸² ARK. CODE ANN. § 19-12-116(b) (Supp. 2005).

¹⁸³ Ark. Op. Att’y Gen. No. 2002-045, 2002 WL 341111, at *3 (Feb. 15, 2002).

ion also relied on an opinion of the District Court of the Virgin Islands¹⁸⁴ in the case of *Rhymer v. Government of the Virgin Islands*.¹⁸⁵

In *Rhymer*, the court construed a deed for real property that specified that the first opportunity to purchase land “shall go to those persons currently owning and living in superfiary buildings located on Anna’s Fancy or leasing land upon which no buildings have been erected.”¹⁸⁶ The court held that “currently” in the deed references encoding time.¹⁸⁷ Interestingly, the court held that the “[n]ormal[.]” sense of *currently* is “the very time of the utterance or the instrument using the word,” and is equivalent to *presently*.¹⁸⁸ To be fair—although it attached no qualifications to its definition—the court may have been speaking only of language in a deed or contract.¹⁸⁹

The overwhelming weight of authority does not support the broad version of the *Rhymer* court’s assertion. For example, a Massachusetts court refused to extend the *Rhymer* court’s understanding of the word to a state statute, citing the “wholly different” context of that case,¹⁹⁰ as did the Illinois Pollution Control Board.¹⁹¹ Likewise, “currently being offered” in a New York insurance statute was held to reference decoding time.¹⁹² So, too, did “currently employed teacher” in a Kentucky statute¹⁹³ and “currently

¹⁸⁴ *Id.*

¹⁸⁵ 176 F. Supp. 338 (D.V.I. 1959).

¹⁸⁶ *Id.* at 341 (internal quotation marks omitted).

¹⁸⁷ *Id.* (internal quotation marks omitted).

¹⁸⁸ *Id.*

¹⁸⁹ Even that presumption, though, is suspect. In *McDonough v. City of Lowell*, the Supreme Judicial Court of Massachusetts refused to accept the *Rhymer* court’s understanding of *currently*. *McDonough v. City of Lowell*, 214 N.E.2d 50, 52 (Mass. 1966). There, the court looked to an earlier Alabama case. *Id.* (citing *Imperial Motorcar Co. v. Skinner*, 78 So. 641, 642 (Ala. Ct. App. 1918)). The Alabama court interpreted a clause in a contract specifying that “[t]he dealer will sell new Hudson pleasure motorcars of the current models as described in the catalogue of the Hudson Motorcar Company, of Detroit, Mich.” *Imperial Motorcar Co.*, 78 So. at 642 (internal quotation marks omitted). Defendant asserted that “current models” included only those models described in the Hudson Motorcar Company’s catalog at the time of the contract’s execution. *Id.* The court concluded that “current models” instead referred to all those models included in catalogs issued by the Hudson Motorcar Company during the life of the contract. *Id.* For other cases in which courts have analyzed *now* as a term in a contract, see, for example, *White v. Greenwood*, 180 P. 45, 46 (Cal. Dist. Ct. App. 1919), and *Chesapeake Brewing Co. of Baltimore City v. Goldberg*, 69 A. 37, 38 (Md. 1908).

¹⁹⁰ *McDonough*, 214 N.E.2d at 52.

¹⁹¹ *Bi-State Disposal, Inc. v. Ill. Envtl. Prot. Agency*, Case No. PCB 89-49, at 5 (Ill. Pollution Control Bd. June 8, 1989), <http://www.ipcb.state.il.us/documents/dsweb/Get/Document-24579>.

¹⁹² *Warren Pearl Constr. Corp. v. Guardian Life Ins. Co. of Am.*, 639 F. Supp. 2d 371, 381-83 (S.D.N.Y. 2009) (quoting N.Y. INS. LAW § 3221(p)(3)(A)(ii) (McKinney 2006)) (internal quotation marks omitted).

¹⁹³ *Jones v. Bd. of Educ. of Laurel Cnty.*, 295 S.W.3d 120, 122 (Ky. Ct. App. 2008) (quoting KY. REV. STAT. ANN. § 161.740 (West 2006)) (internal quotation marks omitted).

valid identification” in a Colorado statute.¹⁹⁴ Many more examples could be provided.¹⁹⁵ The general question in each case focused on whether a party was “currently” performing some action or holding a certain status at some specific (decoding) time, not on whether *currently* references encoding time or decoding time.¹⁹⁶ Instead, it is accepted that *currently* references decoding time, even though dictionaries generally define *currently* and *now* identically or nearly identically.¹⁹⁷ If the two really are synonyms, and if *currently* is both far more common in statutes and has been interpreted to reference decoding time, then perhaps the default rule for *now* should also be that *now* references decoding time.

Of course, there are counterarguments. First, perhaps *now* and *currently* are not such perfect synonyms, and dictionaries simply fail to note the distinction. At least grammatically, if not semantically, their patterns of usage differ.¹⁹⁸ But if this is the case, this casts doubt on the reliability of any dictionary definition of *now*, as cited in *Carciari*. If definitions of *currently* are incomplete, it follows that so too are definitions of *now*.

Second, perhaps drafters of legislation use *now* and *currently* to different ends: the former usually references encoding time, and the latter usually references decoding time. In interpreting a statute, we might presume that *now* references encoding time, and we might presume that *currently* refer-

¹⁹⁴ *Minh Le v. Colo. Dep’t of Revenue*, 198 P.3d 1247, 1251-52 (Colo. App. 2008) (quoting COLO. CODE REGS. § 47-912(A) (1977)) (internal quotation marks omitted), *cert. denied*, No. 08SC549, 2009 WL 64355 (Colo. Jan. 12, 2009).

¹⁹⁵ See, e.g., *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 853 (5th Cir. 1999) (“currently engaging in the illegal use of drugs” (internal quotation marks omitted)); *Schrader v. Idaho Dep’t of Health and Welfare*, 590 F. Supp. 554, 558 (D. Idaho 1984) (“currently available” (internal quotation marks omitted)), *rev’d on other grounds*, 768 F.2d 1107 (9th Cir. 1985); *In re Beaudoin*, 160 B.R. 25, 29 (Bankr. N.D.N.Y. 1993) (“currently effective” (internal quotation marks omitted)); *Addams-More v. United States*, 81 Fed. Cl. 312, 314 (Fed. Cl. 2008) (“money currently due and owing” (internal quotation marks omitted)), *aff’d on other grounds*, 296 F. App’x 45 (Fed. Cir. 2008); *People v. Norton*, 63 P.3d 339, 344 (Colo. 2003) (“the sentence the defendant is currently serving for the previous offense” (internal quotation marks omitted)); *Krider v. Bryant-Banks*, 682 So. 2d 876, 881 (La. Ct. App. 1996) (“currently available or accessible”); *In re George L.*, 648 N.E.2d 475, 478 (N.Y. 1995) (“currently constitutes a physical danger to himself or others” (internal quotation marks omitted)); *Stilwell v. Dep’t of Revenue*, 811 P.2d 1373, 1375 (Or. 1991) (“current employment of land” (internal quotation marks omitted)); *Commonwealth v. Ahlborn*, 683 A.2d 632, 641 (Pa. Super. Ct. 1996) (“currently serving” (internal quotation marks omitted)).

¹⁹⁶ See, e.g., *Zenor*, 176 F.3d at 855-56 (internal quotation marks omitted).

¹⁹⁷ See *supra* notes 192-95.

¹⁹⁸ To the question “When are you leaving?,” *now* seems an appropriate answer, while *currently* seems strange. But this usage of *now* is unlikely to arise in statutory language so that their patterns of usage in statutes may actually coincide. The distinction between *now* and *then* even has an analog: *currently* versus *then currently*. Both appear in statutes. See, e.g., 3 U.S.C. § 107 (2006). That this almost never reveals itself in litigation—that *currently* (which seems to be far more common than *now* in statutes) is nearly always instinctively taken to reference decoding time, despite the existence of *then currently*—while *now* is instead the subject of litigation is in itself interesting.

ences decoding time. Although possible, this rule is one that has never been expressly noted by any court or commentator. Compare the following:

[1] The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction¹⁹⁹

[2] The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe [currently] under Federal jurisdiction²⁰⁰

Does this single change from *now* in (1) to *currently* in (2) make a difference? Should it as a matter of law?

2. “Draftsman’s Time” Versus “Statute Time”

The type of language we normally encounter in statutes strengthens the argument in favor of understanding *now* to reference decoding time. In George Coode’s words, we hold a “supposition of *the law being always speaking*.”²⁰¹ For this reason, the use of *now* in the SSA and uses of *currently* seem perfectly unremarkable. If the law is always speaking, then *now*, with the statute itself, moves through time and references whatever moment at which it is interpreted.

Bowers distinguishes “draftsman’s [time]” from “statute-time.”²⁰² He explains the distinction as follows:

In normal drafting, all provisions are “really” future as far as the draftsman is concerned: in retroactive drafting, commencement is past, so provisions are both past and future to the draftsman. However, a statute, not being someone’s cry in the night, is a declaration of a new generic state of affairs which includes its date of effectiveness, and once declared, exists independently of the draftsman and of his dynamic time, in that what might be past or future for him is timeless for the text and ever-present for each reader at the point of reading. A succession of readers’ zero-points constitutes the eternal presentness of the text. Clearly then, the expression of time from the draftsman’s point of view is irrelevant to the meaning of the statute and quite inappropriate for the expression of its eternal declaration.²⁰³

If a statute is timeless and the draftsman’s time is irrelevant to its meaning, then *now* should not reference encoding time.²⁰⁴ Encoding time is, by defi-

¹⁹⁹ 25 U.S.C. § 479 (2006).

²⁰⁰ Adapted from *id.*

²⁰¹ GEORGE COODE, ON LEGISLATIVE EXPRESSION: OR, THE LANGUAGE OF THE WRITTEN LAW 23 (1845). Compare this with one traditional explanation from the law of wills, that “a will is considered to be republished each day of its existence.” *Jacobs v. Pinkston*, 121 P.2d 996, 997 (Okla. 1942).

²⁰² FREDERICK BOWERS, LINGUISTIC ASPECTS OF LEGISLATIVE EXPRESSION 243 (1989).

²⁰³ *Id.* at 244.

²⁰⁴ *Id.* at 246 (“It is unfortunate that the draftsman’s point of time is given some respectability by the implicit authorization of deictic terms such as *now* and *next* in the Interpretation Act with their

inition, “draftsman’s time,” and thus, in the realm of the statute, can have no bearing on a statute’s meaning.²⁰⁵

C. *Encoding Time or Decoding Time?*

Having explored the arguments for both sides, who should win? Unsatisfying as it may seem, there is some truth in both arguments. Or there is at least substantial confusion, which may explain why the New York court in *Moskowitz* was so willing to go against a statutorily mandated interpretive rule.²⁰⁶ Either way, reasonable drafters, legislators, or interpreters could reasonably come to either conclusion. This being the case, neither alone truly represents the plain meaning of *now*.

Perhaps textual context could disambiguate *now*. But peculiarly, the ambiguity of *now* is not resolved by looking to the subject matter of the statute. The textual canon of *noscitur a sociis* (“it is known by its companions”) counsels that “a word is given meaning by those around it.”²⁰⁷ Its application is quite commonsensical. Comprehension in interpersonal communication probably relies in great part on such a process. As Justice Scalia has explained: “If you tell me, ‘I took the boat out on the bay,’ I understand ‘bay’ to mean one thing; if you tell me, ‘I put the saddle on the bay,’ I understand it to mean something else.”²⁰⁸ Boats have to do with water, so bay in the first sentence must mean body of water. Saddles have to do with horses, so bay in the second sentence must mean horse.

But *now* is different from a word like *bay*. *Bay*, unlike *now*, has substantial semantic content, which the surrounding language of a statute can clarify. It is often said that language is inherently contextual. But context internal to a statute often obviates the interpretation of an otherwise ambiguous word. In Justice Scalia’s example, a statute dealing with horses

definition as ‘having reference to the time when the enactment was enacted.’” (quoting Interpretation Act, R.S.C., ch. I-21 (1985)).

²⁰⁵ One commentator has raised an argument based on the statement in the Dictionary Act, 1 U.S.C. § 1 (2006), that “words used in the present tense include the future as well as the present.” Joseph E. Bernstein, *What About the Dictionary Act?*, INDIAN COUNTRY TODAY, Mar. 6, 2009, <http://www.indiancountrytoday.com/opinion/40844022.html> (quoting 1 U.S.C. § 1) (internal quotation marks omitted). *But see* Rob Capriccioso, *Carcieri Fix, Legal or Legislative, Expected to Be Complicated*, INDIAN COUNTRY TODAY, Mar. 13, 2009, <http://www.indiancountrytoday.com/politics/41205772.html>. If this statement in the Dictionary Act is, in fact, a way of saying what Bowers says here—that statutes are “timeless”—then there is perhaps something to Bernstein’s argument. If statutes are said to be in the “present” tense, that must mean the *interpreter’s* present, not the enactor’s present. Why the presentness of a verb should reference the interpreter’s present, while the presentness of an adverb (*now*) should reference the enactor’s present, in the Supreme Court’s opinion, is an interesting question.

²⁰⁶ *See Moskowitz v. LaGuardia*, 48 N.Y.S.2d 174, 178 (Spec. Term 1944).

²⁰⁷ Scalia, *supra* note 5, at 26 (first internal quotation marks omitted).

²⁰⁸ *Id.*

probably means something equine by the word bay, not something aquatic. It would be odd to interpret a statute reading “all horses with bay or chestnut hair” to reference horses covered with bodies of water and actual chestnuts.

But what can the words surrounding *now* tell about its correct interpretation? First, there are not several meanings of a word at issue. Encoding time and decoding time have the same meaning, with only a difference in use or application. So unless a statute explicitly states something along the lines of “as of the date of enactment,” the surrounding language can tell nothing about whether encoding time or decoding was intended. And second, unlike *bay*, *now* references some parameter of the utterance. That context is always external to the language of an individual statute. The language of a statute taken alone cannot provide any guide to interpreting *now*.

In the end, however, statutes may have *no* canonical temporality. The form of the statute tells very little as to how to interpret *now*. Intuition tugs both ways as to whether encoding time or decoding time best manifests understandings of legislative expression. So where the conventions surrounding the answering machine dictate its interpretation, and the conventions surrounding wills dictate theirs, there seems to be no readily accessible convention by which to interpret the temporal pragmatics of statutes taken as a whole.

V. PREVIOUS CONVERSATIONS BETWEEN THE UTTERER AND THE AUDIENCE: PREVIOUS INTERPRETATIONS OF *NOW*

Legislative expression (i.e., the statute) can be conceptualized as a form of conversation between a legislature and its intended audience (e.g., courts, agencies, the public, etc.).²⁰⁹ The back-and-forth between legislature and interpreter forms a body of prior conversations that these conversational participants look to in determining a word's or a provision's meaning. In determining the meaning of *now* in legislative conversation, then, we look to how *now* has been used and understood in earlier conversations—preexisting statutes, together with the interpretations they have been given by courts, agencies, and others. With an answering machine, for example, there may arise a general societal convention that *now* references decoding time. Notwithstanding this general convention, two individuals, given their interactions, may come to a different understanding—that *now* should instead reference encoding time. In legislative expression, the specific conventions of the conversational partners (i.e., the legislature, courts, agencies) are largely coterminous with more general conventions because of the

²⁰⁹ M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373, 374, 386 (1985).

limited number of active participants and because of well-defined institutional roles and norms.

There are only a small number of “conversations” directly discussing *now*’s interpretation, and they tug in different directions, so previous conversations between Congress and the courts are indeterminate on this point. The First Circuit’s opinion in *Carcieri* makes this same observation: some previous conversations understood *now* in a statute to reference encoding time, while others understood *now* in a statute to reference decoding time, so there was no consensus on which should control.²¹⁰

But beyond conversations regarding *now* specifically, any statutory interpretation takes place in a broader context, one in which certain non-textual, “conversational” norms have developed to guide or direct interpretation and, in a sense, establish institutional meaning (or determine who decides meaning in the absence of certainty). This Part examines two such norms: *Chevron* deference and substantive canons of construction.

A. *Chevron Deference*

Since at least 1984, the Court has held that where laws grant authority to administrative agencies to apply the law, the agencies have voice in the statutory conversation.²¹¹ In the familiar *Chevron* two-step formulation, a court first asks “whether Congress has directly spoken to the precise question at issue.”²¹² If Congress’s intent is “clear,” the court must “give effect to the unambiguously expressed intent of Congress.”²¹³ But if Congress “has not directly addressed the precise question at issue,” and an administrative interpretation exists, the court “does not simply impose its own construction on the statute.”²¹⁴ Instead, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”²¹⁵

In *Carcieri*, an administrative interpretation existed: the Secretary had interpreted the IRA to authorize him to take land into trust on behalf of

²¹⁰ See *supra* Part I.B.

²¹¹ In the earlier case of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Court held that an agency’s interpretations,

while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140.

²¹² *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

²¹³ *Id.* at 842-43.

²¹⁴ *Id.* at 843.

²¹⁵ *Id.*

tribes “now” under federal jurisdiction—that is, at the time the land was to be taken into trust.²¹⁶ Finding the text ambiguous, both the First Circuit and Justice Breyer considered the applicability of the *Chevron* doctrine. The First Circuit found the text of the statute “sufficiently ambiguous in its use of the term ‘now’ that the Secretary has, under the *Chevron* doctrine, authority to construe the Act.”²¹⁷ Justice Breyer disagreed:

The scope of the word “now” raises an interpretive question of considerable importance; the provision’s legislative history makes clear that Congress focused directly upon that language, believing it definitively resolved a specific underlying difficulty; and nothing in that history indicates that Congress believed departmental expertise should subsequently play a role in fixing the temporal reference of the word “now.” These circumstances indicate that Congress did not intend to delegate interpretive authority to the Department. Consequently, its interpretation is not entitled to *Chevron* deference, despite linguistic ambiguity.²¹⁸

One version of the *Chevron* rule is simply put: “If Congress has . . . left a gap for the agency to fill, there is . . . delegation of authority to the agency to elucidate a specific provision of the statute”²¹⁹ If the emphasis of *Chevron* is the identification of gaps left open, rather than the identification of true ambiguity, then Breyer is undoubtedly correct in *Carcieri* that “Congress did not intend to delegate interpretive authority to the Department.”²²⁰

Ambiguity is ambiguous. At the very least, it is an overly broad categorization encompassing many phenomena, among them true ambiguity, vagueness, and generality.²²¹ Ambiguity and vagueness, in particular, are often lumped together, though they present distinct interpretive challenges.²²² In Professor Reed Dickerson’s reckoning, whereas ambiguity is a “disease of language” in law, vagueness and generality, while sometimes diseases, are often “positive benefit[s].”²²³ Ambiguity is “an ‘either-or’ challenge”; an ambiguous word means (a), or it means (b).²²⁴ Vagueness, on the other hand, is “the degree to which . . . language is uncertain in its re-

²¹⁶ *Carcieri v. Kempthorne (Carcieri II)*, 497 F.3d 15, 20 (1st Cir. 2007) (en banc), *rev’d sub nom. Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

²¹⁷ *Id.* at 22.

²¹⁸ *Carcieri v. Salazar (Carcieri III)*, 129 S. Ct. 1058, 1069 (2009) (Breyer, J., concurring).

²¹⁹ *Chevron*, 467 U.S. at 843-44 (emphasis added).

²²⁰ *Carcieri III*, 129 S. Ct. at 1069 (Breyer, J., concurring).

²²¹ REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 43 (1975); *see also* George Lakoff, *A Note on Vagueness and Ambiguity*, in 1 *LINGUISTIC INQUIRY* 357, 357 (1970) (providing a test by which to distinguish ambiguity from vagueness); Qiao Zhang, *Fuzziness – Vagueness – Generality – Ambiguity*, 29 *J. PRAGMATICS* 13, 13-14 (1998) (adding a fourth category, fuzziness, as in “a few apples”).

²²² DICKERSON, *supra* note 221, at 48 (“It is unfortunate that many lawyers persist in using the word ‘ambiguity’ to include vagueness.”).

²²³ *Id.* at 48, 52.

²²⁴ *Id.* at 49.

spective applications to a number of particulars.”²²⁵ It “lies in marginal questions of degree,” where the edges of categorizations are blurred.²²⁶ Vagueness, in Professor H. L. A. Hart’s words, lies in the “penumbra of debatable cases.”²²⁷ We understand a prohibition on vehicles in the park to cover automobiles, but what about bicycles, airplanes, and toy automobiles?²²⁸

Where there is vagueness, there are line-drawing problems. And where there are line-drawing problems, someone must draw those lines. If Congress has not explicitly drawn such lines, someone still must do so—either courts or agencies. Under *Chevron* and its progeny, courts defer to agency interpretations under certain circumstances, assuming the matter to have been delegated to the agency by Congress.²²⁹

In *Carcieri*, though—or in any statute where *now* is used—there are no lines left to be drawn or gaps left to be filled. The answer does not “lie in the marginal questions of degree.”²³⁰ Rather, *now* presents an either-or challenge: it references one of two mutually exclusive concepts.²³¹ It references either the date of enactment or the date the statute is invoked in a particular case. *Now* is not a categorization of indeterminate scope in need of line-drawing. It is thus unlikely that *now* in the IRA was left intentionally ambiguous. In cases of vagueness, the legislators at least agree as to the extremes (the core elements of each category) but disagree as to the scope of those categories. But here, where *now* means either of two mutually exclusive things and the scope of the legislation differs greatly under the two interpretations, there would realistically be no agreement at all if the ambiguity were intentional—a strange compromise, indeed.

Congress almost certainly had one reference in mind when it chose to use *now* in the IRA. *Now* was included purposefully; that much seems obvious from the colloquy cited by the First Circuit.²³² And it is hard to imagine why Congress would intentionally leave the reference of *now* up to an agency. If the reference of *now* was purposely left unclear, then there was no agreement at all, only an agreement that a particular three-letter se-

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ H. L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

²²⁸ *Id.*

²²⁹ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

²³⁰ *See supra* note 226.

²³¹ Granted, there is of course a continuum of time between encoding time and any decoding time. At some point, each of those individual instances could be called *now*, but at any one time, *now* cannot reference all of those points simultaneously. In any particular case, *now* references either encoding time (i.e., the date of enactment) or a single decoding time (i.e., the date of invocation).

²³² *See Carcieri v. Kempthorne (Carcieri II)*, 497 F.3d 15, 28 (1st Cir. 2007) (en banc), *rev'd sub nom. Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

quence, devoid of definite signification, should be inserted into the statute—an odd notion, indeed.

Consider this hypothetical. Congress quickly passes a statute authorizing the Secretary of Equine and Aquatic Affairs to “reasonably regulate bays.” By “bay,” we could understand Congress to mean one of three things: (1) bay-colored horses, (2) certain bodies of water, or (3) both bay-colored horses and certain bodies of water. We can easily discard the third option, as that would imply that Congress purposely relies on double entendres when it legislates. So then we know that Congress intended either the first or the second option (but not both). It seems odd that Congress would allow the Secretary to regulate “bays” and yet leave it up to the Secretary to choose whether she would prefer to regulate bay-colored horses or certain bodies of water. Congress must have meant one or the other, and not to delegate interpretive authority to the Secretary. *Now* in the IRA presents the same problem.

But that some definite reference must exist does not mean that reference is clear from the text standing in isolation. While Justice Thomas’s majority opinion found *now*’s reference to be clear, Justice Breyer in his concurrence and the First Circuit’s opinion note this lack of clarity. Both of the interpretations considered by the First Circuit assume *now* to be some form of limitation. But whether it serves as a “temporal” or a “status” limitation is less clear.²³³ Congress must have meant to reference either encoding time or decoding time. But Congress perhaps never doubted the certainty of the word. And why should they have? *Now* appears deceptively insignificant. It is so small and common a word, and its meaning so simple, that there is no cause to stop and consider it. *Now* means *now*. The ambiguities of deceptively simple words like *and* and *or* have been noted.²³⁴ *Now* may be a member of the same class. It is perhaps possible that some legislators thought *now* clearly referenced encoding time while others thought it clearly referenced decoding time. But if this is the case, an even greater interpretive problem arises: what, then, was congressional intent?

But just because this ambiguity exists does not mean that any gap exists for the agency to fill or that any lines exist for the agency to draw. As Justice Breyer put it, “nothing . . . indicates that Congress believed departmental expertise should subsequently play a role in fixing the temporal reference of the word ‘now.’ . . . Congress did not intend to delegate interpretive authority to the Department.”²³⁵ Holding *Chevron* deference inapplicable in *Carcieri* seems mostly consistent with Justice Breyer’s prior opin-

²³³ *Id.*

²³⁴ See generally LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 45-55 (1993); Kenneth A. Adams & Alan S. Kaye, *Revisiting the Ambiguity of “And” and “Or” in Legal Drafting*, 80 ST. JOHN’S L. REV. 1167 (2006); Maurice B. Kirk, *Legal Drafting: The Ambiguity of “And” and “Or”*, 2 TEX. TECH L. REV. 235 (1971).

²³⁵ *Carcieri v. Salazar (Carcieri III)*, 129 S. Ct. 1058, 1069 (2009) (Breyer, J., concurring).

ions. Dissenting in *Christensen v. Harris County*,²³⁶ for example, Justice Breyer found *Chevron* deference “inapplicable” where “one has doubt that Congress actually intended to delegate interpretive authority to the agency,” in which case the framework of *Skidmore v. Swift & Co.*²³⁷ should apply instead.²³⁸ *Skidmore* held that interpretive questions should be resolved by judges, not by agencies, and that an agency’s interpretation is only persuasive so far as it is well-reasoned and “consisten[t] with earlier and later pronouncements.”²³⁹ Justice Breyer’s conclusion in *Christensen* as to the inapplicability of *Chevron* was cited approvingly in *United States v. Mead Corp.*²⁴⁰ by Justice Souter’s majority opinion.²⁴¹ In *Carcieri*, because Congress must have meant something specific by *now* and could not have intended to delegate the determination of that meaning to the Department, *Chevron* deference to the Department’s interpretation is inapplicable.

But this is not always how the Court has treated (true) ambiguity under *Chevron*. On this point, cases interpreting dangling modifiers are particularly apt.²⁴² True, such cases interpret syntactic ambiguity, not semantic ambiguity (as in *Carcieri*), but the interpretive problem is much the same. In *Young v. Community Nutrition Institute*,²⁴³ for example, the Court deferred to an agency’s interpretation of a truly ambiguous statute where legislative history failed to elucidate.²⁴⁴ Justice Scalia, dissenting in *Mead*, recalled according the agency *Chevron* deference, “as unquestionably we should have.”²⁴⁵

Carcieri can thus be seen as a “*Chevron* Step Zero” case; that is, an argument over “the initial inquiry into whether the *Chevron* framework applies at all.”²⁴⁶ Under Justice Thomas’s majority opinion, the Secretary’s interpretation fails under Step One. Under Justice Breyer’s concurrence, the Secretary’s interpretation is not entitled to *Chevron* deference under Step Zero. Though Justice Breyer found *now* in isolation to be ambiguous, he found the legislative history to be conclusive, so he never had to decide what path to take where true ambiguity exists *and* where legislative history provides no answer. Viewed in this light, then, the First Circuit seems to

²³⁶ 529 U.S. 576 (2000).

²³⁷ 323 U.S. 134 (1944).

²³⁸ *Christensen*, 529 U.S. at 596-97 (Breyer, J., dissenting); see also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 213 (2006).

²³⁹ *Skidmore*, 323 U.S. at 140.

²⁴⁰ 533 U.S. 218 (2001).

²⁴¹ *Id.* at 229-30.

²⁴² See *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 980-81 (1986) (“As enemies of the dangling participle well know, the English language does not always force a writer to specify which of two possible objects is the one to which a modifying phrase relates.”).

²⁴³ 476 U.S. 974 (1986).

²⁴⁴ *Id.* at 981-83; see also Sunstein, *supra* note 238, at 208.

²⁴⁵ *Mead*, 533 U.S. at 253 (Scalia, J., dissenting).

²⁴⁶ Sunstein, *supra* note 238, at 191.

follow the logic of *Young*, deferring to the Department after finding: (a) true ambiguity; (b) the Secretary's interpretation to be reasonable; and (c) legislative history to be inconclusive. Either the court could fathom a guess, or it could defer to the agency's guess; the First Circuit chose the latter.

B. *Substantive Canons of Construction*

Substantive canons can, in theory, point to an interpretation by placing a thumb on the scale in favor of one interpretation or another. For example, a state law presumption against special legislation has at least twice worked to supply *now* with an intended context of interpretation. First, in an Oklahoma case, a court was presented with a statute governing a municipal property tax for "library purposes," which "shall not apply to any city except those which *now* have an established library."²⁴⁷ Protestant complained that the Act was unconstitutional and void because this proviso violated the state constitutional guarantee that "[l]aws of a general nature shall have a uniform operation throughout the state, and where a general law can be made applicable no special law shall be enacted."²⁴⁸ To preserve the statute, the court held that *now* referenced decoding time, not encoding time, giving the statute "uniform operation throughout the state" by not excepting only those cities which had an established library at the time of enactment.²⁴⁹

²⁴⁷ Protest of Chi., R. I. & P. Ry. Co., 279 P. 319, 321 (Okla. 1929) (emphasis added) (quoting OKLA. COMP. ST. 1921, § 9528) (internal quotation marks omitted).

²⁴⁸ *Id.* at 321-22 (quoting OKLA. CONST. art. V, § 59) (internal quotation marks omitted).

²⁴⁹ *Id.* at 323-25. In fact, the statute includes another instance of *now*: "in addition to the maximum levy for current expenses now provided by law." *Id.* at 321 (quoting OKLA. COMP. ST. 1921, § 9528) (internal quotation marks omitted). That instance goes without interpretation, but if it in fact references encoding time, then *now* receives different interpretations in the same statute. *See id.* Some form of intratextual argument appears in *Carcieri*. *See Carcieri v. Salazar (Carcieri III)*, 129 S. Ct. 1058, 1065 (2009). The IRA elsewhere uses the phrase *now or hereafter*. *See* 25 U.S.C. § 468 (2006) ("[T]he geographic boundaries of any Indian reservation now existing or established hereafter . . ."); 25 U.S.C. § 472 (2006) ("Indians who may be appointed . . . to the various positions maintained, now or hereafter, by the Indian Office . . ."). Justice Thomas writes:

Congress' use of the word "now" in this provision, without the accompanying phrase "or hereafter," thus provides further textual support for the conclusion that the term refers solely to events contemporaneous with the Act's enactment. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)).

Carcieri III, 129 S. Ct. at 1065. Here, the Court makes two assumptions. First, *now* and *now or hereafter* must be opposites. In fact, *now* can represent only a single point in time, whereas *now or hereafter* can represent either a point or a ray. *See, e.g., Atl. City v. Bd. of Comm'rs*, 351 A.2d 795, 798 (N.J. Super. Ct. Law Div. 1976) (interpreting "now or hereafter" as a point, referring only to the time of the statute's application, and not as a ray extending from the date of enactment infinitely into the future (internal quotation marks omitted)). And wherever there is a *now*, there is always some time that follows that *now—hereafter*. Second, the Court assumes that if *now* references encoding time in one section of a

Then, in *Loboda v. Township of Clark*,²⁵⁰ the Supreme Court of New Jersey construed *now* in “nothing in this section shall be construed to abolish the office or terminate the term of office . . . of any official or employee *now* protected by any tenure of office law” to reference decoding time because to hold otherwise would be to “question the statute on the grounds that it constitutes special legislation in violation of the New Jersey Constitution.”²⁵¹

In both of these cases, it is possible that the state legislatures intended the legislation to be special legislation and, thus, that *now* referenced encoding time. In the absence of affirmative evidence, however, the courts found the canon of constitutional avoidance to serve as the best stand-in for legislative intent.

But the choice will not always be between a constitutional and an unconstitutional interpretation. In *Carcieri*, leaving aside the issue of the IRA’s constitutionality—though the constitutionality of section 465 has been questioned on nondelegation grounds²⁵²—interpretive canons could be applied to hold that *now* references either encoding or decoding time.²⁵³ Applying the “Indian canon of construction”²⁵⁴ means that the context of

statute, all other instances of *now* must also reference encoding time. But, given the apparent confusion surrounding the reference of *now* in statutory language, if in neither instance did anyone think that *now* was uncertain (it *clearly* meant encoding time in one section but *clearly* meant decoding time in another), then it is entirely possible that one instance of *now* could reference encoding time while another references decoding time. Defendants in *Carcieri* presented their own intratextual theory: section 479 also, in close proximity to *now*, references an absolute date. See *Carcieri v. Kempthorne (Carcieri II)*, 497 F.3d 15, 26 (1st Cir. 2007) (en banc), *rev’d sub nom. Carcieri v. Salazar*, 129 S. Ct. 1058 (2009). The preceding code section expressly references “June 18, 1934,” the date of enactment. 25 U.S.C. § 478b (2006). On this argument of defendants’, the First Circuit found context inconclusive and turned to legislative history and the Secretary’s interpretation. *Carcieri II*, 497 F.3d at 28-34. Either way, an intratextualist approach to such a common word—especially one that is the victim of such confusion—may bear out a weakness of intratextualism, that such an approach may be “cabalistic.” Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 799 (1999) (“Carried to extremes, intratextualism may lead to readings that are too clever by half—cabalistic overreadings conjuring up patterns that were not specifically intended and that are upon deep reflection not truly sound but merely cute (if pro is the opposite of con, what is the opposite of progress?) or mystical.”). Intratextualism is perhaps at its weakest where applied to words so bereft of semantic heft (would you apply an intratextual approach to *and* or *he*?) or to words so dependent on the context of the utterance (necessarily external to the actual text of the statute).

²⁵⁰ 193 A.2d 97 (N.J. 1963).

²⁵¹ *Id.* at 100 (second emphasis omitted) (quoting N.J. STAT. ANN. § 40:69A-207) (first internal quotation marks omitted).

²⁵² See *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 34-40 (D.C. Cir. 2008) (Brown, J., dissenting), *cert. denied*, 129 S. Ct. 1002 (2009).

²⁵³ This Comment does not suggest that the Justices of the Supreme Court or the judges of the District and Circuit Courts applied any of these canons of construction.

²⁵⁴ See, e.g., *Chickasaw Nation v. United States*, 534 U.S. 84, 100 (2001) (O’Connor, J., dissenting) (“This Court has repeatedly held that, when these two canons conflict, the Indian canon predomi-

interpretation of *now* in section 479 is decoding time. Applying, instead, a canon of construction protecting federalism²⁵⁵ or state sovereignty²⁵⁶ means that the context of interpretation of *now* in section 479 is encoding time. But such an approach only emphasizes the problems underlying substantive canons of construction, as addressed in Professor Karl Llewellyn's well-known thrust and parry.²⁵⁷ In the end, "there are so many of them that often one finds canons tugging both ways in the same case, and they are very difficult to weigh against each other."²⁵⁸

VI. EACH *NOW* IS AN INDIVIDUAL: LEGISLATIVE HISTORY, PURPOSIVISM, AND PRAGMATISM

Unlike answering machines, then, it seems the statute as a medium of communication has no canonical temporality and so offers up no easy answer to this interpretive quandary. *Now* has no single plain meaning throughout statutory language. A statute's text is generally incapable of providing any solution. This Part looks to tools beyond individual statutory texts and the form of the statute as a means of communication. First, it revisits Predelli's theory and intentionalism, examining the utterer's subjective intent as manifest in legislative history. Second, it returns to Romdenh-Romluc and examines the audience's beliefs, interests, and history, translating this to statutory interpretation as purposivism and pragmatism. These two discussions have two things in common. First, both look to individual instances of *now*. Second, they move beyond the text.

A. *Revisiting Intentionalism: The Use of Legislative History*

The best example of the use of legislative history in interpreting *now* is *Carcieri* itself. Plaintiffs alleged at all three levels of litigation that the leg-

nates."); *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 766 (1985) (explaining that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit").

²⁵⁵ See Eskridge & Frickey, *supra* note 113, at 373 (describing "the longstanding canon of interpretation that federal statutes will not be interpreted to diminish tribal sovereignty absent a clear statement to that effect").

²⁵⁶ See *Carcieri v. Kempthorne (Carcieri II)*, 497 F.3d 15, 20 (1st Cir. 2007) (en banc) ("The case is in many ways a proxy for the State's larger concerns about its sovereignty vis-à-vis federal and tribal control over lands within the state."), *rev'd sub nom. Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

²⁵⁷ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950); see also Scalia, *supra* note 5, at 26-29. But see Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 452 (1989) ("[Llewellyn's] claim of indeterminacy and mutual contradiction was greatly overstated; some of the canons actually influenced judicial behavior insofar as they reflected background norms that helped to give meaning to statutory words or to resolve hard cases.").

²⁵⁸ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 282 (1990).

islative history of section 479 evidenced that Congress meant “Indian” to refer only to tribes federally recognized on or before the date of enactment.²⁵⁹ Defendants, of course, argued the opposite.²⁶⁰ The district court examined legislative history in a single footnote, largely eschewing its use after finding “no ambiguity on the face of the statute.”²⁶¹ The majority opinion of the Supreme Court followed suit (though, of course, it reached the opposite conclusion).²⁶² The First Circuit did look to legislative history, but it found that history to be inconclusive.²⁶³ Justice Breyer also looked to legislative history; he found it to favor plaintiff’s interpretation.²⁶⁴ This split of opinion is perhaps not unusual and may serve as fodder for those who would avoid legislative history entirely.²⁶⁵ That said, eschewing all other interpretive theories in favor of plain meaning, at least in this case, cuts the interpretive process short. Moreover, because a plain meaning for *now* in statutory language is wanting, relying only on the purported plain meaning can lead to similar fodder for the other side, as opinions split over what *now* plainly means.

B. *Audience’s Beliefs, Interests, and History: Purposivism and Pragmatism*

In statutory interpretation, the audience’s beliefs, interests, and history have the potential to play two interpretive roles: (1) interpreting the statute in light of what the audience supposes the statute’s purpose to be (purposivism); or (2) interpreting the statute in light of what the audience supposes will yield the best possible outcome for society (pragmatism). The two are, of course, wildly different theories. But because they both rely on the audience’s beliefs, interests, and history, this section analyzes the two together.

One argument against purposive interpretation is that statutes are often the result of compromise and purposive interpretation may undo that compromise.²⁶⁶ Because *now* presents an issue of ambiguity, not one of vague-

²⁵⁹ *Carcieri v. Norton (Carcieri I)*, 290 F. Supp. 2d 167, 181 n.14 (D.R.I. 2003), *aff’d sub nom. Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007) (en banc), *rev’d sub nom. Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

²⁶⁰ *See id.*

²⁶¹ *Id.*

²⁶² *Carcieri v. Salazar (Carcieri III)*, 129 S. Ct. 1058, 1068 (2009).

²⁶³ *Carcieri v. Kempthorne (Carcieri II)*, 497 F.3d 15, 28-30 (1st Cir. 2007) (en banc), *rev’d sub nom. Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

²⁶⁴ *Carcieri III*, 129 S. Ct. at 1069 (Breyer, J., concurring).

²⁶⁵ Because legislative history necessarily varies from statute to statute, no general principles can be drawn from its use as to the interpretation of *now*. And of course, if legislative history is available, whether one uses it depends on one’s own feelings toward it.

²⁶⁶ POSNER, *supra* note 258, at 276-77.

ness or generality,²⁶⁷ it is highly unlikely that the uncertainty of *now* is the result of any compromise. A statute that references encoding time and a statute, worded identically, that references decoding time are very nearly two distinct statutes. The two statutes would address two different sets of objects in the real world—one is a closed set frozen at the time of enactment, the other an open and dynamic set that includes any and all objects satisfying some criterion at the time the statute is invoked. This would be an odd compromise between competing factions, to agree that a certain set of tribes should be covered by the IRA, but to leave up to the interpreter whether that should be the set of all tribes in 1934 or the set of all tribes in existence whenever the statute is invoked. In the case of a statute containing *now*, there is no more danger of undoing the legislative compromise in choosing between the two warring interpretations by a purposivist approach than by any other approach. If it is still a guess, it is at least an educated guess and offers a tool where textual tools are inadequate and where legislative history may be unavailing.²⁶⁸

Revisiting *Difford*, why does it only seem logical that *now* in the amendment to the SSA references decoding time? A determination that an individual is no longer entitled to disability benefits because he was able to engage in substantial gainful activity at the time of the amendment's enactment²⁶⁹ seems illogical. Some active policy decision must be drawn to reach this conclusion. But because any competent and attentive audience would draw this conclusion, it must be so.

In a case like *Carcieri*, however, where either interpretation may be justifiable, competent and attentive audience members may reasonably disagree.²⁷⁰ *Now* itself gives no clue to its reference. If a court finds the legislative history unhelpful, or its use distasteful, it may presume that *now* references encoding time or decoding time, but only at the risk of choosing an interpretation not in line with actual congressional intent or purpose and

²⁶⁷ See Reed Dickerson, *The Diseases of Legislative Language*, 1 HARV. J. ON LEGIS. 5, 10-13 (1964).

²⁶⁸ See, e.g., *People v. Reese*, 109 N.W.2d 868, 871 (Mich. 1961) ("Now. An adverb which may be employed in any of several senses. It is said to have a fixed and definite meaning, and generally it implies the present time. However, the word does not in all circumstances necessarily mean at the present time, and the intent with which the term is used as gathered from the context determines its meaning. The word is sometimes used, not with reference to the moment of speaking, but to a time contemporaneous with something done." (internal quotation marks omitted)); *Governmental Research Bureau v. St. Louis Cnty.*, 104 N.W.2d 411, 413-15 (Minn. 1960); *Moskowitz v. LaGuardia*, 48 N.Y.S.2d 174, 178-80 (Spec. Term 1944).

²⁶⁹ See *Difford v. Sec'y of Health & Human Servs.*, 910 F.2d 1316, 1320 (6th Cir. 1990).

²⁷⁰ If the relevant date in *Carcieri* is 1934, the question arises whether the Act covers those hundred or so tribes and bands terminated by statute in the 1950s and 1960s. See WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 61-64 (5th ed. 2009).

perhaps less beneficial than the alternative interpretation.²⁷¹ Where a judge would simply hold one way or the other, based on a presumption that *now* ordinarily means one thing or the other, he

does so at a high price: that of refusing to take seriously the communicative intent, and broader purposes alike, of the legislators in the many cases in which that intent can be discerned, and of refusing to play a constructive role in the development of sound public policies in the remaining cases.²⁷²

Thus, however unsatisfying such a decision may be to textualists (or to intentionalists, where legislative history is unhelpful), because looking first to text and second to legislative history has proven unsuccessful, only a purposivist interpretation appears to be to some degree principled while still taking seriously the legislators' communicative intent.

Perhaps a numbers game separates *Difford* from *Carcieri*. At some point, all those alive at the time of the enactment of the amendment to the SSA will have died, and the provision of the SSA will no longer be relevant. In essence, it will have been "repealed" by changed circumstances. In contrast, tribes are capable of existing in perpetuity (absent, for example, termination of federal recognition). Because some tribes in existence in 1934, at the time of the IRA's enactment, are still in existence and could theoretically exist forever, the IRA will not so easily become ineffective with the passage of time. Therefore, it would have been just as reasonable to enact a perpetual statute covering tribes in existence in 1934 as one covering all tribes recognized by the federal government at the time the statute is invoked. Because either interpretation is reasonable, to decide between these two interpretations, courts must decide on the purpose of the legislation. If it is correct that there is no plain meaning of *now* in statutory language, then a decision resting on the word's plain meaning decision may actually be a purposivist decision (or, where the interpreter fails to look at indicators of purpose, a pragmatic one).

CONCLUSION

All language is contextual to some degree, and there is no way to wholly eradicate ambiguity from a text, statutory or otherwise. But where specific words are known to cause interpretive problems, for which there is no easy resolution, one does best to avoid such words. *Now* is such a word.

²⁷¹ See *Moskowitz*, 48 N.Y.S.2d at 178. For example, a court found that the phrase "now hav[ing] jurisdiction" in a statute referenced decoding time. *Pierce v. Pierce*, 287 N.W.2d 879, 882 (Iowa 1980) (quoting IOWA CODE § 598A.14 (1979)) (internal quotation marks omitted). But there is nothing magically decoding about "now having jurisdiction," interpreted in other statutes to reference encoding time. See, e.g., *Caha v. United States*, 152 U.S. 211, 214-15 (1894).

²⁷² POSNER, *supra* note 258, at 278.

Currently may be another. Any reference to a specific date, “the date of enactment,” or “the time when this statute is applied” is preferable.

That said, statutes employing *now* exist, and where they come before a court, they must be construed. Whether in a given case the courts gave *now* that interpretation intended by the enacting legislature is a mystery. This is a decidedly unsatisfying result, especially in a judicial setting, which requires that a court pick one interpretation over the other.

There are two possible paths, then: either presume that *now* references either encoding time or decoding time, or move beyond plain meaning and, if legislative history is inconclusive, make some substantive judgment about which interpretation better fits the statute’s purpose or is better for society. Applying a presumption, where it is not obvious such a presumption is warranted, may come at a hefty cost. Choosing encoding time where decoding time was intended changes the entire scope of a statute, rigidly limiting its application. Choosing decoding time where encoding time was intended greatly broadens its reach. While there may be no perfect answer to interpreting *now*, the best solution seems to be for a court to engage in substantive judging. *Now*, as used in statutory language, generally has no plain meaning, and so, in order to interpret the word, courts must look further.

However unsatisfying it is that there is no easy answer, investigating the use and interpretation of *now* in statutory language reveals something deeper about statutes than we usually find in cases in statutory interpretation: because interpreting *now* requires understanding one aspect of what statutes are, we learn more about legislative expression. We understand the temporal pragmatics of answering machine messages, and we understand the temporal pragmatics of wills. But the temporal pragmatics of the statute—an apparently basic parameter of perhaps the most powerful communicative act—remain uncertain. Something as simple as the resolution of the word *now* in a statute has no easy answer.