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# Passive-Voice References in Statutory Interpretation

Anita S. Krishnakumar<sup>\*</sup>

## INTRODUCTION

The Supreme Court regularly references grammar rules when interpreting statutory language. And yet grammar references play a peculiar role in the Court's statutory cases—often lurking in the background and performing corroborative work to support a construction arrived at primarily through other interpretive tools. The inevitable jurisprudential<sup>1</sup> question triggered by such references is, why does the Court bother? If grammar rules provide merely a second, third, or fourth justification for an interpretation reached through other interpretive canons, then what does the Court gain—or think it gains—by including such rules in its statutory analysis?

This essay examines these questions through the lens of a little-noticed grammar reference that has reared its head in a handful of Supreme Court cases: inferences based on a statute's use of the passive voice. The essay argues that the Supreme Court's framing of passive-voice arguments suggests both legitimating and harmonizing roles for grammar references in statutory interpretation. Larry Solan has argued that judges employ linguistic analysis in statutory interpretation because they are under pressure to write decisively and to limit what they say to certain acceptable argument forms.<sup>2</sup> Linguistic arguments, Solan theorizes, lend a (false) sense of neutrality and inevitability to a court's

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<sup>1</sup> The term "legisprudence" refers to "the jurisprudence of legislation," as described by Bill Eskridge. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990); John L. Flynn, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO. L.J. 2009, 2012 (1995); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1762 n.32 (2010).

<sup>2</sup> LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 9, 174 (1993).

statutory reading—making it seem as if the court had no choice but to construe the statute in the selected manner.<sup>3</sup> The Court's passive-voice-based linguistic arguments provide some support for Solan's theory. But I submit that there is more to the Court's articulation of passive-voice-based interpretive inferences than the legitimation of its statutory constructions. This essay argues that the Court also uses passive-voice references to promote horizontal coherence across the United States Code. That is, when the Court announces particular interpretive inferences that flow from a statute's use of the passive voice and other grammar devices, it not only justifies its interpretation of the statute at issue but also constructs consistency of meaning across federal statutes.

Elsewhere, I have posited that several members of the Court are motivated by a methodological preference for ensuring coherence across the legal landscape when construing statutes.<sup>4</sup> In line with this preference, when the Court derives specific consequences from a statute's grammatical choices, it does not merely apply well-worn rules to the statute at hand; it also engages in a subtle project of constructing coherence across the legal landscape—creating, in effect, a judicially prescribed federal code of grammatical meaning.

## I. THE PASSIVE-VOICE CASES

To date, six Supreme Court cases, decided between 1977 and 2009, have referenced a statute's use of the passive voice to determine the statute's meaning.<sup>5</sup> Most of these cases have involved criminal statutes,<sup>6</sup> and four have referenced the passive voice only to observe that it leaves the statute's meaning indeterminate.<sup>7</sup> Opinions in two of the cases have read

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<sup>3</sup> *Id.* at 4, 45.

<sup>4</sup> See generally Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221 (2010).

<sup>5</sup> See *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009); *Watson v. United States*, 552 U.S. 74, 81 (2007); *Jones v. United States*, 526 U.S. 227, 259 (1999) (Kennedy, J., dissenting); *United States v. Wilson*, 503 U.S. 329, 332-33 (1992); *id.* at 341, 343 (Stevens, J., dissenting); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 102-03 (1979); *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 128-29 (1977).

<sup>6</sup> See *Dean*, 129 S. Ct. at 1853; *Watson*, 552 U.S. at 81; *Jones*, 526 U.S. at 259 (Kennedy, J., dissenting); *Wilson*, 503 U.S. at 332-33; *id.* at 341, 343 (Stevens, J., dissenting).

<sup>7</sup> See *Watson*, 552 U.S. at 81; *Wilson*, 503 U.S. at 332-33; *id.* at 341, 343 (Stevens, J., dissenting); *Gladstone, Realtors*, 441 U.S. at 102-03; *E. I. du Pont de Nemours*, 430 U.S. at 128-29.

something significant into Congress's decision to employ the passive voice in a statutory phrase.<sup>8</sup> This part reviews all six cases, focusing on the latter two in which the Court placed noteworthy weight on a statute's use of the passive voice.

A. *The Passive Voice as Indeterminate*

There is nothing remarkable about the Court's passive-voice references in the first four cases. In each case, the Court merely acknowledged that the passive voice obscured the identity of the statutory actor who was authorized or deemed to take the action described in the provision. In *Watson v. United States*, for example, the Court noted that the statute's use of the passive voice made it unclear whether a person who trades drugs for a gun "uses" a gun within the meaning of the statute.<sup>9</sup> The passive voice played a similar role in *Gladstone, Realtors v. Village of Bellwood*, where the Court held that because Title VIII used the passive voice in authorizing civil actions for violations of the statute, the statute placed "no particular statutory restrictions on potential plaintiffs" entitled to bring enforcement suits.<sup>10</sup> Likewise, in *E. I. du Pont de Nemours & Co. v. Train*, the Court found that a section of the Federal Water Pollution Control Act, which used the passive voice in describing effluent limitations, was unclear as to whether the administrator or the permit issuer—that is, which actor—was supposed to establish the limitations.<sup>11</sup> Last, in *United States v. Wilson*, both the majority and dissenting opinions observed that a Sentencing Reform Act provision written in the passive voice "created doubt"<sup>12</sup> and "failed to identify" which decision maker—the attorney general or the judge—was to effectuate the sentencing credit in the provision.<sup>13</sup>

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<sup>8</sup> See *Dean*, 129 S. Ct. at 1853; *Jones*, 526 U.S. at 259 (Kennedy, J., dissenting).

<sup>9</sup> *Watson*, 552 U.S. at 81. The statute at issue provided a mandatory minimum sentence for a defendant "who, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm." 18 U.S.C. § 924(c)(1)(A) (2006).

<sup>10</sup> *Gladstone, Realtors*, 441 U.S. at 103.

<sup>11</sup> *E. I. du Pont de Nemours*, 430 U.S. at 128-29. Based on the language in the statute's other sections, the Court ultimately concluded that it was the administrator who was to do so, but it declared the section written in the passive voice indeterminate on this question. *Id.*

<sup>12</sup> *Wilson*, 503 U.S. at 332.

<sup>13</sup> *Id.* at 341-42 (Stevens, J., dissenting). The majority and dissent both concluded, based on other considerations, that one actor should nevertheless be preferred over the other. *Id.* at 333 (majority opinion); *id.* at 343 (Stevens, J., dissenting).

Each of these passive-voice references comports with traditional grammatical understandings of the passive voice as a linguistic construction that focuses on the object of the relevant action rather than the person performing the action.<sup>14</sup> Taken together, these four cases stand for the uncontroversial presumption that a statute written in the passive voice leaves the identity of the relevant statutory actor indeterminate. The Court seems neither to do much with nor to gain much from this form of passive-voice reference. Rather, it simply notes that the passive voice creates interpretive ambiguity.

*B. The Passive Voice and Culpability*

In *Dean v. United States*, by contrast, the Court drew significant inferences from the fact that the statute was written in the passive voice. Specifically, the Court pointed to the statute's use of the passive voice to bolster its argument that a firearms-enhancement provision did not require intentional action by the defendant.<sup>15</sup> The statute at issue provided that any person who "uses," "carries," or "possesses" a firearm while committing a violent crime is subject to a sentencing enhancement of at least five years and at least ten years "if the firearm is discharged."<sup>16</sup> Defendant Dean carried a gun while robbing a bank; as he was collecting money from a teller's drawer, the gun accidentally discharged.<sup>17</sup> The statutory dispute was over whether the enhancement provision's "is discharged" language contains a requirement that the defendant *intend* to discharge the firearm.<sup>18</sup>

In a 7-2 opinion, the Court held that the "is discharged" clause does not contain an intent requirement.<sup>19</sup> Justice Roberts's opinion for the Court began with a nod to the statutory text, noting that the text "does not require that the discharge be done knowingly or intentionally, or otherwise contain words of limitation."<sup>20</sup> The opinion then launched into a nuanced argument about the meaning of the passive voice in criminal statutes:

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<sup>14</sup> See BRYAN A. GARNER, A DICTIONARY OF MODERN AMERICAN USAGE 483 (1998).

<sup>15</sup> See *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009).

<sup>16</sup> 18 U.S.C. § 924(c)(1)(A) (2006).

<sup>17</sup> *Dean*, 129 S. Ct. at 1852.

<sup>18</sup> *Id.* at 1852-53.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1853.

Congress's use of the passive voice further indicates that subsection (iii) does not require proof of intent. The passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability. It is whether something happened—not how or why it happened—that matters.<sup>21</sup>

Several interpretive moves are at work in this paragraph. First the Court made the uncontroversial statement that the passive voice focuses on the action that takes place rather than on its performer. From there, the Court leapt to the conclusion that a statute written in the passive voice is triggered any time the action it describes occurs—without regard to the intent or culpability of any actor, and without regard to whether any actor actually has committed the described action.

As support for this leap, the Court wove a thread connecting the grammatical form of the “is discharged” language in *Dean* with the grammatical form of the “to be used” language in the firearms-enhancement provision in *Watson*—claiming that *Watson* established that the passive voice in the phrase “to be used” reflects “agnosticism . . . about who does the using.”<sup>22</sup> This statement, of course, was a slight recharacterization of *Watson*, which held merely that the passive voice in the phrase “to be used” left unclear whether the statute applied to a person who trades drugs for a gun.<sup>23</sup> Thus, the *Dean* Court did not simply apply an established grammar rule to a statute; it (re)defined the statutory consequences of the legislature's use of the passive voice based on its own prior construction of that grammatical device.

Why did the Court bother with this less-than-straightforward argument about the passive voice? One can only speculate, but the Court's passive-voice reference in *Dean* appears to have accomplished two things. First, it acted as a linguistic trump card, corroborating and lending an air of neutrality to the Court's reading of the statute. Second, it promoted horizontal, landscape coherence by articulating a conventional statutory meaning for passive-voice usage across statutes and cases. That is, it created a sort of common-law, judicially prescribed rule about what a statute's use of the

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<sup>21</sup> *Id.* (emphasis added) (citations omitted).

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> *Watson v. United States*, 552 U.S. 74, 81 (2007) (“[T]he utility of § 924(d)(1) is limited by its generality and its passive voice; it tells us a gun can be ‘used’ in a receipt crime, but not whether both parties to a transfer use the gun, or only one, or which one.”).

passive voice means. Going forward, the Court's decisions in *Dean* and *Watson* establish a linguistic presumption that a statute that uses the passive voice contains no intent or culpability requirement—at least in the case of firearms-enhancement provisions<sup>24</sup> and perhaps in the case of all criminal statutes. This is so despite the fact that the passive-voice argument performed only corroborative work in *Dean* and *Watson*; because the Court's statements about the interpretive consequences of the passive voice are not statute-specific, subsequent courts will be hard-pressed to give a contrary meaning to other criminal statutes written in the passive voice.

### C. *The Passive Voice and Sentencing Factors*

In *Jones v. United States*, Justice Kennedy's dissenting opinion similarly relied on a statute's use of the passive voice to draw definitive inferences about the statute's meaning.<sup>25</sup> *Jones* involved the construction of the federal carjacking statute, 18 U.S.C. § 2119, which reads as follows:

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

- (1) be fined under this title or imprisoned not more than 15 years, or both,
- (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
- (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.<sup>26</sup>

Defendant Jones had participated in a carjacking with two other men.<sup>27</sup> While Jones and one of the other men held up the victims, the third man stuck his gun in one of the victims' ears and later struck that victim on the head, causing serious injury.<sup>28</sup> The issue was whether the statute's numbered

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<sup>24</sup> See, e.g., *United States v. Lora-Pena*, 375 F. App'x 242, 246-47 (3d Cir. 2010) (citing *Dean*, 129 S. Ct. at 1853, to conclude that a Sentencing Guideline requiring "a five-level increase in offense level if 'a firearm was discharged' . . . does not distinguish between accidental and purposeful discharges, and does not require a finding that defendant pulled the trigger").

<sup>25</sup> *Jones v. United States*, 526 U.S. 227, 259 (1999) (Kennedy, J., dissenting).

<sup>26</sup> 18 U.S.C. § 2119 (1988) (amended 1994 & 1996).

<sup>27</sup> *Jones*, 526 U.S. at 229-31.

<sup>28</sup> *Id.*

subclauses were sentencing provisions—specifying escalating punishments for the offense set forth in the first paragraph—or whether they instead constituted three separate offenses.<sup>29</sup>

In a 5-4 opinion, the Court concluded that “the fairest reading” of the statute was to treat the serious-bodily-harm provision as an element of a separate offense rather than as a mere sentencing enhancement.<sup>30</sup> Justice Kennedy, joined by three other dissenters, disagreed. The dissenting opinion relied significantly on the structure of the statute<sup>31</sup> but also emphasized the statute’s use of the passive voice:

[T]here is some significance in the use of the active voice in the main paragraph and the passive voice in clauses (2) and (3) of § 2119. In the more common practice, criminal statutes use the active voice to define prohibited conduct. *See, e.g.*, 18 U.S.C. § 1116 (1994 ed., Supp. III) (“[w]hoever kills or attempts to kill”); § 2114 (“assaults,” “robs or attempts to rob,” “receives, possesses, conceals, or disposes”); Tex. Penal Code Ann. §§ 29.03(a)(1), (2) (1994) (aggravated robbery; “causes serious bodily injury,” or “uses or exhibits a deadly weapon”); cf. 18 U.S.C. § 248(b) (setting forth, as sentencing factors, “if bodily injury results,” and “if death results”); United States Sentencing Commission, Guidelines Manual § 2B3.1(b)(3) (Nov. 1998) (robbery guideline; “[i]f any victim sustained bodily injury”).<sup>32</sup>

Again, several interpretive moves are at work in this grammar-based argument. First, the dissent made the authoritative linguistic-drafting-convention statement that “[i]n the more common practice, criminal statutes use the active voice to define prohibited conduct.”<sup>33</sup> It then referenced several federal statutes, a state statute, and the *United States Sentencing Commission Guidelines Manual* to establish this drafting convention.<sup>34</sup> The dissent’s passive-voice argument thus involved very little linguistic analysis and quite a lot of judicial synthesis, or landscape coherence-construction. As far as one

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<sup>29</sup> *Id.* at 230-32. The distinction was crucial because the indictment had not charged any of the facts relating to bodily injury, and the jury instructions had defined the elements of the government’s burden of proof with reference only to the first paragraph of the statute. If the second and third subclauses were deemed to be sentencing provisions, this would not matter, and Jones could be sentenced to twenty-five years based on the serious bodily injury caused to one of the victims. If, however, the subclauses were read as separate offense provisions containing new elements, then the government’s failure to plead these elements in the indictment and prove them before the jury would preclude it from seeking the twenty-five-year penalty against Jones.

<sup>30</sup> *Id.* at 239.

<sup>31</sup> *Id.* at 256 (Kennedy, J., dissenting).

<sup>32</sup> *Id.* at 258-59.

<sup>33</sup> *Id.* at 258 (emphasis added).

<sup>34</sup> *Id.* at 258-59.



can tell, there was no established rule—linguistic, legislative, judicial, or otherwise—behind the dissent’s pronouncement. The dissenters seem to have constructed this drafting convention out of their own assessment of the other criminal statutes and guidelines they discovered in the surrounding legal landscape.

Again, the lingering legisprudential question is, why bother? And again, the answer appears to be twofold: legitimation and horizontal coherence. Although the passive-voice drafting convention announced by the dissent was not necessary to its construction of the statute, the grammar-based argument lent an element of detached tie-breaking to that construction. Faced with the close question of whether to treat § 2119’s clauses as sentencing enhancements or elements of the offense, the grammar reference cloaked the dissent’s interpretation with the imprimatur of neutrality—presenting it as the product of drafting custom rather than ideological sympathies or a desire to reach a particular result. This is Larry Solan’s theory in action. But there is more than legitimation going on here, particularly since the dissent undermined the force of its drafting-convention argument by acknowledging, in the following paragraph, that the passive-versus-active-voice distinctions “are not absolute rules.”<sup>35</sup>

In addition, the dissent’s passive-voice argument also harmonized (or attempted to harmonize) meaning across criminal statutes. Like the Court’s opinion in *Dean*, the *Jones* dissent did not merely apply grammar rules to the carjacking statute as set forth in a grammar handbook. Instead, it used the statute’s grammatical structure as a means for threading various parts of the statutory framework together into a coherent whole.<sup>36</sup> This brought coherence to the legal landscape in two ways. First, it established a presumption (and pattern) across existing criminal statutes that the active voice describes elements of an offense while the passive voice reflects sentencing factors.<sup>37</sup> Second, it announced a drafting

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<sup>35</sup> *Id.* at 259.

<sup>36</sup> *See id.* at 258-59; *see also* *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009) (citing comments in *Watson v. United States*, 552 U.S. 74, 81 (2007), regarding the meaning associated with a statute’s use of the passive voice).

<sup>37</sup> Of course, as a practical matter, this presumption has limited force since it appeared in the dissent rather than the majority opinion. But I would not be surprised if it is invoked in the future: the *Jones* majority opinion relied heavily on the constitutional avoidance doctrine to reject reading the statute’s subclauses as additional sentencing factors that the prosecution was not required to plead or prove. *Jones*, 526 U.S. at 239-40.

convention, going forward, about the interpretive consequences of composing criminal statutes in the passive, as opposed to the active, voice.

The *Jones* dissent illustrates that judges are drawn to grammar-based—or at least passive-voice-based—arguments even when those arguments are neither necessary to the statute’s construction nor particularly definitive. Part of the reason for this appeal is the false aura of detached decision making associated with linguistic analysis. But part of the appeal also lies in the fact that linguistic analysis provides a natural tool through which judges can impose external coherence across statutes, and can reason from statute to statute and from case to case.

## II. GRAMMAR REFERENCES AND HORIZONTAL COHERENCE

This legitimation-plus-harmonization use of grammatical analysis is similar to the two-in-one approach that the Court uses when invoking the whole-act rule<sup>38</sup> or its own prior interpretation of a particular word to interpret a statute.<sup>39</sup> On the one hand, when the Court relies on the whole-act rule or its own prior interpretations, it engages in a sort of legal fiction,

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Perhaps the *Jones* dissent’s presumption will resurface in a case that distinguishes the *Jones* majority’s contrary construction on constitutional grounds.

<sup>38</sup> The whole-act rule presumes internal statutory coherence—that the legislature drafts each statute as a structurally consistent document, both “in its use of language and in the way [the statute’s] provisions work together.” See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 862 (4th ed. 2007). Consistent with this underlying assumption, the whole-act rule instructs courts to interpret statutory provisions in a way that does not render the statute’s other provisions redundant or superfluous, and presumes that identical words used in different parts of the same statute have the same meaning. The rule also counsels that when the legislature includes particular language in one section of a statute but omits it in another, it acts deliberately and intends different meanings by the disparate wording. See, e.g., *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (disparate wording); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (presumption of consistent meaning for identical words); *Kungys v. United States*, 485 U.S. 759, 778 (1988) (presumption against redundancy).

<sup>39</sup> The Court presumes that Congress legislates against the backdrop of prior judicial interpretations of other statutes. Through this presumption, the Court justifies its reference to its own prior interpretations when giving meaning to similar words or phrases in a new statute. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 16-17 (Amy Gutmann ed., 1997) (“Another accepted rule of construction is that ambiguities in a newly enacted statute are to be resolved in such fashion as to make the statute, not only internally consistent, but also compatible with previously enacted laws. We simply assume, for purposes of our search for ‘intent,’ that the enacting legislature was aware of all those other laws. . . . [O]f course that is a fiction . . .”).

presuming that the construction it has chosen likely is the one Congress intended because it makes the most sense given the statute's structure or the judiciary's prior interpretation of a word. On the other hand, the Court is also saying that even if it sets aside the legal fiction that Congress is internally consistent and deliberate in structuring a statute or that Congress legislates with an awareness of the Court's previous interpretations of particular words, it nevertheless is appropriate to employ the whole-act rule and its own prior interpretations to construe statutes because these interpretive rules help make sense of the overarching, interconnected legal landscape of which the statute is a part. In other words, irrespective of what we know about how Congress behaves when drafting statutes, the Court considers it part of its role as interpreter to bring coherence to the law and to harmonize various legal rules into a sensible whole—much as it would synthesize common-law precedents if it were working with common-law rules rather than with statutes. The same thing is happening, I think, with the Court's passive-voice references. In *Jones*, the dissenting opinion both (1) engaged in the legal fiction that Congress deliberately uses the passive voice to articulate sentencing factors and the active voice to articulate offense elements; and (2) at the same time, announced that even if Congress did not deliberately employ this passive-versus-active-voice distinction, the distinction is a good one—providing a drafting rule that makes sense of the existing legal framework—and thus should be applied in construing the statute at issue. The same legal fiction plus drafting-convention announcement were at work in the Court's opinion in *Dean*.

In my view, then, the Court's passive-voice-based grammar arguments are a little less corroborative and a little *more* constructive than they might appear at first glance. That is, the Court references a statute's grammatical structure not because it is convinced that that grammatical structure reveals Congress's true intent or that Congress focused on the particular meaning conveyed by its grammatical choices when drafting the statute. In other words, I do not think that the Court uses grammar references to lead it to—or to check itself against—Congress's actual intent. Rather, in citing the statute's use of the passive voice, Justice Kennedy's dissent in *Jones* seems to be saying that, because its statutory reading is consistent with the way Congress and state legislatures have drafted other criminal statutes, its construction should be preferred—irrespective of whether Congress deliberately intended that construction when

it chose to use the passive voice. The Court's passive-voice argument in *Dean* is to similar effect: the Court seems to be stating that because its construction of the "is discharged" provision is consistent with its own prior construction of other statutory provisions using the passive voice, this construction is the correct one—regardless of whether Congress was aware of, or agreed with, the prior interpretation. The Court's passive-voice references, then, are about promoting continuity, external consistency, and drafting rules that Congress will have to follow in the future or will be presumed to have followed in the future—almost as if the Court were creating a judicial code of grammatical meaning.

Finally, it is worth noting that this "aggressive" use of the passive voice—aggressive both in the sense that the Court is assigning particular meanings to a statute's use of the passive voice and in the sense that the Court is using the passive voice to formulate a drafting convention that cuts across statutes—seems to be a relatively recent development in the Court's jurisprudence. The *Jones* case was decided in 1999, and *Dean* was decided in 2009. As explained in Part I, in its earlier cases, the Court confined its passive-voice references to the unassuming recognition that a statute written in the passive voice left unclear the identity of the relevant statutory actor. Only recently has the Court sought to give *more* interpretive weight to a statute's use of the passive voice, let alone to announce a particular, consistent meaning to be associated with the passive voice across statutes.

## CONCLUSION

This essay seeks to shed new light on the role that grammar-based linguistic arguments play in the Supreme Court's statutory cases, in partial answer to the question posed by this symposium, How much work—and what kind—does language do in statutory interpretation? Using the Court's passive-voice-based linguistic arguments as a case study,<sup>40</sup> the

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<sup>40</sup> Although this article focuses on the Court's passive-voice references, a similar coherence-driven approach using the adjective "any" appears to exist across statutes. See *Boyle v. United States*, 129 S. Ct. 2237, 2243 (2009) ("The term 'any' ensures that the definition has a wide reach . . . ." (citing *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008))); *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009) ("[T]he word 'any' . . . has an 'expansive meaning.'" (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997))); *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008) ("Five 'any's' in one sentence and it begins to seem that Congress meant the

essay suggests that grammar references perform two significant roles in the Court's construction of statutes. First, as Larry Solan has previously observed, grammar arguments seem to lend an imprimatur of neutrality to the Court's interpretations. Second, like the whole-act-rule presumption about consistent meaning within a single statute and the Court's reliance on its own prior constructions of similar words, grammar-based arguments provide the Court with a toolset for constructing consistent meaning across the federal code. Grammatical analysis thus appears to play an important role in constructing conventional statutory meaning as much as in corroborating it.

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statute to have expansive reach.”); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 261 (2008) (Thomas, J., concurring) (arguing that “any” is indiscriminate and provisions applying to “any losses” mean “all” losses are included (citing *Ali*, 552 U.S. at 219)); *Ali*, 552 U.S. at 219 (“Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” (quoting *Gonzales*, 520 U.S. at 5)); *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007) (holding that “any” in statutory text “embraces all airborne compounds of whatever stripe”); *Lopez v. Gonzales*, 549 U.S. 47, 61-62 (2006) (Thomas, J., dissenting) (“[T]he word ‘any’ . . . has an ‘expansive meaning.’” (quoting *Gonzales*, 520 U.S. at 5)); *Small v. United States*, 544 U.S. 385, 397 (2005) (Thomas, J., dissenting) (arguing that “any court” is a “broad phrase”). So the Court’s use of linguistic analysis to foster coherence does not appear limited to the passive-voice grammatical device.