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Conflicting Courts On Neutral Canons

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Ashley E. Johnson


Will Thompson

According to Professor Karl Llewellyn's famous article on statutory interpretation, "there are two opposing canons on almost every point."[1] In cases that Professor Llewellyn might have cited as exemplars, the U.S. Supreme Court and the Texas Supreme Court each recently confronted a direct conflict between the last-antecedent canon and the series-qualifier canon. The two courts took fundamentally disparate approaches to resolving this conflict, demonstrating that these seemingly neutral grammatical principles lead to outcomes that are far from certain.

The last-antecedent canon provides that "a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows."[2] The series-qualifier canon provides that "when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a ... modifier normally applies to the entire series."[3] These canons point toward opposite results when a statute contains a list or series of items followed by a modifying phrase. Does the modifier apply only to the last item, per the last-antecedent canon, or to each item, per the series-modifier canon? The answer: It depends on the court.

Lockhart v. United States: A Preference for the Last-Antecedent Canon, with a Resort to "Context"

In Lockhart v. United States, the U.S. Supreme Court leaned heavily toward the last-antecedent canon, based on a wide-ranging examination of often-subjective "context." The Lockhart Court interpreted 18 U.S.C. § 2252(b)(2), a criminal statute that increases the sentence for a defendant convicted of possessing child pornography if that defendant has been previously convicted "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward."[4] Lockhart had been previously convicted of sexual abuse of his 53-year-old girlfriend.[5] Does "involving a minor or ward" modify all three crimes listed, such that Lockhart's prior conviction did not trigger the increased sentence, or does it modify only the last crime listed, such that Lockhart's prior conviction did trigger the increased sentence?

In an opinion written by Justice Sonia Sotomayor, the six-justice majority ruled that "involving a minor or ward" modifies only the last item in the series. Although it acknowledged both canons, the court treated the last-antecedent canon as the default rule unless "context weighs against the application" of the rule.[6] The court treated that "context" as informed by subjective considerations, such as whether the items in the series are those "that readers are used to seeing listed together" or whether the limiting modifier is one "that readers are accustomed to applying to each" of the listed items.[7]

The court's resort to "context" also incorporated the court's examination of what Congress likely intended the statute to reach. The same criminal statute increases the sentence for defendants who have certain previous convictions under federal law, including "[a]ggravated sexual abuse," "[s]exual abuse," and "[s]exual abuse of a minor or ward," each in a different statutory section.[8] Because the federal-convictions provision pre-dated the state-convictions provision, the court determined that the latter was patterned on the "template" provided by the former.[9] The court emphasized that there was no reason to think that Congress believed "that offenders with prior federal sexual-abuse convictions are more culpable, harmful, or worthy of enhanced punishment than offenders with nearly identical state priors."[10]

Justice Elena Kagan's dissent, by contrast, treated the last-antecedent canon and the series-qualifier canon as equally valid canons that simply apply in different circumstances. The last-antecedent canon "does not generally apply ... when the modifying clause appears ... at the end of a single, integrated list."[11] In that situation, the series-qualifier canon explains that "the modifying phrase refers alike to each of the list's terms."[12] The last-antecedent rule does apply, however, when there is no series or when the items "in a list are so disparate that the modifying clause does not make sense when applied to them all."[13] This relatively brightline rule based on grammatical structure contrasts sharply with the multifactor balancing test employed by the majority.

Sullivan v. Abraham: Equal Treatment, with a Focus on Punctuation

About a month and a half later, in Sullivan v. Abraham, the Texas Supreme Court confronted a very similar question in a very different context. The Texas Citizens Participation Act "provides an expedited procedure of the dismissal of certain legal actions" and allows a successful movant to recover certain expenses.[14] Those expenses are "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require."[15] Does "as justice and equity may require" modify all three items or only "other expenses"? Under Lockhart — which the Texas Supreme Court did not cite—the answer would be far from clear, requiring inquiry into context.

Rather than engage in a contextual inquiry, the Texas Supreme Court unanimously ruled that "justice and equity" do not limit awards of attorney's fees because the modifier applies only to the last item in the series.[16] The court recognized the legitimacy of both canons and found that they were in equipoise. "Either canon might reasonably apply to this text, but they cannot both apply because they point in different directions. And thus, without more, neither aids in our understanding of the statute."[17] As a result, the court turned its attention to punctuation — specifically, comma placement.

If the legislature had intended the modifier to apply to all three items in the series, the court reasoned, it would have included a comma between the last item and the modifier to so indicate. Thus, the absence of that comma "indicates an intent to limit the justice-and-equity modifier to the last item in the series."[18] The court also explained that the presence of an Oxford comma, also known as a serial comma, between "reasonable attorney's fees" and "and other expenses" weighed in favor of limiting the modifier to the last item.[19]

The respondent argued that the legislature's comma choices did not resolve the case because limiting "as justice and equity may require" to the last item would also limit "incurred in defending against the legal actions" to the last item. As it would be "senseless" to allow recovery of court costs and attorney's fees that weren't "incurred in defending against the legal action," both modifiers must apply to each item.[20] The court rejected that argument by noting that its interpretation would not lead to such

absurd results. Because the last item in the series was "other expenses incurred in the defense of the legal action," "court costs" and "reasonable attorney's fees" could be interpreted as types of "expenses incurred in the defense of the legal action."[21]

Thus, unlike Justice Sotomayor's majority opinion, the Texas Supreme Court treated both canons as equally valid, rather than preferring the last-antecedent canon as the default rule. And unlike Justice Kagan's dissent, the Texas Supreme Court looked to comma placement, not grammatical structure, to resolve the tension between the two canons.

The following table summarizes these key differences between the three different approaches:

Case	Lockhart v. United States (U.S.)		Sullivan v. Abraham (Texas)
Opinion	Majority (Sotomayor)	Dissent (Kagan)	Majority (Devine)
Last-Antecedent Canon	Default Rule	One of two competing canons	One of two competing canons
Series-Qualifier Canon	Dubious legitimacy	One of two competing canons	One of two competing canons
Resolution of Tension Between Canons	Context-sensitive multifactor inquiry	Whether the items in the series are parallel	Comma placement

These disparities suggest at least two important points. First, in the U.S. Supreme Court, these canons of construction may be case-dispositive, but predicting how they will apply in a particular case is difficult. Both the majority and the dissent invoke notions of common understanding, with the court referring to a "basic intuition" that a modifier generally applies only to the last item in a list, while the dissenting opinion insists that its reading is grounded in an "ordinary understanding of how English works, in speech and writing alike."[22] Yet as the competing opinions make clear that "ordinary understanding" is not shared by all readers.

Second, the dramatically different approaches applied by the three opinions to determine how a court should resolve a conflict between these two canons suggest that courts can interpret the same language in vastly different ways. Again, the statute at issue in Lockhart was triggered by prior convictions for "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward."[23] If the Texas Supreme Court had to interpret that statute, it would likely have agreed with Justice Sotomayor's ultimate outcome, but done so based on the absence of a comma between the last item in the series and the modifier, as well as the presence of an Oxford comma in the series itself.

If the U.S. Supreme Court were to consider the statutory language from Sullivan, on the other hand, it might well disagree with the Texas Supreme Court. Although the subjective "context" inquiry could be applied in many ways, one possibility is that the court would have found persuasive an analogy to the fees provision of the Texas Declaratory Judgment Act. That act permits awards of "reasonable and necessary attorney's fees as are equitable and just,"[24] which could support a conclusion that the legislature intended to apply the same justice-and-equity limitation unless someone could "explain why [the legislature] would have wanted to" allow potentially unjust and inequitable fee awards in one context but not the other.[25]

In short, practitioners should take notice that although the last-antecedent canon and the series-qualifier canon may sound like neutral grammatical principles, they carry different weights and are applied differently depending on the court. While they will sometimes reach the same result, agreement is not guaranteed, and the relevant factors for advocates may differ sharply.

—By Ashley E. Johnson and Will Thompson, Gibson Dunn & Crutcher LLP

Ashley Johnson is of counsel in Gibson Dunn's Dallas office. Prior to joining the firm, she served as a law clerk to Justice Clarence Thomas of the U.S. Supreme Court and to Judge J. Michael Luttig, formerly of the U.S. Court of Appeals for the Fourth Circuit.

Will Thompson is an associate in the Dallas office Gibson Dunn & Crutcher. Prior to joining the firm, he clerked for the Honorable Diarmuid F. O'Scannlain of the U.S. Court of Appeal for the Ninth Circuit.

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[1] 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 (1950).

[2] Barnhart v. Thomas, 540 U.S. 20, 27 (2003). See also Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 144 (2012).

[3] Reading Law 147.

[4] Lockhart v. United States, 136 S. Ct. 958, 961 (2016) (quoting 18 U.S.C. § 2252(b)(2)) (emphasis added).

[5] Id. at 961–62.

[6] Id. at 965, 968.

[7] Id. at 963.

[8] Id. at 964.

[9] Id.

[10] Id.

[11] Id. at 970 (Kagan, J., dissenting) (internal quotation marks omitted).

[12] Id.

[13] Id.

[14] Sullivan v. Abraham, 488 S.W.3d 294, 295 (Tex. 2016).

[15] Tex. Civ. Prac. & Rem. Code § 27.009(a) (emphasis added).

[16] Sullivan, 488 S.W.3d at 297.

[17] Id.

[18] Id. at 298.

[19] Id. at 298–99.

[20] Id. at 298.

[21] See id.

[22] Lockhart, 136 S. Ct. at 963; id. at 967 (Kagan, J., dissenting).

[23] Lockhart, 136 S. Ct. at 961 (quoting 18 U.S.C. § 2252(b)(2)) (emphasis added).

[24] Id. § 37.009.

[25] Lockhart, 136 S. Ct. at 967.
