The Puzzle of Trailing Modifiers

By Joseph Kimble

When this column went to press, the United States Supreme Court had not decided the Lockhart *case (page 40).* —*JK*

I've written before about the ambiguity created by trailing modifiers—as in *men and women who are tall*—and the weak doctrine of the last antecedent that courts often invoke to resolve the ambiguity.[1] Now I want to do it in a way that illustrates how deeply conflicted the so-called canons of construction can be: several of them may apply to this one syntactic pattern. The exercise will also provide a glimpse into the uncertain and manipulable world of textualism.

Let's work with this example: *doctors, nurses, and paramedics* [*who work*] *in a hospital*. I give the alternative in brackets because *Reading Law*, the high-profile book by Justice Antonin Scalia and Bryan Garner, distinguishes between two canons that would limit a trailing modifier's reach.[2] One is the last-antecedent canon: since, technically, only pronouns have antecedents, it applies when the modifier includes a relative pronoun like *who*, *that*, or *which*. The other is the nearest-reasonable-referent canon: it applies when the modifier involves an adjective, adverb, adjectival phrase, or adverbial phrase.

In our example, if we include the bracketed *who work*, the pronoun *who* modifies one or all of the nouns. Otherwise, the prepositional phrase *in a hospital* functions as an adjective modifying one or all of the nouns. The ambiguity is the same in either instance, but according to *Reading Law*, the name of the canon changes.

The trouble is that the two canons are not as compatible as they might seem (or as I once said[3]). More on that below. The other problem is that courts are not accustomed to distinguishing the two. Until some clarification comes along, I suspect that most courts will continue to deal with trailing modifiers as they always have—by grabbing onto the last-antecedent canon or finding a reason not to.

A court may, of course, decide not to apply the last-antecedent canon for contextual or nontextual reasons (such as legislative history). But more to the point of this article, a court facing an ambiguous trailing modifier can often choose from a dizzying mix of canons. Some point to one interpretation, some to another.

This is no small matter, by the way. A quick search of WestlawNext for "last antecedent" produces over 1,700 cases. No doubt the argument in most of them was over how to read a trailing modifier. That's a lot of ambiguity.

Maybe the trailing modifier applies to the last item only

1. Last-Antecedent Canon

"A pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent."[4]

OR

2. Nearest-Reasonable-Referent Canon

"When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent."[5]

In our example, #1 would apply to the *who work* variant. But what about applying #2 to the version without a pronoun—*doctors, nurses, and paramedics in a hospital*? Notice the exception in #2 for "a parallel series of nouns or verbs." That fits the example, so #2 would not apply. It makes no sense that such a tiny difference would change the result. What's more, why doesn't the same exception—which mirrors #4 below (the series-qualifier canon)—apply to #1? And finally, doesn't the exception threaten to swallow the rule? Isn't it as likely as not that this syntactic ambiguity will involve a parallel series of nouns or verbs (or noun phrases or verb phrases)? We're left, then, with confusion at the outset, between two related canons.

Now suppose that the modifier appears within one item in a vertical list.

> The following must [do whatever]:
> 1. doctors,
> 2. nurses, and
> 3. paramedics who work in a hospital.

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The structure here strongly suggests that the modifier applies only to *paramedics*—the last antecedent—and *Reading Law* includes just such a canon:

> **3. Scope-of-Subparts Canon**
> "Material within an indented subpart relates only to that subpart; material contained in unindented text relates to all the following or preceding indented subparts."[6]

Yet the Supreme Court in *Paroline v United States* faced this same pattern of a modifier within a subpart, said nothing about it, and applied the modifier to all the items—that is, to all the subparts.[7] And so did 10 of the 11 circuit courts that had considered the statute at issue in *Paroline* before the Supreme Court heard the case.[8]

Maybe the trailing modifier applies to all the items

> **4. Series-Qualifier Canon**
> "When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series."[9]

=?
AND?

> **5. Across-the-Board Canon**
> "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."[10]

Since canon #5 doesn't have an accepted name, I've used the one adopted by another commentator.[11]

Now, canons #4 and #5 seem to be the same, or to involve the same assumption, but there's at least some room for doubt. First, as #5 was expressed by the Supreme Court in *Paroline*, it applies only to trailing modifiers, whereas #4 applies to "prepositive" modifiers as well. Second, if the two are essentially the same, you might expect *Reading Law* to cite the foundational *Porto Rico Railway* case (see footnote 10)—and then perhaps to note that the principle logically applies to premodification as well, or that #5 is subsumed under #4. (That's an observation, not a criticism.) Third, the Supreme Court knows about and has cited *Reading Law*,[12] so you wonder why the Court didn't somehow relate #5 to #4.

A further complication arises when—as so often happens—the ambiguous modifier forms part of a catchall phrase. Suppose that our example read *doctors, nurses, paramedics, and other medical professionals in a hospital*. That was again the pattern in *Paroline*, and the Supreme Court, as support for its deployment of #5, cited what it called "a familiar canon of statutory construction":

> **6. Catchall Canon**
> "[Catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated."[13]

This might sound like the *ejusdem generis* canon, by which a general term is limited to things of the same kind or class as specifically enumerated items. But the Court didn't use the term *ejusdem generis*, which it certainly knows. Besides that, the Court was not limiting the general term to a class shaped by the specifics; rather (as illustrated in the next section), the Court was limiting the specifics by applying to each of them the ambiguous trailing modifier in the general term.

At any rate, this supposedly "familiar" canon—unless it is *ejusdem generis* in disguise—does not appear in *Reading Law*. Nor did it receive any appreciable attention in the ten circuit-court opinions that had reached the same conclusion as the Supreme Court did; only one of them cited it, parenthetically.[14]

An embarrassment of canons

In any one case, at least four, and possibly five, of these six canons could be in play (#1 and #2 are alternatives; #4 and #5 may be the same or cumulative). That's exactly what happened in *Paroline*, with a statute that provides for restitution to victims of pornography. The statute defines "full amount of the victim's losses" as including

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim *as a proximate result of the offense*.[15]

In applying the italicized phrase to (A) through (F), the Supreme Court explicitly rejected canon #1 (last antecedent) and implicitly rejected #3 (scope of subparts). Instead, as we've seen, it called on #5 (across the board) and #6 (catchall). Remember that #5 is probably what *Reading Law* calls the series-qualifier canon (#4), although that's not entirely clear. And #6 is the "familiar" canon that nine circuit-court decisions had not even mentioned.

What an interpretive bird's nest.

Questions for strict textualists to consider

1. Do we really need #1 (last antecedent) and #2 (nearest reasonable referent)? Or could we settle for the last antecedent, recognizing that the name is grammatically loose?

2. Are #4 (series qualifier) and #5 (across the board) the same? If so, do we call it the series-qualifier canon?

3. Does the series-qualifier canon have more purchase when the modifier precedes, rather than trails, the items in the series? I sense that it might, although I'd be surprised if courts start distinguishing between strong-side series qualifier and weak-side series qualifier.

4. Does the series-qualifier canon usually trump the last-antecedent canon? Recall that the nearest-reasonable-referent canon has an explicit exception for "a parallel series of nouns or verbs." So series qualifier seemingly does trump nearest reasonable referent. But does the same go for last antecedent, the older sibling of nearest reasonable referent?

5. What happens when the trailing modifier appears within the last item in a vertical list? For my money, that's a strong indicator. So does #3 (scope of subparts) normally outtrump the series qualifier—leaving *Paroline* as a rare exception?

6. How does #6 (catchall) fit in all this? Does it simply reinforce series qualifier when the modifier follows a catchall phrase?

As fate would have it, in the term after *Paroline*, some of these questions are again before the Supreme Court in a case called *Lockhart v United States*, No. 14-8358 (argued November 3, 2015). The ambiguous language: "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct *involving a minor or ward*."[16] So here we go again.

An assessment

It's anybody's guess how this will all play out in *Lockhart* and beyond. In the meantime, my view is that scope of subparts is the strongest of this group; series qualifier creates a moderately strong presumption and would probably trump last antecedent if a court were reduced to choosing between them; last antecedent has precious little force on its own;[17] and the place of catchall in this scheme (not to mention its operation) is hazy.

But in any event, engaging in a canonical chess match like this is no way to decide cases. To its credit, the Supreme Court in *Paroline* began its analysis by considering policy reasons for applying the proximate-cause requirement in subpart (F) to all the items in the series—and said that doing so "accords with common sense."[18] Only then did the Court take up canons.

Judges should be textualists and nontextualists. Of course they should consider textual principles, although textualists have not tried to assess the canons' relative strengths and weaknesses. But judges should also bring to bear policy, apparent purpose, legislative history, consequences, intuition, common sense—any reasonable argument. Then they weigh and decide. They judge. ■

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ENDNOTES

1. Kimble, *The Doctrine of the Last Antecedent, the Example in* Barnhart, *Why Both Are Weak, and How Textualism Postures*, 16 Scribes J Legal Writing 5 (2015).
2. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), pp 144–146, 152–153.
3. See *Doctrine of the Last Antecedent*, 16 Scribes J Legal Writing at 17 (stating that they "produce the same result with a trailing modifier").
4. *Reading Law*, p 144.
5. *Id.* at 152.
6. *Id.* at 156.
7. *Paroline v United States*, ___ US ___; 134 S Ct 1710; 188 L Ed 2d 714 (2014).
8. *Doctrine of the Last Antecedent*, 16 Scribes J Legal Writing at 21, 23.
9. *Reading Law*, p 147.
10. *Paroline*, 134 S Ct at 1721, quoting *Porto Rico R, Light & Power Co v Mor*, 253 US 345, 348; 40 S Ct 516; 64 L Ed 944 (1920)).
11. See Solan, *The Language of Judges* (Chicago: University of Chicago Press, 1993), p 34.
12. See, e.g., *Johnson v United States*, ___ US ___; 135 S Ct 2551, 2580; 192 L Ed 2d 569 (2015) (Alito, J., dissenting); *Tex Dep't of Housing v Inclusive Communities Project, Inc*, ___ US ___; 135 S Ct 2507, 2520; 192 L Ed 2d 514 (2015); *Yates v United States*, ___ US ___; 135 S Ct 1074, 1093; 191 L Ed 2d 64 (2015) (Kagan, J., dissenting); *T-Mobile South, LLC v City of Roswell*, ___ US ___; 135 S Ct 808, 817 n 5; 190 L Ed 2d 679 (2015); *Heien v North Carolina*, ___ US ___; 135 S Ct 530, 539; 190 L Ed 2d 475 (2014); *Maracich v Spears*, ___ US ___; 133 S Ct 2191, 2205; 186 L Ed 2d 275 (2013).
13. *Paroline*, 134 S Ct at 1721 (brackets in original).
14. *Doctrine of the Last Antecedent*, 16 Scribes J Legal Writing at 23.
15. 18 USC 2259(b)(3) (emphasis added).
16. 18 USC 2252(b)(2) (emphasis added).
17. For a contrary view—that last antecedent has a basis in how readers initially process information and should trump series qualifier—see Neal Goldfarb, LAWnlinguistics, *Coming to SCOTUS: Battle of the Dueling Interpretive Canons* <http://lawnlinguistics.com/2015/10/27/coming-to-scotus-battle-of-the-dueling-interpretive-canons/> (posted October 27, 2015) (accessed December 12, 2015); cf. *The Language of Judges*, pp 33–34, 192 n 8 (suggesting a difference between processing a two-part and three-part coordinate structure: the last-antecedent reading "strategy" applies only with the latter).
18. *Paroline*, 134 S Ct at 1721.