The Sugar Mill Case: Public Waste and the Public Bid Law

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The *Sugar Mill Case*: Public Waste and the Public Bid Law

"Lord Polonius: What do you read my lord?  
"Hamlet: Words, words, words.”

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1. WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2.__
I. THE LACASSINE SYRUP MILL

A series of reports published in 2006 on the construction of a 45 million dollar syrup mill in Lacassine, Louisiana made Agriculture Commissioner Bob Odom out to be a sweet-toothed robber baron eager to exploit local farmers and taxpayers for more sugar money.\(^2\) The Louisiana Department of Agriculture and Forestry built the Lacassine mill to help sugarcane farmers cope with rising trucking costs.\(^3\) The mill condenses cane stalks into syrup, which allows more sugar to fit into each load, and offers a rail spur for bulk shipments to refineries in New Iberia.\(^4\)

Financing for the mill’s construction came from state bonds secured by an annual $12 million in gambling taxes.\(^5\) Commissioner Odom planned to recoup the mill’s cost by selling the mill to a nonprofit farmer’s cooperative.\(^6\) The farmers would use profits from the mill’s operations to pay off the bonds, thereby shifting the construction costs off taxpayers.\(^7\)

Critics of the Department’s efforts regarded the facility as an irresponsible waste of tax money. The credit sale to farmers did not soothe fears that the mill would fail to generate profits without significant increases in cane production.\(^8\) If the mill failed, bond holders would be entitled to the gambling money to repay the debt.\(^9\) The project’s speculative benefits coupled with the vast


\(^{4}\) Id. See also Laura Maggi, *Sugar Cane Farmers to Take Possession of State Syrup Mill*, TIMES PICAYUNE (New Orleans), May 16, 2006, National, at 4.

\(^{5}\) Maggi, *supra* note 2.


\(^{7}\) See id.


\(^{9}\) Maggi, *supra* note 4.
amount of money involved led some to suspect the Commissioner was engaged in self-dealing.\textsuperscript{10}

Suspicions were no doubt heightened after the Commissioner announced he had changed his mind about selling the mill to the farmer’s co-op.\textsuperscript{11} Under the new plan, the mill would be offered to unidentified outside investors while the co-op would receive a lease.\textsuperscript{12} Odom claimed the unknown investors were offering as much as $60 million to buy the facility.\textsuperscript{13}

While the media was busy coloring the Commissioner as the sugar king of south Louisiana, no one was paying attention to the legal problems looming in the background. In building the Lacassine mill, the Department of Agriculture and Forestry ignored the Public Bid Law.\textsuperscript{14} Under the law, state agencies must advertise public works contracts and award them to the lowest responsible bidder.\textsuperscript{15} No bids were ever solicited for the Lacassine mill. Commissioner Odom acted as the project’s general contractor.\textsuperscript{16} Under Odom’s direction, firemen and office clerks who worked for the Department of Agriculture and Forestry furnished labor for the mill’s construction.\textsuperscript{17} For specialized projects, the Commissioner hand-picked the contractors.\textsuperscript{18}

On behalf of its members, Louisiana Associated General Contractors challenged the Commissioner’s authority to run the project. The association sued for an injunction ordering the
Commissioner and others to comply with the Public Bid Law. In response, the Commissioner answered that the Agricultural Finance Act exempted him from compliance. The trial court ruled for the Commissioner and the Louisiana First Circuit Court of Appeal affirmed.

The first circuit treated the case purely as an issue of statutory construction and made no attempt to address the substantive policies that underlie the Public Bid Law. In Louisiana Associated General Contractors v. Louisiana Department of Agriculture and Forestry (the Sugar Mill Case), the Louisiana Supreme Court reviewed the first circuit’s decision. The supreme court unanimously affirmed the first circuit’s decision, but shockingly, Justice Victory’s opinion did nothing to develop the lower courts’ rationale. Instead, the high court adopted the first circuit’s “plain meaning” interpretation.

After the supreme court’s decision, the fate of millions of tax dollars and an enlargement of the Agriculture Commissioner’s powers were decided by consideration of nothing more than the words on a page. This note analyzes the far-reaching consequences of the court’s decision. Part II of this note describes the case and the Public Bid Law in more detail. Part III demonstrates why the court’s plain meaning approach fails to provide an adequate solution under accepted principles of law and linguistics. Part IV concludes with an alternative analysis and a proposal to abolish the intra-agency borrowing of bid law exemptions.

20. See id. at 701.
21. Id. at 702.
22. See id.
23. 924 So. 2d 90 (La. 2006).
24. Id. at 103–04. Justice Johnson concurred in the opinion without assigning reasons.
II. INTO THE CANE FIELD

A. The Public Bid Law

The Louisiana Public Bid Law lays out procedural and substantive rules that govern the awarding of public works contracts. The legislature adopted the Public Bid Law to insulate public funds from fraud and official malfeasance.\(^{25}\) The law achieves this end by requiring competitive bidding for a wide range of public activities and by limiting the discretion of officials to reject bids.\(^{26}\) The Public Bid Law provides fairness to contractors and increases transparency.\(^{27}\) Together these mechanisms drive down the cost of financing public works and reduce the ability of officials to line the pockets of favored campaign contributors by passing exorbitant public contracts under the table.\(^{28}\)

The Public Bid Law requires all public entities to advertise the undertaking of public works over $100,000 and to award the project to the “lowest responsible bidder” who bids in accordance with the project’s specifications.\(^{29}\) “Public entities” subject to the statute include “any agency, board, commission, department, . . . or any political subdivision of the state.”\(^{30}\) Generally, public officers also qualify as “public entities.”\(^{31}\) The term “public works” includes the “construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity.”\(^{32}\)

Advertisements soliciting bids for public contracts must be published at least once a week in a local newspaper.\(^{33}\) The

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25. Id. at 95.
28. J.W. Rombach, 670 So. 2d at 1310.
29. § 38:2212(A)(1).
30. § 38:2211(A)(11).
31. Id.
32. § 38:2211(A)(12).
advertisements must run for at least three weeks and must come at least twenty-five days before bids are eligible for receipt. The successful bidder must sign a contract with the public entity and in most cases must provide a bond for security. Any contract awarded without following these procedures is an absolute nullity. Local district attorneys and the attorney general have authority under the act to sue for nullification of contracts awarded without complying with these procedures. The act also authorizes citizens' suits against public entities that disregard the Public Bid Law.

Public entities also face substantive limits on the award of public contracts. Public entities must award public works contracts to the "lowest responsible bidder." The responsible bidder standard is designed to make contract awards less discretionary. Traditionally, public entities were entitled to reject any and all bids. The government could then readvertise the project. To end this practice, the legislature amended the law to require a just cause for rejection. The just cause standard diminishes the discretion available to public officials under prior law, but does not eliminate it. Officials make the initial determination as to which bidders qualify as "responsible." The Public Bid Law expressly allows officials to consider available funding for the project and changes in the project's scope in making their determination.

34. Id.
35. § 38:2216(A)(1).
36. § 38:2220(A).
37. § 38:2220(B).
38. § 38:2220.1 (authorizing civil actions under sections 2220.1 to 2220.4).
43. § 38:2214(B). See also New Orleans Rosenbush Claims Serv., Inc., 653 So. 2d at 541–42 (discussing the 1982 legislative mistake and subsequent 1983 amendments).
44. See Broadmoor, L.L.C. v. Ernest N. Morial New Orleans Exhibition Hall Auth., 867 So. 2d 651, 656 (La. 2004) (noting that "lowest responsible bidder" is not equivalent to "lowest monetary bid").
45. § 38:2214(B).
Louisiana jurisprudence permits public officials to consider the contractor's financial stability, experience, and reputation.\(^4\)

The jurisprudence has so far treated the responsible bidder issue as a question of good faith.\(^4\) In *New Orleans Rosenbush Claims Service, Inc. v. City of New Orleans*, Rosenbush Claims Service was the low bidder on a public service contract advertised by the City of New Orleans.\(^4\) The City decided to reject all bids and readvertise the project.\(^4\) The City's position was that readvertisement was in the public's best interest.\(^5\) Under prior law, this explanation would have sufficed, but in *Rosenbush*, the City's conclusory assertions failed to meet the just cause standard.\(^5\)

By contrast, in *C.R. Kirby Contractors, Inc. v. City of Lake Charles*, the third circuit upheld the City's rejection of bids on a road patching deal based on the City's good faith assertion that it wanted to prevent bid shopping among subcontractors.\(^5\)

Other decisions have upheld rejections based on the state's finances,\(^5\) and the use of unacceptable subcontractors.\(^5\)

Underlying the need for the Public Bid Law is concern about human greed. Government officials have a perverse incentive to spend public funds in ways that maximize the benefits to themselves. Public servants could be tempted to hire friends, family, or constituents at premiums that fail to reflect the value of their services to the taxpayer. The choice makes perfect sense from the perspective of the public servant because the benefits to the favored individuals are directly apparent whereas the damage to the taxpayer is imperceptible.

\(^4\) *Broadmoor*, 867 So. 2d at 656.
\(^4\) *New Orleans Rosenbush Claims Serv., Inc.*, 653 So. 2d at 540.
\(^4\) *Id.* at 540–41.
\(^5\) *Id.* at 540.
\(^5\) See *id.* at 546–47.
\(^5\) 606 So. 2d 952, 955 (La. App. 3d Cir. 1992).
\(^5\) Pyro Incinerator & Supply Corp. v. Gervais F. Favrot Co., 210 So. 2d 356, 360 (La. App. 4th Cir. 1968). However, the 1982 amendments to the Public Bid Law cast doubt on the case's holding.
The legislature enacted the Public Bid Law to resolve this conflict of interest in favor of taxpayers. The law favors a policy of openness and accountability to minimize the risk of surreptitious deals diluting the public trust. In the *Sugar Mill Case*, Commissioner Bob Odom took the Public Bid Law head-on. After months of controversy in the news, the events culminated before the Louisiana Supreme Court.

B. *The Sugar Mill Case*

The *Sugar Mill Case* involved more than one mill in Southwest Louisiana. Louisiana Associated General Contractors challenged numerous projects undertaken by the Department. Most of the projects were carried out through the Louisiana Agricultural Finance Authority, a subdivision of the Department of Agriculture and Forestry. The projects included the construction of airplane hangars, tree irrigation systems, and office facilities. The Finance Authority carried out the projects on behalf of the Department of Agriculture and Forestry as well as other public and private entities.

Since the parties stipulated the facts before trial, the only question before the court in the *Sugar Mill Case* was the statute's proper interpretation. The case turned on whether the Finance Authority had a statutory exemption from the Public Bid Law's competitive bidding procedures. If the law did provide an exemption, the court also had to decide whether the Agriculture Commissioner could borrow that exemption to carry out projects for the Department of Agriculture and Forestry.

56. *Id.*
57. Hereinafter referred to as the Contractors.
58. *Sugar Mill Case*, 924 So. 2d at 94 nn.2-4.
59. Hereinafter referred to as the Finance Authority.
60. *See Sugar Mill Case*, 924 So. 2d at 94-95.
61. *Id.* at 93.
62. *Id.*
63. *Id.* at 94.
64. *Id.* at 91.
65. *Id.*
Both lower courts applied the rules of statutory construction to resolve the issue. Their reasoning relied heavily on the "plain meaning rule." The Department of Agriculture and Forestry claimed the exemption pursuant to section 266 of the Louisiana Finance Authority Act. This section gives the Finance Authority the power to:

Acquire or contract to acquire from any person, firm, corporation, municipality, federal or state agency, by grant, purchase, or otherwise, movable or immovable property or any interest therein; own, hold, clear, improve, lease, construct, or rehabilitate, and sell, invest, assign, exchange, transfer, convey, lease, mortgage, or otherwise dispose of or encumber the same, subject to the rights of holders of the bonds of the Authority, at public or private sale, with or without public bidding.

The Department argued that the "with or without public bidding" clause at the end of the paragraph operates to exempt the Finance Authority from the Public Bid Law as to all of the enumerated powers. The Contractors contended that the final clause applies only to the conveyance of property "at public or private sale." According to the Contractors, the "logical extension" of the Department's argument would lead to nonsensical constructions. As the Contractors stated in their brief: "[S]eparating 'without public bidding' from 'at public or private sale' and engrafting it to all of the listed powers confounds reason. For example, [the Finance Authority] cannot own or hold property without public bidding."

68. See Original Brief on Behalf of Louisiana Associated General Contractors Inc., at 5–6, Sugar Mill Case, 924 So. 2d 90 (No. 2003-CA-2501) [hereinafter LACG Original Brief].
69. Id. at 15.
70. Id.
71. Id.
Writing for the first circuit in the opinion below, Judge Fitzsimmons rejected the contractors' argument. "We particularly note that the use of the conjunctive 'and' between the clauses . . . logically connects those clauses," the court announced. "A literal reading of this fundamentally unambiguous statute results in application of the words 'without bidding' to all of the powers listed . . . ."\textsuperscript{73}

The supreme court refused to break new ground. It too intoned the canons of construction over section 266 and proceeded with an analysis composed more of conclusions than reasons.\textsuperscript{74} First, the court rejected the contractors' argument that the statutory language had to name the Public Bid Law to create an exemption from its procedures.\textsuperscript{75} The court relied on \textit{Arnold v. Board of Levee Commissioners for the Orleans Levee District}.\textsuperscript{76} According to the court, \textit{Arnold} means the statute does not have to use "magic words" to create an exemption.\textsuperscript{77} \textit{Arnold} was a taxpayer suit under the Louisiana Public Lease Law against the Orleans levee board for leasing public property to house a museum and library named after a congressman.\textsuperscript{78} The levee board claimed an exemption under a statute authorizing leases "under such terms and conditions . . . as [the] Board may deem proper."\textsuperscript{79} Although this statute was not part of the Public Lease Law, the court held that the provision sufficed to exempt the Orleans Parish Levee Board from the Public Lease Law.\textsuperscript{80} According to the court, the language showed the legislature's intention to give levee boards broad discretion to dispose of reclaimed lands.\textsuperscript{81}

\textit{Arnold} sets a low standard for the degree of specificity needed for an exemption to laws such as the Public Bid Law. The statute containing the purported exemption in \textit{Arnold} was a codification of the powers of levee boards taken from the Louisiana Constitution
of 1921. The statute was probably drafted without any consideration of its effect on the Public Lease Law's applicability. If the threshold is properly expressed in Arnold, the interpretation of exemptions would be subject to a rational basis standard. Such a permissive standard seems inappropriate in this context since the legislature's intent in enacting the Public Bid Law was to resolve questionable issues in favor of taxpayers. In relying on Arnold, the supreme court overlooked this fundamental aspect of the law.

After considering Arnold, the court analyzed section 266. The court's reasoning adopted the lower court's plain meaning analysis. The court only added that the comma separating "at public or private sale" from "with or without public bidding" made the contractors' interpretation absurd.

The court bolstered its construction with other statutes related to section 266. The statute authorizing the Finance Authority to use public employees and equipment to perform public work "notwithstanding any other law" was particularly significant to the court since the law presupposes the agency has not let the contract to a private agency. A similar argument was founded on section 2212, which prohibits constructions of the law that "reduce" the powers of the Authority. The court closed its analysis of the first issue with a discussion of other contracting laws that exempt the Authority.

After weaving all of these arguments together in support of its conclusion, the court struggled to successfully argue that any reading of section 266 inevitably leads to the conclusion that the Finance Authority need not comply with the proper bidding procedures. The substantive analysis of the related statutes is undercut by the absence of any justification as to why these other

82. See id. at 1325.
83. La. Assoc. Gen. Contractors v. La. Dep't of Agric. & Forestry (Sugar Mill Case), 924 So. 2d 90, 98–99 (La. 2006).
84. Id. at 98. By the court's rules of grammar, a comma used in such a fashion "negates the 'general rule . . . that relative and qualifying clauses are to be applied to the words or phrase immediately preceding." Id. at 98–99 (quoting State v. Burns, 699 So. 2d 1179, 1181 (La. App. 2d Cir. 1997)).
85. Id. at 99.
86. Id.
87. Id. at 101. In particular, the supreme court notes that the lower courts have held that section 266 exempts the Finance Authority from the Contractors Licensing Law. Id.
statutes are competent indicators of the Public Bid Law's meaning. By the end of the discussion, we are left with little more than the court's conclusions of meaning rather than any sound legal reasoning.

2. Taking Candy from a Baby: Borrowing the Finance Authority's Exemption

Having concluded that the Finance Authority is exempt from the Public Bid Law, the court considered whether the Commissioner lawfully exercised that exemption on behalf of the Department of Agriculture and Forestry. The court approached the issue carefully: "[C]learly there is no express exemption for the Department or the Commissioner," said the court. 88 "[A]nd their powers and authorities are broader than those of [the Finance Authority]." 89 To solve the issue, the court turned to a structural analysis.

The structural relationships among the parties in the Sugar Mill Case arose from a weave of statutory and constitutional law. The Louisiana Department of Agriculture and Forestry is a constitutional entity organized within the executive branch of government. 90 The Commissioner of Agriculture heads the department. 91 The constitution charges the Commissioner with the regulation of produce, livestock, farming, and other agricultural activities. 92 As a state agency, the Department remains subject to general laws such as the Public Bid Law. 93

The legislature created the Louisiana Agricultural Finance Authority in 1983 to respond to a shortage of capital needed to drive agricultural development forward. 94 The Authority has nine members. The Governor appoints eight of the members, and the Commissioner of Agriculture and Forestry serves as the final member. 95 The Finance Authority has the power to adopt

88. Id. at 102.
89. Id.
90. LA. CONST. art. IV, § 10.
91. Id.
92. Id.
94. Id. § 3:262.
95. Id. § 3:264.
regulations, authorize agricultural research, borrow money, and issue bonds.\textsuperscript{96} The Authority also has residual authority to "carry out the purposes and provisions" of the act.\textsuperscript{97} The Authority has a broad purpose. The legislative findings state that the Authority was created to "alleviate[] the severe shortage of capital . . . available at affordable interest rates for investment in agriculture."\textsuperscript{98}

The Authority's power to issue bonds for constructing buildings for ultimate use by the Department of Agriculture and Forestry convinced the court to conclude that the Commissioner had not exceeded his authority.\textsuperscript{99} However, the court's discussion was not entirely candid. The opinion juxtaposes section 270 of the Louisiana Finance Authority Act alongside section 266 without clearly distinguishing them.\textsuperscript{100} Section 270 deals exclusively with the agency's power to issue bonds to fund certain public works.\textsuperscript{101} The quotation from section 266 is the same part of the statute under dispute in the case.\textsuperscript{102} The juxtaposition of the sections in the opinion gives the impression that the court's conclusion is founded on clear statutory language. In reality, the relationship of the two statutes is not as clear.

The court recognized that its reasoning conflicted with the first circuit's opinion in \textit{Associated General Contractors of America v. Police Jury of Pointe Point Coupee Parish}.\textsuperscript{103} In \textit{Pointe Coupee}, the parish police jury was using the employees of the Department of Highways to build roads without public bidding.\textsuperscript{104} The first circuit struck down the practice because it allowed public entities to conspire to avoid complying with the Public Bid Law.\textsuperscript{105} In the \textit{Sugar Mill Case}, the supreme court distinguished \textit{Pointe Coupee

\textsuperscript{96.} Id. § 3:266.
\textsuperscript{97.} Id.
\textsuperscript{98.} Id. § 3:262.
\textsuperscript{99.} La. Assoc. Gen. Contractors v. La. Dep't of Agric. & Forestry (Sugar Mill Case), 924 So. 2d. 90, 102–04 (La. 2006).
\textsuperscript{100.} Id. at 102–03.
\textsuperscript{101.} See LA. REV. STAT. ANN. § 3:270 (2007).
\textsuperscript{102.} See id. § 3:266.
\textsuperscript{103.} 225 So. 2d 300 (La. App. 1st Cir. 1969).
\textsuperscript{104.} Id. at 303.
\textsuperscript{105.} Id. at 306.
on the grounds that the Department of Agriculture and Forestry is the Authority’s parent agency.\footnote{106. La. Assoc. Gen. Contractors v. La. Dep’t of Agric. & Forestry \textit{(Sugar Mill Case)}, 924 So. 2d 90, 103 n.17 (La. 2006).}

In the end, the court’s structural analysis fails to confront the hard issues. The Finance Authority is an independent agency. The Commissioner maintains representation on that body as one of its members. Through that membership, the Commissioner can already wield influence over the Authority’s decisions. To allow the Commissioner to unilaterally borrow the Authority’s exemption vests him with the power to undertake all forms of public works with Department capital provided that the project fits within the court’s broad statutory construction.

\subsection*{C. Cotton Candy}

The \textit{Sugar Mill Case} was decided by a comma. Language is a useful tool for legal practitioners because it offers a degree of predictability. Nevertheless, textual stability goes only so far. For exceptionally unimportant problems, a textual approach may be an expedient measure for conserving judicial effort. Problems in law are seldom of such a variety.

To truly solve issues such as the ones in the \textit{Sugar Mill Case}, society would need to develop perfect laws to govern the meaning of language. Unfortunately, that advancement will probably have to wait until we can build machines that read minds. The court was desperate to imbue the maze of words in section 266 with a common sense meaning. But the approach failed to grapple with the real issues. The Public Bid Law is about reining in favoritism and wasteful public expenditures. The foundation of the law cannot be ignored in favor of a cotton candy appeal to the plain meaning of words.

\section*{III. FROM THE ROSETTA STONE}

The “with or without public bidding” clause at the end of section 266 of the Louisiana Agricultural Finance Act forms part of a syntactical ambiguity that is very common in the English
language. The following sections explore why the phrase is not as clear as the *Sugar Mill Case* represents.

**A. Development in Law and Literature**

Anthropologists started to explore the problems of language in the early twentieth century.\(^{107}\) Claude Levi-Strauss was one of the first to posit a science of language. From his study of foreign cultures, Strauss theorized that words are primarily rules of negative relationships. Strauss’s theory is commonly known as structuralism.\(^{108}\) Professor Ferdinand Saussure deserves credit for structuralism’s impact on linguistics. His lectures contain the famous thought experiment illustrating the structuralist’s concept of language.\(^{109}\) The word “tree” allows us to identify a class of objectively identifiable external objects. Understanding of the word derives from the ability to distinguish “trees” from “bushes.”\(^{110}\) The meaning of these two words in turn derives from the fact that neither means “flowers.”\(^{111}\) Structuralists might say that Hamlet was onto something when he responded to Polonius’s question by responding: “Words, words, words!”\(^{112}\)

Of course, the vagueness inherent in the categorical structure of language is nothing new to legal scholars. The literary theorists who took up the exploration of text after Strauss and Saussure were behind the learning curve.\(^{113}\) The two disciplines did, however, experience something of a parallel development. Each

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108. *Id.* at 90.

109. *Ferdinande de Saussure, Course in General Linguistics* 65. *See also id.* at 110. My example is slightly modified from the one Saussure himself describes.

110. *Saussure, supra* note 109, at 66.

111. *Id.* at 67 (discussing the “arbitrary nature of the sign”).


113. *See Frederick A. Philbrick, Language and the Law* 28–29 (1951). Philbrick discusses the difference between “concrete” and “abstract” words. The analysis is conceptually similar to structuralism although Philbrick does not couch the example in those terms. However, the example serves to show that the avant-garde ideas that linguists would later refine were nevertheless budding in legal intellectual circles.
progressed from a rigidly formalist search for the intention of the
author to a system with some degree of atextual interpretivism.114

At a time when the law was thought to be a system of discrete
rules, Blackstone offered the well-known canons of construction to
solve the difficulties of ambiguous statutory language. Any
Louisiana legal scholar is familiar with these rules since our Civil
Code has codified a number of Blackstone’s canons.115 The
canons have blended well with civilian notions of legislative
primacy. Article 9 is a testament to the marriage of the two
regimes: “When a law is clear and unambiguous . . . the law shall
be applied as written and no further interpretation may be made in
search of the intent of the legislature.”116

The infamous difficulty of employing these rules to resolve
particular cases is well documented.117 It is perhaps an ironic
recognition of these difficulties that the legislature approved
methods that appear mutually exclusive at first blush—the so-
called plain meaning rule and the teleological analysis.118 The
common law ultimately outgrew its heavily formalist roots in
search of more powerful analytical tools. Law merged with
numerous other disciplines such as sociology, economics, and even
literature.119

The literary field deserves credit for developing the most
elaborate theories of interpretation. At the extreme, critics such as
Derrida had abandoned notions of stable meaning in text.120 His
theory, popularly known as deconstruction, generated criticism
within the field that led some critics to denounce it as “licentious
or promiscuity.”121 The legal community, in particular, has

114. See generally Eagleton, supra note 107. Eagleton treats the historic
developments in literature throughout the text.
115. See generally LA. CIV. CODE ANN. arts. 9–13 (2007); Rodolfo Batiza,
116. LA. CIV. CODE ANN. art. 9 (2007).
117. See generally Karl N. Llewellyn, Remarks on the Theory of Appellate
Decision and the Rules or Canons About How Statutes Are to Be Construed, 3
118. See LA. CIV. CODE ANN. arts. 9–10 (2007).
120. See generally Eagleton, supra note 107; see also Posner, supra note
119, at 480, 492–93.
David Gray Carlson defending deconstruction).
struggled with the legitimacy of such an extreme approach.\textsuperscript{122} Literature’s insights into the semi-fluid nature of text nevertheless have much to offer legal analysis.

\textbf{B. The New Textualism}

The flaw in the relativistic theories posited principally by Derrida in the aftermath of the structuralist revolution was the inability of the model to cope with the legitimacy of one context over another. Derrida was unable to find a relationship between the sign and the thing it signified.\textsuperscript{123} No true meaning could be made of the sentence, “Go through the light.”\textsuperscript{124} The deconstructionist fills its meaning with questions. Are the words a desperate plea? Does it imply something profound about the afterlife? All readings are possible depending on the context. To Derrida, the sentence simultaneously holds each possible meaning since no preference for any particular context is possible within deconstruction.\textsuperscript{125} This impossibility arises from the limitless perspectives available to observe the meaning. Should the author’s perspective control? Should an objective meaning prevail over a subjective one? Derrida might say that these considerations are beneath the text. For our purposes, the important question is whether it is possible to reconcile the indisputable fluidity of text with an analytical framework that is not purely relativistic.\textsuperscript{126}

\begin{enumerate}
\item Originalists, for example, reject the view that the Constitution of the United States means anything other than what history says the founding fathers intended. \textit{Posner}, supra note 119, at 240. Originalists believe this methodology is essential to restrain the judiciary from imposing its own views into the law. \textit{Id.} at 241. This sentiment arising from a need in the legal profession to present objective arguments to win cases has confounded the assimilation of the more theoretical interpretive models. \textit{See id.} at 243 (critiquing originalism). \textit{See also Aharon Barak, Purposive Interpretation in Law 341} (Sari Bashi trans., 2005); \textit{Stanley Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies} 5 (1989).
\item \textit{See Peter V. Zima, Deconstruction and Critical Theory} 168 (Rainer Emig trans., 2002); \textit{see generally} Stanley E. Fish, \textit{A Reply to John Reichert; Or, How to Stop Worrying and Learn to Love Interpretation}, 6 \textit{Critical Inquiry} 173 (1979).
\item \textit{See Stanley Fish, There Is No Textualist Position, 42 San Diego L. Rev.} 629 (2005). The example is fully explored below.
\item \textit{Endicott, supra} note 121, at 15.
\item \textit{Fish, supra} note 123, at 175.
\end{enumerate}
1. Stanley Fish—The Impossibility of Neutral Text

Stanley Fish proposed that the stabilizing link between text and meaning is the observer’s interpretive community. He posits that the text itself has no determinate meaning independent of the act of reading. The text’s “meaning” is created by the reader in the process of reacting to syntax and context. Under this model, meaning is limited by the words in the text but remains fluid in that the interpretive strategies of a particular community can powerfully alter its substance.

This fact of language does not mean that texts are worthless. Prevailing wisdom as to the usefulness of texts simply needs re-evaluation—especially in the field of law. Fish’s theory of interpretive communities, popularly known as “reader response theory,” is helpful in this regard. Reader response theory changes the focus of the inquiry of meaning from authors to communities that share a basic level of uniform interpretive strategies. A crude example of an interpretive community would be English speaking people. All English speakers share common strategies that permit them to decode the words on this page. The important thing to note for this discussion is that an

128. Id. at 474.
129. See STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 2 (1980); see also Fish, supra note 127, at 475.
130. Fish, supra note 127, at 478. In his recent article, There Is No Textualist Position, Fish connects the interpretive issues explored in his earlier works to the legal field. Fish, supra note 124. In the article, Fish recounts his father instructing him to “Go through the light” as he approaches a red light. Id. at 629. Fish then poses a simple question: “What did he mean?” Id. Fish concludes that his father was not telling him to run the light but to pass through the intersection when the light changes. Id. Fish looked beyond the “plain meaning” of his father’s words for the meaning his father “must have intended.” Id. Fish hypothesizes the same instruction in a number of contexts. Id. at 631. He asks what the meaning would be if his father were experiencing chest pains or enjoyed flouting authority. Id. Each new context demonstrates the indeterminacy of the words themselves. “A sequence of letters and spaces,” Fish says, “has no inherent or literal or plain meaning; it only has the meanings . . . that emerge within the assumption of different intentions.” Id. at 633.
131. See FISH, supra note 129, at 3.
132. Id. at 14.
133. Id.
134. Id.
interpretive community can be very narrow. This observation is significant because the reader’s interpretive community will always come to bear on the meaning of words. For this reason, no text can be truly neutral. When two communities reach different conclusions about the meaning of a particular text, a mechanism to resolve the dispute is needed. So, the obvious question is—should that mechanism be Blackstone’s cannons?

2. In Defense of the Word—Sort of

As we have just seen, texts themselves cannot create or exclude meaning without reference to the intentions of some human being. Given this critique, we must ask if the legal community should abandon text all together. The answer to that question is obviously no. The community of legal interpreters is sufficiently stable to sustain the continued utility of text. If nothing else, texts—whether cases or statutes—are the point from which other non-textual legal arguments ultimately emerge. Another example taken from the pages of an article by Walter Sinnott-Armstrong helps to illustrate.

The article supposes that lightning strikes a tree leaving a pattern that appears to be the word “STOP.” People start to treat the tree as a stop sign. One day, a driver drives past without stopping and collides with another car. The court holds the driver liable for negligence. The decision of the court in Sinnott-Armstrong’s hypothetical has nothing to do with the meaning of the lightning strike pattern. The driver is deemed negligent because he breached the expectations that had arisen in the community. To this extent, the pattern on the tree serves as

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135. Id.
136. Fish, supra note 124, at 641–42.
137. Id. at 641.
139. Sinnott-Armstrong, supra note 138.
140. Id.
141. Id.
142. Id. at 475.
143. See id.
a useful text since it identifies the governing standard of behavior.\textsuperscript{144}

This accommodation for text should not be taken as a validation of plain meaning. The analysis in previous sections conclusively demonstrates that plain meaning simply does not exist. All supposedly literal interpretations of text amount to little more than shorthand for numerous assumptions and value judgments related to social life.\textsuperscript{145} If the plain meaning rule has any utility, the utility does not derive from any substantive source. The rule's benefit is probably limited to an economizing function for issues that enjoy virtual unanimous consensus.\textsuperscript{146} It would be nonsensical, for example, to ask the courts to explain the policies surrounding speed limits to everyone who gets a ticket because everyone implicitly understands that speed limits are a tax on driving at excessive speeds. But many laws grapple with behavioral issues that are far more complex than speeding. In these cases, competing interpretations often arise, and the court must go beyond the text to reach a resolution.

IV. BEYOND THE MILL

If the text offers no dispositive solution to the sugar mill problem, what does? The answer begins with a simple tenet: Law strives to create the best vision of social life. This section posits the alternative visions of social life that emerge under different interpretations of the Public Bid Law. This part evaluates these alternatives and explores possible legislative responses.

\textbf{A. Did the Court Get it Wrong?}

The court set out to answer an ostensibly simple question in the Sugar Mill Case: Does "with or without public bidding" apply to

\textsuperscript{144} See \textit{id}. In other words, the fake "stop sign" tells us to apply the law of torts and that the standard of liability is negligence because running stop signs is considered an imprudent thing to do by most people. Law adopts this analysis to vindicate other interests, such as fairness, rather than to discern the "true meaning" of the text. See Fish, \textit{supra} note 124, at 641-42.

\textsuperscript{145} See Sinnott-Armstrong, \textit{supra} note 138, at 475; Fish, \textit{supra} note 124, at 642.

\textsuperscript{146} See POSNER, \textit{supra} note 119, at 399.
all powers listed in the paragraph or to only a few of them? The preceding sections lay out why the court’s conclusion was unfounded as a matter of linguistics—not as a matter of law. There is nothing more to gain from studying the statute’s syntax. The rest is beyond the text.

The issue in the Sugar Mill Case is institutional. The public does not have the time to keep a close eye on every public official. In some cases, public servants are unaccountable because they are insulated from the political process. As we have discussed, competitive bidding laws solve this problem in the public works context by limiting the government’s discretion. Whether the court was right depends on whether the transfer of the bidding exemption to the Commissioner and the Department poses no additional risk that competitive bidding would resolve.

On this point, the court’s decision was wrong. The architecture of these institutions reveals relationships that pose a high risk of corruption. As the court acknowledges, the Executive Reorganization Act gives the Commissioner tremendous influence over the Finance Authority’s eight Governor-appointed board members.147 True pluralism on an eight member board could justify an exemption from the Public Bid Law on the theory that the members would check one another. But since the Commissioner of Agriculture and Forestry sits as the ninth member of the board, the risk of collusion rises dramatically.148 The Commissioner’s influence over the Finance Authority’s board is further augmented by virtue of his power to appoint all of the Authority’s employees and to enforce its decisions.149

The Executive Reorganization Act and the Louisiana Agricultural Finance Act concentrate considerable power over the board in the hands of the Agriculture Commissioner. The risk of corruption this influence poses cannot be understated. The political clout of Commissioner Odom is renowned.150 After the

148. § 3:265.
149. Id.
decision in the *Sugar Mill Case*, the Commissioner pressed for construction of another mill in Bunkie. The Commissioner pushed for the project despite an independent feasibility study that concluded the mill would "collapse under the weight of its own debt within a decade." The project would have gone forward were it not for the intervention of Governor Kathleen Blanco who crushed the proposal.

If allowed to stand, the *Sugar Mill Case* could allow public officials to order needless construction projects to benefit political supporters. Officials might be able to ensure re-election by letting constituents sell supplies to the government for exorbitant prices. If the legislature adopted the Public Bid Law to end these perversities, the court should have adopted the Contractors' restrictive interpretation. On the other hand, if there is a political subtext, another horrifying possibility remains.

**B. Did the Court Get it Right?**

Louisiana is not the only state famous for corruption. In 1898, Hackfeld & Co. was one of the big five sugar producers in Hawaii. The United States seized the assets of the German-owned sugar behemoth in World War I. After the war, Congress returned seized property to American citizens who were living abroad during the war. The former stockholders of Hackfeld & Co. bribed public officials and perpetrated elaborate perjuries to obtain recognition of their U.S. citizenship. After the fraud came out in the stockholder's suit, the success of the fraud was staggering. The subterfuge fooled even the President of the United States.

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151. *Id.*
155. *Id.* at 19.
156. *Id.* at 20–22.
157. For a more thorough account of the fraud, see generally *id.*
158. *Id.*
159. *Id.* at 23.
While I do not intend to suggest the sugar mill controversy involved anything so lurid, Hackfeld illustrates the dangers of greed. If the legislature intended to give the Finance Authority an exemption, the court’s interpretation would be the correct one, but not for any of the reasons advanced in the opinion. Two policies could plausibly justify the legislature’s motives.

1. Risk Management and Special Needs

A possibility is that the Finance Authority and Department of Agriculture and Forestry engage in public works activities associated with a low risk of pocket padding, or activities that have special needs. The exemption for public works under $100,000 is an example of the former. Capital costs make under-the-counter deals in low price ranges less attractive. The incentive to engage in deals with which the Public Bid Law is concerned with is likely to become a serious problem only when the profit margins are sufficiently high. Additionally, the cost of implementing the Public Bid Law’s procedures—in particular advertising—may offset the savings derived from requiring them on small projects.

An example of the second variety of exemption arises in the context of transactions with the federal government. State and federal governments depend on each other to provide a number of public services from defense to infrastructure. Federal, state, and constitutional law are the foundation of the relationship. The legislature could have found the state bidding laws ill-suited to remedy the unique problems that arise in the course of federal-state transactions.

Neither of these policies support the expansive decision reached in the Sugar Mill Case. If the court had adopted a narrow interpretation—finding an exemption only if the Authority disposes of property—a low-risk policy could support the exemption. The legislature could have found mandatory bidding unnecessary if competitive bidding was already the custom in sales transactions. This finding does not need to deny the possibility that some officials might pass off cheap farm equipment to

160. See La. Assoc. Gen. Contractors v. La. Dep’t of Agric. & Forestry (Sugar Mill Case), 924 So. 2d 90, 100 n.15 (La. 2006).
political allies. If the incidents of pocket padding are sufficiently low in sales transactions, the legislature could have found that the cost of preventing the transactions offsets the potential gain.

Permitting the Department of Agriculture and Forestry to borrow an exemption to build expensive agricultural facilities is hardly consistent with these findings without the appropriate findings of fact. While the Department did argue that they were saving the state money, the courts never passed judgment on this claim.161

2. Condoning Pocket Padding

In the course of its analysis, the court notes that Senator James David Cain proposed a bill to amend the Public Bid Law to require compliance from the Department of Agriculture and Forestry.162 The bill ultimately failed to receive enough votes to pass into law.163 The bill’s failure could mean that the legislature is not only aware of the problems in the Department of Agriculture and Forestry, but also approves of its practices.

The legislature could find utility in permitting the Commissioner to pay his employees more than their skills would be worth in the private sector. Voters who benefit from higher pay in exchange for doing extra work for the Department would be incensed if their elected officials ended the field trip through the taxpayer’s candy shop. If so, the court’s decision carries out the will of the legislature.

If such a lurid policy lurks beneath the exemption, it cannot justify the court’s interpretation. The judiciary has a duty to apply the law to reach the best results for society. The public hires judges to perform an impartial arbitration function. When the government compensates workers at a level inconsistent with their true value, mid-income individuals and businesses without political clout to protect their interest bear the burden. Courts should provide remedies in these cases. Upholding one-sided schemes in

162. Sugar Mill Case, 924 So. 2d at 99 n.10; see also Lawmaker Wants Odom to Follow Public-Bid Law, ADVOCATE (BATON ROUGE), Apr. 2, 2005, at A12.
163. Sugar Mill Case, 924 So. 2d at 99 n.10.
the name of obeying the will of the legislature sanctions economic stagnation, promotes waste, and diminishes the wealth of the people.  

C. Closing the Candy Store

The decision in the *Sugar Mill Case* was misguided. Our supreme court was no doubt seeking the most appropriate result under the law. Plain meaning failed to deliver that result. The decision concentrated an immense amount of power in the hands of the Agriculture Commissioner to undertake wasteful public works contrary to the public interest. If the law permits agencies to loan bidding exemptions to their parent departments, the holding in the *Sugar Mill Case* threatens to spread.

The *Sugar Mill Case* sets a precedent for exemption lending. Paragraph 15 of section 600.6 of the Louisiana Housing Finance Act is identical to the statute that the court held exempts the Agricultural Finance Authority. The structure of the agency is also very similar. The Housing Authority is a sub-agency of the Department of Treasury. The treasury secretary sits on the board of the Authority. The Governor appoints the remaining members. Under the holding of the *Sugar Mill Case*, the Department of Treasury can build multi-million dollar offices without public bidding through the Louisiana Housing Authority. Louisiana Associated General Contractors warned the court of this possibility in its brief, but the issue only received mention in a footnote.

The remedy now lies in the hands of the legislature. The Public Bid Law needs a comprehensive amendment to rein in the results of the *Sugar Mill Case*, and to centralize the various

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164. See LAGC Original Brief, supra note 68, at 17.
166. Id. § 40:600.3.
167. Id. § 40:600.4.
168. Id.
169. See LAGC Original Brief, supra note 68, at 18–19.
170. La. Assoc. Gen. Contractors v. La. Dep’t of Agric. & Forestry (*Sugar Mill Case*), 924 So. 2d 90, 100 n.11 (La. 2006); see also LAGC Original Brief, supra note 68, at 18–19.
exemptions to its procedures. At a minimum, the amendment needs to achieve two goals:

1. **Codify the Exemptions**

   One section should list all of the exemptions to the Public Bid Law. No exemptions should be permitted except as provided in this section. This change would prevent the problems that arise from piecemeal exceptions and prevent legislators from hiding exemptions for pet projects, which appear throughout legislation.\(^{171}\) The legislature should also craft the exemptions with greater care so that the scope of the exemptions is more clearly defined.

2. **Abolish Inter-Agency Exemption Borrowing**

   The legislature should abolish the power of state departments to use exemptions in favor of its agencies to carry out department projects. The risk of individual public officials influencing the members of the agency’s board with political clout is high. Forcing department officials to rely solely on the resources of the subsidiary agency to avoid the Public Bid Law insulates the process from self-dealing.

   These solutions are not comprehensive in scope. To ensure the proper use of public funding, the legislature should seek to implement cost-effective procedures to ensure the integrity of the public trust. The controversy surrounding the *Sugar Mill Case* proves that appropriate safeguards are still lacking. By implementing the strategies above, the legislature would move the law in the correct direction.

**V. Sweet and Sour**

After the Agriculture Commissioner’s conflict with the Governor over the Bunkie syrup mill, the days of 45 million dollar blockbuster construction contracts could end. The sugar mill

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\(^{171}\) For example, Louisiana Revised Statutes section 3:4274.2 exempts the “taking of mayhaw berries” from the Public Bid Law. Obscure exceptions such as these tucked away in other parts of the Revised Statues could seriously jeopardize the Public Bid Law’s protections.
debacle nevertheless casts a troubling shadow over the viability of the Public Bid Law. If the court continues to view exemptions expansively and allow liberal inter-agency borrowing, public entities with the greatest need for oversight could remain unchecked. The court should not have rendered a decision with such profound consequences in the name of following the letter of the law. To move forward, state representatives should revisit the Public Bid Law to reinforce its procedures and enhance its protection.

Louis Ducote* 

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