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Brown v. Firestone, 382 So. 2d 654 (Fla. 1980)

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Constitutional Law—A HARD CASE MAKES GOOD AND BAD LAW—Brown v. Firestone, 382 So. 2d 654 (Fla. 1980).

On June 6, 1979, the Florida Legislature passed Senate Bill 1297, commonly known as the General Appropriations Act.¹ A massive work comprising over 1400 “line items,” Senate Bill 1297 allocated over fifteen billion dollars for the myriad functions of state government during the 1980-81 biennium.² In his June 28th veto message, Governor D. Robert Graham utilized his item veto power under article III, section 8(a) of the Florida Constitution and struck forty-one separate provisions.³ Leaders of the house of representatives then filed a mandamus suit against Secretary of State George Firestone,⁴ seeking an expungement of six of the vetoes from the official records. The house leaders alleged the vetoes were a violation of article III, which prohibits exercise of the veto through striking of language of qualification or restriction unless the relevant appropriation is also struck.⁵

The Supreme Court of Florida, entertaining the writ as a matter of original jurisdiction, in Brown v. Firestone,⁶ held that (1) four of the vetoes were valid because the provisions struck, despite being phrased as provisos, actually constituted specific appropriations; (2) a fifth veto was invalid (although the provision struck was held void because not germane to the relevant appropriations); (3) a sixth veto was invalid (although the provision struck was held void because it constituted an attempt at substantive legislation within the framework of the General Appropriations Act).

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2. See FLA. S. JOUR. 942-1033 (Reg. Sess. 1979) for the complete text of the bill. “Line items” are separate appropriations for a specified purpose.
3. Letter from Governor D. Robert Graham to Secretary of State George Firestone (June 28, 1979) (on file with the Secretary of State’s Office, Tallahassee, Fla.) [hereinafter cited as Veto Message]. Some of the vetoes were technical corrections (e.g., Item 371B, striking appropriation to Eminent Scholars Program as duplicative because of the prior passage of Fla. CS for HB 1689 (1979), Veto Message at 8) while others constituted exercises of pure gubernatorial discretion (e.g., Item 6H, striking four million dollars for acquisition of beach front property in Destin, Fla. Veto Message at 18).
4. Brown v. Firestone, 382 So. 2d 654 (1980). J. Hyatt Brown (House Speaker), Herbert Morgan (Chair of the House Appropriations Committee), S. Curtis Kiser (House Minority Leader), and Ralph Haben Jr. (Speaker-Designate of the House) joined in the action. No senate members joined in the action despite their involvement in the aborted negotiations which preceded the suit. See Tallahassee Democrat, Oct. 25, 1979, § D at 3, col. 1.
5. Brown v. Firestone, 382 So. 2d 654 (1980). FLA. CONST. art. III, § 8(a) reads in relevant part: “The governor may veto any specific appropriation in a general appropriation bill, but may not veto any qualification or restriction without also vetoing the appropriation to which it relates.”
While upholding generally the right of the Governor to strike any specific appropriation, the court modified existing case law in its ruling that henceforth a governor may not raise the unconstitutionality of a stricken legislative qualification as a defense to a veto challenge. Finally, the court extended the special standing rule of *Department of Administration v. Horne* to recognize the right of any citizen to litigate the validity of a gubernatorial veto of a legislative qualification.

The purpose of this note is to explore the ramifications of *Brown v. Firestone* regarding the exercise of the gubernatorial veto, especially the veto of legislative qualifications or restrictions. Throughout this note the terms "qualification," "restriction" and "proviso" are used interchangeably.

*Brown* represents an attempt to redefine the veto power, an area of inherent tension in a tripartite system of government. The antecedents to the clash between the legislative power to direct and the executive power to forbid can be traced at least to the 1642 claim of the Long Parliament of authority to enact legislation without the approval of Charles I. In colonial America the willful use of the veto power was assigned as one of the principal justifications for revolution. It was only the disillusioning experience with the Articles of Confederation which prompted the Framers of the United States Constitution to confer a "qualified negative" upon the President.

7. *Id.* at 669. Compare *Brown* with *Lee v. Dowda*, 19 So. 2d 570, 573 (Fla. 1944). In *Dowda*, the court stated, "Our conclusion is that . . . the inclusion of section 14. . . . was unconstitutional and void. Therefore the plaintiffs in the court below were not and are not injured by the Governor's veto of a section which was already void." *See also Division of Bond Fin. v. Smathers*, 337 So. 2d 805, 807 (Fla. 1976) ("We need not consider the issue of the constitutional validity of the Governor's veto because we hold the proviso to be unconstitutional.").

8. 269 So. 2d 659 (Fla. 1972). In *Horne*, the Florida Supreme Court recognized a limited exception to the special injury requirement of *Rickman v. Whitehurst*, 74 So. 205, 207 (Fla. 1917), and held that a taxpayer had standing to contest the validity of provisions of the General Appropriations Act on constitutional grounds relating solely to the taxing and spending power. 269 So. 2d at 663.

9. 382 So. 2d at 671.


12. *Note, supra* note 11, at 108. *See also* Alexander Hamilton's plea for an executive veto in *The Federalist* No. 73.
The broader power to selectively strike items in an appropriation bill did not appear in an American constitution until the Civil War.\(^{13}\) In the years following the Civil War, many states adopted an item veto provision to control the legislative practice of attaching nongermane riders to appropriations\(^{14}\) and to defeat what the United States Supreme Court described as "the pernicious effect of . . . 'log-rolling'—by which, in order to secure the requisite majority to carry necessary and proper items of appropriation, unnecessary or even indefensible items are sometimes included."\(^{15}\)

Despite the salutary purpose of the item veto power, its operation presented conceptual and practical difficulties for many state courts. Executive discretion to selectively strike appropriations duly enacted by the legislature places a governor in a position to do much more than simply see that the laws are "faithfully executed"; rather, the executive has a weighty influence in what disbursements are made.\(^ {16}\)

Such enhanced authority must be circumscribed to prevent conflict with the general principles that all appropriations must be made law\(^ {17}\) and that lawmaking power is restricted to the legislature.\(^ {18}\) If the item veto power were read broadly, a governor, through artful deletions, could produce a bill different in amount and effect from the one passed by the legislature.\(^ {19}\) Thus, the em-

\(^{13}\) Art. I, § 7 of the permanent Constitution of the Confederate States read in relevant part, "The President may approve any appropriation and disapprove any other appropriation in the same bill." PROVISIONAL AND PERMANENT CONSTITUTIONS OF THE CONFEDERATE STATES (1861) (out of print, available at the State Library of Florida, R.A. Gray Building, Tallahassee, Fla.).


\(^ {15}\) Bengzon v. Secretary of Justice, 299 U.S. 410, 415 (1937). The Florida Supreme Court defined "logrolling" as:

a practice under which the legislature could include in a single act matters important to the people and desired by the Governor and other matters opposed by the Governor or harmful to the welfare of the state, with the result that in order to obtain the constructive or desired matter the Governor had to accept the unwanted portion.

Green v. Rawls, 122 So. 2d 10, 13 (Fla. 1960).

\(^ {16}\) To enact a bill over a gubernatorial veto generally requires a two-thirds vote of each house of the legislature. FLA. CONST. art. III, § 8(c). In reference to the veto power, the Florida Supreme Court commented, "The veto power is capable of being expressed in precise numbers. It is represented by the difference between a majority vote and a two-thirds vote." Amos v. Gunn, 94 So. 615, 631 (Fla. 1922).

\(^ {17}\) See, e.g., FLA. CONST. art. VII, § 1(c), "No money shall be drawn from the treasury except in pursuance of appropriation made by law."

\(^ {18}\) See, e.g., U.S. CONST. art. I, § 1; FLA. CONST. art. III, § 1.

\(^ {19}\) See, e.g., State ex rel. Sundby v. Adamany, 237 N.W.2d 910 (Wis. 1976), where the effect of the Wisconsin governor's veto was to eliminate one of two alternate options pro-
phasis in the leading cases is on the “negative” nature of the item veto. A typical and oft-quoted statement of the principle appears in State ex rel. Sego v. Kirkpatrick.20

The power of partial veto is the power to disapprove. This is a negative power, or a power to delete or destroy a part or item, and is not a positive power, or a power to alter, enlarge or increase the effect of the remaining parts or items. It is not the power to enact or create new legislation by selective deletions. Thus, a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses or sentences.

This type of separation-of-powers analysis has led a majority of state courts to hold that a governor may not veto valid restrictions which modify an appropriation.21 Although this position effects a doctrinal reconciliation between the governor’s constitutional discretion and the legislature’s fiscal authority, practical difficulties are presented in answering two interrelated questions.

First, and almost ingenuously, what is an appropriation? The question is variously phrased in terms of “items,” or “parts,” or “items or portions” depending on the particular wording of the constitution involved.22 Briefly summarized, the definitions characterize an appropriation vulnerable to executive veto as a specific sum for a specific purpose.23 Although comprehensive in itself, the definition has been enlarged on occasion to include an invalid re-

vided by the legislature to counties seeking a levy increase. See generally Harrington, The Propriety of the Negative—The Governor’s Partial Veto Authority, 60 Marq. L.R. 865, 882-85 (1977).


Some argument is advanced that in the exercise of the item veto the governor can negative what the legislature has done but not bring about an affirmative change in the result intended by the legislature. We are not impressed by this argued distinction. Every veto has both a negative and affirmative ring about it. Id. at 918.


22. See, e.g., Welden v. Ray, 229 N.W.2d 706 (Iowa 1975); Cason v. Bond, 495 S.W.2d 385 (Mo. 1973); State ex rel. Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974).

striction. This has been justified as a check on legislative attempts to circumvent the veto power by artful drafting.

The implications of this reasoning lead naturally to the second question: What is a valid restriction of an appropriation? With a few exceptions, the courts have not attempted to answer this question with precision. In general, a valid restriction must be directory and germane to the subject matter of the appropriation. The last requirement is bound up with the constitutional prohibition found in many state charters providing that appropriation bills may not contain provisions on any other subject. Where it is held that the struck provision was unconstitutional, the propriety of the governor's excision is often not reached. This may result from the pragmatic assessment that one cannot be injured by the veto of a void provision.

Florida first adopted an item veto provision as an amendment to the Constitution of 1868. Case law development closely paralleled the principles outlined above with one salient distinguishing feature. In Green v. Rawls, the Supreme Court of Florida construed the item veto power in connection with the following legislative appropriations:

25. Id. at 157-58.
26. See, e.g., Welden v. Ray, 229 N.W.2d 706, 710 (Iowa 1975). In In re Advisory Opinion to the Governor, 239 So. 2d 1, 10-11 (Fla. 1970), the court stated, "Such qualifications and restrictions may not go to the extent of changing other substantive law, but they may limit or qualify the use to which the moneys appropriated may be put and may specify reasonable conditions precedent to their use . . . ."
28. "[W]e have concluded, for reasons hereinafter stated, that the parts which were disapproved by the Governor were not provisos or conditions which were inseparably connected to the appropriation." State ex rel. Wisconsin Tel. Co. v. Henry, 260 N.W. 486, 490 (Wis. 1935) (emphasis added). See also Jessen Assoc. Inc. v. Bullock, 531 S.W.2d 593, 601 (Tex. 1976).
29. See, e.g., Fla. Const. art. III, § 12, "Laws making appropriations . . . shall contain provisions on no other subject."
31. Lee v. Dowda, 19 So. 2d 570, 573 (Fla. 1944).
32. The amendment provided:
The Governor shall have power to disapprove of any item or items of any bills making appropriations of money embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriation disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the Executive veto.

Fla. Const. of 1868, art. IV, § 18 (1885).
33. 122 So. 2d 10, 12 ( Fla. 1960).
13. Corrections, Division Of
   a. General office
      1. Salaries—including salary of $12,000 per annum for the director and salaries of 25 employees .......... $143,580 $143,580
      2. Expenses ........................................... 53,739 53,179
      3. Operating capital outlay .... 12,816 7,100
      4. Special—discharge pay of inmates in an amount not exceeding $15 per inmate and transportation at not exceeding $23 per inmate, as provided by law ............ 78,900 85,850

Subtotal (a) .......................... $289,035 $290,309

23. Forestry, Florida Board of
   a. Salaries—including salary of $10,000 per annum for the state forester and salaries of 890 employees in 1959/60 and 891 employees in 1960/61 ....... $1,014,794 $1,003,004
   b. Expenses ........................................... 952,013 921,542
   c. Operating capital outlay ........ 466,704 216,774

Total of Item No. 23 .......................... $2,433,311 $2,142,320

The Governor of Florida vetoed the italicized portions of items 13(a)(1) (setting the salary of the director of the Division of Corrections at $12,000 per year) and 23(a) (setting the salary of the state forester at $10,000 per year). A suit was brought to enjoin the state comptroller from issuing salary warrants to the director of the Division of Corrections and the state forester in excess of the limits specified in the stricken provisions. Circuit Court Judge Hugh Taylor granted the injunction, holding that (1) the legislature could constitutionally submit to the Governor, as a single item, the specific sum for the director's salary and the aggregate of the rest of the Division's employees, and since the Governor's veto went to but a part of an item, rather than the whole item, it was ineffectual; and that, (2) in the alternative, the veto was void because the effect of the veto would be to permit the increase of the salaries of the specified individuals thus diverting monies from one purpose (salaries of other Division employees) to another (salary of the director) in contradiction of the legislative will and resulting in

34. Id.
35. Id.
an executive amendment.\textsuperscript{37}

Upon review, the Florida Supreme Court reversed Judge Taylor and held that the Governor could validly strike "items within items."\textsuperscript{38} Most interestingly, the court went on to hold that the overall salary appropriation was not reduced by the amount vetoed.\textsuperscript{39} The court's reasoning on this point was obscure and the precedents it relied on were of doubtful relevancy.\textsuperscript{40} No other state

\textsuperscript{37} As Judge Taylor stated:

\textit{[T]here is another, and a more compelling reason for holding the veto invalid. The power of the Governor to disapprove items of an appropriation bill is intended as a corollary to his power to veto all of other bills. It is the power to annul, to render invalid, to make void that "item" of appropriation which is disapproved. By common understanding, as well as by technical usage, the power to veto an appropriation means the power to prevent the expenditure of a certain part of the public funds for a certain purpose. To give effect to the veto in this case would not destroy any appropriation or render invalid any contemplated expenditure of public money. The purpose of the veto as stated by the Governor, and the practical operation contemplated, is that the amount of money to be expended for the salary of the designated public servant will be increased. Total state expenditures will be unchanged, but the amount of increased compensation to be given the Director of the Division of Corrections will be reflected in a reduction of the amounts that can be made available for other employees of this department. In practical operation the action of the Governor is not to veto any item of the appropriation bill. It is to amend the bill—to take money which the Legislature said should be used for one purpose and use it for another—to use money appropriated by the Legislature for the payment of 25 employees (other than the Director) for the purpose of increasing the salary of the Director beyond that which the Legislature expressly fixed as the amount of his salary. This is not a proper function of the veto power.}

Petitioners' Brief at 19 (quoting Green v. Rawls, Trial Court Order).

\textsuperscript{38} 122 So. 2d at 16.

\textsuperscript{39} The court stated:

Although the Governor had the power to strike out the whole appropriations for salaries for the departments he had no authority, under the form in which the appropriations bill was submitted to him, to reduce the amount of the appropriations for salaries and his veto of the specific items within the general items of salary did not have this effect. In each case the appropriation for salaries, as a general item, remains undiminished as the part of the law approved by the Governor.

\textit{Id.} at 18.

\textsuperscript{40} One possible basis for the court's decision would be a finding that the legislature evinced an intention to appropriate the total sum to the division regardless of the fate of the lesser included figure. This view was the basis of Reardon v. Riley, 76 P.2d 101 (Cal. 1938), which the Florida Supreme Court labeled as "directly in point" in the Rawls decision. 122 So. 2d at 18. The relevance of \textit{Reardon}, however, is problematic due to the complicated situation in that case. In \textit{Reardon}, the Governor of California struck specific lesser included appropriations of $328,000 and $20,000 from a larger lump sum. 76 P.2d at 102. He also separately reduced the lump sum under his constitutional power to "reduce or eliminate" but only by the amount of $228,000 rather than $348,000 (the aggregate of the struck items). \textit{Id.} The court in \textit{Reardon} viewed the vetoes and reduction as separate exercises of gubernatorial power and relied on the action of the legislature which mounted separate challenges to
court has specifically relied on Rawls to reach a similar result.41

The same Judge Taylor who was overruled in Rawls became a member of the Constitutional Revision Commission which met in 1965-66 to revise the 1865 Florida Constitution.42 That body suggested a revision of article IV, section 1843 to provide for a gubernatorial veto of any “specific appropriation” in a general appropriation bill.44 Transcripts of the Commission’s deliberations indicate that the revision was drawn with the intent to overturn the Rawls decision.45

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the vetoes and the reduction. Id. at 103. Whatever the strength of the logic of the Reardon holding, it was based on circumstances which did not appear in Rawls.


42. 382 So. 2d at 666-67.

43. See note 32 supra.

44. 2 Fla. C.R.C. Jour. 120 (Dec. 5, 1966) (remarks of Chairman Smith).

45. The following portion of the transcript provides:

Mr. O’Neill: Mr. Chairman and Members of the Commission, as you will recall, Mr. Turlington’s debate earlier this morning, he was concerned about the legislative intent, which had been generally construed by members of the legislature as being an intent of the legislature and as being a general statute, equal and recognized by the courts as a part of the general law.

As you will recall, in the case of Green v. Rawls, which came out of the Supreme Court of Florida on June 22nd of 1960, there was established in the appropriations bill the question of salary. The governor sought to veto a portion of the language that was in the appropriations bill. What this particular amendment is designed to do, and which I hope and suggest that it does do, says simply to the governor, the governor can veto an item in the appropriations bill, but he cannot veto such items as may express to the budget commission—

Mr. [Judge Hugh] Taylor: Will the gentleman yield?

Mr. O’Neill: In a moment I will, Your Honor.—cannot veto an expression of the legislature, which as far as I am concerned, after 10 years’ experience, have always thought that an expression of the legislature expressing the will of the people, since it was by a majority vote in that group elected by all the people, was what the executive should carry out, the intent of the legislature.

Now, as I recall, and so I am informed, that legislative intent is a word that has been used by the courts of this state to determine what the intent was where there was a conflict between a possibility of what the law said and what the legislature intended. That is my understanding of the historical reasoning for legislative intent, that the courts would suggest to themselves that they would seek the legislative intent and find out wherever they could what the intent of the legislature was, and then they would make their decision based upon what the law said and what the language said, and make it come into complete agreement with the legislative intent.

Now, if you subscribe to that theory, and as Mr. Turlington so well put it this morning, the language following a specific item in appropriations was an expression of the legislature which should be treated as a portion of the general law, and that the governor had no authority to veto that item. He had a right, however, to
Soon after the Commission's report in 1967, Governor Claude Kirk vetoed the 1968-69 General Appropriations Act. Efforts by the largely Democratic legislature to override the veto failed, and Kirk's own more modest proposal was accepted. Governor Kirk then struck certain proviso language in the enacted bill. These events were doubtless fresh in the minds of legislators on the Joint Legislative Committee on Constitutional Revision, which added a specific prohibition in 1967 against the striking of qualifications to the final draft of the revised article IV, section 18 (now article III, section 8(a)).

veto an individual line item or a monetary amount.

So what my amendment simply does is follow the philosophy as expressed by Mr. Turlington that the governor may veto any specific appropriations, but he could not veto the intent of the legislature, or as it was expressed in the appropriations bill.

47. Id. at 1188-89.
48. The Governor vetoed restrictions following items 441 and 453 which read, respectively:
Provided the total amount expended from this appropriation for administration and distribution to counties during this biennium shall not exceed the total amount collected from the 50 cents per year levied for this purpose upon drivers.

Provided that the basic units shall be based on one unit for each 16 students in ADA at a junior college for the first 420 students and one unit for each 20 students in ADA for all over 420 students.

See FLA. S. JOUR. 1188, 1192 (Reg. Sess. 1967).
49. See note 5 supra. The following transcript of the joint committee's deliberations is illustrative:

Sen. Jack Mathews: The floor is clear and open and Rep. Sessums moves that an amendment to Section 8, subparagraph (a) be approved to read as follows: Strike the period at the end of the subsection and insert in lieu thereof a comma, "but may not veto any qualification or restriction without also vetoing the appropriation to which it relates." Is that correct? Is there discussion? If not, then Representative Reed?
Rep. Don Reed: Will Mr. Sessums yield to a question?
Sen. Mathews: He yields.
Rep. Reed: Rep. Sessums, if, let's say, the higher education bill within the appropriation itself, to the University of Florida and Florida Atlantic University, 1 million dollars for each of two given years . . . could the governor in your language veto the words Florida Atlantic University?
Rep. Terrell Sessums: In my opinion this language would prevent that and would require that he would then veto part of the qualification to the appropriation (interruption) or restrictions. He would then also have to veto the specific thing appropriated.
Rep. Reed: Do you feel that those two words "qualification or restriction" would cover any provisions in the general appropriations act pertaining to a specific appropriation.
Rep. Sessums: I believe it was the opinion of the subcommittee that as we
After Kirk's troubled tenure, Governor Reubin Askew also struck provisions of general appropriations acts which arguably constituted language of qualification or restriction, but was never challenged by the legislature. Thus Brown represented the first case in which the issue of the boundary between the authority of the Governor and the authority of the legislature under article III, section 8(a) of the 1968 Florida Constitution was squarely met.

After detailing the procedural history of the case, Justice Sunberg, speaking for a unanimous court, addressed the standing of the petitioners. In Florida, a citizen's standing to enjoin an unauthorized expenditure of public funds has been limited by a requirement that the citizen must allege special injury flowing from the expenditures. The court in 1972, however, had recognized a limited exception to this rule where a citizen challenged provisions of an appropriations act as violative of specific constitutional limitations on the legislature's taxing and spending power. Because of discussed this particular point, we started out with about four adjectives rather than the two as you see here, it was the feeling of the subcommittee that the word "qualifications" was broad enough and inclusive enough to properly cover the language that did qualify the appropriation.

Fla. Joint Legislative Committee on Constitutional Revision, tape recording of proceedings (Oct. 10, 1967) (available at Florida Supreme Court Library), quoted in Petitioners' Brief at 22-23.

50. Governor Kirk again vetoed the General Appropriations Act in 1970, but the legislature overrode his veto. See Fla. HB 5210 (1970). Governor Kirk then propounded a request for an advisory opinion to the Florida Supreme Court on the general constitutionality of the act. See In re Advisory Opinion to the Governor, 239 So. 2d 1 (Fla. 1970). The court, perhaps concerned that the advisory opinion not become a vehicle of general review, declined to analyze all the provisions of the act and upheld it against a general attack. Id. at 11. The court historically has avoided general inquiries. See, e.g., In re Executive Communication, 6 So. 925 (Fla. 1887).

51. See Tallahassee Democrat, Dec. 16, 1979, § D at 12, col. 4. See also Division of Bond Fin. v. Smathers, 337 So. 2d 805 (Fla. 1976). In that case, Governor Askew vetoed a restriction in the 1976 General Appropriations Act partially because he viewed it as unconstitutional. The Governor and the Cabinet then authorized the Division of Bond Finance to initiate proceedings to challenge the constitutionality of the proviso or, alternatively, to validate the Governor's action. The supreme court held the provision unconstitutional but did not pass on the validity of the Governor's action. Id. at 806-07.

52. Petitioners sought a writ of mandamus requiring the secretary of state to expunge the vetoes and an order restraining the comptroller from disbursing funds based on the vetoes. The Cabinet officers filed notices that they considered themselves nominal parties and declined to brief or argue the merits of the case. Governor Graham was added as party respondent on November 1, 1979. 382 So. 2d at 657.

53. Id. at 662. Justice Adkins filed a special concurrence. Id. at 672.

54. Rickman v. Whitehurst, 74 So. 2d 204, 207 (Fla. 1917).

55. Horne, 269 So. 2d at 662. The Horne court made reference to standing to sue as legislators, "[W]e believe that members of that august body [the Florida Senate] would agree that they should not as legislators have a 'second shot' before the judiciary on legisla-
the implications of the Brown dispute regarding the legislature's taxing and spending power, the court held that the petitioners had standing to challenge the vetoes. The court then exercised its discretion to accept original jurisdiction of the writ because of the danger that the functions of government would be adversely affected without an immediate determination.

Before passing on the particular vetoes involved, the court commented on the "peculiar posture" of the case. The legislators alleged the unconstitutionality of the vetoes, whereas the Governor defended two of the vetoes as excisions of provisions which were unconstitutional in a general appropriations act. Acknowledging that "in some instances the outcome of the case will be decided by which side of the issue is focused upon first," the court set as its task "to define and delimit the relationship between the gubernatorial veto power and the legislature's authority to enact general appropriation law."

While recognizing the legislature's constitutional right to qualify and restrict appropriations, the court emphasized that this power was necessarily limited by the constitutional mandate, under article III, section 12, that laws making appropriation for current expenses shall contain provisions on no other subject. The legislature is thus precluded from "logrolling" and changing or amending substantive legislation in a general appropriations act. The court stated that article III, section 12 mandates a germanity test which:

will countenance a qualification or restriction only if it directly
and rationally relates to the purpose of an appropriation and, indeed, if the qualification or restriction is a major motivating factor behind enactment of the appropriation. That is to say, has the legislature in the appropriations process determined that the appropriation is worthwhile or advisable only if contingent upon a certain event or fact, or is the qualification or restriction being used merely as a device to further a legislative objective unrelated to the fund appropriated?\(^6\)

Turning to the Governor's veto power, the court implicitly recognized that Green v. Rawls was erroneous insofar as it allowed the Governor to veto legislative intent but retain the appropriation wedded to that intent. Emphasizing that the veto power is a negative power, the court stated that, under the holding in Rawls, "Legislative intent was not nullified, it was altered."\(^6\) The court went on to hold that the intent of the framers of article III, section 8(a) and the 1968 Constitution, inferred from the minutes of the Revision Commission, was to supersede Green v. Rawls and to require the Governor to forsake the relevant funds whenever legislative intent is negated.\(^6\)

The court completed its discussion of the scope of the veto power with two important determinations. First, the court defined "specific appropriation" for purposes of article III, section 8(a) as the smallest identifiable sum, for a specified purpose, to which a qualification can be said to directly and logically relate.\(^6\) The practical effect of such a definition, the court pointed out, is to prevent the legislature from qualifying an appropriation with a smaller included appropriation so as to insulate the smaller sum from the item veto.\(^6\) Second, the court held that although the veto is an exercise of pure gubernatorial discretion, it must be exercised in a constitutional manner. The specific prohibition of article III, section 8(a) bars the Governor from striking a qualifying provision

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62. 382 So. 2d at 664. (emphasis added). This test arguably sets a lower standard than the almost result oriented test used in Dickinson v. Stone, 251 So. 2d 268, 274 (Fla. 1971):

The important matter of providing appropriation for the operation of the government of the State of Florida should not be prejudiced by the injection into the appropriation of any other subjects, regardless of their inherent merits or demerits, unless such other subjects are so relevant to, interwoven with, and interdependent upon the appropriations so as to jointly constitute a complete legislative expression on the subject. (emphasis added).

63. 382 So. 2d at 666-67.

64. Id.

65. Id. at 668.

66. Id.
without also striking the related appropriation, regardless of the Governor's view of the constitutionality of the provision involved: "The governor cannot act unconstitutionally to remedy a perceived unconstitutional act of the legislature."

In passing on the validity of Governor Graham's six vetoes, the court depended on essentially three grounds. First, the proviso following item 1131 purported to authorize the Bureau of the Uniform Commercial Code to draw additional monies from the deficiency fund upon a demonstration of additional workload and approval of the Department of Administration. The court held that the procedure outlined in the proviso directly contravened section 216.231(1), Florida Statutes, which permits the disbursement of deficiency funds only upon the approval of the Governor and three other members of the Administration Commission. While agreeing that the proviso constituted an invalid attempt under article III, section 12 to amend substantive law in the General Appropriations Act, the court held that the Governor's action in striking the proviso was also invalid. As the proviso purportedly authorized only a contingent transfer of money from the deficiency

67. Id.
68. Id. at 659. Item 1131 reads as follows:
Corporations, Division of
1131 Salaries and Benefits

Provided, that in addition to the funds appropriated in Item 1131 for salaries and benefits for the Bureau of Uniform Commercial Code, if HB 1643 or SB 1256 is enacted into law, the Bureau of Uniform Commercial Code is specifically authorized to utilize up to $100,000 of the deficiency fund upon approval of the Department of Administration. Such deficiency funds may be used to supplement the positions provided by this bill and shall be approved by the Department of Administration, upon a showing of need by the director of the Division of Corporations based upon the following schedule: For every additional 5,000 uniform commercial code documents filed in fiscal year 1980-81 above those documents filed in fiscal year 1979-80, one additional position.

70. 382 So. 2d at 669. FLA. STAT. § 216.231(1) (1979) provides:

Any appropriation to the department which is classified as "emergency," or "deficiency," may be released only with the approval of the Governor and three other members of the Administration Commission. The state agency desiring the use of any such appropriation shall submit to the department application therefor in writing setting forth the facts from which the alleged need arises. The commission shall, at a public hearing, review such application promptly and approve or disapprove the same as the circumstances may warrant. All actions of the commission shall be reported to the legislative appropriation committees, and the committees may advise the commission relative to the release of such funds. (emphasis added) (footnotes omitted).
fund, it did not constitute a specific appropriation susceptible to gubernatorial veto.\textsuperscript{71}

Second, the proviso relating to Glades Correctional Institution purportedly qualified the funding of salaries, expenses, and capital outlay for this major Florida penal institution upon the reduction of the inmate population.\textsuperscript{72} The court found the qualification to be invalid because it did not relate to the subject of the appropriation.\textsuperscript{73} Similarly, the Governor’s veto was held to be ineffectual because the proviso identified no fund which could be said to constitute a “specific appropriation.”\textsuperscript{74}

Finally, the court examined the four provisos which appeared to qualify lump sums with lesser included appropriations.\textsuperscript{75} The petitioners argued that the lesser figures constituted valid qualifications on the whole appropriation in that they reflected a comprehensive legislative intent which would demand reevaluation if

\begin{longtable}{lrr}
\textbf{250} & Salaries and Benefits Positions & \begin{tabular}{r}
6,288 \\
72,614,708 \\
3,310,676 \\
967,100 \\
84,675
\end{tabular} \\
\textbf{250} & From General Revenue Fund & \begin{tabular}{r}
6,459 \\
74,029,307 \\
3,343,857 \\
969,465 \\
84,700
\end{tabular}
\end{longtable}

\textsuperscript{71} 382 So. 2d at 669.

\textsuperscript{72} Id. at 657. The original proviso relating to Glades Correctional Institution reads as follows:

\begin{itemize}
  \item Major Institutions
    \begin{itemize}
      \item Provided that the department shall phase back the inmate count at Glades Correctional Institution to the design capacity of 609 inmates prior to June 30, 1980. Except, however, that should the statewide inmate population exceed maximum capacity then Glades Correctional Institution may exceed design capacity. [vetoed].
    \end{itemize}
\end{itemize}


\textsuperscript{74} 382 So. 2d at 669.

\textsuperscript{75} Id. at 669-70. The four provisos read as follows:
severed.\textsuperscript{76} While accepting the germanity of the qualifications to

\begin{verbatim}
OC    Fixed Capital Outlay
      To the Board of Regents of the State
      University System From Public
      Education Capital Outlay and
      Debt Service Trust Fund ......  30,936,021  28,730,637

Fiscal Year    Fiscal Year

Item
University of South Florida Medical
   Center.


6G    Fixed Capital Outlay
      Park Development
      From Land Acquisition
      Trust Fund .....................  8,000,000  6,250,000

Provided, however, from funds appropriated in item 6G the following park
projects for 1979-80 totaling $2,020,000, Cedar Key, Lake Rousseau, Manatee
Springs, Kingsley Plantation, Wekiwa Springs, Bill Baggs, Hugh Taylor and the
Barnacle, shall be considered as first priority projects by the Department of Natu-
ral Resources.


OB    Fixed Capital Outlay to Boards of Trus-
tees of the
      Community Colleges
      From Public Education
      Capital Outlay and
      Debt Service Trust Fund ......  27,192,240  2,573,035

From the cumulative total allocated to the Board of Trustees of the 28 community
colleges there is to be provided $2,500,000 in the 1979-80 fiscal year and
$2,500,000 in the 1980-81 fiscal year for library books and/or scientific and techni-
cal equipment. These funds shall be allocated based on the FTE's assigned to
each college.


382    Expenses
      From General Revenue Fund ......  4,514,259  4,681,139
      From Medical Center—
      Professional Medical
      Liability Self Insurance Trust Fund  168,500  168,500
      From Operation and Maintenance
      Trust Fund .....................  609,049  658,621

From the cumulative total allocated to the Board of Regents of the state univer-
sity system $10,000,000 shall be provided in the 1979-80 fiscal year and
$10,000,000 shall be provided in the 1980-81 fiscal year for library books.


petitioners' argument did not essentially differ from the position put forth by the legislators
the appropriations, the court reasoned that since the qualifications most rationally and directly related to figures contained within their own terms, the provisos in each instance constituted "specific appropriations" and could be reached by veto. The vetoes eliminated the funds involved and the overall appropriations were reduced accordingly.

The court found that two of the above four provisos presented an additional issue. The determination of the validity of items OB (allocating five million dollars over the biennium for library books and/or scientific and technical equipment for the community college system) and OC (allocating twenty million dollars over the biennium for library books) involved the proper construction of the phrase "capital project" as that term is used in article XII, section 9(a)(2) of the Florida Constitution. Governor Graham contended that since expenditures for books and equipment are of an operating nature, they violate section 9(a)(2)'s restriction on the use of Public Education Capital Outlay and Debt Service Trust Fund (PECO) funds for capital projects authorized by the legislature. Petitioners urged that, since the term "capital project" is not defined in the article, the legislative construction as expressed in section 235.011(10), Florida Statutes, is entitled to great weight.

in People ex rel. State Board of Agriculture v. Brady, 115 N.E. 204 (Ill., 1917). The legislature in that case appropriated a lump sum followed by various subdivisions specifying the expenditure of the sum in specific amounts for specific purposes. The Illinois Supreme Court rejected the view that the subdivisions constituted qualifications upon the lump sum and held that, to prevent an evasion of the gubernatorial veto, each subdivision was deemed an "item" subject to veto. Id. at 207.

77. 382 So. 2d at 669-71.
78. Id.
79. Section 9(a)(2) commits the revenues derived from collection of the gross receipts tax on utilities to the Public Education Capital Outlay and Debt Service Trust Fund until the year 2025. The State Board of Education is authorized to issue full faith and credit bonds to finance or refinance any capital project authorized by the legislature. Monies in the trust fund are required to be used: first, for payment of principal and interest on existing bonds; second, for deposit into any required reserve funds; and third, for direct payment of cost of any capital project for the state educational system. FLA. CONST. art. XII, § 9(a)(2).
81. (1979). The statute provides that, "Capital project' means sums of money appropriated to the Public Education Capital Outlay and Debt Service Trust Fund for the state system of public education."
Contrast the vagueness of this definition with the view of a commentator who was arguing for a revision of another provision of the 1968 constitution to specify that full faith and credit bonds were only to be used to finance fixed capital outlay projects:

This revision is intended to make clear that long-term bonded indebtedness should be incurred only to finance long-term improvements with a useful life that will not be substantially less than the amortization period of the debt. Otherwise, "capital projects" could be construed to include so-called "operating capital out-
The court accepted the asserted legislative latitude in defining capital project for purposes of PECO expenditures, stating that a relatively contemporaneous construction of the constitution by the legislature is entitled to a strong presumption of correctness.\textsuperscript{83}

In closing, Justice Sundberg stated that the Florida Supreme Court was unwilling to act as a referee on a biennial basis between the executive and legislative branches over the appropriations act.\textsuperscript{84} To further strengthen the constitutional prohibition of article III, section 8(a), the court recognized the right of any citizen taxpayer to challenge the constitutionality of a gubernatorial veto.
of a qualification or restriction “even if the qualification or restriction is clearly unconstitutional.” In such an action, the Governor’s veto will be invalidated unless it can be demonstrated that the provision stricken by veto constituted a specific appropriation. In addition, the court reaffirmed the holding of Horne establishing the standing of any citizen to challenge the constitutionality of provisions of the General Appropriations Act via a suit for declaratory judgement.

Brown presents a careful reclarification of the power of each of the coequal branches. The legislature may set valid conditions on the use of appropriated money with the assurance that the funds may not be spent in disregard of the restrictions. The Governor may block any specific expenditure even if it is phrased as qualifying a larger sum. Excesses of either branch may be challenged by any citizen. The judiciary reasserted its traditional position as sole constitutional arbiter by preventing the Governor from raising the unconstitutionality of a stricken provision as a defense to a veto challenge. While Brown cannot be faulted as a general restatement, its less conspicuous aspects are both disturbing and raise doubts as to whether the case will fully stabilize the inherent tension between the power to appropriate and the power to forbid.

Disturbing in a fiscal sense is the court’s acceptance of an openended legislative definition of “capital project” in light of the demonstrated legislative tendency to use PECO bond revenues in a diseconomic fashion. Although a legislative interpretation is entitled to great weight, it is an elementary tenet of constitutional construction that a provision should be read in light of the circumstances it was designed to address and the evils it was intended to remedy. Reason demands that long-term debt not be incurred for

85. Id. (emphasis in original).
86. Id.
87. Id.
88. Although outside the direct scope of this comment, it is interesting to note that Governor Graham also struck a legislative appropriation of $2,600,000 million from PECO funds to local school districts for the purchase of buses. This veto was not challenged despite its inclusion in the negotiations which preceded the lawsuit. See Tallahassee Democrat, Oct. 25, 1979, § D at 3, col. 1 & 2. Whereas some books may last thirty years, laboratory equipment would almost surely be obsolete and/or worn out well before the retirement of the bonds which funded its purchase. It would be the rare school bus which would be serviceable ten years after its purchase.

89. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). Neither side in Brown briefed the admittedly sparse legislative history of article XII, section 9(a). The house hearing on the amendment never focused on a definition of “capital project”; however, all the specific examples used in the discussion are fixed long-term projects. The following exchange be-
short-term benefits and the elaborate prohibitions and procedures specified in article XII, section 9(a) of the Florida Constitution bear witness to the circumspection and restraint with which PECO funds should be used.

Related to the foregoing, and equally as troublesome, is the court's tacit acceptance of the legislative use of the General Appropriations Act as a vehicle for authorizing capital projects despite the clear mandate of article III, section 12 that the act be restricted to salaries and other current expenses. At oral argument, counsel for the house leaders mentioned in passing that such a practice expanded the power of the Governor since a separate bill making several PECO appropriations would not be vulnerable to the item veto. Whatever the intrinsic merits of such a procedure, it can only be validly adopted by a vote of the people.

Finally, the court's streamlined procedure may not encompass all the various forms litigation in this area may take in the future. Faced with a facially unconstitutional but germane qualification, a chief executive must make an unenviable choice between following the prohibition of article III, section 8(a) or the executive's oath to uphold the constitutions of the state and nation. A governor in such a situation could approve the bill but immediately institute proceedings to test the validity of the objectionable provision.

tween Representative William Rish and Representative Ralph Turlington (now Commissioner of Education) is illustrative.

Rish: Mr. (Arnold) Greenfield, I think what he may be getting at is that we might decide to build roads and courthouses and capitols with this money in ten years. Is that what... (sound of door closing).

Turlington: Well... let me make, let me respond to that. That amendment as offered by Mr. Forbes would not transfer any of that money to roads or anything else because the money would still be 100% earmarked for purposes of construction of schools, for kindergarten through higher education.

Fla. H.R., Committee on Finance and Taxation, tape recording of proceedings (Apr. 24, 1974) (hearing on Fla. CS for HJR 2289 § 2984).

90. FLA. CONST. art. III, § 12. In fairness, it must be pointed out that the Governor did not attack the PECO provisos as being invalidly included in the general appropriations and the court may have hesitated to decide an unbrieved issue. Nevertheless it is logically incongruous to define "capital project" when the question is presented in the context of a general appropriations act.


92. FLA. CONST. art. IV § (1)(a) provides: "He [the Governor] shall take care that the laws be faithfully executed..." In his special concurrence, Justice Adkins argued that the Governor should be able to raise the unconstitutionality of a struck proviso as a threshold issue. 382 So. 2d at 672.

93. Under FLA. CONST. art IV, § 1(b), the Governor "may initiate judicial proceedings in the name of the state against any executive or administrative state, county, or municipal..."
The issue may be of such significance to the fiscal well-being of the state as to force the supreme court to take original jurisdiction.

Alternatively, a future chief executive may veto an unconstitutional provision in a manner prohibited by article III, section 8(a) and join the secretary of state as a defendant in any later veto challenges. Even if the Governor will not be heard to defend unconstitutional acts on the basis of the unconstitutionality of the stricken provision, the Secretary as official recordkeeper and a party with "clean hands" would be in a position to oppose the inclusion of provisions of doubtful validity in the annals of the state.

A combination of the above two scenarios is possible. A governor faced with a challenge to a veto action may initiate proceedings attacking the constitutionality of the stricken provision and, in the interest of judicial economy, move to consolidate the declaratory judgement suits. Thus, in a number of ways, the issue of the unconstitutionality of a stricken provision as defense to a veto challenge may rise again, phoenixlike.

Despite the above criticisms, *Brown v. Firestone* presents a much needed synthesis of Florida law on the item veto. The opinion's more regrettable aspects demonstrate the necessity for greater public scrutiny of the important, but often neglected, appropriations process.

David Glatthorn