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# Harbor v. Deukmejian: Expanding the Item Veto to Nonappropriation Measures

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## *Selected Developments in California Law*

### ***Harbor v. Deukmejian: Expanding the Item Veto to Nonappropriation Measures***

Under the California Constitution, the governor may reduce or disapprove sections of an appropriation bill, a power commonly known as an "item veto."<sup>1</sup> In *Harbor v. Deukmejian*,<sup>2</sup> the California Court of Appeal for the First District expanded the Governor's power to veto particular sections of a nonappropriation bill. The court ruled that the Governor may item veto a section of a related nonappropriation bill if that section is directly linked to a specified amount in an appropriations measure.<sup>3</sup> The court also held that the Governor may item veto a portion of a nonappropriation bill to correspond with a reduction in an appropriation bill.<sup>4</sup> The *Harbor* court emphasized that the legislature may not negate the Governor's item veto powers by attempting to structure a veto-proof bill.<sup>5</sup> Part I of this note sets forth the facts and opinion of the *Harbor* case. Part II of this note describes the legal background of the item veto in California. Part III of this note examines the possible legal ramifications of the *Harbor* decision.

#### I. THE CASE

##### A. *The Facts*

On January 10, 1984, the governor submitted a budget for the 1984-1985 fiscal year to the legislature. After making various changes, including the amendment subsequently at issue in *Harbor*, the legislature presented to the Governor a budget bill that included a lump sum appropriation of \$1.5 billion for all Aid to Families with

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1. CAL. CONST. art IV, § 10(b). This section provides in part: "(b) The Governor may reduce or eliminate one or more items of appropriation while approving other portions of a bill. . . ." *Id.*

2. 176 Cal. App. 3d 813, 222 Cal. Rptr. 382.

3. *Id.* at 819, 222 Cal. Rptr. at 387.

4. *Id.*

5. *Id.* at 819, 222 Cal. Rptr. at 386-87.

Dependant Children [hereinafter AFDC] payments.<sup>6</sup> In a separate budget implementation bill,<sup>7</sup> the legislature amended Welfare and Institutions Code section 11056 to allow AFDC payments to begin on the date of application, rather than when the recipient was determined to be eligible as existing law provided.<sup>8</sup> The Governor reduced the lump sum appropriation by \$9,776,000, the amount estimated in a committee report as the increased cost of the attempted change by the legislature of the date AFDC payments begin.<sup>9</sup> The Governor also exercised the item veto against the section of the budget implementation bill that would allow payments to begin when the application is made.<sup>10</sup> Petitioners, a group of welfare applicants and welfare rights organizations, asked the court to order the State Department of Social Services to comply with the changes made by the legislature, thereby declaring the Governor's veto of a portion of the implementation bill ineffective.<sup>11</sup> The legislature filed a brief as amicus curiae in support of petitioners.<sup>12</sup>

### B. The Opinion

The issue of whether the Governor may veto a subject in a nonap-

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6. *Id.* at 814-15, 222 Cal. Rptr. at 384.

7. The budget implementation bill was designed to "provide necessary statutory adjustments to implement the Budget Act of 1984." 1984 Cal. Stat. ch. 268, § 71, at 139.

8. *Harbor*, 176 Cal. App. 3d at 819, 222 Cal. Rptr. at 386-87. The proposed amendment would change the date AFDC benefits began *accruing*. See CAL. WELF. & INST. CODE § 11056.

9. *Harbor*, 176 Cal. App. 3d at 815, 222 Cal. Rptr. at 384. The Governor issued the following statement accompanying the veto:

I am reducing this item by \$9,776,000. This augmentation would have reversed current State policy and regulations regarding the effective date of the first Aid to Families with Dependent Children (AFDC) aid payment. Current law provides that the beginning date-of-aid for an AFDC recipient is the day of eligibility or the first of the following month, but not later than 30 days from the date of application. The intent of the AFDC program is to provide for cash assistance to meet current need. Since no payment is made to an AFDC recipient until eligibility is determined, aid payment would not begin any sooner under the legislative proposal. However, in the event an AFDC recipient has a demonstrated need, prior to authorization, the program can provide for immediate need payments for eligibles before the date of authorization.

1984 Cal. Stat. ch. 258, at 230. The Governor made a similar reduction in a separate item to account for reduced federal support caused by the change in the beginning date of aid. *Harbor*, 176 Cal. App. 3d at 816, 222 Cal. Rptr. at 384.

10. *Harbor*, 176 Cal. App. 3d at 815-16, 222 Cal. Rptr. at 384-85. The Governor stated:

I am eliminating the adjustment relating to beginning date of aid for AFDC recipients. I have reduced Budget Act Item 5180-101-001 by \$9,776,000 and Budget Act Item 5180-101-866 by \$10,385,000 to maintain current policies regarding effective date of aid. . . . The elimination of this section . . . conforms to my actions on the budget.

1984 Cal. Stat. ch. 268, at 21.

11. Prior to the institution of this case, petitioners corresponded with the Director of the Department of Social Services demanding implementation of Welfare and Institutions Code section 11056 as amended. The Director refused. *Harbor*, 176 Cal. App. 3d at 816, 222 Cal. Rptr. at 385.

12. *Harbor*, 176 Cal. App. 3d at 816, 222 Cal. Rptr. at 385.

appropriation bill which corresponds to a reduction in a broader appropriation bill was one of first impression before the court.<sup>13</sup> The issue turned on whether the veto fell within the powers given the Governor by article IV, section 10(b) of the California Constitution. Section 10(b) states in part: "the Governor may reduce or eliminate one or more items of appropriation while approving other portions of a bill."<sup>14</sup>

Petitioners admitted that the Governor acted properly in reducing the general appropriation in the budget bill under section 10(b).<sup>15</sup> Petitioners also admitted that the Governor could have vetoed the entire implementation bill under section 10(a).<sup>16</sup> The petitioners contended, however, that the Governor's purported veto of the portion of the budget implementation bill which changed the date AFDC benefits begin accruing was not a complete veto under section 10(a), or an item of appropriation under section 10(b). Therefore, the petitioners argued, the Governor's actions were not within the veto powers granted to the governor by the California Constitution.<sup>17</sup>

The Governor argued that the veto of a part of the budget implementation bill was a proper item veto under section 10(b). The Governor contended that finding the veto ineffective would upset the system of checks and balances between the branches of government.<sup>18</sup> Furthermore, the effectiveness of the item veto would be reduced because the legislature would be free to deliberately structure veto-proof bills.<sup>19</sup> Specifically, the Governor argued that the legislature had merely separated the subject of the appropriation from the amount, and the Governor had power to veto both portions of the appropriation regardless of the form of the bills.<sup>20</sup>

### 1. Majority

The *Harbor* court first referred to *Wood v. Riley*,<sup>21</sup> which held that an "item of appropriation" is a definite sum of money set forth

13. *Id.* at 817, 222 Cal. Rptr. at 385.

14. CAL. CONST. art. IV, § 10(b).

15. *Harbor*, 176 Cal. App. 3d at 816, 222 Cal. Rptr. at 385.

16. *Id.* See CAL. CONST. art. IV, § 10(a). This section states in part: "(a) Each bill passed by the Legislature shall be presented to the Governor. It becomes a statute if it is signed by the Governor. The Governor may veto it by returning it with any objections to the house of origin, which shall enter the objections in the journal and proceed to reconsider it. . . ." *Id.*

17. *Harbor*, 176 Cal. App. 3d at 816-17, 222 Cal. Rptr. at 385.

18. *Id.* at 817, 222 Cal. Rptr. at 385. See generally *infra* notes 77-82 and accompanying text.

19. *Harbor*, 176 Cal. App. 3d at 817, 222 Cal. Rptr. at 385. See generally *infra* notes 77-82 and accompanying text.

20. *Harbor*, 176 Cal. App. 3d at 817-18, 222 Cal. Rptr. at 386.

21. 192 Cal. 293, 219 P. 966 (1923).

for a designated purpose.<sup>22</sup> The *Wood* court also stated that an item is composed of two parts, the subject and the amount.<sup>23</sup> Relying on *Wood*, the *Harbor* court rejected the argument of the petitioners that the Governor's veto was ineffective merely because the subject and amount of the purported veto were in two different bills.<sup>24</sup> The majority emphasized that the legislature could not override the Governor's item veto by separating the amount from the subject and demanding an all-or-nothing veto of the bill containing the statement of subject.<sup>25</sup> The court held that if a specified appropriation is directly linked to a particular subject, both amount and subject may be eliminated by item veto.<sup>26</sup>

The court then addressed the more difficult question of whether the Governor may exercise the item veto on a section of a nonappropriation measure<sup>27</sup> to correspond with a reduction of a lump sum appropriation in an appropriations bill.<sup>28</sup> The *Harbor* majority held that the Governor's veto of a portion of the budget implementation bill was proper.<sup>29</sup> The court found that the amount reduced by the Governor corresponded directly to the amendment vetoed in the budget implementation bill.<sup>30</sup> In so holding, the court emphasized that the

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22. *Wood*, 192 Cal. at 303, 219 P. at 971. The *Wood* court stated:

This court has held that "by specific appropriation" was understood "an Act by which a named sum of money has been set apart in the treasury and devoted to the payment of a particular claim or demand . . . The Fund upon which a warrant must be drawn must be one the amount of which is designated by law, and therefore capable of definitive exhaustion—a Fund in which an ascertained sum of money was originally placed, and a portion of that sum being drawn an unexhausted balance remains, which balance cannot be thereafter increased except by further legislative appropriation."

*Wood*, 192 Cal. at 303, 219 P. at 971. See generally Note, 37 HARV. L. REV. 843, 844 (1937) (item of appropriation is not susceptible to exact definition).

23. *Wood*, 192 Cal. at 304, 219 P. at 971. See also *Commonwealth v. Barnett*, 48 A. 976, 978 (Pa. 1901); *Fairfield v. Foster*, 214 P. 319, 322 (Ariz. 1923) (appropriations may be divided into subject and amount).

24. *Harbor*, 176 Cal. App. 3d at 818-19, 222 Cal. Rptr. at 386-87.

25. *Id.* See *infra* text accompanying notes 40-42 (dissent states the governor must choose between passage or an all-or-nothing veto). See generally *Daily Journal*, Jan. 20, 1986, at 1, col. 4 (legislature attempted to avoid the governor's veto by placing the amendment changing the beginning date of AFDC payments in the budget implementation bill).

26. *Harbor*, 176 Cal. App. at 819, 222 Cal. Rptr. at 387. This would occur, for example, if the budget bill had specified \$10 million to finance a change in the date aid begins to accrue. The Governor could then eliminate both the funding and the beginning date amendment by item veto. *Id.*

27. The nonappropriation measure in *Harbor* was the amendment placed in the budget bill, which would change the date AFDC payments began accruing.

28. *Id.*

29. *Id.* The court conceded that they could find no precedent authorizing the Governor to divide the lump sum appropriation into component parts and exercise the item veto to eliminate corresponding subjects. *Id.*

30. *Id.*

legislature left clear evidence of the cost of the adjustment to AFDC, citing evidence of an Assembly-Senate Conference Committee report that estimated the change in the beginning date of AFDC aid would cost \$9.8 million.<sup>31</sup> The court also reiterated that the legislature may not negate the governor's item veto power by placing the subject of an appropriation in a nonappropriation bill.<sup>32</sup> The majority concluded that the budget bill and the budget implementation bill were "so intimately related" that the Governor's veto was an effective item veto.<sup>33</sup>

## 2. Dissent

The dissent in *Harbor* stressed that the Governor's power to item veto under article IV, section 10(b) was more limited than suggested by the majority.<sup>34</sup> While the dissent agreed with the majority that the Governor may veto a subject of appropriation contained in a separate bill,<sup>35</sup> the dissent rejected the majority position that the Governor may divide a lump sum into component parts and then eliminate programs financed by the lump sum.<sup>36</sup> The dissent further criticized the majority's reliance on the Committee report estimating the cost of the change in the beginning date of aid to support their holding.<sup>37</sup> The holding of the majority left open the question of whether the Governor may veto substantive legislation only when the legislature has left evidence of the cost of the legislation, or also when the Governor's staff is able to estimate the cost of the program.<sup>38</sup> The dissent emphasized that the power to item veto should not depend upon the ease of estimating the cost of component programs.<sup>39</sup> Stating that the majority's ruling was "unprecedented and unnecessary,"<sup>40</sup> the dissent argued that in situations where the legislature budgets by lump sum appropriations, the Governor has only two options: reduce the lump sum or choose an all-or-nothing veto of the corresponding bill.<sup>41</sup> The dissent felt that to hold otherwise would upset the balance of

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31. *Id.*

32. *Id.*

33. *Id.* The court did not address an argument by respondent that the Governor's veto was an appropriate remedy for a violation by the legislature of the "one subject" rule. *Id.*

34. *Id.* at 820, 222 Cal. Rptr. at 387.

35. *Id.* The dissent stated: "[The veto] may be used to reduce the amount of an appropriation or to eliminate an item of appropriation and its corresponding subject matter (even if the subject matter is contained in a separate bill, such as the budget implementation bill)." *Id.*

36. *Id.*

37. *Id.* at 820, 222 Cal. Rptr. at 388.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

power between the legislative and executive branches, and would create the potential for direct legislation by the Governor.<sup>42</sup>

## II. LEGAL BACKGROUND

In the past, the chief executive in many states could only approve or disapprove a bill as a whole.<sup>43</sup> The California Constitution gives the Governor the power not only to veto any bill in the entirety but also to partially veto portions of appropriations bills.<sup>44</sup> California adopted the item veto in 1908, and a 1922 amendment permitted the Governor to reduce items as well as eliminate them.<sup>45</sup> Article IV, section 10(b) of the California Constitution provides in part: "The Governor may reduce or eliminate one or more items of appropriation while approving other portions of the bill. . . ."<sup>46</sup> The purpose behind the item veto was to enhance executive control of the budget.<sup>47</sup>

The Governor's power to item veto appropriation measures was initially interpreted in the leading case of *Wood v. Riley*.<sup>48</sup> In *Wood*, the legislature added a proviso to the budget bill submitted by the Governor that provided one percent of money appropriated for various educational purposes be set aside for the newly-created Department of Education, which was not specifically included in the budget bill when submitted by the Governor.<sup>49</sup> The Governor vetoed this proviso, and the Director of Education sought a writ of mandate, claiming the veto was null because the proviso was not an "item of ap-

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42. *Id.* The dissent said the majority holding created "precedent which gives the Governor potentially limitless authority to use the line item veto to strike substantive programs." *Id.*

43. Note, 12 S. CAL. L. REV. 321, 323 (1939). See also Comment, *The Item Veto in the American Constitutional System*, 25 GEO. L.J. 106, 107-12 (1936); Note, 37 HARV. L. REV. 843, 844 (1937) (discussing the background of the item veto in the various states).

44. CAL. CONST. art. IV, § 10.

45. Note, 12 S. CAL. L. REV. 321, 323 (1939). See also *Wood*, 192 Cal. at 298-99, 219 P. at 969 (discussion of the 1922 amendment).

46. CAL. CONST. art. IV, § 10(b).

47. *Wood*, 192 Cal. at 298-99, 219 P. at 969. The court stated:

By reason of the power of veto lodged in the Governor, the chief executive has always had a most important relation to the legislative department, and, in so far as his control over the expenditures of the state is concerned, the recent amendment to the constitution providing for an "executive budget" . . . has tremendously widened his powers, which was undoubtedly the primal object of the people in voting for its adoption.

*Wood*, 192 Cal. at 298-99, 219 P. at 969. See CAL. CONST. art. IV, § 12 ("executive budget" amendment). See generally *Lukens v. Nye*, 156 Cal. 498, 105 P. 593 (1909) (exercise of the item veto prior to the 1922 amendment to the constitution).

48. 192 Cal. 293, 219 P. 966 (1923).

49. *Id.* at 294-97, 219 P. at 967-68.

appropriation.”<sup>50</sup> The director contended the proviso was not an appropriation because it merely provided for a transfer of funds.<sup>51</sup> The California Supreme Court held that the proviso was an item of appropriation that could be vetoed by the Governor.<sup>52</sup> The *Wood* court adopted the definition of “appropriation” provided in *Stratton v. Green*,<sup>53</sup> which held that an appropriation was a definite sum of money set aside for a designated purpose connected with the state government.<sup>54</sup> The *Wood* court further recognized that every appropriation involves considerations of both subject and amount.<sup>55</sup>

The operation of the item veto was again addressed by the California Supreme Court in *Reardon v. Riley*.<sup>56</sup> In *Reardon*, the legislature submitted a budget bill that appropriated \$1,625,185 for the department of industrial relations and further provided that \$328,000 and \$20,000 be expended by the department in a particular way.<sup>57</sup> The Governor eliminated the specific amounts, and also reduced the general appropriation to \$1,397,185.<sup>58</sup> The defendant, arguing against the effectiveness of the veto, contended that the elimination of the \$328,000 and \$20,000 amounts automatically reduced the general appropriation by a like amount, to \$1,277,185.<sup>59</sup> Thus, the Governor’s separate reduction of the general sum to \$1,397,185 resulted in an unauthorized “increase” in the appropriation.<sup>60</sup> The court rejected this argument and held that both the elimination of the specific amounts and the reduction of the general sum were effective.<sup>61</sup> The *Reardon* court held that the specific amounts were clearly “items of appropriation,” as was the general appropriation.<sup>62</sup> The *Reardon* court reasoned that the legislature intended to appropriate the general amount regardless of the fate of the specific appropriations.<sup>63</sup> The court further added

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50. *Id.* at 297, 219 P. at 967-68.

51. *Id.*

52. *Id.* at 306, 219 P. at 972.

53. 45 Cal. 149 (1872) *Stratton* involved an application for a writ of mandamus to require the Controller of State to draw a warrant in payment of a salary.

54. *Stratton*, 45 Cal. at 151. The *Wood* court stated that the proviso filled all the requirements of a item of appropriation because it was a definite sum of money required for a designated purpose. *Wood*, 192 Cal. at 304, 219 P. at 971. *See supra*, note 22.

55. *Wood*, 192 Cal. at 304, 219 P. at 971.

56. 10 Cal. 2d 531, 76 P.2d 101 (1938).

57. *Id.* at 533, 76 P.2d at 102.

58. *Id.* at 533-34, 76 P.2d at 102.

59. *Id.* at 535, 76 P.2d at 102-03.

60. *Id.* at 535-36, 76 P.2d at 102-03.

61. *Id.*

62. *Id.*

63. *Reardon*, 10 Cal. 2d at 536, 76 P.2d at 103-04. *See generally* *Riley v. Johnson*, 219 Cal. 513, 519, 27 P.2d 760, 762 (1933) (look to legislative intent in determining if appropriation has been made).

that such a holding would preserve the veto power of the governor without affecting legislative intent.<sup>64</sup>

The California Supreme Court considered a similar issue in *Railroad Commission v. Riley*.<sup>65</sup> In that case, the Governor eliminated \$34,000 designated by the legislature for the safety section of the Railroad Commission without reducing the total amount appropriated.<sup>66</sup> The court held the Governor could veto the specific appropriation without affecting the amount of the general appropriation.<sup>67</sup> The *Riley* cases established the scope of the Governor's power to reduce and eliminate items in appropriations measures.<sup>68</sup> The Governor's power to use the item veto to eliminate a portion of a nonappropriation measure had not, prior to *Harbor*, been addressed by California courts.

### III. LEGAL RAMIFICATIONS

Under the California Constitution, the Governor may reduce and partially veto items in appropriation measures.<sup>69</sup> The holding in *Harbor* expands the Governor's power to exercise the line item veto. Under *Harbor*, an "item of appropriation" may include a subject in a nonappropriation bill, if that subject can be directly linked to an appropriation.<sup>70</sup> The *Harbor* court felt that establishing the link between the subject and amount presented little problem because of the necessary relation between subject from amount.<sup>71</sup>

*Harbor* also held that the Governor may item veto a portion of a related nonbudget bill to correspond to a reduction in an appropriation measure.<sup>72</sup> The majority indicated that the nonbudget bill should

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64. *Id.* at 537, 76 P.2d at 103-04. See generally Board of Fish and Game Comm'n v. Riley, 194 Cal. 37, 227 P. 775 (1924) (subsequent authorization from a special fund of an expenditure greater than the specific budget appropriation did not encroach on legislative function because its effect is not to make an appropriation, but to render available an appropriation already made).

65. 12 Cal. 2d 48, 82 P.2d 394 (1938).

66. *Id.* at 49-50, 82 P.2d at 395.

67. *Id.* at 53, 82 P.2d at 396-97.

68. See also Pomeroy v. Riley, 96 Cal. 355, 82 P.2d 697 (1938) (reaffirming *Reardon and Railroad Commission*).

69. CAL. CONST. art. IV, § 10.

70. *Harbor*, 176 Cal. App. 3d at 819, 222 Cal. Rptr. at 386-87. See *supra* notes 24-26 and accompanying text.

71. *Harbor*, 176 Cal. App. 3d at 819, 222 Cal. Rptr. at 387. The court stated: Actually, it would be difficult or impossible to completely separate amount from subject. An amount without any label would be useless in the budget, and the label itself is a statement of the subject. However, if a more detailed explanation were contained in another bill, it should also be considered part of the appropriation for purposes of the item veto.

*Id.*

72. See *supra* notes 27-33 and accompanying text.

be “intimately related” to the appropriation bill.<sup>73</sup> Whether this “intimately related” requirement extends beyond budget implementation bills is unclear. Furthermore, the legislature must apparently leave “clear evidence” that links the item in the nonbudget bill with the reduction in the appropriations measure.<sup>74</sup> As the dissent pointed out, determining when the evidence becomes “clear” may be problematical.<sup>75</sup> The power to item veto a nonappropriation measure may extend to situations when the legislature leaves “hints” of the cost of a program, or also when the Governor’s staff is able to estimate the probable cost of a program.<sup>76</sup>

Finally, the *Harbor* court stressed that the governor must have the power to perform the item veto when the legislature attempts to structure a veto-proof bill.<sup>77</sup> The dissent, on the other hand, argued that the holding of the majority gives the Governor too much power, and the Governor should be left with the choice of exercising an all-or-nothing veto rather than an item veto.<sup>78</sup> These two views exemplify the traditional debate surrounding the proper role of the veto in the separation of powers scheme.<sup>79</sup> By exercising the veto, the Governor is performing a legislative function.<sup>80</sup> To prevent encroachment on legislative intent, some authorities argue that the scope of the item veto should be restricted.<sup>81</sup> The competing argument contends that the Governor’s veto power should be broadly construed to effectuate executive control of the budget<sup>82</sup> and to prevent logrolling and rider tactics.<sup>83</sup> The *Harbor* court clearly favors the latter policy.

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73. See *supra* note 33 and accompanying text.

74. See *supra* notes 30-32 and accompanying text.

75. See *supra* notes 37-39 and accompanying text.

76. *Id.*

77. See *supra* notes 25 & 32 and accompanying text.

78. See *supra* text accompanying notes 40-42.

79. See Comment, *supra* note 43, at 106-33. See generally *Commonwealth v. Barnett*, 48 A. at 976-78; *Fairfield v. Foster*, 214 P. at 320-21; Note, 12 S. CAL. L. REV. at 323 (1939); Note, 37 HARV. L. REV. at 844 (1937).

80. See Comment, *supra* note 43, at 121. See also *Barnett*, 48 A. at 976-77; *Fairfield*, 214 P. at 320-21.

81. See Comment, *supra* note 43, at 121-30.

82. See *Wood*, 192 Cal. at 305, 219 P. at 971 (legislature may not indirectly defeat the purpose of the constitutional amendment giving the governor executive control of the budget). See also CAL. CONST. art. IV, § 12. See *supra* note 43 and accompanying text.

83. See *Barnett*, 48 A. at 976-78. “Logrolling” refers to the practice of attaching subjects, which would probably not pass as a separate bill, to desirable bills to ensure passage. “Riders” are commonly known as new and unrelated enactments attached to appropriation measures. See *Barnett*, 48 A. at 977. See also Comment, *supra* note 43, at 107-33.

CONCLUSION

In *Harbor v. Deukmejian*, the California Court of Appeal for the First District held that the Governor may veto the subject of an appropriation even if that subject is contained in a nonappropriation bill. The Governor may also item veto a portion of a related nonappropriation measure to correspond with a *reduction* in an appropriations measure. The majority indicated that the nonappropriation bill must be “intimately related” to the appropriation bill. Also, the subject of the appropriation must be directly linked to the dollar figure in the appropriation bill, and the relation must be shown by clear evidence. Finally, *Harbor* indicates that the Governor’s veto power must not be diminished by legislative attempts to circumvent the item veto.

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