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ATTORNEY GENERAL OPINION NO. 91-2

TO: The Honorable Steve Antone  
Idaho State Representative  
Chairman, Revenue and Taxation Committee  
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Will H.B. 92 and H.B. 94 withstand scrutiny under the federal and state constitutions?

CONCLUSION:

It appears H.B. 92 and H.B. 94 will withstand a challenge made under the due process and contract clauses of the federal and state constitutions. The bills will also probably withstand scrutiny under art. 11, § 12, of the Idaho Constitution. However, a separation of powers challenge will likely succeed.

ANALYSIS:

H.B. 92 amends Idaho Code § 63-3027A, affecting computation of Idaho income taxes paid by nonresidents. The bill is retroactive to January 1, 1985. H.B. 94 amends Idaho Code § 63-3622D, by limiting the production exemption for sales and use taxes, effective January 11, 1991. The bill also prohibits refunds or credits of taxes previously paid under the act unless a written claim was made by January 11, 1991. The bills have been proposed to prevent refunds that might otherwise be authorized under two recent Idaho Supreme Court opinions, Moses et ux. v. Idaho State Tax Commission, \_\_\_ Idaho \_\_\_, 799 P.2d 964 (1990) and Idaho State Tax Commission v. Haener Bros., Inc. (S.Ct. Slip Op. No. 17729, December 11, 1990).

Due to the retroactive nature of these bills, they will likely face several federal and state constitutional challenges: (1) that they violate the due process clause, (2) that they impair contractual obligations, (3) that they violate art. 11, § 12, of the Idaho Constitution, preventing certain types of retroactive laws, and (4) that they violate the principle of separation of powers. These arguments will be addressed in turn.

#### I. DUE PROCESS

One argument likely to be raised to defeat a retroactive application of House Bills 92 and 94 is that such an application violates the due process clause of the United States Constitution. The United States Constitution prohibits retroactive criminal laws - ex post facto laws. However, it does not prohibit retroactive civil laws per se. Rather, such laws are subject to examination under the due process clause, and, if they affect social welfare or economic rights, they are upheld if they are rationally related to a legitimate state purpose. See McGowen v. Maryland, 336 U.S. 420, 425-426 (1961).

The United States Supreme Court has been especially amenable to retroactive laws in the area of taxation. This is in part because the Court considers a tax to be neither a penalty nor a contractual liability, but rather a way of apportioning the costs of government among those who enjoy its benefits. Welch v. Henry, 305 U.S. 134 (1938). Thus, the Court has enunciated a flexible standard to determine the validity of a retroactive tax: "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." Id., 305 U.S. at 147.

Initially, in determining whether retroactive tax laws were excessively harsh and oppressive, courts appeared concerned with the type of tax at issue. Retroactive gift and estate taxes were deemed harmful because it was thought that taxpayers relied on current law in deciding how to plan their estates or whether to accept gifts. See, e.g., Untermeyer v. Anderson, 276 U.S. 440 (1928). A retroactive tax on gifts was considered to interfere with a vested right. Id. Retroactive income taxes, on the other hand, were considered less harmful, as courts reasoned taxpayers would not have altered their work behavior even if they had known of the change in tax rates. Welch, supra. Thus, reliance was not an issue in the income tax context.

Over time, other policy considerations surpassed the importance of the type of tax involved. Thus, retroactive gift and estate taxes are now routinely upheld along with retroactive income taxes. See, United States v. Hemme, 476 U.S. 558 (1986) (upholding retroactive gift tax). Rather than focusing on the

particular type of tax at issue, the Court now weighs numerous policy concerns to determine whether the "harsh and oppressive" standard of Welch has been violated: whether the taxpayer would have altered his behavior if he had foreseen the new tax, whether he has notice of the tax, and whether the law imposed a new tax or merely increased a tax rate. U.S. v. Darusmont, 449 U.S. 292 (1981). Other courts have balanced notice, reliance, the number of prior years the retroactive tax reaches back, the government interest in obtaining revenue, the extent to which the retroactive tax interferes with a vested right, and the extent to which the tax imposes a new liability as opposed to increasing an existing tax rate. See, e.g., Purvis v. United States, 501 F.2d 311 (1974); First Nat'l Bank in Dallas v. United States, 420 F.2d 725 (1970); State ex rel. Van Emmerick v. Janklow, 304 N.W. 2d 700 (S.D. 1981). What can be gleaned from these cases is that the validity of a retroactive tax appears to depend upon a broad variety of policy considerations couched within a due process framework.

While the standard applied to retroactive taxes is amorphous, the conclusions drawn by courts are not. There are numerous opinions upholding retroactive taxes against due process attacks. Indeed, it is difficult to uncover a recent case where a due process argument has succeeded. This has led one scholar to remark as early as 1935 that "arbitrary retroactivity may continue . . . to rear its head in tax briefs, but for practical purposes, in this field, it is as dead as a wagger of law." Ballard, Retroactive Federal Taxation, 48 Harvard L. Rev. 592 (1935).

Given the case law of recent decades, neither bill should be considered invalid under federal interpretations of the due process clause. The most frequently cited due process concern of the courts is detrimental reliance by the taxpayer. In the present case, however, it is difficult to argue that taxpayers have relied on prior law since it is the previous tax commission practices, with which many taxpayers undoubtedly complied, that are reinstated by House Bills 92 and 94. Similarly, the proposed bills do not impose a new tax on taxpayers, but rather, in most instances, withhold refunds for money already collected.

If there is a troubling area here, it is the number of years back House Bill 92 reaches. The bill is retroactive to 1985, a six year period. While a statute of limitation may in practice shorten this period, it is nevertheless disturbing when a law attempts to reach a transaction more than half a decade old. However, there is precedent for tax laws reaching back this far. In Prather v. C.I.R., 322 F.2d 931 (1963), the Ninth Circuit upheld a statutory change in the accounting method for income taxes which reached back four years. The court found the case a close call. Despite "the terrible penalty of the income

bunching," id. at 934, caused by the retroactive accounting rules, the Ninth Circuit found that "constitutionality was saved by two provisions" of the new law: (1) the income bunching was alleviated by a ten-year carry forward, and (2) the new law gave adversely affected taxpayers a six-month grace period within which to return to their old method of accounting. Id.

Similarly, in State ex rel. Van Emmerik v. Janklow, 304 N.W.2d 701 (S.D. 1981), the South Dakota Supreme Court upheld retroactive legislation that reached back eleven years to ratify an unauthorized level of a utilities sales tax. The 3-2 majority opinion drew a sharp dissent from one justice who found the eleven-year retroactivity "unprecedented in the annals of American Jurisprudence," 304 N.W.2d at 710. Another justice, concurring in part and dissenting in part, would have limited the valid reach back to the three-year statute of limitations: "Such a result would merely strain the time limits of prior decisions; to go further would shatter the concept of a reasonable time limitation. . . ." Id. at 709. Certainly, the vast majority of retroactive tax laws do not reach so far back as those upheld in Prather and Janklow or that proposed in House Bill 92. However, the United States Supreme Court has never set an express time limit on retroactive laws and House Bill 92 appears to meet all other due process concerns. Consequently, under federal law, it is our opinion that both bills should survive a due process challenge.<sup>1</sup>

## II. CONTRACT CLAUSE

Another argument likely to be raised is that the proposed retroactive tax bills violate the contract clauses of both the federal and state constitutions. U.S. Const. art. I, § 10, and Idaho Constitution art. 1, § 16. This argument will fail.

The contract clause of the federal Constitution prohibits any state law from impairing contract obligations. Similarly, the Idaho Constitution prohibits passage of a law that will

<sup>1</sup>While these bills would withstand a due process attack under federal law, there is a caveat when it comes to Idaho law. In the area of social and economic regulation, federal courts and the vast majority of state supreme courts apply the "rational basis" test to determine whether the legislation meets due process requirements. McGowen v. Maryland, 366 U.S. 420, 425-426 (1961). Such legislation will be upheld if it is rationally related to a legitimate government objective. However, the Idaho Supreme Court has not always applied this test to social and economic legislation. It has, on occasion, applied the "means-focus" test and upheld such legislation only if it "substantially furthers some specifically identifiable legislative end." Jones v. State Board of Medicine, 97 Idaho 859, 867, 555 P.2d 399, 407 (1976), cert. denied, 431 US 914 (1977). This higher standard allows the court to more closely scrutinize social and economic legislation. See, Jones, supra; and Deonier v. Public Employee Retirement Board, 114 Idaho 721, 760 P.2d 1137 (1988).

impair contract obligations. Litigants periodically argue that retroactive laws impair contractual obligations. The theory behind these contentions is generally that retroactive provisions revive fully discharged liabilities, see Romein v. General Motors Corp., 462 N.W.2d 555 (Mich. 1990), or affect existing contract consideration. See Janklow, supra.

In the area of taxation, these arguments fail. Taxes are not considered contractual in nature, but instead statutory. Welch, 305 U.S. at 146. Thus, the contract clause may not be implicated in a case involving retroactive taxation. Additionally, the contract clause, instead of being read literally, is "accommodated to the inherent police power of the State to safeguard the vital interest of the people." Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983). To test the valid accommodation of the contract clause and the state's police power, the United States Supreme Court applies a three-pronged test: whether a state law has substantially impaired a contractual relationship; whether there is a legitimate public purpose for the regulation; and whether the means by which the contracting parties' rights and responsibilities are adjusted are reasonable in light of the deference given to legislative action. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). Retroactive taxes pass this three-pronged test since they usually do not impair a contractual relationship and, even if they do, they constitute a legitimate exercise of police power for a public purpose. See, e.g., Janklow, supra.

While precedent from other jurisdictions indicates an argument under the contract clause would not succeed, it is worth noting that one early Idaho opinion adopted a peculiarly broad interpretation of the contract clause. In Oregon Short Line RR Co. v. Berg, 52 Idaho 499, 16 P.2d 373 (1932), the Idaho Supreme Court struck down additional taxes on taxpayers, reasoning the taxes impaired obligations under limited liability contracts created by municipal special assessment district bonds. The court, in Berg, stated:

[W]hile a tax is considered not a contract, the bond and the obligation thereof as between the bondholder and the property owner within the improvement district clearly becomes a contract of limited liability. To now in effect increase the liability upon these bonds to the extent of the special additional tax on internal taxpayers would, to that extent, impair the obligation of their contract by increasing their liability.

The Berg opinion's precedential value may be questionable since it is from an era of substantive due process, when the contract clause was carefully protected. Nevertheless, it serves as an example of the Idaho Supreme Court's willingness, at least at one time, to read the contract clause prohibition broadly. More recent Idaho Supreme Court decisions have not interpreted the contract clause in this manner. For example, in Simmons v. Idaho State Tax Commission, 111 Idaho 343, 723 P.2d 887 (1986), the court held that a homeowner's exemption did not impair contract obligations even though the exemption shifted the burden of retiring bonds from one class of taxpayers to another.

Thus, despite the Berg caveat, it is our opinion that a contract clause argument will not prevail. The more recent Idaho Supreme Court opinions have narrowed the court's earlier interpretation of the contract clause. In addition, neither H.B. 92 nor H.B. 94 would impair any substantial contractual right, as it is unlikely employees would have ceased working or manufacturers stopped purchasing production materials, had they foreseen the passage of these bills. Additionally, even if the bills do affect contract obligations, they serve a legitimate public purpose, protecting state revenue. Thus, these bills should withstand any challenge under the contract clause of either the federal or state constitution.

### III. THE IDAHO CONSTITUTION'S RETROACTIVITY CLAUSE

Another challenge to the bills will be raised under the retroactivity clause of the Idaho Constitution, art. 11, § 12. While such a challenge probably would not succeed, art. 11, § 12, nevertheless does pose some risk to House Bills 92 and 94.

Article 11, § 12, states:

The legislature shall pass no law for the benefit of a railroad, or other corporation, or any individual, or association of individuals retroactive in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already passed.

The Idaho Supreme Court has indicated the two clauses in the statute are to be read independently. Butler v. City of Blackfoot, 98 Idaho 854, 574 P.2d 542 (1978). The first clause prohibits retroactive legislation for the benefit of a railroad, corporation, individual or association of individuals. The second clause prohibits any law that imposes on the people of any county or municipality a new liability in respect to transactions or considerations already past.

A challenge under the first clause should fail. There are a number of cases construing this clause and they suggest that retroactive legislation for the benefit of the public does not violate this section. See, Powell v. McKelvey, 56 Idaho 291, 53 P.2d 626 (1935); Rogers v. Hawley, 19 Idaho 751, 115 P. 687 (1911). Thus, while there is some broad language in Butler, 98 Idaho at 858, 574 P.2d at 546, suggesting the first clause in art. 11, § 12, was intended to prevent retroactive laws generally, a reading of other precedent indicates that as long as the retroactive legislation is for the public good, this clause is not violated. Here, H.B. 92 and H.B. 94 are designed to protect the state treasury, and thus are for the public good. They do not violate the first clause of art. 11, § 12.

The second clause of art. 11, § 12, is more problematic. It states simply:

The legislature shall pass no law . . . which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past.

This clause was originally passed to limit the municipal bonds that legislatures could validate. Idaho Constitutional Convention, Proceedings and Debates, Vol. II, p. 1071. Unfortunately, the actual language is broader than the original purpose. On its face the provision only prohibits the passage of laws which impose a new liability for past transactions and which are aimed at citizens of a particular county or municipality. If the Idaho Supreme Court interprets the clause in this manner, it would not apply to House Bills 92 and 94, since their aim is statewide.

There is only one case interpreting this clause, Butler, supra, and it seems to conflict with the literal reading discussed above. In Butler, the court addressed legislation purporting to ratify invalid municipal assessments. The court concluded the statute at issue violated this clause, as it imposed a new pecuniary liability in respect to past transactions. The court stated its reasoning in the broadest of terms, declaring that the second clause of art. 11, § 12, was passed "to prevent any law imposing new liabilities for past transactions." Butler, 98 Idaho at 858, 574 P.2d at 546 (emphasis added). The court went on to remark that art. 11, § 12, not only "prohibits retroactive legislation in appropriate cases, but also prohibits the imposition of laws imposing new pecuniary liabilities 'in respect to transactions or considerations already past.'" Butler, 98 Idaho at 859, 574 P.2d at 547.

It is difficult to determine what weight to give this language. On the one hand, it can be dismissed as dicta or confined to the context of the case, a case involving municipal assessment costs. On the other hand, this is the only opinion that interprets the second clause of art. 11, § 12, and, consequently, the current Idaho Supreme Court may feel bound by its language, sweeping as it is. If so, the court would conclude a statewide tax falls within the prohibition of this clause.<sup>2</sup>

In addition to this issue, there is a question of what is meant by the term "new liability," contained in art. 11, § 12. Retroactive increases in tax rates are not considered a "new" tax. See, e.g., United States v. Darusmont, 449 U.S. 292 (1981). Thus, an argument can be made that these bills do not impose a "new liability" on past transactions, but merely increase an already existing liability. However, in Butler, the court, in addressing retroactive legislation validating prior assessments, held that a new liability had been imposed and appropriate adjustments would have to be made to the reassessment roll. This reasoning may indicate the court's unwillingness to treat an alteration in a tax rate or assessment as something other than the imposition of a new liability for purposes of art. 11, § 12.

In conclusion, it is not clear how the court will apply art. 11, § 12, of the Idaho Constitution. The first clause of the provision poses no problem for House Bills 92 and 94. The second clause will not be an issue unless the court adopts the broad language and reasoning of Butler. However, because the purpose behind art. 11, § 12, was narrow, and its language is clear, it is our opinion that the court will limit the effects of this section and hold that it does not apply to this case. Nevertheless, there is some risk to the validity of H.B. 92 and H.B. 94 posed by the Butler opinion.

#### IV. SEPARATION OF POWERS

The final argument which will be raised is that the proposed bills violate the separation of powers provision contained in art. 2, § 1, of the Idaho Constitution. This is the line of attack most likely to succeed and the area where the bills are most vulnerable.

Under art. 2, § 1, of the Idaho Constitution, the governmental powers are divided into three distinct departments, the legislative, executive and judicial. "[N]o person or

<sup>2</sup>If the court reaches this conclusion, it would have to distinguish Herndon, 87 Idaho 335, 393 P.2d 35 (1964), authorizing limited retroactive effect of an income tax law. However, Herndon merely follows the common and accepted practice of applying a new tax law retroactively by a few months, whereas here, one bill is retroactive six years, which is highly unusual and not the general practice in the tax area.

collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others. . . ." Id. Thus, the legislature makes laws, the executive enforces them and the judiciary interprets them. The legislature has no power to interpret law or to overrule an opinion of the supreme court.

House Bills 92 and 94 purport to retroactively amend existing tax laws. However, these retroactive amendments follow briskly on the heels of recent supreme court decisions reducing income tax owed by nonresidents under Idaho Code § 63-3027A and broadly interpreting the production exemptions contained in Idaho Code § 63-3622(D). See Moses, supra, and Haener, supra. The question posed then is: Do these retroactive amendments essentially abrogate a supreme court decision and, thereby, usurp the judicial role?

Courts in other jurisdictions have varied widely in how they view this issue. A number of courts have specifically addressed retroactive tax legislation passed after a judicial interpretation of the previous tax statute. The most prominent case disallowing such a retroactive tax is Phelps Dodge Corporation v. Revenue Division of the Dept. of Taxation, 702 P.2d 10 (N.M. Ct. App. 1985) (cert. denied by New Mexico Supreme Court). In Phelps, a taxpayer sought a refund for tax years 1980 through 1983 based upon a 1983 opinion by the court holding that certain mining companies were exempt under the state code from compensating and gross receipts tax. However, the New Mexico Legislature in 1984 retroactively amended statutory provisions addressing these exemptions and the refund was denied. In amending the statute, the legislature used especially confrontational language, stating its original legislative intent had been misconstrued by the court. The court refused to apply the new bill retroactively, reasoning that the bill sought to abrogate the interpretation of the exemption statute contained in its previous opinion and to preclude that opinion from being accorded normal effect. Phelps, 702 P.2d at 13.

Similarly, in Federal Express Corp. v. Skelton, 578 S.W.2d 1, (Ark. 1979), the legislature attempted to "clarify legislative intent" and retroactively amend tax exemption provisions after a judicial interpretation of those provisions. The Supreme Court of Arkansas held that the retroactive legislation violated the separation of powers principle. The Court stated that the legislature did not have the "authority to retrospectively abrogate judicial pronouncements of the courts . . . by a legislative interpretation of the law." Skelton, 578 S.W.2d at 7-8.

However, in State ex. rel. Van Emmerick v. Janklow, 304 N.W.2d 700 (S.D. 1981), the South Dakota Supreme Court upheld

retroactive legislation which increased to four percent a tax on sales by public utilities after the court had already construed the statute as authorizing a tax of only three percent. The court in Janklow upheld this retroactive legislation without commenting on the separation of powers issue. The dissent, however, argued that this principle had been violated.

Moving away from the tax arena are a number of cases holding that retroactive legislation following a contrary judicial interpretation of a statute will be sustained even in the face of a separation of powers challenge. The most strenuous defender of this approach is the Michigan Supreme Court. In Romein v. General Motors Corp., 462 N.W.2d 555 (1990), that court addressed retroactive legislation affecting worker's compensation offsets. The court had previously construed a worker's compensation statute as mandating certain offsets, although these offsets had a detrimental impact on workers injured before the effective date of the statute. The legislature then retroactively amended the statute, eliminating offsets for that class of workers, to alleviate the financial hardship the offsets imposed. The court in Romein upheld this retroactive legislation even though the new act stated that the court had misconstrued the offset provision. "This enactment is a valid exercise of the Legislature's authority to retroactively amend legislation perceived to have been misconstrued by the judiciary." Id. at 566. The court went so far as to state that it would be usurping the legislative function if it struck down the curative legislation:

Indeed, if the defendants' separation of powers claim had merit as applied to the curative statute challenged here, the power of the Legislature to enact curative and remedial legislation would be severely curtailed, even where the statute does not violate constitutional due process limits. This would represent a judicial usurpation of what is properly a legislative function.

Romein, 462 N.W.2d at 567. It should be noted that the Romein court was almost evenly divided, with especially sharp dissents. The Chief Justice narrated the history of the dispute as follows:

The 1987 Legislature was displeased with the decision of this Court in Chambers, so it sought to correct our "erroneous" decision by providing its own "interpretation" of the intent of the 1981 Legislature. However, as pointed out by the appellants, only a fraction of the senators and representatives who voted in favor of [the 1981 bill] were still around to "interpret" the 1981 legislative intent with 1987 P.A. 28.

Id. at 573. He concluded that the legislature's attempt in 1987 to abrogate the court's interpretation of the 1981 statute violated separation of powers:

In my opinion, the net effect of 1987 P.A. 28 was nothing more than an attempt to "overrule" the decision of this Court in Chambers, to render the Chambers opinion null and void, as if it was never released. This Court cannot surrender to this invasion into the constitutionally granted authority of the judicial branch.

Id. at 576-77.

The Idaho Supreme Court has only once addressed the issue of whether curative legislation usurps the judicial role. In Powell v. McKelvey, 56 Idaho 291, 53 P.2d 626 (1935), the Court implied that retroactive legislation which ratified a state contract for construction of a street subway did not violate the separation of powers principle. The Court quoted approvingly from an Illinois opinion which stated that curative legislation validating the issuance of bonds did not "invade the province of the judiciary." Worley v. Idleman, 120 N.E. 472 (Ill. 1918).

It is our opinion that in addressing House Bills 92 and 94 the Idaho Supreme Court will not consider Powell binding precedent. The language quoted by the court on separation of powers was essentially tagged on the end of the opinion as dicta. The court had not been asked by either party in the case to address the separation of powers principle. Finally, and most importantly, the opinion was not addressing retroactive legislation which nullified a Supreme Court's prior interpretation of a statute. Consequently, Powell's precedential effect is questionable.

In determining the validity of H.B. 92 and H.B. 94 under the separation of powers clause, the Idaho Supreme Court will essentially be working from a clean slate. It can either follow jurisdictions such as Arkansas and New Mexico, which prohibit the legislature from retroactively altering the substance of a statute following judicial construction, but allow retroactive legislation which merely ratifies unauthorized acts; or it can follow the Michigan Supreme Court's lead and uphold retroactive legislation which substantively alters statutes already construed by the Court. While courts are split and there is ample precedent to back either choice, as discussed below, it is our opinion that the Idaho Supreme Court will likely conclude H.B. 92 and H.B. 94 violate the separation of powers clause.

There are a number of reasons the court is likely to reach this conclusion. First, the two leading cases holding that this

type of legislation violates the separation of powers clause are factually similar to the case at hand. Both Phelps and Skelton involved retroactive legislation abrogating the effects of appellate court interpretations of tax statutes. The court is likely to be struck by this similarity and consequently find the reasoning in those opinions particularly persuasive. Romein, on the other hand, the leading case upholding retroactive legislation against a separation of powers challenge, does not involve a tax statute, but rather worker's compensation legislation. While this in and of itself should not be dispositive, the fact that courts are traditionally more deferential to carrying out the remedial purposes of worker's compensation statutes may lessen the weight the Idaho Supreme Court will accord that opinion as it addresses these tax bills.

A second reason the Idaho Supreme Court would likely find HB 92 and HB 94 violative of separation of powers has to do with the distinction many courts draw between legislation that abrogates a prior court ruling and legislation that is merely "curative," or "ratifying" or "remedial" in nature.

Illinois, for example, disallows retroactive legislation which changes the substantive words of a statute following a judicial construction. See, Roth v. Yackley, 396 N.E.2d 520 (Ill. 1979). However, retroactive laws which merely ratify previously unauthorized conduct are not considered to violate the separation of powers clause, so long as they do not alter the substantive language in statutes already judicially construed. See Schlenz v. Castle, 417 N.E.2d 1336 (Ill. 1981). An application of this distinction can be seen in Bates v. Board of Education, 555 N.E. 2d 1 (Ill. 1990), where the Illinois Supreme Court recently upheld that part of a statute which merely ratified a previous issuance of bonds at an interest rate greater than the 7% permitted under the court of appeals' interpretation of the school code; yet also invalidated, on the separation of powers principle, that part of the same statute which purported to retroactively increase the 7% statutory cap on the interest rate.

The Washington Supreme Court has found that legislation which purports to clarify an ambiguous statute already construed by the court raises separation of powers concerns. See Johnson v. Morris, 557 P.2d 1299 (1976), and Marine Power v. Washington State Human Rights Commission, 694 P.2d 697 (Wash. App. 1985). By contrast, under the Washington rule, the legislature is free to amend an unambiguous statute following a judicial construction of the statute. However, such amendments are presumed to apply only prospectively. Marine Power, 694 P.2d at 701. The court in Marine Power did apply the amendment at issue retroactively because it was purely remedial in nature and did not affect vested rights.

In short, it is difficult to reconcile all the opinions which have addressed the effect of retroactive legislation on the separation of powers principle. However, courts appear to be more receptive to such legislation if it only ratifies a prior unauthorized act or is purely remedial in nature. Retroactive legislation which substantially alters the clear language of statutes already construed by an appellate court and essentially annul that court's opinion are met with a greater degree of hostility. See Phelps, supra. But see Romein, supra. The supreme court is unlikely to view these bills as merely ratifying unauthorized tax commission practices. Rather, the court will probably conclude the bills substantively alter statutory language the supreme court has already deemed unambiguous and, in effect, nullify the court's prior opinions. The court will take this into account when determining the validity of these bills.

A third reason the Idaho Supreme court would likely find retroactive legislation violative of separation of powers is because when such legislation seeks "to abrogate the interpretation" given to the prior statute by a court decision, it works "to preclude the decision . . . from being accorded normal stare decisis effect." Phelps, 702 P.2d at 13. The Idaho Supreme Court, in recent years, has repeatedly stressed the value of stare decisis in its decisions as providing predictability for those who depend upon its rulings. It is our opinion that this factor would weigh heavily in the court's deliberations on the question of retroactive legislation that abrogates a prior court ruling.

Additionally, the court is likely to perceive an affront in the passage of these bills. The bills, it is true, have been artfully drafted to avoid any language suggesting the court misconstrued the tax statutes or that the legislature is engaging in the judicial role of "clarifying" or "interpreting" the tax statutes. On their face the bills merely retroactively amend the statutes. However, in addressing these bills, the court will look at substance over form, see e.g., Koon v. Bottolfsen, 66 Idaho 771, 169 P.2d 345 (1946), and be aware of the implications of these bills. The bills substantively alter statutes already construed by the court. In addition, they are being proposed within months of the opinions whose effects they will nullify. In fact, the Haener decision is still pending before the Court on rehearing. Certainly, these bills are an effort to protect the state treasury, and the supreme court will no doubt weigh this factor heavily, especially if the fiscal impacts of Moses and Haener are as large as predicted. Nevertheless, it is difficult to conceive how these bills, which essentially abrogate the court's decisions in Moses and Haener, would not be perceived by the court as a usurpation of its power.

Finally, the court will be concerned with how its ruling will affect the future balance of power. If it upholds these bills, almost any retroactive bill could withstand a separation of powers attack. See, e.g., Kouri v. Equitable Life Assurance Society of the United States, 716 F. Supp. 1018 (E.D. Mich. 1989) (federal decision interpreting Michigan law and holding that since the Michigan appellate courts had found no separation of powers concern with retroactive worker's compensation offset statutes at issue in Romein, supra, retroactive insurance legislation would also be upheld). The Idaho Supreme court will carefully consider a "slippery slope" argument here.

In conclusion, the separation of powers principle presents a serious problem. Clearly, the court could determine the bills do not violate this principle and support its position with case law from Idaho and from other jurisdictions. See Powell, supra, and Romein, supra. However, because this case is strikingly similar on the facts to Phelps and Skelton, because the bills do not fit the pattern of legislation found to be merely "curative," and because the Court is unlikely to want to put itself at risk of having future opinions interpreting tax and possibly other civil statutes nullified by bills such as the ones at issue, the Court will probably conclude H.B. 92 and H.B. 94 violate the separation of powers clause.

#### VI. CONCLUSION

The retroactive legislation contained in H.B. 92 and H.B. 94 will probably be challenged on a number of constitutional grounds, including, (1) due process, (2) contract clause, (3) the retroactivity provisions of art. 11, § 12, of the Idaho Constitution, and (4) separation of powers. The bills should withstand an attack under the due process and contract clauses as well as under art. 11, § 12, of the Idaho Constitution. However, it is the opinion of the office that the Idaho Supreme Court will be sympathetic to an attack premised on separation of powers.

Dated this 14th day of February, 1991.

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Page 15

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AUTHORITIES CONSIDERED

1. *United States Constitution*

U.S. Const. art. I, § 10.

2. *Idaho Constitution*

Art. 1, § 16.

Art. 2, § 1.

Art. 11, § 12.

3. *Idaho Statutes*

Idaho Code § 63-3027A.

Idaho Code § 63-3622D.

4. *Cases*

Allied Structural Steel Co. v. Spannaus,  
438 U.S. 234 (1978).

Bates v. Board of Education, 555  
N.E.2d 1 (Ill. 1990).

Butler v. City of Blackfoot, 98 Idaho  
854, 574 P.2d 542 (1978).

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Board, 114 Idaho 721, 760 P.2d 1137  
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