UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 70 | Number 6 Article 13

9-1-1992

State v. Whittle Communications: Allowing Local School Boards to Turn on Channel One

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State v. Whittle Communications: Allowing Local School Boards To Turn On "Channel One"

American children spend an average of twenty-eight hours per week in front of a television set, and about one-fifth of this viewing time consists of watching commercials.[1] As a result, activist groups closely monitor television advertisements targeted at children.[2] In 1989, these organizations became outraged when Whittle Communications (Whittle) first introduced Channel One, a commercially-sponsored video news program, into the public schools.[3] In fact, "much of the nation seemed caught in passionate debate over the ethics of Channel One, Whittle's newscast . . . that contains plugs for hamburgers and corn chips."[4] While Channel One is designed to enhance students' awareness of current events, it also is designed to sell products to its student viewers.[5]

North Carolina entered the "passionate debate" in February of 1990 when the North Carolina State Board of Education (State Board) passed a temporary rule which prevented local school boards from subscribing to Channel One.[6] Ultimately, the Supreme Court of North Carolina addressed several pivotal questions concerning Channel One in *State v. Whittle Communications*.[7] Did the State Board have authority under the North Carolina Constitution or under the North Carolina General Statutes to promulgate such a rule?[8] Did the contracts between the local school boards and Whittle violate the "taxation for public purposes only" provision of the state constitution?[9] Did the agreements contravene the "free public schools" requirement of the state constitution?[10]

The court answered each question in the negative. Specifically, the

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1. Peter Hallifax, *Children Watching Television Advertising: What's Wrong With This Picture?*, 12 HASTINGS COMM. & ENT. L.J. 495, 495 (1990).

2. *See* Walter Goodman, *Pilot News Program for Schools*, N.Y. TIMES, Mar. 23, 1989, at C13 (organizations objecting to Channel One include the American Association of School Administrators, the National Parent Teachers Association, and Action for Children's Television (ACT)).

3. *See id.* at C13, C22 (describing the effect of the pilot program conducted in six cities in the spring of 1989); N.R. Kleinfield, *What Is Chris Whittle Teaching Our Children?*, N.Y. TIMES, May 19, 1991, § 6 (Magazine), at 32, 49 (Chris Whittle formed Whittle Communications in 1986).

4. Kleinfield, *supra* note 3, at 32.

5. Goodman, *supra* note 2, at C13.

6. State v. Whittle Communications, 328 N.C. 456, 459-60, 402 S.E.2d 556, 558 (1991).

7. *Id.*

8. *See infra* notes 33-36 and accompanying text.

9. *See infra* notes 37-39 and accompanying text.

10. *See infra* notes 40-42 and accompanying text.

court found that local boards of education, as opposed to the State Board, have complete control over the selection and procurement of instructional materials such as Channel One.[11] Therefore, the State Board transgressed its constitutional and statutory authority by adopting the temporary rule.[12] The court also determined that the state constitution does not bar local administrative units from contracting to receive Channel One.[13] The public purposes doctrine of taxation contained in article V, section 2(1) of the constitution does not apply because the Channel One contracts do not involve the expenditure of tax revenues.[14] Nor does the free public schools provision of article IX, section 2(1) apply, as students are not required to pay a fee to view Channel One.[15]

This Note analyzes the statutory and constitutional implications of the supreme court's decision in *Whittle*. The Note presents an overview of the body of law relevant to both aspects of the case[16] and evaluates the *Whittle* court's ruling against this backdrop.[17] The Note concludes that while the court's logic was dubious in parts, the overall thrust of the opinion is clearly reasoned and amply supported. The end result—a victory for local autonomy in public education—is perhaps the most laudable element of the decision.

Each edition of the Channel One newscast runs for twelve minutes, including two minutes of commercial advertising.[18] School boards wishing to receive Channel One enter into contracts with Whittle whereby the school boards pay no fee for the service but are bound by certain restrictions.[19] Each school must air the program at the same time daily.[20] The program must be shown ninety-five percent of the days school is in session during the calendar quarter over which the contract extends.[21] Finally, school officials must submit records detailing the days when students watch Channel One and the number of students who watch

11. *Whittle*, 328 N.C. at 466, 402 S.E.2d at 562.

12. *Id.*

13. *Id.* at 469-70, 402 S.E.2d at 563-64.

14. *Id.* at 469, 402 S.E.2d at 563-64; *see infra* notes 37-39 and accompanying text.

15. *Whittle*, 328 N.C. at 470, 402 S.E.2d at 564; *see infra* notes 40-42 and accompanying text.

16. *See infra* notes 47-76 and accompanying text.

17. *See infra* notes 77-125 and accompanying text.

18. *Whittle*, 328 N.C. at 459, 402 S.E.2d at 557.

19. *Id.*

20. *Id.* Channel One is broadcast via satellite at 6:00 a.m. every weekday, allowing school officials to screen the content and ensure that it is appropriate for student viewing. *Id.* The schools record the program on a videocassette recorder (VCR); later, it is played back to students at the agreed time. *Id.*

21. *Id.*

each program.[22] The contracts specify that students who prefer not to view the program are free to engage in some other activity.[23]

Disturbed by these contracts, the State Board passed a temporary rule on February 1, 1990 which essentially rendered Channel One unavailable to public schools by prohibiting agreements which restrict the ability of administrators and teachers to decide either the content of materials presented to students or the time at which such materials will be presented.[24] The rule further provided that schools may not enter into contracts through which students regularly will be exposed to commercial advertising.[25]

The Thomasville City Board of Education (Thomasville) violated the temporary rule by signing a contract with Whittle after the rule's adoption.[26] In response, the State Board filed suit against Whittle and Thomasville,[27] requesting the Wake County Superior Court to declare the Channel One agreements unenforceable.[28] The complaint asserted that the contracts contravened the State Board rules, provisions of the North Carolina Constitution, and public policy.[29] The defendants asked the court to declare the contracts valid and the temporary rule-making of the State Board unlawful.[30] Affirming the trial judge,[31] the supreme

22. *Id.*

23. *Id.*

24. *Id.* at 459-60, 402 S.E.2d at 558; N.C. ADMIN. CODE tit. 16, r. 6D.0105 (Feb. 1992).

25. *Whittle*, 328 N.C. at 460, 402 S.E.2d at 558.

26. *Id.*

27. The State of North Carolina and the Superintendent of Public Instruction joined the State Board as plaintiffs. *Id.* at 461, 402 S.E.2d at 558. Additionally, the trial court allowed the Davidson County Board of Education (Davidson) to intervene as a defendant. *Id.* Davidson contracted with Whittle to receive Channel One on January 29, 1990. *Id.* at 459, 402 S.E.2d at 558. Although the rule was not adopted until February 1, 1990, the State Board, pursuant to an amendment approved on February 19, 1990, made the rule retroactive. *Id.* at 460, 402 S.E.2d at 558.

28. *Id.* at 461, 402 S.E.2d at 558. Prior to the initiation of judicial proceedings, the Administrative Rules Review Commission sent a letter to the State Board indicating that the State Board lacked statutory authority to promulgate the temporary rule in question. *Id.* at 460, 402 S.E.2d at 558. As a result, the State Board sought a judicial determination of the legality of the rule.

29. *Id.* at 461, 402 S.E.2d at 558.

30. *Id.* at 461, 402 S.E.2d at 559.

31. Judge Stephens granted defendants' motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction on the grounds that the Office of Administrative Hearings was the proper forum for the dispute. *Id.* at 462, 402 S.E.2d at 559. The supreme court disagreed, concluding that the State Board was not required to exhaust all administrative remedies before filing the suit. *Id.* at 463, 402 S.E.2d at 560. The trial judge's ruling on the issue was harmless error, however, because the trial court fully adjudicated the issues raised by the complaint prior to dismissal. *Id.* Thus, the supreme court "affirmed" the portion of the order wherein Judge Stephens made specific findings of fact and conclusions of law.

court held that the State Board lacked the authority to promulgate the temporary rule, that the contracts neither violated the state constitution nor contravened public policy.[32]

Specifically, the court found that the State Board had no authority to make the temporary rule because the acts that the rule prohibited are reserved by statute for local school boards.[33] Article IX, section 5 of the North Carolina Constitution grants the State Board power to create rules and regulations to facilitate its supervision of the public school system, provided the General Assembly has not otherwise restricted its authority.[34] According to the court, section 115C-98(b) of the North Carolina General Statutes, which requires local school boards to develop written policies concerning the procurement of instructional materials, is an example of such a limitation.[35] Because Channel One qualifies as instructional material, decisions regarding its use are solely within the province of the local school boards.[36]

In declaring the Channel One contracts constitutional, the court rejected the State Board's contention that the agreements violated article V, section 2(1) of the state constitution, which mandates that the power of taxation be exercised for public purposes.[37] Under the terms of the contracts, Whittle furnishes all equipment necessary to show the program; therefore, the court found that the schools spend no tax money to support the contracts[38] and did not reach the question of whether Chan-

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32. *Id.* at 471, 402 S.E.2d at 565. This Note does not examine separately the public policy aspect of *Whittle*, as the court's public policy analysis overlapped with its discussion of the statutory and constitutional issues presented in the case. For a brief review of the court's findings with respect to public policy, see *infra* note 88.

33. *Whittle*, 328 N.C. at 468, 402 S.E.2d at 563.

34. *Id.* at 464, 402 S.E.2d at 560. The constitutional provision reads in pertinent part: "The State Board of Education shall supervise and administer the free public school system . . . and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly." N.C. CONST. art. IX, § 5.

35. *Whittle*, 328 N.C. at 460, 402 S.E.2d at 562. Prior to amendment in 1990 the statute provided in part: "Local boards of education shall adopt written policies concerning the procedures to be followed in their local school administrative units for the selection and procurement of supplementary textbooks, library books, periodicals, and other instructional materials needed for instructional purposes in the public schools of their units." Act of May 19, 1969, ch. 519, § 115C-206.14(b), 1969 N.C. Sess. Laws 440, 444 (current version at N.C. GEN. STAT. § 115C-98(b) (1991)).

36. *Whittle*, 328 N.C. at 466, 402 S.E.2d at 562.

37. *Id.* at 469, 402 S.E.2d at 563. Article V, section 2(1) states that "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only." N.C. CONST. art. V, § 2(1).

38. *Whittle*, 328 N.C. at 469, 402 S.E.2d at 563. The State Board claimed that the provision applied because tax funds finance the public school system generally—for example, tax dollars are used to pay for busses and teachers' salaries. *Id.* Note that the State Board did not base its argument on the nominal use of tax dollars for electricity to run the program. *See id.*

nel One constitutes a public purpose.[39]

The court also rejected the State Board's claim that the contracts contravened the "general and uniform system of free public schools" clause of article IX, section 2(1).[40] Despite the State Board's argument that students "pay" in the form of their time to watch Channel One and the advertising it airs, the court maintained that no authorities have equated time with money in this context.[41] This conclusion hinged partly on the fact that viewing Channel One is not mandatory under the agreement.[42]

In dissent, Justice Martin, joined by Chief Justice Exum, first asserted that although section 115C-98(b) of the North Carolina General Statutes directs local school boards to adopt written policies regarding instructional materials, the applicable version of the statute did not grant them the exclusive authority to acquire such materials.[43] In fact, the statute as amended in 1990 does explicitly grant exclusive authority, but this amendment was not in effect at the time the contracts at issue were executed.[44] Justice Martin next reasoned that, even if local school boards solely controlled the procurement of such materials, the State Board's

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But see infra notes 69-72 and accompanying text (discussing Kiddie Korner Day Sch. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 144-45, 285 S.E.2d 110, 117 (1981) (where the plaintiffs advanced and the court accepted a similar argument), *disc. rev. denied*, 305 N.C. 300, 291 S.E.2d 150 (1982).

39. *Whittle*, 328 N.C. at 469, 402 S.E.2d at 563.

40. *Id.* at 470, 402 S.E.2d at 564. The constitutional provision reads in pertinent part: "The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools." N.C. CONST. art. IX, § 2(1).

41. *Whittle*, 328 N.C. at 470, 402 S.E.2d at 564. Specifically, the court found unconvincing the State Board's analogy between students watching Channel One and paying incidental fees for items such as gym uniforms or scholastic magazines. *Id.*; *see infra* notes 120-24 and accompanying text.

42. *Whittle*, 328 N.C. at 470, 402 S.E.2d at 564.

43. *Id.* at 472, 402 S.E.2d at 565 (Martin, J., dissenting). Thus, according to the dissent, the majority's interpretation was contrary to the "plain meaning of the words used by the General Assembly." *Id.* at 472-73, 402 S.E.2d at 565 (Martin, J., dissenting).

44. *Id.* at 472, 402 S.E.2d at 565 (Martin, J., dissenting). In contrast, the majority determined that the 1990 amendment merely clarified existing law. *Id.* at 468, 402 S.E.2d at 563. The statute, as amended in 1990, reads in pertinent part:

> Local boards of education shall adopt written policies concerning the procedures to be followed in their local school administrative units for the selection and procurement of supplementary textbooks . . . audio-visual materials, and other supplementary instructional materials . . . .
>
> Local boards of education shall have sole authority to select and procure supplementary instructional materials, whether or not the materials contain commercial advertising, . . . and to determine when the materials may be presented to students during the school day. Supplementary materials and contracts for supplementary materials are not subject to approval by the State Board of Education.

N.C. GEN. STAT. § 115C-98(b) (1991).

rule simply prohibited them from delegating to some external entity the responsibility of deciding when the materials will be used.[45] Finally, citing evidence that teachers generally neither discuss Channel One's content with their classes nor test students on the material, Justice Martin argued that the program is not instructional in nature, and, therefore, section 115C-98(b) of the North Carolina General Statutes does not apply.[46]

The *Whittle* decision rests on three areas of North Carolina law: (1) section 115C-98(b) of the North Carolina General Statutes coupled with the division of power between state and local authorities in public education; (2) the public purposes doctrine of taxation found in article V, section 2(1) of the North Carolina Constitution; and (3) the free public schools requirement of article IX, section 2(1) of the state constitution.

The General Assembly in 1969 enacted the original statutory provision addressing the procurement of instructional materials.[47] The language of the 1969 statute is nearly identical to that of its 1987 counterpart, except for minor stylistic differences.[48] In the preamble to the 1969 session law preceding the codification of section 115C-206.14, the General Assembly enunciated the primary purpose of the statute: to permit each school administrative unit to select its own supplementary instructional materials.[49]

Although *Whittle* is the first case to demand judicial construction of these statutes, the underlying concern of the statute—the division of power within the public school system—has been addressed previously. As early as 1871, the Supreme Court of North Carolina defined the structure of the public schools: "[T]he Constitution establishes the public school system, and the General Assembly provides for it, by its own taxing power, . . . and the State Board of Education, by the aid of school committees, manage[s] it."[50] In other words, the State Board supervises and administers the public school system pursuant to Article IX, Section 5 of the North Carolina Constitution, subject to the laws of the General Assembly.[51]

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45. *Whittle*, 328 N.C. at 473-74, 402 S.E.2d at 566 (Martin, J., dissenting).

46. *Id.* at 475-77, 402 S.E.2d at 567 (Martin, J., dissenting).

47. Act of May 19, 1969, ch. 519, § 115C-206.14(b), 1969 N.C. Sess. Laws 440, 444 (current version at N.C. GEN. STAT. § 115C-98(b) (1991)).

48. *See* Act to Recodify Chapter 115, ch. 423, § 115C-98(b), 1981 N.C. Sess. Laws 510, 544.

49. Act of May 19, 1969, ch. 519, § 115C-206.14(b), 1969 N.C. Sess. Laws 440, 440-41 (current version at N.C. GEN. STAT. § 115C-98(b) (1991)).

50. Lane v. Stanly, 65 N.C. 153, 156 (1871).

51. Article IX, section 5 is quoted *supra* note 34; *see also* Guthrie v. Taylor, 279 N.C. 703,

One way in which the General Assembly may place statutory limitations on the State Board is by delegating certain rule-making powers to local boards.[52] Accordingly, in *Hughey v. Cloninger*,[53] where citizens sought to enjoin Gaston County from funding and operating a school for dyslexic children, the supreme court stated that "[i]n its discretion the General Assembly may delegate to local administrative units the general supervision and control of schools within their boundaries."[54] Where the General Assembly is silent, however, the rule-making powers of the State Board are limited only by the state constitution.[55]

In *Kiddie Korner Day Schools v. Charlotte-Mecklenburg Board of Education*,[56] the North Carolina Court of Appeals recognized that local school boards have the responsibility to implement state policies concerning public education set by the State Board and the State Superintendent of Public Instruction.[57] Therefore, local school boards are "deemed agents of the State for the purpose of providing public education,"[58] although they have some leeway with respect to policies suited for individual schools within their localities.[59]

713, 185 S.E.2d 193, 200 (1971) (confirming that the State Board derives authority from both the state constitution in article IX, section 5, and the legislature in chapter 115 (currently chapter 115C) of the General Statutes), *cert. denied*, 406 U.S. 920 (1972).

52. *See generally* N.C. GEN. STAT. § 115C-47 (1991) (enumerating the powers and duties of local school boards).

53. 297 N.C. 86, 253 S.E.2d 898 (1979).

54. *Id.* at 93, 253 S.E.2d at 903. The *Hughey* court ultimately held that funding the school was not permissible under the statutory scheme for public education. *Id.* at 94-95, 253 S.E.2d at 903; *see also* Coggins v. Board of Educ., 223 N.C. 763, 767, 28 S.E.2d 527, 530 (1944) (holding that the legislature may grant county boards of education the power to make "necessary or expedient" rules).

55. *See Guthrie*, 279 N.C. at 710, 185 S.E.2d at 198-99. Rules of the State Board must comport with the United States Constitution as well. For instance, a regulation cannot be unreasonably discriminatory so as to violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 713, 185 S.E.2d at 200. The division of power within the school system itself, however, generally is not subject to federal constitutional scrutiny: "How the power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937).

56. 55 N.C. App. 134, 285 S.E.2d 110 (1981), *disc. rev. denied*, 305 N.C. 300, 291 S.E.2d 150 (1982).

57. *Id.* at 140-42, 285 S.E.2d at 114-15.

58. *Id.* at 140, 285 S.E.2d at 114 (citing Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ., 4 N.C. App. 617, 621, 167 S.E.2d 538, 541, *appeal dismissed*, 275 N.C. 675, 170 S.E.2d 473 (1969)).

59. *Id.* at 140, 285 S.E.2d at 115 (citing N.C. GEN. STAT. § 115-27 (repealed 1981)). The current version of the statute cited by the court reads in pertinent part: "Local boards of education, subject to any paramount powers vested by law in the State Board of Education . . . shall have general control and supervision of all matters pertaining to the public schools in their respective local school administrative units." N.C. GEN. STAT. § 115C-40 (1991). Thus, in discussing this latitude of local school boards in areas of local interest, the *Kiddie Korner* court presumably was referring to powers statutorily delegated by the General Assembly. *See,*

Beyond contending that it had the authority to create the temporary rule in *Whittle*, the State Board argued that the court should declare Channel One contracts invalid because they are unconstitutional under both the public purposes taxation requirement and the free public schools mandate of the state constitution.[60] The seminal case construing the public purposes doctrine is *Mitchell v. North Carolina Industrial Development Financing Authority*,[61] where the court outlined the governing principles: The General Assembly has the initial responsibility for defining public purposes, and its determinations are, therefore, "entitled to great weight";[62] further, for a use to qualify as a public purpose, "the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity."[63]

In *Martin v. North Carolina Housing Corp.*,[64] the supreme court followed its ruling in *Mitchell* while clarifying the parameters of public purposes. The *Martin* court held constitutional the state funding of a low-income housing project[65] because North Carolina suffered from a severe shortage of decent housing for the poor, and the general public—even those not directly benefitting from the housing—possessed an interest in the promotion of health, safety, and welfare.[66] Furthermore, the court subsequently declared in *Madison Cablevision v. City of Morganton*[67] that the term "public purpose" should be interpreted broadly, emphasizing that it is not imperative that *every* citizen benefit from a particular

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e.g., *id.* § 115C-47(4) (1991) (giving local boards power to regulate extracurricular activities). *But see* Coggins v. Board of Educ., 223 N.C. 763, 767, 28 S.E.2d 527, 530 (1944) ("It is generally held that local school authorities have the *inherent* power to make rules and regulations for the discipline, government, and management of the schools and pupils within their district.") (emphasis added).

60. *See Whittle*, 328 N.C. at 468-70, 402 S.E.2d at 563-64.

61. 273 N.C. 137, 159 S.E.2d 745 (1968).

62. *Id.* at 144, 159 S.E.2d at 750.

63. *Id.* This test must be satisfied notwithstanding the fact that public and private interests are typically so interrelated that they are difficult to separate. *Id.* For example, under the act at issue in *Mitchell*, tax funds financed the construction of manufacturing plants in order to promote industry in North Carolina. *Id.* at 145, 159 S.E.2d at 751. As a result, the public presumably benefitted from increases in employment and state income. Of course, the private companies who used the plants also benefitted from state-subsidized industrial development. *See id.* at 158, 159 S.E.2d at 760.

64. 277 N.C. 29, 175 S.E.2d 665 (1970).

65. *Id.* at 34, 175 S.E.2d at 667.

66. *Id.* at 44, 175 S.E.2d at 673. The underlying assumption the court relied upon is that social and economic conditions will be important factors in the determination of what benefits the public in common. The concept of public purposes, therefore, "expands with the population, economy, scientific knowledge, and changing conditions." *Mitchell*, 273 N.C. at 144, 159 S.E.2d at 750.

67. 325 N.C. 634, 386 S.E.2d 200 (1989).

undertaking.[68]

Finally, in *Kiddie Korner*,[69] the court of appeals explored the public purposes doctrine in the public school context, considering whether an extended-day program, established by a county board of education and operated in a public elementary school, violated the state constitution.[70] The court found that, although participating students gained a "private benefit," the program also served the public generally because it fostered scholastic achievement.[71] Thus, because education of the citizenry is "essential to good government, morality and a good economy," the program was sufficiently "cloaked with a public purpose."[72]

In *Whittle*, the State Board also maintained that the Channel One contracts violated a second state constitutional provision—the free public schools mandate of article IX, section 2(1). The principal case construing this provision is *Sneed v. Greensboro City Board of Education*.[73] In *Sneed*, plaintiffs challenged the constitutionality of student fees for supplementary instructional materials, such as science laboratory equipment and art supplies.[74] The supreme court held that modest and reasonable fees imposed by local school boards on students who are financially able

68. *Id.* at 646, 386 S.E.2d at 207. Applying this standard, the *Madison* court held that the establishment of a municipal cable television system met the public purposes test. *Id.* at 653, 386 S.E.2d at 211. To support its holding, the court cited examples of acts found to constitute public purposes, including the funding of a railroad, airport, grain handling facility, public park, state fair, public auditorium, and education generally. *Id.* at 650-51, 386 S.E.2d at 209-10.

69. 55 N.C. App. 134, 285 S.E.2d 110 (1981), *disc. rev. denied*, 305 N.C. 300, 291 S.E.2d 150 (1982).

70. *Id.* at 144-45, 285 S.E.2d at 117. Prior to discussing the public purposes implications of the program, the court confirmed that the program indeed was supported by tax dollars. *Id.* While extended-day school appears to operate on merely nominal costs, such as electricity and fuel (teachers receive no additional pay and use of the building is free of charge), these expenses accumulate over time and are sustained by taxpayers. *Id.*; see *infra* text accompanying notes 104-07 for a comparison of *Kiddie Korner* to the supreme court's findings in *Whittle*.

71. *Kiddie Korner*, 55 N.C. App. at 145, 285 S.E.2d at 117.

72. *Id.*; *see also* Hughey v. Cloninger, 297 N.C. 86, 95, 253 S.E.2d 898, 904 (1979) ("[I]t is well established that both appropriations and expenditures of public funds for the education of the citizens of North Carolina are for a public purpose."); State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 588, 174 S.E.2d 551, 560 (1970) (holding the issuance of revenue bonds to provide scholastic loans for low-income students to be a public purpose).

73. 299 N.C. 609, 264 S.E.2d 106 (1980).

74. *Id.* at 612, 264 S.E.2d at 109-10. The fees ranged from $5.00 per year for elementary students to $14.00 per year for secondary students. *Id.* Much of the controversy surrounding incidental fees concerns waivers given to students suffering from economic hardships. *See id.* at 617-19, 264 S.E.2d at 113-14. The waivers are grounded in equal protection principles because "equal access to participation in [the state] public school system is a fundamental right." *Id.* at 618, 264 S.E.2d at 113; *see also* N.C. CONST. art. IX, § 2(1) ("The General Assembly shall provide . . . for a general and uniform system of free public schools . . . *wherein equal opportunities shall be provided for all students.*") (emphasis added).

to pay are not unconstitutional.[75] In so holding, the court rejected the argument that a 1970 amendment to the constitutional requirement of free public schools clearly proscribed the collection of any student fees.[76]

The *Whittle* court's most comprehensive analysis focused on the State Board's authority to promulgate the temporary rule limiting local school boards' ability to acquire supplementary instructional materials such as Channel One.[77] Consequently, the result in *Whittle* ultimately turned on the court's interpretation of section 115C-98(b) of the general statutes, prior to its amendment in 1990.

The principal goal of statutory construction in North Carolina is to ascertain and effectuate legislative intent.[78] The first step, therefore, is to examine the text of the statute[79] and construe the words according to their common, ordinary meanings.[80] The plain language of the 1987 statute interpreted in *Whittle* directed local school boards to adopt written policies regarding the procedures for acquiring supplementary instructional materials; however, it did not necessarily grant them exclusive authority over the process.[81] In contrast, the 1990 amendment to section 115C-98(b) positively states that local school boards have the "sole authority to select and procure supplementary instructional materi-

75. *Sneed*, 299 N.C. at 617, 264 S.E.2d at 112-13. Similarly, the court of appeals in *Kiddie Korner* approved an extended-day program where participants paid a fee; so long as basic education remained tuition-free, the court reasoned, the constitutional mandate was satisfied. *Kiddie Corner*, 55 N.C. App. at 139-40, 285 S.E.2d at 114.

76. *Sneed*, 299 N.C. at 612, 264 S.E.2d at 110. Prior to its amendment in 1970, article IX, section 2(1) read: "The General Assembly . . . shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge . . . ." N.C. CONST. of 1868, art. IX, § 2 (1875). Thus, plaintiffs contended that the 1970 elimination of the word "tuition" to qualify the word "free" represented a substantive change, conveying the legislature's intent that public schools function completely without cost to students. *Sneed*, 299 N.C. at 613, 264 S.E.2d at 110. The court responded by pointing to other parts of the constitution prior to 1970 which contained the phrase "free public schools" and by conducting an historical review that led to the conclusion that the provision never has been understood to preclude the imposition of incidental fees for supplementary educational materials. *Id.* at 613-14, 264 S.E.2d at 110-11; *see also* NORTH CAROLINA STATE CONSTITUTION STUDY COMM'N, 1968 REPORT TO THE NORTH CAROLINA STATE BAR AND THE NORTH CAROLINA BAR ASSOCIATION 34 (1968) (noting that the language of the constitution was modified to reflect contemporary administrative practices).

77. *See Whittle*, 328 N.C. at 463-68, 402 S.E.2d at 560-63.

78. Electric Supply Co. v. Swain Elec. Co., 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991); State *ex. rel.* Hunt v. North Carolina Reins. Facility, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981).

79. *Electric Supply*, 328 N.C. at 656, 403 S.E.2d at 294.

80. State v. Coker, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984); Lafayette Transp. Serv. v. County of Robeson, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973).

81. *See Whittle*, 328 N.C. at 472, 402 S.E.2d at 565 (Martin, J., dissenting). The statute is quoted *supra* at note 35.

als, whether or not the materials contain commercial advertising."[82]

In interpreting a statute with reference to an amendment, it can be assumed that "the legislature intended either to change the substance of the original act or to clarify the meaning of the statute."[83] The presumption, however, is that the legislature adopted the amendment in order to alter the law.[84] Thus, Justice Martin in dissent argued that if local school boards had exclusive control over the selection of supplementary instructional materials before the amendment to section 115C-98(b), "the amendment would indeed have been unnecessary and useless."[85] But the presumption that an amendment changes the original meaning of a statute is "merely an aid to interpretation—not an absolute rule."[86] Accordingly, courts commonly hold that subsequent amendments shed light on prior legislative intent.[87] The *Whittle* majority took this approach, maintaining that the amendment to section 115C-98(b) eliminated any uncertainties as to the appropriate reading of the 1987 version.[88]

On the surface, the conclusion that the 1990 amendment "made clear what the statutes already provided"[89] appears questionable. The argument for clarification is strongest when the legislature amends an ambiguous statute.[90] The words of the 1987 provision are not ambiguous—they order local boards to prepare written policies concerning the selection of instructional materials.[91] Furthermore, the 1990 amendment does not change just a few words; it adds entirely new provisions regard-

82. N.C. GEN. STAT. § 115C-98(b) (1991); *see supra* note 44 and accompanying text. The legislature also amended § 115C-47 of the general statutes by adding the identical provision to local boards' enumerated powers. N.C. GEN. STAT. § 115C-47(33) (1991); *see supra* text accompanying note 52.

83. State v. Blackstock, 314 N.C. 232, 240, 333 S.E.2d 245, 250 (1985) (citing Childers v. Parker's, Inc., 274 N.C. 256, 260, 162 S.E.2d 481, 483 (1968)).

84. State *ex. rel.* Util. Comm'n v. Public Serv. Co., 307 N.C. 474, 480, 299 S.E.2d 425, 429 (1983); *Childers*, 274 N.C. at 260, 162 S.E.2d at 483-84.

85. *Whittle*, 328 N.C. at 472, 402 S.E.2d at 565 (Martin, J., dissenting).

86. *Childers*, 274 N.C. at 260, 162 S.E.2d at 484.

87. *See, e.g.*, General Motors Corp. v. Kinlaw, 78 N.C. App. 521, 524, 338 S.E.2d 114, 118 (1985); *Childers*, 274 N.C. at 263, 162 S.E.2d at 485.

88. *Whittle*, 328 N.C. at 468, 402 S.E.2d at 563. The *Whittle* court also premised its public policy analysis on the assumption that the 1990 amendment to § 115C-98(b) clarified the existing meaning of the statute. Specifically, the court concluded that the General Assembly expressed its position on the public policy of the Channel One contracts when it passed the 1990 amendment to § 115C-98(b), which gave local school boards the power to contract for supplementary instructional materials containing commercial advertising, notwithstanding approval from the State Board, and therefore found no violation. *Id.* at 471, 402 S.E.2d at 564.

89. *Id.* at 468, 402 S.E.2d at 563.

90. *See Childers*, 274 N.C. at 260, 162 S.E.2d at 484.

91. *See supra* note 81 and accompanying text. The legislative history announcing the purpose of the statute, however, increases the ambiguity of the statute. *See infra* notes 95-96 and accompanying text.

ing control over the process and commercial advertising.[92] Finally, if the General Assembly actually intended to grant exclusive authority to local boards prior to the amendment, it could have done so unequivocally.[93] Thus, the addition of explicit language *after* the Channel One controversy arose does not necessarily remove doubt as to the meaning of the statute in 1987.

The *Whittle* decision, however, is not fatally flawed. Following an analysis of the statutory language, courts should consider the history of the legislation to uncover further legislative intent.[94] The General Assembly articulated the purposes of the statute in the preamble to the 1969 session law.[95] The statute was enacted because (1) "it is desirable that the selection of supplementary instructional materials be made by each school administrative unit"; (2) "technological breakthroughs" have enabled local school systems to acquire a wide variety and large volume of such materials; and (3) "local units should be encouraged to design and develop instructional programs that will meet the specific needs of each child in every school situation."[96] Thus, because the legislative history suggests that the General Assembly intended to confer such local control with respect to supplementary instructional materials, the *Whittle* court's holding is not without support.

Finally, courts also determine legislative intent by considering the policy objectives underlying the statute.[97] The most important policy concern of section 115C-98(b) relates to the concept of state versus local control. In general, local school boards possess more limited powers than does the State Board because they are deemed "agents" of the state with an obligation to implement State Board policies.[98] Nevertheless,

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92. *See* State *ex. rel.* Util. Comm'n v. Public Serv. Co., 307 N.C. 474, 480, 299 S.E.2d 425, 429 (1983) (noting that the presumption that the legislature intended to change the law is especially strong when the statutory language is "drastically altered").

93. *See id.* at 480, 299 S.E.2d at 429 (refusing to order payment refund distribution based on customer class because "if [it] had been the legislature's intention, it would have been a simple proposition for them to have explicitly provided for such a method").

94. *See* Electric Supply Co. v. Swain Elec. Co., 328 N.C. 651, 656, 403 S.E.2d 291, 295 (1991); Victory Cab Co. v. City of Charlotte, 234 N.C. 572, 576, 68 S.E.2d 433, 436 (1951).

95. *See Whittle*, 328 N.C. at 464-65, 402 S.E.2d at 561; *supra* notes 47-49 and accompanying text.

96. Act of May 19, 1969, ch. 519, § 115C-206.14(b), 1969 N.C. Sess. Laws 440, 444 (current version at N.C. GEN. STAT. § 115C-98(b) (1991)).

97. *Electric Supply*, 328 N.C. at 656, 403 S.E.2d at 294; *see also* Campbell v. First Baptist Church, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979) (stating that in examining statutory policy issues, courts may consider the consequences which would follow from a particular construction). *But see* Deese v. Southeastern Lawn and Tree Expert Co., 306 N.C. 275, 277, 293 S.E.2d 140, 143 (1982) (asserting that courts should avoid "judicial legislation").

98. *See* Kiddie Korner Day Sch. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 140, 285 S.E.2d 110, 114 (1981), *disc. rev. denied*, 305 N.C. 300, 291 S.E.2d 150 (1982);

when the General Assembly enacted section 115C-98(b), it made a policy judgment that local units make certain decisions more effectively than does a state-wide administrative body.[99] Although the *Whittle* court did not discuss the merits of local autonomy in public education, its decision that the statute gave local boards the exclusive authority to regulate the Channel One contracts is in accord with this policy preference for local control.[100]

The supreme court also decided *Whittle* on two state constitutional grounds.[101] First, the court held that article V, section 2(1) of the North

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supra text accompanying note 58; *see also* Christopher F. Edley, Jr., *Lawyers and Education Reform*, 28 HARV. J. ON LEGIS. 293, 299 (1991) (introduction to symposium: *Investing in Our Children's Future: School Finance Reform in the '90s*) ("The stated tradition is *local* control, but *state* law and actors are often dominant because local governmental units, including school districts, are creatures of state law."). Moreover, while the State Board has broad authority to supervise the public school system pursuant to the state constitution, local boards have only those specific rule-making powers which are statutorily created. *See supra* notes 50-59 and accompanying text.

99. *See supra* text accompanying note 96.

100. The State Superintendent of Public Instruction, Bob Etheridge, has acknowledged the value of local autonomy:

> Superintendent Etheridge stated that while *he has very strong feelings about granting more local control*, he personally opposed showing Channel One in public schools because it places the selection of instructional materials outside the schools and the contract requires that schools make students, as a captive audience, watch the program and its commercial messages 95 percent of the 180-day school year.

Minutes of the February 1, 1990 Meeting of the North Carolina State Board of Education, 1 (emphasis added).

Cases and commentators on various aspects of public education have recognized the importance of local autonomy. *See, e.g.*, desegregation decrees: Milliken v. Bradley, 418 U.S. 717, 741 (1974) ("[n]o single tradition in public education is more deeply rooted than local control over the operation of schools"); William L. Christopher, Note, *Ignoring the Soul of* Brown: Board of Education v. Dowell, 70 N.C. L. REV. 615, 634-35 (1992) (loss of local autonomy over public education reduces community involvement); First Amendment rights: Poling v. Murphy, 872 F.2d 757, 762-63 (6th Cir. 1989) (recognizing the value of local control over student speech), *cert. denied*, 493 U.S. 1021 (1990); Alan Goldberg, Comment, *Textbook Removal Decisions and the First Amendment—A Better Balance*, 62 TEMP. L. REV. 1317, 1338 (1989) (local school boards need broad discretionary powers in the First Amendment area); and funding: Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 653, 458 A.2d 758, 788 (1983) (funding schemes should be arranged to promote local control over public school systems); Edley, *supra* note 98, at 299-300 (discussing the horizontal and vertical dimensions of governance of education).

101. Interestingly, Whittle never raised a freedom of expression argument during the Channel One litigation. Nevertheless, an analysis based on the First Amendment or Article I, § 14 of the North Carolina Constitution may be appropriate. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. Similarly, the North Carolina Constitution states: "Freedom of speech and of the press are two of the great bulwarks of liberty and shall never be restrained, but every person shall be held responsible for their abuse." N.C. CONST. art. I, § 14.

Any claim that the State Board's attempted interference with the Channel One contracts

Carolina Constitution[102] does not apply to Channel One contracts and thereby avoided determining whether Channel One constitutes a public purpose with respect to taxation.[103] In so holding, the court rejected the State Board's claim that because tax revenues support Channel One, taxpayers subsidize private business.[104] Specifically, the State Board contended that the public purposes doctrine controlled because taxes finance the public school system as a whole.[105] In response, the majority opinion suggested that funds already committed to certain expenditures do not qualify as "taxpayer support."[106] The court further reasoned that any additional tax dollars expended as a result of the Channel One contracts were used only for the electricity required to operate the televisions and VCRs, a cost too trivial to consider.[107]

Although energy costs appear insignificant at first glance, they accumulate over time and will increase as more schools receive Channel One.

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deprived Whittle of the right to free expression would have been weakened by the fact that the program airs in public schools and contains commercial advertising. *See* David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 493-99 (1981) ("[c]onventional first amendment analysis is inappropriate in the public school situation"). The Supreme Court held in Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969), that a policy prohibiting students from wearing symbolic armbands violated the First Amendment, for "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. But in Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), the Court narrowed its ruling in *Tinker* by holding that, while school authorities generally cannot silence *personal* expression that occurs on school premises, they have more latitude to regulate the content of activities characterized as part of the school curriculum in order "to assure that participants learn whatever lessons the activity is designed to teach." *Id.* at 271. Clearly, the latter situation would govern the Channel One controversy, as Whittle repeatedly stressed that the program serves educational purposes. Furthermore, commercial speech, which encompasses Channel One, is protected by the First Amendment, but not to the same degree as other forms of expression. *See* Bates v. State Bar, 433 U.S. 350, 363 (1977); Williams v. Spencer, 622 F.2d 1200, 1206 (4th Cir. 1980) (holding that school officials could ban circulation of a drug paraphernalia advertisement); *see generally* Ralph D. Mawdsley & Steven Permuth, *Free Speech and Public Education: An Overview of Legal, Social, and Political Issues*, 16 ST. MARY'S L.J. 873 (1985) (providing a comprehensive study of freedom of expression in the public school context).

102. See *supra* note 37 for the text of the constitutional provision.

103. *Whittle*, 328 N.C. at 469, 402 S.E.2d at 563.

104. *Id.*

105. *Id.*; *see supra* note 38.

106. *Whittle*, 328 N.C. at 469, 402 S.E.2d at 563. In their brief, defendants cited Penn Compression Moulding v. Mar-Bal, Inc., 73 N.C. App. 291, 326 S.E.2d 280, *aff'd*, 314 N.C. 528, 334 S.E.2d 391 (1985), to support this proposition. *See* Defendant Appellees' Brief at 29, *Whittle* (No. 164PA90). By citing *Mar-Bal*, defendants drew an analogy between taxation and the principle of contract law that a preexisting duty is not sufficient consideration. *See Mar-Bal*, 73 N.C. App. at 294, 326 S.E.2d at 282. The use of this analogy, which is reasonable but not highly probative given that contract law is not at issue in *Whittle*, demonstrates the lack of case law directly on point.

107. *Whittle*, 328 N.C. at 469, 402 S.E.2d at 563.

The North Carolina Court of Appeals recognized this cumulative effect in *Kiddie Korner*[108] when it held that the public purposes constitutional mandate applied to an extended-day school, despite the fact that the program operated on nominal additional costs.[109] Furthermore, because Whittle furnishes television monitors, VCRs, and satellite dishes to subscribing schools, money which would otherwise be spent purchasing such equipment can be used for alternative purposes.[110] This arrangement could be construed as a form of "indirect" expenditure, possibly permitting an application of the public purposes doctrine to Channel One contracts.

If future courts determine that tax dollars support Channel One, they will have to address the question of whether the program qualifies as a public purpose. The basic test for determining public purposes within the meaning of article V, section 2(1) of the state constitution is whether the use benefits the general public, as opposed to particular individuals.[111] North Carolina courts have favored a broad interpretation of the public purposes doctrine. For instance, in *Madison Cablevision*,[112] the supreme court, upholding the financing of a city cable system with public funds despite claims that cable television benefits only select individuals,[113] clearly stated that the term "public purpose" should be construed liberally.[114] Additionally, in *Hughey v. Cloninger*[115] and *Kiddie Korner*,[116] the courts unequivocally held that education is a public purpose.[117]

Thus, if the constitutional requirement of public purposes is applied to Channel One contracts in the future, the resolution may turn on whether the program is properly considered an educational tool, despite the inclusion of commercial advertisements. Because the concept of public purposes evolves with current social conditions,[118] and because televi-

108. 55 N.C. App. 134, 285 S.E.2d 110 (1981), *disc. rev. denied*, 305 N.C. 300, 291 S.E.2d 150 (1982).

109. *Id.* at 144-45, 285 S.E.2d at 117. *See supra* note 70.

110. *See Let Schools Choose 'Channel One'*, N.Y. TIMES, June 16, 1989, at A26 (editorial praising Channel One).

111. See *supra* notes 61-63 and accompanying text for a discussion of the traditional public purposes test.

112. 325 N.C. 634, 386 S.E.2d 200 (1989).

113. *Id.* at 653, 386 S.E.2d at 211.

114. *Id.* at 646, 386 S.E.2d at 207; *see supra* note 68 and accompanying text.

115. 297 N.C. 86, 253 S.E.2d 898 (1979).

116. 55 N.C. App. 134, 285 S.E.2d 110 (1981), *disc. rev. denied*, 305 N.C. 300, 291 S.E.2d 150 (1982).

117. *Hughey*, 297 N.C. at 95, 253 S.E.2d at 904; *Kiddie Korner*, 55 N.C. App. at 145, 285 S.E.2d at 117; *see supra* notes 70-72 and accompanying text.

118. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 43, 175 S.E.2d 665, 672 (1970);

sion has become such an influential and diverse medium in modern society, Whittle could advance an argument to withstand constitutional scrutiny.[119]

The second constitutional issue raised by *Whittle* concerns the free public schools provision of article IX, section 2(1) of the North Carolina Constitution.[120] The State Board contended that by watching Channel One, students incur an opportunity cost which violates the constitutional requirement.[121] Rejecting this claim, the court stressed that no specific "fee" ensues from the Channel One contracts.[122] This is consistent with the few previous cases addressing the free public schools provision, each of which involved the charging of actual fees.[123] Furthermore, the *Whittle* court emphasized that there is no basis in the case law to conclude

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Mitchell v. North Carolina Indus. Dev. Fin. Auth., 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968). *See supra* note 66.

119. This line of reasoning ultimately concerns the merits of Channel One—a venture upon which the *Whittle* court did not embark. The main benefits of Channel One are twofold: first, the program enhances students' awareness of current events, which American students commonly lack; and second, subscribing schools receive, free of charge, approximately $50,000 worth of equipment which can be used for a variety of functions in addition to showing the program. *See Let Schools Choose 'Channel One'*, *supra* note 110, at A26. In this respect, Channel One clearly serves educational purposes. On the other hand, the primary drawback to Channel One is philosophical in nature—the program promotes commercialism in public schools (which some argue diminishes any educational value the program may have). *See* Hallifax, *supra* note 1, at 499-501 (describing the precept of ACT that children's advertising is inherently deceptive); *but see* Kleinfield, *supra* note 3, at 79 ("Advertising is making available a good program. . . . It is a trade-off.") (quoting Chris Whittle).

Justice Martin touched on the question of whether Channel One possesses educational utility in his dissent. Refuting the majority's conclusion that § 115C-98(b) of the general statutes governed the facts at hand, he emphasized that based on the record, Channel One is not "needed for instructional purposes." *Whittle*, 328 N.C. at 476, 402 S.E.2d at 468 (Martin, J., dissenting). Specifically, he referred to a study which surveyed North Carolina students and teachers concerning Channel One and concluded that the content of Channel One was rarely the subject of tests or classroom discussions and therefore had "no significant effect" on the current events information students retained. *Id.* (Martin, J. dissenting); *see* Tim Simmons, *TV News in Classroom Ineffective, Study Finds*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 21, 1991, at A1.

120. Article IX, § 2(1) is quoted *supra* at note 40.

121. *Whittle*, 328 N.C. at 470, 402 S.E.2d at 564.

122. *Id.*; *see supra* notes 40-42 and accompanying text.

123. *See supra* notes 73-76, discussing Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 264 S.E.2d 106 (1980), and Kiddie Korner Day Sch. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981), *disc. rev. denied*, 305 N.C. 300, 291 S.E.2d 150 (1982). Indeed, student fees are becoming increasingly common as public schools continue to experience financial difficulties. *See generally* Patricia M. Harris, Note, *Student Fees in Public Schools: Defining the Scope of Education*, 72 IOWA L. REV. 1401, 1402, 1421 (1987) (reviewing the constitutional and practical implications of student fees). In 1976-77, approximately 80% of the North Carolina school districts levied some type of student fees. Anne M. Dellinger, *The Unresolved Status of Public School Fees*, 9 SCH. L. BULL., April 1978, at 1, 4.

that "time equals money" for purposes of the state constitution.[124] Moreover, even if a future court should decide that Channel One contracts do involve a fee within the meaning of article IX, section 2(1), the agreements probably would meet the test established in *Sneed*—modest and reasonable fees for supplementary instructional materials are constitutionally permissible.[125] In other words, it would be logical for a court to conclude that two minutes (the amount of commercial advertising in each program) out of a seven hour school day constitutes a modest and reasonable time expenditure.

In conclusion, the judgment of the *Whittle* court represents a triumph for local autonomy in public education. The plain language of section 115C-98(b) of the general statutes, prior to the 1990 amendments, does not grant local school boards sole control over the selection and procurement of supplementary instructional materials.[126] Thus, based on the text of the 1987 statute alone, the court's determination that the statute gave local school boards exclusive authority over the process is subject to debate.[127] Nevertheless, the 1990 amendment to the statute provides a clear expression of the legislature's intent to confer such control, and subsequent amendments may be instrumental in ascertaining the meaning of the original version.[128] Most importantly, the legislative history of the statute strongly supports the court's conclusion; in the preamble to the antecedent session law, the General Assembly explicitly stated that the purpose of the statute was to enable local administrative units to make the decisions regarding the selection of supplementary instructional materials.[129] Finally, the statute's most significant policy objective—to increase local control in public education—is a factor contributing to the determination of legislative intent. Although the *Whittle* court did not evaluate the advantages and disadvantages of local control over the selection of materials such as Channel One, its decision follows from a recognition of the underlying policy concerns addressed by the General Assembly.[130] While centralized control arguably facili-

124. *Whittle*, 328 N.C. at 470, 402 S.E.2d at 564. The *Whittle* court also refused to apply the constitutional requirement to Channel One contracts because, under the agreements, students are not compelled to watch the program. *Id.* But financially-needy students are not required to pay incidental fees if they qualify for a waiver, and the free public schools provision still applies. *See supra* note 74. Additionally, it is questionable whether students actually feel free to decline to watch Channel One, or whether these contractual terms simply amount to boilerplate language.

125. *Sneed*, 299 N.C. at 617, 264 S.E.2d at 112-13.

126. *See supra* note 81 and accompanying text.

127. *See supra* notes 89-93 and accompanying text.

128. *See supra* notes 82, 87-88 and accompanying text.

129. *See supra* notes 95-96 and accompanying text.

130. *See supra* notes 97-100 and accompanying text.

tates efficiency and uniformity, local control encourages community involvement and allows administrators to tailor programs to the needs of individual schools and students.[131] Therefore, the *Whittle* court sensibly concluded that the legislature intended local units to have the ultimate power to decide whether receiving Channel One is in the best interests of their schools.

From a state constitutional perspective, the *Whittle* court's analysis also is sound. The public purposes requirement of article V, section 2(1) applies only when tax money is spent to finance a particular undertaking. Thus, in the court's view, because no additional tax dollars support Channel One, aside from minimal electricity costs, the public purposes doctrine was of no consequence.[132] This conclusion is reasonable, but it would have been more convincing had the *Whittle* court distinguished the position previously reached by the court of appeals in a similar case.[133] While arguments exist for future application of the public purposes test to Channel One, they remain tenuous without further evidence of tax revenues financing the program.

Similarly, the free public schools provision of article IX, section 2(1) of the state constitution is implicated only when schools charge students some type of actual fee to enjoy certain educational activities. No North Carolina precedent has established that spending time on a particular undertaking is the equivalent of paying for it within the meaning of the free public schools provision.[134] Therefore, the *Whittle* court reasonably dismissed this constitutional claim as well, and its decision, which follows the national trend toward local autonomy,[135] is substantially justified.

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131. *See supra* note 100.

132. *See supra* notes 103-07 and accompanying text.

133. *See supra* text accompanying note 108-09.

134. *See supra* note 122-24 and accompanying text.

135. *See, e.g.*, Defendant Appellees' Brief at 15, *Whittle* (No. 164PA90) ("At the time of trial, Whittle had entered into . . . agreements with approximately 2,700 schools in 33 states in the United States. These 33 states have all left the decision about whether [Channel One] is a useful instructional tool to local school professionals and local boards of education.").