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NO MORE TEACHERS' DIRTY LOOKS—NOW THEY SUE:
AN ANALYSIS OF PLAINTIFF STATUS
DETERMINATIONS IN DEFAMATION ACTIONS
BY PUBLIC EDUCATORS

RICHARD E. JOHNSON*

The constitutionalization of defamation law in 1964 created a revolution in first amendment jurisprudence. The United States Supreme Court established protection for statements concerning public officials unless the statements were made with actual malice, i.e., knowledge of falsity or reckless disregard of truth or falsity. Later, the Court extended much of that protection to statements about public figures who are not government employees. Though the Court eventually narrowed the scope of its public figure doctrine, it never receded from the protection accorded to statements about public officials. The author of this Article contends that this distinction has eluded many state judges and that the less-protective public figure doctrine may be swallowing the public official doctrine in state court interpretations of the first amendment. An analysis of state court cases with public educators as plaintiffs shows that many state courts are misapplying public figure law to status determinations that are properly within the public official sphere.

THE APPLICABILITY of the *New York Times Co. v. Sullivan*¹ actual malice standard to public school educators is almost certainly the most clouded area of public official defamation law. Much of the judicial disarray on this subject is of fairly recent origin and has escaped the attention of most commentators. Although Laurence Tribe has stated that the public official designation “now embraces virtually all persons affiliated with the government, such as most ordinary civil servants, including public school teachers and policemen,”² the status of public school teachers is alarmingly unsettled. The increasingly contradictory nature of status determinations for teachers may be symptomatic of a more general erosion of the foundations of

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1. 376 U.S. 254 (1964); see *infra* text accompanying notes 5-11.

2. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 866 (2d ed. 1988).

the first amendment as applied to public official defamation plaintiffs.

Media law scholars have been comparatively complacent about public official law, concentrating instead on the aleatory condition of public figure law.³ The scope of this Article is more modest, focusing instead on status determinations of one major occupational category of defamation plaintiffs: public school educators. This relatively narrow inquiry has broader implications for the future of other categories of plaintiffs commonly regarded as public officials.⁴ If the public official doctrine is being swallowed by the less protective public figure doctrine, except in cases involving the highest officials, the result could be a "sea change" in the constitutional law of defamation; this well may be the trend.

Although the first amendment holdings of state courts may lack the sweeping impact associated with those of federal appellate courts, state courts are the forums in which most of these determinations are made. Over time, state court holdings tend to be cumulative and mutually reinforcing. The developments discussed here constitute a powerful undercurrent that has been invisible to most observers.

The first section of this Article briefly summarizes the development of the public official doctrine in federal constitutional law. The second section examines the key state cases in which the doctrine has been applied to public educators. The third section seeks to dispel confusion by identifying the factors that have led some courts astray. The fourth section proposes an analytical framework for resolving the confusion. The Appendix is a tabular representation of the major cases in the field and the variables that might have influenced their outcomes.

I. BACKGROUND

The United States Supreme Court constitutionalized the law of defamation in the landmark case *New York Times Co. v. Sullivan*.⁵ A Montgomery, Alabama city commissioner sued the New York Times for its publication of an advertisement alleging misconduct by various

3. Judicial efforts to clarify the definition of public figures have been generally unsuccessful. Cases in this area are notable for their unpredictable outcomes. See, e.g., B. SANFORD, *LIBEL AND PRIVACY* 189-283 (1985); R. SMOLLA, *THE LAW OF DEFAMATION* 2-4 to 2-104; Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 DUKE L.J. 811; Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983); Comment, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931 (1983).

4. See *infra* note 208.

5. 376 U.S. 254 (1964).

officials seeking to prevent racial integration.⁶ The theoretical foundation of *New York Times* is that government participation, through the judicial system, in the punishment of persons making statements critical of public officials is a departure from the central meaning of the first amendment. The Court considered the right to criticize these officials indistinguishable from the right to criticize the government on behalf of which they act.⁷

The Court held that recovery for defamation by a public official must be premised upon a showing of "actual malice," which requires a showing that the offending statement was made with knowledge of its falsity or reckless disregard of whether it was false.⁸ Further, the proof of actual malice must be by clear and convincing evidence, not just by a preponderance of the evidence.⁹ To ensure compliance by lower courts, the Supreme Court took the extraordinary step of providing for de novo appellate review of factual findings of actual malice.¹⁰ However, the Court did not provide criteria for identifying those who fit the public official designation. The Court stated that it had "no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify the categories of persons who would or would not be included."¹¹

One question the Supreme Court did not address in *New York Times* was how far the scope of protected commentary on public officials extended. The Court addressed that question in *Garrison v. Louisiana*.¹² The Court held that the actual malice privilege attaches to "anything which might touch on an official's fitness for office."¹³ Seeking to refine the definition of actual malice, the Court also held that only those statements "made with [a] high degree of awareness of their probable falsity" are made with reckless disregard.¹⁴

In *Rosenblatt v. Baer*,¹⁵ the Court returned to the definition of "public official." High level appointees and all elected officials were

6. The political advertisement contained several errors of fact. Some were minor, such as that demonstrators sang the national anthem instead of "My Country 'Tis of Thee." Others were more serious, such as an erroneous allegation that police padlocked a school cafeteria in an effort to starve out student demonstrators. *Id.* at 258.

7. *Id. passim.*

8. *Id.* at 279-80.

9. *Id.* at 285-86.

10. *Id.* at 284-85.

11. *Id.* at 283 n.23.

12. 379 U.S. 64 (1964). A New Orleans district attorney was prosecuted under a criminal libel statute for his criticisms of various Louisiana judges. *Id.* at 66.

13. *Id.* at 77.

14. *Id.* at 74.

15. 383 U.S. 75 (1966). A newspaper columnist alleged misconduct on the part of a local official in charge of a public skiing facility. *Id.* at 78.

no longer in question, but for other officials, the Court held that a determination of public official status should focus on the public interest in the position rather than on the official's rank in the government hierarchy. Accordingly, the "actual malice" standard applies to "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."¹⁶ The Court offered further guidance: the actual malice standard is triggered when "a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees."¹⁷ Emphasizing that the standard is based on the position itself rather than on any specific issue arising around it, the Court added: "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."¹⁸ The 1966 *Rosenblatt* decision was the last time the Court offered any meaningful clarification of who could be classified as a public official.¹⁹

In the companion cases *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*,²⁰ the Court created the "public figure" doctrine, which extended the actual malice standard beyond government employees. In doing so, the Court recognized that people such as Wallace Butts and Edwin Walker, although not employed by the government, might have a major influence on the debate and resolution of important social issues. Butts, technically an employee of a private corporation, directed the athletic program at the University of Georgia. Walker, a retired general, was a leader in conservative causes, including resistance to school desegregation. The Court found that the public had an interest in unfettered debate over the behavior of both Butts and Walker—Butts because of the position he occupied,²¹ and

16. *Id.* at 85.

17. *Id.* at 86.

18. *Id.* at 87 n.13.

19. A dictum in *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979), states: "The Court has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees, however." It is difficult to see how this added anything to the definition.

20. The cases are reported together at 388 U.S. 130 (1967).

21. *Id.* at 155. Those who qualify as public figures by position alone have come to be known as "pervasive" or "all-purpose" public figures. The classification is limited to those who are well-known, in some field of endeavor, to the general public. For defamation purposes, they are treated the same as public officials. *See, e.g.*, *Carson v. Allied News*, 529 F.2d 206 (7th Cir. 1976) (Johnny Carson); *Buckley v. Littell*, 539 F.2d 882 (3d Cir. 1976) (William F. Buckley, Jr.); *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Repr. 206 (1983) (Carol Burnett); *Nader v. de Toledano*, 408 A.2d 31 (D.C. 1979) (Ralph Nader).

Walker because of his penchant for thrusting himself into the vortex of public controversies, such as taking a leadership role in the struggle to prevent integration of the University of Mississippi.²² These two ways of becoming a public figure remain the essential prototypes.

In an attempt to end division in the lower courts over the meaning of "reckless disregard," the Court granted certiorari in *St. Amant v. Thompson*²³ and established that "reckless disregard" did not exist where an honest mistake arose from mere failure to investigate a statement that turned out to be false or from ill-will toward the plaintiff. A determination of actual malice must focus on the defendant's attitude toward the statement rather than toward the plaintiff or situation. The Court held: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."²⁴

Three years later the Court further refined the scope of privileged commentary on public officials in *Monitor Patriot Co. v. Roy*²⁵ and *Ocala Star-Banner Co. v. Damron*,²⁶ both decided the same day. Noting the centrality of the first amendment to the electoral process, the Court held that candidates for office as well as actual occupants of those offices should be considered public officials.²⁷ The Court also held that an allegation of criminal misconduct against an official or candidate, no matter how remote in time, is protected by the actual malice privilege.²⁸

The Supreme Court reached the high-water mark in constitutional protection for good-faith defamation in *Rosenbloom v. Metromedia, Inc.*, extending the actual malice privilege to matters of "public or general interest" without regard to the status or identity of the plaintiff.²⁹ Speaking for a plurality, Justice Brennan asserted:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is

22. *Walker*, 388 U.S. at 155. This prototype came to be known as the "vortex" or "limited" public figure. Persons in this category are public figures only for purposes of commentary about a particular controversy with which they are associated.

23. 390 U.S. 727 (1968).

24. *Id.* at 731. A candidate for office attacked the integrity of a deputy sheriff. *Id.* at 728.

25. 401 U.S. 265 (1971). A newspaper accused candidate of being a "former small-time bootlegger." *Id.* at 265.

26. 401 U.S. 295 (1971). Local official was running for higher office when newspaper mistook him for his brother and reported he had been arrested. *Id.* at 296.

27. *Roy*, 401 U.S. at 271.

28. *Damron*, 401 U.S. at 300.

29. 403 U.S. 29, 52 (1971). A radio station accused a magazine distributor of circulating obscene literature. *Id.* at 33.

involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.³⁰

This broader application of first amendment protection proved to be short-lived.

At the height of official concern about the power of the press in the Watergate scandal, President Nixon's new appointees on the Court helped form a majority which overruled *Rosenbloom* in the watershed case *Gertz v. Robert Welch, Inc.* In *Gertz*, a magazine published by the John Birch Society falsely accused a prominent Chicago attorney, Elmer Gertz, of being a "Leninist," a "communist-fronter," and an organizer of a conspiracy to frame a police officer for murdering a teenager.³¹ The Court rejected the issue-oriented approach of *Rosenbloom* as too burdensome on private persons seeking to vindicate their reputations in defamation actions arising from controversial issues in which they had been involved. The Court held that such plaintiffs deserve a less stringent standard of fault because unlike public persons, they lack access to the media for counter-speech and have not assumed the risk of greater scrutiny by seeking the limelight.³²

In narrowing the actual malice standard to encompass only public officials and public figures, the *Gertz* Court defined public figures as those who "have assumed roles of especial prominence in the affairs of society."³³ This status can be attained by acquiring "pervasive fame or notoriety" or, alternatively, by entering into a particular public controversy with the intention of influencing its outcome.³⁴ Members of this first category have been denominated "pervasive" or "all-purpose" public figures. Commentary on such public figures qualifies for the actual malice test "for all purposes and in all contexts."³⁵ Members of the second category are generally characterized as "limited" or "vortex" public figures. They must prove actual malice only for statements related to the controversy in which they participated.³⁶ The Court acknowledged an "involuntary" public figure category, but described it as "exceedingly rare."³⁷

30. *Id.* at 43.

31. 418 U.S. 323, 325-26 (1974).

32. *Id.* at 344-45.

33. *Id.* at 345.

34. *Id.* at 351.

35. *Id.*

36. *Id.* at 352

37. *Id.* at 345.

While eliminating the public issue standard, the *Gertz* Court made some comparatively minor concessions to first amendment interests. The Court required proof of fault in all defamation actions—a development that eradicated the common law tradition of strict liability in defamation suits.³⁸ The Court also forbade presumed and punitive damages for all plaintiffs absent a showing of actual malice.³⁹

Public figure law continued its regression in *Time, Inc. v. Firestone*, a case emerging from a report of the spectacular and highly publicized divorce of the Firestone tire fortune heir and his socialite wife.⁴⁰ The case involved allegations of sexual adventures on both sides that, in the words of the trial judge, “would have made Dr. Freud’s hair curl.”⁴¹ Mrs. Firestone subscribed to a press clipping service and held several press conferences during the proceedings to communicate her side of the story.⁴² Concluding that Mrs. Firestone was “compelled to go to court” to seek dissolution of her marital bonds and that she assumed no “special prominence in the resolution of public questions,” the Court found her not to be a public figure.⁴³ Moreover, the Court observed that since Mrs. Firestone could not reasonably expect to influence the judge by her press conferences, she was not trying to influence the resolution of the controversy.⁴⁴

Further contraction of public figure law occurred in *Wolston v. Reader’s Digest Association, Inc.*⁴⁵ and *Hutchinson v. Proxmire*.⁴⁶ In *Wolston* the Court held that the plaintiff was not a public figure for purposes of his arrest years earlier, which resulted from an investigation of Soviet espionage, because his role in the ensuing controversy was involuntary. The Court expressed an unwillingness to allow a plaintiff to become a public figure merely for refusing to comply with a grand jury subpoena and consequently being cited for contempt.⁴⁷ The Court also noted the plaintiff’s lack of media access to rebut the charges against him.⁴⁸

The Court in *Hutchinson* found the plaintiff to be a private figure for purposes of a defamation action arising from comments made by

38. *Id.* at 347-49.

39. *Id.* at 349.

40. 424 U.S. 448, 450 (1976).

41. *Id.*

42. *Id.* at 485-87 (Marshall, J., dissenting).

43. *Id.* at 454-55.

44. *Id.* at 454 n.3.

45. 443 U.S. 157 (1979).

46. 443 U.S. 111 (1979).

47. *Wolston*, 443 U.S. at 166-67.

48. *Id.* at 170-71 (Blackmun, J., concurring).

Senator William Proxmire.⁴⁹ Announcing his "Golden Fleece" awards, Senator Proxmire charged that the plaintiff was wasting taxpayers' money by conducting frivolous research to determine the reasons monkeys clench their jaws. The Court held that a general concern about allegedly wasteful government spending was insufficient to privilege comments about a particular example, absent a pre-existing controversy over that expenditure.⁵⁰ The Court established the rule that a defendant who originated a controversy could not enjoy privileged commentary upon it.⁵¹

II. CONTRADICTORY DEVELOPMENTS

The rulings in *Firestone*, *Hutchinson*, and *Wolston* shattered previous conceptions of public figure law and left in their place new "standards" of such amorphous contour and indiscernible application that a veritable Tower of Babel has been created in the lower courts. This chaos in public figure law is now beginning to chip away at the edges of public official law, an area that was thought to be comparatively well-settled. Status determinations for public school teachers are proving to be the thin end of the chisel.

The United States Supreme Court has never ruled on the public official status of teachers as defamation plaintiffs⁵² and what little case law that has emanated from lower federal courts tends toward a somewhat perfunctory application of state court precedents.⁵³ State courts are deeply divided on the public official status of teachers. State supreme courts that have squarely faced the issue are split four-to-four on the question; those holding that teachers are public officials include Arkansas,⁵⁴ Mississippi,⁵⁵ Ohio,⁵⁶ and Oklahoma;⁵⁷ those hold-

49. Dem., Wis.

50. *Hutchinson*, 443 U.S. at 135.

51. *Id.*

52. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court adopted the *New York Times* standard to establish criteria for discharging a teacher who criticized his superintendent and school board in a non-defamation case. This importation of a defamation principle into the realm of employee rights could be construed as creating special status for teachers that is not enjoyed by government employees generally. It might, therefore, be read as conferring special status upon teachers in other contexts, perhaps in defamation actions. As yet no case law exists to support such an extension of *Pickering*.

53. See, e.g., *Stevens v. Tillman*, 568 F. Supp. 289 (N.D. Ill. 1983), *cert. denied*, 109 S. Ct. 1339 (1989) (cursory determination that a school principal is not a public official for purposes of a defamation claim pendent to a federal civil rights action).

54. *Gallman v. Carnes*, 254 Ark. 987, 497 S.W.2d 47 (1973).

55. *Reaves v. Foster*, 200 So. 2d 453 (Miss. 1967).

56. *Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

57. *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101 (Okla. 1978).

ing that teachers are not public officials are Florida,⁵⁸ Maine,⁵⁹ Virginia,⁶⁰ and Wisconsin.⁶¹

A. Teachers as Public Officials

The Ohio Supreme Court's decision in *Scott v. News-Herald*⁶² is probably the most significant of those holding in favor of public official status for teachers. Unfortunately, ascertaining the meaning of the case is no easy task. *Scott* was one of two major libel actions arising from a sportswriter's criticism of the conduct of a school superintendent and a wrestling coach in events surrounding a brawl at a high school wrestling match. The writer accused the coach of inciting the melee and stated that the coach and the superintendent had lied at subsequent investigative proceedings.⁶³

In the earlier of the two cases, *Milkovich v. News-Herald*,⁶⁴ the Ohio Supreme Court held that the critical article was not opinion and that the coach was neither a public official nor a public figure.⁶⁵ The United States Supreme Court denied certiorari.⁶⁶ In a dissent to the denial of certiorari, Justice Brennan, joined by Justice Marshall, advanced the position that public school teachers and coaches are public officials as a matter of law.⁶⁷

Following an extraordinarily bitter election in which the role of the press was controversial enough to provoke a libel suit by one of the defeated judges,⁶⁸ new judges assumed seats on the Ohio Supreme Court.⁶⁹ This reconstituted court heard the second case, that of superintendent *Scott*. The text of *Scott* reflects the acrimony of the preced-

58. *Nodar v. Galbreath*, 462 So. 2d 803 (Fla. 1984).

59. *True v. Ladner*, 513 A.2d 257 (Me. 1986).

60. *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 362 S.E.2d 32 (1987), cert. denied, 486 U.S. 1023 (1988).

61. *Ranous v. Hughes*, 30 Wis. 2d 452, 141 N.W.2d 251 (1966). The current state of the law is even less clear than the four-to-four split of state supreme courts indicates. For example, the plaintiff in *Gallman* was an associate dean as well as a law professor; that administrative status might have played an unacknowledged role in the Arkansas court's ruling. Also, *Reaves* and *Ranous* were decided before much significant case law or scholarship had developed on public official status and, further, the plaintiff in *Reaves* was a school principal.

62. 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

63. *Id.* at 277-78, 496 N.E.2d at 728-29.

64. 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984), cert. denied sub nom. *Lorain Journal Co. v. Milkovich*, 474 U.S. 953 (1985), overruled, *Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

65. *Id.* at 297, 473 N.E.2d at 1195-97.

66. 474 U.S. 953 (1985).

67. *Id.* at 958.

68. See *Courts Use Hustler to Kill Parody Claims*, 12 NEWS MEDIA & THE LAW 38, 39 (1988).

69. See *id.*

ing election. In a lengthy ruling with four separate opinions, some of them characterized by caustic, intemperate personal attacks on fellow justices, the court's new majority held the article was opinion and overruled *Milkovich*.⁷⁰

Although that conclusion could have disposed of the case, the court opted to decide the public official question. Noting the superintendent's position as the chief executive of the school system and the public interest in evaluating his job performance, the court cited with approval Justice Brennan's discussion of the public official status of teachers in general and the public figure status of the coach with regard to the controversy arising from the brawl.⁷¹ The court held: "Based upon these concerns we cannot, with reflection, be content to rest on the standards related in [*Milkovich*]. Accordingly, we overrule *Milkovich* in its restrictive view of public officials and hold a public school superintendent is a public official for purposes of defamation law."⁷²

Nothing in *Milkovich* suggests that a *superintendent* is not a public official. Rather, the court in *Milkovich* held that a *coach* lacked sufficient governmental authority to qualify as a public official.⁷³ The *Scott* court must, therefore, have meant to say that the "restrictive view" it overruled concerned the status of coaches and other instructional personnel of public schools.

This decision is significant because it swims against the tide of contemporary jurisprudence in other state supreme courts, specifically the courts in Florida,⁷⁴ Maine,⁷⁵ and Virginia⁷⁶ that have had the benefit of an assessment of twenty years of chaotic case law on the subject. Perhaps the greatest significance of the Ohio controversy is that it afforded Justice Brennan the opportunity to lament the misinterpretation of his opinion in *Rosenblatt*.⁷⁷

While Ohio has been the most fractious arena for this issue, Illinois has been the most multifarious. That state's supreme court has essen-

70. *Scott*, 25 Ohio St. 3d at 244, 496 N.E.2d at 701. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), the United States Supreme Court held that statements of opinion may not be the subject of libel suits.

71. *Id.* at 247-48, 496 N.E. 2d at 703-04.

72. *Id.* at 247-48, 496 N.E.2d at 704.

73. *Milkovich*, 15 Ohio St. 3d at 297, 473 N.E.2d at 1195-97.

74. *Nodar v. Galbreath*, 462 So. 2d 803 (Fla. 1984).

75. *True v. Ladner*, 513 A.2d 257 (Me. 1986).

76. *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 362 S.E.2d 32 (1987), *cert. denied*, 486 U.S. 1023 (1988).

77. See *Scott*, 25 Ohio St. 3d at 247, 496 N.E.2d at 703-04; see also *infra* notes 248-51 and accompanying text (discussing Justice Brennan's opinion).

tially ducked the issue⁷⁸ while the lower appellate courts have rendered important and contradictory decisions that must be taken into account for the extent to which they have influenced other state courts, including state supreme courts.⁷⁹

In *Basarich v. Rodeghero*⁸⁰ an Illinois appellate court established some of the theoretical groundwork for finding teachers to be public officials. Noting that certain teachers and coaches who claimed to have been defamed in an anti-union newsletter were public employees paid with public funds, the court discussed the responsible positions held by educators and the state constitution's recognition of education as a prime governmental responsibility. The school system, its academic and athletic programs, and those who run them are "consistent subjects of intense public interest and substantial publicity."⁸¹ The court concluded: "Public school teachers and coaches, and the conduct of such teachers and coaches and their policies, are of as much concern to the community as are other 'public officials' and 'public figures.'"⁸² The reference to public figures, in context, appears to be no more than an offhand bit of surplusage in light of the language about prime governmental responsibility, public funds, and the unique public interest in discussion of education. This reference nevertheless became a focal point of analysis for courts inclined to reach a different result, both in Illinois⁸³ and elsewhere.⁸⁴

Only a few months later, in *Johnson v. Board of Junior College District No. 508*, a court of equal rank in a different Illinois jurisdiction purported to follow *Basarich*, even while declaring that public school teachers are not public officials as a matter of law.⁸⁵ That court somehow read *Basarich* as a public figure case, though that case rested on status rather than conduct, and held that its plaintiffs were "not distinguishable" from junior college professors involved in a racial controversy.⁸⁶ It is unclear why the *Johnson* court, after imposing an actual malice standard based on narrow vortex public figure grounds,⁸⁷ saw fit to reach the public official question when its conclusion entailed such an implausible interpretation of *Basarich*.

78. See *Colson v. Stieg*, 89 Ill. 2d 205, 433 N.E.2d 246 (1982).

79. See *infra* notes 85, 92, 98-105 and accompanying text.

80. 24 Ill. App. 3d 889, 321 N.E.2d 739 (1974).

81. *Id.* at 892, 321 N.E.2d at 742.

82. *Id.*

83. See *supra* note 78 and accompanying text.

84. See *infra* notes 125-30 and accompanying text.

85. 31 Ill. App. 3d 270, 334 N.E.2d 442 (1975).

86. *Id.* at 276, 334 N.E.2d at 447.

87. *Id.*

The *Johnson* court's public figure holding proved to be an intermediate step in the regression from public official to private figure status for public school teachers. The regression was completed in *McCutcheon v. Moran*.⁸⁸ In *McCutcheon* the court declared a teaching principal to be a private figure for purposes of her defamation action against a school janitor who accused her of kicking him in the buttocks. Adopting a California court's⁸⁹ perception of *New York Times* as standing for the "freedom of the governed to question the governor,"⁹⁰ the *McCutcheon* court found that "the relationship a public school teacher or principal has with the conduct of government is far too remote, in our minds, to justify exposing these individuals to a qualifiedly privileged assault upon his or her reputation."⁹¹ The court identified *Basarich* as a "public figure" case and briefly summarized it,⁹² but made no effort to harmonize or distinguish it. The court distinguished *Johnson*, a public figure case, on the basis of the absence of a public controversy in the case at hand.⁹³

Some evidence that *McCutcheon* is now the preferred authority in Illinois appears in the federal case *Stevens v. Tillman*,⁹⁴ wherein the judge, relying wholly on *McCutcheon*, held a school principal to be a private figure.⁹⁵ The Illinois Supreme Court, perhaps finding discretion the better part of valor, sidestepped an opportunity to resolve the conflict in *Colson v. Stieg*.⁹⁶ In a Solomonic ruling, the justices declined to reach the broader status question and, for the limited purpose of tenure decisions within a school, added an actual malice standard to the state's common law special interest privilege, provided publication does not extend beyond those with an interest and concern in the matter.⁹⁷ The Illinois situation warrants notice not only because *Basarich* and *McCutcheon* have been persuasive in other jurisdictions, but also because Illinois law is a microcosm of the confusion and error that characterize American defamation law regarding public school teachers.

Perhaps the most straightforward and unambiguous finding of teachers as public officials by a state supreme court emerged from

88. 99 Ill. App. 3d 421, 425 N.E.2d 1130 (1981).

89. *Franklin v. Lodge* 1108, *Benevolent & Protective Order of Elks*, 97 Cal. App. 3d 915, 159 Cal. Rptr. 131 (1979).

90. *Id.* at 924, 159 Cal. Rptr. at 136.

91. *McCutcheon*, 99 Ill. App. 3d at 424, 425 N.E.2d at 1133.

92. *Id.* at 423, 425 N.E.2d at 1132.

93. *Id.*

94. 568 F. Supp. 289 (N.D. Ill. 1983), *cert. denied*, 109 S. Ct. 1339 (1989).

95. *Id.* at 294.

96. 89 Ill. 2d 205, 433 N.E.2d 246 (1982).

97. *Id.* at 213, 433 N.E.2d at 249.

*Johnston v. Corinthian Television Corp.*⁹⁸ Relying largely on the *Basarich* court's reading of *Rosenblatt*, the Oklahoma Supreme Court found education an "obvious governmental function" under the state constitution, and added: "[W]e can think of no higher community involvement touching more families and carrying more public interest than the public school system. This includes the athletic program."⁹⁹

The Oklahoma court essentially repeated the reasoning of *Basarich*, focusing on the state constitution and the discussion of the importance of public school teachers in a free society. But in doing so the court studiously omitted the superfluous reference to "public figures."¹⁰⁰ By this means the court perhaps sought to spare its ruling from the fate of *Basarich* by closing the main avenue through which other judges might seek to escape *Johnston*'s stricture while citing it approvingly. If such a strategy entered into the court's drafting, its apparent success was perhaps manifested in *Luper v. Black Dispatch Publishing Co.*¹⁰¹ In *Luper* an Oklahoma appellate court, with harsh criticism of the state of defamation law as applied to public officials wrongly accused of crime,¹⁰² conformed to the *Johnston* public official ruling, though a public figure holding also appears in its opinion.¹⁰³

Just a month before *Johnston*, an Arizona appellate court arrived at the same conclusion in what stands as that state's leading case on the status of teachers as defamation plaintiffs—*Sewell v. Brookbank*.¹⁰⁴ Considering the complaint of a high school chemistry teacher accused of incompetence by a group of parents, the court rendered a sweeping declaration: "As far as the law of defamation is concerned, teachers are 'public officials.'"¹⁰⁵ Other than a citation to *Basarich*, the court offered no further discussion of the question.

B. Teachers as Private Figures

The first shot in the counterrevolution was fired in *Poe v. San Antonio Express-News Corp.*, a Texas ruling bestowing private figure status on a high school teacher accused of sexually fondling a four-

98. 583 P.2d 1101 (Okla. 1978). *Johnston* involved another wrestling coach who was accused of forcing a sixth grader to crawl naked through the legs of his teammates while they beat him.

99. *Id.* at 1103

100. *Id.*

101. 675 P.2d 1028 (Okla. Ct. App. 1983).

102. *Id.* at 1032 n.2

103. *Id.* at 1031.

104. 119 Ariz. 422, 581 P.2d 267 (Ct. App. 1978).

105. *Id.* at 425, 581 P.2d at 270.

teen-year-old girl in a classroom after school.¹⁰⁶ In *Poe* the court made some highly aberrational interpretations of federal constitutional defamation law. The court read *Gertz v. Robert Welch, Inc.* as modifying previous holdings of the United States Supreme Court on characteristics of public officials as well as public figures.¹⁰⁷ The court perceived *Hutchinson v. Proxmire*¹⁰⁸ and *Wolston v. Reader's Digest Association, Inc.*¹⁰⁹ as exemplifying recent trends to modify "the rigid rules as to what constitutes a 'public official' or 'public figure' in defamation suits against the news media."¹¹⁰ In fact, neither of these public figure rulings purported to affect public official determinations and *Hutchinson* did not involve a news medium as a party.¹¹¹ The *Poe* court did not even mention *Rosenblatt*, the controlling authority for public official determinations.¹¹² Most startling of all, the court opined that even an elected official can be a private figure for defamation purposes.¹¹³ These conclusions have provoked some scornful commentary,¹¹⁴ and other courts reaching like results have taken care to cite *Poe* for its holding alone without reference to its reasoning.¹¹⁵

In fairness to the *Poe* court, it should be said that the notion of an elected official being a private figure was imposed upon it by the Texas Supreme Court in *Foster v. Laredo Newspapers, Inc.*¹¹⁶ After the lower court in *Foster*, the same court which later decided *Poe*, held an elected county surveyor to be a public official,¹¹⁷ the Texas Supreme Court reversed.¹¹⁸ The *Foster* ruling is contrary to the United States Supreme Court decisions in *New York Times Co. v. Sullivan*,¹¹⁹ *Garrison v. Louisiana*,¹²⁰ *Rosenblatt v. Baer*,¹²¹ *Monitor Patriot Co. v.*

106. 590 S.W.2d 537, 538 (Tex. Ct. App. 1979).

107. *Id.* at 539.

108. 443 U.S. 111 (1979). For a discussion of this case, see *supra* text accompanying notes 49-51.

109. 443 U.S. 157 (1979). For a discussion of this case, see *supra* text accompanying notes 47-48.

110. *Poe*, 590 S.W.2d at 541 n.3.

111. See *supra* notes 49-51.

112. See *infra* text accompanying notes 240-43 (discussing the *Rosenblatt* criteria).

113. *Poe*, 590 S.W.2d at 541.

114. See, e.g., B. SANFORD, *supra* note 3, at 218-19.

115. See, e.g., *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 362 S.E.2d 32 (1987), *cert. denied*, 486 U.S. 1023 (1988); *True v. Ladner*, 513 A.2d 257 (Me. 1986).

116. 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977).

117. *Foster v. Laredo Newspapers, Inc.* 530 S.W.2d 611 (Tex. Civ. App. 1975).

118. *Foster*, 541 S.W.2d at 809.

119. 376 U.S. 254 (1964).

120. 379 U.S. 64 (1964).

121. 383 U.S. 75 (1966).

Roy,¹²² and *Ocala Star-Banner Co. v. Damron*,¹²³ and appears to be the only post-*New York Times* ruling holding an elected official to be a private person. Nevertheless, following the denial of certiorari by the United States Supreme Court,¹²⁴ the lower Texas courts have little choice but to follow *Foster*.¹²⁵

A scant few weeks after *Poe*, and without reference to it, a California appellate court handed down the case that forms the basis of the doctrine that teachers are not public officials: *Franklin v. Lodge 1108, Benevolent & Protective Order of Elks*.¹²⁶ Noting its disagreement¹²⁷ with the Oklahoma court in *Johnston* and the Illinois court in *Basarich*, the California court concluded: "The governance or control which a public classroom teacher might be said to exercise over the conduct of government is at most remote and philosophical. Far too much so, in our view, to justify exposing each classroom teacher to a qualifiedly privileged assault on his or her reputation."¹²⁸ The court preceded that conclusion with this remarkable passage:

Respondents urge that a public high school teacher necessarily occupies a position which, independent of particular issues, "would invite public scrutiny and discussion." This may well be so. But it does not necessarily follow that a public high school teacher is therefore a public official Implicit in the reasoning of *New York Times* and of *Rosenblatt* is the concept of a freedom of the governed to question the governor, of those who are influenced by the operation of government to criticize those who control the conduct of government.¹²⁹

122. 401 U.S. 265 (1971).

123. 401 U.S. 295 (1971).

124. 429 U.S. 1123 (1977).

125. The Texas Supreme Court acknowledged that *Foster* would be a public official for purposes of commentary related to his elected post as county surveyor. *Foster*, 541 S.W.2d at 814-15. The court placed great emphasis on the fact that the elected office had few duties and no salary. *Foster* also frequently contracted with the county government as a consulting engineer. In that latter capacity, a controversy arose over drainage problems on land he was alleged to have platted. The court found this controversy irrelevant to *Foster's* performance in his official position, though it would not seem to require a great leap of imagination to see how an alleged blunder in platting land might touch on one's fitness as a county surveyor, as three dissenting judges pointed out. *Id.* at 820-21 (Pope, J., dissenting).

Because the case was remanded for trial, the United States Supreme Court denied certiorari for lack of a final judgment within the meaning of 28 U.S.C. § 1257 (1982). The Texas court had previously established public figure status for a professor who led anti-war demonstrations, but that is perhaps too obvious and unrelated a determination to be relevant to *Poe*. See *El Paso Times v. Trexler*, 447 S.W.2d 403 (Tex. 1969).

126. 97 Cal. App. 3d 915, 159 Cal. Rptr. 131 (1979).

127. *Id.* at 924, 159 Cal. Rptr. at 137.

128. *Id.* at 924, 159 Cal. Rptr. at 136.

129. *Id.* (emphasis in original).

A sort of judicial shell game is operating here in which an "implicit" standard of "control of the conduct of government" is torn from its qualifying context and smuggled in to override the explicit *Rosenblatt* criterion of independent public interest in the position without regard to actual authority or control.¹³⁰ The Illinois Court in *McCutcheon v. Moran*¹³¹ cited and incorporated this gambit, which has also been an appreciable force, directly and indirectly, in other cases.¹³² In *Franklin*, for example, the court articulated a theory that teachers are entitled to some sort of special role as defamation plaintiffs to preserve academic freedom: "We are unwilling to hold that a school teacher must be deemed to have assumed the risk of nonmalicious defamation. We perceive in such a rule a real and intolerable danger to the freedom of intellect and of expression which the teacher must have to teach effectively."¹³³ In other words, teachers should be exempt from proving actual malice not because they do not occupy a unique position among government employees, but because they *do!* *Rosenblatt* is turned on its head.

In *Foote v. Sarafyan*¹³⁴ a Louisiana appeals court perhaps exceeded that misreading of a United States Supreme Court case in its finding that a department chairman and two professors at a state university were private figures. Consider this holding:

Hutchinson v. Proxmire held that a state university adjunct professor who was also director of research at a state hospital and who had received \$500,000 in federal research grants was not, not even in respect to his federally-supported research, a public official within *New York Times v. Sullivan* We therefore conclude that our plaintiffs are not limited by the actual malice test of *Sullivan*¹³⁵

Now compare the actual language of *Hutchinson*: "The District Court also concluded that Hutchinson was a public official. . . . The Court of Appeals did not decide whether that conclusion was correct. We therefore express no opinion on the issue."¹³⁶

130. See *Rosenblatt v. Baer*, 383 U.S. 75, 85-87 (1966); *infra* text accompanying notes 240-43.

131. 99 Ill. App. 3d 421, 424, 425 N.E.2d 1130, 1133 (1981); see *supra* text accompanying notes 88-93.

132. It was especially influential in *True v. Ladner*, 513 A.2d 257, 264 (Me. 1986). See *infra* text accompanying notes 153-59.

133. *Franklin*, 97 Cal. App. 3d at 924, 159 Cal. Rptr. at 136.

134. 432 So. 2d 877 (La. App. Ct. 1982).

135. *Id.* at 880 (citations omitted).

136. *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979) (citations omitted).

This is merely a more stark presentation of the same error that appeared in *Poe*.¹³⁷ One might expect this sort of mistake to be exceedingly rare in appellate opinions, but a closer examination of the cases in this area discloses that accurate reading and application of the controlling law is the exception rather than the rule.

As recently as 1985 and 1986 when Bruce Sanford¹³⁸ and Rodney Smolla¹³⁹ published the two major modern treatises of defamation law, something approaching a scholarly consensus¹⁴⁰ existed for the proposition that teachers were public officials as a matter of law. Writing in 1985, Sanford could state accurately that "the overwhelming weight of authority thus holds public educators to the *Sullivan* standard."¹⁴¹ Today that conclusion is no longer true. Four major subsequent cases have been decided, by a 3-1 margin, in favor of teachers being private persons. The lone exception is the Ohio case, *Scott v. News-Herald*.¹⁴² A mutually reinforcing modern trilogy of *Nodar v. Galbreath*,¹⁴³ *True v. Ladner*,¹⁴⁴ and *Richmond Newspapers, Inc. v. Lipscomb*,¹⁴⁵ from the supreme courts of Florida, Maine, and Virginia, respectively, have, at the very least, evened the score.

In *Nodar*, the Florida Supreme Court established private figure status for a teacher who was criticized by a parent at a school board meeting for alleged incompetence.¹⁴⁶ The court was unimpressed with contrary conclusions from other jurisdictions: "Petitioner has not cited any binding authority for the proposition that the plaintiff here was a public official. It is enough to say that we decline to so characterize a public high school English teacher."¹⁴⁷

The court's reasoning may not be as inaccessible as that holding suggests. An unmistakable aroma of public figure analysis permeated this public official inquiry, as when the court, acknowledging the difference but glossing over it, cited to *Gertz* after arguing that becoming a teacher does not entail as much assumption of risk as accepting an elected or policymaking position.¹⁴⁸ This assumption of risk analysis is

137. See *supra* notes 106-15 and accompanying text.

138. See B. SANFORD, *supra* note 3, at 216.

139. See R. SMOLLA, *supra* note 3, at 2-92.

140. See also L. TRIBE, *supra* note 2, at 866 (the public official designation "now embraces virtually all persons affiliated with the government, such as most ordinary civil servants, including public school teachers and policemen").

141. B. SANFORD, *supra* note 3, at 216 (citations omitted).

142. 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986); see *supra* text accompanying notes 62-70.

143. 462 So. 2d 803 (Fla. 1984).

144. 513 A.2d 257 (Me. 1986).

145. 234 Va. 277, 362 S.E.2d 32 (1987), *cert. denied*, 486 U.S. 1023 (1988).

146. *Nodar*, 462 So. 2d at 808.

147. *Id.* (footnote omitted).

148. *Id.*

misplaced in a public official inquiry, in which the importance of the position, actual or perceived, is the determinant—without regard to the volition, attitude, or conduct of the occupant of the post. The court justified its analytic conflation of two distinct categories by stating that “both serve the same purpose of preserving a free press.”¹⁴⁹ The justices closed this specious circle with the triumphant observation that Elmer Gertz was found to be a private figure despite his involvement in a well-publicized case.¹⁵⁰

Having decided a public official question on public figure grounds without reference to the importance of the public interest in the job, the Florida Supreme Court shifted back into public official law to distinguish, on the ground of differences in underlying reasoning, its finding that a police officer was a public official in *Smith v. Russell*.¹⁵¹ According to the court in *Smith*, a police officer is a “highly visible representative of government authority who has power over citizens and broad discretion in the exercise of that power.”¹⁵²

The Florida Supreme Court’s status differentiation between teachers and police officers was cited and adopted by the Supreme Judicial Court of Maine in *True v. Ladner*,¹⁵³ which is the *piece de resistance* of the doctrine that teachers are private figures. It stands head and shoulders above the rest in the depth and scope of its analysis and the extent to which its flawed rationale is revealed.

True leans heavily on the doctrine of *Franklin v. Lodge 1108, Benevolent & Protective Order of Elks*:¹⁵⁴ “The governance or control which a public classroom teacher might be said to exercise over the conduct of government is at most remote and philosophical.”¹⁵⁵ However, the Maine court added a new wrinkle to the *Franklin* line of reasoning. Having previously found police officers to be public officials in *Roche v. Egan*,¹⁵⁶ the court distinguished them from teachers on the following grounds: law enforcement is a “uniquely governmental affair,” while education is both public and private; police officers have round-the-clock authority over an entire jurisdiction while teachers have authority only at school during working hours; police

149. *Id.*

150. *Id.*

151. 456 So. 2d 462 (Fla. 1984).

152. *Id.* at 464.

153. 513 A.2d 257 (Me. 1986).

154. 97 Cal. App. 3d 915, 159 Cal. Rptr. 131 (1979); see *supra* text accompanying notes 126-30.

155. *True*, 513 A.2d at 263-64 (quoting *Franklin*, 97 Cal. App. 3d at 924, 159 Cal. Rptr. at 136). For a critique of this proposition with regard to the importance of teachers in relation to other government employees, see *infra* notes 247-60 and accompanying text.

156. 433 A.2d 757 (Me. 1981).

officers have broader authority and firearms to enforce it; and police officers have authority over both adults and children.¹⁵⁷

Though all these are accurate descriptions of the different roles of teachers and police officers, they have limited utility as definitional criteria. One might say with equal irrelevance that teachers generally get summers off and police officers do not. Many public officials perform duties that are not uniquely governmental in the sense that similar jobs exist in the private sector. Governmental utilities, hospitals, museums, libraries, liquor stores, and recreational facilities all have their private counterparts. An important governmental employee is no less important for performing a job which is performed by private employees as well. Many public officials are on duty only certain parts of the day and exert authority only at the office. Few of them are armed. Many have authority over only a limited number of individuals. Nothing in the pertinent body of law indicates that control over children is inherently less important than control over adults, and furthermore, many teachers are involved in various kinds of adult education.

Undoubtedly, the *presence* of the factors the court adduced contributed to the designation of police officers as public officials because they give the public "an independent interest in the qualifications and performance of the person who holds" the position, beyond the general interest in governmental employees as a class.¹⁵⁸ However, the *absence* of these factors is in no way dispositive because different positions command special interest for different reasons. To reach the conclusion it did, the Maine Supreme Court's proper burden was to show that no independent public interest existed in the work of teachers beyond the interest in the work of ordinary, run-of-the-mill government employees, and that teachers lacked substantial responsibility for or control over governmental affairs, or even the *appearance* of such responsibility or control.¹⁵⁹ The Maine court completely avoided this inquiry.

The Maine Supreme Court took note of contrary rulings by the Arizona court in *Sewell v. Brookbank*¹⁶⁰ and the Oklahoma court in *Johnston v. Corinthian Television Corp.*¹⁶¹ The court called these cases into question for their reliance on the Illinois court's decision in *Basarich v. Rodeghero*.¹⁶² The Maine court asserted that the *Basarich*

157. *True*, 513 A.2d at 264.

158. *Rosenblatt v. Baer*, 383 U.S. 75, 85-86 (1966).

159. *See id.*

160. 119 Ariz. 422, 581 P.2d 267 (Ct. App. 1978).

161. 583 P.2d 1101 (Okla. 1978).

162. 24 Ill. App. 3d 889, 321 N.E.2d 739 (1974).

court "held that public high school teachers were 'public officials' or 'public figures,' and thus collapsed and confused the criteria for determining plaintiff's status."¹⁶³ This criticism relies on simple misquotation, and the offending word is the one the Maine court saw fit to emphasize with italics. The pertinent language in *Basarich* is: "Public school teachers and coaches . . . are of as much concern to the community as are other 'public officials' and 'public figures.'"¹⁶⁴ The Maine court's misreading is a variant of the misreadings in *Johnson* and *McCutcheon*.¹⁶⁵ The quoted language can hardly be read as conflating the public official and public figure categories, especially in light of the immediately preceding analysis which rested its conclusion *exclusively* on government employment in responsible positions and the role of education as a prime governmental responsibility in the Illinois constitution.¹⁶⁶

Ironically, the Maine court itself has collapsed and confused the public official and public figure categories. Its holding is based in significant part on public figure principles of assumption of risk and access to counter-speech derived from *Gertz*.¹⁶⁷ Woven into this logic is an argument borrowed from *Franklin* that the academic freedom of teachers is chilled by the fear of having to prove actual malice if they are defamed.¹⁶⁸

The last of the modern trilogy of cases finding teachers to be private figures is the decision of the Virginia Supreme Court in *Richmond Newspapers, Inc. v. Lipscomb*.¹⁶⁹ This case is perhaps most remarkable for the fact that it was decided after the Ohio cases *Milkovich v. News-Herald*¹⁷⁰ and *Scott v. News-Herald*¹⁷¹ were reported, but still made no reference to them other than a bare mention in a string citation.¹⁷² Justice Brennan's dissent from denial of certiorari in *Milkovich*¹⁷³ is by far the most forceful and articulate expression of the public official status of teachers. The dissent was a major factor in

163. *True*, 513 A.2d at 265-66 n.8 (emphasis in original).

164. *Basarich*, 24 Ill. App. 3d at 892, 321 N.E.2d at 742 (emphasis supplied).

165. *See supra* text accompanying notes 85-93.

166. *True*, 513 A.2d at 265-66 n.8.

167. *See infra* text accompanying notes 190-204.

168. *True*, 513 A.2d at 264; *see infra* text accompanying notes 190-217 and 261-67 (criticizing the *Gertz* and *Franklin* approaches).

169. 234 Va. 277, 362 S.E.2d 32 (Va. 1987), *cert. denied*, 486 U.S. 1023 (1988).

170. 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984), *cert. denied sub. nom.* Lorain Journal Co. v. Milkovich, 474 U.S. 953 (1985), *rev'd*, *Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E. 2d 699 (1986).

171. 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

172. *See Lipscomb*, 234 Va. at 288 n.3, 362 S.E.2d at 36-37 n.3.

173. 474 U.S. 953 (Brennan, J., dissenting).

the *Scott* court's decision to overturn *Milkovich*.¹⁷⁴ One would be hard pressed to maintain a contrary position without rebuttal of its principal points.¹⁷⁵

The Virginia court, however, chose instead to plow the well-worn furrows of public figure law in deciding a public official case. A high school teacher and English Department head was held to be a private person based on the now familiar *Gertz* principles of risk assumption and access to means of effective counter-speech.¹⁷⁶ In *Lipscomb*, however, the court trespassed even more deeply into public figure law by giving weight to the fact that the plaintiff made no attempt to control school policy.¹⁷⁷ This, of course, disregards the rule that public official determinations are to be based on position alone, not on individual conduct.¹⁷⁸

Recognizing a state statute mandating confidentiality of student records, the court concluded that the teacher probably lacked access to counter-speech, that is, the teacher could not have fully answered the charges against her without violating that statute.¹⁷⁹ Needless to say, such a consideration constitutes another departure from the "position alone" determinant of public official status. Any consideration of the individual circumstances of a plaintiff is, *ipso facto*, an excursion into public figure law—an improper inquiry in public official cases. Judges, police officers, child-abuse workers, and military officers, to name but a few, are forbidden by law from disclosing certain information that could enhance their reputations at times when they might be under attack. They are no less public officials for that circumstance.

III. SORTING IT OUT

Part of the confusion in public official defamation law stems from the fact that judges vary in their willingness to establish new precedent. Ruling for a libel defendant on common law grounds allows a judge to avoid making a constitutional decision.¹⁸⁰ Moreover, public

174. *Scott*, 25 Ohio St. 3d at 247, 496 N.E.2d at 703.

175. For a discussion of Justice Brennan's argument, see *infra* text accompanying notes 248-54.

176. *Lipscomb*, 234 Va. at 288, 362 S.E.2d at 37.

177. *Id.* at 286, 362 S.E.2d at 37.

178. See *Rosenblatt v. Baer*, 383 U.S. 75, 86-87 n.13 (1966).

179. *Lipscomb*, 234 Va. at 285, 362 S.E.2d at 36.

180. The common law privilege for comment on teachers is a substantial body of law in its own right and is beyond the scope of this inquiry. See generally Annotation, *Libel and Slander: Actionability of Statements Imputing Inefficiency or Lack of Qualification to Public School Teacher*, 40 A.L.R. 3d 490 (1968 & 1989 Supps.).

figure determinations, though constitutional, are often fact-specific inquiries that will not bind future cases. By contrast, a public official determination sets precedent for all future cases within a given occupation. This distinction sheds light on the reluctance of some judges to reach the public official question when an alternative disposition is available. Nevertheless, many other judges have made public official determinations which were not necessary to decide the cases before them.

An examination of thirty-eight defamation cases in which educators were plaintiffs yields a seemingly bewildering cacophony of results with regard to status determinations. Teachers have been classified as public officials, public figures, and private persons by various courts, with no apparent consistency of result emerging from similar fact patterns. Separating the college faculty from the elementary and secondary school teachers continues to show inconsistent results within each group.¹⁸¹ The outcomes are somewhat more uniform in the cases dealing with administrators.¹⁸² Isolating coaches from classroom teachers makes a difference, but some of those cases are clouded by public figure questions involving persons of nationwide fame.¹⁸³

The one variable that makes the most difference is the date of the court's decision. Leaving aside the 1966 decision in *Ranous v. Hughes*,¹⁸⁴ in which the defendants apparently did not raise the public official question, a distinct pattern can be discerned. From 1967 to 1978, the courts found educator plaintiffs to be public officials or public figures in every reported appellate case in which the issue was decided. However, beginning in 1979 and continuing through 1987, a dramatic change occurred—private figure denominations became the rule rather than the exception for all educational personnel except high-level administrators.¹⁸⁵

It is no accident that this shift in results coincides with the United States Supreme Court's pronounced contraction of public figure law in *Hutchinson v. Proxmire*¹⁸⁶ and *Wolston v. Reader's Digest Association*.¹⁸⁷ A content analysis of the teacher cases tends to confirm that sus-

181. See Appendix *infra* page 798.

182. *Id.*

183. *Id.*

184. 30 Wis. 2d 452, 141 N.W.2d 251 (1966). The defendant school board chairman was aware of *New York Times* and *Rosenblatt*. Inexplicably, he attempted to enlist these cases in support of an argument that his comments were privileged because *he* was a public official. While that argument may have force in some jurisdictions, these are not the cases which support it.

185. See Appendix *infra* page 798.

186. 443 U.S. 111 (1979).

187. 443 U.S. 157 (1979).

picion. Beginning with *Poe v. San Antonio Express-News Corp.*¹⁸⁸ and *Franklin v. Lodge 1108, Benevolent & Protective Order of Elks*¹⁸⁹ in 1979, and continuing through *Lipscomb* in 1987, constricted concepts from public figure law lay over public official determinations like a ghostly template. Even though the Supreme Court itself never retreated from a more expansive view of public officials, the spirit of its pro-plaintiff thrust in public figure law filtered down to the lower courts and crossed over into public official questions.

Although the Supreme Court's contraction of public figure designations began in 1974 in *Gertz v. Robert Welch, Inc.*,¹⁹⁰ and gathered steam in 1976 in *Time, Inc. v. Firestone*,¹⁹¹ it did not intrude into public official law in other courts until reaching full throttle in *Hutchinson and Wolston* in 1979.

Exegesis of the cases explains this lag. Virtually every case denominating a teacher a private person has employed the assumption of risk and access to media principles originally articulated in *Gertz*. Prior to 1979, however, these principles were understood to serve a very different purpose. They emerged in *Gertz* as a rationale for discarding the *Rosenbloom* test of issues of "public or general interest" as a trigger of the actual malice standard.¹⁹² Receding from a landmark decision like *Rosenbloom* called for an explanation. The explanation offered by the Supreme Court in *Gertz* focused on the plaintiff rather than on the issue because of the differential in ability among plaintiffs to withstand the ravages of defamation. The *Gertz* majority advanced the belief that most public persons are more likely to have access to means of rebuttal and are more likely to have voluntarily accepted the possibility of defamatory criticism through their efforts to engage public attention. These characteristics were offered as the reason for *having* a distinction between public and private persons, not as the definitional criteria for *making* the distinction.¹⁹³

Nothing in *Gertz* contradicts this assessment and much supports it. At the end of its discussion of risk assumption and access to counter-speech, the Court made clear that these are reasons for having criteria rather than the criteria themselves: "For these *reasons* we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private

188. 590 S.W.2d 537 (Tex. Ct. App. 1979).

189. 97 Cal. App. 3d 915, 159 Cal. Rptr. 131 (1979).

190. 418 U.S. 323 (1974).

191. 424 U.S. 448 (1976).

192. *Gertz*, 418 U.S. at 344-46.

193. *Id.*

individual.”¹⁹⁴ Other passages in the text indicated that the two-fold rationale separating public from private plaintiffs was not to be read as creating definitional elements. The Court introduced the discussion by stating: “Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.”¹⁹⁵

Superior access to media by public persons cannot define the category, for, as the Court recognized, it exists only “usually.”¹⁹⁶ In a key sentence the Court reasoned: “Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.”¹⁹⁷ This statement presupposes an independent and pre-existing conception of public persons that takes no account of access to media or actual assumption of risk—the conception outlined in *Rosenblatt*,¹⁹⁸ in *Butts/Walker*,¹⁹⁹ and elsewhere in *Gertz* itself.²⁰⁰ Finally, the *Gertz* majority allowed for the possibility of involuntary public figures,²⁰¹ a possibility that would be foreclosed if media access and risk assumption were to be defining elements. Clearly, the Court intended to allow for public figures and, *a fortiori*, public officials who have assumed no risk and lack media access.

At that stage in the development of the law, the conception of “public figure” was more expansive. Public figures were those who “have assumed roles of especial prominence in the affairs of society.”²⁰² They were said to attain this status either by gaining “pervasive fame or notoriety” or by attempting to influence the resolution of issues in a particular controversy; either way, such persons assume “special prominence in the resolution of public questions.”²⁰³ *Gertz* chose to associate himself with a case sure to be in the spotlight and he almost certainly could have had media access if he had wanted it. These facts, however, were insufficient to make him a public figure.²⁰⁴

194. *Id.* at 345 (emphasis supplied).

195. *Id.* at 344.

196. *Id.*

197. *Id.* at 345.

198. *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

199. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 388 U.S. 130 (1967) (decided with *Butts* in joint opinion).

200. *Gertz*, 418 U.S. at 351.

201. *Id.* at 345. Involuntary public figures were described as being “exceedingly rare.” *Id.*

202. *Id.*

203. *Id.* at 351.

204. *Id.* at 352.

Media access and risk assumption also played no role in the Court's classifying the plaintiff in *Firestone* as a private person. Indeed, if they had, a different outcome would have been virtually inevitable. Mary Alice Firestone's purely voluntary press conferences attracted prodigious media attention. She created opportunities to communicate her side of the divorce and used them quite effectively.²⁰⁵

Not until *Hutchinson* and *Wolston* did the reasons for forging a dichotomy between public and private figures blend into the standards for drawing the distinction. Justice Blackmun, joined by Justice Marshall, posed the matter starkly:

First, a lapse of years between a controversial event and a libelous utterance may diminish the defamed party's access to the means of counterargument. At the height of the publicity surrounding the espionage controversy here, petitioner may well have had sufficient access to the media to effectively rebut a charge that he was a Soviet spy. It would strain credulity to suggest that petitioner could have commanded such media interest when respondents published their book in 1974. Second, the passage of time may diminish the "risk of public scrutiny" that a putative public figure may fairly be said to have assumed.²⁰⁶

Similarly in *Hutchinson*, Chief Justice Burger, writing for the majority, seemed to classify media access among the identifying characteristics of public figures:

Finally, we cannot agree that Hutchinson had such access to the media that he should be classified as a public figure. Hutchinson's access was limited to responding to the announcement of the Golden Fleece Award. He did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure.²⁰⁷

The degree to which *Hutchinson* and *Wolston* collapsed the reason for defining "public figure" into the definition itself is in no small part responsible for the swirling maelstrom of confusion on this point that persists to this day in the lower courts.²⁰⁸

205. *Time, Inc. v. Firestone*, 424 U.S. 448, 485-87 (1976) (Marshall, J., dissenting).

206. *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 170-71 (1979) (Blackmun, J., concurring).

207. *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979).

208. The misapplication of public figure law principles may also be disordering public official determinations for other occupational categories. *Compare Sellars v. Stauffer Communications, Inc.*, 9 Kan. App. 2d 573, 684 P.2d 450 (1984), *aff'd*, 236 Kan. 697, 695 P.2d 812 (1985)

This phenomenon percolated down into the lower courts' consideration of public official issues in an uneven and inconsistent fashion. The status of police officers, for example, was not affected for the simple reason that law enforcement officers had brought so many suits in so many jurisdictions that they had been firmly established as public officials before *Hutchinson* and *Wolston* were decided.²⁰⁹ By contrast, only a few teacher cases had produced appellate opinions by 1978.²¹⁰ These early decisions primarily designated educators as public officials, but some

(where a file clerk in a sheriff's office who married the sheriff was not considered a public official) *with Auvil v. Times Journal Co.*, 10 Media L. Rep. (BNA) 2302 (E.D. Va. 1984) (where a receptionist at an army pediatric clinic was declared a public official).

The families and associates of political candidates partake of the candidate's public official status in inconsistent and unpredictable ways. *See Lawrence v. Moss*, 639 F.2d 634 (10th Cir.), *cert. denied*, 451 U.S. 1031 (1981) (administrative aide in United States Senate campaign and former aide to Vice President Agnew declared a private figure); *News-Journal Co. v. Gallagher*, 233 A.2d 166 (Del. 1967) (chairman of local Republican committee treated as public official); *Hemenway v. Blanchard*, 163 Ga. App. 668, 294 S.E.2d 603 (1982) (spouse of congressional candidate declared a public person); *Lewis v. Vallis*, 356 Mass. 662, 255 N.E.2d 337 (1970) (mayoral candidate's campaign manager held a private figure); *Gilberg v. Goffi*, 21 A.D.2d 517, 251 N.Y.S.2d 823 (1964), *aff'd*, 15 N.Y.2d 1023, 207 N.E.2d 620, 260 N.Y.S.2d 29 (1965) (mayoral candidate's law partner held a public person).

While grand jurors have been declared public officials, *see Standke v. B.E. Darby & Sons*, 291 Minn. 468, 193 N.W.2d 139 (1971), *cert. dismissed*, 406 U.S. 902 (1972), petit jurors have been considered private figures, *see Macon Telegraph Publishing Co. v. Elliott*, 165 Ga. App. 719, 302 S.E.2d 692, *cert. granted and vacated*, 251 Ga. 544, 309 S.E.2d 142 (1983), *cert. denied*, 466 U.S. 971 (1984).

For a discussion of apparently inconsistent public official determinations in various other occupational categories, see generally: *Arctic Co. v. Loudoun Times Mirror*, 624 F.2d 518 (4th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981) (government contractor conducting environmental and archaeological research); *Kassel v. Gannett Co.*, 15 Media L. Rptr. (BNA) 1702 (D.N.H. 1988) (Veterans Administration clinical psychologist); *Adey v. United Action for Animals, Inc.*, 361 F. Supp. 457 (S.D.N.Y. 1973), *aff'd mem.*, 493 F.2d 1397 (2d Cir.), *cert. denied*, 419 U.S. 842 (1974) (government contractor who experimented with monkeys); *Peoples v. Tautfest*, 274 Cal. App. 2d 630, 79 Cal. Rptr. 478 (1969) (city recreation director); *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315 (Colo. 1981) (ski program director for county recreation); *Fopay v. Noveroske*, 31 Ill. App. 3d 182, 334 N.E.2d 79 (1975) (X-ray technician in county hospital); *Turley v. WTAX, Inc.*, 94 Ill. App. 2d 377, 236 N.E.2d 778 (1968) (government contracted architect/engineer); *Blessum v. Howard County Board of Supervisors*, 295 N.W.2d 836 (Iowa 1980) (county-employed engineer); *Vigoda v. Barton*, 348 Mass. 478, 204 N.E.2d 441 (1965) (psychiatric social worker); *Stephens v. Dixon*, 30 Md. App. 56, 351 A.2d 187 (1976) (federal government engineer); *Nuyen v. Slater*, 372 Mich. 654, 127 N.W.2d 369 (1964) (public health nurse); *Hodgins v. Times Herald Co.*, 169 Mich. App. 245, 425 N.W.2d 522 (1988) (county contracted kennel operator who provided dogs for research); *Mauch, Stastny, & Rassan, P.A. v. Bicknell*, 95 N.M. 702, 625 P.2d 1219 (Ct. App. 1980) (government contracted architect); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977) (government contracted engineer).

209. *See generally* Annotation, *Libel and Slander: Who is a Public Official or Otherwise Within the Federal Constitutional Rule Requiring Public Officials to Show Actual Malice*, 19 A.L.R. 3d 1361 (1968 & 1989 Supps.). One of the better analyses of the police cases may be found in *Roche v. Egan*, 433 A.2d 757 (Me. 1981).

210. *See Appendix infra* page 798.

courts opted for a public figure theory and at least one rested on the subsequently revoked *Rosenbloom* standards.²¹¹ Most courts that gave reasons for classifying teachers as private persons after 1978 found standards from *Gertz*, *Hutchinson*, and *Wolston* applicable to the public official inquiry.²¹² This misapplication of public figure theory accelerated as successive courts incorporated the errors of their predecessors.

To be sure, *Gertz* decided some public official questions: that there is no such thing as a "de facto public official," that a lawyer is not a public official merely by virtue of being an officer of the court, and that unpaid past service on city advisory committees does not rise to the level of public official status.²¹³ None of these rulings, however, has any bearing on public school teachers.

The *Gertz* Court twice used the words "public officials and public figures" in its discussion of risk assumption and media access.²¹⁴ This language is commonly seized upon by state courts wishing to declare teachers private figures on grounds of lacking media access and not having assumed the risk. The Virginia Supreme Court even went so far as to omit the words "public figures" from the quotation with a three-dot ellipsis, making the entire passage appear to be a public official discussion.²¹⁵ This sort of interpretation is misdirected. The dicta about risk assumption and media access did not, at the time of *Gertz*, even enter into the definition of "public figure," let alone the definition of "public official." Application of these concepts to public officialdom would necessarily mean that the *Gertz* Court intended to modify not only *Rosenbloom*, but *New York Times* and *Rosenblatt* as well. This would be a major development indeed; the Texas court in *Poe* actually carried matters to this startling conclusion,²¹⁶ though other courts stopped short of it. One might reasonably expect that if the *Gertz* Court had intended a retooling of the rationale for treating public officials differently, it would have found room for a reference to the inconsistency of seditious libel with the first amendment. That, after all, was and is the foundation of public official defamation law.²¹⁷

Some of the practical inconsistencies are remarkable to behold. The Maine Supreme Court, for example, relied heavily on risk assumption

211. *Id.*

212. *See supra* notes 106-79 and accompanying text.

213. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

214. *Id.* at 344-45.

215. *See Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 284, 362 S.E.2d 32, 35 (1987), *cert. denied*, 486 U.S. 1023 (1988).

216. *Poe v. San Antonio Express-News Corp.*, 590 S.W.2d 537, 539 (Tex. Ct. App. 1979); *see supra* notes 106-15 and accompanying text.

217. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

and media access in excluding teachers from the public official category in *True*.²¹⁸ Yet when it undertook the same inquiry with opposite results for police officers in *Roche*,²¹⁹ it offered not even a nod in the direction of these factors. The same inconsistent approach is found in the Florida cases *Nodar v. Galbreath*,²²⁰ involving a teacher, and *Smith v. Russell*,²²¹ involving a police officer, and is also found in a line of cases encompassing virtually every state that has refused to call a teacher a public official.²²² These factors are either elements of public official status or they are not. They cannot be dispositive for one group of public employees and irrelevant to another.

If different standards are being brought to bear on what is essentially the same inquiry, and if public figure criteria are being improperly transplanted into public official turf in a major subcategory of cases, the situation warrants a common sense review to delineate some of the important differences between public officials and limited public figures. The following is a non-exhaustive list of these differences:

- An individual might be a public figure only for purposes of commentary circulated within a limited geographical area.²²³ A public official is no less so regardless of the area over which the offending statements are spread. The public official concept originated when a Montgomery, Alabama city commissioner sued not his local paper, but the New York Times.²²⁴

- In the case of a vortex public figure, the actual malice standard applies only to the controversy for purposes of which the plaintiff is a public figure.²²⁵ Also, the controversy may not consist of matters that are not

218. *True v Ladner*, 513 A.2d 257, 264 (Me. 1986); see *supra* notes 153-57 and accompanying text.

219. *Roche v. Egan*, 433 A.2d 757 (Me. 1981).

220. 462 So. 2d 803 (Fla. 1984).

221. 456 So. 2d 462 (Fla. 1984).

222. Some representative police cases from the states in question are: *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Gomes v. Fried*, 136 Cal. App. 3d 924, 186 Cal. Rptr. 605 (1982); *Coursey v. Greater Niles Township Publishing Corp.*, 40 Ill. 2d 257, 239 N.E.2d 837 (1968); *Orr v. Lynch*, 60 A.D.2d 949, 401 N.Y.S.2d 897, *aff'd*, 45 N.Y.2d 903, 383 N.E.2d 562, 411 N.Y.S.2d 10 (1978); *Torres v. Playboy Enterprises, Inc.*, 7 Media L. Rptr. (BNA) 1182 (S.D. Tex. 1980); *Pronger v. O'Dell*, 127 Wis. 2d 292, 379 N.W.2d 330 (Ct. App. 1985).

Of the states that have declared teachers private figures only Virginia lacks a contradictory ruling for police; the issue has not been decided in that state. The court in *Roche* observed, "Our research has disclosed that every court that has faced the issue has decided that an officer of law enforcement, from ordinary patrolman to Chief of Police, is a 'public official' within the meaning of federal constitutional law." *Roche*, 433 A.2d at 762 (citations omitted).

223. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974). The Court referred to "general fame or notoriety in the community." *Id.* Prior to *Gertz*, the Supreme Court recognized a local public figure in *Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970).

224. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

225. See *Gertz*, 418 U.S. at 352.

generally considered legitimate subjects of interest, however newsworthy the media may find them.²²⁶ Public officials, on the other hand, are subject to the *New York Times* standard for "anything which might touch on an official's fitness for office."²²⁷

- Vortex public figures must be involved in a controversy that exists prior to the alleged defamation or the privilege will not attach. The defendant cannot "bootstrap" a controversy by starting it.²²⁸ Criticism of public officials requires no pre-existing controversy to qualify for the privilege.²²⁹

- Vortex public figures must be making an effort to influence the *resolution* of some issue for attacks on them to be privileged, and not, for example, just commenting on a judicial proceeding that their comments cannot affect.²³⁰ Public officials are fair game for honestly mistaken remarks even if not involved in the matter that spurs the offending commentary.²³¹

- Whether the defendant is a news medium might be relevant to a public figure question. The distinction between media defendants and others was apparently rejected by a majority in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,²³² but the possibility of revisiting the question was raised later by Justice O'Connor in *Philadelphia Newspapers, Inc. v. Hepps*.²³³ In public official law, however, the distinction has never mattered. In *New York Times Co. v. Sullivan*²³⁴ itself, four ministers were co-defendants with the newspaper.²³⁵ *Garrison v. Louisiana*²³⁶ and *St. Amant v. Thompson*²³⁷ also involved non-media defendants.

- After *Hutchinson* and *Wolston*, access to effective counter-speech and assumption of risk enter into vortex public figure determinations. For public officials, and even for those in their orbit, assumption of risk has not been a determining factor. For example, the law partner of a candidate for mayor was treated as a public official for purposes

226. See *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976).

227. See *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

228. See *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979).

229. See *Garrison*, 379 U.S. at 64; see also *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971).

230. See *Firestone*, 424 U.S. at 454 n.3; see also *Wolston v. Readers Digest Ass'n, Inc.*, 443 U.S. 157 (1979); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980).

231. See *Damron*, 401 U.S. at 295.

232. 472 U.S. 749 (1985) (White, J., concurring) (Brennan, Marshall, Blackmun & Stevens, J.J., dissenting).

233. 475 U.S. 767 (1986).

234. 376 U.S. 254, 257 (1964).

235. *Id.*

236. 379 U.S. 64 (1964).

237. 390 U.S. 727 (1968).

of allegations of conflict of interest by the law firm.²³⁸ As for access to counter-speech, one of Commissioner Sullivan's grievances against the New York Times was that he could not have a retraction printed.²³⁹

IV. ANALYSIS

With these distinctions in mind, one can more fully consider which factors should enter into an appropriate determination of the status of public school teachers. The only binding definitional authority for public officials is found in *Rosenblatt*: "It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."²⁴⁰ More specifically, "[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . the *New York Times* malice standards apply."²⁴¹ Underscoring the point that the position itself rather than any specific controversy is the key, the Court added: "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."²⁴²

These passages, in a nutshell, are the only definitional authority for the term "public official." They have been the subject of so much stubborn misreading that one should pause a moment to appreciate the sheer expansiveness of this definition. First, it applies *at the very least* to those with substantial responsibility for or control over governmental affairs. Clearly, it might apply to an even wider circle.²⁴³ Second, *control* over the conduct of governmental affairs is not necessary—substantial *responsibility* will suffice. Third, even *actual* responsibility is not necessary—the mere *appearance* to the public of responsibility is enough. Finally, no action by the employee in question is required—the position itself can invite scrutiny and discussion of the plaintiff.

238. See *Gilberg v. Goffi*, 21 A.D.2d 517, 251 N.Y.S.2d 823, *aff'd.*, 15 N.Y.2d 1023, 207 N.E.2d 620 (1965).

239. See *New York Times*, 376 U.S. at 261-62.

240. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

241. *Id.* at 86.

242. *Id.* at 86-87 n.13.

243. See *supra* note 208 (providing examples where public official definition has been applied to an even wider circle).

Applying these standards to school teachers would seem to be a fairly straightforward matter. Is the education of students a "governmental affair?" One is hard pressed to deny it. The courts in *Basarich*²⁴⁴ and *Johnston*²⁴⁵ cited provisions of their respective state constitutions identifying education as a prime governmental responsibility. Many state constitutions have similar provisions.²⁴⁶ If some states do not, is a significant portion of the state or local budget devoted to education in the jurisdiction where the inquiry arises? Do teachers have "substantial responsibility" for educating students? If not, does the public think they do? One can hardly imagine a negative response to any of these questions.

Do teachers occupy a position of such "apparent importance that the public has an independent interest in the qualifications and performance of the person who holds [that position], beyond the general public interest in the qualifications and performance of all government employees?"²⁴⁷ In other words, does the public have an independent interest in teachers that it does not confer upon mail carriers, file clerks, computer programers, accountants, meter readers, and traffic-light engineers who are employed by government? The answer seems perfectly obvious. Most people rank their children and grandchildren very high in their hierarchy of values. Students are under the control of teachers for a major and formative period of their lives. School attendance up to a certain age is required by law and private schools are a realistic option for only a minority of families. Moreover, many teachers have the authority to inflict corporal punishment upon students against the will of the parents and to decide if a student is considered an academic success or failure. Most parents take an acute interest in the "qualifications and performance" of any stranger who has that kind of power over their children for six or seven hours per day. This interest is likely to exist even for people who are mostly indifferent to or ignorant of the "qualifications and performance" of senators, governors, and the secretary of agriculture—all of whom are unquestionably public officials.

The author of *Rosenblatt*, Justice Brennan, later offered some guidance on how to apply the standard to teachers.²⁴⁸ For him, "the status of a public school teacher as a 'public official' . . . follows *a fortiori* from the reasoning of the Court in *Rosenblatt*."²⁴⁹ He cited approv-

244. *Basarich v. Rodeghero*, 24 Ill.App. 3d 889, 892, 321 N.E.2d 739, 742 (1974).

245. *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101, 1103 (Okla. 1978).

246. *See, e.g.*, FLA. CONST. art. IX.

247. *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

248. *See Lorain Journal Co. v. Milkovich*, 474 U.S. 953 (1985) (Brennan, J., dissenting).

249. *Id.* at 958.

ingly the Oklahoma court's finding in *Johnston* that a teacher is a public official, calling it a "perfectly obvious conclusion."²⁵⁰

Suggesting a constitutional conception of teachers, Justice Brennan drew upon the law of alienage to reinforce his point. In that body of law, the Supreme Court has drawn bright lines identifying certain occupations such as teachers, police officers, and probation officers, along with elected officials, as being exempt from strict scrutiny under the equal protection clause of the fourteenth amendment for purposes of employment discrimination based on citizenship. Positions which meet this "political function" exemption are those which "go to the heart of representative government."²⁵¹ In *Ambach v. Norwick* the Court found that teachers serve in such a position and therefore qualify for the "rational relation" test instead of the "strict scrutiny" test.²⁵² The standards for the political function exemption in alienage law overlap the *Rosenblatt* standards for public officials to a remarkable degree. In one of the alienage cases, *Bernal v. Fainter*,²⁵³ the Court noted that teachers "possess a high degree of responsibility and discretion in the fulfillment of a basic governmental obligation."²⁵⁴

The principal alienage case related to teachers, *Ambach*, reads as though it could have been written with the *Rosenblatt* public official standards in mind:

Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way course

250. *Id.* at 959 n.3. Justice Brennan further illuminated the meaning of his majority opinion in *Rosenblatt*: "We recognized there, however, that First Amendment protection cannot turn on formalistic tests of how 'high' up the ladder a particular government employee stands. Rather, we determined, the focus must be on the nature of the public employee's function and the public's particular concern with his work." *Id.* at 957.

The best expression of a contrary view is found in Elder, *Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria—A Proposal for Revivification: Two Decades After New York Times Co. v. Sullivan*, 33 BUFFALO L. REV. 579 (1984). Professor Elder's argument for exempting employees such as lower level teachers and police officers from the actual malice standard is sophisticated, massively researched, and yet strained and utterly unpersuasive.

The kind of "formalistic tests" Justice Brennan abjures are advocated in Comment, *Teachers As Plaintiffs in Defamation: Determination of Their Status As Public Officials or Public Figures*, 24 SANTA CLARA L. REV. 433 (1984).

251. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973).

252. 441 U.S. 68 (1979).

253. 467 U.S. 216 (1984).

254. *Id.* at 220.

material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.²⁵⁵

These observations are very much in accord with the way the Court has traditionally conceived the centrality of education to government. In *Wisconsin v. Yoder*,²⁵⁶ the Court stated: "Providing public schools ranks at the very apex of the function of a State."²⁵⁷ The landmark case *Brown v. Board of Education*²⁵⁸ provided occasion for the Court to remark that "education is perhaps the most important function of state and local governments."²⁵⁹ The analysis advanced in *Brown* in the context of racial discrimination is equally relevant to the issue at hand:

Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.²⁶⁰

Perhaps the courts that have declined to accept teachers as public officials do not mean to imply that teachers are unimportant. Certainly, no court has said as much. One senses in these opinions a sympathy for the plight of teachers. Between the lines is the message that

255. *Ambach*, 441 U.S. at 78-79 (footnotes omitted).

256. 406 U.S. 205 (1972).

257. *Id.* at 213.

258. 347 U.S. 483 (1954).

259. *Id.* at 493.

260. *Id.*

teachers are not well-paid and not accorded their proper respect. They are frequently blamed for matters beyond their control. They are saddled with a wide range of peripheral responsibilities and then pilloried for not devoting more time to the classroom. They are pressured to include a variety of non-traditional material in the curriculum even while being reviled for departing from the "basics." Additionally, their redress for reputational damage is limited by the actual malice privilege in those jurisdictions that correctly apply the public official rules.

The situation in *Franklin*,²⁶¹ which essentially turned the tide by finding the plaintiff to be a private figure, was especially poignant. The plaintiff was subjected to a McCarthyite smear that echoed the worst vituperations of the 1950s for doing no more than exposing her students to the ideas necessary to make informed decisions on political and social questions. The fact that the National Education Association was listed as *amicus curiae* for the plaintiff²⁶² might have been influential. Given the facts of *Franklin*, the John Birch Society's treatment of Elmer Gertz²⁶³ comes to mind. Although one can sympathize with the Court's possible motive to protect a teacher from a mindless propaganda attack, misapplying the public figure principles of *Gertz* and its progeny to a public official inquiry ultimately undermines the freedom that effort seeks to protect.

A recurrent theme in these cases is that making it easier to punish libel advances academic freedom because teachers will be less afraid to speak out if they feel more likely to prevail in a defamation action against a critic. This theory had been rejected in *Basarich*²⁶⁴ before it was advanced in *Franklin*²⁶⁵ and adopted in *True*.²⁶⁶ This theme entered modern defamation law in a more general way in Justice White's dissent in *Gertz*. Justice White contended that stricter burdens of defamation proof would lead to "virtually unrestrained defamatory remarks about private citizens" which would "discourage them from speaking out and concerning themselves with social problems. This would turn the first amendment on its head."²⁶⁷ Justice White's dis-

261. *Franklin v. Lodge 1108, Benevolent & Protective Order of Elks*, 97 Cal. App. 3d 915, 159 Cal. Rptr. 131 (1979); see *supra* text accompanying notes 126-33.

262. *Id.* at 918, 159 Cal. Rptr. at 133.

263. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

264. *Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 894, 321 N.E.2d 739, 743 (1974) (rejecting a claim that freedom of association implies a right of teachers "to be free from comment and criticism regarding their activities in the school system").

265. *Franklin*, 97 Cal. App. 3d at 924, 159 Cal. Rptr. at 136.

266. *True v. Ladner*, 513 A.2d 257, 264 (Me. 1986).

267. *Gertz*, 418 U.S. at 400 (White, J., dissenting).

sent in *Gertz* may be the only time a United States Supreme Court justice has mistaken the first amendment for a restraint on the speech of private citizens rather than a restraint on the conduct of government. That the first amendment does not protect defamatory speech is a familiar argument, but the idea that the first amendment should operate to silence some speakers in order to encourage others is, to say the least, an unusual construction.

In support of his general thesis, Justice White referred to the work of David Reisman to the effect that libel law was a bulwark for democracy against the defamatory propaganda the Nazis used to discredit and demoralize their opponents.²⁶⁸ Reisman wrote: "Thus it is that the law of libel, with its ecclesiastic background and domestic character, its aura of heart-balm suits and crusading nineteenth-century editors, becomes suddenly important for modern democratic survival."²⁶⁹

Actually, a closer reading of Reisman's article shows that the law of libel is a two-edged sword—the Nazis actually used the defamation laws quite effectively to silence their opponents, even before coming to power.²⁷⁰ Indeed, if the history of this century has taught anything, it is that the expression of one group in society cannot be enriched by trampling the expression of another. If teachers hesitate to express their views for fear of provoking harsh rebuttal, they are perhaps uniquely positioned to seek instruction in how to return critical fire or rise above it.

Something is inherently self-contradictory in the idea that freedom of speech is somehow advanced by silencing critics with lawsuits. Teachers are already protected to some extent by the tenure system. The Supreme Court in *Pickering v. Board of Education*²⁷¹ afforded teachers themselves an actual malice standard before they can be dismissed for criticizing their employers.²⁷² Their professional organizations provide them with collective strength and vehicles for self-defense. No basis exists for giving teachers an additional sword against critics that is not available to other public officials.

According special privileges to teachers as defamation plaintiffs can follow one of two paths: Either the special status will be confined to teachers alone, perhaps resting on the academic freedom rationale discussed above, or else it will spread to other categories of government

268. *Id.*

269. Reisman, *Defamation and Democracy: Fair Game and Fair Comment I*, 42 COLUM. L. REV. 1085, 1088 (1942).

270. *Id.* at 1098, 1100-02.

271. 391 U.S. 563 (1968).

272. *Id.* at 574.

employees. Neither of these results makes good policy sense. The first alternative is manifestly unfair in its discriminatory impact on other public employees of comparable status, all of whom could, no doubt, adduce unique characteristics of their own occupations that should entitle them to the same preferences. The example of police officers springs immediately to mind. The second alternative would, in effect, restore the regime of seditious libel that *New York Times* and its progeny abolished. The essential breathing space allowed to critics of government would exist only for criticisms implicating officials at the highest levels of government. Neither alternative could be reasonably expected to comport with the values of liberty, fairness, and consistency that we, as a culture, wish to associate with constitutional jurisprudence.

V. CONCLUSION

The United States Supreme Court constitutionalized the law of defamation in 1964 by establishing first amendment protection for negligent errors of fact in statements about public officials. Such plaintiffs could recover damages in defamation only upon a showing of actual malice, which is proof that the defendant promulgated it with knowledge of its falsity or reckless disregard of whether it was true. The Court indicated that statements concerning some lower level government employees would not necessarily enjoy such expansive protection, but has never denominated which specific occupational categories are covered.

Later, the Court expanded its actual malice standard to encompass persons not employed by government who qualified as public figures rather than public officials. The Court eventually narrowed the scope of the public figure doctrine, but gave no indication of receding from the more expansive protection accorded to statements about public officials. State courts are badly split over whether public school teachers qualify as public officials. In states that resolved the question prior to 1979, teachers were consistently held to be public officials. After that, with one major exception, the results have been the opposite.

This change coincides with the United States Supreme Court's narrowing of the public figure doctrine, specifically the Court's introduction of new factors into the determination of public figure status: whether a plaintiff assumed a risk of defamation and had access to effective means of counter-speech. Such factors were never intended to play even a minor role in determining whether a plaintiff is a public official as opposed to a public figure.

Some state courts began to apply these factors to public official inquiries, at least where teachers were concerned, and others followed

suit. Analysis of the pertinent body of Supreme Court opinions shows that these applications are clearly erroneous; so too does a dissent, by Justices Brennan and Marshall, from a denial of certiorari in one of the erroneous cases. The Ohio Supreme Court later overturned its holding partly as a result of comments in that dissent.

An unrelated body of constitutional law, the law of alienage, affords some guidance. States are permitted to discriminate on the basis of citizenship in hiring certain public employees whose positions are said to go to the heart of representative government. Public school teachers hold one of the positions considered important enough to be so denominated. The importance of public school teachers to a democratic society is further underscored in several of the Supreme Court's school desegregation cases.

State courts holding that a teacher is not a public official have consistently ruled the opposite with respect to a police officer—a position of comparable status, compensation, and public importance. Moreover, the cases concerning police have omitted consideration of the factors of risk assumption and access to counter-speech which were erroneously applied in some of the teacher cases. This inconsistency not only has created inaccurate status determination in some of the cases involving teachers, but also has thrown into confusion the method courts should use in arriving at public official determinations. A set of criteria can hardly be dispositive for one occupational category and irrelevant to another.

Resolving the conflict in favor of holding teachers to be public officials would ensure fairness to comparable public employees who are so denominated. More importantly, such an outcome could prevent the revival of the doctrine of seditious libel.

APPENDIX

SURVEY OF TEACHER STATUS CASE LAW

CASE	Year	Public Official Public Figure	Private Figure	Common Law-Privilege	Coach	Administrator	Classroom Teacher	College Level	Not Job Related	Private Employee	U.S. Sup. Ct.	U.S. Cir. Ct.	U.S. Dist. Ct.	State Sup. Ct.	State Ct. App.	State Trial Ct.	State
Mahoney ¹	87	X			X									X			N.Y.
Lipscomb ²	87		X				X							X			Va.
Scott ³	86	X				X								X			Ohio
True ⁴	86		X			X								X			Me.
Nodar ⁵	84		X	X		X								X			Fla.
Milkovich ⁶	84		X		X									X			Ohio
Luper ⁷	83	X	X				X								X		Okla.
Renwick ⁸	83	X				X	X								X		N.C.
Van Dyke ⁹	83	X				X	X							X			Utah
Stevens ¹⁰	83		X			X							X				Ill.
Hicks ¹¹	82	X	X			X	X								X		La.
Byers ¹²	82	X				X	X								X		Ga.
Foote ¹³	82		X	X		X	X								X		La.
Creps ¹⁴	82			X		X	X								X		Ohio
Colson ¹⁵	82			X		X	X							X			Ill.
McCutcheon ¹⁶	81		X	X		X	X								X		Ill.
Fleming ¹⁷	81		X				X	X	X					X			Va.
DeLuca ¹⁸	81		X	X			X	X							X		N.Y.
Defley ¹⁹	81	X				X								X			La.
Torgerson ²⁰	81	X				X	X	X	X						X		Minn.
Avins ²¹	80	X				X	X	X	X	X							Del.
Franklin ²²	79		X				X								X		Cal.
Poe ²³	79		X				X								X		Tex.
Cone ²⁴	79	X				X							X				Ga.
Winter ²⁵	78		X	X	X										X		N.Y.
Johnston ²⁶	78	X			X									X			Okla.
Sewell ²⁷	78	X					X								X		Ariz.
Early ²⁸	76	X				X									X		Fla.
Kapiloff ²⁹	75	X	X			X									X		Md.
Johnson ³⁰	75	X					X	X							X		Ill.
Basarich ³¹	74	X			X		X								X		Ill.
Gallman ³²	73	X		X		X	X	X						X			Ark.
Sanders ³³	72			X			X	X							X		Va.
Time ³⁴	71	X			X			X	X	X	X						N.C.
Grayson ³⁵	67	X			X		X		X					X			Wash.
Reaves ³⁶	67	X				X									X		Miss.
Butts ³⁷	67	X			X	X		X	X	X							Ga.
Ranous ³⁸	66		X	X			X							X			Wis.

1. Mahoney v. Adirondack Publishing Co., 71 N.Y.2d 31, 517 N.E.2d 1365 (1987) (holding as public figure high school coach accused of telling quarterback to "get your head out of your &!(!!(&," even though New York courts tend to confer public status sparingly because they provide extra protection for defendants by requiring a gross negligence standard for all plaintiffs where a matter of public concern is involved, Chapadeau v. Utica Observer-Dispatch, 38 N.Y.2d 196, 379 N.Y.S.2d 61 (1975)).
2. Richmond Newspapers Inc. v. Lipscomb, 234 Va. 277, 362 S.E.2d 32 (1987) (holding as private figure a teacher accused of incompetence by parents), *cert. denied*, 486 U.S. 1023 (1988).
3. Scott v. News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986) (holding as public official a school superintendent accused of lying to cover up coach's misconduct in brawl at wrestling match).
4. True v. Ladner, 513 A.2d 257 (Me. 1986) (holding as private figure teacher given negative job reference by supervisor).
5. Nodar v. Galbreath, 462 So. 2d 803 (Fla. 1984) (holding as private figure teacher criticized as unqualified by parents).
6. Milkovich v. News-Herald, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984) (holding as private figure a coach accused of inciting donnybrook at high school wrestling match), *cert. denied sub nom. Lorain Journal Co. v. Milkovich*, 474 U.S. 953 (1985), *overruled*, Scott v. News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).
7. Luper v. Black Dispatch Publishing Co., 675 P.2d 1028 (Okla. Ct. App. 1983) (holding as both a public official and public figure a teacher and civil rights activist whose deranged former husband managed to convince a newspaper to print a variety of allegations, including mass murder, against her).
8. Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 304 S.E.2d 593 (1983) (holding as public figure a state university dean for purposes of affirmative action controversy, but not reaching public official question), *rev'd on other grounds*, 310 N.C. 312, S.E.2d 405, *cert. denied*, 469 U.S. 858 (1984).
9. Van Dyke v. KUTV, 663 P.2d 52 (Utah 1983) (holding as public official a state college financial aid director accused of sexually harassing students).
10. Stevens v. Tillman, 568 F. Supp. 289 (N.D. Ill. 1983) (holding as private figure a white principal in racial controversy with black parents), *cert. denied*, 109 S. Ct. 1339 (1989).
11. Hicks v. Stone, 425 So. 2d 807 (La. Ct. App.) (holding as public official a state university dean blamed for program's loss of accreditation), *cert. denied*, 429 So. 2d 129 (La. 1982).
12. Byers v. Southeastern Newspapers Corp., 161 Ga. App. 717, 288 S.E.2d 698 (1982) (holding as public figure a state college dean for purposes of a controversy surrounding abolition of his job, but not reaching public official question).
13. Foote v. Sarafyan, 432 So. 2d 877 (La. Ct. App. 1982) (holding as private figures state college professors and chairman in controversy over academic competence and "payroll fraud," but applying common law privilege).
14. Creps v. Waltz, 5 Ohio App. 3d 213, 450 N.E.2d 716 (1982) (not reaching determination of status of adjunct professor of real estate at state college said to be unfit for job by local real estate brokers angered by professor's business practices, but applying common law privilege).
15. Colson v. Stieg, 89 Ill. 2d 205, 433 N.E.2d 246 (1982) (avoiding question of public status, but adding actual malice standard to state common law privilege for purposes of tenure determinations in schools).
16. McCutcheon v. Moran, 99 Ill. App. 3d 421, 425 N.E.2d 1130 (1981) (holding as private figure teacher/principal accused of kicking janitor in buttocks).
17. Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981) (holding as private figure a state university professor for purposes of allegations of racism in zoning controversy unrelated to job).
18. DeLuca v. New York News Inc., 109 Misc. 2d 341, 438 N.Y.S.2d 199 (Sup. Ct. 1981) (holding as private figure a former public school teacher for allegations of improper receipt of salary while on disability leave).
19. State v. Defley, 395 So. 2d 759 (La. 1981) (holding as public officials, in criminal libel case, deceased school superintendent and supervisor for purposes of allegations that they had been drunkards who resisted school integration).

20. *Torgerson v. Minneapolis Star & Tribune Co.*, 7 Media L. Rptr. (BNA) 1805 (Minn. 4th Dist. Ct. 1981) (holding as public figure a private law school dean for purposes of controversy over legitimacy of law school).

21. *Avins v. White*, 627 F.2d 637 (3d Cir.) (holding as public figure a private law school dean in controversy over denial of American Bar Association accreditation), *cert. denied*, 449 U.S. 982 (1980).

22. *Franklin v. Lodge 1108, Benevolent and Protective Order of Elks*, 97 Cal. App. 3d 915, 159 Cal. Rptr. 131 (1979) (holding as private figure a high school teacher accused of expounding "communist, Godless philosophies to our young people" who lost previous job for that reason).

23. *Poe v. San Antonio Express-News Co.*, 590 S.W.2d 537 (Tex. Ct. App. 1979) (holding as private figure a teacher accused of fondling fourteen-year-old student).

24. *Cone v. John H. Phipps Broadcasting Stations*, 5 Media L. Rptr. (BNA) 1972 (N.D. Ga. 1979) (holding as public official a school superintendent accused of financial irregularities).

25. *Winter v. Northern Tier Publishing Co.*, 4 Media L. Rptr. (BNA) 1348 (N.Y. Sup. Ct. 1978) (applying common law privilege and holding as private figure a coach accused of cursing and threatening referees).

26. *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101 (Okla. 1978) (holding as public official an elementary school wrestling coach accused of forcing sixth-grader to crawl naked through the legs of his teammates while they struck him).

27. *Sewell v. Brookbank*, 119 Ariz. 422, 581 P.2d 267 (Ct. App. 1978) (holding as public official a high school chemistry teacher called incompetent by parents).

28. *Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50 (Fla. 4th DCA 1976) (holding as public official elected superintendent of schools accused of incompetence in long series of articles), *cert. denied*, 354 So. 2d 351 (Fla. 1977), *cert. denied*, 439 U.S. 910 (1978).

29. *Kapiloff v. Dunn*, 27 Md. App. 514, 343 A.2d 251 (1975) (holding as "public figure-public official" a school principal ranked low among his peers by newspaper), *cert. denied*, 426 U.S. 907 (1976).

30. *Johnson v. Board of Junior College Dist. No. 508*, 31 Ill. App. 3d 270, 334 N.E.2d 442 (1975) (holding as public figures professors active in controversy over textbooks).

31. *Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 321 N.E.2d 739 (1974) (holding as public officials teachers and coaches criticized for union activity).

32. *Gallman v. Carnes*, 254 Ark. 987, 497 S.W.2d 47 (1973) (holding as public official an assistant dean/law professor accused of inept scholarship).

33. *Sanders v. Harris*, 213 Va. 369, 192 S.E.2d 754 (1972) (not making status determination, but requiring professor involved in administrative dispute to show actual malice to recover in defamation action).

34. *Time, Inc. v. Johnston*, 448 F.2d 378 (4th Cir. 1971) (holding as public figure a private college coach and former professional basketball player for purposes of comment that he had been "destroyed" by the superior skill of Boston Celtics star Bill Russell).

35. *Grayson v. Curtis Publishing Co.*, 72 Wash. 2d 999, 436 P.2d 756 (1967) (holding as public figure a coach of state university basketball team, who was technically employed by a university-related private corporation, for purposes of allegations that he followed a strategy of bullying referees).

36. *Reaves v. Foster*, 200 So. 2d 453 (Miss. 1967) (holding as public official a school principal accused of incompetence).

37. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (holding as public figure a state university athletic director/former coach, who was technically employed by a university-related private corporation, for purposes of allegations of conspiring to rig a game).

38. *Ranous v. Hughes*, 30 Wis. 2d 452, 141 N.W.2d 251 (1966) (holding as private figure, where defendants failed to assert otherwise, a teacher accused of rebuking and punishing children who expressed grief at assassination of President Kennedy).