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School Principals and New York Times: Ohio's Narrow Reading of Who Is a Public Official or Public Figure

Andrew L. Turscak Jr.

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SCHOOL PRINCIPALS AND NEW YORK TIMES: OHIO'S
NARROW READING OF WHO IS A PUBLIC OFFICIAL OR
PUBLIC FIGURE

I. INTRODUCTION	169
II. THE NEW YORK TIMES RULE	170
A. <i>Who is a Public Official?</i>	172
B. <i>Who is a Public Figure?</i>	174
III. EAST CANTON EDUCATION ASSOCIATION V. MCINTOSH.....	175
A. <i>Background</i>	175
B. <i>Procedural History</i>	176
IV. IS A SCHOOL PRINCIPAL A PUBLIC OFFICIAL OR PUBLIC FIGURE?	177
V. CONCLUSION.....	183

I. INTRODUCTION

The United States Supreme Court has promulgated the rule that plaintiffs in defamation cases who are either public officials or public figures must prove that an alleged defamatory statement was made with “actual malice.”¹ This means that while ordinary defamation plaintiffs need only prove negligence,² those individuals who have achieved public official or public figure status have a higher burden of proof; they must show that a defamatory falsehood was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”³

The Supreme Court has not listed precisely which government employees qualify for public “official” status,⁴ but it has provided some guidance. First, the government employee must occupy a position in which there is such “apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it.”⁵ Next, that interest must be “beyond the general public interest in the qualifications and performance of all government employees.”⁶

There are similarly vague guidelines surrounding the distinction of a public figure. Public figures are those who have achieved “such pervasive fame or notoriety” that they become public figures in all circumstances.⁷ In addition, they

¹New York Times v. Sullivan, 376 U.S. 254 (1964).

²*Id.* at 287-88.

³*Id.* at 280.

⁴*Id.* at 283, n.23.

⁵Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

⁶*Id.* at 86.

⁷Gertz v. Welch, 418 U.S. 323, 351 (1974).

are those who either “voluntarily inject[]” themselves or are “drawn into a particular public controversy.”⁸

Courts have grappled with the question of which government employees are public officials or public figures, often arriving at entirely opposite conclusions.⁹ The courts in Ohio are no exception. In its 1999 decision in *East Canton Education Ass’n v. McIntosh*,¹⁰ the Ohio Supreme Court considered the question of whether a public high school principal is a public official or public figure for defamation purposes.¹¹ Over a strong dissent, and contrary to precedent, it held that a principal qualifies as neither.¹² This is a surprising result in light of the United States Supreme Court’s public official/figure guidelines and opposite state decisions elsewhere.

II. THE NEW YORK TIMES RULE

In *New York Times v. Sullivan*,¹³ the Supreme Court recognized this country’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁴ At the very least, the First Amendment¹⁵ guarantees “the opportunity for free political discussion to the end that government may be responsive to the will of the people.”¹⁶ The Court also recognized, however, that “Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.”¹⁷ The law of defamation protects this interest.¹⁸

⁸*Id.* at 351.

⁹*See infra*, note 62.

¹⁰*East Canton Educ. Ass’n v. McIntosh*, 709 N.E.2d 468 (Ohio 1999).

¹¹*Id.* at 474.

¹²*Id.* at 475.

¹³*New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁴*Id.* at 270.

¹⁵U.S. CONST. amend. I. “Congress shall make no law . . . abridging the freedom of speech, or of the press”

¹⁶*New York Times*, 376 U.S. at 269, quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931).

¹⁷*Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). *See also*, *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758, n.5 (1985) (Noting that “not all speech is of equal First Amendment importance. This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. Obscene speech and ‘fighting words’ long have been accorded no protection.”); *Gertz v. Welch*, 418 U.S. 323, 342 (1974) (Discussing the “high price [for] victims of defamatory falsehood” who, because of the nature of their public status, must surmount substantial barriers before recovering for defamation).

¹⁸It is worth noting at the outset that, over the years, certain justices have urged that a proper reading of the First Amendment reveals no limit to freedom of criticism of public officials. *See, e.g.*, the concurrences by Justices Black and Goldberg joined by Justice Douglas in *New York Times v. Sullivan*, 376 U.S. 254, 296, 298 (1964): (“We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the

It is this tension between First Amendment free speech guarantees and society's concern for protecting individuals from defamatory speech that prompted the Supreme Court to establish different standards for recovery of damages for those who have been harmed by defamatory speech.¹⁹ A person's right to recover for an alleged defamatory falsehood depends upon his or her status. While private persons may enjoy greater protection from public defamation,²⁰ those who achieve a certain level of public stature are afforded a lesser degree of protection.²¹ There are several reasons for this distinction. First, because public officials and public figures have "greater access to the channels of effective communication," they also have, therefore, a greater opportunity to rebut false statements, whereas private citizens by contrast are "more vulnerable to injury, and the state interest in protecting them is correspondingly greater."²² Second, public officials "must accept certain necessary consequences" which result from their involvement in government, one of which is "closer public scrutiny than might otherwise be the case."²³ Likewise, public figures "have assumed roles of special prominence in the affairs of society," and as a result, "invite attention and comment."²⁴

In light of these considerations, the *New York Times* rule "prohibits a *public official* from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."²⁵ This means that public officials, in order to recover for defamation, must prove that a false defamatory statement was made with either knowledge of the statement's falsity, or with "serious doubts as to [its] truth."²⁶ More specifically, "[M]ere proof of failure to investigate, without more, cannot establish reckless

people and the press free to criticize officials and discuss public affairs with *impunity*." (Black, J., concurring) (emphasis added); (First Amendment affords "to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses.") (Goldberg, J., concurring)). *See also*, Justice Douglas's dissent in *Gertz v. Robert Welch*, 418 U.S. 323, 356 (1974) ("I have stated before my view that the First Amendment would bar Congress from passing any libel law.") (Douglas, J., dissenting).

¹⁹*See Gertz*, 418 U.S. at 325. ("This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment.")

²⁰*Gertz*, 418 U.S. at 348 ("[I]n defamation suits by private individuals," states may "impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*.")

²¹*Id.* at 342-44.

²²*Id.*

²³*Id.*

²⁴*Gertz*, 418 U.S. at 345.

²⁵*New York Times*, 376 U.S. at 279-280 (emphasis added).

²⁶*St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

disregard for the truth. Rather, the publisher must act with a 'high degree of awareness of . . . probable falsity.'"²⁷

In *Curtis Publishing Co. v. Butts*,²⁸ the Court extended the application of the *New York Times* rule to "public figures" who are now subject to the same heightened burden of proof with which public officials are confronted in defamation cases.²⁹ Both must prove that a false defamatory statement was made with actual malice in order to recover damages for harm to their personal reputation.³⁰

All of the preceding cases pose the question, Who is considered a public official or public figure for purposes of defamation?

A. Who is a Public Official?

Although *New York Times* established the rule that a public official must prove actual malice in order to recover for a defamatory falsehood, the Court did not define who is a "public official," or even issue rough parameters for determination.³¹ Two terms later, *Rosenblatt v. Baer*³² provided some guidance: "[T]he '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."³³ A government employee is a public official for defamation purposes where his or her "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 interest that the public generally has in the performance of all such employees.³⁴

*Rosenblatt v. Baer*³⁵ involved an appointed supervisor (Baer) of a county-owned skiing and recreation resort in New Hampshire, who reported to the county's three elected commissioners.³⁶ He was replaced after a public controversy developed over the perceived under-utilization of the resort.³⁷ Later, a local newspaper columnist, in

²⁷*Gertz*, 418 U.S. at 332 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

²⁸*Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

²⁹*Id.* at 155.

³⁰*Id.* See also, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) ("[W]here a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth.").

³¹*New York Times*, 376 U.S. at 283, n.23 ("We have 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 categories of persons who would or would not be included.").

³²*Rosenblatt v. Baer*, 383 U.S. 75 (1966).

³³*Id.* at 85.

³⁴*Id.* at 86.

³⁵383 U.S. 75 (1966).

³⁶*Id.* at 77.

³⁷*Id.* at 78.

praising the new administrators of the resort, implied mismanagement on Baer's behalf.³⁸ Baer sued, alleging "that the column contained defamatory falsehoods."³⁹ The Court did not squarely decide the issue of whether Baer was a public official, but it remarked that "he may have held such a position,"⁴⁰ that a "substantial argument" could be made that he was a public official,⁴¹ and that the ski resort's management was "a matter of lively public interest."⁴² The Court left the ultimate determination of the public official issue to the lower courts.⁴³

In doing so, it elaborated on which positions are deemed "official": "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."⁴⁴ This meant that a very low-level government employee, such as a night watchman,⁴⁵ would not be subject to the actual malice requirement in an action for defamation just because he might have been involved in a matter of public concern.⁴⁶ In the same respect, since *Gertz v. Robert Welch*,⁴⁷ private individuals who, like the hypothetical night watchman, are not public official, may be able to obtain redress for "defamatory falsehood on a less demanding showing than that required by *New York Times*."⁴⁸

Finally, in *Rosenblatt* the Court was careful to point out that the fact that a particular controversy may be confined to a small locality is "constitutionally irrelevant."⁴⁹ In rejecting the so-called "small fish in a big pond argument," *Rosenblatt* only requires that the defamation be "addressed primarily to the interested community,"⁵⁰ however small. In other words, the public official category includes those who would be regarded as big fish solely because of the smallness of the ponds in which they operate.

³⁸*Rosenblatt*, 383 U.S. at 78.

³⁹*Id.* at 77.

⁴⁰*Id.* at 87.

⁴¹*Id.*

⁴²*Id.* at n.14.

⁴³*Rosenblatt*, 383 U.S. at 87-88.

⁴⁴*Id.* at 86, n.13.

⁴⁵*Id.*

⁴⁶Although, conceivably, he could still be subject to the actual malice standard as a "public figure," as one who has either injected himself into a public controversy or been drawn into a matter of public controversy.

⁴⁷418 U.S. 323 (1974).

⁴⁸*Gertz*, 418 U.S. at 348.

⁴⁹*Rosenblatt*, 383 U.S. at 83.

⁵⁰*Id.*

B. Who is a Public Figure?

*Curtis Publishing Co. v. Butts*⁵¹ broadened the application of the *New York Times* actual malice rule to include “public figures” as well as public officials,⁵² but it offered little assistance in ascertaining who qualifies as a public figure. Later, the Court in *Gertz v. Robert Welch*⁵³ described the various means by which one can achieve public figure status for defamation purposes. One way a person may become a public figure is if he “achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts,”⁵⁴ as is the case for celebrities.

More commonly though, an individual becomes a public figure in either of two ways. The first is where “an individual voluntarily injects himself” into a public controversy.⁵⁵ The other is where an individual “is drawn into a particular public controversy.”⁵⁶ “In either case such [a person assumes] special prominence in the resolution of public questions,”⁵⁷ and “thereby becomes a public figure for a limited range of issues.”⁵⁸

The “limit” to the range of issues is reached where the person’s public activity ends: “We would not lightly assume that a citizen’s participation in community and professional affairs rendered him a public figure for all purposes.”⁵⁹ In other words, “an individual should not be deemed a public personality for all aspects of his life,”⁶⁰ but, rather, only for those aspects which relate to his or her “participation in the particular controversy giving rise to the defamation.”⁶¹ Under these vague and elastic standards, lower courts, including those in Ohio, have struggled with the issue of who is a public official or public figure for defamation purposes.⁶²

⁵¹388 U.S. 130 (1967).

⁵²*Id.* at 155.

⁵³*Gertz*, 418 U.S. at 323. Elmer Gertz, an attorney, represented the family of a victim of a shooting by a police officer who was convicted of second degree murder. His representation took place in the subsequent wrongful death action against the officer. A magazine article, discussing the case, falsely portrayed Gertz as a Communist and Gertz sued the magazine for defamation. The Court decided that Gertz was not a public figure under its guidelines because, among other things, he took no part in the criminal prosecution, his only participation involved the civil representation of a private client, and he never discussed the case with the media.

⁵⁴*Id.* at 351.

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸*Gertz*, 418 U.S. at 351.

⁵⁹*Id.* at 352.

⁶⁰*Id.*

⁶¹*Id.*

⁶²*See, e.g.*, Danny R. Veilleux, Annotation, *Who is “Public Official” for Purposes of Defamation Action*, 44 A.L.R.5th 193 (1996) (Listing and describing numerous cases and courts which have labored over this issue, and cataloging results in which many courts have

III. EAST CANTON EDUCATION ASS'N V. MCINTOSH

In May of 1999, the Supreme Court of Ohio decided the case of *East Canton Education Ass'n v. McIntosh*.⁶³ In *McIntosh*, Justice Douglas, writing for the court, held that a public school principal is neither a public official nor a public figure for purposes of defamation.⁶⁴ In dissent, Chief Justice Moyer argued that McIntosh qualified as both a public official and a public figure, and as such, should be subject to the *New York Times* actual malice standard.⁶⁵

A. Background

The case involved John R. McIntosh, who was employed by the Osnaburg Local School Board of Education as the principal at East Canton High School in Stark County.⁶⁶ Prior to his employment in the Osnaburg school district, he had served variously as a teacher, guidance counselor, principal, and assistant principal in the Marlington district between 1966 and 1987.⁶⁷ He was initially hired by Osnaburg in 1987 as an assistant principal at East Canton High, and served as the high school principal during the 1990-1991 and 1994-1995 school years.⁶⁸

The dispute arose in February of 1995, when the board of education notified McIntosh of its intention not to renew his contract for the 1995-1996 school year and offered him the opportunity to resign.⁶⁹ McIntosh refused, citing his status as a tenured teacher entitled to reassignment.⁷⁰

When word of the board's intentions spread, a number of students mobilized to protest the decision by wearing ribbons supporting McIntosh, by not attending school, and by demonstrating outside the school building.⁷¹ Media coverage ensued.⁷² On March 9, 1995, the district's superintendent, accompanied by police, ordered McIntosh to leave the building and placed him on "home assignment."⁷³ He

reached surprisingly opposite conclusions for identical government employees under the *New York Times* rule and the *Rosenblatt* test).

⁶³East Canton Educ. Ass'n v. McIntosh, 709 N.E.2d 468 (Ohio 1999).

⁶⁴*Id.* at 475.

⁶⁵*Id.* at 479-80. In addition to Chief Justice Moyer's dissent, there were two other opinions in *McIntosh*. Justice Cook wrote a separate concurring opinion in which he agreed that a high school principal is not a public official, but disagreed with the majority's interpretation of Ohio law concerning continuing service contracts. Justice Lundberg Stratton (who joined Justice Moyer's dissent and Justice Cook's concurrence) wrote separately to address several other issues, one of which was whether the alleged defamatory statements were privileged communications.

⁶⁶*Id.* at 469.

⁶⁷*Id.*

⁶⁸*McIntosh*, 709 N.E.2d at 469.

⁶⁹*Id.*

⁷⁰*Id.*

⁷¹*Id.* at 469-70.

⁷²*Id.* at 469-71.

⁷³*McIntosh*, 709 N.E.2d at 469-71.

warned McIntosh that should he return, “appropriate action would be taken against him.”⁷⁴ The superintendent, in a letter dated March 10, 1995, informed McIntosh that he would recommend that his contract be terminated or suspended for, among other things, “gross inefficiency,” “immorality,” ineffective student discipline, and “condoning and/or supporting student unrest.”⁷⁵

At the board of education meeting on March 13, 1995, the president of the East Canton Education Association (ECEA) teachers union read a statement which was prepared by a representative of the Ohio Education Association (OEA).⁷⁶ In it, she chastised McIntosh for blaming his problems on weak teachers in a newspaper article, and for his part in creating the “circus-like atmosphere” which existed in the school district.⁷⁷ She also supported the actions of the superintendent on behalf of the ECEA.⁷⁸ At the meeting, the board voted to suspend McIntosh and to not renew his contract with the district.⁷⁹ “Events surrounding McIntosh’s non-renewal received considerable media attention.”⁸⁰

B. Procedural History

McIntosh brought an action against the superintendent, the board of education, and its individual members in the Stark County Court of Common Pleas on March 17, 1995.⁸¹ In it, he advanced a number of claims, including defamation.⁸² “Specifically, McIntosh alleged that the charge of immorality and other statements made by [the superintendent] and ratified by the board and its members were false and actionable.”⁸³

On December 22, 1995, the East Canton Education Association sued, seeking a declaratory judgment determining either that McIntosh had not attained tenure status or, alternatively if he had, that his reinstatement should not come at the expense of another ECEA member’s position.⁸⁴ In response to the ECEA’s claim, McIntosh answered with a counterclaim against the ECEA as well as a third-party complaint against the president of the ECEA, the Ohio Education Association, and the OEA representative who prepared the statement of March 13, 1995, alleging defamation.⁸⁵

⁷⁴*Id.*

⁷⁵*Id.* at 470.

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*McIntosh*, 709 N.E.2d at 470.

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.* McIntosh also sought relief on other grounds not relevant to the defamation issue, asking for a writ of mandamus, an injunction, monetary damages, and a declaratory judgment that he was a tenured teacher who was entitled to continuing service status.

⁸³*McIntosh*, 709 N.E.2d at 471.

⁸⁴*Id.*

⁸⁵*Id.*

On August 22, 1996, the trial judge, James S. Gwin, granted summary judgment on all claims and counterclaims in favor of the ECEA and the OEA, as well as the ECEA's president and the OEA representative.⁸⁶ The judge ruled that McIntosh was a public figure and that the statement read at the March 13th board of education meeting was not defamatory.⁸⁷ McIntosh appealed, and the Fifth District Court of Appeals⁸⁸ reversed and remanded, holding that "McIntosh was neither a public official nor a public figure and that genuine issues of material fact existed as to whether certain passages contained in the statement read . . . at the March 13, 1995 board meeting were defamatory."⁸⁹

On remand, Judge John F. Boggins ruled that McIntosh was entitled to continuing service status, but granted summary judgment on the defamation claims in favor of the board of education and the other defendants.⁹⁰ Subsequently, the Fifth District Court of Appeals⁹¹ affirmed on the continuing service issue, but reversed and remanded on the defamation issue, deciding that the trial judge had erred in dismissing the defamation claims.⁹² The Supreme Court of Ohio allowed a discretionary appeal,⁹³ and considered the McIntosh case against the backdrop of its prior decision in *Scott v. News-Herald*,⁹⁴ in which the court, citing Justice Brennan's dissent in *Lorain Journal Co. v. Milkovich*,⁹⁵ held that a public school superintendent is a public official.⁹⁶

IV. IS A PRINCIPAL A PUBLIC OFFICIAL OR PUBLIC FIGURE?

In his dissent from denial of certiorari in *Lorain Journal Co. v. Milkovich*,⁹⁷ Justice Brennan analyzed the status of public school *teachers* in light of the *New York Times* rule.⁹⁸ Brennan reasoned that "the status of a public school teacher as a 'public official' for purposes of applying the *New York Times* rule follows *a fortiori* from the [*Rosenblatt* guidelines which help to determine who in the hierarchy of

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸Occupied by a panel of judges from the Ninth District Court of Appeals sitting on assignment in the Fifth District.

⁸⁹*McIntosh*, 709 N.E.2d at 471-72.

⁹⁰*Id.* at 472.

⁹¹Occupied by a panel from the Seventh District sitting on assignment in the Fifth District Court of Appeals.

⁹²*McIntosh*, 709 N.E.2d at 472.

⁹³*Id.*

⁹⁴496 N.E.2d 699 (1986).

⁹⁵474 U.S. 953 (1985).

⁹⁶*Scott v. News-Herald*, 496 N.E.2d 699, 704 (Ohio 1986).

⁹⁷474 U.S. 953 (1985).

⁹⁸*Lorain Journal Co. v. Milkovich*, 474 U.S. 953 (1985) (Brennan, J., dissenting from denial of cert.).

government employees is a public official].”⁹⁹ He described the public school teacher as “unquestionably the central figure in [education],”¹⁰⁰ and applying *Rosenblatt’s* guidelines, found it to be “self-evident that ‘the public has an independent interest in the qualifications and performance’ of those who teach in the public high schools that goes ‘beyond the general public interest in the qualifications and performance of all government employees[.]’”¹⁰¹ He concluded, “Public school teachers thus fall squarely within the rationale of *New York Times* and *Rosenblatt*.”¹⁰²

The Supreme Court of Ohio adopted this reasoning in *Scott v. News-Herald*,¹⁰³ holding that a public school superintendent is a public official within the meaning of *New York Times*.¹⁰⁴ The court quoted Justice Brennan extensively and approvingly,¹⁰⁵ and stated that Brennan’s belief “that the public school teacher exerts a substantial role in shaping a community through his or her impact on the students” was “at the core of [its] decision.”¹⁰⁶

In *East Canton Education Ass’n v. McIntosh*, the court did an abrupt about face.¹⁰⁷ Seemingly ignoring its reasoning in *Scott*, the court decided that a public high school principal is not a public official for defamation purposes, in effect overlooking its enthusiastic endorsement of Justice Brennan’s *Milkovich* analysis (arguing that *teachers* are public officials) in *Scott*.¹⁰⁸ In doing so, the court instead adopted the reasoning of cases from Illinois and Georgia.¹⁰⁹

In *McCutcheon v. Moran*,¹¹⁰ an Illinois appellate court held that a principal who doubled as a teacher is neither a public official nor a public figure. In distinguishing the case from two previous Illinois decisions which held otherwise,¹¹¹ the court said,

⁹⁹*Id.* at 958.

¹⁰⁰*Id.*

¹⁰¹*Id.* at 959-60 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

¹⁰²*Id.* at 959-60. Some courts have followed suit, holding that public school teachers are public officials within the meaning of *New York Times* and *Rosenblatt*. *See, e.g.*, *Kelley v. Bonney*, 606 A.2d 693 (Conn. 1992); *Campbell v. Robinson*, 955 S.W.2d 609 (Tenn. Ct. App. 1997). *But see*, *True v. Ladner*, 513 A.2d 257 (Me. 1986); *Richmond Newspapers, Inc. v. Lipscomb*, 362 S.E.2d 32 (Va. 1987) (public school teachers not public officials).

¹⁰³496 N.E.2d 699 (Ohio 1986).

¹⁰⁴*Id.* at 704.

¹⁰⁵*Id.* at 703.

¹⁰⁶*Id.* at 703-04. (“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.” (Overruling *Milkovich v. News-Herald*, 473 N.E.2d 1191 (Ohio 1984), which held that a public school teacher/wrestling coach is not a public official)).

¹⁰⁷*McIntosh*, 709 N.E.2d at 474.

¹⁰⁸*Id.*

¹⁰⁹*Id.* at 475.

¹¹⁰425 N.E.2d 1130 (Ill. Ct. App. 1981).

¹¹¹*Id.* at 1132 (distinguishing *Basarich v. Rodeghero*, 321 N.E.2d 739 (Ill. App. Ct. 1974) (Teacher/coaches are public figures), and *Johnson v. Board of Junior College Dist. No. 508*,

“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.”¹¹² Blending the public official/public figure analysis, and finding that public school principals fall beyond the purview of the *Gertz* guidelines, the Illinois court continued: “A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.”¹¹³

The Georgia Supreme Court arrived at a similar conclusion in *Ellerbee v. Mills*,¹¹⁴ saying, “[p]rincipals, in general are removed from the general conduct of government, and are not policymakers at the level intended by the *New York Times* designation of public official.”¹¹⁵ A concurring justice disagreed, concluding that a principal is high enough in the *Rosenblatt* hierarchy of government employees to qualify for public official status: “As the school’s chief administrative officer, the principal establishes school policy, recommends hiring and firing of teachers and staff, implements curriculum and other educational programs, expends and accounts for public funds, represents the institution before the public, and is accountable for the students’ educational advancement and the faculty’s performance.”¹¹⁶ To hold that a principal is not a public official “belittles the role of the public school principal.”¹¹⁷ The Georgia majority also found that Mills, the principal, was not a public figure under *Gertz*, but added that principals could, by “inviting attention and comment by thrusting themselves into a controversy,” acquire the public figure label.¹¹⁸

Justice Douglas, writing for the Ohio majority in *McIntosh*, was content to quote brief passages from the Illinois and Georgia opinions parenthetically without offering any further elaboration on the public official issue.¹¹⁹ He also concluded that McIntosh was “not a ‘public figure’ as defined by *Gertz*,” and quoted the Fifth District Appeals Court’s argument that, under *Gertz*, McIntosh “did not assume a role of special prominence in the affairs of society,” nor did he “occupy a position of such persuasive power and influence that he can be deemed a public figure for all purposes.”¹²⁰ In a key passage, Justice Douglas also borrowed this quote from the lower court: “Nor did he thrust himself to the forefront of the public controversy that

334 N.E.2d 442 (Ill. App. Ct. 1975) (Junior college professors are public figures within their community)).

¹¹²*McCutcheon*, 425 N.E.2d at 1133.

¹¹³*Id.* (quoting *Hutchinson v. Proxmire*, 443 U.S. 111 (1979)).

¹¹⁴422 S.E.2d 539 (Ga. 1991).

¹¹⁵*Id.* at 540.

¹¹⁶*Id.* at 542.

¹¹⁷*Id.*

¹¹⁸*Id.* at 540, n.2.

¹¹⁹*McIntosh*, 709 N.E.2d at 475.

¹²⁰*Id.*

may have developed concerning his termination . . . [n]or is there any evidence that McIntosh sought out the media to trumpet his cause.”¹²¹

However, Chief Justice Moyer, in dissent, found ample evidence in the record that McIntosh both thrust himself into the forefront of a very public controversy and sought out the media: “[The majority] reaches this conclusion despite the fact that McIntosh repeatedly met with members of the press, provided them with comments concerning the public debate surrounding his termination, and allowed a reporter and photographer access to his home.”¹²² Further, McIntosh showed his termination notice to a reporter and spoke with media members the day after the board of education meeting at which the alleged defamation occurred.¹²³ He also insisted that board meetings concerning his termination take place in open session.¹²⁴

The Moyer dissent found that, as a result, McIntosh clearly fell within the *Gertz* public figure criteria,¹²⁵ having both “voluntarily inject[ed] himself” and been “drawn into a particular public controversy.”¹²⁶ Under *Gertz*, he achieved “notoriety in the community,” he “thrust himself into the vortex of this public issue,” and “he engage[d] the public’s attention in an attempt to influence its outcome.”¹²⁷ Chief Justice Moyer’s dissent concludes that McIntosh had become a limited public figure, subject to the *New York Times* actual malice burden of proof.¹²⁸

As for whether McIntosh was a public official, here too, Chief Justice Moyer disagreed with the majority. Citing the *Scott* case above, in which the Ohio Supreme Court held that a school superintendent is a public official under *New York Times*, the Chief Justice observed:

I cannot, nor does the majority attempt to, distinguish a school superintendent from a high school principal for purposes of determining public official status. Both are school administrators. Both are responsible for implementing the policies adopted by a local school board. Both are expected to serve as public role models for students. Both exercise supervisory authority over those who have more direct contact with the children of the community. Many of these individuals assume active roles in the life of their greater communities.¹²⁹

¹²¹*Id.*

¹²²*Id.* at 481.

¹²³*Id.*

¹²⁴*McIntosh*, 709 N.E.2d at 481.

¹²⁵*Id.*

¹²⁶*Gertz*, 418 U.S. at 351.

¹²⁷*Id.* at 352.

¹²⁸*McIntosh*, 709 N.E.2d at 481.

¹²⁹*Id.* at 479.

He added that, under *Rosenblatt*,¹³⁰ “principals hold positions which invite public scrutiny and discussion concerning them based solely on the basis of the positions they hold.”¹³¹

Chief Justice Moyer also cited a number of cases which arrived at conclusions opposite to the ones arrived at in the Georgia and Illinois decisions relied upon by the majority. For example, in *Palmer v. Bennington School District, Inc.*,¹³² the Vermont Supreme Court held that an elementary school principal is a public official for purposes of defamation law.¹³³ The court quoted a famous passage from *Brown v. Board of Education*:¹³⁴ “[E]ducation is perhaps the most important function of state and local governments.”¹³⁵ Therefore, applying the *Rosenblatt* public official test of whether an individual’s “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,”¹³⁶ the court determined that school principals meet these criteria.¹³⁷

A federal judge in Minnesota also concluded that an elementary school principal is a public official within *Rosenblatt*’s meaning.¹³⁸ “A contrary holding would stifle public debate about important local issues.”¹³⁹ Finding it unnecessary to reach the public figure question, the judge nevertheless stated that if the court were to reach that issue, it would find that, under the circumstances of the case,¹⁴⁰ the principal in question was a public figure.¹⁴¹

Similarly, in a case not cited by the Chief Justice, a Massachusetts trial court found that, under *Rosenblatt*, a high school principal “occupied a position that

¹³⁰*Rosenblatt*, 383 U.S. at 86 at n.13 (1966) (The relevant passage reads, “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.”)

¹³¹*McIntosh*, 709 N.E.2d at 479.

¹³²615 A.2d 498 (Vt. 1992).

¹³³*Id.* at 503.

¹³⁴347 U.S. 483 (1954).

¹³⁵*Id.* at 493 (emphasis added).

¹³⁶*Rosenblatt*, 383 U.S. at 86.

¹³⁷*Palmer v. Bennington Sch. Dist., Inc.*, 615 A.2d 498, 500-501 (Vt. 1992). *See also*, *Johnson v. Robbinsdale Indep. Sch. Dist. No. 281*, 827 F. Supp. 1439 (D. Minn. 1993), which arrived at an identical conclusion vis-a-vis elementary school principals under the *Rosenblatt* criteria.

¹³⁸*Johnson v. Robbinsdale Indep. Sch. Dist. No. 281*, 827 F. Supp. 1439, 1443 (D. Minn. 1993).

¹³⁹*Id.* at 1443.

¹⁴⁰The circumstances of the case included media coverage of an ongoing dispute between the principal and the parents of some students.

¹⁴¹*Johnson*, 827 F. Supp. at 1443.

invited public scrutiny. He was a public official for purposes of commentary about the manner in which he discharged the duties with which he was charged.”¹⁴² The court, having reached the public official issue, did not decide the public figure question.¹⁴³

The dissent also cited a decision by a Maryland appeals court, which held that a principal is both a public official and a public figure, and noted that the Supreme Court has “engaged or acquiesced in a progressive expansion of the public figure category into decreasingly public spheres.”¹⁴⁴ Likewise, in a case not mentioned by the dissent, a Tennessee appellate court,¹⁴⁵ noting that the term “public official” had previously been applied in Tennessee to a highway patrol officer¹⁴⁶ and a social worker,¹⁴⁷ held that a principal, as “an authoritative figure and a government representative,” whose actions affected Tennessee taxpayers, was a public official.¹⁴⁸

The Chief Justice also noted a decision by Louisiana’s supreme court, which held that a school superintendent and a school “supervisor” are both public officials with regard to defamation law.¹⁴⁹ That court found that school supervisors meet the *Rosenblatt* criteria in 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.”¹⁵⁰

In his dissent in *McIntosh*, Chief Justice Moyer found the reasoning employed by these courts more persuasive than that relied upon by the majority.¹⁵¹ He explained, “The naming of a public school principal, particularly a high school principal, is an event widely published and discussed in many communities,” particularly in towns such as “East Canton, where only one high school serves the entire community.”¹⁵² Although he conceded that not all principals would necessarily qualify as public officials in all circumstances, he stated his belief that “in most cases they will qualify as such.”¹⁵³ Finally, he predicted that “open, free, and vigorous public debate

¹⁴²*McNulty v. Kessler*, No. 914375, 1995 WL 809931 at *7 (Mass. Sup. Ct. Apr. 3, 1995).

¹⁴³*Id.* at *6, n.15.

¹⁴⁴*Kapiloff v. Dunn*, 343 A.2d 251, 258, n.10 (Md. Ct. App. 1975).

¹⁴⁵*Junior-Spence v. Keenan*, No. 89-284-11, 1990 WL 17241, at *4 (Tenn. App. Feb. 28, 1990).

¹⁴⁶*Roberts v. Dover*, 525 F. Supp. 987, 990 (M.D. Tenn. 1981) (highway patrol officer is public official).

¹⁴⁷*Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1981) (social worker is public official).

¹⁴⁸*Junior-Spence v. Keenan*, No. 89-284-11, 1990 WL 17241, at *4 (Tenn. App. Feb. 28, 1990).

¹⁴⁹*State v. Defley*, 395 So. 2d 759, 761 (La. 1981).

¹⁵⁰*Id.* at 761 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

¹⁵¹*East Canton Educ. Ass’n v. McIntosh*, 709 N.E.2d 468, 480 (Ohio 1999).

¹⁵²*Id.* at 479.

¹⁵³*Id.* at 480.

concerning the operation of public schools” would be stifled as a result of the majority’s holding.¹⁵⁴

The essence of *New York Times* is its “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁵⁵ Unfortunately, as Chief Justice Moyer predicts, that debate, at least as far as it concerns the administration of Ohio’s public schools, will be more cautious and restrained as a result of *McIntosh*.

V. CONCLUSION

With little explanation, the Supreme Court of Ohio ignored precedent and defied the weight of authority as well as a logical reading of *New York Times* and its progeny. In establishing a rigid rule that a public high school principal is neither a public official nor a public figure in a defamation case, the court set a high floor in the hierarchy of government employees in whose performance and qualifications the public has as independent interest.

Not long ago, the court enthusiastically adopted an analysis that specifically included public school teachers in the public official category. Yet, in one fell swoop, it not only removed teachers from that category, but principals as well.

Public school principals command considerable attention, particularly high school principals who serve in small communities such as East Canton, Ohio, which has a population of fewer than two thousand people.¹⁵⁶ Even if the majority could have reasonably found that McIntosh himself was neither a public official or public figure, it unnecessarily imposed an inflexible rule that removes all Ohio principals, under virtually any circumstances, from public official status under *New York Times*.

Ironically, it was Justice Douglas himself, who, writing separately in *Scott v. News-Herald*,¹⁵⁷ agreed that a public school superintendent is a public official and added, “[T]he First Amendment guarantee of freedom of speech provides us with the right to think as we will and to speak as we think. When we are tempted, in any way, to move to restrict these precious rights, it is well to remember the historical consequences of the formulation of the First Amendment.”¹⁵⁸ He added, “The First Amendment gives a special protection to the press from the chilling effect of defamation litigation. This is a protection we must preserve at any and all cost.”¹⁵⁹

The United States Supreme Court has stated that “education is perhaps the most important function of state and local governments.”¹⁶⁰ The public interest in the administration of its schools is far greater than it is, for example, in the administration of the public ski area that was at issue in *Rosenblatt*.

¹⁵⁴*Id.* at 478.

¹⁵⁵*New York Times*, 376 U.S. at 270.

¹⁵⁶Population, 1,742, according to 1990 U.S. Census Bureau statistics.

¹⁵⁷*Scott v. News-Herald*, 496 N.E.2d 699 (Ohio 1986).

¹⁵⁸*Id.* at 713-14 (citations omitted).

¹⁵⁹*Id.* at 714.

¹⁶⁰*Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

In the American scheme of public education, high school principals almost always fit within *Rosenblatt's* parameters for determining who is a public official. Their positions are of "such apparent importance" that the public's "independent interest" in their performance is "beyond the general public interest in the qualifications and performance of all government employees."¹⁶¹

They also usually meet the *Gertz* standards for determining who is a public figure. As prominent figures in their communities, they often either "voluntarily inject[]" themselves or are "drawn into a particular public controversy."¹⁶²

Chief Justice Moyer's dissent espouses the better view. It is supported by the weight of authority and controlling precedent and reflects a proper reading of *New York Times*. Eventually, his view will be adopted as Ohio and the rest of the nation implement clearer standards for public official/figure status. When they do, high school principals will, as a rule, meet those standards and be subject to the *New York Times* actual malice requirement in defamation cases.

ANDREW L. TURSCAK, JR.

¹⁶¹*Rosenblatt*, 383 U.S. at 86.

¹⁶²*Gertz*, 418 U.S. at 351.