COMMENTS

(Re)defining Public Officials and Public Figures: A Washington State Primer†

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I. INTRODUCTION

In New York Times Co. v. Sullivan, the Supreme Court established a constitutionally based conditional privilege for protecting free speech in the context of defamation actions. The privilege creates a presumption of good faith, insulating the speaker from liability unless the plaintiff shows by clear and convincing evidence that the publication was made with "actual malice." The Court has chosen a "status approach" limitation to the privilege, applying it only when the plaintiff has the status of "public official" or "public figure." Lower court applications of the New York Times conditional privilege are inconsistent from state to state and often inconsistent with the Supreme Court’s mandate, because, in part, New York Times and its progeny have not provided clear guidance in defining these

† In part, this is a response to another law review article: David Finkelson, The Status/Conduct Continuum: Injecting Rhyme and Reason Into Contemporary Public Official Defamation Doctrine, 84 VA. L. REV. 871 (1998). While Mr. Finkelson recognizes that application of the New York Times conditional privilege should result from a specific balance, his conception of the factors to be considered in the balance and his suggested solutions are antithetical to those offered in the present Comment.

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2. Actual malice is defined as knowledge or reckless disregard of falsity. Id. The conditional privilege of New York Times is sometimes referred to as "the actual malice standard" in both this Comment and in defamation case law.

3. The "status approach" is a shorthand method of referring to the Supreme Court’s choice to use the status of the plaintiff as the triggering mechanism for application of the New York Times conditional privilege. See Gertz v. Welch, 418 U.S. 323, 337, 346 (1974).

4. Id. at 342.
public plaintiffs. As a result, courts generally resort to a reexamination of the principles underlying the decision in *New York Times*.

Unfortunately, lower courts do not evince consistent application of the principles either. Courts repeat the now familiar statements of *New York Times* in a myriad of combinations to lend support to whatever decision they reach—whether increasing constitutional protections of speech or preserving the state’s power and laws of redress for reputational injury. As *New York Times* and its progeny have discussed the underlying principles at great length, language from the cases can be used selectively to support the courts’ varying positions. However, it is only out of context that the language can be so misused.

Although the Supreme Court has struggled in addressing the issues at stake, appearing to vacillate at times, it has continually corrected and refined its position. As a whole, however, a theme can be derived from *New York Times* and its progeny: an application of the privilege only for certain types of speech. A more precise explication of this theme should allow lower courts to apply the status approach more accurately and consistently. This Comment reflects an attempt to distill the Supreme Court’s thematic intent from over thirty years of defamation case law. The Comment then evaluates current definitions of public officials and public figures to determine whether they are consistent with the theme. Washington courts have already addressed these definitions, but this Comment posits that Washington law on public officials and public figures is inconsistent with the Supreme Court’s intent and suggests alternative defining tests for public officials and public figures.

II. PERSPECTIVE ON PRINCIPLES UNDERLYING NEW YORK TIMES

The *New York Times* conditional privilege is usually said to be a compromise between state defamation law\(^5\) and constitutional rights.\(^6\) This statement reflects the two interests at stake in defamation cases: the state’s interest in protecting reputation by providing redress for injury through legal means,\(^7\) and the constitutional constraints of the First Amendment.\(^8\) However, these interests are not treated equally.

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5. A state’s common law actions available to defamation plaintiffs are referred to throughout this Comment as state defamation laws.


8. Although there are multiple purposes of the First Amendment, see Curtis Publishing
by all courts, and the operative compromise between the two interests is affected by the relative values of each interest as seen through the eyes of the reviewing court.

For example, seen from a historical perspective, the previously unchallenged value of state defamation law was merely qualified by the New York Times Court's recognition of the competing values underlying free speech. Thus, the New York Times privilege can be viewed as a cost extracted from personal reputation, and reputation should be given considerable protection.

Seen from another perspective, however, First Amendment rights are paramount. Under this perspective, state defamation laws are burdens to free speech that must be strictly limited. Thus, New York Times and its progeny delineate, in relief, the circumstances under which defamation laws may be tolerated.

The operative compromise between these competing interests is therefore affected by an interpreting court's starting perspective. If a court desires to follow the guidance of New York Times and its progeny, however, it must adopt the compromise as laid out by the Supreme Court. The Court has worked out its compromise based on a recognition of the value of reputation and a particular understanding of the First Amendment.

The Supreme Court has held that the First Amendment protects true speech, and protects false speech inasmuch as it is an unavoidable attendant to public debate. Although there is no social value in the

Co. v. Butts, 388 U.S. 130, 149 (1975) (Harlan, J.), here, the issue is the interest of the public in public speech as a necessary component of democratic governance. See infra note 33 and accompanying text.


12. In general, defamation laws are not evaluated as state actions that must pass a "strict scrutiny" analysis when the defamatory statement is political in nature. See generally Buckley v. Valeo, 422 U.S. 1 (1976). However, New York Times specifically opens that door by holding that the constitutional limitations at issue apply to the states through the Fourteenth Amendment. 376 U.S. at 276-77. For a case attempting a strict scrutiny evaluation, see Gaylord Entertainment Co. v. Thompson, 958 P.2d 128 (Okla. 1998).


14. New York Times, 376 U.S. at 271. The rhetoric throughout New York Times and its progeny on the constitutional protection of false speech is conflicting. For instance, in New York Times, the court states that speech is not stripped of constitutional protection simply because it is false. Id. at 271, 273. On the other hand, Gertz begins its analysis by reminding us that there is no constitutional value in false statements of fact. 418 U.S. at 340. These seemingly opposing
content of false speech, liability for false speech is not without a social cost. Fear of such liability may prevent some persons from entering the arena of public debate and thereby limit the overall quantity of speech. Expressing concern over this potential for self-censorship, the Supreme Court has provided constitutional protections for false speech. The protections create "breathing space" for important speech and promote unfettered public debate. The protection of false speech is not considered too costly for competing interests, because false speech is redressable within the field of public debate: we can redress false speech with more speech.

However, this evaluation is no longer wholly appropriate when false speech injures reputation, as is the nature of defamation. An individual’s reputation interest is recognized as uniquely valuable in our society. The interest requires special protection, because additional speech is often insufficient to redress injury to reputation enter state defamation laws.

However, as even defamatory speech is valuable for providing breathing space, defamatory speech also receives a measure of constitutional protection under the New York Times conditional privilege. The appropriate formulation of the privilege, as a compromise between state defamation laws and First Amendment concerns, will depend on a specific evaluation: under what conditions is the social value of defamatory speech, as a provider of breathing space, greater than the social value of reputation? Or, more precisely, when is pro-

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15. "Neither the intentional lie nor the careless error materially advances society’s interest in . . . debate on public issues." Gertz, 418 U.S. at 340.
18. Id. at 272 (quoting NAACP v. Button, 371 U.S. 415, 433 (1962)).
21. "[T]he individual’s right to the protection of his own good name ‘reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.’" Gertz, 418 U.S. at 341, (citing Rosenblatt v. Baer, 373 U.S. 75, 92 (1966) (Stewart, J., concurring)).
22. Gertz, 418 U.S. at 344 n.9.
23. See id. at 340-41
tection against self-censorship more important than protection of reputational interest? Since *New York Times*, the Supreme Court has expressed concern with self-censorship primarily in regard to certain types of speech.

Speech type$^{24}$ may be viewed along a continuum: on one end, core political speech; at the other end, speech on private matters.$^{25}$ Between these ends is all remaining speech. Where exactly on this continuum the public/private distinction lies probably requires permanent theoretical exploration.$^{26}$ Precise categorization of specific speech is equally difficult. The following evaluation, therefore, merely serves to provide rough divisions within the speech continuum.

Near the core political speech end of the continuum is a type of speech this Comment will refer to as “public issue” speech. Generally, public issue speech concerns social and political issues that a self-governed people must include in their discussions, such as civil rights, crime, or poverty.$^{27}$

Further down the continuum from political speech and public issue speech is what this Comment will refer to as “public interest” speech or “speech on issues of public interest.”$^{28}$ Public interest

$^{24}$ Terminology, of course, varies. “Type” in this Comment refers to the matter at issue, such as political speech or private speech. “Content” in this Comment will refer to whether speech is defamatory, or obscene, or truthful, for instance.

$^{25}$ There are numerous articles that discuss distinctions of different types of speech. See, e.g., Marc A. Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657 (1987) (dividing the spectrum of speech into speech that relates to self governance and speech that does not); R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27 (1987) (dividing the spectrum of speech into speech on “matters of public interest and concern” (MOPIC) and speech which is non-MOPIC); Bruce J. Borrus, *Defamation and the First Amendment: Protecting Speech on Public Issues*, 56 WASH. L. REV. 75 (1980) (dividing speech into core and peripheral constitutionally important speech). See also Richard Barkley, *The Evolution of a Public Issue: New York Times Through Greenmoss*, 57 U. COLO. L. REV. 773 (1986) (following the idea of a public/private distinction in speech through Supreme Court defamation cases); See also infra note 28.


$^{27}$ This concept, speech relating to self governance, could be thought of as “quasi” political speech. The concept has been recognized by scholars in various forms described by a variety of terms. See supra note 26. See also Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990) (terming “speech about matters that ought to be of interest to those who practice the art of democratic self governance” as the “normative conception of public concern”).

$^{28}$ Like speech of importance to self governance, speech of public interest as a touchstone for constitutional protection has been widely discussed. See supra note 26. It achieved widespread use in case law after its appearance in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).
speech covers a broad range of nonprivate speech, whether viewed as the equivalent to "public and general interest" from Warren and Brandeis' famous article on privacy \(^\text{29}\) or whether a more modern conception. \(^\text{30}\) The exact First Amendment protection available for speech at any given point along the continuum varies. However, for protection through the *New York Times* conditional privilege, the Supreme Court has clearly been aiming at a certain range of speech. The Court has consistently \(^\text{31}\) expressed that it was only for political speech and speech on public issues that self-censorship was a concern. \(^\text{32}\) Only in this context does the need to promote true speech supersede legitimate state interests in protecting reputation, requiring constitutional protection of falsehoods through use of the actual malice standard. Without this context, courts cannot properly apply the *New York Times* conditional privilege to public plaintiffs.

Of course, it is just as impossible (and judicially inadvisable) for courts to attempt to determine where the public issue/public interest transformation occurs as it is for courts to determine the line between private speech and public speech generally. \(^\text{33}\) The Supreme Court,

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\(^\text{29. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890). The major theme of the article is that legal precedent, public policy, and human need all support a "right to privacy." However, the authors argued that this right would not extend to matters of public or general interest. See infra note 51 and accompanying text.}\)

\(^\text{30. There has been a significant lack of clarity between the terms "public or general concern," "public interest," "public issues," and "public concern." See supra note 26 and accompanying text. Thus, pointing to the affirmative use of any of these terms within a case proves little. However, from its use in case law it is clear that the term "public interest" is generally interpreted to mean all speech within the public realm. See Rosenbloom, 403 U.S. at 43-44. It is probably broader than "public concern." See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). See generally Rodney A. Smolla, Dun and Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation, 75 GEO. L.J. 1519, 1541 (1987). If "public interest" is interpreted to mean anything the public is interested in or newsworthy, it is certainly broader than the Warren and Brandeis' term "public or general concern." See Warren & Brandeis, supra note 29, and infra note 51.}\)

\(^\text{31. But see Franklin, supra note 26, at 1660.}\)

\(^\text{32. This is the particular balance for clearly defamatory speech. Gertz v. Welch, 418 U.S. 323, 348 (1973) announcing its conclusion obtains where "the substance of the defamatory statement makes substantial danger to reputation apparent" (citation omitted)). See also, Schauer, supra note 6 (appeal for recognition of this concept); Franklin, supra note 25, at 1663 (recognition of this concept).}\)

\(^\text{33. As noted, there is significant diversity of opinion in how to differentiate between speech types. See Franklin, supra note 25, at 1678-79 ("no plausible line in this area is self defining"); id. at 1668 (noting that speakers are better able to recognize a content-related line than the a status-related line); Post, supra note 27, at 671 (what should constitute public discourse is appropriately defined by the actual public discourse itself); Gertz, 418 U.S. at 343 ("[A]d hoc resolution of the competing interests at stake in each case is not feasible . . .").}\)
however, has not required states to do so. Rather, the Court has chosen the status approach as a method of serving its views of the competing values at stake.34

By employing the status approach, the Court does not limit its protection of speech regarding public persons to core political speech or even to public issue speech. Yet, not all speech of public interest is covered under this approach. Rather, the shape of constitutional protection follows the contours of status.35 Courts should still consider the type of speech of concern to the Supreme Court when they define public plaintiffs. This consideration provides a context by which to fill in and help define any areas of the status approach that are unclear.36

III. DETERMINING THE SUPREME COURT'S AREA OF CONCERN

In New York Times, an elected commissioner brought a libel action against the publishers of a defamatory political advertisement that appeared to criticize his performance in office.37 The Court created the now-famous conditional privilege for such defamatory publications regarding the official conduct of public officials. The Court implied that the privilege serves to protect speech that criticizes government. Thus, the decision in New York Times can be interpreted as being concerned only with core political speech.38

This objective is mirrored by the subsequent decision of Rosenblatt v. Baer.39 In Rosenblatt, the Court remanded the suit of a county employee to the trial court for a determination of the plaintiff's status.40 The Court found the employee might meet its definition of public official because of the light in which the plaintiff painted his

34. See Gertz, 418 U.S. at 346. There is considerable academic criticism regarding this choice. See David J. Branson & Sharon A. Sprague, The Public Figure—Private Person Dichotomy: A Flight from First Amendment Reality, 90 DICK. L. REV. 627 (1986); David Finkelson, The Status/Conduct Continuum: Injecting Rhyme and Reason Into Contemporary Public Official Defamation Doctrine, 84 VA. L. REV. 871, (1998); Franklin, supra note 25.

35. The Court recognizes the differential outcomes likely under the status approach. Gertz, 418 U.S. at 344. However, status provides a finer, more discriminating instrument of regulation and gives better protection to individual reputations. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 68, 69 (1971), (Harlan, J., dissenting).

36. Thus, this Comment advocates a concurrent application of sorts. For a similar viewpoint, see Franklin, supra note 25 (advocating the use of content as the primary touchstone for differential protections for speech in libel context and proposing modifications to the status approach to accommodate content.)


38. Curtis Publishing Co. v. Butts, 388 U.S. 130, 153 (1975); Finkelson, supra note 34, at 875; Barkley, supra note 25, at 775-77.


40. Id. at 88.
claim. In presenting his theory of recovery, the employee represented himself as holding a publicly prominent position of importance within the government, and he demonstrated that he was publicly considered to be responsible for the successes and failures of a county-owned and run recreation area.

However, the Rosenblatt opinion is very conservative in its use of language, focusing its analysis of public officials on core political speech aspects: "[D]ebate on public issues may include... sharp attacks on government and public officials"; "Criticism of government is at the very center of... free discussion"; "Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized."

A conservative reading of Baer is consistent with the origination of the New York Times privilege: as the constitutional protection superseding state defamation laws was newly set out, it would not be unusual if the privilege was intended to be interpreted as a minimal intrusion into the field. Even the breadth of "official conduct," anything that might touch on an official's fitness for office, is congruent with a narrow privilege when applied to speech critical of government.

However, the language of New York Times itself supports an extension of its protection to a somewhat broader range of speech. In discussing the fundamental issues involved, the New York Times Court referred to "debate on public issues" and "freedom of expression upon public questions." This language supports a moderate extension, indicating that constitutional protection is necessary for a

41. Id. at 87.
42. Id. at 77.
43. Id. at 85 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
44. Rosenblatt, 383 U.S. at 85.
45. See Garrison v. Louisiana, 379 U.S. 64 (1964). Garrison noted that it would be unfair to allow public officials a broader range of commentary privilege than the private persons they serve. Id. at 74. The Court in New York Times intended a relatively broad interpretation of "official conduct," because it analogized its rule to the common law privilege of speech by public officials, which extends to statements made even within the "outer perimeter" in a public official's line of duty. Id. at 282.
46. See Franklin, supra note 25, at 1661 (arguing that speech critical of government has a broad scope).
47. 376 U.S. at 270.
48. Id. at 269. Despite the incidence of this broader language, (e.g., "unfettered interchange of ideas for bringing about of political and social changes desired by the people," id. at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957))); "to speak one's mind... on all public institutions," id. (quoting Bridges v. California, 314 U.S. 252, 270 (1941)); "debate on public issues... may include attacks on government officials," id. at 270; "one of the major public issues of our time" id. at 271), this Comment posits that only a moderate increase in scope of the New York Times conditional privilege is appropriate.
broader range of speech. While not core political speech, this type of speech is still very important and public in nature. It certainly resembles “public issue” speech.

For a time, however, the Court supported an expansive application of the privilege to cases involving public interest speech with the holding in Rosenbloom v. Metromedia. With an insightful critique on the problems of categorizing public figures particularly, the Court in Rosenbloom rejected the status approach in favor of protecting all speech of “general or public concern.” The court acknowledged that the term “general or public concern” came from the Warren and Brandeis article, but they also used the term “public interest” throughout the opinion. Therefore, it is unclear exactly what speech the Court believed would be included under this approach. Notwithstanding any inconsistencies in approach, the Rosenbloom Court espoused strong First Amendment protection for speech reaching further down the continuum than speech on public issues.

This expanded protection of speech was rejected in Gertz v. Welch. In Gertz, a public official had been convicted of murder, and

50. Id. The Rosenbloom expansion was probably predicated on a combination of factors: First, the belief that speech in the realm of public interest should receive constitutional protection, as speech of public interest was a common thread in earlier cases, and second, the expanded and poorly delineated application of New York Times to include public figures. See Curtis Publishing Co. v. Butts, 388 U.S. 130 (1975). The inclusion of public figures under the New York Times conditional privilege greatly increased the amount of speech ultimately covered; thus, the Rosenbloom expansion was not a great departure from contemporary practical application of New York Times.
51. Warren and Brandeis, supra note 29. Ironically, the term as used by Warren and Brandeis more closely circumscribes speech covered by the status approach rather than speech identified by its location on a continuum. They offer a definition of what is not of public or general concern, as a method of describing what is of public concern:
In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity . . . Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.

Warren & Brandeis, supra note 29, at 216.
52. “[T]he First Amendment extends to myriad matters of public interest.” Rosenbloom, 403 U.S. at 42; “If a matter is a subject of public or general interest . . . the public’s primary interest is in the event . . . .” Id. at 43. This usage lends the Rosenbloom decision a breadth that appears to extend far down the speech continuum, into “public interest” speech.
53. It is unclear whether the Rosenbloom Court meant to protect anything the press decided was “newsworthy” or of subjective interest to the public, or whether they intended to stop somewhere short of that line. However, public interest has been interpreted by lower courts very broadly. See supra note 29.
the plaintiff, Gertz, was an attorney who represented the official in a subsequent civil action. A magazine article published during the representation labeled Gertz as a communist. Upon review of the resulting libel suit, the appellate court accepted that the New York Times conditional privilege applied to any public issue without regard to the plaintiff's status.55

Citing inadequate protection of both interests involved, the Supreme Court rejected both the speech-type approach56 and the idea that speech of public interest was important enough to obtain the specific constitutional protection provided by New York Times.57

Gertz, although rejecting a speech-type approach, nonetheless supports the view that the Court is looking to protect public issue speech. By rejecting protection of public interest speech, requiring a status approach, and defining public figures in a narrow fashion,58 the Gertz Court did not display concern with protecting all, or even most, speech of public interest. Rather, it showed concern with protecting speech that is likely to be covered under its limited definition of public figures.

Gertz espoused a limited definition of public figures.59 A limited definition of public figures covers less territory in the realm of public speech and focuses on protection of speech toward the political end of the continuum. More recent public figure cases have also come down in clear support of a limited definition of public figures, thus, demonstrating a concern for speech on public issues, not for speech of public interest.60

For example, in Times v. Firestone, the Court held that the wife of a wealthy businessman was not a public figure, because the details of her divorce proceedings were not the type of event appropriately protected by the actual malice standard.61 "To equate a person's involvement in an event of public interest with involvement in public affairs would be to reinstate the Rosenbloom expansion."62

55. See id.
56. Id. at 346-48.
57. Times v. Firestone, 424 U.S. 448, 456 (1976) (citing Gertz, 418 U.S. at 344-46). Firestone interpreted Gertz as rejecting not only the speech-type approach, but also in rejecting support for constitutional protection for defamatory falsehoods in the area of "public or general interest." Id. at 454.
58. See Gertz, 418 U.S. 323.
59. See id.
61. 424 U.S. at 455-56.
62. Id. at 454. The extension of the New York Times conditional privilege to public figures, on the surface, appears to support an application of the actual malice standard to defamation cases involving even "public interest" speech. However, a careful examination of the cases refutes such a conclusion. See, e.g., Curtis Publishing Co. v. Butts, 388 U.S. 130 (1975). See
In Wolston v. Reader's Digest Association, where the plaintiff was a relative of and agreed to testify at the trial of admitted Russian spies, the Court stated the argument differently: private persons do not become public persons just because they are involved, however self-determinedly, in an issue of public interest.63

The public figure cases, then, illustrate that the actual malice standard is not intended to be applied to protect speech on issues of public interest. This approach is consistent with recent Supreme Court cases on defamation issues, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,64 and Philadelphia Newspapers, Inc., v. Hepps,65 which deal with First Amendment protections required for speech of "public concern." These decisions held that when allegedly defamatory speech is of public concern, the plaintiff, public or private, must bear the burden of proving falsity and may only recover nonpunitive damages.66

As might be expected, it is unclear exactly what the Court means by "public concern."67 If the term does not extend to public interest speech, then this test also supports the argument that the Court is more concerned with speech closer to the political end of the spectrum. If the term is meant to equate to public interest speech, then these cases illustrate that there are methods of protecting public interest speech other than the demanding actual malice standard of the New York Times conditional privilege, thereby relieving courts of the need to stretch the definitions of public persons to provide protection for such speech.

The foregoing analysis demonstrates that the Supreme Court has consistently espoused concern for constitutional protection of defamatory speech only in the context of speech on public issues and for political speech. Stepping back from case analysis, this concern also reflects common sense. Under what conditions do we as a society care whether a person refrains from publishing obviously defamatory material unless certain of its truth?68 The answer is where silence is

infra note 132 and accompanying text.
63. Wolston v. Reader’s Digest Association, Inc., 443 U.S. 157, 167 (1979). The Court in Wolston assumes arguendo that propriety of the actions of law enforcement officials in investigating and prosecuting suspected Soviet agents is a "public controversy." Law enforcement is probably the sort of issue for debate for a self-governed people. Further, the Court indicated that there must be controversy or debate, not just an "issue."
66. See Greenmoss, 472 U.S. at 749 and Hepps, 475 U.S. at 767.
67. See Barkley, supra note 25, for an evaluation of the meaning of this term.
68. Note, however, that Gertz established negligence as a minimum fault standard for private persons. 418 U.S. at 347. For a discussion on the effect of a negligence standard on the
worse than the injury—where our democratic existence needs issues addressed regularly and vigorously. Do we care if a gossip columnist hesitates to publish celebrity dirt rather than risk liability if the content of the publication is false? Are the morals of a minor government employee a threat to democracy such that a speaker needs the freedom to publish without taking reasonable steps to be accurate?

Such are the freedoms allowed through broad application of the actual malice standard. Therefore, when defining public officials and public figures, courts must keep in mind the types of speech intended to be protected and why. If these terms are defined too broadly, defamatory falsehoods receive an unjustified quantum of protection.

IV. DEFINING PUBLIC OFFICIALS

State courts have had difficulty articulating and applying the Supreme Court’s definition of public officials. The New York Times decision only made clear that the term “public official” included elected officials, but not all public employees. The Court left the task of formulating a more specific definition for later cases, providing its best definition of public official in Rosenblatt.

The Rosenblatt decision appears to formulate two separate definitions of public officials, and many courts have interpreted the decision that way. First, the Court stated that the designation “public official,” includes, “at the very least . . . government employees who have or appear to the public to have, substantial responsibility for, or control over the conduct of governmental affairs.” Second, the Court offered the following:

Where 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.

The most accurate interpretation of this passage, based on both context and on an understanding of the type of defamatory speech the

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73. Id. at 86.
Court seeks to protect, is that the second statement is merely an explanation justifying constitutional encroachment upon defamation laws.\textsuperscript{74} It means only that in certain circumstances, when a person occupies a position in government that is of high apparent importance, or, as the Court stated earlier in the opinion, when a person has or appears to have substantial responsibility for or control over some aspect of government, society's interest\textsuperscript{75} in free speech is greater than its interest in redressing that person's injured reputation.

The definition of public official from \textit{Rosenblatt}, then, is based on control over government, responsibility for governmental decisions, or a position otherwise of importance in government. These factors may be an actuality or may only appear to be the case.\textsuperscript{76} Most importantly, the position must have a relationship to government such that

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\textsuperscript{74} \textit{But see} Elder, supra note 71, at 666 (indicating that in order to avoid problems applying \textit{Rosenblatt}, the second "alternative" definition should not be used "offhandedly"). Elder appears to equate the term "interest" in the second alternative with "curiosity" rather than as a stakeholder interest. Thus, Elder focuses significant attention on footnote 13 of the \textit{Rosenblatt} opinion, which says:

It is suggested that this test might apply to a night watchman accused of stealing state secrets. But a conclusion that the \textit{New York Times} malice standards apply could not be reached merely because a statement defamatory of some person in government catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. 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. \textit{Rosenblatt}, 383 U.S. at 86 n.13. Contrary to the view in Elder's article, the author of this Comment argues that this footnote does not refer to the "second definition" offered in \textit{Rosenblatt}. Rather it is only a response to Justice Douglas' concurrence. Justice Douglas uses the night watchman scenario to illustrate that it is important to protect public issues without reference to position in government of persons involved in that issue. In other words, Justice Douglas was advocating the \textit{Rosenbloom} speech-type approach in this pre-\textit{Rosenbloom} dissent. This is not surprising, as Justice Douglas was a regular proponent of expansion of First Amendment protection to all speech on issues of public interest. The footnote can best be viewed in two parts. First, the footnote says that to use a speech-type approach extending to all issues of public interest would not adequately protect reputation. Secondly, beginning with "the employee's position," the footnote is restating \textit{for the third time} what kind of position will be considered as requiring application of the \textit{New York Times} actual malice standard: somebody so important that she would be a valid target of public discussion entirely apart from an issue of public interest. The phrasing of the last sentence of the footnote also puts to rest the fear that the press could generate an issue of public interest, and thus generate a "public official" out of a citizen. This last sentence is merely a bonus. The primary function of this footnote is not to limit any of the two other statements regarding public officials, but to rebut the concurrence's suggestion that protection of all issues of public interest is appropriate. The footnote misrepresents Justice Douglas' dissent, which is actually suggesting that the majority's test would \textit{not} apply to the night watchman, but this does not change the function of the footnote as a response to Justice Douglas' concerns.

\textsuperscript{75} The term "interest" in the first statement offered by the \textit{Rosenblatt} Court refers to the public's stake in free speech. That is also the most likely interpretation for the term "interest" in the second statement offered by the \textit{Rosenblatt} Court. \textit{See supra} note 74.

\textsuperscript{76} Appearance to the public of control and responsibility was likely the only reason the county employee in \textit{Rosenblatt} could be considered a public official.
\end{footnotesize}
society has an interest in free speech about the position holder that is more important than reputational interest for the New York Times conditional privilege to properly apply.

In light of the Court's expressed concern discussed above, the definition that emerges from Rosenblatt is conceptually proper. However, various misinterpretations of the second statement regarding public officials in the Rosenblatt decision have caused significant state court confusion. The second statement has been interpreted as a limitation and has been applied in conjunction with the first statement to create a definition. While this interpretation is not accurate, infusing a strong focus on power and influence over government (or protection of only core political speech and public issues) into the interpretation renders its inaccuracy harmless.

A more significant problem occurs when courts treat this second statement as a stand-alone definition, allowing them to hold that if there is public interest in a position, it falls within the definition of a public official. Only if read out of context can the Rosenblatt passage support this misinterpretation. Such a misreading renders the decision internally inconsistent, because it functions to make public interest the determinant of public official status. The Rosenblatt court, however, rejects that very concept in footnote thirteen of the opinion. Moreover, courts choosing to follow this misinterpretation must often attempt to reconcile a government position that has no responsibility or control over government functioning with a valid argument that there is a high level of public interest in the position.

In addition, the misinterpretation functions to make speech of interest to the public the ultimate reason why New York Times is ap-

77. See generally Elder, supra note 74, for an evaluation of the merits of the Rosenblatt definition of public official. While the author of this Comment disagrees with Elder on the exact mechanisms behind lower court confusion, both this Comment and the Elder article conclude that misinterpretations of the Rosenblatt decision are primarily responsible for state court problems with the definition of public official.

78. See generally id.

79. See, e.g., Clawson v. Longview Publ'g Co., 91 Wash. 2d 408, 598 P.2d 1223 (1979) (Roselini, J., dissenting).

80. While the statement seems to be a limitation, its limitation is internal; it does not relate back to the first statement.


83. See supra note 74 and accompanying text.

84. Id.

85. See, e.g., Kelley v. Bonney, 606 A.2d 693 (1992); see also Hutchinson v. Proxmire, 443 U.S. 111 (1979) for how the Court has had to deal with the problems that come from the use of "public interest" as a defining mechanism.
applied. This would be indistinguishable from a speech type approach that protects all speech of public interest. This approach was expressly rejected in *Gertz v. Welch*. 86

The *Gertz* decision did several important things. It redirected inquiry of application of the *New York Times* conditional privilege to the status of the defamed individual, 87 it reviewed the line of cases following *New York Times*; and it reiterated the importance of the reputation interest and the validity of the *New York Times* privilege's balance between the competing interests. 88 The *Gertz* Court did not, however, offer a definition of "public official." 89

The *Gertz* court set out two factors, access to media and acceptance of risk of public scrutiny, as justifications for treating public and private plaintiffs differently. 90 Unfortunately, many courts use these justifications to define public persons. 91 This approach results from a misreading of the text. 92 It is a significant misuse of *Gertz* and results in an entirely inappropriate definition of public official. 93

Because so many courts have misread and misused *Gertz* in this fashion, it is necessary to demonstrate why this reading of the text is erroneous. First, *Gertz* clearly stated that these factors will not apply to all public persons. 94 Therefore, use of the factors produces a test in contradiction of the express language of *Gertz*, as well as one subject to the vagaries of interpretation. Second, *Gertz* recognized that "access to the media" does not guarantee an adequate remedy for a defamed plaintiff. Even with access to a rebuttal forum, rebuttals usually do not repair the damage done. 95 Access to media may be indicative of a general attribute of public persons that justifies less protection for their reputations, but it is an uncertain test factor at best. Third, "accepting the risk of public scrutiny" is a meaningless

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87. Id. at 345-46.
88. Id. at 341.
89. See id. at 344.
90. Id. at 344-45.
91. See, e.g., Clawson v. Longview Publ'g Co., 91 Wash. 2d 408, 598 P.2d 1223 (1979). Clawson is unusual, however, in that it uses the factors as a definition of public officials; they are more commonly used to define public figures.
92. See id. "[W]e have no difficulty in distinguishing among defamation plaintiffs." *Gertz*, 418 U.S. at 344. In the context of the opinion, this statement refers to the Court's forthcoming explanation for why it will treat public and private persons differently. The passage does not mean that the Court is laying out a definition of public persons. See also Marc A. Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657, 1663 (1987) (the factors are justifications for focusing on status of the plaintiff, rather than content of speech).
93. See infra note 96 and accompanying text.
95. Id. at 344 n.9.
standard, unless there is, or is likely to be, public scrutiny. If taken as a defining characteristic of public plaintiffs, "acceptance of risk" would cause public scrutiny—public interest—to trigger application of the actual malice standard. This result would be identical to the Rosenbloom framework, an application of the New York Times privilege to any issue of public interest regardless of the status of the individual defamed. That concept is exactly what the Gertz decision rejects. Therefore, Rosenblatt is a better reflection of the Supreme Court's intent regarding public official status. The factors laid out in Gertz may be a useful supplement to Rosenblatt, but they should not stand alone. 96

V. WASHINGTON STATE: DEFINING PUBLIC OFFICIALS

The Washington Supreme Court, in Clawson v. Longview, created one of the most unique tests for determining whether the New York Times conditional privilege should apply to a particular plaintiff. 97 The Clawson court created its test by elevating the Gertz factors into its criteria for the determination of the plaintiff's status. 98 Then, the court modified final application of the actual malice standard based on the subject matter of the defamation. 99

The libel plaintiff in Clawson was a nonelected public sector employee, who was an administrator of a county motor pool. The Clawson court determined the plaintiff's public official status by placing primary emphasis on assumption of risk of public scrutiny. 100 Citing Gertz, the Clawson court asserted that even nonelected public officials and public sector employees must expect a degree of public interest in the performance of their duties, and thus that they have accepted the risk of being involved in public speech and are properly classified as public officials. 101 This broad definition potentially includes any public employee. 102

96. See Danny R. Veilleux, Annotation, Who Is a "Public Official" for Purposes of Defamation Action, 44 A.L.R.5th 193 (1996) (indicating that access to media is a factor that may bolster an argument of public official status). A court should be careful not to place too much emphasis on access to media and acceptance of risk, however. See, e.g., Kassel v. Gannett Co., Inc., 875 F.2d 935 (1989) (using access to media and accepting the risk of public scrutiny as the second and third factors in determining a plaintiff's status).


98. Clawson, 91 Wash. 2d at 414, 598 P.2d at 1226.

99. Id.

100. Id. at 416, 598 P.2d at 1227.

101. Id.

102. While the Clawson court implied that not all public employees are public officials, id. at 417, 598 P.2d at 1227, this is not set forth clearly, and the only published Washington case interpreting Clawson does not pick up on that important restriction. See Himango v. Prime
Recognizing the sweep of that definition, the court then identified two "pertinent variables" to determine how much of a public official's life should be subject to public scrutiny: (1) the importance of the position held, and (2) the nexus between that position and the defamatory statements. Thus, publications regarding the private life of a high ranking government employee are likely to be considered to have a "nexus" with his public official status. Conversely, "[w]hen the individual is less powerful...exposure is limited to matters more closely connected to actual job performance."104

Therefore, the court declared that the administrator of a county motor pool with unsupervised discretion over expenditures of county funds could be considered a "public official."105 Although the position was "near the bottom" of the public official category, the nexus between the public official's duties and the content of the defamatory statements (allegations of improper use of county resources) "could not be closer, as they related directly to the respondent's job performance."106 The court justified its conclusion by pronouncing it consistent with "a substantial body of law which has developed since New York Times," and citing a list of cases where persons in nonelected government positions have been considered public officials in other jurisdictions.107

Although the outcome in Clawson is congruent with the outcome of other cases, those cases are often based on faulty analyses of Supreme Court doctrine. Many of the cases cited by the Clawson court rely on a misreading of Rosenblatt, focusing on the "public interest" aspect of its second definition.108 This misapplication leads to the same type of conclusion reached by the Clawson court, but equally erroneous.109

Time Broad. Inc., 37 Wash. App. 259, 262, 680 P.2d 432, 436 (1984), rev. denied, 102 Wash. 2d 1004 (1984). Therefore, a practical application of Washington law could mean that all public employees will have to prove actual malice, as long as the defamation relates to their job.

103. Clawson, 91 Wash. 2d at 417, 598 P.2d at 1227-28. See also Finkelson, supra note 34. Mr. Finkelson applauds this step of the Clawson test, but the author of this Comment disagrees with that praise. Both Mr. Finkelson and the Clawson court improperly focus on access to media and acceptance of risk as defining factors for public persons. See supra notes 92, 96 and accompanying text.


105. Clawson, 91 Wash. 2d at 416, 598 P.2d at 1227.

106. Id. at 417, 598 P.2d at 1227-28.

107. Id. at 418, 598 P.2d at 1228.

108. See supra note 74 and accompanying text. Elder expresses a different view on how Rosenblatt has been misapplied.

109. This is beginning to be recognized. One of the cases cited in Clawson, Basarich v. Rodeghero, 321 N.E.2d 739 (Ill. App. Ct. 1974), has been rejected by subsequent rulings in the same jurisdiction because the decision "confused and collapsed" the "public figure" and "public official" categories. True v. Ladner, 513 A.2d 257, 264 n.8 (Me. 1986). The Clawson court also
Washington recognizes that United States Supreme Court cases are controlling, yet Washington's test is wholly unlike that set forth in New York Times and its progeny. Through its misinterpretation of Gertz, Washington has created (a) a broad definition of public official based upon the concept of assumed risk, which extends to nonelected public sector employees, and (b) an application of the New York Times privilege that is limited by the content of the defamatory publication. In contrast, New York Times and its progeny delineate (a) a narrow definition of public official based on power and influence, and (b) an expanded application of the New York Times actual malice standard to all conduct which might bear upon a public official's fitness for office.

Washington law is thus likely to have a very different outcome than that intended by the United States Supreme Court. New York Times and Gertz intended to honor both the state interest in protecting citizens against defamation and the constitutional interests in free speech. The actual malice standard is not intended to be applied to any unwary citizen who goes in for public service. Washington law potentially applies the New York Times conditional privilege for speech on any public servant—doing so when the plaintiff's position is likely to attract attention or to warrant scrutiny by members of the public, that is, when there is "public interest" in the position. As discussed above, this is the Rosenbloom holding, rejected by Gertz.

Additionally, Washington law functions to provide less protection for an individual's professional reputation than for his private one. Nowhere in New York Times or its progeny is it stated or implied that professional reputations are less deserving of protection than private ones. Rather, New York Times indicated that when a plaintiff is a "public official," the official's personal and professional reputation will receive the same lower level of protection.

The Washington Supreme Court should rethink its definition of "public official" in order to align itself with the United States Supreme Court. Its definition of public official should be appropriately narrow, in accordance with the importance of protecting reputation and the need to protect speech that is close to the political end of the contin-

cites Reaves v. Foster, 200 So. 2d. Declining to follow Reaves, the court in Ellerbee v. Mills, 422 S.E.2d 539 (Ga. 1992), noted that school principals are not public officials because implicit in the reasoning of New York Times was the concept that people should be free to criticize those who govern them. The court stated that principals do not have such a relationship with government. Id. at 539-40. See also Elder, supra note 74 at 635, 668. Elder sharply criticizes Clawson and other cases that found lower echelon public employees to be public officials.

110. Clawson, 91 Wash. 2d at 413-14.
111. Id. at 421, (Rosellini, J., dissenting); Elder, supra note 74, at 658.
uum. A better test for public officials would use *Rosenblatt* as its backbone and fill in gaps using the *Gertz* factors. However, any test should acknowledge the need to find a balance closer to the political end of the spectrum and scrupulously refrain from using public interest as a triggering event for public official status.

VI. DEFINING PUBLIC FIGURES

The law regarding public figures under the *New York Times* conditional privilege is subject to even more definitional problems than public officials. A wide variety of views have been expressed on the definition and all of its aspects. However, most of the views and academic evaluations become moot if the purpose of the actual malice conditional privilege is considered.

*New York Times* was meant to establish a balance between two competing interests. It evaluates when self-censorship of speech is so costly to our society that we will sacrifice protection of personal reputation in order to prevent it. The balance struck protects speech only when it is political in nature or concerns issues that lay close to political speech on the continuum. It is no different when the plaintiff is a public figure than when he is a public official. Public figures should be defined so that protection is focused on that range of speech.

In public figures cases, other problematic applications of the actual malice standard may occur because of the parallel roots of common law. At common law, the lack of a right to privacy for public figures was created by the public’s interest. Persons of fame or notoriety became and were legitimate targets of public interest. These persons were deemed to have lost their right to privacy because they had assumed the risk of publicity, because their affairs had become part of the public domain, and the press had a privilege to report on issues of public interest.

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113. See Elder, supra note 74, demonstrating another good tool for applying the *New York Times* actual malice standard.


118. *Id.*
New York Times and its progeny are not incongruent with these common law ideas. In as much as they relate to speech or are general indicators of public figures, these common law ideas have merit. However, a person's interests in privacy and reputation are not identical.\textsuperscript{119} While a famous person may have lost his or her right to privacy by having a famous life, that person need not substantially abdicate his interest in his good name as well. Arguably, the good reputations of some famous persons, i.e., those who make a living off of their reputations, are in need of greater protection.\textsuperscript{120}

Public figures are correctly ascribed a separate and different definition under New York Times and its progeny than at common law.\textsuperscript{121} Just as when defining public official, when defining public figures, it is important to keep in mind that the actual malice standard is intended to protect speech that is close to the political speech end of the continuum.

There have been two phases in the development of the defamation definition of public figures. The first phase is represented by Curtis v. Butts and its companion case, Walker v. Associated Press. Curtis v. Butts involved a published accusation of a conspiracy to "fix" a university football game. The plaintiff, Butts, was a privately employed athletic director for one of the teams. He was "well-known" and respected in coaching ranks, and he was negotiating to secure a position with a professional team when the publication occurred.\textsuperscript{122} The publication in Walker v. Associated Press stated that the plaintiff, Walker, had encouraged rioters and participated in resisting federal marshals during a campus riot touched off by a desegregation order.\textsuperscript{123} Walker had made a number of anti-desegregation statements that had been widely published, gaining a following known as "the Friends of Walker." He could "fairly be deemed a man of some political prominence."\textsuperscript{124}

Both plaintiffs were found to be public figures in Justice Harlan's opinion, writing for the Court.\textsuperscript{125} However, the Warren concurrence commands the majority. The two justices seemed to have different concepts of public figures in mind.

\textsuperscript{120} This is the strongest argument against the prevailing definitions for "general" public figures. See Gertz v. Welch, 418 U.S. 323 (1974).
\textsuperscript{122} Curtis Publishing Co., 388 U.S. at 135-36.
\textsuperscript{123} Id. at 140.
\textsuperscript{124} Id. at 140.
\textsuperscript{125} Id. at 154.
Justice Harlan summarily classifies the plaintiffs as public figures, because he uses a definition of public figures from common law.\textsuperscript{126} However, the Harlan opinion sets out a fault standard less stringent than actual malice for speech about these public figures.\textsuperscript{127} The Warren concurrence claims to be in disagreement only with this new fault standard, and it does not specifically object to classifying the plaintiffs as public figures.\textsuperscript{128} However, the language Justice Warren uses to express disagreement with the fault standard conflicts with a broad definition of public figures.

The Warren opinion states that it is not reasonable to differentiate between public figures and public officials vis-à-vis a fault standard, because public figures are increasingly part of and have influence over the resolution of public issues. Justice Warren's opinion seems to be premised on a vision of a public figure that looks very much like a public official.\textsuperscript{129} The language\textsuperscript{130} indicates an understanding that the type of speech at issue for public figure defamation cases is that of political speech or public issue speech, not public interest speech.\textsuperscript{131} As the Warren concurrence commands the majority, the Harlan opinion and its common law understanding of public figures carries no precedential value.\textsuperscript{132} Further, such an understanding of public figures is overturned by \textit{Gertz},\textsuperscript{133} the second defining phase of public figures.

\textsuperscript{126} Id. at 154.
\textsuperscript{127} Justice Harlan states that constitutional protection is necessary for all types of speech, not merely "political expression or comment on public affairs." Id. at 147 (quoting \textit{Time Inc. v. Hill}, 385 U.S. 374, 388 (1967)). However, he opines that the harsh requirements of \textit{New York Times} are not appropriate "throughout the realm of [this] broader constitutional interest." Id. at 148.
\textsuperscript{128} \textit{Curtis}, 388 U.S. at 162. Perhaps the incongruence between the language of Justice Warren's opinion and finding a privately paid athletic director to be a public figure can be reconciled by noting that \textit{Curtis} is a pre-\textit{Gertz} decision. There is significant focus in \textit{Curtis} on the public's interest in football and the fixing of games. Id. at 154-55. From a public interest viewpoint, then, \textit{Curtis} would qualify as a public figure. The later analysis of \textit{Curtis} in \textit{Firestone} omits discussion of \textit{Butts} and focuses entirely on \textit{Walker}, perhaps in recognition that \textit{Butts} could not be included as a public figure under \textit{Gertz}. See \textit{Time v. Firestone}, 424 U.S. 448, 454 (1976).
\textsuperscript{130} The language of the opinion is reminiscent of C. WRIGHT MILLS, THE POWER ELITE (New York, Oxford University Press, 1959). The term refers to a sociological theory that the same individuals may be found at the highest levels of government, industry, and the military. Justice Warren appears to recognize that an overlap of individual power similar to Mills' theory requires an application of the \textit{New York Times} conditional privilege that is specifically tied to influence over government. Cf. \textit{Rosenblatt v. Baer}, 383 U.S. 75 (1966).
\textsuperscript{131} See Shauer, supra note 6, at 914.
\textsuperscript{132} In either case, the result is that \textit{Curtis} cannot be said to require an application of the \textit{New York Times} actual malice standard to speech of "public interest." Neither the Harlan nor the Warren opinion supports extension of the privilege to this type of speech.
Gertz offered a definition of public figure that differed from the common law definition. Unfortunately, the definition of public figure is an aggregate of language scattered throughout the opinion. Portions of the definition are easily misused if the clarifications offered by the Gertz decision are ignored—which they often are. If a court focuses on a partial definition, it is likely to derive a skewed interpretation of the Gertz Court’s defamation-First Amendment compromise. The resulting outcome is likely to be a broad application of New York Times based on a misguided intent to protect all speech on issues of public interest with the actual malice standard.

The full definition of public figure from Gertz is:

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to

134. Id. Gertz was an attorney representing a family in a civil action against a police officer for the murder of their son. A local magazine published an article stating that the case against the officer was part of a Communist campaign against the police. The article alleged Gertz had a criminal record and was a member of several communist organizations involved in subversive activities against the government. The Gertz Court found the plaintiff had not thrust himself into the vortex of this public issue (a nationwide conspiracy to harass the police), nor did he engage the public’s attention in an attempt to influence its outcome. Thus, the Court looked at a public issue close to the political end of the speech continuum and required a level of participation that was not met by the plaintiff.

135. There are three locations of a definition of public figures in Gertz. The most general of the definitions is: “Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures...” Id. at 342. Using this definition will result in an incorporation of every successful celebrity, even those who are reclusive and shun public involvement, into the category of public figure. In the second definition the Court divides up the category of public figure into the now well-known “all purpose” and “limited public figures”:

In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.

Id. at 351. This definition is not complete, and is still misleading. The best and most complete definition provided in Gertz is:

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Id. at 345.

136. The fact that the Gertz Court’s language can appear to support both a broad and a narrow definition of public figures is rarely acknowledged. See Brewer v. Memphis Pub. Co., Inc., 626 F.2d 1238 (5th Cir. 1980), for a recognition of the possibilities and a reason for choosing acceptance of risk and access to the media as factors to focus on.
the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.137

This definition has been preferentially used in subsequent Supreme Court cases.138 It indicates that more than fame, public prominence, or notoriety is required to classify a plaintiff as a public figure: the fame, prominence, or notoriety must be as a result of or used in the resolution of public questions. It is this part of the definition that makes public figures similar to public officials, because the Court's use of the word “resolution” implies the ability to influence.139

An emphasis on influence is the most important element of defining public figures, if public figures are to be delimited in accordance with protection of public issue and political speech, instead of public interest speech. Emphasis on influence is also consistent with the Warren opinion in Curtis that a public figure is a nongovernment employee with the same type of influence over society as a public official.140 Additionally, by reference to the general concern of the Court for speech on public issues, "public controversies" is best interpreted as closer to the political end of the continuum.

However, courts use other language from Gertz to support definitions that are focused almost entirely on the fame of the individual. Such definitions consider, not an individual's influence over public issues, but rather his visibility, including access to media, and whether such visibility is the result of intentional acts.141

For instance, the offhanded remark, "In either event, they invite attention and comment," is often repeated by lower courts.142 The proper reading of this statement is that attention and comment are the

137. Gertz, 418 U.S. at 345 (emphasis added).
139. See Stern, supra note 115. Mr. Stern's article focuses on the "public question" portion, as do many courts. See Wolston, 443 U.S. at 167 n.8 (1979). Both elements are essential, however. Without public controversy, any person of power or prominence within a finite universe would be a "public" figure. See Miller v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980). This is not a problem, however, if it is required that the defamatory statements be germane only to the individual's influence within that finite universe. Without influence though, fame and its various generating factors form a broad and undiscriminating definition.
140. Thus, it may help in defining public figures to keep Rosenblatt in mind. The Rosenblatt conception of influence would include both actual and apparent influence.
141. See Gertz, 418 U.S. at 345.
142. Id. Whether a subjective or objective invitation, it is problematic either way. The phrase is often used standing alone by lower courts, but is not regularly reproduced by the Supreme Court in its public figure decisions. It is cited in Wolston, 443 U.S. at 165, but not Firestone, 424 U.S. at 453, or Hutchinson, 443 U.S. at 134.
likely results of the actions (a thrust into the vortex with intent to influence, or engagement of the public with intent to influence) taken by a public figure. It is error to use public attention and comment as defining characteristics of public figures for the same reason that it is error to use access to media and acceptance of risk as defining characteristics of public officials.143

A definition based on fame is entirely inconsistent with Gertz, because fame is really indistinguishable from public interest. Gertz rejected application of the New York Times conditional privilege to speech on issues of public interest, but advocated application of the privilege to speech on public figures. However, the Court in Firestone points out the impropriety of defining public figures by fame or notoriety.144

The Firestone case involved publications on the divorce proceedings of a wealthy couple. The former wife had provided several press conferences in order to provide requested information to the media. The Firestone court indicated that to term the divorce proceedings a "public controversy" would be to equate public controversy with "controversies of interest to the public" and would effectively reinstate the Rosenbloom approach.145

The court also specifically contrasted the former wife with "General" Walker from Curtis.146 Whereas Ms. Firestone was involved only in the court proceedings of her divorce, Mr. Walker was involved in a student riot over racial desegregation that clashed with federal troops. Ms. Firestone had provided press conferences to provide information in response to media requests; Mr. Walker "was acutely interested in the issue of physical federal intervention [to enforce desegregation] and had made a number of strong statements against such action which had received wide publicity." Ms. Firestone could, at most, be said to be especially prominent in "Palm Beach society." Mr. Walker, on the other hand, had his own following, the "Friends of Walker," and could fairly be deemed a "man of some political prominence." Thus, Firestone indicates that public persons should be defined in a manner that more closely resembles public officials, covering public issue speech.147

143. See supra note 92 and accompanying text.
145. Id. at 454.
146. Id. at 454-55. Also worth noting, Walker and Butts were companion cases, but Firestone does not mention the facts from Butts in its analysis. It is unlikely that Butts would be found to be a public figure if a court used the Warren language in Curtis or Gertz as its guide. The Firestone decision was made using Butts reasoning, but Butts is not mentioned.
The Wolston decision also reflects a narrow definition of public figures. Wolston was subpoenaed as a witness in an espionage case but did not obey the subpoena. Later prosecuted and convicted for the refusal to obey the court command, Wolston did not otherwise get involved in the trial. The district court held that "Wolston became involved in a controversy of a decidedly public nature in a way that invited attention and comment and thereby created in the public an interest in knowing about his connection with espionage."  

Fortunately, the Supreme Court reproduced the exact language of the ruling and firmly rejected it. The Wolston Court held that private persons do not become public persons just because they are involved, however self-determinedly, in an issue of public interest. Nor would mere involvement in a public issue equate to public figurehood. Rather, the Court indicated that there must be actual controversy or debate regarding a public issue.

Courts should take the Wolston holding as a reminder that the public's interest in an issue has nothing to do with whether or not the plaintiff is a public figure for the purpose of applying the New York Times conditional privilege. Public interest does not create the public person, and "inviting attention and comment is not sufficient." Rather, there must be an attempt by the plaintiff to influence a public issue.

[Wolston]'s failure to respond . . . was in no way calculated to draw attention to himself in order to invite public comment [upon the issue] or influence the public with respect to any issue. He did not in any way seek to arouse public sentiment in his favor and against the litigation. [T]his is not a case where a defendant invites a citation for contempt in order to use [it] as a fulcrum to create public discussion. . . . It is clear that petitioner played only a minor role in whatever public controversy there may have been concerning the investigation of Soviet

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149. Id. at 165.
150. Id. at 166.
151. The court in Wolston assumes arguendo that propriety of the actions of law enforcement officials in investigating and prosecuting suspected Soviet agents is a "public controversy." Id. at 167 n.8.
152. Without this clarification, this statement could appear to condone labeling any Hollywood star a public figure because she has invited public attention. Id. at 166. That would be incongruent with the other ideas expressed in the same passage, and in contradiction with the definition set forth in Gertz. "Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." Gertz v. Welch, 418 U.S. 323, 345 (1973).
153. Wolston, 443 U.S. at 166.
Therefore, public figures must be ascribed a different defining mechanism than mere fame or acceptance of risk of public scrutiny. The above definition set out from Gertz provides the most material for defining public persons. However, the definition is not without problems. It would seem that the definition of a limited purpose public figure will hinge on whether the controversy at issue is "public," and this determination leads again to the problem of courts deciding where speech falls along the continuum. However, "public controversy," like "public figure," could be sketched out as a term of art, keeping in mind the type of speech that the court is concerned with.\textsuperscript{155} That way, courts would not use public controversy as a threshold or defining mechanism.

The Supreme Court, in its efforts to find the correct line, has been hampered by listless decisions and an unwillingness to delve into the law. \textit{Hutchinson v. Proxmire} is one such example.\textsuperscript{156} In that case, the district court had held that Hutchinson, a scientist who successfully solicited grants from the government, had voluntarily involved himself in an issue of public interest. Thus, the district court concluded, Hutchinson was a public figure. The Supreme Court rejected the lower court's holding. Its primary reasons were that Hutchinson had no predefamation access to the media and that if "expenditure of funds" is used as an issue of public interest, then too many people involved with receiving government funds will be classified as public figures.

Instead of setting forth correct interpretations of the definition of public figure, \textit{Hutchinson} simply addressed the issues exactly as the trial court had viewed them. The \textit{Hutchinson} Court's first error was in not rejecting the access to media argument, merely overturning the district court's evaluation of Hutchinson's access. As discussed above, the access to media factor was never intended to be a test for defining public figures.

The second error of the \textit{Hutchinson} Court was its acceptance of the partial definition of public figure that was used by the trial court. In order to limit the scope of this overblown definition, the Court had to summarily exclude speech on expenditures of public funds from the

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} Courts could look at combined factors: the likelihood or the intention to influence, how close the controversy is to a political issue, and whether the defamatory comment relates to the person's involvement or fitness to influence the outcome. This is similar to the "equitable approach" described in Stern's article, \textit{supra} note 115.

constitutional protection, even though this is a public issue bordering on core political speech.

This case could have been resolved simply if the Hutchinson Court had referred back to the Gertz definition of public figures. Mr. Hutchinson would not be a public figure, because he lacked fame or notoriety acquired by influence over public affairs. Mr. Hutchinson played no role of special prominence in deciding how public funds should be spent. In contrast, someone who does have such influence over government expenditures must be considered a public figure, if the First Amendment protections set out by New York Times are to be honored. 157

Even in view of the Hutchinson case, the main body of Supreme Court rulings in public figure cases supports the contention that the public figure category is narrowly delineated. 158

VII. DEFINING PUBLIC FIGURES: WASHINGTON STATE

Washington State has derived its current law defining public figures from Clardy v. Cowles. 159 The Clardy case involved publication of the details and dirt on past business dealings of the developer of a housing project within the local circulation area of the publishing newspaper. The developer sued the publisher, and was found to be a limited public figure vis-à-vis the housing project. The case shows a strong First Amendment stance, the classic misunderstandings of Gertz, and is complicated by poor editing. 160

The Clardy court expressed concern that past Washington cases did not consider the plaintiff’s opportunity for rebuttal, claiming that Gertz found the access to media to be an important consideration. 161 In reality, Gertz stated that this general attribute of public persons was a weak justification for applying the New York Times actual malice standard, because rebuttal is hardly ever as effective as the original libel. 162

The Clardy opinion further reflects a complete misunderstanding of the issues at stake. The court represents the issues as “balancing the right to report on issues of public interest against the right of pri-

157. For a different opinion on what went wrong in Hutchinson, see Bruce J. Borrus, Defamation and the First Amendment: Protecting Speech on Public Issues, 56 WASH. L. REV. 75 (1980).
158. See Elder, supra note 74 (“[T]he Court has unambiguously constricted the field of application of the more exacting New York Times standard in ‘public figure’ cases . . ..”).
160. The strong First Amendment stance is illustrated by its tone and use of references: the Court cites academic critics of the Gertz opinion’s focus on individuals rather than a broad speech type approach in Rosenbloom. Id. at 58.
161. Id. at 62.
vate citizens to be free from defamatory comments. . . "163 This interpretation reflects a severe departure from the carefully crafted compromise of *New York Times* and *Gertz*: balancing the public's stake in speech on public issues against an individual's interest in his reputation. The right to report on public issues is not at stake. Rather, at stake is the constitutional privilege to defame in order to prevent self-censorship of speech on political or quasi-political speech. Additionally, the issue is not the right to be free of defamatory comments, but rather the ability to redress defamatory comments through state laws.

The *Clardy* court borrows a five part test from another jurisdiction in order to meet what it perceives to be the important issues. The test relies on whether (1) the plaintiff had access to channels of effective communication, (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy, (3) the plaintiff sought to influence the resolution or outcome of the controversy, (4) the controversy existed prior to the publication of the defamatory statement, and (5) the plaintiff retained public figure status at the time of the alleged defamation.164

Unfortunately, after stating it would follow this test, the *Clardy* court instead proceeded to look at different factors. The five issues that the *Clardy* opinion actually addressed are: (1) access to the media, (2) voluntariness and nature of role, (3) statements germane to the controversy, (4) prior existence of controversy, and (5) plaintiff's retention of public figure status.165

As discussed, access to media is too problematic of a factor to be considered for defining public figures. The *Clardy* court's test, as actually applied, also disregards influence over public controversy. The adopted test focuses two factors on influence: (2) a role of special prominence and (3) seeking to influence. *Clardy* collapsed these factors into "voluntariness and nature of role," thereby omitting reference to the most important aspect of public figures. Influence is discussed under *Clardy*’s second factor, but the focus is on voluntariness of involvement rather than on ability to influence.166

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164. *Clardy*, 81 Wash. App. at 60.
165. *Id.* at 62-65.
166. Possibly because it may have seemed to the court that voluntary involvement is de facto an attempt to influence outcome. *Clardy*, 81 Wash. App. at 63-64. However, though an attempt to influence can always be seen as voluntary involvement, the converse cannot be true if "influence" is given a meaning consistent with protecting political speech and speech on public issues. Influence reflects a measure of power and ability to cause change.
Wolston and Hutchinson dealt with this improper focus by looking at the nature of the public controversy. Although it is not entirely clear from the opinion, it appears that the Clardy court found two "public" activities: (1) a newsletter that Clardy sent to local residents in an attempt to influence public opinion regarding his housing project, and (2) Clardy's contact with local politicians in order to influence HUD's decision to provide funds for the project. Under Wolston and Hutchinson, it is unlikely that either of these public events would be understood as a public controversy.

More correctly, the focus should be on the ability of the plaintiff, actual or perceived, to influence the public controversy. This idea is entirely absent from the Clardy test.

Finally, the Clardy case included germaneness to controversy as an element of its test. Germaneness is the public figure analog to "official conduct" of public officials. Although it is a viable and important factor, the Clardy decision failed to apply it properly. In looking at public officials, the actual malice standard applies to anything that relates to the official's fitness for office, that is, anything that relates to the official's fitness to control or influence government. For public figures, the actual malice standard should apply to anything that relates to the public figure's fitness to influence the outcome of public controversies. The Clardy court did not attempt an evaluation of this kind.

There are other definitions of public figure in other courts that are much truer applications of the Gertz definition of public figures.

167. Id. at 63-64.
168. Id. at 64.
169. Neither of these acts is clearly set out by Clardy as a public controversy. Negative public opinion regarding the city of Spokane's approval of the housing development had been reported in newspaper articles. But the housing development had already been approved. Id. at 64. Although Clardy attempted to influence public opinion in this area, public disapproval does not equate to a public issue. That would be equivalent to asserting that public interest creates a public issue, which was rejected in Firestone. The other potential public issue is the expenditure of HUD funds. But Hutchinson held that attempts to procure government funding do not rise to the level of attempting to influence public issues. The public's interest in the spending of public funds is not sufficient to create a public figure.
170. The main problem with this test is that courts cite the definition, but fail to apply it when looking at the nature and extent of the participation. For instance, WFAA-TV, Inc., v. McLemore, 978 S.W.2d 568 (Tex. 1998), ignores the influence aspect of public figures, looking instead to the voluntariness of the participation and access to the media. A similar problem can be found in Harris v. Quadacci, 48 F.3d 247 (7th Cir. 1995). See Hill v. Evening News Co., 715 A.2d 999 (N.J. Super. Ct. App. Div. 1998), for a view of the vagaries of voluntariness of participation in a criminal trial setting.
172. Id.
than Clardy. The Circuit Court for the District of Columbia, in Waldbaum v. Fairchild, set forth the following definition of public figure: one who is "attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants." The Waldbaum court set out a three factor test to address this definition: (1) determining whether there is, in fact, a public controversy, (2) looking at the nature and extent of the plaintiff's participation in that controversy, and (3) determining whether the speech was germane to the plaintiff's participation in the controversy.

This definition and test, together, provide excellent guidance, because they emphasize the important ideas from New York Times, Rosenblatt, and Gertz and address the problems that the Gertz opinion engenders. First, they speak to the idea that influence must be an actual, or at least a perceived, possibility. Second, by focusing on a controversy as opposed to the content of the speech, they ensure that the issue will be more than one of mere public interest or newsworthiness, and at the same time, they honor the concept that what is relevant to self governance is for the public, not the courts, to determine. Third, they address the "official conduct" analog, germaneness.

The Clardy court specifically declined to adopt this test. But given its misunderstandings and initial viewpoint, that is not surprising. However, cases that have applied this test have a remarkable grasp of an appropriate delineation of what is a public figure. Washington should view the Clardy decision as out of step with Supreme Court intent and cases and give the Waldbaum test another try.

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175. Id.
176. Id. at 1296.
177. Id. at 1297.
178. Id. at 1298.
VIII. CONCLUSION

At this time, the state courts are following New York Times and its progeny for two reasons. The first is that it does state the minimum requirements for safeguarding federal First Amendment rights. Secondly, Rosenblatt mandates an adherence to federal definitions of public officials and, by extension, public figures. The Supreme Court has made clear, however, that its protections are merely minimum requirements, and that states are free to provide more First Amendment protections if they choose.

Because both the Clawson and the Clardy decisions function to provide higher First Amendment protections, it may be that Washington would prefer a higher level of protection. The protections should be provided by alternative means, not by stretching Supreme Court decisions. A potential solution would be to sidestep the public official and public figure determination altogether through use of the state constitution.181 If the state constitution requires greater free speech protections, then even a content-based test similar to that in Rosenbloom may be possible.182

However, in nondefamation cases, or in those where defamation is a peripheral issue, the Washington constitution will not provide protections to speech at the expense of protection to reputation—not generally, and certainly not in excess of the balance applicable to the federal right.

For instance, Richmond v. Thompson183 rejected an absolute privilege for defamatory speech regarding police officers’ field actions. Citing a lack of either textual or historical support for absolute protection of defamatory speech, the Richmond court rejected both a constitutional and a common law absolute privilege on the facts before it. Thus, article I, section 5 does not require a complete or partial abrogation of the reputational interest through an absolute privilege.184 Whether a conditional privilege could have a broader application under the Washington constitution was not addressed.

181. See Doe v. Daily News, L.P., 632 N.Y.S.2d 750, 752 (1995). This case may be an attempt to assert independent state grounds for reaching its decision.
182. While the current Washington Supreme Court advocates strong free speech protections, and is disposed to develop state law independently of federal law, the author believes that a Gunwall analysis of Article 1, Section 5 of the Washington constitution does not support a speech protection broader than the First Amendment.
184. Moreover, the dissent’s objection focuses not on the requirements of § 5, but rather on that of § 4, the right to petition. Id. at 389, 922 P.2d at 1354.
Moreover, Washington courts have rejected the protection of strict scrutiny in evaluating speech restrictions. The rejection began in *Bering v. Share*, where the court looked at time, manner, place, and content restrictions imposed on antiabortion picketers by court injunctions. The supreme court in *Bering* held without analysis that Washington’s speech provision was broader than its federal counterpart. First, the court stated that, unlike the Federal Constitution, the Washington constitution required a compelling interest and narrow parameters for any time, manner, or place restrictions. Then, after discussing post-publication sanctions, including the allowance of both civil damage awards and injunctions under the Washington constitution (as responsibility for abuse of speech), the court adopted a strict scrutiny approach for post-publication *injunctive relief*.

Did the court merely exercise judicial restraint in its holding, or did it mean to imply that Washington’s constitution would provide less speech protections when the method of sanctioning changes? The court does not say. It is possible the court recognized that requiring a strict scrutiny approach for civil damage awards would destroy torts such as defamation. Did the court mean to say that in order to protect the tort, or perhaps—where the reputation interest is at stake, free speech is not so free after all? This is certainly implied in a recent case, *Vote No!*. *

*Vote No!* held unconstitutional a state law which sanctioned false political advertising published with actual malice. The court held that the law did not survive strict scrutiny, notably, because it did not serve a compelling state interest. To address a state argument, the court differentiated its facts from those of defamation cases: because injury to reputation is by nature an individual injury, and because of the special value of reputation in society, sanctions against defamatory speech are specially allowed. Although the court in *Vote No!* was engaging in a federal law analysis, it signifies an understanding that there is something different about a state sponsored defamation action that prevents it from being treated as any other “state action.” Together with *Bering*, *Vote No!* represents a rejection by Washington courts of the use of the strict scrutiny approach.

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185. See supra note 12.
187. *Id.* at 230, 721 P.2d at 929.
189. In other words, because reputation is so important, defamation should not be analyzed under the same rubric as other types of state action—strict scrutiny—because it probably would not pass muster under that standard.
Washington has therefore rejected the idea that its constitution requires broader speech protections through either absolute privilege or a strict scrutiny methodology. It would be consistent, therefore, to find the Washington constitution does not require broader protection through application of the actual malice standard to all speech of public interest. This Comment concludes that the solution lies with the legislature. Retraction statutes or statutes that provide for higher standards of proof could provide the additional protection we have come to expect for speech, avoiding the continuing struggle to define public plaintiffs.190