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1992]

CONSTITUTIONAL LAW—REINING IN PATRONAGE BY SAYING ‘NO’ TO
GOVERNMENT EMPLOYERS SEEKING TO ASSERT THE POLITICAL
EXCEPTION DOCTRINE IN THE *ELROD/BRANTI* ANALYSIS:

Zold v. Township of Mantua (1991)

I. INTRODUCTION

The United States Court of Appeals for the Third Circuit recently reevaluated the political exception doctrine laid down by the United States Supreme Court in *Elrod v. Burns*¹ and *Branti v. Finkel*.² Generally, under *Elrod* and *Branti*, a governmental unit cannot constitutionally discharge an employee solely for his or her political affiliation.³ Such an

1. 427 U.S. 347 (1976). *Elrod* was the seminal case in which a plurality of the Supreme Court recognized an actionable First Amendment right of a government employee to political association. *Id.* at 349-50. *Elrod* involved a group of plaintiffs who were employees of a county sheriff's office, and who were discharged or in imminent danger of being discharged solely for their political affiliations when a new sheriff of a political party different from theirs was elected. *Id.* at 350-51.

The Court found that such employees, fired solely because of their political affiliation, were unconstitutionally deprived of their First Amendment rights. *Id.* at 358-60, 372-73. The firings were therefore constitutionally impermissible. *Id.*

The *Elrod* Court, however, recognized an exception to this general rule for those positions for which political affiliation was a legitimate criterion, and on which firing could be based, in order that "representative government not be undercut by tactics obstructing the implementation of policies of [a] new administration, policies presumably sanctioned by the electorate." *Id.* at 367. A plurality of the Court limited this exception to "policymaking" positions. *Id.* *But cf. id.* at 375 (Stewart, J., concurring) (suggesting that only "nonpolicymaking, non-confidential government employee[s]" should be protected from patronage dismissals). For a further discussion of *Elrod*, see *infra* notes 18-23 and accompanying text.

2. 445 U.S. 507 (1980). In *Branti*, the Supreme Court reformulated the *Elrod* test. *Id.* at 518. The Court found that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position." *Id.* Instead, the Court framed the test as whether the government could "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* While the *Branti* test is less concrete and more flexible than the *Elrod* test, the Supreme Court provided little guidance for courts in the application of the new test. See *Brown v. Trench*, 787 F.2d 167, 169 (3d Cir. 1986) ("While *Branti* provides us with a 'test' the Supreme Court has not specified the particular factors which indicate that a position falls within the *Branti* test."); *cf. Zold v. Township of Mantua*, 935 F.2d 633, 635 (3d Cir. 1991) (noting that under *Branti* test, each decision is fact specific). For a discussion of the Third Circuit's difficulty in applying the *Branti* test, see *infra* notes 32 & 111 and accompanying text. For a further discussion of *Branti*, see *infra* notes 24-26 and accompanying text.

3. *Branti*, 445 U.S. at 516-17; *Elrod*, 427 U.S. at 372-73.

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act violates the employee's First Amendment right to freedom of association.⁴ Although under *Elrod* and *Branti* certain governmental positions are exempted from this general rule, a definition of the scope of this exemption has proved elusive for the Supreme Court and the Third Circuit.⁵

In *Zold v. Township of Mantua*,⁶ the Third Circuit attempted to clarify what constituted a government position for which "party affiliation is an appropriate requirement."⁷ Only those employees holding such government positions can be discharged on the basis of political affiliation.⁸ In *Zold*, the Third Circuit revealed that it would subject to "special scrutiny" governmental claims that party affiliation was relevant to a particular position, rather than simply "rubber stamp" such claims.⁹ While

4. *Branti*, 445 U.S. at 515-16; *Elrod*, 427 U.S. at 372-73. The right to freedom of association is derived from the First Amendment. Although "[n]owhere does the constitutional text mention freedom of association . . . the Supreme Court has decided that the freedoms of speech, press, and assembly imply a right to join together with others to exchange ideas or promote causes." Vincent Blasi, *The Pathological Perspective and First Amendment*, 85 COLUM. L. REV. 449, 495 (1985) (citing *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958)).

First Amendment political patronage dismissal claims are often combined with assertions of Fourteenth Amendment violations of due process rights for deprivation of life, liberty or property without due process of law. See, e.g. *Brown*, 787 F.2d at 168 (plaintiff claimed both *Branti* violation and deprivation of due process based on asserted property interest in employment). In the context of employment, the liberty interest asserted in a Fourteenth Amendment claim is based on the theory of the free pursuit of career. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 572-74 (1972). The property interest asserted is grounded in the theory of a property interest in the job itself. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972) (discussing untenured college professor claims of denial of property and liberty without due process of law); see also *Roth*, 408 U.S. 564 (companion case to *Perry*). The Supreme Court has stated that in cases in which plaintiff asserts a property interest, the plaintiff must show a "legitimate claim of entitlement" to the job, and then a deprivation of that interest without a hearing. *Id.* at 577.

A case like *Elrod*, asserting a First Amendment violation due to a political patronage discharge, however, requires no showing of a property or liberty interest. See *Perry*, 408 U.S. at 597 (noting that even without right to government benefit, benefit cannot be withheld on basis which violates freedom of speech). Even though an employee may have no right to employment past his or her appointment period, as the *Elrod* court noted, "there are some reasons upon which the government may not rely" in firing an employee, even if the employee can be fired for any number of reasons, or for no reason at all. *Elrod*, 427 U.S. at 360-61; see also *Perry*, 408 U.S. at 597.

5. See *Branti*, 445 U.S. at 518 (reformulating *Elrod* test); *Elrod*, 427 U.S. at 367-68 (stating that *Elrod* test, based on meaning of policymaking, is hard to define); *Brown*, 787 F.2d at 169 (stating that Supreme Court has not specified factors which indicate whether position falls within *Branti* test).

6. 935 F.2d 633 (3d Cir. 1991).

7. *Id.* at 635 (citing *Branti*, 445 U.S. at 518).

8. *Id.*

9. *Id.* at 636 (stating that court must use "special scrutiny" for issues turning on "constitutional fact"). For a discussion of special scrutiny, see *infra* notes 70 & 79-84 and accompanying text.

the *Zold* decision is consistent with the Supreme Court's general disfavor for political patronage in most positions,¹⁰ however, *Zold* fails to clarify entirely what criteria are used to determine which positions qualify for the *Elrod* exemption.¹¹

10. The Supreme Court has addressed the issue of the political exception doctrine in three cases: *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party*, 497 U.S. 62 (1990).

In *Elrod*, plaintiffs alleged that they were discharged from their government employment because their political affiliation differed from that of their supervisor. *Elrod*, 427 U.S. at 350. Under these facts, a plurality of the Court recognized a cause of action for deprivation of the First Amendment right to association. *Id.* at 372-73. The *Elrod* Court held that generally this kind of "patronage dismissal" was unconstitutional. *Id.* In its opinion, the Court cited *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), for the proposition that political association is not a valid ground for denying public employment, and *Perry v. Sindermann*, 408 U.S. 593 (1972), for its holding that the dismissal of a college professor for his exercise of First Amendment rights was unconstitutional. *Elrod*, 427 U.S. at 358-60.

The plurality opinion in *Elrod*, however, recognized an exception to the general rule for government "policymaking" positions. *Id.* at 367. The test for this exception is whether a governmental unit could establish that a position was a "policymaking" one. *Id.* *But cf. id.* at 375 (Stewart, J., concurring) (including employees under duty of confidentiality as well as policymaking employees). In discussing this "policymaking" test, the Court noted that "no clear line can be drawn between policymaking and nonpolicymaking positions." *Id.* at 367. Furthermore, the Court noted that "[t]he nature of the responsibilities is critical." *Id.* The Court provided as an example of evidence of a policymaking position an employee with responsibilities of "broad scope," and the Court noted the relevance of "whether the employee acts as an adviser or formulates plans for the implementation of broad goals." *Id.* at 368.

The Court placed the burden of establishing this exception on the governmental entity claiming that the position fell within this exception. *Id.* For a further discussion of *Elrod*, see *supra* note 1 and *infra* notes 18-23 and accompanying text.

In *Branti*, the Supreme Court changed the test espoused by the *Elrod* Court to establish exemptions to *Elrod's* general rule against patronage dismissals, from determination of "policymaking" positions to a question of whether the hiring authority can demonstrate that the position is one for which political affiliation is "an appropriate requirement for the effective performance" of the office involved. *Branti*, 445 U.S. at 518. For a discussion of *Branti*, see *supra* note 2, and *infra* notes 24-26 and accompanying text.

Finally, in *Rutan*, the Supreme Court expanded the *Elrod/Branti* doctrine to include all employment-related decisions such as promotion, transfer, recall, hiring and firing. *Rutan*, 497 U.S. at 65. For a discussion of *Rutan*, see *infra* notes 27-30 and accompanying text.

The Supreme Court has spoken in sweeping terms, and has left the courts of appeals to establish tests to decide the kinds of positions for which political affiliation is an appropriate requirement. See, e.g., *Ness v. Marshall*, 660 F.2d 517, 520 (3d Cir. 1981) (noting that scope of the *Elrod/Branti* exemption has been left to lower courts).

11. For an analysis of the *Zold* decision, see *infra* notes 105-20 and accompanying text.

II. BACKGROUND

A. *Political Patronage*

Political patronage has had a two hundred year history in the United States.¹² The reaction to patronage has ranged from disgust for the “political machines” such as Tammany Hall,¹³ to a belief that patronage is essential to our political system.¹⁴

B. *The Conditional Benefit Theory*

Until the 1960s, the constitutionality of patronage was not in doubt. Courts considered government employment a benefit, allowing government to condition the receipt of that benefit on many bases, including waiver of First Amendment rights.¹⁵ By the late 1960s and the early 1970s, however, the Supreme Court had rejected the constitutional validity of this conditional benefit doctrine.¹⁶ This set the stage for the

12. See *Rutan*, 497 U.S. at 95 (Scalia, J., dissenting) (commenting that patronage “bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic”); *Branti*, 445 U.S. at 521 (Powell, J., dissenting) (noting that “with scarcely a glance at almost 200 years of American tradition” the “Court continues the evisceration of patron practices”); *Elrod*, 427 U.S. at 375 (Burger, C.J., dissenting) (“The Court strains the rational bounds of First Amendment doctrine and runs counter to longstanding practices that are part of the fabric of our democratic system to hold that the Constitution *commands* something it has not been thought to require for 185 years.”); Louis Cammarosano, Note, *Application of the First Amendment to Political Patronage Employment Decisions*, 58 FORDHAM L. REVIEW 101, 103 (1989) (“Patronage has existed in American politics for over 200 years.”).

13. See Frances Sorauf, *Patronage and Party*, 3 MIDWEST J. POL. SCI. 115, 115-16 (1959) (noting that some “political scientists react[] instinctively against patronage much as they reacted against slavery, aggressive war, and divine right monarchy”).

14. See Cammarosano, Note, *supra* note 12, at 103 (stating that patronage bolsters political party system by enabling political parties to encourage their supporters to participate in political process); Kathleen M. Dugan, Note, *An Objective and Practical Test for Adjudicating Political Patronage Dismissals*, 35 CLEV. ST. L. REV. 277, 279 (1987) (“[T]raditional justifications [of patronage] include: 1) efficiency of public employees; 2) accountability and responsiveness to the public; 3) preservation of the democratic process; 4) strengthening of political parties; 5) performance of quasi-welfare functions; and 6) helping minorities obtain social acceptance.”(footnote omitted)); see also *Rutan*, 497 U.S. at 93 (Scalia, J., dissenting) (noting that political leaders “complain of the helplessness of elected government, unprotected by ‘party discipline’ ” as a result of *Elrod* rule); cf. *Elrod*, 427 U.S. at 379 (Powell, J., dissenting) (recognizing that patronage in employment played a significant role in democratizing American politics).

15. Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 700 (1984) (“[C]ourts considered government employment . . . [a] privilege[], not [a] right[]. As [a] privilege[] [it] could be offered on any condition the government imposed including the sacrifice of constitutional rights.”); see also *Elrod*, 427 U.S. at 358-59 (noting validity of this practice before *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)).

16. *Elrod*, 427 U.S. at 358-59. (“*Keyishian* squarely held that political associ-

Elrod decision.¹⁷

C. Supreme Court Cases

1. *Elrod v. Burns*

In *Elrod*, the Supreme Court held that a government employee who is discharged because of his or her political affiliation is deprived of his or her First Amendment right of freedom of association.¹⁸ This holding ended the patronage practice of “cleaning house,” where the winning political party would fire many employees who were members of the losing party, and give the now vacant positions to loyal supporters as the “spoils of victory.”¹⁹

The Supreme Court, however, recognized that political affiliation was relevant to the performance of the duties of certain positions, and created an exception for those positions.²⁰ The *Elrod* Court justified this exception by weighing the governmental benefit of being able to use political affiliation as a criterion in employment decisions against the encroachment on the employee’s First Amendment right to political association.²¹

A plurality of the *Elrod* Court distinguished between “policymaking” and “nonpolicymaking” positions in determining when political affiliation was relevant for employment decisions.²² Those positions

ation alone could not, consistently with the First Amendment, constitute an adequate ground for denying public employment.” (citing *Keyishan v. Board of Regents*, 385 U.S. 589 (1967)). The *Elrod* Court also noted that *Perry v. Sindermann* “broadly rejected the validity of limitations on First Amendment rights as a condition to the receipt of a governmental benefit.” *Id.* at 359 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972)); see also *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (finding “uniform rejection” of the practice of attaching conditions to government employment). The demise of this doctrine, known as the “doctrine of unconstitutional conditions,” has been hailed as “the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.” Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989).

17. For a discussion of *Elrod*, see *supra* notes 1 & 10, and *infra* notes 18-23 and accompanying text.

18. *Elrod*, 427 U.S. at 373.

19. See *id.* at 359. Typical of patronage practices, the plaintiffs in *Elrod* were employees in a county sheriff’s office who were all discharged when a new sheriff, a Democrat, according to custom, fired all of the employees belonging to the Republican party. *Id.* at 350-51.

20. *Id.* at 367 (no constitutional violation for dismissing employee where political party relevant). Because the *Elrod* Court found patronage dismissals to be “a significant impairment of First Amendment rights,” any such dismissal “must survive exacting scrutiny.” *Id.* at 362. The governmental interest justifying the dismissal must be “of vital importance,” outweighing the dismissed employee’s loss of protected rights. *Id.* at 362-63.

21. *Id.*

22. *Id.* at 367-68.

deemed to be “policymaking” were held to be exempt from the general rule prohibiting termination for political affiliation.²³

2. *Branti v. Finkel*

Four years later in *Branti*, the Supreme Court, dissatisfied with the *Elrod* test, reformulated it.²⁴ The *Branti* Court held that to succeed in claiming an *Elrod* exception, the governmental unit must “demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”²⁵ If this showing is met, then the governmental unit may discharge an employee from that public office on the basis of party affiliation without unconstitutionally violating the employee’s First Amendment rights.²⁶

3. *Rutan v. Republican Party*

The Supreme Court addressed the *Elrod/Branti* protections again in *Rutan v. Republican Party*.²⁷ Before *Rutan*, the *Elrod* and *Branti* principles had applied only to discharges and threats to discharge.²⁸ The *Rutan* Court expanded the *Elrod/Branti* protections to include all manner of employment-related decisions, such as promotion, transfer, recall, hiring and firing decisions.²⁹ Thus, *Rutan* did not address the scope of the *Elrod/Branti* exception, but instead increased the pool of potential plaintiffs for *Elrod/Branti* claims.³⁰

D. *The Third Circuit Position*

The Third Circuit has addressed the issue of termination on the grounds of political affiliation five times since the Supreme Court’s decision in *Branti* in 1980.³¹ In these cases, the Third Circuit has struggled

23. *Id.* at 372 (Governmental interests “can be fully satisfied by limiting patronage dismissals to policymaking positions.”). In his concurrence, Justice Stewart added “confidential” positions to the definition of the exception. *Id.* at 375 (Stewart, J., concurring). For a further discussion of *Elrod*, see *supra* note 1.

24. *Branti*, 445 U.S. at 518 (“the ultimate inquiry is not whether the label ‘policymaker’ or ‘confidential’ fits a particular position”). *Branti* was a case in which two assistant public defenders claimed that they were about to be unconstitutionally discharged solely for their political affiliations. *Id.* at 508. The Supreme Court affirmed the lower court, holding that these employees could not be discharged. *Id.* at 520.

25. *Id.* at 518.

26. *Id.* For purposes of this article, this shall be called “the *Branti* exception.” For a further discussion of *Branti*, see *supra* note 2.

27. 497 U.S. 62, 65 (1990).

28. *Id.*

29. *Id.*

30. *Id.* at 68 (issue was whether First Amendment’s proscription of patronage dismissals, recognized in *Elrod* and *Branti*, extended to “promotion, transfer, recall, or hiring decisions involving public employment positions for which party affiliation is not an appropriate requirement”).

31. See *Zold v. Township of Mantua*, 935 F.2d 633, 639-40 (3d Cir. 1991)

to interpret and develop the *Branti* exception, attempting to formulate a functional test to indicate when political affiliation can be used as a pre-requisite to a government employment position, since “[g]uidance from the Supreme Court as to when party affiliation may be ‘appropriate’ is limited to the facts of the *Branti* case and to a few examples offered” in the opinion.³²

1. *Ness v. Marshall—The Functional Analysis Approach*

In *Ness v. Marshall*, the Third Circuit professed to adopt a standard which further refined *Branti* by using what it called a “functional analysis” approach.³³ The *Ness* court concluded that should a difference in party affiliation be “highly likely to cause an official to be ineffective in carrying out” the duties of the position, then dismissal for that reason would not violate the First Amendment.³⁴ Applying this functional analysis approach, the court concluded that the position of city solicitor qualified for the *Branti* exception.³⁵ Party affiliation was relevant because the city solicitor, as the mayor’s lawyer, was relied upon to deliver opinions and advice to the mayor.³⁶

(holding that municipal deputy clerk position not within *Branti* exception given that deputy clerk’s duties mainly ministerial, with no possibility of confidential duties except when deputy clerk must fill in for municipal clerk, and where latter position is itself nonpolitical); *Furlong v. Gudknecht*, 808 F.2d 233 (3d Cir. 1986) (finding fact that nonelected plaintiff may fill elected office important factor in *Branti* equation, but not determinative of *Branti* exception); *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (holding *Branti* doctrine not applicable to independent contractors, only to governmental employees); *Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986) (allowing *Branti* exception for position involving writing of speeches and press releases for elected official); *Ness v. Marshall*, 660 F.2d 517 (3d Cir. 1981) (finding that city solicitor and assistant city solicitor positions qualify for *Branti* exception because both involve advising mayor).

For a discussion of *Ness*, *Horn*, *Brown* and *Gudknecht*, see *infra* notes 33-47 and accompanying text. For a summary and analysis of *Zold*, see *infra* notes 48-122 and accompanying text.

32. *Ness*, 660 F.2d at 520. The *Ness* court noted that the Supreme Court left it to the lower courts to decide “in any particular case whether ‘party affiliation is an appropriate requirement for the effective performance of the public office involved.’” *Id.* (quoting *Branti v. Finkel*, 445 U.S. 507, 518 (1980)).

The *Branti* Court gave a limited number of examples of positions that would and would not qualify for a *Branti* exception. *Branti v. Finkel*, 445 U.S. 507, 518-20 (1980). The examples were: a football coach, who would not qualify for a *Branti* exception, although his duties might include formulating policy; an assistant public defender, who represented “individual citizens in controversy with the State,” who would not qualify for a *Branti* exception; and speech writers for a state governor, who would qualify. *Id.*

33. *Ness*, 660 F.2d at 521.

34. *Id.*

35. *Id.* at 522-23.

36. *Id.* at 522. The *Ness* court noted that “[i]n relying on an attorney to perform . . . functions so intimately related to city policy [i.e., rendering legal opinions, drafting ordinances and negotiating contracts], the mayor has the right to receive the complete cooperation and loyalty of a trusted adviser, and

2. Horn v. Kean—*A Refusal to Expand the Branti Doctrine to Independent Contractors*

The Third Circuit next addressed the *Branti* doctrine in *Horn v. Kean*.³⁷ This decision, like the Supreme Court's *Rutan* decision, concerned the overall scope of the applicability of the *Branti* doctrine, not the scope of the *Branti* exception itself.³⁸ In *Horn*, the court refused to expand the *Branti* doctrine to include government independent contractors, and instead limited the doctrine to government employees.³⁹ Judicial conservatism underscored the court's opinion; the court did not want to expand the *Branti* doctrine any further than the Supreme Court's formulation.⁴⁰

3. Brown v. Trench—*The Speechwriter Case*

The Third Circuit again addressed the issue of politically-based firings in *Brown v. Trench*.⁴¹ In *Brown*, the court reviewed the law in other circuits, seeking factors on which to base its decision and from which to form a comprehensive test.⁴² The court determined that "[t]he key factor seems to be . . . whether the employee had 'meaningful input into decision making concerning the nature and scope of a major [governmental] program.'"⁴³ After so stating, however, the court decided the

should not be expected to settle for less." *Id.* The court made this decision notwithstanding the fact that the city solicitor had the duty of advising the city council, which could be comprised of members of a different political party. *Id.*

The Third Circuit once lamented that "[w]hile *Branti* provides us with a 'test' the Supreme Court has not specified the particular factors which indicate that a position falls within the *Branti* test." *Brown v. Trench*, 787 F.2d 167, 169 (3d Cir. 1986). The same could be said of the *Ness* court's functional analysis approach as the *Ness* test provides no factors on which to rely in determining whether a position fits the *Branti* exception. This may explain why later Third Circuit opinions have all but ignored *Ness*' functional analysis approach. Although these later opinions have cited *Ness*, none have noted it for adopting a test. *See, e.g.*, *Zold v. Township of Mantua*, 935 F.2d 633, 635-40 (3d Cir. 1991) (citing *Ness* test, then reverting to *Branti* question of whether political affiliation is appropriate requirement for effective performance of office in question); *Brown*, 787 F.2d at 169 (citing *Ness* holding, yet neglecting test).

The *Ness* language does little more than restate the *Branti* question. *Ness* asks if a difference in party affiliation is highly likely to cause the official to be ineffective in carrying out the duties of his position. *Ness*, 660 F.2d at 521. Similarly, *Branti* asks whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the position. *Branti*, 445 U.S. at 518. Given the similarity between the two, perhaps the *Ness* test's failure lies in how little it adds to the discussion.

37. 796 F.2d 668 (3d Cir. 1986) (en banc).

38. *Id.* at 678-79. For a discussion of the scope of *Rutan*, see *supra* note 10, and *supra* notes 27-30 and accompanying text.

39. *Horn*, 796 F.2d at 674.

40. *Id.* at 678. For a further discussion of *Horn*, see *infra* note 109.

41. 787 F.2d 167 (3d Cir. 1986).

42. *Id.* at 169-70.

43. *Id.* (quoting *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981),

case narrowly on its facts, finding that because the plaintiff wrote speeches, communicated with legislators and prepared press releases for elected, policymaking officials, the position was one which could not be performed effectively except by someone who shared the political beliefs of the government officials for whom the plaintiff worked.⁴⁴

4. *Furlong v. Gudknecht—Possible Succession to Elected Office is Not Enough*

The Third Circuit in *Furlong v. Gudknecht*⁴⁵ addressed the scope of the *Branti* exception once again. Unlike the former Third Circuit decisions, *Furlong* focused neither on which employees could claim *Elrod/Branti* protections nor on what duties qualified a position for a *Branti* exception, but on whether the possibility of an employee's statutory ascension to a superior's elected office in itself is enough to qualify the employee's position for a *Branti* exception.⁴⁶ The court decided that the possibility of succession alone, although an important factor, was not determinative in the *Branti* analysis.⁴⁷

Ness, Horn, Brown and *Furlong* set the stage for the *Zold* opinion.

5. *Zold v. Township of Mantua—The Latest Word*

*Zold v. Township of Mantua*⁴⁸ is the Third Circuit's most recent pronouncement on the subject of patronage dismissals. *Zold*'s significance lies both in its synthesis of prior Third Circuit decisions and in its use of "special scrutiny" to analyze the facets of the position for which the gov-

cert. denied, 455 U.S. 1021 (1982)). Thus, the court seemed to circle back to the *Elrod* standard, distinguishing between policymaking and nonpolicymaking decisions. *See id.*

44. *Id.* at 170. The court's conservatism in applying *Branti* is apparent from its willingness to fit plaintiff within one of the few examples offered in *Branti* of a position for which political affiliation constitutionally could be a prerequisite: assistants to a state governor "who help him write speeches, explain his views to the press, or communicate with the legislature." *See Branti v. Finkel*, 445 U.S. 507, 518 (1980).

45. 808 F.2d 233 (3d Cir. 1986).

46. *Id.* The employee was Second Deputy Recorder of Deeds for Bucks County, Pennsylvania. *Id.* at 234. By Pennsylvania statute, "[t]he recorder of deeds may appoint a second deputy recorder of deeds, who shall possess and discharge all the rights, powers and duties of the principal deputy recorder of deeds during his necessary or temporary absence." *Id.* at 236 (citing 16 PA. CONS. STAT. ANN. § 1312 (1956)). Similarly, the first deputy recorder assumes the position of recorder of deeds, should that office become vacant. *Id.* (citing 16 PA. CONS. STAT. ANN. § 1305). Thus, the second deputy recorder "might temporarily occupy the Recorder's office during the absence of both the Recorder and the First Deputy." *Id.*

47. *Id.* at 238. The court, following *Brown v. Trench*, found the key factor to be "whether the employee has meaningful input into decision making concerning the nature and scope of a major . . . program." *Id.* at 235 (quoting *Brown*, 787 F.2d at 169-70).

48. 935 F.2d 633 (3d Cir. 1991).

ernmental unit claims a *Branti* exception.⁴⁹

III. FACTS AND PROCEDURAL HISTORY

Jeanette Zold was employed by Mantua Township, New Jersey as a deputy municipal clerk.⁵⁰ A member of the Democratic Party,⁵¹ Zold was employed pursuant to a one year appointment.⁵² During her appointed term, the Republican Party won control of the Mantua Township Committee.⁵³ When Zold's one year term ended, she was not reappointed.⁵⁴ Zold claimed that she had not been reappointed because of her political affiliation.⁵⁵

By statute, New Jersey municipalities can define the term, compensation, powers, duties and functions of the office of deputy municipal clerk.⁵⁶ In Mantua, the deputy clerk's duties in and of themselves are largely ministerial, and thus not appropriate for a *Branti* exception.⁵⁷ The New Jersey statute, however, also provides that the deputy clerk "shall have all the powers of the municipal clerk" during periods of "absence or disability of the municipal clerk."⁵⁸ The Mantua deputy clerk thus "handles the day-to-day duties of the clerk and must fill in whenever the latter is unavailable."⁵⁹ The clerk's duties, in turn, include confidential functions, such as presiding over closed-session township

49. *Id.* at 635-36 (analyzing precedent and applying "special scrutiny" to facts at bar).

50. *Id.* at 634.

51. *Id.* at 634-35.

52. *Id.* at 635.

53. *Id.* The Republican Party won control of the Township Committee in the November 1988 elections. Plaintiff's term of appointment ended in December 1988. *Id.* at 634-35.

54. *Id.* at 635.

55. *Id.*

56. N.J. STAT. ANN. § 40A:9-135 (West 1980). The statute provides:

The governing body of any municipality, by ordinance, may create the office of deputy municipal clerk and provide for appointments thereto, his compensation, term thereof and the powers, duties and functions of such office. During the absence or disability of the municipal clerk, the deputy municipal clerk shall have all the powers of the municipal clerk and shall perform the functions and duties of such office.

Id.

57. *Zold*, 935 F.2d at 637-38. The characterization of the office is critical; if an office is characterized as ministerial, it cannot be considered for a *Branti* exception. *See Zold v. Township of Mantua*, 737 F. Supp. 308, 313 (D.N.J. 1990) (citing *Branti v. Finkel*, 445 U.S. 507, 518 (1980)); *see also* Cammarosano, Note, *supra* note 12, at 110 (commenting that ministerial duties do not support claim of *Branti* exception).

58. N.J. STAT. ANN. § 40A:9-135.

59. *Zold*, 935 F.2d at 636. In Mantua, the office of township clerk is a part-time position, and the deputy clerk is a full-time position, leaving the deputy clerk as "the highest ranking full-time employee." *Id.*

meetings.⁶⁰ Although under New Jersey law the deputy municipal clerk position itself is not within the *Branti* exception,⁶¹ the township based its claim for a *Branti* exception on this function of “filling in” for the municipal clerk.⁶²

Ms. Zold filed suit alleging that defendants⁶³ had violated her First Amendment right to freedom of association by refusing to reappoint her because of her political affiliation.⁶⁴ Defendants argued that the position fell within the *Branti* exception, which allowed them to not reappoint Zold because of her political affiliation.⁶⁵ The United States District Court for the District of New Jersey granted defendants’ motion for summary judgment, concluding that Zold’s position as deputy municipal clerk was one for which the Township Committee could properly take into account her political affiliation.⁶⁶

60. *Zold*, 737 F. Supp. at 316-17.

61. *Zold*, 935 F.2d at 638 (stating that “[New Jersey] law makes clear that political affiliation is not a factor in the municipal clerk’s position”). For a discussion of the Third Circuit’s view of the municipal clerk’s position under New Jersey law, see *infra* notes 100-01.

62. *Zold*, 737 F. Supp. at 316.

63. The defendants named in this action were the township, the mayor and two committeemen. *Id.* at 308.

64. *Id.* at 310. Plaintiff filed suit under 42 U.S.C. § 1983 (1988). *Zold*, 737 F. Supp. at 309. Section 1983, in pertinent part, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

65. *Zold*, 737 F. Supp. at 310. The court noted: “[D]efendants argue that the position of deputy clerk is a sensitive and confidential position which demands political loyalty to . . . the Township Committee.” *Id.* The defendants also questioned Zold’s competence as deputy clerk, alleging that “she failed to adequately perform even her ministerial tasks.” *Id.*

66. *Id.* at 318-19.

The district court granted the defendants’ motion for summary judgment because it found as a matter of law that plaintiff’s position was political in nature and therefore fell within the *Branti* exception. *Id.* at 316. The district court did not base its decision on the duties of the office of the deputy clerk itself, as these were mainly ministerial in nature. *Id.* at 315-16. The court noted that the deputy clerk’s duties in and of themselves were confined to maintaining records, issuing dog licenses and filing documents. *Id.* Instead, the district court emphasized the deputy clerk’s statutory role of filling in for the municipal clerk, having all of the powers and performing all of the duties of that office. *Id.* at 317. Noting that “the deputy clerk essentially serves as municipal clerk on a daily basis,” the district court stressed the deputy clerk’s access to confidential information. *Id.* The district court also stated that the deputy clerk served a public relations function much like that at issue in *Brown v. Trench*. *Id.* For a discussion of *Brown*, see *supra* notes 41-44 and accompanying text. For a discussion of the Third Circuit’s analysis of the nature of the deputy clerk’s position, see *infra* notes 85-104 and accompanying text.

Because the clerk served a public relations function, and because the clerk, and in her absence the deputy clerk, presided at township meetings including closed sessions, the district court found that the deputy clerk position was confidential.⁶⁷ Therefore, political affiliation was considered an appropriate criterion on which to base the employment decision.⁶⁸

IV. THE THIRD CIRCUIT'S ANALYSIS

The Third Circuit reversed the district court's decision in favor of the township, stating in part that the trial court had misapplied precedent.⁶⁹ The Third Circuit relied largely on a procedural matter: the use of "special scrutiny" in evaluating the position of deputy clerk.⁷⁰

The Third Circuit first set forth the legal principles governing the case.⁷¹ The court traced the patronage dismissal doctrine through the Supreme Court's *Elrod* and *Branti* decisions.⁷² Noting that "[e]ach decision is, of course, fact specific,"⁷³ the court reviewed the fact patterns of its prior *Branti* doctrine decisions: *Ness v. Marshall*,⁷⁴ *Brown v. Trench*,⁷⁵ and *Furlong v. Gudknecht*.⁷⁶ Because the *Zold* case implicated the First

The district court refused to grant defendants' motion for summary judgment based on the claim that plaintiff's job performance was poor, because the material facts concerning that question were in dispute, making summary judgment inappropriate. *Zold*, 737 F. Supp. at 312.

67. *Zold*, 737 F. Supp. at 316-17. For an explanation of this conclusion, see *supra* note 66.

68. *Zold*, 737 F. Supp. at 316-17.

69. *Zold v. Township of Mantua*, 935 F.2d 633, 638 (3d Cir. 1991) (distinguishing *Brown*, which district court wrongly believed controlling). For a discussion of the Third Circuit's view of *Brown*, see *infra* notes 95-99 and accompanying text.

70. *Zold*, 935 F.2d at 636. The court found that since no facts regarding the position were in dispute, and therefore the characterization of the position was determinative, it would use "special scrutiny." *Id.* The court opined that "[w]hen the issue on appeal turns on a constitutional fact, *i.e.*, 'a fact whose "determination is decisive of constitutional rights'" appellate courts have the obligation to give such facts special scrutiny." *Id.* (citation omitted) (quoting *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1259 (3d Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987)). For a further discussion of special scrutiny, see *infra* notes 79-84 and accompanying text.

71. *Zold*, 935 F.2d at 635.

72. *Id.* For a discussion of *Elrod*, see *supra* notes 1 & 10, and *supra* notes 18-23 and accompanying text. For a discussion of *Branti*, see *supra* notes 2 & 10, and *supra* notes 24-26 and accompanying text.

73. *Zold*, 935 F.2d at 635.

74. 660 F.2d 517 (3d Cir. 1981) (city solicitor position falls within *Branti* exception). For a discussion of *Ness*, see *supra* notes 33-36 and accompanying text.

75. 787 F.2d 167 (3d Cir. 1986) (speechwriter position falls within *Branti* exception). For a discussion of *Brown*, see *supra* notes 41-44 and accompanying text.

76. 808 F.2d 233 (3d Cir. 1986) (fact that employee may succeed to elected

Amendment, the court followed the Supreme Court's holding in *New York Times v. Sullivan*⁷⁷ and indicated it would "make an independent examination of the whole record."⁷⁸ Accordingly, "constitutional facts," those whose determination is decisive of a constitutional issue, merited "special scrutiny."⁷⁹

The Supreme Court articulated the "special scrutiny" standard in *New York Times*,⁸⁰ and the Third Circuit reiterated the standard in *Bender v. Williamsport Area School District*.⁸¹ In *Bender*, the court noted:

[T]he Constitution requires that judges must exercise independent appellate review "in order to preserve the precious liberties established and ordained by the Constitution." . . . As a result, we do not defer to the same factual inferences drawn from the record by the district court, as we might [in a non-constitutional case].⁸²

The *Bender* court further stated that "[f]actual findings by the district judge . . . would not necessarily be required to add to our understanding."⁸³ Taking heed, the *Zold* court noted that in cases involving "constitutional facts," "[a]n appellate court . . . may draw its own inference from facts in the record."⁸⁴

The court then applied "special scrutiny" by closely examining the duties of the deputy clerk.⁸⁵ The court noted that the New Jersey statute which authorizes municipalities "to create the office of deputy municipal clerk and provide for . . . the powers, duties and functions of such office" specifies only that the deputy clerk can assume the powers and

office not enough by itself to qualify position for *Branti* exception). For a discussion of *Furlong*, see *supra* notes 45-47 and accompanying text.

77. 376 U.S. 254 (1964) (libel suit).

78. *Zold v. Township of Mantua*, 935 F.2d 633, 636 (3d Cir. 1991) (quoting *New York Times*, 376 U.S. at 285).

79. *Id.* (quoting *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1259 (3d Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987)).

80. *New York Times*, 376 U.S. at 285 ("We must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.") (citation omitted) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)).

81. 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986) (vacating judgment because appellant lacked standing).

82. *Id.* at 542 n.3 (citation omitted) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984)).

83. *Id.*

84. *Zold*, 935 F.2d at 636 (citing *Bender*, 741 F.2d at 542 n.3); see also *New York Times*, 376 U.S. at 285 (stating that court itself must examine speech at issue to see whether it is of character protected by First Amendment); *Black v. Potter*, 631 F.2d 233, 241 (3d Cir. 1980) (noting that Supreme Court has consistently recognized that in cases involving asserted violations of constitutional rights, reviewing court is free to draw its own inferences from established facts).

85. *Zold*, 935 F.2d at 636-38.

duties of the municipal clerk in the latter's absence or disability.⁸⁶ The court thus characterized the deputy clerk's duties as "handl[ing] the day-to-day duties of the clerk and . . . fill[ing] in for the clerk."⁸⁷ In so "filling in," the deputy clerk could assume the following statutory duties: "1) secretary of the governing body, 2) secretary of the municipal corporation, 3) election official and 4) administrative official on the municipal level."⁸⁸

The court found that in *Zold* only the first of these statutory duties, secretary of the governing body, could possibly support a claim for a *Branti* exception.⁸⁹ By "filling in" for the clerk as secretary of the governing body, the deputy clerk had access to confidential information;⁹⁰ acted as a liaison officer between the government and the taxpayers and between township executives and "the general body of municipal personnel";⁹¹ and acted as a public relations figure in the municipal corporation.⁹² In its opinion, the court expressly addressed the latter two duties as one.⁹³

86. *Id.* at 636 (quoting N.J. STAT. ANN. § 40A:9-135 (West 1980)) (omission in original).

87. *Id.*

88. *Id.*

89. *Id.* at 637-38. The latter three duties are ministerial, a classification that tolls a death knell for *Branti* exceptions. See *Zold v. Township of Mantua*, 737 F. Supp. 308, 313 (D.N.J. 1990), *rev'd on other grounds*, 935 F.2d 633 (3d Cir. 1991) (noting that "characterization of the position as 'ministerial' is critical").

90. *Zold*, 935 F.2d at 637. The court described this access as follows: The deputy clerk could have access to confidential information because the clerk or deputy attends closed sessions in which the Committee discusses appointments and personnel, handling litigation, decisions relating to enactment of ordinances and resolutions, and strategy relating to municipal business. The clerk or deputy can be privy to the Committee's discussion of civil or criminal penalties.

Id.

91. *Id.* (quoting *Zold*, 737 F. Supp. at 317). The court noted that "in fulfilling those functions [of liaison] the deputy clerk has had duties such as dealing daily with the Township engineer and solicitor as well as discussing with the auditor action to collect mobile home fees that have been uncollected for a long time." *Id.*

92. *Id.* This claim was based on an assertion that "[t]he status of the clerk . . . depends upon gaining and maintaining the complete confidence of the governing body, the press, the taxpayer, and the citizen. In other words, much of the clerk's effectiveness depends on good public relations." *Id.* at 637-38 (quoting Appendix at 50, *Zold*, 935 F.2d 633 (No. 90-5513) (containing material for training clerks)) (omission in original).

93. *Id.* at 638. The court expressly addressed whether either the deputy clerk's access to confidential information or her role as press relations figure would qualify her position for a *Branti* exception. *Id.* Nowhere in the opinion, however, does the court discuss directly what effect *Zold*'s role as liaison officer between the governing body and the taxpayers or the municipal employees has in the *Branti* analysis. The role of liaison between the governing body and the taxpayers seems to be but another description of *Zold*'s press relations duties. See *id.* Similarly, her role as liaison between the governing body and the other municipal employees presumably included discussing official policy as well as

The Third Circuit determined that the public relations role involved in this case did not require political affiliation.⁹⁴ Thus, the Third Circuit distinguished *Zold* from its 1986 decision in *Brown v. Trench*,⁹⁵ the case on which the *Zold* district court had relied heavily in making its decision.⁹⁶ In *Brown*, the plaintiff wrote speeches and press releases for elected officials and acted as spokesman for those officials before the press and the public.⁹⁷ The Third Circuit in *Zold* distinguished the deputy municipal clerk position from that at issue in *Brown*, because instead of writing press releases and speeches, the press contact required of the position of deputy clerk was “generally limited to informing reporters about the agenda of upcoming meetings,” while her contact with the public involved “‘receiving inquiries and complaints from the electorate . . . and responding in kind,’ rather than promoting policies.”⁹⁸ Because of this difference in functions, the *Zold* court found that *Brown* was not controlling.⁹⁹

The *Zold* court then turned its attention to the possibility of access to confidential information as a basis for a *Branti* exception. The Third Circuit determined that although the possibility of access to confidential information might form the basis for a *Branti* exception in other cases, it was not so in this case because the deputy clerk gained access to confidential information only through assuming the duties of the clerk, and state law in New Jersey makes the clerk’s job non-political.¹⁰⁰ There-

obtaining or discussing confidential information. *Id.* at 637 (examples of liaison duties included “dealing daily with the Township engineer and solicitor” as well as discussing collection of municipal fees).

94. *Id.* at 638 (noting that deputy clerk officially was not assigned any politically sensitive tasks, and that municipal clerk, who could not be discharged because of political affiliation, shared spokesman role).

95. 787 F.2d 167 (3d Cir. 1986).

96. *Zold*, 935 F.2d at 638. The Third Circuit stated that “[t]he district court gave great weight to the public relations aspect of the deputy clerk’s job because it believed that our decision in *Brown v. Trench* was controlling.” *Id.* (citation omitted). The *Brown* court had found that a plaintiff who wrote speeches and press releases for elected officials could be fired on the basis of her political affiliation. *Brown*, 787 F.2d at 170. For a further discussion of *Brown*, see *supra* notes 41-44 and accompanying text and *infra* note 97.

97. *Brown*, 787 F.2d at 170 (plaintiff was Assistant Director of Public Information for Bucks County, Pennsylvania whose duties included “preparing and distributing press releases, contacting media representatives, and promoting county projects”).

98. *Zold*, 935 F.2d at 638 (quoting *Zold v. Township of Mantua*, 737 F. Supp. 308, 317 (D.N.J. 1990), *rev’d on other grounds*, 935 F.2d 633 (3d Cir. 1991)).

99. *Id.* The court also noted that the clerk, who shared the spokesman role, by statute could not be terminated on the basis of political affiliation. *Id.* For a discussion of the depoliticization of the clerk’s position, see *infra* note 100.

100. *Zold*, 935 F.2d at 638. The court commented that “[New Jersey] law makes clear that political affiliation is not a factor in the municipal clerk’s position.” *Id.* The New Jersey legislature had depoliticized the clerk’s position by making it an appointed rather than an elected position, and by providing for tenure after five years. *Id.* Significantly, under New Jersey law, “even non-ten-

fore, the court held that these duties were not a basis for a *Branti* exception.¹⁰¹

Finally, the court summarily dismissed the township's other claims that the plaintiff could deliberately harm the government,¹⁰² that the position was traditionally filled by patronage practices,¹⁰³ and that since the position was not tenured, the township could fire plaintiff for any reason.¹⁰⁴

V. ANALYSIS

Zold is significant for two reasons. First, the *Zold* court adopted special scrutiny for analyzing claims of *Branti* exceptions.¹⁰⁵ This special scrutiny, in turn, brings with it a policy of disfavor for *Branti* exception

ured clerks are explicitly protected from political firings after three years of service." *Id.* at 638-39.

For the text of the statutes governing the municipal clerk's office, see N.J. Stat. Ann. §§ 40A:9-133 to -134.1 (West Supp. 1992).

101. *Zold*, 935 F.2d at 639-40. Relying on New Jersey's statutory law, the court noted it could not "conclude that duties fulfilled by a tenured, nonpolitical appointee suddenly become confidential or political on those occasions when the deputy clerk is called to substitute for [the municipal clerk]." *Id.* at 639.

Interestingly, four years earlier in *Furlong v. Gudknecht*, the Third Circuit held that statutory schemes of succession, while a major factor in a *Branti* analysis, were not outcome-determinative. *Furlong v. Gudknecht*, 808 F.2d 233, 236 (3d Cir. 1986). In *Furlong*, though, the employee could succeed to the elected office of Recorder of Deeds. *Id.* In addition, the *Furlong* court took pains to stress that "the attendant duties of the Recorder of Deeds appear unaffected by the Recorder's political views" and emphasized the largely ministerial duties of that office. *Id.* at 236-37. For a further discussion of *Furlong*, see *supra* notes 45-47 and accompanying text.

102. *Zold*, 935 F.2d at 639. Responding to the township's claim that an employee of the other political party could sabotage the township administration, the court noted that "[t]he potential that an employee may cause havoc is in itself no basis for holding the employee can be hired or discharged because of his or her political affiliation." *Id.*

103. *Id.* The court stated that the township can find no support "from its long tradition of treating the deputy clerk's job as a political patronage position to be filled by the party in power" because "[t]he patronage practices held to be in violation of the First Amendment by the Supreme Court [also] had long histories." *Id.* (citing *Elrod v. Burns*, 427 U.S., 347, 353-55 (1976)).

Furthermore, the Third Circuit found that the township could not prevail by informally treating an employee as one whose position qualified for a *Branti* exception. *Id.* The Third Circuit stated that "the fact that Township Committee members have traditionally sought confidential and valuable advice from the deputy clerk on pending policy decisions does not transform the deputy clerk into a confidential employee under *Elrod*." *Id.*

104. *Id.* The court stated: "There is no basis to assume that an employee hired at-will who can be fired for any or no reason can be fired for a constitutionally prohibited reason." *Id.* at 639-40 (citing *Elrod*, 427 U.S. at 360-61).

105. *Id.* at 636. For a discussion of the legal basis of the special scrutiny standard of review, see *supra* notes 79-84 and accompanying text.

claims.¹⁰⁶ Second, *Zold* follows the policy set by the *Branti* Court to allow maximum flexibility in the use of the *Branti* doctrine by staying away from a comprehensive test.¹⁰⁷

A. *Special Scrutiny*

The Third Circuit adopted a special scrutiny standard for municipalities claiming a *Branti* exception for jobs with patronage potential.¹⁰⁸ This standard shows the Third Circuit's disinclination towards finding a position politically oriented. The fact that an appellate court will not defer to a trial court's fact findings implicitly demands that trial courts not defer to governmental claims of *Branti* exceptions, but rather scrutinize such claims closely.¹⁰⁹

However, the use of special scrutiny does not in and of itself provide a comprehensive test. The Third Circuit has bemoaned the fact that *Branti* provided a test, but little guidance in the practical application of that test.¹¹⁰ The court continues to struggle with this problem.¹¹¹

106. For a discussion of this policy, see *infra* note 109 and accompanying text.

107. For a discussion of the *Branti* Court's policy, and the *Zold* court's interpretation of this policy, see *infra* notes 114-22 and accompanying text.

108. *Zold*, 935 F.2d at 636. Appellate courts have the obligation to give facts in constitutional litigation "special scrutiny" due to the importance of the First Amendment rights asserted. *Id.* For a discussion of special scrutiny, see *supra* notes 70 & 79-84 and accompanying text.

109. Compare *Zold v. Township of Mantua*, 737 F. Supp. 308, 315 (D.N.J. 1990) (holding incorrectly that "the Third Circuit has taken a very narrow view of *Branti*," and therefore granting deference to governmental claim of *Branti* exception (citing *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986))), *rev'd*, 935 F.2d 633 (3d Cir. 1991) with *Zold*, 935 F.2d at 636 (reversing the district court and providing for special scrutiny).

In the *Zold* decision, the Third Circuit countered what it saw as a misperceived policy argument made by the *Zold* district court. In the earlier *Horn v. Kean* decision, the Third Circuit declared that it would interpret *Branti*'s scope narrowly. *Horn v. Kean*, 796 F.2d 668, 678 (3d Cir. 1986) (en banc). The *Horn* court refused to extend the *Branti* doctrine to include independent contractors, but limited its use to government employees. *Id.* at 674. This narrow interpretation, however, was limited to the overall scope of applicability of the *Branti* doctrine; it did not widen the scope of the *Branti* exception. *Id.* at 678. The *Horn* court actually expressed no opinion about whether the *Branti* exception doctrine should be read narrowly or broadly. *Id.* at 678-79 (noting that judicial conservatism demands that court not expand *Branti* doctrine to independent contractors, stating that "[w]e believe that it is a danger for courts, other than the Supreme Court, to expand this particular rule"). For a further discussion of *Horn*, see *supra* notes 37-40 and accompanying text.

Zold and *Horn* are consistent. The Third Circuit will not expand the doctrine to new groups of plaintiffs, but will vigorously scrutinize claims by local governments that their employees fall within the *Branti* exception.

110. *Brown v. Trench*, 787 F.2d 167, 169 (3d Cir. 1986) ("While *Branti* provides us with a 'test' the Supreme Court has not specified the particular factors which indicate that a position falls within the *Branti* test.').

111. The Third Circuit's difficulty in applying *Branti* is largely due to the Supreme Court's *Branti* decision itself, which formulated a vague, non-concrete

Ironically, Zold provides for the use of special scrutiny, but fails to fully

test. According to *Branti*, a governmental unit or actor may fire an employee for his or her political affiliation if that affiliation is relevant to the effective execution of the office he or she holds. *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

The Court provided few factors to analyze in determining which positions qualify for the exception. Indeed, the *Branti* "test" is arguably not a test at all, but a statement of policy—that patronage is impermissible except when necessary. Justice Brennan's plurality opinion in *Elrod* supports this theory. In *Elrod*, the Court created the patronage dismissal doctrine, and expounded on the protection given political affiliation by the First Amendment. *Elrod v. Burns*, 427 U.S. 347, 356-60 (1970) (plurality opinion). The Court found that "[a]lthough the practice of patronage dismissals clearly infringes First Amendment interests . . . the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons." *Id.* at 360.

Elrod made a distinction between policymaking and nonpolicymaking positions, while the *Branti* test, based as it is on the "appropriateness" of the use of political affiliation in employment decisions, is far less concrete. For this reason, one ought to view *Branti* more as a reaffirmation of the policy underlying Justice Brennan's plurality opinion in *Elrod* than as a "test." As the Third Circuit noted in *Ness v. Marshall*, the Supreme Court left to the courts to decide "in any particular case whether 'party affiliation is an appropriate requirement for the effective performance of the public office involved.'" *Ness v. Marshall*, 660 F.2d 517, 520 (3d Cir. 1981) (quoting *Branti*, 445 U.S. at 518).

The Supreme Court in *Branti* provided only three examples as guidance. A football coach, although he might formulate policy, would not fall within the *Branti* exception. *Branti*, 445 U.S. at 518. On the other hand, speech writers for a state governor would qualify. *Id.* Finally, an assistant public defender, who represents "individual citizens in controversy with the State," would not qualify. *Id.* at 519-20.

The Third Circuit has enunciated some of its own guidelines. The simple cases involve ministerial positions which never qualify for a *Branti* exception. See *Zold*, 935 F.2d at 638 (finding that functions exercised by deputy clerk as secretary to township committee, including processing, recording, filing and advertising ordinances, resolutions, municipal budgets and bids for municipal contracts, are purely ministerial and therefore not basis for *Branti* exception); see also Cammarosano, Note, *supra* note 12, at 110 & n.91 ("The use of patronage alone to make an employment decision concerning a purely ministerial position is especially difficult for the government to justify."). In *Ness v. Marshall*, the Third Circuit analyzed the applicability of the *Branti* exception in terms of whether party affiliation was "highly likely" to cause an employee to be "ineffective" in carrying out his duties. *Ness*, 660 F.2d at 521. In *Brown v. Trench*, the Third Circuit determined that the "key factor" in a *Branti* analysis was whether an employee had "meaningful input into decision making concerning the nature and scope of a major [governmental] program." *Brown v. Trench* 787 F.2d 167, 169-70 (3d Cir. 1986) (quoting *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981)). Thus, the court seemed to circle back to the *Elrod* standard, distinguishing between "policymaking" and "nonpolicymaking" decisions. In *Furlong v. Gudknecht*, in addition to applying the *Brown* standard, the Third Circuit determined that the possibility that the holder of a position might succeed to an elected position in itself is an important factor, although not outcome determinative of the *Branti* analysis. *Furlong v. Gudknecht*, 808 F.2d 233, 238 (3d Cir. 1986).

For a discussion of the *Elrod* test, see *supra* notes 18-23 and accompanying text. For a discussion of the *Branti* test, see *supra* notes 24-26 and accompanying text. For a discussion of *Ness*, see *supra* notes 33-36 and accompanying text. For a discussion of *Brown*, see *supra* notes 41-44 and accompanying text. For a discussion of *Furlong*, see *supra* notes 45-47 and accompanying text.

instruct as to what to scrutinize.¹¹² Like Supreme Court Justice Stewart's comments in *Jacobellis v. Ohio* on pornography, the Third Circuit's view on whether a position requires a certain political affiliation appears to be that although it cannot define it, it "knows it when [it] see[s] it."¹¹³

B. Branti Policy

Zold demonstrates that the search for a well-defined *Branti* test is as fruitless as the search for perpetual motion. There is no good reliable test. As the Third Circuit noted, "[e]ach decision is, of course, fact specific for that case."¹¹⁴

When the *Elrod* Court enunciated a standard based on "policymaking,"¹¹⁵ it noted that that criterion was not well defined.¹¹⁶ The *Branti* Court took a step back, creating an even vaguer test based on the "appropriateness" of using political affiliation as a job criterion.¹¹⁷ In so doing, the *Branti* Court noted that the *Elrod* "policymaking" and "confidential" criteria were valid factors to consider in most cases, but stressed that the use of these factors would not always bring a fair, rational result.¹¹⁸

The *Branti* Court willingly sacrificed some clarity in its rule in order to ensure maximum flexibility for lower courts in determining whether a position falls within the *Branti* exception. Only a flexible approach could serve the twin aims of *Branti*: to allow governmental use of political affiliation as a touchstone for employment decisions where reasons were

112. The *Zold* court's "scrutiny" concentrated almost exclusively on the township's claim that *Zold's* position was confidential. *Zold*, 935 F.2d at 638. This seems to circle back to Justice Stewart's theory in his *Elrod* concurrence that policymaking or confidential positions qualify for *Branti* exceptions. See *Elrod*, 427 U.S. at 375 (Stewart, J., concurring); see also *Branti*, 445 U.S. at 520-21 (Stewart, J., dissenting).

113. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Commenting on whether a motion picture should be judged obscene by the Court, Justice Stewart noted:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hardcore pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture in this case is not that.

Id. (Stewart, J., concurring).

114. *Zold*, 935 F.2d at 635.

115. *Elrod*, 427 U.S. at 367.

116. *Id.* at 367-68. The Court stated: "No clear line can be drawn between policymaking and nonpolicymaking decisions." *Id.* at 367.

117. *Branti v. Finkel*, 445 U.S. 507, 518 (1980). The *Branti* exception test is whether the governmental unit can "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* For a discussion of the *Branti* test, see *supra* notes 24-26 and accompanying text.

118. *Branti*, 445 U.S. at 518. The *Branti* Court used as an example the case of a football coach, who may make "policy," but whose position would not fall within the *Branti* exception. *Id.*

“overriding” and of “vital importance,”¹¹⁹ and to protect individuals’ rights to First Amendment freedom of association.¹²⁰

Zold upholds these twin aims admirably. Maintaining that each case is fact specific provides maximum flexibility in decision making. On the other hand, the use of special scrutiny protects plaintiffs by ensuring that trial courts will not merely rubber stamp government claims that positions fall within the *Branti* exception.

VI. CONCLUSION

In short, the formulation of a comprehensive test would least likely effectuate the policy message expressed by the *Branti* Court. Instead, the identification of possible factors, to be used or ignored as the case demands,¹²¹ will effectuate the policy message of *Branti*. *Zold* is only the fifth decision touching on this issue in the Third Circuit. Time, and cases with novel fact patterns, will further clarify and develop the *Branti* exception.¹²²

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119. *Id.* at 517 (“[P]arty affiliation may be an acceptable requirement for some types of government employment.”).

120. *See id.* at 513.

121. The example noted by the *Branti* Court where it would ignore the “policymaking” of a football coach illustrates how a court may ignore certain factors. *Id.* at 518.

122. For example, the *Furlong v. Gudknecht* decision demonstrated that possible succession to elected office is an important, if not determinative, factor to be considered. *Furlong v. Gudknecht*, 808 F.2d 233, 238 (3d Cir. 1986). For a discussion of *Furlong*, see *supra* notes 45-47 and accompanying text. Similarly, *Zold* held that succession to a position of confidentiality is not determinative if the position is meant to be apolitical. *Zold v. Township of Mantua*, 935 F.2d 633, 638-39 (3d Cir. 1991).