American University Criminal Law Brief

Volume 2 | Issue 1 Article 6

2006

Courts, Cops, Citizens, And Criminals: How Courts Misapply SeibertTo Question-First Interrogations And How They Can Fix It

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I. Introduction

"Do you know why we're here?"[1] This was Virginia homicide Detective David W. Allen's first question to Jayant Kadian, who was suspected of killing his mother.[2] "Yeah," Kadian replied, "because I stabbed my mom in the neck."[3] Immediately after that response, Detective Allen read *Miranda* warnings to Kadian, who then confessed in chilling detail to the murder.[4]

Detective Allen's simple question and Kadian's surprising answer and subsequent confession eventually led to a suppression hearing in a Virginia courtroom.[5] At the hearing, the judge suppressed the confession, relying on *Missouri v. Seibert,*[6] the United States Supreme Court's fractured decision which mandates suppression of some confessions obtained during a question-first interrogation.[7] The judge found that Detective Allen's initial "question 'makes no particular sense except as an attempt to [elicit] an incriminating response.'"[8] As the judge explained, "[A]sking such a question, then giving a defendant *Miranda* warnings, then asking about the incident in question makes a hash of the whole process of giving a defendant notice of his rights."[9]

However, in many, if not most, state and federal jurisdictions across the United States, the judge's ruling would be reversed by an appellate court. The hypothetical appellate court's opinion would begin by laying out the relevant Supreme Court cases, starting with *Miranda v. Arizona*[10] and *United States v. Dickerson*,[11] then moving to *Oregon v. Elstad*[12] and ending with *Seibert*. The appellate court would explain that both *Elstad* and *Seibert* addressed question-first situations, where the police asked the suspect a question or began to interrogate the suspect before reading the *Miranda* warnings, then later read the suspect *Miranda* warnings and began asking questions again. In *Elstad*, the Court allowed the subsequent warned confession to be admitted into evidence during the prosecution's case-in-chief, while in *Seibert*, the Court did not. As this Article explores, distinguishing between *Elstad* and *Seibert* is complicated.

When analyzing *Seibert*, the hypothetical appellate court would first observe that there was no majority opinion. Then it would discuss *United States v. Marks,*[13] where the Court established the "narrowest grounds" doctrine, allowing lower courts to identify or derive a controlling opinion or holding from within one of the Court's fractured decisions. If the appellate court followed the majority approach to the *Marks* analysis, the hypothetical court would quickly conclude that Justice Kennedy's concurrence was the controlling opinion.

Justice Kennedy's concurrence only calls for excluding a postwarning statement where the interrogator deliberately used a question-first strategy to obtain the statement. It is the deliberateness requirement that seems to be missing in Kadian's case, and that is why the judge's decision to suppress Kadian's confession would be reversed by the hypothetical appellate court.[14] In Kadian's case, the hypothetical became real when the Court of Appeals of Virginia reversed the judge's suppression of Kadian's statements and remanded the case for trial.[15]

Nevertheless, the Court of Appeals of Virginia decision to reverse the trial court and allow Kadian's confession might ultimately be wrong. Under a correct *Marks* analysis, there is no controlling opinion in *Seibert*. Therefore, when given the choice, lower courts should address question-first *Miranda* violations by applying the *Seibert* plurality opinion, rather than Justice Kennedy's concurrence. The Fifth Amendment declares that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself,"[16] and the judiciary is the institution entrusted with the responsibility to guard that constitutional right from state encroachment, including the threat posed by question-first tactics.

The next part of this Article, Part II, traces the development of *Miranda* jurisprudence, highlighting the four Supreme Court decisions most relevant to question-first interrogations, *Miranda, Elstad, Dickerson*, and *Seibert*. After laying this foundation, Part III explores *Marks* as applied by the Supreme Court and lower courts, ending with a survey of lower court opinions applying *Marks* to *Seibert*. Part IV explains why, contrary to the majority approach, Justice Kennedy's concurrence is not the narrowest grounds in *Seibert*. Part IV concludes by proposing that, after *Seibert*, lower courts are free to decide what rule to apply to question-first interrogations. Taking the next logical step, Part V evaluates the four possible approaches that lower courts might take to question-first interrogations. Part V concludes that the plurality test is the best choice. The Article concludes by exhorting courts to reflect carefully upon the constitutional right at stake when police obtain a confession through a question-first technique.

II. From *Miranda* to *Seibert*: The Supreme Court Struggles with Its "Constitutional Role"

Beginning with *Miranda v. Arizona*, the Supreme Court has struggled to define the scope of the privilege against self-incrimination, and, in particular, how to deal with question-first interrogations. Over the following decades, the Court created exceptions to *Miranda*, including *Elstad*, which allowed some confessions that could be products of question-first tactics to be admitted. In *Dickerson*, the Court answered the underlying question of whether *Miranda* warnings are constitutionally required. Yet, the fractured decision in *Seibert* proves that the debate over the privilege's scope is ongoing and that the Court still disagrees about how to handle confessions obtained through question-first interrogations.[17]

Miranda v. Arizona

Miranda is relevant to question-first interrogations on at least four levels. First, *Miranda* was and is a constitutional paradox: It went far beyond the Constitution's text, yet pro-

scribed concrete constitutional rules.[18] In the opening paragraph, the majority explained that it was addressing the Fifth Amendment privilege's relationship to evidence and procedure.[19] That promise was fulfilled in the third section of the opinion, which dictated the four *Miranda* warnings and procedural rules for admitting warned confessions and excluding unwarned confessions.[20] Although the majority insisted that the "decision in no way creates a constitutional straitjacket," encouraging Congress and the states to find alternatives to the warnings,[21] this was a false assurance. In reality, the majority stated that Congress and the states would have to demonstrate to the Court "procedures which are at least as effective" as the warnings,[22] a seemingly impossible challenge. Therefore, on its face, *Miranda* is invincible: It claims to be replaceable but only by a rule that provides *more* protection for the privilege.[23]

Second, *Miranda* relied on two fundamental principles that speak to the continuing debate over the privilege against self-incrimination in question-first interrogations: personal autonomy and evidentiary reliability.[24] With respect to personal autonomy, the Court placed a high value upon the individual defendant's rights when juxtaposed against the interests of government and society as a whole.[25] With respect to evidentiary reliability, the Court was concerned that modern interrogation techniques made confessions less reliable in the absence of an advocate or impartial observer.[26] The *Miranda* Court used both the personal autonomy and evidentiary reliability principles to justify placing a "heavy burden" on the government to "demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[27]

Third, *Miranda* is relevant to question-first tactics because it is an explicitly objective doctrine.[28] Admittedly, the majority considered the state of mind of the interrogator and the suspect.[29] The first section of the opinion focused entirely on the many techniques law enforcement officers employed to produce a calculated result: an admission of guilt.[30] However, in the end, the majority chose an objective rule, from the *Miranda* warnings to the knowing and intelligent waiver.[31] In fact, the majority emphatically rejected a subjective standard for determining whether the defendant knew his right to remain silent.[32] Since *Miranda*, the Court has continued to debate the value of subjective versus objective tests in protecting the privilege against self-incrimination.[33]

Finally, the *Miranda* majority arguably addressed question-first tactics, a point often overlooked. When the majority described its holding, it repeatedly declared that the warnings must be given *first*, before any interrogation.[34] The *Miranda* majority also placed substantial value on the temporal element of the warnings when applying its holding to the specific cases under review.[35] The Court even went so far as to treat one of the *Miranda* cases, *Westover v. United States*,[36] as a question-first interrogation.[37]

Oregon v. Elstad

Although *Miranda* initially appeared to be a bright-line rule, the Court has since created many exceptions to *Miranda* in its struggle to define the scope of the privilege against self-incrimination.[38] The exception most directly related to question-first tactics is *Oregon v. Elstad*.[39] In *Elstad*, the Court held that when a suspect has made an unwarned, but voluntary admission, a subsequent warned and voluntary statement is admissible.[40] As Justice O'Connor wrote for the majority,

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undemine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.[41]

Therefore, "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion."[42] Additionally, the *Elstad* majority felt that a fifth *Miranda* warning, that the "prior statement could not be used against" the suspect, was "neither practicable nor constitutionally necessary."[43]

The *Elstad* majority unambiguously rejected two arguments for excluding the second statement. It found neither the "fruit of the poisonous tree"[44] nor the "cat out of the bag"[45] theory justified excluding the second statement. Consequently, *Elstad* could have ended the question-first debate. Twenty years later, however, the *Seibert* Justices disagreed about how to interpret *Elstad*. The *Seibert* plurality interpreted *Elstad* as creating a good-faith mistake exception for *Miranda* violations,[46] while the *Seibert* dissent interpreted *Elstad* as requiring all question-first interrogations to meet the traditional Fifth Amendment voluntariness test.[47] Separating from the other eight Justices, Justice Kennedy interpreted *Elstad* as adequately addressing all interrogations except for deliberate two-step interrogations.[48] Elstad contains language that supports each position, so it is not surprising that the Court disagreed.[49]

Dickerson v. United States

Dickerson v. United States[50] is central to the discussion of question-first tactics because the Court used *Dickerson* to reaffirm *Miranda*'s constitutional nature. In *Dickerson*, the Court rejected Congress' attempt to statutorily overrule *Miranda*.[51] The seven-justice majority, led by Chief Justice Rehnquist, refused to allow Congress to overrule *Miranda* and, relying on *stare decisis* principles, refused to overrule *Miranda* itself.[52]

The *Dickerson* majority reaffirmed several key *Miranda* doctrines. First, the majority noted that "*Miranda* announced a constitutional rule."[53] The majority reconciled this statement with the *Miranda* exceptions by claiming that the *Miranda* exceptions "illustrate the principle–not that *Miranda* is not a constitutional rule–but that no constitutional rule is immutable."[54] Second, the *Dickerson* majority admitted that *Miranda* placed a higher cost on society because it was an objective rule. Chief Justice Rehnquist conceded: "The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result."[55] However, the Chief Justice and six other

Justices believed that society still benefited from *Miranda*'s objectivity because the alternative totality of the circumstances test would be harder to administer.[56]

Missouri v. Seibert

Missouri v. Seibert[57] represents the latest episode in the Court's quest to define the scope of the privilege against self-incrimination. In *Seibert*, the Court reconsidered the constitutionality of question-first tactics in light of *Elstad*. The result was a fractured decision that left lower courts with the task of finding constitutional law somewhere within four opinions, none of which received more than four votes.

The Facts

The defendant in *Seibert*, Patrice Seibert, had a twelve-year-old son, Jonathan, with cerebral palsy.[58] When Jonathan died in his sleep, Seibert was afraid she would be charged with neglect because Jonathan had bedsores.[59] *Seibert* conspired with her other two sons and their friends to set fire to their trailer house and burn Jonathan's body in it. To make the plan complete, Seibert planned to leave another mentally ill teenager, Donald Rector, in the trailer when they set it on fire.[60] The fire was set, and Donald died in it.[61]

In the subsequent investigation, Seibert became a suspect. Before Seibert's arrest, Officer Richard Hanrahan instructed the arresting officer not to read Seibert her *Miranda* rights.[62] At the police station, Officer Hanrahan interrogated Seibert for about half an hour, pressuring her to admit that Seibert knew Donald would be left in the fire.[63] When Seibert admitted she knew, Officer Hanrahan gave her a break from the questioning, read her *Miranda* warnings, obtained a signed *Miranda* waiver, and then continued questioning *Seibert*.[64] During the second interrogation, Officer Hanrahan walked Seibert through her earlier statement, repeating questions and even reminding her of answers she gave in the first interrogation. Eventually, Seibert confessed and was convicted.[65]

The Plurality Opinion

Justice Souter wrote for the plurality in *Seibert*, joined by Justices Stevens, Ginsburg, and Breyer.[66] The plurality first observed that *Miranda* warnings were designed "to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause."[67] The plurality explained that "*Miranda* warnings are customarily given under circumstances allowing for a real choice between talking and remaining silent."[68] But the plurality found that law enforcement departments were promoting question-first tactics to neutralize the effectiveness of *Miranda* warnings.[69] As the *Miranda* Court had done over thirty years earlier, the plurality considered how the interrogation practice would affect a suspect's knowing and voluntary exercise (or waiver) of the privilege against self-incrimination, as protected through the *Miranda* warnings.[70] For the plurality, "[t]he threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires."[71] The plurality concluded that the warnings were likely to be ineffective.[72]

Once the plurality concluded that question-first tactics could make *Miranda* warnings ineffective, it turned to the State of Missouri's argument that *Elstad* was controlling.[73] Justice Souter declared that Missouri's argument "disfigures" *Elstad*.[74] *Elstad*, wrote Justice Souter, created a good-faith mistake exception to *Miranda*, while the facts in *Seibert* "by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings."[75] *Elstad* was therefore distinguishable based on "a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object."[76] These facts turned into a five-factor test to measure the efficacy of *Miranda* warnings.[77]

Justice Breyer's Concurrence

Justice Breyer wrote a brief concurrence in which he declared that he "join[ed] the plurality's opinion in full."[78] However, he wanted to apply the "fruit of the poisonous tree" rationale which the *Elstad* majority had dismissed, and he believed that the plurality's approach would have that effect.[79] Most importantly, Justice Breyer endorsed the good faith exception reading of *Elstad* that was vital to the plurality's decision.[80]

Justice Kennedy's Concurrence in the Judgment and Opinion

Playing *Seibert*'s Lone Ranger, Justice Kennedy concurred in the judgment but wrote a separate opinion. He noted that while he agreed with "much" of the plurality's opinion, his "approach does differ in some respects, requiring this separate statement."[81] Justice Kennedy based his opinion on a practical balancing of public and private interests inherent in interrogations.[82] He explained that the *Miranda* exceptions illustrated this interest-balancing approach: "[N]ot every violation of the [*Miranda*] rule requires suppression of the evidence obtained. Evidence is admissible where the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction."[83] Justice Kennedy identified the central concerns of *Miranda* as "'the general goal of deterring improper police conduct'" and "'the Fifth Amendment goal of assuring trustworthy evidence.'"[84]

Elstad, Justice Kennedy felt, properly balanced the interests in most two-step interrogations.[85] However, where "[t]he police used a two-step questioning technique based on a deliberate violation of *Miranda*," the balance of interests shifted because, when applied intentionally, the technique "distorts the meaning of *Miranda*" and "furthers no legitimate countervailing interest."[86] Therefore, when police deliberately employed question-first tactics to violate *Miranda*, Justice Kennedy believed that "postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps."[87]

In a crucial portion of his opinion, Justice Kennedy distinguished his approach from that of the plurality.[88] He wrote that the plurality's "test envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations."[89] He explained, "In my view, this test cuts too broadly. . . I

would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning."[90] Justice Kennedy envisioned *Elstad* as the general rule and *Seibert* as the exception where "the deliberate two-step interrogation was employed."[91]

The Dissenting Opinion

Justice O'Connor, who wrote the *Elstad* majority opinion, wrote the dissent in *Seibert*. She applauded the plurality for not applying a "fruit of the poisonous tree" analysis and for not focusing on the interrogator's subjective intent.[92] Much of the dissent was devoted to explaining why Justice Kennedy's use of subjective intent was wrong.[93] However, the dissent disagreed with the plurality about the need to protect the defendant from coercion caused by the two-step interrogation tactic.[94] Two-step interrogations should be "analyze[d] . . . under the voluntariness standards central to the Fifth Amendment and reiterated in *Elstad*."[95]

On Subjective Versus Objective Standards

Although it only earned a footnote in the plurality's decision, the debate over objective versus subjective standards in evaluating question-first interrogations is central to the disagreement between the nine *Seibert* Justices. Justice Kennedy unambiguously endorsed the interrogator's deliberate violation of *Miranda* warnings as the triggering factor for a different constitutional inquiry, arguably a subjective standard. The dissent, on the other hand, vehemently rejected subjective intent, thus subscribing to an objective standard. The real question is, therefore, where the plurality falls in the debate.

When the plurality distinguished *Elstad* as a good-faith mistake, it was relying on the officer's intent to justify the *Miranda* exception.[96] On the other hand, the plurality quickly differentiated the facts in *Elstad* from the facts in *Seibert*: "At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings."[97] This statement led to the footnote which appeared to signal the plurality's commitment to an objective rather than subjective test: "Because the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from intent that show the question-first tactic at work."[98] This footnote is consistent with the plurality's objective threshold question, which questions the potential "effectiveness" of *Miranda* warnings in light of question-first tactics, disregarding the actual or likely intent of either the interrogator or the suspect.[99]

Furthermore, at the end of the opinion, Justice Souter clarified the objective nature of the plurality's test. The test is objective from the reasonable person standard: "These [question-first interrogation] circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk."[100]

One commentator has questioned whether "the plurality foreclosed subjective characteristics entirely."[101] Admittedly, the plurality did not reject a subjective inquiry as clearly as it found such an inquiry unhelpful and unnecessary. The Court may resolve the objective-subjective debate when it next considers question-first tactics. Meanwhile, lower courts attempting to understand *Seibert* should accept the basic premise that the plurality's test is objective. Otherwise, the quandary posed by the fractured decision makes little sense. Both the plurality and Justice Kennedy agreed that the confession should be suppressed.[102] But Justice Kennedy distinguished his position from that of the plurality by characterizing the plurality's test as "an objective inquiry from the perspective of the suspect [that] applies in the case of both intentional and unintentional two-stage interrogations."[103] Finally, in her dissent, Justice O'Connor praised the plurality for rejecting an intent-based test.[104]

The Court will continue to debate the scope of the privilege's suppression remedy. However, at least until the Court's next *Miranda* opinion, lower courts must play the cards they have been dealt. This means lower courts must scrutinize *Seibert* in light of the Court's guidance on fractured decisions to determine what binding precedent applies to question-first interrogations.

III. From *Marks* to *Seibert*: Plurality Opinions, Concurrences, and the Narrowest Grounds Doctrine

Because *Seibert* has no clear majority opinion, lower courts addressing question-first tactics must decide whether one or more of the four opinions in *Seibert* is, or contains, controlling precedent. For lower courts, the most popular approach to this question is to apply the "narrowest grounds" doctrine. As Part III.A explains, the Supreme Court developed the" narrowest grounds" doctrine in *Marks v. United States*,[105] a First Amendment obscenity case. However, Part III.B notes that the Court has been inconsistent in its own application of *Marks*, recently failing in *Grutter v. Bollinger*[106] to resolve a circuit split on how *Marks* should be applied. Despite the Court's partial silence on *Marks*, many lower courts have applied *Marks* to *Seibert*. As the jurisdictional survey in Part III.C shows, the majority of lower courts that have applied a *Marks* analysis have concluded that Justice Kennedy's concurrence is the controlling opinion in *Seibert*. However, a minority of lower courts disagree with that analysis and offer logical alternatives.

United States v. Marks and the Narrowest Grounds Doctrine

The "narrowest grounds" doctrine arose in *United States v. Marks*[107] as part of the Court's resolution of long-standing disagreements among the Justices over the First Amendment status of obscenity.[108] In *Marks*, the defendants were charged with transporting obscene materials interstate.[109] Their criminal conduct ended in February 1973.[110] In June 1973, the Court decided *Miller v. California*,[111] finally establishing, by majority opinion, a controlling precedent for obscenity cases, including a new definition of obscenity.[112] At trial, the defendants argued that they should be tried under the definition of obscenity in the 1966 plurality opinion, *Memoirs v. Massachusetts*,[113] which they claimed constituted the Court's

obscenity rule before *Miller*.[114] The district court refused to apply *Memoirs* and applied *Miller*'s more stringent test, under which defendants were convicted.[115]

The Sixth Circuit heard the defendants' appeal.[116] In their decision affirming the district court, the Circuit court "noted correctly that the *Memoirs* standards never commanded the assent of more than three Justices at any one time, and [the court] apparently concluded from this fact that *Memoirs* never became the law."[117] The circuit court reasoned that if *Memoirs* was not controlling, then the last opinion where a majority of the Supreme Court agreed would be the proper rule, and because *Miller* was consistent with that earlier decision, it was fair to use *Miller* to convict the defendants.[118]

The Supreme Court reversed.[119] Justice Powell wrote for the majority, "[W]e think the basic premise for this line of reasoning is faulty."[120] He then stated what is now known as the "narrowest grounds" doctrine: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"[121] Justice Powell then analyzed Memoirs using the Narrowest Grounds Doctrine:

> Three Justices joined in the controlling opinion in *Memoirs*. Two others, Mr. Justice Black and Mr. Justice Douglas concurred on broader grounds in reversing the judgment below. They reiterated their well-known position that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity. Mr. Justice Stewart also concurred in the judgment, based on his view that only 'hardcore pornography' may be suppressed. The view of the *Memoirs* plurality therefore constituted the holding of the Court and provided governing standards. . . . Materials were deemed to be constitutionally protected unless the prosecution carried the burden of proving that they were 'utterly without redeeming social value,' and otherwise satisfied the stringent *Memoirs* requirements.[122]

Justice Powell concluded that "*Memoirs* therefore was the law," and the defendants should have been tried under the *Memoirs* standard for obscenity, rather than the new *Miller* test.[123] Thus was born the *Marks* narrowest grounds doctrine.

The Supreme Court's (Non)application of the Narrowest Grounds Doctrine

Commentators have criticized the "narrowest grounds" doctrine because the Court itself has refused to apply *Marks* to fractured decisions where lower courts struggled to find the narrowest grounds.[124] The most prominent example is *Grutter v. Bollinger,*[125] where the Court refused to apply a *Marks* analysis to its fractured decision in *Regents of the University of California v. Bakke*.[126] In *Bakke*, Justice Powell provided the fifth vote to strike down a particular race-conscious admissions program when the other eight justices were split evenly.[127] However, Justice Powell agreed with the dissent that race could be a proper factor in higher education admissions programs.[128] After *Bakke*, lower courts applied *Marks* to determine the holding in *Bakke*, concluding, at least in some instances, that Justice Powell's opinion controlled.[129] However, when the Supreme Court decided *Grutter*, it refused to do a *Marks* analysis of *Bakke*.[130] Instead, it simply adopted Justice Powell's *Bakke* opinion as the rule in *Grutter*.[131]

The Court's pattern of avoiding *Marks* has led some to question how firmly the "narrowest grounds" doctrine binds lower courts.[132] One respected article describes the "narrowest grounds" doctrine as "a doctrine of limited applicability."[133] The article concludes:

> [The "narrowest grounds" doctrine] is only useful where the plurality and concurring opinions stand in a "broader-narrower" relation to each other. Many of the most troublesome plurality opinions, however, do not fit into this mold, and lower courts have been left to their own devices to determine the precedential value of most plurality opinions.[134]

The Court has failed to clarify the meaning of the doctrine,[135] so it is appropriate to consider how lower courts have treated it.

An Alternative Perspective on the Narrowest Grounds Doctrine

The United States Courts of Appeals for the District of Columbia, the Third Circuit, and the Second Circuit have each recognized that "the *Marks* 'narrowest grounds' doctrine is not universally applicable."[136] But instead of avoiding its complexities, as the *Grutter* Court did, these federal circuits have confronted the "narrowest grounds" doctrine and reached a conclusion: The "narrowest grounds" doctrine does not always provide an answer to the Court's fractured decisions.

The District of Columbia Circuit, in *King v. Palmer*,[137] was the first circuit to offer an alternative to a rigid application of the "narrowest grounds" doctrine. In *King*, the court had to decide on the availability of contingency enhancements to attorneys' fees.[138] The Supreme Court's most relevant opinion, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*[139] ("*Delaware Valley II*"), was a fractured decision with a four-Justice plurality in which Justice O'Connor concurred in part and concurred in the judgment.[140] Before *King*, the District of Columbia Circuit had used *Marks* to find Justice O'Connor's concurrence in *Delaware Valley II* controlling.[141] Upon reconsideration, however, the *King* majority found that *Marks* had a more limited applicability than previously believed:

> *Marks* is workable–one opinion can be meaningfully regarded as "narrower" than another–only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by atleast five Justices who support the judgment.[142]

The *King* majority agreed that some of the Court's fractured decisions, such as *Marks*, were cases in which the "'narrowest grounds' approach yielded a logical result."[143] However, the *King* majority was concerned about some fractured decisions

where applying *Marks* raised serious problems:

> When, however, one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judg-ment are mutually exclusive, Marks will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.[144]

In *King*, the majority was unable to find enough "common ground" between Justice O'Connor's concurrence and the plurality decision in *Delaware Valley II* to decide "*when* to apply contingency enhancements."[145] Furthermore, the *King* majority was completely at a loss to try to perform a *Marks* analysis on the question of "how the contingency enhancement should be calculated."[146] Here, the *King* majority wrote, "We do not see how either approach can be thought 'narrower' than the other; they are simply different."[147] As a result, the District of Columbia Circuit was "left without a controlling opinion or a governing test for awarding contingency enhancements under *Delaware Valley II*."[148]

Relying upon the reasoning in *King*, the Third Circuit, in *Rappa v. New Castle County*,[149] recognized that there must be a "common denominator in the Court's reasoning" before *Marks* could be applied.[150] The *Rappa* Court observed that "[i]n some splintered decisions, there will be three or more distinct approaches, none of which is a subset of another; instead, each approach is simply different."[151] Where there was no common denominator, "no particular standard constitutes the law of the land, because no single approach can be said to have the support of a majority of the Court."[152]

Recently, the Second Circuit applied the reasoning in *King* and *Rappa* to reach a similar result in *United States v. Alcan Aluminum Corp*.[153] The court agreed with the *King* majority that the "narrowest grounds" doctrine "works . . . only when that narrow opinion is the common denominator representing the position approved by at least five justices."[154] Therefore, the court recognized that "[w]hen it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one standard commands the support of a majority of the Supreme Court."[155]

One commentator agreed with these circuit courts' alternate perspective on the "narrowest grounds" doctrine: "*Marks* provides no useful guidance in those cases in which different Justices take different approaches to the issues. Such decisions cannot be forced into the *Marks* 'narrowest grounds' mold because of the absence of any logical connection between the concurring opinions."[156] In *King, Rappa*, and *Alcan Aluminum Corp*., three federal circuits refused to blindly apply *Marks*, choosing instead the uncertainty of finding no controlling rule. One lesson to be gained from these decisions is that lower courts should apply the narrowest grounds doctrine with a critical eye.

A Survey of Lower Court Cases Applying Marks to Seibert

The following survey of cases in which lower courts have applied the *Marks* "narrowest grounds" doctrine to *Seibert*[157] evaluates the majority and two minority approaches. The majority of lower courts view Justice Kennedy's opinion as the narrowest grounds and, therefore, as controlling. The minority of lower courts take one of two positions: the first group treats both the plurality's and Justice Kennedy's opinions as controlling, avoiding the need to choose between them; the second group, currently comprised of only two judges, holds that *Seibert* does not have a narrowest grounds and, consequently, does not have a controlling opinion.

Majority Approach

A majority of courts that have applied the *Marks* "narrowest grounds" doctrine to *Seibert* have concluded that Justice Kennedy's concurrence is the controlling opinion. Among the federal circuits, the Third,[158] Fourth,[159] Fifth,[160] Seventh,[161] Eighth,[162] and Ninth[163] Circuits have followed the majority approach. At the federal trial court level, judges on the district courts for the District of Minnesota,[164] the District of Nebraska,[165] the Eastern District of Pennsylvania,[166] and the Western District of Pennsylvania[167] apply the majority approach. State appellate courts in the following states have also followed the majority approach: California,[168] Kentucky,[169] Maryland,[170] and Washington.[171]

The Ninth Circuit's recent opinion in *United States v. Williams*[172] is an example of the majority approach. After describing *Elstad* and *Seibert*, the court noted that in *Seibert*, "[a]lthough five Justices agreed that Seibert's postwarning statement was inadmissible, the case did not produce a majority opinion."[173] Therefore, lacking a majority opinion, the court had to "decide how to interpret *Seibert* in light of these splintered opinions."[174] Citing the *Marks* "narrowest grounds" doctrine, the court declared that it "need not find a legal opinion which a majority joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'"[175] The court believed that "[t]o determine whether *Seibert* contains a precedential holding, [it] must identify and apply a test which satisfies the requirements of both Justice Souter's plurality opinion and Justice Kennedy's concurrence."[176]

The *Williams* court then applied *Marks* to *Seibert*. The court noted that while "the plurality would consider all two-stage interrogations eligible for a *Seibert* inquiry, Justice Kennedy's opinion narrowed the *Seibert* exception to those cases involving the deliberate use of the two-step procedure to weaken *Miranda*'s protections."[177] The court found that the plurality and Justice Kennedy agreed that confessions obtained through a deliberate use of two-stage interrogations were inadmissible.[178] Consequently, "[t]his narrower test–that excludes confessions made after a deliberate, objectively ineffective midstream warning–represents *Seibert's* holding."[179] All other two-stage interrogations would still be controlled by *Elstad*'s voluntariness test.[180]

After establishing that Justice Kennedy's test was controlling, the *Williams* Court observed that Justice Kennedy failed to provide guidance for what constituted a deliberate two-step interrogation.[181] The court believed that both objective and subjective evidence should be considered when deciding if the two-step interrogation was deliberate.[182] This forced the court to use the plurality's five-factor test to analyze the facts for deliberateness.[183] Only if there was a deliberate two-step interrogation would the court have to determine whether the midstream warnings were effective.[184] Again, the court believed that it should "look both to the objective circumstances the plurality cited . . . and to the curative measures [described by Justice Kennedy]" to decide the effectiveness of the warnings.[185]

The First Minority Approach

A minority of lower courts that have applied *Marks* to *Seibert* have not found Justice Kennedy's concurrence controlling. These courts have followed one of several different approaches. The first minority approach is used by the Eleventh Circuit,[186] the United States District Courts for the Northern District of Iowa,[187] the Southern District of Indiana,[188] and the Court of Appeals of Alaska.[189] It could be called the "alternative argument" approach. The alternative argument is familiar to many lawyers from their law school days, when professors instructed them to argue in the alternative on their exams; it also shares some similarities with the concept of alternative pleading in the Federal Rules of Civil Procedure.[190] Courts using the alternative argument approach generally analyze the facts under both the plurality decision and under Justice Kennedy's concurrence.[191] As long as the results of the two analyses are the same, the courts do not specify which analysis is outcome determinative.[192]

Courts use the alternative argument approach to avoid committing to a position unless absolutely necessary. However, because the alternative argument approach does not resolve the fractured decision dilemma, it is a delay tactic rather than a solution. At one time, the Eighth Circuit was in the alternative argument camp, but as more panels heard question-first cases, the circuit gradually pitched its tent further and further away until it landed squarely in the majority approach's camp.[193] The Eleventh Circuit will eventually face the same decision.

The Second Minority Approach

The second minority approach rejects Justice Kennedy's concurrence as the narrowest grounds and allows the court to create its own rule. So far, only two judges have endorsed this approach. The first is Ninth Circuit Judge Marsha S. Berzon in her dissenting opinion in *United States v. Rodriguez-Preciado*.[194] Unlike the other two judges on the panel in *Rodriguez-Preciado* who held that *Seibert* was not applicable, Judge Berzon's dissent reached the *Seibert* issue.[195]

Judge Berzon began her *Marks* analysis by explaining that "[g]enerally, where there is no majority opinion, the narrowest opinion adhered to by at least five Justices controls. Applying the *Marks* rule to Seibert, however, is not a straightforward analysis."[196] In a subtle critique of Justice Kennedy's opinion, Judge Berzon conceded that Justice Kennedy's reasoning was "arguably narrower" than the plurality's but observed in a footnote that it was Justice Kennedy himself who "characterized his opinion as 'narrower.'"[197]

Judge Berzon identified Justice Kennedy's concurrence as focusing on the "deliberateness on the part of the police–or lack thereof" rather than "the objective effectiveness factors outlined in Justice Souter's plurality opinion."[198] However, seven justices "decisively rejected any subjective good faith consideration, based on deliberateness on the part of the police."[199] This analysis led Judge Berzon to conclude that Justice Kennedy's opinion had the support of "two Justices, at most" (because Justice Breyer had at least partially concurred in Justice Kennedy's opinion).[200] Therefore, *Marks* did not provide a solution.[201] The only answer that *Marks* provided was that Justice Kennedy's opinion could not be controlling.[202]

The next question facing Judge Berzon was what to do if Justice Kennedy's opinion was not controlling.[203] Neither the dissent nor the plurality was binding, thus, there was no controlling precedent, and the Ninth Circuit was free to decide the issue.[204] Judge Berzon concluded that the Ninth Circuit should adopt the plurality position, something other circuits had done in similar situations.[205] Subsequently, in *United States v. Williams*,[206] the Ninth Circuit refused to adopt Judge Berzon's analysis and went with the majority approach.[207]

Joan M. Azrack, the Chief United States Magistrate Judge for the Eastern District of New York, also adopted the second minority approach in *United States v. Cohen*.[208] In *Cohen*, Judge Azrack analyzed *Seibert* in light of *Marks* and concluded that Justice Kennedy's opinion could not be the "narrowest grounds" for two reasons and, therefore, could not be controlling.[209] The first reason Justice Kennedy's opinion was not the "narrowest grounds" was that at least three of the Justices in the plurality and the four dissenting Justices rejected Justice Kennedy's reliance on subjective intent.[210] Therefore, "Justice Kennedy's rule, rejected by a large majority of the court, cannot be *Seibert*'s holding."[211] As discussed above in Part II.D.6, while the plurality did not explicitly reject a subjective standard, it endorsed an objective standard and implied that a subjective standard was unnecessary and would normally be worthless.[212]

The second reason Justice Kennedy's concurrence was not the narrowest grounds was that Justice Kennedy's "analysis . . . is 'simply different' than that articulated by the plurality, not a logical subset."[213] This lack of congruence between Justice Kennedy's and the plurality's positions meant that *Marks* could not produce a satisfactory rationale for the holding in *Seibert.*[214] In other words, although Justice Kennedy and the plurality agreed about the result in *Seibert*, they did not agree about how to reach the result in such a way that Justice Kennedy's reasoning could be categorized as a subset of the plurality's reasoning.[215] Under such circumstances, *Marks* was not designed to lead to a conclusion, and there was no possible narrowest holding.[216]

Judge Azrack relied upon the decision in *Alcan Aluminum Corp.*, where the Second Circuit explained, "'[W]hen it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one stan-

dard commands the support of a majority of the Supreme Court.'"[217] The only identifiable result from *Seibert* was that "*Elstad* does not control all situations of question-first interrogations; that sometimes warned confessions related to previous unwarned confessions must be suppressed."[218]

Without a controlling opinion to apply, Judge Azrack reasoned she was "left to devise a test to determine whether to suppress statements made in a question-first situation, in other words, to determine whether midstream *Miranda* warnings could be considered effective."[219] Judge Azrack's solution was to synthesize the plurality's five-factor test with Justice Kennedy's concern for curative measures to evaluate the effectiveness of the *Miranda* warnings.[220] Applying this test, Judge Azrack found the warnings were effective, and so the second statement was admissible.[221]

No other court has yet taken the bold approach of Judges Berzon and Azrack, but as Part IV explains, their approach is one that courts should consider when faced with question-first interrogations.

IV. Why Justice Kennedy's Concurrence in *Seibert* is Not the "Narrowest Grounds"

Despite what a majority of lower courts have held, under a correct *Marks* analysis, Justice Kennedy's concurrence in *Seibert* is not the narrowest grounds. The majority approach in applying *Marks* to *Seibert* is incorrect, as Section IV.A explains. The correct approach is the second minority approach, which says that there is no narrowest grounds in *Seibert*, and courts must therefore decide for themselves how to handle statements derived from question-first interrogations, the topic of Part V.

The Majority Approach to Seibert is Incorrect

The majority approach, using *Marks* to declare that Justice Kennedy's concurrence is the controlling opinion in *Seibert*, is incorrect for at least five reasons. The first reason is the most convincing: seven Justices disagreed with Justice Kennedy. With regard to the plurality, Justice Kennedy himself noted their differences with him.[222] As discussed above, the plurality endorsed an objective test for question-first interrogations and implicitly found a subjective inquiry unnecessary.[223] Granted, the plurality did not shy away from calling question-first tactics "a police strategy adapted to undermine the *Miranda* warnings,"[224] but the plurality immediately qualified this recognition by explaining that "the focus is on facts apart from intent that show the question-first tactic at work."[225] This is at least partly "[b]ecause the intent of the officer will rarely be as candidly admitted as it was" in *Seibert*.[226] At the very least, the four Justices comprising the plurality did not believe that Justice Kennedy's deliberateness test would adequately protect suspects' constitutional rights.[227] Justice O'Connor, speaking for the four dissenting Justices, was more outspoken in her criticism of allowing the interrogator's subjective intent to play a role in admissibility determinations, stating, "I believe that the approach espoused by Justice Kennedy is ill advised."[228]

In *Rodriguez-Preciado*, Judge Berzon suggests that Justice Breyer's concurrence indicates that he may agree with Justice Kennedy on the intent issue.[229] This is debatable, since Justice Breyer joined in the plurality opinion in full and endorsed a good-faith interpretation of *Elstad*.[232] However, that still leaves a seven-to-two majority rejecting Justice Kennedy's deliberateness test.[231] While the *Marks* rule may be satisfied at a highly theoretical and superficial level, it is paradoxical to find that the "narrowest grounds" doctrine is satisfied under such circumstances.[232]

The second reason the majority approach is incorrect is that Justice Kennedy's concurrence is "simply different" than the plurality's opinion.[233] The "narrowest grounds" doctrine implies that one of the concurring opinions will be "narrower," but here "neither [of the analyses] is a logical subset of the other."[234] The very nature of Justice Kennedy's subjective intent inquiry is different than the plurality's objective, factor-based test.[235]

The "simply different" concept is best illustrated by two analogies from mathematics. The first is the common denominator, which, in mathematics, is a number by which two other numbers are both divisible. For example, a common denominator of 4 and 6 is 2. The three federal circuits that have found an alternative approach to *Marks* each believed that only a common denominator in legal reasoning between two non-majority opinions could be the narrowest grounds.[236] If two opinions did not have a common denominator, there could be no narrowest grounds between them. Consistent with the principles in *King, Rappa*, and *Alcan Aluminum Corp*., Judge Berzon and Judge Azrack found no common denominator between Justice Kennedy's concurrence and the plurality's opinion in *Seibert* because Justice Kennedy's reasoning was "simply different" than the plurality's.[237] Justice Kennedy focused on the deliberate nature of the interrogation while the plurality focused on the circumstances of the interrogation.[238]

The second mathematical analogy is to Venn diagrams, in which groups or collections of objects or things (called "sets" in mathematics) are drawn as circles that may (1) overlap entirely; (2) overlap partially; or (3) not overlap at all. The *King* court described this principle in layman's terms: "*Marks* is workable–one opinion can be meaningfully regarded as 'narrower' than another–only when one opinion is a logical subset of other, broader opinions."[239] Although the *result* from Justice Kennedy's and the plurality's tests could overlap partially, the *reasoning*–the "grounds" used to reach the result–does not overlap: In one case, the grounds are the subjective intent of the interrogator, in the other, the circumstances of the interrogation.[240] As Judge Berzon summarized this analysis, "The only point not enjoying the assent of five Justices is the appropriate admissibility standard to apply [to exceptions to *Elstad*], on which the Court is split 4-1-4."[241] Echoing Judge Berzon, Judge Azrack wrote, "Only a recognition that deliberate circumvention of *Miranda* is unconstitutional [the partially overlapping result], but for different reasons and after separate analyses [the grounds], binds the plurality and Justice Kennedy's concurrence."[242] The reasoning in Justice Kennedy's concurrence is "simply different," so his opinion is not the narrowest grounds upon which the plurality agreed with him; the narrowest grounds upon which the plurality agreed with Justice Kennedy is his concurrence in the judgment.

At least three other criticisms may be leveled at the majority approach to the *Marks-Seibert* question. The first criticism is that the majority approach relies upon circular reasoning. Some lower court opinions, rather than thoroughly applying *Marks*, rely upon Justice Kennedy's own characterization of his opinion as "narrower" to justify finding that Justice Kennedy's opinion is the narrowest grounds.[243] Citing to Justice Kennedy's self-interpretation short-circuits the necessary legal reasoning.

The second criticism is that some lower courts that applied *Marks* to *Seibert* were hasty in their consideration of the issues and did not fully evaluate how the Supreme Court and the federal circuits have applied *Marks* in the past.[244] Courts need to make decisions based on imperfect guidance from the Supreme Court; however, several circuits, including the Eighth and the Eleventh, at least temporarily avoided making a hasty decision through the alternative argument approach.[245]

The final criticism is that *Elstad* already encompasses most circumstances that would arise under Justice Kennedy's concurrence. Even Justice Kennedy admits his test would "apply . . . only in the *infrequent* case" where question-first tactics were deliberately employed; he would place most interrogations under Elstad's voluntariness test.[246] However, as the Seibert dissent notes, Patrice Seibert's second statement might still be suppressed under *Elstad*.[247] Any time the interrogator affirmatively expresses a subjective intent to violate *Miranda* through the question-first tactic, the interrogator will probably also use other coercive techniques that would make both the pre- and post-warning interrogations involuntary.

The Second Minority Approach to Seibert is Correct

The second minority approach embodies the correct application of the "narrowest grounds" doctrine to *Seibert*. As discussed in Part IV.A above, both Judge Berzon and Judge Azrack properly concluded that *Marks* did not lead to a "narrowest ground" between the plurality's opinion and Justice Kennedy's concurrence. To the contrary, these two judges believed that it would be counterintuitive and unsound for Justice Kennedy's concurrence to be the controlling opinion under *Marks*.[248] This principle was supported by the Second Circuit, the D.C. Circuit, and, implicitly in *Grutter*, the Supreme Court: Where the "narrowest grounds" doctrine cannot produce a logical basis for the judgment, it is counterproductive to try to create one.[249]

While rejecting Justice Kennedy's concurrence as the narrowest grounds, Judge Berzon and Judge Azrack recognized that *something* must be drawn from *Seibert*.[250] Judge Azrack identified that something as simply "the specific result" and went on to observe that "[a] fair characterization [of the result] is that *Elstad* does not control all situations of question-first interrogations; that sometimes warned confessions related to previous unwarned confessions must be suppressed."[251] What those situations are is a matter for lower courts to decide.[252]

V. What Should Courts Do?

If there is no controlling precedent for at least some question-first scenarios, lower courts must "decide how to decide" the admissibility of defendants' statements obtained through question-first interrogations.[253] Courts have four options, ranked here by merit: (1) adopt the plurality opinion; (2) synthesize Justice Kennedy's concurrence with the plurality opinion; (3) adopt Justice Kennedy's concurrence; or (4) devise a new test. The best of these options is the first.

Courts Should Adopt the Plurality Opinion

Given the choice, courts should adopt the Seibert plurality opinion. The Constitution guarantees to each person the right to not "be compelled in any criminal case to be a witness against himself."[254] The judiciary is the institution entrusted to protect this constitutional right from being trampled or abused by the other two branches of government. For fifty years now, the judiciary has defended the privilege through *Miranda* warnings. Today, question-first tactics threaten the efficacy of those warnings.

Most importantly, the plurality opinion protects the efficacy of the *Miranda* warnings from being manipulated by the state. As the *Seibert* plurality observed, the state often gains a benefit from giving *Miranda* warnings because the warnings almost always ensure that subsequent statements will be admissible for purposes of proving guilt.[255] However, this "virtual ticket of admissibility"[256] presumes that the suspect's constitutional rights have been provided to him. Question-first tactics manipulate this guarantee by withholding those rights at the moment a suspect most needs to know them, when he is in custody and facing interrogation.[257] The *Miranda* Court instituted the warnings because it was primarily concerned with psychological, rather than physical, coercion in interrogations.[258] When facing question-first interrogations, courts face the same question: Should the state be permitted to take advantage of a suspect's psychological vulnerability? The plurality opinion's five-factor test allows courts to wrest ultimate control over the interrogation out of the hands of law enforcement. While a police officer may swear from the stand that she did not intend to violate *Miranda* by questioning first, the trial court can assess "the completeness and detail of the questions and answers in the first round of interrogation" and "the overlapping content of the two statements" to decide for itself whether the state manipulated the efficacy of *Miranda* warnings.[259]

The plurality opinion also prevents the state from turning the *Miranda* warnings against the suspect. Withholding the warnings when the suspect most needs them and giving them to him when the state most needs them is like grabbing the suspect's constitutional shield, turning it into a sword, and attacking him with it. The primary purpose of *Miranda* warnings is to protect the suspect's privilege against self-incrimination, not to assist the state in eliciting a confession from the suspect (this is a by-product of the warnings). The *Miranda* Court believed that it was the state's job to prosecute the suspect, and courts were therefore charged with the responsibility of ensuring that the state did not depend upon "the cruel, simple expedient of compelling [incriminating evidence] from [the suspect's] own mouth."[260] The *Seibert* plurality's test, by requiring the warnings to precede any questioning, prevents the state from timing *Miranda* warnings to its advantage.

Besides providing appropriate protection for constitutional rights, the *Seibert* plurality opinion is consistent with Miranda, with the most relevant *Miranda* cases, and with the Court's general criminal procedure jurisprudence. First, at the most basic level, the plurality opinion is consistent with *Miranda* itself. The plurality is consistent with *Miranda*'s original holding, which requires warnings to be given *before* any interrogation begins.[261] The plurality opinion is also consistent with *Miranda*'s quasi-constitutional nature because it protects the Fifth Amendment privilege with a judicially-created, fact-based procedural mechanism to protect the privilege.[262] Finally, the plurality opinion is consistent with *Miranda*'s two rationales, personal autonomy and evidentiary reliability.[263] With respect to personal autonomy, the objective factor-based test prevents interrogators from using psychological manipulation or coercion to obtain a confessions from their subjects and imposes a threshold of conduct which an interrogator may not cross without risking exclusion of the defendant's statements.[264] With respect to evidentiary reliability, the plurality opinion is consistent with two principles the *Miranda* Court expressed: Courts will not question whether the test must be met in particular cases, but if the test is met, there is a "virtual guarantee" of admissibility.[265]

The plurality opinion is consistent with the most relevant *Miranda* cases, *Elstad* and *Dickerson*. It treats *Elstad* as a good-faith mistake exception, which "pos[es] no threat to warn-first practice generally."[266] At the same time, it supports *Dickerson*'s reaffirmation of the "constitutional character" of *Miranda* by responding to a "new challenge to *Miranda*" with new prophylactic protections, refusing to return to what the *Seibert* plurality calls the "old way of doing things" through a case-by-case voluntariness determination.[267]

Furthermore, the plurality opinion is consistent with the Court's criminal procedure jurisprudence. Justice O'Connor devotes over three pages of her dissent to this topic, during which she praises the plurality for rejecting both the fruit of the poisonous tree analysis and Justice Kennedy's intent-based test.[268] Justice O'Connor found the plurality's opinion to be consistent with several of the Court's criminal procedure cases, including *Moran v. Burbine, New York v. Quarles, United States v. Patane, Harris v. New York, United States v. Leon, and Whren v. United States*.[269]

Finally, as Judge Berzon observed in *Rodriguez-Preciado*, several federal circuits have adopted Supreme Court plurality decisions in other contexts, relying on them as persuasive authority rather than binding precedent.[270] This is the course that Judge Berzon ultimately recommends.[271] For all of these reasons, the plurality opinion is the best approach a court could choose to respond to the new challenge posed by question-first tactics.

Courts Should Not Synthesize Justice Kennedy's Concurrence with the Plurality Opinion

Another option for lower courts deciding how to evaluate the admissibility of postwarning statements is to synthesize Justice Kennedy's concurrence with the plurality opinion. There are many ways to synthesize the plurality opinion with Justice Kennedy's concurrence. The first minority approach to the *Marks* analysis of *Seibert* is the most logical synthesis because it applies both the plurality's five-factor test and Justice Kennedy's deliberateness inquiry. While this approach would seem to honor the merits of the plurality without ignoring Justice Kennedy's contribution, incorporating a "deliberateness" inquiry would be unhelpful in most cases and could distract courts from more important questions.

If the synthesis relies heavily on the "deliberateness" inquiry in Justice Kennedy's concurrence, it would conflict with the views of at least seven of the *Seibert* Justices.[272] Furthermore, in practice, an inquiry into an officer's subjective intent would likely be unfruitful. As the plurality argued, rarely will an officer testify to a judge that the officer did his best to violate *Miranda*.[273] More than likely, the officer will swear that he never intended to violate *Miranda*, and this will give him an opportunity to explain away the circumstances of the interrogation. In the end, "deliberateness" would only be helpful if the state chose to shoot itself in the foot by admitting that it tried to violate *Miranda*. In all other situations, the deliberateness inquiry would simply distract the court from evaluating the circumstances of the interrogation. Even the Ninth Circuit, in *Williams*, found that Justice Kennedy's concurrence did not provide sufficient guidance for determining "deliberateness," forcing the court to rely upon the plurality's five-factor test.[274]

A less controversial synthesis would incorporate Justice Kennedy's "curative measures" into the plurality test. For example, the plurality and Justice Kennedy each place some weight upon the absence of an additional warning that a previously made, unwarned statement may be inadmissible.[275] This is essentially Judge Azrack's approach in *Cohen*.[276] Judge Azrack applied the plurality's five-factor test, but he identified where Justice Kennedy's curative measures fit into the factors.[277] Nevertheless, before endorsing any synthesis, courts should acknowledge that it is something on which the Justices themselves were unable to agree.

Courts Should Not Adopt Justice Kennedy's Concurrence

The third possible option for lower courts deciding what test to apply to question-first interrogations is to rely on Justice Kennedy's test. Besides the concerns expressed by the plurality and dissent in *Seibert*, it is worthwhile to consider another defect in the subjective test: the burden of proof. One commentator notes that Justice Kennedy's "new bad faith test shifts an impossible and inappropriate burden onto the defendant, who must now prove that a particular police officer acted in bad faith."[278] This requirement "creates the risk that future pretrial *Miranda* hearings will devolve into credibility battles focused on irrelevant and unanswerable questions inevitably won by the men and women in blue."[279] Under most circumstances, the state would be foolish to admit bad faith, so the defendant will have to prove intent circumstantially. And even if the initial burden of proof was manageable, Justice Kennedy's test allows the state to redeem itself after the fact by applying cheap "Band-Aides" in the form of curative measures, which could be as simple as a fifth-warning.[280]

Courts Could Devise a New Test

The last option for courts deciding how to address question-first interrogations is to devise an entirely new test. In this context, five sitting Justices have already declared their positions. However, with Chief Justice John Roberts and Associate Justice Samuel Alito joining the Court since *Seibert* was decided, the Supreme Court's *Miranda* jurisprudence should continue to evolve, and this could allow lower courts to explore new solutions to question-first tactics.

VI. Conclusion

At the end of this Article, it is worthwhile to return to its beginning–to return to *Miranda*. When Chief Justice Warren, in *Miranda*, recounted the historical development of the privilege against self-incrimination, he observed that "[t]he privilege was elevated to constitutional status and has always been 'as broad as the mischief against which it seeks to guard.'"[281] Chief Justice Warren believed that the Court was compelled to honor that principle: "We cannot depart from this noble heritage."[282] Today's courts are no less obligated to protect the constitutional rights and privileges of its citizens, and the scope of those rights and privileges must remain "as broad as the mischief against which [they] seek to guard."[283] Although there has been much debate over the *Seibert* Justices' positions, all nine Justices acknowledged the potential for mischief caused by question-first interrogations.

On a normative level, a correct *Marks* analysis shows that Justice Kennedy's opinion in Seibert is not the narrowest grounds and is, therefore, not controlling. On a positive level, courts should consider *Miranda*'s underlying policies in light of the mischief caused by question-first tactics before selecting a governing standard.

One may argue that a particular defendant, such as Jayant Kadian, does not "deserve" the rights and privileges which he or she is granted under the Constitution, particularly when that privilege is given effect by courts. Nevertheless, the Constitution does not govern only that defendant. The Constitution governs courts, cops, citizens, and criminals, and that is why Chief Justice Warren's statement is still true today: "We cannot depart from this noble heritage."

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1 Tom Jackson, *Judge Invalidates Admission by Va. Slaying Suspect*, WASH. POST, Dec. 12, 2005, at B3.

2 *See id.*

3 *Id.*

4 *See id.*

5 *See id.*

6 542 U.S. 600 (2004).

7 *See Seibert*, 542 U.S. at 617 (plurality opinion). The terms "question-first interrogation," "two-step interrogation," and "two-stage interrogation" all refer to a modern law enforcement interrogation tactic: An officer will question the suspect in custody without giving him *Miranda* warnings; then, after the suspect has admitted his guilt, the officer will give him *Miranda* warnings and question him again, this time recording the statement to use against the suspect in criminal proceedings. The only detailed record of the first interrogation may be that of the eyewitnesses and participants. Justice Souter described question-first interrogation tactics in *Seibert*. *See id*. at 609-11. In Kadian's case, other officers had read him *Miranda* warnings before Detective Allen arrived, but Detective Allen did not read Kadian his rights until after Kadian confession to the killing. *See* Jackson, *supra* note 1.

8 Jackson, *supra* note 1.

9 Jackson, *supra* note 1.

10 384 U.S. 436 (1966).

11 530 U.S. 428 (2000).

12 470 U.S. 298 (1985).

13 430 U.S. 188 (1977).

14 *See* Jackson, *supra* note 1 (quoting several law professors who agreed that Detective Allen's question did not have the necessary markings of deliberateness that Justice Kennedy required).

15 *See* Commonwealth v. Kadian, Record No. 3036-05-4, 2006 WL 1458128, *1-4 (Va. Ct. App. May 30, 2006) (reversing trial court's ruling to suppress confession).

16 U.S. CONST. amend. V.

17 *See* Peter Bowman Rutledge & Nicole L. Angarella, *An End of Term Exam: October Term 2003 at the Supreme Court of the United States*, 54 CATH. U. L. REV. 151, 179-80 (2004) ("*Seibert* demonstrates that *Miranda* issues will continue to divide the Court despite the so-called 'détente' announced several terms ago in *Dickerson v. United States*.").

18 In his dissent, Justice Harlan criticized "the Court's new constitutional code of rules for confessions." Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting). He later described "the Court's asserted reliance on the Fifth Amendment . . . as a *trompe l'oiel*." *Id*. at 510 (Harlan, J., dissenting).

19 *See id.* at 439 (majority opinion) ("[W]e deal with the admissibility of statements . . . and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment . . . .").

20 *See id.* at 467-79.

21 *See id*. at 467.

22 *See id*.

23 This is the quality in *Miranda* that later frustrated Justice Scalia in *Dickerson v. United States*, 530 U.S. 428 (2000). As he accurately observed in his dissenting opinion, "[T]he Court has (thankfully) long since abandoned the notion that failure to comply with *Miranda*'s rules is itself a violation of the Constitution." Dickerson, 530 U.S. at 450 (Scalia, J., dissenting). With this observation in hand, Justice Scalia painted a false dichotomy between upholding Congress's voluntariness test in 18 U.S.C. § 3501 and declaring *Miranda* "an illegitimate exercise of [the Supreme Court's] authority to review state-court judgments." *Id*. at 461. The third possibility, which Justice Scalia refused to acknowledge, was that Congress could in theory enact other procedural rules, besides Section 3501, that satisfied *Miranda*'s threshold, thereby obviating the need for the judicially enforced *Miranda* warnings.

[24] *See* William T. Pizzi & Morris B. Hoffman, *Taking Miranda's Pulse*, 58 VAND. L. REV. 813, 816 (2005) (describing these two rationales as arising from a "disapproval of coerced confessions . . . that has always been grounded [even pre-*Miranda*] in the confluence of twin evils).

[25] *See Miranda*, 384 U.S. at 460 (espousing that "all policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government–state or federal–must accord to the dignity and integrity of its citizens.") (citations omitted).

[26] *Id*. at 453, 455-56, 461, 470.

[27] *Id*. at 475.

[28] *See* Missouri v. Seibert, 542 U.S. 600, 624 (2004) (O'Connor, J., dissenting) (agreeing with the plurality's "rejection of an intent-based test" and citing *Miranda* as support).

[29] *See Miranda*, 384 U.S. at 448-55 (describing modern interrogation techniques intended to produce a confession from the suspect); *id*. at 468-69 (rejecting a subjective test for knowledge of the right to remain silent).

[30] *See id*. at 445-58.

[31] *See id*. at 478-79 (requiring the state to produce evidence at trial that it gave defendant the *Miranda* warnings and that the defendant made a knowing and intelligent waiver of his rights).

[32] *See id*. at 468-69. Besides the uncertain nature of a subjective test, the Court identified a second reason for requiring the test to be objective, related to the reliability of the confession: "More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." *Id*. at 469.

[33] *See Seibert*, 542 U.S. at 624-27 (O'Connor, J., dissenting) (debating subjective and objective standards); *see also* Peter B. Rutledge, *Miranda and Reasonableness*, 42 AM. CRIM. L. REV. 1011, 1014-18 (2005) (listing three factors in the subjective-objective debate as (1) the administrability of the rule; (2) the protection of individual rights; (3) and the balancing of interests between the individual and law enforcement).

[34] *See Miranda*, 384 U.S. at 477. For example, the Court stated:

> The principles announced today deal with the protec tion which *must* be given to the privilege against self-incrimination when the individual is *first* subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is *at this point* that our adversary system of criminal proceedings commences, distin guishing itself *at the outset* from the inquisitorial sys tem recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play *at this point*.

Miranda, 384 U.S. at 477 (emphases added). Similarly, in the Court's summary of its holding, Chief Justice Warren wrote that the defendant being interrogated "must be warned prior to *any* questioning." *Id*. at 479 (emphasis added).

[35] *See id*. at 492 n.67, 495-97.

[36] 342 F.2d 684 (9th Cir. 1965), *rev'd*, Arizona v. Miranda, 384 U.S. 436 (1966).

[37] The Court found in *Westover* that, where the defendant had undergone a lengthy state interrogation and the federal "interrogation was conducted immediately following the state interrogation in the same police station–in the same compelling surroundings," the "giving of warnings alone [by the federal agents] was not sufficient to protect the privilege." *Miranda*, 384 U.S. at 496-97. The Court noted that "[a] different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them." *Id*. at 496.

In *Oregon v. Elstad*, 470 U.S. 298 (1985), Justice O'Connor dismissed the *Miranda* Court's analysis of *Westover* as a finding of actual coercion. *Elstad*, 470 U.S. at 310. After noting that *Westover* was decided with *Miranda*, Justice O'Connor wrote, "Of the courts that have considered whether a properly warned confession must be suppressed because it was preceded by an unwarned but clearly voluntary admission, the majority have explicitly or implicitly recognized that *Westover*'s requirement of a break in the stream of events is inapposite." *Id*. at 311 & n.2. By relying on a "majority" of lower courts, Justice O'Connor avoided confronting the *Miranda* Court's analysis of the facts in *Westover*.

[38] *See* Paul G. Alvarez, Comment, *Taking Back* Miranda: *How* Seibert *and* Patane *Can Keep "Question-First" and "Outside* Miranda" *Interrogation Tactics in Check*, 54 CATH.. U. L. REV. 1195, 1202-12 (2004) (describing how the Supreme Court "took definitive steps toward tempering the bright-line rule of *Miranda*" through "a series of five major cases over the twenty years following *Miranda*"). The most significant *Miranda* exceptions include *Harris v. New York*, 401 U.S. 222 (1971), *Michigan v. Tucker*, 417 U.S. 433 (1974), *Oregon v. Hass*, 420 U.S. 714 (1975), *New York v. Quarles*, 467 U.S. 649 (1984), *Oregon v. Elstad*, 470 U.S. 298 (1985), *United States v. Patane*, 542 U.S. 630 (2004), and *Missouri v. Seibert*, 542 U.S. 600 (2004).

[39] 470 U.S. 298 (1985).

[40] *Id*. at 318.

[41] *Id*. at 309.

[42] *Id*. at 314.

[43] *Id*. at 316.

[44] *See id*. at 306 (dismissing the defendant's "fruit of the poisonous tree" argument).

[45] *See id.* at 311 (rejecting the reasoning of the defendant's second argument that the first statement "let the cat out of the bag," so that the suspect would face "a subtle form of lingering compulsion" when making the second statement).

[46] Missouri v. Seibert, 542 U.S. 600, 614-15 (2004) (plurality opinion).

[47] *Id*. at 628 (O'Connor, J., dissenting).

[48] *Id*. at 619 (Kennedy, J., concurring in the judgment).

[49] *But see* Joëlle Anne Moreno, *Faith-Based* Miranda?: *Why the New* Missouri v. Seibert *Police "Bad Faith" Test is a Terrible Idea*, 47 ARIZ. L. REV. 395, 410-13 (2005) (arguing that Justice Souter and Justice Kennedy both misread *Elstad*'s facts and that their interpretations of the *Elstad* majority opinion are therefore wrong).

[50] 530 U.S. 428 (2000).

[51] *See id.* at 443-44.

[52] *Id*. at 444.

[53] *Id*.

[54] *Id*. at 441.

[55] *Id*. at 444.

[56] *Id*.

[57] 542 U.S. 600 (2004).

[58] *See id*. at 604 (plurality opinion).

[59] *See id*.

[60] *See id*.

[61] *See id*.

[62] *See id*.

[63] *See id*. at 605.

[64] *See id*.

[65] *See id*.

[66] Justice Breyer concurred "fully" in the plurality opinion, and he also wrote a separate concurrence in which he argued for an application of the "fruit of the poisonous tree" doctrine. *See id*. at 617-18 (Breyer, J., concurring). Justice O'Connor, in her *Seibert* dissent, wrote that "[t]he Court today [in *United States v. Patane*, 542 U.S. 630 (2004)] refuses to apply the traditional 'fruits' analysis to the physical fruit of a claimed *Miranda* violation. The [*Seibert*] plurality correctly refuses to apply a similar analysis to testimonial fruits." *Id*. at 623-24 (O'Connor, J., dissenting). This suggests that Justice Breyer was the only vote for a traditional fruit of the poisonous tree analysis.

[67] *Id*. at 608 (plurality opinion) (quoting Chavez v. Martinez, 538 U.S. 760, 790 (2003) (Kennedy, J., concurring in part and dissenting in part)).

[68] *Id*. at 609.

[69] *See id*. at 611-13. Justice Souter concluded that "[t]he upshot of all this advice [given by police departments and even a national police training organization] is a question-first practice of some popularity, as one can see from the reported cases describing its use, sometimes in obedience to departmental policy." *Id*. at 611.

[70] *See id*. at 612-13.

[71] *See id*. at 611-12.

[72] *See id*. at 613. Justice Souter explained, "By any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." *Id*. He reasoned that this was why police departments were applying question-first techniques. *See id*.

[73] *See id.* at 614.

[74] *Id*.

[75] *Id*. at 615-16.

[76] *Id*. at 615.

[77] *Id*. The five factors are: (1) "the completeness and detail of the questions and answers in the first round of interrogation"; (2) "the overlapping content of the two statements"; (3) "the timing and setting of the first and the second"; (4) "the continuity of police personnel"; (5) "the degree to which the interrogator's questions treated the second round as continuous with the first." *Id*. at 615. Arguably, the plurality added a sixth factor when it stated that the absence of "a formal addendum warning that a previous statement could not be used" was "clearly a factor that blunts the efficacy of the warnings and points to a continuing, not a new, interrogation." *Id*. at 616 & n.7. Some lower courts, however, describe the test as comprising five factors. *See, e.g.*, United States v. Briones, 390 F.3d 610, 613 (2005) *reh'g and reh'g en banc denied*, 2005 U.S. App. LEXIS 3084 (2005), *cert. denied*, 125 S. Ct. 2925 (2005).

[78] *See Seibert*, 542 U.S. at 617-18 (Breyer, J., concurring).

[79] *See id*.

[80] *See id*. at 617 ("Courts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith.") (citations omitted).

[81] *Id*. at 619 (Kennedy, J., concurring in the judgment).

[82] *See id.*

[83] *Id*. at 618-19. Justice Kennedy referred to four *Miranda* exceptions as appropriately balancing public and private interests: *Harris, Quarles, Patane*, and *Elstad*. *See id*. at 619-20.

[84] *Id.* at 619.

[85] *See id*. at 620 ("*Elstad* reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning."). Justice Kennedy quoted approvingly the following statement from *Elstad*: "It is an unwarranted extension of *Miranda* to hold that a simple failure to administer warnings . . . so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." *Id*. at 620 (quoting Oregon v. Elstad, 470 U.S. 298, 309 (1985)).

[86] *Id*. at 621.

[87] *Id*. Justice Kennedy required that "[c]urative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id*. at 622. He hypothesized that "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Id*. (citations omitted).

[88] *See id*. at 621-22.

[89] *Id*. at 621.

[90] *Id*. at 622.

[91] *Id*.

[92] *Id*. at 623 (O'Connor, J., dissenting).

[93] *See id*. at 624-27.

[94] *See id*. at 627-28. The dissent characterized the plurality's approach as "indistinguishable" from the "cat out of the bag" argument that the *Elstad* majority rejected. *Id*. at 627.

[95] *Id*. at 628.

[96] *Id*. at 615 (plurality opinion) ("Although the *Elstad* Court expressed no explicit conclusion about either officer's state of mind, it is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally.").

[97] *See id*. at 616.

[98] *See id*. at 616 n.6.

[99] The plurality believed that the circumstances of the interrogation would create a situation in which *Miranda* warnings would be ineffective for a person in the suspect's shoes. *See Seibert*, 542 U.S. at 613.

[100] *See id*. at 617 (note omitted).

[101] *See* Rutledge, *supra* note 33, at 1024.

[102] *Compare Seibert*, 542 U.S. at 617 (plurality opinion) *with id*. at 622 (Kennedy J., concurring in the judgment).

[103] *See id*. at 621 (Kennedy, J., concurring in the judgment). In other words, the objective nature of the plurality's test is most evident as a negative inference from Justice Kennedy's opinion.

[104] *See id*. at 624 (O'Connor, J., dissenting) (applauding "the plurality's rejection of an intent-based test").

[105] 430 U.S. 188 (1977).

[106] 539 U.S. 306 (2003).

[107] 430 U.S. 188 (1977).

[108] *See* Bob Woodward & Scott Armstrong, The Brethren 192-204 (Simon & Schuster 1979) (describing how, in the context of the 1971 term, current and former Supreme Court justices had disagreed strongly about the status of obscenity under the First Amendment).

[109] *See Marks*, 430 U.S. at 189.

[110] *See id.*

[111] 413 U.S. 15, 24 (1973).

[112] *See Marks*, 430 at 190 & n.3 (detailing the three-part test created by the *Miller* court to determine whether material was obscene and therefore not entitled to First Amendment protection).

[113] 383 U.S. 413 (1966).

[114] *See Marks*, 430 U.S. at 190-91 (reiterating the plurality in *Memoirs* which held that "three elements must be coalesce" for the material to be found obscene and thus outside the protection of the First Amendment).

[115] *See id.*

[116] *See id*. at 191.

[117] *Id*. at 192.

[118] *See id*. at 192-93.

[119] *Id*. at 193.

[120] *Id*.

[121] *Id*. (alteration in original) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

[122] *Id*. at 193-94 (citations omitted).

[123] *Id*. at 194. The constitutional basis for overturning the defendants' convictions in Marks was an Ex Post Facto Clause argument. See id. at 191.

[124] *See* Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 436-42 (1992) (detailing "the Supreme Court's disregard for the 'narrowest grounds' doctrine" and observing that, through 1992, "[t]he Court has cited *Marks* only four times for the 'narrowest grounds' rule - three times in dissent"); Rafael A. Seminario, *The Uncertainty and Debilitation of the Marks Fractured Opinion Analysis–The Supreme Court Misses an Opportunity*: Grutter v. Bollinger, 2004 UTAH L. REV. 739, 759-62 (2004) (criticizing the Court for side-stepping a *Marks* analysis of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) in *Grutter v. Bollinger*, 539 U.S. 306 (2003), when many lower courts had struggled to apply Marks).

[125] 539 U.S. 306 (2003).

[126] 438 U.S. 265 (1978); *see* Seminario, *supra* note 124, at 759-62.

[127] *See* Seminario, *supra* note 124, at 743.

[128] *See id.*

[129] *See id*. at 751, 760.

[130] *See id.* at 760. In *Grutter*, Justice O'Connor acknowledged for the majority that "[i]n the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent under *Marks*." Grutter v. Bollinger, 539 U.S. 306, 325 (2003). She continued, "As the divergent opinions of the lower courts demonstrate, however, '[t]his test is more easily stated than applied to the various opinions supporting the result in [Bakke].'" *Id*. (citations omitted). Therefore, Justice O'Connor concluded, the majority "d[id] not find it necessary to decide whether Justice Powell's opinion is binding under *Marks*. It does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.'" *Id*. (citation omitted).

[131] Seminario, *supra* note 124, at 760.

[132] *See* Thurmon, *supra* note 124, at 442 (suggesting that "[l]ower courts should take the Supreme Court's rejection of the *Marks* rule as an invitation to follow suit"); Seminario, *supra* note 124, at 762 (recognizing that "instead of clarifying the proper use of the *Marks* analysis in *Grutter*, the Court has most likely increased the likelihood that it will be subject to whimsical application, subjective interpretation, and more importantly, divisive disagreement . . .").

[133] Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions,* 80 COLUM. L. REV. 756, 767 (1980).

[134] Novak, *supra* note 133, at 767.

[135] *See* Seminario, *supra* note 124, at 760 ("The Court's avoidance of the *Marks* analysis severely weakened the analysis as a tool for judicial interpretation of fractured opinions.").

[136] Thurmon, *supra* note 124, at 442.

[137] 950 F.2d 771 (D.C. Cir. 1991) (en banc).

[138] Id. at 773.

[139] 483 U.S. 711 (1987).

[140] *See King*, 950 F.2d at 776-77.

[141] *See id*. at 780.

[142] *Id*. at 781.

[143] *Id*.

[144] *Id*. at 782.

[145] *Id*. at 782-83 (emphasis in original).

[146] *Id*. at 783 (emphasis in original).

[147] *Id*.

[148] *Id*.

[149] 18 F.3d 1043 (3d Cir. 1994).

[150] *Id*. at 1058.

[151] *Id*. (citations omitted).

[152] *Id*.

[153] 315 F.3d 179 (2d Cir. 2003).

[154] *Id*. at 189.

[155] *Id*.

[156] Thurmon, *supra* note 124, at 442.

[157] This survey is intended to provide an overview of case law in this area. As of April 7, 2006, Westlaw Keycite indicated that *Seibert* has been cited in approximately 172 cases. Of those cases, approximately forty refer to *Marks*, and this survey is representative of those. While several courts have applied *Seibert* without performing a *Marks* analysis, see, for example, People v. Paulman, 833 N.E.2d 239, 246-47 & n.5 (N.Y. 2005), their decisions cannot be given much weight because they fail toaddress a central question in *Seibert*: which opinion controls and under what circumstances. *See id.*

[158] *See* United States v. Naranjo, 426 F.3d 221, 231-32 (3d Cir. 2005); United States v. Latz, 162 Fed. App. 113, 119-20 (3d Cir. 2005); United States v. Kiam, 432 F.3d 524, 532-33 (3d Cir. 2006).

[159] *See* United States v. Mashburn, 406 F.3d 303, 308-09 (4th Cir. 2005).

[160] United States v. Sinclair, No. 05-40544, 2006 WL 616030, at *1 (5th Cir. Mar. 13, 2006).

[161] *See* United States v. Stewart, 388 F.3d 1079, 1089-90 (7th Cir. 2004); *see also* United States v. Peterson, 414 F.3d 825, 827-28 (7th Cir. 2005) (citing United States v. Stewart, 388 F.3d 1079, 1086-90 (7th Cir. 2004)).

[162] *See* United States v. Ollie, No. 05-2503, 2006 WL 829755, at *5-7 (8th Cir. Mar. 31, 2006) ("Because Justice Kennedy provided the fifth vote and his concurrence resolved the case on narrower grounds than did the plurality, it is his reasoning that rules the present case.").

[163] *See* United States v. Williams, 435 F.3d 1148, 1158 (9th Cir. 2006); United States v. Rodriguez-Preciado, 399 F.3d 1118, 1129-30 (9th Cir. 2005). The 8th Circuit's early opinions in 2004 applied what is essentially the first minority approach analyzing question-first interrogation under both the plurality opinion and Justice Kennedy's concurrence while hoping the tests agreed. *See, e.g.,* United States v. Aguilar, 384 F.3d 520, 524-25 (8th Cir. 2004). The Eighth Circuit is now fully aligned with the majority. *See* United States v. Ollie, No. 05-2503, 2006 WL 829755, at *6 (8th Cir. Mar. 31, 2006).

[164] *See* United States v. Banks, No. Civ. 05-426JNE/FLN, 2006 WL 839508, at *8-10 (D. Minn. Mar. 30, 2006).

[165] *See* United States v. Hansen, No. 8:05CR186, 2005 WL 2655468, at *2 (D. Neb. Oct. 18, 2005).

[166] *See* United States v. Kiam, 343 F. Supp. 2d 398, 408-10 (E.D. Pa. 2004).

[167] *See* United States v. Yamba, No. 2:04 CR 329, 2006 WL 41182, at *13 (W.D. Pa. Jan. 6, 2006) (citing United States v. Naranjo, 426 F.3d 221 (3d Cir. 2005)).

[168] *See* People v. Roberts, No. D043221 (Super. Ct. No. SCD169869), 2005 WL 615851, at *12 (Cal. Ct. App. March 17, 2005); In re Richard G., No. H026504 (Santa Clara County Superior Court No. J125855), 2005 WL 428967, at *8-11 (Cal. Ct. App. Feb. 23, 2005); People v. Brown, No. H026138 (Santa Clara County Super. Ct. No. CC256280), 2004 WL 2384330, at *10 (Cal. Ct. App. Oct. 26, 2004); People v. Knight, No. C042870 (Sup. Ct. No. TF030730A), 2005 WL 1478995, at *9 (Cal. Ct. App. June 21, 2005); People v. Dutra, No. C044075 (Sup. Ct. No. SF085258B), 2005 WL 1177582, at *12 (Cal. Ct. App. May 18, 2005); People v. Hall, No. C042586 (Sup. Ct. No. 01F00138), 2004 WL 2526699, at *8-9 (Cal. Ct. App. Nov. 9, 2004). As a caveat, the author notes that none of the California Court of Appeal decisions was reported in the state reporter, and, therefore, none of them may be cited as binding precedent in California. However, six unpublished opinions from the California Court of Appeal arguably together constitute an implicit precedent.

[169] *See* Callihan v. Commonwealth, 142 S.W.3d 123, 125-26 (Ky. 2004); Jackson v. Commonwealth, Nos. 2004-SC-0118-MR, 2004-SC-0319-MR, 2006 WL 733991, at *6 (Ky. March 23, 2006) (plurality opinion)..

[170] *See* Cooper v. State, 877 A.2d 1095, 1107 (Md. Ct. Spec. App. 2005).

[171] State v. Andrusiv, No. 53923-0-I, 2005 WL 1345438, at *2 & n.14 (Wash. Ct. App. June 6, 2005); State v. T.R., No. 54156-1-I, 2005 WL 221888, at *3 n.14 (Wash. Ct. App. Jan. 31, 2005).

[172] 435 F.3d 1148 (9th Cir. 2006).

[173] *Id*. at 1155.

[174] *Id*. at 1157.

[175] *Id*. (quoting Planned Parenthood v. Casey, 947 F.2d 682, 693 (3d Cir. 1991)).

[176] *Id*.

[177] *Id*. at 1157.

[178] *See id*. at 1158. The *Williams* Court explained,

> In other words, both the plurality and Justice Kennedy agree that where law enforcement officers deliberately employ a two-step interrogation to obtain a confession and where separations of time and circumstances and additional curative warnings are absent or fail to apprise a reasonable person in the suspect's shoes of his rights, the trial court should suppress the confession.

Id. (emphasis in the original).

[179] *Id*.

[180] *See id*. (concluding that *Elstad* controls the admissibility of post-warning confessions where question-first tactics are not employed deliberately).

[181] *Id*. at 1158 & n.11.

[182] *Id*. at 1158-59.

[183] *See id*. at 1160.

[184] *See id.*

[185] *Id*.

[186] *See* United States v. Gonzalez-Lauzan, Jr., 437 F.3d 1128, 1137-1139 (11th Cir. 2006).

[187] *See* United States v. Johnson, No. CR05-4063-MWB, 2005 WL 2704892, at *14 (N.D. Iowa Oct. 20, 2005).

[188] *See* United States v. Thomas, No. IP04-0106-CR-01-H/F, 2004 WL 3059794, *8 (S.D. Ind. Dec. 16, 2004).

[189] *See* Crawford v. State, 100 P.3d 440, 450 (Ala. Ct. App. 2004).

[190] *See* FED. R. CIV. P. 8(a) ("Relief in the alternative or of several different types may be demanded.").

[191] *See, e.g*., Johnson, 2005 WL 270489 at *14.

[192] *See, e.g.,* United States v. Gonzalez-Lauzan, Jr., 437 F.3d 1128, 1137-39 (11th Cir. 2006) (deciding not to resolve the "dispute over whether *Elstad* or *Seibert* controls"). The Court of Appeals of Alaska varies the alternative argument approach by applying the plurality test and then finding that the dissent's broader test was also met. *See* Crawford, 100 P.3d at 450 (concluding that the defendant's post-*Miranda* statements must be suppressed under the *Seibert* plurality opinion and under the reading of *Elstad* advocated by the *Seibert* dissenters).

[193] *See supra* note 162.

[194] 399 F.3d 1118 (9th Cir. 2005); *see also* United States v. Williams, 435 F.3d 1148, 1157 (9th Cir. 2006) (acknowledging Judge Berzon's dissent).

[195] *See Rodriguez-Preciado*, 399 F.3d at 1129-30, 1133 (Berzon, J., dissenting in part).

[196] *Id*. at 1139 (Berzon, J., dissenting in part).

[197] *See id*. at 1139 & n.10 (Berzon, J., dissenting in part).

[198] *Id*. at 1139 (Berzon, J., dissenting in part).

[199] *Id*. at 1133 (Berzon, J., dissenting in part).

[200] *See id*. at 1139 & n.12, 1140 (Berzon, J., dissenting in part).

[201] *See id*. at 1141 (Berzon, J., dissenting in part).

[202] *See id*. (Berzon, J., dissenting in part) ("As I read it, in agreement with other circuits' opinions discussed above, *Marks* does not prescribe the adoption as governing precedent of a position squarely rejected by seven Justices. Justice Kennedy's opinion on the admissibility standard therefore cannot govern.").

[203] *Id*. (Berzon, J., dissenting in part).

[204] *See id*. (Berzon, J., dissenting in part) (setting forth that the Seibert dissent could not govern, yet nothing prevented the court in this case from adopting the Seibert plurality opinion).

[205] *See id*. (Berzon, J., dissenting in part).

[206] 435 F.3d 1148 (9th Cir. 2006).

[207] *See id.* at 1156-61 (holding that a narrower test that excluded confessions made after deliberate ineffective mid-stream warnings is the true holding of Seibert); *see also* discussion *supra* Part III.C.1.

[208] 372 F. Supp. 2d 340 (E.D.N.Y. 2005).

[209] *Id*. at 353 ("I disagree with courts which have found Justice Kennedy's concurrence to be the narrowest grounds for the judgment, and do not consider the concurrence controlling."); *see* Cooper v. State, 877 A.2d 1095, 1107 n.5 (Md. Ct. Spec. App. 2005) (recognizing that Judge Azrack disagreed with the position taken by three federal circuits). *Cf.* Sorto v. Herbert, 364 F. Supp. 2d 240-41 (E.D.N.Y. 2004) (relying on Justice Kennedy's concurrence to reject defendant's argument of an alleged question-first *Miranda* violation).

[210] *Cohen*, 372 F. Supp. 2d at 353-54.

[211] *Id.* at 354.

[212] *See* discussion *supra* Part II, p. 39.

[213] *Cohen*, 372 F. Supp. 2d at 354 (quoting King v. Palmer, 950 F.2d 771, 783 (D.C. Cir.1991) (en banc)).

[214] *Id*. at 354.

[215] *Id*.

[216] *See id.*

[217] *Id*. at 353 (quoting United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (2d Cir. 2003) (citations omitted)).

[218] *Id*. at 355.

[219] *Id*.

[220] *See id.* at 355-58.

[221] *See id.* at 358-59.
[222] Missouri v. Seibert, 542 U.S. 600, 621-22 (2004) (Kennedy, J., concurring in the judgment).
[223] *See supra* Part II, p. 39.
[224] *Seibert*, 542 U.S. at 616 (plurality opinion).
[225] *Id*. at 616 n.6.
[226] *Id.*
[227] *See id*. at 602-04 (plurality opinion).
[228] *Id*. at 626 (O'Connor, J., dissenting).
[229] *See* United States v. Rodriguez-Preciado, 399 F.3d 1118, 1139 n.12 (9th Cir. 2005) (Berzon, J., dissenting in part).
[230] *See* Seibert, 542 U.S. at 617-18.
[231] *See Rodriguez-Preciado*, 399 F.3d at 1140 n.12 (Berzon, J., dissenting in part); *cf*. United States v. Cohen, 372 F. Supp. 2d 340, 353-54 (E.D.N.Y. 2005) ("Justice Kennedy's rule, rejected by a large majority of the court, cannot be *Seibert*'s holding.").
[232] *See* King v. Palmer, 950 F.2d 771, 782 (D.C. Cir. 1991) (en banc) ("When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.").
[233] *See* United States v. Cohen, 372 F. Supp. 2d 340, 354 (E.D.N.Y. 2005) ("Justice Kennedy's opinion cannot be the narrowest for another reason. Justice Kennedy laid out an analysis which is 'simply different' than that articulated by the plurality, not a logical subset." (quoting King v. Palmer, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc))).
[234] *Id*. at 354.
[235] *Id.*
[236] *See* discussion *supra* Part III.C.
[237] *See Cohen*, 372 F. Supp. 2d at 353-54; *Rodriguez-Preciado*, 399 F.3d at 1140; United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (2d Cir. 2003); Rappa v. New Castle County, 18 F.3d 1043, 1057-58 (3d Cir. 1994); King v. Palmer, 950 F.2d 771, 777-78 (D.C. Cir. 1991) (en banc).
[238] *See* Missouri v. Seibert, 542 U.S. 600 at 611-12, 621-22 (2004).
[239] King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).
[240] *See Cohen*, 372 F. Supp. 2d at 354 ("The *Marks* methodology reviews splintered opinions to determine whether any of the grounds for the result are a logical subset of other grounds, not whether a result is within a larger category of results.").
[241] *Rodriguez-Preciado*, 399 F.3d at 1141.
[242] *Cohen*, 372 F. Supp. 2d at 355.
[243] *See, e.g*., United States v. Naranjo, 426 F.3d 221, 231 (3d Cir. 2005) ("Justice Kennedy would therefore apply a 'narrower test' . . . ." (quoting Missouri v. Seibert, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in the judgment))). This point was subtly highlighted by Judge Berzon in *Rodriguez-Preciado*. *See* United States v. Rodriguez-Preciado, 399 F.3d 1118, 1139 & n.10 (9th Cir. 2005) (Berzon, J., dissenting in part) (noting that while Justice Kennedy's reasoning was "arguably narrower," it was the Justice himself who first "characterized his opinion as 'narrower.'").
[244] *Cf*. United States v. Thomas, No. IP04-0106-CR-01-H/F, 2004 WL 3059794, at *4-5, 8 (S.D. Ind. Dec. 16, 2004) *with* United States v. Cohen, 372 F. Supp. 2d 340, 351-59 (E.D.N.Y. 2005).
[245] *See* discussion *supra* Part III, p. 42.
[246] Missouri v. Seibert, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in the judgment) (stating that post-warning statements should be governed by *Elstad* unless a deliberate two-step strategy was used).
[247] *Seibert*, 542 U.S. at 628-29 (O'Connor, J., dissenting).
[248] *See* discussion *supra* Part IV, p. 43.
[249] *See* discussion *supra* Part III, pp. 40-41.
[250] *See* United States v. Rodriguez-Preciado, 399 F.3d 1118, 1140-41 (9th Cir. 2005); United States v. Cohen, 372 F. Supp. 2d 340, 355 (E.D.N.Y. 2005).
[251] *Cohen*, 372 F. Supp. 2d at 355. Judge Berzon seemed to agree: "The existence of exceptions to *Elstad* enjoys the support of five Justices." *Rodriguez-Preciado*, 399 F.3d at 1141 (Berzon, J., dissenting).
[252] *See Cohen*, 372 F. Supp. 2d at 355 (allowing the court to create it's own test to determine whether to suppress statements); *Rodriguez-Preciado*, 399 F.3d at 1141 (Berzon, J., dissenting) (arguing, in essence, that neither Seibert opinion governs).
[253] *See Cohen*, 372 F. Supp. 2d at 355 (creating an analysis by which to decide the issue of suppression); *Rodriguez-Preciado*, 399 F.3d at 1141 (Berzon, J., See Cohen, 372 F. Supp. 2d at 355 (creating an analysis by which to decide the issue of suppression); Rodriguez-Preciado, 399 F.3d at 1141 (Berzon, J., dissenting) (advocating for the use of the Seibert plurality although it is not binding).
[254] U.S. CONST. amend. V.
[255] *See* Missouri v. Seibert, 542 U.S. 600, 608-09 (2004) (plurality opinion).
[256] *Id*. at 609.
[257] *See id.* at 612-14 (providing that when *Miranda* warnings are used in the midst of interrogation they are likely to deprive a defendant of his knowledge of his rights).
[258] *See* Miranda v. Arizona, 384 U.S. 436, 448 (1966) (stressing the fact that modern interrogation is psychologically oriented).
[259] *Seibert*, 542 U.S. at 615 (plurality opinion).
[260] *Miranda*, 384 U.S. at 460.
[261] *See* discussion *supra* Part II, pp. 36-37.
[262] *Id.*
[263] *Id.*
[264] *See* Missouri v. Seibert, 542 U.S. 600, 612-14 (2004) (plurality opinion) ("Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision.").
[265] *Cf. Seibert*, 542 U.S. at 617 (excluding defendant's postwarning statements "[b]ecause the question-first tactic effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose").
[266] *See id*. at 614-15.
[267] *Id*. at 609.
[268] *See id*. at 623-27.
[269] *See id*.
[270] *See* United States v. Rodriguez-Preciado, 399 F.3d 1118, 1141 (2004) (Berzon, J., dissenting in part).
[271] *See* Rodriguez-Preciado, 399 F.3d at 1141.
[272] *See* discussion *supra* II, p. 39.
[273] *See Seibert*, 542 U.S. at 616 n.6 (plurality opinion).
[274] *See* discussion, *supra* Part III.D.1.
[275] *See Seibert*, 542 U.S. at 616 & n.7, 622.
[276] *See Cohen*, 372 F. Supp. 2d at 355-59.
[277] *See id*.
[278] *Moreno, supra* note 49, at 397-98.
[279] *Moreno, supra* note 49, at 398.
[280] *See Seibert*, 542 U.S. at 622 (Kennedy, J., dissenting).
[281] Miranda v. Arizona, 384 U.S. 436, 459-60 (1966).
[282] *Id*. at 460.
[283] *Id*. at 459-60.