The vogue word 'plurality'

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The non-resident and plurality-gaping Prelats, the gulphs and whirle pooles of benefices.

1642, John Milton, Apology for Smectymnuus[1]

A plurality opinion is an appellate opinion not having enough judges' votes to constitute a majority but receiving the greatest number of votes in support of the decision.

With a plurality decision, the only opinion to be accorded precedential value is that which decides the case on the narrowest grounds.

2016, Brett M Kavanaugh & ors, The Law of Judicial Precedent[2]

Introduction

'Plurality' has had many meanings: more than one, many, more than one but less than half, more than half… and that's before we get to the more technical ones.

In a 21st century of Pax Americanus there is one particularly technical meaning, a peculiarly post facto form for use in the mists of precedent. Australia has not adopted the use. Instead, it has developed its own use. This article explores the recent rise of the word in Australia and compares the use in the two legal systems.

In terms of legal time, the development in Australia has been rapid. In 1998, a plurality opinion of the High Court of Australia was unknown.[3] In 1999, the word in this sense appeared for the first time in a High Court judgment. In 2007, the word in its various majesties hit Austlii's case law database 47 times; in 2012, 575; and in 2017, 945. To 31 October of this year, 'plurality' is at 833. We may reach 1,000.

The US Supreme Court

The world remains fascinated by the machinations of US Supreme Court appointments. Apart from the spectacle and this year a plurality of darker themes, we know that appointments affect us. Legal argument about the power of a US state to make a particular law or the inability of the federal executive to broaden its reach, rapidly becomes a vehicle for worldwide debates about the facts underlying the case. Abortion, the death penalty, corporate involvement in the political process, these things engage us all.

An end to a gruelling process

The authors of the book from which the second quote at the top of this essay is drawn include Bryan A Garner. Professor Garner is America's best-known legal lexicographer and the editor of *Black's Legal Dictionary.* His name appears first on the hardcopy cover. Yet the others are co-authors of the whole, and the existence of this plurality is acknowledged in our own bar library's catalogue. One has now been elevated to the US Supreme Court after a bruising appointment process.

Most of us understand that court as a place where 5 + 4 is a different sum from 4 + 5. That is useful. But the underlying arithmetic can be much more complex. Justice Kavanaugh has spent his judicial life on a court of appeal whose job is the process of discerning the precedent from such a case. He will spend the rest of his judicial life writing one or other of the judgments which create the process. Before moving to the broader history of the word, I shall explain its peculiar operation in the US.

A woman of plurality

John Cleland's *Memoirs of a woman of pleasure* was first published in London in 1748. Popularly known as *Fanny Hill*, a play on *mons veneris*, it has made regular appearances in porn prosecutions over the centuries. The US Supreme Court had its say in *Memoirs v Massachusetts*.[4] The syllabus states:

> Appellee, the Attorney General of Massachusetts, brought this civil equity action for an adjudication of obscenity of Cleland's Memoirs of a Woman of Pleasure (Fanny Hill), and appellant publisher intervened. Following a hearing, including expert testimony and other evidence, assessing the book's character but not the mode of distribution, the trial court decreed the book obscene and not entitled to the protection of the First and Fourteenth Amendments. The Massachusetts Supreme Judicial Court affirmed, holding that a patently offensive book which appeals to prurient interest need not be unqualifiedly worthless before it can be deemed obscene.

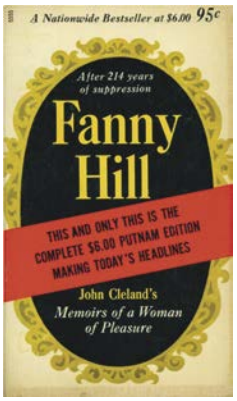
Justices Clark, Harlan & White in dissent would have dismissed the appeal. The six other justices allowed it. Justice Brennan, joined by the chief justice and Fortas J, applied a test that 'a book cannot be proscribed as obscene unless found to be utterly without redeeming social value'. Justice Black joined in the result, but on the basis put by him in an earlier decision:

> I believe the Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind (as distinguished from conduct).

Justice Douglas wrote to the same effect. Justice Stewart had a different view again, proscribing only hardcore pornography:

> . . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. . . .

Of the justices in the voting majority, a plurality of three used 'utterly without redeeming social value', two refused to impose a burden, and a unity looked to an absence of even a pretence of value. By the way, my reading of the US definition precludes the idea that there



A red letter day for the court

can be two plurality opinions within one plurality decision. Had Justices Black & Douglas written a joint judgment, it could not have been one of two plurality opinions.

The Marks rule

In *Marks v United States*,[5] the court explained the way that other courts should read decisions such as Memoirs:

> 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. . .'
>
> Despite the quote (of an earlier opinion of Stewart, Powell and Stevens JJ) the test is known as the Marks rule. 'In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices to support the judgment.' [6]

The plurality decision v the plurality opinion

A plurality decision is a decision which contains the plurality opinion. The opinion has no greater force inside the decision than that. It may set the precedent and it may not. This is because the precedent in a plurality decision belongs only to the opinion which decides the case on the narrowest grounds.

Thus if three justices decide that no law can ban any book and two justices (together or separately) decide that a law can ban a book if the law is directed to an absence of social value, then the precedential value of the majority is found in the reasons of the two justices and not of the three.

The matter has been made more complex by the approach of the Third Circuit to Marks. In the words of the authors of the 2016 text:[7]

> [In one case, the Third Circuit] continued, 'if three Justices issue the broadest opinion, the two Justices concur on narrower grounds, and one Justice concurs on still-narrower grounds, the two-Justice opinion is binding because that was the narrowest of the opinions necessary to secure a majority.' This statement differs from strict Marks analysis, under which the one-Justice opinion would control as the narrowest. The mathematical element ('necessary to secure a majority') appears to be a Third Circuit gloss. Among the other circuits, only the Ninth Circuit has expressly cited the Third Circuit's reasoning, but neither adheres to it exclusively.

An ununited plurality

The Marks rule is predicated on the existence of at least one opinion which has more than two judges although I don't think it is necessary for it to operate. I mean, if five different views emerge as the majority of five from a bench of nine, why would the narrowest opinion not still prevail.

But what if there is no narrowest opinion? What if there is no commonality across a majority in the result. What happens when none can be discerned?

In 2001, the High Court considered whether a person who had arrived in Australia in 1966 on his father's UK passport and who had never taken out Australian citizenship, was subject to or beyond the reach of, the *Migration Act*.[8]

A majority held that he was beyond the reach and not liable to be returned to the UK, as he qua British subject had become a subject of the Queen of Australia. However, each member of the majority reasoned a different cut-off date for this privileged status. For one, it was 1973 (the year of Mr Whitlam's *Royal Styles and Titles Act*); for two writing separately, it was 1987 (with substantive changes to the *Citizenship Act* upon the triumph of the *Australia Act* reforms); the last did not need to state a position but in a later case identified the date as the passage (or better, passages) of those reforms in 1986. There was a commonality in the result, to be sure. And there was, I think, a qualitative commonality found in the emergence of an Australian monarch. But there was no quantitative commonality, the necessary element by which other courts in the polity could apply a rationale to future cases.

A later chief justice of Australia was left to deal with the result as a trial judge in the Federal Court:[9]

> In my opinion, there is no binding principle in Re Patterson which assists me to a decision in this case. I consider that I should not apply to this case the proposition that British subjects living in Australia were not to be regarded as aliens until after 1987. In my opinion the appropriate position to take is the minimum position adverted to by McHugh J (although not definitively). On that position the division of allegiances between the Queen of the United Kingdom and the Queen of Australia became clear and the status of British subjects who were not Australian citizens also became clear as aliens for the purpose of the Constitution in 1973 upon the enactment of the Royal Style and Titles Act 1973. This approach is the most conservative approach to the decision in Re Patterson which, having regard to its divergent reasoning, should be seen as disturbing pre-existing law to the least extent necessary consistent with the outcome.

Justice French's reasoning has similarity to the Marks rule, as applied to a group of unity opinions forming a majority.

Meanwhile, the High Court reconsidered its position. Three members of the court in *Shaw* observed that *Long* itself 'illustrates the inconvenience and lack of useful result from Patterson.' However, the members did not endorse the 'minimum position' approach of French J. They preferred to state the task in the following manner:[10]

> Any consideration of the significance to be attached to Patterson must involve the determination whether Patterson was effective to take the first step of overruling the earlier decision in Nolan v Minister for Immigration and Ethnic Affairs. In our view, the Court should be taken as having departed from a previous decision, particularly one involving the interpretation of the Constitution, only where that which purportedly has been overthrown has been replaced by some fresh doctrine, the elements of which may readily be discerned by the other courts in the Australian hierarchy. On that approach to the matter, and as Long indicates, the decision in Patterson plainly fails to pass muster.

Three members of the court separately disagreed. This left Heydon J. Justice Heydon agreed in the conclusion reached in the joint reasons. This, as we shall see, makes the joint

reasons an Australian plurality. Whether it makes the joint reasons a plurality in the US sense depends, of course, on how Heydon J proffered the concurrence:

> It was common ground between the applicant and the Solicitor-General of the Commonwealth that while it is now the case that British subjects who are not Australian citizens are aliens, in 1901 British subjects were not aliens. Hence the argument between the parties postulated the axiomatic correctness of the proposition that in 1901 British subjects were not aliens, and concentrated on the question of when and how the change occurred. Understandable though this approach is, there is an unsatisfactory element in it. It is not in fact self-evident that from 1 January 1901 all British subjects were not aliens, and inquiry into a subsequent date on which, or process by which, they became aliens tends to proceed on a false footing so far as it excludes the possibility that on 1 January 1901 some of them were aliens. Much has been said in this Court and elsewhere, and much more could be said, in denial of that possibility, but there are arguments that that possibility is correct, and its correctness should be left open until a case is heard in which the contrary is not simply assumed, but fully debated. The stance of the parties makes it inevitable that the Court must proceed on the assumption on which the case was argued. On that assumption, the orders proposed by Gleeson CJ, Gummow and Hayne JJ should be made for the reasons they give.

The premise for the operation of the Marks rule is the absence of a single rationale explaining the result enjoying the assent of a majority. On one view, Shaw does not qualify. The reasons of three had a rationale explaining the result and it enjoys the concurrence of the fourth member of a bench of seven. On the other hand, the fourth member only embraced the rationale on an assumption or, arguably, declined to embrace the rationale without further argument. In the result:

- Prior to Patterson, Nolan held the field. After 1948 (the passage of the Citizenship Act) a person could be an alien notwithstanding that they were a British citizen.
- From Patterson and by virtue of Long, after 1948 and up to 1973 such a person could not be an alien.
- From Shaw, three members of a seven-bench court returned to 1948, while one member flagged the possibility of a further jump to 1901.

The precedential universe is expanding at a great rate. And if there is a place in the firmament for the ever-minimising position or for the obiter plurality, Australia stands ready.

A plurality of views on fracture

On one view, the position in the US is different to that in Shaw. A decision of a nation's supreme court however fractured is precedent. Another court cannot decide that the decision 'fails to pass muster'. Rather, and to pick up then-Judge Kavanaugh: [11]

> Vertical *stare decisis* is absolute and requires lower courts to follow applicable Supreme Court rulings in every case. The Constitution vests Judicial Power in only one Supreme Court. U.S. CONST. art. III, § 1. We are subordinate to that one Supreme Court, and we must decide cases in line with Supreme Court precedent.
>
> Vertical *stare decisis* applies to Supreme Court precedent in two ways. First, the result in a given Supreme Court case binds all lower courts. Second, the reasoning of a Supreme Court case also binds lower courts.
>
> The Marks rule is an essential aspect of vertical *stare decisis*: 'The binding opinion from a splintered decision is as authoritative for lower courts as a nine-Justice opinion. While the opinion's symbolic and perceived authority, as well as its duration, may be less, that makes no difference for a lower court. This is true even if only one Justice issues the binding opinion.' …
>
> In interpreting most splintered Supreme Court decisions, the Marks rule is not especially complicated. But on rare occasions, splintered decisions have no 'narrowest' opinion that would identify how a majority of the Supreme Court would resolve all future cases. Marks itself did not have reason to specifically address that situation. But in that situation, the necessary logical corollary to Marks is that lower courts should still strive to decide the case before them in a way consistent with how the Supreme Court's opinions in the relevant precedent would resolve the current case… The easy way to do that is for the lower court to run the facts and circumstances of the current case through the tests articulated in the Justices' various opinions in the binding case and adopt the result that a majority of the Supreme Court would have reached…
>
> Indeed, if a lower court ever has doubt about the predictive utility of a single opinion from a splintered Supreme Court decision, this opinion-by-opinion methodology is a foolproof way to reach the correct result in the lower court's subsequent decisions. Again, that is really just common sense in a system of absolute vertical *stare decisis*.

Compare the robust retort by Kavanaugh J's colleague in the same matter, a view which is closer to the plurality in Shaw:

> … some Supreme Court decisions yield no binding precedent, but that reality does not trigger vertical *stare decisis* concerns of the sort that trouble Judge Kavanaugh. Such instances are similar to a 4-4 split that affirms the lower court's opinion but does not supply a national rule governing future litigation…
>
> Moreover, where the Court resolves a case with a splintered decision and a binding precedent cannot be found under Marks/King, the disarray among Supreme Court opinions is in important ways akin to the situation where one or more (indeed, perhaps all but one) courts of appeals have resolved an issue one way. In that case it is the duty of a court of appeals facing the issue de novo to resolve it de novo, with of course due recognition of the insights and arguments reflected in the opinions of other courts. That independent approach allows the issue to 'percolate' and facilitates ultimate Supreme Court resolution on the basis of a broad pallet of lower court reasoning...
>
> Judge Kavanaugh's quest for binding Supreme Court precedent leads him to propose that when lower courts are confronted with such complete disarray that no single view meets even his standards…, they should 'strive to decide the case before them in a way consistent with how the Supreme Court's opinions in the relevant precedent would resolve

> the current case.' Well, of course, that is what we always try to do. But the question is whether, looking at a set of opinions that reveal no common core, we should pretend that they have offered a unified body of coherent reasoning and treat that synthetic body of reasoning as binding precedent. Pursuing that approach, lower courts would look more like lower officials seeking to discern the intent of their superiors than like judges engaged in discerning and applying rules of law. Courts are still, or should be, institutions of reason, not will.

Plurality in dissent

Before leaving the substance of the Marks rule, what happens where proposition X is the subject of majority agreement between, say, dissenters and members of a plurality decision other than the authors of a plurality opinion.

For example, the plurality opinion comprising four justices says 'We hold proposition Y to be the law, and on the facts we allow the appeal'; the concurring opinion comprising one says 'I hold proposition X to be the law, and on the facts I allow the appeal'; while the justices in dissent hold proposition X to be the law and dismiss the appeal on the facts.

In the US this remains a hot area of debate and the construct has its own name, the dual-majority. Don't worry. You can tread where I have not and pick up your copy of Michael L Eber's 'When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent'.[12]

Legal language and etymology

Comparing words used in different jurisdictions is a dangerous task. A word's meaning is informed by its environment. Anyway, the people in the environment use the word differently. Moreover, there is the ignorance of the user. I can count on more than two hands (?) the number of barristers who have spoken over the years about the weaknesses of the inquisitorial system. I don't think I know any who have practised in it.

Etymology can be a useful starting place. That's what an etymon is, I guess. It's not perfect, but I'm going to use it when I start talking about 'plurality'.

Two examples first. When I interpret a piece of a document, I look to the text of the piece, and the context of the document, and the object of the document. I might, if required, look at other matters such as the surrounding circumstances known to the authors of the document at the time it was written. The relevance of surround circumstances is controversial. And the controversy is not lessened when the participants refer to the 'context' of surrounding circumstances. Maybe that's Little Context, as we've already met Big Context. And we've all used 'bigger context', haven't we? Etymology is helpful. Text has its root in *textus*, the woven thing, and so context, woven together. Context, for me, ends at the edge of the document. Etymology cannot define, it can merely inform, but I think it has a role to play.

'Join' springs from *iungere*, to join or to yoke. Appellate judges have different ideas on which verb does the better job.

In Australia, the joint judgment – that is, the jointly authored judgment where authorship is public – is a regular species and a species with its own controversy. At least two chief justices in recent memory have encouraged joint judgments. On the other hand, Chief Justices Barwick and Gleeson frequently delivered a concurrence. As is well known, Justice Heydon often preferred to concur than to join. *Shaw* above provides an example.

The US Supreme Court has used 'joint judgment' when discussing a judgment against more than one debtor jointly. But the usual practice in the field of judicial authorship is that one justice will write something and put their name to it, and others will either join or concur. An example:

> STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, post, p. 377. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined.

You will see the first-joined opinion got the numbers, i.e., got to five, so there was an opinion of the Court in a precedential sense.

When the usual practice doesn't yield a majority, the practice, at least in one of the cases discussed later in the essay, is that the author of the plurality opinion will state the order of the court. There is no opinion of the court. As we have seen, in *Memoirs v Missouri*, Brennan J was joined by the chief justice and Fortas J; Black J, Stewart J and Douglas J concurred separately; and three justices dissented. When the result was formally delivered:

> MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and MR. JUSTICE FORTAS join.

There may be other cases where the result is only announced after each judgment, or the holding of each judgment. My straw poll suggests a plurality of Australian appellate courts announce the result at the end. This is invariably the situation with special leave applications, although the practice there is no precedent in any sense of the word.

However, the commonplace in Australia – the jointly authored judgment – is 'a rare but fascinating variant' in the US.[13] It is fascinating how themes – the strengths and weaknesses of the co-authored judgment – emerge in different jurisdictions wearing only slightly different clothes.

Etymology of plurality

The *OED* has an apt opening for the word: 'Plurality – Origin: Of multiple origins.' The classical Latin *pluralis* is not the immediate etymon, rather it's the post-classical *pluralitis*. And even inside the post-classical period – roughly AD 200 to AD 600 – the shift is from 'more than one' to 'a multitude'.

Stop reading if you hanker for simpler days, the 'one, two, many' counting systems of foraging peoples.[14] Reflect, though, if you enjoy the objective theory of contract formation. The parties agree on delivery of a plurality of umbrellas and two arrive. Where does the court put its reasonable businessperson? Were they expecting a rainfall of umbrellas or a drizzle? If your judge had a big intellectual property practice, it is likely that the reasonableness will fall on 'two or more' and not 'many'. The reason for this is discussed below.

Proceeding in proceedings

Speaking of contract formation, the hot topic in Australia at the moment is the relevance of 'surrounding circumstances'. You can have one circumstance I think but we usually prefer our surroundings to come in a plurality.

But plurality is not to be confused with 'plurale tantum'. This describes those nouns which only have, or usually only get, a plural. We have entrails but not an entrail. We have genitals but not a genital. A curious cross-cultural example is 'faeces'. It is the genitive plural of 'faex', yet our own word for the singular is 'dregs'.

Speaking of dregs, a notice of appeal has its grounds. There is the ground and the hopeless grounds, a filtering process which

usually ends in the opening words of the presiding judge. This process was illumined by Sir Garfield Barwick's identification of a constitutional nexus between plurality and the *plurale tantum:*[15]

> *I mention but to dismiss it a submission based on the plurality of the expression 'external affairs' which would deny that an external affair, because of its singularity, could fall within the power. There is, in my opinion, no substance whatever in the submission.*

A plurality of meanings

Common uses of plurality include 'more than one'; 'lots'; 'more than half'; and 'the largest in the lot'. The first and second uses represent the classical and post-classical dichotomy, better understood as strict -v- colloquial. In Re Tripodi and Director-General of Social Security, the member noted:[16]

> Mr Wood (for the applicant) said that on a head count he had 12 for and 6 against, but readily conceded that it was not a matter of plurality of favourable witnesses that would determine the matter.

If the expression was 'a plurality of', we could understand it to mean 'a multiplicity of' and not 'two or more', multiplicity carrying itself 'the more the merrier'. Without the indefinite article ('an indefinite article' being too tautological for most legal tastes), the word is probably a synonym for 'numbers' but not 'number'. Welcome home, prodigal *plurale tantum*.

Better by half, or almost

Plurality as more than half of the whole is Scottish in origin. It has had strong support. It pops up in *Leviathan*. Jowitt's Plato applied it to Socrates in the *Dialogues*, and he must have been right. As the Oxford wags sang:

> Here come I, my name is Jowett.
> All there is to know I know it.
> I am Master of this College,
> What I don't know isn't knowledge!

Plurality in the field of voting is more nuanced. In the second paragraph of this essay, I described the plurality opinion as a peculiarly post facto form of US precedent. The link between plurality and the post facto state – in the States and elsewhere – may not be that peculiar, merely odd. Consider the term 'plurality voting'. Its most usual meaning is 'first-past-the-post'. In a horse race, first-past-the-post has a clear meaning. But in voting? What can be more post facto than a post which is only seen when all are past?

At any rate and by 1803, a plurality of votes was the greatest number regardless of whether it was a simple or absolute majority.[17] This necessarily scotches the Scotch meaning discussed immediately above.

However, the Americans did not stick at this. By 1828, Mr Webster was defining it, or more correctly, providing as one use of it:

> In elections, a plurality of votes is when one candidate has more votes than any other, but less than half of the whole number of votes given.

The link between US elections observed by Mr Webster and plurality opinions issued by the US Supreme Court is strong. The thesis developed later in this essay is that while Australian and US courts both refer to 'plurality opinions', the references travel alongside the voting difference. Australian use is akin to the 1803 usage and the US use is akin to the 1828 usage.

Before moving to the High Court's use of the word, I note that as far as I can tell, plurality was introduced into Australian usage in 1837, first in statute and then, about seven weeks later, in the NSW Full Court.

On 9 September 1837, Governor Bourke on the advice of the Legislative Council but not on the advice of a non-existent Assembly brought about 'An Act to regulate the temporal affairs of Presbyterian Churches and Chapels connected with the Church of Scotland in the Colony of New South Wales'. As to the mode of election of trustees, persons contributing money for the erection of church buildings were permitted 'to elect by plurality of votes from among themselves any number of trustees…' Doubtless the discussion was vigorous. Sir Richard Bourke was a Whiggish fellow who worked to disestablish the Anglicans and put other churches on the same footing. That he was Irish doubtless annoyed everyone.

Meanwhile, consider Joseph Catterall, born Lancashire 1812, arrived Sydney 1832, married one Georgina Anne Sweetman in 1835. He pressed allegations which ended up in the NSW Supreme Court before Dowling ACJ, Burton and Kinchela JJ. The *Sydney Herald* of 2 November 1837 refers to Mr Catterall's relentless allegations, including those that his wife had committed 'a disgusting act of adultery with an officer of the 28th Regiment (among a plurality of adulteries)'. Catterall had a further run in with the Supreme Court in 1838 before returning to England in the early 1840s and being admitted to the bar.

Toltoys Brix master builder blocks August 1968

Rebecca's Collections on Flickr

A patent plurality

On 26 November 1912, Isaacs J decided that a specification for improved kiln – whose improvements included a plurality of top vents – was worthy of the patent the commissioner had decided to reject. On 7 April 1913, a majority rejected his view and reinstated the commissioner's original rejection.[18]

It is apt that the first use of plurality was in a patent matter. While our justices have used the word in other area, patent appeals take the prize by a long way.[19] For example, in *Weiss v Lufft*,[20] Starke J referred to the appellant's assertions that the invention was particularly useful in printing a plurality of component parts and later that the press comprised a plurality of printing stages. More recently the court has recognised the word's environmental friendliness, taking time in a patent matter to hear argument over a way to provide householders with a plurality of waste bins so that each householder could sort waste into various categories.[21]

Has 'plurality' been a vogue word for patent attorneys? The answer is, better vogue than vague. Whatever shades of meaning the word has taken on through the centuries, it has always retained one, 'two or more', and if you are drafting a document which everyone hopes will found a billion-dollar empire, you are being consistent. If you search the Austlii case law database up to 31 December 1999, only a handful of tribunals (one the High Court) get in to double figures; the Australian Patent Office is the crushing winner at 152.

One US mathematician turned patent lawyer recently posted the following inspirational:[22]

The church in question - St James, Kingston, Isle of Wight

> Story time. I was once involved in a huge litigation — like greater than $1B of damages at stake — involving a patent that had the word 'plurality.' Through some slightly shady twists of fate, the attorney who drafted the patent ended up being a co-owner. This guy was a stereotypically sleazy attorney. 'Better Call Saul, Patent Attorney Edition.'
>
> Early in the case, we were trying to figure out who to sue. We already had something like 90–95% of the industry, but he wanted the remaining 5–10%. He once proposed, with a straight face, that we could get that last little bit by arguing that 'plurality' meant zero or more.
>
> Fortunately, that suggestion was… not accepted.

The most important High Court case for barristers of my vintage was *Interlego AG v Toltoys Pty Ltd*.[23] Alex Tolmer built an empire on the hula hoop, selling the first plastic version from his Melbourne store in the 50s. The litigation was Lego's attempt to kybosh Toltoys' Brix. It was a close call, with Stephen J at first instance and Menzies J on appeal voting for Brix, leaving it to Barwick CJ and Mason J to apply the Danish slice.

Toltoys is no more. The ASIC website shows that the Pty Ltd name was deregistered in 1976. That doesn't mean much one way or the other without more, but one is left to wonder whether the case was the beginning of the end for an Aussie icon.

Kendle v Melsom

Kendle v Melsom was the last High Court decision but one before 'plurality' arose in its current form.[24] Looking back, we can almost sense that the court knew that they were about to leave to one side, one meaning of 'plurality', and that it believed the only appropriate send-off was one swathed in multiplicity.

The chief justice and McHugh J set a fierce pace. In 15 paragraphs, they use the word 16 times, a record that is unlikely ever to be broken. In one paragraph they use it six times. Justices Gummow and Kirby managed eight. Justice Hayne didn't use it but managed the best footnote award, inserting a typically certainty from Jessel MR, 'Of course manager may mean managers in the plural.'

A plurality of judges

As early as 1945, Dixon J used 'plurality' to describe High Court justices:[25]

> In the result, I think that we can but assess the amounts to be awarded by combining the foregoing considerations and applying the figures, as a jury might, to guide us in forming as sound and just an estimate as we can of what the plaintiff should be paid. We cannot do it by calculation, and precision in the application of such relevant figures as the materials do supply is made neither easier nor safer by the fact that in this Court a plurality of minds must determine the final sum.

As far as I have seen, though, the first use of the word to describe a plurality opinion of judges is *Lipohar v The Queen*. Three members observed:[26]

> The federal system operates with what is now the common law of Australia. One consequence is that there do not arise in Australia, as once might have been thought, difficulties with the notion of a distinct 'federal common law' which still are encountered in the United States after the overruling of Swift v Tyson by Erie Railroad Company v Tompkins. In Erie, Brandeis J, delivering the plurality opinion of the court, said that there was 'no federal general common law'.

It is true that the opinion delivered by Brandeis J was joined in by other judges, but it was not a plurality opinion within current American usage. It was a majority opinion.[27]

But this means little. We are in Australia, and the question is what the expression means to us and how we have used it, since *Lipohar*. As discussed above, I think there is a similarity of difference in the 1803 and 1828 descriptions of the plurality vote, and I think the use by Australian courts of 'plurality judgment' since *Lipohar* bears this out.

So in *Corporation of the City of Enfield v Development Assessment Commission*, the High Court observed:[28]

> Differing views on this subject were expressed by Scalia J, concurring with the plurality opinion of Stevens J, and by Brennan J, dissenting, in Mississippi Power & Light Co v Mississippi.

Mr Justice Stevens attracted joiners. Again, the opinion he delivered was not a plurality opinion within the meaning of the Marks rule. The maths was 5 + 1 v 3:[29]

> STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, post, p. 377. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined

Shades of Milton

During ASIC's stoush with Mr Rich after the OneTel collapse, the commission sought discovery of certain documents and Mr Rich opposed it on the basis that contending that the proceedings exposed him to penalties and that, for that reason, he should not be ordered to make discovery.[30] The court observed:

> That is why the privileges against exposure to penalties or forfeiture have been allowed in cases as diverse as those already mentioned and to cases of forfeiture of estate, as for simony, for infringing the Pluralities Act (1 & 2 Vict c 10) , for breaches of covenants in leases, by marriage without consent, or by having acted as agent for the Confederate States of America. Moreover, the privilege against exposure to penalties has been held applicable to preclude an order for discovery by the debtor in a petition for bankruptcy on the basis that the loss of

civil status consequent on bankruptcy is penal.

The decision of *Boteler v Allington* is referred to in the footnotes.[31] The law was that if a clergyman holding one living took another, the first was avoided. The plaintiff sought discovery to find out whether the defendant with a first living valued at £170 per annum, had taken on another two to a total value of £42 per annum. If this was so, the first living fell and, so the plaintiff asserted, it fell to him as gift to present to another. Lord Hardwicke LC allowed the demurrer, rejecting an ambitious argument that avoidance of the living was not a penalty.[32]

In a later decision, the testator left his money for a benefice on the Isle of Wight, provided that the benefice was never held in plurality by a neighbouring clergyman. By this time and however grasping the prelates, the church itself was grasping for numbers. When the benefice amalgamated with its neighbours, Mr Justice Eve refused to invalidate the gift. 'The rector is rector of the united single parish, not the holder in plurality of the three benefices out of which it has been formed…'[33] There is an essay in why trinitarianism has no place in a pluralist society but I'm not brave enough to write it.

If God has a prelate, so too Mammon and plurality has as/des/cended to the company director. In the decade of Salomon's case, the *Law Times* reported that 'There is a growing feeling that plurality in the matter of directorships is dangerous and to be deprecated.' A century on, the feeling may have grown but the professional director is as strong as ever. One company doctor was described in the UK press as '[t]he self-styled 'pluralist' and '[o]ne of the first advocates for plurality of directorships…'

A plurality in this sense hails at least from the 15th century. Nonconformist scholar John Studley gave us the hierarchy of 'dualities, pluralityes, and totquots'. The last word abbreviates the also alliterative 'totiens quotiens', or 'all you can grab'. The idea may not take off at the bar. A good commercial silk can get a plurality of retainers but if it's a totquot they may find themselves conflicted from ever appearing.

Back to judgment(s)

In *Australian Broadcasting Commission v O'Neill,*[34] Heydon J referred to 'the plurality judgment' in *Bonnard v Perryman*.[35] There, the chief justice read a judgment 'in which [the Master of the Rolls and three lords justices] concurred'. With only Kay LJ in dissent, the judgment was not a plurality in the US sense, but more than one judge participated. One Australian commentator has written:[36]

> … in Australian Broadcasting Corporation v O'Neill [the word] is used, perhaps inaccurately, to refer to the judgment of Lord Coleridge CJ in Bonnard v Perryman, a judgment that Lord Esher MR, and Lindley, Bowen and Lopes LJJ did not join, but with which they concurred.

The point is noted. But Lord Coleridge used the first person plural in the course of the judgment, so Heydon J gets my tick. Tellingly, the commentator takes no issue that the use is not the American use. For my part, Heydon J's use of the word to describe a decision which is neither American nor 20th century is a further illustration that the use by Australian courts from *Lipohar* is both fresh and well-founded in history.

The singularity of 2008

The year 2008 provided a plurality of Rubicons. In *HML v The Queen; SB v The Queen; OAE v The Queen*,[37] Gleeson CJ refers five times to 'the plurality judgment' of Mason CJ, Deane and Dawson JJ in *Pfennig v R*, Hayne J four and Crennan J twice. Thus three members of a court of seven approve 'plurality' in this sense.

Pfennig was a court where five members sat on an appeal against conviction. All members dismissed the appeal. In their reasons, Mason CJ, Deane and Dawson JJ expressed one approach to the admissibility of similar fact evidence, Toohey J substantially agreed, and McHugh J set out a different approach.

One distinguished commentator has taken the view that the three judges were the majority.[38] The three judges and Toohey J together favoured one statement of a principle of law and McHugh J favoured another. The three judges make a majority but possibly not the majority.

Anyway, the reasons of Mason CJ, Deane and Dawson JJ comprised a plurality judgment, in the sense used two years before by Heydon J. Yet and again, *Pfennig* was not a plurality opinion in the US sense. It will be recalled that this is 'an appellate opinion not having enough judges' votes to constitute a majority but receiving the greatest number of votes in support of the decision.' The reasons did comprise a majority. Not, as I have suggested, 'the majority', as the reasons of the majority comprised two opinions over four judges. But a majority, nonetheless.

Later in 2008, four of the seven members of the court[39] referred to 'the plurality judgment' in the 1992 decision of *Jiminez v The Queen*. In *Jiminez*, six members gave one set of reasons and one, again McHugh J, another. Again, McHugh J agreed in the result. For current purposes, this decision is the first time a majority of the High Court embraces the idea of the plurality judgment in the Australian sense. Only the previous year, 2007, two justices had described the same judgment as 'the majority judgment'[40]. I note the two justices were in dissent.

Midway through plurality

In 2009, the chief justice provided a tweak to the new orthodoxy. Six judges sat in *Stuart v Kirkland-Veenstra*.[41] All agreed in the result. Justices Gummow, Hayne and Heydon gave one set of reasons, Justices Crennan and Kiefel gave another, and the chief justice the third. In US appellate usage, there could be no plurality in three members of a six-bench. The chief justice said, consistently with Australian usage to date, 'I agree with the orders proposed in the plurality judgment of' the three judges.

The High Court today

In *Commissioner of Taxation v Jayasinghe*,[42] five justices sat. Four wrote one opinion and the other agreed 'with the orders proposed by the plurality'. The High Court's own 'Case Summary' refers to the appeal being allowed 'unanimously' and refers to the four judges the plurality. The word is part of the court's own language.

Other courts

Language is its own precedent, and this essay cannot end without a brief reference to the use by lower Australian courts of 'plurality'. In 2006, Tobias JA was the first member of the NSW Court of Appeal to so describe reasons written by more than one but not all High Court members.[43] The other two members of that court agreed with his Honour, so unlike the High Court, the first use in the Court of Appeal met with unanimous approval.

And in *Borzi Smythe Pty Limited v Campbell Holdings (NSW) Pty Ltd*,[44] the presiding judge referred to the plurality judgment of Gleeson CJ, Hayne and Heydon JJ in *Butcher v Lachlan Elder Realty Pty Ltd.* Five members

of the High Court had sat and McHugh and Kirby J had dissented, so – like many of the examples used here – the plurality judgment was also the judgment of the majority.

The word appears in the relevant database 417 times. It has not always been used in the sense we are discussing, but the use by Tobias JA was only the 10th time in date order. I infer that the Court of Appeal has picked up and run with a use introduced by the High Court in 1998.

What of the Court of Criminal Appeal? The first mention is in *R v Janceski*,[45] where Spigelman CJ referred to 'the observations of Harlan J for the plurality of the Supreme Court in Glidden Co v Zdanok…' In *Glidden*, Harlan J was joined by Brennan and Stewart JJ, Frankfurter J took no part in the decision, White took no part in the consideration or decision, Clark J joined by the chief justice concurred in the result, and Douglas and Black JJ dissented. The judgment delivered by Harlan J has been regarded by US commentators as a plurality opinion. The decision of the majority is fractured, in the sense that neither reasons can be regarded as a subset of the other in the sense of the Marks rule. In *DTS v R*,[46] *Beazley* JA referred to a plurality judgment of five members of the High Court in a 1990 decision. Justices Kirby and Hall agreed with her Honour. So, like the Court of Appeal and unlike the High Court, this first use in the Australian sense in the Court of Criminal Appeal was unanimous.

A fresh use of an old word

Readers will recall that by 1803, a plurality of votes was the greatest number regardless of whether it was a simple or absolute majority, but that by 1828, the US had redefined this so that the person receiving a plurality had more than any other but less than half of the whole. Two decades after *Lipohar*, what can we say?

- In Australia and in the US, a plurality opinion has more than one author. That is, each jurisdiction picks up the patent meaning.
- In Australia, a plurality opinion can be a majority opinion but has not been used to describe a unanimous opinion. In the US, a plurality opinion cannot be either.
- In Australia, a plurality opinion can and frequently does co-exist with a unanimous decision. In the US, they cannot. A synonym for the US word is 'no-clear-majority decisions',[47] although this may conflate the plurality opinion and the decision of which it forms part.
- In Australia, a plurality opinion can be authored by one-half of the bench. In the US, a plurality opinion cannot be authored by one-half of the bench.
- In Australia and in the US, a plurality opinion cannot dissent in the decision, ie the outcome of the appeal.

Maybe 'plurality opinion' and the like did start life as a US import. That does not mean they stayed that way. At a wider level, the import of a word is rarely, if ever, the full import of its meaning.

In *R v Keenan*,[48] the presiding judge referred to 'the reasoning of the majority in *Barlow*' which included 'the joint plurality reasons of Brennan CJ, Dawson and Toohey JJ'. This may be a bridge too far but illustrates that the US idea has not made much impact.

We must remember that the plurality is part of the bigger picture. One US state Supreme Court declined to follow its federal counterpart because they were 'reluctant to declare unconstitutional… statutes based upon a decision by less than a clear majority.' To which Blackmun J of the latter court observed the decision was 'a four-justice majority of a seven-justice shorthanded court'. But he dissented in his own case,[49] so we may never know.

END NOTES

1 The last word is the nom de plume of five clergymen. It comprises their initials. The group was opposed to the Anglican hierarchy. They had a champion in Milton, whose belief in the need for an intercessor between man and scripture was poetically absent. That phase of Anglican history – bear in mind, more than 200 years before Trollope – was intermeshed with the political crises of civil war and the protectorate, although like all church politics it had a healthy life of its own.
2 Thomson Reuters, p 195.
3 I found no reference in the index to a standard text of the time, *MacAdam & Pyke's Judicial Reasoning and the Doctrine of Precedent in Australia*, 1998, Butterworths.
4 383 US 413 (1966).
5 430 US 188 (1977).
6 *The Law of Judicial Precedent*, p 201.
7 Page 202.
8 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.
9 *Long v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1422, [40].
10 *Shaw v MIMA* [2003] HCA 72; 218 CLR 28; 203 ALR 143; 78 ALJR 203, [36].
11 *US v Duvall* 740 F3d 604 (2013).
12 (2008) 58 Emory LJ 207.
13 Laura Krugman Ray, 'Circumstance and Strategy: Jointly Authored Supreme Court Opinions' (2012) 12 *Nevada Law Journal* 727, 727.
14 See Steven Pinker's remarks in https://www.edge.org/conversation/daniel_l_everett-recursion-and-human-thought .
15 Barwick CJ in *New South Wales v Commonwealth* [1975] HCA 58; (1975) 135 CLR 337, 360-361.
16 [1984] AATA 309, [6].
17 *Black's Law Dictionary*.
18 *Lee v Commissioner of Patents* [1912] HCA 84; (1912) 15 CLR 161.
19 See e.g. *Martin v Scribal Pty Ltd* [1954] HCA 48; (1954) 92 CLR 17; *Sunbeam Corporation v Morphy-Richards (Aust) Pty Ltd* [1961] HCA 39; (1994) 180 CLR 98; *Welch Perrin & Co Pty Ltd v Worrel* [1961] HCA 91; (1961) 106 CLR 588; *Lucas Industries Ltd v Commissioner of Patents* [1977] HCA 27; (1977) 138 CLR 152. The reasons of Fullagar J in *Societe Des Usines Chimiques Rhone-Poulenc v Commissioner of Patents* [1958] HCA 27; (1958) 100 CLR 5 does not count. The use is a plurality of inventions, a use of the commissioner picked up by the judge. So too *Re British Nylon Spinners Ltd* [1963] HCA 28; (1963) 109 CLR 336.
20 [1941] HCA 19; (1941) 65 CLR 528.
21 *Firebelt Pty Ltd v Brambles Australia Ltd* [2002] HCA 21; (2002) 188 ALR 280; (2002) 76 ALJR 816, [20].
22 www.quora.com/When-a-claim-in-a-patent-application-uses-the-term-plurality-can-this-be-one-or-is-it-always-a-count-of-two-or-more.
23 ('Lego case') [1973] HCA 1; (1974) 130 CLR 461.
24 1998] HCA 13; 193 CLR 46; 151 ALR 740; 72 ALJR 560.
25 *Commonwealth v Huon Transport Pty Ltd* [1945] HCA 5; (1945) 70 CLR 293.
26 [1999] HCA 65; 200 CLR 485; 168 ALR 8; 74 ALJR 282.
27 Mr Justice Brandeis was joined by Hughes CJ and Black, Stone & Roberts JJ. Mr Justice Reed concurred in part. Mr Justice Butler dissented and McReynolds J concurred with him. Mr Justice Cardozo 'took no part in the consideration or decision of' the case. Justice Brandeis was described as speaking for the majority of the court by C Sherman Dye in 'Development of the Doctrine of *Erie Railroad v Tompkins*' (1940) 5(2) Missouri LR, 193, 194.
28 [2000] HCA 5; 199 CLR 135; 169 ALR 400; 74 ALJR 490, [41].
29 http://www.worldlii.org/us/cases/federal/USSC/1988/139.html.
30 *Rich v ASIC* [2004] HCA 42; 220 CLR 129; 209 ALR 271; 78 ALJR 1354, [26].
31 *Boteler v Allington* (1746) 26 ER 1061.
32 At 1063.
33 *Re Macnamara, Hewitt v Jeans* (1911) 104 LT 771, 773.
34 *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46; 80 ALJR 1672; 229 ALR 457, [254].
35 [1891] 2 Ch 269.
36 lawgeekdownunder.blogspot.com/2011/06/curious-case-of-plurality-in-high-court.html. .
37 2008] HCA 16.
38 Stephen Odgers, *Uniform Evidence Law*, 12th ed, [EA.101.180], [EA.101.210].
39 *CTM v The Queen* [2008] HCA 25, [6].
40 *Libke v The Queen* [2007] HCA 30, [61].
41 [2009] HCA 15.
42 [2017] HCA 26; 260 CLR 400.
43 *Niven v SS* [2006] NSWCA 338, [51].
44 [2008] NSWCA 233.
45 [2005] NSWCCA 281; 223 ALR 580; (2005) 64 NSWLR 10, [113].
46 [2008] NSWCCA 329.
47 *The Law of Judicial Precedent*, p 195.
48 [2009] HCA 1.
49 *North Georgia Finishing Inc v Di-Chem Inc* 419 US 601 (1975).