

JURISPRUDENCE WITHOUT MORAL
CONSENSUS: CONSTITUTIONAL
ARGUMENTS IN IDD FOR DRIVING
ON THE RIGHT OR LEFT SIDE
OF THE ROAD

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The same laws cannot suit so many diverse provinces with different customs, situated in the most various climates, and incapable of enduring a uniform government.

Rousseau, *The Social Contract*

Conventional wisdom was that Iddians should drive on the right side of the road. During Idd's first hundred years, most Iddians believed this was one of the ten divine Traffic Commandments. For the most part, traffic seemed to flow smoothly too. Those who violated the rules usually did so negligently, not intentionally, and they were dealt with harshly. To be sure, there were doctrinal differences among Iddian sects about, for example, how far right of the striping on traffic lanes vehicles should travel, but these disagreements were minor.

That was all to change in the Nineteenth Century when immigrants began arriving from neighboring civil law countries. Immigrants argued that driving on the left side of the road is divine, a belief Iddians thought heresy. Iddians initially responded to this doctrine by hanging its most visible proponents. But over time, some Iddians, who became known as "liberals," were persuaded that the immigrants' faith was more accurate or at least not inconsistent with historic Iddian theology. Immigrants and liberal Iddians formed sects that drove on the left side of the road only at night in secluded areas. The State did not enforce its "right-side only" driving laws in these enclaves between 1 and 5 a.m. Although fatalities increased, most agreed this approach was "progressive."

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At the turn of the century, still other Iddians rejected their historic religion altogether. These “ultraliberals” followed Dariddian, who claimed that driving on the right side of the road was prevalent in Idd only because Iddians were naturally right-handed. Dariddian said immigrants, on the other hand, tended to drive on the left side of the road because they were left-handed. Dariddian speculated that it might be natural for others to drive in the middle of the road or not to drive at all. Fossil evidence suggested the same. Thus, ultraliberals and liberals began arguing that Idd’s traffic laws were themselves an impermissible establishment of religion—a relic of what they termed “theocracy.”

Still, the “silent majority” in Idd, although less cohesive as each decade passed, persisted into the late-Twentieth Century, holding to a slightly liberalized version of the Nineteenth Century liberal view. That is, the silent majority came to believe that driving on the right side of the road in the morning and afternoon was proper, as was driving on the left side of the road in the evening. The atheists in the silent majority came to this view because they thought it was practical, whereas the liberal theists in the majority decided it was consistent with historic Iddian theology. So-called “fundamentalists” continued to insist left side driving should only occur between 1 and 5 a.m. Once more, “ultrafundamentalists” called for a return to driving on only the right side always. They demanded conscientious exemptions from what they called the anti-family, liberalizing trend in the law, but ultraliberals argued that exemptions would be an establishment of religion.

Nobody predicted what happened next. On June 4, 1998, the greatest mass tort in recorded history occurred when, suddenly, Iddians everywhere disobeyed Idd’s traffic laws. Ideologues claimed the long-awaited proletarian revolution had arrived. At least one-quarter of the population began driving on the right side of the road; another quarter drove on the left; another, in the middle. The rest of the driving population stopped their vehicles in the road, unsure what to do. Collision after collision followed, maiming and killing hundreds in what has become known as the Lane Rebellion.

Legal scholars who have evaluated the Lane Rebellion argue that the Supreme Court was to blame, either because it failed to protect basic, substantive rights of Idd’s minorities or, depending on the scholar’s views, overly protected them. I contend the legal scholars are wrong: that, at root, the Lane Rebellion was

the inevitable consequence of (1) the breakdown in Iddian consensus regarding basic traffic values, and (2) the expansion of the Iddian state into nearly every area of life, snuffing out non-conformity. States' rights in Idd became largely theoretical. The Supreme Court of Idd fractured along the same lines as society when it tried to respond to the growing pluralism and centralization of Idd: the "Right" deferred to facially neutral, generally applicable statutes, whereas the "Left" preferred balancing the interests of individuals against state or other interests on a case-by-case basis.

By deferring to generally applicable laws, the Right necessarily identified with the majority rule, and, in effect, turned substantive constitutional rights into equality rights. The Right argued that granting exemptions to generally applicable rules would be a recipe for anarchy—opening a "flood gate" for fraudulent claims. In contrast, the Left identified itself with the "enlightened" minority, so defined by liberal political theory. Rather than focus on tradition or the legitimacy of legislative outcomes, the Left emphasized the legitimacy of process for each Iddian, using terms like "fair play and substantive justice." The Left also tended to find Establishment Clause violations more frequently than the Right and to identify new rights for each Iddian by inference from the Constitution. The Left was also more willing to preempt the State's own solutions to these problems.

One side won the judicial debate. We are not sure which, because the "Lane Rebellion" destroyed most of the evidence. However, assume for a moment that one group of legal scholars, the Plebians, are right. They say the Left won. The Plebians point out that, although prior to the Rebellion scholars on the Left contended their way would produce the fairest outcome for each individual, the Left never identified an instance where the State's interest was more important than the individual's right to an exemption, except where the individual applying for the exemption was not a member of an "enlightened" group. Also, the Left discovered more and more constitutional rights it said were "implicit in the concept of ordered liberty," so that Iddians almost could not advance in traffic without having to dodge one specially exempted vehicle or another. Slowly, but steadfastly, the rule of law in Idd reflected the values of the liberal and ultraliberal sects in Idd.

Finally, according to the Plebians, the Supreme Court of Idd announced that the Framers of the Constitution really intended all Iddians to drive on the left side of the road. The Supreme

Court used structural arguments, like driving on the left side of the road is more consistent with Iddian democracy. The Court also said left-side driving promotes the dignity of discrete and insular minorities. In addition, the Supreme Court pointed out that left-side driving is more consistent with precedent identifying personal autonomy and liberty as a fundamental, albeit implicit constitutional right. *Stare decisis*, the Court emphasized, is a governing principle of the Court, all the more important when issues are controversial.

Plebian say the Supreme Court eventually decided that driving on the right side of the road was a violation of the Establishment Clause and inconsistent with the “ethos” of the Ibbian people. Fundamentalist Iddians objected and got the limited right to drive on the right side of the road on their church property (which, by the way, the Court decided was taxable in every respect and subject to “anti-discrimination against ultraliberals” legislation). Ultrafundamentalist Iddian conduct was severely circumscribed, too. The state removed the driver’s licenses of some ultrafundamentalists because they advocated an immediate lane change. In sum, according to the Plebians, it turned out that the Left’s conception of “fair play and substantive justice” was no less biased or coercive than the Right’s.

However, Plubians contend the Plebians have it all wrong: that really the Right won the judicial debate. For the sake of argument, assume for a moment the Plubians are correct. They argue the primary reason for the Lane Rebellion was that the Supreme Court consistently refused to grant exemptions for minorities burdened by the rule of law. Thus, the Court forced ultraliberals to, in effect, finance and abide by fundamentalist dogma. The Court said Idd’s age-old traffic conventions had a secular purpose, secular effect, and did not lead to any religious entanglement with the state. One Iddian argued they “stole his spirit,” but the Court treated this as simply an unfortunate, incidental consequence of a generally applicable statute—in short, the Court held, “burn in hell.”

What’s more, Plubians say that against one complaint the Supreme Court refused to acknowledge the right of ultraliberals to drive on the left side of the road between 2 and 3. a.m. when there would be no danger to others. Writing for the majority, Justice Sliasca said the exemption was not part of the common law tradition and would be too onerous to administrate. He added the complainant made only a free exercise claim, whereas successful complainants made at least a free speech claim, as

well. Furthermore, Sliasca said exemption would not accord with representative democracy, since it required judges to use too much discretion. Concurring, Justice Rquisthen asked, "Who are we to decide in which lane Iddians should drive?" The Court preferred to leave the decision to state legislators.

Also, when Congress did have a change of heart and decided to allow left-side driving in ultraliberal enclaves during restricted hours, Plubians say the Supreme Court overturned the legislation. The Court said Congress' authority to pass the law was not explicit in the Commerce Clause, nor obvious from the intent of the Framers. Furthermore, Justice Rquisthen wrote that the obvious intent of the regulation was other than to protect the health or welfare of Iddians. Ultimately, according to Plubians, the peniless and powerless ultraliberals and many more moderate liberals were effectively disenfranchised from the political process and their lifestyles outlawed.

Whether this sad tale of the Plubians is accurate, or that of the Plebians, does not matter to my argument. The important point is simply that one side of the judicial debate won. By winning, that side alienated the clients of the other. Alienation was magnified by the fact that Idd had so centralized power that every political, economic, or social issue ultimately came to the Court for a winner-take-all decision. The Court imposed conformity, whereas Idd's states provided for diversity. Finally, the most idealistic Iddians revolted and started the Lane Rebellion.

Unbelievable? History has been too short to pronounce on the fate of a democracy lacking consensus on basic moral and legal values. The American Civil War shows one result; the "switch in time which saved nine," another. The lesson of the Lane Rebellion is that a democracy can persist only as long as it flexibly embraces the changing viewpoint and norms of not just a majority, but a super-majority. A bare majority leaves a substantial minority in potential noncompliance and in need of exemption. Exemptions present a quantitative and qualitative problem which the Left underestimates. The quantitative problem is that as exemptions increase in number, either because the Left creates new constitutional rights or simply adds exemptions to existing laws, government cannot administer its program cost effectively and commerce becomes more difficult. Thus, driving in Idd may well have become more hazardous and a less efficient way of getting from point A to point B. On the other hand, the qualitative problem with exemptions is that, regardless of how many there are, even one radical departure from tradition may

inspire resistance by a majority or committed minority. In Idd, making left-side driving the constitutional norm would have so enraged fundamentalists, it is reasonable to assume this doctrinal shift would have led them to initiate the Lane Rebellion.

This leads us to the realization the Right will not admit: that some exemptions for minorities are absolutely crucial to the rule of law in a democracy. The status quo is always gerrymandered in favor of some group, usually the dominant one of the past. On the other hand, the Left believes that where the Right failed to create "strict neutrality," it can succeed. This is also an illusion, since virtually no law is amoral, and no minority has been content with only equal protection. In Idd, ultraliberals at first demanded exemptions for left-side driving at particular hours, but then pushed to make driving on the left side of the road the norm.

The Rule of Law must reflect some group's values. Imagine those values and their adherents arranged on an ideological continuum from left to right. The rule of law could be continuously amended to reflect the changing values of slightly more than the middle-half of the ideological spectrum. But as the extremes of the continuum diverged farther and farther from the median, the rule of law would become less coherent and the extremes more intent on overthrowing the legal system. With little more than pragmatism, precedent, the state's symbols, ceremonies, and secular religion to legitimate the rule of law, it would collapse like Idd's traffic regime and the wisp that was the Soviet Union.

Today, Iddians who survived the Lane Rebellion flounder, are looking for some new rationale for driving on either the left or right side of the road. One side argues its way is more just; the other, the opposite. Pragmatists say Iddians should simply decide, and let that be the end of it. But most Iddians believe there must be a "truth" about which side is the correct one to drive on, even if they do not agree what it is. The tragedy of the pluralist democracy is that only pragmatism or utilitarianism can be the basis of law once a dominant morality evaporates, and neither philosophy is compelling enough of a justification for most to defend the rule of law against dogmatic idealists. Ultimately, the lesson of the Lane Rebellion is: without consensus about fundamental values, democracy collapses, regardless of what judicial and legislative countermeasures are taken. It happened in Idd, and it will happen in the United States.