

The Rule of Law as a Law of Rules
28 Jan 05

- I. Introduction
 - A. “Personal Discretion to do Justice”
 - 1. King Louis/Solomon
 - 2. Individual Cases
 - B. “General Rule of Law”
 - 1. Thomas Paine/Aristotle
 - 2. Broad Enactments
- II. Judicial Balancing Act
 - A. Perfect Justice vs. Consistent Justice
 - 1. Could the Rule of Law ever provide Perfect Justice?
 - 2. Could Personal Discretion ever provide Consistent Justice?
 - 3. Matter of Degrees: Which is least undesirable?
 - B. Reasons Scalia Sides with Rule of Law
 - 1. Equal Protection
 - a. Lower Court Discretion Cannot Always Be Reviewed
 - b. Removing Potential Biases Maximizes Justice
 - 2. Predictability
 - a. Times When Bad Rule Is Better Than None At All?
 - b. Laws With Indefinite Implication Are Meaningless?
 - 3. Judicial Restraint
 - a. Is Establishing a Rule Always “Making Law”?
 - b. Is “Making Law” a Bad Thing?
 - 4. Emboldened Judges
 - a. Judges are Free to Pursue Constitutional Purpose
 - b. But What Is Their Constitutional Purpose?
 - 5. Judges as Fact-finders: “A regrettable concession of defeat”
 - a. Rule When Possible, Discretion When Necessary
 - b. Fact-finding Diminishes Judicial Importance?
 - c. Concept of Law is Lost?
- III. Conclusion
 - A. Scalia’s Five Reasons Play Off Same Ideas
 - 1. General Sense of Justice
 - 2. Consistency
 - 3. Judges as Interpreters, Not Arbiters
 - B. Knowing Anything Is Better Than Not Knowing
 - 1. How true is this? (II.B2, II.B3)
 - 2. Is a Judge’s Time Being Wasted Without Rule of Law? (II.B4, II.B5)