

Ronit Levine-Schnur and Lior Nawi

Conservative but Activist Judicial Interpretation: The Collapse of the Prejudicial Labels in the Ruling Concerning the Constitutional Amendment Abolishing the Unreasonableness Doctrine

Critics of the theory of purposive interpretation view it as one of the worst manifestations of judicial activism. It has been argued that moving away from this approach while adopting “conservative” interpretive methodologies – including originalism and probabilistic interpretation – is appropriate for those seeking to avoid judicial activism. In this Article we argue that the alternative, so-called “conservative” interpretive approaches themselves, when applied, are characterized by a considerable degree of activism. This “conservative” activism manifests itself in the ruling concerning the constitutional amendment abolishing the unreasonableness doctrine in at least two different ways. First is the “conservative” preference for the rule of the canon of constitutional avoidance, designed to uphold the law when it prevents the repeal of a constitutional norm. This order of decision-making, according to which the canon of constitutional avoidance takes precedence over the legislator’s intention, indicates a rejection of a “conservative” theory of interpretation that clings to the language and intent of the legislator over any principle that stands above it, and turns it into a means to achieve a goal (that is, not an obligation with an absolute value). Second, the “conservative” preference for the written explanatory statements of a bill – even though real-time oral information contradicts their value as regards revealing the legislator’s intention, and even though the written texts represent the position of professional staff and not that of the legislators – also indicates a rejection of both the original and probabilistic approaches because of a principle that stands above them – a preference for avoiding the result of repealing the norm.

The Article therefore argues that alternative approaches to purposive interpretation in the conventional sense, promoted by the “conservative” movement, may be equally activist. In addition, the fact that the interpreter who is considered an originalist and the interpreter who is considered an “activist” arrive at the same interpretive conclusions and in the same way, as happened in the unreasonableness case, indicates that it is hard to view their interpretive theories as clearly distinct. We therefore argue that there is no interpretive methodology that necessarily leads to an “activist” interpretation, nor is there an interpretive methodology that necessarily prevents an “activist” interpretation: all interpretations involve the determination of the order of principles and evidential priorities on the part of the operator of interpretive authority – orders and priorities that are essentially activist since the agent of the action is involved in setting them.