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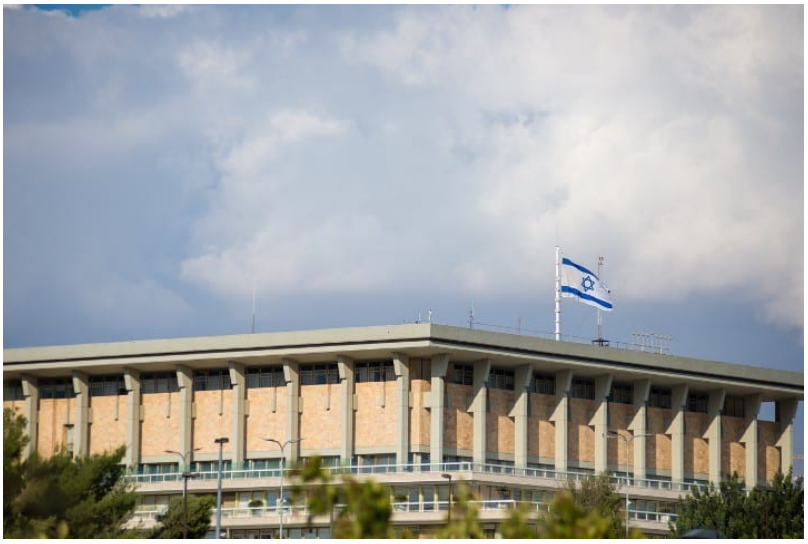
Debates in Knesset on Judicial Review Invoke Federalists and Antifederalists

In their effort to define the limits of the constitutional authority of the country's judiciary, lawmakers in Israel are referring to how that subject was addressed by the Federalists and Antifederalists during the ratification debates in the United States.



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Israeli Knesset

As the Knesset, Israel's unicameral legislative body, seeks to refine, and perhaps restore, the original constitutional structure of their country, the names of Publius and Brutus are being invoked by partisans on both sides of the debate on judicial authority to review the acts of the Knesset.

Before launching into the specifics of the debate, a quick primer on the structure of the government of Israel is appropriate.

The Israeli government is a parliamentary democracy with a president as the head of state and a prime minister as the head of government. The government has a multiparty system, and the Knesset, which is the unicameral legislature, has 120 members.

The executive branch consists of the president, who is elected by the Knesset for a seven-year term and serves as a ceremonial head of state, and the prime minister, who is the head of government and is elected by the Knesset. The prime minister selects Cabinet ministers to head various government departments and agencies.

The legislative branch, the Knesset, has 120 members who are elected for four-year terms through a proportional representation system. The Knesset is responsible for passing laws, approving the budget, and monitoring the actions of the executive branch.

The judicial branch, the subject of the current controversy in the Knesset, consists of a system of courts headed by the Supreme Court. The Supreme Court has assumed the power of judicial review, and thus become responsible for interpreting the constitution and ensuring that laws are in compliance with it.

And it is that power — judicial review — that is causing the current uproar and has led to the names of Brutus and Publius being mentioned in the Israeli media's coverage of the current debate.

So here's a summary of the kernel of the controversy, as published by *The Jerusalem Post*:

> Like Britain and New Zealand, the judiciary was not granted the power of judicial review, according to which the courts can nullify an act of parliament/Knesset. This was the system that governed Israel from its founding. But in 1992 the court influenced the justice minister to propose Knesset adoption of two Basic Laws: "Human Dignity" and "Freedom of Occupation."

> Upon adoption of these laws, the court announced that it was up to the court to define their content and that this content included the power of judicial review. Thus, judicial review in Israel was entirely a judicial creation. It enabled the court to rein in the Knesset. In short, the court was formulating a constitution.
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> These fundamental laws of constitutional character were adopted without even 61 members of the 120-member Knesset being present, let alone voting in favor of these laws (one was adopted by 32 Knesset members, the other by 23). This "ordinary vote" in the Knesset was instituting vast and radical changes in the country's system of government in a clandestine manner at midnight and without any public notice.
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> The court also assumed a novel power to declare Knesset laws unconstitutional for "unreasonableness," a power unknown even to American courts. It was a brazen grab of power unmatched in any democracy. The court also nullified the standard requirement of standing, so that anyone could challenge a Knesset decision for any reason.

The author of the story in *The Jerusalem Post* notes that those members of the Knesset opposing the restoration of the absolute sovereign authority of the legislative branch are invoking not only "Israeli history, but American history, as well."

Herein the article launches into a summary of the competing views of Alexander Hamilton (writing as Publius in *The Federalist Papers*) and the Antifederalist Brutus (whose authorship remains uncertain to date) of the power granted to the federal judiciary in the then-proposed Constitution.

Simply put: the Antifederalist Brutus warned that the blackletter of the Constitution drafted in Philadelphia in 1787 did not place fast fetters on the power that could be wielded by the federal courts. In his Letter XII, Brutus warned:

> The courts, therefore, will establish this as a principle in expounding the constitution, and will give every part of it such an explanation, as will give latitude to every department under it, to take cognizance of every matter, not only that affects the general and national concerns of the union, but also of such as relate to the administration of private justice, and to regulating the internal and local affairs of the different parts.

Later, in Letter XV, he continued on this theme:

> But the judges under this constitution will control the legislature, for the supreme court are authorized in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment. The framers of this constitution appear to have followed that of the British, in rendering the judges independent, by granting them their offices during good behavior, without following the constitution of England, in instituting a tribunal in which their errors may be corrected; and without adverting to this, that the judicial under this system have a power which is above the legislative, and which indeed transcends any power before given to a judicial by any free government under heaven.

In response to Brutus's opinion on the lack of judicial restraint set out in the Constitution, Alexander

Hamilton (writing as Publius) downplayed the dire warnings, arguing in *The Federalist*, No. 78:

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove anything, would prove that there ought to be no judges distinct from that body.

Remarkably, later in that letter, Hamilton invoked the separation of powers as the ultimate defense against despotism, and the author of the *Jerusalem Post* piece echoes that opinion, calling on the Knesset to force Israel's judiciary to retreat within its original constitutional boundaries, describing the separation of powers as the "fulcrum of democracy."

For the record, I'll give James Madison the last word on the intended power of the federal courts and its rightful constitutional role. In his "Report on the Virginia Resolutions" of 1800, Madison explained:

> However true therefore it may be that the Judicial Department, is, in all questions submitted to it by the forms of the constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the government; not in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts. On any other hypothesis, the delegation of judicial power, would annul the authority delegating it; and the concurrence of this department with the others in usurped powers, might subvert forever, and beyond the possible reach of any rightful remedy, the very constitution, which all were instituted to preserve.