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EDITORIAL

The Supreme Court.

A significant passage in President Taft's message (p. 1160) is that in which he speaks of the Supreme Court. It is significant of a dangerous tendency with reference to the judiciary, and of the possible influence of that tendency upon Mr. Taft with reference to Supreme Court appointments.



The proper and chief usefulness of the Supreme Court of the United States, so runs that passage in the President's message, is "so to expound the law, and especially the fundamental law, the Constitution, as to furnish precedents for the inferior courts in future litigation and for the executive officers in the construction of statutes and the performance of their legal duties." This passage carefully avoids any definite statement that the Executive and Congress are subject to the opinions of the Supreme Court in the execution of their own functions; but that is the common notion, and Mr. Taft's message lends it color, unless very carefully scanned.



Nothing could be further from the truth than the idea that the Supreme Court should be politically supreme. The Constitution makes the President, Congress and the Supreme Court independent of one another. Yet the President is not independent of the Supreme Court if its decisions bind him in administration, nor is Congress if they

CONTENTS.

EDITORIAL:	
The Supreme Court.....	1177
President Taft's Appointments.....	1178
Woodrow Wilson's Declaration.....	1179
Some of the Humor of It.....	1179
Mr. Perkins and Profit-Sharing.....	1179
Mrs. Pelham's Object Lesson.....	1180
Direct Legislation in Illinois.....	1180
The Big Righteousness.....	1180
Those Japanese Cases.....	1181
Property Rights and Property Wrongs (A. H. Jackson).....	1181
EDITORIAL CORRESPONDENCE:	
Politics In and About New York (C. O'C. Hennessey).....	1182
INCIDENTAL SUGGESTIONS:	
The Currency Suckhole (F. J. Van Vorhis).....	1184
Sleepy Michigan (Aldrich Blake).....	1184
NEWS NARRATIVE:	
The British Elections.....	1185
The Canadian Farmers' Movement.....	1185
La Follette and Taft.....	1185
The Arizona Constitution.....	1186
Constitutional Reform in Illinois.....	1186
The Public Policy Referendum in Illinois.....	1186
Association for Labor Legislation.....	1187
The Chicago Garment Workers' Strike.....	1187
Garment Workers' Strike in Milwaukee.....	1187
Tolstoy Memorial at Cincinnati.....	1188
The Brazilian Mutiny.....	1188
Constitutional Government in China Again Hastened.....	1188
The Anti-Imperialist League Honors George Fred-erick Seward.....	1188
News Notes.....	1189
Press Opinions.....	1190
RELATED THINGS:	
Ye Old Man and Ye Forty Year Dead Line (Uncle Sam).....	1191
A Provincial New Yorker Awake.....	1191
Congressman Kent (with portrait).....	1192
A Tendency in Municipal Taxation (Clinton Rogers Woodruff).....	1193
BOOKS:	
A Fact in Fiction.....	1194
Steamboating on the Mississippi.....	1194
Political Short Stories.....	1195
How Our Forebears Kept Holiday.....	1195
Navigating the Air Fields.....	1195
A Modern View and a Story.....	1195
Up-to-Date Fairy Tales.....	1195
Periodicals.....	1195

bind it in legislation. As Charles Frederick Adams of New York recently demonstrated in a noonday speech on the subject at the Chicago City Club, quoting the best of legal authority to support his argument, a decision of the Supreme Court binds nobody but the parties to the law suit in which the decision is made. Its opinions may be useful to the Executive, but they are only suggestive guides, not authoritative commands.

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As Mr. Adams explained by way of illustration, the Supreme Court's decision declaring the income tax unconstitutional has been treated by the Presidents, beginning with Cleveland, as if it were binding on the Executive. But neither the Executive nor Congress was so much as a party to that law suit. As Mr. Adams suggested, if there had been in the White House at that time a President as sternly determined to enforce the income tax statute as Jackson was to put down the United States Bank, he would have gone on collecting income taxes in spite of the Supreme Court, and income tax payers would have had no recourse but to sue customs collectors for recovery of money paid under protest, which would soon have choked the Federal courts with petty lawsuits and brought the question of conflict of authority up to the people of the United States, where it properly belongs. A careful reading of Mr. Taft's message shows a recognition on the part of the writer, by silence however, of the point that Mr. Adams made. But there is no disguising the fact that the Supreme Court claims the power, and that the Presidents and Congress have practically conceded it, to overrule both Congress and the President on any Constitutional question. It is this that makes Supreme Court appointments so vitally important and of necessity a political question.

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If the nine gentlemen who constitute the Supreme Court had no wider function than deciding quarrels between individuals, their decisions, though wickedly wrong or mistakenly erroneous, would do no harm to any one but defeated litigants, and all such harm would soon wear away. But when those decisions are treated as absolute orders, binding upon Presidents and Congresses and States, and with reference not merely to some ephemeral quarrel, but to the powers of elective executives and legislators as direct representatives of the people, the Supreme Court of the United States becomes the most potent political body in the world. In the last analysis, under this false but growing theory of the relation of the judicial

to the executive and the legislative departments of the Federal government, the people of the United States as a whole, and the States themselves, are ruled, not alone as to private and ephemeral quarrels, but in their politics and perpetually, by five men in a body of nine, all appointed for life.

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Is it any wonder that political considerations dictate appointments to that most potent of all political oligarchies? Is it not right that political considerations should dictate those appointments? Why, for instance, should a President opposed to people's rule appoint judges whose bias is for it, or Presidents who favor people's rule appoint judges whose bias is against it? Why should a Republican President appoint a Democrat to nullify on the bench a political policy to which the Republican party gives statutory form and force? Why should a Democratic President play into the hands of the opposing party by appointing to the Supreme Court a Republican to whose legal mind every vital policy of the Democratic party seems unconstitutional? And why should progressive Senators confirm appointments of reactionaries to the bench? But of all things else, why should a republic based upon the principle of people's rule permit judicial usurpation of autocratic dictatorial powers?

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President Taft's Appointments.

The promotion by President Taft of Justice White to the chair of Chief Justice of the United States is applauded because the President and his appointee affiliate with opposing political parties. There is nothing at all in that reason for approval. Justice White affiliates with a faction in the Democratic party which is politically much closer to Mr. Taft's faction in the Republican party than his faction is to the rest of his party. Aside, however, from that empty reason for non-partisan boasting, and simply with reference to conventional tests, the appointment is a good one. In a sense at least it is also a safe one. It can not change the complexion of the court, the appointee being already one of its members with voting rights equal to one-ninth of its great political power. The place to look for the political tendency of the Court under President Taft's appointments of this week is where the new appointees sit.

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The only one of President Taft's judicial appointees of the week of whose bias we are advised is Judge Mack of Chicago (vol. xii, p. 460).