That there is need for both procedural and substantive reform in national transportation policy is widely recognized. The subject, though hardly headline-making in a time of chronic global crisis, has recently evoked a remarkable official and academic output on the same theme as the work under review.[13] The general disposition of almost all the writers is toward more competition in transportation. Fulda's similar predisposition and his measured analysis of the legal setting combine to form a solid platform for other students and for policy-makers.

RALPH S. BROWN, JR.†

LEGACY OF SUPPRESSION. By Leonard W. LEVY.* Cambridge: The Belknap Press of Harvard University Press, 1960. Pp. xiv, 353. $6.50.

THE doctrine of seditious libel derives from the English common law. It maintains that the mere expression of critical opinions which disturb the public repose by holding the government up to contumely constitutes a crime. By definition, then, the doctrine is incompatible with the notion of a truly open society, where presumably any citizen is free to express any opinion of the government, no matter how unpopular, as long as the expression does not immediately and directly result in an incitement to crime.

It has long been a school boy's copy book maxim, let alone a fundamental postulate in the constitutional interpretation of the meaning of free speech, that a major objective of the American Revolution and of the enactment of the First Amendment was to repeal the English common law of seditious libel and install in its stead freedom of speech and press. Judges, from Holmes to Brandeis to Black and Douglas, and constitutional historians, from Madison to Schofield

13. Fulda has a thorough bibliography. I mention here only some of the items that have appeared since his book went to press early in 1961: J. F. Kennedy, *Message to Congress on Transportation Policy*, April 5, 1962, in N.Y. Times, April 6, 1962, p. 18; House Committee on the Judiciary, Antitrust Subcommittee, *The Ocean Freight Industry*, H. R. REP. No. 1419, 87th Cong., 1st Sess. (1962); CAVES, AIR TRANSPORT AND ITS REGULATORS (1962); FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES (1962); HEALY, THE EFFECTS OF SCALE IN THE RAILROAD INDUSTRY (Yale Univ. Comm. on Transportation, 1961); RICHMOND, REGULATION AND COMPETITION IN AIR TRANSPORTATION (1961); Barber, *Airline Mergers, Monopoly and the CAB*, 28 J. AIR L. 189 (1962); Prince, *Railroads and Government Policy—A Legally Oriented Study of an Economic Crisis*, 48 VA. L. REV. 196 (1962); Symposium, *Antitrust and the Regulated and Exempt Industries*, 19 A.B.A. REP. ANTITRUST SECTION PROCEEDINGS 261 (1961); Note, *Merger and Monopoly in Domestic Aviation*, 62 COLUM. L. REV. 851 (1962); Note, 71 YALE L.J. 307 (1961), note 10 *supra*; Comment, *Restrictions on Entry of Surface Carriers Seeking to Fly*, 71 YALE L.J. 1529 (1962).

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and Chafee have iterated and reiterated the concept.[1] Nor would the concept appear to be something manufactured and distributed by latter day libertarians for their own purposes. For one can assume that if contrary authority existed, the decisions of our time restricting free speech and assembly, or dissents to those decisions protecting them, would have employed it.[2]

Now comes Dean Leonard W. Levy and alleges that the king has no clothes. It is his contention that this entire host of distinguished jurists and constitutional commentators was plainly wrong in concluding that the Bill of Rights, at the time of its adoption, embodied a wide latitude for freedom of expression. On the contrary, he argues that only after the Jeffersonians, when still a minority party, were obliged to defend themselves against the Federalist Sedition Act of 1798, did a broad libertarian freedom of speech and press emerge in the United States. Moreover, once in power, the Jeffersonians were as intolerant of political criticism as the Federalists.[3] Levy insists, in fact, that freedom of speech as an independent concept was virtually unheard of at the time of the framing of the Bill of Rights.

> That freedom had almost no history as a concept or a practice prior to the First Amendment or even later. It developed as an offshoot of freedom of the press, on the one hand, and on the other, freedom of religion—the freedom to speak openly on religious matters. But as an independent concept referring to a citizen's personal right to speak his mind, freedom of speech was a very late development, virtually a new concept without basis in everyday experience and nearly unknown to legal and constitutional history or to libertarian thought on either side of the Atlantic prior to the First Amendment. . . .[4]

This thesis, which is as disturbing as it is astonishing, requires more than a cursory summation. Its origins lie well back in English and American Colonial sources. According to the common law as taught by Blackstone, freedom of the press meant simply protection against restraint prior to publication; there was no protection subsequent to publication for seditious or licentious utterances.[5] During the Colonial period the law of sedition was enforced widely and harshly, though chiefly by the provincial legislators. The executive officials and courts

1. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., joined by Holmes, J., concurring); Near v. Minnesota, 283 U.S. 697, 714, 717-18 (1931) (opinion by Hughes, C.J.); Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (opinion by Murphy, J.); Bridges v. California, 314 U.S. 252, 263-65 (1941) (opinion by Black, J.); Beauharnais v. Illinois, 343 U.S. 250, 272 (1952) (Black, J., joined by Douglas, J., dissenting); Wood v. Georgia, 370 U.S. 375 (1962) (opinion by Warren, C.J.). *Madison's Report on the Virginia Resolution*, 4 DEBATES 569 (Elliot ed. 1866); 2 SCHOFIELD, ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 521-22 (1921); CHAFEE, FREE SPEECH IN THE UNITED STATES 3-35 (1941).

2. For examples of restrictive decisions, see Abrams v. United States, 250 U.S. 616 (1919); Gilbert v. Minnesota, 254 U.S. 325 (1920); Uphaus v. Wyman, 360 U.S. 72 (1959); Barenblatt v. United States, 360 U.S. 109 (1959).

3. Pp. viii, 297-307.

4. P. 5.

5. Pp. 14-15, 185.

in the colonies were far less involved in tracking down nonconformist opinions. The Zenger trial, Levy suggests, was so notorious in part because, as a judicial proceeding, it was a relatively isolated phenomenon.[6]

Nor did Blackstone's common law of criminal libel include the defendant's right to introduce the truth of the libel as a defense or his right to have the jury rather than the judge decide if the words were criminal. These limitations on freedom of speech and of the press greatly exercised the libertarians. Indeed, almost their sole preoccupation in the Eighteenth Century, both in England and America, was with these two notions.[7] Apparently it did not occur to them that the truth of an opinion is not susceptible to proof, and that juries in dealing with truth's purveyors are no more likely to withstand prevailing prejudices than judges. After examining a stupefying array of Court decisions, newspaper accounts, statutes, trial records, treatises, pamphlets, correspondence, and other primary and secondary sources, Levy concludes that the libertarians of that day never even remotely approached the presupposition now so commonly associated with the framing of the First Amendment, namely, that it is not possible criminally to assault the government by mere words. The great libertarian figures of two centuries, from the Star Chamber to the American Revolution, in both countries are examined: in England, William Walwyn, John Milton, John Locke, "Cato," Roger Williams, John Lilburne and John Wilkes; in America, William Penn, Alexander MacDougall, Peter Zenger and his attorney, Andrew Hamilton, and Benjamin Franklin. Only one of this group —either explicitly or by implication—disavowed the doctrine of seditious libel. The others did not even acknowledge the right to call for the peaceful overthrow of the Government.[8] Indeed, the great majority of them explicitly embraced the validity of the doctrine. Madison and Jefferson, otherwise so voluble, remained totally silent on the question until well after the First Amendment had been framed. Among this exalted line only Jeremy Bentham stands in unequivocal opposition. True, some lesser English figures—Furneaux, Kippis and Ratcliffe—did attack the application of seditious libel to religious freedom, but not the doctrine *per se*.[9]

The debate on the Bill of Rights during the ratification, so Levy's argument continues, was conducted with vague rhetorical references to freedom of the press but without precise definition as to the meaning of that freedom. Neither the great Bill of Rights advocates, such as Jefferson, Patrick Henry, Elbridge Gerry, Richard Henry Lee, and George Mason, nor the newspapers, pamphlets, or the ratifying convention debates provide insight.[10] Probably most of the founding fathers were satisfied that existing common law adequately protected the freedoms in question. At the most, they would have demanded the right to show truth as a defense and to have the jury determine the whole question of

6. P. 19.
7. Pp. 130-31.
8. P. 171.
9. P. 172.
10. P. 215.

libel. Levy thinks that much of the whole Bill of Rights controversy and rather happenstantial wording of the First Amendment itself as finally enacted was a consequence of the political struggle between those favoring strong state and those favoring strong central government. He puts it thus:

> But the history of the ratification indicates no passion on the part of anyone to grind underfoot the common law of liberty of the press. Indeed the history of the framing and ratification of the First Amendment and the other nine scarcely manifests a passion on the part of anyone connected with the process. Considering its immediate background, our precious Bill of Rights was in the main the chance result of certain Federalists, having been reluctantly forced to capitalize for their own cause the propaganda that had been originated in vain by the Anti-Federalists for ulterior purposes. Thus the party that had first opposed a Bill of Rights inadvertently wound up with the responsibility for its framing and ratification, while the party that had at first professedly wanted it discovered too late that its framing and ratification were not only embarrassing but inexpedient.[11]

And so it was not until seven years after the Bill of Rights was framed that the theory now conventionally accepted as American libertarianism emerged. It coincides with the passage of the Sedition Act of 1898 under the Adams administration. The Act made "any false, scandalous and malicious" publications against the government a criminal offense. Truth was a defense and a jury could determine the entire criminal libel. Fearing a Federalist victory in 1800 through a one-party press and the stifling of political criticism and consequent control of public opinion, the Jeffersonian party's writers "were driven to originate so broad a theory of freedom of expression that the concept of seditious libel was, at last, repudiated."[12] Madison, Gallatin, Hay, St. George Tucker, and others, when they attacked the constitutionality of the Sedition Act, constantly avowed among other things that there could be no libel of a free republican government; that the intent of the Framers was to supersede the laws of sedition; that the First Amendment freedoms were absolute with respect to the United States; and that they had been purposely left undefined so as not to limit future generations.[13] Tucker, significantly, included these theories in the edition of Blackstone which he edited, and which, says Levy, was for many years thereafter the standard edition of the American bench and bar. It is these assertions which eventually became woven into our constitutional tradition.

In sum, the noble American libertarian theory is itself the creation of historical revisionism—a revisionism engendered by political imperatives of the day.

The thesis of *Legacy of Suppression*, then, is a somber one. How well does it stand up? A number of considerations will engage the thoughtful reader.

First, there is the language of the Amendment itself, "Congress shall make no law . . . abridging the freedom of speech, or the press. . . ." Could anything

11. P. 233.
12. Pp. 259-60.
13. Pp. 273-83.

be more explicit? A whole body of judicial writing asserts that no amount of historical interpretation or logical inference can surmount the absolute sweep of those words: if the English language had any meaning to the Framers, Congress could abridge *no* speech, including seditiously libelous speech.[14] Such an assertion, however, not only ignores the complete absence of any sources to indicate any intention of the Framers to make the Federal protection absolute, but most certainly fails to explain the advent of the Sedition Act within only seven years after the Amendment's framing. The latter circumstance alone would appear conclusive of the issue. An argument based on the plain meaning of the Amendment's words becomes still more dubious when we note that the Framers did not have the slightest intention of restricting the states' power to deal with seditious libel.[15] (This would explain, though it would hardly justify, the prosecutions of Jefferson's administration.) Unless one is prepared to argue, as Mr. Justice Jackson has done, that the Federal government has narrower latitude than the states in seditious libel matters, the Framers' attitude toward the states may by implication be read back into their strictures on the federal government. But in the continuing debate over the extent to which the word "liberty" in the due process clause of the Fourteenth Amendment embodies the freedom of speech of the First, this distinction, suggested by Mr. Justice Jackson, has yet to find any takers on the Court.[16]

Second, there is the short shrift that Levy gives to the influence of such English thinkers as Bentham,[17] and of Furneaux,[18] Kippis,[19] Ratcliffe,[20] Erskine,[21] and Dawes.[22] For Bentham, it is sufficient that he dealt with the question only as a passing abstraction, not as an actual problem; for the others, that they restricted themselves to religious controversy. True, the history of

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14. For the first amendment does not speak equivocally. It prohibits any law abridging freedom of speech or of the press. It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

Bridges v. California, 314 U.S. 252, 263 (1941) (Black, J.); see Leach v. Carlile, 258 U.S. 138, 141 (1922) (Holmes, J., joined by Brandeis, J., dissenting).

15. The state cases involving seditious libel as herein defined are rare. See State v. Gardner, 112 Conn. 121, 151 Atl. 349 (1930), where, curiously, the main point was not raised by the defense. For state criminal—but not seditious—libel cases, see State v. Colby, 98 Vt. 96, 126 Atl. 510 (1924) (libel of political candidates); Commonwealth v. Szliakys, 254 Mass. 424, 150 N.E. 190 (1926) (libel of private person); State v. Gurry, 163 S.C. 1, 161 S.E. 191 (1931) (slander of private person).

16. See Beauharnais v. Illinois, 343 U.S. 250, 288-89 (1952) (Jackson, J., dissenting). See Gitlow v. New York, 268 U.S. 652, 672 (1925); Gilbert v. Minnesota, 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); Stromberg v. California, 283 U.S. 359 (1931); Near v. Minnesota, 283 U.S. 697 (1931).

17. Pp. 170-72.

18. Pp. 165-69.

19. Pp. 169-70.

20. P. 169.

21. Pp. 249-50.

22. Pp. 251-52.

religious liberty is indissociable from the history of freedom of expression; but where the commentaries, as here, stopped short of addressing themselves to the extent of governmental power, it can scarcely be said in the absence of further proof that they somehow must have created the new and radically heightened political awareness necessary to outlaw seditious libel.[23]

Third, the question has been raised whether sufficient attention has been given by Levy to public feeling and political climate at the time of the framing.[24] The obvious reply is that if popular political expression is not found in the writings and public records of the day, which Levy has so meticulously examined, the feelings probably did not exist in any large measure. Nevertheless, one cannot but wonder whether there might not have been a significant amount of popular feeling behind the (unsuccessful) attempt in the Pennsylvania Assembly in 1788 to institute impeachment proceedings against two judges for convicting a newspaper publisher of seditious libel,[25] and if so, what inspired it.

Finally, Levy has been accused of misrepresenting what Chafee really said in his great classic, *Free Speech in the United States*.[26] Chafee considers seditious libel and the Bill of Rights at length in the very first chapter and he concedes that the Framers "say very little about its exact meaning."[27] Nonetheless, he concludes that a consideration of all the factors "leaves the Blackstonian interpretation . . . without a leg to stand on."[28] No, it is not fair to say that Levy has distorted Chafee's conclusions.

If, as has been said, the writing of history is a determination of the weight of the evidence, then, all things considered, there can be no doubt that Levy's case must stand as proven beyond all reasonable doubt. If such a conclusion is more appropriately arrived at by a professional historian than by a practicing attorney, it nevertheless gives rise to two searching questions that are bound to trouble a historian, a lawyer, or anyone else who is concerned about free speech in the United States. One, how is it that the assumptions which Levy demolishes have existed unchallenged until now? The other, do the implications of the book portend dire consequences for a liberal interpretation of free speech?

The first question, to which Levy does not address himself at all, is dealt with more easily. There were no seditious libel cases considered by the Supreme Court between the 1798 Sedition Act and the cases arising out of the 1917-1918 Espionage Acts. During those four generations, the towering authority of Madison, the father of the Bill of Rights, and of Jefferson, coupled with the writings of the other Jeffersonian Democrats, had made their impact. Had not

23. *Cf.* Jensen, Book Review, 75 HARV. L. REV. 456 (1961).

24. Book Review, 13 STAN. L. REV. 991 (1961). Levy himself concedes that certain ideas must have been in the air at the time, "but the fact is no longer susceptible to proof." P. ix.

25. Pp. 204-06.

26. Meiklejohn, Book Review, 35 So. CAL. L. REV. 111, 113 (1961).

27. CHAFEE, FREE SPEECH IN THE UNITED STATES 16 (1941).

28. *Id.* at 28.

Madison actually participated in the drafting of the Amendment, and therefore did he not know whereof he spake? Then came Holmes, joined by Brandeis, and in a line of significant free speech cases lent their own immense authority to the endorsement of the Madison-Jefferson legend. By the time such great constitutional authorities as Schofield and (particularly) Chafee had also endorsed the legend, perhaps with more fervor than research, the canonization of the concept of absolute free speech was complete.[29] In other words, the legend has existed because of its original power and nobility, because of the length of the subsequent period during which there was no case to challenge it, and because the stature of the great judges and commentators of our day who embraced the legend overshadowed the inadequacy of their scholarly inquires into the nature of its origin. Thus did it spring and remain full blown in our constitutional jurisprudence.

But Levy says:

> No citizen, and certainly no jurist worthy of his position, would or should conclude his judgment on either a constitutional question or a matter of public policy by an antiquarian examination of the original meaning of the freedom of speech-and-press clause.[30]

Well, whatever eminent liberal judges would or should do about the freedom of speech-and-press clause, they have certainly not hesitated to conclude their judgments both on constitutional questions and on public policy matters by an antiquarian examination of the original meaning of the establishment clause of the First Amendment. Consider Mr. Justice Black's decision in the *Everson*[31] and the New York Regents *Prayer*[32] cases and, particularly, Mr. Justice Rutledge's dissent in *Everson*.[33] Maybe the Black and Rutledge historical analyses are correct.[34] But what if they are subsequently proven to be otherwise? To what extent is the integrity of the judicial process undermined? It is difficult to conceive a more stark warning against this type of constitutional construction than *Legacy of Suppression*.

More important is the second question, Does the book seriously damage the case for free speech? This much is plain, it does not help the cause. Whether it will wreak mischief remains to be seen. Hopefully, the American libertarian tradition is now so well established that reformulation at this late date of the notions of the greatness of its origins can have little effect on it. One assumes

29. A classic example is the eloquent concurring opinion of Mr. Justice Brandeis, joined by Mr. Justice Holmes, in Whitney v. California, 274 U.S. 357, 372 (1927). And note how Chafee relies on Madison's Report, written in 1799. CHAFEE, *op. cit. supra* note 27, at 19-20.

30. P. 4.

31. Everson v. New Jersey, 330 U.S. 1 (1947).

32. Engel v. Vitale, 370 U.S. 421 (1962).

33. 330 U.S. 1, 28 (1947).

34. The eminent constitutional authority on church and state, Leo Pfeffer, has endorsed the historical basis of this dissent. See PFEFFER, CHURCH, STATE AND FREEDOM 118-21 (1953). Other eminent writers vigorously disagree. CORWIN, CONSTITUTION OF POWERS IN A SECULAR STATE 98 (1951); O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 83 (1949).

that the faith of the believer has not been irreparably shattered by the discovery of the Dead Sea Scrolls. Conversely, those judges who have sought to abridge political activity short of overt acts have found it possible to do so without the necessity of elaborate historical justification.[35] And latterly there has developed what some observers believe is a distinct tendency to "balance" freedom of expression out of any real meaning.[36]

Yet it does not do, on the basis of such considerations, to take the thesis of this work lightheartedly. Who can deny, for example, the role that historical re-evaluation of original Scriptural texts eventfully played in bringing about the Reformation? No, the devout free speech believer, after such a book as this, must find his refuge in Tertullian's adage, "Certum est, quia impossibile est."

GERALD A. BERLIN†

35. See, *e.g.*, Schenk v. United States, 249 U.S. 47 (1919); Gitlow v. New York, 268 U.S. 652 (1925); or more contemporaneously, Uphaus v. Wyman, 360 U.S. 72 (1959); Barenblatt v. United States, 360 U.S. 109 (1959); Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961). Concededly, the latter cases, all involving contempt of Congress, require some extension of logic before they qualify as seditious libel cases. They are, nevertheless. See Mr. Justice Brennan's succinct exposition of the point in his dissent in *Uphaus v. Wyman*, *supra* at 82.

36. For an exhaustive consideration of the "balancing" question, see Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

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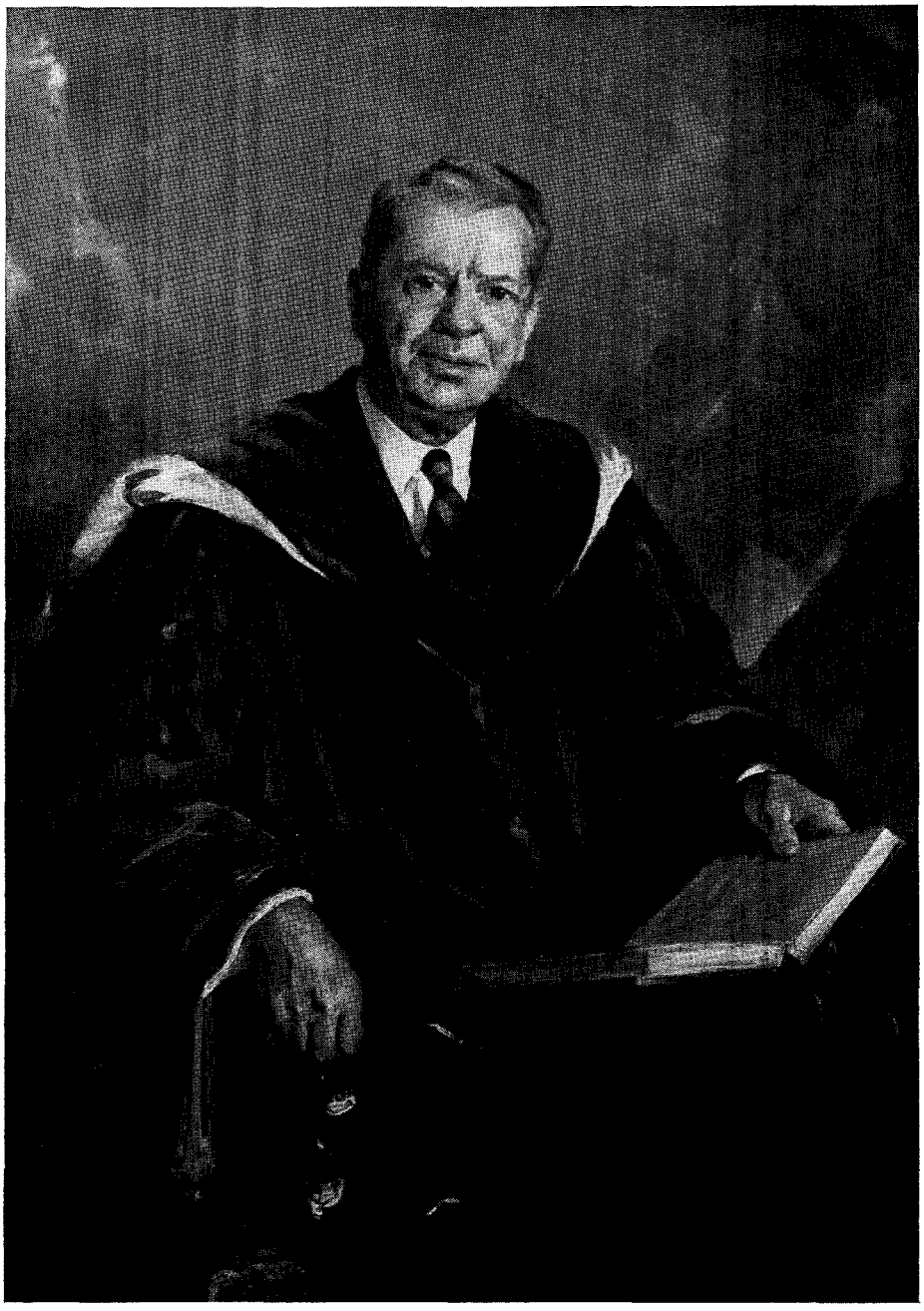

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