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Legally Supressing the *Nauvoo Expositor* in 1844

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Chapter Eighteen

Legally Suppressing the *Nauvoo Expositor* in 1844

Dallin H. Oaks

The suppression of the *Nauvoo Expositor* by the Mormons in Nauvoo, Illinois, in 1844 has interest for historians because it was the first in a series of events that lead directly to the murder of the Mormon prophet, Joseph Smith.[1] The effect of the suppression of this anti-Mormon newspaper on the non-Mormon elements in the vicinity was explosive. In the neighboring cities of Warsaw and Carthage, citizens in mass meetings declared the act revolutionary and tyrannical in tendency and resolved to hold themselves ready to cooperate with their fellow citizens in Missouri and Iowa "to exterminate, utterly exterminate the wicked and abominable Mormon leaders" and to wage "a war of extermination … to the entire destruction, if necessary for our protection, of his adherents."[2] Thomas Ford, then governor of Illinois, called the event a violation of the Constitution and "a very gross outrage upon the laws and the liberties of the people."[3] Even B. H. Roberts, a Mormon historian, conceded that "the procedure of the city council … was irregular; and the attempt at legal justification is not convincing."[4]

This article will assess those judgments by examining the legal basis of some of the charges the *Expositor* made against the leading citizens of Nauvoo and

1. See H. Smith, *The Day They Martyred the Prophet* (1963); Gayler, "The *'Expositor'* Affair—Prelude to the Downfall of Joseph Smith," *Northwest Missouri State College Studies* 25 (February 1, 1961): 3.

2. J. Smith, *History of the Church of Jesus Christ of Latter-day Saints,* 6:464 (2d ed. 1950) (hereafter cited as *History of the Church*).

3. *History of the Church,* 6:534.

4. Roberts, *A Comprehensive History of the Church of Jesus Christ of Latter-day Saints,* 2:231–32 (1930).

the legal implications of the suppression of the newspaper by those citizens. Before this is done, however, it will be helpful to review some facts that put the event in historical perspective.

Historical Background

After successively fleeing or being driven from their homes and property in Lake County (Ohio), Jackson County (Missouri), and Clay, Daviess, and Caldwell counties (Missouri), the Mormon people gathered along the Illinois bank of the Mississippi River about forty miles north of Quincy. There, in winter 1839, they commenced to build the city of Nauvoo. Under the leadership of their prophet and president, Joseph Smith, the Mormons obtained a generous city charter, erected substantial homes and public buildings, obtained a charter for a university, and initiated trading and some manufacturing.

By 1844, Nauvoo was the largest and one of the most prosperous cities in Illinois. But events already in progress were soon to prove its downfall. Some citizens were jealous of Nauvoo's prosperity, others were hostile to the curious religion of a majority of its inhabitants, and many were suspicious of the political power of its leaders.[5] Each of these sore spots was aggravated by events in the first six months of 1844. At this time Joseph Smith was mayor of the city of Nauvoo, ex officio chief justice of the municipal court, and lieutenant general of the Nauvoo Legion, a large body of state militia organized pursuant to the Nauvoo City Charter. Prominent church officers and members filled most of the other positions of leadership in the city and legion.

Antipathy toward the union of religious, civil, and military authority in Nauvoo was sharpened by Hyrum Smith's candidacy for the legislature from Hancock County and by Joseph Smith's announced candidacy for President of the United States. These enmities, engendered by political controversies and local commercial rivalries between Saint and Gentile, were further magnified by religious and personal animosities. The religious turmoil was given such a sensational focus in 1843–1844 by several new doctrines that the Prophet was reportedly introducing, especially polygamy, that historians are fond of characterizing these conditions as combustible materials awaiting only a spark to set them aflame to work death and destruction.[6]

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5. Berry, "The Mormon Settlement in Illinois," in *Transactions of the Illinois State Historical Society for the Year 1906,* at 88 (1906), and Gayler, "The Mormons and Politics in Illinois 1839–1844," *Illinois State Historical Society Journal* 49 (1956).'

6. E.g., Nibley, *Joseph Smith the Prophet* 518 (1946); *History of the Church,* 6:xxxvii.

The spark came in the wrecking of the *Nauvoo Expositor,* a newspaper established in Nauvoo by anti-Mormons and suppressed by the city authorities on June 10, 1844, three days after its first issue. Francis M. Higbee, one of the newspaper's proprietors, promptly made a complaint before a justice of the peace in Carthage, the Hancock County seat, against Joseph Smith, the city council, and other leading citizens for committing a riot while destroying the *Expositor* press.[7] The Carthage justice issued a "writ" (an arrest warrant) ordering state officers to "bring them before me or some other justice of the peace" to answer the charges.[8]

When Joseph Smith and his associates were arrested on this warrant on June 12 in Nauvoo, he proposed to go before any justice of the peace in Nauvoo, but the constable insisted on what seems to have been his legal right to take the prisoner before the issuing justice in Carthage.[9] Exercising the broadest range of habeas corpus jurisdiction authorized by the Nauvoo Charter and Illinois law, the municipal court held what amounted to a preliminary hearing on the guilt or innocence of the prisoner. After hearing testimony on this question, the court decided that Joseph Smith had acted under proper authority of the Nauvoo City Council in destroying the *Expositor* (referring to both the newspaper and the press), that his orders were executed without noise or tumult, that the proceeding resulting in his arrest was a malicious prosecution by Francis M. Higbee, that Higbee should, therefore, pay the costs of the suit, and that Joseph Smith should be honorably discharged from the accusations and from arrest.[10] On the following morning, Joseph Smith took his seat as chief justice of the municipal court, and the court proceeded to consider the habeas corpus petitions of Joseph's codefendants on the same charges of riot. After hearing testimony, the court ordered that these defendants also be honorably discharged and that Francis M. Higbee pay the costs. Thereupon, execution was issued against Higbee for the amount.[11]

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7. *History of the Church,* 6:453.

8. *History of the Church,* 6:453.

9. The Illinois statutes on this subject provided that the warrant should direct the officer to bring the prisoner "before the officer issuing said warrant, or in case of his absence, before any other judge or justice of the peace," Ill. Rev. Stat. §3, at 220 (1833), or "before the judge or justice of the peace who issued the warrant, or before some other justice of the same county." Ill. Rev. Stat. §7, at 222 (1833). Under these provisions, and under the language of the warrant itself, text accompanying note 8 supra, the constable would have had authority to take the prisoners before a justice of the peace in Nauvoo. But he was not compelled to do so, and returning them to the Carthage justice was probably the normal practice.

10. *History of the Church,* 6:456–58.

11. *History of the Church,* 6:461.

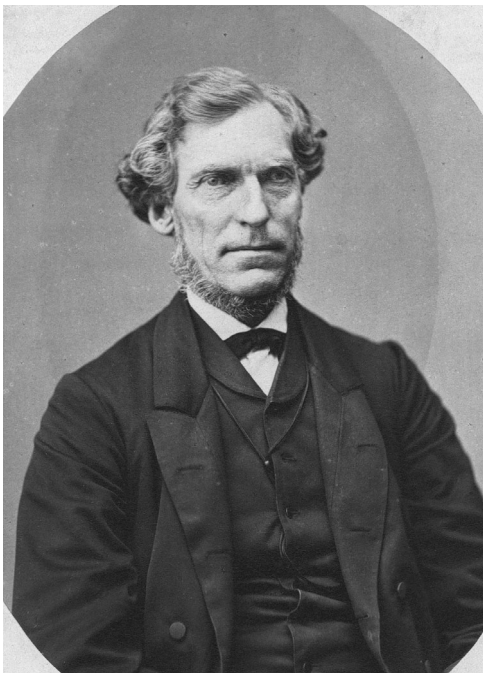
To the non-Mormons of Hancock County, these actions of the municipal court, which were of questionable legality if interpreted to have the significance that the Nauvoo authorities assigned to them, added the insult of defiance to the injury of riot and gave substantial impetus to the furious citizens' groups who met in nearby Warsaw and Carthage and called for "extermination."[12]

As the week progressed, the magnitude of the crisis became increasingly apparent. In a letter dated June 16, Joseph Smith advised Governor Ford of sworn information he had received that an attempt was going to be made to exterminate the Mormons by force of arms. He also placed the Nauvoo Legion at the governor's service to quell the insurrection and asked the governor to come to Nauvoo to investigate the situation in person. On June 18, before any reply had been received from Ford, Joseph Smith declared the city of Nauvoo under martial law in view of the reports of mobs organizing to plunder and destroy the city.[13]

Perhaps because of the rising tide of resentment against the Mormon leaders, and perhaps because of some doubts about the legality of the municipal court's action on the riot charges, the Nauvoo authorities consulted the state circuit judge Jesse B. Thomas. He advised them that in order to satisfy the people they should be retried before another magistrate who was not a member of their faith.[14] This advice clearly explains the fact that on Monday, June 17, a citizen named W. G. Ware signed a complaint for riot in the destruction of the *Expositor* against Joseph Smith and the other parties named in the Higbee complaint. Daniel H. Wells, a non-Mormon justice of the peace residing near Nauvoo, thereupon had the defendants arrested and brought before him for trial.[15] After hearing numerous witnesses and counsel for both prosecution and defense, Wells gave the prisoners a judgment of acquittal.[16]

This second trial was no more satisfactory to the anti-Mormons than the first. During the remainder of the week there were reports of mobs forming around Nauvoo and charges of violence on each side. The Nauvoo Legion began entrenching the city against attack.[17] On Saturday, June 22, Governor Ford sent a rider to Joseph Smith with a letter declaring that nothing short of trial before the same justice by whom the original writ was issued

12. *History of the Church,* 6: 463–65.
13. *History of the Church,* 6:480, 97.
14. *History of the Church,* 6:498, 592.
15. *History of the Church,* 6:487.
16. *History of the Church,* 6:488–91.
17. *History of the Church,* 6:504–24, 528, 531–31.



Daniel H. Wells. Courtesy Church History Library.

would "vindicate the dignity of violated law and allay the just excitement of the people." Joseph Smith's reply reminded the governor that the defendants had already been tried and acquitted by a justice of the peace for the riot offense, so that a second trial would rob them of their constitutional right not to be twice put in jeopardy of life and limb for the same offense. Joseph also expressed willingness to stand another trial, but reluctance to rely on the governor's promise of physical protection because he felt that the governor could not control the mob.[18]

On Sunday, June 23, a posse sent by the governor arrived in Nauvoo to arrest the Prophet, but was unable to find him. He had crossed the river to Montrose, Iowa, during the night, contemplating a flight to the West. He returned to Nauvoo that evening, however, and sent the governor a message offering to give himself up on the following day in reliance on the governor's pledge of protection.[19]

On Tuesday morning, June 25, in Carthage, Illinois, Joseph and Hyrum Smith voluntarily surrendered themselves to the constable who had attempted to bring them to Carthage on the original riot warrant. That afternoon the prisoners were taken before a Carthage justice of the peace, Robert F. Smith, who was also the captain of the Mormon-hating Carthage militia, and not the justice who had issued the original writ. At this preliminary hearing, the justice fixed five hundred dollars bail for each defendant on the riot charge, which was paid. Almost immediately thereafter, however, the two brothers were arrested on another warrant sworn out by a private citizen on a dubious charge of treason against the state of Illinois for having declared martial law in Nauvoo.[20]

18. *History of the Church,* 6:536–40.

19. *History of the Church,* 6: 48–50.

20. Ford, *History of Illinois,* 337 (1854); *History of the Church,* 6:561–62.

This second arrest had unfortunate consequences for the prisoners. Because the charge of treason was non-bailable,[21] they were compelled to remain in the custody of the constable. The prisoners were hustled into the Carthage County jail by the constable and militia under Robert F. Smith's command, pursuant to a mittimus (a warrant of commitment to prison) which recited that they had been examined on the treason charge but that trial had been postponed by reason of the absence of a material witness—none other than Francis M. Higbee.[22] The statement in the mittimus was false; the examination had not been held; and the prisoners were thus committed for treason without an opportunity to be heard on the charges.

On the following day, Wednesday, June 26, the prosecution sought to remedy the defect in the mittimus by again bringing the prisoners before Robert F. Smith for examination on the treason charge. None of the defendants' witnesses were present, however, so the defendants requested a one-day continuance (until June 27) and subpoenas for witnesses in Nauvoo, which the court granted. Later that evening Robert F. Smith changed the return day on the subpoenas to June 29, thus assuring that the defendants would be imprisoned without a hearing at least until that day.

On the morning of June 27, Governor Ford released most of the 1,200 to 1,300 militiamen then under arms in Carthage. But instead of ordering them to march to their homes for dismissal, he disbanded them in or near Carthage. To guard the prisoners at the jail, Ford selected the Carthage Grays, the company commanded by Robert F. Smith that had been so notorious for their uproarious conduct and for their threats toward the prisoners.[23] With a few remaining troops the Governor then marched to Nauvoo, where he delivered a speech berating the inhabitants for civil disobedience.

Shortly after five o'clock on the afternoon of Thursday, June 27, a mob of about a hundred men with blackened faces, apparently composed largely of members of the disbanded militia,[24] overcame the token resistance of the militia guards and shot Joseph and Hyrum to death in their room in the jail. Two fellow prisoners survived to record the brutal details.[25] This concluded the chain of events set in motion by the destruction of the *Nauvoo Expositor.*

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21. The Illinois Constitution, art. VIII, §13 (1818).

22. *History of the Church,* 6:567–70; *History of the Church,* 7:85.

23. *History of the Church,* 6:606–607.

24. See *History of the Church,* 7:143–46.

25. *History of the Church,* 6:616–22.

The *Nauvoo Expositor* and Its Charges

Nauvoo citizens had been notified of the coming of the *Expositor* by a prospectus issued May 10, 1844. Sylvester Emmons, a non-Mormon member of the Nauvoo City Council, was named editor, and William and Wilson Law, Francis and Chauncey Higbee, Robert and Charles Foster, and Charles Ivins signed as publishers. The prospectus declared that a part of the newspaper's columns would be devoted to advocating free speech, religious tolerance, unconditional repeal of the Nauvoo Charter, disobedience to political revelations, hostility to any union of church and state, censure of gross moral imperfections wherever found, and, "in a word, to give a full, candid, and succinct statement of FACTS AS THEY REALLY EXIST IN THE CITY OF NAUVOO." The publishers further declared their intent to "use such terms and names as they deem proper, when the object is of such high importance that the end will justify the means."[26]

The first and only issue of the *Nauvoo Expositor,* the four-page issue of Friday, June 7, 1844, was more sensational than distinguished.[27] While the paper contained a short story, some poetry, a few news items (mostly copied from eastern newspapers), and a scattering of ads, it was principally devoted to attacking Joseph and Hyrum Smith and their unnamed associates in the Church and in the city government. With "lame grammer and turgid rhetoric" that John Hay termed dull or laughable,[28] the paper assailed the Mormon leaders on three fronts: *religion, politics,* and *morality.* A summary of the most prominent charges will be set forth here as a basis for the discussion to follow.

Religion: The religious items are all contained in a "Preamble, Resolutions and Affidavits, of the Seceders from the Church at Nauvoo," which, an editor's note explains, is included in order to give the public the facts about the schism in The Church of Jesus Christ of Latter-day Saints.[29] This lengthy document commenced with an affirmation that the gospel as originally taught by Joseph Smith is true and that its pure principles would invigorate, ennoble, and dignify man. However, it proclaimed that Joseph Smith was a fallen prophet who had introduced many doctrines that were "heretical and

26. *History of the Church,* 6:444.

27. The excerpts from the *Nauvoo Expositor* that appear in the text were taken from an original copy in the Illinois State Historical Library at Springfield, Illinois.

28. Oaks explores the validity of these claims in more detail in his original article. See pp. 877–85.

29. *Nauvoo Expositor,* June 7, 1844, p. 1, col. 5. The "Preamble," "Resolutions," and "Affidavits" were reprinted in the *Salt Lake Tribune,* October 6, 1910, 4; the "Preamble" and "Resolutions" were quoted at length in the *Deseret Evening News,* December 21, 1869.

damnable in their influence."[30] It denounced Joseph and Hyrum Smith and other unnamed officials as apostates from the doctrine of Jesus because they had "introduced false and damnable doctrines into the Church, such as a plurality of Gods above the God of this universe, and his liability to fall with all his creations; the plurality of wives, for time and eternity; the doctrine of unconditional sealing up to eternal life, against all crimes except that of shedding innocent blood."[31] The "Resolutions" also proposed that all persons presently preaching false doctrines come and make satisfaction and have their licenses renewed,[32] which was presumably a bid for allegiance to the church recently organized by the seceders.

Politics: At the political level, the principal complaint was the Mormon leaders' attempts to unite church and state. Various editorial notes and news articles described these attempts and the "Resolutions" condemned them.[33] There were three specific complaints.

First, the "Preamble" speaks vaguely of "examples of injustice, cruelty and oppression" accomplished by "the inquisitorial department organized in *Nauvoo,* by Joseph and his accomplices."[34] If suffered to persist, the paper predicted, this inquisition "will prove more formidable and terrible to those who are found opposing the iniquities of Joseph and his associates, than even the Spanish Inquisition did to heretics as they termed them."[35]

Second, an "Introductory" by the editor bitterly protested the Nauvoo authorities' use of the writ of habeas corpus to defy the law by inquiring into the guilt or innocence of prisoners and by releasing prisoners arrested or held in custody pursuant to the authority of the United States or the state of Illinois.[36]

The third complaint related to the political candidacies of Joseph and Hyrum. Excerpts from Joseph's letter to Henry Clay and from his *Views on the Powers and Policy of the Government of the United States* were quoted and ridiculed.[37] The "Resolutions" of the seceders submitted that this bid for political power was not pleasing to God,[38] and an open letter to the citizens of Hancock County by Francis M. Higbee argued that the citizens of the

30. *Nauvoo Expositor,* June 7, 1844, p. 1, col. 6.
31. *Nauvoo Expositor,* June 7, 1844, p. 2, col. 3.
32. *Nauvoo Expositor,* June 7, 1844, p. 2, col. 4.
33. *Nauvoo Expositor,* June 7, 1844, p. 2, col. 4.
34. *Nauvoo Expositor,* June 7, 1844, p. 2, col. 3.
35. *Nauvoo Expositor,* June 7, 1844, p. 2, col. 3.
36. *Nauvoo Expositor,* June 7, 1844, p. 2 col. 6.
37. *History of the Church,* 6:207–8, 376–77.
38. *Nauvoo Expositor,* June 7, 1844, p. 2, col. 4.

county should not support the Smiths, citing the candidates' alleged immoralities, Joseph's being under indictment for adultery and perjury, the candidates' defiance of the law by using habeas corpus to rescue fugitives from justice, and the dangerous tendencies of their attempts for civil power.[39]

Morality: The third and most pervasive theme was the alleged immorality of Joseph and his associates, of whom Hyrum was the only one specifically named. Some of these charges related to financial affairs or vague implications of murderous conduct. Most concerned sexual behavior.

The "Resolutions" of the seceders from the Church made serious charges of misuse of Church funds. The general charges of knavery were also numerous, varied, and unrestrained. Higbee's letter about the political candidates said Joseph was "one of the blackest and basest scoundrels that has appeared upon the stage of human existence since the days of Nero, and Caligula" and urged that the community "support not that man who is spreading death, devastation and ruin throughout your happy country like a tornado."[40]

"It is a notorious fact," the "Preamble" continues, as its charges begin to get specific, "that many females in foreign climes … have been induced, by the sound of the gospel, to forsake friends, and embark upon a voyage … as they supposed, to glorify God … But what is taught them on their arrival at this place?" They are soon visited and told that there are great blessings in store for the faithful and that "brother Joseph will see them soon, and reveal the mysteries of Heaven to their full understanding." Later, the "harmless, inoffensive, and unsuspecting creatures" are requested to meet brother Joseph or some of the Twelve Apostles at some isolated spot. There, the "Preamble" alleges, the faithful follower of Joseph is sworn to secrecy upon a penalty of death and then told that God has revealed

> that she should be his [Joseph's] Spiritual wife; for it was right anciently, and God will tolerate it again: but we must keep those pleasures and blessings from the world, for until there is a change in the government, we will endanger ourselves by practicing it—but we can enjoy the blessings of Jacob, David, and others, as well as to be deprived of them, if we do not expose ourselves to the law of the land. She is thunderstruck, faints, recovers, and refuses. The Prophet damns her if she rejects. She thinks of the great sacrifice, and of the many thousand miles she has traveled over sea and land, that she might save her soul from pending ruin, and

39. *Nauvoo Expositor,* June 7, 1844, p. 3, col. 4.

40. *Nauvoo Expositor,* June 7, 1844 p.3 col. 5.

> replies, God's will be done, and not mine. The Prophet and his devotees in this way are gratified.[41]

The "Preamble" then goes into a lengthy and detailed description of the injured feelings, the broken health, and the eventual untimely death of those "whom no power or influence could seduce, except that which is wielded by some individual feigning to be God."[42] One of the most often repeated themes in the *Expositor* was the promise that future issues would be unrestrained in their exposure. The editor's "Introductory" declared:

> We intend to tell the whole tale and by all honorable means to bring to light and justice, those who have long fed and fattened upon the purse, the property, and the character of injured innocence;—yes, we will speak, and that too in thunder tones, to the ears of those who have thus ravaged and laid waste fond hopes, bright prospects, and virtuous principles, to gratify an unhallowed ambition.[43]

The foregoing summary is representative of the worst that the *Expositor* had to offer. Comment on this material will follow a review of the Nauvoo authorities' reaction to the paper.

The Reaction to and Suppression of the *Expositor*

The first issue of the *Expositor* produced a furious reaction from the citizens of Nauvoo, which, as one observer reported at the time, "raised the excitement to a degree beyond control, and threatened serious consequence."[44] Joseph Smith later gave this explanation to the governor:

> [C]an it be supposed that after all the indignities to which we have been subjected outside, that this people could suffer a set of worthless vagabonds to come into our city, and right under our own eyes and protection, vilify and calumniate not only ourselves, but the character of our wives and daughters, as was impudently and unblushingly done in that infamous and filthy sheet?

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41. *Nauvoo Expositor,* June 7, 1844, p. 2, col. 1.

42. *Nauvoo Expositor,* June 7, 1844, p. 2, col. 1.

43. *Nauvoo Expositor*, June 7, 1844 p. 3 col. 1.

44. *History of the Church,* 6:470. See generally Roberts, *Comprehensive History,* 2:229 (1930); *History of the Church,* 6:446.

> There is not a city in the United States that would have suffered such an indignity for twenty-four hours.
>
> Our whole people were indignant, and loudly called upon our city authorities for redress of their grievances, which, if not attended to they themselves would have taken the matter into their own hands, and have summarily punished the audacious wretches, as they deserved.[45]

The temper of the times suggests that the prospect of mob action against the *Expositor* press was real and not merely speculative. One historian has said that there were sixteen instances of violence in Illinois between 1832 and 1867 to presses or editors who dared to express highly controversial views contrary to those generally held in the community.[46] The editors of the *Expositor* did not openly advocate mob action, but that possibility did not remain unnoticed. The editors posed the following rhetorical question:

> [W]ill you bring a mob upon us? In answer to that, we assure all concerned, that we [the editors] will be among the first to put down anything like an illegal force being used against any man or set of men.... [But] if it is necessary to make a show of force, to execute legal process, it will create no sympathy in that case [for the Mormons] to cry out, we are mobbed.[47]

On Saturday, June 8, 1844, the day following issuance of the *Expositor,* the Nauvoo City Council met for a total of six and a half hours in two sessions in which they discussed the character and conduct of the various publishers of the *Expositor.* The council then adjourned until Monday, June 10, when it met for an additional seven and a half hours, dedicating much of its attention to reviewing the *Expositor* itself.[48]

During this Monday meeting, Mayor Joseph Smith expressed a concern that what the opposition party was trying to do by the paper was to destroy the peace of Nauvoo, excite its enemies, and raise a mob to bring death and

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45. *History of the Church,* 6:581.

46. Davis, *The Story of the Church,* 335–36 (6th ed. 1948). One of these cases involved the destruction of the *Alton Observer,* public meetings and outroar, violent harrangues, the secret organization of an abolitionist society, and an armed nighttime mob attack resulting on October 26, 1837, in two deaths, including that of the publisher, Elijah P. Lovejoy, in an Illinois town on the Mississippi River. Ford, *History of Illinois,* 234–38 (1854).

47. *Navuoo Expositor,* June 7, 1844, p. 2, col. 5.

48. *History of the Church,* 6:430, 432.

destruction upon the city.[49] He argued that the paper was "a nuisance—a greater nuisance than a dead carcass," and urged the council to make some provision for removing it.[50] (This was not the first time that the city council had been urged to exercise the power given in its legislative charter "to declare what shall be a nuisance, and to prevent and remove the same.")[51]

Joseph's concern about the *Expositor* was echoed by some and supported by others throughout the deliberations. Hyrum Smith announced himself in favor of declaring the *Expositor* a nuisance.[52] Councilor John Taylor said that no city on earth would bear such slander and that he was in favor of active measures. He read from the United States Constitution on freedom of the press and concluded: "We are willing they should publish the truth; but it is unlawful to publish libels. The *Expositor* is a nuisance, and stinks in the nose of every honest man."[53]

After the mayor read the provisions of the Illinois Constitution on the responsibility of the press for its constitutional liberties,[54] Councilor Stiles read Blackstone's definition of and comments on abatement of nuisances and declared himself in favor of suppressing any more slanderous publications. Others likewise supported abating the *Expositor* as a nuisance.[55] Hyrum Smith stated that the best way to suppress it was to smash the press and pi (scatter) the type.[56]

Not all council members agreed. Councilor Warrington, a non-Mormon, considered the proposed action rather harsh. He suggested assessing a heavy fine for libels and then proceeding to quiet the paper if it did not cease publishing libels. Hyrum Smith replied that, in view of the financial condition of the publishers, there would be little chance of collecting damages for libels. Other aldermen and councilors said there was no reason to suppose that the publishers would desist if fined or imprisoned and that it was unwise "to give them time to trumpet a thousand lies."[57]

Finally, at about 6:30 P.M. on Monday, June 10, the council came to a decision. It resolved that the issues of the *Nauvoo Expositor* and the printing office from whence it issued were "a public nuisance . . . and the Mayor is instructed

49. *History of the Church,* 6:438, 442.
50. *History of the Church,* 6:441.
51. Ill. Laws 1840, §13 at 54–55. See also *History of the Church,* 4:442, 444.
52. *History of the Church,* 6:445.
53. *History of the Church,* 4:442, 444.
54. *History of the Church,* 4:442, 444.
55. *History of the Church,* 6:445.
56. *History of the Church,* 6:445.
57. *History of the Church,* 6:446.

to cause said printing establishment and papers to be removed without delay, in such manner as he shall direct." The mayor promptly ordered the marshal to "destroy the printing press from whence issues the *Nauvoo Expositor,* and pi the type of said printing establishment in the street, and burn all the *Expositors* and libelous handbills found in said establishment."[58] He also ordered the Nauvoo Legion to be in readiness to execute the city ordinances if the marshal should need its services.

By eight o'clock that evening, the marshal had made a return to the order.[59] Accompanied by a large crowd of citizens and by a number of the militia, he had proceeded to the *Expositor* office, destroyed the press, and scattered the type as ordered.

According to the criminal charges soon filed against the principals in this action, the manner of execution of the council's order constituted a riot. This crime was committed when two or more persons did an unlawful act "with force or violence against the person of another" or did a lawful act "in a violent and tumultuous manner."[60] At the two subsequent trials for riot, numerous witnesses, including several visitors from cities outside Illinois, testified without significant contradiction that the whole transaction was accomplished quietly and without noise or tumult.[61] The marshal demanded the press, Higbee refused, the marshal opened the door (one witness said he ordered it "forced," another said "a knee was put against it," another named a man who had opened it; several said there was little or no noise or delay at its opening), Higbee left the premises unhindered, and seven to twelve men went inside and carried out the press and type. Except for one minor deviation, all witnesses also agreed that there was no violence, and that nothing was destroyed or damaged that did not pertain to the press.[62]

An Evaluation of the *Expositor*'s Charges

The legality of the council's action in suppressing the *Expositor* depends upon the inflammatory nature of the charges in the *Expositor* and the reaction which the city councilors could therefore reasonably conclude that they were likely to produce in the community and the surrounding areas.

58. *History of the Church,* 6:448.
59. *History of the Church,* 6:448.
60. Ill. Rev. Stat. §117, at 197 (1833).
61. *History of the Church,* 6:456–58, 488–91.
62. *History of the Church,* 6:456–58, 488–91.

The *Expositor*'s general complaints about the union of the authority of church and state in Nauvoo were essentially true. Notwithstanding the presence of non-Mormons on the city council, the dominance of Mormon Church leaders in every branch of government in the city and legion was beyond question. In protesting this condition, in urging its readers to vote against Joseph and Hyrum Smith in their election contests, and even in advocating repeal of the Nauvoo Charter, the *Expositor* was performing the traditional function of a free press. The name-calling accompanying the *Expositor*'s political advocacy was pretty rough, but not particularly unique in view of the prevailing style of political commentary of that day.[63] However offensive this aspect of the newspaper's copy may have been to the individuals in power, it offered no conceivable justification for harassment, much less suppression.

The *Expositor*'s most specific complaints against Joseph's and Hyrum's political conduct or their qualifications for office were the charges that they had defied the law by using the writ of habeas corpus: (a) to release prisoners held in the custody of state or federal authorities and (b) to try the guilt or innocence of parties who applied for the writ. An evaluation of these charges requires a discussion of the habeas corpus law in Illinois in 1844.

Honored as the "highest safeguard of liberty," the writ of habeas corpus was the command by which a court or judge required a person who had another in custody to produce the prisoner and explain the cause of his detention.[64] In Illinois during the Nauvoo period, the law of habeas corpus was the common law, as modified by the Illinois Habeas Corpus Act of 1827 and supplementary legislation. These laws authorized the writ of habeas corpus to be issued by the Illinois Supreme Court, by various circuit courts, or by any of the judges of these courts or the masters in chancery.[65] In addition—and this was the source of contention—the legislative charter of the city of Nauvoo gave its municipal court "power to grant writs of habeas corpus in all cases arising under the ordinances of the city council."[66] The *Expositor*'s complaint related to several instances where the Nauvoo court had issued this writ to bring before it prisoners in the custody of state or federal officers, held hearings on the prisoners' guilt or innocence, and ordered them discharged.

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63. See, e.g., Mott, *American Journalism* 237, 255, 263, 310 (3d ed. 1941); Mott, *A History of American Magazines, 1741–1850,* 159–60 (1930); *Truth's Advocate* and *Monthly Anti-Jackson Expositor,* January–October, 1821 (Cincinnati newspaper).

64. Oaks, *Habeas Corpus in the States—1776–1865*, 32 *University of Chicago Law Review* 243 (1965).

65. Ill. Rev. Stat. §1, at 322 (1833) (Habeas Corpus Act of 1827); Ill. Laws 1834–35, §2, at 32.

66. Ill. Laws 1840, §17, at 55.

The legality of this action will be considered first from the standpoint of the special problems involved in issuing the writ for a federal prisoner. Courts that had ruled on the matter prior to 1844 were practically unanimous in the opinion that state courts had the power to issue the writ of habeas corpus for persons held by federal officers. In 1858, a leading authority on habeas corpus law declared: "It may be considered settled that state courts may grant the writ in all cases of illegal confinement under the authority of the United States."[67] Among the cases relied upon were recent decisions by the supreme courts of Ohio and Wisconsin holding that the courts of those states had properly issued their writs of habeas corpus for prisoners arrested by federal officers or tried, convicted, and imprisoned by federal courts.[68] It was not until 1859, when the Supreme Court of the United States reversed the Wisconsin judgment in the leading case of *Ableman v. Booth,*[69] that it was established that persons held in federal custody could not be freed by a writ of habeas corpus issued by a state court. Consequently, there was nothing in federal statutory or state common law that forbade a court like Nauvoo's that the state had authorized to issue the writ of habeas corpus from issuing the writ for a federal prisoner. It is equally true, however, that there was nothing to prevent a state from voluntarily forbidding its courts to interfere with the custody of federal prisoners.

Since the city of Nauvoo derived its authority from state law, the question whether the municipal court had jurisdiction over state prisoners was simply a question whether the legislature had given the court that authority in the Nauvoo City Charter. The relevant charter provision, giving the municipal court "power to grant writs of *habeas corpus* in all cases arising under the ordinances of the city council," might have been read narrowly so that the court would have power to issue the writ only in those cases where the prisoner was confined by the authority of the city of Nauvoo.

The habeas corpus provision could also be read more broadly to give the court power to investigate any confinement, state or federal, within the city of Nauvoo that was in violation of the terms of a valid ordinance of the city of Nauvoo. During summer and fall 1842, when Missouri was striving feverishly to extradite Joseph Smith, the Nauvoo authorities relied on this later interpretation to enact an ordinance which provided that whenever any person should be "arrested or under arrest" in Nauvoo he could be brought before

67. Hurd, *Habeas Corpus,* 166 (1858).

68. In the Matter of Collier, 6 Ohio St. 55 (1856); *In re* Booth & Rycraft, 3 Wis.157 (1855); *In re* Booth, 3 Wis.1 (1854).

69. 62. U.S. (21 How.) 506 (1859).

the municipal court by a writ of habeas corpus. The court was thereupon required to "examine into the origin, validity and legality of the writ of process under which such arrest was made."[70] Since this portion of the ordinance does not seem to have exceeded the council's charter authority to make ordinances "as they may deem necessary for the peace, benefit, good order, regulation, convenience and cleanliness of said city,"[71] it probably offers a valid basis for the issuance of the writ of habeas corpus if the broader construction of the charter's habeas corpus powers is the correct one.

Governor Ford conceded that the officials of Nauvoo "had been repeatedly assured by some of the best lawyers in the State who had been candidates for office before that people, that it [the municipal court] had full and competent power to issue writs of habeas corpus in all cases whatever."[72] The foregoing discussion shows that their advice had considerable support in the law of that time. The better construction of the charter provision gave the municipal court authority to issue its writ of habeas corpus for any confinement within the limits of the city—state or federal—that was in violation of any valid ordinance of the city council. The *Expositor*'s first criticism of the Nauvoo court's habeas corpus actions was, therefore, legally unjustified.

The *Expositor*'s second complaint about the Nauvoo writ of habeas corpus—that the Nauvoo authorities defied the law by using habeas corpus to try the guilt or innocence of parties who applied for the writ—was also unfounded. These complaints concern instances wherein individuals held under warrants of arrest in Nauvoo were given a writ of habeas corpus to bring them before the municipal court, which held a hearing upon their cases and gave them discharges.[73]

But it is apparent that this action and most, if not all, of the others complained of were perfectly legal uses of the writ of habeas corpus. Under Illinois law, typical of the state law of that period, a person who had been arrested was promptly taken before a judicial officer—typically a justice of the peace—for an examination to determine "the truth or probability of the charge exhibited against such prisoner or prisoners, by the oath of all witnesses attending."[74]

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70. *History of the Church,* 6: 88.

71. Ill. Laws 1840, §11, at 54.

72. Ford, *History of Illinois,* 325 (1854). See *History of the Church,* 5:466–68, 471–73.

73. Joseph Smith's journal notes the following instances: *History of the Church,* 5:461–74 (Joseph Smith released from Governor's extradition warrant); *History of the Church,* 6:418–22 (Jeremiah Smith released from custody of two different federal marshals acting under writs issued by federal district judge). The court also used the writ to free persons seized under civil process. *History of the Church,* 6:80, 286.

74. Ill. Rev. Stat. §3, at 221 (1833).

The judicial officer would hear the evidence and then decide whether to commit the prisoner to jail to await trial or action of the grand jury, admit him to bail, or discharge him from custody. Although based upon evidence of guilt or innocence, the decision at the examination was only preliminary. If discharged, the prisoner could still be rearrested if additional evidence was secured. If held in jail or admitted to bail, he could still prove his innocence at his trial.

One might wonder if it would have been an abuse of the writ of habeas corpus to use it to consider questions of guilt or innocence, for one important role of habeas corpus was to determine whether the arrest warrant was free from any formal defects and perhaps whether the warrant had been based on sufficient written evidence.[75] But several states, including Illinois, assigned a broader role to habeas corpus, as explained in this passage from a Philadelphia lawyer's 1849 book on habeas corpus:

> There is, however, an engraftment upon its use, as we derived this writ from the English law, which seems to have grown into strength in America, in some of the States by judicial decision, and in others by express statutory enactment, viz.: the hearing the whole merits and facts of the case upon habeas corpus, *deciding* upon the guilt or rather upon the *innocence* of the prisoner, and absolutely discharging him without the intervention of a jury, where the court is of opinion that the *facts* do not sustain the criminal charge.[76]

In Illinois this approach was embodied in the statutory provision that permitted a petitioner for habeas corpus to "allege any facts to shew, either that the imprisonment or detention is unlawful, or that he is then entitled to his discharge," and empowered the court or judge to "proceed in a summary way to settle the said facts, by hearing the testimony … and dispose of the prisoners as the case may require."[77] Under these provisions, an Illinois prisoner who had been arrested under a warrant issued by a justice of the peace[78] could validly use a writ of habeas corpus to obtain a judicial review of his case, including a hearing at which he could present witnesses or other evidence and a judicial determination of his guilt or innocence (to the limited extent of discharging him if he was clearly innocent, or holding him in

75. Church, Habeas Corpus §§234–35 (1884); Oaks, *supra* note 106, at 258–60.

76. Ingersoll, *History and the Law of the Writ of Habeus Corpus,* 39–40 (1849).

77. Ill. Rev. Stat. §3, at 324 (1833).

78. Ill. Rev. Stat. §3 at 324 (1833).

custody or admitting him to bail if there was probable cause to believe that he had committed the charged offense). The Nauvoo Municipal Court may have erred in its application of these principles, and some of its members seem to have misapprehended the significance of the discharge—considering it a final adjudication of innocence that would preclude any further arrest or trial—but the power that the court exercised was clearly authorized by law, not in defiance of it.

The *Expositor*'s charges about abuse of the writ of habeas corpus have provided the occasion for a discussion of the municipal court's use of this ancient and honored remedy. It is readily apparent that, even though the *Expositor*'s charges of abuse of the writ were not well founded, the whole subject was well within the area of political controversy. There was nothing in the *Expositor*'s political copy that gave the authorities of Nauvoo any legal basis whatever for the suppression of the newspaper.

The same can be said of the *Expositor*'s charges that Joseph Smith was teaching false religious doctrines, notably polygamy. Since the Illinois Constitution provided that "no human authority can in any case whatever control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious establishments or modes of worship,"[79] the teachings of religion could not properly be the concern of any civil authority. Consequently, the doctrinal controversy in the *Expositor* offered no conceivable basis for suppressionary action by city authorities.

Probably the most provocative portions of the *Expositor* were the claims that Hyrum Smith was a "base seducer, liar and perjurer" and the charges that Joseph Smith had spread "death, devastation and ruin," that he had committed fraud in handling Church monies, and that he was guilty of practicing whoredoms and had engaged in numerous seductions, which were said to have caused the untimely death of the women involved.

Volumes have been written about the truth or falsity of these and similar charges relating to the character of the Mormon leaders.[80] For present purposes it is unnecessary—even if it were possible—to resolve the conflicts between their detractors and defenders. Whether the charges were true or false, they were malicious, scandalous, and defamatory.[81] In view of the Mormons' undoubted affection for their leaders, the virulent attacks upon

79. Ill. Const. art. VIII, §3 (1818).

80. *E.g.,* Brodie, *No Man Knows My History* (1945); Evans, *Joseph Smith—An American Prophet* (1933); O'Dea, *The Mormons* (1957).

81. Defamation, which includes libel and slander, consists of an attempt by words or pictures to blacken a person's reputation or to expose him to hatred, ridicule, or contempt. Prosser, Torts §92, at 574, §96, at 630 (2d ed. 1955).

them had a tendency to provoke retaliatory mob action against the newspaper by the citizens of Nauvoo. The councilmen also feared that the first and subsequent issues of the *Expositor* would arouse mobs of anti-Mormons to come to Nauvoo to drive out its citizens. Subsequent events, notably the mob murder of Joseph Smith and the eventual expulsion of the Mormons from Nauvoo by armed mobs, suggest that these fears were not groundless. Each of these aspects of the *Expositor*'s charges was a legitimate concern of the city government and a possible basis for its suppressionary action.

The Legality of the Suppression

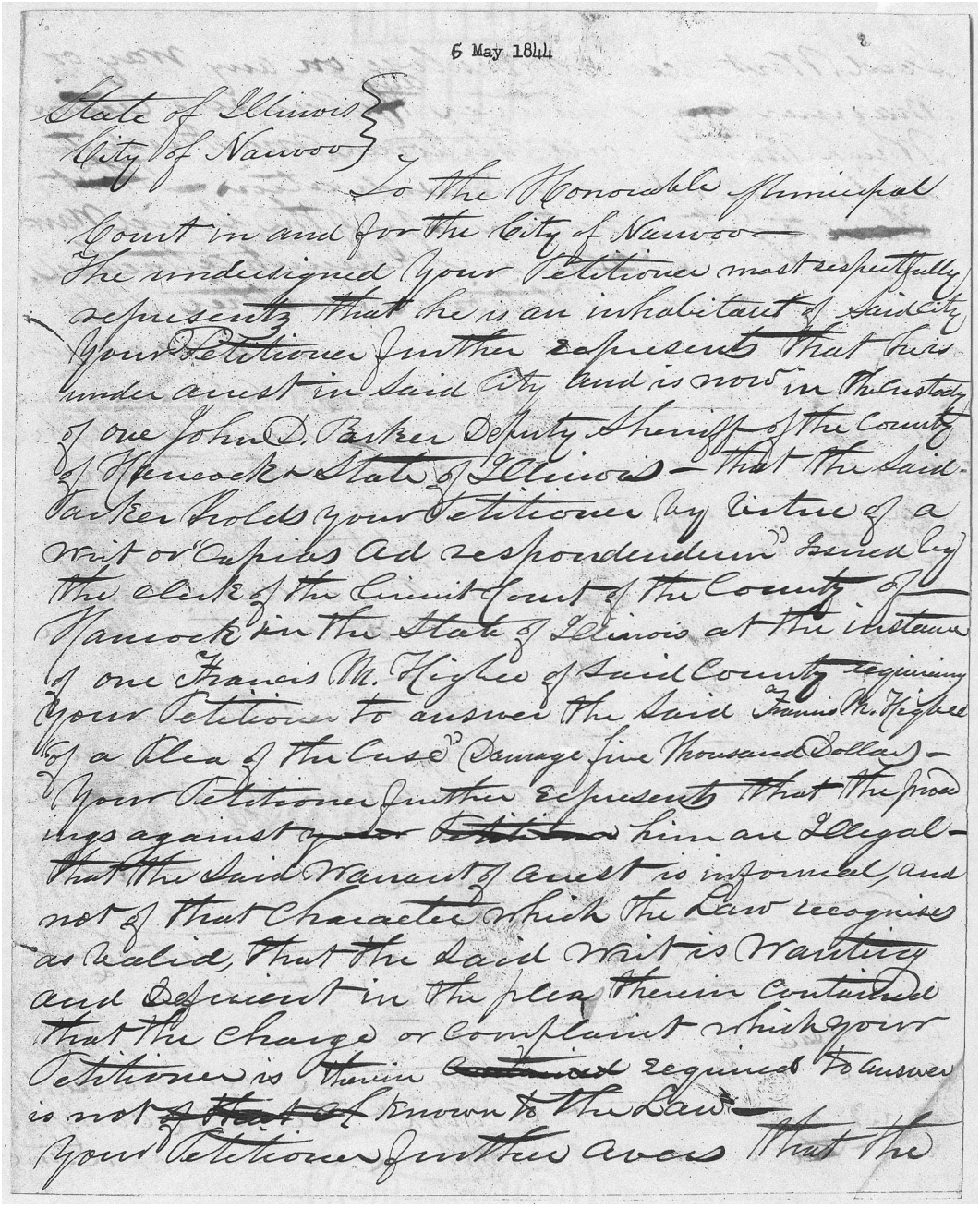
Governor Ford and subsequent commentators have made three objections to the legality of the council's action in suppressing the *Expositor.* First, the council had gone beyond its legislative powers of defining a nuisance by general ordinance and had entered upon the judicial prerogative of passing judgment on individual acts, all without notice, hearing, or trial by jury. Second, a newspaper, however scurrilous or libelous, cannot be legally abated or removed as a nuisance. Third, the council's action violated the state constitutional provision insuring the liberty of the press.[82] These points will be discussed in that order.

The Council's Power to Abate Nuisances. So far as municipal government law is concerned, Governor Ford's insistence that "the Constitution abhors and will not tolerate the union of legislative and judicial power in the same body of magistracy"[83] was totally without merit. The concept of separation of legislative, executive, and judicial authority, so vital in our federal government, has relatively little application at the municipal level. The blend of legislative and executive authority inherent in the mayor-council form of government was and is familiar. Less common, but by no means unique, was the combination of executive, legislative, and judicial powers established by the Illinois General Assembly in the Nauvoo Charter. The city council was composed of the mayor, four aldermen, and nine councilors.[84] This was the lawmaking body, whose legislative authority expressly included the power (invoked in the destruction of the *Expositor*) "to make regulations to secure the general health of the inhabitats [*sic*], to declare what shall be a nuisance, and to prevent and

82. These are the main problems identified by Governor Thomas Ford. Ford, *History of Illinois,* 325–27 (1854); *History of the Church,* 6:534–35.

83. *History of the Church,* 6:535.

84. 8 Ill. Laws 1840, §6, at 53. A complete copy of the Nauvoo Charter also appears in Gregg, *The Prophet of Palmyra,* 463–71 (1890), and in *History of the Church,* 4:239–48.



6 May 1844

State of Illinois }
City of Nauvoo }

To the Honorable Municipal Court in and for the City of Nauvoo—

The undersigned Your Petitioner most respectfully represents that he is an inhabitant of said city Your Petitioner further represents that he is under arrest in said City and is now in the custody of one John D. Parker Deputy Sheriff of the County of Hancock State of Illinois—that the said Parker holds your Petitioner by virtue of a Writ or "Capias Ad respondendum" issued by the clerk of the Circuit Court of the County of Hancock in the State of Illinois at the instance of one Francis M. Higbee of said County requiring your Petitioner to answer the said Francis M. Higbee of a plea of the case "Damage five Thousand Dollars"—

Your Petitioner further represents that the proceedings against ~~him for Libel~~ him are illegal—that the said Warrant of arrest is informal, and not of that Character which the Law recognises as valid, that the said Writ is Wanting and Defficient in the plea therein Contained that the Charge or Complaint which your Petitioner is therein ~~Charged~~ required to answer is not ~~that of~~ known to the Law—

Your Petitioner further avers that the

Petition of Joseph Smith for a writ of habeus corpus filed with the Nauvoo Municipal Court to quash an arrest warrant served on Joseph Smith based on a complaint of slander raised by Francis M. Higbee. Church History Library.

said Writ does not disclose in any way or manner any whatever any cause of action which Matter your Petitioner most Respectfully submits for your consideration — That together with a copy of the said Warrant against which is herewith attached.

Your Petitioner further States that this proceeding has been instituted against him without any just or legal cause and further that the said Francis M. Tighe is actuated by no other motive than a desire to persecute and harass your Petitioner for the base purpose of gratifying feelings of revenge which without any cause the said Francis M. Tighe has for a long time been fostering and cherishing —

Your Petitioner further States that he is not guilty of the Charge preferred against him or of any act against him by which the said Francis M. Tighe could have any Charge Claim or demand whatever against your Petitioner —

Your Petitioner further states that he believes that another object the said F. M. Tighe had in instituting this proceeding was and is to throw your Petitioner into the hands of his Enemies that he might the better carry out a Conspiracy which has for some time

remove the same."[85] The judicial authority was vested in the individuals who were mayor and aldermen. As a group, they comprised the municipal court. In addition, the mayor had exclusive jurisdiction in all cases arising under city ordinances, and he, with the various aldermen, had all the powers of justices of the peace within the limits of the city, both in civil and in criminal cases arising under state law.[86]

The traditional function of legislative power is to enact general legislation to define what constitutes a crime, leaving it to the judiciary to determine whether individual acts or conditions come within that definition. Therefore, Governor Ford criticized the Nauvoo City Council for assuming both legislative and judicial functions by declaring particular property to be a nuisance and simultaneously ordering its abatement without first laying the matter before a court. In his conference with the governor in Carthage, Joseph Smith undertook to justify this action on the ground that the council represented both legislative and judicial powers:

> I cannot see the distinction that you draw about the acts of the City Council, and what difference it could have made in point of fact, law, or justice, between the City Council's acting together or separate, or how much more legal it would have been for the Municipal Court, who were a part of the City Council, to act separate, instead of with the councilors.[87]

There are two reasons Joseph Smith's argument was not well founded and the council's action cannot be justified on the basis of the judicial powers of some of its members. First, judicial power cannot be validly exercised without notice to interested parties and an opportunity for them to be heard. The owners and publishers of the *Expositor* were not given notice or hearing. Second, the Nauvoo Charter guaranteed "a right to a trial by a jury of twelve men in all cases before the municipal court,"[88] and there was, of course, no jury trial prior to the suppression.

Joseph Smith was on sounder ground, however, in the original explanation he gave of the *Expositor* suppression as simply an exercise of the council's legislative authority to abate nuisances.[89] The destruction or removal (abatement) of nuisances was one of those classes of acts that the common

85. Ill. Laws 1840, §13 at 54–55.
86. Ill. Laws 1840, §§16–17, at 55.
87. *History of the Church,* 6:584–85.
88. Ill. Laws 1840, §17, at 55.
89. *History of the Church,* 6:538.

law permited without the interposition of judicial power. Blackstone, whose definitive work on the common law was studied by the councilors to determine the legality of their proposed action, states that certain nuisances may be abated by the aggrieved party without notice to the person who committed them.[90] The leading American case on summary abatement at this time was an 1832 decision by the highest court of the state of New York concerning the right of the city of Albany to pass an ordinance declaring a structure in its harbor to be a public nuisance and directing its officers to abate it by destruction (without any judicial proceedings).[91] The court held that the municipality's proposed action was a valid exercise of its common law powers and of the police power conferred by its statutory authority to abate nuisances and that no judicial hearing was required.

Blackstone and this same New York case were the principal authorities followed by the Illinois Supreme Court in 1881 in a nuisance-abatement case.[92] There the court held that a municipality's charter authority to abate nuisances permitted it to pass a valid ordinance ordering its marshal (without any judicial proceedings) to remove a roof that did not conform to fire regulations from a private home and destroy it, without any liability for damages. Similarly, in a later case the Illinois Supreme Court said that a municipality (whose charter powers to abate nuisances were practically identical to those of Nauvoo) could properly provide by ordinance that a certain house infected with smallpox germs be summarily abated by burning, if the circumstances were such that less drastic measures were not feasible.[93]

From the authorities discussed above it appears that the first objection to the Nauvoo Council's action—that it wrongly failed to use or that it improperly exercised judicial powers—was without foundation. If the *Expositor* was a nuisance, and if it was the sort of nuisance that permitted summary abatement, the council's legislative powers sufficed to justify the action taken. These two qualifications will be discussed next.

Abatement of Newspapers as a Nuisance. The common law defined a nuisance as any unreasonable, unwarranted, or unlawful use of property, or any improper, indecent, or unlawful personal conduct that produced material annoyance, inconvenience, discomfort, or injury to others or their property.[94] Nuisances were private when they affected particular individuals, and

90. 2 Blackstone, *Commentaries,* 4–5 & n.6 (Am. ed. from 18th Eng. ed. 1832).

91. Hart v. Mayor of Albany, 9 Wend. 571 (N.Y. Ct; Err. 1832).

92. 9 King v. Davenport, 98 Ill. 305, 311 (1881).

93. Sings v. City of Joliet, 237 Ill. 300, 86 N.E. 663 (1908).

94. 1 Wood, Nuisances §1 (3d ed. 1893).

public when their effect was general. Under this definition, if the *Expositor* was a nuisance at all it could have been classified as both a public and a private nuisance, since its inflammatory language not only injured private individuals but were also of such a scandalous and provocative character as to be of concern to the community at large. A party injured by a private nuisance could sue to obtain damages or to compel its removal. The commission of a public nuisance was punishable as a crime. In addition, in certain circumstances private individuals could abate private nuisances and private individuals or public officials could abate public nuisances.[95] There seems to have been considerable basis from which a person acting in 1844 could have concluded that a publication devoted to malicious, scandalous, and defamatory matter likely to provoke mob action could be abated as a nuisance.

The passage of Blackstone's *Commentaries* referred to by the Nauvoo city councilors in their deliberations on what measures should be taken against the *Expositor* reads as follows:

> (6) … As to private nuisances, they also may be abated.… So it seems that a libellous print or paper, affecting a private individual, may be destroyed, or, which is the safer course, taken and delivered to a magistrate. 5 Coke, 125, b. 2 Camp. 511.[96]

The basis for the statement in footnote six—the passage specifically relied on by the councilors[97]—is the classification as a private or public nuisance of whatsoever has a deleterious influence upon the morals, good order, or well being of society. For example, in a case decided in 1854, the Illinois Supreme Court gave its opinion that obscene books, prints, and pictures could be categorized as a public nuisance because they were hurtful and injurious to the public morals, good order, and well-being of society.[98]

Authorities suggest three bases for the characterization of the *Expositor* and its individual issues as a nuisance. The safety and good order of the community were threatened by the *Expositor:* (1) because the reaction of an outraged citizenry threatened the annihilation of the newspaper and perhaps the injury of its publishers by mob action in the city; (2) because its continuance might incite mob action by anti-Mormons in the surrounding areas against the city and its inhabitants; and (3) because of their scurrilous, defamatory,

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95. Wood, Nuisances §2 at 941–70 (3d ed. 1983).

96. 2 Blackstone, *Commentaries,* 4–5 & n.6 (Am. ed. from 18th Eng. ed. 1832).

97. *History of the Church,* 6:445, 538, 581; see note 148 supra.

98. See Goddard v. President of Jacksonville, 15 Ill. 589, 594 (1854); 2 Russell, *Crimes 1731* (8th ed. 1923).

and perhaps obscene character, the individual newspapers were offensive to public morals. In view of the law discussed previously, particularly the statement in Blackstone, the combination of these three considerations seems to have been sufficient to give the Nauvoo City Council considerable basis in the law of their day for their action in characterizing *the published issues* of the *Nauvoo Expositor* as a nuisance and in summarily abating them by destruction.

The characterization of the printing press as a nuisance, and its subsequent destruction, is another matter. The common law authorities on nuisance abatement generally, and especially those on summary abatement, were emphatic in declaring that abatement must be limited by the necessities of the case, and that no wanton or unnecessary destruction of property could be permitted. A party guilty of excess was liable in damages for trespass to the party injured. This principle was illustrated by an Illinois court shortly after the *Expositor* affair.

The Illinois Supreme Court rendered an opinion[99] in an action for damages for trespass against a citizen who had broken into a saloon, smashed glasses, boxes, and beer kegs, and had torn down the building on the pretext of abating a public nuisance. The court affirmed the saloon keeper's right to recover damages from the intruder. Even if the house were a public nuisance, the court said, "neither the common law nor the statute has authorized individuals or communities to tear down and destroy the buildings in which such unlawful business is pursued, nor does either permit the courts, on conviction, to have such buildings destroyed or abated."[100]

The principle applied in this case was that set forth in Blackstone's discussion of nuisances, which the council studied and used as authority for its abatement ordinance.[101] This case makes clear that there was no legal justification in 1844 for the destruction of the *Expositor* printing press and type as a nuisance. Its libelous, provocative, and perhaps obscene output may well have been a public and a private nuisance, but the evil article was not the press itself but the way in which it was being used. Consequently, those who caused or accomplished its destruction were liable for money damages in an action of trespass.

Constitutional Guarantee of Free Press. It was not the destruction of private property without compensation that caused Joseph Smith and his associates to be condemned for the *Expositor* affair. The principal complaint

99. Earp v. Lee, 71 Ill. 193 (1873).

100. Earp v. Lee, 71 Ill. 193 (1873).

101. 2 Blackstone, *Commentaries,* 4–5 & n.6 (Am. ed. from 18th Eng. ed. 1832).

would have been the same if the council had silenced the paper by a court order, by jailing the editor, or by padlocking the premises. The most important legal aspect of the *Expositor* suppression—the one that served to enrage public opinion, disenchant sympathetic historians, and offend the sensibilities of modern students—is the charge that the action violated the freedom of the press.

The major modern bulwark of the free press, the first amendment to the United States Constitution, had no application to the suppression of the *Nauvoo Expositor.* By its terms, the First Amendment only restricts the action of the federal government, and it was not until long after the Fourteenth Amendment was adopted in 1868 that the free-press guarantees became applicable to the agencies of state authority.[102] Therefore, the only constitutional free-press guarantees relevant to the *Expositor* suppression are those that were embodied in the Illinois Constitution.

The pertinent provision of the Illinois Constitution of 1818, then in effect, was section 22 of the Declaration of Rights:

> The printing presses shall be free to every person, who undertakes to examine the proceedings of the General Assembly or of any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.[103]

The constitutional status of the abatement of the *Expositor* as a nuisance depends on the meaning to be drawn from these words in 1844. Since the Illinois Supreme Court had given no opinion on the meaning of the above provision by 1844, it is necessary to examine the history of the free-press guarantees and the meaning ascribed to comparable language in neighboring states.[104]

Although the Illinois free-press provision seems to have been copied from the guarantees previously adopted by Kentucky, Ohio, and Indiana,[105] this particular phraseology was apparently first used in the Pennsylvania

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102. *E.g.,* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 707 (1931).

103. Ill. Const. art VIII, §22 (1818), reprinted in Ill. Rev. Stat. at 46 (1833).

104. See generally Duniway, "The Development of Freedom of the Press in Massachusetts," *Harvard Historical Studies* no. 12 (1906): 141; Schofield, *Essays on Constitutional Law and Equity,* 510–71 (1921); Kelly, "Criminal Libel and Free Speech," *Kansas Law Review* 6 (1958): 295.

105. Levy, *Preface* to *Legacy of Suppression* at vii (1960).

Constitution of 1790.[106] Because there seems to have been no early interpretive litigation in any of the first three states, the meaning that the Pennsylvania courts read into this provision is, therefore, of the greatest significance.

The first judicial opinion on the meaning of the general phrases later embodied in the Illinois Constitution came in a 1788 Pennsylvania case, which held that they simply meant that every citizen had a right to investigate the conduct of public officials "and they effectually preclude any attempt to fetter the press by the institution of a *licenser.*"[107] This view that the great general guarantees of a free press were simply a precaution against reinstitution of the historic prior restraints or censorships on publication was reiterated by James Wilson, a renowned lawyer and Justice of the United States Supreme Court, who drafted the 1790 Pennsylvania Constitution.

> What is meant by the liberty of the press is that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character and property of the individual.[108]

The Illinois Constitution also said that the editor should be "responsible for the abuse of that liberty." The usual form of responsibility was a civil action for damages or a state prosecution for criminal libel, particularly seditious libel, which consisted broadly of criticism of the form, officers, or acts of government. Such prosecutions were relatively common, especially at the turn of the nineteenth century.[109] The temper of the times is revealed by an 1805 Pennsylvania case. The defendant was indicted for seditious libel for statements in a weekly paper that were alleged to have been intended to bring the independence of the United States and the constitution of Pennsylvania into hatred and contempt, to excite popular discontent against the government, and to scandalize the characters of revolutionary patriots and statesmen. When the defendant urged the constitutional freedom of the press in defense, the Pennsylvania court gave this exposition of the meaning of the constitutional provision that was the prototype of the Illinois free-press guarantee:

> There shall be no licenses of the press. Publish as you please in the first instance without control; but you are answerable both to the community and the individual, if you proceed to unwarrantable lengths. No alteration is hereby made in the law as to

106. Anthony, *The Constitutional History of Illinois* 39 (1891).

107. Respublica v. Oswald, 1 Dall. 319,325 (Pa. 1788).

108. Levy, *Legacy of Suppression,* 201–2 (1960). (Emphasis omitted.)

109. Levy, *Legacy of Suppression,* 176–309 (1960).

> *private* men, affected by injurious publications, unless the discussion be *proper for public information.* But "If one uses the weapon of truth wantonly, for disturbing the peace of families, he is guilty of a libel."[110]

The cases decided before 1844 do not provide a definitive answer to the question whether the Illinois free-press guarantee would have permitted an agency of the state to use its nuisance-abatement powers to suppress a newspaper which was publishing material that offended the public's sense of decency or threatened the public peace or welfare. They do hold that the only purpose of the general free-press language was to prevent formal prior restraints upon publication, such as licensing and censorship.[111] They also show great judicial sympathy for stern repressive measures in the enforcement of the criminal libel and civil damage laws against newspaper editors who abused their privileges. Although the succeeding century was relatively free from litigation interpreting the free-press guarantees, the available evidence demonstrates that the nineteenth-century interpretation of constitutional provisions like that of Illinois laid far more emphasis on the "responsibility" of the press than on its "freedom."

The Illinois free-press guarantees would not have been an obstacle if the Nauvoo authorities had brought criminal prosecutions against the *Expositor* publishers for an abuse of the liberty of the press. A prosecution for criminal libel for the attacks on the city officials or a prosecution for unlawful assembly for the paper's efforts to incite violence would both have been feasible under Illinois laws then in effect.[112] The arrest and jailing of the editor and publishers might have stilled the *Expositor.* The same effect might also have been produced by suing these parties for damages for libel, obtaining judgment, and then satisfying the judgment by levying upon and selling the press. A third alternative, a suit for an injunction against the publication of the newspaper, was not feasible as a practical matter.

Two factors distinguish these alternatives from the method (abatement by destruction) used by the council. First, it can be argued that the destruction of the press was a prior restraint with respect to later issues of the *Expositor,* and, therefore, illegal under the predominant purpose of the free-press provision. Although admittedly forceful, this argument falls short of being

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110. Respublica v. Dennie, 4 Yeates 267, 269–70 *(Pa.* 1805). (Emphasis added.)

111. Beman, *Censorship of Speech and the Press,* 208–9 (1930); 2 Cooley, *Constitutional Limitations,* 883 (8th ed. Carrington 1927); Vance, "Freedom of Speech and of the Press," *Minnesota Law Review* 2 (1918): 239, 248.

112. Ill. Rev. Stat. §120, at 172 (1833); Ill. Rev. Stat. §115, at 196 (1833).

conclusive, for the free-press provision can be read to prohibit only licensing measures that allow the state to prevent *initial* publication of the writer's efforts. The constitutional provision clearly did not prevent criminal punishment, or civil attachment, even though either of these remedies could easily suppress subsequent writings. In numerous other instances, legislative bodies have imposed, and courts have approved, restraints prior to publication.[113] With the exception of avowed licensing measures, the prohibition against prior restraints, it seems, was relative and not absolute, and it is by no means obvious that the "prior restraint" rationale forbade what was done at Nauvoo.

Second, in a criminal prosecution or in a civil action for damages or an injunction, there is an interposition of judicial power between the party who desires to stop the newspaper and the application of the force that brings about that result. There was no such use of judicial power at Nauvoo. This is an important distinction to a people who believe in a rule of law. Nevertheless, there are circumstances in which the use of private property can be curtailed, forbidden, or, where necessary, even destroyed by the government or by private individuals without invoking judicial power. The summary abatement of nuisances, the theory on which the council proceeded, is one such example.

In sum, the action of the Nauvoo City Council in suppressing an opposition newspaper may have been the earliest example of official action of this type (in a day when mobs were not infrequently employed for the same purpose), but subsequent history shows that such official acts of suppression were not unique. The most striking example, because of its similarity to the events in Nauvoo, occurred in September 1927 when a weekly newspaper, the *Saturday Press,* was established in Minneapolis by Howard A. Guilford and J. M. Near. Its avowed mission was to furnish an exposé "of conditions AS THEY ARE in this city."[114] The various issues of the newspaper charged in brutally frank language that the *Twin City Reporter* and various city officials were in league with or part of the gangsters who controlled gambling, bootlegging, and racketeering in Minneapolis and linked them to various instances of blackmail, murder, and assault. The police chief was attacked for graft, neglect of duty, and companionship with gangsters; the county attorney was accused of failure to take corrective measures against known centers of vice; the mayor was castigated for inefficiency and dereliction of duty.[115]

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113. See Note, *Previous Restraints Upon Freedom of Speech,* 31 Colum. L. Rev. 1148, 1151–55 (1931).

114. Record, p. 15, Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) [hereinafter cited as Record].

115. Record, pp. 57–58, 96.

Minnesota at this time had a unique statute providing that any person who was engaging in publishing or circulating a malicious, scandalous, and defamatory newspaper was guilty of a nuisance and could be enjoined.[116] On November 21, two days after the ninth issue of the *Saturday Press,* the county attorney filed a complaint under the above statute alleging that the *Saturday Press* was largely devoted to malicious, scandalous, and defamatory articles and asking for an injunction to abate the nuisance.[117] The trial judge promptly issued an order restraining Guilford and Near from any further circulation of existing issues and from producing or publishing any further issues of the *Saturday Press.*[118] Two weeks later, the judge issued an opinion upholding the constitutionality of the Minnesota legislation and denying defendants' motion to dismiss the action.[119] Later, after a consideration of the evidence, the judge reaffirmed this conclusion and entered an order that the nuisance be abated and that defendants Guilford and Near be permanently enjoined from further publication or sale of the *Saturday Press* or any other malicious, scandalous, or defamatory newspaper.[120]

Twice this case was appealed to the Minnesota Supreme Court, and twice that court—without dissenting voice—affirmed the trial judge, holding that the suppressive action did not offend the constitutional guarantee of a free press.[121] The court rested on three main findings.

First, the Minnesota Supreme Court concluded that a newspaper, which exhibited "a continued and habitual indulgence in malice, scandal, and defamation," could validly be characterized as a nuisance within the meaning of the statute "since it annoys, injures, and endangers the comfort and repose of a considerable number of persons."[122] Second, the court ruled that, in declaring such a business to be a public nuisance, the statute was a legitimate exercise of the police power of the state:

> The distribution of scandalous matter is detrimental to public morals and to the general welfare. It tends to disturb the peace of the community. Being defamatory and malicious, it tends to provoke assaults and the commission of crime.[123]

116. Minn. Laws 1925, ch. 285, §1, at 358.
117. Record, pp. 4, 7.
118. Record, p. 1.
119. Record, p. 336.
120. Record, p. 360.
121. Record, p. 360.
122. State v. Guilford, 174 Minn. 457, 459 (1928).
123. State v. Guilford, 174 Minn. 457, 461–62 (1928).

Finally, the court ruled that the action taken did not offend the liberty of the press guaranteed by the Minnesota Constitution (a provision similar to Illinois'),[124] which simply "meant the abolition of censorship and that governmental permission or license was not to be required."[125] The court's opinion on what the freedom of the press did mean is worth reproducing at length.

> It was never the intention of the Constitution to afford protection to a publication devoted to scandal and defamation. He who uses the press is responsible for its abuse.... It is the liberty of the press that is guaranteed—not the licentiousness. The press can be free and men can freely speak and write without indulging in malice, scandal, and defamation; and the great privilege of such liberty was never intended as a refuge for the defamer and the scandalmonger.... A business that depends largely for its success upon malice, scandal, and defamation can be of no real service to society.
>
> It is not a violation of the liberty of the press or of the freedom of speech for the Legislature to provide a remedy for their abuse.... Indeed, the police power of the state includes the right to destroy or abate a public nuisance. Property so destroyed is not taken for public use, and therefore there is no obligation to make compensation for such taking. 6 R.C.L. 480, §478. The rights of private property are subservient to the public right to be free from nuisances which may be abated without compensation. 12 C. J. 1279, §1085. The statute involved does not violate the due process of law guarantee.[126]

Although the reaction of the nation's press to this decision was predictably intense, the ruling also had strong support, including the immediate endorsement of the Minnesota Legislature, which rejected an attempt to repeal the law by an 86 to 30 margin.[127]

Ultimately, the United States Supreme Court reversed this Minnesota judgment by a bare 5 to 4 majority in *Near v. Minnesota,*[128] the first case where the United States Supreme Court struck down the action of a state

124. Minn. Const. art. 1, §3.

125. 174 Minn. at 462, 219 N.W. at 772.

126. 174 Minn. at 462, 463–65.

127. Beman, *Censorship of Speech and the Press supra* note 180, at 321.

128. 283 U.S. 697 (1931).

for violating the freedom of the press. Interestingly, the Supreme Court did not find that the state practice constituted a prior restraint in the traditional sense. Rather, the practice was stricken in reliance upon an expanded concept of the free-press guarantees (made applicable to the states by the Fourteenth Amendment) as also forbidding other restraints on publication which, like the Minnesota statute, comprised "the essence of censorship."[129] Four dissenting justices, who adhered to the traditional definition, would have sustained the suppression.

The Minnesota opinion in the *Near* case stands at a turning point in the law of free speech. It was preceded and decisively influenced by the suppressionist philosophy that guided the action of numerous state authorities in the nineteenth century and even extended its effects into the twentieth century. It was followed by the enlightened liberalism of our own day, when the freedom of the press is so jealously guarded that we are able to forget that not many years have elapsed since lawyers and judges united in attempts to suppress and hold responsible the publications whose scandalous and provocative character were thought to have caused that freedom to be forfeited through abuse.

The facts that led to the suppression of the *Saturday Press* and the *Nauvoo Expositor* are strikingly similar, and the legal theories upon which each was suppressed are practically identical. The method of abatement—by destruction or by injunction—was different, but the end results and the consequences of the action so far as a free press was concerned were equivalent. The reasoning of the Minnesota opinion was a justification not only of what was done in Minneapolis, but also of what was done over eighty years earlier in Nauvoo. If the *Saturday Press,* like the *Nauvoo Expositor,* had been printed in 1844 (when there was no Fourteenth Amendment), this state court judgment abating a newspaper as a nuisance would have remained unchallenged.

The crucial issue to the legality of the *Expositor*'s suppression under the Illinois Constitution was whether the rule that the editor shall be "responsible for the abuse of that liberty" is limited to the prospect of civil damages and criminal penalties or whether it also includes the risk that the publication will be suppressed as a nuisance.

There was no direct precedent in 1844 to support the use of nuisance-abatement powers to suppress a newspaper like the *Expositor,* but there was no direct authority against such use either. Subsequent history shows that other government officials also undertook to exercise suppressionist powers beyond the conventional damage or criminal action, and some even found

129. 283 U.S. 697 (1931).

high judicial approval for the use of the nuisance device. Once the Nauvoo City Council had concluded that its nuisance-abatement powers extended to the abatement of newspapers publishing scandalous or provocative material, it would be unrealistic to have expected them to observe limitations that were not articulated clearly in any constitution, statute, or court decision of their day. To charge them with a willful violation of the Illinois free-press guarantees, one must overlook the suppressionist sentiments of the age in which they lived and attribute to them a higher devotion to the ideals of a free press than was exhibited from 1928 through 1931 by eight justices of the Minnesota and United States Supreme Courts.

Conclusion

A historian friendly to the people of Nauvoo has called the suppression of the *Nauvoo Expositor* "the grand Mormon mistake."[130] That its consequences were disastrous to the Mormon leaders and that alternative means might better have been employed cannot be doubted. Nevertheless, the common assumption of historians that the action taken by the city council to suppress the paper as a nuisance was entirely illegal is not well founded. Aside from damages for unnecessary destruction of the press, for which the Nauvoo authorities were unquestionably liable, the remaining actions of the council, including its interpretation of the constitutional guarantee of a free press, can be supported by reference to the law of their day.

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130. Durham, "A Political Interpretation of Mormon History," *Pacific Historical Review* 13 (1944): 136, 140.