

INVOLVING READERS
IN THE LATTER-DAY SAINT
ACADEMIC EXPERIENCE

BYU Studies Quarterly is dedicated to the conviction that the spiritual and the intellectual can be complementary and fundamentally harmonious. It strives to publish articles that reflect a faithful point of view, are relevant to subjects of interest to Latter-day Saints, and conform to high scholarly standards. *BYU Studies Quarterly* also includes poetry, personal essays, reviews, and never-before-published documents of significant historical value to The Church of Jesus Christ of Latter-day Saints. Contributions from all fields of learning are invited, and readers everywhere are welcomed.

ARTICLES

- 4** Habeas Corpus in Early Nineteenth-Century Mormonism:
Joseph Smith's Legal Bulwark for Personal Freedom
Jeffrey N. Walker
- 98** The 1890s Mormon Culture of Letters and
the Post-Manifesto Marriage Crisis:
A New Approach to Home Literature
Lisa Olsen Tait
- 125** A Mormon Approach to Politics
Thomas B. Griffith
- 136** Two Early Missionaries in Hawaii:
Mercy Partridge Whitney and Edward Partridge Jr.
Scott H. Partridge

REVIEW ESSAY

- 148** Faith and Same-Gender Attraction:
A Look at Ty Mansfield's *Voices of Hope*
Reviewed by Allen E. Bergin and Marian S. Bergin

BOOK REVIEWS

- 155** *Brigham Young, Pioneer Prophet* by John G. Turner
Reviewed by Thomas G. Alexander
- 159** *The Book of Mormon: A Biography* by Paul C. Gutjahr
Reviewed by Tod R Harris

- 166** *Joseph Smith, Jesus, and Satanic Opposition: Atonement, Evil, and the Mormon Vision* by Douglas J. Davies
Reviewed by Steven L. Olsen
- 170** *Shakers, Mormons, and Religious Worlds: Conflicting Visions, Contested Boundaries* by Stephen C. Taysom
Reviewed by Matthew J. Grow
- 174** *Exhibiting Mormonism: The Latter-day Saints and the 1893 Chicago World's Fair* by Reid L. Neilson
Reviewed by Marian Wardle
- 179** *Sacred Symbols: Finding Meaning in Rites, Rituals, and Ordinances* by Alonzo L. Gaskill
Reviewed by Herman du Toit
- 183** *Between Pulpit and Pew: The Supernatural World in Mormon History and Folklore* edited by W. Paul Reeve and Michael Scott Van Wagenen
Reviewed by Curtis Ashton

BOOK NOTICES

- 187** *The Tree of Life: From Eden to Eternity*
And Should We Die . . . : The Cane Creek Mormon Massacre
A Firm Foundation: Church Organization and Administration
The Man Behind the Discourse: A Biography of King Follett
No Weapon Shall Prosper: New Light on Sensitive Issues



JOSEPH SMITH, 1805–1844. Joseph Smith had many interactions with the legal system and developed a keen understanding of the law. This article examines the writ of habeas corpus in a historical legal context and demonstrates that his use of it fell well within the authoritative precedents and proper judicial practices of his time. Engraving by Danquart Anthon Weggeland. Courtesy Church History Museum.

Habeas Corpus in Early Nineteenth-Century Mormonism

Joseph Smith's Legal Bulwark for Personal Freedom

Jeffrey N. Walker

I. INTRODUCTION

Habeas corpus has been referred to as the cornerstone of the common law. Indeed, it is the “Great Writ of Liberty.”¹ Chief Justice John Marshall confirmed this singular status given to the writ of habeas corpus in 1807 when he called it the “great constitutional privilege.”² This article explores the use of this most famous writ during the early nineteenth century and specifically how Joseph Smith used it against those who sought his incarceration.

A writ of habeas corpus is essentially an order directing one who has a person in custody to deliver that person to a court so that the reasons for the incarceration can be independently reviewed. The legal process typically starts with a petition by the prisoner requesting a writ of habeas corpus to a local court authorized to hear the petition. If the local court determines that the petition has merit, it orders the person who has custody of the prisoner, often a sheriff, to bring the prisoner before a court with jurisdiction to hear the writ (compared to a court with jurisdiction to grant the petition) at a specific time and place. This is referred to as the “return.” At the hearing on the writ of habeas corpus, the court determines whether the prisoner is remanded back to jail, allowed to post bail, or discharged and released.³

1. Eric M. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* (New York: New York University Press, 2001), 1.

2. *Ex parte Bollman and Swartwout*, 8 U.S. (4 Cranch) 75, 95 (1807).

3. James Kent, *Commentaries on American Law* (O. Halstead, 1827), 2:22-30; Giles Jacob, *The Law-Dictionary* (I. Riley, 1811), 3:222-31; John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America and of*

During Joseph Smith's life (1805–1844), he invoked the habeas corpus laws on several occasions: From seeking review of his incarceration in Liberty Jail to seeking approval for the charter for the City of Nauvoo (which included the right of the municipal court to hear writs of habeas corpus) to seeking review of his arrests during the various extradition efforts to return him to Missouri, Smith developed a keen understanding of the protections that habeas corpus afforded, and he needed that understanding. Joseph Smith believed, and accurately so, that if he were to be jailed in Illinois as he had been in Missouri, he would not survive his incarceration. It was in fact his jailing in Illinois that ended in his murder.

Historians and commentators, however, have almost uniformly acquiesced that Joseph Smith's use of habeas corpus was unusual and overreaching.⁴ Some critics even assert that such improper use was a catalyst to his death.⁵ While it is true that some people in the 1840s were critical of Joseph's

the Several States of the American Union; with References to the Civil and Other Systems of Foreign Law, 2 vols. (T. & J. W. Johnson, 1839), 1:454–57. Blackstone explained the writ of habeas corpus as follows: “The writ of *habeas corpus*, the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice. But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; directed to the person detaining; another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention.” St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, 5 vols. (Philadelphia: William Young Birch and Abraham Small, 1803), 4:129, 131. For purposes of this article, when addressing the writ of habeas corpus, the author is speaking about the writ of *habeas corpus ad subjiciendum*.

4. See John S. Dinger, “Joseph Smith and the Development of Habeas Corpus in Nauvoo, 1841–44,” *Journal of Mormon History* 36 (Summer 2010): 136. “The Nauvoo City Council took an extremely expansive view of habeas corpus and enacted ordinances implementing that right to a degree that it infuriated non-Mormon neighbors in Illinois. In fact, the Nauvoo City Council habeas corpus laws were likely the most expansive version ever passed in the American or British legal systems.” See also, for example, Morris Thurston, “The Boggs Shooting and Attempted Extradition: Joseph Smith's Most Famous Case,” *BYU Studies* 48, no. 1 (2009): 5, 18–19, 54–56; Glen M. Leonard, *Nauvoo: A Place of Peace, a People of Promise* (Salt Lake City: Deseret Book, 2002), 281, 285; but compare Nate Oman, “Joseph Smith, Justice Frankfurter and the Great Writ,” *Times and Seasons*, January 28, 2005, <http://timesandseasons.org/index.php/2005/01/joseph-smith-justice-frankfurter-and-the-great-writ/> (accessed December 15, 2012).

5. Robert Flanders, *Nauvoo: Kingdom on the Mississippi* (Urbana: University of Illinois Press, 1965), 99: “The habeas corpus clause of the charter and the cavalier fashion in which the Mormons used it generated much popular fear and hatred,

use of the right of habeas corpus, and while lawyers in that day still argued about the correct application of this writ in particular cases, the idea that Joseph's use of habeas corpus was not fully within the laws of his day is not supported by careful legal analysis.

This article is intended to clarify and examine the history of habeas corpus, specifically how it was understood and used during the first half of the nineteenth century in America. With that foundation, this article will trace Joseph Smith's use of the writ of habeas corpus from the first time he sought the writ while incarcerated in Liberty Jail through the enactments of various ordinances dealing with habeas corpus while in Nauvoo to his use of the writ during the first two of three attempts by Missouri officials to extradite him from Illinois to Missouri in June 1841 and July 1842. The author is preparing an accompanying article to complete this examination of Joseph Smith's use of the writ of habeas corpus through the end of his life, including the last extradition effort by the Missourians in June 1843, his use of the writ after an arrest in May 1844 based on a complaint filed by Francis Higbee,⁶ as well as his use of habeas corpus after the destruction of the *Nauvoo Expositor*, an anti-Mormon newspaper, in June 1844. Finally, this second article will examine Smith's rulings as chief judge of the Nauvoo Municipal Court when others brought petitions for writs of habeas corpus to the court.⁷

There is a modern resurgence of interest in understanding the use of habeas corpus during the postarrest and preindictment phase arising from the imprisonment of prisoners accused of possible terrorist activities.⁸

and were the points upon which legal attacks on the whole charter were finally focused. Smith's riddled body at Carthage jail and the dissolution of the city corporation marked the conclusion of the issue." Morris Thurston similarly opined, "The Mormon prophet's successful repulsion of the three attempts by Missouri to extradite him was an important contributing factor in the Anti-Mormon frenzy. . . . Believing their elected officials and judges lacked the power and the will to bring the Mormon prophet to justice, the mob in Carthage became judge and executioner, shoving the law aside like a troublesome boulder in the road." Thurston, "Boggs Shooting and Attempted Extradition," 55–56.

6. Francis Marion Higbee (1820–1850) was an early convert to Mormonism joining in 1832. He was excommunicated from the Church on May 18, 1844. Higbee was a key participant in the publication of the newspaper the *Nauvoo Expositor* in June 1844.

7. During his tenure as the chief judge of the Nauvoo Municipal Court, Joseph Smith heard and ruled on at least eight petitions for writs of habeas corpus and subsequent hearings.

8. Marc D. Falkoff, "Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention," *Denver University Law Review* 86 (2009): 961–62. See also

Interestingly, understanding the application of this writ during the nineteenth century provides useful insight and perspective to its use in our modern environment.

II. HISTORY OF THE WRIT OF HABEAS CORPUS LEADING UP TO THE NINETEENTH CENTURY

As Sir Edward Coke appropriately opined, “He that knoweth not the reason of the law knoweth not the law.”⁹ A brief primer of the history of habeas corpus and its basic attributes is therefore appropriate before attempting a critical analysis of this most famous writ.¹⁰ Understanding the reason for the law of habeas corpus is a starting point to understanding how and why Joseph Smith used it.

The history of habeas corpus predates the Magna Carta of 1215¹¹ and can be traced to a series of writs from the Middle Ages providing protection from imprisonment unrecognized in law, which had the aggregate effect of

James Thornburg, “Aliens Detained at Guantanamo Bay Have a Constitutional Right to File Habeas Corpus Petitions in Federal Court: *Boumediene v. Bush*,” *Duquesne Law Review* 47 (2009): 179; Caprice L. Roberts, “Rights, Remedies, and Habeas Corpus—the Uighurs, Legally Free while Actually Imprisoned,” *Georgetown Immigration Law Journal* 24 (2009): 2; and Colin W. Masters, “Note: On Proper Role of Federal Habeas Corpus in the War on Terrorism: An Argument from History,” *Journal of Legislation* 34 (2008): 190.

9. Sir Edward Coke (1552–1634) as quoted in William S. Church, *A Treatise of the Writ of Habeas Corpus including Jurisdiction, False Imprisonment, Writ of Error, Extradition, Mandamus, Certiorari, Judgment, etc. with Practice and Forms VI* (A. L. Bancroft and Co., 1884), viii.

10. For a more complete history, see William F. Duker, *A Constitutional History of Habeas Corpus* (Westport, Conn.: Greenwood Press, 1980); Paul M. Bator, “Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,” *Harvard Law Review* 76, no. 3 (1963): 441; Clarke Forsythe, “The Historical Origins of Broad Federal Habeas Review Reconsidered,” *Notre Dame Law Review* 70 (1995): 1079; Dallin H. Oaks, “Habeas Corpus in the States—1776–1865,” *University of Chicago Law Review* 32, no. 2 (1965): 243; Dallin H. Oaks, “Legal History in the High Court—Habeas Corpus,” 64 *Michigan Law Review* 64, no. 3 (1966): 451. For a recent perspective on the development of this writ, see Paul D. Halliday, *Habeas Corpus from England to Empire* (Cambridge, Mass.: Harvard University Press, 2010).

11. Larry W. Yackle, *Postconviction Remedies* (Rochester, N.Y.: Lawyers Cooperative Pub. Co., 1981), sec. 4, 7–9. Blackstone notes that habeas corpus is “a doctrine co-eval [co-equal] with the first rudiments of the English constitution; and handed down to us from our Saxon ancestors.” Blackstone, *Commentaries*, 3:132. A cornerstone of the English constitution, the Magna Carta established that the will of the monarch, King John, was bound by the law. See generally Louis B. Wright, *Magna Carta and the Tradition of Liberty*, ed. Russell Bourne (Washington: American Revolution Bicentennial Administration, 1976), 56.

the modern writ.¹² The Magna Carta itself makes only an oblique reference to the writ of habeas corpus.¹³ This is because the writ had already emerged as the law by the time of the Magna Carta and was thus already a fundamental part of the unwritten common law of the land.

The four hundred years following the Magna Carta saw a growing tension between the rights of the individual and those of the state. This tension was most prominently seen in the increased use of the writ of habeas corpus as a tool to check the power of the state and to preserve the rights of the individual against the potentially arbitrary power of the king, his counsel, and his courts.¹⁴ As a result of this increased use coupled with the end of the English Civil Wars, the British Parliament codified the common law practice through the enactment of the Habeas Corpus Act of 1679.¹⁵

Habeas corpus laws traveled across the ocean to the American colonies with the full panoply of English common law and practice. This right was regarded as a fundamental protection guaranteed to each citizen, and historical records confirm that petitions for writs of habeas corpus were filed in colonial America.¹⁶ Indeed, the British restriction of this right was a major cause of the American Revolution.¹⁷ So fundamental was the right of habeas corpus that the Founding Fathers placed it in the Constitution

12. See W. S. Holdsworth, *A History of English Law*, 17 vols. (London: Methuen and Co., 1903), 1:95–98 (identifying pre-Magna Carta writs that functioned akin to the writ of habeas corpus); Henry Hallam, *View of the State of Europe during the Middle Ages* (A. C. Armstrong and Sons, 1880), 2:116–19.

13. “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.” Peter Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (Berkeley: University of California Press, 2008), 289.

14. See Linebaugh, *Magna Carta Manifesto*, 21–45; A. E. Dick Howard, *Magna Carta: Text and Commentary* (Charlottesville: University of Virginia Press, 1998), 14.

15. “The English Habeas Corpus Act of 1679 is the most significant part of the English law of habeas corpus for its impact on American law at the Founding. . . . James Kent considered the Act of 1679 to be ‘the basis of all the American statutes on the subject.’” Forsythe, “Historical Origins of Broad Federal Habeas Review Reconsidered,” 1095–96.

16. Church, *Treatise of the Writ of Habeas Corpus*, 35: “In 1706, an application was made to Chief Justice Sewall [in Massachusetts] for a writ of habeas corpus, and, although it was refused for satisfactory reasons, there is nothing to indicate that the court regarded it as a novel application.”

17. The Declaration of Independence, para. 20 (articulating objections to King George III’s abuse of his detention power); see generally Allen H. Carpenter, “Habeas Corpus in the Colonies,” *American Historical Review* 8 (1902): 18.

itself: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁸ While other important, even fundamental, rights were added to the Constitution by way of the Bill of Rights two years later, the writ of habeas corpus was established from the outset.¹⁹ This protection was further delineated in the Judiciary Act of 1789, which provided state defendants with the right to take federal questions to the United States Supreme Court by writs of error.²⁰

With such a storied history, it should be no surprise that each state’s original constitution included provisions for habeas corpus and that each of the fifty states currently has legislation authorizing state courts to issue writs of habeas corpus.²¹ Yet, throughout the history and evolution of the doctrine, the writ’s principal purpose has remained unchanged—to compel the person holding a prisoner to bring the prisoner before a court so that the propriety of the incarceration can be reviewed.

III. HISTORY OF THE WRIT OF HABEAS CORPUS IN NINETEENTH-CENTURY AMERICA

A. Introduction

The primary objective of traditional legal research is to find the most recently enacted statute or reported case. Indeed, it is the fundamental principle of research taught to every aspiring lawyer. While older cases may be helpful for context or to be used analogously, the most current pronouncements control. This methodology cannot be used when doing historical legal research. An understanding of the laws today has no place in determining the law in a prior period. Even trying to understand the law

18. U.S. Constitution, art. 1, sec. 9.

19. Alexander Hamilton, citing Blackstone, declared habeas corpus a “bulwark” of individual liberty, calling secret imprisonment the most “dangerous engine of arbitrary government.” Alexander Hamilton, no. 84 of *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), 512.

20. The Judiciary Act of 1789, ch. 20, sec. 25, 1 Stat. 73 (1789), was passed concurrently with the Bill of Rights. See also An Act to Provide Further Remedial Justice in the Courts of the United States, ch. 257, 5 Stat. 539, (1842). A writ of error allows a court of superior jurisdiction to examine the record of an inferior court and upon examination to affirm or reverse the same, according to law. Bouvier, *Law Dictionary*, 2:501–02; Giles Jacob, *The Law-Dictionary* (I. Riley, 1811) 2:398–414.

21. See Henry C. Black, *Black’s Law Dictionary*, fifth ed. (St. Paul, Minn.: West Publishing Co., 1979), 638; see generally Justin J. Wert, *Habeas Corpus in America: The Politics of Individual Rights* (Lawrence: University Press of Kansas, 2011), 10–13, 26–64.

of a prior time within the context of a modern understanding of that law is inherently problematic, as interpretations and applications change over time. Doing so skews perspectives and often conclusions as well.

Historical legal research requires the discipline to not look forward to subsequent events or laws; it is not an exercise to determine whether a judge's or attorney's proposition was subsequently validated, followed, or even cited. The primary historical objective is to determine whether the law was being properly applied according to the practice and status of the law of that time. It requires an understanding of the judicial system that then existed, the statutes and case law of the time, and the nature of the practice. These understandings are prerequisites to forming any legitimate opinion about the prosecution or defense in a particular historical judicial proceeding.

B. Nineteenth-Century vs. Modern Habeas Corpus Practices

Such a historical understanding is necessary when analyzing the writ of habeas corpus in America's nineteenth century, for many differences exist between the historical and modern use and interpretations. Between 1800 and 1850, there were 906 reported federal and state cases involving the use of habeas corpus (on average, less than eighteen per year).²² In contrast, today there are an average of more than twenty thousand reported habeas corpus cases each year,²³ with that number rising yearly. While this increase in filings is certainly a result of the dramatic growth in the population in America coupled with the increased size and complexity of the American judiciary, the numbers alone do not tell the whole story.

An even more telling observation of how this fundamental legal vehicle has changed during the past two hundred years emerges when one separates the early nineteenth century cases into the three different phases in

22. The author accessed LEXIS® searching in the all-federal and state courts database using the following search: "habeas w/2 corpus" with date restriction of 1/1/1800 and 12/31/1850. This search found 957 cases. Of the 957 cases, 906 dealt with habeas corpus while the others only made a mention of the writ.

23. In the twelve-year period from 2000 through 2011, the author located through the LEXIS® service 290,338 federal and state habeas corpus cases, thereby averaging more than 24,000 per year. The number steadily increased during that time. See also Nancy J. King, Fred L. Cheesman II, and Brian J. Ostrom, *Final Technical Report: Habeas Litigation In U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996* (Nashville, Tenn.: Vanderbilt University Law School, 2007), 9–10 (noting that each year since 1996, "more than 18,000 cases, or one out of every 14 civil cases filed in federal district courts, are filed by state prisoners seeking habeas corpus relief").

which a writ may be sought and compares them to a sampling of such filings today.

Habeas corpus can be sought anytime after an arrest. For purposes of discussion the application of habeas corpus is separated into three distinct phases (chart 1):

- (1) postarrest, but prior to indictment;²⁴
- (2) postindictment, but prior to conviction; and
- (3) postconviction.

During any of these three phases of the case, there are three principal outcomes of a writ for habeas corpus. First, the prisoner's writ could be denied and he would be remanded back to jail to await the outcome of the prosecution. Second, the prisoner's writ for release could be denied, but the prisoner would be offered bail pending trial. Third, the prisoner's writ could be granted in full and he would be discharged and released. The process for determining which outcome should result has been the central point of discussion of Joseph Smith's use of habeas corpus.

A review of the writs for habeas corpus reported during the first half of the nineteenth century shows that approximately 40 percent of the writs were filed after arrest but before indictment; approximately 10 percent were filed after indictment but before conviction; and 50 percent were filed after conviction (chart 2).

In contrast, today less than 1 percent of the habeas corpus cases are filed after arrest but before indictment; approximately 5 percent are filed after indictment but before conviction; and more than 95 percent of the cases are filed after conviction²⁵ (chart 3).

The change in the timing of habeas corpus use not only highlights differences in the judiciary, but also further undermines looking at the historical interpretation of habeas corpus through modern lenses. For example, today habeas corpus can be used to attack pretrial custody on criminal charges—to seek release on bail, to raise speedy trial or double jeopardy claims, to

24. An indictment is the written accusation of a crime found by a grand jury. See Bouvier, *Law Dictionary*, 1:496–98; Black, *Black's Law Dictionary*, 5th ed., 695.

25. See generally Andrea Lyon, Emily Hughes, Mary Prosser, and Justin Marceau, *Federal Habeas Corpus: Cases and Materials* (Durham, N.C.: Carolina Academic Press, 2010), 5–7 (modern use of habeas corpus is almost entirely a post-conviction procedure); Sara Rodriguez, “Appellate Review of Pretrial Requests for Habeas Corpus Relief in Texas,” 32 Tex. Tech. L. Rev. 45 (2000) (modern use of habeas corpus has limited pretrial application). Based on the commentary and the authors' sampling of modern habeas corpus cases, more than 95 percent are used after conviction and sentencing. A very small fraction of cases are brought before indictment and few after. Even in cases where allegations of pretrial errors exist, most are only brought after a conviction and the prisoner is incarcerated.

CHART 1. Three Periods in Which a Writ of Habeas Corpus May Be Used

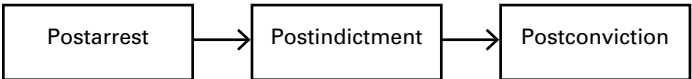


CHART 2. 1800–1850 Use for Writs of Habeas Corpus

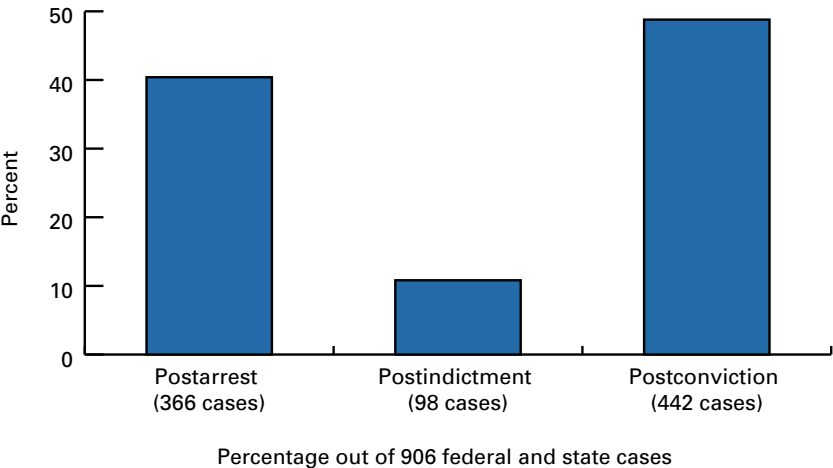
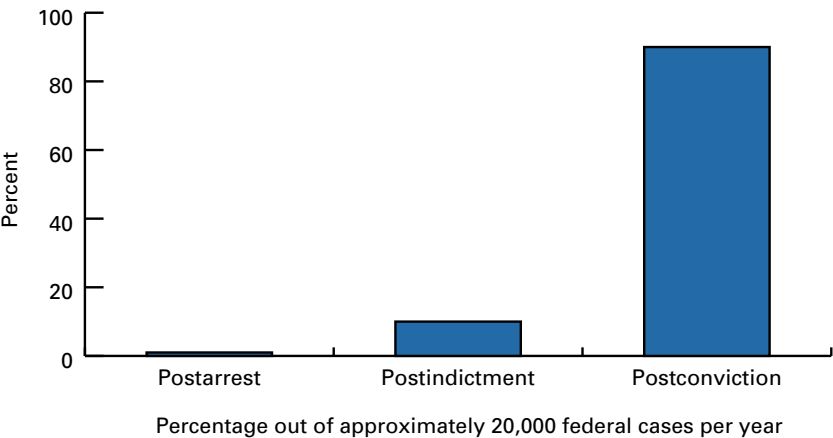


CHART 3. 2000–2011 Use for Writs of Habeas Corpus



attack unconstitutional conditions of confinement, or to contest interstate extradition. But the most common use of habeas corpus in the United States today is as a postconviction remedy. As such, habeas corpus is used to challenge custody pursuant to a criminal conviction on grounds that the conviction or the sentence was obtained in violation of a constitutional or other fundamental right. It may alternatively be used on grounds unrelated to the validity of conviction and sentence, as where the convicted person's parole was unlawfully revoked or denied or where the conditions of confinement are allegedly unconstitutional.²⁶

Thus, a modern paradigm provides no assistance in understanding Smith and his colleagues' use of habeas corpus during the 1830s and 1840s, since he was never convicted of any crimes in any court in any state.²⁷

C. Applying the Writ of Habeas Corpus in Nineteenth-Century America

To properly understand the application of the habeas corpus laws during Joseph Smith's time, we first look at the organization of the court system in that era. Next we consider the applicable legal commentary and case law that defined the use of habeas corpus in the various phases of litigation—from arrest to indictment to conviction—to determine how the application of the writ changed as the case moved through the legal process.

1. How the Nineteenth-Century American Judicial System Encouraged the Use of Habeas Corpus

Engaging in a discussion of Smith's use of habeas corpus first requires an understanding of how the judicial process has evolved over the past two hundred years. One dramatic evolution for purposes of this discussion is the change from a "term-based" court system to a "standing" court system. In the nineteenth century, with the exception of the most local level of the

26. Herbert M. Kritzer, *Legal Systems of the World: A Political, Social and Cultural Encyclopedia*, 4 vols. (Santa Barbara, Calif.: ABC-CLIO, 2002), 2:646; Donald E. Wilkes Jr., *2008–2009 State Postconviction Remedies and Relief Handbook* (St. Paul, Minn.: Thomson West, 2010).

27. Some have asserted that Joseph Smith was convicted in 1826 of being a disorderly person. See Wesley Walters, "Joseph Smith's Bainbridge, N.Y., Court Trials," *Westminster Theological Journal* 36, no. 2 (Winter 1974); but compare Gordon Madsen, "Joseph Smith's 1826 Trial: The Legal Setting," *BYU Studies* 30, no. 2 (1990): 91; Marvin S. Hill, "Joseph Smith and the 1826 Trial: New Evidence and New Difficulties," *BYU Studies* 12, no. 2 (1972): 223. The extant court records are incomplete, making a definitive determination impossible.

courts (typically the justices of the peace), a court would be in session only twice a year.²⁸ These terms were most often held in the spring (the May Term, or Spring Term) and the fall (the October Term). In contrast, modern courts, both state and federal, are in session throughout the year. This difference is central to the corresponding change in trends of filing petitions for writs of habeas corpus.

The two-term system created a unique situation wherein a person could be arrested for an alleged crime and held until the next term began. For example, if a person were arrested for a crime in November, after the October Term had concluded, his or her charges would not be brought before a grand jury until the May Term began. Moreover, if the charges were not bailable, that person could be held for five or more months, based only on an affidavit or a preliminary hearing. During this period, a prisoner would have both significantly more time and opportunity to seek a review of his or her incarceration by petitioning for a writ of habeas corpus. These long incarceration periods obviously increased the incentive to contest the incarceration.

It is during this early phase of the litigation that we see the emergence of an American approach that diverges from the traditional British one. Under British jurisprudence habeas corpus was fundamentally a vehicle to protect from misuse of the judicial processes or procedures. A review by a court on a writ of habeas corpus under this approach would be curtailed to whether the procedural requirements were satisfied. In contrast, under the emerging American approach, while due process considerations remained important, the courts began “looking behind the writ” to review the underlying charges that allegedly supported an arrest and detention.

It was in this very situation that Joseph Smith most often petitioned for and obtained writs of habeas corpus. For example, Smith and his colleagues found themselves in this exact situation when they were incarcerated at Liberty Jail. They were imprisoned based only on the testimony solicited during a preliminary hearing, but as the charges were nonbailable, they would remain in jail for more than five months until the next term of the court where a grand jury would be empanelled. Smith sought a writ of habeas corpus to not only have a court review the procedures of their arrest, but also to look behind the writ itself to determine whether the underlying charges were supported by admissible and sufficient evidence.

28. The Revised Statutes of the State of Missouri, sec. 16 at 169 (1845); “An Act Regulating the Terms of Holding the Circuit Courts in this State,” in *The Public and General Statutes Laws of the State of Illinois* (Stephen F. Gale, 1839), 180.

2. Nineteenth-Century Writs of Habeas Corpus after Arrest but before Indictment (First Phase)

While the most recognized treatise on habeas corpus was not written until 1858,²⁹ early commentaries are helpful in assessing Joseph Smith's use of habeas corpus. For example, Joseph Chitty's work on criminal law published in 1819³⁰ provides a general discussion regarding the propriety of looking behind the writ in ruling on a petition for habeas corpus during this first phase. Indeed, Chitty's discussion of looking into the underlying factual allegations indicates that it was a common, even expected examination:

We do not find that the mere informality of the warrant of commitment [a procedural aspect] is, of itself, a sufficient ground for discharging or admitting to bail; for the court will look into the depositions returned, and if the facts there sworn to seem to amount to felony, they will remand the party to prison. And, on the other hand, even though the commitment be regular; the court will examine the proceedings, and if the evidence [the factual aspects] appear altogether insufficient, will admit him to bail; for the court will rather look to the depositions which contain the evidence, than to the commitment, in which the justice may have come to a false conclusion.³¹

Chitty's explanation was further developed in 1827 by James Kent, who authored perhaps the most cited and authoritative treatise on nineteenth-century American law in his *Commentaries on American Law*. Kent traced American jurisprudence's departure from the British common law principle of limited procedural review on a writ of habeas corpus during this first phase of a possible incarceration:

Upon the return of the *habeas corpus*, the judge is not confined to the face of the return, but he is to examine into the facts contained in the return. . . . [and] authorizes the judge to re-examine all of the testimony taken before

29. "There is now but one work [on habeas corpus], to our knowledge, upon the subject, and the first edition of that appeared in 1858, followed by a second in 1876." Church, *Treatise of the Writ of Habeas Corpus*, vii.

30. Joseph Chitty, *A Practical Treatise on the Criminal Law; Comprising the Practice, Pleadings, and Evidence which Occur in the Course of Criminal Prosecutions, Whether by Indictment or Information: with a Copious Collection of Precedents of Indictments, Informations, Precedents, and Every Description of Practical Forms, with Comprehensive Notes as to Each Particular Offence, the Process, Indictment, Plea, Defence, Evidence, Trial, Verdict, Judgment, and Punishment* (Edward Earle, 1819). Throughout his career, Chitty authored many treatises and other legal works, so many volumes that Chitty is considered to be the first "professional" legal writer. See *Biographical Dictionary of the Common Law* (London: Butterworth Legal Publishers, 1984).

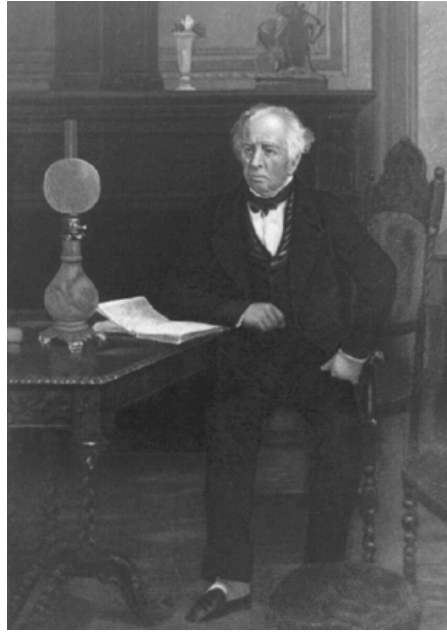
31. Chitty, *Practical Treatise on Criminal Law*, 87.

the magistrate who originally committed, and to take further proof on the subject, for he is “to examine into the facts.”³²

Kent’s explanation on looking behind the writ in a petition for habeas corpus is further developed in Rollin Hurd’s seminal 1858 work, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and the Practice Connected with It with a View of the Law of Extradition of Fugitives*, wherein he conducted a careful analysis of the United States Supreme Court 1807 case *Ex parte Bollman & Swartwout*.³³ This case involved Erik Bollman and Samuel Swartwout’s use of habeas corpus to challenge the charges of treason brought against them for recruiting persons to participate in Aaron Burr’s failed attempt to create a separate nation in the West. Hurd examined how the Supreme Court addressed the use of extrinsic evidence in proving or defending the charge of treason, outside of that evidence presented in the charging pleadings used in the initial arrest.³⁴

Hurd noted that the Supreme Court addressed the issue again in the principal Burr case itself, finding,

the presence of the witnesses to be examined by the committing justice, confronted with the accused, is certainly to be desired; and ought to be



JAMES KENT. Kent’s *Commentaries on American Law* provide an accurate understanding of the law on writs of habeas corpus in nineteenth-century America. Library of Congress.

32. James Kent, *Commentaries on American Law*, 1st ed. (1827), 2:26. Kent’s *Commentaries* was first published in 1827. Fifteen editions have been published, the last in 2002.

33. *Ex parte Bollman and Swartwout*, 8 U.S. (4 Cranch) 75 (1807).

34. Rollin C. Hurd, *A Treatise of the Right of Personal Liberty and on the Writ of Habeas Corpus and the Practice Connected with It* (Albany: W. C. Little, 1858), 310–19.

obtained, unless considerable inconvenience and difficulty exist in procuring his attendance. An *ex parte*³⁵ affidavit, shaped perhaps, by the person pressing the prosecution, will always be viewed with some suspicion, and acted upon with some caution; but the court thought it would be going too far to reject it altogether. If it was obvious, that the attendance of the witness was easily attainable, but that he was intentionally kept out of the way, the question might be otherwise decided.³⁶

Thus, as the United States Supreme Court opined, the underlying affidavits that supported an arrest, while *ex parte* by their very nature, were admissible to support an arrest during a review by habeas corpus by a court. The Supreme Court also acknowledged additional scrutiny of the allegations made in the affidavits, noting that such scrutiny was both appropriate and preferable. It was this scrutiny that the courts applied to determine the proper scope for challenges to the incarceration of an accused.

Lastly, William Church's 1884 treatise on the writ of habeas corpus³⁷ provides some additional clarification. Church provides a summary of how the courts treated the postarrest, but preindictment, petition for habeas corpus during the nineteenth century:

The decisions on this point may be divided into two classes . . . 1. Those which hold that, upon a commitment regular and valid upon its face, the only open question before a court on the hearing of a return to a writ of habeas corpus is the jurisdiction of the committing magistrate [procedural]; and, 2. Those which hold that not only the proceedings but the evidence taken before the committing magistrate may be examined [factual], and the commitment revised if necessary, or a commitment made *de novo*³⁸ by the court hearing the matter. . . . The practice set down in the first rule seems to have been followed in many of the states, and is probably supported by a preponderance of authorities; but we consider the second to be the soundest, most in accord with the spirit which gave birth to the writ of habeas corpus, and one from which will flow the greatest and best results of this beneficent writ.³⁹

Church recognized the tension between the traditional common law approach (as derived under British precedents), which was that only the

35. *Ex parte* means on the part of one side only.

36. Hurd, *Treatise on the Right of Personal Liberty*, 313 (quoting 1. Burr. Tr. 97).

37. Church, *Treatise of the Writ of Habeas Corpus*. William S. Church (b. 1851) studied the law in 1881 and was admitted the same year. It was the next year that he wrote his book on habeas corpus. Winfield J. Davis, *An Illustrated History of Sacramento County, California* (Chicago: Lewis Pub. Co., 1890), 376–77.

38. *De novo* means “from the beginning.”

39. Church, *Treatise of the Writ of Habeas Corpus*, 285–86.

form of the writ should be subject for examination, and the more expansive American approach, noted with approval from the United States Supreme Court, which permitted or even required inquiry into the underlying factual predicates. Church succinctly distills these competing approaches endorsing the American approach, stating:

As before intimated, we rather lend our approval to this rule [the American approach, allowing both procedural and factual review], which seems to have prevailed quite extensively, and to have stood side by side, in some of the states, with the more rigid one akin to that of the common law [the British approach, allowing only procedural review]. . . . In fact, it seems necessary for the court to look beyond the warrants and into the affidavits to see whether the committing magistrate had colorable jurisdiction. In all cases in habeas corpus proceedings previous to indictment, the court will look into the depositions before the magistrate or before the coroner's inquest; and though the commitment be full, and in due form, yet if the testimony proves no crime, the court will discharge or bail.⁴⁰

Courts and judges should have, and do have to a great extent where this rule prevails, authority to revise the cause of commitment, and to examine into the truth of the facts alleged in the return, and the officer may examine into the merits of the commitment, and hear the allegations and proofs arising thereon in a summary way, and dispose of the party as justice may require. . . . The doctrine of looking behind the commitment of the magistrate protects alike the interests of the accused and of the commonwealth.⁴¹

These legal commentators provide a consistent paradigm to view the use of habeas corpus during the nineteenth century as it evolved from a British model to an American one. This same evolution can be viewed through the courts. For example, in *People v. Martin*,⁴² the New York Supreme Court confronted the prosecution's position "that the commitment of the magistrate is conclusive upon me, and that I have no right on this return to look beyond the question of its regularity or that if I do look beyond it, I can look only at the depositions taken before the magistrate."⁴³ The judge confessed that while such an approach appeared consistent with his "reading of [his] boyhood [rather] than of riper years," because of the vital nature of the underlying principles of habeas corpus, he took the time for an "extended" examination, to ensure "an accurate and intimate knowledge of

40. Church, *Treatise of the Writ of Habeas Corpus*, 295.

41. Church, *Treatise of the Writ of Habeas Corpus*, 296.

42. 2 Edm. Sel. Cas. 28 (N.Y. 1848).

43. 2 Edm. Sel. Cas. 29 (N.Y. 1848).

the properties of this great instrument of personal liberty, the writ of habeas corpus.”⁴⁴ The judge summarized the law after arrest but before indictment:

If in custody on criminal process before indictment, the prisoner has an absolute right to demand that the original dispositions be looked into to see whether any crime is in fact imputed to him, and the inquiry will by no means be confined to the return. Facts out of the return may be gone into to ascertain . . . whether the commitment was not palpably and evidently arbitrary, unjust, and contrary to every principle of positive law or rational justice.⁴⁵

The same court in 1851 acknowledged the continuing fluid development of the American approach of looking behind the writs in *People v. Tompkins*, explaining:

It was very strenuously urged on the argument of this case, on the part of the public prosecutor, that on habeas corpus the court or officer had no right to go behind the warrant on which the prisoner was detained, and inquire from facts out of the return into the legality of the imprisonment. The effect of this principle would be, that the warrant of a committing magistrate, when legal upon its face, would be conclusive upon the prisoner, and he could have no relief from imprisonment, even if no charge whatever had in fact been preferred against him. . . . I have examined the subject very carefully, and rejoice to find that there is no authority to shake my previous convictions on this subject.⁴⁶

After reviewing the cases and authority cited by the prosecution advocating only a procedural review [the British approach], the *Tompkins* Court explained:

Of all the cases which I can find, or to which I have been referred in support of the doctrine contended for in behalf of the prosecution none of them sustain the doctrine, and it is well they do not, for the habeas corpus would be a mockery, whenever a magistrate might please to make the instrument of oppression and false imprisonment formal and regular on its face, and personal liberty would be at the mercy of ignorance or design, beyond anything yet known to our laws, careless as they too frequently are of freedom in the detail, from the abundance of it in the gross.⁴⁷

44. 2 Edm. Sel. Cas. 28–29 (N.Y. 1848).

45. 2 Edm. Sel. Cas. 38 (N.Y. 1848).

46. 2 Edm. Sel. Cas. 191, 191–92 (N.Y. 1851). Both the New York courts and legislature were leading voices for the development of jurisprudence and policy that would typically be adopted throughout the other states. James Kent, *Commentaries on American Law* (O. Halstead, 1827), 2:24.

47. 2 Edm. Sel. Cas. 194 (N.Y. 1851).

A sampling of cases from other jurisdictions involving a postarrest, but preindictment, scenario shows that the courts routinely allowed a substantive analysis of the underlying facts rather than just looking at the procedural formalities.⁴⁸ State courts also interpreted the statutory provisions of their respective habeas corpus acts to permit close scrutiny of the factual predicates of the crime.⁴⁹

3. Nineteenth-Century Writs of Habeas Corpus after Indictment but before Conviction (Second Phase)

The American courts' treatment of habeas corpus after indictment in the nineteenth century closely aligns with the traditional English common law. As articulated by the New York Supreme Court in *People v. McLeod*, "Nothing is better settled, on English authority, than that on habeas corpus, the examination as to guilt or innocence cannot, under any circumstances, extend beyond the depositions or proofs upon which the prisoner was committed."⁵⁰ This rule was repeatedly applied when the request for habeas corpus came after the prisoner had been indicted.⁵¹ This is fundamentally because grand jury testimony is not publicly available to scrutinize. Such a presumption of guilt for purposes of habeas corpus does not extend to the trial on the charges.⁵² These limitations on review after indictment but before conviction are not applicable when allegations of fraud or perjured testimony are involved. For example, in *United States v. Burr*, one of Aaron Burr's central arguments accepted by the court against the indictments of treason was that they "had been obtained by perjury."⁵³ Similarly, in *Commonwealth v. Carter*, the Supreme Court of Massachusetts held that its Habeas Corpus Act itself provided for relief after indictment upon showing the prosecutor's "witness is occasioned by fraud," reasoning "that such avoidance is fraudulent, unlawful and collusive, and done or caused with a design to defeat the claims of justice."⁵⁴ As noted by the Arkansas Supreme Court in *Ex parte White*, in a postindictment but pretrial stage:

48. See, for example, *State v. Doty*, 1 Walk. 230 (Miss. 1826); *State v. Best*, 7 Blackf. 611, 612 (Ind. 1846); *In re McIntyre*, 10 Ill. (5 Gilm.) 422, 425 (1849); *In re Powers*, 25 Vt. 261, 269 (1853); *Ex parte Mahone*, 30 Ala. 49, 50 (Ala. 1857); *People v. Stanley*, 18 How. Pr. 179, 180 (N.Y. 1859).

49. See, for example, *In re Clark*, 9 Wend. 212, 220 (N.Y. 1832); *Snowden et al. v. State*, 8 Mo. 483, 486 (1844).

50. 25 Wend. 483, 568 (N.Y. 1841).

51. See, for example, *State v. Mills*, 13 N.C., 420, 421-22 (1830); *People v. Martin*, 2 Edm. Sel. Cas. 28, 31-32 (N.Y. 1848).

52. See, for example, *Hight v. United States*, 1 Morris 407, 410 (Iowa 1845).

53. 25 F.Cas. 55, 70 (D.Va. 1807).

54. 28 Mass. 277, 279 (Ma. 1831).

The law requires the party to make an affidavit of merits to warrant this court in going behind the indictment, and the affidavit must state such particular facts that, if proven to be false, the affiant [the person who signs an affidavit] could be indicted for perjury: otherwise, the requiring of an affidavit would be a merely idle form.⁵⁵

4. Nineteenth-Century Writs of Habeas Corpus after Conviction (Third Phase)

The nineteenth-century application of habeas corpus after conviction followed more closely the modern application in the same phase: “The writ of habeas corpus was not framed to retry issues of fact, or to review the proceedings of a legal trial.”⁵⁶ Consequently, postconviction writs of habeas corpus are predominantly limited to constitutional challenges of the charges or procedure of the case and challenges to the implementation of the sentence.⁵⁷

5. Summary

As the foregoing illustrates, these three phases are really parts of a continuum. In a postarrest but preindictment phase, a person is in custody based on a complaint supported typically by an affidavit. In the postindictment but preconviction phase, a person is in custody based on a grand jury finding. Finally, in the postconviction phase, a person is in custody based on the trial itself. At each consecutive phase, there is an increased amount of information supporting the incarceration. The affidavit supporting an arrest does not carry much weight. There is more weight given to an indictment and even more weight given to a conviction. Thus, the ability to look behind the writ depends on where the case is heard, with the level of review decreasing or narrowing as the case makes its way through the judicial process.

Consequently, a proper examination of Joseph Smith’s use of habeas corpus must first identify in which phase of the case the petition was brought. Failure to do so results in an inaccurate determination of whether the sought-after review was legally available; this failure lies at the root of the misunderstanding by many historians and commentators of Joseph Smith’s use of this writ.

55. 9 Ark. 223, 226 (1848).

56. *Ex Parte Bird*, 19 Cal. 130, 131 (1851).

57. See, for example, *Stewart’s Case*, 1 App. Pr. 210, 212 (NY 1820); *People v. Martin*, 2 Edm. Sel. Cas. 28, 37 (N.Y. 1848).

IV. JOSEPH SMITH'S USE OF HABEAS CORPUS

Joseph Smith's first use of habeas corpus was in response to the preliminary hearing before Circuit State Judge Austin A. King in November 1838, which hearing resulted in his incarceration in Liberty Jail. While in the Missouri jail he joined in two petitions for habeas corpus—one in January 1839 to the county judge in Clay County and a second to the Missouri Supreme Court in March 1839. In Nauvoo, Smith was involved in enacting ordinances that articulated the rights extended by the Nauvoo Charter for issuing and hearing writs of habeas corpus. Later, still in Illinois, Smith used the writ of habeas corpus again as a key protection during extradition attempts by the State of Missouri. These events provide a window into his understanding and application of this most important writ.

A. Habeas Corpus in Missouri (1838–1839)

1. Facts

On November 1, 1838, Major General Samuel D. Lucas arrested Joseph Smith and six of his colleagues outside of Far West, Missouri, thereby marking the effective end of the Missouri conflict and the start of a forced exodus by the Mormons from Missouri.⁵⁸ More than sixty others who were charged with crimes ranging from arson, burglary, and robbery to treason and even murder, joined Smith.⁵⁹ Because some of the alleged crimes occurred in Ray County, Missouri, the preliminary hearing (referred to as a Court of Inquiry) was held in Richmond, the county seat of Ray County, before Fifth

58. See Rough Draft Notes of History of the Church, 1838-033 to 036, Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City; see generally Richard L. Anderson, "Atchison's Letters and the Causes of Mormon Expulsion from Missouri," *BYU Studies* 26, no. 3 (1986): 3–28; Alexander L. Baugh, "A Call to Arms: The 1838 Mormon Defense of Northern Missouri" (PhD diss., Brigham Young University, 1996; Provo, Utah: BYU Studies, 2000); Kenneth H. Winn, *Exiles in a Land of Liberty: Mormons in America, 1830–1846* (Chapel Hill: University of North Carolina Press, 1989), ch. 4–7.

59. *Document Containing the Correspondence, Orders, &c., in Relation to the Disturbances with the Mormons; and the Evidence Given before the Hon. Austin A. King, Judge of the Fifth Judicial Circuit of the State of Missouri, at the Court-house in Richmond, in a Criminal Court of Inquiry, Begun November 12, 1838, on the Trial of Joseph Smith, Jr., and Others, for High Treason and Other Crimes against the State* (Fayette, Mo.: Boon's Lick, 1841), 19–20, 34 (hereafter cited as Missouri Documents); *Document Showing the Testimony Given before the Judge of the Fifth Judicial Circuit of the State of Missouri, on the Trial of Joseph Smith, Jr., and Others, for High Treason and Other Crimes against That State* (Washington, D.C.: United States Senate, 1841), 119, 132, 140 (hereafter cited as Senate Documents).

Circuit State Court Judge Austin King.⁶⁰ This hearing lasted two weeks, concluding on November 29, 1838, at which time Judge King found probable cause to charge thirty-four of the defendants. Bail was available for twenty-three of the thirty-four,⁶¹ leaving eleven to be held in custody pending a grand jury, wherein indictments would be considered. Of those eleven, Joseph Smith, Hyrum Smith, Lyman Wight, Alexander McRae, Caleb Baldwin, and Sidney Rigdon were charged with treason and sent to Liberty Jail in Clay County (because no jail existed in either Caldwell or Daviess County, where these alleged crimes had occurred) on December 1, 1838.⁶² There they were incarcerated to await a grand jury, which, the October Term having already concluded, would not occur until the 1839 Spring Term.

An attempt for the Missouri legislature to review the matter was made almost immediately after Judge King bound them over. On December 5, 1838, Governor Boggs provided the Missouri Legislature with a report of the Mormon dispute to support the charges for the incarcerated. The Mormons answered by providing the “Memorial of a Committee to the State Legislature of Missouri in Behalf of the Citizens of Caldwell County” on December 10, 1838.⁶³ On December 18, 1838, a joint committee of the legislature charged with investigating the Mormon dispute submitted their preliminary findings, noting that the underlying record of Judge King’s preliminary hearing was “in a great degree *ex parte*, and not of the character which should be desired for the basis of a fair and candid investigation. Moreover, the papers, documents, etc., have not been certified in such manner, as to satisfy the committee of their authenticity.”⁶⁴ The committee concluded that a full investigation lasting several months was necessary, and that their findings should not be made public until after the grand jury had heard the case during the upcoming Spring Term.⁶⁵ During this time, Smith and his

60. Austin A. King (1801–1870) was appointed judge of the Fifth Judicial Circuit Court in 1837. He remained on the bench until 1848, when he was elected governor of Missouri. After losing re-election to the governorship, King returned to the Fifth Judicial Circuit, where he remained until his death in 1870. William Van Ness Bay, *Reminiscences of the Bench and Bar of Missouri* (F. H. Thomas and Co., 1878), 153–55.

61. Missouri Documents, 97, 150; Senate Documents, 1.

62. Missouri Documents, 150. Five were bound over for murder arising from the Battle of Crooked River. They included Parley P. Pratt, Norman Shearer, Darwin Chase, Lyman Gibbs, and Maurice Phelps.

63. Rough Draft Notes of History of the Church, 1838–038.

64. Missouri Documents, 2.

65. Rough Draft Notes of History of the Church, 1838–039. On January 16, 1839, this joint committee introduced a bill that was thereafter passed by both houses of the Missouri legislature entitled, “To provide for an investigation of the late disturbance in this State.” Missouri Documents, 4–8. The final report from the

colleagues remained in Liberty Jail waiting for the empanelling of a grand jury in the 1839 Spring Term.

With the prospects of timely help from the Missouri legislature gone, Joseph Smith and the other prisoners looked to the courts for assistance. Smith recalled:

Under such circumstances, sir, we were committed to this jail, on a pretended charge of treason, against the State of Missouri, without the slightest evidence to that effect. We collected our witnesses the second time, and petitioned a habeas corpus: but were thrust back again into prison, by the rage of the mob; and our families robbed, and plundered: and families, and witnesses, thrust from their homes, and hunted out of the State.⁶⁶

Sidney Rigdon prepared an extensive affidavit delineating his experiences in Missouri, including a summary of their efforts for review via this same petition for habeas corpus:

The trial at last ended, and Lyman Wight, Joseph Smith Senior,⁶⁷ Hyrum Smith, Caleb Baldwin, Alexander McRea, and myself were sent to jail in the village of Liberty, Clay county Missouri. We were kept there from three to four months; after which time we were brought out on habeas corpus before one of the county judges. During the hearing under the habeas corpus, I had, for the first time, an opportunity of hearing the evidence, as it was all written and read before the court. It appeared from the evidence that they attempted to prove us guilty of treason in consequence of the militia of Caldwell County being under arms at the time that General Lucas' army came to Far West. This calling out of the militia, was what they founded the charge of treason upon—an account of which I have given above. The charge of murder was founded on the fact, that a man of their number, they said, had been killed in the Bogard battle. The other charges were founded on things which took place in Davies. As I was not in Davies county at that time, I cannot testify anything about them.⁶⁸

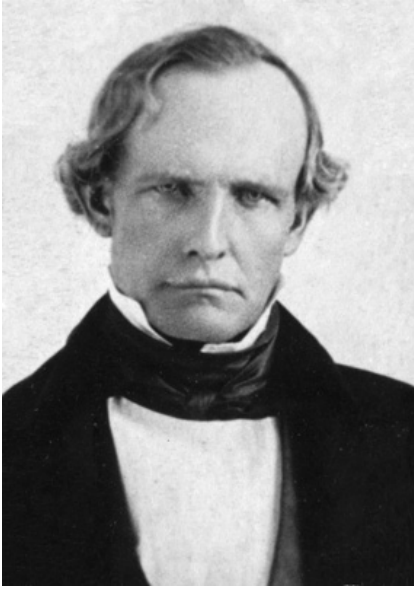
These two accounts provide some useful insights into nineteenth-century application of habeas corpus. Both accounts note that the hearing included the examination of the evidence, Joseph Smith noting that they “collected [their] witnesses the second time” (the first being the King hearing), and Rigdon writing that all of the written evidence was “read before the court.” These examinations were in accord with the law of looking behind the

investigation of the joint committee was not ready for publication until February 1841. Missouri Documents, 11.

66. Joseph Smith to Isaac Galland, March 22, 1839, Church History Library.

67. This affidavit was prepared in 1843, by which time Joseph Smith had begun to use the name Joseph Smith Senior, since his father had died.

68. Affidavit of Sidney Rigdon, July 2, 1843, Church History Library.



PETER HARDEMAN BURNETT, circa 1860. Burnett began his law practice in Clay County, Missouri. He was recruited by Alexander Doniphan to assist in representing Joseph Smith and others as they were held in the Liberty Jail during the winter of 1838–39. Burnett went on to become the first governor of California. Courtesy The Bancroft Library, University of California, Berkeley.

case before the County Judge. All of us were intensely opposed to mobs, as destructive of all legitimate government, and as the worst form of *irresponsible* tyranny. We therefore determined inflexibly to do our duty to our clients at all hazards, and to sell our lives as dearly as possible if necessary. We rose above all fear, and felt impressed with the idea that we had a sublime and perilous but sacred duty to perform. We armed ourselves, and had a circle of brave and faithful friends armed around us; and, it being cold weather, the proceedings were conducted in one of the smaller rooms in the second story of the Court-house in Liberty, so that only a limited number, say a hundred persons, could witness the proceedings.

writ on a petition for habeas corpus when the petition was brought during the first phase (after arrest but before indictment), which was exactly the status of Smith, Rigdon, and their companions.

During this habeas corpus hearing before Clay County Judge Turnham, Alexander Doniphan recruited Peter Burnett,⁶⁹ a local attorney, to assist him in representing Smith, Rigdon, and the other prisoners held at Liberty Jail. Burnett's account of this hearing provides some additional details, as well as a flavor of the intensity of the persecution that the Mormons were experiencing. He recorded:

We had the prisoners out upon a writ of habeas corpus, before the Hon. Joel Turnham, the County Judge of Clay County. In conducting the proceedings before him there was imminent peril. . . . We apprehended that we should be mobbed, the prisoners forcibly seized, and most probably hung. Doniphan and myself argued the

69. For Peter Hardeman Burnett (1807–1895), see Roger D. Launius, “Burnett, Peter Hardeman (1807–1895),” in *Dictionary of Missouri Biography*, ed. Lawrence O. Christensen, William E. Foley, Gary R. Kremer, and Kenneth H. Winn (Columbia: University of Missouri Press, 1999), 134–35.

Judge Turnham was not a lawyer, but had been in public life a good deal, and was a man of most excellent sense, very just, fearless, firm, and unflinching in the discharge of his duties. We knew well his moral nerve, and that he would do whatever he determined to do in defiance of all opposition. While he was calm, cool, and courteous, his noble countenance exhibited the highest traits of a fearless and just judge.

I made the opening speech, and was replied to by the District Attorney; and Doniphan made the closing argument. Before he rose to speak, or just as he rose, I whispered to him: "Doniphan! Let yourself out, my good fellow; and I will kill the first man that attacks you." And he did let himself out, in one of the most eloquent and withering speeches I ever heard. The maddened crowd foamed and gnashed their teeth, but only to make him more and more intrepid. He faced the terrible storm with the most noble courage. All the time I sat within six feet of him, with my hand upon my pistol, calmly determined to do as I had promised him.

The Judge decided to release Sidney Rigdon, against whom there was no sufficient proof in the record of the evidence taken before Judge King. The other prisoners were remanded to await the action of the grand jury of Davis County. Rigdon was released from the jail at night to avoid the mob.⁷⁰

Burnett's account is consistent with both Smith's and Rigdon's accounts that Judge Turnham "looked behind the writ" and reviewed the underlying facts.⁷¹

At the conclusion of this hearing, Judge Turnham ruled that there was not sufficient evidence to hold Rigdon and released him. While there are several accounts noting Rigdon's release, the basis for the release has remained largely uncertain. Burnett's account helps to clarify the legal basis, which fits squarely within the legal parameters of the applicable habeas corpus laws.

Following Rigdon's release in January, but before the grand jury was held in Daviess County in April 1839, Joseph Smith, his fellow prisoners, and others sought a second writ of habeas corpus from the Missouri Supreme Court in a series of documents simply titled "*Petition*," dated March 1839. These petitions not only articulated procedural irregularities in the events leading up to their imprisonment in Liberty Jail but also noted irregularities

70. Peter Hardeman Burnett, *Recollections and Opinions of an Old Pioneer* (D. Appleton and Co., 1880), 53–55.

71. While there is some question to what extent Judge Turnham examined these underlying facts, at a minimum Judge Turnham reviewed the factual record generated during the King hearing. It is not clear in what form this record was available to Judge Turnham. Most likely it was a handwritten copy prepared during the hearing. Unfortunately, the record was incomplete.

in the underlying factual allegations altogether.⁷² They did this in two manners: first, they disputed the factual allegations themselves; and second, they argued that the facts testified of were insufficient to constitute the crime of treason. The Missouri Supreme Court refused to hear these petitions.

2. Charges

A review of the preliminary hearing before Judge King reveals that the treason charge that held Joseph Smith and his colleagues in Liberty Jail can be separated into two categories. The first is the alleged illegal activities that occurred in Daviess County in October 1838. The second category involves various speeches given by Sidney Rigdon in Far West, Caldwell County.

The following specific acts relating to this first category include: burning Jacob Stolling's store in Gallatin; taking goods from the same store; burning a home just outside of Gallatin; taking household furnishings and livestock from homes in or near Gallatin to Adam-ondi-Ahman; and taking Addison Price and Jesse Kelley prisoner.

The charges against Joseph Smith, Hyrum Smith, Lyman Wight, Alexander McRae, and Caleb Baldwin were based on their alleged participation in the "expeditions" which resulted in these activities.⁷³ The accused did not have equal involvement in the aforementioned activities;⁷⁴ however, the prosecution claimed that each participated in the overall operation and was considered a leader. While multiple witnesses supported these allegations,⁷⁵ the evidence was not consistent and was often contradictory.

72. Joseph Smith Letter Book, 2:21–24, Joseph Smith Collection, Church History Library.

73. See Madsen, "Joseph Smith and the Missouri Court Inquiry," 92, 115–19. Madsen provides a thorough analysis of the facts solicited during the preliminary hearing and whether they constituted treason.

74. From the record, it appears that Hyrum had the least direct involvement.

75. Three copies of the transcripts from the preliminary hearing are extant, in addition to the printed versions submitted to the Missouri legislature and the U.S. Senate. Copies of the transcripts include copies (1) held with the Viollette Collection, Joint Collection: Western Historical Manuscript Collection and the State Historical Society of Missouri, University of Missouri, Columbia, (2) held at Missouri State Archives, Jefferson City, Missouri, and (3) held at Missouri Historical Society, St. Louis, Missouri. Unfortunately these records must be viewed with some skepticism: as Madsen notes in his article, the record kept of this preliminary hearing is problematic on several fronts. See Madsen, "Joseph Smith and the Missouri Court Inquiry." No shorthand or stenographic record was kept. The record is a summary of the testimony proffered. Under the rules of evidence that existed at that time, such summaries were prepared by the judge or, more often, by his clerks and then signed by the witness, verifying the accuracy of the summary. *The Revised*

The second category of charges involves the alleged speeches that Sidney Rigdon gave in Far West in June 1838, also known as the “Salt Sermon,” and July 1838, known as the “July 4th Oration.”⁷⁶ The Salt Sermon was directed to a purging of dissenters within the Church, and the July 4th Oration was directed at fighting those outside the Church. Both were viewed as incendiary speeches, and multiple witnesses testified that they were present during the original delivery.

It was these cumulative factual allegations that supported binding these men over for the grand jury and holding them in Liberty Jail until the grand jury would convene.⁷⁷

3. Discussion

The law of treason finds its roots in the United States Constitution.⁷⁸ The Missouri Constitution directly borrows its language on treason from the

Statutes of the State of Missouri, Practice and Procedure in Criminal Cases, art. II, secs. 17 and 20, 2d ed. (St. Louis: Chambers, Knapp and Co., 1840). Unfortunately, such verifications are mostly missing. Further, the record was to include the direct and cross-examinations, as well as any questioning that was done by the judge. See *Revised Statutes of the State of Missouri*, secs. 14, 15, 18, and 19. The record does not contain any cross-examination or questions from Judge King, both of which clearly occurred. Finally, the record identifies forty-one witnesses, but contains the testimony of only thirty-eight. These problems are chronic and do not allow for a complete understanding of these events. However, it was the only record that existed and was thus all that was available to be reviewed on the writs of habeas corpus, assuming it was in some measure available. These problems are somewhat helpful in determining how the subsequent courts ruled.

76. See Manuscript of Austin King’s Court of Inquiry, Viollette Collection, Joint Collection, Western Historical Manuscript Collection and the State Historical Society of Missouri, University of Missouri, Columbia, Mo., 28–31, 43, 47, 62, 75, 96, 106–7.

77. They were held in Liberty Jail because the first alleged activities occurred in Daviess County, and since there was no jail in Daviess County, the Liberty Jail was used, being the closest. And the speeches were given by Rigdon in Caldwell County, where no jail had been constructed, also leaving Liberty Jail as the closest available jail to hold him. The group of Mormons charged with murder, including Parley P. Pratt, was held in the Richmond Jail pending a grand jury hearing. During the Court of Inquiry held in Richmond, because the Richmond Jail was not large enough to hold all of the prisoners, the jailers used a local log home to house several of the accused, nailing down the windows and chaining the accused together and to the floor. It was in this makeshift jail that Smith made his famous rebuke of the guards as recorded by Parley P. Pratt, who was chained next to him. Parley P. Pratt, *Autobiography of Parley Parker Pratt, One of the Twelve Apostles of the Church of Jesus Christ of Latter-Day Saints* (Law, King, and Law, 1888), 227–34.

78. U.S. Constitution, art. 3, sec. 3: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them

United States Constitution.⁷⁹ Judicial refinements of the law were defined early in American history through a series of cases arising out of Aaron Burr's failed effort to create a separate nation from Spanish-owned Mexico, which included states west of the Mississippi Valley. The most applicable refinement was the affirmation by the United States Supreme Court that treason required an "overt act" to "levy war."⁸⁰ Justice Marshall, in the opinion for the Burr conspiracy case, further held that accessory rules, which make accessories equally guilty as the principal who actually commits the crime, were inapplicable to cases of treason; that is, advising, counseling, advocating, or even assisting in preparing for treasonous actions does not constitute treason.⁸¹

Applying the foregoing rules and factors to the habeas corpus hearing before Judge Turnham is relatively straightforward. As discussed above, if a petition for habeas corpus falls within the first phase (after arrest and before indictment), a judge may look behind the writ to assure that there are sufficient factual allegations to support the charges. While the evidence in the record implicating Joseph Smith, Hyrum Smith, Lyman Wight, Alexander McRae, and Caleb Baldwin would ultimately be insufficient to warrant a conviction, the record does articulate generally that these men were the leaders of or directed various military or riotous actions.⁸² Thus apparently Judge Turnham determined that sufficient evidence had been admitted to find that the minimum standard of probable cause was established. Consequently, the judge denied their request to be released from Liberty Jail. It is not clear whether Smith and his colleagues were allowed to affirmatively present additional testimony, although Smith indicates that they had at least prepared to do so.

Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

79. Missouri Constitution, art. XIII, sec. 15 (1820), *The Revised Statutes of the State of Missouri* (J. W. Dougherty, 1845), 44: "That treason against the state can consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort; that no person can be convicted of treason unless on the testimony of two witnesses to the same overt act, or on his own confession in open court."

80. U.S. Constitution, art. 3, sec. 3.

81. See *United States v. Burr*, 8 U.S. (4 Cranch) 470, 473 (1807); *Ex parte Bollman* and *Ex parte Swartwout*, 8 U.S. (4 Cranch) 75, 126 (1807); see generally David Robertson, *Trial of Aaron Burr for Treason* (James Cockcroft and Company, 1875).

82. This conclusion is based on the testimony given during the Court of Inquiry. For purposes of this analysis such testimony is accepted as true. See Madsen, "Joseph Smith and the Missouri Court Inquiry," 115–19, for a discussion about the chronic problem with the extant testimony of this preliminary hearing to establish treason.

In contrast, the only evidence implicating Sidney Rigdon was the two speeches he gave in Far West. While we have the text of only the July 4th Oration (which was printed and distributed in Far West), there are numerous sources (including witnesses at the preliminary hearing) that provide the general outline of the Salt Sermon.⁸³ Both speeches included rhetoric of warfare, even calling for action. However, taking all of the statements presented in the preliminary hearing as fact does not constitute the crime of treason. As Justice Marshall articulated in the *Burr* case, speech alone is insufficient to constitute treason—there must be an actual overt action in levying war; none could be found in the record against Rigdon. As their attorney, Peter Burnett, recounted, “The Judge decided to release Sidney Rigdon, against whom there was no sufficient proof in the record of the evidence taken before Judge King.”⁸⁴

This analysis illustrates that courts were allowed, during the period between arrest and indictment, to look behind the procedural niceties of an arrest and resulting incarceration, and examine the underlying facts of the matter. That is exactly what Judge Turnham did for Joseph Smith and his colleagues in hearing their collective petitions for a writ of habeas corpus.

4. Summary

Joseph Smith’s correct understanding of the writ of habeas corpus is demonstrated in his and others’ efforts to have the Missouri courts review their arrest and incarceration. These various petitions not only demonstrate Smith’s understanding of the law of treason as applied by Justice Marshall in the *Burr* opinions, but also his knowledge of the application of the writ of habeas corpus that allowed the court to look at both procedural and substantive issues.

Through these events, Smith became both a student and practitioner in the use of the writ of habeas corpus. He subsequently left Missouri in April 1839, with a growing understanding of the need to protect the right of

83. See for Rigdon’s Salt Sermon, John Corrill, “A Brief History,” manuscript version in the John Fletcher Darby Papers, Missouri History Museum Archives, St. Louis, Missouri, 29–30; Reed Peck, Manuscript, “Quincy, Illinois to Dear Friends,” September 18, 1839, L. Tom Perry Special Collections, Brigham Young University, 7–8; See for Rigdon’s July 4th sermon, “Oration Delivered by Mr. S. Rigdon on the 4th of July, 1838: At Far West, Caldwell County, Missouri” (Far West, Mo.: Journal Office, 1838), Church History Library.

84. Peter Hardman Burnett, *Recollections and Opinions of an Old Pioneer* (D. Appleton, 1880), 55.

habeas corpus. This skill became even more evident as he found himself in need of such protection while residing in Illinois.

B. Habeas Corpus in Illinois under the Nauvoo City Charter

The Nauvoo Charter, granted by the Illinois legislature on December 16, 1840,⁸⁵ granted the city council the “power and authority to make, ordain, establish, and execute, all such ordinances, not repugnant to the Constitution of the United States or of this State, as they deem necessary for the peace, benefit, good order, regulation, convenience, and cleanliness, of said city.”⁸⁶ Under this charter, the Nauvoo City Council had the power to enact laws pertaining to the use of habeas corpus in Nauvoo. The charter also provided for the creation of a court system, as follows:

Sec. 16: The Mayor and Aldermen shall be conservators of the peace within the limits of said city, and shall have all powers of Justices of the Peace therein, both in civil and criminal cases, arising under the laws of the State: . . .

Sec. 17: The Mayor shall have exclusive jurisdiction in all cases arising under the ordinances of the corporation, and shall issue processes as may be necessary to carry said ordinances into execution and effect; appeals may be had from any decision or judgment of said Mayor or Aldermen, arising under the city ordinances, to the Municipal Court, under such regulations as may be presented by ordinance; which court shall be composed of the Mayor, as the Chief Justice, and the Aldermen as Associate Justices, and from the final Judgment of the Municipal Court, to the Circuit Court of Hancock county, in the same manner as appeals are taken from judgments of Justices of the Peace; *Provided*, That the parties litigants shall have a right to a trial by a jury of twelve men, in all cases before the Municipal Court. **The Municipal Court shall have power to grant writs of habeas corpus in all cases arising under the ordinances of the City Council.**⁸⁷

These sections provided that the mayor and aldermen were “justices of the peace” within Nauvoo and together constituted the “municipal court.” The municipal court was the equivalent in some limited situations to the

85. For a discussion about the process for obtaining the Nauvoo City Charter, see generally James L. Kimball Jr., “A Wall to Defend Zion: The Nauvoo Charter,” *BYU Studies* 15, no. 4 (1975): 492–97; see also B. H. Roberts, *The Rise and Fall of Nauvoo* (Salt Lake City: Deseret News, 1900), 81.

86. “The City Charter: Laws, Ordinances, and Acts of the City Council of the City of Nauvoo,” sec. 11 (1840) (hereafter cited as *Nauvoo City Charter*), Church History Library. Very similar provisions were also incorporated into the Illinois charters of Galena (1839), Springfield (1840), and Quincy (1840). See James L. Kimball, “A Study of the Nauvoo Charter, 1840–1845” (master’s thesis, University of Iowa, 1966), 36.

87. *Nauvoo City Charter*, secs. 16–17, bold emphasis added.

Illinois circuit courts wherein appeals from the justices of the peace could be taken and where original jurisdiction was expanded. Such original jurisdiction expressly extended to the municipal court was the power to grant writs of habeas corpus. While some have viewed this inclusion as unique, two of the five city charters adopted in Illinois before the Nauvoo Charter contained similar judicial rights. For example, in 1839 the 1837 charter for the city of Alton, Illinois, was amended to grant that “the judge of the municipal court of the city of Alton shall have power, and is hereby authorized, to issue writs of habeas corpus” and other writs “within the jurisdiction of said court; and the same proceedings shall be had thereon before said judge and court as may be had in like cases before circuit judges and circuit courts of this State.”⁸⁸ Jurisdiction for issuing writs of habeas corpus as could a circuit court was also expressly granted in the city of Chicago’s charter in 1837, so that its municipal court had “jurisdiction concurrent with the circuit courts of the State, in all matters civil and criminal, arising within the limits of the city, and in all cases where either plaintiff and defendant or defendants, shall reside at the time of commencing the suit, within said city,”⁸⁹ with the municipal judge possessing “all and singular the powers, and he is hereby required to perform all the judicial duties appertaining to the office of a judge of the circuit courts of this state, and to issue all such writs and process as is or may hereinafter, by statutory provision, be made issuable from the circuit courts of this state.”⁹⁰

The drafting of the Nauvoo charter was undoubtedly influenced by the Mormons’ experiences in Missouri and the perceived threat of additional efforts by the Missourians to apprehend Mormon leaders, especially Joseph Smith. Yet its grant of rights to issue writs of habeas corpus cannot be seen as entirely unique. The cumulative effect of these provisions in the charter was the progressive development of ordinances dealing with the rights and uses of habeas corpus. As will be discussed, it appears from these ordinances

88. “An Act to Amend an Act, Entitled ‘An Act to Incorporate the City of Alton,’” sec. 1, *Incorporation Laws of the State of Illinois Passed by the Eleventh General Assembly, at Their Session Began and Held at Vandalia, on the Third of December, One Thousand Eight Hundred and Thirty-eight* (Vandalia, Ill.: William Walters, 1839), 240. Further research would be required to determine whether any such writs were ever issued by cities other than Nauvoo.

89. “An Act to Incorporate the City of Chicago,” *Laws of the State of Illinois Passed by the Tenth General Assembly, at Their Special Session, Commencing December 5, 1836, ending March 6, 1837* (Vandalia, Ill.: William Walters, 1837), 75, sec. 69.

90. “An Act in Relation to the Municipal Court of Chicago, and for Other Purposes,” *Laws of the State of Illinois Passed by the Tenth General Assembly, at Their Special Session, Commencing July 16, 1837 ending July 22, 1837* (Vandalia, Ill.: William Walters, 1837), 15–16, sec. 1.

that the leaders in Nauvoo understood that the charter provided them the right to enact these types of ordinances and that they were restricted only by the contours of the United States Constitution or the Illinois Constitution, whichever was broader. Consequently, these ordinances must therefore be read not only in light of the general law of habeas corpus as understood and applied in the first half of nineteenth-century America, but also in harmony with the broader provisions of the United States and Illinois Constitutions.

C. Missouri's First Effort to Extradite Joseph Smith—June 1841

1. Facts

In early April 1839, Joseph Smith, Hyrum Smith, Lyman Wight, Alexander McRae, and Caleb Baldwin were taken from Liberty Jail, where they had been incarcerated since early December 1838, to Gallatin, Daviess County, where a grand jury was empanelled at the commencement of the Spring 1839 court term to consider the charges brought against them, including the nonbailable charge of treason. There, after a two-day hearing, they were indicted on several charges. At the close of the grand jury hearing, Judge Thomas Burch granted a request to change venue to Boone County due to the fact that he had been the prosecuting attorney in the preliminary hearing before Judge Austin King. En route to Boone County all of the prisoners either escaped or were released and made their way to Illinois to join the body of the Church.⁹¹

Sixteen months later, on September 1, 1840, Governor Boggs sent a requisition to Illinois Governor Thomas Carlin seeking the extradition of Joseph Smith and five others to Missouri based on these outstanding indictments.⁹² The extradition request was supported by the indictments,

91. See Joseph Smith Letter Book 2:6, Joseph Smith collection, Church History Library; see also Jeffrey Walker, "A Change of Venue: Joseph Smith's Escape from Liberty," presented at the Mormon History Association Conference, Sacramento, California, 2007 (copy in possession of author).

92. The others noted in the requisition included Lyman Wight, Caleb Baldwin, Alanson Brown, Sidney Rigdon, and Parley Pratt. Smith, Wight, and Baldwin were indicted for several crimes, including treason. The same jury indicted Brown for burglary. Rigdon was not sought to be returned on the treason charge (from which he was discharged by Judge Turnham, as discussed above) but for being an accessory before the fact to the murders for which Pratt was indicted. Smith, Wight, and Baldwin had left Missouri after being released (some believed escaped) on route to Boone County after the change of venue. Brown had left Missouri prior to being indicted in April 1839. See Alanson Brown, Affidavit, Adams County, Illinois, January 8, 1840, in *Mormon Redress Petitions: Documents of the 1833–1838 Missouri Conflict*, ed. Clark Johnson (Provo, Utah: FARMS, 1992), 425–26. Rigdon had been

of which Governor Boggs had secured certified copies in July 1839.⁹³ What is not clear is whether Governor Boggs knew that in August 1839 all of these indictments had been dismissed based on a motion by the Boone County prosecuting attorney.⁹⁴ The judge in Boone County was Governor Boggs's successor, Thomas Reynolds.

Unfortunately, the resulting arrest warrant issued by Illinois Governor Carlin based on the extradition request of the succeeding Missouri Governor Reynolds for the arrest of Joseph Smith and others is not extant. It apparently was carried to Nauvoo, where the legal officer could not locate

released by Judge Turnham and had shortly thereafter left Missouri for Illinois. Pratt, who after being indicted in Richmond for murder, escaped prior to him being transferred to Boone County on a separate change of venue.

93. Thomas C. Burch to James L. Minor, June 24, 1839, Mormon Papers, Missouri Historical Society, St. Louis, Mo.; Indictment [for treason], Gallatin, Missouri, April [11,] 1839, certified copy, 6 July 1839, Joseph Smith Extradition Records, Abraham Lincoln Presidential Library, Springfield, Ill.; Indictment [for burglary], Gallatin, Missouri, April [11,] 1839, certified copy, July 6, 1839, Joseph Smith Extradition Records, Lincoln Presidential Library; Parley Pratt's Indictment [murder], Richmond, Missouri, April 24, 1839, certified copy, July 18, 1839, Joseph Smith Extradition Records, Lincoln Presidential Library.

94. See Circuit Court Record C, Boone County Circuit Court, Columbia, Missouri, 222, 261–62, 280–81, 316–17. Governor Boggs did not send these indictments to Illinois until near the close of his term as governor in December 1840. It is uncertain whether he attempted to forward these indictments earlier, although there is some evidence that he and Governor Carlin (the governor of Illinois at the time) had corresponded about them. As Governor Boggs did not run for a second term as governor, he knew that by waiting until the end of his term that the extradition would take place after his term had expired. While this timing is not critical by itself, it becomes more intriguing as a result of Thomas Reynolds becoming the successor governor in Missouri. Prior to being elected governor, Thomas Reynolds was a circuit judge in the state's Second Circuit, which included Boone County. Judge Reynolds presided over the transferred cases from Daviess County involving Smith and others (for example, the treason case) and from Ray County involving Pratt and others (for example, the murder case). He was the judge that granted the Boone County Prosecutor's motion and ordered the dismissal of all of the indictments in August 1840. He must have been fully aware that there were no outstanding indictments against any of the men identified in Governor Boggs's requisition made in September 1840. Whether Boggs knew this is uncertain. Both of these cases were continued in August 1839 to the following August 1840 term. The Boone County Circuit records contain the following pleading for each case: "This day Came the attorney prosecuting for the State And On his motion. It is ordered by the Court That the Suit be dismissed, and that the Defendant(s) go hence without delay with his costs." Circuit Court Record C, Boone County Circuit Court, Columbia, Missouri, 222, 261–62, 280–81, 316–17.

Smith or the others listed in it, and the warrant was consequently returned to Governor Carlin.⁹⁵

No further action was taken until Joseph Smith, who was returning to Nauvoo with his brother Hyrum and William Law from a mission in the East, was arrested outside of Quincy, Illinois, on June 5, 1841.⁹⁶ Upon arrest, Smith filed a petition for a writ of habeas corpus with Calvin Warren, the master in chancery for the Adams County Circuit Court.⁹⁷ Warren granted Smith's petition and issued the writ of habeas corpus. That same evening, Associate Illinois Supreme Court Justice Stephen Douglas arrived in Quincy and agreed to hear the writ⁹⁸ at the Warren County Circuit Courthouse located in Monmouth. He scheduled the hearing for the following Monday, June 8, 1841, and after a one-day postponement to allow the state to better prepare, the matter was heard on June 9, 1841.

2. Hearing

Throughout the hearing a full panoply of attorneys represented Joseph Smith. The *Times and Seasons* noted that Calvin Warren, Sidney Little, and Orville Browning represented the accused,⁹⁹ while other accounts add James Ralston, Cyrus Walker, and Archibald Williams.¹⁰⁰

The hearing started on a procedural matter, since the underlying indictments from the Missouri courts had not been attached to the arrest warrant

95. See notes 106–9, wherein Douglas ruled that once attempts to serve the arrest warrant had occurred and the warrant was returned not having been served, it could not be subsequently used.

96. "The Late Proceedings," *Times and Seasons*, June 15, 1841.

97. Circuit Courts in Illinois held equitable jurisdiction and as such were referred to as "courts in chancery," as opposed to common law courts; a similar distinction is found in courts in England. Each circuit court was required to appoint a "Master-in-Chancery" in each county that the court covered, vesting such appointee with the right to issue of writs of habeas corpus. See "An Act Prescribing the Mode of Proceedings in Chancery," sec. 1, in *The Public and General Statute Laws of the State of Illinois* (Stephen F. Gale, 1839), 139; "An Act to Provide for Issuing Writs of Ne Exeat and Habeas Corpus, and for Other Purposes," secs. 1–2, in *Public and General Statute Laws of the State of Illinois*, 145.

98. Section 1 of the Illinois 1827 Act provides that both the supreme and circuit courts had jurisdiction to hear writs of habeas corpus while "in term." At the time of arrest neither court was in session. Section 1 alternatively provides that "any judge thereof, [for example, supreme or circuit court judge] in vacation" could also hear the writ. "An Act Regulating the Proceeding on Writs of Habeas Corpus," sec. 1, in *Public and General Statute Laws of the State of Illinois*, 322 (hereafter Illinois 1827 Act).

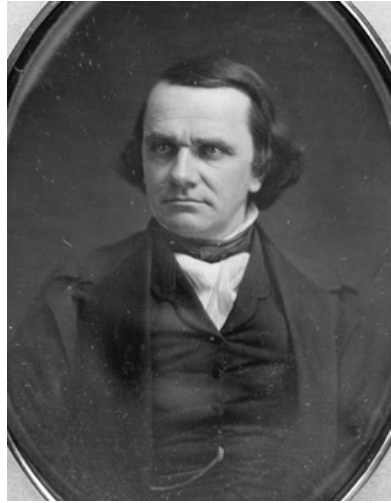
99. "Late Proceedings."

100. "History of Joseph Smith," *Millennial Star* 18 (August 30, 1856): 551.

as required by law. As this procedural irregularity could result in further postponement, both sides stipulated that such indictments existed. Ironically, had Joseph Smith's counsel further investigated this issue, they would have discovered that in fact no indictments existed, all of them having been dismissed in August 1840 by the now sitting Missouri Governor Reynolds. Notwithstanding this oversight, Joseph Smith's counsel argued that the indictments supporting the requisition from Missouri were obtained by "fraud, bribery and duress." This phraseology closely paralleled the language in the Illinois 1827 Act for summarily ruling on a writ of habeas corpus.¹⁰¹ The Illinois 1827 Act appears in full in appendix C.

Joseph Smith's counsel called four witnesses: Morris Phelps, Elias Higbee, Reynolds Cahoon, and George Robinson. The state objected that these witnesses should not be allowed to testify pertaining to the underlying merits of the case because the indictments sufficiently established the facts required at this stage of the litigation. Attorney Browning argued for the admissibility of the testimony for more than two hours, concluding his remarks as follows:

Great God! Have I not seen it? Yes, my eyes have beheld the blood stained traces, and the women and children, in the drear winter, who had travelled hundreds of miles barefoot, through frost and snow, to seek a refuge from their savage pursuers. T'was a scene of horror sufficient to enlist sympathy from an adamant heart. And shall this unfortunate man, whom their fury has seen proper to select for sacrifice, be driven into such a savage band, and none dare to enlist in the cause of justice? If there was no other voice



STEPHEN A. DOUGLAS. While an Associate Illinois Supreme Court Justice, Douglas heard Joseph Smith's writ of habeas corpus over the first extradition attempt, ruling that the arrest itself was invalid. He was a witness for Joseph Smith during the second extradition effort, heard before Federal Judge Nathaniel Pope. Library of Congress.

101. Illinois 1827 Act, sec. 3, 323–24: "If it appear that the prisoner is in custody by virtue of process from any court, legally constituted, he can be discharged only for some of the following causes: . . . sixth, where the process appears to have been obtained by false pretense or bribery."

under heaven ever to be heard in this cause, gladly would [I] stand alone, and proudly spent my latest breath in defence of an oppressed American citizen.¹⁰²

In the end, Judge Douglas allowed the testimony from these witnesses, as well as several unidentified state witnesses before ruling the testimony's admissibility.

3. *Ruling and Rationale*

Judge Douglas delivered his ruling the next morning. He sidestepped the issue as to whether the court could go beyond the indictments, noting that neither side presented authority. As discussed earlier in this article, law existed that could have been cited, and had it been cited, it would have on its face supported the government's position that looking beyond the indictment was not permitted. The argument was straightforward, as stated in *People v. Martin*: "The testimony before the grand jury would not be written, and could not be looked into, the court or officer, on the habeas corpus, could not ascertain on what evidence the grand jury had acted, and could not entertain the question without receiving precisely the same testimony which the jury would be obliged to receive on the trial, and thus, in fact, usurp the province of the jury."¹⁰³

However, contrary authority could have been cited that such limitations do not extend to allegations of fraud, as established by statute in section 3 of the Illinois 1827 Act. As explained by the Arkansas Supreme Court in *Ex parte White*: "The law requires the party to make an affidavit of merits to warrant this court in going behind the indictment, and the affidavit must state such particular facts that, if proven to be false, the affiant could be indicted for perjury: otherwise, the requiring of an affidavit would be a merely idle form."¹⁰⁴

Yet, even without citing the applicable case law, Joseph Smith's counsel made that exact argument—that the Missouri indictments were obtained "by fraud, bribery and duress." This claim justified an examination into how the indictments were obtained both relevant and admissible.

However, instead of addressing this issue, Judge Douglas based his ruling on a narrow procedural issue—the validity of the warrant used to arrest Joseph Smith. It was undisputed that the arrest warrant actually used was the same warrant initially issued by Governor Carlin and returned to him

102. "Late Proceedings."

103. *People v. Martin*, 2 Edm. Sel. Cas. 28, 32 (N.Y. 1848).

104. 9 Ark. 223, 226 (1848).

after the legal officer failed to find Joseph Smith in Nauvoo. Douglas held that “the writ once being returned to the executive, by the Sheriff of Hancock County was dead and stood in the same relationship as any other writ which might issue from the Circuit Court and consequently the defendant [Smith] could not be held in custody on that writ.”¹⁰⁵ Future Illinois Governor and former Illinois Supreme Court Justice Thomas Ford recorded in his work *History of Illinois* that Smith “was discharged upon the ground that the writ upon which he had been arrested had been once returned, before it had been executed, and was *functus officio*.”¹⁰⁶ (“*Functus officio*” is Latin for “having performed his office.” This term is applied to something which once had life and power, but which now has no virtue whatsoever.)

While some would argue that Douglas’s ruling was a political move to garner the Mormon vote and lacked legal merit, a review of the doctrine of *functus officio* shows that it was actually the proper legal ruling.¹⁰⁷ For example, in *Hall v. Hall*, the Maryland Court of Appeals in discussing jury instructions noted that “if a jury believed the warrant to have been received and served by *Sharer* [the sheriff], and returned by the magistrate. . . then the warrant was *functus officio*, and could not again be re-issued.”¹⁰⁸ The New York Supreme Court created an even stricter standard in *Filkins v. Brockway* holding: “A seal which has been used by being affixed to any process which has been filled up, whether such process has been delivered to the sheriff or not, cannot be again used, or attached to another writ. It is *functus officio*, and to allow it to be again used, would lead to improper practices, and be a fraud on the clerk’s office. We . . . shall set aside any writ or process to which such a seal shall be so affixed.”¹⁰⁹

As these cases and their progeny demonstrate, Justice Douglas’s ruling, while on a technical rather than a substantive basis, was in accord with established law. Accordingly, Joseph Smith was properly discharged.

D. Nauvoo City Council’s First Ordinances on Habeas Corpus— July and August 1842

The Nauvoo City Council’s first ordinance regarding habeas corpus was passed on July 5, 1842 (the “July 1842 City Ordinance”). What precipitated the passage of this ordinance is not certain. Yet, it may have been in response

105. “Late Proceedings.”

106. Thomas Ford, *A History of Illinois: From its Commencement as a State in 1818 to 1847* (S.C. Griggs and Co., 1854), 266.

107. See Bouvier, *Law Dictionary*, 1:551.

108. 6 G. & L. 386, 411 (Md. 1834).

109. 19 Johns. 170, 170-171 (1821).

to the publishing on July 2, 1842, by the *Sangamon Journal* the first of a series of letters by John C. Bennett, the former mayor of Nauvoo and leading antagonist against the Mormons, especially Smith. This first letter, in part, solicits Governor Reynolds to seek the extradition of Smith “alone” to Governor Carlin and should Governor Carlin issue a writ for the arrest of Smith “in *my hands*, I will deliver him up to justice, or die in the attempt.”¹¹⁰

The July 1842 City Ordinance provides as follows:

Sec. 1. Be it, and it is hereby ordained by the city council of the city of Nauvoo, that no citizen of this city shall be taken out of the city by any writs without the privilege of investigation before the municipal court, and the benefit of a writ of habeas corpus, as granted in the 17th section of the Charter of this city. Be it understood that this ordinance is enacted for the protection of the citizens of this city, that they may in all cases have the right of trial in this city, and not be subjected to illegal process by their enemies.

Joseph Smith, Mayor.

Passed July 5, 1842.

James Sloan, Recorder.¹¹¹

This ordinance, while cryptic, is in accord with the Illinois 1827 Act. Section 3 provides, in pertinent part, for the following rights of the prisoner and responsibilities of the court hearing the writ of habeas corpus:

Sec. 3. . . . The said prisoner may deny any of the material facts set forth in the return, or may allege any fact to shew, either that the imprisonment or detention is unlawful, or that he is then entitled to his discharge; which allegations or denials shall be made on oath.¹¹²

The July 1842 City Ordinance, which gives the prisoner the right to investigate the basis for his incarceration and the right to a trial arising from such investigation, does not broaden the right of habeas corpus further than section 3 of the Illinois 1827 Act. This ordinance therefore appears to be in accord with the rights extended in Nauvoo City’s charter.

On August 8, 1842, the Nauvoo City Council refined the July 1842 City Ordinance by further delineating the procedures for an investigation. This ordinance (the “August 1842 City Ordinance”) provides as follows:

Sec. 1. Be it ordained by the city council of the city of Nauvoo, that in all cases where any person or persons, shall at any time hereafter, be arrested or under arrest in this city, under any writ or process, and shall be brought

110. See *Sangamon Journal*, July 2, 1842; see also note 129.

111. Nauvoo City Council, Minutes, July 5, 1842, Church History Library. This ordinance was published in the *Wasp* (Nauvoo) on July 16, 1842.

112. Illinois 1827 Act sec. 3, 323.



RED BRICK STORE. Completed in 1841, the large second floor room of the store was used for governmental meetings, including Nauvoo City Council meetings, as well as for the municipal and mayor's courts. This photograph was taken by B. H. Roberts circa 1885–86. Courtesy Church History Library. © Intellectual Reserve Inc.

before the municipal court of this city, by virtue of a writ of habeas corpus, the court shall in every such case have power and authority, and are hereby required to examine into the origin, validity and legality of the writ of process, under which such arrest was made, and if it shall appear to the court, upon sufficient testimony that said writ or process was illegal, or not legally issued, or did not proceed from proper authority, then the court shall discharge the prisoner from under said arrest; but if it shall appear to the court that said writ or process had issued from proper authority, and was a legal process, the court shall then proceed and fully hear the merits of the case, upon which said arrest was made, upon such evidence as may be produced and sworn before said court, and shall have power to adjourn the hearing, and also issue process from time to time, in their discretion, in order to procure the attendance of witnesses, so that a fair and impartial trial and decision may be obtained in every such case.

Sec. 2. And be it further ordained that if upon investigation it shall be proven before the municipal court, that the writ or process has been issued, either through private pique, malicious intent, or religious or other persecution, falsehood or misrepresentation, contrary to the constitution of this state, or the Constitution of the United States, the said writ or process shall be quashed and considered of no force or effect, and the prisoner or prisoners shall be released and discharged therefrom.

Sec. 3. And be it also further ordained that in the absence, sickness, debility, or other circumstances disqualifying or preventing the mayor from officiating in his court, as chief justice of the municipal court, the aldermen present shall appoint one from amongst them to act as chief justice, or president pro tempore.¹¹³

Sec. 4. This ordinance to take effect and be in force from and after its passage.¹¹⁴

The following charts compare the August 1842 City Ordinance procedures to those provided in the Illinois 1827 Act. The August 1842 City Ordinance can be separated into two parts: The first part examines the *process* of the arrest, and the second part examines the *substance* of the charges (looking behind the writ).

1. Challenging the process of the arrest

August 1842 City Ordinance	Illinois 1827 Act
"upon sufficient testimony" (sec. 1)	"by hearing the testimony and arguments" (sec. 3)
"that said writ or process was illegal" (sec. 1)	"second, where, though the original imprisonment was lawful, yet by some act, omission, or event, which has subsequently taken place, the party has become entitled to his discharge" (sec. 3)
"that said writ or process was not legally issued" (sec. 1)	"third, where the process is defective in some substantial form required by law; fourth, where the process, though in proper form, has been issued in a case, or under circumstance where the law does not allow process, or orders for imprisonment or arrest to issue" (sec. 3)

113. This section appears to be enacted to address the reality that Smith, who was then the mayor, was a target which the habeas corpus laws were intended to protect. Consequently, as mayor he would be the chief justice of the municipal court that was empowered to rule on these matters. When Smith was the target, this section provided a mechanism for the municipal court to replace him.

114. Nauvoo City Council, Minutes, August 8, 1842, underlining in original. This act was signed by Hyrum Smith acting as vice mayor and president pro tempore, since Joseph Smith was under arrest at the time. It was published in the *Wasp* on August 13, 1842.

“that said writ or process did not proceed from proper authority” (sec. 1)

“first, where the court has exceeded the limits of its jurisdiction, either as to the matter, place, sum, or person . . . ; fifth, where, although in proper form, the process has been issued or executed by a person either unauthorized to issue or execute the same, or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him” (sec. 3)

2. Challenging the substance of the arrest

August 1842 City Ordinance

“fully hear the merits of the case, upon which said arrest was made, upon such evidence as may be produced and sworn before said court” (sec. 1)

“and shall have power to adjourn the hearing, and also issue process from time to time, in their discretion, in order to procure the attendance of witnesses, so that a fair and impartial trial and decision may be obtained in every such case.” (sec. 1)

Illinois 1827 Act

“The said prisoner may deny any of the material facts set forth in the return, or may allege any fact to shew, either that the imprisonment or detention is unlawful, or that he is then entitled to his discharge; which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge, before or after the same is filed, as also may all suggestions made against it, that thereby material facts may be ascertained” (sec. 3)

“If any person shall be committed for a criminal, or supposed criminal matter, and not admitted to bail, and shall not be tried on or before the second term of the court having jurisdiction of the offence, the prisoner shall be set at liberty by the court, unless the delay shall happen on the application of the prisoner. If such court, at the second term, shall be satisfied that due exertions have been made to procure the evidence for, and on behalf of the people, and that there are reasonable grounds to believe that such evidence may be procured at the third term, they shall have power to continue such case till the third term. If any such prisoner shall have been admitted to bail for a crime other than a capital offence, the court may continue the trial of said cause to a third term, it shall appear by oath or affirmation that the witness for the people of the state are absent, such witnesses being mentioned by name, and the court shewn wherein their testimony is material” (sec. 9)

As these charts demonstrate, section 1 of the August 1842 City Ordinance was drafted in accord with corresponding rights and duties found in the Illinois 1827 Act. Thus, the Nauvoo City Council acted within its rights as granted under section 11 of the Nauvoo Charter.¹¹⁵

Section 2 of the August 1842 City Ordinance further articulates the duty of the municipal court to assure that the underlying charges were not brought “through private pique, malicious intent, or religious or other persecution, falsehood or misrepresentation”; if so, the prisoner would be “discharged.” Similar provisions are found in section 3 of the Illinois 1827 Act.¹¹⁶ Interestingly, the Illinois 1827 Act further provides for monetary penalties being assessed if such wrongful conduct is discovered.¹¹⁷ The August 1842 City Ordinance does not provide any remedy beyond the discharge. This section provides further evidence that this ordinance was created within the bounds granted under the Nauvoo Charter.

The term “discharged,” as used in the August 1842 City Ordinance and the Illinois 1827 Act, rendered into modern terminology, means “dismissed without prejudice.” This means that should other facts or theories of law be discovered, the person released may be rearrested on the same or different charges arising from the same set of events. Stated another way, the doctrine of “double jeopardy” does not attach to a person discharged (or released) based on a writ of habeas corpus.¹¹⁸ The Illinois 1827 Act has a similar provision in section 7,¹¹⁹ again evidencing the validity of the August 1842 City Ordinance.

115. See Nauvoo City Charter.

116. Illinois 1827 Act, secs. 3, 12 at 323–24, 326.

117. Illinois 1827 Act, sec. 12, at 326.

118. Kent, *Commentaries*, 2:30–31: “A person discharged upon *habeas corpus* is not to be reimprisoned for the same cause; but it is not to be deemed the same cause if he be afterwards committed for the same cause by the legal order of the court in which he was bound to appear, or in which he may be indicted and convicted; or if the discharge was for defect of proof, or defect in the commitment in a criminal case, and he be again arrested on sufficient proof and legal process; or if in a civil case, or discharged on mesne process, he be arrested on execution, or on mesne process in another suit, after the first suit is discontinued”; see also *Ex parte Bollman*, 8 U.S. 75, 136–37, 4 Cranch 75 (1807); *Gerard v. People*, 4 Ill. 362, 363, 3 Scam 362 (1842).

119. Illinois 1827 Act, sec. 7, at 325: “No person who has been discharged by order of a court or judge, on a *habeas corpus*, shall be again imprisoned, restrained, or kept in custody, for the same cause, unless he be afterwards indicted for the same offence, or unless by the legal order or process of the court wherein he is bound by recognizance to appear.”

E. Second Extradition Attempt—July 1842

1. Facts

On May 6, 1842, former Missouri Governor Lilburn W. Boggs was shot at his home in Independence, Missouri.¹²⁰ Although serious, the injuries were not fatal.¹²¹ A local citizens' committee headed by Samuel Lucas¹²² conducted an initial investigation focusing on a silversmith,¹²³ but they could find no legitimate suspects.¹²⁴ Early insinuations about a possible Mormon

120. Boggs was hit in the head and neck from a shot through his home's window. For additional discussion about his injuries, see William M. Boggs, "A Short Biographical Sketch of Lilburn W. Boggs by His Son," ed. F. A. Sampson, *Missouri Historical Review* 4 (1910): 106–8.

121. His injuries were so serious that several reported them as fatal. These erroneous reports quickly reached Nauvoo. See "Assassination of Ex-Governor Boggs of Missouri," *Wasp*, May 28, 1842, 4; Andrew H. Hedges, Alex B. Smith, and Richard Lloyd Anderson, eds., *Journals, Volume 2: December 1841–April 1843*, vol. 2 of the Journals series of *The Joseph Smith Papers*, ed. Dean C. Jessee, Ronald K. Esplin, and Richard Lyman Bushman (Salt Lake City: Church Historian's Press, 2011), 57 (hereafter cited as *JSP Journals* 2).

122. Samuel D. Lucas (1799–1868), an active anti-Mormon, was an early settler of Independence as a merchant. In 1833, Lucas was part of the citizenry who forced the Mormons from Independence, acting as the secretary for the movement. A court clerk and then judge, Lucas also was a colonel and later major general of the fourth division of the Missouri militia. In that capacity, he pursued the Mormons at Far West, taking Smith and other key leaders into custody, holding a military court that resulted in ordering their execution. When Alexander Doniphan refused to carry out the order, Lucas took the prisoners to his headquarters in Independence and then to Richmond, where they were charged with various crimes, including treason. From Richmond, Smith and others were bound over to Liberty Jail to await a grand jury. Roger D. Launius, *Alexander William Doniphan: A Portrait of a Missouri Moderate* (Columbia: University of Missouri Press, 1997), 62–66.

123. Identified only as "Tompkins," this suspect was apparently a silversmith who claimed to have told others of his intent to kill Boggs. So confident was the citizen committee of his guilt that they offered a \$200 reward for his arrest. Governor Reynolds authorized an additional \$200 for his arrest and another \$300 for his conviction. An advertisement in the *Jeffersonian Republican* that ran on May 14, 1842, noted that "on the evening of the assassination, [he] was seen in the vicinity of Independence—which with many other corroborating circumstances, leaves no doubt of his guilt." See Monte B. McLaws, "The Attempted Assassination of Missouri's Ex-Governor, Lilburn W. Boggs," *Missouri Historical Review* 60, no. 1 (1965): 50. Yet, despite the apparent evidence indicating his guilt, the *Jeffersonian Republican* noted just a week later that he had been fully acquitted. McLaws, "Attempted Assassination," 55.

124. This committee reported to Governor Reynolds that "no Shadow of suspicion rests upon any one. And our community yet remains in painful ignorance of their greatest foe." Citizens of Jackson County to Governor Reynolds, May 13, 1842, Thomas Reynolds, 1840–44, Office of Governor, Record Group 3.7, Missouri State Archives,

involvement¹²⁵ gained traction in July 1842 with the published claims of dissident and former Nauvoo mayor John C. Bennett, alleging that Orrin Porter Rockwell, who was in Independence at the time,¹²⁶ committed the crime under the direction of Joseph Smith.¹²⁷ While there was never any direct evidence implicating either Rockwell or Joseph Smith, Boggs's pivotal

Jefferson City, Mo. Lucas wrote separately to Governor Reynolds on May 16, 1842, recommending a "Reward of \$1000.00 for his apprehension and Conviction" of the perpetrator of the crime. Samuel D. Lucas to Governor Reynolds, May 16, 1842, Thomas Reynolds, 1840–44, Office of Governor, Record Group 3.7, Missouri State Archives.

125. For example, D. W. Kilbourne, an anti-Mormon in Montrose, Iowa, wrote to Governor Thomas Reynolds on May 14, 1842: "Almost every Mormon here rejoicing over it & I have heard many of them Say that he ought to have been Killed long ago; and one leading Mormon remarked that he had no doubt but a Mormon had done it. You will pardon the liberty I have taken in addressing you on this subject. My only object is to make you acquainted with the Manour in which these Mormons receive the news of Gov Boggs's death, and if the perpetrator has not been discoverd and his name Known, it may be well to direct publick attention in this direction & towards a man too who has even prophesized that he would come to an awful End." D. W. Kilbourne to Governor Reynolds, May 14, 1842, Thomas Reynolds, 1840–44, Office of Governor, Record Group 3.7, Missouri State Archives.

126. Rockwell had apparently brought his wife to Independence to be with her parents when she delivered their fourth child. Rockwell was using the alias "Brown" while in Independence. William Franklin Switzler, *Switzler's Illustrated History of Missouri, from 1541 to 1877* (C. R. Barns, 1879), 251. Rockwell married Luana Beebe in Independence, Missouri, in 1832. "A List of Saints in Jackson County," comp. Thomas Bullock, Church History Library.

127. As noted above, Bennett wrote a series of published letters attacking the Mormon leadership, especially Joseph Smith. These letters were published initially in the Springfield newspaper *Sangamo Journal*. See *Sangamo Journal*, July 2, 15, 22, and 29, 1842. Bennett claimed that when Rockwell left Nauvoo for Independence with his wife, he asked Joseph Smith where he was going, to which Smith replied, "to fulfill prophesy." Such claims were communicated to Governor Reynolds by L. B. Fleak, the postmaster in Keokuk, Iowa. In a letter dated July 12, 1842, to Governor Reynolds, he wrote, "Genl Bennet, late a Mormon leader, now a dissenter goes to you as he tells me for the purpose of giving information touching the attempted assassination of Ex Gov Boggs. It is not doubted here in the least but that the information which he intends to convey to you is literally correct, i.e. that he knows who the person is that shot Boggs and that he /Bennet/ can prove Smiths agency in the matter sufficiently clear to satisfy any person of his participation in the matter." L. B. Fleak to Governor Reynolds, July 12, 1842, Thomas Reynolds, 1840–44, Office of Governor, Record Group 3.7, Missouri State Archives. In one of his letters Bennett penned: "Smith said to me, speaking of Governor Boggs, 'The Destroying Angel has done the work, as predicted, but Rockwell was not the man who shot; the Angel did it.'" *Quincy Whig*, July 16, 1842. This reference was the origin of Rockwell's nickname, "The Destroying Angel."

role in the displacement of the Mormons from Missouri in 1838 during his governorship made him a supposed target of the Mormons.

Boggs fueled this notion of Mormon involvement with an affidavit dated July 20, 1842, stating that he had information leading him to believe that Smith was an accessory before the fact in orchestrating the assassination attempt.¹²⁸ Based on this affidavit, on July 22, 1842, Missouri Governor Thomas Reynolds issued a requisition for the extradition of Smith and Rockwell¹²⁹ from Illinois to Missouri. As a result of this requisition, Illinois Governor Carlin issued an arrest warrant for Smith and Rockwell.¹³⁰ Adams County Sheriff Thomas C. King arrested Smith and Rockwell in Nauvoo on August 8, 1842, on the governor's warrant.¹³¹

128. Affidavit of Lilburn W. Boggs, July 20, 1842, Lincoln Presidential Library.

129. Discussing Orrin Porter Rockwell's involvement and circumstances connected to these events is beyond the scope of this article. In brief, Rockwell and his wife, Luana, left Nauvoo in late February 1842 for Independence. Luana was eight months pregnant. Their fourth child was born in Independence on March 25, 1842. Rockwell stayed several weeks caring for his wife and child. Rockwell was likely back in Nauvoo on May 15 to hear Smith's Sunday sermon, which included references to Boggs being shot. As rumors emerged about his involvement as the shooter, he vehemently denied any involvement. See, for example, *Wasp—Extra*, July 27, 1842. Rockwell was living in Nauvoo when he and Smith were arrested on August 8, 1842, pursuant to Carlin's arrest warrant. After Nauvoo marshal Dimick Huntington released Rockwell on August 8, 1842, he travelled to Philadelphia, where he spent the winter. He was arrested in St. Louis in March 1843 as he was returning to Nauvoo, and he was taken to Independence. An empanelled grand jury in Independence failed to indict him on the assassination attempt (charged as attempted murder) of Boggs. Yet during his incarceration he and a fellow prisoner made an unsuccessful jail break. A grand jury thereafter did indict him for jail breaking and he was tried and found guilty. Alexander Doniphan was his lawyer with funds sent from Nauvoo. The case was tried before Judge Austin King. Upon being found guilty, he was sentenced to "five minutes" in jail. He was released in December 1843, when he finally returned to Nauvoo on Christmas Eve. See generally McLaws, "Attempted Assassination"; Circuit Court Records, Jackson County, Mo., August term, Record Book E, 106; Fifth Judicial District Court of Missouri, Record Book G, no. 4, 236; *Millennial Star* 22 (August 18, 1860): 517–20, 535–37; Harold Schindler, *Orrin Porter Rockwell: Man of God, Son of Thunder*, 2d ed. (Salt Lake City: University of Utah Press, 1983), 67–91, 94–102; Richard L. Dewey, *Porter Rockwell, A Biography*, 10th ed. (New York City: Paramount Books, 1996), 49, 50, 55–77.

130. This was done in accord with the Illinois "Act Concerning Fugitives from Justice," in *Public and General Statute Laws of the State of Illinois*, 318–20.

131. Smith's journal notes that Sheriff King was accompanied by "two other officers." These two officers were most likely James M. Pitman, constable of Adams County, and Edward R. Ford, the person designated by Governor Carlin to receive Smith and Rockwell. *JSP Journals* 2 (August 8, 1842) 81, n. 317.

Anticipating that Joseph Smith and Rockwell would petition for a writ of habeas corpus, the Nauvoo City Council convened in the morning of August 8, 1842, and enacted the August 1842 City Ordinance.¹³² Some critics have highlighted section 2 of this act as expanding the scope of habeas corpus.¹³³ Yet, as discussed above, the scope of review permitted under this ordinance is in accord and finds parallel references in the Illinois Habeas Corpus Act of 1827.

Of significantly greater application were the additional procedures articulated in section 3 of the August 1842 City Ordinance: “And be it also further ordained that in the absence, sickness, debility, or other circumstances disqualifying or preventing the mayor from officiating in his court, as chief justice of the municipal court, the aldermen present shall appoint one from amongst them to act as chief justice, or president pro tempore.”¹³⁴ This section directly addressed the situation that the Nauvoo Municipal Court anticipated, and actually did face, on August 8, 1842, after Mayor Joseph Smith was arrested.¹³⁵

Both Smith and Rockwell retained Sylvester Emmons as their counsel to prepare and argue their petitions for writs of habeas corpus. The basis for the petition included both the procedural claim as to the “insufficiency of the Writ,” as well as the factual claim as to “the utter groundlessness of

132. Nauvoo City Council Proceedings (August 8, 1842), Church History Library.

133. Dinger, “Joseph Smith and the Development of Habeas Corpus,” 149–50. Noting about section 2: “This section of the new ordinance also greatly expanded the municipal court’s authority to void writs against Church leaders. I am aware of no other court that invalidates a writ issued for ‘malicious intent’ or ‘religious . . . persecution.’” In this regard, section 3 of the Illinois 1827 Act provides for relief upon a showing from a litany of bases including if the charges were obtained by “false pretense” or “where there is no general law . . . to authorize the process.” Illinois 1827 Act, sec. 3, 323–24. Each of the delineated bases noted in section 2 of the August 1842 City Ordinance (for example, “private pique, malicious intent, Religious or other persecution, falsehood or misrepresentation”) would certainly fall within the ambit of section 3 of the Illinois 1827 Act.

134. Nauvoo City Council Proceedings (August 8, 1842).

135. Smith’s journal for August 8, 1842, notes that the Nauvoo City Council convened immediately after Smith’s and Rockwell’s arrest that morning. *JSP Journals* 2, 81. This ordinance appears to have been enacted in the morning, because by 1:00 p.m. the Nauvoo Municipal Court held a “special meeting.” At that time, the minutes note, “Present, Aldermen Marks, Whitney, Harris, Spencer, and Hills. Alderman Spencer was selected, and elected by vote, to act as Chief Justice, or President pro tem, (in absence of the Chief Justice, who was under arrest,) and he took his seat accordingly.” Nauvoo Municipal Court docket (August 8, 1842), Church History Library.

the charge preferred in said Writ.”¹³⁶ The municipal court “heard the Petition read, and the reasons adduced by Counsellor Emmons upon behalf of the Prisoner, and the nature of the Case, and prayer of the Petition,” and granted the petition issuing a writ of habeas corpus for both Joseph Smith and Rockwell. The return was “directed to Thomas C. King, to forthwith bring the body of Joseph Smith before this Court.” The minutes of this hearing ended with the court being adjourned “until the first Monday in September next.”¹³⁷

However, no hearing on the return of the writ of habeas corpus was held at that time.

Sheriff King left Smith and Rockwell in the custody of the Nauvoo Marshal Dimick B. Huntington.¹³⁸ However, Sheriff King took with him the original arrest warrant from Governor Carlin, as

well as the writs of habeas corpus granted by the municipal court.¹³⁹ Without the arrest warrant, there was no legal basis for Marshal Huntington to keep Smith and Rockwell in custody, and for that reason they were released.¹⁴⁰

Upon learning of these proceedings, coupled with Rockwell’s and Smith’s release, Governor Carlin took the position that the municipal court



THOMAS CARLIN. Carlin was elected governor of Illinois in 1838 and was involved in both the first and second extradition efforts. During the second extradition he offered a reward for the arrest of Joseph Smith and Porter Rockwell. Abraham Lincoln Presidential Library & Museum (ALPLM).

136. Petition of Joseph Smith for Writ of Habeas Corpus, August 8, 1842, Church History Library.

137. Nauvoo Municipal Court Docket, August 8, 1842, Church History Library.

138. Law of the Lord, 129, Church History Library.

139. Sharalyn Howcroft, an archivist on the Joseph Smith Papers Project, recently discovered the original copy of this writ of habeas corpus in the United States District and Circuit Courts files in the National Archives and Records Administration Great Lakes Region, Chicago, Illinois.

140. Having the arrest warrant “in hand” was a threshold requirement for detaining a person. “An Act to Regulate the Apprehension of Offenders, and for Other Purposes,” sec. 7, in *The Public and General Statutes of the State of Illinois*, 239.

lacked judicial authority to rule on the warrant and that the ordinances passed by the Nauvoo City Council overstepped its legislative authority. Specifically, Governor Carlin contested the interpretation of sections 16 and 17 of the Nauvoo Charter that created the municipal court and articulated its jurisdiction, including its right to grant “writs of habeas corpus in all cases arising under the ordinances of the City Council.”¹⁴¹ Carlin argued that this provision only extended to cases that originated under a violation of a Nauvoo City Council ordinance. Carlin’s position was that the underlying charge (accessory before the fact) and the resulting warrant did not arise from a Nauvoo ordinance and therefore was beyond the scope of the municipal court and the city council.

Nauvoo officials, however, argued that these sections must be read in conjunction with section 11 of the Nauvoo Charter that gave the Nauvoo City Council “power and authority to make, ordain, establish, and execute, all such ordinances, not repugnant to the Constitution of the United States or of this State.”¹⁴² Nauvoo officials argued that the laws protecting the citizens of Nauvoo (for example, rights pertaining to writs of habeas corpus) were well within the contours of both the U.S. and Illinois Constitutions and therefore fell directly within the jurisdiction of the municipal court and city council.

Most commentators unfortunately miss the legal dichotomy raised by Carlin and the Nauvoo officials. The issue was not whether the July, August, or November ordinances passed by the Nauvoo City Council were in legal accord with state or federal law, but whether the Nauvoo City Council could enact habeas corpus laws that applied to alleged crimes that did not occur in Nauvoo. Therefore, the issue for Carlin was not *how* the Nauvoo Municipal Court handled a petition for a writ of habeas corpus, but rather *whether* it could handle a petition.

As discussed earlier, none of the ordinances passed by the Nauvoo City Council conceptually violated the established application of habeas corpus in the nineteenth century. While some would criticize language in these city ordinances that permitted a look “behind” the procedures of an arrest, such action clearly fell within statutory interpretation and American court’s common law usage of habeas corpus. In fact, the Illinois Habeas Corpus Act of 1827 had express language that permitted a court to look behind the procedures. Still others would criticize language in these city ordinances that allowed a prisoner to be discharged if the alleged charges were brought in bad faith, with malice, or based on falsehoods; yet such efforts were explicitly

141. Nauvoo City Charter, secs. 16, 17 (1842).

142. Nauvoo City Charter, sec. 11.

allowed by both case law and comparable statute. In fact, the scope of remedies available under a writ of habeas corpus is not one of guilt or innocence, but rather remand, bail, or discharge—all intermediate rulings.¹⁴³

This author believes that Carlin's position that the Nauvoo Municipal Court lacked the authority to either grant a petition for or hear the writ of habeas corpus was legally flawed. Such a position results in a restrictive reading of the Nauvoo Charter that limits the Nauvoo Municipal Court's jurisdiction to grant writs of habeas corpus to specific subject matter. As discussed above, the cities of Alton and Chicago also had by charter municipal courts with the rights of issuing and hearing writs of habeas corpus. These rights were considered "as may be had in like cases before circuit judges and circuit courts of this State."¹⁴⁴ No state courts with similar jurisdiction were restricted in the manner suggested by Carlin.¹⁴⁵ If, for example, Smith and Rockwell had petitioned for a new writ of habeas corpus in a circuit court outside of Nauvoo, there would be no concern as to whether the circuit court had jurisdiction even though the crime did not take place within the circuit court's jurisdictional boundaries. Indeed, Joseph Smith and Rockwell contemplated such a legal move shortly after learning of Carlin's opposition to the Nauvoo Municipal Court's granting of the writ. Smith notes on August 9, 1842, that he "prepared a writ of Habeas Corpus from the Master in Chancery."¹⁴⁶

The first extradition effort is a perfect example of how Illinois law allowed any circuit court to issue a writ of habeas corpus, regardless of where the alleged offence or arrest warrant originated. In the first extradition context, Joseph Smith was arrested outside of Quincy, Warren County, Illinois. Upon arrest, Joseph Smith filed a petition for a writ of habeas corpus in the Warren County Circuit Court.¹⁴⁷ Remember, none of the matters contained in the arrest warrant and ensuing writ of habeas corpus occurred in Warren County. Nevertheless, section 1 of the Illinois 1827 Act provides that both the supreme and circuit courts had jurisdiction to issue and hear writs of habeas corpus while "in term."¹⁴⁸ Thus Associate Supreme Court Justice Stephen Douglas had authority to hear the writ. The Warren County Circuit Court

143. See, for example, Illinois 1827 Act, sec. 2, 323 (provides for contesting the factual basis of the imprisonment) and sec. 3 (allows the "prisoner may deny any of the material facts set forth in the return, or may allege any facts to shew, either that the imprisonment or detention is unlawful, or that he is entitled to his discharge").

144. "An Act to Amend an Act, Entitled 'An Act to Incorporate the City of Alton,'" sec. 1, *Incorporation Laws of the State of Illinois*, 240; see generally notes 88–90.

145. Illinois 1827 Act, sec. 1, 322.

146. *JSP Journals* 2 (August 9, 1842), 83.

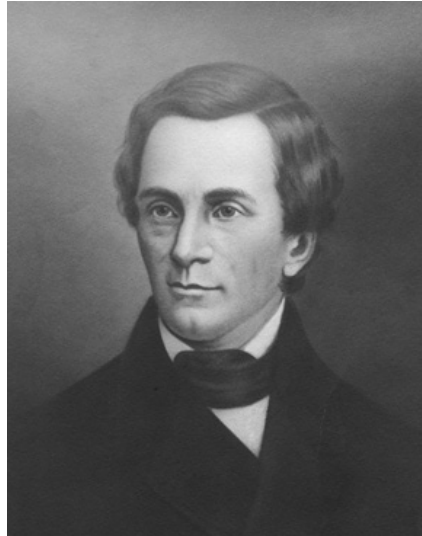
147. Rough Draft Notes of History of the Church, 1841–011.

148. Illinois 1827 Act, sec.1, at 322.

was as remote for the first extradition arrest as the Nauvoo Municipal Court was for the second.

The fact that no case or appeal was ever filed in any Illinois court to challenge the legality of any of these ordinances based on the Nauvoo City Council's interpretation of the Nauvoo Charter further evidences their validity despite open hostility to the Mormons generally. In the end, the only remedy that was sought was to repeal the Nauvoo Charter itself. These actions in great measure legitimized these ordinances as being in accord with a charter that the Illinois legislature enacted for the operations of Nauvoo.

Governor Carlin attempted to circumvent the issue of the legality of these ordinances by simply offering a reward for the capture of Smith and Rockwell. Captioned as a "Proclamation," Governor Carlin on September 20, 1842, announced a \$200 reward each for the arrest of Smith and Rockwell. The basis of the proclamation was that "the said Rockwell and Joseph Smith resisted the Laws by refusing to go with the officers who had them in custody as fugitives from Justice, and escaped from the custody of said officers."¹⁴⁹ Such a basis is belied by (1) the facts of the petitions for habeas corpus being made by Smith and Rockwell, (2) the proceedings before the Nauvoo Municipal Court granting the writs, (3) the decision of Sheriff King to take the arrest warrants with him when he left Nauvoo to report to Carlin, and (4) the release of Smith and Rockwell by Marshal Huntington based on not having the arrest warrants. Nevertheless, Joseph Smith and Porter Rockwell thereafter went into hiding to avoid being rearrested.¹⁵⁰



THOMAS FORD. As a former Illinois Supreme Court Justice before his election as governor, Ford gave Joseph Smith legal advice about how to resolve the requisition issued by his predecessor Governor Thomas Carlin. Abraham Lincoln Presidential Library & Museum (ALPLM).

149. "Proclamation," *Illinois Register*, September 30, 1842.

150. Smith initially spent time across the Mississippi River in the Iowa Territories in an effort to avoid arrest in Illinois. The governor of Iowa, John Chambers, later issued an arrest warrant for Smith and Rockwell based on a requisition from

Thomas Ford was elected Illinois governor in November 1842, replacing Thomas Carlin.¹⁵¹ With this change in administration, a delegation representing Joseph Smith traveled from Nauvoo to Springfield in early December to determine, in part, Governor Ford's disposition regarding the Missouri extradition efforts.¹⁵² After meeting with several prominent attorneys and judges, including Judge Douglas and Governor Ford, the delegation concluded that if Joseph Smith would voluntarily appear in Springfield, the entire situation could be acceptably resolved.¹⁵³ The delegation also

Missouri Governor Reynolds. It was apparently returned to him as not served. He wrote to John Cowan on March 10, 1843, that he planned on taking no additional action on the matter unless the Missouri governor made a new requisition. John Chambers to John Cowan, March 10, 1843, Church History Library.

151. Thomas Ford was a replacement Democratic candidate for governor of Illinois. Adam W. Snyder, a state senator, was selected as the Democratic candidate at the Illinois state Democratic convention in December 1841. Snyder enjoyed the support of the Mormons, having been in the Senate during, and a supporter of, the passage of the Nauvoo City Charter. Joseph Duncan was selected as the Whig candidate in spring 1842. Duncan campaigned, in part, against the Nauvoo Charter. Snyder died unexpectedly in May 1842. Thomas Ford was named as his replacement. At the time, Ford was a member of the Illinois Supreme Court. Ford enjoyed the benefit of the Mormon support of Snyder. He never openly supported the Nauvoo Charter during his abbreviated campaign and announced his concern over it in his inaugural address. Ford, *History of Illinois*, 267–78; “Gov. Ford’s Inaugural Address,” *Sangamo Journal*, December 15, 1842.

152. This trip to Springfield had been previously scheduled to hopefully conclude Smith’s bankruptcy. Smith and several other prominent Mormon leaders had filed under the newly enacted bankruptcy laws on April 28, 1842. An initial hearing was held on June 6, 1842, with a final hearing scheduled for October 1, 1842, to discharge him of his debts. U.S. Attorney Justin Butterfield had filed an objection to the discharge, claiming that Smith had improperly transferred property to avoid paying an obligation with the U.S. Government for the purchase of a riverboat. Consequently, the hearing was rescheduled for December 15, 1842. See Dallin H. Oaks and Joseph I. Bentley, “Joseph Smith and Legal Process: In the Wake of the Steamboat Nauvoo,” *BYU Law Review* (1976): 735–82. The delegation left Nauvoo on December 9, 1842, arriving in Springfield on December 13. The delegation included Hyrum Smith, Willard Richards, William Clayton, Henry Sherwood, Benjamin Covey, Peter Haws, Heber Kimball, Reynolds Cahoon, and Alpheus Cutler. See *JSP Journals* 2 (December 9–20, 1842), 173.

153. Stephen A. Douglas, an associate justice of the Illinois Supreme Court, advised that Smith should petition Governor Ford to rescind the arrest warrant and reward. The next day (Wednesday) they met Justin Butterfield, who agreed to prepare such a petition to Governor Ford. Butterfield also had several supporting affidavits prepared. Armed with these pleadings, as well as a copy of the Boggs affidavit, Butterfield met with Governor Ford to discuss the warrant. Governor Ford indicated that while the arrest warrant was likely illegal, he doubted whether he had the authority to rescind

met and retained Justin Butterfield,¹⁵⁴ the United States Attorney for the District of Illinois, to represent Joseph Smith in this matter.¹⁵⁵

the action of a prior governor. He agreed to get advice on the matter from his former fellow Supreme Court Justices. *JSP Journals 2* (December 9–20, 1842), 174. Ford later wrote to Smith indicating that after consulting with the justices the consensus was that he lacked the power to rescind the warrant. He did note, however, that if the matter was brought to the court that Smith would probably prevail. Thomas Ford to Joseph Smith, December 17, 1842, Joseph Smith Collection, Church History Library. This letter was given to the delegation to deliver to Smith. The following day (Thursday), Butterfield confirmed the views of the Illinois Supreme Court justices pertaining to the legality of the arrest warrant. Concurrently, as Butterfield was helping Smith pertaining to the arrest warrant, he was negotiating the possible resolution of Hyrum and Joseph Smith's discharge in bankruptcy. On Friday, Butterfield accepted the terms to settle the government's claim against both Smiths. Hyrum immediately received his discharge. For Joseph's case, Butterfield needed to get the settlement that included payment terms and suggested collateral approved by the Solicitor of the Treasury Charles Penrose. *JSP Journals 2* (December 9, 1842), 178 n. 592. Ultimately, Penrose rejected Butterfield's recommendation and sought a cash payment rather than installment payments. Smith was murdered before a final deal was consummated. Justin Butterfield to Charles Penrose, December 17, 1842, and Penrose to Butterfield, January 11, 1843, National Archives, Records of the Solicitor of the Treasury, Record Group 206, Part I (1841–1852), microfilm copy at Church History Library; Oaks and Bentley, "Joseph Smith and Legal Process," 737–43.

154. Justin Butterfield (1790–1855) was appointed in 1841 by President Harrison as the United States District Attorney for the District of Illinois. *Historical Encyclopedia of Illinois*, ed. Newton Bateman and Paul Selby (Munsell Publishing Co., 1918), 1:70. Perhaps his admiration of Daniel Webster was the reason that he often attended court dressed "*a la Webster*, in blue dress-coat and metal buttons, with bluff vest." *History of Sangamon County, Illinois* (Inter-State Publishing Co., 1881), 103. Usher F. Linder, *Reminiscences of the Early Bench and Bar of Illinois* (Chicago Legal News Company, 1879), 87–88.

Sidney Rigdon had contacted Justin Butterfield through Calvin A. Warren, an attorney who was assisting various Church leaders file under the newly enacted federal bankruptcy laws in October 1842. Warren had apparently apprised Butterfield of the factual issues surrounding the extradition efforts. Butterfield gave Warren his general opinion of the matter at that time. Rigdon had asked for a more formal opinion. By letter dated October 20, 1842, written from Chicago, where Butterfield lived and practiced law, Butterfield further articulated his legal position. Butterfield to Rigdon, October 20, 1842, Sidney Rigdon Collection, Church History Library. See appendix A for the full text of this October 20, 1842 letter. Butterfield's central position was that Smith could not be charged with having fled from justice unless he had actually fled from Missouri.

155. Justin Butterfield to Joseph Smith, December 17, 1842; Law of the Lord, 215; *JSP Journals 2* (December 17, 1842), 181–82.



JUSTIN BUTTERFIELD. Perhaps the most prominent attorney to ever represent Joseph Smith, Butterfield often attended court “a la Webster” in a blue dress-coat, metal buttons, and a bluff vest. His opening statement to the court during the hearing on Joseph Smith’s writ of habeas corpus illustrated his legendary oratorical skills. Abraham Lincoln Presidential Library & Museum (ALPLM).

Consistent with the delegation’s findings, on December 27, 1842, Joseph Smith, accompanied by a few close colleagues, left for Springfield,¹⁵⁶ arriving on December 30, 1842.¹⁵⁷ Upon their arrival, Butterfield’s initial efforts were to make sure the niceties of the procedural requirements were satisfied. Wilson Law, a general in the Nauvoo militia, officially “arrested” Joseph

156. The group included Wilson Law, Hyrum Smith, John Taylor, William Marks, Levi Moffitt, Peter Hawes, Lorin Walker, Willard Richards, and Orson Hyde. William Clayton and Henry Sherwood left Nauvoo the day before for Carthage to seek a writ of habeas corpus from the master in chancery. *JSP Journals* 2 (December 27, 1842), 195. By law, circuit judges in each county of the judge’s judicial circuit appointed a master in chancery. Masters in chancery were empowered by statute to order writs of habeas corpus. “An Act to Provide for Issuing Writs of Ne Exeat and Habeas Corpus, and for Other Purposes,” secs. 1–2, in *Public and General Statute Laws of the State of Illinois*, 145. They apparently did obtain an order for the writ from the master in chancery (Chauncey Robison) but could not get it issued by the court clerk, Jacob C. Davis, as he was unavailable, having won a state senatorial seat. *JSP Journals* 2 (December 27, 1842), 195. Davis was implicated in the murder of Joseph and Hyrum Smith in June 1844. One of the enumerated duties of a court clerk was to issue writs ordered by the court. “An Act Concerning Justices of the Peace and Constables,” sec. 36, in *Public and General Statute Laws of the State of Illinois*, 402, 410; *People v. Town*, 4 Ill. (3 Scam.) 18 (1841), the Illinois Supreme Court held that a master in chancery could not issue a writ of habeas corpus, but only order the court clerk to do so. It is not clear on what basis Master in Chancery Robison found cause for ordering the writ of habeas corpus. As discussed above, the failure for Smith to have the original arrest warrant required obtaining a new one before petitioning for a writ of habeas corpus. The record does not identify what documents or arguments Clayton or Sherwood used in getting Robison to order the writ.

157. The party ate dinner at Judge James Adams’s residence that evening, where Justin Butterfield joined them. *JSP Journals* 2 (December 30, 1842), 197.

Smith pursuant to the September 20 proclamation of Governor Carlin.¹⁵⁸ However, because the arrest warrant that Carlin had previously issued was still in the possession of Sheriff King and it became apparent that getting the arrest warrant from King in a timely manner might prove difficult, Butterfield recommended seeking a new arrest warrant from Governor Ford.¹⁵⁹ The new warrant could then be used as the legal basis for filing a new petition for a writ of habeas corpus.

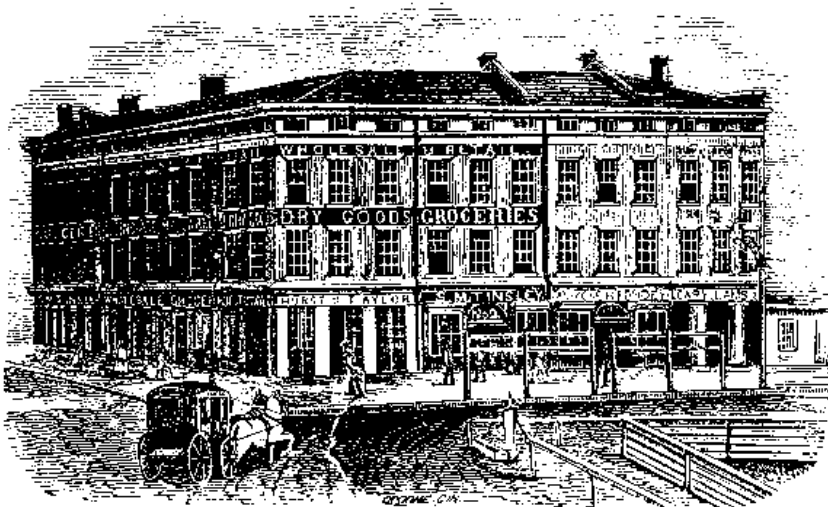
The next morning (December 31), Butterfield prepared a petition to Governor Ford for a new arrest warrant.¹⁶⁰ Ford granted the petition and issued the warrant.¹⁶¹ Butterfield then filed a petition in the United States Circuit Court in Springfield for a writ of habeas corpus to review the arrest the same

158. *JSP Journals 2* (December 27, 1842), 195.

159. This decision was based on two factors: First, that Clayton/Sherwood had been unable to secure a new writ of habeas corpus from the master in chancery in Carthage. Second, no one was certain as to when they could get the original arrest warrant. During the dinner at Judge Adams's on December 30, William Smith, Joseph's brother and then member of the Illinois State House of Representatives, noted that he had seen Sheriff Pitman in Springfield but did not know whether he still had the warrant. Pitman was apparently evasive when asked by the Illinois Secretary of State Lyman Trumbull whether he had the warrant. The group decided to try and get the original warrant from Pitman, but if they were unsuccessful to seek a new arrest warrant. *JSP Journals 2* (December 30, 1842), 197–98. The following day, Butterfield attempted to get the original warrant from Pitman, who told him that sheriff Thomas King had it in Quincy, but that King was bringing it to Springfield as requested by Trumbull. *JSP Journals 2* (December 31, 1842), 200, 203.

160. The petition articulated that the arrest warrant was to be an “alias warrant” based “upon the same requisition” as prepared by the governor “for the sole purpose of having this question settled by the Judicial Tribunal.” Petition to Governor Ford for New Arrest Warrant, December 31, 1842, Lincoln Presidential Library, spelling regularized.

161. The “alias warrant” noted, in part, as follows: “Whereas it has been made known to me by the Executive Authority of the state of Missouri that one Joseph Smith stands charged by the affidavit of Lilburn W Boggs made on the 20th day of July 1842 . . . being accessory before the fact to an assault with intent to kill made by one O. P. Rockewell on Lilburn W Boggs on the night of the sixth day of May AD 1842 . . . and that the said Joseph Smith has fled from Justice of said State and taken refuge in the State of Illinois.” Arrest Warrant issued by Governor Ford, December 31, 1842, Lincoln Presidential Library, spelling regularized. Butterfield then had both Wilson Law (under the auspices of the Proclamation) and Sangamon County Sheriff William Elkins (under the auspices of the new arrest warrant) take Smith to Judge Nathaniel Pope's courtroom in Springfield.

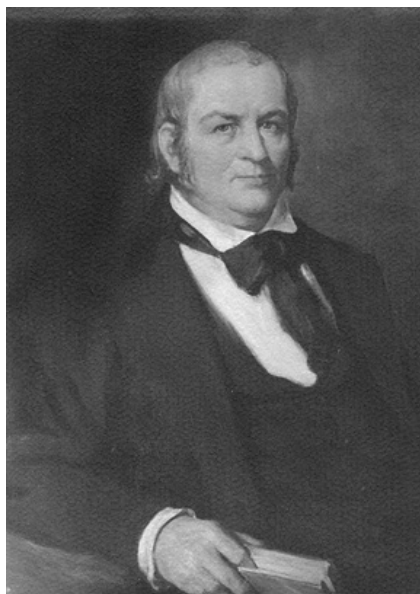


TINSLEY BUILDING. This three-story brick building was built circa 1840–41, located on the corner of Adams and Sixth Streets in Springfield, Illinois. It was owned by Seth Tinsley, who operated a dry goods store there. The United States Federal Court rented space on the second floor. It was here that Justin Butterfield represented Joseph Smith before Federal Judge Nathaniel Pope. From 1843 to 1852, Abraham Lincoln, with Stephen Logan and William Herndon, had a law office on the third floor of the building. Abraham Lincoln Presidential Library & Museum (ALPLM).

day.¹⁶² With the filing of the petition, Federal Judge Nathaniel Pope¹⁶³ permitted Butterfield to address the court. Butterfield articulated the procedural

162. The petition signed by Joseph Smith for a writ of habeas corpus read, in part, as follows: “The petition of Joseph Smith respectfully sheweth that he has been arrested and is detained . . . upon a warrant issued by the Governor of the State of Illinois upon the requisition of the Governor of Missouri as a fugitive from justice . . . And your Petitioner is also arrested by Wilson Law and by him also held and detained in custody (Jointly with the said Sheriff of Sangamon Co.) upon a proclamation issued by the Governor of the state of Illinois, a copy of which proclamation is hereto annexed.—Your Petition prays that a writ of Habeas Corpus may be issued by this Court directed to the said William F. Elkin and Wilson Law commanding them furtherwith and without delay to bring your petitioner before this Honorable Court to abide such order and direction as the said Court may make in the premises.” Smith’s Petition for a Writ of Habeas Corpus issued by Governor Ford, December 31, 1842, Lincoln Presidential Library, spelling regularized.

163. Nathaniel Pope (1784–1850) was appointed by President James Monroe to the federal bench for the District of Illinois in 1819. Paul M. Angle, *Nathaniel Pope, 1784 to 1850, a Memoir* (Springfield, Ill.: Privately printed, 1937); Linder, *Reminiscences of the Early Bench*, 215–17.



NATHANIEL POPE. Judge Pope was the first commissioned federal judge in Illinois, a position he would hold for more than thirty years. During the hearing on Joseph Smith's writ of habeas corpus, he allowed several ladies, including his daughter and Mary Todd Lincoln, to sit with him on the bench. It is reportedly the only time that he permitted anyone to sit next to him during court. Abraham Lincoln Presidential Library & Museum (ALPLM).

posture of the matter (the requisition from Governor Reynolds, the proclamation of Governor Carlin and the new arrest warrant from Governor Ford), as well as the substantive position of Joseph Smith (that the requisition was flawed because Joseph Smith never fled from Missouri as alleged). He then introduced Joseph Smith to the court, read the petition for a writ of habeas corpus, and requested a hearing on the underlying extradition effort and for bail pending the hearing.¹⁶⁴ Judge Pope granted the writ of habeas corpus,¹⁶⁵ set bail at \$4,000,¹⁶⁶ and scheduled the hearing on the return of the writ for the following Monday, January 2, 1843.

164. *JSP Journals* 2 (December 31, 1842), 200–204.

165. The writ of habeas corpus ordered by Judge Pope and issued by the court clerk James Owing noted, in part, as follows: “We command you, that you do forthwith, without excuse or delay, bring or cause to be brought, before the Circuit Court of the United States for the District of Illinois; at the District Court Room in the City of Springfield the body of Joseph Smith . . . and who is unlawfully detained in your custody. . . . And hereof make due return, under the penalty of what the law directs.” Writ of Habeas Corpus ordered by Judge Nathaniel Pope, December 31, 1842, Lincoln Presidential Library, spelling regularized.

166. Section 4 of the Illinois 1827 Habeas Corpus Act required that if bail is admitted, the prisoner (Smith, in this case) “shall enter into recognizance with one or more securities.” The record indicates that Judge James Adams and Wilson Law acted as securities for Smith. *JSP Journals* 2 (December 31, 1842), 204.

2. Hearing

On Monday morning, Joseph Smith was represented before Judge Pope by two attorneys: Justin Butterfield, who lived in Chicago, and Benjamin S. Edwards,¹⁶⁷ who lived in Springfield. Illinois Attorney General Josiah Lamborn represented the state of Illinois.¹⁶⁸

Lamborn immediately sought a continuance to have additional preparation time for the hearing on the return of the writ. Judge Pope granted the request and moved the hearing to Wednesday, January 4, 1843. Butterfield then moved to file objections to the factual basis of the extradition warrant upon which the writ of habeas corpus was taken.¹⁶⁹ It does not appear that Lamborn objected to the motion. Butterfield's motion was supported by an affidavit of Joseph Smith that noted:

Joseph Smith being brought up on Habeas Corpus before this Court comes and denies the matter set forth in the return to the same in this, that he is not a fugitive from the justice of the State of Missouri; but alleges and is ready to prove that he was not in the State of Missouri at the time of the Commission of the alleged crime set forth in the affidavit of L. W. Boggs, nor had he been in said State for more than three years previous to that time, nor has he been in that State since that time—but on the contrary at the time the said alleged assault was made upon the said Boggs as set forth in said Affidavit the said Smith was at Nauvoo in the County of Hancock in the State of Illinois, and that he has not fled from the justice of the State of Missouri and taken refuge in the State of Illinois, as is most untruly stated in the warrant upon which he is arrested and that the matter set forth in the requisition of the Governor of Missouri and in the said Warrant are not supported by oath.

Joseph Smith¹⁷⁰

167. Benjamin S. Edwards (1818–1886) graduated from Yale in 1838 and studied law the following year with Stephen T. Logan, one of the most distinguished lawyers in Illinois and one-time partner with Abraham Lincoln. Linder, *Reminiscences of the Early Bench*, 350–52. See David Herbert Donald, *Lincoln's Herndon: A Biography* (1948; rpt., Cambridge, Mass.: Da Capo Press, 1989), 139–41; *Illinois State Register* (Springfield), February 5, 1886, 7.

168. Josiah Lamborn (1809–1847) was “described by his contemporaries as an able and brilliant man, but of convivial habits and unscrupulous to such a degree that his name was mixed up with a number of official scandals. Separated from his family, he died of delirium tremens, at Whitehall, Greene County, [Illinois].” Bateman and Selby, *Historical Encyclopedia of Illinois*, 1:327. *Transactions of the Illinois State Historical Society* (Springfield, Ill.: Phillips Bros., 1903), 218. Linder, *Reminiscences of the Early Bench*, 258–59.

169. *JSP Journals* 2 (January 2, 1843), 210, 387.

170. Affidavit of Joseph Smith, January 2, 1843, Church History Library.

After the Monday hearing, Joseph Smith, his counsel, and various colleagues further discussed the preparation for the hearing, including whether additional affidavits should be prepared supporting the fact that Smith was not in Missouri when Boggs was shot. Jacob Backenstos¹⁷¹ even volunteered to go to Carthage to get affidavits from people who had dined with Smith in Nauvoo on May 7, 1842. In the late afternoon of the day of the hearing, Attorney General Lamborn and Marshal William Prentiss visited Joseph Smith and had a “jovial” meeting.¹⁷²

The following day, Butterfield drafted two additional affidavits—one to be signed by a group of Mormons and the other by a group of non-Mormons, both affirming Joseph Smith’s presence in Nauvoo around the date that Boggs was shot.¹⁷³ It appears that these affidavits were prepared to make sure that this evidence became part of the record, as Butterfield probably anticipated the forthcoming objections from Lamborn. Both of these affidavits were submitted and read into the record at the beginning of the hearing the following day.

On Wednesday, January 4, 1843, the court convened at 9 a.m., all parties being present.¹⁷⁴ The court started by inquiring whether either party had any preliminary motions. Both did. Lamborn had two—the first was a motion to dismiss the issuance of the writ of habeas corpus on the ground that the court had no jurisdiction to hear the matter, and the second was effectively a motion in limine (a motion before the trial to resolve evidentiary rulings) to prevent any inquiry into any facts “behind the writ.”¹⁷⁵ Butterfield and Edwards countered the two motions, first articulating that the court not only had jurisdiction over this matter but exclusive

171. Jacob Backenstos (1811–1857) was a friendly non-Mormon. He was sheriff of Hancock County in 1845, where he defended the rights of the Mormons from mob violence.

172. *JSP Journals* 2 (January 2, 1843), 211–12.

173. See *JSP Journals* 2 (May 7, 1842), 54–55, identifying that Smith was in Nauvoo on the date that Boggs was shot, where he both reviewed the Nauvoo Legion and had dinner with a group of “distinguished Strangers,” including Stephen A. Douglas.

174. Numerous accounts report that Judge Pope had several young ladies sit on either side of him at the bench during these proceedings, including his daughters, Butterfield’s daughter, and Mary Todd Lincoln, who had recently married Abraham Lincoln. *History of Sangamon County, Illinois*, 103–4; Angle, *Nathaniel Pope, 1794–1850*, 56; Isaac Newton Arnold, *Reminiscences of the Illinois Bar Forty Years Ago* (Fergus Printing Co., 1881), 6–7; *JSP Journals* 2 (January 2, 1843), 211–12. Marshal William Prentiss noted that this “was the first time in his administration that the Ladies had attended court on a trial.” *JSP Journals* 2 (January 2, 1843), 211.

175. *JSP Journals* 2 (January 4, 1843), 216–18.

jurisdiction, because Joseph Smith was in custody “under color of U.S. Law.”¹⁷⁶ Concerning Lamborn’s second motion, Butterfield argued that the facts were undisputable—Smith could not be a fugitive from a crime that occurred in Missouri when he was in Illinois at the time.¹⁷⁷ Butterfield then had read into the record the two prepared affidavits.¹⁷⁸ The first affidavit, signed by ten Mormons, itemized the times they knew Smith was in Nauvoo, making it impossible for him to have been in Missouri participating in the attempt on Boggs’s life.¹⁷⁹

The second affidavit, signed by Stephen A. Douglas and Jacob Backenstos, confirmed “that [they] were at Nauvoo, in the County of Hancock in this State, on the seventh day of May last, that they saw Joseph Smith on

176. *JSP Journals* 2 (January 4, 1843), 219–20.

177. *JSP Journals* 2 (January 4, 1843), 222–24.

178. Before reading into the record the affidavits, the court put under oath the signers, including Wilson Law, Henry Sherwood, Theodore Turley, Shadrach Roundy, William Clayton, John Taylor, William Marks, Lorin Walker, and Willard Richards. After the joint affidavit was read, the court swore in Stephen Douglas and Jacob Backenstos and their joint affidavit was read. *JSP Journals* 2 (January 4, 1843), 216. This was done in accordance with section 3 of “An Act Concerning Oaths and Affirmations,” in *Public and General Statute Laws of the State of Illinois*, 514. Both affidavits note that they were “sworn to and subscribed in Open Court” on January 4, 1843.

179. The affidavit read, in part: “Being duly sworn say that they know that Joseph Smith was in Nauvoo . . . during the whole of the Sixth & Seventh days of May last; That on the sixth day of May Aforesaid the said Smith attended an officer drill at Nauvoo from Ten O’clock in the forenoon to about four o’clock in the afternoon at which drill the Said Joseph Smith was present: . . . —and these deponents . . . were with the said Smith at his dwelling house, in Nauvoo, on and during the evening of the fifth day of May last. & conversed with him; — and all of the deponents aforesaid do say that on the seventh day of May aforesaid the Said Smith reviewed the Nauvoo Legion. & was present with the said Legion all that day, in the presence of many thousand people and it would have been impossible for the Said Joseph Smith to have been at any place in the State of Missouri, at any time, on or between the sixth & seventh days of May aforesaid; and these deponents . . . say that they have seen & conversed with the said Smith at Nauvoo aforesaid daily from the Tenth of February last until the first of July last and know that he has not been absent from said city of Nauvoo at any time, during that time, long enough to have been in the State of Missouri.—that Jackson county in the State of Missouri, is about three hundred miles from Nauvoo.” Collaborative Affidavits of Wilson Law, Henry Sherwood, Theodore Turley, Shadrach Roundy, William Clayton, Hyrum Smith, John Taylor, William Marks, Lorin Walker, and Willard Richards, January 4, 1843, Church History Library, spelling and punctuation regularized. While Hyrum Smith apparently signed the affidavit, his name is not recorded as being present and sworn in by the court. Further, his name is struck out on the Affidavit. Consequently, it is likely that Hyrum was not present at the hearing.

that day reviewing the Nauvoo Legion at that place, in the presence of several thousand persons.”¹⁸⁰

a. Jurisdiction to hear the return of the writ of habeas corpus. Lamborn argued that because the extradition effort was between the states of Missouri and Illinois,¹⁸¹ state court was the only place that had jurisdiction. In support he cited the famous Supreme Court case *Ex parte Bollman*¹⁸² for the proposition that the federal court’s jurisdiction was at common law and could be restricted by statute. Lamborn argued that the above-cited Illinois statute preempted federal jurisdiction.¹⁸³ Lamborn furthered this position, claiming an Illinois statute governed the incident.¹⁸⁴

Edwards responded by simply noting that Lamborn was “in the dark” on this issue.¹⁸⁵ Citing *Kent Commentaries*, Edwards argued that the federal court had jurisdiction in any case involving habeas corpus that “arises under U.S. law.”¹⁸⁶ Edwards continued that the right of habeas corpus was so central to the American ideal that it was expressly written into the Constitution itself.¹⁸⁷ Edwards concluded that the Revolutionary War was won to extract such powers from the Crown. Certainly, the Founders never intended those powers to be given to a governor.¹⁸⁸

180. Collaborative Affidavits of Stephen A. Douglas, James H. Ralson, Almeron Wheat, J. B. Backenstos, January 4, 1843, Church History Library, spelling and punctuation regularized. Only Douglas and Backenstos were in court and signed the affidavit.

181. *JSP Journals* 2 (January 4, 1843), 218–19.

182. Reported as *Ex parte Bollman* and *Swartwout*, 8 U.S. (4 Cranch) 75 (1807). This case arose from the Aaron Burr treason conspiracy. Lamborn apparently cited the following parts of Chief Justice John Marshall’s opinion in support of his argument: “As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States. The inquiry therefore on this motion will be, whether by any statute, compatible with the constitution of the United States, the power to award a writ of *habeas corpus*, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court.” In *Bollman* the court concluded that such statutory authority existed under the Judiciary Act of 1789. Consequently, the *Bollman* case did not support Lamborn’s argument.

183. *JSP Journals* 2 (January 4, 1843), 216–18.

184. “An Act Concerning Fugitives from Justice,” in *Public and General Statute Laws of the State of Illinois*, 318–20.

185. *JSP Journals* 2 (January 4, 1843), 219.

186. Kent, *Commentaries*, 2:32.

187. U.S. Constitution, art. 1, sec. 9, cl. 2.

188. *JSP Journals* 2 (January 4, 1843), 219.

Butterfield rose and next addressed the court. His opening lines have been recorded in numerous reports¹⁸⁹ and were so poetic and classic that they bear repeating. As reported by a fellow attorney who was present:

Mr. Butterfield . . . rose with dignity and amidst the most profound silence. Pausing, and running his eyes admiringly from the central figure of Judge Pope, along the rows of lovely women on each side of him, he said: "May it please the Court: I appear before you today under circumstances most novel and peculiar. I am to address the 'Pope' (bowing to the Judge) surrounded by angels (bowing still lower to the ladies), in the presence of the holy Apostles, in behalf of the Prophet of the Lord."¹⁹⁰

Butterfield then reaffirmed Edwards's arguments generally and continued that the federal court not only had jurisdiction but also had exclusive jurisdiction to hear the return. Butterfield turned Lamborn's argument on itself, arguing that state law could not preempt federal law, but rather federal law preempted state law.¹⁹¹ Butterfield specifically argued that no state law could preempt the U.S. Constitution.¹⁹² In support, Butterfield cited *Jack v. Martin*, a New York case involving the return of a slave from Louisiana. The New York Court of Errors



BENJAMIN EDWARDS. Edwards was the often forgotten co-counsel with Justin Butterfield in representing Joseph Smith. While Butterfield would receive most of the accolades, Edwards provided important contributions to the legal arguments that resulted in the discharge of Joseph Smith. Abraham Lincoln Presidential Library & Museum (ALPLM).

189. See, for example, "Opening in Joe Smith's Case," *New Orleans Daily Picayune*, February 24, 1842; "Justin Butterfield's Defence of Joe Smith," *Central Law Journal* 2 (1875), 776; *History of Sangamon County, Illinois*, 103; Angle, *Nathaniel Pope, 1784–1850*, 56; Paul M. Angle, *"Here I Have Lived": A History of Lincoln's Springfield 1826–1835* (New Brunswick, N.J.: Rutgers University Press, 1950), 126.

190. Arnold, *Reminiscences of the Illinois Bar*, 3.

191. *JSP Journals* 2 (January 4, 1843), 220.

192. U.S. Constitution, art. 3, sec. 2: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the

held that the state process could not circumvent federal process, noting that “whenever the terms in which a power is granted to Congress, or the nature of the power requires that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislature as if they had been expressly forbidden to act.”¹⁹³ Butterfield opined, “Has not my client, Joseph Smith, the rights of a [slave]?”¹⁹⁴ Butterfield concluded, “This Court not only has Jurisdiction, but, it is the only court I could bring this case to. . . . Judicial power shall extend to all cases arising under the constitution and laws of the United States. . . . I hope the Gentlemen of the bar will not give their opinions without reading their books—these out door opinions are a disgrace to the profession.”¹⁹⁵

b. Jurisdiction to look behind the arrest warrant. With that concluding jab at Lamborn, Butterfield turned to the second and substantive issue before the court, framing it as follows: “Has the court power to issue Habeas Corpus? It has. Is the return sufficient to hold the prisoner in custody without further testimony? Unless it appears on the testimony that he is a fugitive, it is not sufficient.”¹⁹⁶ Butterfield then dissected the affidavit of ex-Missouri Governor Boggs and the requisition from Missouri Governor Carlin. First Butterfield noted that Boggs’s affidavit never alleges that Smith was in Missouri when the crime occurred. Next, he cited Carlin’s requisition that claimed that Smith was a “fugitive from justice.”¹⁹⁷ Butterfield continued stating that to qualify as a fugitive Smith had to have “fled” from

Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”

193. *Jack v. Martin*, 14 Wend. 507 at 535 (N.Y. Court for the Correction of Errors, 1835), quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819).

194. *JSP Journals* 2 (January 4, 1843), 220. Butterfield also quoted for the same proposition *Priggs v. Commonwealth of Pennsylvania*, 41 U.S. 539, 16 Peters 611 (1842). The *Priggs* court cited to *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

195. *JSP Journals* 2 (January 4, 1843), 220, spelling, grammar, and punctuation regularized.

196. *JSP Journals* 2 (January 4, 1843), 220, 222, spelling and punctuation regularized.

197. Governor Reynolds went beyond the allegations in the Boggs affidavit in making the requisition, noting: “WHEREAS, it appears by the annexed document which is hereby certified as authentic, that one *Joseph Smith is a fugitive from justice*, charged with being accessory before the fact to an assault with intent to kill, made by one O P. Rockwell on Lilburn W. Boggs in this State and, it is represented to the Executive Department of this State, *has fled to the State of Illinois*.” Affidavit of Lilburn W. Boggs, July 20, 1842, Lincoln Presidential Library (emphasis added). The Boggs Affidavit never alleged that Smith had “fled to the State of Illinois.”

Missouri. Butterfield summarizes the validity of these efforts: "Governor Carlin would not have given up his dog on such a requisition."¹⁹⁸

Butterfield examined the facts supported by the two affidavits previously read into the record that Joseph Smith was in Nauvoo at the time the crime occurred in Missouri: "He [Smith] was at officer's drill until 6 and in the Lodge from 6 to 9 o'clock. . . . 300 miles off in uniform reviewing the Nauvoo Legion, instead of running away from Boggs in uniform. Judge Douglas partook of the hospitality of General Smith[;] instead of fleeing from Justice, he was dining with the highest court judge in our land."¹⁹⁹

Butterfield then articulated the established status of the law as to when one could look behind the writ on a return for a writ of habeas corpus stating that "[the] power of Habeas Corpus is pretty well settled." Citing a case involving a conviction for embezzlement, Butterfield noted that on a return for a writ of habeas corpus one "cannot go behind the Judgment. [When a] judgment is not issued, [one] can go behind the writ."²⁰⁰ Butterfield's final example was an 1835 New York case involving the requisition request of

198. *JSP Journals* 2 (January 4, 1843), 222, spelling, grammar, and punctuation regularized.

199. *JSP Journals* 2 (January 4, 1842), 222–23; see notes 182–83 and accompanying text.

200. *JSP Journals* 2 (January 4, 1843), 223, spelling, grammar, and punctuation regularized. Butterfield cited *Ex Parte Watkins*, 32 U.S. (7 Pet.) 568 (1833), application having been made in 1830 at 28 U.S. (3 Pet.) 193, for the proposition that after judgment the appeal (here in the form of a writ of habeas corpus) cannot revisit the basis for the judgment. He then cited *Ex Parte Burford*, 7 U.S. (3 Cranch) 448, 451–52 (1806), for the proposition of the rights of a prisoner to look at the underlying facts in some cases. In this regard, the Burford court noted, "By the 6th article of the amendments to the constitution of the United States, it is declared, 'that no warrants shall issue but upon probable cause, supported by oath or affirmation.' By the 8th article it is declared, that in all criminal prosecutions, the prisoner shall enjoy the right to be informed of the nature and cause of his accusation, and to be confronted with the witnesses against him."

Butterfield also cited to *In re Clark*, 9 Wend. 212, 220–21 (Supreme Court of Judicature of New York, 1832) that spoke to the process and scope of looking behind a writ. The Clark court held: "We are next to inquire into our own duties. These are to be found in our statutes. They direct, 2 R. S., 567–569, that the court or officer authorized to allow the *habeas corpus* shall, upon the return thereof, proceed to examine into the facts contained in the return. If no legal cause be shown for the imprisonment, the party shall be discharged; but if he is legally detained, he shall be remanded. The 48th section, p. 569, permits the party, upon the return of the *habeas corpus*, to deny on oath any of the material facts set forth in the return, or allege any fact to show the detention unlawful; and then the court or officer shall, in a summary way, proceed to hear proofs and allegations, and dispose of the party as justice may require; . . . whether he is guilty or not, is not the question to be decided

the governor of Alabama to the governor of New York for the extradition of abolitionist William G. Williams. Williams had been indicted in Alabama for sedition based on him publishing an antislavery newspaper, *The Emancipator*, and distributing it in Alabama. The central issue was whether Williams had “fled” from justice (the state of Alabama). While the indictment from a grand jury in Alabama found that Williams had fled and the requisition relied upon the indictment, the governor of New York refused to comply, asserting that the facts, as alleged by Williams, were that he had never left the state of New York, the newspaper was printed in New York, he lived in New York, and the newspaper was simply shipped to Alabama.²⁰¹ The New York Governor concluded, in his yearly address to the New York senate and assembly on January 5, 1836: “The accused was not an actual fugitive from justice, and it did not appear that he had any other participation in the alleged crime than what arose from acts done within this State. I, was, therefore, convinced that neither the constitution or laws of the United States, nor of this State, imposed on me a duty, or conferred the right, to surrender him, and I declined to do so.”²⁰²

Butterfield closed his argument with the following summation:

That an attempt should be made to deliver up a man who has never been out of the State strikes at all the liberty of our institutions. His fate today may be yours tomorrow. I do not think the defendant ought under any circumstances to be delivered up to Missouri. It is a matter of history that he and his people have been murdered and driven from the state. He had

here; it is whether he has been properly charged with guilt, according to the Constitution and the Act of Congress.”

These opinions support the argument made by Butterfield that he should be allowed to present evidence directly relevant to the legal sufficiency of the requisition.

201. *Documents of the Assembly of the State of New-York, Fifty-Ninth Session* (E. Cromwell, 1836), 1:40–51.

202. *Documents of the Assembly of the State of New-York, Fifty-Ninth Session*, 1:38. Butterfield had previously explained this case to Rigdon by letter dated October 20, 1842, concluding that “the governor of a state has no jurisdiction over the body of a citizen to arrest and surrender him up to a foreign state unless he is a fugitive from that state, unless he has fled from that state to evade justice or in other words to evade being tried for the offence with which he is charged. In a despotic form of government, the sovereign power is the will of the monarch who can act in every instance as may suit his pleasure. But can the governor of one of our states of his own mere will, without any authority from the Constitution or the legislative power of the State arrest and deliver up to a foreign government any person whatever; if he can do this, then is the liberty of the citizen wholly at his disposal.” Butterfield to Rigdon, October 20, 1842, 2–3, spelling, grammar, and punctuation regularized. See appendix A.

better been sent to the gallows. He is an innocent and unoffending man. The difference is this people believe in prophecy and others do not. Old prophets prophesied in poetry and the modern in prose.²⁰³

After a short recess, Lamborn made his final argument, attempting to use the same *Williams* case to support the state's position. Lamborn noted that the *Williams* case stood for the proposition that the issue of extradition was one between the governors of two states, not the courts. He summarized, "no court could compel him [the governor of New York] to act."²⁰⁴

c. Ruling and rationale. With Lamborn's final argument, the case was submitted to Judge Pope. The judge indicated that the court would issue its opinion at 9:00 a.m. the following day.²⁰⁵ Willard Richards provides us with a succinct summary of the day's hearing:

The courtroom was crowded the whole of the trial and the utmost decorum and good feeling prevailed. Esquire Butterfield managed the case very learned and judiciously. Preceded by Esquire Edwards who made some very pathetic allusions to our sufferings in Missouri. Esquire Lamborn was not severe apparently saying little more than the nature of his situation required—and no more than would be useful in satisfying the public mind—that there had been a fair investigation of the whole matter.²⁰⁶

The following morning Judge Pope rendered his opinion in open court, ruling in Joseph Smith's favor and discharging him.²⁰⁷ Pope's written opinion was published in the *Sangamo Journal* on January 19, 1843.²⁰⁸ Mormon-operated newspapers the *Times and Seasons* and the *Wasp* ran the opinion

203. *JSP Journals* 2 (January 4, 1843), 224, spelling, grammar, and punctuation regularized.

204. *JSP Journals* 2 (January 4, 1843), 225, spelling, grammar, and punctuation regularized.

205. *JSP Journals* 2 (January 4, 1843), 225.

206. *JSP Journals* 2 (January 4, 1843), 225, spelling, grammar, and punctuation regularized.

207. *JSP Journals* 2 (January 5, 1843), 233.

208. Apparently, Pope noticed Willard Richards taking notes throughout the hearings. Afterwards Pope asked if Richards would assist him in preparing the written version of his ruling, to which Richards agreed. Richards prepared a draft of the opinion taken from his notes. Pope then used this draft preparing the version for publication. Richards Draft of Pope's Opinion, Springville, Ill., January 5, 1842, *Ex Parte JS for Accessory to Boggs Assault*, Church History Library. Based on this assistance, Smith asked Pope if the *Wasp* could publish the opinion first. Pope replied that Mr. Francis would have the right to publish the opinion first. Simeon Francis was the editor of the local *Sangamo Journal*. *JSP Journals* 2 (January 6, 1843), 235, n. 234.

as well.²⁰⁹ The opinion was cited in federal and state courts for more than a hundred years.²¹⁰

The importance of the case was not lost on Judge Pope, who introduced the opinion as follows:

The importance of this case, and the consequences which may flow from an erroneous precedent, affecting the lives and liberties of our citizens, have impelled the court to bestow upon it the most anxious consideration. . . . When the patriots and wise men who framed our constitution were in anxious deliberation to form a perfect union among the states of the confederacy, two great sources of discord presented themselves to their consideration; the commerce between the states, and fugitives from justice and labor. The border collisions in other countries had been seen to be a fruitful source of war and bloodshed, and most wisely did not the constitution confer upon the national government, the regulation of those matters, because of its exemption from the excited passions awakened by conflicts between neighboring states, and its ability alone to adopt a uniform rule, and establish uniform laws among all the states in those cases.²¹¹

Pope first addressed the issue of jurisdiction. The state's argument was that state law exclusively governed the case and therefore jurisdiction lay with the state. Pope disagreed. He reasoned: "The warrant on its face purports to be issued in pursuance of the constitution and laws of the United States, as well as of the state of Illinois. To maintain the position that this warrant was not issued under color or by authority of the laws of the United States, it must be proved that the United States could not confer the power on the executive of Illinois."²¹²

209. "Circuit Court of the U. States for the District of Illinois," *Times and Seasons*, January 16, 1843 (three days earlier than the *Sangamo Journal*); "Circuit Court of the United States for the District of Illinois," *Wasp*, January 28, 1843.

210. *Ex parte Smith*, 6 Law Rep. 57, published in 1843, was the earliest legal version and contains both a syllabus and the opinion from Judge Pope. The first "official" legal version was published in 1847 in *Reports of Cases Argued and Decided in the Circuit Court of the United States for the Seventh Circuit* (Cincinnati, Ohio: Derby, Bradley and Co., 1847) as 3 McLean 121 and includes a synopsis of the case, selected pleadings (Boggs's affidavit, Reynolds's request for extradition, and Ford's arrest warrant), and the opinion from the court. Finally, the preferred official version was published in 1896 as 22 F. Cas. 373 in *The Federal Cases Comprising Cases Argued and Determined in the Circuit and District Courts of the United States*. It includes the syllabus from the Law Rep. version and the opinion from the McLean Version. No pleadings are included. For a list of federal and state courts that have cited the *Ex parte Smith* opinion, see appendix B.

211. *Ex parte Smith*, 22 F. Cas. 373, 376 (C.C.D. Ill. 1843) (No. 12,968).

212. *Ex parte Smith*, 22 F. Cas. 376. Pope did not rule on whether the state courts had jurisdiction, noting that "this court is not called upon to decide." *Ex parte Smith*, 22 F. Cas. 377.

Judge Pope declared that the state did not do this, and this failure was “enough to dispose of that point.” Pope then easily dismissed Lamborn’s corollary argument that there was “greater sanctity in a warrant issued by the governor, than by an inferior officer.” Pope poetically responded:

Magna Charta established the principles of liberty; the habeas corpus protected them. It matters not how great or obscure the prisoner, how great or obscure the prison-keeper, this munificent writ, wielded by an independent judge, reaches all. It penetrates alike the royal towers and the local prisons, from the garret to the secret recesses of the dungeon. All doors fly open at its command, and the shackles fall from the limbs of prisoners of state as readily as from those committed by subordinate officers.²¹³

Pope then turned his attention to the second issue before him: Could the factual basis of the moving pleadings be questioned—here the Boggs affidavit and the Reynolds requisition. To answer this question, Pope focused on what “proof” existed to support the extradition. Pope identified that the “proof is ‘an indictment or affidavit,’ to be certified by the governor demanding. The return brings before the court the warrant, the demand and the affidavit.” Pope concluded that the “affidavit being thus verified, furnished the only evidence upon which the Governor of Illinois could act.” He acknowledged that Joseph Smith presented opposing “affidavits proving that he was not in Missouri at the date of the shooting of Boggs.” While the state objected to such testimony on the basis that it required looking behind the return, Pope determined that such evidence was unnecessary, “inasmuch as it thinks Smith entitled to his discharge for defect in the affidavit.”²¹⁴

The affidavits presented by Joseph Smith all focused on the fact that Smith was not in Missouri when the crime was committed and therefore could not have fled from the justice of Missouri. Pope succinctly reasoned:

As it is not charged that the crime was committed by Smith in Missouri, the governor of Illinois could not cause him to be removed to that state, unless it can be maintained that the state of Missouri can entertain jurisdiction of crimes committed in other states. The affirmative of this proposition was taken in the argument with a zeal indicating sincerity. But no adjudged case or dictum was adduced in support of it. The court conceives that none can be.²¹⁵

Some commentators have pointed out that the crime of being an accessory was somehow different in the early nineteenth century than it is today,

213. *Ex parte Smith*, 22 F. Cas. at 377.

214. *Ex parte Smith*, 22 F. Cas. at 377.

215. *Ex parte Smith*, 22 F. Cas. 378.

and that Smith would not have to be in Missouri to be an accessory today. Of course, being physically in Missouri is not a requisite then or today to conspire to commit a crime. The issue was not whether Smith had committed a crime, but whether the extradition by Missouri was proper. Extradition is based on one committing a crime in one state, under its laws, and then fleeing that state to avoid prosecution. The state where the crime was committed can seek to have the person extradited back. Such a procedure does not circumvent a state from charging its own citizen for a crime committed in its state that involves a second state. For example, someone that published libelous statements that are distributed between different states could be guilty of the crime of libel in several venues. If the publisher never was in the second state, that state could still charge him with libel, but could not have him extradited if he had never been in the state to flee from. In the present situation, the substantive legal question was not whether Smith had conspired with Rockwell, but whether Missouri had the right to extradite him for an alleged crime that occurred, if at all, in Illinois. Such a conspiracy would have violated Illinois law, and the Illinois authorities would have had the duty to prosecute. But handing Smith over to Missouri for a crime that occurred in Illinois would not have been available based on a requisition demand from Missouri.

Pope's reasoning is instructive to understand the legal basis of his ruling, as it was indeed not necessary to engage in further factual findings:

It is the duty of the state of Illinois to make it criminal in one of its citizens to aid, abet, counsel, or advise, any person to commit a crime in her sister state. Any one violating the law would be amenable to the laws of Illinois, executed by its own tribunals. Those of Missouri could have no agency in his conviction and punishment. But if he shall go into Missouri, he owes obedience to her laws, and is liable before her courts, to be tried and punished for any crime he may commit there; and a plea that he was a citizen of another state, would not avail him. If he escape, he may be surrendered to Missouri for trial. But when the offence is perpetrated in Illinois, the only right of Missouri is, to insist that Illinois compel her citizens to forbear to annoy her. . . . The court must hold that where a necessary fact is not stated in the affidavit, it does not exist. It is not averred that Smith was accessory before the fact, in the state of Missouri, nor that he committed a crime in Missouri: therefore, he did not commit the crime in Missouri—did not flee from Missouri to avoid punishment.²¹⁶

Pope then criticized and dismissed the facts asserted in the Boggs affidavit, finding that “beliefs” without facts are insufficient, as are “legal

216. *Ex parte Smith*, 22 F. Cas. 378.

conclusions.” Pope simply found that the “affidavit is fatally defective.” Pope then, in preparation for the inevitable conclusion, provided a context to his ruling:

The return is to be most strictly construed in favor of liberty. . . . No case can arise demanding a more searching scrutiny into the evidence, than in cases arising under this part of the constitution of the United States. It is proposed to deprive a freeman of his liberty—to deliver him into the custody of strangers, to be transported to a foreign state, to be arraigned for trial before a foreign tribunal, governed by laws unknown to him—separated from his friends, his family and his witnesses, unknown and unknowing. Had he an immaculate character, it would not avail him with strangers. Such a spectacle is appalling enough to challenge the strictest analysis. The framers of the constitution were not insensible of the importance of courts possessing the confidence of the parties.²¹⁷

Pope’s ruling was clear and concise: “The affidavit is insufficient—1st. because it is not positive; 2d. because it charges no crime; 3d. it charges no crime committed in the state of Missouri. Therefore, he [Smith] did not flee from the justice of the state of Missouri, nor has he taken refuge in the state of Illinois.”²¹⁸ Joseph Smith was discharged.

F. Nauvoo City Council’s Final Ordinance on Habeas Corpus—November 1842

The Nauvoo City Council made its final additions to the Municipal Code regarding habeas corpus in November 1842 (the “November 1842 City Ordinance”).²¹⁹ The November 1842 City Ordinance was the most detailed ordinance passed by the city council regarding writs of habeas corpus. It was this ordinance that some later writers claimed was abusive and over-reaching. However, a careful reading of the November 1842 City Ordinance demonstrates that the Nauvoo City Council merely adopted, in substance, the entire Illinois 1827 Act. It is reproduced in full in appendix C.

More than 80 percent of the Illinois 1827 Act was incorporated verbatim by the Nauvoo City Council in the November 1842 City Ordinance. Yet, while the similarities are striking, looking at the differences is crucial. These differences highlight both the sophisticated understanding that the Nauvoo City Council had of the habeas corpus laws, as well as the rights it understood were extended to the city’s inhabitants through the Nauvoo Charter.

217. *Ex parte Smith*, 22 F. Cas. at 379.

218. *Ex parte Smith*, 22 F. Cas. at 379.

219. Rough Draft Notes of History of the Church, 1842b-015, Church History Library.

See appendix C for a line-by-line comparison of the Illinois 1827 Act with the November 1842 City Ordinance.

Section 1 of the November 1842 City Ordinance differs from the Illinois 1827 Act only in that the November 1842 City Ordinance refers to the city of Nauvoo and the Nauvoo Municipal Court (as authorized to hear writs of habeas corpus in section 17 of the Nauvoo Charter) instead of referring to the state of Illinois and the courts of Illinois. The other change in section 1 centers on the process to file a petition requesting a writ of habeas corpus. While the Illinois 1827 Act describes the process, the November City Ordinance provides sample forms to use for a petition.

Section 2 defines who can file for a petition for a writ of habeas corpus, beyond those arrested for a crime. The November 1842 City Ordinance adds a penalty for violating these provisions of accepting a petition under both sections 1 and 2.

Sections 3–7 of the November 1842 City Ordinance are materially identical to the corresponding sections in the Illinois 1827 Act, including provisions dealing with the hearings on writs of habeas corpus (sections 3), issues of bail, recognizance, and security (sections 4), procedures for remand (sections 5), second writs of habeas corpus after discharge (sections 6), and procedures for discharge (sections 7).

Section 8 of the November 1842 City Ordinance omitted the corresponding section of the Illinois 1827 Act in its entirety. In the Illinois 1827 Act, this section excluded federal claims, war claims, slavery claims, and high crimes from the act, leaving them to the federal courts. The November 1842 City Ordinance does not include these exclusions. This was done in apparent reliance on section 11 of the Nauvoo Charter that provides that the city council could enact “all such ordinances, not repugnant to the Constitution of the United States or of this State.” As the Constitution of the United States provided for relief under a writ of habeas corpus for these exclusions, the Nauvoo City Council included them within the scope of its municipal code.

No material differences are found in section 9, with the exception that the November 1842 City Ordinance does not grant as much discretion to the court to delay the resolution of a habeas corpus hearing as does the Illinois 1827 Act.

Section 10 of the Illinois 1827 Act is omitted in the November 1842 City Ordinance. This section deals with the moving of a prisoner from one county to another that would have the impact of delaying or avoiding a trial. As the interest of the Nauvoo City Council was to allow its citizens to have their concerns addressed in Nauvoo, the issue of moving a prisoner out of Nauvoo was apparently deemed unnecessary.

Section 11 of the November 1842 City Ordinance does not include a provision for moving a prisoner to a different jail should an overcrowding issue arise, or moving to a different jail based on a federal law or executive demand. Basically, it said that if prisoners were in Nauvoo, they would stay in Nauvoo until the habeas corpus matter was resolved.

Sections 12–17 of the November 1842 City Ordinance are virtually identical to the corresponding provisions of the Illinois 1827 Act.

Finally, section 18 of the November 1842 City Ordinance differs from the last section of the Illinois 1827 Act in the fact that the Act provided that the supreme and circuit courts shall have power to grant petitions for writs of habeas corpus. The November City Ordinance deleted these provisions, since section 17 of the Nauvoo Charter provides that the “Municipal Court shall have power to grant writs of habeas corpus in all cases arising under the ordinances of the City Council.”

As this summary evidence shows, the Nauvoo City Council, under the leadership of Mayor Joseph Smith, adopted a consistent, albeit increasingly detailed, approach to the use of habeas corpus in Nauvoo. This approach is characterized by three guiding principles. First, the Nauvoo Municipal Court was fully vested with the power to grant and hear writs of habeas corpus. Second, the Nauvoo City Council was empowered with the rights to enact ordinances for the city of Nauvoo to the extent permitted by the United States Constitution or the Illinois Constitution, whichever was broader. Lastly, the municipal court had a duty when hearing a writ of habeas corpus to look at both the procedural legality of an arrest and the substantive merits of the underlying charges.

V. CONCLUSION

Any credible analysis of Joseph Smith’s use of the writ of habeas corpus must start with an understanding of the law as it existed and applied in the early nineteenth century. Without this indispensable perspective, the legal theories, arguments, enactments, and actions raised by or for Smith under the rubric of “habeas corpus rights” cannot be properly understood. With this understanding, the actions of the various witnesses, lawyers, clerks, aldermen, council members, sheriffs, and judges involved in Joseph Smith’s world begin to make legal sense.

While placing the right of habeas corpus in the United States Constitution itself evidenced the importance that the Founding Fathers placed on this great writ, America’s jurisprudence of the writ diverged quickly and distinctively from English law. A central aspect of this evolution was the allowance of an expanded review of the underlying charges allegedly

supporting an arrest and detention. The courts often referred to this review as “looking behind the writ.” Nineteenth-century legal scholars and practitioners recognized this development and provided useful legal analysis and rules of application. The need for a review of both the procedural and substantive aspects of a case necessarily decreased as a case moved through the system: a person who claimed he was incorrectly arrested could demand looking at both; a need to examine the substance of a detention decreases once a grand jury indicts the accused, absent fraud or bad faith; and if a trial resulted in a conviction, the need to look at the substance of the detention would be only to challenge the trial itself.

This methodology is crucial in understanding how Joseph Smith (most often through his lawyers) employed the use of habeas corpus when he was arrested and/or detained. Critics have argued that Smith attempted to use habeas corpus in an overreaching, even abusive manner. Their critique is principally based on his repeated efforts to have the court “look behind the writ” and determine the legitimacy (or illegitimacy, as he argued) of the underlying charges. Yet these critics have failed to acknowledge that these cases all involved the first phase of the litigation or arose in cases where fraud and bad faith were alleged. In these circumstances, his request to look behind the writ was supported both by the applicable law and the facts.

Peter Burnett, one of Joseph Smith’s lawyers during the habeas corpus hearing in Missouri in January 1839, similarly noted that he and his co-counsel, Alexander Doniphan, prepared to re-examine the evidence adduced at the preliminary hearing before Judge Austin King. Indeed, Rigdon’s release makes legal sense only in light of his lawyers’ successful application of this rule.

Joseph Smith’s lawyer during the second extradition efforts, Justin Butterfield, articulated clearly this legal approach discussing the Boggs affidavit. He said, “Under the laws of our own Habeas Corpus Act, [Joseph Smith] has a right to show that the [Boggs] affidavit as false and that the order for his arrest was obtained by false pretenses.”²²⁰

This approach is also evidenced in the various maturations of the ordinances passed in Nauvoo articulating the scope and use of the writ of habeas corpus.

In the end, it is clear that Joseph Smith and his advisors had a very sophisticated and accurate understanding of the scope and application of the right to habeas corpus in his day. This scope included the important evolution that the writ experienced as it was transformed from an English prerogative writ of the king to a constitutionally based right of all Americans. Upon his return to Nauvoo on June 30, 1843, being under arrest

220. Butterfield to Rigdon, October 20, 1842. See appendix A.

pursuant to a third and final extradition request from the governor of Missouri, and in anticipation of having his petition for a writ of habeas corpus heard the next day, Smith, in speaking to the citizens of Nauvoo, aptly and passionately summarized how he saw the right of habeas corpus: “The Constitution of the United States declares that the privilege of the writ of Habeas Corpus shall not be denied. Deny me the right of Habeas Corpus, and I will fight with gun, sword, cannon, whirlwind, and thunder, until they are used up like the Kilkenny cats.”²²¹

Jeffrey N. Walker (who can be reached at jeffrey.walker@ldschurch.org) received his JD from Brigham Young University and has practiced law for nearly twenty-five years. He currently is a senior advisor for the Joseph Smith Papers Project for The Church of Jesus Christ of Latter-day Saints and is the manager and coeditor of its Legal and Business Series. He is a Trustee and Treasurer for the Mormon Historic Sites Foundation and managing editor of Mormon Historical Studies. Walker also is an adjunct professor in the J. Reuben Clark Law School and has taught in the Church History and Doctrine Department at Brigham Young University.

221. Joseph Smith, in *Journal of Discourses*, 26 vols. (Liverpool: F. D. Richards, 1855–86), 2:163, 167. The term “Kilkenny cat” refers to anyone who is a tenacious fighter. To “fight like a Kilkenny cat” refers to an anonymous Irish limerick about two cats that fought to the death and ate each other up so that only their tails were left.

Appendix A

Justin Butterfield to Sidney Rigdon, October 20, 1842, Sidney Rigdon Collection, Church History Library, Salt Lake City.¹

Chicago, October 20, 1842

Sidney Rigdon, Esq.

Dear Sir –

In answer to your favor of the 17th instant Mr. Warner was correct in the information he gave you of my opinion of the illegality of the requisition made by the governor of Missouri upon the governor of this state for the surrender of Joseph Smith, and that if the governor of this state should cause him to be arrested, for the purpose of being surrendered I had no doubt but the Supreme Court of this State would discharge him upon habeas corpus. Subsequent examination has confirmed me in that opinion. I understand from your letter and from the statement of facts made to me by Mr. Warren that the requisition of the governor of Missouri is accompanied by an affidavit of ex-Governor Boggs stating in substance that on the 6th day of May last he was shot while sitting in his house with intent to kill and as he verily believes the act was committed by O.[rrin] P.[orter] Rockwell and that Joseph Smith was accessory to the crime before its commission and that he had fled from justice; that it can be proved that Joseph Smith was not in the state of Missouri at the time the crime was committed, but was in this state; that it is untrue that he was in the state of Missouri at the time of the commission of the said crime nor has been there any time since and therefore could not have fled from that state since the commission of the said crime. The right on the part of the governor of Missouri to demand Smith and the duty on to the part of the governor of this state to deliver him up, if they exist, are given and imposed by that clause in the Constitution of the United States, which declares, “that a person charged in any State with treason, felony, or other crime who [p. 1] shall flee from justice and be found in another state; shall on demand of the executive authority of the state to which he fled, be delivered up to be removed from the state having jurisdiction of the crime.”

It is unnecessary to refer to the Acts of Congress in relation to the delivering up of fugitives from justice, as Congress has just so much, however and no more than is expressly given by the said clause in the Constitution – the Constitution is the best exponent of itself that persons then can be surrendered up by the governor of one state to the governor of another.

1. The author thanks Melisa Walker for completing the initial transcription of this letter. The author and Pierce Walker completed a double blind transcription verifying the initial transcription. This transcription has the spelling, punctuation and grammar regularized to create a clear text of the letter. Underlining is retained from the original.

First, “he must be a person charged with treason, felony or other crime.” It is sufficient if he is charged with the commission of crime, either by indictment found or by affidavit.” Second, “he must be a person who shall flee from Justice and be found in another State.” It is not sufficient to satisfy this branch of the Constitution, that he should be “charged” with having fled from justice, unless he has actually fled from the state where the office was committed to another state the governor of this state has no jurisdiction over his persons and cannot deliver him up. When Mr. Smith is brought up on a habeas corpus he will have a right under the 3^d Section of our Habeas Corpus Act to introduce testimony and show that the “process upon which he is arrested was obtained by false pretense” that it is untrue that he fled from the state of Missouri to evade being brought to justice there for the crime of which he is charged he will have the right to place himself upon the platform of the Constitution of the United States and say, “I am a citizen of the state of Illinois, I have not fled from the state of Missouri or from the ‘justice’ of that state on account of the commission of the crime with which I am charged. I am ready to prove that the charge of having fled from that state is false, and I am not therefore subject under the Constitution of the United States to be delivered up to that state for trial.”

You say, in your letter to me, that you doubt whether on a writ of habeas corpus the court would have a right to try the question whether Smith was in Missouri at the [p. 2] time of the commission of the crime of which he is charged. To this I answer that upon a writ of habeas corpus the court would be bound to try the question whether Smith fled from justice from Missouri to this state. The affidavit of Mr. Boggs is not conclusive on this point. It may be rebutted unless Smith is a person who has fled from justice. He is not subject to be delivered up under the specific provisions of our own Habeas Corpus Act. He has a right to show that the affidavit as false evidence and that the order for his arrest was obtained by false pretenses. Again, the affidavit on its face was not sufficient to authorize the arrest of Smith, it is evasive and deceptive – it does not show that he fled from the state of Missouri to evade justice for the commission of the crime of which he is charged by Governor Boggs.

Robert G. Williams in the year 1835 was indicted in the state of Alabama for attempting to incite rebellion and insurrection in that state. He was demanded by the governor of that state, of the governor of New York, and the requisition stated that he had fled from justice. The governor of the state of New York (Marcy) took notice that the said Williams was a citizen of the state of New York and had not fled from justice from Alabama and on that ground alone refused to surrender him up. This was a stronger case than that of Smith’s as an indictment had been found. Governor Marcy put his refusal upon the express grounds that by the Constitution of the United States the governor of one state had no right to demand nor had the governor of another state a right to surrender up one of his citizens unless he had fled from justice and it was the right and the duty of the governor upon whom the demand was made to inquire into the fact whether he had fled from justice

before he made the surrender. I have the book containing all the proceedings in this case of Williams. There are several other cases equally on point, and they all proceed upon the ground that the governor of a state has no jurisdiction over the body of a citizen to arrest and surrender him up to a foreign state unless he is a fugitive from that state, unless he has fled from that state to evade justice or in other words to evade being tried for the offence with which he is charged. In a despotic form of government, the sovereign power is the will of [p. 3] the monarch who can act in every instance as may suit his pleasure. But can the governor of one of our states of his own mere will, without any authority from the Constitution or the legislative power of the State, arrest and deliver up to a foreign government any person whatever; if he can do this, then is the liberty of the citizen wholly at his disposal.

The writ of habeas corpus is a suit that every person imprisoned or unlawfully detained has a right to prosecute for the recovery of his liberty, and if he is in custody by due process from a competent power, he is entitled to his discharge when the jurisdiction has been exceeded.

The governor of this state has no power or jurisdiction over the person of a citizen of this state to arrest and cause him to be delivered up and transported to another state, except the power expressly given to him by the Constitution of the United States. And what is that power? It only authorizes the governor of one state to surrender up a fugitive from justice to return him back to the state from whence he has fled. First, the person to be surrendered up must be a fugitive from the state to which it is attempted, to surrender him. Second, he must be a fugitive from justice in other words he must have been in the state when and where the crime was committed and have [p. 4] fled from that State to evade being apprehended and tried for that crime. Third, unless he is in fact such a fugitive from justice the governor has no power by the laws or Constitution to deliver him up. Fourth, if he is charged with being a fugitive from justice and the governor cause him to be apprehended on that charge, he has a right to sue out a writ of habeas corpus; and when brought up on the writ he has the undoubted right of showing that the governor has no constitutional power to deliver him up to another state; that he has not "fled from justice into this state," and is not such a person as the Constitution authorizes the governor to deliver up; and that it would be an excess of jurisdiction on the part of the governor to deliver him up.

The question to be examined into upon the return of the habeas corpus would be a mere question of locality. The question would be, was Smith in this state, or not, at the time the crime was committed in Missouri? If he was in this state at that time, then he could not be a fugitive from justice from Missouri, in the sense of the Constitution; and the governor would have no power to deliver him up.

The argument that because Governor Boggs has made affidavit that Smith has fled from justice, his affidavit is to be taken as conclusive on that point, and that upon the return of habeas corpus, Smith would be precluded from controverting or showing the falsity of the affidavit, is too

absurd to require a serious answer. [p. 5] The liberties of the citizens of the state are not held on quite so feeble a tenure, nor does the Constitution authorize the governor to transport the citizens of this state upon a mere "charge" made by a citizen of another state; such is not the reading of the constitution; that instrument only authorizes the delivery up of such persons "who shall flee" upon the demand of the executive authority of the state from which they "fled." There must have been a "flight" in fact and in deed from the state where the offense was committed, or the governor has no jurisdiction to "deliver up." If the charge of having "fled" is made, and the governor acting in pais² is attempting to deliver up upon that charge, the person attempted to be made the victim has a clear, undoubted, constitutional right by the means of a writ of habeas corpus to test its truth before a judicial tribunal of the country; and if the charge is proven to be false, the governor is ousted of his jurisdiction over the person of the prisoner and he is restored to his liberty before he has undergone the penalty of the transportation to a foreign country, upon the mere charge of an interested or partial witness.

The power of the executive of a state to surrender up a citizen to be transported to a foreign state for trial is a most tremendous power which might be greatly abused were it not limited by constitutional checks, and the citizen secured against its despotic use by the writ of habeas corpus. In the case of Williams the governor of New York in his reply to the Governor of Alabama says, "What occurs daily in the ordinary course of criminal proceedings may take place in regard to persons transported [p. 6] to a distant jurisdiction for trial. It may happen that an innocent man will be accused and if demanded he must be delivered up, should your exposition of the Constitution be sanctioned, under these circumstances his condition would be perilous indeed, dragged from his home, far removed from friends, borne down by the weight of imputed guilt, and unable, probably, to obtain the evidence by which he might vindicate his innocence. If appearances were against him, he could scarcely hope to escape merciless condemnation."

The American colonists regarded the exercise of this power as an act of revolting tyranny, and assigned it in the Declaration of Independence as one of the prominent causes that impelled them to a separation from the British Empire. A power that may be then oppressively used should be resorted to with the greatest caution. Where its exercise is invoked, it is not sufficient that the case may apparently come within the letter of the Constitution. It is the duty of the Executive before yielding a blind obedience to the letter of the law, to see that the case comes within the spirit and meaning of the Constitution. It may be pleasing as well as instructive to

2. "In law, matter *in pais* is matter of fact in opposition to a matter of record." John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union; with References to the Civil and Other Systems of Foreign Law*, 2 vols. (T. & J. W. Johnson, 1839), 2:214.

look into the proceedings of the executive of our sister state, and witness that by faithfully administering the law in relation to the delivery up of fugitives from justice, according to its spirit and meaning, they have saved at least two of the citizens of Illinois from becoming victims to its abuse. In the year 1839, the governor of the state of New York was presented with the copy of an indictment by a grand jury in the city of New York against John and Nathan Aldrich, for fraud in obtaining goods by false pretenses, and was requested to make an requisition upon the governor of Illinois to surrender them up as fugitives from justice. Now here was a case which came exactly within the letter of the law of Congress in [p. 7] relation to fugitives from justice. An indictment had been found charging them with having committed a crime. But did the governor of New York make the "requisition"? No; he referred the application to the Honorable John C. Spencer, now Secretary of War, and one of the most enlightened lawyers of the age.

The following is an extract of Mr. Spencer's opinion upon the case: "The Constitutional provisions under which requisitions may be made by the governor of our state upon the governor of another was a substitute for the principal recognized, by the law of nations, by which one sovereign is bound to deliver to another fugitives who have committed certain offences. These offenses are of the deepest grade of criminality, and robbers, murderers, and incendiaries, and these enumerated, as proper to be surrendered. Following the analogy this suggested, the provision in our Constitution it would seem should be construed to embrace similar cases only, except perhaps these offenses which arise from an abuse of the same constitutional provision. That provision must be guarded with the utmost care or it will become intolerable.

I do not think the circumstances of the case before me are of such grave import, or the offense itself of such high grade, as to justify the requisition desired. The power given by the Constitution ought not to be cheapened, nor applied to trifling offenses, nor indeed to any that was not originally contemplated.

For the reasons stated in Mr. Spencer's opinion the governor of New York refused to make the requisition upon the governor of Illinois. The case certainly came within the letter of the law [p. 8] but not within its spirit and meaning. So with the affidavit of Governor Boggs, when he swears that Smith had fled from justice. It may come within the letter of the Constitution, but does it come within its spirit and meaning? Does it show that Smith was in Missouri at the time of the commission of the crime and that he fled from that state to evade being brought to justice for that crime? Or does it refer to the flight of Smith and the Mormons from Missouri some years since?

I will refer to one more case of a similar nature. Lord Campbell, formerly Attorney General in England, in a recent debate in Parliament upon the subject of the Creole made the following remarks: "To show how cautious states should be in making such concessions one to the other reciprocally, he would mention a case that occurred when he was Attorney General. A treaty had been agreed upon between the state of New York and

the province of Canada, by which the government of each agreed reciprocally to deliver up the citizen or subject of the other against whom grand juries had found a bill, and who had sought refuge within the territories of the other. It happened that a slave had escaped from his master at New York and had got to Canada. To facilitate his escape he rode a horse of his master's for a part of the way, but turned him back on his reaching the frontier. The authorities of New York well knew that England would not give up a runaway slave and that as they could not claim under the treaty, they therefore had a bill of indictment against him before a New York grand jury for stealing the horse, though it was clear the *animus furandi*³ [p. 9] was wanting. The grand jury, however, found a true bill against him for the felony, and he was claimed under the treaty. The governor under such circumstances refused to give him up until he had consulted the government in England. He (Lord Campbell) was consulted, and gave it as his opinion that the man ought not to be given up, as the true bill where no felony had been committed, did not bring the case within the treaty. The man was not given up, and there the matter rested. This, he repeated, showed the necessity of the greatest caution where reciprocal rights of surrender were granted between states."

It is not to be presumed that the executive of this state would knowingly lend his aid in dragging one of our citizens who is not a fugitive from justice into a foreign state for trial. The governor has undoubtedly been misled by the evasive affidavit that accompanied the requisition. I would advise that Mr. Smith procure respectable and sufficient affidavits to prove beyond all question that he was in this state and not in Missouri at the time the crime with which he is charged was committed, and upon these affidavits apply to the governor to countermand the warrant he has issued for his arrest. If he should refuse so to do, I am clearly of the opinion that upon the above state of facts, the Supreme Court will discharge him upon habeas corpus.

Respectfully your obedient servant,

Justin Butterfield [p. 10]

3. "Animus" is the intent in which a thing is done. "Animus furandi" refers to the intention of stealing. Bouvier, *Bouvier's Law Dictionary*, 1:78; *United States v. Amedy*, 11 Wheat 392 (1826).

Appendix B

Citations to *Ex Parte Smith*, 22 F. Cas. 373, 376 (C.C.D. Ill. 1843) (No. 12,968).

The following is a list of federal courts that have cited *Ex parte Smith*:

Rice v. Ames, 180 U.S. 371, 21 S. Ct. 406, 45 L. Ed. 577 (1901)
Ex parte Brown, 28 F. 653 (D.N.Y. 1886)
In re Leary, 10 Ben. 197, 15 F. Cas. 106, F. Cas. No. 8162, 6 Abb. N. Cas. 43 (S.D.N.Y. 1879)
Day v. Keim, 2 F.2d 966 (4th Cir. W. Va. 1924)
Ex parte Hart, 63 F. 249 (4th Cir. Md. 1894)
Ex parte Lane, 6 F. 34 (D. Mich. 1881)
In re Kahley, 2 Biss. 383, 14 F. Cas. 71, F. Cas. No. 7593 (7th Cir. 1870)
Ex parte Dawson, 83 F. 306 (8th Cir. Ark. 1897)
In re Bloch, 87 F. 981 (D. Ark. 1898)
Ex parte Morgan, 20 F. 298 (D. Ark. 1883)
In re Doo Woon, 9 Sawy. 417, 18 F. 898 (D. Or. 1883)
In re Cook, 49 F. 833 (C.C.D. Wis. 1892)
In re Robb, 9 Sawy. 568, 19 F. 26 (C.C.D. Cal. 1884)
Burford v. Klippell, 4 F. Cas. 725, F. Cas. No. 2151 (C.C.D. Ind. 1878)
Buerk v. Imhaeuser, 4 F. Cas. 597, F. Cas. No. 2108 (C.C.S.D.N.Y. 1876)
In re Jackson, 13 F. Cas. 199, F. Cas. No. 7126 (C.C.D. D.C. 1857)
McDermott v. Naylor, 16 F. Cas. 15, F. Cas. No. 8747, 4 D.C. 527 (1845).

The following is a list of state courts that have cited *Ex parte Smith*:

Ex parte Spears, 88 Cal. 640, 26 P. 608 (1891)
Ennist v. Baden, 158 Fla. 141, 28 So. 2d 160 (1946)
State ex rel. Peck v. Chase, 91 Fla. 413, 107 So. 541 (1926)
State ex rel. Arnold v. Justus, 84 Minn. 237, 87 N.W. 770 (1901)
Ex parte Hagan, 295 Mo. 435, 245 S.W. 336 (1922)
Smith v. State, 21 Neb. 552, 32 N.W. 594 (1887)
People ex rel. Higley v. Millspaw, 281 N.Y. 441, 281 N.Y. (N.Y.S.) 441, 24 N.E.2d 117 (1939)
People ex rel. Corkran v. Hyatt, 172 N.Y. 176, 172 N.Y. (N.Y.S.) 176, 64 N.E. 825, 17 N.Y. Cr. 79 (1902)
People ex rel. Cornett v. Warden, 60 Misc. 525, 112 N.Y.S. 492, 23 N.Y. Cr. 37 (N.Y. Sup. Ct. 1908)
State v. Hall, 115 N.C. 811, 20 S.E. 729 (1894); *Thomas v. Evans*, 14 Ohio Dec. 336 (Ohio C.P. 1902)
Ex parte Hill, 34 Okla. Crim. 120, 245 P. 663 (1926)
Stump v. Roberts, 23 F. Cas. 280, 3 Tenn. 350, 1 Cooke 350 (1853)
Ex parte Anderson, 135 Tex. Crim. 291, 120 S.W.2d 259 (Tex. Crim. App. 1938)
Ex parte Chittenden, 124 Tex. Crim. 228, 61 S.W.2d 1008 (Tex. Crim. App. 1933)

Ex parte Rowland, 35 Tex. Crim. 108, 31 S.W. 651 (Tex. Crim. App. 1895)

Ex parte Stanley, 25 Tex. Ct. App. 372, 8 S.W. 645, 8 Am. St. Rep. 440 (Tex. Crim. App. 1888)

McClendon v. Callahan, 46 Wn.2d 733, 284 P.2d 323 (1955)

Armstrong v. Van De Vanter, 21 Wash. 682, 59 P. 510 (1899)

In re Eldred, 46 Wis. 530, 1 N.W. 175 (Wis. 1879)

Appendix C

Habeas Corpus Acts

Comparing Illinois' Habeas Corpus Act of 1827 and Nauvoo's Habeas Corpus Act enacted on November 12, 1842. Differences are marked with ***bolded italics***. See pages 72–73 for comments.

Illinois' Habeas Corpus Act of 1827 ("Illinois 1827 Act")

SEC. 1. Be it *enacted* by the *people* of the *State of Illinois, represented in the General Assembly*, That if any person shall be, or stand committed, or detained for any criminal or supposed criminal matter, it shall and may be lawful for him to apply to the *supreme or circuit courts in the term time, or any judge* thereof, in vacation, for a writ of habeas corpus, which application shall be in writing, and signed by the prisoner, or some person on his *or* her behalf, setting forth the facts concerning his imprisonment, and in whose custody he *is* detained; and shall be accompanied by a copy of the warrant or warrants of commitment, or an affidavit that the said copy had been demanded of the person in whose custody the prisoner *is* detained, and by him refused or neglected to be given; *the* said court or *judge*, to whom the *said* application shall be made, shall forthwith award the said writ of habeas corpus, unless it shall appear from the petition itself, or from the documents annexed that the party can neither be discharged nor admitted to bail, nor in any other manner relieved. Which said writ, *if issued by the court, shall be under the seal of the court; if by a judge, under the hand of the judge; and shall be directed to the person in whose custody the prisoner is detained, and made returnable forthwith; to*

Nauvoo's Habeas Corpus Act enacted on November 12, 1842 ("November 1842 City Ordinance")

SEC. 1. Be it *ordained* by the *city council* of the *city of Nauvoo*, that if any person *or persons* shall be or stand committed or detained for any criminal or supposed criminal matter, it shall and may be lawful for him, *her, or them* to apply to the *municipal court, when in session, or to the clerk* thereof in vacation, for a writ of habeas corpus; which application shall be in writing and signed by the prisoner, or some person on his, her, *or their* behalf, setting forth the facts concerning his, *her, or their* imprisonment, and in whose custody he, *she, or they are* detained, and shall be accompanied by a copy of the warrant, or warrants of commitments, or an affidavit that the said copy had been demanded of the person *or persons* in whose custody the prisoner *or prisoners are* detained, and by him *or them* refused or neglected to be given. *The* said court or *clerk* to whom the application shall be made, shall forthwith award the said writ of habeas corpus, unless it shall appear from the petition itself, or from the documents annexed, that the party can neither be discharged nor admitted to bail, nor in any other manner relieved. Which said writ *shall be issued under the hand of the clerk, and* the seal of the court; *which seal may be a written one, until another shall be obtained, and shall be in the following words, to wit: "Seal of the Municipal Court of the city*

the intent that no officer, sheriff, jailer, keeper, or other person, to whom such writ shall be *directed*, may pretend ignorance thereof, every such writ shall be endorsed with these words, "by the habeas corpus act;" and whenever the said writ shall by any person be served upon the sheriff, jailer, keeper, or other person *whatsoever, to whom the same shall be directed*, or being brought to him, or being *left with* any of his under officers or deputies at the jail, or place where the prisoner is detained, he or some of his under officers or deputies shall upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the court *or judge* awarding the said writ, and endorsed thereon; not exceeding ten cents per mile; and upon sufficient security given to pay the charges of carrying him back, if he shall be remanded, make return of such writ, and bring, or cause to be brought, the body of the prisoner before the court *or judge who granted the said writ; or in case of the adjournment of the said court, or absence of the judge, then before any other of the judges aforesaid, and* certify the true cause of his imprisonment *within three days thereafter*, unless the commitment of such person *be in a place beyond the distance of twenty miles from the place where the writ is returnable: if beyond the distance of twenty miles, and not above one hundred miles, then within ten days; and if beyond the distance of one hundred miles, then within twenty days* after the delivery of the writ as aforesaid, and not longer.

of Nauvoo," and said writ shall be in substance as follows, to wit;

State of Illinois }
City of Nauvoo } Set.

The People of the State of Illinois, to the Marshal of said City, Greeting:

Whereas application has been made before the municipal court of said city that the body (or bodies) of A B, &c., is or are in the custody of C D, &c., of &c., these are therefore to command, the said C D, &c., of &c., to safely have the body (or bodies) of said A B, &c., in his custody, detained, as it is said, together with the day and cause of his (her or their) caption and detention by whatsoever name the said A B, &c., may be known or called, before the municipal court of said city, forthwith to abide such order as the said court shall make in his behalf; and further, if the said C D, &c., or other person or persons having said A B, &c., in custody shall refuse, or neglect to comply with the provisions of this writ, you, the marshal of said city, or other person authorized to serve the same, are hereby required to arrest the person or persons so refusing or neglecting to comply as aforesaid, and bring him or them, together with the person or persons in his or their custody, forthwith before the municipal court aforesaid, to be dealt with according to law; and herein fail not, and bring this writ with you.

Witness, J. S., clerk of the municipal court at Nauvoo, this day of in the year of our Lord one thousand eight hundred and

J. S., Clerk.

And be directed to the city marshal, and shall be served by delivering a

copy thereof to the person or persons in whose custody the prisoner or prisoners are detained, and said writ shall be made returnable forthwith, and the form and substance thereof, as herein set forth, and be taken and considered as part and parcel of this ordinance. To the intent that no officer, sheriff, jailer, keeper, or other person, *or persons, upon* whom such writ shall be *served*, may pretend ignorance thereof, every such writ *and copy thereof served* shall be endorsed with these words, "By the Habeas Corpus Act;" and whenever the said writ shall by any person be served upon the sheriff, jailor, keeper, or other person *or persons whomsoever, holding said prisoner or prisoners*, or being brought to him *or them*, or being *served upon* any of his *or their* under-officers or deputies at the jail, or place where the prisoner *or prisoners* are detained, he *or they*, or some of his or their under-officers or deputies shall, upon payment or tender of the charges of bringing the said prisoner *or prisoners*, to be ascertained by the court awarding the said writ, and endorsed thereon, not exceeding ten cents per mile; and upon sufficient security given to pay the charges of carrying him, *her, or them* back, if he, *she, or they* shall be remanded, make return of such writ, and bring or cause to be brought, the body *or bodies* of the prisoner or prisoners before the *municipal* court *forthwith*, and certify the true cause of his, *her, or their* imprisonment, unless the commitment of such person *or persons shall be to the county jail in Hancock County, in which case the time shall be prolonged till five days* after the delivery of the writ as aforesaid, and not longer.

Provided, nevertheless, that in case any person or persons may at any

SEC. 2. Where any person not being committed or detained for any criminal, or supposed criminal matter, shall be confined, or restrained of his *or* her liberty, under any color or pretence whatever, he or she may apply for a writ of habeas corpus, as aforesaid, which application shall be in writing, signed by the party, or some person on his *or* her behalf, setting forth the facts concerning his or her imprisonment, and wherein the illegality of such imprisonment consists, and in whose custody he or she is detained; which application, or petition shall be verified by the oath of affirmation of the party applying, or some other person on his *or* her behalf; if the confinement or restraint is by virtue of any judicial writ or process, or order, a copy thereof shall be annexed thereto, or an affidavit made that the same had been demanded and refused: the same proceedings shall thereupon be had in all respects, as are directed in the preceding section.

time hereafter be taken and lodged in the city or county jail, under any writ or process, as provided by the city charter of the city of Nauvoo and shall require a writ of habeas corpus to issue to bring him, her, or them before the municipal court of said city, said writ shall issue to bring him, her, or them before said court, and be directed to the city marshal to be served upon the person or persons in whose custody such prisoner or prisoners may then be detained.

SEC. 2. Where any person *or persons* not being committed or detained for any criminal or supposed criminal matter shall be confined or restrained of his, her, *or their liberty*, under any color or pretense whatever, he, *she, or they* may apply for a writ of habeas corpus, as aforesaid, which application shall be in writing, signed by the party, or some person on his, her, *or their* behalf, setting forth the facts concerning his, her, *or their* imprisonment, and wherein the illegality of such imprisonment consists, and in whose custody he, she *or they are* detained; which application or petition shall be verified by the oath or affirmation of the party applying, or some other person on his, her, *or their* behalf. If the confinement or restraint is by virtue of any judicial writ or process, or order, a copy thereof shall be annexed thereto, or an affidavit made that the same had been demanded and refused: the same proceedings shall thereupon be had in all respects, as are directed in the preceding section, *and any officer, person, or persons, knowing that he or they have an illegal writ, or not having any writ, who shall attempt through any false pretext to take or intimidate any of the inhabitants of this city, through such pretext, shall forfeit for every such offense a sum not exceeding one thousand dollars, nor less than five hundred dollars, or*

SEC. 3. Upon the return of the writ of habeas corpus, a day shall be set for the hearing of the cause of imprisonment or detainer, not exceeding five days thereafter, unless the prisoner shall request a longer time. The said prisoner may deny any of the material facts set forth in the return, or may allege any fact to shew, either that the imprisonment or detention is unlawful, or that he is then entitled to his discharge; which allegations or denials shall be made on oath. The said return may be amended by leave of the court *or judge*, before or after the same is filed, as also may all suggestions made against it, that thereby material facts may be ascertained. The said court *or judge* shall proceed in summary way to settle the said facts, by hearing the testimony and arguments, as well of all parties interested civilly, if any there be, as of the prisoner, and the person who holds him in custody, and shall dispose of the prisoner as the case may require. If it appear that the prisoner is in custody by virtue of process from any court, legally constituted, he can be discharged *only* for *some of* the following causes: *first*, where the court has exceeded the limits of its jurisdiction, either as to the matter, place, sum, or person; second, where, though the original imprisonment was lawful, yet by some act, omission, or event, which has subsequently taken place, the party has become entitled to his discharge; third, where the process is defective in some substantial form required by law; fourth, where the process, though in proper form, has been issued in a case, or under circumstance where the law does not allow process, or orders for

in case of failure to pay such forfeiture, to be imprisoned not more than twelve months nor less than six months.

SEC. 3. Upon the return of the writ of habeas corpus, a day shall be set for the hearing of the cause of imprisonment or detainer, not exceeding five days thereafter, unless the prisoner *or prisoners* shall request a longer time. The said prisoner *or prisoners* may deny any of the material facts set forth in the return, or may allege any fact to show either that the imprisonment or detention is unlawful, or that he, *she, or they*, is or are then entitled to his, *her, or their* discharge, which allegations or denials shall be made on oath. The said return may be amended, by leave of the court, before or after the same is filed, as also may all suggestions made against it, that thereby material facts may be ascertained. The said court shall proceed in a summary way to settle the said facts, by hearing the testimony and arguments, as well of all parties interested civilly, if any there be, as of the prisoner *or prisoners* and the person *or persons* who holds him, *her, or them* in custody, and shall dispose of the prisoner *or prisoners* as the case may require. If it appear that the prisoner *or prisoners* are in custody by virtue of process from any court, legally constituted, he, *she, or they* can be discharged for the following causes: First, where the court has exceeded the limits of its jurisdiction, either as to the matter, place, sum, person, *or persons*; second, where, though the original imprisonment was lawful, yet by some act, omission, or event which has subsequently taken place, the party has become entitled to his, *her, or their* discharge; third, where the process is defective in some substantial form required by

imprisonment or arrest to issue; fifth, where, although in proper form, the process has been issued or executed by a person either unauthorized to issue or execute the same, or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him; sixth, where the process appears to have been obtained by false pretense or bribery; seventh, where there is no general law, nor any judgment, order, or decree of a court, to authorize the process, if in a civil suit, nor any conviction, if in a criminal proceeding. **No court or judge, on the return of a habeas corpus, shall, in any other matter, inquire into the legality or justice of a judgment, or decree of a court legally constituted.** In all cases where the imprisonment is for a criminal, or supposed criminal matter, if it shall appear to the said court **or judge**, that there is sufficient legal cause for the commitment of the prisoner, although such commitment may have been informally made, or without due authority, or the process may have been executed by a person not duly authorized, the court **or judge** shall make a new commitment, in proper form, and directed to the proper officer, or admit the party to bail, if the case be bailable.

SEC. 4. When any person shall be admitted to bail, on habeas corpus, he shall enter into recognizance with one or more securities, in such sum as the court **or judge** shall direct, having regard to the circumstances of the prisoner, and the nature of the offence, conditioned for his or her appearance at the next circuit court, to be holden in and for the county where the offence was committed, or where the same is

law; fourth, where the process though in proper form has been issued in a case, or under circumstances where the law does not allow process, or orders for imprisonment or arrest, to issue; fifth, where although in proper form the process has been issued or executed by a person **or persons**, either unauthorized to issue or execute the same, or where the person **or persons** having the custody of the prisoner **or prisoners** under such process is not the person **or persons** empowered by law to detain him, **her, or them**; sixth, where the process appears to have been obtained by false pretense or bribery; seventh, where there is no general law, nor any judgment, order, or decree of a court, to authorize the process, if in a civil suit, nor any conviction, if in a criminal proceeding. In all cases where the imprisonment is for a criminal or supposed criminal matter, if it shall appear to the said court that there is sufficient legal cause for the commitment of the prisoner **or prisoners**, although such commitment may have been informally made, or without due authority, or the process may have been executed by a person **or persons** not duly authorized, the court shall make a new commitment, in proper form, and directed to the proper officer **or officers**, or admit the party to bail, if the case be bailable.

SEC. 4. When any person **or persons** shall be admitted to bail on habeas corpus, he, **she, or they** shall enter into recognizance with one or more securities in such sum as the court shall direct, having regard to the circumstances of the prisoner **or prisoners**, and the nature of the offense, conditioned for his, **her, or their** appearance at the next circuit court to be holden in and for the county where the offense was

to be tried: where **any** court **or judge** shall admit to bail, or remand any prisoner brought before **him or them**, on any writ of habeas corpus, it shall be the duty of the said court or judge to bind all such persons as do declare any thing material to prove the offence with which the prisoner is charged, by recognizance, to appear at the proper court having cognizance of the offence, on the first day of the next term thereof, to give evidence touching the said offence, and not to depart the said court without leave; which recognizance, so taken, together with the recognizance entered into by the prisoner when he is admitted to bail, shall be certified and returned to the proper court on the first day of the next succeeding term thereof. If any such witnesses shall neglect or refuse to enter into a recognizance as aforesaid, when thereunto required, it shall be lawful for the court **or judge** to commit him to jail until he shall enter into such recognizance, or be otherwise discharged by due course of law; if **any judge** shall neglect or refuse to bind any such witness or prisoner, by recognizance as aforesaid, or to return any such recognizance, when taken as aforesaid, **he** shall be deemed guilty of a misdemeanor in office, and be proceeded against accordingly.

SEC. 5. Where any prisoner, brought up on a habeas corpus, shall be remanded to prison, it shall be the duty of the court **or judge** remanding him, to make out and deliver to the sheriff, or other person, to whose custody he shall be remanded, an order in writing, stating the cause or causes of remanding him. If such prisoner shall obtain a second writ of habeas corpus, it shall

committed, or where the same is to be tried. Where the court shall admit to bail, or remand any prisoner **or prisoners** brought before **the court**, on any writ of habeas corpus, it shall be the duty of said court to bind all such persons as do declare any thing material to prove the offense, with which the prisoner **or prisoners** are charged by recognizance to appear at the proper court having cognizance of the offense, on the first day of the next term thereof, to give evidence touching the said offense, and not to depart the said court without leave; which recognizance so taken, together with the recognizance entered into by the prisoner **or prisoners**, when he, **she, or they** are admitted to bail, shall be certified and returned to the proper court, on the first day of the next succeeding term thereof. If any such witness **or witnesses** shall neglect or refuse to enter into a recognizance as aforesaid, when thereunto required, it shall be lawful for the court to commit him, **her, or them** to jail until he, **she, or they** shall enter into such recognizance, or be otherwise discharged by due course of law. If **the court** shall neglect or refuse to bind any such witness **or witnesses**, prisoner **or prisoners**, by recognizance as aforesaid, or to return any such recognizance, when taken as aforesaid, **the court** shall be deemed guilty of a misdemeanor in office, and be proceeded against accordingly.

SEC. 5. Where any prisoner **or prisoners** brought up on a habeas corpus shall be remanded to prison, it shall be the duty of the **municipal** court remanding him, **her, or them** to make out and deliver to the sheriff, or other person **or persons** to whose custody he, **she, or they** shall be remanded, an order in writing, stating the cause or causes of remanding him, **her, or them**.

be the duty of such sheriff or other person *to* whom the same shall be *directed*, to return therewith the order aforesaid: and if it shall appear that the said prisoner was remanded for an offence adjudged not bailable, it shall be taken and received as conclusive, and the prisoner shall be remanded without further proceedings.

SEC. 6. It shall not be lawful for *any* court *or judge*, on a second writ of habeas corpus, obtained by such prisoner, to discharge the said prisoner, if he *is* clearly and specifically charged in the warrant of commitment with a criminal offence; but the *said* court *or judge* shall, on *the return of such second writ, have power* only *to* admit such prisoner to bail, where the offence is bailable by law, or remand him to prison where the offence is not bailable; or being bailable, *where* such prisoner shall fail to give the bail required.

SEC. 7. No person who has been discharged by order of a court *or judge*, on a habeas corpus, shall be again imprisoned, restrained, or kept in custody, for the same cause, unless he be afterwards indicted for the same offence, or unless by the legal order or process of the court wherein he is bound by recognizance to appear. The following shall not be deemed to be the same cause: first, if after a discharge for a defect of proof, or any material defect in the commitment in a criminal case, the prisoner should be again arrested on sufficient proof, and committed by legal process for the same offence; second, if in a civil suit the party has

If such prisoner *or prisoners* shall obtain a second writ of habeas corpus, it shall be the duty of such sheriff or other person *or persons upon* whom the same shall be *served*, to return therewith the order aforesaid; and if it shall appear that the said prisoner *or prisoners* were remanded for an offence adjudged not bailable, it shall be taken and received as conclusive, and the prisoner *or prisoners* shall be remanded without further proceedings.

SEC. 6. It shall not be lawful for *the municipal* court, on a second writ of habeas corpus obtained by such prisoner *or prisoners*, to discharge the said prisoner *or prisoners*, if he, *she, or they are proven guilty of the charges* clearly and specifically charged in the warrant of commitment with a criminal offense; but *if the prisoner or prisoners shall be found guilty, the municipal* court shall only admit such prisoner *or prisoners* to bail, where the offense is bailable by law *or ordinance*, or remand him, *her, or them* to prison, where the offense is not bailable; or being bailable, *if* such prisoner *or prisoners* shall fail to give the bail required.

SEC. 7. No person *or persons* who have been discharged by order of *the municipal* court on a habeas corpus, shall be again imprisoned, restrained, or kept in custody for the same cause, unless he, *she, or they*, be afterwards indicted for the same offense, or unless by the legal order or process of the *municipal* court wherein he, *she, or they* are bound by recognizance to appear, the following shall not be deemed to be the same cause. First, if after a discharge for defect of proof, or any material defect in the commitment in a criminal case, the prisoner *or prisoners* should be again arrested *upon* sufficient proof and committed by legal

been discharged for any illegality in the judgment or process, and is afterwards imprisoned by legal process for the same cause of action; third, generally, whenever the discharge has been ordered on account of the non-observance of any of the forms required by law, the party may be a second time imprisoned, if the cause be legal, and the forms required by law observed.

SEC. 8. *No person shall be discharged under the provisions of this act who is in custody under a commitment, for any offence exclusively cognizable by the courts of the United States, or by order, execution, or process issuing out of such courts, in cases where they have jurisdiction, or who is held by virtue of any legal engagement or enlistment in the army, or who being subject to the rules and articles of war, is confined by any one legally acting under the authority thereof, or who is held as prisoner of war under the authority of the United States, or who is in custody for any treason, felony, or other high misdemeanor, committed in any other state or territory of the United States, and who by the constitution and laws of the United States, ought to be delivered up to the executive power of such state or territory; nor shall any negro or mulatto, held as a slave within this state, try his right to freedom, or be discharged from slavery under the provision of this act, but for that purpose shall be put to his suit for freedom.*

SEC. 9. If any person shall be committed for a criminal, *or supposed criminal* matter, *and not admitted to bail, and shall not be tried on or before the second term of the court having jurisdiction of the offence, the*

process, for the same offense; second, if in a civil suit the party *or parties* have been discharged for any illegality in the judgment or process, and are afterwards imprisoned by legal process, for the same cause of action; third, generally whenever the discharge has been ordered on account of the non-observance of any of the forms required by law, the party *or parties* may be a second time imprisoned, if the cause be legal and the forms required by law observed.

[None]

SEC. 8. If any person *or persons* shall be committed for a criminal matter, *in case of the absence of a witness or witnesses whose testimony may be considered to be of importance in behalf of the people, the municipal*

prisoner shall be set at liberty by the court, unless the delay shall happen on the application of the prisoner. If such court, at the second term, shall be satisfied that due exertions have been made to procure the evidence for, and on behalf of the people, and that there are reasonable grounds to believe that such evidence may be procured at the third term, they shall have power to continue such case till the third term. If any such prisoner shall have been admitted to bail for a crime other than a capital offence, the court may continue the trial of said cause to a third term, if it shall appear by oath or affirmation that the witnesses for the people of the state are absent, such witnesses being mentioned by name, and the court shewn wherein their testimony is material.

SEC. 10. *To prevent any person from avoiding or delaying his trial, it shall not be lawful to remove any prisoner on habeas corpus under this act, out of the county in which he or she is confined, within fifteen days next preceding the term of the court at which such person ought to be tried, except it be to convey him or her into the county where the offence with which he or she stands charged is properly cognizable.*

Sec. 11. Any person being committed to *any prison*, or in the custody of any officer, sheriff, jailer, keeper, or other person, or his under officer or deputy, for any criminal, or supposed criminal matter, shall not be removed from *the* said prison or custody into any *other* prison or custody, unless it be by habeas corpus, or *some other legal writ, or where the prisoner shall be delivered to the constable, or other inferior officer, to be carried to some common jail, or shall be removed from one place to another, within the county, in order to his discharge or*

court may adjourn from time to time at its discretion, provided they decide upon the case within thirty days, if it shall appear by oath or affirmation that the witness or witnesses for the people of the state are absent, such witness or witnesses being mentioned by name, and the court shown wherein their testimony is material.

[None]

SEC. 9. Any person or persons being committed to *the city or county jail, as provided in the Charter in the City of Nauvoo*, or in the custody of any officer, sheriff, jailer, keeper, or other person *or persons*, or his *or their* under-officer or deputy, for any criminal or supposed criminal matter, shall not be removed from said prison or custody into any prison or custody, unless it be by habeas corpus, or *by an order of the municipal court*, or in case of sudden fire, infection, or other necessities; if any person *or persons* shall, after such commitment as aforesaid, make out,

trial in due course of law, or in case of sudden fire, infection, or other necessity, *or where the sheriff shall commit such prisoner to the jail of an adjoining county, for the want of a sufficient jail in his own county, as is provided in the act concerning jails and jailers, or where the prisoner, in pursuance of a law of the United States, may be claimed or demanded by the executive of any of the United States or territories.* If any person or persons shall, after such commitment as aforesaid, make out, sign, or countersign, any warrant or warrants for such removal, *except as before excepted*, then he or they shall forfeit to the prisoner *or party* aggrieved, a sum not exceeding *three* hundred dollars, to be recovered by the prisoner or *party* aggrieved, in the manner hereinafter mentioned.

SEC. 12. *Any judge empowered by this act* to issue writs of habeas corpus, *who* shall corruptly refuse to issue *such* writ, when legally applied to, in a case where such writ may lawfully issue, or who shall, for the purposes of oppression, unreasonably delay the issuing of such writ, shall, for every such offence, forfeit to the prisoner or party aggrieved, a sum not *exceeding* five hundred dollars.

SEC. 13. If any officer, sheriff, jailer, keeper, or other person, *to* whom any such writ shall be *directed*, shall neglect or refuse to make the returns as aforesaid, or to bring the body of the prisoner according to the command of the said writ, within the time required by this *act*, all, and every such officer, sheriff, jailer, keeper, or other person, shall be guilty of a contempt of the court *or judge* who issued said

sign, or countersign any warrant or warrants for such removal, then he or they shall forfeit to the prisoner *or prisoners* aggrieved a sum not exceeding *five* hundred dollars, to be recovered by the prisoner or *prisoners* aggrieved, in the manner hereinafter mentioned.

SEC. 10. *If any member of the municipal court, or the clerk of said court* shall corruptly refuse *or neglect* to issue writ *or writs* of habeas corpus when legally applied to in a case where such writ *or writs* may lawfully issue, or who shall for the purpose of oppression unreasonably delay the issuing of such writ or writs, shall for every such offense forfeit to the prisoner *or prisoners*, party *or parties* aggrieved, a sum not *less than* five hundred dollars *and not exceeding one thousand dollars, and be imprisoned for six months.*

SEC. 11. If any officer, sheriff, jailer, keeper, or other person *or persons upon* whom any such writ shall be *served*, shall neglect or refuse to make the returns as aforesaid, or to bring the body of the prisoner *or prisoners* according to the command of the said writ within the time required by this *ordinance*, all and every such officer, sheriff, jailer, keeper, or other person *or persons* shall be guilty of a contempt of the *municipal*

writ; whereupon, the said court **or judge** may, and shall issue an attachment against **such** officer, sheriff, jailer, keeper, or other person, and cause him or them to be committed to the jail **of the county**, there to remain without bail or mainprize, until he or they shall obey the said writ; such officer, sheriff, jailer, keeper, or other person, shall also forfeit to the prisoner or party aggrieved, a sum not exceeding **five hundred** dollars, and **shall be incapable of holding or executing his said office**.

SEC. 14. Any **one** having a person in his custody, or under his restraint, power or control, for whose relief a writ of habeas corpus is issued, who, with intent to avoid the effect of such writ, shall transfer such person to the custody, or place him or her under the control of **another**, or shall conceal him or her, or change the place of his or her confinement, with intent to avoid the operation of such writ, or with intent to remove him or her out of the state, shall forfeit for every such offence one thousand dollars, and may be imprisoned not less than one year, nor more than five years. In any prosecution for the penalty incurred under this section, it shall not be necessary to show that the writ of habeas corpus had issued at the time of the removal, transfer, or concealment therein mentioned, if it be proven that the acts therein forbidden were done with the intent to avoid the operation of such writ.

SEC. 15. Any sheriff, or his deputy, any jailer, or coroner, having custody of any prisoner, committed on any civil or criminal process, of any court

court who issued said writ: whereupon the said court may and shall issue an attachment against **said** officer, sheriff, jailer, keeper, or other person **or persons**, and cause him or them to be committed to the **city or county** jail **as provided for by the City Charter of the City of Nauvoo**, there to remain without bail or mainprize, until he or they shall obey the said writ; such officer, sheriff, jailer, keeper, or other person **or persons** shall also forfeit to the prisoner **or prisoners**, party **or parties** aggrieved, a sum not exceeding **one thousand dollars, and not less than five hundred dollars**.

SEC. 12. Any **person or persons** having a prisoner **or prisoners** in his **or their** custody, or under his **or their** restraint, power, or control, for whose relief a writ **or writs** of habeas corpus is issued, who, with intent to avoid the effect of such writ **or writs**, shall transfer such person **or persons** to the custody of, or place him, her, **or them** under the control of **any other person or persons**, or shall conceal him, her, or **them, or** change the place of his, her, **or their** confinement, with intent to avoid the operation of such writ **or writs**, or with intent to remove him, her, **or them** out of the state, shall forfeit for every such offense one thousand dollars, and may be imprisoned not less than one year, nor more than five years. In any prosecution for the penalty incurred under this section, it shall not be necessary to show that the writ **or writs** of habeas corpus had issued at the time of the removal, transfer, or concealment therein mentioned, if it be proven that the acts therein forbidden were done with the intent to avoid the operation of such writ **or writs**.

SEC. 13. Any sheriff, or his deputy, any jailer or coroner having custody of any prisoner **or prisoners** committed on any civil or criminal process,

or magistrate, who shall neglect to give such prisoner a copy of the process, order, or commitment, by virtue of which he is imprisoned, within six hours after demand made by said prisoner, or any one on his behalf, shall forfeit five hundred dollars.

SEC. 16. Any person who, knowing that another has been discharged by order of *a competent judge or tribunal*, on a habeas corpus, shall, contrary to the provisions of this *act*, arrest or detain him again for the same cause, which was shown on *the* return of such writ, shall forfeit *five hundred* dollars for the first offence, and *one* thousand dollars for every subsequent offence.

SEC. 17. All the pecuniary forfeitures incurred under this *act*, shall inure to the use of the party for whose benefit the writ of habeas corpus issued, and shall be sued for and recovered, with costs, by the *attorney general, or circuit* attorney, in the name of the *state*, by information; and the amount, when recovered, shall, without any deduction, be paid to the *party* entitled thereto.

SEC. 18. In any action or suit for any offence against the provisions of this *act*, the defendant or defendants may plead the general issue, and give the special matter in evidence.

SEC. 19. The recovery of *the* said penalties shall be no bar to a civil suit for damages.

[None]

SEC. 20. *The supreme and circuit courts within this state, or the judges thereof, in vacation, shall have power*

of any court or magistrate, who shall neglect to give such prisoner *or prisoners* a copy of the process, order, or commitment, by virtue of which he, *she, or they* are imprisoned, within six hours after demand made by said prisoner *or prisoners*, or any one on his, *her, or their* behalf, shall forfeit five hundred dollars.

SEC. 14. Any person who knowing that another has been discharged, by order of *the municipal court*, on a habeas corpus, shall, contrary to the provisions of this *ordinance*, arrest or detain him *or her* again for the same cause which was shown on return of such writ, shall forfeit *one thousand* dollars for the first offense, and *two* thousand dollars for every subsequent *one*.

SEC. 15. All the pecuniary forfeitures incurred under this *ordinance* shall *be and* inure to the use of the party for whose benefit the writ of habeas corpus *was* issued, and shall be sued for and recovered with costs by the *city* attorney, in the name of the city by information, and the amount when recovered shall, without any deduction, be paid to the *parties* entitled thereto.

SEC. 16. In any action or suit for any offense against the provisions of this *ordinance*, the defendant or defendants may plead the general issue, and give the special matter in evidence.

SEC. 17. The recovery of said penalties shall be no bar to a civil suit for damages.

SEC. 18. *The municipal court upon issuing a writ of habeas corpus may appoint any suitable person to serve the same, other than the marshal, and shall endorse the appointment on the back of said writ.*

SEC. 19. This *ordinance* to take effect *and be in force from and after its passage, any act heretofore to*

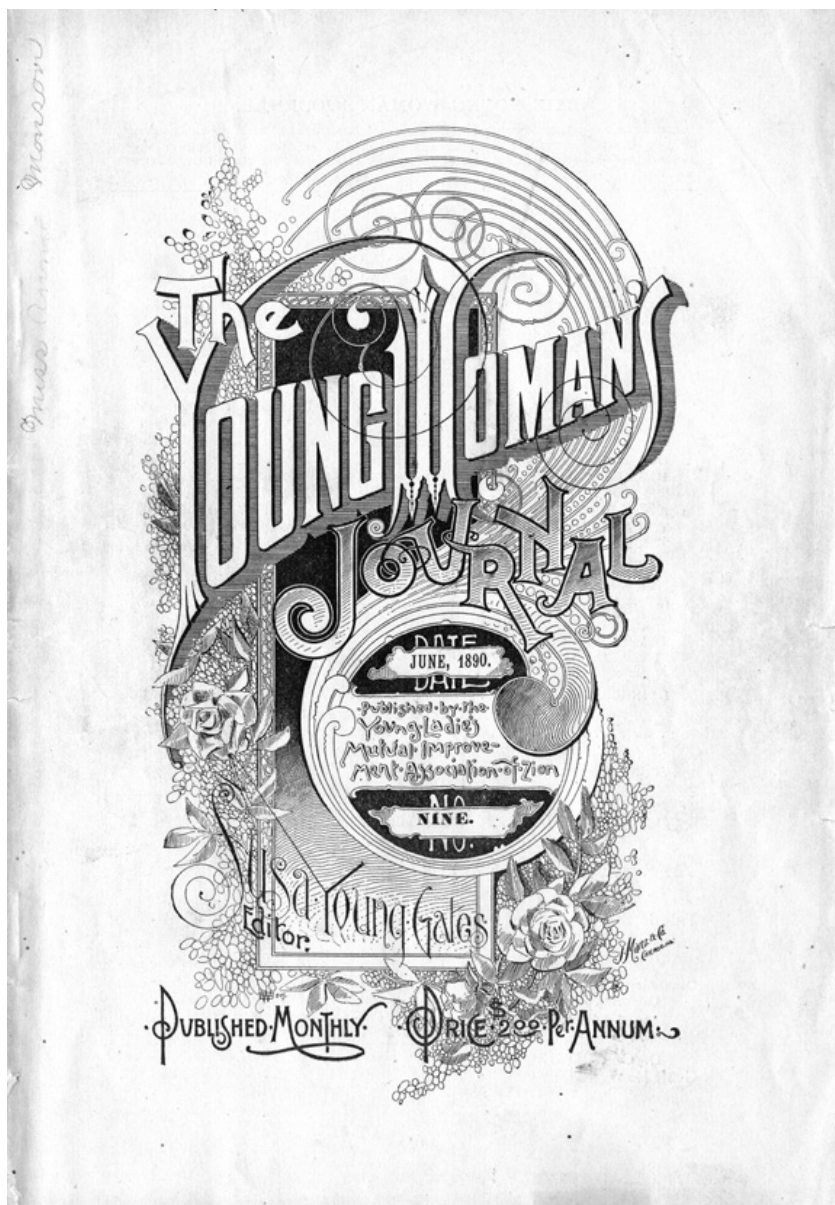
to issue writs of habeas corpus, for the purpose of bringing the body of any person confined in any jail within the same before them, to testify, or be surrendered, in discharge of bail. When a writ of habeas corpus shall be issued for the purpose of bringing into court any person to testify, or the principle to be surrendered in discharge of bail, and such principal or witness shall be confined in any jail in this state, out of the county, in which such principal or witness is required to be surrendered or to testify, the writ may run into any county in this state, and there be executed and returned by any officer to whom it shall be directed; and the principal, after being surrendered, or his bail discharged, or a person testifying as aforesaid, shall, by the officer executing such writ, be returned to the jail from whence he was taken, by virtue of an order of the court, for the purposes aforesaid; an attested copy of which, lodged with the jailer, shall exonerate such jailer from being liable for an escape. The party praying out such writ of habeas corpus shall pay to the officer executing the same, such reasonable sum for his services as shall be adjudged by the courts respectively. This act to take effect on the first day of June.

the contrary thereof in any wise notwithstanding.

Passed Nov. 14, 1842 Joseph Smith, Mayor. James Sloan, recorder.

Source: "An Act Regulating the Proceeding on Writs of Habeas Corpus," in *The Public and General Statute Laws of the State of Illinois* (Stephen F. Gale, 1839), 322–28.

Source: Rough Draft Notes of History of the Church, 1842b-015, Church History Library. Capitalization and some punctuation have been modernized.



The *Young Woman's Journal*, founded by Susa Young Gates in 1889, was one of the primary venues for Home Literature in the 1890s Mormon culture of letters. Courtesy Church History Library.

The 1890s Mormon Culture of Letters and the Post-Manifesto Marriage Crisis

A New Approach to Home Literature

Lisa Olsen Tait

To please while we teach important lessons, to implant solid principles of truth and nobility while chaining the minds and attentions with our seemingly “light literature;” these are some of our aims.

—Susa Young Gates¹

The literary department of the December 1892 issue of the *Young Woman’s Journal* features a story entitled “Judith’s Decision” in which the title character, a young woman in her early twenties, announces that she is planning to go to the World’s Fair in Chicago, set to open in the spring of 1893.² A “glowing account” of the fair given by a local man has caused “every fibre of my being” to be “kindled with a desire to go and see the magnificent sight,” Judith tells her mother, excitedly reporting that she has figured out how, “by denying myself a few of the luxuries of life,” she can save up enough money from her teaching job to pay her way to Chicago. Judith’s mother replies without enthusiasm, “It will certainly be a great thing for those who can go” (111–12).

Judith persists in trying to elicit her mother’s approval, describing all the exciting things to be seen, but Mrs. Randall is unmoved. “I wish you . . . were a little more spiritual-minded,” she tells Judith. “Have you ever thought about going to the dedication of the Salt Lake temple?” Judith replies that she has not but muses that perhaps she could arrange to go to both. Still unimpressed, her mother asks whether she has donated anything to the temple building fund. Judith assures her that she has promised to give five dollars—but then, at her mother’s prompting, admits that she is planning to spend over a hundred on the trip to the fair. “My dear, I wonder which is the most desirable, the good things of this life or the glories of the

My current project is a biography of Susa Young Gates, and I am finding (not surprisingly) that her fiction and her life experience are mutually illuminating. For example, Susa endured a miserable marriage and bitter divorce early in her life. In some of her stories, she writes “mentor” characters who guide the young protagonists in making wise marital choices by invoking their own disastrous decisions. In “Donald’s Boy,” young Phyllis is mentored by Winnie Selden, who has escaped an abusive marriage. “I have felt just like you do,” Winnie tells Phyllis. “I broke all bonds, disobeyed my mother; gave up everything for him and gloried in the thought that I could sacrifice everything on his altar. Well, the Lord says we shall have no other gods before Him, and in less than four months after my marriage my idol lay shattered at my feet and at the end of a year, there was not a spark of love in my breast for him” (June 1895: 309). While mentor characters were a common convention in woman’s fiction, the biographical resonances here are unmistakable. I have found that many other stories are constructed around plot lines and characters drawn from the real-life experiences of Mormon women.



I have also found evidence that these stories did make an impression. Reminiscing decades later, Elsie Talmage Brandley (editor of the *Journal* as it ceased publication in 1929) recalled that it was the magazine’s stories that first impressed her with the power of fiction. “Never has anything else I have heard or read on the subject found the same fervent echo in my heart as the words of Phyllis, in *Donald’s Boy*—‘I’ll be an old maid for the Gospel’s sake,’” she recalled. “I wept bitterly over her renunciation, and in the depths of my twelve-year-old heart, I cried, ‘I know how you feel, Phyllis. I’ll be an old maid for the Gospel’s sake, too!’” (October 1929: 685). Whatever else we can say about these stories from a strictly literary point of view, this anecdote suggests that we should not overlook their impact on the lived experience of young Latter-day Saints during a tumultuous era.

next world?" the mother asks pointedly (113). She then proceeds to voice two pages' worth of counsel to Judith about her priorities. This dialogue, sounding as if it could be delivered over the pulpit, invites young women readers of the story to identify with Judith and evaluate their own desires:

Sacrifice brings forth the blessings of heaven. This is the law and neither you nor I can escape from it. . . . Now you, my child, when you were asked for your contribution [to the temple] gave your name for five dollars. That was something, of course; but here comes along some man and tells you of the grand sights you are going to see in Chicago. Your imagination is so fired by the brilliant prospect that you are ready to pinch and almost starve for a year, and then you can give—think of it—one hundred and thirty dollars to gratify your own love of sight seeing, while you send up to the temple of the Lord five dollars. How do you think the Lord looks at that? (114)

Judith, "awed" by her mother's "solemn and impressive tones," promises to pray about her decision, though she expresses doubt at the efficacy of prayer because she has been praying for a worthy husband for years and, at age twenty-four, still has not found one.

Sometime after this exchange, Judith is invited to a costume party where she encounters Wilson Gray, an up-and-coming young man from the city who has been spending the summer with his relatives in her town. Judith is in love with Wilson, but she fears that he does not return her feelings. The young people at the party play a game in which each person must answer a randomly selected question. Gray is asked whether he is going to be married, to which he replies laconically, that he is not, because, he explains, "I have not found a girl who comes quite up to my ideal" (120).

The question Judith draws hits even closer to home: "Are you going to the Chicago Fair?" Without hesitation, Judith replies that she is not. Her friends are taken by surprise. "I thought you were saving up every nickel to go to that lovely Fair," they exclaim, asking why she is not going. Judith considers for a moment before "bravely" answering: "Because I am going to send my mother up to the dedication of the Salt Lake temple." As she makes this confession, Judith is afraid that it has cost her the good opinion of Wilson Gray. "No doubt this would make him look upon her as a girl with no public spirit, no appreciation of the artistic and beautiful," she reflects—but she vows to herself that she does not care (120).

After the party, Gray suddenly offers to walk Judith home, whereupon he professes his love and proposes marriage, declaring, "When you dared to tell all those gapers and silly listeners that you loved your religion better than yourself and loved your mother better than you did your own selfish pleasure, then I could have claimed you before them all" (121). He has been in love with Judith all along, he confesses, but he had heard that she was not

very religious. Now he sees differently. He takes her into his arms and asks, "Are you not my own, my wife?"

"Sacrifice brings forth the blessings of heaven," Judith murmurs in response as he kisses her (122).

"Judith's Decision" is a representative example of the fictional stories featured prominently in Latter-day Saint periodicals of the late nineteenth century. A young woman wavers in her faith, attracted by worldly pleasures. Her rescue is effected by equal parts of motherly love, authoritative discourse, and personal prayer. Her reward is the ultimate blessing of a worthy marriage to the man of her choice. In the story, the world's fair and the dedication of the Salt Lake Temple are posed as events of equivalent cultural magnitude in an either/or dilemma that encapsulates Mormons' sense of loyalties divided between their religious and national identities. And there is no room for compromise. When Judith suggests that she might be able to attend both events, her mother is unequivocal, in terms that express the symbolic nature of the dilemma: "You and I, dear, must choose between the temple and the Fair" (115). The purpose of "Judith's Decision," as of all these stories, is to motivate young Latter-day Saints to choose the "temple."

LDS scholars and lay readers alike have long puzzled over what to do with these texts. They exist somewhere between literature and history. Clearly marked by their authors and original contexts as "literary," to the modern eye they appear "long on plot and short on artistry and character development," as one description puts it.³ This body of fiction—"Home Literature" was both the contemporary label and the term used by modern critics—received a brief flicker of academic interest a generation ago, largely in dismissive terms.⁴ Since that time, scholars have developed approaches to noncanonical texts that enable us to see them as productive sites for literary and cultural analysis, based on the "cultural work" these texts perform. In Jane Tompkins's now-famous formulation, the plots and characters of popular texts provide society "with a means of thinking about itself, defining certain aspects of a social reality which the authors and their readers [share], dramatizing its conflicts, and recommending solutions."⁵ The key to a popular novel's appeal is its "embrace of what is most widely shared" within a culture at a given historical moment.⁶

This article presents an approach to reading the cultural work of Mormon Home Literature.⁷ My focus is on the work of Susa Young Gates (the most prolific and perhaps most influential writer of the period) in the *Young Woman's Journal* (one of the major venues for Home Literature) during the decade of the 1890s (the high point for this literary movement). My central points are these: Home Literature was largely a female enterprise, and the women who wrote it did so from within coherent cultural and

literary traditions. Home Literature is by and large a gendered, generational phenomenon, not only in its authorship, but also in its thematics and structure. These stories are about young women, for young women—but written by older women. Moreover, when Home Literature is read in light of the cultural crises (both perceived and real) taking place within Mormondom of the 1890s, it yields rich insights into the internal dynamics of change within the Mormon community at a critical juncture—including some of the ambivalences and uncertainties that existed beneath the surface. In particular, Home Literature grappled with the implications of the Manifesto as the Saints began their painful transition away from plural marriage.

Development of Home Literature

The late nineteenth century was a time of diverse, diffuse literary practice in the United States. Developments in technology made reading material cheap and widely available, while expansion of education and literacy created new audiences for literary productions of all kinds. Outpourings of mass-produced story papers were countered in other venues by high-minded discussions of art and literary theory. Immigration, economic and political turmoil, and the exploding sense of living in a “modern” world all contributed to a sense of dynamism and profound uncertainty that drove the cultural conversations of the day, many of which took place in the pages of magazines. In these conversations, fiction was a central feature, both as a topic and a means of discussion.

Scholar Richard Brodhead has described the literary landscape of this period as “cultures of letters”—the “differently organized (if adjacent) literary-social worlds” of the period, which existed “in differently structured cultural settings composed around writing and regulating” the social life of a particular group. In these cultures of letters, Brodhead explains, “differently constituted social publics . . . provided audiences for different kinds of writing”; that is, “each supplied a public for the particular selection or version of writing that spoke to its cultural identity and social needs.”⁸

Brodhead’s neutral term “cultures of letters” carefully avoids a hierarchical valuation of literary productions; labels such as “highbrow” and “low-brow” were still developing in the late nineteenth century.⁹ A broad range of people at this time felt they had claim on the “literary” as a means of expression so that, for example, publications of all kinds—labor union papers or fashion magazines—carried fiction and poetry as part of their regular contents. Even in high-culture venues, as Nancy Glazener has observed, the literary was constructed as “a general interest that could be advantageously pursued even among the very lowliest of the aspiring.”¹⁰ Given

these conditions, Brodhead argues that literary history must be understood in terms of the “multiform transactions” between texts and contexts, “the relation between literary writing and the changing meanings and places made for such work in American social history.”¹¹ The term “cultures of letters” provides a framework within which these different literary manifestations, including Mormon Home Literature, can be explored and valued on their own terms.

We must begin our discussion of Home Literature, then, with an overview of the Mormon cultural situation in the final decade of the nineteenth century. Having founded their communities in the West on separatist ideals of communal economics, theocratic politics, and plural marriage, the Latter-day Saints had lost a decades-long standoff with the federal government; they now had to make major adjustments on both the practical and theoretical levels. The 1880s were shaped by intense turmoil as increasingly punitive legal measures sent scores of polygamists to jail and countless others into hiding, severely disrupting the functioning of the institutional Church and the security of individual families. Finally, in September 1890, LDS Church President Wilford Woodruff announced a manifesto, declaring that the Mormons would “submit” to the law of the land and “refrain from contracting any marriage forbidden” by law.¹² This move ushered in the beginning of the end of polygamy. It was clear that the Saints had moved irrevocably toward the mainstream, but it was unclear what the ultimate result would be.

“We are certainly undergoing radical changes in our temporal and more especially our political affairs,” Susa Young Gates wrote the following year.¹³ This sense of profound and unsettling change in the community was focused in a perception of generational crisis, with fears for the future expressed as the tendency of the young people to be spiritually unmotivated, materialistic, and even rebellious. Such concerns appeared frequently in the *Young Woman’s Journal*. “Sister Snow spoke intelligently and with feeling of the indifference which seems to be growing up among the young in regard to spiritual affairs,” according to one report, while Sister Talmage deplored “the flippant way some young ladies have of referring to sacred things.”¹⁴ Talmage revisited the subject the next month, asserting that many young women were “‘running astray’ rather than being ‘led astray.’”¹⁵ Fictional characters voiced the concerns as well. “I tell you young people now-a-days don’t know what life means,” Aunt Betsy declares in one story as she watches her young niece prepare to be married. “They must begin it with everything heart can desire, consequently they can’t enjoy anything.”¹⁶

Such expressions can be seen as conventional rhetorical devices, and similar sentiments have appeared, then and now, in many contexts. There

were particular reasons, however, that these perceptions took on special urgency for Latter-day Saints at this time. There were real and significant changes taking place, not only in terms of the external pressures that had been brought to bear on the Mormons, but also in terms of the demographics and internal dynamics of the community itself. In the 1890s, Mormonism reached a demographic turning point: more new members were added by birth than by baptism.¹⁷ This was a reversal of the pattern of conversion that had worked to establish the community in its first sixty years, and the new trend would continue for another fifty years. Moreover, the generation of young people coming of age in the 1890s was an exceptionally large cohort. According to historian Davis Bitton, by the 1880s about 54 percent of the population of Utah was teenage or younger, and nearly 18 percent was age four or less. The 1880 census found that “Utah has more children under five years old, in proportion to its population, than any other division in the country.” These children were the teenagers and young adults of the 1890s.¹⁸

These young people—the assumed audience for Home Literature—were, like their parents, native-born Mormons, but in their early years the distinguishing features of the community were increasingly under pressure. They never knew isolation and insularity to the same extent as their parents, and the trappings of consumer culture were increasingly available to them, as were education and cultural refinements. In many cases, their parents began to prosper, providing a level of material comfort and social opportunity previously unknown. Meanwhile, these children grew up in a time of intense disruption and uncertainty brought on by the federal antipolygamy campaign. Even those whose parents were not polygamous must have experienced a great deal of insecurity and turmoil in their youth, only to be told, as they became teenagers and young adults, that they were not measuring up to the sacrifices of their elders.

Within this context, the reading material of young Latter-day Saints received particular attention. Suspicion of fiction was of course a time-honored sentiment in the United States, even as novels became the preferred reading of millions; the Mormon case is one example of how that sentiment died out unevenly and flared up occasionally throughout the century. By the late 1880s, however, a new generation of Latter-day Saints envisioned the development of a *Mormon* literature through which authoritative messages could be delivered by means of entertaining stories. An ardent sermon by charismatic young bishop Orson F. Whitney solidified the name of the movement—Home Literature.¹⁹

While Whitney’s sermon invoked the highest examples of poetry (“We will yet have Miltons and Shakespeares of our own,” he famously

proclaimed),²⁰ the primary focus of LDS literary ambitions was fiction. Writing under the pen name “Horatio,” Elder B. H. Roberts, newly installed editor of the young men’s magazine, cited contemporary examples such as *Robert Elsmere* and *Ben Hur* to argue that “it is becoming generally recognized that the medium of fiction is the most effectual means of attracting the attention of the general public and instructing them.”²¹ Indeed, he continued, “This class of fiction . . . is working its way into our own literature; and stories illustrating the evils overtaking young women, who marry those not of our faith, have appeared. . . . Nor do I think any one reading those stories can doubt their effectiveness; and I am of the opinion that this style of teaching can be employed successfully in other directions.”²²

Roberts’s call to turn fiction to communal benefit represented a departure from the previous decades of opprobrium that had been heaped upon novels by various commentators, criticism that was also expressed in terms of the potential effect of fiction on young people, especially young women. “Literature of this class extols a state of society utterly inconsistent with that which will exist when the government of God holds sway upon the earth,” Elder George Reynolds had opined in one notable discussion. People who read novels “imbibe a spirit . . . antagonistic to the teachings of divine revelation, which dwarfs their growth in heavenly principles and measurably unfits them for the realities of life.” Continuing, Reynolds made the gendered, generational concerns explicit: “Take, as an example, the young lady whose mind is crowded with thoughts and fancies of the impossible and unnatural heroes and heroines of romance, and whose matrimonial aspirations are turned in the direction of some modern counterpart of her beau ideal of chivalry[;] then how insignificant, how wearisome, how disgusting become the constantly recurring duties of her every day life as a wife and mother; whilst plural marriage she personally avoids as utterly incompatible with the notions she has formed of life.”²³

It is notable that these commentators seem to share some foundational assumptions about the function and power of fiction and the potential waywardness of the young—with particular concern, as Reynolds’s comments suggest, about the susceptibility of young women.²⁴

Just as those assumptions drove the resistance to fiction, they also enabled a call for the development of Home Literature. Roberts and Reynolds would have agreed with contemporary commentator George Clarke, who wrote in the *Arena* magazine about the mechanism of fiction’s cultural work. Fiction’s power, Clarke wrote, is that of “lifting us up out of the region of the commonplace, and transporting us among scenes of enchanting interest.” This power is achieved through the mechanism of identification: “The power which we have of sympathizing with others in their ambitions,

joys, and sorrows—that gift of the imagination by which we are enabled to contemplate the careers of others with a personal interest by identifying ourselves for the moment with them—supplies us with a means of obtaining a sort of happiness by proxy.”²⁵ In this view, the power and danger of fiction were centered in its portrayal of human agents—characters—with whom readers would identify and whose thoughts and behavior readers would emulate.

If Mormons saw *identification* as the operative principle of narrative on the individual level, I would argue that they considered *idealization* the power of fiction on a collective level. In presenting characters worthy of emulation through identification, fiction can create ideals of thought and action. It can hold up a standard to which all should aspire, a standard that defines and delineates the boundaries of a community. Readers know that they belong to that community to the extent that they adopt and emulate the ideals portrayed.

This is not to argue that Mormon Home Literature was necessarily different than didactic or popular fiction of the period produced in other contexts. Indeed, that is my point. Mormon writers followed familiar genres and formulas. Edward Geary has argued that the Mormon characteristics of Home Literature were only “skin deep,” and it was characterized by a “superficial adaptation to Mormon themes,” charges that may very well represent an accurate, if limited, description of the aesthetics of nineteenth-century Mormon fiction.²⁶ My interest is in the motivation and cultural context for these texts—and those concerns were certainly more than skin deep. I would argue that the fears and ambivalences that registered in Mormon fiction—particularly those surrounding the demise of polygamy—were extremely difficult to articulate on a conscious level. Writers—especially women writers—could not openly question or challenge what they perceived as authoritative decisions by Church leaders, and in political terms they certainly could not appear to continue to advocate polygamy just when the outside world’s opposition was diminishing. Furthermore, it is probable that many Mormons, including Home Literature writers, welcomed the demise of plural marriage, at least on some level. Fear and ambiguity are most powerful when they are unexamined, and I would argue that the formulaic, sensational fiction created by Home Literature writers represented an attempt to express worries and emotions that were extremely difficult to articulate directly.

Moreover, we must note that the term “Home Literature” carried particular resonances for Latter-day Saints in the 1890s. Gates and her contemporaries had grown up hearing constant admonitions to support “home industries,” as opposed to buying from non-Mormons locally or sending abroad for “imported” goods from the East, and women were considered

important participants in this effort. Eliza R. Snow told the sisters that “each successful Branch of Home Manufactures [is] an additional stone in laying the foundation for the upbuilding of Zion,” and she taught that women who assisted in this effort were “doing just as much as an Elder who went forth to preach the Gospel.”²⁷ The “Home” in “Home Literature” echoed this same ethic; in adopting “Homespun” as her favorite pen name, Gates aligned herself with the tradition represented by that term in Mormon culture, implicitly claiming for her stories the cultural authority of the prophets and apostles who had established it.²⁸ The Saints’ goal of rendering themselves materially separate from mainstream America was all but dead by the 1890s; Home Literature attempted to maintain that ideal in the cultural realm. In this respect, Home Literature expressed one of the deepest of Mormonism’s aspirations.

Women Writers, Literary Contexts

While male authorities conducted the theoretical discussions about Home Literature, women set about writing the stories.²⁹ Beginning in the mid-1880s with a tentative trickle of “Christmas” stories and sketches of ambiguous fictionality, Home Literature gained steam rapidly. By 1890, the LDS youth magazines featured substantial amounts of fiction—between a fifth and a quarter of their contents, by one count, and throughout the decade this proportion increased.³⁰ A majority of these stories were written by women, and Susa Young Gates was one of the most prolific of the Mormon home authors.

Quantifying Gates’s literary output is a daunting task because of its sheer volume and because she used so many different pen names. Gates’s first fictional piece appeared in the *Juvenile Instructor* in December 1883. From 1884 to 1889, when she began publication of her own magazine, she contributed over thirty items, totaling over sixty pages to that journal. Not all of these were fictional, but as the Home Literature movement gained momentum, Gates’s work was increasingly dominated by fiction. After 1889, in addition to her voluminous output of material for the *Young Woman’s Journal*—by my count, she wrote up to a third of the contents of any given issue herself—Gates’s productivity rose even further, with over four hundred pages of fictional material (and dozens more pages of nonfiction) published in the *Juvenile* and the *Contributor* between 1890 and 1899. Most of this page count came from several long serialized novels or stories, which meant that in any given month in the 1890s, there was likely to be at least one fictional piece by Susa Young Gates published in the LDS youth periodicals.

Moreover, the women writers who featured prominently in the *Journal*—Ellen Jakeman, Sophy Valentine, Julia A. Macdonald, Josephine Spencer—also contributed frequently to the other magazines. In the December 15, 1891, issue of the *Juvenile Instructor*, for example, “Prof. Phil’s Christmas,” a five-page story by Homespun, was followed by “An Old Fashioned Surprise Party,” a story by Ellen Jakeman; a long story and a poem by Josephine Spencer; and a story by Sophy Valentine.³¹

In taking up the pen to write morally instructive fiction, Gates and her sisters were participating in a well-established tradition of female literary practice—that of the “literary domestics.”³² As described by Anne E. Boyd, these women—examples include Fanny Fern, Harriet Beecher Stowe, and Susan Warner—stepped out from their supposedly natural and divinely appointed place in the domestic sphere to write “for God, family, or society.” As writers, they “viewed their roles as those of educators and moral inculcators” and presented themselves as “representatives of their sex rather than as unique individuals.”³³ Susa Young Gates’s comments about her own literary ambitions show that she shared in these assumptions, channeled through her commitment to her Mormon community. “My whole soul is for the building up of this kingdom. I would labor so hard to help my sisters in this same work,” Gates wrote to one correspondent, discussing her literary aspirations. She added, “If I have any desire[s] for personal aggrandizement, I most humbly pray they may be taken from me.”³⁴

Brodhead’s term for this mode of writing—the “maternal-tutinary”—captures the generational dynamics involved.³⁵ Women of Gates’s generation, who had grown up in a world that was largely structured along gender lines, expected to wield a decisive influence in initiating their daughters into the gendered ideology of femininity that formed the bedrock foundation of their lives. Like so many other things in the *fin de siècle*, that ideology and the intergenerational bonds through which it was communicated were being challenged and reconfigured as the cohort termed “young ladies” in a previous era were now becoming seen as “girls,” active participants in coeducation and consumer culture in ways that increasingly took them beyond the bounds of their mothers’ influence.³⁶ As we will see, in Home Literature stories aimed at young women, the central voice is usually that of the mothers.

Like much popular magazine fiction of the day, Home Literature featured plot-driven stories centered on intense emotional choices or situations, with dense adjectival description of landscape or character providing the “artistic” element. Most writers attempted to draw on Mormon cultural resources in their fiction, particularly the pioneer past,

the convert-immigrant experience, the social setting of the Mormon village, and, in a few cases, stories and characters from the Book of Mormon. Regardless of setting, the majority of Home Literature stories were structured around a marriage plot in which a young Saint (usually a young woman) had to make the right decision—that is, had to choose a mate who would represent a choice to remain loyal to the community and its ideals. Obstacles to this resolution included alluring non-Mormon suitors, the immaturity or worldliness of the protagonist, or the opposition of antagonistic family members. A strong variation on this pattern was the Mormon seduction tale, in which the disastrous consequences of an unsuitable marriage were unsparingly portrayed.

One of the clearest generic debts visible in Home Literature stories is to the sensation genre first made popular at midcentury in England by writers like Wilkie Collins and Mary Elizabeth Braddon. These stories turned on shocking plots of deception, murder, and bigamy, reflecting Victorians' anxiety over rapid social change and ill-defined social status.³⁷ In the United States, as Karen Halttunen has shown, similar fears about the authenticity of identity gave rise in novels and advice literature to the figure of the confidence man, another trope that proved exceptionally useful to Mormon authors who were concerned about the intrusion of "outsiders" in their community.³⁸ In their configuration of this device, Mormon writers invariably imagined the confidence man as the cunning non-Mormon whose only intention was to seduce and ruin unsuspecting young Mormon women for the sake of his own gratification. Over and over in Home Literature stories, a suave Gentile man (or faithless Mormon) seduces an unsuspecting, usually undisciplined young woman, and she pays dearly.

The helpless victimization of the young women in these stories stands in contrast to others, especially Gates's longer serialized novels, that draw on the pattern defined by Nina Baym in her classic study of the genre she termed "woman's fiction"—mid-nineteenth-century American novels that enact stories of young women's self-development. In these stories, a young woman undergoes a process of refinement through which she "finds within herself the qualities of intelligence, will, resourcefulness, and courage sufficient to overcome" her trials and become a fully developed woman.³⁹ In Gates's imagination, that process was tied up in the equally crucial task of becoming a true *Mormon* woman—a thoroughly committed Latter-day Saint who would remain loyal to the faith and make the right choices.⁴⁰

Woman's fiction offered many useful conventions for portraying the conversion process, and while traces of this genre can be found throughout her work (not least in "Judith's Decision"), Gates's long serialized novels provide the best sustained examples. In "Seven Times," for example, which



Susa Young Gates expressed her deeply cherished literary ambitions in a maternal narrative voice, writing domestic fiction aimed at shaping young women's commitment to the gospel. Courtesy Church History Library.

ran through all twelve issues of volume 5 (1893–94) of the *Young Woman's Journal*, Margery Stuart, a young woman from Scotland who has come to Utah to live with her LDS brother and his wife following her mother's recent death, undergoes a series of trials that convert her from a proud, resistant non-Mormon into a converted "true Mormon woman."

Margery's spiritual progression is traced in terms of her feminine development, often in contrast or complement to the masculinity of her noble young lover, Donald. Early in the story, Margery betrays her deplorable spiritual (and feminine) state when she tricks Donald into declaring his love so that she can humiliate him. (She is offended that Donald refuses to marry outside the faith, in spite of being in love with her.) In this scene, Gates's narrator constructs gendered ideals of spirituality by describing Donald's calm reaction in terms of his masculinity: "The gentle words, the manly self-control, melted her as nothing else. . . . She could have bourned his wrath, his scorn. But this dignified, manly renouncing of her heart, forever and forever, could she bear it?"⁴¹ If Donald's response is "manly" Margery, by implication, has been "unwomanly."

After Margery has been converted and Donald has returned from a mission, the association of gender and spirituality is made explicit as Margery ponders the changes in Donald: "What a manly man he had become! Margery secretly wondered if every man returned from a foreign mission so improved as Donald had done. . . . She hated men who were weak. . . . She liked manly men, as she herself was, with all her faults, a womanly woman" (572). As a mature, spiritually experienced Mormon, Donald is "manly." And now that she has humbled herself and embraced the truth, Margery can be called a "womanly woman." The narrator emphasizes this paradigm in the climactic love scene: "Margery loved him, and he was unspeakably happy. She loved him as he longed to be loved, with the depth and fire of a true woman. Not ashamed to show him the fullness of her loving soul" (574). Now that Margery has been converted to the gospel, her love can be that of a "true woman," whose soul is essentially "loving," just as we have already seen that Donald's "reserved nature" is equated with his manhood and spirituality.

In "Seven Times," the process of gaining a testimony and becoming a thoroughly committed Mormon is indistinguishable from the process of becoming a "true woman." Though Gates makes the story more dramatic by portraying Margery as a resistant non-Mormon, it is clear that her heroine is intended to be a proxy for the young women readers, modeling for them the process they must undergo to become true Mormon women themselves. The reward, of course, is marriage to a noble "manly man," himself a converted, committed Latter-day Saint—a choice, and a reward that

were especially urgent in light of the crisis taking shape in post-Manifesto Mormondom.

Narrative Structure and Cultural Work in Home Literature

So far I have been taking Home Literature essentially at face value and seeking to explain it on its own terms. Gates and her colleagues would, I hope, recognize their concerns and approaches in this description and would agree that Home Literature attempted to perform important cultural work for the community. As we look at the themes and structures of these stories, however, we will see that cultural work operating on several levels, some more conscious than others.

Home Literature was, of course, a fundamentally didactic enterprise and, as such, exhibited many elements of that tradition. Cathy Davidson has described a central difficulty in didactic novels, which she describes as being divided against themselves, structured around “two distinct and even contradictory discourses, a didactic essay and a novel, shuffled together and bound as one book.” In these texts, the didactic attempts to outweigh the dramatic, but the structure of the romance plot complicates those intentions: “The moralists have the . . . largest claim on the reader’s time and attention, while the lovers have the story. Differently put, the text’s primary residence is with one discourse while its primary concern is with the other.”⁴²

Home Literature stories, likewise, frequently find themselves in this same predicament, their primary loyalty being to the ideology they attempt to inculcate but their primary interest being in the romantic plot and the characters through which the story is enacted. These two competing discourses—the novelistic and the didactic—divide the story against itself by instituting competing demands on the narrative. Formally, the conventions of novels were well established, with the basic expectation being that a romance plot would develop along a trajectory leading to a satisfactory resolution in which the characters are rewarded, usually with a happy marriage. This discourse is about fantasy, wish fulfillment, and desire, fed and realized on an individual basis so that the reader’s experience parallels but also goes beyond that of the characters to produce “new needs [and] different desires” that urge her beyond the status quo of her own life.⁴³

It was precisely this formal aspect of fiction, according to some, that made it so potentially dangerous, as reflected in George Reynolds’s denunciation of the unrealistic desires engendered by novel reading. Therefore, the formal conventions of fiction had to be counterbalanced with a didactic discourse that kept the true principles of reward and punishment clearly in

sight. In “Judith’s Decision,” it is the mother’s voice that functions authoritatively to contain the individualistic desires of the character (and, it is hoped, the reader). In many other stories, the subversive potential of fiction is neutralized through the use of a strong narrator, who steps in frequently to control the reading experience.⁴⁴

In some stories, the generational dynamics, and therefore the cultural work, of this strong narrative voice are made explicit. “Aunt Alice’s Story,” a two-part serial by Katie Grover that appeared in the *Young Woman’s Journal* in 1895, is framed as a conversation between an older woman and her niece. Aunt Alice relates the story of her girlhood friend Jean who married a non-Mormon man and paid for it with her life when it turned out that he was a bigamist who poisoned her to avoid being caught. At the end of the story, Thelma, the niece, confesses that she was on the verge of becoming engaged to a non-Mormon man, but the story has changed her mind. “I have learned a valuable lesson,” she declares.⁴⁵ In another story, Aunt Ruth tells a similar tale to a group of young nieces, likewise convincing them to listen to their elders and make wise decisions about marriage.⁴⁶

In Gates’s stories, the narrator’s control is often quite subtle, though no less definite. Returning to “Seven Times,” in one scene Donald has proposed to Margery, unaware that she has been luring him into a trap because he had previously offended her. In this scene, the narrator makes her presence felt through her descriptions, using judgmental terms in the midst of otherwise straightforward narration to remind the reader of their common values. This is the description of Margery’s response to Donald’s proposal: “This was what she had waited for; this is what she had plotted for. With all the strength of her wicked purpose, assisted by the power of evil, to put from her the longing of love, which sought to pluck at her heart strings, she looked proudly and coldly up into the young man’s face” (369). With terms such as “plotted,” “wicked,” “proudly and coldly,” and “assisted by the power of evil,” the narrator’s purpose is to make sure the reader sees Margery’s actions as the narrator does, not as retribution for Donald’s self-righteousness, which is Margery’s (perhaps justified) perception.

At the same time, because of the uneasy blend of the literary and the didactic, these stories often express deep ambivalence and uncertainty about even the supposedly unquestionable verities they are ostensibly promoting. It is in these gaps—which do not always favor the didactic—that we can see the cultural work of Home Literature occurring on its deepest levels, particularly in regard to the changing meaning of marriage in post-Manifesto Mormondom.

“Suggestions” to the Girls: Marriage and Manifesto in Home Literature

Plural marriage rarely appears overtly in Home Literature stories, but it is no exaggeration to say that it shadows and shapes almost all of them. Indeed, fiction became a crucial element in a web of communal rhetoric through which Latter-day Saints worked out the implications of the impending shift from plurality to monogamy.

Writing in March 1891, a few months after the announcement of the manifesto ending plural marriage, Susa Young Gates predicted a dire crisis for young Mormon women who could no longer become plural wives. The Manifesto has resulted in some “laughing comment,” Gates began, “but only once or twice have I heard the matter spoken of in the grave and serious manner which it assuredly deserves.” “Oh, exclaims one of my bright young readers, I thought this manifesto made the men feel bad. I didn’t think I had anything to do with the matter!” Gates’s rhetorical reply was scathing: “You didn’t? Well, just wait ten years, and then see if this manifesto hasn’t as much significance for you, sitting at home with your empty dreams, as it has for the young married man, who has had his choice from a surplus of girls as good and good-looking as you are, and who now has . . . the comforts of home, with one wife and a growing family of children.” Gates concluded ominously, “Young girls will find that not all the advantage[s] of plural marriage belong to the married men.”

The problem, as Gates saw it, was the gender imbalance that had once been used to justify the necessity for polygamy. “It is a well known fact that there is a preponderance of females over the male population,” she asserted. Add to that fact “the number of miners, roughs, adventurers and dissolute men” and then “remember that as a people we have rarely among us a young man over the age of twenty-six unmarried,” and the scope of the problem begins to come clear. Throughout the territory, Gates claimed, there were more young women than men—definitely more *righteous* young women than righteous young men—leading observers to wonder, “Where are all these nice and really beautiful young women going to find a husband and a home?”⁴⁷

Researchers have found no actual “surplus” of women in early Utah, but it should be emphasized that the concerns expressed were based on perceptions of the numbers of *righteous* women versus righteous men, a number that would be nearly impossible to quantify.⁴⁸ Gates’s response therefore gauges the depth of fear and uncertainty that accompanied the abandonment of polygamy. Most urgent was the question of what the end of polygamy would mean for the marriage prospects of the young people. Young

women especially had to be fortified to make the right choices regarding marriage because, Gates and her colleagues feared, those choices were going to be severely curtailed or subject to corrupting influences.

The biggest threat was that, given the (perceived) demographic realities, young women would choose to marry outside the faith. “Be ye not unequally yoked together,” pled countless articles, editorials, and sermons, and over and over again the fiction dramatized the perils of marrying an “outsider.” Young women were constantly warned that they had to prepare themselves to make some tough choices. To this end, Gates reported the following conversation with her Sunday School class of teenage girls: “They . . . asked me which was better[:] to marry a man who, although born under the covenant and an heir to the priesthood, yet was not trying to live up to his privileges, perhaps smoked, drank and swore, and would not go to the Temple, and was not worthy so to do; was it better to marry such a man, or to marry a man not of our faith, yet who was upright, good and honorable.”

Gates responded in her typically outspoken way: “If a person was to ask me which I would rather have, the small-pox or the diphtheria, I should be almost at a loss what to answer. ‘May the Lord preserve me from either,’ I should be most apt to reply.” Instead, she insisted, “It would be far better for girls to die, or live single lives, than to wed either out of the Church or unworthily in the Church. Good gracious,” Gates exclaimed, “it is no disgrace to be an old maid.”⁴⁹

This message—that remaining single was preferable to marrying unworthily—became one of the foundational principles of post-Manifesto discourse on marriage. In editorials and articles, it had to be stated forcefully, unequivocally, and repeatedly. In fiction, however, it was possible (and perhaps necessary, given the demands of novelistic conventions) to both deliver and mitigate the message. In her novel “Donald’s Boy,” a sequel to “Seven Times,” Gates portrays the spiritual awakening of young Phyllis Jones, which leads her to break off her engagement to a wealthy, worldly non-Mormon man. He tries to dissuade her, promising that they will be married at once and go off in a “whirl of pleasure and excitement” to Europe. But Phyllis sees through this illusion. “But afterwards,” she cries, “there would still be an afterwards. . . . There would be times when I should want to go back to my people, the Mormons, I mean, and you would not like that. . . . It would make me miserable.”⁵⁰

When the fiancé refuses to relent and become a Mormon, Phyllis parts with him for good. Afterwards, she sits alone, overcome with grief, until her father comes home and worriedly asks what is wrong. “Oh papa!” she answers, throwing herself into his arms, “I’m going to be an old maid for the Gospel’s sake.”⁵¹ While readers were surely meant to internalize this

same commitment to the gospel, even at the cost of their own spinsterhood, the story ends with Phyllis happily married to a virtuous young Mormon man. Like almost every other heroine in Home Literature stories, she is rewarded for her faithfulness with marriage to an honorable Mormon.

Beyond offering fictional assurances of earthly reward for young women's faithfulness, Gates also explored more nebulous possibilities, probing at whether there was not yet some possibility that plural marriage could provide a solution to the problem. Some of her editorials, for example, fortify girls for the possibility of "single blessedness" in this life by holding out the hope that being "an old maid for the gospel's sake" did not have to mean eternal loneliness. "Women who prefer to spend their lives singly, and who keep their covenants and remain pure and true, need not fear," Gates assured her readers. "God will provide a partner for them in eternity, where men or man-made laws will not interfere."⁵² Gates here implied that women who remain single in this life will be able to become plural wives in the next.

From this possibility, in which plural marriage is entirely deferred to the next life, it was a small leap to an even more intriguing arrangement, dramatized in a subplot in "Seven Times," in which Gates attempts to retain plural marriage in the Mormon system without leaving all the arrangements until the hereafter. Early in the story, Margery Stuart's brother, Harvey, proposes to young Clara Jones (Donald's sister), asking her to become his plural wife. She rejects him and marries, on a whim, a foolish young man named Levi Miller. When Clara later comes down with diphtheria, Harvey goes to help the young couple and discovers that their marriage has been a "disappointment." Levi has not been able to make a living, and they have quarreled and been unhappy together. Clara, the narrator tells us, is "quite willing to die" (466).

Before she passes away, Clara rallies momentarily and begins motioning to the men as if trying to send a message: "She began to link her fingers together again and still again, and then would weave them back and forth as if weaving a chain of dandelions" (466). As she makes these motions, she looks "appealingly up at the Professor [Harvey] as if to beg him to speak." Levi is baffled. "She never seems to look at me," he complains to Harvey. "What is she doing, twisting her hands so, it seems as if it would drive me mad!" Finally, Harvey, who "felt that he knew what she was saying to him," bends his head slightly and looks "straight into the dazzling black eyes, deep into their very depths." Clara understands his meaning and closes her eyes "as if in silent happiness" (467). Shortly afterwards, she dies.

This scene might seem almost as incomprehensible to the reader as it does to poor Levi, but after Harvey buries her, he reflects on the meaning

of Clara's gesture. "He knew that some time in the great Beyond he should meet and have joy with the soul who had so repented her rash conduct," the narrator tells us. "She was his; he felt that she knew that it was so in the last awful struggle, and had symbolized the future for them both in her dying moments" (468). In other words, Harvey is to have Clara sealed to him as a plural wife for the eternities, even though he did not get to marry her in this life.

Improbable as this scenario might seem, to readers of the *Young Woman's Journal* it was not entirely unfamiliar. In this plot line, Gates dramatizes a creative idea posed by another article a few months earlier. Entitled "A Suggestion to the Girls" and signed by "Diener," this piece addresses itself to the fate of girls who remain single in this life rather than marry unworthily. "What will . . . become of the girls in eternity?" the writer asks. "My remedy," she continues, "would be, to have the union consummated after the death of one or the other person." She explains: "Supposing, for instance, a young woman, with no human prospect of a happy marriage here on earth, and no desire for any other union, becomes acquainted with a man already married, whom she can respect and love. National and Church laws forbid their union. But there is neither human nor divine prohibition of their being sealed for eternity after one or the other is dead."

In order to effect this arrangement, the young woman and the married man should "mutually agree in the presence of witnesses" or, even better, record their wishes in their personal papers to be found by their relatives after they die: "Then a union can be completed by vicarious work [in the temple], which God will sanction, and which will bring to the contracting parties, if they are and have been faithful, the blessings of 'eternal lives.'" Our writer acknowledges that men might be reluctant to propose such a scheme; therefore, women should be permitted to take the initiative, while men retain "the privilege of refusing." "If girls can adopt and console themselves with some such plan," the article concludes, "they will be able to more profitably spend their time than many do at present, in vainly seeking to capture the affections of some noble youth, or, failing in this, to accept the first creature in the form of a man who presents himself as a suitor."⁵³

Implausible as this "suggestion" may sound, the Mormon practice of vicarious temple work for the dead did leave at least theoretical room for such an idea. Regardless of whether the Church would have permitted such a practice, the key issue here is that this "suggestion" was an attempt to retain polygamy in the thought system surrounding Mormon marriage without violating any of the institutional constraints on its practice.⁵⁴ As our author says, "National and Church laws forbid" plural marriage. But the gospel, which Mormons viewed as a higher law, provided a possible

solution. Rather than leave it all to be determined in the next life, this “suggestion,” and Gates’s dramatization of it, attempt to resolve the post-Manifesto demographic problem with concrete action in the here and now.

Gates’s fictionalization of the “suggestion” in one of her most ambitious serialized novels gives it a certain level of prominence, but the idea does not seem to have gained much traction. Another idea advocated by Gates, however, proved to be much more influential. This was the idea of a “foreordained mate,” or, as Gates put it in one editorial, “the God-given companion designed for you from before the beginning of this world.”⁵⁵ The idea of a “soul mate” was not new, of course. For Mormons, however, it was rooted in their understanding of a premortal existence, a doctrine they believed to be unique to themselves. Gates did not originate the foreordained mate idea—it had been circulating in Mormondom for decades—but she played an important role in popularizing it.⁵⁶

The most striking example of Gates’s use of this idea is found in her novel “John Stevens’ Courtship,” which appeared serially in the *Contributor* in 1895 and 1896. In this story, Gates unmistakably replaces plural marriage with the foreordained mate idea. “John Stevens’ Courtship” dramatizes the events surrounding the Utah War in 1857, when President Buchanan sent a large contingent of army forces to Utah to subdue a purported Mormon rebellion. As one of Brigham Young’s trusted lieutenants, John Stevens is drawn into the conflict. His overriding fear is that the incoming soldiers will attempt to “ruin” the innocent Mormon girls of the community.

Before the foreordained mate idea is ever mentioned, Gates wrestles with the problem of polygamy. The story revolves around a love triangle for which plural marriage would provide an ideal solution. John Stevens loves Diantha Willis. Diantha’s friend Ellen loves John. Diantha is not particularly interested in John at first, and he half-heartedly courts Ellen. Meanwhile, a wicked army officer has set his sights on both girls. At one point in the story, John discusses his worries with Brigham Young. Brother Brigham counsels him directly, “Brother Stevens, why don’t you court one or both of those girls and marry them yourself?”⁵⁷

John does not respond to Young’s suggestion, and it is never mentioned again. The story makes it clear that John does consider marrying each of the girls, but not both of them. Considering that the suggestion of polygamy is voiced by Brigham Young himself, and considering that the story is set in a time when polygamy was practiced more freely than at any other time, its repudiation is unmistakable. Moreover, as if to add an exclamation point, Gates has Ellen murdered by a prostitute who used to be the mistress of the evil Captain Sherwood. In this story, there is not even theoretical space for polygamy.

Instead, Gates features the “foreordained mate” idea as the defining concept of Mormon marriage. Aunt Clara, the mentor figure in the story, preaches the idea to John this way: “There is a belongingness in love as in life. We are not married by chance. If that girl [Diantha] belongs to you, you will get her. If not, you don’t want her” (718). Later, in the climactic love scene, John embraces Diantha, fervently declaring, “I think I must have loved you, sweet-heart, when we sang together with the morning stars and shouted in unison with our companions when the foundations of the earth were laid” (726).

Instead of plural marriage, we have two predestined lovers finding each other in monogamic bliss. By setting her moral in the context of the original community, Gates’s story enshrines the foreordained mate as the basis of Mormon beliefs about marriage. This move retains the idea of marriage as the monolithic doctrine of Mormonism but spins it to sidestep polygamy altogether. There is nothing about the way Aunt Clara explains the doctrine that would necessarily exclude the possibility of polygamy, but it establishes the foreordained mate as the *essence* of Mormon beliefs about marriage, effectively subordinating any other teachings about polygamy.

In 1890s Mormondom, then, a distinctive culture of letters organized itself to grapple with the dangers, the uncertainties, and the ambivalences that accompanied the profoundly “radical changes” taking place in the community. Drawing on well-established literary models and theories, Susa Young Gates and her colleagues energetically set about writing Home Literature stories that would complement other forms of discourse aimed at keeping the young people on the straight and narrow path, harnessing the potential of fiction to perform both overt and covert cultural work. Examined in light of this context, Home Literature was an important, if little-recognized, participant in the wrenching process of Mormonism in transition.

Lisa Olsen Tait (who can be reached via email at byustudies@byu.edu) received a PhD in American literature with a graduate certificate in women’s studies from the University of Houston in 2010. She is currently an adjunct professor of Church history and doctrine at BYU and has published articles in *American Periodicals* and the *Journal of Mormon History*.

1. Editor’s Department, *Young Woman’s Journal* 1, no. 3 (December 1889): 96. [^]

2. “Judith’s Decision,” *Young Woman’s Journal* 4, no. 3 (December 1892): 111–22. The story is unsigned, but it was almost certainly written by Susa Young Gates. Throughout this article, initial references to fictional texts will be cited in the notes and all subsequent references will be cited parenthetically in the text. [^]

3. Richard H. Cracroft and Neal E. Lambert, *A Believing People: Literature of the Latter-day Saints* (1974; repr., Salt Lake City: Bookcraft, 1979), 257. [^]

4. See, for example, Eugene England, “The Dawning of a Brighter Day: Mormon Literature after 150 Years,” *BYU Studies* 22, no. 2 (1982): 131–60, and Edward A. Geary, “The Poetics of Provincialism: Mormon Regional Fiction,” *Dialogue* 11, no. 2 (1978): 15–24. Terryl Givens’s more recent survey essentially duplicates the earlier assessments. Terryl Givens, *People of Paradox: A History of Mormon Culture* (New York: Oxford, 2007), 172–78. [^]

5. Jane Tompkins, *Sensational Designs: The Cultural Work of American Fiction, 1790–1860* (New York: Oxford University Press, 1985), 200. [^]

6. Tompkins, *Sensational Designs*, xvi. [^]

7. Though it was not the standard practice in contemporary sources, I have chosen to capitalize Home Literature for emphasis in this discussion. [^]

8. Richard H. Brodhead, *Cultures of Letters: Scenes of Reading and Writing in Nineteenth-Century America* (Chicago: University of Chicago Press, 1993), 5–6. [^]

9. See Lawrence Levine, *Highbrow/Lowbrow: The Emergence of Cultural Hierarchy in America* (Cambridge: Harvard University Press, 1988), for an influential discussion of this process. [^]

10. Nancy Glazener, *Reading for Realism: The History of a U.S. Literary Institution, 1850–1910* (Durham: Duke University Press, 1997), 246. [^]

11. Brodhead, *Cultures of Letters*, 8. [^]

12. Official Declaration—1, The Doctrine and Covenants of The Church of Jesus Christ of Latter-day Saints (Salt Lake City, 1981), 292. [^]

13. Editor’s Department, *Young Woman’s Journal* 2, no. 9 (June 1891): 425. [^]

14. Ann M. Cannon, “YLMIA Officers’ Meeting,” *Young Woman’s Journal* 4, no. 2 (November 1892): 93. [^]

15. L. S. Cartwright, “YLMIA Conference,” *Young Woman’s Journal* 4, no. 3 (December 1892): 141. [^]

16. S[ophy] Valentine, “In Days of Yore,” *Young Woman’s Journal* 5, no. 8 (May 1894): 377. Valentine’s first name is sometimes spelled “Sophie.” She also signed “S. Valentine” or “S. V.” sometimes, but “Sophy” was by far the most common. [^]

17. Dean L. May, “A Demographic Portrait of the Mormons, 1830–1980,” in *The New Mormon History: Revisionist Essays on the Past*, ed. D. Michael Quinn (Salt Lake City: Signature Books, 1992), 128. [^]

18. Davis Bitton, “Zion’s Rowdies: Growing Up on the Mormon Frontier,” in Davis Bitton, *The Ritualization of Mormon History and Other Essays* (Urbana and Chicago: University of Illinois Press, 1994), 56, 66, quotation on 66, n. 4. [^]

19. Whitney was not the first to use this term. As I will discuss below, it was a natural extension of the ethic of “home industries” that had long prevailed in the community. Whitney’s sermon has often been cited as a watershed moment in the movement; I would emphasize that he articulated ideas that were already in circulation. I have not found any references to Whitney’s sermon in contemporary discussions of Home Literature, citing it as particularly noteworthy or influential. [^]

20. Orson F. Whitney, “Home Literature,” *Contributor* 9, no. 8 (June 1888): 300. [^]

21. Horatio [B. H. Roberts], “Legitimate Fiction,” *Contributor* 10, no. 4 (February 1889): 135. [^]

22. Horatio, “Legitimate Fiction,” 136. [^]

23. George Reynolds, “Influence of Outside Literature,” *Contributor* 2, no. 12 (September 1881): 358–59. [^]

24. "That most readers of novels . . . were thought to be women and youth made particularly ominous the implications of a novel reading based on self-gratification as opposed to social feelings," Nina Baym observes in her study of antebellum book reviews. Nina Baym, *Novels, Readers, and Reviewers: Responses to Fiction in Antebellum America* (Ithaca, N.Y.: Cornell University Press, 1984), 39. [^]

25. George Clarke, "The Novel-Reading Habit," *Arena* 19, no. 102 (May 1898): 670–79, quotation on 670. Reprinted in *The American 1890s: A Cultural Reader*, ed. Susan Harris Smith and Melanie Dawson (Durham, N.C.: Duke University Press, 2000), 43–51. [^]

26. Geary, "Poetics of Provincialism," 15. [^]

27. Quoted in Jill C. Mulvay [Derr], "Eliza R. Snow and the Woman Question," *BYU Studies* 16, no. 2 (1976): 256. [^]

28. Gates's identity as Homespun seems to have been widely known in the community. Her papers contain several letters addressed to her personally in which stories by Homespun are discussed, and in the announcement of the new journal published by Emmeline Wells in the *Woman's Exponent* 18, no. 7 (September 1, 1889): 55, "Homespun" is parenthetically identified as "Sister Susa Young Gates." [^]

29. In my view, it is striking that the few previous treatments of Home Literature have given it a largely patriarchal origin, tracing its development through Whitney's sermon to B. H. Roberts's early attempts at fiction and culminating in the work of Nephi Anderson. While I do not wish to ignore these men's contributions to the field (neither the original authors nor the later critics), even a cursory glance at the early Home Literature will show that women writers far outnumbered men, especially in the early years. Moreover, the patterns I am describing in the fiction in the *Young Woman's Journal* were prevalent across the board in all Home Literature stories published in LDS youth periodicals. All this having been said, there is certainly room for further investigation of gendered patterns in both authorship and thematics of Mormon Home Literature and youth magazines of the 1890s. [^]

30. Matthew Durrant and Neal E. Lambert, "From Foe to Friend: The Mormon Embrace of Fiction," *Utah Historical Quarterly* 50, no. 4 (Fall 1982): 331. [^]

31. I am currently working on a book that will consider these authors individually and collectively. There were differences in subject and technique between them, but overall their similarities are unmistakable. In this article, I am treating Gates as representative of Mormon women writers generally; at the same time, I would argue that her output, her position as a prominent editor and leader, and her recognition within the community as a literary figure did afford her a special status among Mormon readers and writers. [^]

32. See Mary Kelley, *Private Woman, Public Stage: Literary Domesticity in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2002). Indeed, the term "Home Literature" closely echoes that of "domestic novel," which has been commonly applied to the work of these women. [^]

33. Anne E. Boyd, *Writing for Immortality: Women and the Emergence of High Literary Culture in America* (Baltimore: The Johns Hopkins University Press, 2004), 3. [^]

34. Susa Young Gates to Zina D. H. Young, May 5, 1888, Susa Amelia Young Gates papers, MS 7692, Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City. [^]

35. Brodhead, *Cultures of Letters*, 74. In my view, this is an understudied aspect of domestic and didactic fiction generally. [^]

36. Jane Hunter, *How Young Ladies Became Girls: The Victorian Origins of American Girlhood* (New Haven: Yale University Press, 2002), insightfully examines this “cultural revolution.” For the intergenerational pattern of gender construction, see Nancy Theriot, *Mothers and Daughters in Nineteenth-Century America: The Bio-social Construction of Femininity* (Lexington: University Press of Kentucky, 1996). [^]

37. For an introduction to the sensation genre, see Lyn Pykett, “Sensation and the Fantastic in the Victorian Novel,” in *The Cambridge Companion to the Victorian Novel*, ed. Dierdre David (Cambridge: Cambridge University Press, 2001), 192–211. [^]

38. Karen Halttunen, *Confidence Men and Painted Women: A Study of Middle-Class Culture in America, 1830–1870* (New Haven: Yale University Press, 1982). [^]

39. Nina Baym, *Woman’s Fiction: A Guide to Novels by and about Women in America, 1820–1870*, 2d ed. (Urbana: University of Illinois Press, 1993), 22. While much has subsequently been written about sentimentality, domestic fiction, and women writers, Baym’s genre analysis has not been superseded. [^]

40. The term “true woman” was ubiquitous in nineteenth-century discourse. It was adopted by Barbara Welter in her influential study of “The Cult of True Womanhood,” *American Quarterly* 18, no. 2 (Summer 1966): 151–74. Recent scholarship has worked to greatly problematize this and similar terms used in analyzing nineteenth-century women’s experience (“separate spheres,” “domesticity”), and I use it here with full awareness of its complexity. With Patricia Okker, I believe these terms are worth using because they appear in contemporary sources, but they should be considered as “rhetorics” that expressed idealized and largely unexamined assumptions about gender, not as a monolithic ideology or a straightforward reflection of “reality.” See Patricia Okker, *Our Sister Editors: Sarah J. Hale and the Tradition of Nineteenth-Century American Women Editors* (Athens and London: University of Georgia Press, 1995), 14. [^]

41. Homespun [Susa Young Gates], “Seven Times,” *Young Woman’s Journal* 5, no. 8 (May 1894), 370. The novel runs through the entire volume, which is continuously paginated. [^]

42. Cathy N. Davidson, *Revolution and the Word: The Rise of the Novel in America* (New York: Oxford University Press, 1986), 99–100. [^]

43. Davidson, *Revolution and the Word*, 44. [^]

44. Susan K. Harris notes that the “engaging” narrators in these texts guide readers through the hermeneutic process and severely limit the possible interpretations of the narrative by constructing what she calls the narrator-narratee contract, in which the narrator engages narratees “in a dialogue intended to teach them how—and how not—to live.” Susan K. Harris, *19th-Century American Women’s Novels: Interpretive Strategies* (New York: Cambridge University Press, 1990), 40. [^]

45. Katie Grover, “Aunt Alice’s Story,” *Young Woman’s Journal* 6, no. 8 (May 1895): 360. [^]

46. Sophy Valentine, “Aunt Ruth’s Story,” *Young Woman’s Journal* 4, no. 1 through no. 3 (October–December 1892): 2–15, 55–60, 107–111. The concluding installment ran in the same issue with “Judith’s Decision.” [^]

47. Editor’s Department, *Young Woman’s Journal* 2, no. 6 (March 1891): 283–85. [^]

48. On demographics, see Davis Bitton, “Polygamy Defended,” in Bitton, *The Ritualization of Mormon History*, 35–36. [^]

49. Editor’s Department, *Young Woman’s Journal* 5, no. 5 (February 1894): 244–45. [^]

50. Homespun [Susa Young Gates], “Donald’s Boy,” *Young Woman’s Journal* 6, no. 11 (August 1895): 498. [^]

51. Homespun, "Donald's Boy," 498–99. [^]

52. Editor's Department, *Young Woman's Journal* 5, no. 5 (February 1894): 245. [^]

53. Diener [pseud.], "A Suggestion to the Girls," *Young Woman's Journal* 5, no. 6 (March 1894): 279–80. [^]

54. I have found no other official or published references to this idea, but anecdotal evidence suggests that such arrangements might have been possible. One anonymous reviewer of this article, for example, recounted an incident from family history in which a young missionary whose fiancée died was sealed to her anyway, with her elder sister standing as proxy. Such incidents, whether fictional or actual, underscore the urgency of efforts to retain some form of plural marriage in the Mormon worldview without violating institutional boundaries. [^]

55. "What Is Your Mission?" *Young Woman's Journal* 5, no. 2 (November 1893): 92. [^]

56. The earliest reference to this idea that I have found is an 1857 article by John Taylor, "Origin, Object, and Destiny of Woman," which Gates reprinted in the *Young Woman's Journal* in June 1897. [^]

57. Homespun [Susa Young Gates], "John Stevens' Courtship," *Contributor* 17, no. 8 (May 1896): 498. [^]

A Mormon Approach to Politics

Thomas B. Griffith

This address was delivered November 13, 2012, in Washington, D.C., at the tenth anniversary of Brigham Young University's Milton A. Barlow Center. Thomas B. Griffith is a circuit judge on the United States Court of Appeals for the District of Columbia Circuit.

I am a native Washingtonian. My mother's family—the Bealls—settled in nearby Montgomery County, Maryland, in the second half of the eighteenth century. My father's family—the Griffiths—came to Washington, D.C., in the 1830s. And we have been here ever since. I grew up just across the Potomac River in McLean, Virginia. From that heritage, I developed one loyalty, one bias, and a life-long interest. The loyalty: I am a Redskins fan. The bias: I detest the Cowboys.

But more germane to our gathering this evening, I grew up with a deep interest in American politics. It was part of the air we breathed and the water we drank. I remember watching President Kennedy throw out the first pitch on opening day in 1962. I stood along Constitution Avenue with my family and watched his funeral cortege a year later. I lived a short distance from the home of Robert F. Kennedy, whose eleven children were everywhere in McLean. I went to school and played sports with the children of congressmen, senators, cabinet secretaries, presidential aides, and Supreme Court justices. I worked on Capitol Hill during summers in high school. Nothing unusual about that. Everyone did.

I joined The Church of Jesus Christ of Latter-day Saints as a junior in high school in a ward that was filled with political figures. To me, there was nothing unusual about practicing politics while pursuing discipleship of Christ.

I saw many in my ward who did. It wasn't until serving on my mission in southern Africa that I learned there were some in the Church who thought there might be a tension between the two. My mission president frequently told me that he thought my interest in politics odd for someone devoted to building the kingdom. Many years later, as general counsel of BYU, I discovered that my mission president's view was shared by some senior General Authorities. On the one hand, there seemed to be a fascination with Washington, D.C. Given my background, I benefited from that interest. On the other hand, there was a wariness about D.C., a distrust that is understandable given the way the federal government has interacted with the Church in the past. Given my background, I was viewed by some with suspicion.

The Milton A. Barlow Center represents a decision by the Church to encourage young Latter-day Saints to fully engage with the American political system. I heartily endorse that engagement. Your presence suggests you do, too. But over the years, I have gained a greater appreciation for my mission president's concern and the suspicion of others. There are high spiritual risks that accompany the practice of politics in a fallen world. Tonight I will speak about how to practice politics without losing your soul.

N. T. Wright, the Anglican cleric who is also one of the foremost New Testament scholars, wrote a book last decade titled *Simply Christian: Why Christianity Makes Sense*.¹ This volume is Wright's effort to provide a defense of Christianity in the tradition of C. S. Lewis's masterpiece *Mere Christianity*. Wright begins, as Lewis did, by arguing that evidence for the existence of God is found in the fact that almost all humans agree upon a common set of moral principles. The first principle upon which Wright relies for his argument that there is a God is what he calls "our passion for justice."² That strikes me as an interesting place to begin. Is that where Latter-day Saints would start? How many of us think of a "passion for justice" as a religious impulse? My guess is that we think of religious imperatives differently. We are more likely to think of our religious life in terms of that from which we abstain. I wonder if we are missing something fundamental about the religious life. Are we missing the big picture by focusing on some comparatively insignificant corners of the canvas?

I begin my remarks here because the thrust of my argument is that politics is, for those who have eyes to see and ears to hear, a religious activity. Properly understood, politics should be pursued to satisfy our "passion for justice," which comes from God. But, as I have already suggested, the practice of politics poses grave risk to our spiritual well-being. It is through politics that communities decide the rules that govern society. Because so much is at stake when rules are being made about security, liberty, and

wealth, politics inevitably attracts many who are drawn to power. And the pursuit of power as an end in itself is sinful. The Savior warned us about this. Remember what he told his disciples about the rich? “I tell you the truth, it is hard for a rich man to enter the kingdom of heaven. Again I tell you, it is easier for a camel to go through the eye of a needle than for someone who is rich to enter the kingdom of God.’ When the disciples heard this, they were greatly astonished and asked, ‘Who then can be saved?’ Jesus looked at them and said, ‘With man this is impossible, but with God all things are possible’” (Matt. 19:23–26, NIV). Lest you feel too comfortable by assuming the Savior’s dire warning is better targeted at those in the business world, it was C. S. Lewis’s view that the “riches” referred to by the Lord cover more than wealth. He believed “it really covers riches in every sense—good fortune, health, popularity, and all the things one wants to have.”³ If I may be allowed to add my own gloss on Lewis, “riches” covers power, too—civil and ecclesiastical.⁴ So be careful. The pursuit of politics poses real danger to your spiritual welfare.

The answer, of course, is not to avoid politics. That is, in my view, an unacceptable response for those who have been called to be the “salt of the earth” (Matt. 5:13, KJV), a powerful image that assumes we are deeply involved in a society larger than our family and ward. Although spirituality begins with allowing the effects of Christ’s atoning sacrifice and his awe-inspiring grace to heal the wounds that sin inflicts on our broken hearts, we learn from scripture, the sacrament of the Lord’s Supper, and the temple endowment that the highest form of spirituality is most powerfully expressed when we work to make the effect of the Atonement radiate beyond ourselves and our families to create communities: our ward, our town, our nation, the world. I believe that the work of community building is the most important spiritual work to which we are called. All other work is preparatory.

But how do we engage in politics and build community without losing our souls? That is where Wright’s insight may be helpful. Our involvement in politics *must* be an expression of our God-given “passion for justice.” Remember Jacob’s teachings? “Before ye seek for riches, seek ye for the kingdom of God. And after ye have obtained a hope in Christ ye shall obtain riches, if ye seek them; and ye will seek them for the intent to do good—to clothe the naked, and to feed the hungry, and to liberate the captive, and administer relief to the sick and the afflicted” (Jacob 2:18–19). According to Jacob, God will only aid those who pursue riches “for the intent to do good.” Recognizing no doubt that what it means to “do good” is so vague that the qualification hardly places any limits on our motives, Jacob makes clear what he means,

and the force of his teaching is a slap in the face to those of us who are comfortably secure in the prosperity of the North American middle class in the twenty-first century. God will only aid those who pursue riches “to do good” for very particular purposes: “to clothe the naked, and to feed the hungry, and to liberate the captive, and administer relief to the sick and the afflicted.” As Jesus would later do, Jacob is teaching us that we must expend our best efforts to provide help and succor to those who have been pushed to the margins of our society, to those who have been left out and left behind. Remember that Jesus taught that it was those considered the “least” in the eyes of the world who were, in truth, his “brethren” (Matt. 25:40, KJV).

Over forty years ago, Robert F. Kennedy expressed a secular version of this idea during his visit to South Africa in the grips of racial segregation. Although some of the examples Kennedy used in his speech at the University of Capetown are dated, his call to pursue a “passion for justice” is timeless:

There is discrimination in New York, the racial inequality of apartheid in South Africa, and serfdom in the mountains of Peru. People starve to death in the streets of India; a former prime minister is summarily executed in the Congo; intellectuals go to jail in Russia; and thousands are slaughtered in Indonesia; wealth is lavished on armaments everywhere in the world. These are different evils, but they are the common works of man. They reflect the imperfections of human justice, the inadequacy of human compassion, the defectiveness of our sensibility toward the sufferings of our fellows; they mark the limit of our ability to use knowledge for the well-being of our fellow human beings throughout the world. And therefore they call upon common qualities of conscience and indignation, a shared determination to wipe away the unnecessary sufferings of our fellow human beings at home and around the world.⁵

In our time, Mitch Daniels, a conservative politician, has reminded us that this impulse is not partisan: “Our first thought is always for those on life’s first rung, and how we might increase their chances of climbing.”⁶

I am arguing today in favor of a Mormon approach to politics. Let me make clear, however, that I am not saying you will have certain views about marginal tax rates or the best way for a nation to conduct its foreign affairs by virtue of the fact that you are a Latter-day Saint. In fact, I am quite uncomfortable with those who maintain that the principles of the restored gospel not only inform but somehow compel their partisan political affiliations. Fortunately, we seem to be moving beyond that narrow and mistaken view.

What I am urging is that there should be a Mormon way of engaging in politics, and, like every other activity in which Latter-day Saints participate, our involvement in politics should be a result of what we understand from

the restoration of the gospel about the Atonement of Christ. We know from the story of Adam and Eve that Satan's objective in the Garden of Eden was to divide men from women. A casual glance at the history of the world reveals that Satan's chief tactic is to divide people one from another. The fault lines he uses are gender, wealth, race, religion, culture, and the list goes on. Wherever we see division and animosity, we see the handiwork of Satan.

By contrast, the most fundamental work of Christ is to bring people together. His Atonement has a vertical component, to be sure. Christ will unite us with God. But his Atonement has a horizontal component that is just as important. Christ will unite us with other humans. Joseph Smith called this the "sealing power," and he made clear that the great objective of the restored gospel of Jesus Christ was to seal together all humankind.⁷ "Friendship is one of the grand fundamental principles of Mormonism," he taught; "[it is designed] to revolutionize and civilize the world, and cause wars and contentions to cease and men to become friends and brothers."⁸ When he announced his candidacy for the presidency, Robert F. Kennedy said, "I run for the Presidency because I want . . . the United States of America to stand . . . for [the] reconciliation of men."⁹ The word "reconciliation" conveys the sense of bringing together things that have been separated.¹⁰ In his 1526 translation of the New Testament, William Tyndale employed a recently created English word to capture the concept of reconciliation between God and humankind, which the King James translators later adopted: "at-one-ment" or "atonement."¹¹

I have two ideas about how Latter-day Saints can make the Atonement of Christ part of the way we practice politics. First, we must always keep firmly fixed in our minds that the Lord's primary vehicle to bring about reconciliation in a fallen world is the restored Church and not any particular nation, party, movement, or leader. Your best efforts should be directed at building the kingdom of God on earth by being fully engaged in church work. You already know the importance of family devotional activities. But you must always keep in mind that your home and visiting teaching assignments and the other duties that come from your membership in the Church are *far* more important than your political work. Moments before he was executed, Thomas More, the patron saint of lawyers and politicians, uttered these words, which provide the right view of our priorities: "I die the King's good servant but God's first."¹² This idea is captured in the British anthem "I Vow to Thee My Country." I will spare you the pain of listening to me sing this majestic hymn. In my view, it gives the proper perspective on our loyalties to God and country:

I vow to thee my country, all earthly things above,
 Entire and whole and perfect, the service of my love;
 The love that asks no question,¹³ the love that stands the test,
 That lays upon the altar the dearest and the best;
 The love that never falters, the love that pays the price,
 The love that makes undaunted the final sacrifice.

And there's another country, I've heard of long ago,
 Most dear to them that love her, most great to them that know;
 We may not count her armies, we may not see her King;
 Her fortress is a faithful heart, her pride is suffering;
 And soul by soul and silently her shining bounds increase,
 And her ways are ways of gentleness, and all her paths are peace.¹⁴

Second, we must treat our political opponents in a fashion that reflects our understanding that they, like we, are children of God for whom the Savior suffered, bled, died, and lives today. This may be the point at which the call to practice a Mormon approach to politics presents the greatest challenge. It seems that as part of our headlong rush to be embraced by American society, we cheer when any of our number achieves some measure of success in politics, with little regard to how that success is achieved. Thirty years ago, Robert Bellah, the renowned sociologist and scholar of religious life in America, sounded a warning while visiting BYU that we would do well to consider:

Perhaps the Mormon experience, which was in its initial phase a protest against the world of harsh, capitalist individualism, but then through much of [the twentieth] century became an increasingly close adaptation to that world which was originally rejected—perhaps that experience could give food for thought not only for Mormons but for all of us who live in this nation. Mormons often criticize the larger society in which they live and contrast it to their own vigorous community. How many of them realize that their own current social, economic, and political views and actions may contribute to the wasteland that they see around them, or that their own experience as a people might suggest a very different course for America today?¹⁵

We seem to have a tacit understanding that it is permissible for us new kids on the block to play by the age-old rules of politics—rules as old as civilization itself. We embrace tactics of personal attack and resort to plays upon passions and biases rather than treat our opponents with respect. C. S. Lewis avoided politics, but an insight from his essay “The Weight of Glory” offers a sobering perspective that serves as an indictment of the way the world does politics:

It is a serious thing to live in a society of possible gods and goddesses, to remember that the dullest and most uninteresting person you can talk

to may one day be a creature which, if you saw it now, you would be strongly tempted to worship. . . . It is in the light of these overwhelming possibilities, it is with the awe and circumspection proper to them, that we should conduct all our dealings with one another, all friendships, all loves, all play, all politics. There are no *ordinary* people. You have never talked to a mere mortal. . . . Next to the Blessed Sacrament itself, your neighbor is the holiest object presented to your senses.¹⁶

As far as I can tell, Lewis's challenge has gone untested in politics. Why can't Latter-day Saints, knowing what we do about the worth of each soul and the price that was paid by God for each person, be the ones to take up that challenge?

A story from *Slate* gives us an inkling of what such an approach to politics might mean. It relies upon a passage from a 1997 *New York Times Magazine* profile of John McCain. It takes a few minutes to read, but I think it worth the effort. (I also offer this story because it involves the legendary Mo Udall, who was my neighbor in McLean when I was a teen and was my first boss and mentor.)

When [McCain] was elected to the House in 1982, he said, he was "a freshman right-wing Nazi." But his visceral hostility toward Democrats generally was quickly tempered by his tendency to see people as individuals and judge them that way. He was taken in hand by Morris Udall, the Arizona congressman who was the liberal conscience of the Congress and a leading voice for reform. . . . "Mo reached out to me in 50 different ways," McCain recalled. "Right from the start, he'd say: 'I'm going to hold a press conference out in Phoenix. Why don't you join me?' All these journalists would show up to hear what Mo had to say. In the middle of it all, Mo would point to me and say, 'I'd like to hear John's views.' Well . . . I didn't have any views. But I got up and learned and was introduced to the state." . . . "There's no way Mo could have been more wonderful," he says, "and there was no reason for him to be that way."

For the past few years, Udall has lain ill with Parkinson's disease in a veterans hospital in northeast Washington. . . . Every few weeks, McCain drives over to pay his respects. These days the trip is a ceremony, like going to church, only less pleasant. Udall is seldom conscious, and even then he shows no sign of recognition. McCain brings with him a stack of newspaper clips on Udall's favorite subjects: local politics in Arizona, environmental legislation, Native American land disputes, subjects in which McCain initially had no particular interest himself. . . .

. . . In his time, which was not very long ago, Mo Udall was one of the most-sought-after men in the Democratic Party. Yet as he dies in a veterans hospital a few miles from the Capitol, [only a handful of lawmakers come to see him.] . . . McCain spoke of how it affected him when Udall took him in hand. It was a simple act of affection and admiration, and for that reason it meant all the more to McCain. It was one man saying to another, *We*

disagree in politics but not in life. It was one man saying to another, party political differences cut only so deep. Having made that step, they found much to agree upon and many useful ways to work together. This is the reason McCain keeps coming to see Udall even after Udall has lost his last shred of political influence. The politics were never all that important.¹⁷

Many have described 2012 as the “Mormon Moment,” and, truth to be told, it has been a harrowing time. It is never pleasant to have that which is most dear held up for scrutiny and sometimes ridicule. Even so, I think most of us will say, with some considerable relief, that the media and the pundits have, for the most part, been fair, if not generous or wholly accurate. But as we wince at some of the portrayals (“nice people who believe really crazy things” seems to be the consensus among some of the elite) and take stock of how we are perceived by others, what should be our hope? How do we wish to be seen? As we embrace the best that American political culture offers—a commitment to freedom and equality of opportunity that is unique in all the world—I hope we will not adopt the brand of politics that has far too often been part of that culture. I hope that we will be able to do politics differently than it has been done since King Benjamin showed us a better path. An ambitious proposal, I know.

Our discipleship must extend beyond our personal and family lives and our activity in the Church. It must move us to be involved in politics. But it should move us to serve in a way consistent with what we know and cherish about the Lord Jesus Christ and the redeeming power of his Atonement. The Gospels of Matthew, Mark, and Luke record an extraordinary exchange between Jesus and his disciples. Matthew puts the story on the eve of Jesus’s triumphal entry into Jerusalem. Mark has it earlier, in Capernaum. Luke includes it in his telling of the Last Supper. I will use Matthew’s recounting. The mother of James and John had knelt before Jesus to ask “a favor of him.” She hoped that her sons would be able to sit at Christ’s side when he rules the earth. The mere asking of the question with its presumption that James and John might be first among equals angered the other Apostles. Matthew writes: “When the ten heard it, they were angry with the two brothers. But Jesus called them to him and said, ‘You know that the rulers of the Gentiles lord it over them, and their great ones are tyrants over them. It will not be so among you: but whoever wishes to be great among you must be your servant, and whoever wishes to be first among you must be your slave; just as the Son of Man came not to be served but to serve’” (Matt. 20:24–28, NRSV).

In this regard, the men and women of the armed forces whom we honored just yesterday (Veteran’s Day) are great examples. They put themselves in harm’s way for others. To overcome the natural inclination to act

primarily in one's own self-interest and to act instead for the benefit of others is a type of love that is deeply moving. I can remember watching *Saving Private Ryan* and realizing that the men portrayed in the film, as crass, profane, and unrefined as they were, had discovered and exemplified something that my temple recommend—awarded more for the things I had not done than for any virtue I possessed—did not require. They had lived out what Christ called “my commandment”: “That ye love one another, as I have loved you. Greater love hath no man than this, that a man lay down his life for his friends” (John 15:12, 13, KJV).

I understand that not all soldiers, sailors, and pilots understand that. And certainly neither do all politicians. But *you* should. And that understanding should be the reason that you use the lessons learned from your experience in the Church to fully engage in the life of our nation.

Now, I'm mindful of the fact that this evening a week ago [election day] was a joyous moment for some of you and a difficult moment for others. To the victors, I offer my congratulations. Permit me, however, to speak to your disappointed classmates for a moment. When you face a setback in politics, there are two things to keep in mind. The first is to use humor. When Mo Udall lost the New Hampshire primary during his run for the Democratic Party nomination for the presidency in 1976, he declared, “The people have spoken: the jerks!” Only he didn't use the word “jerks.” You get the point. Second, get up off the dirt and stay in the game. Politics is hardball. It's not for the faint-hearted or the thin-skinned. It's for those who have hope that their beliefs will help others, that their beliefs matter enough to be pursued. In this regard, it's helpful if you have been a committed fan of a losing team. That may be one explanation for the tenacity of politicians from Chicago. And for Latter-day Saints, whose entry into national politics has been, for the most part, a fairly recent phenomenon, it is important that, having ventured into the sometimes lone and dreary world that politics can be, we don't retreat into the comfortable and familiar confines of the chapel.

I'm reminded of the dialogue in *Chariots of Fire* between Cambridge classmates and future Olympians Aubrey Montague and Harold Abrams. Sharing their life dreams with one another as students at Cambridge immediately following the carnage of World War I, Montague, who is the very embodiment of the WASP, is surprised to hear from the politically ambitious Abrams, whose parents were Lithuanian Jews, that the corridors of power of the England he loved were guarded with jealousy, venom, and bigotry and thus closed to Jews. “So what now?” Montague asks in a tone of resignation. “Grin and bear it?” “No, Aubrey,” says Abrams. “I'm going to take them on, all of them, and run them off their feet.”¹⁸

And so I say to you my young friends: Keep running.

Thomas B. Griffith (who can be reached via email at byustudies@byu.edu) is a circuit judge on the United States Court of Appeals for the District of Columbia Circuit. He received a BA from Brigham Young University and a JD from the University of Virginia School of Law.

1. N. T. Wright, *Simply Christian: Why Christianity Makes Sense* (Great Britain: Society for Promoting Christian Knowledge, 2006; repr., New York: HarperCollins, 2006). [^]

2. Wright, *Simply Christian*, 3. [^]

3. C. S. Lewis, *God in the Dock: Essays on Theology and Ethics* (Grand Rapids, Mich.: Eerdmans, 1970), 51–52. [^]

4. With uncommon insight, Screwtape himself knows the church is no sanctuary from pride. In some ways, the church can be pride's special greenhouse: "[Religion] can still send us the truly delicious sins. The fine flower of unholiness can grow only in the close neighborhood of the Holy. Nowhere do we tempt so successfully as on the very steps of the altar." C. S. Lewis, "Screwtape Proposes a Toast," in *C. S. Lewis Essay Collection and Other Short Pieces*, ed. Lesley Walmsley (Great Britain: HarperCollins, 2000), 763. [^]

5. Robert F. Kennedy, "A Tiny Ripple of Hope," Day of Affirmation Address at Cape Town University, June 6, 1966, audio file and transcribed text at <http://www.americanrhetoric.com/speeches/rfkcapetown.htm>. [^]

6. Mitch Daniels, Governor of Indiana, Keynote Address at the Ronald Reagan Centennial Dinner, 2011 Conservative Political Action Conference, February 11, 2011. [^]

7. Describing the work that occupied the last months of Joseph's life, George Q. Cannon wrote, "He also taught and administered . . . the sealing ordinances, explaining in great plainness and power the manner in which husbands and wives, parents and children are to be united by eternal ties, and the whole human family, back to Father Adam, be linked together in indissoluble bonds." George Q. Cannon, *The Life of Joseph Smith, the Prophet* (Salt Lake City: Juvenile Instructor Office, 1888), 483–84, available at <http://archive.org/stream/lifeofjosephsmithoocann#page/n3/mode/2up>. [^]

8. Joseph Smith Jr., *History of The Church of Jesus Christ of Latter-day Saints*, ed. B. H. Roberts, 2d ed., rev., 7 vols. (Salt Lake City: Deseret Book, 1971), 5:517. [^]

9. "Kennedy's Statement and Excerpts from News Conference," *New York Times*, March 17, 1968, 68. [^]

10. See Hugh W. Nibley, "The Atonement of Jesus Christ, Part 1," *Ensign* 20 (July 1990): 18, explaining that the word reconciliation "means literally to be seated again with someone." [^]

11. See *Oxford English Dictionary*, 2d ed. (Oxford: Clarendon Press, 1989), 755, noting Tyndale's use of the word *atonement*; also available at <http://www.oed.com/view/Entry/12599?redirectedFrom=atonement#eid>. [^]

12. See Peter Ackroyd, *The Life of Thomas More* (New York: Doubleday, 1998), 405. [^]

13. I take exception to this phrase. We *must* ask tough questions of our country. [^]

14. Cecil Spring-Rice, "I Vow to Thee My Country," 1918, music by Gustav T. Holst, 1921. [^]

15. Robert N. Bellah, "American Society and the Mormon Community," in *Reflections on Mormonism: Judaeo-Christian Parallels*, ed. Truman G. Madsen,

vol. 14 of the Religious Studies Monograph Series (Provo, Utah: BYU Religious Studies Center, 1978), 11. [^]

16. C. S. Lewis, "The Weight of Glory," in *The Weight of Glory and Other Addresses* (New York: Touchstone, 1996), 39–40, italics in original. [^]

17. Michael Lewis, "The Great McCain Story You've Probably Forgotten," *Slate*, April 9, 2008, available at <http://www.slate.com/id/2188545/>, quoting Michael Lewis, "The Subversive," *New York Times Magazine*, May 25, 1997. [^]

18. Hugh Hudson, director, *Chariots of Fire* (Los Angeles, Calif.: 20th Century Fox, 1981). [^]



Left, Mercy Partridge Whitney (1795–1872). Right, Edward Partridge Jr. (1833–1900). Mercy was one of the first company of Protestant missionaries in Hawaii, and she lived there from 1820 to the end of her life. In 1854, she received a visit from her nephew, Edward Partridge Jr., who was serving a mission for The Church of Jesus Christ of Latter-day Saints in Hawaii. The portrait of Mercy Whitney was painted by Samuel F. B. Morse. Courtesy Kauai Museum, Hawaii. Photo of Edward Partridge Jr. courtesy Scott H. Partridge.

Two Early Missionaries in Hawaii

Mercy Partridge Whitney and Edward Partridge Jr.

Scott H. Partridge

When Edward Partridge (1793–1840) converted to The Church of Jesus Christ of Latter-day Saints in 1830, it caused a terrible rift in his family: his sister Emily said that she wanted nothing to do with him as long as he held such ideas, and his parents began to question his sanity. Edward had eleven siblings, including his sister Mercy (1795–1872). Mercy was prominent in the Congregational Church and in 1819 went to Hawaii as a missionary and remained there the rest of her life. Edward was called as the first LDS bishop¹ soon after his conversion and was faithful for the rest of his life; he died in Nauvoo in 1840. In 1854, Edward's son, Edward Partridge Jr. (1833–1900), was sent on an LDS mission to preach the gospel in Hawaii, where he met his aunt and a cousin for the first time. Their meeting is an interesting intersection of two missionaries in one family, divided by their devotion to their respective religions.

1. Edward Partridge, the son of William Partridge and Jemima Bidwell, was born on August 27, 1793, in Pittsfield, Berkshire County, Massachusetts. He married Lydia Clisbee in Kanesville, Ohio, in 1819, and they were the parents of seven children. He was baptized into the LDS Church on January 11, 1831, and on February 4 was ordained a bishop. He moved with his family from Ohio to Missouri and suffered from mob persecution with the Saints, eventually moving to Nauvoo, Illinois, where he died on May 27, 1840. Andrew Jenson, *Latter-day Saint Biographical Encyclopedia: A Compilation of Biographical Sketches of Prominent Men and Women in The Church of Jesus Christ of Latter-day Saints*, 4 vols. (Salt Lake City: Andrew Jenson History, 1901–1936), 1:218–21.

Mercy Partridge in Hawaii

Mercy, like Edward, was born in Pittsfield, Massachusetts. She was devoted to her beliefs and to her Congregational Church. When Mercy came of age, Congregationalist women began to take on new roles as crusaders for Christ,² and she dreamed of becoming a missionary. At age twenty-four, Mercy was introduced to Samuel Whitney, who also wanted to serve a mission and was required to have a wife accompany him. Only two hours after meeting Samuel, she accepted his proposal of marriage, and they were soon wed. They were among the very first Protestant missionaries to preach Christianity in the Sandwich (later Hawaiian) Islands. For five months, they sailed the eighteen thousand miles from Boston around South America to Hawaii while crammed into a six-by-six-foot cabin already filled with luggage, goods, and a single narrow bunk. Mercy kept an extensive record of her activities and correspondence from the time she sailed from Boston until her death in the Islands fifty-three years later. Her eight volumes of journal entries and twenty-three letter books are carefully kept by the Mission Houses Museum in Honolulu.³

In the early nineteenth century, Anglo-Americans often judged people of other cultures and races, including American Indians, Africans, and Hawaiians, to be savages.⁴ Mercy, growing up in that culture, was very critical of the customs and living arrangements in Hawaii. But she was content with the prospects of “communicating the blessings of the gospel . . . , together with the conviction that . . . providence has opened for us a door of usefulness.”⁵ She and Samuel taught religion and modern skills to natives, both adults and children. She was very committed to the work of teaching Hawaiians and wrote, “I feel it my duty to instruct them in everything which may promote their civilization, so far as I have strength, and they are

2. Between 1819 and 1850, eighty women served around the world as assistant missionaries under the direction of the American Board of Commissioners for Foreign Missions. Seventy of these women were married. Patricia Grimshaw, *Paths of Duty: American Missionary Wives in Nineteenth-Century Hawaii* (Honolulu: University of Hawaii Press, 1989), xi.

3. Mercy P. Whitney, Journal and Letters, March 10, 1820, to March 15, 1870, Mission Houses Museum, Hawaiian Mission Children's Society, Honolulu, Hawaii. Mercy's rich documentary history was likely referred to by James A. Michener as he wrote his famous novel *Hawaii*; in fact, Mercy and Samuel may be seen as models for the characters Jerusha and Abner.

4. On Christian missionary views particularly, see David J. Bosch, *Transforming Mission: Paradigm Shifts in Theology of Mission* (Maryknoll, N.Y.: Orbis Books, 2011).

5. Whitney, Journal, July 23, 1820.

willing to learn.”⁶ Yet she was humble about her own merit, and as a true Calvinist she wrote, “I feel that I never did nor never can do one meritorious act in the sight of God, but that if ever I am saved it must be all of grace, free, rich, sovereign, unmerited grace.”⁷

Mercy, like other missionary wives, viewed her responsibilities as a wife and homemaker as mission service. She served as a living demonstration of what Hawaiians were told was a truly proper lifestyle. The culture of New England was taught alongside Christianity, and Hawaiian women were encouraged to show reverence for God, to be decent and modest in behavior, and to be domestically oriented. She was frustrated when their teaching seemed to have little effect. In 1832, after twelve years in Hawaii, Mercy wrote:

Although we have the greatest encouragement to labour for the good of this people, & notwithstanding there has been a very great change for the better in their manners and morals, still I think they are at present far, very far, from being placed on a level with civilized countries. . . . Instances have occurred of persons who have for a long time appeared like true Christians both in conduct and conversation, and yet have afterwards conducted in such a manner, as to make it evident they were actuated only by selfish or sinister motives.⁸

Mercy was also much exercised over the arrival of Catholic missionaries in Hawaii in 1840, claiming that they brought “destruction and ruin.”⁹

Mercy and Samuel had four children, and when each of the children reached about age eight, they were sent back to the United States to live with Congregationalist host families. This separation was very hard to bear, but Mercy and Samuel had seen other missionary children adopt the local customs and desired their children to live a good Christian life. Samuel Whitney spent his entire missionary career on the island of Kauai, traveling around the island to visit the seventy villages on his circuit. Whitney had great influence with the chiefs on Kauai and, in time, became an effective speaker; his audience sometimes rose to thousands of people.¹⁰ He became ill in September 1845 and died that December, at age fifty-two. The shock of her husband’s death must have been great on Mercy, for she quit writing

6. Mercy Whitney to Mrs. Mary Clark, July 15, 1830, quoted in Mary Zwiep, *Pilgrim Path: The First Company of Women Missionaries to Hawaii* (Madison: University of Wisconsin Press, 1991), 99.

7. Mercy Whitney to Dr. and Mrs. Winslow, October 13, 1849, quoted in Grimshaw, *Paths of Duty*, 75.

8. Whitney, Journal, November 8, 1832.

9. Whitney, Journal, November 16, 1840.

10. Edward Joesting, *Kauai: The Separate Kingdom* (Honolulu: University of Hawaii Press; Lihue, Hawaii: Kauai Museum Association, 1984), 128.

in her journal for the next two and a half years, making no entries until August 1848, when she wrote, "I feel at times almost disconsolate, cast down and dejected. The Lord alone is my consolation."¹¹

Mercy must have been pleased when three of her children, Maria, Emily, and Henry, returned to the islands in 1848, but unfortunately they returned to live in Honolulu, leaving her still alone on Kauai. Her son Samuel W. Whitney stayed in the United States. Henry Whitney became editor of a Honolulu newspaper, *The Pacific Commercial Advertiser*, and later served as the first postmaster in Honolulu.¹²

Over the years, Mercy maintained contact with her family in spite of the slowness of the mail, which could take six months to make the journey around the Horn from Boston. Her relatives kept her informed of the activities of Edward, as he moved to Kirtland, then Missouri, and finally Nauvoo. Mercy recorded her thoughts in her journal in 1832:

I received two letters one from cousin C. Ely, & another from br. C. He gave an account of Edward's leaving his home in Ohio, & joining himself to a sect called Mormonites, & had gone to the Rocky Mountains¹³ with a view to convert the Indians. I cannot account for any one's embracing such a faith as brother C. describes that of the Mormonites to be, who is not given up to a delusion to believe a lie; for I am sure there is no ground for such a faith in the word of God. May Edward be brought to see the error into which he has fallen, repent of his sins & embrace that faith which alone can save his soul.¹⁴

The Family of Edward Partridge

After his conversion, Edward was called by Joseph Smith to return to Massachusetts and preach the gospel to his parents and siblings, and he continued to write about the gospel to his family over the years, but they never joined him in Mormonism. Edward Jr. was born in Independence, Missouri, and was only six years old when his father passed away in Nauvoo in 1840. The family started west in 1847, and by then Edward Jr. was able to assume much of the burden of the physical labor needed during the trek. They arrived in

11. Whitney, Journal, August 8, 1848.

12. Postmaster Whitney issued stamps that became known as "Hawaiian Missionaries" because they were frequently used by American missionaries on the Islands to send letters back to the continental United States; these stamps are among the world's philatelic rarities.

13. Edward did not travel to the Rocky Mountains of the western United States; Mercy may be referring to Edward's move to Missouri.

14. Whitney, Journal, June 28, 1832.

the Salt Lake Valley in 1848 and settled down to scrape together enough to live on and to put together some kind of shelter.

Sandwich Islands LDS Mission

The Mormon mission to the Sandwich Islands arose from the gold fields of California. Ten young Mormons, the most prominent being George Q. Cannon, future Apostle and member of the Church's First Presidency, were called to leave their hunt for treasure and open up a mission in the Sandwich Islands. They accepted their calls and sailed from San Francisco, landing in Honolulu on December 12, 1850. The day following their arrival, the young missionaries climbed a hill outside of the city, improvised an altar, sang a hymn, and offered a prayer for the success of their mission.

The missionaries began their proselyting on the assumption that they were to work among the Islands' white people, and for weeks they labored with little or no success. Eventually, under these frustrating circumstances, five of the missionaries left the mission. Four of them returned to the United States, while a fifth decided on his own initiative to switch his mission to Tahiti.

As the five remaining missionaries evaluated their situation, they felt that their mission was not to be primarily among the "haoles" (whites) but among the native Hawaiians. This recognition imposed upon them the tasks of learning the very difficult Hawaiian language and becoming accustomed to living among the natives. The chief advocate of this change was the youngest of the missionaries, George Q. Cannon. Once moving in this direction, the tiny mission saw success.¹⁵

Edward Partridge Jr. Comes to Hawaii

At general conference on April 6, 1854, twenty-year-old Edward Jr. was among twenty men called on a mission to the Sandwich Islands. Edward began immediately to make the necessary preparations for the journey to the coast of California. Like other Mormon missionaries of the time, he was to go without purse or scrip and was to depend on the contributions of members and sympathetic nonmembers as well as income he might earn through temporary employment to pay for his travel expenses and to provide the necessities of life during his tenure as a missionary. In July he arrived at Los Angeles where, for the first time in his life, Edward beheld the ocean and an ocean-going ship. Between July 10 and December 1, Edward lived in the San

15. Edward Partridge Jr., Journal, typescript, 1854–1899, Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, p. 9a.

Francisco Bay area; he quickly earned enough money for his own steerage passage but donated it to other missionaries. By November, Edward and the other two remaining missionaries of the original twenty obtained passage on the brig *Abigale*. Although there were ocean-going steamers at the time, the missionaries apparently elected to travel to Honolulu by sailing ship because the fare was cheaper. It took the ship twenty-two days to travel from San Francisco Bay to the island of Oahu. On the voyage, Edward wrote that he was seasick only on the first day and seems to have felt fine for the rest of the journey even though the slow progress of the wind-driven ship made the “time pass wearily away.”¹⁶

On a bright Sunday morning, December 24, 1854, Edward and his companions awoke to find the city of Honolulu spread before them. The travelers had no difficulty in locating the house where the missionaries lived and found four elders eagerly waiting for them. The newcomers were informed that they had arrived just in time to observe a change in the rulership of the islands, since King Kamehameha III had died on December 15.

On Christmas Day, Edward called on his first cousin, Henry M. Whitney, the son of Mercy Partridge Whitney. Mr. Whitney was unfriendly. He said he was very busy and invited Edward to call some other time. On January 12, Edward and another new missionary left Honolulu on board the steamer *Kalama* for the island of Kauai, about 250 miles from Honolulu. They paid \$4.00 each for deck passage. After two days at sea, they landed at the little town of Nawiliwili. Here he got his first taste of native food, which he described as “anything but pleasant.” He found his quarters to be a native hut. He observed that when the floor was covered with mats, the huts presented a very comfortable appearance. On Sunday, January 14, Edward attended his first native meeting in his assigned district and wrote, “Here I endeavored to get my mind as much upon the native language as possible.” He was finally able to get to the serious work of serving as a missionary.¹⁷

The Visit of the Two Missionaries

On Tuesday, March 6, 1855, Edward went to visit his Aunt Mercy in Waimea, which was the largest town on the island. He noted that there was a good stone church and three or four foreign residences, the remainder being native houses. Mrs. Whitney lived in a large two-story house with a veranda in front. Edward went in and introduced himself to his aunt and handed her a letter from his mother (Mercy’s sister-in-law), Lydia Partridge. She

16. Partridge, Journal, December 3–12, 1854, p. 8.

17. Partridge, Journal, January 14, 1855, p. 12.

received it very coldly, but he recorded that was what he had expected from what he had heard of her. He described Mercy as a tall, slim woman aged fifty years,¹⁸ and she described him as a fine, healthy-looking man about twenty-one years of age.

In her journal entry for the day, Mercy commented on the letter Edward had given her. It was, she wrote,

the first line I have ever received from her pen, & this was quite unexpected. It was dated the 3rd of last May, almost a year ago. She speaks of their trials and persecutions as having been very great, & says, "There Are many things believed with us, which at first comes in contact with the prejudices of the people at the present day, yet to those that understand them, they are perfectly consistent, & according to scripture, therefore judge not hastily but prove all things." In the above sentence, I suppose she refers to polygamy as one thing.

In another part of her letter she says, "It was by searching the scriptures & obeying the requirements laid down by Christ & his Apostles, that I came in possession of my present belief, the Spirit of God bearing witness of the truth, & I do thank the Lord that I have been brought to a knowledge of these things." Her letter is written in a very good spirit, & perhaps she is a christian, notwithstanding all her errors.¹⁹

During the late afternoon and evening that Edward and Mercy were together, they spent much of their time discussing the differences they had on organized religion. Mercy shed a tear over hearing confirmation that three of her nieces were married to the same man. She did not consider them any better than public prostitutes and consequently did not feel like acknowledging relationship with them or anyone who believed such a doctrine. She said it was in direct opposition to the whole tenor of the Bible; she and her husband had spent years teaching the native population to forsake the practice of polygamy, which now her Mormon relatives were following.

Edward told her that he had not found anything in the Bible that forbade men the privilege of having a plurality of wives but had read of many men who were considered good men and received the approbation of the Almighty and actually received revelation and the ministrations of angels, and yet were polygamists. Mercy responded by noting that, based on her observation of polygamy among Hawaiian natives, women in polygamous families lived in jealousy and a spirit of contention. Edward said that his sisters living in the same household were contented and seemed very happy.

18. Partridge, Journal, March 6, 1855, p. 14.

19. Whitney, Journal, March 6, 1855.

Mercy further argued that Christ put down polygamy in the Bible. In response Edward asked her to show him the place in the scriptures where that occurs. She took the Bible and looked through it but was unable to find any such scripture. Mercy then referred to Genesis chapter one where it says that a man should cleave unto his wife—wife not wives. Edward responded by referring to 2 Samuel 12:7–9, in which the Lord gave a man a plurality of wives.

Having exhausted the subject of polygamy, Mercy and Edward covered a variety of other subjects and had differing opinions regarding most of them. Edward said the scriptures show that we shall be rewarded according to our works. Mercy responded that she did not think she would be saved for any good she had done; if she were saved, it would be through grace. Edward argued that Mercy had a way of “spiritualizing” scriptures to make them mean something they do not say, but Mercy countered that Mormons take such portions of the Bible as suit them and reject parts that don’t suit them. Mercy asked why Mormons were so insistent on baptism, since baptism is not essential to salvation. Edward taught that there is no virtue in the water, but baptism is in obedience to the requirements of the Almighty.²⁰

Mercy, in her journal, concluded the following regarding Edward and the message he was bringing to the islands.

Mormonism was the principal subject of conversation during his stay, & I learned a good deal respecting their views, which I should think in some respects similar to the Unitarians. Edward seems to be trusting principally to his own good works for salvation, but is willing to have Christ supply his lack of perfect obedience should he come short. He does not believe in the doctrine of original sin, but thinks mankind are born “pure & holy as the angels.” When I spoke of the new birth or that change of heart which all must experience before they are prepared to enter heaven, he said he did not know what I meant by that expression, as he was not accustomed to hear anything about a new birth, & it was very evident to me from his conversation, that he knew nothing respecting it from experience.²¹

In addition to the philosophical differences Mercy had with Edward, she was also concerned that he had been living on the opposite side of the island among the natives—“accommodating himself to their customs and habits, and eating fish and poi, of which he says he has become quite fond.” She feared that he would soon be no better than those with whom he associated, since he was secluded from all civilized society.

Finally, Mercy offered this hope:

20. Partridge, *Journal*, March 5, 1855, pp. 14–15.

21. Whitney, *Journal*, March 6, 1855.

O let us pray that his coming to these islands may be the means of his conversion from Mormonism to Christianity. Should this be the case, he will have cause to all eternity to bless God for sending him hither—He told me that if he could find Any better religion than the Mormons he would embrace it, but he thought most sects or denominations were nothing but hypocrites. I asked him if he included me in that. No. He replied. “I did not say so,” but from what he did say there could be but little doubt as to his meaning. This visit I have long dreaded, and rejoice that it is past. Such seasons are too exciting for my feeble bones.²²

Edward summarized the visit by writing:

She told me that she did not feel like receiving anyone at her house that believed and taught such principles, which I told her was no more [than] I had expected. I was prepared to receive almost any kind of treatment. I stayed all night with her but should probably not have done so if I had known of any other place where I could stop.

Wed., March 7, 1855. This morning after conversing with Aunt till 10 o'clock I arose to depart, having previously saddled my horse. I bore my testimony to her that Mormonism was true and Joseph Smith was a prophet of God, and told her that inasmuch as she did not feel like receiving me at her house as a relative I should trouble her no more, and with this understanding I took my leave.²³

Edward reported no further visits with his relatives in Hawaii.

Edward Partridge Jr. as Mission President

Twenty-seven years later, on April 6, 1882, while attending general conference in Salt Lake City, Edward Partridge was again called to go to the Sandwich Islands, this time to take the presidency of that mission and to take some of his family with him. On June 1, 1882, Edward and his family took the train for San Francisco. The party consisted of Edward, his wife Sarah, and two of their sons, who were to serve as missionaries.

The world had changed greatly in the intervening years. Instead of taking many weeks to cross the deserts and nearly a month to cross the ocean, they were able to travel from Salt Lake City to Honolulu in just over ten days. Also, the position of the Church had changed. Although the Church had grown and was therefore able to send more missionaries and provide permanent chapels and other facilities, the opposition against it, largely due to the continued practice and unwavering defense of polygamy, was more intense and worldwide.

22. Whitney, Journal, March 6, 1855.

23. Partridge, Journal, March 7, 1855, p. 15.

During Edward's second year as mission president, he and Sarah took the opportunity to visit some of the other islands. While visiting Kauai, he recorded the following:

Mon, Sept. 10, 1883. Went to Makawali traveling slow as Sarah could not ride fast. Distance about 9 miles. We went out of our way a mile or two for the purpose of visiting Waimea and the grave of my aunt Mercy Whitney, who I visited when I was here on my former mission, when she refused to receive me at her house because I was a Mormon, although I stopped overnight. The church that was built for Mr. Whitney was a large, stone building of rather an imposing appearance compared with other buildings of the same period which I have seen on other islands. Mrs. Whitney's buried back of the church. A heavy slab of white marble marks her last resting place and her plot is surrounded by a rough picket fence. The inscription on the slab is as follows:

Sacred to the memory of Reverend Samuel Whitney,
Pioneer Missionary of the ABCFM and First Pastor
of the Waimea Church. Born in Bradford, Connecticut,
April 28, 1793, Landed at Kaioua March 20, 1820,
Died at Lahaina, Maui, December 15, 1845 age 52 years
And to the memory of his wife Mercy Partridge Whitney
Born at Pittsfield, Massachusetts, August 14, 1795
Died at Waimea, December 26, 1872, age 77 years
Blessed are the dead who die in the Lord.

We rode to the Whitney residence not far from the church. The building looks natural but is fast going to ruin. The upper porch is nearly all fallen down as well as the outside stairs. The trees in the yard and everything bear an appearance of neglect and desolation. I went to the house of the Reverend Mr. Lowell and got the keys to the house. We went through the different rooms which were bare of furniture but dusty and musty and ornamented and festooned with cobwebs. I pointed out the place where stood the lounge on which I sat and the room on the second floor where I slept the one night I stayed there, and it was with peculiar feelings when I looked upon the desolate place to contemplate the changes wrought by time and the providences of God.

I felt hurt when I was turned from her door but harbored no resentment towards my aunt. I felt like I would like to do her a kind action in return for her enmity towards me, and I thought while I stood by her grave and wrote in my memorandum book the inscription upon her grave, that perhaps the time had come that I could do her a favor by having the ordinances of baptism performed for her and her husband, and if she was sincere in her course of life on earth, she may be convinced of the truth of the gospel in the place to which she has gone, and be grateful to those whom she despised on earth as unfit to associate with her, if they shall perform for her the ordinances of the gospel that she would not, in consequence of her false religious bigotry, perform for herself.

After ascending two pairs of stairs into the tower I found papers and tracts strewn around, some bearing dates of 1822 and 1825 and 1829. I picked up a few as matters of curiosity.²⁴

And with that wish to perform temple work for his relatives, Edward expressed his desire to be one with them in the eternities. Each of these two missionaries in Hawaii performed their work dutifully and true to their faiths, never seeing eye to eye on matters of religion.

Scott H. Partridge (who can be reached via email at byustudies@byu.edu) is Professor Emeritus at California State University, Hayward, where he taught for thirty-two years. He received a BS from Brigham Young University, an MBA from the University of Oregon, and a Doctor of Business Administration from Harvard University. He is the author of "The Failure of the Kirtland Safety Society," *BYU Studies* 12, no. 4 (1972): 437–54; and "Edward Partridge in Painesville, Ohio," *BYU Studies* 42, no. 1 (2003): 50–73.

24. Partridge, *Journal*, September 10, 1883, pp. 409–10.

Faith and Same-Gender Attraction

A Look at Ty Mansfield's *Voices of Hope*

Allen E. Bergin and Marian S. Bergin

This unusual, beautifully conceptualized book¹ features personal accounts by nineteen men and women who struggle with same-gender sexual attraction (SGA) in themselves or loved ones, as well as one man who is challenged by transgender identity (GID). All are striving to live by the doctrines of The Church of Jesus Christ of Latter-day Saints, which sometimes means going against what feels natural to them and against prevailing societal currents that encourage them to express and celebrate their inclinations. These accounts are written with an openness and authenticity that draws the reader into their inner worlds in a most personal way. We have read and studied many books about SGA, and we found this volume to be unique.

Personal Themes

While the book does include ten pages of relevant references and resources, it does not follow the usual protocol for reporting case histories or clinical data. Instead it presents accounts that are more like the testimony of witnesses in a court of law, in a Church testimony meeting, or in an autobiography. As such, readers need to approach these life stories as the personal documents that they are. They do not pretend to be proofs of anything. Rather, the authors have bared their souls with transparent honesty. Laden with doubts, conflicts, and regressions, they do not claim magical transformations but convey the full complexity and anguish—as well as the joys—of their journeys.

The personal narratives of change documented here are rooted in deeply spiritual motivation and divinely inspired promptings so tender and open that critiquing them would be irreverent and crass. We, therefore, let them stand for what they are—open windows revealing the difficult lives and the crosscurrents inherent in dealing with SGA within an LDS context. There is a nobility in these stories, accentuated by open recounting of pain and suffering before and after changes were made. There is also authenticity in

their admissions that old feelings do not disappear completely and in the painful poignancy of wistful memories that try their souls.

The book includes six sections, each introduced by a doctrinal essay written by a prominent LDS author who is familiar with SGA. The first-person accounts within each section illustrate the principles introduced by the author. Written by Brad Wilcox, M. Catherine Thomas, Wendy Ulrich, Camille Fronk Olson, Robert L. Millet, and Michael Goodman, these doctrinal essays provide a thoughtful, carefully crafted, orthodox context for the spiritual and emotional challenges that accompany efforts to cope with SGA.

The heart of the book lies in the compelling stories that the editor, Ty Mansfield, solicited and that he characterizes as putting a “seal of living reality” on the gospel teachings that precede them. Mansfield, who has himself struggled with SGA, explains his motivation: “I longed to hear the real, lived experiences of real, live Latter-day Saints—flesh-and-blood people who had been where I was” (4). We applaud him for creating this book. We also join him in the trepidation expressed in his epilogue: “It’s hard to say *anything* on this topic without some form of backlash by *someone*” (359).

Mansfield’s introductory essay is an enlightening and moving autobiographical account of his journey through the “hell” of internal turmoil to the “heaven” of marital communion. He weaves four concepts into his introduction, asserting them as the foundation of his volume: (1) being rooted in Jesus Christ, (2) proximate vs. ultimate hope, (3) standing as witnesses of God, and (4) our covenant to mourn with and comfort others. These concepts, he argues, “have often been neglected in conversation about homosexuality in the LDS community” (8). He intends these principles to be a way to shift from past debate-like approaches to an approach that invites civil dialogue and shared testimony.

The editor’s deep feelings about the fourth concept are palpable as he pleads with all in the LDS community to honor their covenants to “mourn with those that mourn . . . and comfort those that stand in need of comfort” (Mosiah 18:9). Doing so would reverse our common cultural practice of rejecting and isolating those who so acutely need our empathy and support and would mark a huge step forward in behaving as God’s covenant people ought to behave. Mansfield quotes a friend as saying, “If they [those with SGA] feel the most love in the gay and lesbian cultural community, that community wins; if they feel it with God’s covenant people, then we win” (28). We join Mansfield and his contributors in this heartfelt desire.

Mansfield’s emergence as a key spokesperson for same-gender-attracted men and women began nearly a decade ago when he coauthored *In Quiet Desperation: Understanding the Challenge of Same-Gender Attraction* (Deseret Book, 2004). That book centered on the tragic suicide of Stuart Matis, who

in protest and desperation shot himself on the steps of an LDS chapel in California. The resulting book was a rare attempt by a major LDS publisher to reach the wider LDS audience about SGA issues.

In *Voices of Hope*, we find continuing movement toward more openness about the private struggles of SGA Church members. Twelve of the narrative writers courageously use their own names, perhaps indicating an increasing sense of trust that the general LDS population can handle the intimate matters revealed in their accounts. As one contributor grappled with whether to include his name or not, he told Mansfield: "When I made the final decision to use my real name, knowing the potential for backlash, I decided that there is a war being waged, and our side is losing while gay cultural ideologies are winning. We are losing because people like me feel the need to hide and pretend. I pretend not out of fear of the gay community; I pretend out of fear of the negative reaction I will get from people in the Church" (21). Although public disclosure may not always be wise, we express our loving appreciation for the risk taken by him and others and express our hope that they will all find their bravery rewarded.

As clinicians, we have counseled with a number of SGA clients and also have personal family experience with SGA, including two of our sons. We know many of the same dilemmas, struggles, regressions, and wrestles with the Lord that are recounted in *Voices of Hope*. We understand the agonizing scenarios that unfold when SGA challenges arise in individuals and their families. We empathize with Kathleen Marsden as she recounts her struggle to come to terms with having a son suffering from depression who was living with a male partner:

The initial steps in my journey to peace were trying to find someone or something to blame. First it was my fault, and then it became my husband's. . . . Everything I read seemed to indicate that we should be careful about placing blame for the agony our boy was experiencing. Amidst his own anguish, he tried to assure me that nobody had ever abused him or mistreated him in ways he felt contributed to his attraction. During the following months, he often commented that he would rather be burdened with anything but this particular trial, occasionally even alluding to thoughts of wanting to end his life. As a younger man, he thought if he was good enough the feelings would go away. I cried incessantly. My heart broke to think that he had suffered in silence for so many years (139).

Later in her story, she recounts: "My dilemma between loving my son and his partner and loving the gospel was gradually resolved: I love the gospel and the Church of Jesus Christ, and I love TJ and his partner. For me, it eventually became that simple. . . . I need not choose between my son and the gospel. The Church does not need to alter its teachings because I love

these young men. For me, it isn't a choice of being faithful to one or to the other; I have heart enough for the gospel and for TJ, and to spare." It seems that the resolution of her despair resulted from realizing that disapproval of the same-sex relationship did not require her to lessen the love she felt for her son. She applied the doctrine of love in her situation as declared in many scriptural injunctions, for example, "Bear ye one another's burdens, and so fulfil the law of Christ" (Gal. 6:2).

Many of the stories in the book allude to shame as an early primary emotion for same-gender-attracted individuals. Leaders and parents who hold negative feelings about SGA sometimes shame and reject those struggling with it because they have limited experience with this challenge. Robbie Pierce's account is illustrative. At age thirteen he identified himself as "gay" and could not stop the negative cultural messages from plaguing him: "The crisis here was one of identity. I couldn't be gay. I was a good Mormon kid. . . . Something I had not asked for was happening to me. I began to arrange my memories of my life to make them fit in with this new idea" (45). He then recounts a searing shame-based memory: "At dinner in a restaurant shortly after my own self-discovery, one brother tauntingly called another 'gay,' and Mom slammed her fists on the table. The bang and the clinking of silverware and glasses made every head turn toward her as she seethed, 'None of my children would ever be evil enough to be gay.' And yet, 'gay' was the most accurate adjective I had for myself" (46).

Even though Robbie Pierce does not use the word shame, undoubtedly he felt shamed. It is important to understand and distinguish between the meanings of shame and guilt. Healthy guilt tells us we've done something wrong. When we identify the wrong as sinful, it leads us to repentance, forgiveness, and the Savior's healing power. Shame tells us that we *are* something wrong, that the core of our being is defective and undesirable. At this point, shame often triggers feelings of helplessness and hopelessness, which can lead to the belief that we shouldn't *be*, because there is something inherently bad about us. And thus many SGA individuals descend into shame's sinkhole, feeling that they are not redeemable. To avoid the pain of this dark and desolate place, many escape into obsessive sex and other addictions. Some feel so desperate for relief that they take their own lives. This book is an important aid in helping Latter-day Saints more fully understand the SGA predicament and behave in more loving, covenant-keeping ways.

Social, Emotional, and Spiritual Themes

These reports of "lives in progress" teach insightful lessons for all people of faith, regardless of orientation, who wish to endure victoriously the onslaught of a fallen world. They teach that we live in a "sex-saturated"

culture where physical sensation and momentary pleasure predominate, and where the minds of many are clouded from the real reasons for mortal existence. *Voices of Hope* provides an antidote and a way out of compulsion and dissolution. It features faith, freedom, integrity, authentic emotional connecting, and self-sacrifice that all mark mature and committed relationships.

An unusual example of these qualities is illustrated by the story of Kenneth Hoover and his friend, Steven, who lived together and both contracted HIV/AIDS. Kenneth reports that through spiritual counsel and divine power, they found the strength to abstain from sex and support one another. Eventually, Kenneth baptized Steven, and they have remained celibate partners for thirteen years at the time of the book's publication. Both regularly attend church and the temple. Each holds a calling in their Oakland, California, ward. They emphasize the love of Christ and of each other. The example of their newfound spiritual priority is one that heterosexuals could learn from. Too many LDS heterosexuals, married or single, have never learned how to put first their social, emotional, and spiritual commitments and place legitimate sex as an integrated expression thereof.

An unusual theme of spirituality is woven into most of the accounts in this book. Prayer, promptings, and healing moments all attest to the divine interventions that frequently occurred. These happened in the context of counseling with priesthood leaders, desperately searching private prayers, healing encounters with loved ones, priesthood blessings, professional counseling, anguished repentance, and meditating.

Perhaps we have here a selective sample of people who made it into light and healing. We do not, of course, have a random sample. How many people have tried similarly and failed, we do not know. What we do know is that we have diverse paradigms presented here of how spiritual forces worked for good and, in many instances, above and beyond temporal and human efforts alone. The depth of pain that was eventually relieved by these invisible means is a phenomenon to behold. Even if it is documented only by this small group of testimonies, the stories reveal a power that inspires. Could it be that this small coterie of people who have described their pains, their hopes, and their faith-driven reforms exemplify pathways that others can learn from? Perhaps their narratives can prompt feelings of hope where despair prevails.

Remarkably, going against the cultural norms of the day, Tyler Moore, a married Latter-day Saint with SGA, shares some truths he discovered about himself:

I've learned that what so many in what is commonly referred to as the lesbian, gay, bisexual, and transgender (LGBT) community told me is

absolutely correct. I do need to be 'true to myself.' My true self, my first and foremost identity, is a *brave son of God*. From this identity I gain the ability to be a husband, a father, a son, a brother, a friend, and a student—all secondary to my primary identity. Because I am a son of God, I can lay my weaknesses and sins at the feet of my Lord and Savior, Jesus Christ. As I have allowed Him to take my heart of stone and replace it with a heart of flesh, He has made true peace possible. . . . It was change from the inside out, not the reverse. It was more than just finding healthy male relationships or simply learning sports. It was something deeper I needed, deeper even than sex or sexual identity; it was finally finding a way to accept myself as worthwhile and to know I was worth loving. (185–88)

Scientific and Political Themes

Voices of Hope is not a scientific report, and it does not pretend to be one. It is also not a polemic making claims about how likely sexual-orientation change might be. Rather, it is a narrative conveying details of personal struggles in how to implement the doctrines of the gospel of Jesus Christ and its program for self-development and how to be touched by God's spirit in the process. Such effort, often guided by principles of repentance, has yielded a "newness of self" for those who have disclosed their processes.

This "newness of self" is manifested in most of these cases; but it cannot yet be quantified into a statistical report. It might be argued, however well these peoples' struggles turned out, that they are not a representative sample, or that there were no objective pre- and post-tests of their condition, or that there are insufficient long-term follow-ups. Such critiques are correct, but they are beside the point. What we have here are descriptive reports of something very significant happening to a lot of people. The real issue is whether this can spread and affect the lives of others who study these accounts or who find enough inspiration to discern the principles involved and apply them to their own personal dynamics. If so, then we have the germ of a benevolent movement, and a controlled outcome study is not yet relevant.

Official or political views of mental health professions that oppose SGA change do not apply. No one here has asserted that they had mental illnesses or that they required the application of techniques that had been tested for efficacy and safety in outcome studies with untreated placebo-control groups. The self-descriptions of the respective changes that each of these contributors reported were often aided by professional counselors in auxiliary roles, but the primary processes were spiritual and partook of religious motivations in church contexts. Freedom of religion thus trumps the overbearing interests of those activist groups or accreditation agencies that engage in endless critiques of spiritually based change.

With respect to the controversies over whether SGA can be changed, it should be noted that the cohort of people assembled by Ty Mansfield were judged by us to be mainly people who could be listed initially as “exclusively homosexual” or 5–6 on the Kinsey Scale of sexual orientation. We judged only one case to have moved all the way to 1–2 on that scale, namely, mostly heterosexual. Many, but not all, of these cases moved toward the midrange or “bisexual” and continued to have homosexual feelings. Thus, they were not declaring miracle cures. Instead they (1) felt homosexual urges to be less intense and urgent and, therefore, more diminished and controllable, especially after children were born to them; (2) found ways to accommodate their lives to the Church-inspired guidelines for living; and (3) experienced the satisfactions of being integrated into and prized by the mainstream culture, thus being less dependent upon the nurture of an alternative subculture. It should be noted here that we are applying the Kinsey Scale to the self-reports as illustrative only. The scale, of course, has limitations, as does employing the scale outside of a clinical setting.

There are two other caveats to consider regarding our otherwise positive view of this book’s distinctive contribution to a controversial debate. First, this is a selective sample of success stories. Harm could be done if persons with SGA or their helpers and families assume that dramatic improvements can readily be obtained by following the principles identified herein. There is a danger that failure to achieve inflated hopes may yield to despair. Second, theory and research show that sexual orientation arises from multiple pathways; therefore, we are dealing with homosexualities (plural) and not a uniform phenomenon that can be explained or changed by a single approach.

Yet we find this book, as we stated previously, to be helpful, hopeful, and faith promoting. We recommend that the word be spread to read it.

Allen E. Bergin is Professor Emeritus of Psychology at Brigham Young University. He was also a professor in the clinical psychology doctoral program at Columbia University for eleven years. He is a past president of the Society for Psychotherapy Research (International) and also past president of the Association of Mormon Counselors and Psychotherapists. Bergin has received national awards for his work, from both the American Psychological and American Psychiatric Associations.

Marian S. Bergin is a clinical social worker (retired). She was a program director in behavioral medicine for seven years at Utah Valley Hospital, served clients in private practice for twenty-five years, and was also appointed as an adjunct clinical faculty member at the BYU Comprehensive Clinic.

Allen and Marian Bergin can be contacted via email at byustudies@byu.edu.

1. Ty Mansfield, comp., *Voices of Hope: Latter-day Saint Perspectives on Same-Gender Attraction* (Salt Lake City: Deseret Book, 2011). [^]

John G. Turner. *Brigham Young, Pioneer Prophet*.
Cambridge, Mass.: Belknap Press of Harvard University Press, 2012.

Reviewed by Thomas G. Alexander

John G. Turner, an assistant professor of religious studies at George Mason University, used a novelist's convention by beginning his scholarly biography of Brigham Young near the end of the story. The opening paragraphs take the reader to St. George in 1877 and the dedication of Utah's first temple with the author summarizing Young's sermon.

From the St. George Temple dedication, the author essays on the founding of The Church of Jesus Christ of Latter-day Saints. The summary includes Joseph Smith's discovery of the gold plates, their translation, and the controversy generated by his ministry.

Turner then lays the groundwork for the remainder of the text by reviewing Brigham's career. He points out that Young led the Mormon people to Utah, supervised the settlement of a sixth of the western United States, and governed the Mormons during the beginnings of their conflicts with the United States over theocratic leadership and plural marriage. Turner points out that Young became "the greatest colonizer in American history" (3) and insists in contradiction with some "contemporaries and early biographers [that] Young was sincere in his faith" (5).

The remainder is essentially a chronological treatment of Young's life. Turner writes on the hardscrabble background of Brigham's family. He writes of the migration of the family to western New York, and he tells of Young's conversion to Reformed Methodism.

The central message of the text, however, is Young's conversion to Mormonism and his life in the Church. After joining, Young became a stalwart supporter of Joseph Smith. Others wavered in their allegiance to the young prophet, but Young did not. His conversion took him to Kirtland, to northwestern Missouri, and to Nauvoo. He participated in the effort of Zion's Camp to redeem the Missouri Saints. He served as a central figure in the 1840 mission of the Twelve in the British Isles, and he was campaigning for Joseph Smith's candidacy for U.S. president when he learned of the Prophet's murder.

Thereafter, as president of the Quorum of the Twelve Apostles, he led the pioneer company of Saints to Utah. Returning to Winter Quarters, he secured the approval of the Twelve and the Church membership of his call as Church President. He presided over the Church until his death in August 1877. During this time, he served not only as Church President but also as the first governor (1850–1858) of Utah Territory, which Congress organized in 1850.

As a whole, this biography both complements and contradicts the previous standard biography of Brigham Young, Leonard J. Arrington's *Brigham Young: American Moses* (New York: Alfred Knopf, 1985). Like Arrington's biography, Turner's rests on the vast documentary resources of the LDS Church Archives. Unlike Arrington, however, Turner downplays the generous aspects of Young's character. Nevertheless, both biographies, from a historical standpoint, surpass previous writings such as Morris R. Werner's early work, *Brigham Young* (New York: Harcourt, Brace, 1925), the poorly researched Stanley P. Hirshson's *The Lion of the Lord: A Biography of Brigham Young* (New York: Alfred Knopf, 1969), and eulogistic works like Preston Nibley's *Brigham Young: The Man and His Work* (Salt Lake City: Deseret News Press, 1936) and Francis M. Gibbons's *Brigham Young: Modern Moses, Prophet of God* (Salt Lake City: Deseret Book, 1981).

Turner includes significant information, especially on Young's spiritual and family life, not found in Arrington's excellent biography. We learn, for instance, of Young's early commitment to Pentecostal glossolalia. We have known before about his speaking in tongues on his first meeting with Joseph Smith, but we have not generally understood his continued practice that stretched into his British mission.

Turner writes of some of the internal conflicts and dissatisfactions that one would expect in a large family with multiple wives. He points out that Young favored some wives over others, something that Young's daughter Susa Young Gates understood. Favorites included Emmeline Free and Amelia Folsom. He constructed the magnificent Second Empire Gardo House on South Temple for Amelia.

Because of his extensive research in Young's papers and collateral sources, Turner confirms Arrington's conclusion and the conclusion arrived at more than a half century ago by Juanita Brooks, that Young did not order the Mountain Meadows Massacre. His culpability extends to his violent rhetoric and to sending George A. Smith to warn the settlers south of Salt Lake County to prepare for the approach of a hostile army.

Turner faults Young for failing to work assiduously to bring the perpetrators to justice. He argues that "in his desire to protect the church and himself, Young decided that the risks of full disclosure outweighed those

of inaction” (309). It seems, however, that Turner does not give enough weight to the problems that Young faced in bringing them to justice and to his actual efforts to do so. Young had to cope with the misguided crusades of Judges Delana Eckels, John Cradlebaugh, and Charles Sinclair, and Acting U.S. Attorney Robert Baskin, all of whom sought to prove that Young ordered the massacre.

After 1858, Young, as a private citizen, offered on a number of occasions to assist the federal officers in investigating and trying the massacre participants. They refused to accept Young’s help or the help offered by other Mormon officials, most likely because some of them believed, erroneously, that Young had ordered the massacre.¹

Turner also gives some credence to John D. Lee’s insistence that he had told Young the whole story during a visit to Salt Lake City shortly after the massacre. Contrary to Lee’s assertion, we have a full account in Wilford Woodruff’s journal of Lee’s lies to Young, a point that Turner notes. Lee blamed the massacre on the Paiutes.

The large collection of documents in the Church History Library on the massacre, which Turner should have mined more thoroughly, provides additional evidence of the misinformation Young received. Ute chief Arapeen told Young the Paiutes had perpetrated the massacre. Indian Agent George W. Armstrong said it was a Paiute massacre, though we are unsure of his source. Young’s clerk, Leo Hawkins, noted various reports that Paiutes had perpetrated the massacre.² As Turner points out, Young learned from George A. Smith that Lee and other whites participated in the massacre. It is nevertheless unclear just when Young understood that the Mormon militiamen rather than Paiutes bore the principal responsibility.

Turner faults Young for allowing massacre participants to go so long without Church sanctions. Contrary to his assertion, in 1859 Apostles, working on Young’s instructions, released the major participants from their positions in the Church and told them to prepare for trials. The Apostles replaced them with nonparticipants. Some of them prepared by engaging legal counsel. Significantly, in May 1863, Young denounced Lee in the presence of a number of Church leaders, telling him that he would never see the presence of God or Christ. Lee reportedly considered himself excommunicated at that date.³

Nevertheless, Turner contradicts the oft-told tale that Young ordered the destruction of the monument at Mountain Meadows erected by Major James Carlton. Relying on evidence from non-Mormon sources, Turner shows that the monument still stood after Young had left the meadows. Turner argues that a “massive flood the following winter might have been responsible for the monument’s [later] destruction” (310).

I recommend this book for all readers, scholars, Church members, and the lay public. It is well written and, most importantly, reveals much about Brigham Young's spiritual and marital life that has not been well known.

Thomas G. Alexander (who can be reached via email at byustudies@byu.edu) is the Lemuel Hardison Redd Jr. Professor Emeritus of Western American History at Brigham Young University and has served as the director of the Charles Redd Center for Western Studies.

1. Thomas G. Alexander, *Brigham Young, the Quorum of the Twelve, and the Latter-day Saint Investigation of the Mountain Meadows Massacre*, Leonard J. Arrington Mormon History Lecture Series, No. 12 (Logan, Utah: Utah State University Press, 2007), 20–25, 29–31, and passim. [^]
2. Alexander, *Brigham Young, the Quorum of the Twelve, and the Latter-day Saint Investigation*, 5–7, 24, and passim. [^]
3. Alexander, *Brigham Young, the Quorum of the Twelve, and the Latter-day Saint Investigation*, 24–25, 29–31, and passim. [^]

Paul C. Gutjahr. *The Book of Mormon: A Biography*.
Princeton: Princeton University Press, 2012.

Reviewed by Tod R Harris

There is something of a paradox prevalent in academic religious studies: in order to consider a community and its traditions objectively, one should not be a member of that community; yet the only way to understand fully and appreciate and therefore faithfully report about the community is to be a member. Many times this contradiction leads to the unfortunate situation where “outsiders” do not report their findings objectively or accurately and thus disappoint those hoping for fair and informative treatment, and where the work of members attempting serious scholarly analysis of their own community is viewed with suspicion and distrust because of their perceived lack of objectivity. The state of affairs has improved in recent years with well-received work coming out of many of the communities themselves, particularly the Islamic community.¹ Mormon studies, unfortunately, often finds itself in a position where nonmember academics produce work that is incomplete, biased, or, in some cases, flat-out wrong, and where LDS scholars are not even invited to contribute.²

1. A notable case in point is the conference on the Qur'an convened by the School of Oriental and African Studies (SOAS) at the University of London every other year. I attended this conference in November 2011 and was deeply impressed by the high quality, thorough treatment, and objective nature of all the papers, whether given by Muslim or non-Muslim scholars. For a list of session topics and papers, see <http://www.soas.ac.uk/islamicstudies/conferences/quran2011/>.

2. In stark contrast to my experiences at SOAS was a session of the annual American Academy of Religion meeting I attended in November 2005, called “What the Study of Mormonism Brings to Religious Studies: A Special AAR Session Organized on the Occasion of the Bicentennial of Joseph Smith's Birth.” Though all presenters were noted biblical or religious studies scholars, I was very concerned about the lack of knowledge and serious study of the subject on the part of these luminaries in their field, most of whom at some point in their papers stated that they did not know much about Mormonism and then proceeded to say things that were unfounded, biased, or simply wrong. If these scholars had done the same thing in a session about

There are heartening signs of change for the better even here, though, one of them being the recent publication of *The Book of Mormon: A Biography* by Paul C. Gutjahr. This book, though short, is an engaging and generally positive overview of the origin and impact of the Book of Mormon by a serious non-LDS scholar. The book is part of Princeton University Press's Lives of Great Religious Books series, a series designed to "recount the complex and fascinating histories of important religious texts from around the world."³ Other volumes in the series include treatments of Exodus, Job, the Qur'an, the Baghavad Gita, and even Thomas Aquinas's *Summa Theologiae*. Though Latter-day Saints have long known that the Book of Mormon is an "important religious text," it is encouraging to see it considered as such by a prestigious American university. And if an LDS scholar could not have written *The Book of Mormon: A Biography*, then Paul Gutjahr is a particularly well-qualified non-Mormon writer.

Gutjahr is a professor of English, American studies, and religious studies at Indiana University Bloomington, where he researches and teaches courses in American literature and culture from 1640 to 1860, the history of the book in America, and American religious and intellectual thought. These interests have led Gutjahr to write extensively on the production of the English Bible in America, and much of this research is summarized in his earlier publication *An American Bible: A History of the Good Book in the United States, 1777–1880*. A book about the influence of the Book of Mormon on American religious thought and culture is an appropriate follow-up volume, and Gutjahr does an admirable job of presenting information that objectively informs non-LDS readers about "the book that gave the Church of Jesus Christ of Latter-day Saints its popular name" and in a way that is appreciative of the Church and its respect for the book as "the most important religious text ever to emerge from the United States" (10).

Buddhism or Islam or even medieval Christianity, it would have seriously damaged their professional credibility. Noted LDS scholars (including John W. Welch and John Gee) were also in attendance that day and shared my concern. For a list of papers and their presenters, see the listing for session A20-53 at http://www.aarweb.org/Meetings/Annual_Meeting/Past_and_Future_Meetings/2005/program_book.asp. There is other, more current evidence (besides Gutjahr's book) that the situation is improving, as for example the recent "Mormon in America" program on NBC's *Rock Center*. The Church's "Mormon Newsroom" blog called the program "evenhanded," though some aspects were also considered "insensitive" (see the KSL website, August 30, 2012, <http://www.ksl.com/index.php?nid=1016&sid=21931840>).

3. Princeton University Press website, July 18, 2012, <http://press.princeton.edu/catalogs/series/lgrb.html>.

Gutjahr demonstrates early in his book the kind of intuitive understanding of his subject—usually reserved for long-standing community members—with the clever structuring of his book. He arranges it around one of the central metaphors from the Book of Mormon itself: “Now we will compare the word unto a seed” (from Alma 32:28, which he quotes on page 1)—with each part reflecting the stages of a seed’s development. Part 1, “Germination,” discusses the emergence of the Book of Mormon. Chapter 1, “Joseph’s Golden Bible,” offers a concise but informative overview of the historical origins of the Book of Mormon that for the most part parallels the Church’s official account. Chapter 2 is a summary of distinctly non-LDS theories that try to explain the Book of Mormon. The title of this chapter, “Holy Writ or Humbug?” sets up the dichotomy Gutjahr explores. Despite the provocative ideas he presents, the tone of this part is generally positive and respectful to the Church’s perspective. As an example, Gutjahr states in his summary what he sees as one of Joseph Smith’s chief objectives: “Telling anyone who would listen, Joseph proclaimed that God had not only spoken to the ancient Jews of the Middle East; he had spoken to the ancient inhabitants of the Americas. More importantly, Joseph wished those around him to realize that God was still speaking, and in his inscrutable wisdom had chosen Joseph as the Prophet ordained to inaugurate a new biblical age” (37).

This last idea serves as an appropriate springboard to Part 2, “Budding,” and its first chapter, “Multiplying Prophets.” Gutjahr informs his readers that “absolutely central to any understanding of the religious power and influence of [the Book of Mormon] is the prophetic figure who ushered it into the world” (61). He then presents a fast-paced review of Joseph’s role in developing the Church that sprang up around the book he translated, first in Kirtland and then in Nauvoo, as well as a consideration of those who succeeded Joseph, particularly all the splinter groups that arose after Joseph was killed at Carthage jail. This chapter is notable for its account of “how each of these sects developed its own special relationship to the *Book of Mormon*” (69), which is a history many current LDS members may not be familiar with. The overview of the engagement of the Reorganized Church of Jesus Christ of Latter Day Saints (known as the Community of Christ since 2001) with the Book of Mormon is especially interesting.

The next chapter returns specifically to The Church of Jesus Christ of Latter-day Saints and provides an account of the development of the Church’s attitude toward and use of the Book of Mormon as it grew and expanded from a somewhat isolated community in the 1860s to an institution with worldwide influence and presence by the end of the twentieth century. And here again, Gutjahr provides a superb summary of a period and

perspective that may not be well known by most members of the Church as he charts the slow shift among LDS scholars and leaders from what can almost be seen as an avoidance of any kind of dependence on the book to the overwhelming emphasis of its importance to the mission of the Church today. He makes particular note of the work of Hugh Nibley on the scholarly side and of President Ezra Taft Benson on the ecclesiastical. As he prepares to enter the final phase of his overview of what he calls the “life” of the Book of Mormon (10), Gutjahr writes that President Benson is “perhaps most accurately described as a kind of culminating catalyst whose presidency served as a tipping point within the Church that propelled the Book of Mormon to the forefront of LDS consciousness” (109). He concludes that “since the 1980s the LDS Church has engaged its founding text with unprecedented energy and resources” (109).

The third and final part, “Flowering,” comprehensively presents the various ways the Church (and others) have in fact “engaged” the Book of Mormon and the ways in which the book, in turn, has exerted a wide-ranging influence. With his chapters “Missionary Work and the Book,” “Scholars and the Book,” “Illustrating the Book,” and “The Book on Stage and Screen,” Gutjahr again demonstrates the depth of his own research and engagement throughout this part with often fascinating treatments of the topics at hand. The chapter on missionary work is notable for its overview of the history of the various translations of the Book of Mormon, as well as its careful and accurate description of the process the Church uses to find and train translators and then support them in the work they do.⁴

“Scholars and the Book” reviews much of the work that Mormon apologists such as the researchers at FARMS (the Foundation of Ancient Research and Mormon Studies, subsumed into the Neal A. Maxwell Institute at BYU in 2006) and its affiliates have contributed to an understanding of the possible historical and cultural origins of the Book of Mormon, noting especially the geographic and anthropological work of John Sorenson and the linguistic and text critical studies of Royal Skousen. In a particularly sympathetic nod to an important perspective the Church has always maintained with regard to scholarly studies of the Book of Mormon, Gutjahr is careful to note that “Church leaders continue to emphasize that one’s relationship

4. I must confess to my own lack of objectivity regarding this point. As part of his research Dr. Gutjahr spent several days at Church headquarters in the summer of 2011, including almost an entire day with me. During that time I had the opportunity to explain the Church’s scripture translation process to him and demonstrate many of the tools and methods we use. Dr. Gutjahr has done a very nice job summarizing the torrent of information I presented him with that day.

to the *Book of Mormon* and the religious practice it engenders is based on personal revelatory confirmation and is primarily a matter of faith" (146).

Readers next get a look at the various ways artists have endeavored to portray the images and themes of the Book of Mormon throughout its history. Well-known works from painters such as Minerva Teichert and Arnold Friberg make an appearance, as well as important but obscure representations such as Michael Allred's comic book series, *The Golden Plates*. Here Gutjahr also provides interesting sociological commentary on the overtly Mesoamerican influence on much of Book of Mormon artwork and how that presentation continues to inform the way Church members think about the book, even while the Church itself now downplays overt connections.

The last chapter, "The Book on Screen and Stage," reviews the different attempts to portray Book of Mormon themes and images over the years through these mediums. Because most are not well known, even among members, the descriptions of movies based on the Book of Mormon is fascinating. Perhaps the most entertaining of these deals with Lester Park's 1931 independent film *Corianton: A Story of Unholy Love*, whose storyline is "based on a theatrical adaptation of an 1889 story published by B. H. Roberts" (180) and for which the Tabernacle Choir granted permission for use of its music. The rare stills Gutjahr located to illustrate his case provide fascinating context and are astoundingly graphic for a film from this era.

Gutjahr devotes his final pages to some of the major Book of Mormon pageants, "an art form that the LDS Church has kept alive since the early twentieth century" (188) and "an important part of Mormon culture" (189). He describes what is arguably the most famous of these, the Hill Cumorah Pageant, with a particularly poignant observation: "On the very hillside where Joseph reportedly first uncovered the golden plates, the Church has been able to recapture some of the dramatic magic of that discovery" (192). Gutjahr also includes here a short summary of the Broadway musical *The Book of Mormon*. Though arguably necessary for a thorough treatment of the subject at hand, by so doing he runs the risk of offending some LDS readers who may be jarred by the close juxtaposition of the Hill Cumorah pageant with a play most Latter-day Saints would consider blasphemous. The book concludes with two useful appendices: a descriptive chronology of significant English editions of the Book of Mormon and a comprehensive table of the translations of the Book of Mormon into other languages.

Despite all that is good about Gutjahr's book, there are some things slightly amiss that should be noted. The most serious of these has to do with the sources Gutjahr uses. Though the scholarship is generally solid, he does not make clear which of his sources are objective and which are negatively

biased (though that exercise itself might be seen as introducing bias into the treatments; still, LDS readers will recognize many of the sources as unsympathetic). For example, throughout his presentation of competing theories of Book of Mormon origins in “Holy Writ or Humbug?” (chapter 2), Gutjahr simply lists the theories and does not comment on the group presenting the theory. He discusses a 2008 study conducted by “a group of scholars at Stanford University led by Matthew L. Jockers” (50) that purported to produce evidence using “sophisticated linguistic computer modeling” (50) that Sidney Rigdon was the chief “author” of the Book of Mormon, yet does not cite the work done by Paul Fields and others published in the same journal as the Jockers study (the *Journal of Literary and Linguistic Computing*, January 2011 issue) that criticizes and largely refutes the conclusions of Jockers’s group.⁵ Other missteps include describing Joseph as the “self-proclaimed author” of the Book of Mormon (11), Joseph joining the Methodist church at about twelve years old (14), and Joseph giving details about the translation process that he in reality never gave (23–24).

Less serious but still noteworthy, there are a number of ideas and turns of phrase that let LDS readers know that the author, though trying hard, still lacks a true community insider’s view. For example, in describing Joseph’s and Oliver’s experience with John the Baptist during their translation work, Gutjahr notes that the angel told them that later they would be “ordained into a higher priesthood, which would allow them to baptize with the power of the Holy Ghost” (40). Not being familiar with the ordinance, he concatenates two distinct rites into one. A little later he describes the Book of Mormon as “Trinitarian in nature” (66) when numerous LDS theological treatises argue the Book of Mormon is in fact strongly anti-Trinitarian. As a final illustration, as he writes about the Corianton film described above, he notes that this episode made such good subject matter because otherwise “the stories that fill the *Book of Mormon* are almost entirely devoid of sex and romance” (182). Yet the story of the movie is liberally fabricated from a very short passage in the Book of Mormon that mentions Corianton’s indiscretion with the “harlot Isabel” (Alma 39:3). Faithful readers generally do not perceive passages of the Book of Mormon as being particularly salacious.

Finally, Gutjahr misses the opportunity to describe other media, such as literature, that take the Book of Mormon as inspiration, perhaps most notably Orson Scott Card’s Alvin Maker series (where Alvin is a thinly veiled

5. For more information, see <http://llc.oxfordjournals.org/content/early/2011/01/18/llc.fqq029.abstract> and <http://www.deseretnews.com/article/700169259/FAIR-Wordprint-analysis-and-the-Book-of-Mormon.html?pg=all>.

version of Joseph Smith) and his Homecoming series (where the plot of at least the first several books parallels the narrative in perhaps the first third of the Book of Mormon). Gutjahr indicates he wanted to include a chapter on the Book of Mormon and fiction but had a strict word limit so regretfully had to leave that topic out.⁶

Nevertheless, *The Book of Mormon: A Biography* is overall a delight. Non-LDS readers should find the book interesting enough to provoke them to learn more, and perhaps even to read the Book of Mormon itself. And yet, though this group (interested non-LDS readers) seems to be the intended audience, members of the Church will find enough new information (or at least information related to aspects of the Book about which they might not have thought or even been aware) to come away having learned something about their foundation scripture. In his overview of “Scholars and the Book” (chapter 6), Gutjahr makes a critical point: “For decades treatments of the book have largely fallen into two camps: Mormon education and apologetic texts and Evangelical works attacking the book’s veracity. The Book of Mormon has now emerged as a legitimate focal point of academic study” (151).

Gutjahr’s own book is a terrific example of a work typifying legitimate academic study, particularly as compared with most of the poor mistreatments of Mormon studies. It is balanced and engaging enough to give non-LDS readers a clear insight into what members consider a truly divine work and, perhaps more importantly, accurate and honest enough to satisfy LDS readers. The book admirably fulfills both the goal of the series of which it is part, as well as demonstrates the sentiment Gutjahr expresses in conclusion: “Not everyone may believe its contents, but fewer and fewer can continue to doubt the importance the [Book of Mormon] holds in American history and culture” (195).

Tod R Harris (who can be contacted via email at byustudies@byu.edu) is Manager of Scripture and Temple Translation for The Church of Jesus Christ of Latter-day Saints.

6. Email correspondence with Paul C. Gutjahr, June 14, 2012. Paul also writes, “I do think about writing an article about it [the Book of Mormon and fiction] for *BYU Studies*.”

Douglas J. Davies. *Joseph Smith, Jesus, and Satanic Opposition: Atonement, Evil, and the Mormon Vision*.
Farnham, England: Ashgate, 2010.

Reviewed by Steven L. Olsen

Douglas J. Davies is one of the most insightful and prolific scholars of Mormonism working today. He is a professor in the Department of Theology and Religion at the University of Durham, UK. Two of his earlier studies—*The Mormon Culture of Salvation* (2000) and *An Introduction to Mormonism* (2003)—analyze foundational aspects of Mormonism from an engaging academic synthesis of history, religious studies, cultural studies, literary studies, theology, and philosophy. The breadth and depth of his scholarly background enable him to address new and crucial questions, yielding remarkable insights. For example, *The Mormon Culture of Salvation* proposes that the plan of salvation is Mormonism’s “doctrine of doctrines,” its most far-reaching theological innovation.

Davies’s most recent study on Mormonism develops this thesis to a greater degree. It claims that the doctrine of the plan of salvation is as fundamental and distinctive to Mormonism as the Trinity is to the rest of Christianity. Furthermore, the plan of salvation anchors a comprehensive Mormon worldview, influences Mormon religious thought and life more than any other single doctrine, and defines the essential identities of Jesus, Satan, and Joseph Smith.

Davies pursues this complex thesis through an in-depth examination of Latter-day Saints’ understanding of three paradigmatic events: “A pre-mortal council in heaven, the passion of Jesus in Gethsemane and the first vision of Joseph Smith” (1). This thesis unfolds along various lines of inquiry, as reflected in the focus of the book’s dozen chapters: the Christology of early Mormon America; the Mormon identification with biblical Israel; Mormon millennialism, especially the extreme version authored by the schismatic leader James J. Strang; the plan of salvation and the Godhead; the mortal mission of Jesus Christ; the respective identities of Jesus, Joseph Smith, and Lucifer; Christ’s Atonement in relation to the plan of salvation; the problem of evil in Mormonism; Mormon notions of kinship and family;

the tripartite heaven of the Latter-day Saints; the nature and role of the Holy Ghost; and the role of sacrifice in mortality and eternity.

Within these general headings, Davies examines a dizzying array of individual topics, including the translations of the Book of Mormon and the Book of Abraham, the nature of revelation, succession of leadership in the Church, the character of Joseph Smith, personal piety and other core Mormon values, Mormon temple rituals, LDS art and iconography, the structure of Mormon social life, the transformation of Mormon religious identity over time, language and the expression of Mormon culture, patriotism and politics among the Latter-day Saints, the management of formal group boundaries, changing concepts of ethnicity and race, the use of speculative disciplines (theology and philosophy) by Latter-day Saints, Joseph Smith's martyrdom, Mormon notions of the human body, Adam-God controversies, patriarchal blessings, and notions of priesthood and power, to name a few. The book's bibliography is as extensive and eclectic as are its contents.

I applaud Davies's scholarly ambitions and have sympathy for many of his general perspectives. His insights into the cultural, theological, and metaphysical implications of such foundational doctrines as the plan of salvation are worthy of more serious consideration by Mormon scholars generally.

That said, I find this particular attempt unsatisfying because, while expansive, the study does not provide a systematic treatment of the innumerable "nooks and crannies" of Mormonism that are affected by the plan of salvation. Davies certainly gives us much more than a simple lexicon of related doctrines and practices. His analysis of the parts, however, is too disparate to provide a compelling appreciation of the whole. To borrow an analogy from the textile industry, Davies's present study may have been more successful with fewer individual strands and more overall patterning.

To illustrate the problematic nature of the study, I focus in detail on perhaps its paradigmatic chapter, whose title, "Joseph, Jesus and Lucifer," reflects that of the book as a whole. In its opening paragraph Davies declares that this chapter will "explore the mutual identity of these three agents in their agonistic achievement of salvation" (109). While it appears that Davies intends to explore how these identities have been formed and transformed over time, he does not clearly define what he means by "identity." My own academic training suggests that "identity" distinguishes the role, status, and significance of a person or subgroup in society. Identity is thus more permanent than "personality," more comprehensive than "character," and at the same time informed by the cultural context of which the person or group is a part. So when a chapter focuses on identity, I expect insights into

how Mormons have defined and used the respective identities of (1) Joseph Smith (and his successors) as “prophet,” “seer,” “revelator,” “apostle,” “president,” and so on; (2) Jesus as “Christ,” “Messiah,” “Jehovah,” “Son of God,” “Lamb of God,” and so on; and (3) Satan as “Lucifer,” “devil,” “serpent,” “Perdition,” and so on. A more rigorous treatment of these respective cultural roles would have done much to achieve better the lofty objectives of this chapter and of the entire book. While the chapter provides a variety of insightful details, it does not always deliver on its scholarly promises. I cite a few examples.

The second paragraph of the chapter opens with the evocative declaration, “As for Jesus, his identity is ever reconstructed, era by era” (109). Rather than demonstrating how Mormons have reimagined Jesus “era by era” since 1820, the chapter instead identifies disparate sources—primarily art and text—through which Jesus has been depicted by Mormons over the years. Further on, instead of evaluating the various roles for which Joseph Smith claimed divine authority and through which he attracted endless controversy, Davies considers several qualities of his personality (111–15). However, other Mormon scholars have examined Joseph’s personality in greater depth. In addition, Davies draws conclusions about Joseph’s psyche from words that the Mormon Prophet attributes to God. Because Davies does not apply in this case the anthropological ethic of “letting the natives speak for themselves,” he implies that Joseph suffers from the more serious character flaw of systematic and structural misrepresentation. Because Davies does not work out the ramifications of this implication, his characterization of the Mormon Prophet remains unclear.

Davies further explores Joseph’s identity by citing his occasional use of code names for himself and others (115–16). While this practice is evocative, Davies uses it to reveal nothing further about Joseph’s identity beyond the ambiguous conclusion that “Joseph explored language in several forms” (116). Davies’s next point about Joseph’s identity involves the antiquity of the Book of Abraham (116–18). Pursuing this question, he relies primarily on a single modern source that questions the authenticity of Joseph’s translation. Davies implies once again that Joseph misrepresented his prophetic gifts but avoids the explicit treatment of the alleged character flaw. In a section titled “Joseph’s Temptations,” Davies summarizes Joseph’s encounter with Satan immediately prior to the First Vision (118–21). The analysis says little about the identity of either Joseph or Satan as revealed in the encounter, except to draw potential parallels between the language and imagery of Joseph’s various accounts of the event and other possible, primarily biblical, sources. While merely observing that Smith’s varied accounts “show how Joseph’s religious thought was developing” (122), this study does not use

such empirical sources to illuminate how Joseph's identity was evolving, to offer a thorough discussion of the dynamics of Mormon thought, or to systematically reconstruct the evolution of the plan of salvation as exemplified in Joseph's own revelations.

While similar disappointments do not pervade all other chapters of Davies's book, I found myself repeatedly wishing for a more consistent, coherent, and systematic treatment of the stated thesis. The book contains many individual insights that justify reading it, and on these grounds I can recommend it to others. For me, its greatest insights come from the disciplines of theology and philosophy; less satisfying were those from cultural, literary, and historical studies. My familiarity with Davies's earlier works created for me high expectations that were not met with this present effort, though I have no doubt that such a perceptive scholar will produce even more cogent studies in the future.

Steven L. Olsen (who can be contacted via email at byustudies@byu.edu) received his PhD in cultural anthropology from the University of Chicago. He has presented and published widely in the fields of Mormon studies and museum studies. He has also served in leadership positions of such professional organizations as Utah Humanities Council, American Society of Church History, Western Museums Association, Utah State Office of Museum Services, and Charles Redd Center for Western Studies.

Stephen C. Taysom. *Shakers, Mormons, and Religious Worlds: Conflicting Visions, Contested Boundaries*.
Bloomington: Indiana University Press, 2011.

Reviewed by Matthew J. Grow

In *Shakers, Mormons, and Religious Worlds*, Stephen Taysom, an assistant professor of religious studies at Cleveland State University, has written an intriguing and theoretically rich monograph that compares Shaker and Mormon approaches to religious identity formation and boundary maintenance. Although Shakerism dwindled as a religious movement in the twentieth century, Shakers and Latter-day Saints in the nineteenth century stood out as examples of successful new movements on the American religious scene. Taysom's comparison of Latter-day Saints and Shakers places him within a select group of scholars, most notably Mario DePillis, Lawrence Foster, and Spencer Fluhman, who have studied Shakers and Mormons together and placed them within the scholarly world of communal studies.¹ Even though the United States has long been identified in the popular imagination as a land of rugged individualism and free market capitalism, communalism has been a consistent theme throughout American history and has manifested itself in a dizzying array of groups. Taysom's book points to the advantages of integrating Mormonism further within the framework of communal studies.

Taysom, who originally wrote this book as a doctoral dissertation at Indiana University under noted Shakerism scholar Stephen Stein, drew not only from the literature on American communalism but on a broad range of theoretical and scholarly works. He invokes insights from disciplines such as ritual studies and memory studies and from scholars such as Victor Turner, Jonathan Z. Smith, Thomas Tweed, Mary Douglas, and Michel Foucault. While the heavy emphasis on theory contributes to the book's strengths, it may also limit the volume's accessibility for many readers. Nevertheless, when it comes to understanding the question of nineteenth-century Mormon identity and interactions within the larger culture, Taysom's book should be required reading alongside Armand Mauss's study of the same

question for the twentieth century, *The Angel and the Beehive: The Mormon Struggle with Assimilation*.²

Taysom divides his book into four lengthy chapters, plus a brief introduction and conclusion. The first two chapters examine the connections between Shaker and Mormon ideas of sacred space and group identity formation. In the first chapter, “The Shakers in the World: Walls and Bridges,” Taysom explores the apparent paradox that in their villages Shakers simultaneously erected strong boundaries between themselves and the world but also remained deeply involved in the outside world by frequently hosting visitors and by selling their renowned products. Taysom resolves this apparent gap between rhetoric and action by arguing that the Shakers interacted with two conceptual worlds: “the one they believed was totally evil, incredibly dangerous, and dominated by supernatural forces, which I call the *culturally postulated world*, and the world that they experienced in their everyday lives, which I call the *experienced world*” (4). Such a distinction suggests how Shakers (and many other religious groups) can both denounce in harsh rhetoric the outside world and yet extensively engage with it.

In chapter 2, “Imagination and Reality in the Mormon Zion: Cities, Temples, and Bodies,” Taysom insightfully explores the evolving Latter-day Saint ideas of the meaning of Zion. In the early 1830s, Latter-day Saints imagined the creation of a center community of gathering anchored by a temple in Jackson County, Missouri, but were unable to completely build such a community before their expulsion. For the rest of the 1830s, the Saints longed for a return to Jackson County, until they turned their attention to their new community of Nauvoo, Illinois. Taysom persuasively argues that Nauvoo, with its new temple under construction, soon came to be seen as Zion by Latter-day Saints. However, just as in Jackson County, Latter-day Saint power led to a crisis and expulsion.

Nevertheless, even before the Saints left Nauvoo, their conception of Zion had begun to shift from a communal expression to an individual one. The temple rituals introduced in Nauvoo, Taysom suggests, created a new definition of Zion, in which the “highest expression” of Mormon sacred space was no longer a “holy city with a temple at its center” but an “individual within the temple.” Salt Lake City was never Zion in the same sense that Nauvoo or Jackson County had been Zion, “a single sacred city with a single central temple.” Rather, Taysom writes, the Mormon view of Zion came to be a “decentralized vision of multiple temples spread throughout the world where individual Mormons could go and receive the sacred rituals” (93). Thus boundaries were not centered on an actual city but within the symbolic boundaries of temple covenants, the temple garment, and the

individual Latter-day Saint. Taysom thus places the transition away from an actual, physical Zion to a symbolic Zion much earlier in Latter-day Saint history than other scholars.

In chapter 3, “Godly Marriage and Divine Androgyny: Polygamy and Celibacy,” Taysom compares Shaker and Mormon conceptions of gender and marriage. Notwithstanding the diametrically opposed practices of Latter-day Saint plural marriage and Shaker celibacy, “the structures motivating those behaviors are nearly identical,” as both Mormons and Shakers hoped “to behave in ways that imitated God” (100). Latter-day Saints believed in an embodied and married God, while the Shakers “held a view of an androgynous God that transcended all physicality” (101). Celibacy and plural marriage functioned differently, though, in their involvement in boundary maintenance and creation; while both were highly visible markers of religious identity, nineteenth-century Americans disdained Latter-day Saint plural marriage (which could also be legislated against, unlike celibacy) to a much higher degree, contributing to a series of crises between the Saints and the nation.

In chapter 4, “Boundaries in Crisis,” Taysom compares two episodes of crisis: the Shaker Era of Manifestations of the late 1830s and the Mormon Reformation of the mid-1850s. He argues that Mormon leaders created a crisis in the Reformation, while rank-and-file Shakers reacted to a genuine crisis in the Era of Manifestations, a period of intense visionary experiences. The Reformation, Taysom suggests, arose during a “prolonged period of peace without the tension that they had come to expect” (152). Taysom correctly paints the Reformation as primarily driven from the top, as leaders used fiery rhetoric and rituals (including rebaptism, public confessions, and the suspension of the sacrament) to encourage rededication within Latter-day Saint communities. Nevertheless, he overstates the case about the Mormon period of peace in the mid-1850s; rather than “too much tranquility,” Latter-day Saints in the mid-1850s faced ongoing disputes with federal officials and American Indians in Utah Territory, severe droughts, and the national uproar over plural marriage, which was publicly announced in 1852. In addition, I believe that Taysom imputes too much consciousness to Mormon leaders in the project of boundary formation, suggesting that they “had to find new crises to replace those that they had successfully managed and escaped” (170).

According to Taysom, nineteenth-century Latter-day Saints relied on an “*episodic crisis-driven tension model*,” while Shakers adopted a “*stable high-intensity moderate-risk tension model*” (199–200). He means that Latter-day Saints chose boundary markers that drew intensely negative responses from the larger culture, leading to crises and to an eventual shifting and

renegotiation of the original boundary markers. By contrast, Shakers' actions drew sufficient negative responses from the larger culture to define the Shakers as outsiders but not strong enough to threaten the movement as a whole. Taysom thus examines the question of identity formation in nuanced terms and is sensitive to historical trends and particular situations but is also bold enough to see larger patterns that extend beyond the individual case studies of Latter-day Saints and Shakers. His approach should be useful to scholars of other new religious movements in understanding the dynamics of identity formation and boundary creation and should be of interest to Latter-day Saint scholars in placing nineteenth-century Mormonism in a new theoretical model.

At times, though, as with his analysis of the Mormon Reformation, his theoretical model seems to drive his analysis, and many readers will find his theoretical approach (though written in clear, logical prose) to be challenging. Nevertheless, *Shakers, Mormons, and Religious Worlds* establishes Stephen Taysom as an insightful historian of the Latter-day Saint experience and will shape our understanding of how Latter-day Saints understood their relationship with the broader world.

Matthew J. Grow (who can be contacted via email at byustudies@byu.edu) is Director, Publications Division, Church History Department, The Church of Jesus Christ of Latter-day Saints. He received a BA from Brigham Young University in history and an MA and PhD in American history at the University of Notre Dame. He is the author of *"Liberty to the Downtrodden": Thomas L. Kane, Romantic Reformer* and coauthor, with Terryl L. Givens, of *Parley P. Pratt: The Apostle Paul of Mormonism*.

1. Mario S. DePillis, "The Development of Mormon Communitarianism, 1826–1846" (PhD diss., Yale University, 1960); Lawrence Foster, *Religion and Sexuality: Three American Communal Experiments of the Nineteenth Century* (New York: Oxford University Press, 1981); Lawrence Foster, *Women, Family, and Utopia: Communal Experiments of the Shakers, the Oneida Community, and the Mormons* (Syracuse, N.Y.: Syracuse University Press, 1991); J. Spencer Fluhman, "Early Mormon and Shaker Visions of Sanctified Community," *BYU Studies* 44, no. 1 (2005): 79–110. [△]

2. Urbana: University of Illinois Press, 1994. [△]

Reid L. Neilson. *Exhibiting Mormonism:
The Latter-day Saints and the 1893 Chicago World's Fair.*
Religion in America Series.
New York: Oxford University Press, 2011.

Reviewed by Marian Wardle

There is a natural and overwhelming curiosity to know what manner of creature a real live flesh and blood Mormon is,” wrote an 1893 reporter for the *Chicago Daily Tribune*, quoted by Reid Neilson in his study of the participation by the LDS Church at the 1893 Chicago fair (131). Neilson is a scholar of Mormon religious history and current managing director of the Church History Department of The Church of Jesus Christ of Latter-day Saints. He convincingly argues that this participation with the larger world community helped Church leaders understand how they could improve the Church’s public image. He sets forth the 1893 fair as a turning point. In representing itself, the Church began to deemphasize its polarizing doctrinal differences and emphasized its cultural contributions instead.

In the last few decades, much has been written about the Chicago World’s Columbian Exposition, the international fair that was organized to celebrate the four hundredth anniversary of Columbus’s discovery of America.¹ It occupied six hundred acres on the banks of Lake Michigan, attracted 27.5 million visitors, and housed nearly sixty-five thousand exhibits from all over the world.² Dubbed the “White City” because of its many elaborate temporary white buildings made of plaster in the style of French Beaux-Arts architecture, the exposition set the standard of American urban planning and civic architecture for decades. Recent scholarship exposes the defining role of the national ruling establishment—primarily of northern European descent—in the organization of the fair. These elites, argues Robert Rydell, envisioned themselves at the apex of human development and the helm of developing civilization.³ Very little recent scholarship, however, has addressed the Mormon presence at the fair. Indeed, apart from period sources, Neilson relies on Gerald Peterson’s 1974 master’s thesis, “History of Mormon Exhibits in World Expositions,” for an overview of LDS participation at world’s fairs from 1893 through 1967. Neilson’s volume adds to the body of scholarship on Mormonism by addressing a previously neglected subject.

Short on information about the fair in general and long on facts regarding Mormon cultural history, Neilson's study seemingly addresses contemporary scholars of religion, to whom his many citations of period references in LDS publications will introduce new sources. At the same time, the stimulating chapters on the performances of the Tabernacle Choir at the fair and B. H. Roberts's controversial exclusion from the World's Parliament of Religions will prove fascinating to the general educated LDS reader.

Neilson sets up his argument by providing a history of the Church's participation in the creation of its own public image, beginning in the 1830s, initially through proselytizing efforts that led to an often-negative perception of Mormonism. He then launches into his account of LDS participation at the Chicago fair and its impact on a more sympathetic public assessment of the Church. He concludes with a brief summary of the Church's participation in later world's fairs, through 1934, to demonstrate further the importance of the 1893 Chicago experience in molding future efforts in public relations. According to Neilson, the World's Columbian Exposition of 1893 and the 1933–34 Century of Progress International Exposition, also held in Chicago, act as “bookends to tell a larger story of the church's accommodation and assimilation into the larger American religious mainstream” (207).

In his introduction, Neilson summarizes LDS participation in world's fairs. Noting that much has been written on nineteenth-century popular representations of Mormons, he finds that “much less has been written on how the Latter-day Saints themselves were participants in the construction and contestation of their own image in America” (6). The ensuing chapters of the book are his efforts to meet that need.

The first and longest chapter, on the history of Mormonism's self-representation, largely through missionary work, from 1830 to 1892, gives a history of the Church's negative reputation based on alienating doctrines that emphasized theological differences. Neilson divides the Church's pre-1893 self-representation into two periods: the founding period (1830–46), which was a defensive and reactive time of pamphleteering; and the pioneer period (1847–90), which was a period of aggressive use of print media by the Church to represent itself by emphasizing doctrinal differences over similarities. This latter period included the 1852 public announcement by the Mormons that they were openly practicing polygamy. Neilson views this period as “a public relations disaster” (46).

In chapter 2, Neilson gives a history of Utah's participation as a territory at the Columbian Exposition. Utah would not be granted statehood until 1896, three years after the fair. As Neilson points out, the Chicago fair occurred three years after President Wilford Woodruff issued the 1890

manifesto prohibiting polygamy. At this juncture, according to Neilson, the Church was looking for public relations opportunities in its bid for statehood. The Chicago fair provided a chance to showcase the territory's achievements and lessen national prejudice. Ultimately, the territory produced the best mineral exhibit, winning thirty medals along with thirteen awards for its agricultural exhibition. The Utah Building attracted crowds with its display of a fifteen-hundred-year-old Native American mummy from a cliff-dweller tomb.

Chapter 3 discusses the involvement of LDS female leaders of the Church's Relief Society, Young Ladies' Mutual Improvement Association, and Primary in the World's Congress of Representative Women held on the fairgrounds. These women had already won respect through their prior participation in meetings of the National Council of Women and the Woman Suffrage Association Convention. In Chicago they continued to dispel prejudicial stereotypes and win the respect of their cohorts in the cause of national and international feminism. Neilson writes that the Church's male leadership was "thrilled with their success" (100).

The Church leaders had difficulty approving the Tabernacle Choir's journey to Chicago to perform at the fair. As discussed in chapter 4, this difficulty was largely due to the financial burden of transporting such a large group. It would be the choir's first out-of-state performance and the beginning of the Church's most successful public relations venture. Neilson's account of the choir's participation at the Grand International Eisteddfod—a choir competition staged by the Welsh-American National Cymmrodion Society of Chicago—is fascinating. The choir's performances at the fair and in cities along their train route began a demand for their performances that continues to this day, validating Neilson's thesis that the Church's participation at the Chicago fair began a public relations effort to emphasize Mormon cultural contributions.

Neilson's report on an episode of LDS involvement at the White City comprises chapter 5. From my perspective, this is his most captivating and well-written chapter. The story of B. H. Roberts at the World's Parliament of Religions in Chicago is illuminating and intriguing, and Neilson documents it with a wealth of period sources reporting on the parliament. The chapter details Mormon exclusion, then inclusion, and exclusion again from representation at the parliament. As reported by Neilson, the American Protestant organizers invited over three thousand leaders of Christian and non-Christian religions worldwide to present papers in Chicago. The LDS Church was the only American religious group not invited. B. H. Roberts, a member of the Church's Quorum of the Seventy, pushed for LDS involvement and was given permission to present a paper. At the last minute,

however, he was relegated to a small side room. He withdrew his paper in protest and helped publish his unfair treatment in the national press. This incident came on the heels of the success enjoyed by the Tabernacle Choir. According to Neilson, the juxtaposition of the two events can help scholars understand the limits of religious tolerance in nineteenth-century America.

The last chapter of the book summarizes LDS participation in ensuing world's fairs as an extension of the public relations effort begun in Chicago. Neilson asserts that dating from its participation in the 1893 fair, the Church stressed its cultural contributions over its polarizing beliefs. He points out the paradox of Mormonism being mainstreamed into American culture as a religion because of its nonreligious achievements (178). The book fittingly ends with a report of successful Mormon involvement in the 1933–34 Century of Progress International Exposition, again in Chicago, where the seventy-six-year-old B. H. Roberts was invited to present two papers at the First International Congress of the World Fellowship of Faiths. Roberts died two weeks later.

In the end, Neilson acknowledges that, in agreement with the national mainstream, Mormons believed in a trajectory of progress, but he missed an opportunity to address the dichotomous position of Mormons in this regard. Included in the notions of progress and advancement promoted at the Columbian Exposition were theories of evolutionary and racial progress, points discussed in other scholarship in recent decades. Standing apart from the exhibition halls and the auxiliary world's congresses of the "civilized" nations was an area of the fair known as the Midway Plaisance. There, exhibitions of and performances by "primitive" and "exotic" peoples created an "alliance between entertainment and anthropology."⁴ Contemporary beliefs in evolutionary racial progression were put on display in a carnival-like atmosphere. Mormons were at least indirectly complicit in these ideas, as witnessed by Neilson's reports of the popularity of the exhibition of a Native American mummy in the Utah Building and Utah visitors' enjoyment of the Midway Plaisance, where they viewed tribal dances, harems, and displays of and by tribal peoples.

Mormon identity with progressive evolution, along with the successes of the Tabernacle Choir and the LDS women's auxiliary leaders in Chicago, aligned Mormons with mainstream American culture. Yet their polarizing doctrines, especially the practice of polygamy, aligned them with the exotic. Just as fairgoers enthusiastically viewed the primitive peoples displayed on the Midway, they were curious to see a "real live flesh and blood Mormon." A discussion of the collusion of Mormons—a marginalized, even exotic people—with 1890s secular theories of progress could have deepened and strengthened Neilson's analysis of Mormon acceptance through cultural

mainstreaming and nonacceptance through doctrine. It would also have made a fascinating contribution to recent scholarship on world's fairs.

Overall, Neilson adds an interesting piece to a growing body of scholarship on Mormonism and makes his case for a change in the Church's public relations program after the 1893 Chicago Fair. Along the way, he provides an intriguing account of little-known episodes of Mormon participation at the fair.

Marian Wardle (who can be contacted via email at byustudies@byu.edu) is Curator of American Art at the Brigham Young University Museum of Art and an adjunct member of the art history faculty at BYU. She is author of *Minerva Teichert: Pageants in Paint* (BYU Museum of Art, 2007) and editor and coauthor of *American Women Modernists: The Legacy of Robert Henri, 1910–1945* (Rutgers University Press, 2005) and *The Weir Family, 1820–1920: Expanding the Traditions of American Art* (University Press of New England, 2011).

1. See, for example, Robert Rydell, *All the World's a Fair* (Chicago: University of Chicago Press, 1984), 38–71; Robert Rydell, "Rediscovering the 1893 Chicago World's Columbian Exposition," in *Revisiting the White City: American Art at the 1893 World's Fair* (Washington, D.C.: National Museum of American Art and National Portrait Gallery, Smithsonian Institution, 1993), 19–61; and Norman Bolotin and Christine Laing, *The World's Columbian Exposition: The Chicago World's Fair of 1893* (Urbana: University of Illinois Press, 2002). [^]
2. Bolotin and Laing, *World's Columbian Exposition*, 4, 11. [^]
3. See Rydell, "Rediscovering," 25, 53–56; Rydell, *All the World's a Fair*, 63–71. [^]
4. Rydell, *All the World's a Fair*, 63. [^]

Alonzo L. Gaskill. *Sacred Symbols:
Finding Meaning in Rites, Rituals, and Ordinances.*
Springville, Utah: Cedar Fort, 2011.

Reviewed by Herman du Toit

The power and viability of symbolism is often lost on the American psyche and also finds mixed reception by American LDS audiences. It is as if the essential pragmatism of the American spirit militates against the very appearance of ambiguity in all its forms. Symbolism and metaphor comprise the tools-in-trade of skillful meaning making and the explication of profound truths in both word and image. Alonzo Gaskill, a professor of Church history and doctrine at Brigham Young University, makes the observation that Latter-day Saints do not always like symbolism. He references Truman Madsen, who recalled: “I had a built-in hostility to ritual and to symbolism. I was taught by people both in and out of the Church—with good intention, I have no doubt—that we don’t believe in pagan ceremony: we don’t believe in all these procedures and routines; that’s what they did in the ancient apostate church; we’ve outgrown all of that” (5). As a consequence, Gaskill claims, in the words of LDS scholar Suzanne E. Lundquist, that we Latter-day Saints “have become an asymbolic society, and, as a result, we do not understand the power of our own rites of passage” and make little effort to “understand the meanings of our own rituals or what ritual behavior implies.” Lundquist adds that we fail “to comprehend or internalize the messages contained in ritual symbols.”¹

The motivation for this book came after Gaskill had delivered a lecture on the interpretation of symbols in art and was approached by one of the attendees, who complained that “she had always seen things quite literally and thus had ever struggled to find symbolic meaning in the ceremonies and symbols of the Church and its ordinances or rituals. . . . Almost in a spirit of pleading she asked, ‘How can I get myself to see the symbols, and find meaning in

1. Page 2, quoting Suzanne E. Lundquist, “Native American Rites of Passage: Implications for Latter-day Saints,” in *By Study and Also by Faith*, ed. John M. Lundquist and Stephen D. Ricks, eds., 2 vols. (Provo, Utah: FARMS, 1990), 1:441–43.

them?” (2). Gaskill says it was this singular encounter that spurred him on to write a book that would help this sister and others like her to find personal meaning in the rites and rituals of the restored gospel.

Gaskill teaches world religions and Christian history and is the author of numerous articles and books, including *The Lost Language of Symbolism—An Essential Guide for Recognizing and Interpreting Symbols of the Gospel*. His most recent offering is abundantly supported with copious endnotes and an extensive bibliography that speak to his broad knowledge of what symbolic acts, gestures, covenants, and ritualistic dress mean in both his own faith and in the faiths of others. However, his text is never dry and uninteresting; he writes from the perspective of “an enthralled layman” (x, quoting Madsen). Gaskill’s text is intended for an LDS audience and begins with an overview of how people function as patrons, actors, or officiators in the rites being enacted in sacred performances—roles that have been echoed down the ages. He provides the example of the narratives of the mystery plays of medieval times in which the audience was invited to identify with the action of the play and to ask, “What divine or sacred knowledge does this narrative seek to reveal to me?” (93). He makes the point that these stories being acted out—the Creation and the Fall—are *our* story, even the story of humankind. Gaskill is ever careful of not speaking directly to, or in too a revealing manner of, the sacred practices of the LDS temple.

In a chapter dealing with initiation rituals, Gaskill reveals how the practices of baptism, clothing, washing, anointing, and naming are widespread throughout the Christian world and how they have been practiced by various sects over the centuries. Here again a wealth of information is contained in the endnotes to this chapter for the serious reader with desires for more in-depth research. Turning to ordination rituals, Gaskill quotes from various sources, both ancient and modern, confirming that the “imposition of the hand is almost universally attested as the principal ritual gesture of ordination”² and, as we read in Doctrine and Covenants 36:2, that the laying on of hands can symbolize “transmission of power from on high” (76). Gaskill gives a fascinating account of the liturgical role of women in the early Christian church. According to numerous references, women began serving in the early Christian church as “deaconesses” from the early second century. He notes that their responsibilities included visiting other sisters in their homes to teach them the gospel, and washing and anointing the bodies of female candidates who had come forward to be baptized. These female deaconesses were not ordained to the priesthood

2. Page 76, quoting Paul F. Bradshaw, *Ordination Rites of the Ancient Churches of the East and West* (New York: Pueblo, 1990), 46.

but, as one early source noted, were “appointed” to serve (79, 80). These women symbolized the feminine aspects of the divine and represented “the handmaiden of the Lord” by the service they rendered. Gaskill notes from early Catholic liturgical documents: “The deaconess’s role during the rituals was to quietly sit by until someone needed her service. Her role or position of responsibility was not for personal gain or aggrandizement. She played no part but servant. Consequently she is as Christ, who patiently waits upon us as a servant, in that all that He does on our behalf is evidence of His desire to serve and to save.”³

Gaskill goes on to show how pervasive the uses of clothing rituals are in the Christian church from the earliest times. Sacred vestments were a standard feature in ancient Israel’s temple worship, including the donning of aprons, ephods, head coverings, sashes, and robes as noted in the book of Exodus and other early liturgical writings. Gaskill devotes a substantial portion of his text to explaining how these symbolic elements become part of covenant-making rituals that often include oath making, tokens, and passwords. He concludes his study with an overview of marriage rituals and makes the overarching observation that “from a Christian perspective, all rites, rituals, and ordinances of the Gospel are Christocentric. Their primary purpose is to draw participants unto Christ, and to place them in a covenant relationship with Him. Beyond their salvific purpose, Christian rituals are also designed to direct the patrons’ attention toward Christ through the symbolism they employ” (271).

In overview, Gaskill’s book is insightful, highly informative, and a much-needed text in these times of encroaching materialism and pseudo-religiosity. The text is lucid, and the endnotes to each chapter provide much additional information for the serious reader. Perhaps Gaskill could have given a little more prominence and explanation to the operation of typology within the lexis of symbolism. In the present text, the term is accurately defined in the endnotes as a branch of symbolism where a symbol (the “type”) is fulfilled in someone or something else (the “antitype”), an example being the Pascal Lamb and the crucified Christ (25 n. 35). However, the use of typologies in scriptural symbolism is so pervasive and so profound that it warrants greater attention in a study of this nature. Also, a little more consideration of metaphor as a powerful symbolic tool is also warranted. In a literally minded (and less literate) society, the power of metaphor is poorly understood and often neglected in visual and textual forms of discourse.

3. Page 85, paraphrasing Mary Lawrence McKenna, *Women of the Church: Role and Renewal* (New York: P. J. Kennedy, 1967), 180.

Gaskill's book contributes to Mormon literature in providing a much-needed guide to those who struggle to find meaning in sacred symbols that are often taken for granted by Latter-day Saints in their religious observances. It also alludes to a major deficit in our understanding and use of these tropes in our daily discourse.

Herman du Toit (who can be contacted via email at byustudies@byu.edu) is an independent artist and scholar. He retired as Head of Museum Research at Brigham Young University Museum of Art in Provo, Utah, in 2011. He has enjoyed an extensive career as an art educator, curator, administrator, critic, and author, both locally and abroad. He is a former head of the Durban Art School and founding director of the Cecil Renaud Art Gallery at the former Durban Technical Institute in South Africa. He holds postgraduate degrees in Art History and Sociology of Education from the former University of Natal. At Brigham Young University he was awarded a J. Paul Getty Fellowship for his PhD study of interpretive practices at some of America's leading art museums.

W. Paul Reeve and Michael Scott Van Wagenen, eds.
*Between Pulpit and Pew:
The Supernatural World in Mormon History and Folklore.*
Logan: Utah State University Press, 2011.

Reviewed by Curtis Ashton

In an address to a joint meeting of the Utah Historical Society and the Folklore Society of Utah in 1991, folklorist William A. Wilson applauded the two organizations for their cooperation over the previous twenty years and then urged even greater cooperation between history and folklore in Utah over the next twenty years.¹ *Between Pulpit and Pew* serves as one benchmark for measuring just how seriously a rising generation of historians have taken Wilson's challenge. The editors, Paul Reeve and Michael Van Wagenen, are firmly planted in their chosen discipline, each with an impressive start to developing careers that explore contributions to American history not only of Mormon-Americans but also of Mexican-Americans, Native Americans, and African-Americans. With this work, however, these authors, and the four others they have gathered around them, demonstrate their virtuosity in cross-disciplinary conversation. Throughout the book's eight chapters, the stated aim is to "take Latter-day Saint lore seriously and recognize it as an important component of Mormon history" (3). To accomplish this, the authors focused on accounts of the supernatural as meaningful historical evidence in the hope of discovering beliefs, attitudes, and values held by nineteenth- and twentieth-century Saints that cannot otherwise be easily elucidated. As the title suggests, the work focuses on the responsibility of individuals to incorporate the unique cosmological doctrines taught from the pulpit into the everyday behavior of members listening in their pews (11). By paying attention to stories circulating among Church members, the authors are free to explore the dynamic interplay between official Church doctrine and unofficial religious expression over time. The collection includes a foreword by folklorist Elaine Thatcher and a bibliography of primary and secondary sources for further research.

Following the introductory framing chapter from the editors are two chapters that explore a central doctrinal theme: the devil struggling to overthrow the work of the Lord. In "A Mormon Bigfoot," author Matthew

Bowman follows the story of Apostle David Patten's 1835 sighting of Cain from nineteenth-century accounts to retellings from the 1980s and 1990s. His analysis demonstrates a shift in the storytelling tradition and attitudes over time that brings the story cycle closer in line with mainstream American accounts of Bigfoot, eliding the overtly religious and especially racist overtones of earlier tellings. Paul Reeve's next chapter on Gadianton robber haunts in southwestern Utah continues the theme of a dynamic transformation of attitudes. The chapter shows that people's concern that evil forces actually inhabit specific places has not eroded over time but that ideas about the inherent evil of Native Americans as descendants of Book of Mormon robbers have eroded. Both Bowman and Reeve are able to leverage recent folklore student field collections in USU's Fife Folklore Archives and BYU's Wilson Folklore Archives to bring their arguments forward from the nineteenth century up to the end of the twentieth. What persists from these accounts is a core belief in the reality of evil forces at work against the Saints, even though the exact nature of evil's embodiment adapts to changing cultural attitudes.

Bowman's next essay deals with accounts of miraculous healing, specifically with raising the dead. His research connects the Mormon practice of healing through the laying on of hands to other evangelical religious traditions. However, he then documents an evolution in Mormon thinking that moves away from an evangelical kind of faith healing, which relies primarily on manifestations of the Holy Ghost, to healing for those with faith in divine priesthood power and authority. The supernatural miracle of healing or even raising the dead through the personal, charismatic power of the gifted healer became rationalized over time, so that within Mormon doctrine there are really two ideas simultaneously at work: God grants power to his servants to raise the dead, but he also allows his children to suffer and die according to the natural order of the world. Examples of priesthood holders who have tried to exercise their authority to reverse the natural order contrary to God's will always end tragically, warning all those who might try their hand at healing that they must do so only when priesthood can combine the will of God with the course of nature.

The theme of combining science with the miraculous continues in the next essay, where Van Wagenen traces an evolution of thinking about UFOs. Many of his examples of UFO sightings are drawn from outside of mainstream LDS beliefs, but he justifies these illustrations as part of Mormon folklore because of their foundations in Joseph Smith's "expansive cosmology" that includes life on other planets, quite unlike other Christian doctrines of his time (124). Indeed, the narrative of Smith's First Vision

could itself be interpreted as a manifestation of alien life forms visiting earth. Van Wagenen concludes the essay by celebrating Mormonism's "theological adaptability" as contributing to its enduring appeal including the present time.²

The next two essays discuss particular places in Utah. Kevin Cantera writes an account of believers in Utah County's Dream Mine, meant to produce gold just in time to save the Church from financial ruin. Alan Morrell focuses on the tale of the Bear Lake Monster, an unidentified large animal that was reported by prominent LDS leaders during the mid-nineteenth century. Both essays demonstrate how such tales cast Utah as a promised land filled with wonderful resources to bless the Saints. Cantera includes perspectives about the mine from a range of believers and nonbelievers. His reliance on personal communications and observations of an actual stockholders' meeting makes this treatment of his subject more like a folklorist's ethnographic perspective of belief as it is actually performed in the daily lives of individuals. In the case of the Bear Lake Monster belief cycle, Morrell shows how the monster transformed into a P. T. Barnum-type entertainment reminiscent of attractions further east. He does not, however, follow the cycle into contemporary arenas of performance. In fact, Elaine Thatcher responded to this essay in the foreword of the book by bringing readers up to date in the transformation of the Bear Lake Monster as a source of local pride and self-parody for tourist commodities and public festival.

The final chapter returns to the notion of miracles, this time the ability to walk on water. Author Stanley Thayne describes how the well-known American legend of walking on water became associated with Joseph Smith and was incorporated into Mormon folklore, mostly by non-LDS adherents. The essay illustrates the ease with which motifs from legend cycles can cross boundaries of time, space, and religious traditions.

The entire collection of essays should be applauded for its breadth of examples, its attention to a range of research methods, and above all for its willingness to accept narrative accounts from ordinary people as a legitimate window into the history of a people. I see students of folklore, American studies, Western studies, and Mormon studies all profiting from reading the collection, as well as anyone who desires to understand the rich cultural diversity within Mormon history and folklore.

Curtis Ashton (who can be contacted via email at byustudies@byu.edu) received his PhD from Indiana University-Bloomington in folklore. He has also received degrees

in anthropology, linguistics, and library science. He teaches courses in folklore, anthropology, and museum studies at Utah State University and Brigham Young University.

1. William A. Wilson, “‘Something There Is That Doesn’t Love a Wall,’” in *The Marrow of Human Experience: Essays on Folklore*, ed. Jill Terry Rudy (Logan: Utah State University Press, 2006), 44–61. [^]

2. An example of that adaptability can be found in President N. Eldon Tanner’s general conference address, “Warnings from Outer Space,” which framed Church doctrine in the context of a 1970s resurgence of interest in extraterrestrial life. Available at <https://www.lds.org/ensign/1973/01/warnings-from-outer-space?lang=eng>. [^]

The Tree of Life: From Eden to Eternity, edited by John W. Welch and Donald W. Parry (Provo: Neal A. Maxwell Institute for Religious Scholarship and Salt Lake City: Deseret Book, 2011).

One of humankind's most sacred and abiding symbols is the tree of life. From earliest recorded religious belief, that singular image encompassed the sense of our humanity, rooted deeply in this earthly life with branches stretching outward, heavenward, in hope of the divine. From the Garden of Eden to Lehi's dream, tree of life imagery is particularly evocative within Mormonism, and many contributors to this book are Latter-day Saints writing from scholarly and religious points of view. The tree likewise takes a central place in the development of various human belief systems. Scholars whose works appear in this collection explore the origins and significance of the tree as it is found in art, history, and religious tradition in cultures across the world.

This book includes eleven chapters and an extensive bibliography. The first six chapters focus in on biblical, noncanonical, and early Christian texts, including the Book of Mormon. For example, in considering tree of life imagery in the Hebrew Bible, Donald Parry discusses the trees of the Garden of Eden in Genesis 2–3; Andrew Skinner finds substantial correlating “touch points” among Mesopotamian, biblical, and Jewish perspectives. Margaret Barker traces patterns relating to Enoch's fragrant tree; and chapters by John Welch and Wilfred Griggs discuss the tree of life and the cross in the New Testament and early Christian art and literature. Charles Swift's essay on Lehi's archetypal vision of the tree of life shows how the tree of life thrives at the heart of the entire Book of Mormon. The remaining chapters explore

even broader landscapes. Two chapters address discoveries of the tree in the Western Hemisphere: Allen Christenson looks at Mayan culture and theology; Jaime Lara offers the Catholic Church's view of the tree as a symbol in Central American traditions. Daniel Peterson offers additional insight into the appearance of the tree in the Qur'an, and John Lunquist samples the evidence concerning the tree of life in southeast Asian religion and folklore. I am not aware of any other scholarly book that has gathered together lore on the tree of life from so many traditions around the world; this work is a vital and distinctive contribution to the literature in cross-cultural and religious studies, as Richard Oman graphically demonstrates.

Whether among Abrahamic religions or in Asian creeds and folklore, both anciently and into modernity, the symbolic and religious significance of the tree of life has been expressed for millennia. Some elements of the various stories about the tree are unique, but certain features appear with significant regularity across geography and time, including the tree—in fact, sometimes two trees—as life-giver. There is often a gardener, whether a king, prince, or god, and a pure place, such as a garden, temple, or mountain. The assemblage of these perspectives is interesting and valuable for the ways they are unique as much as for the ways they are the same.

—Liza Olsen

And Should We Die . . . : The Cane Creek Mormon Massacre, by Donald R. Curtis (Brandenburg, Ky.: Bearhead Publishing, 2011).

Donald R. Curtis, a Kentucky native, has a passion for early Church history, particularly in Kentucky and the South. Curtis's work has been featured in

publications such as *The Kentucky Encyclopedia* and the *Kentucky Explorer*. In this book, Curtis presents the account of the lesser-known massacre in Mormon history at Cane Creek, Tennessee. *The Cane Creek Mormon Massacre* gives a detailed account from multiple points of view of how a Sunday worship service turned into a violent incident that left five dead and one wounded.

Curtis is able to put the massacre in the context of the greater Mormon movement, beginning the book with a succinct history of Mormonism and missionary work in the South. This history gives the reader background into the area and lends understanding to the developing anti-Mormon atmosphere that escalated into the violence at Cane Creek.

After giving multiple detailed accounts of the incident, Curtis focuses a large portion of the book on the immediate aftermath of the massacre. He shows the reaction of the local missionaries and Church members involved and even the national and global reaction, which gives a comprehensive understanding of the tragedy. Curtis then goes on to discuss the lasting impact and hostility that followed the Cane Creek Massacre. The final chapter discusses the years following the incident and what became of those involved and the actual site of the massacre.

While the limitations of a small publisher are evident at times, this volume is extensively researched and filled with letters, journal entries, newspaper articles, and pictures that contribute to giving the reader a thorough understanding of this history and the event in its entirety. *The Cane Creek Mormon Massacre* will provide Latter-day Saints and scholars alike with a new vista in Church and Southern history. Scholars and enthusiasts of Church history and missionary work will be interested not only because *Cane Creek* is the first book written exclusively

on this subject, but because of the clear picture Curtis gives of both the incident and the conditions surrounding it.

—Mickell Summerhays

A Firm Foundation: Church Organization and Administration, edited by David J. Whittaker and Arnold K. Garr (Provo, Utah: Brigham Young University Religious Studies Center, 2011).

The subject for the 2010 Brigham Young University Church History Symposium was the organization and administration of The Church of Jesus Christ of Latter-day Saints. Since most topics in Mormon history also relate to administrative history, there was a great response to the call for papers. BYU faculty members David J. Whittaker and Arnold K. Garr have compiled twenty-seven of the symposium addresses in this substantial volume, which also includes a foreword by Elder Marlin K. Jensen, an introduction by the editors, and a source essay by Whittaker that directs readers to further studies of the topics contained in the book.

The book is divided into four sections. "The Revelatory Foundation: Revelations and Organization" discusses organizational principles from the early days of the Church, including the Book of Mormon's influence on Church administration and the succession crisis of 1844. "Gathering, Organizing, and Strengthening the Saints" focuses on Church innovations primarily from the second half of the nineteenth century, such as the Gathering (first to Nauvoo and then to Salt Lake City) and the organization of the Primary in 1878. "Building on the Firm Foundation" features articles that generally cover events from the past century, including discussions of changes to auxiliary organizations and an article about Spencer W. Kimball written by his

son Edward L. Kimball. "Administering Missions" has three papers about the organization of missionary work: one about German mission leadership during World War II, one about the role of Seventies in Church administration, and one about the organization of missions.

While *A Firm Foundation* as a whole will appeal mainly to Church scholars and those interested in organizational theory, each of its individual articles offers an important synthesis of information for those who are interested in a particular topic. For example, a musician researching the history of the hymnbook would be interested in Michael Hicks's article "How to Make (and Unmake) a Mormon Hymnbook," and a newly called Young Women president might be intrigued by Janet Peterson's article "Young Women of Zion: An Organizational History." The book is broad enough that there is something of interest for everyone, from a young man or young woman wondering how mission calls are determined to a groundskeeper interested in the Church's history of beautification.

—R. Mark Melville

The Man Behind the Discourse: A Biography of King Follett, by Joann Follett Mortensen (Salt Lake City: Greg Kofford Books, 2011).

Joann Mortensen, a third great-granddaughter of King and Louisa Follett, has long been involved in documenting the lives of her ancestors. Her book, *The Man Behind the Discourse*, is the first published biography of King Follett, the man whose funeral sermon became known as one of the Prophet Joseph Smith's greatest discourses.

The book begins with King Follett's ancestry and early life, then follows the Follett family through their conversion

in Ohio and their experiences in Missouri and Illinois. Mortensen offers not only information and stories that she has collected concerning Follett and his family but also images of important documents and photographs of significant places that enrich her explanation of Follett's life. Following the chapters discussing Follett's death and the sermon that made his name famous in the Church, Mortensen closes with a brief summary of the lives of Follett's wife and children after his death.

Mortensen's work, though indeed a thorough biography of King Follett, goes beyond the scope of his life to establish the everyday way of life of the early converts to The Church of Jesus Christ of Latter-day Saints. In cases where Follett's location has been confirmed but no record of his activities remains, Mortensen explores journals and reports left by Follett's friends and neighbors—those whose lives likely reflected Follett's own. With these added insights, Mortensen depicts the lives of many of the "ordinary individuals" who made up the bulk of the Church's membership and whose "lives only occasionally intercepted leaders or events that gave them brief mentions in the official record" (x).

Mortensen has structured the book to be accessible to a wide audience. For those less familiar with the Church, a short, simple introduction to the beliefs of the Saints stands at the beginning of the book, and a "brief overview of Joseph Smith's life and prophetic mission" (59) provides context for the conversion of King Follett and his family. Readers interested in more information about the events and people in the text will appreciate the copious notes accompanying each chapter. For anyone interested in learning about King Follett's life—or the lives of the early Saints in general—*The Man Behind the*

Discourse is a thorough, well-written, and readable resource.

—Emily H. Bates

No Weapon Shall Prosper: New Light on Sensitive Issues, edited by Robert L. Millet (Provo, Utah: Brigham Young University Religious Studies Center, 2011).

During this Internet age, detractors of The Church of Jesus Christ of Latter-day Saints have a larger platform and a larger audience than they have ever had in the past, resulting in questions from people both within and outside of the Church concerning controversial topics. In response to widespread confusion and misinformation, BYU religion professor Robert L. Millet has compiled seventeen articles by scholars that address some of the more common points being raised. *No Weapon Shall Prosper: New Light on Sensitive Issues* provides a fair response to these questions and points out that many of the objections to the Church come from sincere and well-intentioned Christians. Millet notes that the doctrine of the Restoration, namely that all other churches are apostate, is offensive to those of other faiths—in other words, “we started the fight!” (vii). It should not surprise anyone, then, that the status quo has been a “seemingly unending flow” of anti-Mormon activity from the Church’s beginnings. However, with new technologies the currents of criticism have greatly accelerated, and while we as Latter-day Saints must not become

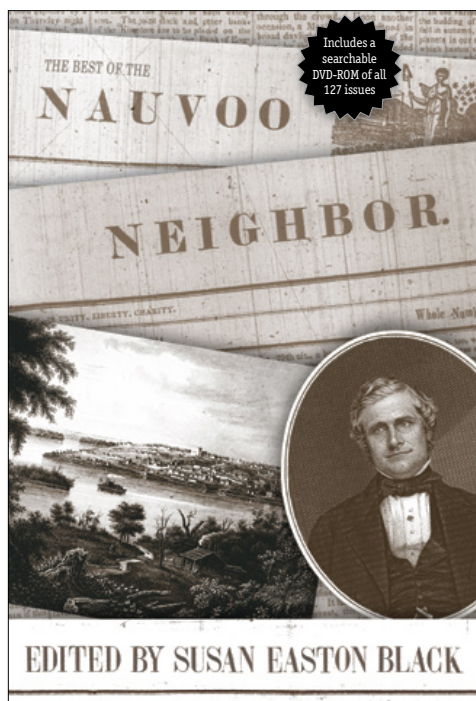
“consumed with provocative materials critical of the Church, the day for ignoring such matters is long past” (viii).

The book is organized into four main sections: “Restored Christianity,” which addresses issues such as the definition of a Christian and whether Mormons fit that definition; “Latter-day Saint Church History,” which discusses sensitive topics such as Joseph Smith’s sealing to Helen Mar Kimball and his alleged translation of the Kinderhook Plates; “Scriptural Perspectives,” which includes articles concerning DNA and the Book of Mormon and the authenticity of the Book of Abraham; and “Doctrinal Teachings,” which presents discussions of restored doctrines such as the Fall as a beneficial event and the relationship between God and man.

No Weapon Shall Prosper is a valuable resource for those who are curious about, or even troubled by, some of the less discussed or more controversial aspects of Mormonism. The Internet has allowed anti-Mormon arguments to gain greater ground, and this book respectfully but unapologetically responds to such arguments. In a concluding chapter at the end of the book, Millet notes that despite all of the evidence—or lack thereof—that might exist for a certain viewpoint, it is ultimately the words of the prophets and apostles, as confirmed to us by the Holy Ghost, that enable us to know spiritual truths.

—R. Mark Melville

For access to more reviews, please see our website at byustudies.byu.edu. Under “The Journal” on the main navigation bar, choose “Reviews.” This will give access to all our book reviews as well as arts and culture reviews, including some that have not yet been published in the print journal.



Published by
BYU Studies

292 pages + DVD, 6" x 9"

\$21.95, paperback

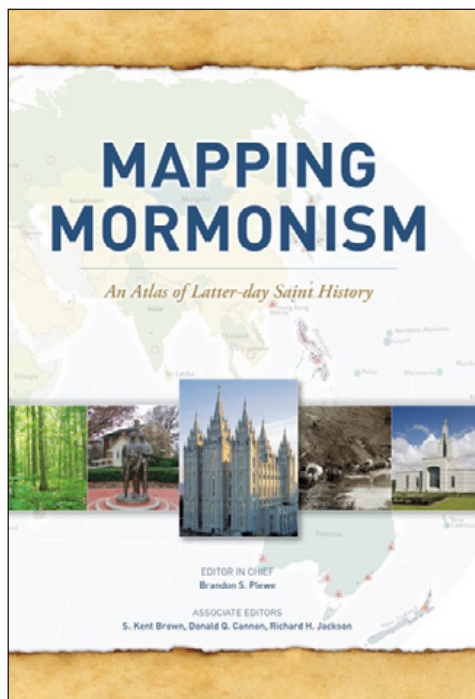
ISBN 978-1-938896-39-2

Published from May 1843 to October 1845, the *Nauvoo Neighbor* is a significant key to understanding the Latter-day Saint experience at the Mississippi River. Although not an official Church newspaper, the *Neighbor* was edited by Apostle John Taylor and played a significant role in the national discussion of Mormonism, the presidential election of 1844, and perceptions of the martyrdom of Joseph Smith. The paper printed an unrelenting defense of Mormonism against a backdrop of exaggerated reports and sensational claims that stemmed from Hancock County to newspapers in the East.

By 1843, what had once been a fledgling community of Mormon believers huddled near the Mississippi was a bustling metropolis. As such, the city of Nauvoo could support more than one LDS newspaper, especially a paper focused on local news. In addition to defending the faith, the *Nauvoo Neighbor* printed conference reports, epistles from the Quorum of the Twelve Apostles, city ordinances, poetry, fiction, marriage and death notices, words of wisdom, and humorous anecdotes.

The 127 issues of the *Neighbor* also contain over 950 names that make a valuable genealogical database. The DVD that accompanies the book includes not only full-color scans of each issue but also brief biographical sketches of the individuals mentioned in the *Neighbor*.

SECOND PRINTING



Published by
Brigham Young
University Press

full color, bibliography, index,
272 pages, 9" x 12"

\$39.95, hardcover

ISBN-0-8425-2825-2

In this state-of-the-art atlas, readers can take in the epic sweep of the Mormon movement in a new, immersive way. Never has so much geographical data about The Church of Jesus Christ of Latter-day Saints been presented in one volume so attractively and informatively.

Mapping Mormonism brings together contributions from sixty experts in the fields of geography, history, Mormon history, and economics to produce the most monumental work of its kind.

More than an atlas, this book also includes hundreds of timelines and charts, along with carefully researched descriptions, that track the Mormon movement from its humble beginnings to its worldwide expansion.

This book covers the early Restoration, the settlement of the West, and the expanding Church, giving particular emphasis to recent developments in the modern Church throughout all regions of the world.

A work of this magnitude rarely comes along. Five years in the making and updated right before going to press, *Mapping Mormonism* will prove to be a landmark reference work in Mormon studies.

Due to popular demand, the first printing of *Mapping Mormonism* sold out in three months. The second printing has arrived. Get your copy today!

VISIT OUR WEBSITE AT [HTTP://BYUSTUDIES.BYU.EDU](http://BYUSTUDIES.BYU.EDU)