CALIFORNIA CARPETBAGGER: THE CAREER OF HENRY DIBBLE

Charles McClain*

I. INTRODUCTION

On March 13, 1897, Governor James Budd of California signed into law a bill making it illegal for places of public accommodation and amusement to discriminate on the basis of race.1 It was California’s first civil rights law. The measure, as passed, was watered down from its original form. As originally introduced by Republican Assemblyman Henry C. Dibble of San Francisco, the bill made discrimination a criminal offense.2 As passed, it simply gave victims of discrimination the right to sue for civil damages.3 Without a criminal provision, the law had much less force and one wonders what impact those who voted for it expected it to have. Still, it cannot be insignificant that, almost ten months after the United States Supreme Court decision in Plessy v. Ferguson,4 which endorsed a state’s right to segregate on the basis of race,5 the California legislature passed a law making some forms of segregation illegal, and by a very large margin.

Henry C. Dibble, the author and chief promoter of the civil rights

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* Recently Retired Vice Chair of the Jurisprudence and Social Policy Program, School of Law, University of California at Berkeley; Professor of American Legal History, University of California at Berkeley. I am grateful to Professor Lawrence N. Powell for his comments on an earlier draft of this article. I wish to thank Kony Kim, Ashley Aubuchon Rubin, and Willow Meyer for their very helpful research assistance. I am grateful to John C. Kelly of the Earl K. Long Library University of New Orleans, Irene Wainwright of the Louisiana Division/City Archives New Orleans Public Library, Marianne Alcorn of the Ross-Blakley Law Library Arizona State University, and David Combe and Alan Childress of Tulane Law School for archival assistance. As usual, I am indebted to the Berkeley Law Library reference staff for their prompt responses to my numerous requests for information.

1. 1897 Cal. Stat. 137 (codified as amended at CAL. CIV. CODE § 51 (West 2007)).
4. 163 U.S. 537 (1896).
5. Id. at 550-51.
measure (the newspapers dubbed it "Dibble's Civil Rights Bill") was a major, if somewhat controversial, figure on the California political scene and a man of singularly interesting background. He had settled in California in 1883 and was first elected to the California State Assembly in 1888. By 1897 he was one of the chamber's acknowledged leaders. He was also a prominent member of the California bar. He had served as Assistant United States Attorney in the mid-1880s and since resigning that post had been pursuing a successful and enormously varied law practice. He was in especially great demand as an appellate lawyer. His clients included large California capitalists, criminal defendants in capital cases, and Chinese immigrants seeking to navigate the vagaries of the Chinese exclusion laws. In 1905, he would be retained by the leading Chinese organization in America to argue perhaps the most important Chinese immigration case of the twentieth century before the United States Supreme Court. Before coming to California, Dibble lived briefly in Arizona where he practiced law, managed the affairs of a large mining concern, and fought the Apaches. Before Arizona he lived for close to two decades in Louisiana. Dibble's years in Louisiana overlapped the era of Reconstruction, and he was at or near the center of most of the events that marked its tempestuous history in that state. He was an early adherent of Louisiana’s Radical Republican party. He served at various times as judge of the state’s most important trial court, as the state’s acting Attorney General, and as president of the New Orleans Board of Education, this during the short period of time when that body presided over the only experiment in school integration undertaken

9. Id.
10. Myers, supra note 7, at 63-64.
11. SAN FRANCISCO JOURNAL, supra note 8, at 136.
13. BAILEY & CHAPUT, supra note 7, at 89; SAN FRANCISCO JOURNAL, supra note 8, at 136.
14. Myers, supra note 7, at 63.
15. SAN FRANCISCO JOURNAL, supra note 8, at 135.
16. Myers, supra note 7, at 63.
in any southern state after the Civil War. In addition, he was a confidant of, and adviser to, the state's two Republican governors.

What follows is an account of the public life and career of this little known but quite remarkable man, a life that was, as a contemporary biographical sketch put it, "crowded [with] a greater number of interesting and stirring incidents" than that of any other figure in California public affairs.

II. LOUISIANA

A. Early Years in New Orleans

1. A Radical Republican

Henry Dibble was born in Delphi, Indiana in 1844. Very little is known of his early life other than that he received an elementary education in the Delphi common schools and that he was working as a printer's apprentice when the Civil War started; according to one account, he left the town once to serve as a cabin boy on the Mississippi. At the war's outbreak, at the age of seventeen, he enlisted in the New York Marine Artillery, a regiment that saw service in Ambrose Burnside's campaign in North Carolina. He was mustered out of that unit in 1863 and enlisted then in the Fourteenth New York Volunteer Cavalry, which was soon sent to Louisiana to form part of General Nathaniel Banks's Red River expedition. Dibble took part in the protracted Union siege of Port Hudson, Louisiana, an engagement notable for its ferocity (some 5,000 Union officers and men were killed or wounded during the siege) and also for the fact that it was the first in which African American units saw combat. During the siege, he was wounded in the left leg and eventually had to have it amputated at the
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26 Dibble had an aunt in New Orleans, which was then in federal hands, and went to her home to recuperate. 27

By the time the war was over, Dibble resolved to make New Orleans his home and to pursue the legal profession. 28 He had acquired sufficient knowledge through self-study to be admitted to the Louisiana bar in 1865, but enrolled the following year in the law school of the University of Louisiana (now Tulane University), a fact of some note inasmuch as few aspiring lawyers sought formal legal education in universities in those days. 29 The school was then under the deanship of the eminent Louisiana attorney and civil law scholar, Christian Roselius. 30

In 1867, he received the degree of Bachelor of Laws. 31

Dibble’s legal ambitions soon came up against a stark and unpleasant reality. The New Orleans legal and business community did not wish to have anything to do with Union veterans. As he would tell a Congressional committee in 1872, “When I began to practice I found myself opposed on every side. Gentlemen who were merchants told me they would like to assist me, but that the political feeling was so bitter, it was impossible to do so.” 32 Recognizing that “there was no chance for a man who had been identified with the war upon the side of the Union to remain in the South and succeed” unless political change were effected, he resolved—temporarily it would turn out—to give up the law almost entirely, or at least not to actively seek any new clients, and go into politics. 33 More specifically, he decided to throw in his lot with Louisiana’s then new Republican Party.

The Louisiana Republican party came into being as an organized political force in September of 1865. 34 A small committee of radical

26. Myers, supra note 7, at 63.
27. SAN FRANCISCO JOURNAL, supra note 8, at 135.
28. Id.
29. Id.
32. H.R. MISC. DOC. No. 42-211, at 268 (1872).
33. Id. A letter to the Radical New Orleans paper, the Tribune, expressed something of the same sentiment, “A man wishing employment in this city must procure evidence of his having been in the ‘Confederate’ service at the time of the surrender—otherwise he cannot obtain employment.” What Will Become of the Union Men of the South?, NEW ORLEANS TRIBUNE, Sept. 16, 1866, at 1.
whites and blacks, calling itself the Republican Party, had been organized in New Orleans in 1863, but it never seems to have done anything.\(^{35}\) In June of 1865, leaders of the New Orleans black community, Southern white Radicals, and Northern residents of the state founded an organization called the Friends of Universal Suffrage, a group committed, as the name suggests, to the extension of the franchise to blacks.\(^{36}\) The organization assembled in convention in New Orleans in September and voted to affiliate with the national Republican Party and rename itself the Republican Party of Louisiana.\(^{37}\) That same convention adopted resolutions calling for universal suffrage and supporting the equality of all men before the law.\(^{38}\) It also adopted a resolution espousing a novel political theory.\(^{39}\)

By May 1, 1862 New Orleans was under the control of Union forces.\(^{40}\) Under the auspices of the federal military commander, a civilian government was eventually formed. In April, 1864, a new state constitution was adopted, one which limited suffrage to whites, and elections were held under the new constitution in those parts of Louisiana that were under federal control.\(^{41}\) A new election was scheduled for fall of 1865, this one to encompass the whole of the state (the vote on the 1864 constitution had taken part in only that small part of the state that Union forces controlled), but the newly organized Republican Party chose not to participate.\(^{42}\) Its refusal was based on the theory that Louisiana, because of its secession, was without a legitimate state government and had reverted to the status of a territory.\(^{43}\) Rather than participate in the fall elections for state office, it decided to send to Congress as its “territorial delegate” the main proponent of the theory at the convention, the radical spokesman and former Union officer, Henry

35. Id. at 199.
36. Id. at 205.
37. Id. at 205-06.
38. Uzee, supra note 34, at 206.
39. Id. For information about the Republican Party in Louisiana at this time, see, e.g., RICHARD NELSON CURRENT, THOSE TERRIBLE CARPETBAGGERS 11 (1988); PEYTON MCCRARY, ABRAHAM LINCOLN AND RECONSTRUCTION: THE LOUISIANA EXPERIMENT 316-17, 331-33 (1978); JOE GRAY TAYLOR, LOUISIANA RECONSTRUCTED, 1863-1877, at 27 (1974).
41. Id. at 79.
42. TAYLOR, supra note 39, at 71-72, '76.
43. Id. at 76.
Clay Warmoth.\textsuperscript{44} Warmoth went to Washington but got nowhere with his claims; indeed, there is no evidence that Congress ever took the territorial theory seriously.\textsuperscript{45}

2. The New Orleans Riot of 1866

Henry Dibble's decision to affiliate with the fledgling Louisiana Republican Party was by no means a purely strategic one. He seems to have been genuinely committed to the radical egalitarian principles for which the party then stood. As he stated before the 1872 Congressional committee: "I have been a radical. I was always an abolitionist. I never knew any difference between races."\textsuperscript{46} There seems no reason to doubt the sincerity of these sentiments.

It appears that Dibble joined the Republican party shortly after its founding and soon began to attract the notice of the party faithful. He was elected, for example, as one of the Vice Presidents of a Republican mass meeting held in New Orleans in November, 1865.\textsuperscript{47} According to one newspaper report, two thirds of those in attendance were black.\textsuperscript{48} The following year he would achieve greater visibility as a party representative in connection with one of the seminal events of Reconstruction history: the New Orleans riot of 1866.

Because of President Andrew Johnson's lenient suffrage policies, many ex-Confederates were able to stand for office in the state elections of November 1865, and many won seats in the state legislature. This body proceeded to enact measures of a distinctly conservative cast, including a repressive code regulating black labor, to the alarm not only of radicals but also of moderate unionists who may have harbored no pro-black sentiments but who did not wish to see the former planter aristocracy again in control of the state.\textsuperscript{49} To counter what was transpiring, some began to agitate for a reconvening of the convention that had produced the constitution of 1864, citing a resolution passed shortly before adjournment that by one interpretation at least seemed to confer authority on the president to do that.\textsuperscript{50} The expectation, it

\textsuperscript{44} FICKLEN, supra note 40, at 113.
\textsuperscript{45} Id. at 114-15.
\textsuperscript{46} H.R. MISC. DOC. NO. 42-211, at 274 (1872).
\textsuperscript{47} CENT. EXECUTIVE COMM. OF THE REPUBLICAN PARTY OF LA., PROCEEDINGS OF THE CONVENTION OF THE REPUBLICAN PARTY app. at 37 (1865).
\textsuperscript{48} Id. at 38.
\textsuperscript{49} FICKLEN, supra note 40, at 140-41.
\textsuperscript{50} Id. 143-44.
became obvious, was that the reconvened convention would produce a new constitution that would enfranchise blacks and disenfranchise many ex-Confederates. The agitation bore fruit and the convention was summoned to reconvene in New Orleans, the state capital, on July 30, 1866.\footnote{ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 262-64 (1988); TAYLOR, supra note 39, at 99-106.}

In anticipation of the convention, convention supporters held a rally on the evening of July 27 at the Mechanics' Institute.\footnote{GILLES VANDAL, THE NEW ORLEANS RIOT OF 1866: ANATOMY OF A TRAGEDY 143 (1983).} A crowd, mostly black and numbering in the hundreds, formed outside.\footnote{Id. at 144.} Among the speakers who addressed this gathering was Henry Dibble.\footnote{Id.} There is no record of the content of his remarks, but newspaper accounts portray most speakers bemoaning the growing strength of former secessionists, affirming their support for black suffrage and endorsing the Reconstruction policies of Congress as opposed to those advocated by President Johnson.\footnote{EMILY HAZEN REED, LIFE OF A.P. DOSTIE; OR, THE CONFLICT IN NEW ORLEANS 289-97 (New York, Tomlinson 1868).} The one speaker who stood out for the tone as well as the content of his remarks was the radical white dentist and former state auditor, Dr. Anthony Dostie.\footnote{VANDAL, supra note 52, 145.} There is dispute about exactly what Dostie said, but most agree that his was the most provocative of all the speeches made that night. According to some accounts, he urged supporters to come to the convention armed and said that the streets of New Orleans cried out for rebel blood.\footnote{Id. at 145-46, 149. The accounts were published weeks after the speech, however, and may not accurately reflect what Dostie said.} After the speeches, a torchlight procession formed and began to make its way through the streets.\footnote{Id. at 145.} The procession soon encountered armed city police and an affray broke out in which two blacks were killed.\footnote{Id. at 145-46.} It turned out to be a pale portent of the much bloodier affray that would follow three days later.

The opening day of the reconvened constitutional convention ended in disaster. Delegates gathered at Mechanics' Institute, the convention site, the morning of July 30.\footnote{TAYLOR, supra note 39, at 108.} A large group of black supporters
A crowd of armed whites and police soon converged on the crowd. An exchange of fire took place between the two groups, with the blacks eventually retreating inside the hall for protection. The white crowd, including the police, began to fire into the building and continued firing for over two hours. When those inside began fleeing the premises, they were cut down mercilessly. Thirty-four blacks and three whites were killed in the fighting, among them Dr. Dostie who, it was clear, had been singled out as a target. Over a hundred were wounded. All of the casualties save one were unionists. General Philip Sheridan, the commanding general of federal forces in New Orleans, described the riot as “an absolute massacre” perpetrated by the police which he believed, moreover, was premeditated. The riot attracted an enormous amount of adverse attention in the northern press and inflamed northern opinion. Most historians agree that it was crucial in discrediting President Andrew Johnson’s Reconstruction policies and in paving the way for the radical plan of Reconstruction adopted by Congress in 1867.

Henry Dibble was not present at the New Orleans riot but was clearly moved and shaken by the events, especially at the general whitewashing of the police violence by the New Orleans press. On August 4, 1866, he wrote a letter to the New Orleans Times chastising it (quite properly) for its coverage. The Times had reported that those inside Mechanics’ Institute had been conducted safely from the building. “Your accustomed falsification of truth,” he wrote, “cannot pass over unnoticed . . . .” Dr. Dostie states, in his dying declaration, that he was shot down, cut, beaten, and left lying in the street by the police. The Rev. Mr. Horton [a Radical minister] was shot and beaten by the same persons.” “And further,” he went on, “I have heard as many as twenty
persons say that they saw policemen shoot negroes who were unarmed and making no resistance.”

Dibble was one of the handful who attended Dr. Dostie’s funeral (due to threats of violence, the turnout was small).

In an account he wrote for the New Orleans Advocate, an African American Methodist newspaper, Dibble gave full vent to what must have been the feelings of many local radicals. He wrote,

The sorrow we felt was not of the nature which we experience when lamenting the removal of a friend by the natural visitation of Death—when we can attach no blame upon man. But while our tears fell upon the bier of our friend, we could not but dwell upon the atrocious crime, which had snatched him from our side; and then a choking indignation demanded JUSTICE.

Dostie, Dibble proclaimed, “died a martyr in the cause of human rights.”

3. Involvement in Politics: Dibble at the 1867 Republican Convention

On March 2 and 23, 1867 Congress passed two acts, the first over President Johnson’s veto, that inaugurated the period of radical Reconstruction in the ex-Confederate states. Premised on the view that neither legal governments nor adequate protection for life and property existed in them, it divided the South into five military districts, Louisiana and Texas constituting one of them, and gave command of these districts to military officers appointed by the President. These officers were charged with the duty of overseeing the organization of conventions for the drafting of new state constitutions and the formation of civilian governments. According to the law, voting for delegates to the conventions was to be open to all irrespective of race and the new constitutions were to provide for universal male suffrage. The law
also barred from the privilege of voting and from office those ex rebels who were disenfranchised by the proposed Fourteenth Amendment.\textsuperscript{82} Upon adoption of new constitutions with the requisite provisions and ratification of the Fourteenth Amendment states were to be readmitted to the union.\textsuperscript{83} The legislation’s suffrage provisions, for obvious reasons, opened up new and promising vistas for the Louisiana Republican Party as it did for all southern Republican parties.

The Republican Party convened for the first time under that name in New Orleans in mid-June, 1867.\textsuperscript{84} Dibble, then only twenty-three, played a major role in the proceedings. He was on the credentials committee, was charged with the responsibility of finding a permanent site for the meetings (the sessions had commenced in temporary quarters),\textsuperscript{85} and was selected chair of probably the convention’s most important committee: the committee on resolutions.\textsuperscript{86} This committee passed on all resolutions that were offered, including ones proposed for incorporation in the party platform. His actions as resolutions committee chair tell us something about his political orientation. On the second day of the meeting, a delegate offered a resolution, as paper reporting convention debates put it, “providing for certain rules for State elections.”\textsuperscript{87} The exact content of the resolution is not available but, to judge from a report in the \textit{New Orleans Tribune}, it recommended that state offices be split evenly between blacks and whites.\textsuperscript{88} Dibble, speaking for his committee, voiced disapproval and offered a substitute: “\textit{Resolved, That the Radical Republican party of the State of Louisiana will always discountenance any attempt on the part of any race or class of people to assume political control in any branch of Government to the exclusion of any other race or class.”} The substitute was adopted, but that was not the end of the matter.

Reading the account of the convention debates, it is obvious that black Republicans, who at the time constituted a majority of the party,

\begin{itemize}
\item \textsuperscript{82} Id.
\item \textsuperscript{83} Act of Mar. 2, 1867, ch. 153, §§ 5-6, 14 Stat. 428, 429.
\item \textsuperscript{84} \textit{The Radical Convention}, NEW ORLEANS TRIBUNE, June 11, 1867, at 1. The \textit{New Orleans Tribune}, a paper founded and managed by African Americans, was the official organ of the Republican Party and carried a full daily account of all convention activities. New Orleans Tribune, About Us, http://id3410.securedata.net/theneworleanstribune/aboutus.htm (last visited Apr. 17, 2010).
\item \textsuperscript{85} \textit{The Radical Republican Convention, supra} note 84.
\item \textsuperscript{86} \textit{The Radical Republican Convention}, NEW ORLEANS TRIBUNE, June 13, 1867, at 1.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Id.
\end{itemize}
harbored some suspicion about the willingness of their white allies to share political power. So P.B.S. Pinchback, a free person of color who would go on to become the most important black political leader in Reconstruction Louisiana, got a resolution adopted saying the party would not support any candidate for office who did not pledge to make an equal distribution of appointed posts. Yet another resolution pledged that at least one half of the party’s nominations would go to blacks.

The above three resolutions, in obvious tension with each other, eventually were incorporated into the party platform. Other resolutions that found their way into the platform insisted on “perfect equality” in access to the jury box, the right to practice all professions, and the right to travel and be entertained, committed the party to the opening of the state’s schools to all children black and white alike (it was not made clear whether this amounted to an endorsement of integrated schools), asked for government assistance in the restoration of the state’s levee system, and endorsed the eight-hour work day.

At an election held in September—the first statewide election in which blacks exercised the franchise—Louisianans voted to hold a constitutional convention and at the same time elected convention delegates. The constitutional convention, composed of approximately equal numbers of white and black delegates, met between November 1867 and March 1868, and produced a constitution that was, as the historian Joe Gray Taylor observed, “probably the most radical of any . . . which resulted from the Reconstruction Acts.”

Its most revolutionary provisions without doubt were Article 13, which provided that the means of public transportation and places of public accommodation be open to the “patronage of all persons, without

90. The Radical Republican Convention, NEW ORLEANS TRIBUNE, June 14, 1867, at 2.
91. Id.
92. Radical Republican Convention: Reports of the Committee on Platform, NEW ORLEANS TRIBUNE, June 18, 1867, at 1 (reprinting platform in its entirety). The party passed a resolution, changing its official name to “The Radical Republican party of Louisiana.” Id. The term “radical” was adopted, it was explained, because it was associated in the minds of all with a commitment to black suffrage. Id.
94. Id. 341-42, 350. There is some dispute as to the precise delegate mix. Ted Tunnell, an historian, estimates it at fifty black and forty-eight white members. TED TUNNELL, CRUCIBLE OF RECONSTRUCTION: WAR, RADICALISM AND RACE IN LOUISIANA, 1862-1877, at 113 (1984).
95. TAYLOR, supra note 39, at 151.
distinction or discrimination on account of race or color."96 and Article 135, which banned segregation in the public schools.97 The document also contained a disenfranchisement provision disqualifying more ex-Confederates than were disqualified either by the Fourteenth Amendment or by comparable provisions in the constitutions of other southern states.98

While the constitutional convention was deliberating, in January 1868, the Republican party had met to choose nominees for the elections it expected would take place.99 Dibble was present at the meeting.100 Henry Warmoth won the nomination for Governor, defeating a free man of color, Francis Dumas, in a very close vote.101 This loss caused some of the more radical black members to abandon the nominee and to nominate their own candidate for Governor, James G. Taliaferro.102 It was the first manifestation of that factionalism and in-fighting that would plague the Louisiana Republican party during Reconstruction years. The ensuing election campaign was short and marred, it should be noticed, by a considerable amount of violence, directed both at newly enfranchised black voters and at white Republicans. In mid-April, Louisianans voted to ratify the constitution and elected Henry Warmoth Governor, giving him a large majority over Taliaferro.103

4. Henry Clay Warmoth

Warmoth would cast a large shadow over Louisiana politics during his term as Governor and would have a large impact on the career of Henry Dibble. It is therefore appropriate to say a word at this point about Louisiana's first Republican Governor.

Henry Clay Warmoth, certainly the most colorful, probably the most interesting, of all the southern Reconstruction Governors, hailed

96. LA. CONST. of 1868, art. 13, in 4A SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS: LOUISIANA 145, 146 (William F. Swindler ed., 1975) [hereinafter SOURCES AND DOCUMENTS].
97. Id. art. 135, at 158.
99. TAYLOR, supra note 39, at 156.
100. H.R. MISC. DOC. No. 42-211, at 266 (1872).
101. TAYLOR, supra note 39, at 156. Warmoth defeated Dumas, forty-five to forty-three. Id.
102. Id.
103. Id. at 158-60.
from Illinois. He moved to Missouri at age eighteen, read law on his own, and, shortly before his nineteenth birthday, was admitted to the Missouri bar. He served in the union army during the Civil War, reaching the rank of Lieutenant Colonel. He participated in several engagements during the war and was severely wounded in 1863 during the Vicksburg campaign. In 1864, he was appointed judge of the provost court for the Department of the Gulf in occupied New Orleans. When his military commission ended, he opened a law practice in New Orleans and early on became involved in radical politics. As noted above, he was elected “territorial delegate” at the Republican gathering in 1865. Warmoth served as Governor from 1868 to 1872, leaving office at the age of thirty-one. He would live for another sixty years, spending most of that time as the owner of a sugar plantation in Plaquemines Parish and remaining active in Louisiana Republican politics during most of this time.

Warmoth was both a man of considerable personal charm and a shrewd political manipulator. Henry Clay Dibble was, initially at least, one of his warm admirers, and it is clear that in his first years in office, Warmoth viewed Dibble as one of his most trusted confidants, perhaps his most trusted. Their relationship, however, would eventually turn sour.

5. Law Work for the Governor

Dibble was a member of Warmoth’s campaign committee in 1868, and soon after Warmoth’s election as Governor, found himself reaping the benefits of this association. The legal career that he had come close to abandoning completely now got a new lease on life as a significant amount of state legal business began to come his way. Between late 1868 and early 1870, Dibble either alone or in conjunction with other attorneys represented the state in several important cases that

105. Id.
106. Id. at 164-65.
107. Id. at 165.
108. Vincent, supra note 104, at 165.
109. Id.
110. FICKLEN, supra note 40, at 113.
111. Vincent, supra note 104, at 167.
112. Id. at 168.
were eventually decided by the state supreme court. Every one of them had to do in one way or the other with state finances, most with the occupational license fees the legislature had adopted as a central part of its revenue-raising program, and in all but one case, Dibble’s client prevailed. The net effect of these decisions, it hardly needs emphasis, was to put firmer legal footing under the fiscal policies of Louisiana’s Reconstruction government.

One decision must have been especially pleasing to Henry Warmoth. *State ex rel. Oliver v. Warmoth* arose out of an 1868 law providing for the contracting out of work to improve the navigation of the Red River. The work was to be paid for with state bonds which the Governor was to sign and turn over to the contractors upon completion of each stage of the project. Upon completion of several stages, the contractors made demand for the bonds, but Governor Warmoth refused to sign them (apparently because of a belief that the work had not been satisfactorily completed), whereupon the contractors sought a writ of mandamus directed at the Governor and other state officers. The trial court dismissed the mandamus directed at the other state officers, but issued a writ ordering the Governor to sign the bonds. The Governor refused and an appeal was taken to the Louisiana Supreme Court, with Dibble brought in as special counsel to assist in presenting the Governor’s case, one of first impression for that tribunal.

The Governor’s brief, signed first by Henry Dibble and second by the Louisiana Attorney General, contended that, because of the principle of the separation of powers, no court could compel the Governor to perform an executive act. It was generally agreed that acts lying within the discretion of the executive could not be compelled, but there was a body of legal opinion holding that acts of a purely ministerial


116. *Id.* at 1.

117. *Id.*


120. *Id.*

121. *Id.*

character could be. The Governor’s brief sought to elide this distinction, contending that “every act of [the Governor’s] is necessarily executive, that is discretionary.” In illustration, the brief pointed to the law in question. It seemed to impose on the Governor a mere clerical act, the affixing of his signature to bonds, but what was the Governor to do, the brief asked, if he honestly believed work contracted for had not been completed. The Supreme Court, relying heavily on the appellant’s argument, reversed the lower court, holding that no court could order the Governor to perform any act within the range of his official duties, whether one characterized it as discretionary or ministerial. This unusually spacious view of gubernatorial power persisted in Louisiana constitutional jurisprudence well into the twentieth century.

B. Dibble on the Eighth District Court

1. Appointment to the Court by Governor Warmoth

By 1870, Henry Dibble must have considered his legal prospects bright indeed. Given his close connections with the state administration and his record of success in appellate litigation, he seemed assured of getting a continuing flow of state business. His state government connections as well as his demonstrated skills must have also made him attractive to many private clients. In March of 1870, however, he decided to give up his law practice and accept an appointment from Warmoth to a newly created court, the Eighth District Court.

The Louisiana Constitution of 1868 provided that there should be seven district courts in Orleans parish (encompassing New Orleans and certain unincorporated areas), three of limited and four of general jurisdiction, with the legislature given authority to establish as many more as the public interest might require. In March 1870, the legislature in special session created an eighth court and conferred on it
special powers that made it potentially the most powerful trial court in the state.\textsuperscript{130} It was given exclusive jurisdiction to issue injunctions and writs of mandamus, and, most important, "to entertain all proceedings . . . in which the right to any office . . . is in any way involved."\textsuperscript{131} It is interesting to note that Henry Dibble claimed that the creation of the court was his idea and that he drafted the legislation that established the tribunal and helped get the bill passed.\textsuperscript{132} His reason for acting, he said, was concern that the existing New Orleans courts, which all had the same authority in these areas, were often issuing conflicting rulings.\textsuperscript{133} He wished to avoid these problems by lodging exclusive authority over these matters in a single court.\textsuperscript{134} He moved forward with his plans only after consulting the governor and securing his approval, he said.\textsuperscript{135}

Most historians of Louisiana Reconstruction see the matter somewhat differently. In the prevailing view, it was Governor Warmoth himself who was mainly responsible for the establishment of the new court, part of an overall strategy aimed at consolidating control over state politics.\textsuperscript{136} He had secured legislation establishing a Returning Board with authority to review all election returns and throw out those it considered invalid.\textsuperscript{137} Having a single court, staffed by his own loyal appointee, with exclusive authority over election lawsuits, would give him further advantage.\textsuperscript{138} It is of course possible that both views are right, i.e., that Dibble came up with the idea for the court but that Warmoth seized on it for its political potential and was mainly responsible for getting the legislation enacted. In any event, shortly after the bill was passed, Governor Warmoth offered the job to Henry Dibble. According to Dibble, he did not know he was going to get the offer and initially turned it down, first because the post paid much less than he was earning from his law practice and secondly because he thought himself

\begin{itemize}
\item \textsuperscript{130} H.R. MISC. DOC. NO. 42-211, at 266.
\item \textsuperscript{131} Act No. 2, 1870 Gen. Assem., Extra Sess., (La. 1870).
\item \textsuperscript{132} H.R. MISC. DOC. NO. 42-211, at 266.
\item \textsuperscript{133} \textit{id.}
\item \textsuperscript{134} \textit{id.}
\item \textsuperscript{135} \textit{id.} Dibble may have had in mind an 1869 dispute concerning the filling of vacancies on the New Orleans city Council. \textit{ELLA LONN, RECONSTRUCTION IN LOUISIANA AFTER 1868}, at 46-47 (1918). In that dispute, three New Orleans courts issued three conflicting injunctions. \textit{id.}
\item \textsuperscript{136} \textit{LONN, supra} note 135, at 56; \textit{TAYLOR, supra} note 39, at 185.
\item \textsuperscript{137} \textit{LONN, supra} note 135, at 188-89.
\item \textsuperscript{138} \textit{LONN, supra} note 135, at 56; \textit{TAYLOR, supra} note 39, at 185. Under the law, the governor could appoint the first judge but that judge would have to stand for election in 1872.
\end{itemize}
too young for the responsibility. 139 Something caused him to change his mind, however, and on March 24, 1870 he took his seat as the first judge of the Eighth District Court. 140 He would remain on the bench for about three years. 141 Warmoth’s hopes, if such they were, that he could rest confident that Dibble would always promote his interests would in the long run prove to be ill founded.

2. Economic Development Cases

Because of its exclusive jurisdiction over writs of mandamus and injunctions and its location in the state’s capital and largest city, the Eighth District Court routinely found its docket crowded with cases raising large public policy issues, including those involving what might be styled the economic development program of Reconstruction Louisiana.

No state in the post-Civil War South could have failed to make economic development a lynchpin of its political agenda. The economies of the defeated confederacy were near collapse, their infrastructures in tatters. Beyond this, however, there was what historians have called “the gospel of prosperity.” 142 To many southerners, military defeat had brought home the poverty and economic backwardness of their region. Many, both native southerners and recently transplanted northerners, believed that by government-promoted industrialization, the South could be transformed and made to catch up with the more advanced and more prosperous North. Moreover, almost all saw the promotion of railroad building on a large scale as a key ingredient in the mix. To be sure, as the one in-depth study of railroad building in Louisiana during the nineteenth century makes abundantly clear, public clamor for railroad construction pre-dated Reconstruction and continued after it was over. 143 Both before and after Reconstruction some wanted to see this accomplished without governmental assistance, but these appear to have been minority sentiments. 144

139. H.R. Misc. Doc. No. 42-211, at 266.
140. Id.
141. San Francisco Journal, supra note 8, at 136.
144. Id. As the Louisiana historian, Joe Gray Taylor, observed, "A fever for internal
The state of Louisiana was as smitten as any other state with railroad mania in the years after the Civil War and passed any number of railroad promotion measures in the early Reconstruction years, many quite generous in the subsidies they afforded the railroads. One of the chief beneficiaries of this legislation was the New Orleans, Jackson and Great Northern Railroad, the affairs of which wound up in Dibble’s court early in his tenure.\textsuperscript{145}

The New Orleans, Jackson, and Great Northern railroad had been chartered before the Civil War as a public corporation, the shares of its stock in the hands of the state and of the city of New Orleans.\textsuperscript{146} It had ceased to function by war’s end, but by 1870 it was again in good working order due principally to the efforts of its new president, the former Confederate general P.G.T. Beauregard.\textsuperscript{147} It was in a somewhat parlous fiscal situation (it carried a large debt burden) and lacked capital to expand, however, and the legislature, with Governor Warmoth’s strong support, passed a law in March authorizing the state and the city to sell all of their shares in the company.\textsuperscript{148} Bids were solicited and of the three that were received, the highest was that of the Delaware railway magnate, Henry S. McComb.\textsuperscript{149} McComb’s bid of four dollars per share was a small fraction of their par value, but no one thought the shares could ever be sold at par.\textsuperscript{150} Still, there was stiff resistance to the sale in many quarters, in part because many thought the votes of some legislators had been bought,\textsuperscript{151} and Beauregard refused to turn over the shares to McComb.\textsuperscript{152} McComb immediately sought relief in the Eighth District Court.\textsuperscript{153} During the trial, which lasted several days, all principals to the transaction, including Warmoth, testified.\textsuperscript{154} Despite the suspicions of irregularities surrounding the legislation, no evidence

\begin{footnotesize}
\begin{enumerate}
\item See generally SUMMERS, supra note 142 (discussing ways in which the New Orleans, Jackson, and Great Northern Railroad benefitted from railroad-specific legislation in Louisiana); \textit{Jackson Railroad Matter}, DAILY PICAYUNE (New Orleans), Apr. 20, 1870, at 2 (case before Dibble’s Eighth District Court).
\item TAYLOR, supra note 39, at 191.
\item \textit{Id.}
\item \textit{Id.} at 191-92.
\item \textit{Jackson Railroad Matter, supra} note 145.
\item \textit{Id.} at 191-92.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
came to light during the proceedings that would have entitled a judge to scuttle the deal, and the shares were transferred to McComb.155 After securing control of the railroad, McComb extended the line northward into Tennessee and eventually to the Ohio River, where it linked up with the network of the Illinois Central.156 As the historian Joe Gray Taylor observed, it is doubtful this expansion would have happened without the management skills and of course, the capital, of McComb.157 One must hasten to add that this was one of the few Louisiana railroad ventures that proved at all successful.

If railroads were an important part of the state’s economic development program, another important part was the promotion of the butchering industry. In early 1869, the Louisiana legislature passed a law requiring that all slaughtering of livestock be done downstream from the city of New Orleans on grounds owned and operated by a single New Orleans corporation, the Crescent City Livestock-Landing and Slaughter-House Company.158 Once viewed by historians as purely the product of bribery and corruption, the law is now seen somewhat differently. Though bribery may have played a role in its passage, many scholars now see it as both a legitimate public health measure and as reasonably calculated to rationalize the New Orleans butchering business, seen as key to the area’s economic revival.159 The law incensed numerous independent butchers, however, who attacked it in a series of lawsuits, alleging among other things that its monopoly provisions trampled on their rights under the newly adopted Fourteenth Amendment.160 As is well known, the butchers’ cases eventually reached the United States Supreme Court, producing one of the seminal opinions of American constitutional history.161

155. See TAYLOR, supra note 39, at 191.
156. Id.
157. Id. at 191. For other newspaper articles detailing the proceedings in the Eighth District Courts see Jackson Railroad Matter, DAILY PICAYUNE (New Orleans), Apr. 21, 1870, at 2; Jackson Railroad Matter, supra note 145, at 2.
158. LONN, supra note 135, at 42.
160. LONN, supra note 135, at 42-43.
The most important of the Slaughterhouse lawsuits had either begun in or eventually found their way into Dibble’s Eighth District Court by virtue of its exclusive authority over injunctions; suits for injunction that had begun in other courts were transferred to Dibble’s tribunal by the Act that created it. In almost every instance when Dibble had occasion to hand down a ruling, he ruled in favor of the Crescent City Company monopoly. Thus, in early June 1870, he issued an injunction ordering the Metropolitan Police of New Orleans to take all measures necessary to prevent interference with the Crescent City franchise, in implementation of which officers shut down the operations of a rival abattoir disaffected butchers had erected across the river from the Crescent City facility. The following month he upheld the right of the state Attorney General to enforce an injunction against the rival butchers’ facility he had obtained earlier in another New Orleans trial court. These two rulings cleared the way for the Crescent City Company to operate its slaughterhouse free of competition pending the outcome of the butchers’ appeal to the United States Supreme Court.

Dibble’s decisions rested on plausible legal foundations. Dibble, however, made no effort to conceal his sympathies for the Slaughterhouse Act; there seems no reason to doubt that he supported the state’s economic development program generally. In an opinion he wrote in May 1871, in yet another case arising out of the measure, he went out of his way to compliment the Louisiana legislature on passing the law. He called it a wise and practical thing. Butchers operating within the city limits of New Orleans had for years, in disregard for law, been carelessly throwing their waste products into the Mississippi, “to be carried past the city, endangering the health and comfort of its inhabitants.” A private company, supported, he noted, by large interests, had now succeeded in doing what the officers of the law had failed to do, force the butchers to do their business below the City of

162. LABBÉ & LURIE, supra note 161, at 139.
163. Id. at 140.
164. Id. at 140-41.
165. Id. at 151.
166. Chapter 6 of the book by Labbé and Lurie recounts the full story of the complex Slaughterhouse Act litigation in the New Orleans trial courts, including Dibble’s Eighth District Court. LABBÉ & LURIE, supra note 161, at 136-66.
168. Id.
New Orleans.\textsuperscript{169}

3. Civil Rights Cases: Public School Integration

From a modern perspective, none of the cases decided by Henry Dibble during his tenure as judge of the Eighth District Court surpass in interest two that arose out of the civil rights provisions of the Louisiana Constitution of 1868.

Louisiana had a functioning public school system before the Civil War, but the schools were open to white children only, with no provision made for the education of the children of the state’s substantial free black population, to say nothing of the children of slaves. The Louisiana Constitution of 1864 provided for the establishment of a free public school system open to all students,\textsuperscript{170} but debates in the convention made it clear that the majority of delegates had a segregated system in mind, and in 1864 the state legislature passed a law barring the admission of black children to white schools.\textsuperscript{171}

Leaders of the New Orleans African American community made it clear that this was not an acceptable state of affairs and pressed for integrated schools.\textsuperscript{172} The agitation eventually bore fruit. In June, the Republican convention, at which Dibble was a delegate, passed a resolution calling for integrated public schools.\textsuperscript{173} In addition, the Louisiana constitutional convention of 1867, dominated by black and white Republicans, inserted into the constitution an article categorically forbidding any racial segregation in publicly supported education.\textsuperscript{174}

There is, of course, often a large gap between the law on the books and the law in action, and this was certainly the case with respect to school integration in Louisiana. No effort of any sort was ever made to implement the constitutional provision outside the City of New Orleans, and in New Orleans, in the beginning at least, it looked as if there would be no disturbance of the status quo. The New Orleans school board,

\begin{itemize}
\item \textsuperscript{169} Id.
\item \textsuperscript{170} LA. CONST. of 1864, art. 141, \textit{reprinted in} SOURCES AND DOCUMENTS, \textit{supra} note 96, at 126, 139.
\item \textsuperscript{171} DEVORE & LOGSDON, \textit{supra} note 17, at 59.
\item \textsuperscript{172} "Separation is not equality," New Orleans’s leading black newspaper editorialized in May 1867, “The very assignment of schools to certain children on the ground of color, is a distinction violative of the first principles of equality.” \textit{Star Schools, NEW ORLEANS TRIBUNE}, May 12, 1867, at 1.
\item \textsuperscript{173} TAYLOR, \textit{supra} note 39, at 146.
\item \textsuperscript{174} LA. CONST. of 1868, art. 135, \textit{reprinted in} SOURCES AND DOCUMENTS, \textit{supra} note 96, at 145, 158.
\end{itemize}
indeed, did everything it could to frustrate the purposes of the law. When twenty-eight African American girls managed to secure admission to a previously all-white school, the board reprimanded the principal for allowing this to happen and had all of the girls removed.\footnote{175} It later adopted a “pupil placement system,” requiring the permission of the president of the school board before a pupil could be admitted to a school.\footnote{176} As the \textit{Daily Picayune} noted, the president of the school board took “good care that no negroes were admitted into white schools.”\footnote{177} Nevertheless, the State Superintendent of Public Education, Thomas Conway, was determined, as he declared, “to put the system of mixed schools to a thorough, practical test.”\footnote{178} His view was that if the state authorities were resolute, the opponents of integration would in the end yield to the inevitable.\footnote{179} The device for accomplishing his purposes was the comprehensive public education act passed by the Louisiana legislature in 1870.

This law made it the duty of the State Board of Education, the body that had ultimate authority over the state school system, to enact a regulation to affirm that the schools should be open to all without racial distinction; at its first meeting in 1870, the board did just that.\footnote{180} It also created a new governance structure for the parish school systems, dividing authority between parish-wide boards and separate boards for subdivisions or wards within the parishes.\footnote{181} The ward boards were given the primary right of control and government over schools in their districts, including the right to levy taxes, employ teachers, and, significantly, to admit pupils.\footnote{182} The authority of the parish-wide boards

\begin{itemize}
  \item\footnote{175} DEVORE \& LOGSDON, supra note 17, at 68; \textit{Mixed Schools}, \textsc{DAILY PICAYUNE} (New Orleans), Jan. 12, 1871, at 1.
  \item\footnote{177} \textit{Mixed Schools}, supra note 175.
  \item\footnote{178} Letter from Thomas Conway to Editor, Washington New National Republican (June 4, 1874), \textit{in} Harlan, \textit{supra} note 176, at 664.
  \item\footnote{179} Id.
  \item\footnote{180} \textsc{STATE SUPERINTENDENT OF PUB. EDUC.}, \textsc{ANNUAL REPORT TO THE GENERAL ASSEMBLY OF LOUISIANA} 7 (1871). Interestingly, at the same meeting, the Board adopted a regulation calling for equal pay for male and female teachers, characterizing unequal pay under the old system as a “relic of barbarism.” \textit{Id.} The 1869 law contained a provision making it a misdemeanor for any school official to deny admission to any child “lawfully entitled to admission.” 1869 La. Acts 175, 188. This provision was included in the 1870 statute. 1870 La. Acts 42.
  \item\footnote{181} \textsc{STATE SUPERINTENDENT OF PUB. EDUC.}, \textit{supra} note 180, at 7.
  \item\footnote{182} \textit{Id.}
\end{itemize}
CALIFORNIA CARPETBAGGER

was less specifically defined. A special section was devoted to New Orleans. As in the rest of the state, authority over the schools was allocated to a “City Board of School Directors” and boards of directors for the city’s different wards, though the size of the city board and the manner in which its members were selected were different.

Under the law, the New Orleans City Board was supposed to appoint members to the various ward boards. It took months, however, before the Board made any moves to fill these positions and then it acted as if the ward boards did not exist. State Superintendent Thomas Conway, convinced that the Board had no intention of implementing the new education law, informed the Board that he intended to deal with the ward boards as if they had the effective day-to-day authority over the schools and to fund them directly, bypassing the Board completely. In response, the Board filed suit for an injunction in the Eighth District Court to prevent Conway from interfering with its functions; Conway responded by filing his own petition, asking the court to restrain the Board from seeking to exercise exclusive control over the city’s schools. The issue of where authority over the schools ultimately lay was thus dumped into the lap of Judge Henry Dibble.

Dibble delivered a decision on November 21, 1870, rejecting the Board’s request and affirming the power of the ward boards. The law gave the New Orleans ward boards the same extensive list of rights and responsibilities as it did to ward boards in the parishes, he noted. To be sure, a subsequent section of the law said that “control and direction of all public schools” within the city was lodged in the Board. He did not see, however, how that general provision could divest the ward boards of the primary authority over school affairs they had explicitly been granted by the law. Moreover, he noted, the very next section declared that “the sole and exclusive control and regulation of all public schools” should reside in the City Board and the local boards.

183. Id.
184. Id. at 15.
185. STATE SUPERINTENDENT OF PUB. EDUC., supra note 180, at 17.
186. Id.
187. Id. at 17-18.
188. Id. at 18.
189. The Courts: The Public School Matter, DAILY PICAYUNE (New Orleans), Nov. 22, 1870, at 2. This article reprints the full text of Dibble’s opinion.
190. Id.
191. Id.
192. Id.
was not clear on what specific authority remained with the Board after the statute.  

It was a yeoman effort on Dibble’s part to make sense out of what was in truth an unartfully drafted statute and probably did comport with the intent of the framers of the legislation. Superintendent Conway, who seems to have been the inspiration for the legislation, said that the ward boards were the “vital germ” of the school plan.

As the historian, Louis R. Harlan, pointed out in his important study of school desegregation in post-Civil War New Orleans, Dibble’s decision “was acknowledged by all . . . to be decisive” and paved the way for the experiment in integration that followed. On the very day it was handed down, Superintendent Conway issued an announcement ordering the ward boards of the City of New Orleans to immediately take charge of the schools in their respective wards and to make application to him for funding. The announcement declared that no child would henceforth be excluded from any New Orleans school because of race or color. Within weeks, the first black schoolchildren began to be admitted to formerly all white schools.

Interestingly, the ward school boards, which were at the center of the controversy in the Eighth District Court case, would themselves soon disappear. Conway himself conceded that the layers of supervisory authority set up by the 1870 law were “cumbrous and complicated” and realized that his purposes might be accomplished simply by giving the State Board of Education greater control over who sat on the city school board. In February 1871, an amendment to the 1870 statute was approved, eliminating the ward boards, vesting sole control of the schools in the city board of school directors, but now giving the State Board of Education the right to appoint all of its members. Shortly thereafter, a new New Orleans school board was appointed, with Henry Dibble designated representative for the city’s Second Ward. At its...
first meeting in March, Dibble was elected school board president. He would preside over the board for the next six years—virtually the whole period of the New Orleans desegregation experiment. We will return later to this phase of Dibble's career.

4. Civil Rights Cases: Public Accommodations

Article 13 of the 1868 Louisiana Constitution, part of its Bill of Rights, declared that all persons should have equal rights and privileges on public conveyances and that places of business or public resort should be open to all without distinction or discrimination on account of race or color. Like the public school provision, it was made part of the 1868 Constitution because of the determined efforts of black delegates at the constitutional convention, free persons of color from New Orleans in the main. Legislation in implementation of Article 13 was passed by the legislature in 1868, but was returned unsigned by Governor Warmoth. He gave as his principal reason the fact that the law made discrimination criminal (Dibble told a congressional committee that he himself opposed the law in its original form for this reason), but by this time it was clear that the governor had no enthusiasm for legislation promoting "social equality," as it was called. In 1869, a new civil rights law was passed that the Governor saw fit to sign. It banned discrimination on all common carriers and in places of public accommodation. It lacked a criminal enforcement provision, but provided for the forfeiture of the license of any owner of a business that should discriminate and made him liable in damages to the victims of discrimination. Then in 1871, a law was enacted providing that either party to a civil lawsuit arising under Article 13 or its implementing legislation should have the right to a trial by jury, but that if the jury could not agree on a verdict, the trial judge should have the right to decide the case on the merits himself.

Opinion differs as to how effective the civil rights law was, some

203. LA. CONST. of 1868, art. 13, reprinted in SOURCES AND DOCUMENTS, supra note 96, at 145, 146.
204. H.R. MISC. DOc. No. 42-211, at 274 (1872).
205. Id.
206. Id.
arguing that, at least in New Orleans, it had a real impact on practices in restaurants, bars, theaters, and other places of public resort; others argue that it was almost completely ineffective. 209 What is certain is that a fair number of cases were brought by African Americans in New Orleans under the law, none more interesting than that by C.S. Sauvinet. Sauvinet, the civil sheriff of Orleans parish, 210 had long been active in Republican party politics. 211 He was also something of a civil rights activist. 212 His daughter, for example, was one of the first to seek enrollment in a previously all white school. 213 In January 1871, he filed a petition in the Eighth District Court alleging that he, in the company of two white acquaintances, went to a New Orleans coffee house but was refused service and that the only ground for this refusal was that he was a "man of color." 214 Complaining that he had suffered outrage to his feelings he asked that the proprietor's license be declared forfeit and for damages in the amount of $10,000. 215 Sauvinet was extremely light-skinned, so much so that he averred that even before the Civil War he had been able to pass for white and get service in white establishments, but he presented evidence at the trial that the coffee house proprietor knew he was of mixed ancestry and refused service for that reason. 216

After some deliberation the jury reported to Dibble that it could not reach a verdict and was discharged; invoking the 1871 law, Dibble took the case into his own hands, prompting an objection that the law deprived Walker of his state and federal right to have a jury decide his case. 217 Dibble decided that the preponderance of the evidence supported Sauvinet's claim that he had been denied service because of his race and that he was entitled to relief. 218 Dibble obviously was

209. Compare FISCHER, supra note 201, at 69 ("[T]he Civil Rights Act of 1869 did little to end racial discrimination in places of public accommodation."), and TAYLOR, supra note 39, at 259 (finding that the law was largely ignored), with JOHN W. BLASSINGAME, BLACK NEW ORLEANS 1860-1880, at 196 (1973) (finding that as a result of the law "[s]ome of the businesses... capitulated and served all customers without distinction").

210. BLASSINGAME, supra note 209, at 185.

211. FISCHER, supra note 201, at 111.

212. Id.

213. Id.


217. See id. at 13-14.

218. During the trial, Sauvinet testified that, notwithstanding his appearance, he had the reputation of being a colored man at the time of the incident. Others testified to the same
acquainted with Sauvinet, but nothing in the transcript of the proceedings reveals bias or partiality in his handling of the case. "Every citizen has the right to ask from courts that he be protected in the immunities and privileges guaranteed by the constitution," Dibble wrote, "In this case the plaintiff shows an infringement of such civil rights. His citizenship had been degraded."219 And he thought the damages should be sufficient, "as will sanctify the principle involved and deter others from inflicting the same injury."220 He settled on the figure of one thousand dollars.221

As to the attack on the validity of the statute made by Walker's counsel, Dibble pointed out that there was nothing in the Louisiana Constitution that guaranteed the right to a jury trial in civil cases. Nor did the U.S. Constitution provide any basis for such a claim. The Seventh Amendment, which gave litigants such a right, according to the opinion, applied only to proceedings in the federal courts.222

Dibble's decision was appealed to the Louisiana Supreme Court, which affirmed,223 and from there to the United States Supreme Court on the question of whether the denial of Walker's demand for a jury trial violated his rights under the U.S. Constitution.224 In an opinion that still looms large in American constitutional law, the Court held that it did not; the Seventh Amendment related only to federal trials, and neither the Due Process nor Privileges or Immunities Clauses of the Fourteenth Amendment mandated a trial by jury in state civil proceedings.225 States had wide latitude in fashioning their systems of civil justice. During the twentieth century, by a process of selective incorporation, the Supreme Court has made almost all of the provisions of the Bill of Rights binding on the states via the Due Process Clause of the Fourteenth Amendment, including the right to a jury trial in criminal cases,226 but it has never overruled its decision in the Walker case.227

When the question was put to him by counsel for the defendant, "Are you a colored man?" he replied, revealingly, "Whether I am or not is a matter that I do not know myself." transcript of record at 56-57, Sauvinet v. Walker, 27 La. Ann. 14 (1875) (No. 3513).

220. Id.
221. Id.
222. Id. Dibble did not order Walker's license forfeited. The Courts, supra note 219.
225. Id.
C. Political Maneuvers, 1871-1872

1. Republican Party Factionalism

Dibble's judicial duties did not prevent him from remaining deeply involved in Republican Party politics, which by 1871 had become something of a mare's nest. Like most other southern Republican parties, the Republican Party of Louisiana was beset by fractiousness and factionalism during Reconstruction. Fault lines were apparent as early as 1870, but by the legislative session that began in January 1871, the party had split into two feuding factions, one led by Governor Warmoth and the other by James Casey, collector of the port of New Orleans (and brother-in-law of Ulysses Grant's wife) and Stephen Packard, the United States Marshal and chairman of the Republican state central committee. Because both Casey and Packard had their offices in the New Orleans Custom House, the seat of federal power in Louisiana, this faction came to be dubbed the Custom House faction, or, by its opponents, the Custom House Ring. George Carter, speaker of the Louisiana House of Representatives and initially a supporter of Warmoth, came also to be a leading figure in the faction as did Casey's predecessor as collector, William P. Kellogg.

The sources of opposition to Warmoth were various. Henry Dibble dated its beginnings to his refusal to sign the civil rights bill passed in 1868, an action which, according to Dibble, had alienated many black leaders. Historians of the period have pointed to other factors as well, including Warmoth's successful effort to win approval of a constitutional amendment allowing him to run for a second term, his appointment of Democrats to state office, and his failure to support Casey in his 1871 bid for a United States Senate seat. Some think that at bottom the dispute was one over who should control and who should get the rather well paying patronage positions that the Governor's office and the Custom House, respectively, controlled. In 1871, even while

228. FONER, supra note 51, at 349-50.
229. TAYLOR, supra note 39, at 184, 210-12, 214-17.
230. Id. at 210-12.
231. Id. at 210-12, 214-17.
232. H.R. Misc. Doc. No. 42-211, at 274 (1872); see also FISCHER, supra note 201, at 64-66; TUNNELL, supra note 94, at 166.
233. LONN, supra note 135, at 73-77.
234. RICHARD N. CURRENT, THREE CARPETBAG GOVERNORS 46-51 (1967); LONN, supra note 135, at 73-77; TAYLOR, supra note 39, at 209-16. Lawrence Powell argues that
presiding over his court, Dibble was in the forefront of efforts to promote Warmoth's political fortunes and to counter the maneuvers of the Custom House faction.

2. The "Gatling Gun" Convention

The Republican Party was due to convene in New Orleans sometime in 1871, with the sole item on the agenda the election of a new state central committee. The prospect of the meeting produced, as the historian Ella Lonn has written, "the greatest excitement in the party." At the end of May, Warmoth, Dibble, and six other Republicans wrote Packard asking that the convention be held in October or November rather than the summer, as was tentatively planned, arguing that attendance might be poor since many Republicans tended to be away during the summer and there were fears of a yellow fever epidemic during this season. When Packard refused and scheduled the meeting for August 9, Dibble, who had originally planned to go north on vacation immediately after his court adjourned in July, abruptly changed plans. "[S]eeing the attack that was about to be made upon [Warmoth], and believing that to sustain him was necessary to the maintenance of the republican party of Louisiana," he told a Congressional committee in 1872, "I determined to remain and assist in the organization of [the] convention."

According to his 1872 testimony, Dibble, with Warmoth's approval, took virtual charge of the pre-convention campaign of the Warmoth faction, organizing a committee, gathering political intelligence throughout the state, disbursing funds to Warmoth

disputes over patronage, themselves the product of Republican politicians' lack of a toehold in the private economy, were the chief source of the factionalism that ultimately led to the collapse of the southern Republican parties during Reconstruction. Lawrence N. Powell, The Politics of Livelihood: Carpetbaggers in the Deep South, in REGION, RACE, AND RECONSTRUCTION 315 (J. Morgan Kousser & James M. McPherson eds., 1982). Powell describes the typical southern Republican party as one "that was financially hard pressed from head to toe and usually wedded to political patronage for economic sustenance." Id. at 332. Whatever its sources, factionalism was, as Eric Foner perceptively writes, "given Southern Republicans' other weaknesses, . . . a luxury the party could scarcely afford." FONER, supra note 51, at 348.

235. LONN, supra note 135, at 96.
supporters, and in general doing whatever he could to round up pro-Warmoth convention delegates. "I conducted the campaign as far as the reception and disbursement of funds went," Dibble declared, "I heard from every parish in the State. I sent out persons who assisted me... and I had regular reports from most of the parishes in regard to the elections held." Warmoth may not have been in a position to assume control of the campaign himself, as he was in very ill health at the time, recovering from a severe foot infection.

Considerable controversy surrounded the elections for the Republican convention, each faction accusing the other of using improper means, including intimidation, to influence the choice of delegates. When all of the election returns were in, however, Dibble believed, with justification it seems, that he had secured a majority of the convention delegates for Warmoth. According to an historian of Louisiana Reconstruction, Joe Gray Taylor, that was the weight of opinion in New Orleans at the time. Nevertheless, the Warmoth faction was suspicious that Packard would disregard the results and seize control of the convention, and decided to take preventive action in anticipation. Thinking it crucial that the event not be held at the Custom House, a venue Marshal Packard could control (the central committee had made no public announcement of a meeting place), the faction's leaders rented all the public meeting halls in New Orleans so that there would be no dearth of available meeting sites. Dibble testified that this idea may have been his, though he acknowledged his memory was vague. He certainly was involved in deciding on this maneuver and in implementing it. After the meeting halls were rented, several were offered to Marshal Packard but he declined to...
accept. On the eve of the convention, August 8, he announced that it would indeed be held at the Custom House. He also announced that anyone who wished to attend would need an admission ticket and that these would only be given to those duly certified as delegates by members of his central committee.

At some point after the election returns were received, Dibble had suggested his drafting a letter of protest to be signed by the Warmoth delegates and to be used in the event the Packard forces sought to hold the convention in any inhospitable venue. His idea was that if this were to happen he would rise, read the protest, and relying on it, take temporary control of the convention. Upon hearing the announcement of a meeting site on August 8, the Warmoth group caucused and some sixty-five delegates signed Dibble’s letter of protest. It accused Packard and his allies, among other things, of conspiring to pack the convention and to “prevent a fair and free expression of the will of the republicans of Louisiana.” That evening Dibble and two others met with Packard, gave him the protest, and asked for admission tickets, but Packard said they would not be available until the next morning.

As it happened, Dibble would never have the opportunity to read his protest. On the morning of August 9, when Governor Warmoth and his supporters went to the Custom House to get their admission tickets, they found the building’s rotunda occupied by about one hundred federal troops, armed with muskets and two Gatling guns; the convention came to be dubbed the “Gatling Gun Convention.” Only half of Warmoth’s delegates received admission tickets. Furthermore, they were told that they could not enter the room where the convention was to be held until later in the morning. When Warmoth noticed a caucus of Packard supporters in an adjacent courtroom, he decided to take matters into his own hands. What ensued was, as Joe Gray Taylor puts it, “one of those comic-opera scenes which were more and more to be a

247. Lonn, supra note 135, at 100 n.1.
248. Id. at 100.
249. Id.
251. Id.
252. Id.
253. Id. (internal quotations omitted).
255. Taylor, supra note 39, at 216-17.
256. Id. at 217.
257. Id.
258. Id.
feature of Louisiana Reconstruction."

Warmoth led his supporters, Dibble among them, in procession, from the Custom House to one of the meeting halls he had rented—the group proceeded to hold its own convention. Dibble gave a passionate speech denouncing the Custom House convention as, in the words of the Daily Picayune, "a body of Administration favorites, guarded by bayonets and lawless tyranny." Dibble said that he would go to Washington to ask President Grant whether he had authorized what had happened. If the answer were yes, Dibble said, then Grant could not be the Republican presidential candidate: "The free people of this country will not endure such lawless tyranny." Before it ended, the convention elected its own state central committee and voted to send a delegation to meet with President Grant.

After the conclusion of the Republican convention, or better put, conventions, Dibble traveled to New York, in part on holiday, in part to press the cause of the Warmoth Republican faction with President Grant. While in the state he arranged a meeting of Warmoth supporters with President Grant at his vacation home in Long Branch, New Jersey. Dibble himself had a separate meeting with the President, at which, he said, he "made a very emphatic representation to him," presumably about Packard's use of federal troops at the New Orleans convention. Grant was quite noncommittal in his responses, however, promising only that he would look into the matter.

259. TAYLOR, supra note 39, at 217.
261. The Republican Convention, supra note 260.
262. Id.
263. Id.
264. TAYLOR, supra note 39, at 217-18; The Republican Convention, supra note 260.
266. Id.; TAYLOR, supra note 39, at 218. While in the northeast, Dibble was engaged in other Warmoth related business as well. He pursued negotiations with Henry McComb (of New Orleans, Jackson, and Great Northern Railroad fame), aimed at persuading him to take control of the Louisiana Levee Company, a corporation put in charge of the state's levee system but then under incompetent management and in dreadful financial shape. The discussions ended abortively and left Dibble and Warmoth bitter at the powerful Delaware businessman. The negotiations are extensively documented in correspondence between Dibble and Warmoth in the Henry C. Warmoth Papers. There is a suggestion in some of the correspondence that Dibble and Warmoth might have hoped to profit personally from a successful outcome. Letter from Henry C. Dibble to Henry Clay Warmoth, Governor, State of La. (Aug. 26, 1871) (on file with University of North Carolina Chapel Hill); Letter from Henry C. Dibble to Henry Clay Warmoth, Governor, State of La. (Sept. 27, 1871) (on file with University of North Carolina Chapel Hill).
3. *Dibble’s Break with Warmoth*

In the months following the August 1871 Republican convention, Custom House Republicans openly entered negotiations with Democrats to mount impeachment proceedings against Warmoth, but these plans were dealt a blow when Lieutenant Governor Oscar Dunn, one of the state’s two leading black politicians and a Custom House adherent, died in November.\(^{267}\) Under Louisiana law, the Senate had the right to fill the vacancy and Warmoth very much wanted one of his supporters put in the post.\(^{268}\) Fearing that the lower house might initiate impeachment proceedings, he summoned the Senate alone into special session.\(^{269}\) It then elected P.B.S. Pinchback, the other leading black political leader and a Warmoth supporter, Lieutenant Governor.\(^{270}\)

The regular session of the legislature, which convened in early January 1872, was the scene of an almost Byzantine struggle for power between the two Republican factions, with George Carter, the House speaker, working intensely to start impeachment proceedings against Warmoth, the “Warmothites” doing all in their power to frustrate Carter’s plans; at one point, each side brought an armed police force into the House.\(^{271}\) During one legislative session, when the speaker’s position was declared temporarily vacant, Warmoth managed to get Carter replaced by his own man, O.H. Brewster.\(^{272}\) Carter then led his representatives to a saloon on Royal Street where they began to conduct legislative sessions of their own.\(^{273}\) Louisiana now had two bodies, each claiming to be the legitimate lower house of the Louisiana legislature.\(^{274}\)

Henry Dibble was drawn into the controversy when Brewster filed a petition for a writ of habeas corpus in the Eighth District Court alleging that three Warmoth representatives were being illegally kept under arrest by the Carter forces. Dibble ordered the writ issued, but the men in question were never delivered over to his court and the issue never tried.\(^{275}\) Meanwhile, Governor Warmoth filed a suit of his own seeking an injunction to restrain the Carter group from continuing to

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\(^{267}\) TAYLOR, *supra* note 39, at 218.
\(^{268}\) *Id.* at 219.
\(^{269}\) *Id.* at 219-20.
\(^{270}\) *Id.* at 220-21.
\(^{272}\) *Id.* at 224.
\(^{273}\) *Id.*
\(^{274}\) *Id.* at 225.
\(^{275}\) *The Injunction Against the Carter Legislature*, *DAILY PICAYUNE* (New Orleans), Jan. 25, 1872, at 9.
meet in the Royal Street saloon. A supplementary petition asked the court to restrain the State Auditor and the State Treasurer from paying claims against the state upon any order issuing from the Carter group.276

In a decision handed down on January 22, Dibble granted the second injunction but refused the first.277

Notwithstanding Dibble’s refusal to stop the Carter group from meeting, the Warmoth forces could only have seen the decision as a victory for their side. While not explicitly holding that the Warmoth House of Representatives was the legitimate lower house, Dibble ruled clearly that the group assembled in the Royal Street coffee house was not.278 Under Louisiana law, both houses of the Louisiana legislature were to meet in the same place unless both houses agreed to move elsewhere. There was no evidence that the Senate had agreed to meet anywhere other than at its original meeting place. The Royal Street assembly could only be contemplated as a collection of individuals, he wrote.279 He went on, however, that as individuals they had a fundamental constitutional right to assemble and to speak. They could do so wisely or foolishly. They could even presume “to play legislature as long as they please.”280 Of course, should they seek to turn their deliberations into action, they could be prevented from doing so.281 For a variety of reasons, probably including Dibble’s decision, by the end of January, most Carter representatives had returned to the state house to claim their seats and all but two were eventually seated.282 Warmoth, though, was now back in effective, albeit tenuous, control of the legislative branch.283

At the time, Henry Dibble was seen as one of Warmoth’s closest allies and was tarred with the same brush by his opponents. At an anti-Warmoth mass meeting held in early January in New Orleans under the auspices of the Democratic Central Committee, one speaker accused Dibble of “perverting the courts of justice to the ends of ambitious partisans” (the reference was probably to his the writs of habeas corpus Dibble had just issued) and called for the abolition of the Eighth District
Court.\(^{284}\) By this time, Dibble was also persona non grata with the white New Orleans establishment (as we shall see, this arose as much from his support for school integration as from his association with Warmoth). This could be seen even in the celebration of that year’s Mardi Gras where he was the butt of satire from one of the city’s elite carnival organizations. That year the mayor of New Orleans had given Rex, the king of Carnival, ceremonial authority to rule the city on Mardi Gras day.\(^{285}\) Among the “edicts” Rex issued were one commanding Governor Warmoth to “disperse that riotous body known as the Louisiana State Legislature,” and another declaring that “[t]he following laws enacted by a previous government having been found to weigh grievously upon His Majesty’s subjects—The Registration Law, Constabulary Law, Printing Law, Taxes and Judge H. C. Dibble—all of the same are hereby abrogated and abolished.”\(^{286}\)

Through the spring, Dibble was at the forefront of those supporting Henry Warmoth. In April, he was a principal speaker at a pro-Warmoth rally sponsored by the Orleans parish Republican executive committee.\(^{287}\) The mass meeting commended the Warmoth administration, somewhat disingenuously, for its efforts “to break down the caste of race which has been the bane of our society.”\(^{288}\) But, as it would happen, this would be the last public appearance Dibble would make on Warmoth’s behalf. Dibble and Warmoth were soon to part ways, the break occasioned by a dramatic shift in political direction by the ever-agile Governor. In early 1872, a national group styling itself the Liberal Republican party had organized to deny Grant the Republican presidential nomination.\(^{289}\) The group drew inspiration from many sources and had a multifaceted political platform, the reform of the civil service, tariff reduction, and an end to corruption in government being among its principal planks.\(^{290}\) It was extremely hostile to Southern Reconstruction governments, however, and its call for the

\(^{284}\) *The Meeting Last Night*, DAILY PICAYUNE (New Orleans), Jan. 9, 1872, at 2.


\(^{286}\) *The Wannoth Republican Mass Meeting*, supra note 287.

\(^{287}\) *The Warmoth Republican Mass Meeting*, DAILY PICAYUNE (New Orleans), Apr. 12, 1872, at 8. The resolution calling for the rally can be found in *Political Notices*, SEMI-WEEKLY LOUISIANAN, Apr. 11, 1872, at 1. Though there is no direct evidence, the wording of the resolutions adopted at the rally suggest they might have been Dibble’s work.

\(^{288}\) *The Warmoth Republican Mass Meeting*, supra note 287.

\(^{289}\) *TAYLOR*, supra note 39, at 228.

\(^{290}\) *FONER*, supra note 51, at 500.
return to "local self-government" was understood by many to be in effect a call for a re-establishment of white control in the region. It was notably unsympathetic to the plight of the newly freed black population. Warmoth soon allied himself with this movement (an irony, of course, since he was to many Northern critics the very emblem of all that was wrong with carpetbag government) and in May led a delegation of Louisiana Republicans to the group's national convention, a convention that chose the newspaper publisher, Horace Greeley, as presidential nominee. The political maneuvers that followed on Warmoth's return to Louisiana are of a truly bewildering complexity. A full description would consume many pages. Suffice it to say that by mid-August there were in effect three political parties vying for power in the state: the Democratic Party; the Liberal Republican Party headed by Warmoth; and another Republican Party consisting, amazingly, of the formerly antagonistic Pinchback and Custom House factions, with Henry Dibble one of the leading members of this last group (he was for a brief while its nominee for Congress). In late August, the three parties were reduced to two when Warmoth's Liberal Republicans formed an alliance with the Democrats. The Custom House/Pinchback Republicans nominated William Kellogg for Governor. The Liberal Republicans agreed to support the Democratic nominee, John McEnery.

As cool as Dibble's relations were with the Grant administration, he was never attracted to Liberal Republicanism and was deeply dismayed by Warmoth's decision to throw in his lot with that movement. Like many Republicans, he viewed the thought of any combination with the Democratic party with abhorrence. The local Republican paper called the McEnery ticket a collection of "negro-hating, schoolhouse burning, fire-eating Bourbonists." He expressed his displeasure to Warmoth in September while campaigning for the national Republican ticket in

291. Id.
292. Id. at 498-99.
293. TAYLOR, supra note 39, at 228-29.
294. Joe Gray Taylor compares the scene "to the Italian peninsula during the Renaissance." Id. at 231.
296. TAYLOR, supra note 39, at 232-33.
297. Id. at 233.
298. Id. at 235.
299. Id. at 236 (internal quotations omitted).
Maine and at the same time offered his assessment that the pro-Greeley alliance of Republicans and Democrats was doomed to fail. The sympathies, ideas, and purposes of the two parties were too entirely different, he wrote; Dibble compared Democrats to “rum-guzzling rabble.”

“A political party cannot be formed with no other platform than opposition to an individual,” he declared. He predicted that Grant would win the presidential election by a greater margin than he had in 1868.

At the same time, Dibble went out of his way to reassure Warmoth of his continuing warm personal attachment and assured him that he had studiously avoided criticizing him publicly.

Dibble’s predictions about the presidential election were right on target. Grant easily defeated Greeley that November, winning 55.6% of the popular vote compared with Greeley’s 43.9%, a margin of victory that substantially exceeded his margin over his Democratic opponent in 1868.

The results in the Louisiana gubernatorial election were not so conclusive.

D. The 1872 Elections and Dibble’s Removal from the Eighth District Court

When the results were first reported, they showed McEnery the winner by about ten thousand votes over Kellogg, but, as Joe Gray Taylor notes, “it is impossible to determine how closely the vote reported corresponded with the vote cast.”

Loud charges of fraud or voter intimidation were heard from both sides, and it quickly became clear that the Kellogg campaign would not accept the vote tally. It then fell to a state authority, the Returning Board, to sort out the claims and declare a victor.

It is necessary to say a word, by way of background, about this unique Louisiana creation.

Widespread violence, aimed mainly at black and Republican voters, had marred the elections of 1868. It has been estimated that upwards of

300. Letter from Henry C. Dibble to Henry Clay Warmoth, Governor, State of La. 3 (Sept. 8, 1872) (on file with University of North Carolina Chapel Hill).
301. Id. at 5.
302. Id. at 6.
303. Id.
305. TAYLOR, supra note 39, at 241.
306. Id. at 242.
307. LONN, supra note 135, at 170-79; TAYLOR, supra note 39, at 242.
one thousand may have died.308 There were also numerous allegations of voter fraud. In response, the state passed a law revamping its election machinery. One of the devices that was put in place was an agency, called the Returning Board, empowered to review election returns and throw out those it thought tainted by fraud or violence.309 Historians agree that safeguards created by the new election law, including the Returning Board, helped ensure that the 1870 fall elections to the Louisiana House of Representatives went off smoothly with few irregularities and no serious violence.310 Given the Returning Board’s powers, however, it was a virtual certainty that this body would itself eventually become embroiled in politics.

On November 13, 1872, the Returning Board met briefly for the first time and adjourned to the next day.311 Its members were Governor Warmoth, Lieutenant Governor Pinchback, the Secretary of State, Francis Herron, and two members of the state senate, John Lynch and T.C. Anderson.312 Pinchback and Anderson were disqualified from participation, however, because they had been candidates in the election; this left two vacancies on the board.313 Under the law, the three remaining members had the right to fill them.314 When the Board met on November 14, Governor Warmoth, who had discovered that Herron, once a supporter, had defected to the Kellogg faction, informed it that he had removed Herron as Secretary of State and replaced him with a known supporter, Jack Wharton.315 Warmoth and Wharton voted to elect two loyalists, Durant DaPonte and Frank H. Hatch, to fill the Board vacancies.316 Lynch and Herron left the meeting and proceeded to make their own appointments, naming James Longstreet and Jacob Hawkins to the two vacant positions.317 A year earlier, two different bodies had met claiming to be the legitimate legislature of the state. There were now two bodies each claiming to be the legitimate Returning Board. Since the Eighth District Court had exclusive jurisdiction over election contests, it was inevitable that the dispute would come before Henry

308. TUNNELL, supra note 94, at 157.
309. LONN, supra note 135, at 160; TUNNELL, supra note 94, at 83.
310. LONN, supra note 135, at 70.
311. TAYLOR, supra note 39, at 242.
312. Id. at 241.
313. Id.
314. Id. at 241-42.
315. TAYLOR, supra note 39, at 242.
316. Id. at 243.
317. Id.
Dibble, now, it must be added, a lame-duck judge inasmuch as he had been defeated in his bid for reelection.\(^{318}\) That same day Lynch, Longstreet, and Hawkins (usually called by historians “the Lynch Board”) filed suit in the Eighth District Court under a Louisiana law called “the intrusion in office act.”\(^{319}\) The suit asked for an injunction to restrain the Warmoth appointees from acting as members of the Board.\(^{320}\) Dibble set the case for argument, which commenced two days later to considerable press coverage.\(^{321}\)

While the case was still pending, and in an apparent effort to influence the outcome, Warmoth made some sort of overture to Dibble. In a letter dated November 19, Dibble decisively rejected it. The reasons he gave are revealing. He wrote,

> I cannot join you in your effort. You may, probably will, succeed, but I had better fail with my republican friends than triumph with my political opponents. The democracy and liberal party of our state are inimical to the interests of the colored people with whom I have been politically associated and whom I cannot desert. Doubtless you will secure the government but I must not ever consent to the accession of your men to power.\ldots [I]n every act where I can justly and properly exercise discretion I will be found with the republican party.\(^{322}\)

That day Dibble handed down a decision granting the injunction.\(^{323}\) His judgment was based on his conclusion that Herron was the *de facto*, if not the *de jure* Secretary of State and that it was his vote, not Wharton’s, that had determined the makeup of the Returning Board.\(^{324}\) He denied that the Governor had any power to remove Herron from office and characterized his action in doing so as a nullity.\(^{325}\) He went on, however, even if the Governor had in fact legitimately removed Herron and given Wharton his commission, no further steps had been taken to effectuate the appointment.\(^{326}\) On the day the vote on Board

\(^{318}\) *Id.* at 243-44.

\(^{319}\) *The Question About the Returning Boards*, *Daily Picayune* (New Orleans), Nov. 20, 1872, at 1.

\(^{320}\) *Id.*

\(^{321}\) *Id.*

\(^{322}\) *TAYLOR*, *supra* note 39, at 243.

\(^{323}\) *Id.*

\(^{324}\) *The Question About The Returning Boards*, *supra* note 319.

\(^{325}\) *Id.*

\(^{326}\) *Id.*
members was taken, Herron was still to all outward appearances the Secretary of State, and it was his vote, not Wharton’s, that determined the Board’s makeup.\textsuperscript{327} Some had been describing Warmoth’s actions as “a brilliant coup d’etat.”\textsuperscript{328} Perhaps because of this, Dibble felt compelled to add a caustic obiter dictum at the end: “coup d’etat is not an American institution,” he declared “it belongs to another country where they have barricades, and where they meet at midnight.”\textsuperscript{329}

The day the decision came down, Warmoth had approached Dibble with a proposal, possibly that he immediately vacate the Eighth District bench in exchange for some reward. Dibble answered him:

\begin{quote}
I\textquoteright{}t would be treason for me to act as you suggest. I hold a trust which was given me by a party. I desire to administer for the advantage of the whole people yet I must not surrender except to those who gave it to me or to the one entitled by law to succeed me and then only when the demand is made in conformity to law.\textsuperscript{330}
\end{quote}

Dibble clearly understood that he had lost the election, but refused to vacate his seat until the Returning Board had completed its official canvas of returns and promulgated the results. Warmoth then decided to take matters into his own hands: he signed an order removing Dibble from the Eighth District Court bench and appointing Judge-elect W.A. Elmore to the position.\textsuperscript{331} On November 21, Elmore arrived in court and took his seat on the bench.\textsuperscript{332} When Dibble showed up an hour later the two men got into a loud argument, each claiming a right to the seat and each threatening the other with forcible removal.\textsuperscript{333} It was Dibble who was at length forced to beat a retreat from the courtroom.\textsuperscript{334} But that did not end the matter.

On December 3, he wrote Elmore informing him he still claimed to be judge and that he considered Elmore’s acts \textit{coram non judice}, i.e., rendered by a court without jurisdiction; the Louisiana Supreme Court, it

\begin{footnotes}
\footnotetext{327}{Id.}
\footnotetext{328}{The Question About the Returning Boards, supra note 319.}
\footnotetext{329}{Id.}
\footnotetext{330}{Letter from Henry C. Dibble to Henry Clay Warmoth, Governor, State of La. 1-2 (Nov. 20, 1872) (on file with University of North Carolina Chapel Hill).}
\footnotetext{331}{TAYLOR, supra note 39, at 244.}
\footnotetext{332}{The Returning Boards Abolished, DAILY PICAYUNE (New Orleans), Nov. 22, 1872, at 1.}
\footnotetext{333}{Id.}
\footnotetext{334}{Id.}
\end{footnotes}
should be noted, never recognized Elmore's authority. Elmore filed a petition for an injunction against Dibble to which Dibble responded asking the court to enjoin Elmore from exercising judicial duties. The entire affair was made moot on December 11 when the state legislature abolished the Eighth District Court.

The election of 1872 was eventually decided by a federal court. On December 6, Federal Circuit Judge Edward Durrell, in an opinion whose reasoning paralleled that of Dibble, ruled that the Lynch Board was the legal Returning Board, and on December 9 it certified Kellogg as winner of the governor's race. McEnery and his supporters refused to accept the results and for several months acted as if they were the legitimate government of the state—there were two separate gubernatorial inaugurations and two rival legislatures met separately. The issue was ostensibly settled on May 22, 1873 when President Grant officially recognized the Kellogg administration.

One postscript to the Warmoth-Dibble imbroglio. Dibble's "defection," if that is the right word, left a bitter taste in the mouth of Henry Warmoth and he could be found complaining about it even in his old age. In his autobiography published in 1930, when he was nearly ninety, he lumped Dibble in with others whom he considered to have shown themselves ungrateful for the help they had received from him. And yet to judge from their correspondence in the years immediately following these events the two men maintained decent, if not cordial, relations. Just a few months after rendering his decision, for example, Dibble, now in private practice, was doing legal work for Warmoth.

In 1874, in the midst of an election campaign, a campaign in which Dibble criticized the political positions taken by Warmoth, Dibble went out of his way to deny to Warmoth charges that he had been making

336.  Id. at 155-56.
337.  Id. at 156.
338.  Kellogg v. Warmouth, 14 F. Cas. 257, 259 (C.C.D. La. 1872) (No. 7667). Warmoth sought review of the decision in the United States Supreme Court, but was turned down. Ex parte Warmouth, 84 U.S. (17 Wall.) 64 (1872).
340.  Id.
personal attacks on him. The attacks were purely on Warmoth's politics, he assured the Governor. He had always considered him to be a personal friend and would never do anything to jeopardize that relationship. The next month, after Warmoth was wounded in an assassination attempt, he received a letter from Dibble which was certainly more than a pro forma expression of sympathy. He wrote,

Do not let anything worry you. You have the full and heart-felt sympathy of your friends. You have done no wrong, . . . You are justified before God and man. No one lays blame on you, and more you are endeared now to thousands for whom you have been estranged. You may command me for anything.

E. In the Kellogg Administration

1. Return to Law Practice, Appointment as Assistant Attorney General

After being removed from the Eighth District bench, Henry Dibble returned to private law practice in New Orleans. Given his legal reputation and his connections, political and otherwise, he had little difficulty in attracting business. Within weeks he was retained by Louisiana's Attorney General to serve as special counsel in a tax case. In the following months, he represented either government officials or private parties in other tax or payment matters, usually of a complex nature. Among the private parties was the Louisiana Levee Company, which successfully resisted a challenge to the law that had created it and forced the State Auditor to pay it for work done. In late 1873, he represented P.B.S. Pinchback before the U.S. Senate Committee on Privileges and Elections in the black man's effort to be recognized as the elected Senator from Louisiana (the Committee could not come to a decision).

One non-tax case on which Dibble was co-counsel proved to be of some lasting constitutional significance. In 1869, the state legislature had passed a law limiting the right to inspect the hatches of vessels arriving at the port of New Orleans and to make surveys of damaged goods to the master and wardens of the port or their designees. An inspector, not a designee, challenged the law on grounds, *inter alia*, that it was an impermissible attempt by a state to regulate interstate commerce, something only the U.S. Congress could do. Dibble argued the case on behalf of the wardens and prevailed in the Louisiana Supreme Court, which ruled that the law was a legitimate exercise of a state’s right to determine who should conduct vessel inspections if inspections were asked for. Two years later, however, the United States Supreme Court reversed, holding that the law was in fact not an inspection law, but a regulation of commerce. Oddly enough, the Court would reach the opposite result seventy years later in another case involving a Louisiana law strikingly similar in purpose and effect.

The approval of a law in March 1874, creating the new office of Assistant Attorney General, paved the way for Dibble’s return to the public sector. Dibble was soon appointed to the position and would remain in it for almost three years, serving at times (during the Attorney General’s incapacity, it appears) as Acting Attorney General. It was a busy practice and he was involved in handling a large number of cases, including, for the first time, criminal matters. Criminal cases would become a significant part of his law practice later in his life.

Though demanding of his time, the Assistant Attorney General position did not preclude Dibble from continuing to take on private cases, including at least one involving a high profile litigant. *The Daily Picayune*, for example, reported on September 11, 1875 that Dibble had filed a civil rights lawsuit on behalf of the black Secretary of State, P.G.

350. *Id.* at 105-06.
351. *Id.* at 107.
353. *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552 (1947). The challenge here was to a Louisiana law that had the effect of limiting the lucrative profession of Mississippi River pilot to the friends and relatives of existing pilots. *Id.* at 553-56. The Supreme Court upheld the law. *Id.* at 563-64. The case was argued purely on equal protection grounds. *Id.* at 556. No commerce clause issue was addressed.
355. *Myers, supra* note 7, at 63.
Deslonde, and his wife, seeking damages from a saloon owner for refusing to serve them.\textsuperscript{357} Nor did Dibble's duties prevent him from continuing to stay actively involved in Louisiana politics. He remained on the parish executive committee and even ran for Congress in 1876, losing by a fairly substantial margin to the Democratic candidate.\textsuperscript{358} More important he became a close confidant and adviser of Governor Kellogg and, inevitably, was drawn into the controversies that plagued the Kellogg administration, a regime that many Louisiana Democrats fervently believed was illegitimate.

2. \textit{The Battle of Liberty Place}

William Pitt Kellogg was from Vermont and like his predecessor, Henry Warmoth, had served in the Union army during the Civil War.\textsuperscript{359} He came to Louisiana in April 1865 when President Lincoln named him collector of customs for the port of New Orleans.\textsuperscript{360} He was elected to the United States Senate in 1868 and served in that body until he resigned to run for Governor.\textsuperscript{361} Kellogg was a fundamentally honest man (no credible allegations of corruption were ever made against him as they were against Warmoth) with realistic proposals for promoting internal improvements and bringing the state's fiscal house into order.\textsuperscript{362} He was also a committed proponent of racial equality, signing a new civil rights bill into law in 1873 and appointing many blacks to office.\textsuperscript{363} For this reason, as much as for the irregular way he came into power, Kellogg was never accepted by Louisiana whites.\textsuperscript{364} Indeed, throughout

\begin{footnotesize}
\textsuperscript{357} \textit{The Civil Rights Bill}, \textsc{Daily Picayune} (New Orleans), Sept. 11, 1875, at 1. The suit was filed by Dibble and his brother, Harvey M. Dibble, who was associated with Henry in the practice. \textit{Id.} The case was eventually dismissed in 1878. \textit{See} Deslonde v. Triconi, No. 43730, (4th Dis. Ct. 1878) (on file in Louisiana Collection, New Orleans Public Library).

\textsuperscript{358} \textsc{San Francisco Journal}, \textit{supra} note 8, at 136.

\textsuperscript{359} Nicholls, \textit{supra} note 339, at 173.

\textsuperscript{360} \textit{Id.}

\textsuperscript{361} \textit{Id.}

\textsuperscript{362} \textit{Id.} at 175.

\textsuperscript{363} Nicholls, \textit{supra} note 339, at 175.

\textsuperscript{364} \textsc{Taylor}, \textit{supra} note 39, at 264; Nicholls, \textit{supra} note 339, at 173. The 1873 Act, unlike its 1869 predecessor, contained a provision making it illegal for interstate carriers to discriminate on the basis of race. 1873 La. Acts 156, 157. This provision was presumably rendered null and void by the 1877 United States Supreme Court case of \textit{Hall v. DeCuir}, 95 U.S. 485 (1877). In \textit{Hall}, the Court, adopting the interpretation of the Louisiana Supreme Court that the 1869 Act applied to interstate carriers, held that the statute to that extent was an invalid attempt by a state to trench on Congress's exclusive power to regulate interstate commerce. \textit{Id.}
\end{footnotesize}
his term in office he served as a lightning rod for everything the white population thought was wrong with Reconstruction.365

Opposition to Kellogg was taken up several notches with the formation in the spring and summer of 1874 of a radically anti-black paramilitary organization calling itself the White League, whose members were expected to arm themselves and engage in military drills.366 The organization’s avowed purpose was to rid the state of black and Radical Republican officeholders and to restore white rule.367 Among the resolutions passed by one of its branches were: “that our experience with the colored people demonstrates their utter incapacity for good government” and “[t]hat the issue in the next campaign is not between Republicans and Democrats or Liberals, but between whites and blacks, and that the issue is: Shall the white people of Louisiana govern Louisiana?”368 The group did not advocate the violent overthrow of the government, but members used physical intimidation to force Radicals out of office in some rural areas of the state.369 In September, armed members of the New Orleans White League and others of like temperament staged what can only be called an attempted coup d’état against the Kellogg administration.

What set the events in motion was the impending arrival in New Orleans of a ship carrying a large supply of arms meant for the White League.370 Rumors circulated that the Metropolitan Police, an armed force under the control of the Governor, was about to seize the arms, and this brought a call for a mass rally by leaders of the White League.371 At the rally, held the morning of September 14 on Canal Street in the vicinity of the state house and attended by thousands, a resolution was passed calling for Kellogg’s immediate abdication.372 A delegation was appointed to go to the state house and demand just that of the Governor; the man they met on their arrival was none other than Henry Dibble, on duty that day as a member of Kellogg’s military staff.373 Dibble consulted with the Governor and returned to inform the delegation that Kellogg could receive no communication from them inasmuch as he had

366. TAYLOR, supra note 39, at 281, 291.
367. Id. at 291.
368. Id. at 282.
369. Id. at 284-85.
370. TAYLOR, supra note 39, at 292.
371. Id.
372. Id.
373. 1 JOHN SMITH KENDALL, HISTORY OF NEW ORLEANS 364 (1922).
information that bodies of armed men had assembled in the streets at the behest of the same people who had organized the mass meeting and sent them to meet him.\textsuperscript{374} Dibble, for his part, sent a letter to the chief of the Metropolitan Police stating that under the riot act it was his duty to disperse the crowd and advising him to send a squad of cavalry to do so.\textsuperscript{375} When the delegation returned to the mass meeting to report the failure of their mission, it broke up amid cries of “hang Kellogg.”\textsuperscript{376} But that was hardly the end of the matter as D.B. Penn, the defeated candidate for Lieutenant Governor on the McEnery ticket (McEnery himself was out of town), soon issued a proclamation calling upon all male citizens between eighteen and forty-five to arm and assemble “for the purpose of driving the usurper from power.”\textsuperscript{377} What ensued later in the day was a pitched battle in downtown New Orleans, along a line running parallel to the Mississippi River, between some 8400 White Leaguers and a sizeable contingent of Metropolitan Police and black militia under the command of former Confederate General James Longstreet.\textsuperscript{378} The confrontation came to be called the “Battle of Liberty Place” after a monument called the “Liberty Monument” that the by then all-white government of the city caused to be erected on the main battle site in 1891.\textsuperscript{379} The White Leaguers drove the Longstreet men back to the river and his force soon fell apart.\textsuperscript{380} The insurgents proceeded to occupy the state house and city hall.\textsuperscript{381} Some then converged on the Federal Custom House, where a number of state officials, Dibble included, had sought safety, and a gunfight erupted there.\textsuperscript{382} Dibble had been on Canal Street with the commander of the Metropolitan Police, but had been summoned to the Custom House by Kellogg.\textsuperscript{383} How it actually began is a matter of some controversy, but some segments of the New Orleans press accused Henry Dibble of starting the fracas by firing shots from a Custom House window and killing a man.\textsuperscript{384}

\begin{thebibliography}{99}
\item 374. GILL, supra note 285, at 112; KENDALL, supra note 373, at 364-65.
\item 376. GILL, supra note 285, at 112; KENDALL, supra note 373, at 365.
\item 377. GILL, supra note 285, at 111 (internal quotations omitted).
\item 378. TAYLOR, supra note 39, at 293.
\item 379. GILL, supra note 285, at 113-14, 260.
\item 380. Id. at 114.
\item 381. TAYLOR, supra note 39, at 295.
\item 382. GILL, supra note 285, at 114.
\item 383. Henry C. Dibble, A Card, DAILY PICAYUNE (New Orleans), Sept. 22, 1874, at 4.
\item 384. GILL, supra note 285, at 114.
\end{thebibliography}
The charge prompted Dibble to write a long letter to The Daily Picayune in defense of his conduct:

During the progress of the fight I stood at the window looking out but taking no part. . . . While there a person on the opposite side of the street seeing me fired two pistol shots at me. I was incensed at the act and drew my revolver and returned the fire with one shot. . . . Soon after . . . one of the persons in the body opposite took a rifle and deliberately fired at me, the ball striking near my head. I was very angry at what I deemed a wanton attempt upon my life, since I was not in the engagement, and I immediately called a wounded soldier, and taking his rifle I fired again and remained at the window until the tide of the conflict swept out of sight.\(^{385}\)

No one had been killed, he said, and he apologized if anyone had been wounded.\(^{386}\) But, he concluded, “I am not conscious of having done any unsoldierly act.”\(^{387}\)

Many thought the insurrection of September 14 had effectively put an end to Kellogg’s rule. Indeed, on September 16 the Picayune trumpeted: “So ends the Kellogg regime. Big, inflated, insolent and overbearing, it collapsed at one touch of honest indignation and gallant onslaught.”\(^{388}\) The rejoicing proved much too hasty. On September 15, Governor Kellogg had asked Grant to send federal troops, a request to which Grant acceded.\(^{389}\) Federal troops arrived in New Orleans the evening of September 16 and forced the White Leaguers to leave the state property they had seized.\(^{390}\) By September 18, Governor Kellogg had been restored to power.\(^{391}\)

3. The 1874 Elections

Notwithstanding the tumultuous events of mid-September, campaigning for the scheduled November elections for state and federal office resumed soon afterwards (it had gotten underway in the summer).\(^{392}\) It was one of the most vitriolic campaigns in Louisiana history. Some of the vitriol was aimed at Henry Dibble, now seen,
especially by the White League and its allies, as a central figure in the Kellogg administration. Thus the Natchitoches \textit{Vindicator}, an important country newspaper quite sympathetic to the White League, thundered:

The White Man's party is determined to rescue Louisiana from the polluting embraces of such a hybrid pack of lecherous pimps as Kellogg, Packard, Durrell, Pinchback, Dibble, Casey, and their followers, who were conceived in sin, brought forth in pollution, nursed by filthy harpies, and dropped in Louisiana, to show the world to what depths of corruption, disgrace, and infamy human nature can stoop, when the flesh is weak and the spirit willing.\footnote{Id. at 279 (internal quotations omitted).}

It was also a campaign marred by large-scale violence and intimidation, almost all of it aimed at black voters in rural areas.\footnote{Taylor, \textit{supra} note 39, at 298-99.} The main contest was for control of the lower house of the Louisiana legislature, and again, as in 1872, the outcome was disputed.\footnote{Id. at 302-04.} Initial returns showed the anti-Kellogg forces, Democrats and dissident Republicans (they took to calling themselves the Conservative Party), with a majority, but the Returning Board threw out many of these returns and declared that the two sides had each won fifty-three seats, with five seats left undecided; each party charged the other with fraud.\footnote{Id. at 303-04.}

4. \textit{A Congressional Investigation and its Aftermath}

In his annual message to Congress, transmitted December 7, 1874, Ulysses S. Grant called attention to “the unsettled condition of affairs in some of the Southern States,”\footnote{Ulysses S. Grant, President, Sixth Annual Message (Dec. 7, 1874), \textit{in} A \textit{Compilation of the Messages and Papers of the Presidents 1789-1902}, at 284, 296 (James D. Richardson ed., 1903).} focusing in particular on the State of Louisiana and charges that black voters had been subjected to extensive intimidation in the recent elections there.\footnote{Id. at 296-98.} He suggested that the body might wish “to ascertain, by means of a committee,” whether there was substance to these allegations or whether they were manufactured for political purposes.\footnote{Id. at 298.} The House empanelled such a committee and in late December, three of its seven members, under the chairmanship of

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\item \footnote{Id. at 279 (internal quotations omitted).}
\item \footnote{Taylor, \textit{supra} note 39, at 298-99.}
\item \footnote{Id. at 302-04.}
\item \footnote{Id. at 303-04.}
\item \footnote{Ulysses S. Grant, President, Sixth Annual Message (Dec. 7, 1874), \textit{in} A \textit{Compilation of the Messages and Papers of the Presidents 1789-1902}, at 284, 296 (James D. Richardson ed., 1903).}
\item \footnote{Id. at 296-98.}
\item \footnote{Id. at 298.}
\end{itemize}
Representative Charles Foster, traveled to New Orleans to hold hearings. They sat for eight days and took testimony from some ninety-five witnesses.\(^{400}\) Henry Dibble represented the state Republican Party during the sittings of the committee and himself testified, providing evidence, among other things, on the intimidation of blacks.\(^{401}\)

While in New Orleans the subcommittee witnessed an extraordinary happening in the Louisiana State House. When the new legislature convened on January 4, 1875, the Conservatives sought through extralegal maneuvers to execute a parliamentary coup d'état and install Democrats in the five contested seats.\(^{402}\) They would have succeeded had not a federal army colonel, acting at the behest of Governor Kellogg, caused the five men to be forcibly removed from the building.\(^{403}\)

The subcommittee in due course issued a report. It found the actions of the Returning Board “unjust, illegal and arbitrary” and denied that there had been any general intimidation of black or Republican voters.\(^{404}\) Shortly afterward, the full committee visited New Orleans and held its own hearings. Three of its members issued a report which, while agreeing with the subcommittee that the Returning Board had acted improperly, concluded that “the party calling themselves the white man’s party” had determined to take over the government of the state by any means necessary, including fraud and force.\(^{405}\) It found that anti-black violence was widespread and endemic and that the law seemed unable or unwilling to stop it. A majority of the committee stood by the original subcommittee report.\(^{406}\)

Shortly after the conclusion of the subcommittee hearings and before the full committee made its trip to New Orleans, Henry Dibble saw fit to publish an open letter to subcommittee chairman, Charles Foster, giving what he termed his “historical resume” of events in the state of Louisiana.\(^{407}\) The letter appeared prominently in a number of American newspapers, including the *New York Times*.\(^{408}\) Its language

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402. TAYLOR, supra note 39, at 304-05.
403. Id. at 305.
404. H.R. REP. 43-263, at 2, 3 (1875).
405. Id. at 5.
406. Id.
408. Id. The letter was published in the New Orleans press on January 8, 1875; in the
was, to say the least, provocative. One catches the flavor of the piece in this statement, appearing near the beginning:

It seems to me that Congress and the country at large will be unable to solve the problem presented by the Louisiana case unless they consider that everything that has occurred in this State since the election of 1872 has been revolutionary, utterly beyond due process of law, and violative of those fundamental rules and principles which underlie a Republican form of government....

What he meant, he explained, was that a number of times over the course of the previous three years extraordinary and, he intimated, perhaps even extralegal, measures had been necessary to prevent something even worse from happening. They had been necessary in 1872 to prevent Governor Warmoth from manipulating “the registration and the election so as to change and alter the result” and then from packing the Returning Board (he seemed to be referring here to the decision of federal Judge Durrell). In 1874, the White League had organized to overthrow the government. The “emeute,” as he called it, of September 14 had shown its true character and that character had been shown as well when it engaged in intimidation during the fall election campaign. When the Returning Board threw out some of the November election returns it was to “prevent the consummation of a gigantic wrong.” On January 4, 1875, federal troops had entered the legislative halls to prevent “a perfected plan [by the White League and its allies] for the seizure of the State Government by a bold coup d’état.”

He had always considered the Kellogg administration to be a “revolutionary government,” he wrote. “The existing Government is not the product of an election duly ascertained by regular process of law, but of a revolution, or rather of a counter-revolution set in motion to

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New York Times on January 9, 1875. It was also published as a pamphlet. HENRY C. DIBBLE, THE LOUISIANA QUESTION: THE LETTER OF JUDGE HENRY C. DIBBLE TO HON. CHARLES FOSTER (1875).

409. Open Letter from Henry C. Dibble to Charles Foster, supra note 407.
410. Id.
411. Id.
412. Id.
413. Open Letter from Henry C. Dibble to Charles Foster, supra note 407.
414. Id.
415. Id.
check another.” Still he believed it to be legitimate and that its acts should be granted full force and effect.

There were, of course, elements of truth in Dibble’s analysis, but the manner in which he chose to present his views could not have helped but cause consternation to many in his own party. The letter greatly angered Governor Kellogg, who immediately fired off a telegram to the New York Times, declaring that the Republican Party did not endorse Dibble’s views. Rumors soon circulated that Kellogg had decided to remove Dibble from office, a post he held at the Governor’s pleasure. Kellogg did summon Dibble to the state house for what one presumes must have been a very stern talking-to the morning of January 9, but made a public statement that afternoon that he had no intention of removing him from office. Indeed, when Dibble’s appointment came up for renewal in August, Kellogg reappointed him. What, other than a certain impetuosity that seemed part of his character, caused Dibble to issue his manifesto is something of a mystery.

Dibble weighed in again on the Louisiana troubles in late March, this time in an open letter to Louisiana’s Senator, J.R. West. It was prompted by remarks West had made on the senate floor to the effect that Dibble had gone over to the Democracy, a charge which anyone familiar with Dibble’s politics would have known to be an absurdity. In addition to denying strenuously the charge (“the Democracy have not taken me up and are not going to get me”), he restated and tried to clarify the views on the “revolutionary” nature of the Kellogg government that he had expressed earlier. He stressed that he meant

416. Id.
417. The Louisiana Difficulty, N.Y. TIMES, Jan. 10, 1875, at 1.
418. Telegram from W.P. Kellogg, Governor, State of La., to New York Times (Jan. 9, 1875), in Republican Caucuses, N.Y. TIMES, Jan. 10, 1875, at 1.
419. The Louisiana Difficulty, supra note 407.
422. Interestingly, the New Orleans Times, no particular friend of Dibble at the time, commented:

No charge of dishonesty in any capacity has ever been made against Judge Dibble by those who have been most violently opposed to him politically. We do not believe that in all his party the Governor could have found a man who knows the law better, and who will do his duty to the State more thoroughly and satisfactorily.

Id. (quoting the NEW ORLEANS TIMES).
424. Id.
only to be saying that it had come to power by unorthodox, but under the circumstances, entirely legitimate means.425 He also gave his endorsement to the "new plan for making a state government" in Louisiana then being brought to fruition under congressional supervision.426 The method by which this had been accomplished had been unorthodox but also remarkable, he allowed.427

The new plan to which Dibble referred was the so-called "Wheeler Compromise."428 Building on an expression of willingness by the leaders of both parties to have the congressional committee resolve the Louisiana election dispute, one of its members, Representative William Wheeler of New York, came up with a proposal.429 Under its terms, no effort would be made to disturb Kellogg in the execution of his duties.430 Specifically, there would be no effort to impeach him.431 The committee would decide who should have the disputed seats in the lower house.432 Not without difficulty, Wheeler persuaded both parties to accept it, and the committee eventually awarded a majority of seats in the lower house to the Conservatives (Democrats).433 The compromise was in due course embodied in law in a resolution passed by both houses of the legislature in April.434

Politics in Louisiana, however, soon reverted to their normal pattern. Notwithstanding the no-impeachment pledge, a committee of the Louisiana House of Representatives recommended in 1876 that impeachment proceedings be brought against Kellogg and the State Treasurer.435 It also recommended that then Acting Attorney General Henry Dibble be "addressed out of [removed from] office."436 The grounds were that funds had been withdrawn from the state treasury without the necessary warrants; there was no charge of personal

425. Id.
426. Id.
427. Open Letter from Henry C. Dibble to J.R. West, supra note 423.
428. TAYLOR, supra note 39, at 308.
429. Id.
430. Id.
431. Id.
432. TAYLOR, supra note 39, at 308.
433. Id. at 308-09.
435. TAYLOR, supra note 39, at 310.
436. LONN, supra note 135, at 394.
dishonesty against any of the three. The House did vote to impeach Kellogg, but this purely partisan effort failed when the Senate convened and acquitted him. No steps seem to have been taken to force Dibble’s removal, and he continued to occupy the position of Assistant Attorney General until the end of the Kellogg administration in January 1877.

Dibble’s resignation as Assistant Attorney General marked the end of his career as a paid public servant in Reconstruction Louisiana but his career in public service would last a few more months. He continued to serve, until April, in the unpaid position of president of the New Orleans school board, a post he had held since March 1871. As noted earlier, Dibble’s tenure as school board president coincided with the Reconstruction South’s sole experiment with school integration and constitutes one of the most interesting phases of his sojourn in Louisiana. We return now to take up the thread of that story.

F. President of the New Orleans School Board: The Experiment with Integration

1. The Question of School Finance

Henry Dibble’s November 1870 decision in the matter of the ward or neighborhood school boards had opened the way for school integration in New Orleans, and the first few African American pupils began to attend previously all-white schools in January 1871. By the time he was appointed to the newly reconstituted New Orleans school board and was elected its president, there appear to have been more than a dozen black pupils in integrated classrooms. Integration could hardly have taken place in a more inhospitable environment. The local media was bitterly hostile to it from the outset. The Daily Picayune described the appearance of the first black students at white schools as “an outrage.” Like most other papers, it would remain intransigent on the subject throughout the period of integration, never missing an opportunity to fan the flames of white resentment against integration in

437. Id.
438. TAYLOR, supra note 39, at 310.
439. SAN FRANCISCO JOURNAL, supra note 8, at 136.
440. Mixed Schools, supra note 175.
441. Id.
442. Id.
general and the members of the school board in particular.\footnote{One reporter assigned to cover the New Orleans schools in the early days of integration was George Washington Cable, later to achieve fame as a novelist and social critic. See \textit{Arlin Turner, George W. Cable: A Biography} (1956). In late June 1871, he reported on a compulsory Teachers’ Institute held in New Orleans. \textit{The “Teachers’ Institute” Trick}, \textsc{Daily Picayune} (New Orleans), Jun. 1, 1871, at 1. He expressed resentment at the fact that the school authorities had in effect forced black and white teachers to sit together in the same room and made some hostile general remarks about integration. \textit{Id.} Cable later repented of what he had said in the piece and became a supporter of school integration. \textit{George W. Cable, My Politics, in The Negro Question: A Selection of Writings on Civil Rights in the South 8} (Arlin Turner ed., W.W. Norton & Co. 1958) (1889).}

The question of school finance presented a problem more vexing and immediate than the press hostility facing Dibble and his colleagues in the first months of the new board’s existence. The 1871 Amendment to the Louisiana school law provided that the New Orleans school board (or as it was called officially, the Board of School Directors) should each year estimate the amount of funds it needed to run the schools and should report that sum to the city government which should then levy a property tax to raise that sum.\footnote{The relevant provisions of both acts are quoted in \textit{State ex rel. Board of School Directors v. Mayor & Administrators.}, 23 La. Ann. 358 (1871). 1871 La. Acts 42 was the Act which reorganized the New Orleans school board and under which Dibble and his colleagues were appointed members.} Pursuant to this provision the school board notified the city that it required $350,000 to operate the schools for 1871 and asked it to levy a tax calculated to produce that amount.\footnote{\textit{Id. at 359.}}

The city government, however, refused, relying on another act passed during the same legislative session which prohibited municipalities from levying any tax on property to an amount greater than two percent of the property’s gross value unless the voters should approve such an increase.\footnote{\textit{Id. at 359.}} That level of taxation had already been reached, the city claimed, and there had been no popular vote to raise the limit.\footnote{\textit{Id. at 358.}}

Dibble, who throughout his tenure as board head was a committed and energetic leader, immediately filed suit in the Eighth District Court, asking it to issue a writ of mandamus ordering the city to levy and collect the tax; he temporarily recused himself from the tribunal during the pendency of the proceeding and the judge of another court took his place.\footnote{\textit{Meeting of the School Board}, \textsc{Daily Picayune} (New Orleans), May 4, 1871, at 2.} He himself prepared the school board’s brief and persuaded the New Orleans Republican Printing Company to print it free of charge.\footnote{Meeting of the School Board, \textsc{Daily Picayune} (New Orleans), May 4, 1871, at 2.}
There was no doubt in his own mind, he assured the school board, concerning the right of the city to impose the tax. The Eighth District Court thought otherwise, however, and denied his petition. The matter was then taken to the Louisiana Supreme Court for review. In May, that court affirmed the lower court judgment, concluding that the second law was in fact intended to place an upper limit on the taxing power of local governments.

Now facing a funding crisis, Dibble got a resolution passed authorizing a meeting with the city to persuade it to hold a special election to raise taxes. Nothing came of that, but a temporary emergency funding package was cobbled together and allowed the schools to operate for the duration of the year. Dibble then drafted a bill authorizing the city to levy and collect taxes for the schools and appeared on the floor of the legislature to lobby for its passage. The legislature did in due course pass legislation permitting the city to collect school taxes. Eventually long-term funding in the form of both state and city allocations was put together. School funding, the payment of teachers in particular, would, however, remain a chronic problem throughout Dibble's tenure as president of the New Orleans board.

2. Tentative First Steps

Meanwhile, the integration of the city's schools was progressing, albeit at a measured pace. The New Orleans School Board reported to the State Board of Education at the end of 1871: "As a general thing pupils have preferred to attend at schools where their associates are of their own race, but in the instances where under the action of the law the schools have to some extent become 'mixed schools,' no difficulty is experienced." It attributed this happy state of affairs to "the firm, yet moderate, attitude of the board on this subject" of school integration. Much is captured in the quoted language. During Dibble's tenure, the
board's position on desegregation seems to have been not that it should actively promote the mixing of black and white pupils but that when black parents took the initiative and sought to enroll their children in white schools, it would support them. 455 It is probably worth noting that during this entire period the board always had black members and there were times when the majority of its members were black.

The board was certainly prepared to actively intervene to effectuate the purposes of the law when circumstances warranted it. Dibble, for example, in April 1873, acting in his capacity as Director for the Second Ward, ordered an apparently reluctant Webster elementary school to accept a number of black schoolchildren who were seeking admission. 456 His action provoked a sarcastic broadside from *The New Orleans Times*. It commented: “It appears that the Hon. H. C. Dibble . . . perhaps, dreading that in these days of inspired donkeys he is not sufficiently prominent, has concluded to surround himself once more with public affection. . . . [W]e submit that Mr. Dibble has taken a step as foolish as it is wicked.” 457

The board too showed a willingness to discipline employees it saw as attempting to undermine its policies. In the summer of that year, it dismissed a veteran white New Orleans school teacher for what appears to have been a “calculated” gesture of “discourtesy and insubordination” directed at the State Superintendent of Education, William Brown, a black man. 458

It is thought by most historians that what the school board characterized as its “honest trial of an impartial system of education” was reasonably successful during its first four years. 459 Since the school district in these years did not keep track of students’ race, it is difficult to say with certainty how much integration actually occurred. It was clearly more than trivial. Best estimates say that at its peak, which probably came in 1874, no fewer than five hundred and as many as one thousand black schoolchildren were attending integrated schools in New Orleans. 460 They were relatively widely distributed. Roughly one third of the city’s schools, it seems, had some degree of racial mixture, a trend

455. On the attitude of the school board, see DEVORE & LOGSDON, supra note 17, at 70; Harlan, *supra* note 176, at 666-67.
457. *Id.*
noticed by The New Orleans Bulletin, the city’s most overtly racist paper, which bemoaned the insidious way in which the school board had managed the introduction of so many black pupils into the city’s schools.\textsuperscript{461} By 1874, whites, who had initially abandoned the public schools in large numbers either because of the fact or because of the threat of integration, had by and large returned.\textsuperscript{462} This tranquil state of affairs, however, was not long to last. In mid-December 1874, as the historian Roger Fischer put it, “[t]he peaceful progress toward school desegregation was shattered suddenly and violently.”\textsuperscript{463}

3. \textit{A Newspaper-Sponsored “Emeute”}

The troubles began on December 14, 1874, when a small group of black girls presented themselves for examination and admission at the Upper Girls High School, a previously all white school.\textsuperscript{464} They received a cold reception and were not able to enroll.\textsuperscript{465} When a number of members of the graduating class sent in a public protest to the school board announcing that they would not accept their diplomas if the school were to be integrated, the press was effusive in its praise; the Bulletin asked: “Where are the young gentlemen of our High Schools that they do not respond to the indignity which was perpetrated upon the young ladies of the High Schools?”\textsuperscript{466} As if on cue they soon appeared. Over the next few days, as the historians of the New Orleans public schools put it, “white high school boys, cheered on by the newspapers, raced through the integrated schools of the city, intimidating teachers and physically evicting black children.”\textsuperscript{467} The schoolboys were often accompanied by a mob of white adults, some members of the White League.\textsuperscript{468} On one of these romps a group chanced upon Henry Dibble and roundly hooted him.\textsuperscript{469}

On December 18, Dibble and the New Orleans school superintendent announced that they were closing the schools a week in
advance of the normal Christmas holidays. The local press was jubilant, seeing the decision as a capitulation on integration on the part of the board, but the celebration proved highly premature. At its meeting of January 9, 1875, the school board adopted a resolution, introduced by Dibble, that the schools re-open on January 11 and that the president and school superintendent be given the discretion to close the schools in the event of disturbances and to re-open them when the disturbances ceased. The public schools re-opened on schedule and most of the black students who had been forcibly evicted returned to their former schools. Several months later the school board began proceedings to terminate the appointments of some seventy-five teachers who it thought had showed disloyalty during the December school disturbances. Around the same time, giving a renewed token of its commitment to integration, it appointed an African American and distinguished graduate of Paris’s École Polytechnique, E.J. Edmunds, to teach mathematics at the Boys Central High School, a predominantly white school. Integrated public education would continue in New Orleans, with relatively little disturbance, for another two plus years.

4. The Return of Segregation

New Orleans school integration was in the end a casualty of the fall 1876 elections. These elections too were shot through with controversy and resulted, again, in two men each claiming to be Governor and two groups of men each claiming to be the legitimate state legislature. But this time the national administration did not come to the aid of the Republicans as Grant had tired of the Louisiana troubles. In the end, a Democratic administration managed to take power. On April 4, a whole new Board of School Directors was sworn into office, Henry Dibble not among them. By June it received a report from one of its committees urging the end of integration, and on July 3 it adopted a resolution, over the protest of its black members, re-segregating the New

470. See DEVORE & LOGSDON, supra note 17, at 76.
471. Minutes of the New Orleans Board of School Directors 5 (Jan. 9, 1874) (on file with University of New Orleans).
472. The School Board, DAILY PICAYUNE (New Orleans), Sept. 12, 1875, at 1.
473. DEVORE & LOGSDON, supra note 17, at 81.
474. TAYLOR, supra note 39, at 493. “The people were not unduly excited. The existence of two governors and two legislatures was by now nothing new.” Id.
475. Id. at 495.
476. DEVORE & LOGSDON, supra note 17, at 84-85.
Orleans schools. Then in November, the board approved the transfer of Edmunds to a school “for colored pupils of advanced grade” that it had established the previous month, a coda, one might say, to the whole experiment in integration. In 1879, the state adopted a new constitution. Notably missing from it was any provision prohibiting segregated schools.

**G. Dibble’s Postmortem on Reconstruction; Last Years in Louisiana**

Shortly after leaving the school board, Henry Dibble sat down to write a retrospective on Reconstruction. He published it in November 1877, in the form of a lengthy open letter to William Wheeler, author of the Wheeler Compromise, and then Rutherford B. Hayes’ Vice President. It was entitled, significantly, *Why Reconstruction Failed.* It is an exceedingly interesting document, one of the first analyses of Reconstruction written by a participant. It takes on a special relevance since it was written contemporaneous with the events it discussed. The piece is somewhat disjointed—more a shoveling out of ideas than a systematic development of a fully coherent argument. After reading it, through, one is impressed with how many of the ideas of later writers on Reconstruction Dibble managed to anticipate.

Dibble thought it was undeniable that Reconstruction had failed. As he wrote: “Whether considered with regard to the hopes and expectations of the statesmen and politicians who devised the scheme, or whether viewed in the light of the good accomplished in the South, Reconstruction proved a disastrous failure.” It failed, he thought, for two reasons: first, it was not well conceived; and second, it was...
abandoned by its northern supporters at a crucial time.\textsuperscript{484}

The Republican leaders who conceived Reconstruction were “great and good men,” motivated by the highest ideals.\textsuperscript{485} Their noble purpose was “to render justice to the loyal men of the South, white and black, by transferring [sic] to them the government of the Southern States.”\textsuperscript{486} Dibble argued, however, that governments, if they are to be successful, cannot be imposed from above; they needed to grow up from below as the result of the common action of all those in the polity.\textsuperscript{487} Such common action, however, was an impossibility in the South by reason of the deep-seated southern belief in black inferiority, a product of the “Institution of Caste.”\textsuperscript{488}

Postwar southern white society was simply not prepared to accept blacks as equal participants in the political process. “The idea of admitting the negro to political equality... was laughed at as absurd.”\textsuperscript{489} Southerners had shown this over and over again. But did that mean that Reconstruction was doomed from the outset? Dibble thought not. What had doomed the experiment in the end was the abandonment of southern Republicans by their brethren to the north, this despite the widespread violence aimed at blacks and southern white Republicans that was apparent for all to see.\textsuperscript{490} Dibble spoke of the “thousands of men who were murdered throughout the reconstructed South, by the enraged and maddened whites.”\textsuperscript{491} Northern Democrats had always been opposed to Reconstruction so they did not need to be factored into the equation. Had northern Republicans continued to support the project, however, southern whites would have realized that it was futile to continue to resist black participation in politics, would have grudgingly accepted it, and would have re-engaged with politics themselves, thus lending legitimacy to the southern governments.\textsuperscript{492} He attributed this loss of interest on the part of northern Republicans to an attitude of deference that had always characterized northerners in their dealing with southern elites and to the southern press, which, he contended, managed to convince northerners that the carpetbaggers were

\textsuperscript{484} DIBBLE, supra note 480, at 21.
\textsuperscript{485} Id. at 5.
\textsuperscript{486} Id. at 3.
\textsuperscript{487} Id. at 5-6.
\textsuperscript{488} DIBBLE, supra note 480, at 6.
\textsuperscript{489} Id. at 9.
\textsuperscript{490} Id. at 21.
\textsuperscript{491} Id.
\textsuperscript{492} DIBBLE, supra note 480, at 21
Dibble had much to say on carpetbaggers, blacks, and corruption. The "carpetbaggers" had been the victims of a bad press. To be sure, some were in the South mainly for personal gain, but the majority were men of idealistic political views who wished to see them realized in the new societies in which they had settled. "Men who go out to fight for political views continue to have an interest in civil life in the ascendancy of those views." They were, in addition, men of "unbounded nervous energy," who were consumed by a desire to transform southern society and put it "in the line of progress" by building railroads and other works of public improvement. They were also victims of the institution of caste. In the eyes of most white southerners, they were pariahs or outcasts, ostracized almost completely from southern business and social life for committing the unforgivable sin of treating blacks as equals.

Radical Republican leaders tended to idealize blacks, looking upon them "almost as a superior race." "It would have been hard to convince Charles Sumner," Dibble wrote, "that negroes were very much like other people, better for what intelligence they possessed—worse for their ignorance." Blacks were, Dibble thought, what slavery had made them, and any bad traits they had were a product of slavery. "[Southerners] believed that slavery followed the degradation pronounced by fate; whereas the converse was the truth." They were "sympathetic and kindly" by nature but had been taught by "bitter experience" to be suspicious of southern whites. Conversely, they were deeply grateful to those who had liberated them from slavery and looked to them for leadership. In the wake of emancipation they had made impressive strides. "They sought education for their children.

493. Id. at 22-23.
494. Id. at 16-17.
495. Id. at 6.
496. DIBBLE, supra note 480, at 18. On the view common to so many northern Radicals that Reconstruction offered an opportunity to remake southern society and the southern economy along northern lines, see FONER, supra note 51, 233-35. Foner points out, however, that the Radicals differed in precisely what they thought this entailed. Id.
497. DIBBLE, supra note 480, 22-23.
498. Id. at 5.
499. Id.
500. Id. at 9.
501. DIBBLE, supra note 480, at 7.
502. Id. at 10.
They knew how to work intelligently."⁵⁰³ They had succeeded impressively in bettering their condition and were continuing to better it. On the other hand, many of those who entered politics were ignorant and easily bribed.⁵⁰⁴ Still, he argued it had been entirely fit and proper to extend the franchise to them once they became citizens. Manhood suffrage was the foundation of republican government.⁵⁰⁵

Dibble conceded that there was corruption aplenty in the southern governments although he argued that its extent had been exaggerated, that it crossed racial lines, that it extended to Democrats as much as to Republicans, and that corruption was endemic throughout the country.⁵⁰⁶ But it was not corruption or misgovernment which caused the failure of Reconstruction, he stressed. It was the fact that northerners had pulled the rug out from under the project.⁵⁰⁷

One factor contributing to northern loss of interest in Reconstruction that Dibble did not discuss was the rather unlovely spectacle of Republican party politics, most unlovely perhaps, in the Pelican state. The internal divisions, infighting, and general disorder that characterized southern Republican affairs, one imagines, could not have helped but given pause to even the most supportive of outsiders.

Albion Tourgée, author of an extremely popular 1879 novel based on his experiences as a carpetbagger in Reconstruction North Carolina and even then becoming known as one of the foremost white advocates of black civil rights (he would go on to represent Homer Plessy in the landmark case of Plessy v. Ferguson⁵⁰⁸), was greatly impressed with Dibble’s work.⁵⁰⁹ He quoted from it liberally in an historical exposition that he appended to a second edition of the novel published in 1880.⁵¹⁰ He paid particular compliments to Dibble’s description of the plight of northerners settled in the south, to his dissection of the white southerner’s attitude toward blacks ("the best explanation of this feeling that has ever been attempted"), and to his account of the way in which the southern press had managed to deceive the rest of the country as to

⁵⁰³ Id.
⁵⁰⁴ Id. at 19.
⁵⁰⁵ DIBBLE, supra note 480, at 5.
⁵⁰⁶ Id. at 19-20.
⁵⁰⁷ Id. at 21.
⁵⁰⁸ 163 U.S. 537 (1896).
the true condition of affairs in the Reconstruction states.\textsuperscript{511}

There is little in the way of documentation of Dibble's last years in Louisiana. We do know that he continued to be involved in Louisiana Republican politics and in public affairs; in July 1878, he wrote a long letter to his old friend and adversary, Henry Warmoth, giving him the benefit of his views on the state of the Republican Party in Louisiana.\textsuperscript{512} He also pursued private law practice, in the course of which he made the acquaintance of a group of New Orleans businessmen who had an interest in some mining litigation in Arizona.\textsuperscript{513} He went there in the summer of 1881 to represent them, settled the matter successfully, and a few months later decided to move himself and his family to the Arizona silver mining town of Tombstone.\textsuperscript{514} He would never return to Louisiana.

One may reasonably speculate as to what factors led Dibble to make his decision to leave Louisiana. The economy of New Orleans had been in the doldrums for some time. It seems that no city's economy was hit harder by the 1870's depression.\textsuperscript{515} Dibble's law business may have been affected as well by these developments. Then there was, for Republicans at any rate, the rather gloomy political outlook. By 1881, the Democratic Party was firmly entrenched in power in Louisiana, and it must have been apparent to any reasonably informed observer that there was little chance of a Republican resurgence and the opportunity for political-legal appointments that would have brought with it. In 1878 Dibble had been disappointed in a bid for a position in the New Orleans District Attorney's office. Given all of this he may have simply come to the conclusion that he had no future in the state.\textsuperscript{516}

\textsuperscript{511} Id. at 126. Tourge was much harsher in his assessment of the plan of Congressional Reconstruction and its authors than was Dibble. Conceived mainly for reasons of short-term political advantage, it was, he wrote, a "monster, doomed to parricide in the hour of its birth." \textsc{Tourgé}, supra note 509, at 133. He was particularly critical of the grant of universal suffrage to blacks, "[t]he action of the Republican Party in conferring the power of the ballot upon the mass of ignorant voters at the South without making any provision for their enlightenment and instruction was unquestionably an act of the most egregious folly." \textsc{Albion Winegar Tourgeé, An Appeal to Caesar}, 399 (New York, Fords, Howard, & Hulbert 1884).

\textsuperscript{512} Letter from Henry C. Dibble to Henry Clay Warmoth (July 15, 1878) (on file with University of North Carolina Chapel Hill).

\textsuperscript{513} \textsc{San Francisco Journal}, supra note 8, at 136.

\textsuperscript{514} Id.

\textsuperscript{515} \textsc{Taylor}, supra note 39, at 361.

\textsuperscript{516} Letter from Henry C. Dibble to Henry Clay Warmoth, supra note 512.
III. ARIZONA INTERLUDE

Tombstone, Arizona was founded in 1879 and in two years grew from a tiny settlement of about 100 souls to a freewheeling boomtown of around 7000, the population growth fueled by the discovery of a rich lode of silver ore nearby. By the time Dibble arrived, in late 1881, it had, according to one account, “more gambling houses, saloons, and a larger ‘boothill’ and ‘red light’ district than any town in the southwest.” It is possible to give only a sketchy account of his roughly two-year sojourn there.

Soon after arrival, he established a law office in Tombstone, entering into a partnership with the former Chief Justice of the Nevada Supreme Court, James F. Lewis. The Dibble-Lewis firm concentrated on mining litigation, a highly technical area of practice, where mastery of a complex body of legal doctrine, as well as a solid acquaintance with geology, were essential to success. One particularly important client was the syndicate controlled by California entrepreneurs George Hearst, Lloyd Tevis, and James Ben-Ali Haggin, which owned vast mining properties throughout the American west and had holdings in Arizona. In addition to handling the syndicate’s legal affairs, Dibble had charge of managing its Arizona mines.

One event that occurred during Dibble’s stay in Arizona deserves special mention. In March 1883, Dibble’s brother Harvey, who had accompanied him to Arizona from New Orleans was killed by a band of Apache Indians. It was one of a number of similar incidents that took place in and around Tombstone in the first months of that year. A mass

518. Tombstone, Arizona, supra note 517.
520. Shuck, supra note 31, at 823.
521. The Arizona historian Lynn Bailey states that Dibble served as a Cochise County judge, having been appointed to the post by the territorial governor. BAILEY & CHAPUT, supra note 7, at 89. Dibble’s name, however, does not appear on the list of those who served as district court judges during the time he was in Arizona (the district courts were the territory's trial courts, and were the only judicial posts filled by the Governor). On the history of the Arizona judiciary see JAMES M. MURPHY, LAWS, COURTS AND LAWYERS THROUGH THE YEARS IN ARIZONA (1970). It is possible that he may have served as a part-time justice of the peace in Tombstone.
meeting of Tombstone residents, described by the *Los Angeles Daily Times* as “[t]he largest outpouring the people of Tombstone had ever witnessed,” assembled in April to discuss the situation.\(^{523}\) Several speakers took the floor to lambaste the federal government, the army in particular, for failing to protect the white inhabitants against the Indians.\(^{524}\) One of the speakers was “Judge Henry Clay Dibble.”\(^{525}\) At the end of the meeting, a decision was made to organize a volunteer band to organize a private militia to go after the Apaches.\(^{526}\) A band of armed horsemen left Tombstone a week later with the intention of finding and engaging the Apaches, but the band seems to have done nothing more than engage in maneuvers and never saw any combat.\(^{527}\)

In late September 1883, Dibble and Lewis, motivated possibly in part by the deteriorating security situation, left Arizona for San Francisco.\(^{528}\) The *Arizona Gazette* counted Dibble’s departure a great loss for the territory, describing him as “a man of great energy and brilliant mind” who might well have won the Republican nomination for Congress the following year had he stayed.\(^{529}\)

One final note on Dibble’s Arizona sojourn. It provided him with raw material for a semi-autobiographical novel that he published many years later. Entitled *The Sequel to a Tragedy: A Story of the Far West*, it recounts the story of a United States Attorney in San Francisco (Dibble himself served briefly as Assistant United States Attorney in that city\(^{530}\)) who fears he has wrongfully convicted a criminal defendant and sets about to make matters right.\(^{531}\) The main action transpires in San Francisco, but part of it takes place in Arizona, where the protagonist finds himself “legal business for Eastern clients.”\(^{532}\) There, he helps foil a stagecoach robbery and witnesses an attempted assassination on

\(^{523}\) *Rangers to Take the Field—Fire—Cave in a Mine*, L.A. DAILY TIMES, Apr. 5, 1883, at 1; see also BAILEY, supra note 522, at 67.

\(^{524}\) BAILEY, supra note 522, at 67-68.

\(^{525}\) Id.

\(^{526}\) Id. at 68.

\(^{527}\) Id. at 68, 75-81. It is perhaps worth noting that O.O. Howard, the first head of the Freedmen’s Bureau, led a military campaign against the Nez Perce Indians in 1877 aimed at forcing them to move out of Oregon. FONER, supra note 51, at 583.

\(^{528}\) BAILEY & CHAPUT, supra note 7, at 89; Shuck, supra note 31, at 823.

\(^{529}\) Id. (internal quotations omitted).

\(^{530}\) *Senators and Assemblymen*, S.F. CALL, Nov. 5, 1896, at 5.


\(^{532}\) Id. at 24.
another stagecoach ride.\textsuperscript{533} Full of many melodramatic twists and turns, a few that strain credulity, the work could hardly be called a literary gem. It is representative of a type of low-brow fiction that had a certain mass appeal around the turn of the century and probably stands up well enough when compared with other works of this genre. The novel does contain an arresting description of the town of Tombstone in its silver mining heyday.\textsuperscript{534}

IV. CALIFORNIA

A. Early California Law Practice

The Dibble and Lewis law partnership lasted just two years. When Lewis died in 1885 Dibble moved to California.\textsuperscript{535} He would spend the rest of his professional life, some twenty-five years, in the Golden State. He initially took a position as Assistant United States Attorney in San Francisco.\textsuperscript{536} In 1887, he resigned that position to form a new partnership, this time with Louis T. Haggin, the son of James Ben-Ali Haggin, the colorful California entrepreneur and land magnate, whose mining interests Dibble had managed in Arizona (a third attorney, Thomas C. Van Ness, was briefly associated with the firm).\textsuperscript{537} If the cases that it argued in the California Supreme Court are typical of its practice, the firm seems to have specialized in insurance litigation, representing both insurance companies and policy holders in coverage disputes, but it dealt also with cases raising public policy issues, such as the division of authority between the executive and legislature and the scope of legislative authority over state agencies, turf familiar to Dibble from his Louisiana lawyering days.\textsuperscript{538}

In either 1890 or 1891, Dibble left the Haggin-Dibble-Van Ness partnership and went into law practice on his own (the firm seems to have dissolved in 1891 when Haggin moved to the East Coast but

\textsuperscript{533} Id.
\textsuperscript{534} Id. at 24-28.
\textsuperscript{535} BAILEY & CHAPUT, supra note 7, at 89.
\textsuperscript{536} Senators and Assemblymen, supra note 530.
\textsuperscript{537} Shuck, supra note 31, at 823; Men of the State, L.A. TIMES, Aug. 22, 1887, at 4; Senators and Assemblymen, supra note 530. For cases demonstrating that Dibble worked with Van Ness, see Rankin v. Amazon Ins. Co., 26 P. 872 (Cal. 1891); Paulsen v. Schultz, 24 P. 1070 (Cal. 1890).
\textsuperscript{538} See, e.g., People v. Dunn, 22 P. 140 (Cal. 1889); People ex rel. Waterman v. Freeman, 22 P. 173 (Cal. 1889).
Dibble may have left it before that date). Over the course of the next decade, however, the law would take a back seat to politics in the life of Henry Dibble.

B. Career in the California Legislature

1. Speaker of the State Assembly

In 1888, Henry Dibble, who had been so notably unsuccessful in his quest for elective office in Louisiana, decided to throw his hat into the California political ring. He secured the Republican nomination for member of the State Assembly for San Francisco’s Forty-First Assembly District and, to the surprise of many, won the general election. He would represent the district in four of the legislature’s six biennial sessions that met between 1889 and 1899.

Dibble quickly rose to a position of prominence in the legislature. The Los Angeles Times described him as “the brainiest lawyer” of the 1889 legislative session. In 1891, upon re-election to the body, he became chairman of the Assembly’s powerful Ways and Means Committee, narrowly missing election as speaker of that chamber even though it then had a Democratic majority. During every session that he attended, Dibble was acknowledged to be one of the Republican faction’s chief leaders and generally a power to be reckoned with in the legislative halls of Sacramento.

2. Legislative Initiatives: Women’s Suffrage

Dibble was a very active legislator, either authoring or sponsoring a large number of measures on a large range of subjects during his four terms. Several deserve special mention. One of the first bills that he ever introduced was one to give women the right to vote for school directors and superintendents of public instruction in the districts where they lived. A stimulus for the introduction of the measure may have been what happened in San Francisco, then the state’s largest city, in

539. San Francisco Journal, supra note 8, at 136; Senators and Assemblymen, supra note 530.
542. Senators and Assemblymen, supra note 530.
1888. In 1874, the California legislature had granted women the right to stand in elections for many state educational offices, including the office of school board director, but they had never been given the right to vote in the same elections.\(^5\) In 1888, women's organizations, with the strong backing of the San Francisco Republican Party, mounted a major push to get a slate of women candidates elected to the San Francisco school board, as a way of forcing what was seen as desperately needed educational reform in that city.\(^4\) The effort, however, fell just short of success.\(^5\) It undoubtedly occurred to some that an opposite result would have been reached had women had the franchise, and the time may have seemed opportune for passage of a law extending suffrage to women in this one limited area.

The legislature did not pass Dibble's measure, and women would have to wait until 1911 before they got the right to vote for school directors or any other elective offices; in that year, the state's male voters approved a constitutional amendment granting suffrage to women.\(^5\) Throughout his California career, however, Henry Dibble was recognized by the women's suffrage movement as one of its reliable male patrons. In Reda Davis's guide to women's politics in nineteenth-century California, he is included in her short list of California men supporting women's right to vote.\(^5\) He was one of the few male speakers invited to address the women's suffrage meeting held in San Francisco in 1894.\(^5\)

3. Political Reform Measures

Mindful, perhaps, of his experiences in Louisiana, Dibble took an especially active interest in bills aimed at reforming the electoral process. He introduced two such bills in the 1897 legislative session.

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546. Id. at 46.
547. Id. at 191. In 1894, the state Republican Party adopted a resolution endorsing women's suffrage, and in 1896, a statewide referendum on extending suffrage to women was held, but the measure failed of passage by a significant margin. Id. at 93-95; Susan Scheiber Edelman, "A Red Hot Suffrage Campaign": The Woman Suffrage Cause in California, 1896, in 2 The California Supreme Court Historical Society Yearbook 51-53 (Harry N. Scheiber ed., 1995).
549. Id.
One made it unlawful for anyone to demand or solicit a pledge from any candidate for office that he should vote for any particular piece of legislation and for any candidate to give such a pledge. The law did not apply to pledges solicited or made at political conventions. This measure became law. The other, much more ambitious in scope, sought to regulate the way in which parties selected candidates for public office. At the time, candidates were selected at party conventions and there was a widespread belief that political bosses effectively controlled the conventions. Dibble's measure required that convention delegates be selected in state-supervised elections. This bill failed to pass, but two years later Dibble led the fight in the Assembly for another measure similar, though not identical, to his 1897 bill. This bill passed both houses and was signed into law by the Governor. It was struck down by a divided California Supreme Court the following year, however, on grounds that a provision limiting access to the new nomination machinery to parties that had polled three per cent of the vote at the last election discriminated against minor parties, in violation of the state constitution. The court also held that the law, in allowing voters to elect delegates to party conventions irrespective of political affiliation, violated the rights of political parties.

Regulation of the California nomination process did come in due course. A few months after the court handed down its decision the voters approved an amendment to the state constitution granting the legislature broad authority to regulate the election of delegates to party conventions. In 1908, they approved another amendment authorizing the holding of direct primary elections.

550. 1897 Cal. Stat. 53-54; Many Bills in the Assembly, S.F. CHRON., Jan. 12, 1897, at 3.
551. Id.
552. Id.
553. Assem. B. 2, 1897 Leg., 32d Sess. (Cal. 1897).
554. Id.
556. Id.
558. Id. In 2000, the United States Supreme Court struck down on similar grounds a 1996 voter initiative providing for "blanket" or "open" primaries in California. Cal. Democratic Party v. Jones, 530 U.S. 567 (2000). Dibble's interest in improving the electoral process extended to such mundane matters as the method of recording voter choice. In 1899, for example, he authored and pushed through to passage a measure creating a commission to examine the feasibility of using mechanical lever voting machines, then a novel invention, in state elections. Assem. B. 551, 1899 Leg., 33d Sess. (Cal. 1899).
559. JOHN RICHARD SUTTON, CIVIL GOVERNMENT IN CALIFORNIA 23-24 (1914).
560. STATE OF CAL., DIRECT PRIMARY LAW 74 (1918).
4. Dibble's Civil Rights Bill

Henry Dibble’s most important legislative legacy was doubtless his civil rights law. On January 5, 1897, the first day of business of the thirty-second session, he introduced in the Assembly a bill captioned “An Act to Protect All Citizens in Their Civil and Legal Rights.”\(^{561}\) It banned discrimination on the basis of race in “inns, restaurants, hotels, eating houses, barber shops, bath houses, theaters, skating rinks, and all other places of public accommodation or amusement.”\(^{562}\) It applied to those who practiced such discrimination and to those who aided or incited it.\(^{563}\) It contained both civil and criminal enforcement provisions, allowing persons aggrieved by discrimination to sue for damages up to five hundred dollars and making discriminatory acts misdemeanors, punishable by imprisonment in the county jail.\(^{564}\) The criminal liability provision comes as a bit of a surprise. It will be remembered that Dibble had opposed the first Louisiana public accommodations bill on grounds that it contained a criminal provision.\(^{565}\) What may have caused him to change his mind? One can only speculate, but perhaps it was his memory of how relatively ineffective the Louisiana law, which had no criminal provision, had been.

“Dibble’s Civil Rights Bill,” as it was called in the press, won the immediate backing of the state’s African American community.\(^{566}\) Black leaders from San Francisco and Oakland appeared before the Assembly Judiciary Committee on January 19 to voice their strong support for the measure and the Judiciary Committee recommended passage that next day.\(^{567}\) But the bill soon underwent an important change. It was amended to strike the civil liability provision from the bill, leaving the criminal law as the sole enforcement mechanism, and it passed the full Assembly in that form.\(^{568}\) This change caused considerable opposition in the Senate, and after heated debate, and on a close vote, that body passed a version restoring the civil liability

\(^{561}\) Assem. B. 4, 1897 Leg., 32d Sess. (Cal. 1897); Dibble’s Civil Rights Bill, supra note 6.
\(^{562}\) Id.
\(^{563}\) Id.
\(^{564}\) Id. It was in its wording very similar to a civil rights law passed by the state of New York in the previous decade.
\(^{566}\) Dibble’s Civil Rights Bill, supra note 6.
\(^{567}\) Id.
\(^{568}\) Legislative Proceedings, S.F. Chron., Feb. 24, 1897, at 14.
provision, but without any maximum cap on the damages that could be recovered by aggrieved plaintiffs, and completely eliminating the criminal enforcement provision. The Assembly concurred in the change and the bill, as so amended, became law on March 13.

The 1897 California Civil Rights Law was amended several times during the twentieth century, the minimal amount of damages recoverable in lawsuits being raised each time. A spate of lawsuits arising under the law was reported by the press in the months immediately following its passage, but for reasons not entirely clear, the law seems to have produced little litigation in the twentieth century. One case arising under it reached the appellate courts. In 1918, an African American boy was seated in a segregated section of a Fresno movie theater and recovered damages from the theater owner. The judgment was appealed to the Court of Appeals on a number of grounds, the principal one being that segregation did not constitute discrimination. A unanimous court had no difficulty in rejecting this contention, holding that putting the plaintiff in a separate section of the movie theater, reserved only for people of color, "constitutes a discrimination against [him] on account of his color and race in violation of his rights" under the law.

5. End of a Political Career

Dibble lost his bid for re-election to the Assembly in 1900, his defeat attributable in part perhaps to a relentless campaign waged against him by the San Francisco Call newspaper, which accused him of corrupt dealings (not providing much in the way of evidence). He never
sought elective office again. He remained very active in Republican Party politics, however, his name featuring prominently at one point in discussions about a new chairman of the state party executive committee. In addition, he continued to involve himself in legislative matters, lobbying for the enactment of bills he favored and at times drafting them for others to introduce. One he wrote was a bill permitting the adoption of persons who had reached the age of majority. This bill passed the legislature in 1903, but Governor Pardee refused to sign it, stating that the right to adopt an adult should be limited to cases where persons had been living in a family as children but because of oversight or neglect had never been legally adopted. Dibble’s adoption bill was well in advance of its time as it would turn out. California did not permit the adoption of adults until 1951.

C. Later California Law Practice

1. Criminal Law

Dibble had continued to represent clients during his years in the Assembly, but after leaving the legislature his practice shifted into a higher gear. His son Oliver joined him in 1899, and thereafter the firm would be known as “Dibble and Dibble.” It also expanded to include a wholly new kind of litigation, the representation of criminal defendants in capital murder prosecutions. Several of these cases reached the California Supreme Court.

One case, People v. Milton, decided in 1904, gave the Supreme Court the opportunity to make new law, or perhaps better put, to clarify existing legal doctrine. The result was not the one Dibble sought. The defendant had been convicted of first-degree murder and sentenced to death. His conviction rested upon California’s felony-murder rule, that old and harsh criminal law doctrine which made every killing that

CALL, Sept. 30, 1899, at 14.

578. Letter from Henry C. Dibble to George C. Pardee, Governor, State of Cal. (Mar 25, 1903) (on file with University of California Berkeley).
579. Id.
581. Letter from Henry Dibble to George C. Pardee, supra note 578.
582. 78 P. 549 (Cal. 1904).
583. Id. at 549.
occurred during the perpetration or attempted perpetration of certain dangerous felonies a first-degree murder. The question was whether the rule applied to killings that were accidental; exactly what happened is not clear from the record. Dibble argued that it did not, contending that an intent to take life was requisite for a conviction of first-degree murder. The court disagreed, holding that the mere entering on the commission of one of the named crimes evinced an "abandoned and malignant heart" and sufficed as a basis for the conviction. California’s felony-murder rule has changed little since then. In two cases decided in the 1980s, the United States Supreme Court ruled that a defendant convicted of felony-murder could only be put to death if it was shown that he intended to kill the victim or had acted in reckless indifference to human life. The death penalty could not be premised solely on his participation in a dangerous felony. The position taken by the modern United States Supreme Court, then, is not too far removed from the one Dibble argued for in Milton.

Dibble fared better in another murder case decided by the California high court the same year. Minnie Adams was convicted of poisoning her infant son with carbolic acid and sentenced to life in prison. Her trial was something of a cause célèbre and attracted considerable press attention. Dibble did not participate in the trial but was retained to represent the defendant on appeal. The evidence that had led to conviction was entirely circumstantial, much of it conflicting, and Dibble argued that the jury had been improperly instructed as to the weight to be given it. The court, however, focused on another alleged error in the proceedings. At the end of the trial, the sheriff, for reasons unknown, and contrary to the instructions of the court, split the jury into three groups and put each group into a separate hotel room for the night. Dibble argued that this clearly contravened state law, which

584. Id.
585. Id.
588. See Tison, 481 U.S. at 158 (holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement").
589. People v. Adams, 76 P. 954, 954 (Cal. 1904).
591. Adams, 76 P. at 954.
592. Id. at 956.
593. Id. at 954.
required that all jurors deliberate in one group. The court agreed and ordered a new trial.\textsuperscript{594}

Though the defense of capital cases was new to Dibble and though he lost more appeals than he won (probably no reflection on his abilities, as it was an era inhospitable to criminal defendants and capital defendants in particular; few murder convictions were overturned) he seems to have done a capable job of representing his clients.

2. Representing Chinese Immigrants

Surely one of the most interesting parts of Dibble’s later law practice was his representation of Chinese litigants in immigration law cases. Here a word by way of background is necessary.

Responding to intense agitation in California and other western states, Congress in 1882 enacted a Chinese Exclusion Act.\textsuperscript{595} The first immigration law aimed at a particular ethnic group, it forbade the further entry of Chinese laborers into the United States.\textsuperscript{596} Merchants, students, government officials, and tourists continued to be permitted to enter the country.\textsuperscript{597} Congress amended the legislation several times over the course of the next dozen years, each time making it more draconian.\textsuperscript{598} The Chinese challenged this legislation on constitutional grounds, taking several cases to the United States Supreme Court, but their appeals were largely in vain. In a series of decisions handed down in the 1880s and 1890s, the Court declared that there were virtually no constitutional constraints on Congress’s power to limit and regulate immigration, up to and including the right to abrogate treaties the national government had entered into.\textsuperscript{599}

These defeats in the Supreme Court did not end the Chinese Exclusion Act litigation. The Chinese continued to bring numerous cases in the lower federal courts, alleging that they had the right to enter or stay in the United States either because they belonged to one of the exempt classes (usually the merchant class) or because they were

\begin{itemize}
  \item \textsuperscript{594} Id. at 955-56.
  \item \textsuperscript{596} McClain, supra note 595, at 149.
  \item \textsuperscript{597} id.
  \item \textsuperscript{598} Id. at 147-72, 191-219.
  \item \textsuperscript{599} Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893); Chae Chan Ping v. United States, 130 U.S. 581, 610-11 (1889).
\end{itemize}
American citizens. In California they tended to be represented by a small corps of lawyers, who appeared regularly on their behalf in the courts. One of these was Henry Dibble.

It is not clear when Dibble first began to represent Chinese litigants in immigration cases, but his name first appears in the federal appellate reports in 1894. The case was *Lee Kan v. United States*\(^{600}\) and the question before the court was whether a man who claimed to be a partner in a firm that imported Chinese goods but whose name did not appear in the firm name could claim merchant status.\(^{601}\) The relevant statute defined “merchant” as one who bought and sold goods and who conducted the business “in his own name.”\(^{602}\) Since the man had other evidence that he was part owner of the firm and since it was shown that the firm name was a fictitious business name, containing the names of no real persons, the court held that he could.\(^{603}\) Dibble appeared in this case in association with two other lawyers prominent in Chinese immigration litigation, Lyman Mowry and Thomas Riordan.\(^{604}\) Riordan, like Dibble, was heavily involved in Republican Party politics. In subsequent cases he appeared alone or in association with his son.

The courts were usually not so liberal in their reading of the exclusion laws, tending rather to a strict and narrow interpretation of the legislation. Two appeals that Dibble handled the following year, both involving the question of merchant status, can serve by way of illustration. A Chinese person returning to the United States after a temporary sojourn in China was denied permission to land and ordered held aboard ship.\(^{605}\) He sued out a writ of habeas corpus, challenging his detention.\(^{606}\) He claimed he was a merchant partner in a San Francisco firm that sold Japanese goods.\(^{607}\) The federal district court upheld the refusal of permission and the court of appeals affirmed.\(^{608}\) There was solid evidence that he had an ownership interest in the firm, but other evidence showed that in order to accommodate a former employer he had worked occasionally for very brief periods as a house

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600. 62 F. 914 (9th Cir. 1894).
601. Id. at 915.
602. Id.
603. Id. at 920.
604. Lee Kan, 62 F. at 914.
605. Lew Jim v. United States, 66 F. 953, 953 (9th Cir. 1895).
606. Id.
607. Id.
608. Id.
servant.\textsuperscript{609} That was enough to make him a laborer in the court’s judgment.\textsuperscript{610} The only manual labor permitted under the act was such as was “necessary in the conduct of his business.”\textsuperscript{611} Dibble argued too that inasmuch as his client had left the country before the relevant legislation was enacted, it did not apply to him, but the court rejected this argument.\textsuperscript{612} In the other case, Dibble’s Chinese client, apparently the owner of a garment factory, spent a considerable amount of time himself cutting and sewing the garments that he sold.\textsuperscript{613} The court said this was “manual labor not necessary in the buying and selling of merchandise” and enough to turn him into a “laborer” for purposes of the law.\textsuperscript{614}

More difficult questions were raised when Chinese seeking to enter or remain in the United States claimed to be American citizens. By the time the first Chinese Exclusion Act was passed in 1882, there were lower court decisions holding that Chinese could not become naturalized American citizens,\textsuperscript{615} and, to eliminate all doubt, the Act categorically denied them this right.\textsuperscript{616} In 1898, however, in the extremely important case of \textit{United States v. Wong Kim Ark},\textsuperscript{617} the United States Supreme Court affirmed that Chinese born in the United States were, by virtue of the Fourteenth Amendment, American citizens.\textsuperscript{618}

Ju Toy, claiming to be an American citizen by birth, sought to enter the United States through the port of San Francisco in October of 1904.\textsuperscript{619} Pursuant to the administrative procedure then in place, an examination was conducted by a federal immigration officer who concluded that he had not been born in the United States and denied him entry.\textsuperscript{620} He appealed that denial to the Secretary of Commerce and Labor, who affirmed the lower officer’s decision.\textsuperscript{621} Ju Toy then applied

\begin{itemize}
\item \textsuperscript{609} Lew Jim, 66 F. at 954.
\item \textsuperscript{610} \textit{Id.}
\item \textsuperscript{611} \textit{Id.} at 954.
\item \textsuperscript{612} \textit{Id.} at 954-55.
\item \textsuperscript{613} Lai Moy v. United States, 66 F. 955, 955 (9th Cir. 1895).
\item \textsuperscript{614} \textit{Id.} at 957.
\item \textsuperscript{615} See, e.g., \textit{In re Ah Yup}, 1 F. Cas. 223 (C.C.D. Cal. 1878) (No. 104).
\item \textsuperscript{616} Chinese Exclusion Act, ch. 126, § 14, 22 Stat. 58, 61 (1882) (repealed 1943).
\item \textsuperscript{617} 169 U.S. 649 (1898).
\item \textsuperscript{618} \textit{Id.} at 702-05. Section One of the Fourteenth Amendment reads, “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1.
\item \textsuperscript{619} United States v. Ju Toy, 198 U.S. 253, 258-59 (1905).
\item \textsuperscript{620} \textit{Id.} at 259.
\item \textsuperscript{621} \textit{Id.}
\end{itemize}
for a writ of habeas corpus in the federal district court, which after a hearing held, over government objections, that he was in fact a native-born citizen.\textsuperscript{622} The government appealed that decision to the Circuit Court of Appeals, which, invoking a procedure then available, referred the case to the United States Supreme Court for decision on the novel legal questions raised.\textsuperscript{623} It was at this stage that Henry Dibble was brought into the case, retained by the Chinese Six Companies, a coordinating council of Chinese American regional-origin associations and the leading Chinese organization in the United States.\textsuperscript{624} The case was clearly one, as Dibble would say in his Supreme Court brief, “of vital interest to all natives of Chinese descent” in the United States.\textsuperscript{625}

The principal question for review was whether the final authority to determine the right to enter the United States based on a claim of citizenship could be vested in immigration officials or whether their decisions were subject to court review.\textsuperscript{626} The high court had partially addressed the question the previous year. In United States v. Sing Tuck,\textsuperscript{627} in an opinion written by Justice Oliver Wendell Holmes, the Court held that Congress had indeed established a procedure under which claims of citizenship were adjudicated by immigration officials and had purported to make those adjudications final.\textsuperscript{628} Resort to the courts could be had, if at all, only after that process had been completed.\textsuperscript{629} The Court, however, avoided answering the question whether Congress could constitutionally make the decisions of such officials final when it came to claims of citizenship.

Dibble argued strenuously that Congress could not. Chinese born in the United States were citizens of the United States, entitled to all the rights of citizenship (rights of “incalculable value”), one of which was the right to travel abroad and return.\textsuperscript{630} Such a right could only be taken away by “due process of law,”\textsuperscript{631} and that meant a hearing in a court of law with all the protections that implied, including the right to be

\textsuperscript{622} Id. at 259-60.
\textsuperscript{623} Ju Toy, 198 U.S. at 257.
\textsuperscript{625} Brief for the Appellee at 2, United States v. Ju Toy, 198 U.S. 253 (1905) (No. 535).
\textsuperscript{626} Ju Toy, 198 U.S. at 260.
\textsuperscript{627} 194 U.S. 161 (1904).
\textsuperscript{628} Id. at 170.
\textsuperscript{629} Id.
\textsuperscript{630} Brief for the Appellee, supra note 625, at 3.
\textsuperscript{631} Id.
represented by counsel and to compel the attendance of witnesses in one's behalf. 632 Under the administrative regulations in place, detainees had no such rights and were therefore denied due process of law. 633 The very facts of the case, Dibble pointed out, illustrated "the pernicious consequences of leaving to the final determination of the executive officer the question of citizenship." 634 When Ju Toy had received a court hearing (actually a hearing before a referee appointed by the court), he had been able to vindicate his claim. 635 If the government's contention were sustained, he declared, American citizens of Chinese ancestry would in the future travel abroad at their peril. 636

It seems clear from his brief that Dibble was not totally pleased with the way Ju Toy's original lawyer had handled his case. In applying for the writ of habeas corpus in the federal trial court, counsel had based the application on a bare claim of citizenship and had not alleged any errors or arbitrariness in the way his client had been treated by immigration officials. 637 One of the questions certified to the Supreme Court for decision was whether such an allegation was necessary to invoke the trial court's jurisdiction. 638 Dibble argued that it was not, but, if the Court determined that it was, he went on, it should grant his client the right to make this allegation retroactively: "A person entitled to the writ of habeas corpus should not be allowed to suffer through the inadvertence or mistake of the person, who has sued out the writ in his behalf." 639

Holmes again delivered the opinion of the Court. 640 The habeas corpus writ that allowed Ju Toy to air his case in court should not have been granted, he ruled. 641 Persons seeking entry into the United States and claiming to be citizens were entitled to due process of law, but due process of law did not always require a judicial trial. 642 Congress could constitutionally entrust the determination of the right to enter to an administrative official and, absent a showing of abuse of discretion, such

632. Id. at 5-6.
633. Id. at 6.
636. Brief for the Appellee, supra note 625, at 3.
638. Id.
639. Brief for the Appellee, supra note 625, at 8.
641. Id. at 263-64.
642. Id. at 263.
determinations were to be treated as final and conclusive by the courts. The opinion prompted an angry dissent from Justice David Brewer, who characterized the decision as sanctioning "a star-chamber proceeding of the most stringent sort."

Two years later Holmes delivered another opinion in a Chinese immigration case. It raised the possibility that an alternative trial strategy in *Ju Toy* (one that an experienced trial lawyer like Dibble might have employed?) might indeed have produced a different result. In *Chin Yow v. United States*, a Chinese individual seeking to enter the United States on the basis of citizenship and detained by the authorities sought a writ of habeas corpus on the ground that immigration officers had handled his claim in an arbitrary manner, refusing, for example, to allow him to present relevant corroborative evidence. These allegations, according to Holmes, entitled him to a court hearing, at least for the purpose of showing that there had been some sort of arbitrariness.

Altogether, Dibble argued some dozen Chinese immigration cases in the federal appellate courts, and it seems that the representation of Chinese clients constituted a significant part of his law practice.

643. Id. at 263-64.
645. 208 U.S. 8 (1908).
646. Id. at 10-11.
647. Id. at 13.
648. In 1904 Dibble was retained by the family of a high-ranking Chinese diplomat, Tom King Yung, to represent them in connection with an investigation into the man's suicide. Letter from Henry C. Dibble to George C. Pardee, Governor, State of Cal. (Aug. 18, 1904) (on file with University of California Berkeley) [hereinafter Letter from Henry C. Dibble to George C. Pardee (Aug. 18, 1904)]. While returning home from dinner, Yung had been stopped by a San Francisco police officer who mistook him for a criminal. *Arrest and Death of Tom Kim Yung May Bring International Trouble*, S.F. CALI., Sept. 15, 1903, at 3; *Prefers Death to Police Court Trial*, S.F. CHRON., Sept. 15, 1903, at 5. There is no completely reliable report of what happened, but according to one account two officers and two citizens handcuffed him to a post. *Prefers Death to Police Court Trial, supra*. A few weeks later, the man asphyxiated himself at the Chinese consulate and left a note saying that his death was the result of the humiliation he had suffered. Id. A police report on the matter was sent by the Mayor of San Francisco to Governor Pardee for transmission to the State Department. Letter from Henry C. Dibble to George C. Pardee, Governor, State of Cal. (Aug. 31, 1904) (on file with University of California Berkeley). Dibble also sent documents to Pardee (tending to bolster Yung's side of the story) along with a cover letter declaring that, in view of the "attack upon Yung's character," simple justice dictated that the documents be forwarded to Washington along with what he called "the ex parte report." Letter from Henry C. Dibble to George C. Pardee (Aug. 18, 1904), *supra*. It is unclear whether Pardee ever sent them on.
D. Dibble’s Last Years

Henry Dibble’s appellate law practice appears to have come to an end with his appearance in the *Ju Toy* case in 1905 (it is, at any rate, the last year in which one finds his name in any appellate reports, state or federal), and his practice generally seems to have shifted into a lower gear after that date. He continued, however, to play a prominent role in Republican politics. Indeed, in 1908, he was mentioned as a possible new chairman of the state party executive committee. He took on a leading role in the Grand Army of the Republic, the large and politically influential organization of Union army veterans whose ranks he had belonged to for many years. In March 1910, while on business in Sacramento, he fell seriously ill and was taken to his home in San Francisco to convalesce. He would never leave it. He died there on June 13, survived by his wife, a son, and two daughters.

V. CONCLUSION: THE ARC OF A CAREER

Taking stock of Henry Dibble’s long and varied public life, what sense can be made out of it? What patterns can one detect? His career as a Louisiana carpetbagger followed a trajectory common to that of many belonging to this class. Like so many other Northerners who settled in the South during or after the Civil War, he thought initially of a purely private career but soon found himself drawn into politics, and for mixed reasons. First, as he frankly admitted, there was self-interest. There were too many barriers to success for a Yankee seeking to make a go of it in traditional private law practice in post-Civil War Louisiana. Politics offered a way to expand his economic opportunities (and expand them it did). But there was also a strain of idealism involved in Dibble’s decision to join the Republican party. There is no reason to doubt his claim in 1872 that he was a Radical, (though not an extremist; note his early opposition to racial quotas in the distribution of elective office) and saw involvement in Louisiana politics as a way of changing that state for the better. Like most Republicans who plunged into Louisiana

Neither the statements in support of Tom nor the Police Commission Report are extant. The characterization of these attachments is based solely on Dibble’s letters.
651. *Id.*
652. *Id.*
653. H.R. MISC. DOC. NO. 42-211, at 274 (1872).
politics during Reconstruction, however, he was eventually undone by them. Louisiana, though, was not the whole of Dibble’s life.

Dibble spent more time in California than he did in Louisiana. There he had a successful and, one imagines, personally satisfying professional career, both in the law and in politics. There is a tendency in writing about the “carpetbaggers” to focus so entirely on their Southern experience that their lives after Reconstruction take on the character of postscripts. It is quite possible that Henry Dibble viewed his time in Louisiana more as prelude than as postscript, as a frustrating and potentially career-destroying life experience that he had managed successfully to transcend. His silence on the subject offers some evidence to support this view. So far as I can determine, he never said anything publicly about Reconstruction after leaving Louisiana.

Three common threads do seem to run through all phases of Dibble’s life: devotion to the practice of law; loyalty (at times verging on the myopic) to the Republican party; and, finally, a commitment to racial equality, or, perhaps more precisely, to equal civil and political rights for blacks. The law was a lifelong passion and, as I hope the foregoing discussion has made clear, it was a profession in which he could make a plausible claim to have excelled (and in both civil law and common law jurisdictions). If the law was his passion, the Republican party was his lodestar, the source it would seem of his mainspring values. Being a Republican meant many things. It meant a kind of visceral disdain for the Democracy, seen as tainted both by its association with slavery before the Civil War and by its rather too close connections with the (white) lower classes. The Republican party was the party of intelligence and virtue, Dibble wrote to Henry Warmoth. Democrats, were “the rum-guzzling rabble.” Being a Republican meant also supporting the protective tariff, that key plank of the party’s platform in the nineteenth century. Toward the end of the century, it meant supporting America’s flirtation with imperialism and endorsing the new version of American manifest destiny that went along with it. “I believe this republic has been builded and set apart for the upbuilding of humanity,” he said in a 1904 speech commemorating the Republican party’s golden jubilee. And that task could only be entrusted to his party. Where the Republican party fifty years before had “stood alone against the slave power,” so it now stood alone in favor of the spread of

654. Letter from Henry C. Dibble to Henry Clay Warmoth, supra note 300, at 3.
the American gospel of enlightenment around the globe.  

Yet, as the historian LaWanda Cox has pointed out, in the late nineteenth century, being a Republican could also denote support for civil rights and racial equality in some form. Dibble had begun his career as a Radical and, though his Radicalism moderated over the years, Radical aspirations continued to influence his behavior long after Reconstruction. He was one of those white Republican carpetbaggers who, unlike some others, did not abandon their ideals after leaving the South. One sees clear evidence of Dibble’s continued commitment to racial equality in his sponsorship of the 1897 California Civil Rights law, possibly also in his willingness to represent Chinese immigrants in the exclusion cases. In this respect he resembles the North Carolinian, Albion Tourgée, and the Mississippians, Adalbert Ames and Henry Warren, versus Daniel H. Chamberlain, carpetbag Governor of South Carolina, who in later life publicly repudiated his erstwhile commitment to racial equality, declaring in 1904 that an electorate made up predominantly of blacks was incapable of producing good government.

If Henry Dibble had nothing to say about his Reconstruction days, he recurred often while in California to his service in the Union army. It was something in which he took intense pride. In an address he delivered in San Francisco on Memorial Day, 1897, he spoke of the Civil War’s significance. The war had been a great struggle over the form of government, “whether the state or the Union was paramount,” and a struggle likewise “between the advocates of slavery and the friends of freedom.” “Had the confederacy prevailed,” he declared, “the Union would have been dismembered . . . and the chains would have been more firmly riveted upon four million slaves and their descendants, to the eternal disgrace of the very name of America.” Instead, he went on, “[t]he curse of slavery was swept away . . . [T]he nation was further consolidated, and the republic was at length firmly established upon the enduring basis of universal freedom and equal

656. Id.
657. LAWANDA COX, The Limits of the Possible, in FREEDOM, RACISM, AND RECONSTRUCTION 260 (Donald G. Nieman ed., 1997) (noting consistent Republican support for civil rights measures in the U.S. Congress down to the end of the century).
658. See CURRENT, supra note 39, at 397; FONER, supra note 51, at 265-66.
660. Id. at 300.
661. Id. at 302.
It is tempting to dismiss these remarks as so much patriotic holiday rhetoric. Given the direction in which events were moving, the reference to universal freedom and equal rights has a hollow ring to it. But Dibble uttered these words a few months after the passage of his Civil Rights bill. If not a very perspicacious description of present realities, they must at least have reflected genuine ideals and aspirations, ideals that went back ultimately to his days as a young Radical in Reconstruction Louisiana.

662. Id. at 301-02.