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Con Law: Civil Rights

In his 1868 treatise on constitutional limitations, Judge Thomas Cooley articulates a view of “unequal and partial legislation” and enumerates the many ways in which a law may violate the federal constitution’s commitment to equality under law.¹ By Cooley’s standards, the Freedmen’s Bureau Act of 1866 would be considered legitimate legislation.² An argument for this idea may be expounded by examining: how the legal distinctions the legislation puts forth are based in legitimate differences between persons; how the act avoids favoring one class at the expense of another; and how the distribution of benefits and burdens as proposed by the act was within the government’s aim towards equality of rights and privileges amongst citizens.³

While discussing the idea of legislation that regulates specific classes of citizens, Cooley makes one criterion of his standard clear immediately.⁴ “Distinctions in these respects should be based upon some reason which renders them important – like the want of capacity in infants, and insane persons” (GGW, P. 323). The Senate debate on the Second Freedmen’s Bureau Act makes it clear that the difference between the freedmen targeted by the legislation and the citizens excluded from it was regarded as a legitimate basis for distinction.⁵ Senator

¹ The first sentence provides a synopsis of the essay’s primary source material.

² This sentence answers this assignment’s prompt directly; this may be understood as a thesis statement.

³ This sentence details the three ways in which the Freedmen’s Bureau Act will be assessed (and the ways in which the law satisfies Thomas Cooley’s standards for ‘unequal and partial legislation’), while providing an outline of the essay’s body paragraphs.

⁴ Cooley’s first criterion for unequal and partial legislation.

⁵ This sentence explains how textual evidence will be utilized to illustrate why Senators debating merits of the Freedmen’s Bureau Act would support Cooley’s evaluation of the law as ‘unequal and partial legislation.’

Thomas Hendricks notes that legislators have understood the states to have a duty to provide “for the poor, the insane, the blind, and all who are dependent upon society” (GGW, p. 328). The Democrats’ emphasis during the debate was that this duty to support dependent populations fell to the states. “What has occurred, then,” Senator Hendricks asks, “in this war that has changed the relation of the people to the General Government to so great an extent that Congress may become the purchaser of homes for them?” The answer to Hendricks’ question is obvious according to Senator Lyman Trumbull. Trumbull notes that these people had no property when the Civil War began, did not use their labor independently, and were still surrounded by a “prejudiced and hostile population who have been struggling to overthrow the Government” (GGW, p. 329). As a direct result of the war a class of freedmen and refugees was created, and this class could not rely upon their local governments for aid. This argument makes the distinction drawn all the more legitimate: not only are freedmen appropriate targets of assistance, but they stand as a class recognized by the federal government and ignored by the States – as a result the freedmen, a new class created from people regarded by some governments as property, were in more need for aid than any other marginalized group of people.⁶ Trumbull makes it clear that the freedmen are entirely dependent on society – thus meeting Cooley’s standard for want of capacity.

Cooley states clearly that any piece of legislation that favors one class at the expense of another qualifies as unequal and partial legislation.⁷ “Privileges,” Cooley notes, “may be

⁶ This sentence summarizes points of emphasis in lecture materials, appropriately identifying changes in the way the Constitution regarded different classes of citizens (specifically after ratification of the Thirteenth Amendment.)

⁷ This supporting evidence is used in reverse, noting what laws Cooley *would* view as an unequal and partial legislation before contrasting aspects of those laws with the Second Freedmen’s Bureau Act. While the last paragraph provided sufficient evidence to meet a standard, evidence here will be used to illustrate the Act’s

granted to individuals, when by so doing the rights of other persons are not injuriously affected” (GGW, p. 323). The Second Freedmen’s Bureau Act of 1868 grants government assistance to a special class of people without infringing upon the rights of other groups. This piece of legislation granted aid to freedmen and refugees through allotments of provisions and fuel, land, the creation of schools, and military protection for all those refused their rights (GGW, P. 327). Republicans during the Senate Debate noted that any aid given to freedmen was used to offset the differences between this new class of people and full citizens. “Republicans hoped to provide persons of color with the economic and educational opportunities they thought necessary for equal citizenship” (GGW, p. 326). Paired with the insistence that the Act was a legitimate exercise of Section 2 of the Thirteenth Amendment, Republicans set out to prove that aid given to freedmen did not constitute Cooley’s “arbitrary deprivation of rights” for other citizens. The Second Freedmen’s Bureau Act, according to Trumbull, is not an issue of favoritism or partiality, but instead another part of the process in ending slavery.⁸ “With the destruction of slavery necessarily follows the destruction of incidents to slavery. When slavery was abolished, slave codes in its support were abolished also” (GGW, p. 329). The separation between former slaves and citizens was predicated on the institution of slavery - the legislation that prevented freedmen from owning property, enforcing rights, and seeking an education “never would have been thought of or enacted anywhere but for slavery.” (GGW, p. 329) Further, the Black Codes that were enacted following the Civil War turned a class

inability to cross the threshold to be regarded as ‘unequal and partial legislation.’ That is to say, unlike the first paragraph which argues the Act *is* legitimate legislation, this paragraph argues that the Act *is not illegitimate* legislation.

⁸ Here is an example of a writer distinguishing between his/her own voice and the opinions of others, rather than providing an objective description of a historical event.

regarded as property into a people deprived of rights (GGW, P. 325). By seeking to address the artificial divide based on differences no longer regarded as real, the Second Freedmen's Bureau Act attempts to remedy an arbitrary deprivation of rights.

Cooley also addresses the granting of special privileges and imposing of special burdens, in relation to the government's aim of equality in rights, privileges, and capacities. "It must be presumed," Cooley says of legislation dealing with special privileges, "that the legislature designed to depart as little as possible from this fundamental maxim of government" (GGW, p. 323).⁹ Does the Second Freedmen's Bureau Act move the government and citizenry towards a greater equality amongst classes? "When slavery goes, all this system of legislation, devised in the interests of slavery and for the purpose of degrading the colored race." (Senator Trumbull, GGW, p. 330). Republicans in the Act's Senate Debate, the same legislators responsible for the ratification of the Thirteenth Amendment, believed that the policy of government was to "legislate in the interest of freedom" (GGW, P.330). Of course, Senator Lyman Trumbull saw the Second Freedmen's Bureau Act as consistent with the commitment to general rights of equality. The ability to punish those depriving others of their civil rights, as put forth by the Act, was regarded as a means to securing freedom that Congress had a constitutional right to adopt (GGW, P.330). Further, not only was the application of this legislation well within the commitment to equality as identified by Cooley, but the intent of those drafting the legislation was also to work towards greater equality in society. Senator Trumbull opines that by making land and education available to freedmen, Congress is expediting the end of a class'

⁹ Cooley's third criterion for legitimate legislation – that is, legislation must be "designed to depart as little as possible from this fundamental maxim of government," in order to **not** be considered 'unequal and partial legislation.'

dependence on the public treasury (GGW, p. 329). The Republican Senators involved in the debate understood these new programs geared towards refugees and freedmen not as permanent structures, but designs upon a citizenry in which no class is entirely dependent upon state assistance. The granting of temporary special benefits was necessary to realize a greater equality amongst citizens; Judge Cooley would not deem the Second Freedmen's Bureau Act to be unequal and partial legislation.¹⁰

¹⁰ In light of this assignment's page limit, a one sentence conclusion is all that is necessary to finish the essay.