Course Description: Civil Rights Legislation (Spring 2006)

The primary focus of this course is on 42 U.S.C. Section 1983, a Reconstruction Era civil rights statute that has been a powerful tool for protecting civil rights. Because so many new issues have arisen in the field of civil rights, as a consequence of the September 11 attacks, I have built into the syllabus time for class discussion of those issues, as well.

The grade for the course will be based on a final exam (50%) and a written paper (50%).

For the writing assignment, you will be asked to draft (1) a federal civil rights statute creating an individual civil remedy for the violation of a designated individual right and (2) a supporting congressional committee report justifying adoption of the statute. Please try to limit your statute/report to no more than 10 typewritten pages. (I assume that the committee report will be double-spaced, and that the statute will be single-spaced.)

As we study the Reconstruction Era civil rights statutes, you will be introduced to many, if not all, of the issues that you will confront in drafting a statute. Pay attention to how these statutes have been interpreted, to their strengths and weaknesses. You may wish to draft a statute that incorporates an approach taken in these statutes, or you may wish to take a very different approach to your chosen civil rights issue. The choice is yours, and it will be an informed and good choice if you let the materials we study be a guide to your work.

Here are some things to think about as you begin work on your statute and accompanying committee report.

A. The problem the statute deals with:

The first thing you should do is to identify a state of affairs or a problem that needs to be addressed through an individual civil rights statute. In previous years, for example, I have had students work on English-only statutes, privacy statutes, gay rights statutes, drug testing statutes, homeless people’s rights statutes. The better statutes tend to focus on a very specific aspect of a more general problem.

Once you identify the problem that you want to address, you must educate yourself to the real-world dimensions of the problem you hope to address through legislation. If you understand all the practical ins and outs of a problem, you will be much better equipped to identify what rights are at stake and to propose statutory protections for those rights. You will also be able to narrow the focus of your statute so that you have a manageable project on which to work. You are going to need this information to put together an adequate committee report, in any event. Don’t delay educating yourself about the problem.

In your committee report, you will not be expected to provide a comprehensive legislative history that actually documents all problems, as Congress would provide, but I will want you to show me that you have a realistic sense of the problem you are
addressing. Rely on what others have written to learn about the issue you have chosen. Law review articles are sometimes of great help; articles in popular magazines or newspapers can also be useful; perhaps some state has already adopted similar legislation that you can look to for help in understanding the problem; and judicial decisions may discuss relevant issues (perhaps in the course of dismissing a claim that your statute will, in future, require courts to recognize). Even if articles don’t directly deal with statutes, they can be very helpful to your understanding of the dimensions of a particular problem, what solutions are really needed, what solutions can really work. You may even find language used by courts or academics that could usefully be incorporated into your statute.

Keep track of all of sources of information, for you will want to refer to them in your Committee Report. You are free to take advantage of any and all sources of help and information (although if you rely heavily on a particular source, you are obliged to give credit to that source, via a footnote to your Committee Report).

B. Statutory remedies:

You are developing a statute to solve a specific civil rights problem. Think carefully about what individual remedies will do the job. Do you want to stop certain people from behaving in a particular way? Do you want to provide relief to certain people who have been harmed? Are your goals compensatory, deterrent, both, other? Are you interested in injunctive relief, compensatory damages, punitive damages, or other forms of relief? For example, some of you may want to consider authorizing damages measured by the inherent value of a constitutional (or statutory) right. Others may want to cap damages in some way. Still others may wish to authorize a specific, non-traditional form of relief (e.g., mandate that defendants collect and maintain data about a particular area of activity, so that future enforcement of rights will be facilitated). Some of you may prefer to leave courts free to provide (or limit) relief according to conventional judicial rules (e.g., as does Section 1983), while others may wish to place more constraints on judicial discretion. And, finally, some forms of relief may raise difficult questions of federalism or separation of powers.

Think creatively and make sure that your statute directly addresses the remedial question. And remember that the assignment is to provide remedies to private individuals.

C. Defendants:

Against what persons does your statute authorize suit? Are you contemplating a cause of action against government officials, private individuals, or both? Do you intend to make those who actually inflict wrongful injury liable, or are you interested in some form of vicarious liability? Does your statute deal with individual or corporate (entity) liability? In providing a statutory answer to the original question, think about which persons must be defendants if your statute is to provide an effective remedy for the problem you have identified.
D. Plaintiffs:

Which private individuals are authorized to file a claim based on your statutory cause of action? Do you want to authorize representative suits, or do you anticipate that only direct victims of illegal conduct will be allowed to assert a claim? Should the interests of third parties be taken into account in any lawsuit based on your cause of action? Can you specify a mechanism through which those interests can be taken into account (e.g., perhaps directly, through authorized intervention, or perhaps indirectly, through the way in which standards of liability are defined)?

E. Wrongful conduct:

What is the wrongful conduct addressed by your statute (i.e., what triggers liability)? Are you providing an enforcement mechanism for rights defined elsewhere (e.g., in the Constitution), or does your statute itself create a substantive right (e.g., as does Section 1981)? If you are creating a substantive right, what are the contours of that right (e.g., are you prohibiting intentional racial discrimination, or conduct that has a disparate impact on racial groups; is there liability only if there is fault, or is liability strict)? Do you want to be very specific (e.g., require a showing of deliberate indifference as defined specifically by your statute and with reference to a certain kind of proof), thereby limiting judicial discretion in statutory interpretation, or do you prefer a more open-ended statute?

F. Congressional authority:

If you are creating a substantive statutory right that does not already exist under the Constitution, what is the source of Congress’ authority to adopt such substantive legislation? Does Congress have authority under the Commerce Clause? Is Congress acting pursuant to Section 5 of the Fourteenth Amendment? Are there other sources of authority? Also, are there constraints on congressional authority which derive from, for example, the First Amendment or the Eleventh Amendment or concepts of federalism and state sovereignty? This can be a tricky issue; if it is of concern to you, please do not hesitate to talk to me about it.

G. Defenses:

Do you want to authorize any defenses? I suspect that some of you are going to discover that you want to qualify liability in some fashion. If you think that an immunity is warranted, what sort of immunity should you grant (e.g., an immunity from trial or an immunity from liability; an absolute or a qualified immunity; an immunity from damages or an immunity from injunctive relief)? Perhaps you will want to include some defenses (e.g., good faith, to protect those who try to act lawfully but fail due to some reasonable misunderstanding). Should private persons get the same immunities or defenses as governmental defendants? Should entities get the same immunities or defenses as individuals?

H. Procedural issues:
Don’t forget the procedural context for your cause of action. For example, if your statute is likely to create a federal proceeding that parallels a state inquiry into the same issue, do you want to impose exhaustion or abstention requirements, or to specify how claim and issue preclusion should be handled? Do you instead wish to rely on existing statutes (e.g., Section 1738 with respect to preclusion)? Are you interested in asking plaintiffs to utilize alternative forms of dispute resolution as a prerequisite to filing suit? Are you willing to incorporate state rules into your cause of action (e.g., as Section 1988(a) does)? Do you want federal courts to develop federal procedural rules, or do you think they should be specified in the statute? Do you imagine there will be concurrent state and federal court jurisdiction?

I. The final statute:

In general, think about all of the issues that inevitably arise when someone files a lawsuit, and decide how you want to handle them. Remember that you can always do what Congress did when it adopted Section 1983: there is no prohibition on open-ended statutes that leave many issues to judicial interpretation. The consequence of this approach, of course, is that your statute may be interpreted in ways that undermine what you want to accomplish.

Although there are a lot of issues to think through, once you have resolved them your statute will probably not be very lengthy. You may, of course, include a statement of purpose in your statute, or include definitions of specific terms, as you see fit.

J. The Committee Report:

The Committee Report is where you will explain in detail what you (speaking on behalf of Congress) intend to accomplish with this statute and where you will address any potential interpretational issues or questions of congressional authority. You might consider including the following sections in your Report: (1) a section that succinctly states the purpose of the statute; (2) a section that documents and discusses the problem addressed by the statute; (3) a section that identifies a source of authority (e.g., 14th Amendment) for congressional action in this area and that shows Congress has acted constitutionally in adopting the statute; and (4) a section discussing any definitional or interpretational issues that may arise under the statute and giving some guidelines or examples to help courts properly apply the statute.

You are not required to follow this format, but it should serve as a useful guide to those of you who are uncertain just what should be included in the Report.

With respect to (2), I have stated earlier that I do not expect you to do the kind of information-gathering that Congress would do (through hearings) to document the problem your statute addresses. I do want you to show me that you have a realistic understanding of the problem.
With respect to (3), if you believe there is any doubt as to Congress’ authority to legislate in this area, I want you to tell me precisely what kind of information Congress would probably need to gather (under relevant Supreme Court standards) to provide sufficient justification for the statute. For example, Congress arguably may not rely on evidence of problems in a single State as justification for sweeping national legislation.