

Sunday, November 11, 2007

Read your deed.

Bill of Rights. (From the public domain.) In my law school, as perhaps is the case at them all, the mandatory and only first year classes were torts, contracts, criminal, legal research and writing, Constitutional law, property law, civil procedure, and moot court. Property law was not very enjoyable for me. It seemed to be a dry area of the law focused on maintaining the status quo of the privileged (disclaimer: I grew up privileged, and have always remained so); and referring to parcels of real property as blueacre, greenacre (the home of Oliver Wendell Douglas) and boogeracre (okay, that word I made up). After getting beyond my eyes glazing over about property law, I remembered what motivated me to attend law school in the first place, which was to learn how to do something good with the law on the one hand, and to learn the language of those who use the law to oppress, in order to battle them with their own weapons. With property law, for instance, one way to do good is to stand up for low income renters against their landlords who try to squeeze rental payments from them without giving much service, repair nor fairness in return. With contract law, a skilled lawyer sometimes can get a consumer out of an oppressive contract that was signed at the behest of a bubbly salesperson. With criminal law, of course, one can defend the accused. The most interesting part of property class was learning about the deed covenants that excluded property from being held by people from designated racial and religious groups, and the Supreme Courts' Shelley v. Kramer case, 334 U.S. 1 (1948), which invalidated deed covenants excluding people from designated racial and religious groups. Shelley says the Constitution is implicated with restrictive deed covenants as to the state action needed to have such covenants enforced. Consequently, it is critical to read every word of your deed, lease and accompanying documents. If offensive language is contained in the deed or lease, then the buyer or renter can proceed forward to excise the language, refuse to sign the document, or file a lawsuit to remove the language. Fast forward to 2007. A strip club signs a lease to begin its new operation. Then, a neighbor of the club obtains a temporary court order restraining the club from presenting stripping. The case continues being litigated as we speak. How was the temporary restraining order prohibiting stripping ever issued? Because the deed for the strip club has a restrictive covenant prohibiting any product or entertainment appealing to prurient interests. Stripping is First Amendment protected. Moreover, the phrase "appealing to prurient interests" is generally associated with obscenity cases; stripping cannot automatically, if ever, qualify as obscene. May Shelley v. Kramer return in full force, to remind judges, lawyers, and everyone else that unconstitutional deed provisions are not enforceable by the courts. Jon Katz. ADDENDUM: Thanks to a fellow listserv member for bringing this strip club case to my attention.

Posted by Jon Katz in Constitutional Law at 00:00