John Chipman Gray
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The Harvard Brahmin of Property Law

Gerald Paul Moran
Professor of Law
Florida Coastal School of Law

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For Judith K. Moran

I was fortunate to have a muse who sparked the light in my early years in high school. She was also my high school girlfriend and who, to my delight, became some forty-six years later my wife. It is to her that I dedicate this book with special love and everlasting appreciation.
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Preface

This project started when I was involved with the discussion of whether Ohio should enact a statutory modification to the Rule Against Perpetuities (RAP) for the purpose of allowing the establishment of private trusts to be exempt from the limitations imposed by this ancient rule of law. Recognizing that a number of other states had taken the action for commercial reasons, I was interested in the current function of the rule. Intuitively, it did not appear that there was a current reason for the continuance of the RAP. Yet, to repeal a rule which is so embedded in legal education seemed like a monumental event. A brief review of the legal literature did not provide a current basis for its continuance.

My primary teaching experience at that time was in the area of taxation and my practice involved tax controversies against or as a former representative of the Internal Revenue Service. A comprehensive study of the matter would take an enormous amount of time. Several years later, I retired, as a professor emeritus, from the University of Toledo College of Law and accepted a position with Florida Coastal School of Law. In time, I decided to teach property law and slowly drifted into a comprehensive study of the development of the RAP. It is a complex area of law which calls for extended study. Reading the history of the common law of property, reviewing original cases of importance, and law review articles from the late nineteenth century to the present led me to question the hand of the distinguished Professor John Chipman Gray, as he was the principal marketing agent of the RAP in the United States. He, along with Lord Chancellor Nottingham and Lord Kenyon (as well as others), shaped the contours of the RAP. Gray interpreted the RAP in his famous treatise on the RAP in a very dogmatic and restrictive fashion. Because Gray’s treatise on the RAP was, and is, universally accepted, it became obvious that one could not study the RAP as a legal abstraction apart from understanding the life and times of Gray himself.

The more I backed into the study of his life, the more I realized the intrinsic relationship of the man to his RAP. This historical essay is intended to pro-
vide that context and also to suggest that there is no present reason for the continued hegemony of Gray’s RAP. John Chipman Gray is and continues to be a special scholar. He did so much in his life: soldier in the Civil War, principal participant in the ascension of Harvard Law School in the late nineteenth century, practitioner of the law extraordinaire, founder of one of the major law firms in the United States (Ropes & Gray), founding Editor of *American Law Review*, member of a very distinguished family, and scholar of the first order. As a Brahmin, Gray was trained to be a perfectionist, and certainly fulfilled that mission.

What follows here is an extended essay on the man, John Chipman Gray. The object here is not to exempt private trusts from legal accountability, but to suggest continued utilization of his RAP as achieving that goal constitutes reliance on a custom instilled in legal education for far too long. A rule of law formed when real estate was the foundation of wealth and future interests in dirt were conveyed in kind has little relationship to the availability of a modern complex trust (funded with stocks, bonds, and other intangible assets) that possesses an arsenal of powers exercisable by an active and accountable trustee. I leave it to you to agree or disagree, however, that determination cannot be made without a focus on the hand applying the RAP.
Acknowledgments

I take note of the valuable contributions of the many legal scholars on the common law and express deep respect for their dedicated work in providing a comprehensive narrative of the past. I am fully indebted to their contribution to the goal of attempting to establish a rational framework of the law of property. Although I may personally decry the fiction of the exclusively rational development and/or application of the rules of the common law in the Blackstonian rendition, I would have nothing to address but for the discipline and debt of the massive scholarship produced by the masters of the common law such as Maitland, Pollock, Plucknett, Holdsworth, Baker, Milsom and others of the English sort, as well as numerous American scholars. I owe and express special recognition to the historical scholarship of A. W. Brian Simpson. Also especially important to my study of John Chipman’s family was the information provided by Stephen Robert Mitchell’s doctorate dissertation (1961) on Horace Jr. Mitchell’s dissertation provided important data as it relates to my analysis of the relationship between the two brothers and the enormous impact that the relationship with Horace had on Gray and his scholarship.

The scholarship of Steven A. Siegel on Gray has been also helpful in the development of my thesis although there are differences in our perspective of Gray. Bruce A. Kimball’s extensive study on the life and contributions of Christopher Columbus Langdell, the first dean of Harvard Law School, is also noteworthy and particularly relevant.1 Kimball’s scholarship will no doubt secure renewed recognition for the significance of Langdell’s contributions to the development of modern legal education. He has “ably rescued Langdell from posterity’s condescension.”2 And further, I foremost acknowledge and continue to celebrate the illuminating scholarship, superb insight, and tortuous witticisms of W. Barton Leach whose diligent efforts alone revealed the

RAP for what it was and remains: an oath of institutional allegiance on the part of the academic community to the mysticism of the legal past.

This extended essay could not have been accomplished without the generous financial summer research grants of Florida Coastal Law School. Dean Peter Goplerud and his administration provided needed resources for employment of several outstanding research assistants. I would particularly note the able assistance of the following past students who have aided me in this endeavor: Lance Neff, JD, Patrick J. Kelly, MD, JD, Catherine Micaud, JD, and Jennifer Shoaf, JD. In addition, I would like to give special appreciation for the editorial and research work of Kyle S[ill], JD. Mr. Sill has separately published an article regarding the RAP and its application to commercial transactions; notwithstanding, his contrary conclusion that “the elusive rule against perpetuities will not be going away any time soon.”3 In addition, the assistance of former and present faculty assistants, Holly Bolinger, MaryBeth Evans, and Patricia Maroney, has been invaluable. I further deeply appreciate the editorial assistance and guidance provided by Sondra Greenfield.

I also express deep appreciation for the generous and caring services of the staff of the Florida Coastal School of Law Library and Technology Center, under the leadership of Nickie Singleton, Director, and Martha Smith, Associate Director. In addition, the willingness of Professor Christopher Roederer to read a rough first draft must be more than noted. I equally appreciate the research assistance of the Houghton Library and Harvard Archives of Harvard College and their permission to publish selected portions of materials contained in the correspondence file of Gray as well as letters in the presidential files. My appreciation also extends to the quality of assistance provided by the Harvard Law School Library and the generous services provided by its staff, particularly Lesley Schoenfeld.

Others participants in my life who have added greatly to my sense of exploration include Myrtle Loughney, Professor William H. Osterle (my mentor at the University of Scranton), Donald Keune, Esq., Joseph Patrick Moran (my brother, in whose steps and direction I have followed), Nora Kay Zelizer, Ph.D., my special step-children and their progeny, and finally my parents, Evelyn Murray Moran and Joseph Aloysius Moran. Each in different ways has added to my quest for understanding the experience of life.

I must also recognize and express deep appreciation for the willing assistance of Jeffrey B. Gray, Esq., and Roland Gray III, Esq., the great-grandsons of Gray. They openly shared the collected personal and private narrative of

their Gray ancestors. In addition, they provided previously unpublished family pictures of Gray and his wife, Nina. It is not surprising to note Jeffrey and Roland count seven generations of American lawyers in the Gray family dynasty. Nicolas Gray, one of the latest family members of the bar and the great-great-grandson of Gray, made available several memorandums setting forth unique information regarding the careers of John Chipman and Horace Jr.

Finally, Gray was a man of enormous talent and energy and his contribution to the formation of a principled system of property law will be with us forever. Nothing stated herein should be interpreted to the contrary. The spirit of Gray’s intelligence and relentless dedication to a legal system by which members of society are held accountable to his form of secular morality will resonate with me and others throughout time. Although Gray’s original version of the RAP has been modified, his vision as the Harvard Brahmin on the law of property will be preserved in perpetuity. I hope that this essay will add to his record of exceptional achievement.