1. Please provide an Analytical Overview of the Topic.

The Rule Against Perpetuities (RAP) is perhaps the most feared rule in the entire legal universe, without reason for it to be. There is a great tendency to avoid the obvious and to focus in the obscure in covering this rule. We will not fall into this tendency. Instead, we shall focus on the Eight Secrets to Unlocking the Rule Against Perpetuities. As you master these secrets to the RAP, you will be within the limited number of law students (and lawyers for that matter) who really understands RAP. The Eight Secrets are as follows:

1. What is the RAP?
2. What is the RAP’s rationale?
3. Which property interests are outside the RAP (interests where it does not apply)?
4. Which property interests are subject to the RAP?
5. When is a subjected property interest tested for the RAP?
6. When does a subjected property interest violate the RAP?
7. What is the outcome on when a subjected property interest violates the RAP?
8. What are the major statutory modifications of the RAP today?

2. What is the Rule Against Perpetuities?

The Rule Against Perpetuities states that “No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.” John Chipman Gray. Or according to Crusto, “A contingent remainder, an executory interest, and a commercial option is void and shall be destroyed and is unenforceable if, at the time of its creation (by will, when the testator died; or by gift, when, the gift is made irrevocable) it cannot vest (become possessory) with the perpetuities period (a time period represented by the life time of anyone alive and casually connected with the interest (“validating life”), at the time of the creation of the interest plus 21 years or a total of about 120 or so).

3. What is the RAP’s rationale?

It represents a compromise between wealthy landowners who wanted to control the disposition of their estates for long periods of time after they died versus their children who wanted the power to control the land to their needs without limitations. The compromise was to allow the original landowner to control the disposition of their estates for lives in being (those presently alive at the time of the Grantor) plus 21 years (the traditional age of majority). After that time period, the original landowner could continue to control the disposition of the estate (from the grave).
4. Which property interests are outside the RAP (interests to which RAP does not apply)?

Vested remainders and future interests retained by the Grantor, such as reversions, possibilities of reverts, and rights of entry, are not subject to RAP. See Examples 27 and 28, p. 250. (Can you see why? Because they are all considered vested or possessory interests, such as in the case of future interests in the Grantor, never left the Grantor.

But notice that in Great Britain (England), by statute (English Perpetuities and Accumulations Act, 1964) RAP applies to possibilities of reverts and rights of entry. (Can you see why? Because they may negatively impact marketability.)

In a number of states in this country, by statute, these interests may be limited to a given time period, such as 30 years (Ca, Mass., NY), or 60 years (NC). Other states allow these interests to last longer but require that they be recorded in the courthouse with notice of the owner’s intent to preserve the future interest.

5. Which property interests are subject to the RAP (“subjected property interest”)?

There are some property interests that are clearly subject to RAP and ALWAYS violate RAP, at the time of the creation of the interest. These are executory interests (future interests in third party grantees, see Examples 29 and 30, p. 250) following either a determinable fee simple or a fee simple subject to an executory limitation. Beware of a remainder interest, following a life estate, in an unascertained person. Such as “to A for life, then to my wife and her heirs who reaches 25.” This may violate RAP. (Can you see why? The use of the word “wife” vague and could lead to an interpretation of an unborn wife at the creation of the grant who does not reach 25 within the perpetuities period.)

In addition to executory interests (that always violate RAP), there are three other types of property interests that are subject to RAP (“subjected property interest”): options to purchase land, contingent remainders, and class gifts. The first and most significant subjected property interest is the option to purchase land (both residential and commercial) (and in many states rights of first refusal of purchase land), and they violate RAP if they may last beyond the “perpetuities period,” at the time of the creation of the interest. See Symphony Space, p. 251 and notes, p. 262.

The second subjected property interest is the contingent remainder. Contingent remainders (those that are not vested remainders, where the third party grantee is unascertained or follows a condition) is subject to the RAP and will violate it if at the time of their creation, they may vest or become possessory sometime after the perpetuities period. If a contingent remainder references a vesting time after 21 years (such as “to A for life,
then to B when B reaches 25), it violates the RAP. See Examples 23 and 24, p. 246, but note that these examples may be wrong (at least in Great Britain) because they reference the grant as being “in trust” and the RAP may not apply to interests in trust. See pp. 266 on the perpetual trust

The third and clearly most challenging subject property interest is a remainder that is a class gift. First, the class gift application to the RAP is contrary to a previously presented rule, that a remainder to a class is considered vested (not contingent) if at the creation of the interest, any member of the class is ascertained and there is no condition precedent. See p. 229. When it comes to applying the RAP to a remainder that is to a class of persons, such as to my children, grandchildren, etc, the rule is that the class is not considered vested (in any member) until the class is closed, that is when the interests of all the members are vested (or possessory). In other words, if at the time of the creation of the subject property interest, all members of the class must be ascertained and all conditions precedent for each and every member of the class must be satisfied within the perpetuities period. This leads to some easy to evaluate examples and some less easy. As to the easy cases, in a gift grant to “A for life, then to A’s children,” and A has one child B in existence at the time, the RAP is not violated because all of A’s children will exist when the remainder vests, when A dies. See p. 248. But if the remainder vests outside of the perpetuities period (lives in being plus 21), the RAP will be violated, such as “to A for life, then to A’s children who reach age 25. (Can you see why? Because at least one of A’s children might reach 25, after lives in being plus 21.)

Because the RAP is a game of possibility (not of reality), there are some far-fetched examples of its application, such as in the Jee case, p. 247, fn 22, presuming that a 80 year old woman could have a child (“fertile octogenarian rule”) or that a 2 year old child could have a child (“the precocious toddler rule”). With today’s fertilization technology, many jurisdictions have by statute has simply ignored the possibility of a child being born by a dead person.

6. When is a subject conveyance tested for the RAP?

A property interest that is subject to RAP is tested as to whether it violates RAP at the creation of the interests. If the subject interest is granted in a will, it is considered and judged for RAP violation when the testator (Grantor) dies (not when the will is written). If the subject interest is granted in an inter vivos (during the Grantor’s lifetime) gift, it is considered and judged for RAP violation when the gift is irrevocable (usually delivered to and accepted by the initial grantee, recipient, without reservation as to the Grantor’s control, beyond the future interests). See p. 246, fn 16.
This is both easy to understand and yet potentially confusing. The confusing part is that the law does not police the suspect grants that may violate RAP on a current, ongoing basis. The RAP issue usually comes up for court review sometime long after the creation of the subjected interests. But RAP expressly evaluates whether there is a RAP violation “at the creation of the interest” and not at the time of the challenge to the validity of the interest.

7. When does a subjected property interest violate the RAP?

A subjected property interest violates RAP if there is any possibility that at the creation of the subjected property interest, that subjected property interest could become vested or possessory at a time outside of the perpetuities period.

8. What is the outcome on when a subjected property interest violates the RAP?

If a subjected property interest could vest or become possessory outside the perpetuities period, then it is void, invalid, and unenforceable. The total conveyance is read as if the invalid interest was deleted (“blue pencil rule”).

9. What are the major statutory modifications of RAP today?

The RAP has withstood the test of time. But there are four major sources of criticism. See USRAP, pp. 264-266. The first is that the RAP should change the time when the subjected interest should be evaluated. In order words, critics desire that the time for evaluating violation of the RAP should not be at the creation of the interest based upon a potential violation, but on a more lenient and permissible actual outcome or “wait and see” basis, assessing whether the subjected property interest actually violated the RAP.

The second is that the RAP should make the perpetuities period less based upon difficult to understand lives in being plus 21 years to an actual, easily understood time period, such as 90 years.

The third is rather than totally invalid the entire subjected interest that violates the RAP, the law should seek to save the interest by applying the RAP in a manner that comes closest to achieving the intention of the Grantor (“cy pres”).

Then there are some states (at least a quarter of the states) that take an approach that the RAP does not apply in the case of trusts in which the trustee has the power to sell the land (and other assets) in (“perpetual”) trust.