Harnessing Formative Assessment Data to Tailor Teaching (in doctrinal classes)

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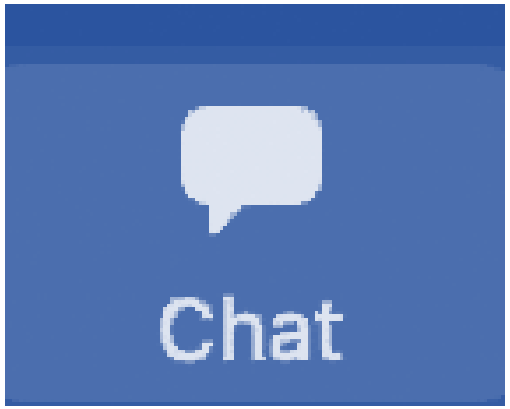
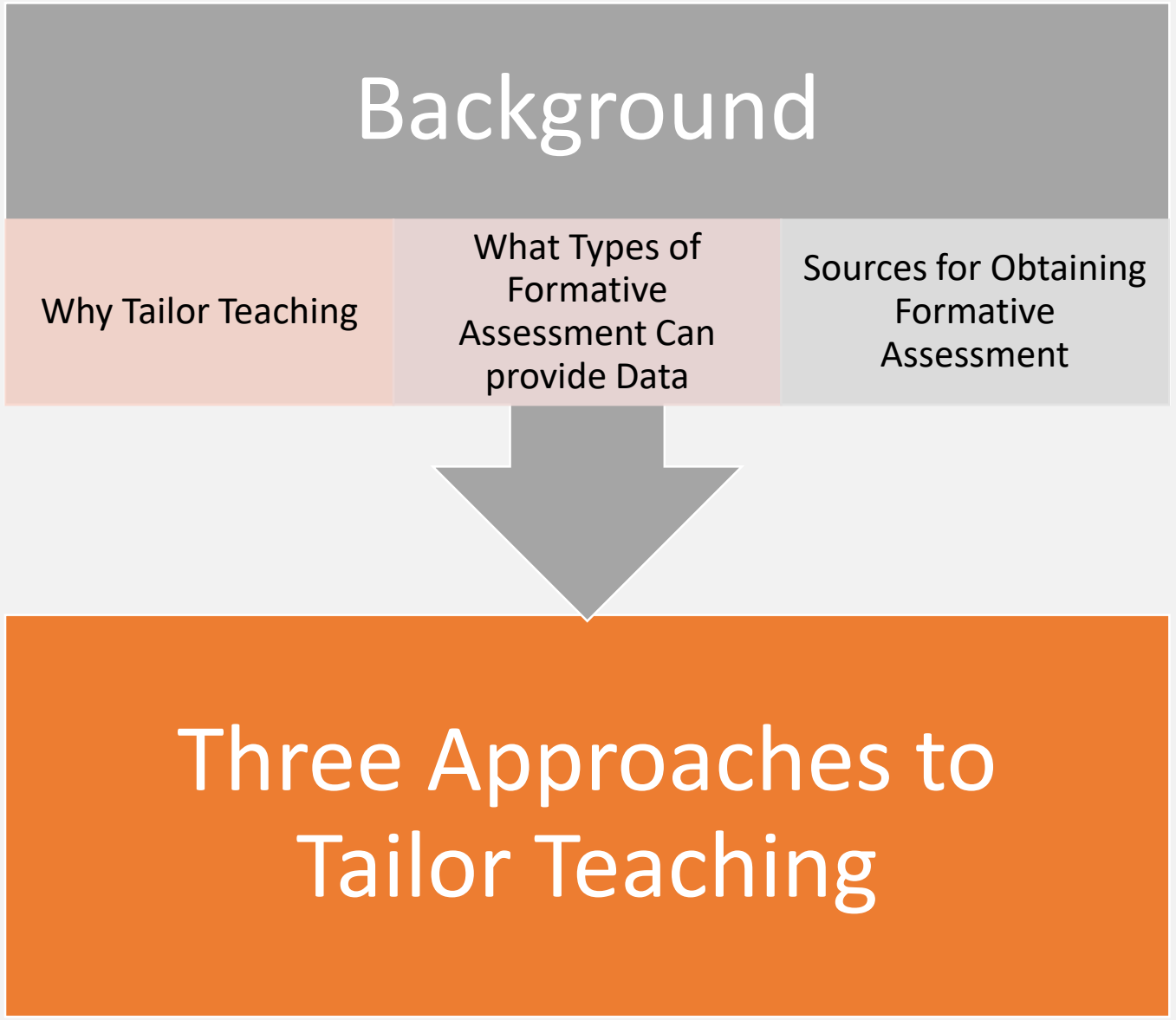


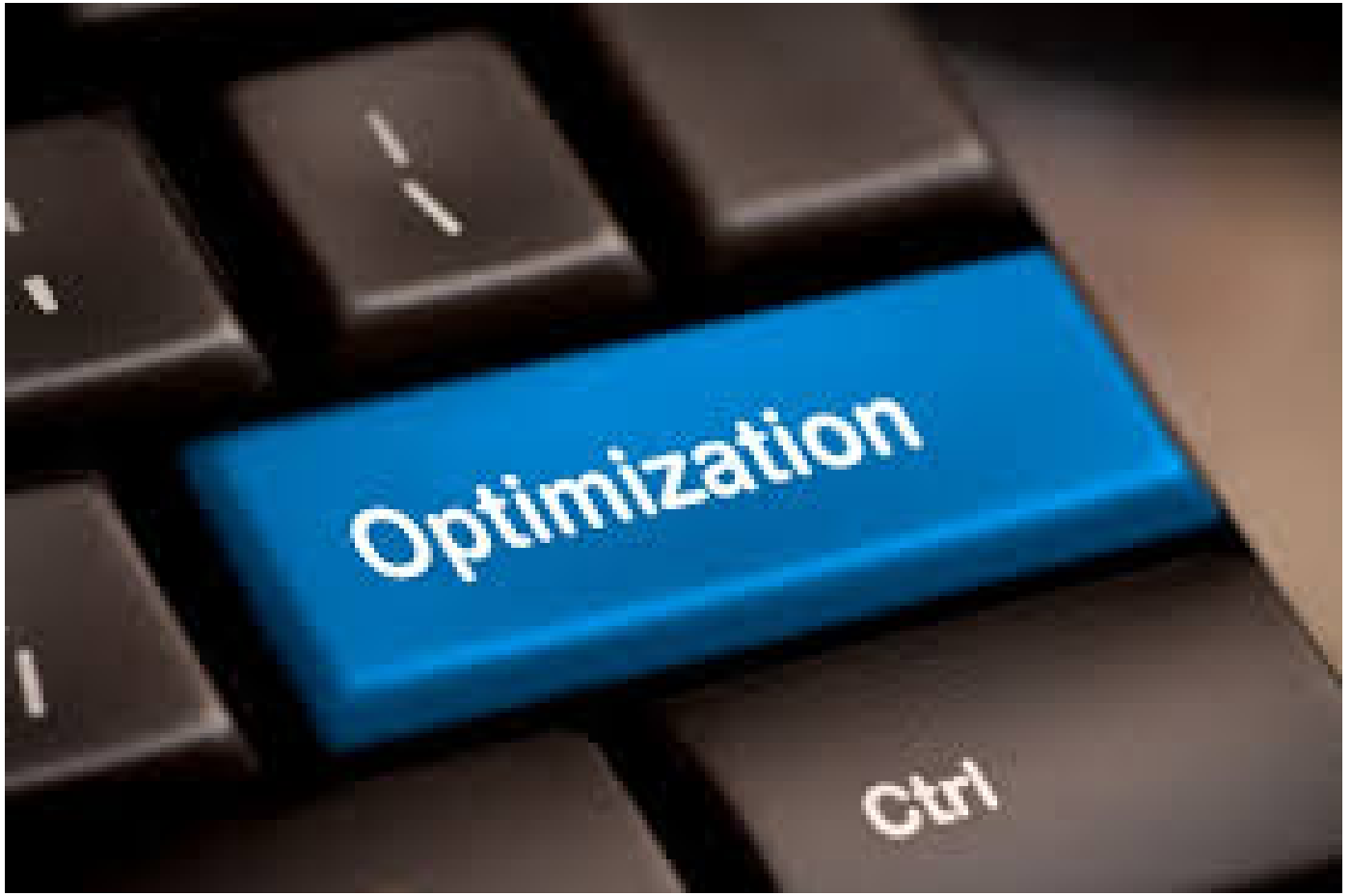
Click & Learn
Civil Procedure
(Carolina Press, 2020)
Upchurch, Gilles & Ho

Overview

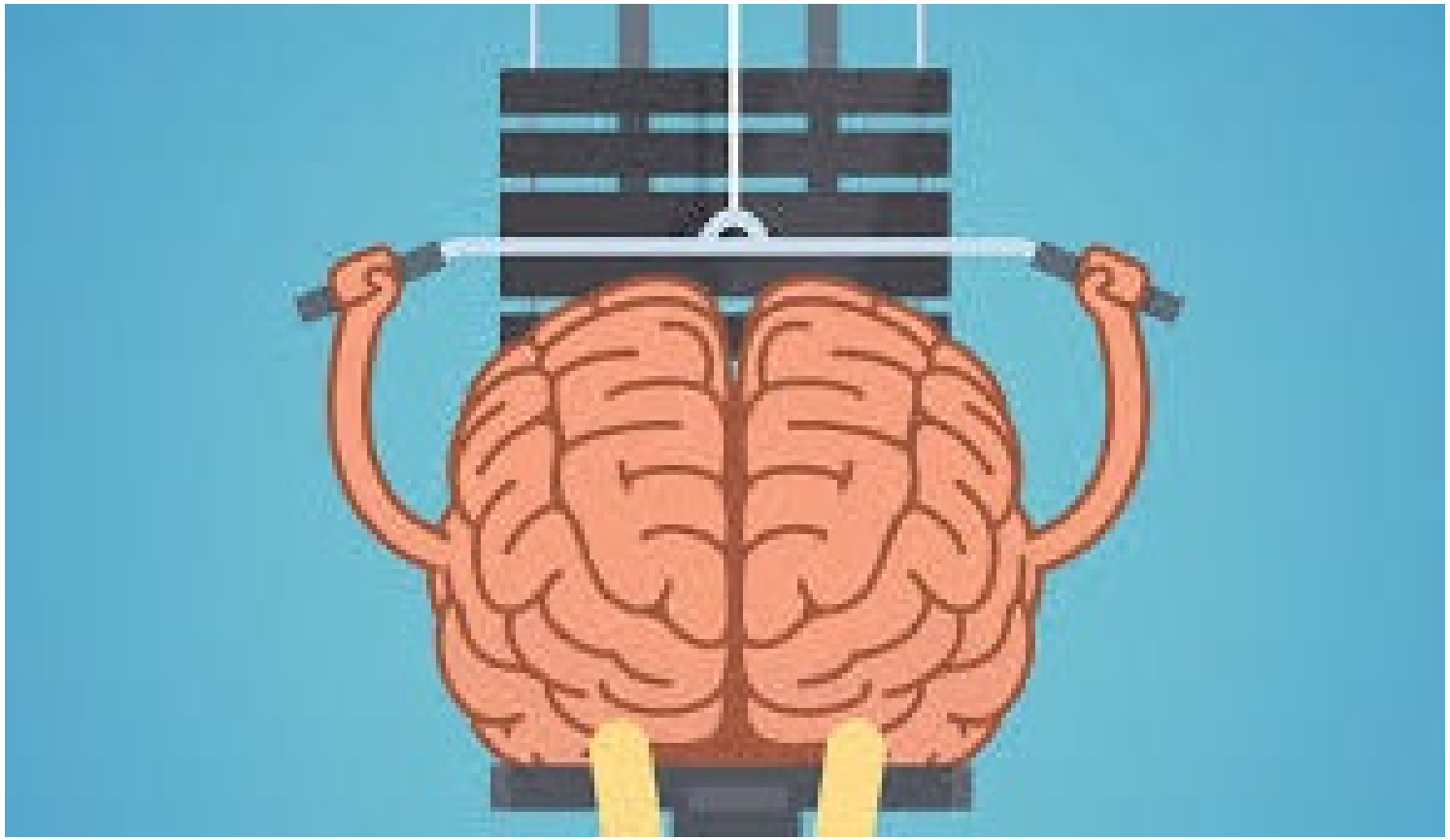

Background
Why Tailor Teaching
What Types of Formative Assessment Can provide Data
Sources for Obtaining Formative Assessment
Three Approaches to Tailor Teaching

Why Tailor Teaching?

- Efficiency
- Maximize & Individualize Student Learning *
- Students are accustomed to self-directed learning and other activities



Generation Effect



- Improves retention (richer “encoding” of data)
- Better long-term recall than “pure study”

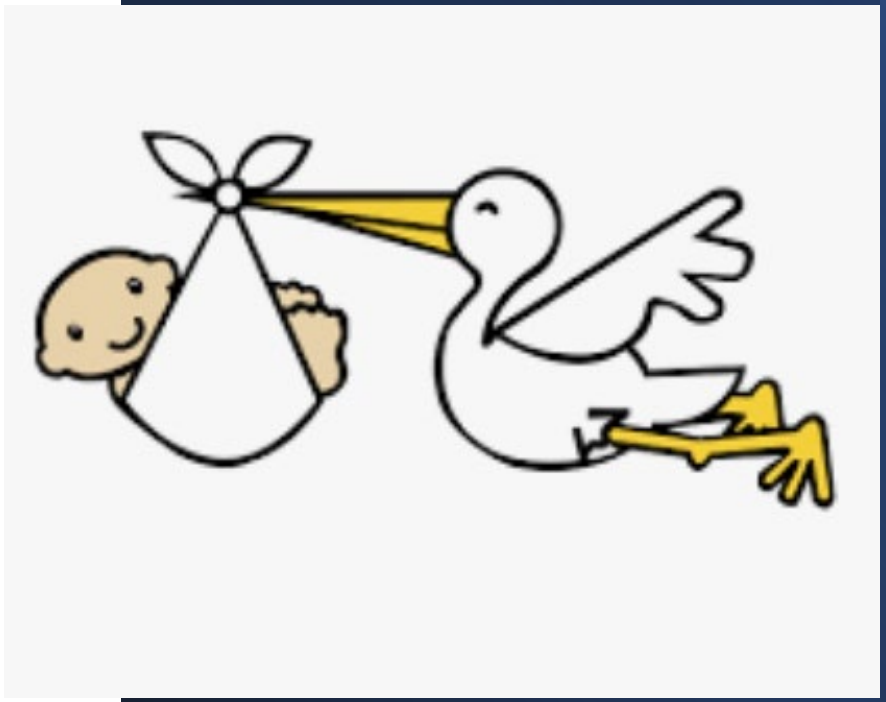
- Yan, V., Yu, Y., Garcia, M., & Bjork, R. (2014). Why does guessing incorrectly enhance, rather than impair, retention? *Memory & Cognition, 42* (8), 1373-1383;
- Christian Jarrett, *How Guessing the Wrong Answer Helps You Learn the Right Answer*, BPS Research Digest, Nov. 17. 2014, https://digest.bps.org.uk/2014/11/17/how-guessing-the-wrong-answer-helps-you-learn-the-right-answer/

What Formative Assessment Data?

1. **”Objective”** (MC, T/F, etc)
2. Essay Answers
3. Discussion Board Responses (& other narrative responses)

Where do Formative Assessment Questions come from?

- Off the Shelf
  - "Objective"
    - CALI lessons
    - Casebook Connect – quizzing; West Casebook plus
    - Click & Learn: Civil Procedure (CAP)
    - Core Knowledge for Lawyers (CAP)
    - Quimbee, SeRiouS, Kaplan-MBE bank
  - Essay
    - Commercial Sources – including Quimbee
- DIY
  - "Objective"
    - LMS questions (including TWEN)
    - Polling Questions (Zoom, Poll it Everywhere, etc)
  - Essay/Discussion
    - Old exams
    - Inspiration from commercial sources



3 Options to Tailor YOUR CLASS using assessment data

IN CLASS ONLY: In class polling and quick tailoring

PRE-CLASS ONLY: Pre-class assessment with pre-class review = medium tailoring

COMBO: Both pre-class and in class assessment = MAXIMIUM tailoring

HELP US TAILOR THIS PRESENTATION FOR YOU!

Do you use in-class or pre-class assessment *(excluding midterms)*?

A. **NO** (that's why I came to this session!)
B. **Yes -- IN CLASS assessment such as polling** (i.e. zoom Q like this)
C. **Yes - PRE-CLASS assessment** (i.e. LMS quiz or Discussion Board)
D. **Yes - <u>BOTH</u> *pre-class and in class***

IN CLASS ONLY

- polling and quick tailoring

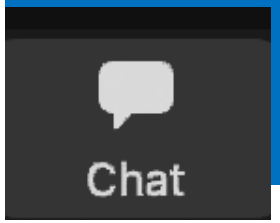
In-Class (Polling) Questions – the WHY

INCREASED EFFICIENCY

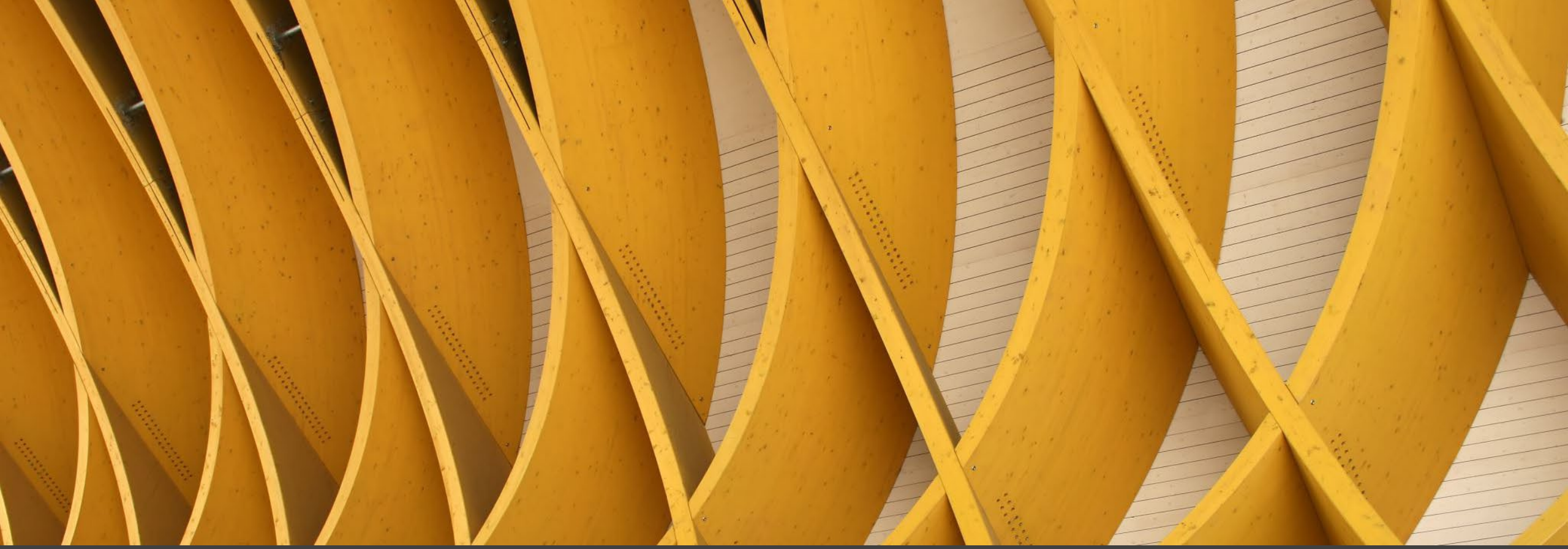
ACTIVE LEARNING

HELPS PROMOTE LONG-TERM LEARNING

In class (polling) questions: the HOW TO



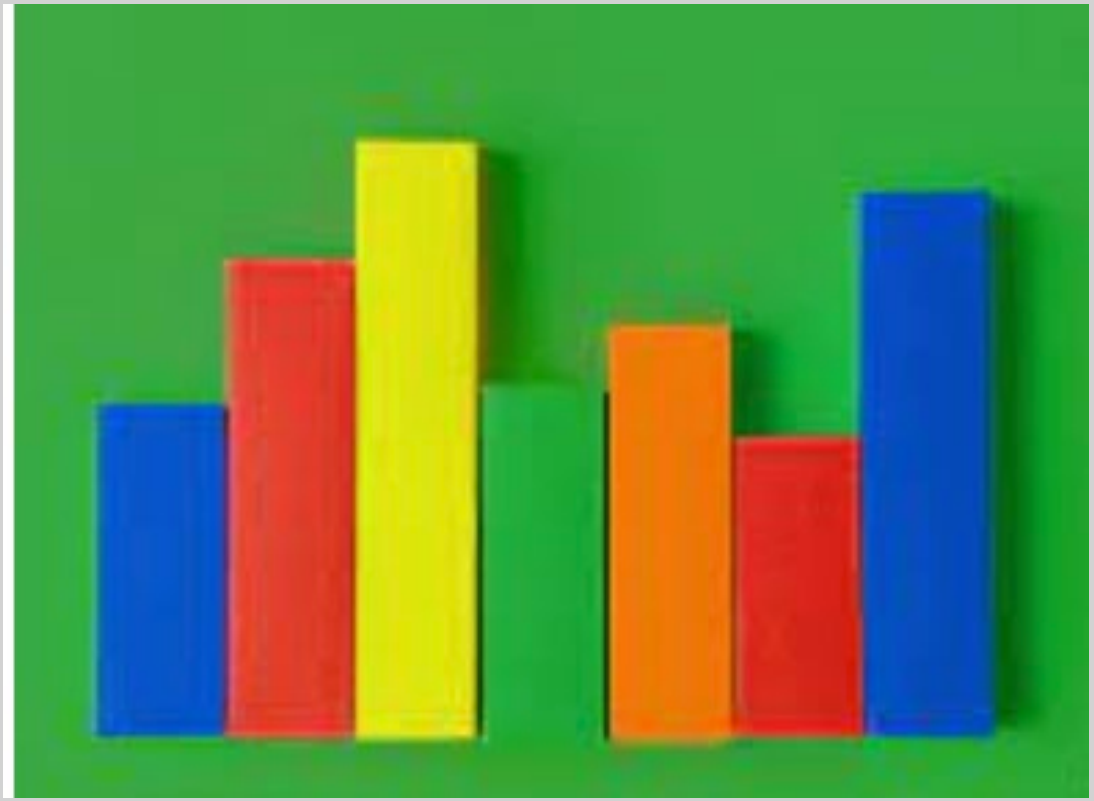
- **Choose a Polling Platform for your goal(s)** (Zoom, Socrative, Tophat, Poll Everywhere, etc)
- Include extra questions for flexibility
- Student answers – count ALL answers, but decide on individual v. group
- Question preview?
- **Display class results**
- When/how to reveal correct answer



In-Class (Only) Polling Questions

When to ask a polling question?

- To review material just covered (to ensure mastery)
- Additional practice
- In lieu of lecture/discussion
- To change the pace



Big picture Issues

- What is the major difference between TS and patent protection in terms of what the owner's rights?
- Source of Law =?
  - How different than patent/copyright/TM?
  - Are state laws the same or different
  - Other associated claim(s) with TS claim?
- Is remedy sought only $$?
  - Preliminary Injunction
  - What is this? What is standard?

UTSA – Definition of TS

- Information, including a formula, pattern, compilation, program, device, method, technique, or process that:
  - (1) Derives independent economic value, actual or potential from not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
  - (2) Is the subject of efforts that are *reasonable* under the circumstances to maintain its secrecy or confidentiality

Questions

- Are only the blue things possible TS? (what one word suggests otherwise)
- Are all processes TS?
- Given definition, why do we need cases?

How do Cases tie in?

- Which part of UTSA do these address?
- Information, including a formula, pattern, compilation, program, device, method, technique, or process that:
  - (1) Derives independent economic value, actual or potential from not being readily ascertainable by *proper means* by other persons who can obtain economic value from its disclosure or use; and
  - (2) Is the subject of efforts that are *reasonable* under the circumstances to maintain its secrecy or confidentiality

Amoco v. Laird

- What aspect of TS definition is at issue?
- Court statutory interp
- What evidence?
- TS policy?
- Who to sue?

- Information.. that:
  - (1) Derives independent economic value, actual or potential from not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
  - (2) Is the subject of efforts that are *reasonable* under the circumstances to maintain its secrecy or confidentiality

Which of the following is likely a TS?

A. A rare and valuable diamond is locked up in a vault with high security.

B. Test results indicate that certain compounds are unlikely to cure cancer; information is only known to two scientists and kept secret from others.

C. A & B

D. None of the above (A & B are not TS).

- Information, including a formula, pattern, compilation, program, device, method, technique, or process that:
  - (1) Derives independent economic value, actual or potential from not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
  - (2) Is the subject of efforts that are *reasonable* under the circumstances to maintain its secrecy or confidentiality

Potential Extra Question for more practice

Which of the following is a TS?

A. A new method of making a battery for an electric car that its inventor has sought a patent for, and for which the patent application is published

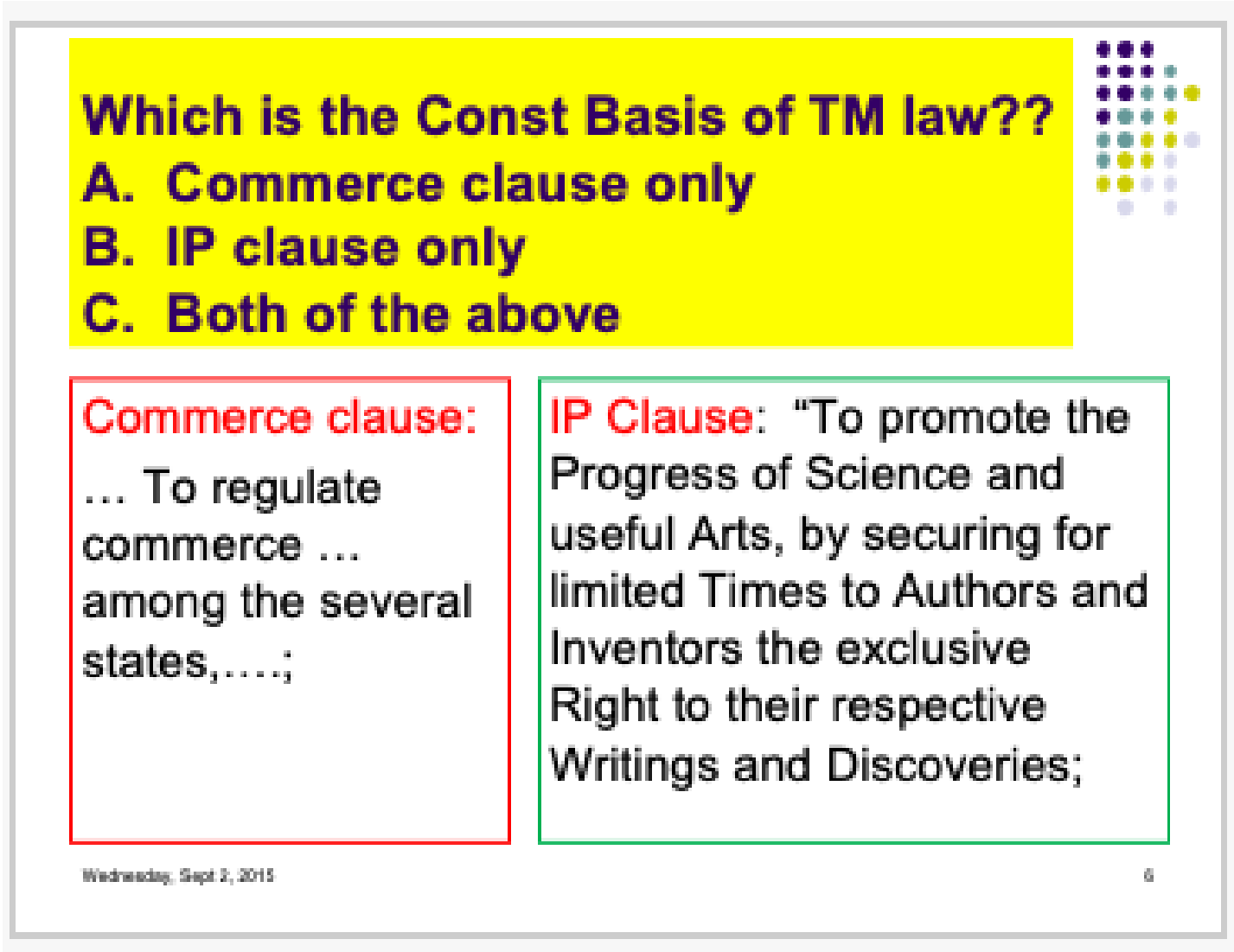
B. A new low-cost method for making stone washed jeans that utilizes a process disclosed in an article for archeologists about how to restore artifacts that is written in a private journal and which took almost no money to develop, but would result in a 20% cost savings compared to prior methods.

C. A new memory-enhancing formula that Ana initially posts on Facebook and tweets to her 1000 followers, but then removes from all public sources and puts under lock and seal once she realizes it would be valuable to competitors.

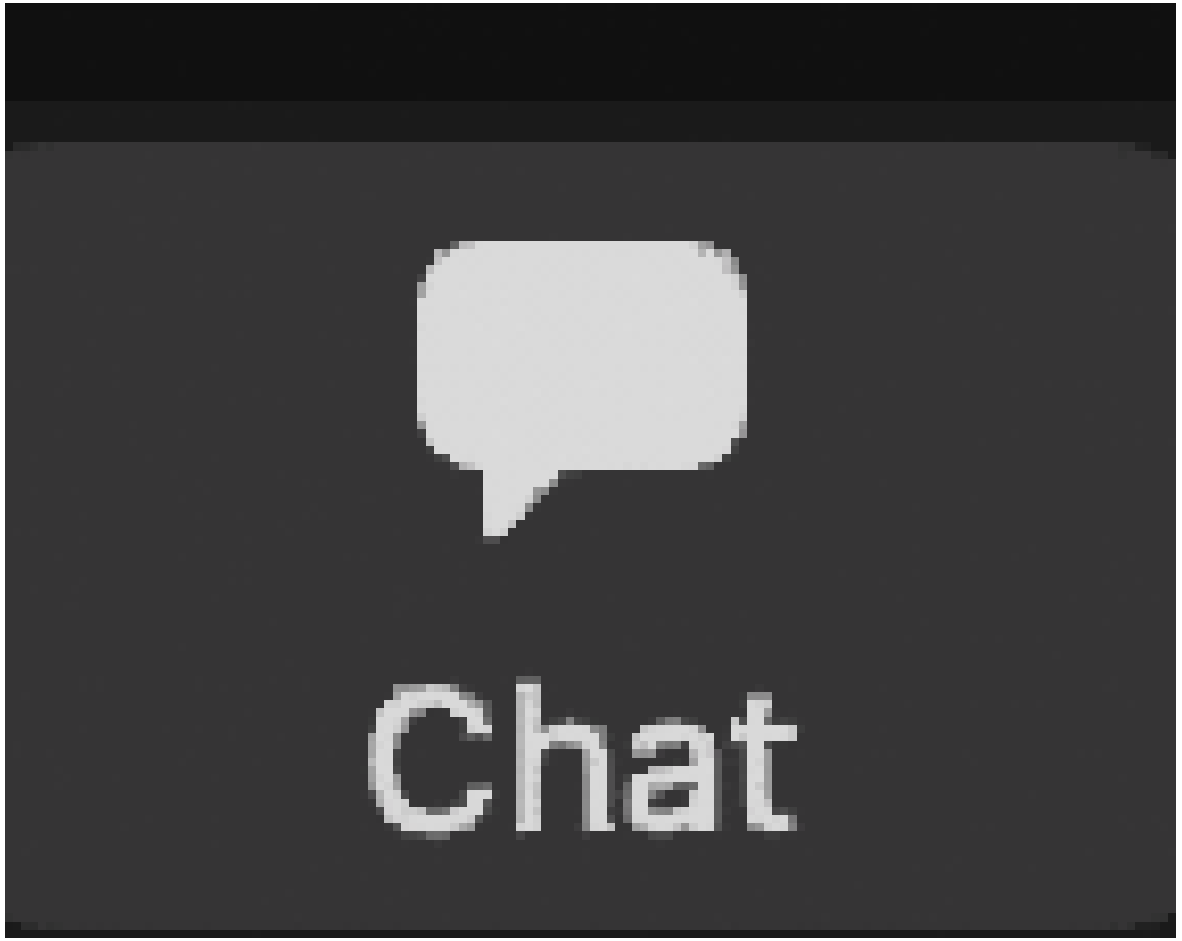
D. ALL of the above (Choices A-C) are a TS

E. NONE of the above (Choices A-C) are a TS

Polling question in lieu of lecture/discussion



WHAT ABOUT YOU:
What do you do with in-class polling ?



Pre-class Only

- pre-class assessment with pre-class review to tailor class content

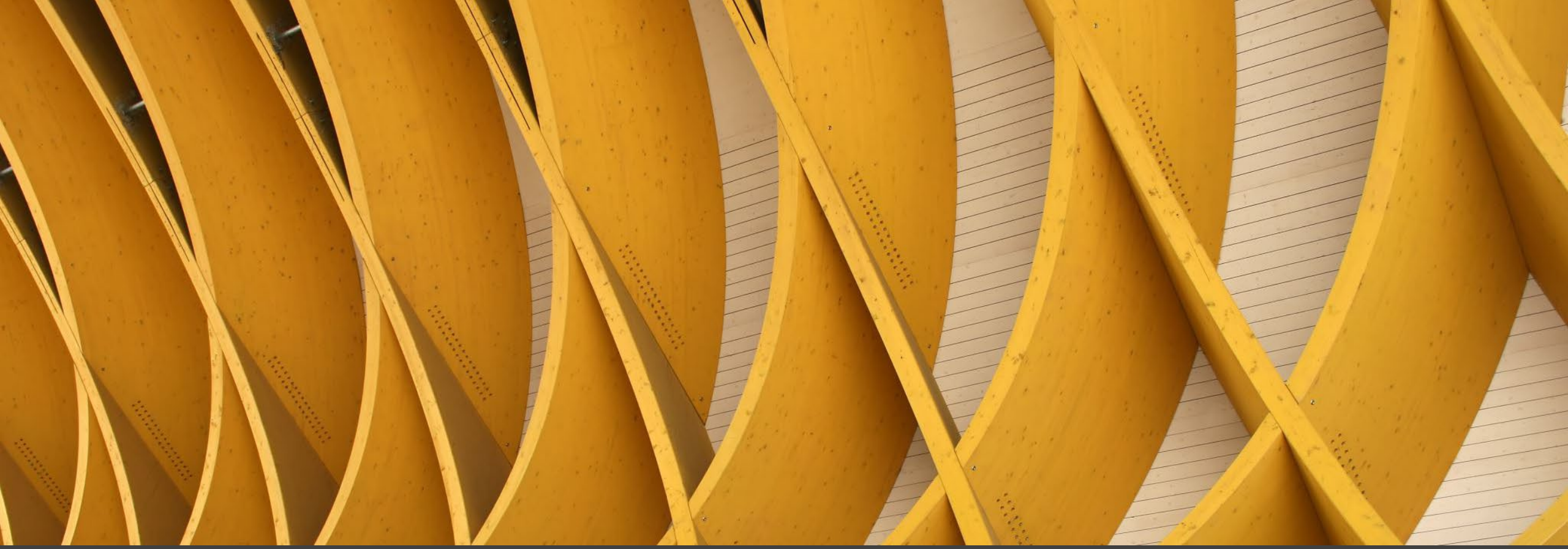
Pre-Class Questions – the WHY

- Efficiency; Promote long-term learning
- basic floor of understanding *before class*

PRE-CLASS Questions- the HOW

- **Choose Program to promote ease of data review**
- **Focus on “basic” knowledge and application**
- **Instant feedback with explanation**
- **“Grade” Based on Timely completion**
  - Emphasizes focus on learning not “testing”
  - Eliminates problem with re-using questions again

Instant Feedback



Examples of Pre-Class Questions

Pre-class: Introduce the key legal text

How to Respond to Allegations in a Complaint (or other Claims) — Rule 8(b)

Rule 8(b) has very detailed instructions on how to respond to the claims (allegations) the plaintiff made in her complaint. Read over Rule 8(b), paying close attention to Rule 8(b)(1)(B) and 8(b)(2)-(6).

Rule 8. General Rules of Pleading

(b) Defenses; Admissions and Denials.

(1) In General. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) Denials — Responding to the Substance. A denial must fairly respond to the substance of the allegation.

(3) General and Specific Denials. A party that intends in good faith to deny all the allegations of a pleading— including the jurisdictional grounds— may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) Denying Part of an Allegation. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) Lacking Knowledge or Information. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) Effect of Failing to Deny. An allegation— other than one relating to the amount of damages— is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

Example of a pre-class question

Click & Learn Civil Procedure

Parson v. Deckler Fact Pattern

Multiple Choice

Review Rule 8(b)

Under Rule 8(b), what are your options when you plead **in response to an allegation** in the Complaint?

- A. Admit or deny
- B. Admit, deny or deny based on insufficient knowledge.
- C. Admit, deny or argue there is no legal basis for the claim.
- D. Admit, deny, argue there is no legal basis for the claim or deny based on insufficient knowledge.

Submit

U5_P3_C2_SC_Q1

Example of instant feedback

Under Rule 8(b), what are your options when you plead **in response to an allegation** in the Complaint?

- A. Admit or deny
- C. Admit, deny or argue there is no legal basis for the claim. ✓
- B. Admit, deny or deny based on insufficient knowledge.
- D. Admit, deny, argue there is no legal basis for the claim or deny based on insufficient knowledge.

Submit

U5_P3_C2_SC_Q1

Sorry!
You are incorrect.

The correct answer is: **B**

Here's Why:
Rule 8(b)(1)(B) tells you to admit or deny an allegation. Rule 8(b)(5) provides that if a party lacks the information to admit or deny, they can plead insufficient knowledge and this has the effect of a denial.

Choices C and D are incorrect, because pleadings are not where you argue about the law. If you want to argue there is no legal basis for a claim, you should either immediately file a Rule 12(b)(6) motion to dismiss for failure to state a claim; or, in Task Two (pleading defenses), assert this as a defense and then argue it later.

Practice Tip! *Sometimes lawyers try to get creative by pleading, "neither admitted nor denied, as the allegation calls for a legal conclusion" or "neither admitted nor denied, as a jury decision on this issue is requested." Read Rule 8(b) again and you will realize that such responses are improper — and in the next section, we will see that such improper pleading can be treated as an admission. You must either admit, deny, or deny for insufficient knowledge; you don't get to duck the question like these responses try to do!*

I'm still confused.

Pre-Class Question Example (TWEN-IP)

Pre-class example of instant feedback (TWEN- IP)

Incorrect:
Although the CB does not explain this, I think it's a fundamental point in how trademarks work. You should notice that the IP clause mentions "limited times," which means that rights based on the IP clause cannot last forever. In contrast, there is no such clause for the Commerce Clause. So, this means trademarks can last indefinitely, as stated in choice one. Although trademarks have that *potential* based on the Constitutional underpinning, whether that happens turns on whether the trademarks continue to function as valid trademarks, as we will discuss.

Can trademarks show creativity if the IP clause is about writings and discoveries? Yes! Although the IP clause is the basis for patents and copyrights, and generally thought to promote innovation and creativity, there is nothing about the Commerce clause that bars a trademark used in commerce from having a creative aspect. So, choice 2 is wrong. Creativity is possible, but simply not the fundamental goal – at least in terms of the Constitutional basis. Also, as you will later see in this course, when a logo, which can be a trademark, reflects substantial creativity (not necessarily always the case), it may be protected by copyright as well.

Lastly, the commerce clause means that trademarks are only valid if they are in fact used in interstate commerce. So, actual use *is* mandatory. We will later discuss how this is not necessarily true for other types of IP. For example, a patent can be valid (in the US) even if its owner does not use it.

So, both choice 1 and 3 are true.

The CB (p. 500) tells you that the Constitutional basis for federal trademark law, i.e. the Lanham Act, is the commerce clause, rather than the IP /Progress clause. Look at the language of both below and answer the question that follows:

IP (Progress) Clause - Article 1, Section 8, clause 8: "To promote the Progress of Science and Useful Arts, by securing for limited times to Authors and inventors the exclusive right to their respective writings and discoveries."

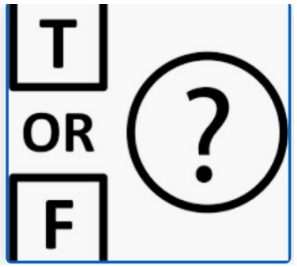
Commerce clause-Art. 1, Section 8, clause 3: "To regulate Commerce .... among the several states"

How are the differences between the Commerce Clause and the IP Clause relevant to trademark law? Select ALL that apply

- ✔ ☐ 1. Since (federal) trademarks are under the commerce clause, they need not be limited in time and can last indefinitely
- ☑ 2. Since (federal) trademarks are under the commerce clause, they can not show creativity
- ✔ ☐ 3. Since (federal) trademarks are under the commerce clause, they cannot exist without actual use in interstate commerce.

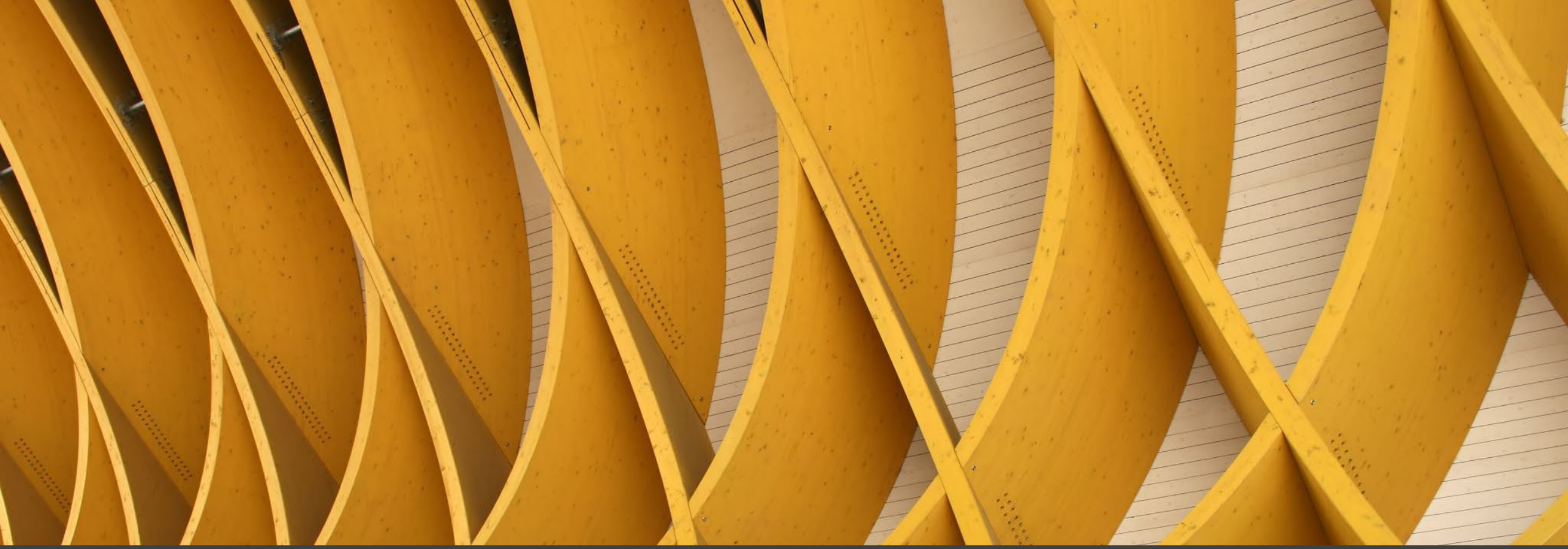
Review Pre-class Data for General Trends

- "Objective"



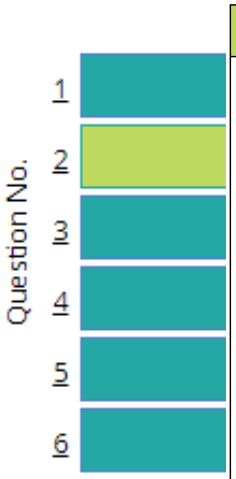
- Narrative Answers

- What points of confusion for substantial number of students?



Examples of how we review the data (& what features are helpful)

(Objective) Pre-Class Data – Click & Learn



Multiple Choice

Let's try another hypo: this time **Deckler wants to make a claim**.

Suppose Defendant Deckler suffered injuries in the collision and wanted to make a counterclaim against Plaintiff Parson to recover for his damages. (He asserts that it was Parson's negligent skating that caused the accident and his heart attack.)

If Defendant Deckler wants to assert this counterclaim for damages against Plaintiff Parson in the *Parson v. Deckler* lawsuit, how can he do this?

A. Include a counterclaim as part of his answer.
C. File a pleading called a counterclaim.
B. File a counter-complaint.
D. He cannot do so.

Correct Answer: A

Show Explanation

ONE CLICK ACCESS to Qs
Click on Question # to see TEXT of Q and Answers

Answer Breakdown

A: 24
B: 5
C: 11
D: 1

Click & Learn Civil Procedure

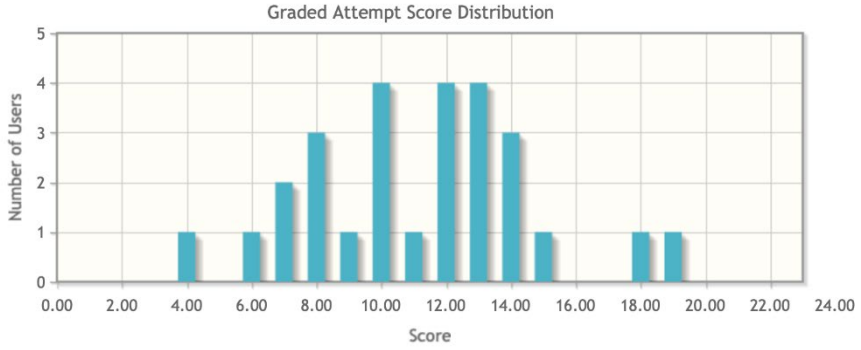
Objective Pre-class Data – TWEN Quiz

Day 4 - TM RIghts Summary

Total Points Possible: 23
Attempts Allowed: Unlimited
Attempt Graded: First

Number of Users: 27

Reports



Day 4 - TM RIghts Reports

Question Breakdown | User Breakdown | Print Frie

Question	Type	Answers				
1	True/False	True: 27*	False: 0			
2	Multiple Choice	A: 2	B: 1	C: 10*	D: 7	E: 7
3	Multiple Choice	A: 20*	B: 24*	C: 6		
4	Multiple Choice	A: 22*	B: 2	C: 24*		
5	Multiple Choice	A: 0	B: 3	C: 26*	D: 19*	

Objective Pre-class Data (TWEN)

ONE CLICK ACCESS to Qs
Click on Question # to see TEXT of Q

Day 1 - Intro to IP; Trade secrets Reports

Question Breakdown | User Breakdown

Question	Type	Answers				
1	True/False	True: 0	False: 17*			
2	True/False	True: 1	False: 16*			
3	True/False	True: 2	False: 15*			
4	Multiple Choice	A: 4	B: 11*	C: 2		
5	Multiple Choice	A: 2	B: 5	C: 0	D: 10*	
6	Multiple Choice	A: 2	B: 0	C: 11*	D: 1	E: 3
7	True/False	True: 4	False: 13*			
8	Multiple Choice	A: 17*	B: 0	C: 0		
9	Multiple Choice	A: 0	B: 0	C: 17*		
10	Multiple Choice	A: 0	B: 0	C: 17*		
11	Multiple Choice	A: 16*	B: 1			
12	Multiple Choice	A: 0	B: 17*			
13	Multiple Choice	A: 1	B: 16*	C: 0		
14	True/False	True: 3	False: 14*			
15	Multiple Choice	A: 1	B: 0	C: 16*		
16	Multiple Choice	A: 0	B: 17*	C: 3	D: 15*	
17	Multiple Choice	A: 1	B: 16*			
18	Multiple Choice	A: 0	B: 0	C: 2	D: 15*	
19	Multiple Choice	A: 3	B: 6*	C: 8		
20	Multiple Choice	A: 0	B: 0	C: 10*	D: 7	

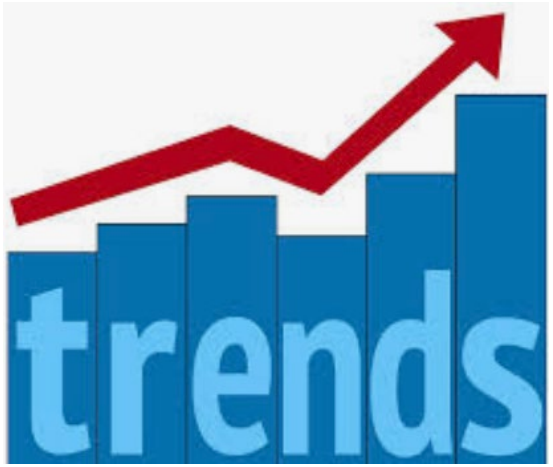
Which of the following do you think is true about IP if only one answer is correct? Take your best guess and then read the explanation that follows.

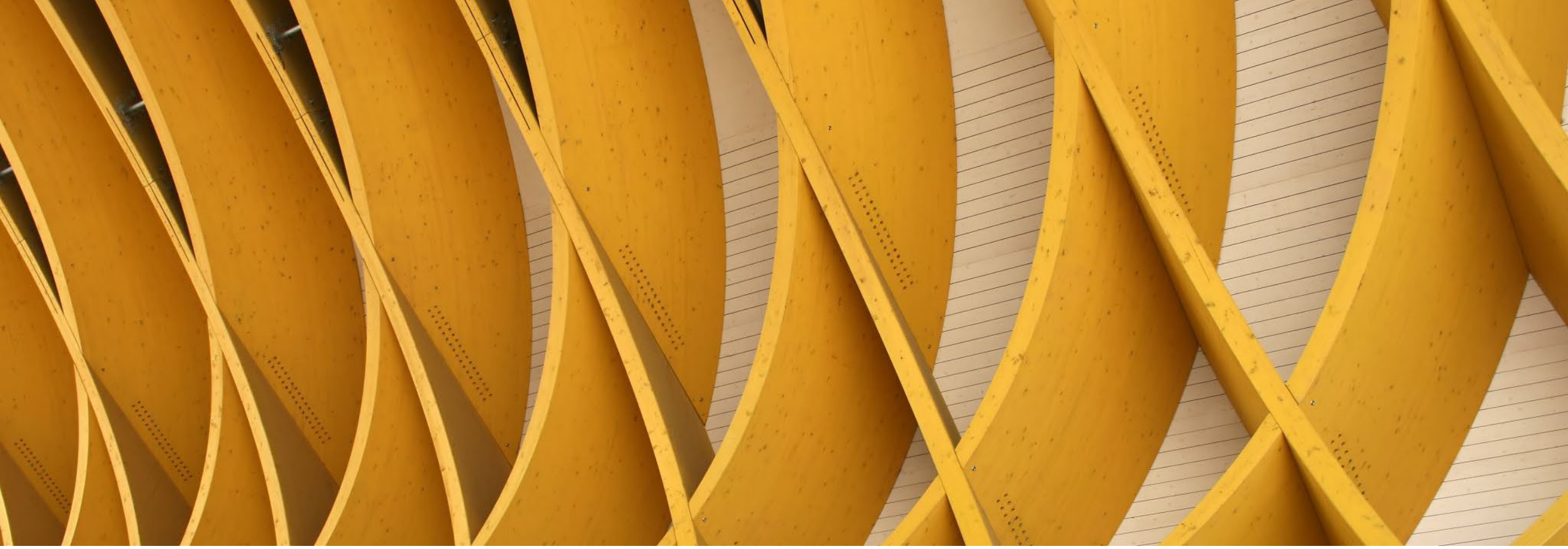
- ○ 1. Government involvement is required for any kind of IP to properly exist
- ○ 2. Government approval is only required for a patent; it is not required for any other type of IP
- ○ 3. A patent granted by the US Patent Office is enforceable against those who use a patented invention without permission anywhere in the world

Textual “data” from Essays/Posts

- Sampling Approach
  - 3-5 answers out of 70 students

- Note common issues to clarify/tailor class





Examples of how data can be used to tailor class

Enhance in-class learning by tailoring your class to focus on areas of confusion (& skip what is not necessary)

- Display question that students struggled with and solicit discussion of right answer (or why they are still confused)
- New application question

Class discussion of (tough) pre-class quiz question

- Apple sues Orange. Apple's complaint alleges that Orange failed to timely deliver a key microprocessor for Apple's new computers in violation of their contract and that Orange has stated under oath that it need not comply with the contract because the contract is invalid pursuant to a federal law.
- [C&L II.A.4. Q13) (IA4. Q13)

- Is there 1331 SMJ?
  - Why or why not?

Click & Learn
Civil Procedure

Provide new scenario to review point of confusion from pre-class data

A document which has the recipe for Krispy Kreme donuts is prominently posted on the employee break room board, although it is marked confidential.
Six months after it was first posted, employee Carl sees this document and sells it to Stan's Donut.

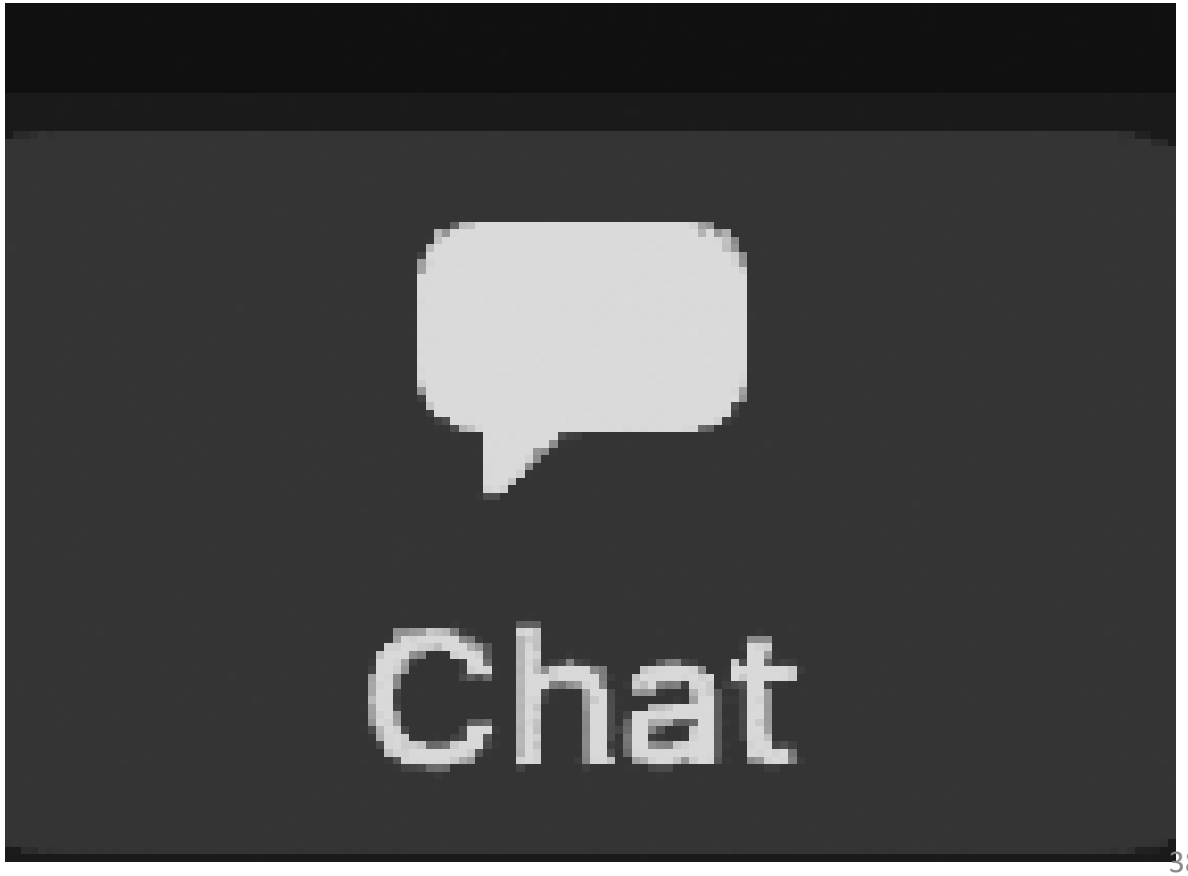
- What is the best argument for why there is no trade secret misappropriation and for whom?

Use sampled (essay) data to structure discussion

Order/Analysis

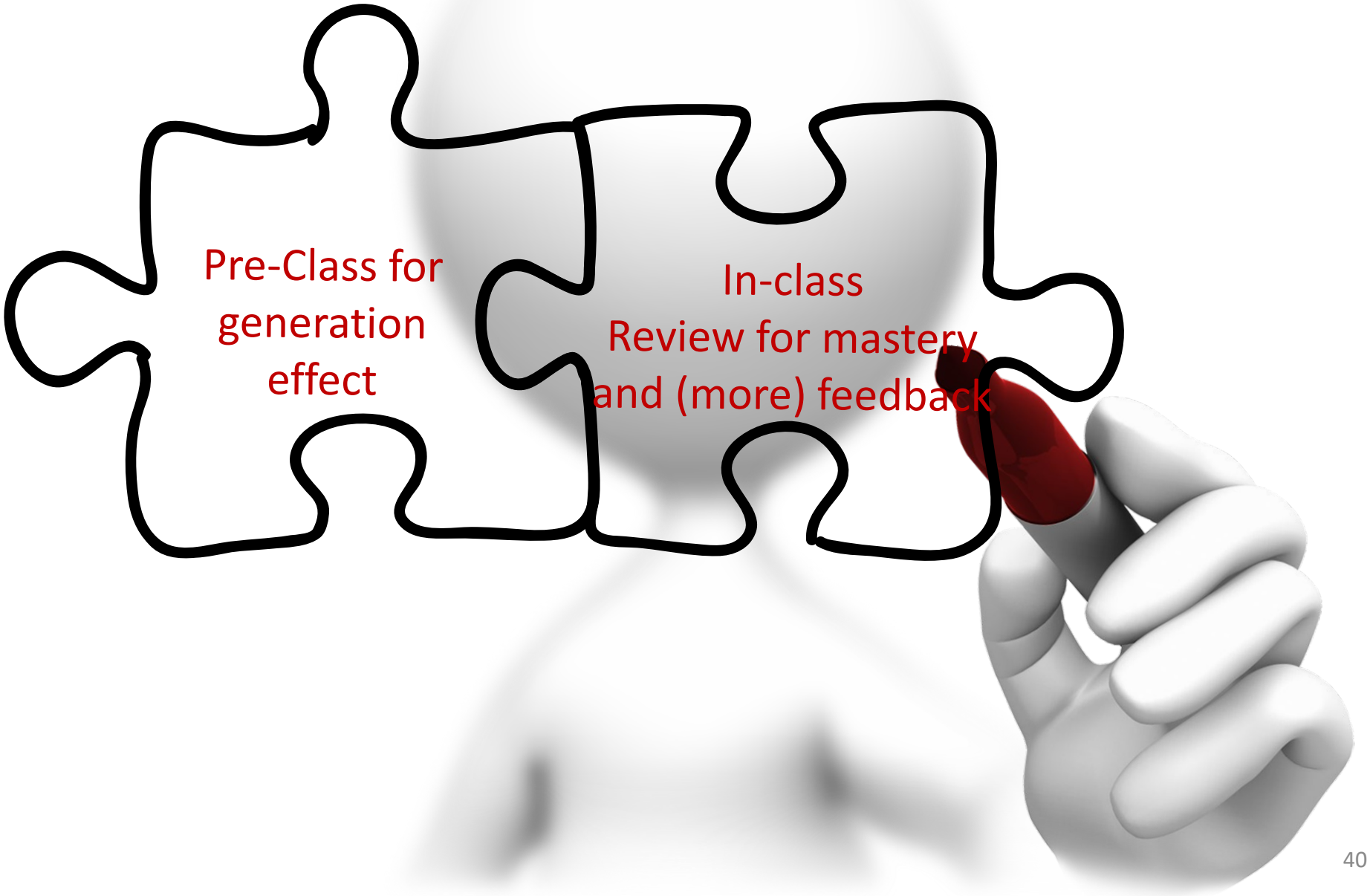
- What order for these?
  - 1332 SMJ
  - 1331 SMJ
  - SMJ procedurally proper
- Citizenship
  - Is it adequate to conclude no complete diversity because both in IL without discussion of rules or analysis of parties?
- Evaluating AIC
  - Should you discuss this if you know no 1332 SMJ?
  - How to analyze aggregation – do you do that after concluding AIC is met?
  - Is helmet law relevant to whether AIC is met to a legal certainty?

WHAT ABOUT YOU?
How do you do pre-class assessment/review (without considering in-class combo)?



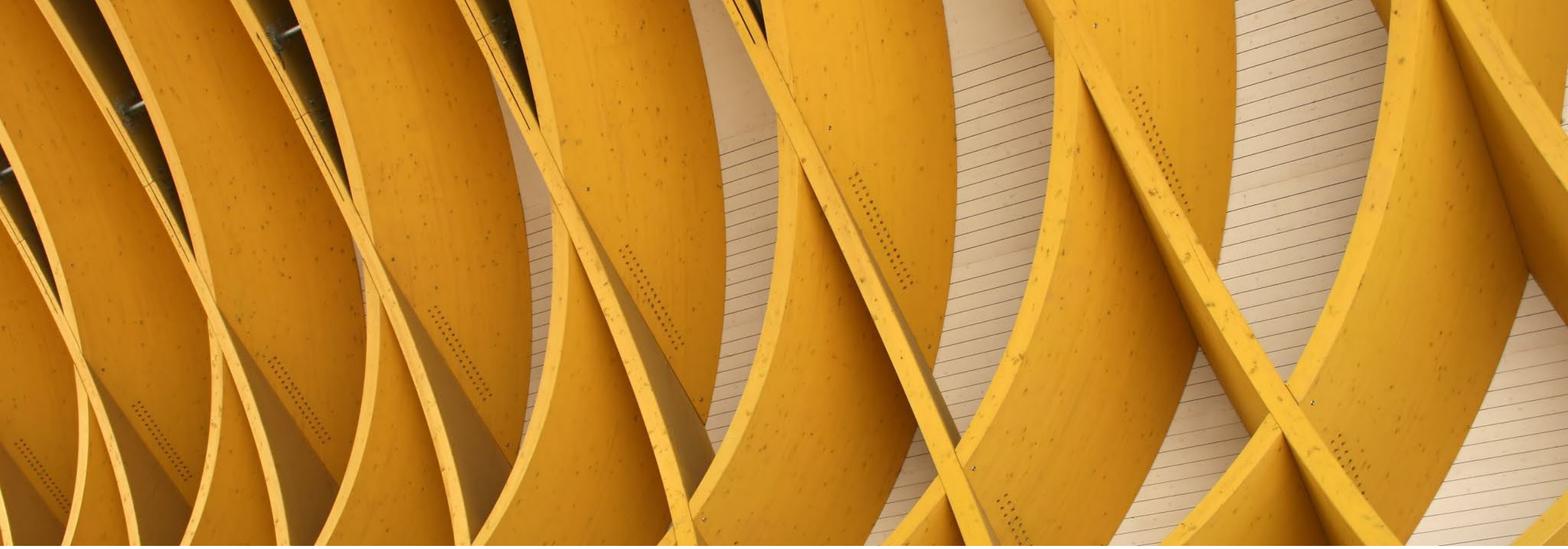
COMBO:
*pre-class and in class assessment = MAXIMIUM tailoring**

* Especially if pre-class includes review questions


Pre-Class for generation effect
In-class Review for mastery and (more) feedback

All the benefits of other options PLUS:

- New/“mash-up” questions
  - “Objective” Q with same facts, but different answer choices
  - Q created from sampled data of essay/narrative answers
- Maximize tailoring
  - Including identifying students for more assistance



Examples of the Combo Approach for Maximum Class Tailoring & Learning

New/Mash-up Polling Question
New Answers to Facts from Pre-class Quiz Question

Assume that Amy (who is in possession of the car) files a DJ complaint seeking to declare the contract is invalid under the federal statute (the Federal Highway Safety Act).

Is there 1331 SMJ – why or why not?

A. Yes, because there is a federal statute involved.

B. Yes, because there is a federal statute that creates a right to seek a DJ.

C. No, but if Becky had filed a DJ complaint, she would have 1331 SMJ.

D. None of the above are true.

E. I don't know.

Click & Learn Civil Procedure

Build upon sampled (essay) data

Which of the following should you have discussed?

I. Whether there was 1332 SMJ

II. Whether there was 1331 SMJ

III. Whether it was proper for Chris to raise lack of SMJ

IV. Whether the court should remand to state court

V. The merits of the federal defense (helmet law)

A. All of the above
B. I and II only
C. I, II and III only
D. None of the above choices are correct.
E. I don't know.

Which is the best 1331 rule?

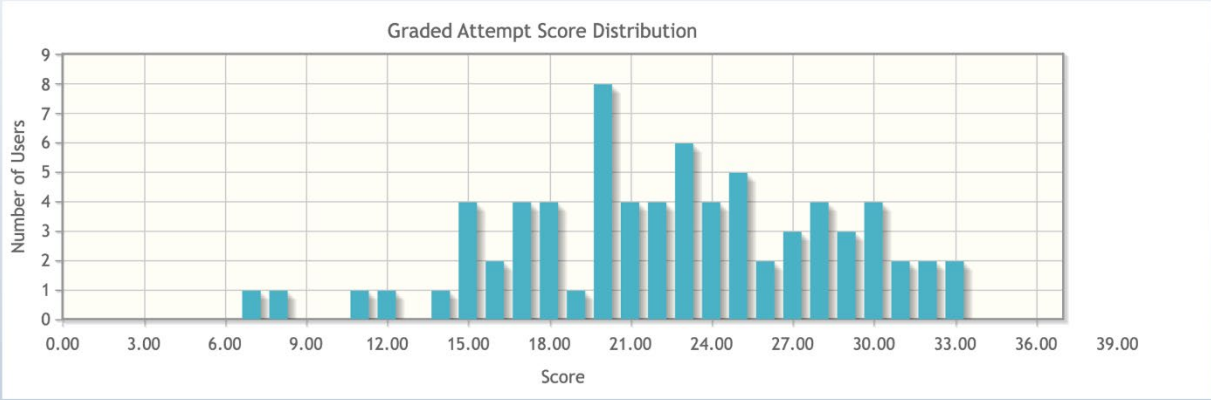
A. Federal law must be central to the WPC, which means that (1) the federal issue is "central" to the claim, (2) the ct looks only at the complaint and disregards defenses and counterclaims, (3) the ct ignores extraneous material such as anticipated defenses
B. The claim is based on federal law.
C. The claim arises under federal law and the federal law is central to the claim.
D. Complaint relies on a federal statute, treaty or issue regarding the US Constitution.
E. The claim arises under federal law; a federal defense alone is inadequate
F. All of the above are equivalent
G. I don't know.

Example of Data from Pre-Class Review Q (TWEN chart)

Midterm II-MC

Avg= 22.56/37 (61%); std dev =5.93

review/redo if 16 or less (-1 std)



Your turn

- Would you like to use more assessment data to tailor class? (Y/N)

- What would you like help with?
  A. How to get started since I'm not using any assessment data now
  B. How to create your own MC/TF questions
  C. How to create & use essay questions or discussion posts
  D. How to choose polling platform

Creating your own questions

Commercial Source (including bar questions) → DIY

Your prior class notes and old exams

- Common misunderstandings

Want more?

- *Teaching Civil Procedure Online with Active Learning, in* LAW TEACHING STRATEGIES FOR A NEW ERA: BEYOND THE PHYSICAL CLASSROOM (Dysart & Norton *forthcoming* 2021)
- *An Active Learning Approach to Teaching Tough Topics: Personal Jurisdiction as an Example,* 65 J. LEGAL ED. 772 (2016)

- Click & Learn: Civil Procedure
  - Failure Fun & Formative Assessment: Lessons From Click & Learn (2020)
  - 2020 Video presentation on Click & Learn (1 hr)
  - Click & Learn portal – request access to try out!

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