Don Griswold *Jane May* *Rick O'Connor*

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TEI Roundtable No. 1:

The *Wynne* Case

In November 2014, the U.S. Supreme Court heard oral argument in *Maryland State Comptroller of the Treasury v. Brian Wynne, et ux*. The case involved a particular provision of a Maryland tax statute, which, according to the plaintiff, violated the dormant interstate Commerce Clause of the U.S. Constitution and potentially could have an enormous effect on state income corporate tax law and practice.

The Supreme Court is expected to rule on *Wynne* in late winter or early spring. The case is so compelling for corporate tax practitioners that we thought it would make an excellent topic for the first TEI roundtable discussion. In early December 2014, we convened a conference call, moderated by *Tax Executive's* senior editor Michael Levin-Epstein, with Don Griswold, partner at Crowell & Moring; Jane May, partner at McDermott Will and Emery; and Rick O'Connor, corporate tax director of Maxim Healthcare Services Inc.

Levin-Epstein: Rick, you're intimately familiar with this case. Brian Wynne, the plaintiff in this case, and you discussed the case about five years ago. What were the circumstances behind those discussions?

O'Connor: We decided in January 2009 to challenge a Maryland statute, which provides a credit against state taxes for taxes levied in other states but specifically doesn't allow a credit against county tax in Maryland for taxes paid on income earned in other states. So, because of what I'll call the partial credit scheme of the Maryland statute, we argued that was a burden on interstate commerce and violated the dormant interstate Commerce Clause of the U.S. Constitution. We raised the argument in the Maryland Tax Court in January 2009, and that was the beginning of the case. We spoke to Brian, and he agreed to make that constitutional law challenge.

Levin-Epstein: So what happened after you made that first challenge? Take us through to the granting of *cert* by the Supreme Court.

O'Connor: The Maryland Tax Court summarily dismissed the challenge. We then appealed to the Circuit Court for Howard County, Maryland, where the Wynnes reside. After a one-year wait after the hearing, the circuit court judge issued a 70-page opinion, ruling that the Maryland statute was unconstitutional. It took exactly one year to write that opinion. It was really an amazing effort by a judge at the circuit court level—that he and his clerk generated that opinion all by themselves. Of course, the Maryland comptroller immediately appealed to the midlevel appellate court of Maryland.

We then filed a motion in the highest court of Maryland to take the case from the midlevel appellate court, and the highest court, which is the Maryland Court of Appeals, granted that motion and took the case. We then had an oral argument there, and subsequently, the Maryland Court of Appeals voted 5–2 that the Maryland statute violated the Interstate Commerce Clause of the U.S. Constitution. Of course, the Comptroller then took advantage of the only procedural option he had available and filed a petition for *cert* in the Supreme Court of the United States.

What happened then was really a surprising turn. The court almost immediately asked for the views of the Solicitor General of the United States. That referral is unusual but not highly unusual. The Solicitor General then held meetings in his office with the Wynnes' attorney and the Comptroller's attorney. The solicitor general subsequently issued a brief in which he advised the Supreme Court to take the case and reverse the decision of the Maryland Court of Appeals.

Levin-Epstein: Jane and Don, what do you think are the central issues in this case?

Griswold: Before we go there, let me make a comment about what Rick has accomplished here. Rick's success is an object lesson for people considering alternate career paths in tax. In the course I teach at Georgetown Law School, my students often ask, "Have I made a good choice to go into state tax? And where should I start my career? Should I go into government, in-house, a law firm, an accounting firm?" Well, Rick has demonstrated that you don't have to practice in a law firm to excel at the highest levels of tax laws—reaching the U.S. Supreme Court.

I love this story, Rick. From an in-house tax counsel position, you have basically generated and carried this hot issue from the idea level all the way through to a case argued in front of the Supreme Court of the United States. In my personal career, I felt I had to leave my in-house position and go out to a law firm to truly have a shot at getting a case that would be decided by the Supreme Court. I've made some attempts at that, had some *cert* petitions denied, but I haven't gotten there yet. And now we're here, talking to Rick, who is on the in-house side, having gotten that through! Really, it's like the Holy Grail for a tax lawyer. I think it's a great message to young people starting out that, really, it doesn't matter if you go in-house, to a law firm, or to the government; you statistically have about equal odds getting your case up to the high court. Very, very cool.

O'Connor: Thank you, Don. I realize I'm incredibly lucky.

Levin-Epstein: Rick, did you think it would take five years to get from that initial stage until it the case eventually made it to the Supreme Court?

O'Connor: You might be surprised that we were not surprised at all by how long the case took to get to the Supreme Court. The central reason being that we believed that the Comptroller of Maryland, who is represented by the attorney general, never had the option of settling with us. Once we raised the federal constitutional law issue, we believe the attorney general was statutorily required to defend it in court and never had a chance to settle with us. He wasn't settling, and we weren't giving up, so I'm not surprised that it just kept going.

Granting *Cert*

May: Rick, are you surprised that the highest court granted *cert*?

O'Connor: Oh yes. We know that odds were against the comptroller when we first knew the comptroller had filed the petition, which everyone anticipated. We believed the chances of him getting it granted were 5 percent, but as soon as the Court issued an order asking for the views of the Solicitor General to be filed, it went from 5 percent to 60 percent. And then when the brief was filed at the *cert* stage advising the Supreme Court to take the case, then we were at 75 percent.

I think one of the really interesting issues for those of us who worked on the case all these years has been, "Why did the Solicitor General think the high court should take the case?" It's turning out that we're never going to know why he did that, but he did. That made the case very likely to be granted *cert*. That one factor.

May: I completely agree. I never would have thought the [Supreme] Court would have taken this case. Of course, states have the right under the due process clause to tax their residents. But I assumed that the Commerce Clause would require some sort of credit mechanism. So when I first heard about this case, I wondered why the Court took it.

Justice Scalia and the "Imaginary" Dormant Commerce Clause

Griswold: I've always feared that the one reason the Court took the case is that Justice [Antonin] Scalia, who abhors the concept of the dormant Commerce Clause—in fact Scalia called it the *imaginary* Commerce Clause in oral argument in this case—may think that he's counted enough noses to get to five justices to vote for the dream he has held for decades now: pulling the rug out from under the dormant Commerce Clause and leaving it only with a discrimination prong. As far as I can tell, that's as far as Scalia, [Justice Clarence] Thomas, or [Justice Samuel] Alito would go to admit that the dormant Commerce Clause stands for some protection of the national free trade zone. I think, although we'll never know, how he might have built a coalition to grant *cert* because he does not believe there is such a thing as a fair apportionment concept under the dormant Commerce Clause, and he doesn't think there is a nexus concept under the dormant Commerce Clause, at least not anymore.

So that's my nightmare, that the *Complete Auto* four-prong test might go out the window.

May: So, Don, now that you've heard the argument, can you really envision an opinion that broad-sweeping?

Griswold: I'm much less concerned now after the oral argument than I was leading up to it. Chief Justice Roberts spoke about internal consistency, and that's squarely founded on the dormant Commerce Clause. That helps a lot, but then Alito's questions fell more on the discrimination argument and not fair apportionment, so I don't know what that means. We're not entirely out of the woods yet, but I am less concerned.

May: I think an opinion like you're envisioning is unlikely to come, having heard the oral argument. I don't think it's entirely clear how the case will be resolved, but I really don't think it will be so broad that it would eviscerate the Commerce Clause of the U.S. Constitution.

Griswold: I hope you're right, Jane. Rick do you mistrust Justice Scalia as much as I do?

O'Connor: I can only say what I hope will happen, Don. And, of course, I was at the oral argument. I felt the same way that Jane did: that the Chief Justice and Justice Alito seemed to be leaning in favor of the precedent that support the dormant Commerce Clause, and that was very heartening to us.

To answer Michael's earlier question about the case, I think we basically believe that there are a group of justices who will recognize and adhere to certain precedent and will lean in favor of the Wynnes. There are at least three cases, and I can't give you their names, mentioned in the oral argument which support the force of the dormant Commerce Clause and limit the states. We feel that there are three or four justices who have a judicial philosophy of tending to stay within the bounds of precedent, and we're hoping that they do here. But that only gives you three or four votes. We were trying to get five or more votes by indicating the entire state tax system is based on apportionment of subchapter C corporations and credits for owners of [pass-through] industries, and there were actually 41 states that had such a system, and Maryland's was the only one that was inconsistent. We were hoping that some of the swing votes would be persuaded by that argument—that if they reversed the Maryland Court of Appeals, they would open the door so that all the other 41 states could begin to cut back on credits allowed to people who own multistate businesses. In his brief, the solicitor general raised the issue of whether apportionment was constitutionally required for subchapter C corporations, which was way outside the scope of the facts of the case and actually intruded into the case.

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> **—Rick O'Connor**

Otherwise, we were hoping—in order to preserve the state tax system that exists in 41 states that have state income tax—that two or three additional justices would want to preserve that system and would vote for the Wynnes. And we understand that Justice Scalia does not believe that there is a dormant Commerce Clause, as Don mentioned. I think that for the first time in the oral argument, he used the words "imaginary dormant Commerce Clause," which drew a lot of laughter in the

courtroom. I don't think he's ever previously in the courtroom used the word "imaginary" in referring to the dormant Commerce Clause.

Griswold: That does often seem to be part of his goal in oral argument: to make the crowd laugh.

O'Connor: He is very humorous. I was going to make one last hopeful note for the Wynnes. One of the problems the Maryland comptroller has in this case is that the state of Maryland taxes the apportioned income of subchapter C corporations who do business in Maryland. And yet they were arguing that they could tax all the income of owners of pass-through entities. That inconsistency came up repeatedly in the oral argument—why that was fair. And there were some of us who were hoping that the lack of fairness in the current situation might persuade Justice Scalia to vote for the Wynnes, not on a dormant Commerce Clause argument, but on a fairness argument. He actually used the word "fairness."

We were very heartened that he was very engaged in the oral argument. You'd think that his vote was already decided and he would sit back, but he was very engaged and asking questions. And he did ask a couple of times about the word "fairness." So we were really heartened about that.

"Really, it's like the Holy Grail for a tax counsel. I think it's a great message to young people starting out that really it doesn't matter if you go in-house, to a law firm, to the government; you statistically have about equal odds getting your case up to the Supreme Court. Very, very cool."

—Don Griswold

Griswold: Do we think that fairness for Scalia means due process?

O'Connor: I'm only giving you our hopeful view of what he was alluding to. We couldn't really tell what he was alluding to, but obviously it would be a tremendous victory for the Wynnes if he voted for them.

Griswold: Scalia seems to have a pretty narrow sense of the protections of the Due Process Clause, too, but due process ought to be able to get the Wynnes to victory, right? Think of the due process roots of fair apportionment before you even get to the Commerce Clause roots of fair apportionment. Think of the *Mobil Oil* case—the tax has to be rationally related to in-state values. You get sort of a fairness concept, I think, out of that due process apportionment concept.

O'Connor: I think that's more likely what Justice Scalia was referring to.

Griswold: So there may be some reason for optimism here.

May: I really like your point about the form of the business entity being significant. I was hopeful going into the argument about that point being made, and I think it was. The Court has to realize that so many people are doing businesses now through partnerships and other pass-through entities. Pass-through entities account for more than 40 percent of all income taxes on business income. I think that some of the *amicus* briefs did a good job of referencing that point.

O'Connor: I agree, Jane. The last thing I'll say about the oral argument is that it was very clear near the end that Justices Sotomayor, Kagan, and Ginsberg were looking for some way to come up with what I'll call a compromise in this case. Two of the justices were actually asking our attorney whether he thought that some kind of a minimum tax would be allowed to be charged by a state without the state granting a credit against taxes paid on that minimum income in other states.

Our attorney very carefully rejected the idea that even a minimum tax could be imposed without giving a credit for taxes paid in other states if that minimum tax was an income tax. So I think Justices Sotomayor and Kagan were really looking for some way to compromise here, and we're hoping there really isn't any way to compromise. Our attorney made the point that if a minimum tax is constitutional without a credit, why couldn't a larger tax be constitutional? In other words, there's no principled basis for deciding this case on the grounds that a minimal tax that is not creditable is constitutional.

Griswold: There's probably some fruitful support back in *ATA [American Trucking Association] v. Scheiner,* in the case involving a flat tax on the number of axles of a truck passing along the road.

O'Connor: The justices raised that case during the oral argument. That was definitely the best case for the comptroller.

May: From being at the argument, what did you think was the most difficult argument against the Wynne's position?

O'Connor: There was no question in my mind that the justices who may be a little more oriented towards deciding in favor of government and government power were troubled by the fact that a person who works in Delaware, lives in Maryland, but doesn't own real estate in Maryland, might be paying no taxes to Maryland. Delaware has no reciprocity agreement with Maryland: so that Maryland resident would pay Delaware tax on his or her W–2 income, and then, if the Wynnes prevail, receive a 100 percent credit against Maryland tax.

The question is [whether] that person is getting away with paying no tax in Maryland if Maryland has to give him a credit against Delaware taxes. So the hypothetical of the person who would end up paying no tax in Maryland was the most powerful argument the comptroller had. The comptroller really emphasized that in his brief, and so did the solicitor general. And two of the justices actually repeatedly asked about that very hypothetical in the oral argument. And I think that's what led those two justices to start raising the possibility of a minimum income tax that would not be creditable. The fact is, if you look at the revenues that states earn from various organizations, such as the Ernst & Young study, the great majority of revenue raised by the states is from sales taxes and property taxes. Income taxes are a small portion of the total revenues gained. I'm hoping those stats, which are in the record in the case, will let the justices who are concerned about this person getting away with paying no tax be less concerned about that. That hypothetical is only a tiny percentage of shareholders.

May: When asked about that issue at one point, I believe that the Wynnes' counsel talked about reciprocal agreements, and I wish that more had been made of that. I think reciprocal agreements represent the states coming together and acknowledging that very real fact pattern: people working in one state and living in another.

O'Connor: Yes, Jane. As you know, Maryland has reciprocal agreements with Pennsylvania, D.C., West Virginia, and Virginia, and the only state it doesn't have a reciprocal agreement with is Delaware, which borders the state of Maryland. So that's why the hypothetical repeatedly came up that I previously discussed. If a person lives in Maryland, works in Delaware, pays Delaware tax, and, because there's no reciprocity agreement, does not own real estate in Maryland—so if he's allowed a full credit against Maryland tax, for the Delaware tax he ends up paying nothing. And that is the hypothetical that was a concern for some of the justices.

Griswold: This concept of the reciprocal agreement might solve the problem. It goes to this whole concept of apportionment being "rough justice," that there isn't any clearly right approach to getting there. When you play in the income tax space, most of the time you think of formulary apportionment as the solution. But if you play in the sales and use tax space more of the time, you think of credits. When you don't have an apportionment or credits or a reciprocal agreement, though, and the fair apportionment system breaks down, then you have laid bare this question that the Maryland comptroller put: State of source or state of residence—which one trumps and why? Is it just a matter of historical accident that often it's the state of source that trumps, that gets the tax dollars, whereas the state of residence gets nothing but a thank-you note? Or is there some legal, constitutional, or economic theory that would suggest that one of those things, either state of source or state of residence, might more appropriately be the jurisdiction that gets the revenues?

So, this is another issue that causes me to stay awake worried about things that maybe I really shouldn't lose any sleep over. Might the Court step into this state-of-source vs. state-of-residence issue, and muck up the waters on other issues? It has not been uncommon that the Court will step into a state tax area—which all of us in the TEI readership know and love very well—misspeak, and send us off on some strange tangent that we have to deal with as we wrestle with confused judicial precedents. Might the Supremes make sense of things if they start thinking about the theory underlying this source vs. residency issue?

May: Don, don't lose any more sleep about this, my friend. That is not likely to happen.

Griswold: Adam Smith, *The Wealth of Nations*.

O'Connor: Jane, I'm afraid that I agree with Don, that the issue of whether income should be taxed in the state of source vs. the state of residence was actively on the mind of the justices during oral argument. One of the justices specifically asked our counsel if that was the Wynnes' position—whether state of residence had to give way always as a matter of principle to the state of source of the generation of the revenue—and our counsel said, "Yes." So I agree with Don. That principle, which has always been accepted, was definitely in play in the oral argument.

May: And I agree, Rick, with the Court's focus on that issue. But I thought Don was losing sleep over the potential application of that narrow decision if it, in fact, is addressed by this Court to a much broader swath of taxation principles. You

know—corporate income tax source principles that are trending right now.

O'Connor: Oh I see, Jane, now. I guess I agree with you on that. I believe the Court will try to craft as narrow as possible a decision. I think it's going to be hard for them to decide the case without effectively deciding, if they're going to rule in favor of the Wynnes, that the state of residence has to give way to the state of source of the income.

Griswold: On a different topic: The most narrow way a court can deal with a case is to kick it out on standing. Could the Court pull a *DaimlerChrysler* on us here, and tease us with the merits, and then just refuse to consider the case due to a lack of standing?

O'Connor: We've been thinking about that for the last couple of years, and I just don't know how they can do that. The Wynnes have standing to bring the argument that they made. They would pay more county tax if they lose the case. They financially benefit if they win the case. I can't see where they would be found to not have standing. We've calculated the refund they'll get for their 2006 taxes, and there's no question that they financially will benefit if they win.

Griswold: Was it the assistant solicitor general in oral argument who was talking about the core piece of the internal consistency argument being the problem of tax on nonresidents? I thought he argued that since the Wynnes are not nonresidents, that might create a standing problem?

O'Connor: I wasn't really following that, but that's definitely a direction the Maryland comptroller's attorney was raising that issue.

Griswold: I'd hate to see that. We get so few of these state tax cases heard by the high court, and to have it knocked out on standing would be such a disappointment.

May: I was surprised by that whole vein of argument as well. I felt that it was trying to take the justices' focus away from what was really at issue. I don't think that the Court really went down that path.

Griswold: If I remember right, Chief Justice Roberts said that you can't separate the resident from the nonresident piece. Hopefully that will make the standing issue go away.

O'Connor: What was really damaging to the Comptroller was the fact that Maryland imposes a nonresident tax on nonresidents who do business in Maryland and yet turns around and says that it doesn't have to allow a Maryland resident to get a credit against income taxes for income earned in other states. And the Chief Justice right at the beginning pointed out that inconsistency, and I think that's why the attorney for the solicitor general tried to defend that inconsistency most of the time he had when he was arguing.

May: That thread came back several times. I think that it was a very persuasive point. Maryland didn't have clean hands, so to speak—the fairness really didn't swing in Maryland's favor.

O'Connor: The Solicitor General was making a tortuous argument that it was not inconsistent to tax the income of nonresidents of Maryland and yet tax all the income of residents; he was really struggling with some kind of a way-out-there argument because he had to, and he heard the Chief Justice make that point and the solicitor general had to say something.

May: Isn't that where he went so far as to say that a nonresident could more effectively challenge this tax, but then backed down when one of the justices asked him if that challenge would be successful, and he said, "No"?

Griswold: It does seem like there are multiple ways the justices could get to the right answer here in support of the Wynnes. We've got apportionment; we've got discrimination; Justice Alito talked about erecting a tariff; we have the "unclean hands" argument, as Jane put it, with the Comptroller. I guess I'll go out on a limb and see how you guys react. If the Court does indeed rule on the merits, and I expect they will, my prediction is the Wynnes will get a victory, but it might be a cobbled-together victory from some concurring opinions.

Levin-Epstein: Before we do that, I'd like to know: If this decision were to be reversed by the Supreme Court, what would it mean for the everyday activities of the members of TEI? How much of an impact would it have?

May: So, Michael, to answer that, let's talk about if they reverse the decision below, they could do it in different ways. So let's say they decide that the Commerce Clause does not apply to individuals. Is that reasonable, Rick and Don, that this basis would be one way the Court could rule against the Wynnes?

O'Connor: Yes.

May: So, if they conclude the Commerce Clause doesn't apply to individuals, then I think of the various states' reactions on offering a credit. I

was recently speaking on a panel, and one of the state representatives said, "If we don't have to allow a credit, we aren't going to allow a credit." I think that many states in a revenue-raising time might consider if they do have a credit, getting rid of the credit and keeping that revenue. Do you think that's reasonable, Don and Rick, as one ramification?

Impact on TEI Members

O'Connor: Yes. Michael, I'd like to address your question, too, as far as the impact on TEI members. There is no question that tax people like Jane, Don, and I think of subchapter C companies as being different from subchapter S companies, which is what Brian Wynne partially owned. However, in the area of constitutional law, there is not that kind of distinction. Corporations are more and more treated in effect as citizens of the United States in the area of freedom of speech and religion. And if the court rules against the Wynnes, it creates the possibility that, as we were saying earlier, that someone could challenge whether or not subchapter C companies (and that's the great majority of TEI members), whether the states of domicile of those corporations are limited to taxing subchapter C companies to their apportioned income, which, as Don said, has been a cornerstone of state taxation. That principle could be upset by a state that sees Maryland win this case against the Wynnes and then decides not to limit its tax of subchapter C companies to only their apportioned income, because in the constitutional law area, corporations are more and more equated with individuals. I believe that factor is why the United States Chamber of Commerce and TEI and other business organizations filed *amicus* briefs supporting the Wynnes.

May: Rick, you are saying that if the Court decided that the Commerce Clause didn't protect individuals, then that would have implications for corporations as well, because there would be questions about whether the Commerce Clause continues to apply to subchapter C corporations?

O'Connor: The problem would be: How could you say the dormant Commerce Clause does not protect individual owners of pass-through entities and yet it does protect subchapter C corporations? What's happening in some of the other Supreme Court cases [is] the court is viewing corporations more and more as equivalent to being individuals. So if the Wynnes lose this case, then the whole principle of limiting taxation of subchapter C companies to their apportioned income could be threatened. Why would the dormant Commerce Clause protect subchapter C corporations but not individual owners of subchapter S corporations?

May: And that's why the Court should not decide it on that basis, because you're exactly right.

Griswold: I think there's another reason why they should not decide the case on that basis, and that is, at least as I read the law, the concepts that have been developed under the dormant Commerce Clause don't protect persons. That's not their goal. The goal of the Commerce Clause is not to protect individuals, corporations, though we like to speak casually and colloquially about it that way. The Commerce Clause got its roots in *The Federalist Papers*, right? And there the concept very clearly is "we're protecting the nationwide free trade zone—this tariffless, burdenless economic zone that makes no distinction amongst the states—so that we can then have this tremendous, unfettered, whole economic engine going that's not burdened." I would posit that the dormant Commerce Clause prongs articulated in *Complete Auto,* whether it be apportionment, nexus, discrimination, or the fairly related prong, are all aiming at the number one thing that's being protected: the nationwide free trade zone. And corporations or individuals are merely the ancillary beneficiaries of that protection. Thus, any distinction between the corporations and individuals is irrelevant to whether the protection applies in the first place.

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> **—Jane May**

O'Connor: I think that's exactly right, Don. I think that's why the Solicitor General said in his brief [that] it's an open question whether the dormant Commerce Clause requires states to apportion the income of publicly traded corporations.

Levin-Epstein: The last question that I'd like to pose in this roundtable, and I realize it's a simplistic question, but the only way to pose it is this way. I'd like you each to make a fearless prediction at this point as to whether or not this decision will be affirmed or reversed and by what margin—and you can feel free to also actually name the justices who will side with the

majority. This is an opportunity to truly shine, to predict the outcome with an actual margin, and name specific justices. Who wants to start the prognostication?

Predicting the Decision—and Vote—by the Supreme Court

O'Connor: Let me go first. We hope we will get the votes of the four justices who tend to give a lot of credence to the precedents of the Court: Chief Justice Roberts and Justices Alito, Kennedy, and Breyer. We are hoping to get two of the three women justices who tend to vote in favor of government power but who are not going to want to upset the entire system of state taxation. We don't know which two—I won't predict which two—but I'll say two of them. So the vote will be 6–3 in favor of the Wynnes.

May: Rick, do you think that there will be one majority opinion, or will there be several different opinions, but the Wynnes will still prevail?

O'Connor: We've talked about that. We don't really have a strong prediction, but we believe that it will be one opinion that will be very narrowly drafted to only apply to owners of pass-through entities and to be limited in every way that the court can.

May: I agree with that. I think the Wynnes are also going to win. I think it will be close. I'm not sure if there will be one majority opinion. I could see there being several concurring opinions, but I do hope and believe that the Wynnes are going to win.

Griswold: I do believe that the Wynnes are going to win as well. I can predict with a certain high degree of confidence that Justice Scalia will pen a separate opinion and Justices Thomas and Alito will join that and put in print the "imaginary Commerce Clause" line that he got such a laugh at during oral argument.

Levin-Epstein: And that's a good way to end the first TEI roundtable. Thank you all for participating in this discussion.