

Volume 67 | Issue 3

---

2017

## Tribute to Professor Erik Jensen

Jonathan L. Entin

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

---

### Recommended Citation

Jonathan L. Entin, *Tribute to Professor Erik Jensen*, 67 Case W. Res. L. Rev. 641 (2017)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol67/iss3/4>

This Tribute is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

---

ERIK JENSEN: CURMUDGEON, SCHOLAR, COAUTHOR,  
FRIEND

*Jonathan L. Entin*<sup>†</sup>

Erik Jensen is one of the nation's leading authorities on tax law. He has published two books<sup>1</sup> and scores of articles, book chapters, essays, and reviews—not only on technical questions of tax law,<sup>2</sup> but also on the Constitution,<sup>3</sup> American Indian law,<sup>4</sup> legal education,<sup>5</sup> and more.<sup>6</sup> Erik set a law school record by holding three different endowed

---

<sup>†</sup> David L. Brennan Professor Emeritus of Law and Political Science, Case Western Reserve University. This is a slightly revised version of remarks delivered at a retirement celebration on May 26, 2016.

1. ERIK M. JENSEN, *THE TAXING POWER: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* (2005); *FEDERAL INCOME TAXATION OF OIL AND GAS INVESTMENTS* (Alexander Jay Bruen, Willard B. Taylor & Erik M. Jensen eds., 2d ed. 1989) (Erik prepared the second edition and also did the lion's share of the work on the annual supplements to both editions of this treatise).
2. *E.g.*, Erik M. Jensen, *The Supreme Court and the Timing of Deductions for Accrual-Basis Taxpayers*, 22 GA. L. REV. 229 (1988); Erik M. Jensen, *The Unanswered Question in Tufts: What Was the Purchaser's Basis?*, 10 VA. TAX REV. 455 (1991); Erik M. Jensen, *The US Legislative and Regulatory Approach to Tax Avoidance*, in *COMPARATIVE PERSPECTIVES ON REVENUE LAW: ESSAYS IN HONOUR OF JOHN TILEY 99* (John Avery Jones et al. eds., 2008).
3. *E.g.*, Erik M. Jensen, *Did the Sixteenth Amendment Ever Matter? Does It Matter Today?*, 108 NW. U. L. REV. 799 (2014); Erik M. Jensen, *The Export Clause*, 6 FLA. TAX REV. 1 (2003); Erik M. Jensen, *The Extraordinary Revival of Dred Scott*, 66 WASH. U. L.Q. 1 (1988).
4. *E.g.*, Erik M. Jensen, *American Indian Tribes and Secession*, 29 TULSA L.J. 385 (1993); Erik M. Jensen, *Indian Gaming on Newly Acquired Lands*, 47 WASHBURN L.J. 675 (2008); Erik M. Jensen, *Monroe G. McKay and American Indian Law: In Honor of Judge McKay's Tenth Anniversary on the Federal Bench*, 1987 BYU L. REV. 1103.
5. *E.g.*, Erik M. Jensen, *Pragmatic Instrumentalism and the Future of American Legal Education*, in *PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS: FESTSCHRIFT FOR ROBERT S. SUMMERS* 161 (Werner Krawietz et al. eds., 1994); Erik M. Jensen, *The Law Review Manuscript Glut: The Need for Guidelines*, 39 J. LEGAL EDUC. 383 (1989).
6. Erik made his scholarly mark while still in law school. For instance, his law review piece, Erik M. Jensen, Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666 (1978), continues to be widely cited (and often quoted) by courts around the country. See *Price Waicukauski & Riley, LLC v. Murray*, 47 F. Supp. 3d 810, 824 (S.D. Ind.

chairs,<sup>7</sup> and has been in an informal (and mostly friendly) competition with our retired colleague Arthur Austin<sup>8</sup> to see who could be the first to publish in all fifty states.<sup>9</sup>

It is my task to say a few words of tribute to our remarkable colleague. As it happens, Erik has had a few things to say about me over the years. For example, he has accused me—in print, no less—of spending ten weeks on *Marbury v. Madison*<sup>10</sup> in my Constitutional Law course.<sup>11</sup> And he has used me as a shady character on just about all of his exams for many years. His best story had me showing up at a law office on April 14th with a shoe box full of documents the tax significance of which the students had to analyze: Erik described me as a law professor moonlighting as a barber—because “I like to split hairs”—who had a

---

2014); *Carolina Cas. Ins. Co. v. Gallagher Sharp*, 940 F. Supp. 2d 569, 581 (N.D. Ohio 2013); *Labair v. Carey*, 291 P.3d 1160, 1169–70 (Mont. 2012). For earlier citations, see, e.g., *Kovacs v. Chesley*, 406 F.3d 393, 399 (6th Cir. 2005); *Williams v. Bashman*, 457 F. Supp. 322, 326 n.1 (E.D. Pa. 1978); *Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal. Rptr. 2d 780, 788 (Ct. App. 1997); *Jenkins v. St. Paul Fire & Marine Ins. Co.*, 422 So. 2d 1109, 1115 (La. 1982) (Dennis, J., dissenting); *Fishman v. Brooks*, 487 N.E.2d 1377, 1380 n.1 (Mass. 1986); *Frank v. Pepe*, 717 N.Y.S.2d 873, 876 (App. Div. 2000); *Vahila v. Hall*, 674 N.E.2d 1164, 1169–70 (Ohio 1997); *Gibson v. Trant*, 58 S.W.3d 103, 118 (Tenn. 2001) (Birch, J., concurring and dissenting); *Daugert v. Pappas*, 704 P.2d 600, 604 (Wash. 1985); *Lewandowski v. Continental Cas. Co.*, 276 N.W.2d 284, 287 n.2 (Wis. 1979).

He also coauthored an article with one prominent Cornell professor and had his research assistance acknowledged by another of his famous law teachers. See Roger C. Cramton & Erik M. Jensen, *The State of Trial Advocacy and Legal Education: Three New Studies*, 30 J. LEGAL EDUC. 253 (1979); Robert S. Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433, 433 n.\* (1978).

7. Erik held the following chairs: David L. Brennan Professor of Law, 1998–2012; Schott-van den Eynden Professor of Law, 2012–2014; Coleman P. Burke Professor of Law, 2014–2016.
8. Austin is the Edgar A. Hahn Professor Emeritus of Jurisprudence. He was a member of our faculty from 1968 through 2011. See, e.g., Leon Gabinet, *A Tribute to Professor Arthur Austin*, 62 CASE W. RES. L. REV. 1 (2011); Erik M. Jensen, *Arthur D. Austin*, 62 CASE W. RES. L. REV. 3 (2011); J. Timothy McDonald, *Teaching as Product Differentiation: Studying Under Professor Arthur D. Austin*, 62 CASE W. RES. L. REV. 11 (2011).
9. See Jensen, *supra* note 8, at 8 & n.46. Austin had a fifteen-year head start, but Erik has made the competition remarkably close despite Arthur's extraordinary scholarly productivity over the years. See, e.g., *id.* at 4–5 nn.8 & 11–16 (citing many of Austin's publications).
10. 5 U.S. (1 Cranch) 137 (1803).
11. Erik M. Jensen, *The Continuing Vitality of Tribal Sovereignty Under the Constitution*, 60 MONT. L. REV. 3, 11 n.39 (1999). This claim both exaggerates and understates the amount of time that I spent on *Marbury*. Jonathan L. Entin, *An Ohio Dilemma: Race, Equal Protection, and the Unfulfilled Promise of a State Bill of Rights*, 51 CLEV. ST. L. REV. 395, 395 n.2 (2004).

piece of art hanging on the wall that “tilted slightly to the left” and had me explaining that “I have no idea what the intent of the framer was”; one of the documents was a receipt from the fashion museum at Kent State University for “one red sweater (slightly frayed), which will make a valuable addition to our history of polyester collection.”<sup>12</sup>

Nor are these the only published barbs that Erik has directed at me.<sup>13</sup> I won’t respond to those other digs here. Instead, I want to focus on what has made Erik so important to the law school, the legal academy, and the profession for the past third of a century. Although he is a tax specialist and I assuredly am not, we have had an enduring professional and personal friendship that I hope will continue for years to come.

We met when I interviewed here, during his first semester on our faculty. Erik was the proverbial harried rookie assistant professor, but we hit it off immediately. Perhaps this reflected some analogous experience and interests. Both of us were in college during the Vietnam era, and both of us went off to graduate school—he in political science, I in demography and sociology. The draft sidetracked both of us from completing our Ph.D. programs, but we had focused on many of the same intellectual questions. Each of us still had lots of social science and history books, and we soon came to operate a mutual lending library.

Notwithstanding these similarities, our different disciplines reflected other significant differences. Erik and I disagree about a lot of important issues, and we have not hesitated to debate our disagreements.<sup>14</sup>

- 
12. These statements appeared in Question 1 of Erik’s Fall 1988 final examination in Federal Income Taxation. The reference to the red sweater concerned a very old garment that I still own. He is still disparaging that sweater. See Erik M. Jensen, *Tax Classification of Snuggies, Tomatoes, and Beans (Oh My!)*, 155 TAX NOTES 851, 853 (2017) (describing it as “an atrocious red sweater”). Nor is Erik the only colleague who has needled me about it. For more on that sweater, see Jonathan L. Entin, *Leon Gabinet’s Ride*, 65 CASE W. RES. L. REV. 1, 3 n.10 (2014). I responded, after a fashion, with a question on my Spring 1989 exam in Administrative Law that involved a junior law professor named Jensen who failed of promotion after having made derogatory comments about various colleagues on his own tests. Although I tried to skew the facts slightly against him, the students’ answers reflected greater sympathy for the fictional Professor Jensen than was warranted.
  13. See, e.g., Erik M. Jensen, Book Review, 47 CASE W. RES. L. REV. 253, 256–57 n.19 (1996) (describing me as “an administrative law specialist, for crying out loud”); Erik M. Jensen, *The Heroic Nature of Tax Lawyers*, 140 U. PA. L. REV. 367, 373 n.39 (1991) (discussing the Museum of Taxation in Rotterdam and asking: “Has anyone ever seen an administrative law museum?”); Erik M. Jensen, Book Review, 38 CASE W. RES. L. REV. 318, 318 & n.2 (1987) (observing that American Indian law “has a formal definition that sounds suitably intellectual”—“[a]s compared, say, to administrative law or property” (both of which I was teaching)).
  14. One of those recent debates resulted in our producing dueling op-ed columns that appeared in print adjacent to each other under the heading “Clinton Foundation Donors Pose Constitutional Quandary.” See Jonathan L. Entin,

Despite—or maybe because of—those differences, we spent the best part of seven years co-editing the *Journal of Legal Education*, and we have published five articles together.<sup>15</sup> In other words, our relationship confirms Daniel Bell’s observation that “friendship is more important than ideology.”<sup>16</sup>

Beyond the articles that Erik has co-authored with me, he has published an extraordinary range of work. His books address the taxing power under the Constitution and the taxation of oil and gas investments;<sup>17</sup> his articles, just to name a few, have focused on the meaning of direct taxes,<sup>18</sup> the tax treatment of damage awards,<sup>19</sup> the legal status of American Indian tribes,<sup>20</sup> and the tax aspects of intercollegiate athletics<sup>21</sup> (not that this explains his interest in the last topic, but Erik was the clean-up hitter for the MIT baseball team and on one memorable afternoon had a double, two home runs, and seven runs

---

*Dubious Argument Won’t Bar Clinton Holding the Presidency*, PLAIN DEALER (CLEVELAND), Sept. 23, 2016, at E1; Erik M. Jensen, *Letter of Law May Not Be Violated, But Its Spirit Has Been Ignored*, PLAIN DEALER (CLEVELAND), Sept. 23, 2016, at E1.

15. Jonathan L. Entin & Erik M. Jensen, *Taxation, Compensation, and Judicial Independence: Hatter v. United States*, 90 TAX NOTES 1541 (2001); Jonathan L. Entin & Erik M. Jensen, *United States v. Hatter and the Taxation of Federal Judges*, 92 TAX NOTES 673 (2001); Jonathan L. Entin & Erik M. Jensen, *Taxation, Compensation, and Judicial Independence*, 56 CASE W. RES. L. REV. 965 (2006); Erik M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power: New York v. United States Revisited*, 15 CONST. COMMENT. 355 (1998); Erik M. Jensen & Jonathan L. Entin, *The Constitution Matters in Taxation*, CLEV. METRO. B.J., Jan. 2010, at 18.
16. Daniel Bell, *Our Country—1984*, 51 PARTISAN REV. 620, 635 n.\* (1984–1985).
17. See *supra* note 1.
18. E.g., Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997); see also *infra* note 23.
19. E.g., Erik M. Jensen, *Are Recoveries for Nonphysical Injuries Automatically Taxable?*, 105 TAX NOTES 1439 (2004); Erik M. Jensen, *Murphy v. Internal Revenue Service, the Meaning of “Income,” and Sky-Is-Falling Tax Commentary*, 60 CASE W. RES. L. REV. 751 (2010).
20. E.g., Jensen, *supra* note 11 (tribal sovereignty and the Constitution); Erik M. Jensen, *Doing Business in Indian Country: Introduction to American Indian Law Concepts Affecting Taxation*, 20 J. TAX’N INV. 223 (2003); Erik M. Jensen, *The Imaginary Connection Between the Great Law of Peace and the United States Constitution: A Reply to Professor SchAAF*, 15 AM. INDIAN L. REV. 295 (1991).
21. E.g., Erik M. Jensen, *Taking the Student Out of Student Athlete: College Sports and the Unrelated Business Income Tax*, J. TAX’N INV., Summer 2014, at 29; Erik M. Jensen, *Taxation, the Student Athlete, and the Professionalization of College Athletics*, 1987 UTAH L. REV. 35.

batted in, a prodigious performance at any level).<sup>22</sup> He has not hesitated to challenge conventional wisdom, and some of his work has resulted in extended debates with prominent scholars around the country.<sup>23</sup> His writing has been consistently elegant, and often very funny. Here are

- 
22. See Joe LaBreche, *Varsity Nine Annihilates Brandeis*, THE TECH, Apr. 29, 1966, at 8. For other accounts of Erik's baseball exploits, see, e.g., Larry Kelly, *Tech Nine Edge Middlebury, 5-4*; *Jensen Star in Eleven-Inning Game*, THE TECH, Apr. 25, 1967, at 8; Jerrold Sabath, *Baseball Squad Drops Two*, THE TECH, Apr. 14, 1965, at 10 (accompanied by a photograph of Erik scoring a run for MIT). Special thanks to Addie Jensen, Erik's daughter, for discovering the online archive of the MIT student newspaper, *The Tech*, containing these and many other articles describing her father's athletic accomplishments.

Erik, who grew up mainly in Brigham City, Utah, was not the only tall, blond Westerner named Jensen who patrolled right field in my New England youth. San Francisco native Jackie Jensen played that position for the Boston Red Sox, leading the American League in runs batted in three times, winning the Most Valuable Player award in one of those seasons, and earning a Gold Glove for his defensive prowess. See *Jackie Jensen*, BASEBALL REFERENCE, <http://www.baseball-reference.com/players/j/jenseja01.shtml> [<https://perma.cc/HSU9-YFYL>] (last visited Apr. 1, 2017). That other Jensen was an outstanding all-around athlete. He was the first person ever to appear in both the World Series (1950) and a college football bowl game (the 1949 Rose Bowl). As an undergraduate at the University of California, Berkeley, Jackie Jensen helped to lead his school to the first NCAA college baseball championship (the Golden Bears defeated a Yale team led by first baseman George Herbert Walker Bush). See CalBear81, *The First College World Series Champions: The 1947 Golden Bears*, SB NATION (Dec 14, 2011, 7:01 AM), <http://www.californiagoldenblogs.com/2011/12/13/2379019/the-first-college-world-series-champions-the-1947-golden-bears> [<https://perma.cc/6SVT-67TU>]. A star fullback on the football team, Jackie Jensen finished fourth in the balloting for the Heisman Trophy as the nation's outstanding college football player and was elected to the College Football Hall of Fame (one of the players who finished ahead of him in the Heisman Trophy voting, law review readers might appreciate, was Charlie Justice). See *Hall of Fame Inductees*, COLLEGE FOOTBALL HALL OF FAME, <http://www.cfbhall.com/inductees/> [<https://perma.cc/E3F4-8DYP>] (last visited Apr. 1, 2017) (select magnifying glass from left-side menu; search "Jackie Jensen"; select "Jackie Jensen").

The two Jensens merged in a question on my colleague Robert Strassfeld's Labor Law exam during a season when the collective bargaining agreement for major league baseball was being renegotiated. Bob's question hypothesized that the owners locked out the players and hired law professors as replacements. One of the scab players was "Erik (Jackie) Jensen."

23. Compare, e.g., Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 2, 52-56 (1999), and Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 14-24, 67-70 (1998), and Lawrence Zelenak, *Radical Tax Reform, the Constitution, and the Conscientious Legislator*, 99 COLUM. L. REV. 833 (1999), with, e.g., Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & POL. 687 (1999), and Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057 (2001).

just two examples of his humorous work. “Declining Fortunes,”<sup>24</sup> a more or less empirical study conducted at a now-defunct Chinese restaurant where he often ate lunch, chronicles the deterioration of fortune cookies, which formerly provided actual predictions but now offer little more than trite aphorisms. And “A Call for a New Buffalo Law Scholarship”<sup>25</sup> includes every imaginable use of the word “buffalo” (which sometimes refers to bison, other times to the city on the shores of Lake Erie, and occasionally to the synonym for bamboozle)—noting, for instance, that the dearth of Supreme Court cases on the subject might signal that “no self-respecting buffalo proponent relishes appearing before a body that was once called the Burger Court”<sup>26</sup> and asking, in reference to the *Buffalo Forge* case,<sup>27</sup> one of the few High Court decisions arguably on point, “How does one forge a buffalo anyway?”<sup>28</sup>

Erik’s prodigious scholarship is not the only reason for his significant impact beyond the campus. He has been active in the American Bar Association’s Section of Taxation and the Cleveland Tax Institute, and he served on the executive committee of the Order of the Coif. And, in addition to his editorial work on the *Journal of Legal Education*, he has been editing the *Journal of Taxation of Investments*.

When I consider everything that Erik has accomplished, I think back to our first meeting. Not only then, but for our first couple of years as colleagues, Erik seemed like the most insecure junior professor you could imagine. By sheer coincidence, while he was almost literally chewing his fingernails during his review for promotion to associate professor, I came across a sweatshirt emblazoned with a frazzled cat whose fur was about the same shade as Erik’s hair. The feline was asking: “What, me paranoid? Who wants to know?” I bought the shirt and attached it to his office door one morning while he was in class. I don’t know whether he still has that sweatshirt, but of course he had no reason to worry.

---

24. Erik M. Jensen & Estel Crabtree, *Declining Fortunes*, J. IRREPRODUCIBLE RESULTS, July/Aug. 1994, at 5. The coauthor’s listing is an inside joke: Estel Crabtree was a journeyman outfielder who played primarily for the Cincinnati Reds and briefly for the St. Louis Cardinals at various times between 1929 and 1944. His main claim to fame is that he was born in Crabtree, Ohio, making him probably the only major leaguer from a home town with the same name as his surname. See *Estel Crabtree*, BASEBALL REFERENCE, <http://www.baseball-reference.com/players/c/crabtes01.shtml> [https://perma.cc/6229-YFSC] (last visited Apr. 1, 2017). Erik published another piece under the pseudonym Estel Crabtree: *A 1990s Law School Conversation*, 44 J. LEGAL EDUC. 608 (1994).

25. Erik M. Jensen, *A Call for a New Buffalo Law Scholarship*, 38 U. KAN. L. REV. 433 (1990).

26. *Id.* at 435.

27. *Buffalo Forge Co. v. United Steelworkers of Am.*, AFL-CIO, 428 U.S. 397 (1976).

28. Jensen, *supra* note 25, at 435 n.15.

Erik might be retiring, but he won't be going away. Happily for the law school, he will keep his office and continue his research and writing. He'll still be defending the Queen's English,<sup>29</sup> making bad puns,<sup>30</sup> helping to coordinate a lecture series devoted to tax law and the law of nonprofit organizations, and casting a jaundiced eye on the world. From my purely selfish perspective, this is wonderful news. I'll be able to continue our long-running friendship. But I am confident that I speak for everyone in thanking Erik for all that he has done for the law school over the years and wishing him all the best.

---

*Leon Gabinet†*

Erik Jensen arrived at Case Western Reserve University School of Law just in time to find that Dean Lindsay Cowen, who had interviewed him, was leaving the deanship and that a new dean, Ernest Gellhorn, was now in place. It must have been a bit unnerving to this tall, soft spoken Scandinavian. He was newly arrived from Cornell Law School and a stint at Sullivan & Cromwell in New York. Prior to that, he had been an undergraduate at MIT and then a graduate student in Political Science at the University of Chicago. It was the latter connection that intrigued me, since I myself was a product of both the College and Law School at the University of Chicago. I was immediately predisposed in his favor, particularly as I was now the only tax teacher on the faculty and Erik wanted to be a tax professor. My predisposition was buttressed by an interview with Erik, where I realized that he knew his stuff, that he approached the vast field of federal taxation with great thoughtfulness and that he would be an invaluable colleague—especially to me. The years—now decades—have proved me right. He is and has been an invaluable colleague and a good friend. Many is the time I have wandered into his office with some tax issue that puzzled

---

29. *E.g.*, Erik M. Jensen, *Propositions in the Constitution*, 14 GREEN BAG 2D 163 (2011); Erik M. Jensen, *Can't Trust Officials Who Don't Talk Right*, PLAIN DEALER (CLEVELAND), Oct. 16, 1993, at 7-B; Erik M. Jensen, *Is It a Crime to Murder the Queen's English?*, PLAIN DEALER (CLEVELAND), July 1, 1988, at 5-B; Erik M. Jensen, *Let's Hope Grammar Steps Up to the Plate in Indians' Telecasts*, PLAIN DEALER (CLEVELAND), Apr. 1, 2015, at E6.

30. *E.g.*, Erik M. Jensen, *Wher's the Beef? Buffalo Law and Taxation*, 36 N.M. L. REV. 517 (2006) (analyzing *Wher v. Commissioner*, No. 4350-03S, 2004 WL 1921830 (T.C. Aug. 30, 2004), a tax case involving a bodybuilder's unsuccessful attempt to deduct the cost of buffalo meat that he allegedly consumed to enhance his prospects in competitions).

† Coleman P. Burke Professor Emeritus of Law, Case Western Reserve University School of Law.