Tribute to Professor Erik Jensen

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Erik Jensen: Curmudgeon, Scholar, Coauthor, Friend

Jonathan L. Entin†

Erik Jensen is one of the nation’s leading authorities on tax law. He has published two books1 and scores of articles, book chapters, essays, and reviews—not only on technical questions of tax law,2 but also on the Constitution,3 American Indian law,4 legal education,5 and more.6 Erik set a law school record by holding three different endowed

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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).


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

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* in my Constitutional Law course. 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


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).

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.”12

Nor are these the only published barbs that Erik has directed at me.13 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.14

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.


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.15 In other words, our relationship confirms Daniel Bell’s observation that “friendship is more important than ideology.”16

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;17 his articles, just to name a few, have focused on the meaning of direct taxes,18 the tax treatment of damage awards,19 the legal status of American Indian tribes,20 and the tax aspects of intercollegiate athletics21 (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

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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.


batted in, a prodigious performance at any level). 22 He has not hesitated
to challenge conventional wisdom, and some of his work has resulted in
extended debates with prominent scholars around the country. 23 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 Ref-
erence, 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-
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 replace-
ments. 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 Tazing Power, the Sixteenth Amendment, and the Meaning of “Incomes,”
just two examples of his humorous work. “Declining Fortunes,”24 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”25
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”26 and asking, in reference to the
Buffalo Forge case,27 one of the few High Court decisions arguably on
point, “How does one forge a buffalo anyway?”28

Erik’s prodigious scholarship is not the only reason for his signifi-
cant 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 Edu-
cation, 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 pro-
fessor, 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,
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.

26. Id. at 435.

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

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,29 making bad puns,30 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


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