

## Part 1: SABBATICAL PLAN

*Board of Regents and CU System policies require the following information be provided by each faculty member applying for a sabbatical assignment. Thank you for completing this public document in a clear and substantive way. Each response should be a minimum of 300 words.*

Applicant Name: [REDACTED]

Title of Sabbatical Project: **Juris Aporia – Or the Rules We Need But Do Not Have**

(1) Describe your sabbatical's academic objectives including its contribution to your professional growth and expertise.

*The focus of my sabbatical leave will be a project provisionally titled Juris Aporia – Or The Rules We Need But Do Not Have. My plan is to craft an extensive (~25,000 word) law review article on these absent rules and then, in short order, to use that article as the foundation for a larger, more expansive book. Both article and book will comprise novel work – new in my scholarly agenda, new in the legal academy – though both will also draw on themes and ideas woven through my other published research – in particular [REDACTED]*

*[REDACTED] A short excerpt of this new and developing project, focusing on one such “missing” rule:*

(Institutional) First Bestism We might have seen this move coming. Some may even say we were warned. In 1956, in the pages of the *Review of Economic Studies*, Richard Lipsey and Kelvin Lancaster outlined the theory of the second best – the idea, in short, that suboptimal results may be acceptable when purely optimal results are impossible. As written, Lipsey and Lancaster’s claim was conceptual, speculative, and abstract – rooted in the (then-current) economic vocabulary of “optimality conditions” and “market distortions.” It was not about law. But soon it found a home in law anyway. Illustrations abound. Each echoes Lipsey and Lancaster; each speaks the language of *second bestism*, displaying a tolerance for, a resignation to, even a celebration of suboptimal outcomes in law. But now consider a different kind of *bestism* – what I call *first bestism*. *First bestism* flips much of *second bestism* over. It prioritizes the optimal, not the suboptimal; it trades in ideals, not in actualities. It claims, not that second-best outcomes are sometimes acceptable, but that first-best options are sometimes required. It decrees that something else – another result, another decision-maker, another institution – is better than the one chosen and must be pursued. An example: *Raich*, and in particular Justice Stevens’ concluding paragraph: Respondents also raise a substantive due process claim and seek to avail themselves of the medical necessity defense. These theories of relief were set forth in their complaint but were not reached by the Court of Appeals. We therefore do not address the question whether judicial relief is available to respondents on these alternative bases. We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress. Under the present state of the law, however, the judgment of the Court of Appeals must be vacated. The case is remanded for further proceedings consistent with this opinion. There is something gentle, even generous, about this passage. Justice Stevens seems to sympathize with *Raich*’s losers – and perhaps to lament the law’s hard edge – and so he plots their path forward. Those unhappy with “the present state of the law,” he says, need not give up. They simply must go somewhere else: They must follow “democratic process[es],” not “legal avenues.” They must hope “one day [to] be heard” in Congress, not in court. This is institutional *first bestism*. ....

*Both article and book project will likely unfold this way: After a brief and engaging introduction, Chapter 1 will set the stage, drawing on the hoary metaphor of the law as a “seamless web” to call attention to the inevitable gaps and “seams”—those places where the world needs answers but the law’s sidewalk ends. It will also provide a catalog of the absent rules—the juris aporia—that I hope to excavate and evaluate in subsequent chapters: first*



*bestism, harmful improvement, narcissistic interpretation, internal antinomianism, and the like. The chapters that follow, six or seven, will dive deeply these rules. And then a final chapter (or two) will synthesize and look forward, applying these freshly forged lessons to an eclectic array of examples and issuing a call to lawyers and judges, courts and legislatures to use the rules we have wisely and also to develop the rules we miss but need. All told, the book will be an ambitious and unusual exploration of a topic too-often elided. It will also be the necessary next step in my scholarly development.*

(2) Describe your work plan including all anticipated professional activities (i.e., where will you spend your sabbatical, what you will do, your work timeline, etc.).

*I intend to spend my sabbatical largely, if not exclusively, at my desk in Boulder. I may travel a bit to conduct some dusty archival research, though that is unlikely. And I will build this project as I've built so many of my other scholarly works: begin with a heavy, intensive period of research and reading—a span likely lasting two months; follow with a furious attempt to draft and draft well—a stretch likely lasting 3 weeks; finish with a prolonged and persnickity process of polishing and preparing for publication—a space likely lasting less time than I wish but more time than I have. And I will be cognizant throughout of both the privilege of the sabbatical and of the dangers of desk-bound research, even (or especially) in the law. More than half a century ago, scholars coined the term “law office history” to describe—pejoratively—the practice of the Supreme Court distorting the historical record to support particular outcomes in constitutional cases. (Think here, especially, of things like the Second Amendment, the realm of same-sex marriage rights, and the world of reproductive choice rights.) Both the allure and the dangers here are obvious: cherry-picking friendly evidence from the comfortable and cloistered confines of one's ivory tower office, whether in a judicial chambers or in an academic building. Put more simply, the critique is well made. But it has not been effective in relation to the Court. If anything, the Court seems to have grown only more addicted to law office history—and to enjoy poking the eye of its academic critics by resorting to it all the more. I will not fall prey to the academic failings of legal research at one's desk, nor will I glibly ignore the wise and empirically astute concerns of those who think that “work at the desk” is both opportunistic and lazy—too easily manipulated to support preconceived notions and too comfortably performed without connection to or consideration of life as actually lived. I may not travel to farflung places or many dank archival basements in compiling my evidence and completing my work, then. But I will perform my research in the way that all the best and most rigorous legal research is performed: with a clear eye, an open mind, a skeptical bearing, and a sharp pen.*

(3) Describe how meeting your sabbatical objectives will benefit the academic, clinical, and/or pedagogical goals of your primary unit.

*Both of my projects fit the definition of creative, ambitious legal scholarship. By that measure they will advance the Law School's goal to be, and to stay, a welcome home to scholarship of the greatest ambition and highest quality. Both also fit nicely with the stated mission of the Law School. The Law School's Strategic Plan states: Our Vision: A supportive and diverse community . . . that inspires vigorous pursuit of ideas, critical analysis, and civic engagement in order to advance the rule of law in an open, sustainable society. . . . Scholarship: We believe that all faculty should be committed to the broader mission of education that is accomplished through exploration, discussion, and dissemination of ideas. We seek a better understanding of existing law, to develop and test new ideas and approaches, to challenge the status quo, and to convey our research and ideas to lawyers, academics, policy makers, and the wider world. The philosophies and approaches of faculty members can and should vary widely in pursuing this mission, but all are expected to produce noteworthy work. At their core, my projects aim to be precisely that: “critical,” engaged, provocative, challenging to the “status quo.” They also endeavor to make a difference in court, in the classroom, and on the ground to “lawyers, academics, policy makers, and the wider world.” More than that, my projects will do exactly what the Law School's Strategic Plan envisions: they will seek out—and lead to—a better understanding of existing law while developing new ideas, challenging the status quo, and conveying critical concepts to lawyers, academics, policy makers, and the wider world. At the same time, my projects will have a real, perhaps measurable effect on what legal academics call “law on the ground.” They will, in other words, influence how lawyers argue, how policy makers deliberate, and how courts decide.*

(4) Describe how your sabbatical project will enhance the university's reputation.

*The University of Colorado has a reputation for producing high quality legal scholarship. My goal for this sabbatical is to exceed that well-earned reputation. I am pleased (and fortunate) to report that my research has*



achieved a kind of national prominence, and this prominence has carried with it an increasing influence in discussions at bench and bar, as well as in legislative chambers. This sabbatical project will only advance that prominence and that influence, burnishing the University's reputation as it does. In this, the Law School's mission and that of the University more broadly are nicely and harmoniously aligned. The Law School endeavors to support scholarship that is vigorous in pursuit of ideas, critical analysis, and civic engagement in order to advance the rule of law in an open, sustainable society. So too does the University of Colorado. The Law School also seeks out scholarship that conveys a better understanding of existing law, develops and tests new ideas and approaches, challenges the status quo, and communicates ideas to lawyers, academics, policy makers, and the wider world. So too, again, does the University of Colorado. My sabbatical projects, like all of my scholarly and research (and pedagogical) work before them, will thus do exactly what both the Law School and the University envision: they will seek out—and lead to—a better understanding of existing law while developing new ideas, challenging the status quo, and conveying critical concepts to lawyers, academics, policy makers, and the wider world. At the same time, my projects will have a real, perhaps measurable effect on what legal academics call "law on the ground." They will, in other words, influence how lawyers argue, how policy makers deliberate, and how courts decide—and nothing will burnish the University's reputation more directly (if subtly) than that.

(5) Describe how your sabbatical will contribute to the educational experience of students.

I write about what I teach and teach about what I write. It follows that these sabbatical projects will deepen my understanding of many topics I discuss in the classroom each year: character evidence, rule / statutory interpretation, judicial structure, implied negation, and court power. The project will make me a sharper lecturer, a richer resource, and a clearer classroom instructor for all of our students. Consider just one example in greater detail: How our students read cases. In every case we read, teach, or otherwise study, there's a place where the sidewalk ends—a "point of abandonment" at which the story closes and the facts abate. In many (most?) of these cases, this point of abandonment makes sense—or at least carries no influence. Things are as things are. But in many other cases, the point of abandonment matters greatly, for it closes the book when more chapters might be written, ending a story (of people and of law) that might leave more to be told. We have no understanding or appreciation of where this point will be positioned—let alone any kind of rule. But it can mean so much and reveal so powerfully all sorts of things: the stories we do not wish to hear, the facts we do not want to know, the chapters we do not want to read. And consider the double meaning here: the point of abandonment. It's both a place of sorts—a spot where things stop narratively, necessarily or otherwise—and also a rhetorical, argumentative, dialectical turn—a device of cessation that has its own reason and its own effect. My sabbatical projects will help students, in my class and in others, begin to see all of this—not just what we might want to see but is missing, but also why it is absent and what effect that serves. Many of our students will spend their professional lives reading cases and crafting stories for their clients. What could contribute to their educational experience more than helping them think harder, better, and more clearly about how to do those vital things?

## Part 2: REMUNERATION AND FUNDING PLAN

*Regarding external funding, faculty members applying for sabbatical assignments are expected to apply for external funding (such as fellowships, grants, or clinical work) when appropriate. The total university salary to the faculty member, from sabbatical pay and any contract or grant administered through the university, shall not exceed university limits. There is no restriction on additional non-university income, subject to the faculty member satisfying the duties of the sabbatical plan and any contract/grant requirements. If a faculty member on sabbatical anticipates funding, sponsorship, employment, gifts, non-financial support, or other benefits from foreign institutions or sources, these should be detailed in the sabbatical remuneration plan, and all appropriate Export Control procedures should be followed. In addition, faculty members on sabbatical leave are not permitted to be paid for any administrative appointments or extra teaching during the sabbatical period.*

- (6) Per CU System APS 1024, it is expected that faculty members applying for sabbatical will also apply for **external** funding to the extent it is available. Describe any anticipated external funding sources, amount of funding from sources external to CU, and attempts to obtain such funding.

*I have applied for two prestigious legal fellowships. Both are highly competitive—and not typically extended to law faculty—and both are only now at the start of their selection processes. Should I receive either (or both), I will supplement this response—and I intend to seek additional funding if opportunities arise.*

- (7) Describe the source and amount of any additional funding to support your sabbatical, including departmental or gift funding.

*None to date.*

- (8) Describe any anticipated support from foreign or international entities, including research collaborators, host universities, or other institutions, (e.g., equipment use, office/lab space, lodging or travel).

*None.*

- (9) Under the University's [APS 1024](#), faculty must identify business expenses to be reimbursed in connection with a Sabbatical Plan. Please describe anticipated business expenses and the funding source for those expenses.

*None anticipated.*

- (10) Will this plan require international travel? If so, please describe the travel including anticipated destination(s).

*No.*



**Part 3:**  
**DEPARTMENT CHAIR/UNIT HEAD**  
**PLAN FOR COVERAGE AND REMUNERATION**

*Based on the corresponding CU System [APS 1024](#), the dean of the school/college shall ensure that the costs associated with the sabbatical are covered, including teaching replacement expenses. The dean may suspend a sabbatical if funding is not available in the school/college. Remuneration (from university resources such as state funding, university administered grants or contracts, or any other university managed sources) for the sabbatical assignment shall be as follows: for full-time faculty on nine-month appointments, either full salary for one semester or half salary for two semesters; for full-time faculty on 12-month appointments, six months full salary or 12 months half salary. Please note that remuneration from university-managed funds or university-administered grants or contracts should not exceed 100% of the faculty member's base salary in the case of full-pay sabbaticals, or 50% in the case of half-pay sabbaticals. For two-semester sabbaticals, remuneration sourced from General Funds (Fund 10) should not be used to supplement a half-salary. Stipends for administrative duties, such as chair or center director stipends, are not included in "base salary" and shall not be taken into account in calculating the individual's salary while on sabbatical.*

- (11) Describe the plan for coverage of the faculty member's teaching responsibilities and replacement of teaching expenses. If it is known at the time this application is being made, include specific course names or numbers to be replaced each semester.

Professor [REDACTED] normally teaches two courses in the spring semester: [REDACTED]  
[REDACTED] will be covered by an adjunct faculty member in the Spring during Professor [REDACTED]  
absence. [REDACTED] is an upper-level elective and will not be covered in the Spring semester.

- (12) If the applicant is in an additional administrative position (e.g., chair or director), indicate how the administrative responsibilities will be covered.

The applicant does not have additional administrative responsibilities.