

## ARTICLES

**The New Market for Federal Judicial Law Clerks***Christopher Avery*<sup>†</sup>*Christine Jolls*<sup>‡</sup>*Richard A. Posner*<sup>††</sup>*Alvin E. Roth*<sup>‡‡</sup>

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*[T]hough I knew it was coming and I knew it would be bad, I had no idea just how [bad].*

–2004 applicant for federal judicial clerkships<sup>1</sup>

*I received the offer via voicemail while I was in flight to my second interview. The judge actually left three messages. First, to make the offer. Second, to tell me that I should respond soon. Third, to rescind the offer. It was a 35 minute flight.*

–2005 applicant for federal judicial clerkships<sup>2</sup>

*One of [Judge X's] clerks even chastised me for “overly stringent adherence to this timeline they have” and noted that other students from my school were willing to interview ahead of schedule. It was a real conflict for me. I felt like I had to choose between cheating and (potentially) not getting a clerkship.*

–2005 applicant for federal judicial clerkships<sup>3</sup>

*Many people/professors brazenly cheated.*

–2004 applicant for federal judicial clerkships<sup>4</sup>

*[P]eople who followed the rules were at a disadvantage.*

–2006 applicant for federal judicial clerkships<sup>5</sup>

*It's sad (pathetic?) that judges aren't obeying their own rules. [It] flies in the face of the whole notion of “law and order.”*

–2005 applicant for federal judicial clerkships<sup>6</sup>

*It's very disheartening to see so many Federal judges—the ostensible paragons of rules and fair play—breaking their own rules and scheduling interviews before the agreed-upon date in the law clerk hiring plan. I expected better.*

–2005 applicant for federal judicial clerkships<sup>7</sup>

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<sup>1</sup> 2004 Student Survey #261. For further information about our surveys, see the text and Appendix of this Article.

<sup>2</sup> 2005 Student Survey #132 (parentheses omitted).

<sup>3</sup> 2005 Student Survey #4.

<sup>4</sup> 2004 Student Survey #508.

<sup>5</sup> 2006 Student Survey #292.

<sup>6</sup> 2005 Student Survey #147.

<sup>7</sup> 2005 Student Survey #193.

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*There is absolutely no reward for those students who keep to their moral obligation.*

–2006 applicant for federal judicial clerkships<sup>8</sup>

*The cheating abounds! I have brought this to the attention of the committee but do not even get the courtesy of a reply.*

–Federal appellate judge, 2005<sup>9</sup>

\* \* \*

*It's terrible. Just about anything, including malicious lies, forcible running with scissors, and active misuse of electric cords, would be better.*

–1999 applicant for federal judicial clerkships<sup>10</sup>

*You will have to arrest me before I will again set foot in [specified courthouse]. I would not wish this process on my worst enemy.*

–2000 applicant for federal judicial clerkships<sup>11</sup>

*[T]he current non-system makes applicants see judges behaving in ways which are unseemly, to put it mildly. That view of our behavior will inevitably shape what these people think of the judiciary. To the extent that many of these applicants will become leaders in the bar and in politics, we will as judges reap what we have sown. They will hold us in contempt and will not be wholly wrong.*

–Federal appellate judge, 1999<sup>12</sup>

As the new millennium dawned, the market for federal judicial law clerks was in a state of near crisis. The final two clerkship applicants and federal appellate judge quoted above, as well as many others like them, expressed deep and wide-ranging concerns with the functioning of this market in 1998–2000.<sup>13</sup> In an attempt to gain some control of the market, in March of 2002 a group of prominent federal appellate judges organized a one-year moratorium on the hiring of federal judicial law clerks; federal judges were requested to skip hiring entirely in 2002 and were then to resume hiring in the fall of 2003,

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<sup>8</sup> 2006 Student Survey #369.

<sup>9</sup> 2005 Judge Survey #80.

<sup>10</sup> See Christopher Avery, Christine Jolls, Richard A. Posner, and Alvin E. Roth, *The Market for Federal Judicial Law Clerks*, 68 U Chi L Rev 793, 838 (2001), quoting 1999 Student Survey #184.

<sup>11</sup> See Avery, Jolls, Posner, and Roth, 68 U Chi L Rev at 839, quoting 2000 Student Survey #26.

<sup>12</sup> See Avery, Jolls, Posner, and Roth, 68 U Chi L Rev at 835, quoting 1999 Judge Survey #7.

<sup>13</sup> See Avery, Jolls, Posner, and Roth, 68 U Chi L Rev at 834–45 for a full account based on survey evidence from both federal appellate judges and clerkship applicants.

with the primary pool of candidates the third-year law students who under past practice would have been hired as second-year students in the fall of 2002.<sup>14</sup> Likewise, in subsequent years judges were to hire students during the fall of their third year of law school.<sup>15</sup> This new system for the hiring of clerks is presently structured around a set of “start dates” for the transmission of applications, the scheduling and conducting of interviews, and the making of offers.<sup>16</sup>

The law clerk market that is the subject of this regulatory regime is widely viewed as important both to the functioning of the federal court system and to the career paths of lawyers. Many judges believe that clerk quality has a significant effect on judges’ productivity and thus on the functioning of the federal court system.<sup>17</sup> With respect to lawyers’ career paths, federal court clerkships provide valuable knowledge and experience to clerks.<sup>18</sup> Federal court clerkships are also often stepping stones to various elite legal posts.<sup>19</sup> A series of law review publications over the years in the *Yale Law Journal*, the *University of Chicago Law Review*, and other leading journals has analyzed the recurrent difficulties experienced by the law clerk market.<sup>20</sup>

The current regime for hiring federal judicial law clerks is a substantial departure from the system (or “non-system”) in effect prior to the 2002 moratorium, and thus it is important to inquire into the operation of the new regime. As was the case at the time of a study we conducted in 1998–2000 of the law clerk market under the premorato-

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<sup>14</sup> See Edward Becker, et al, *Law Clerk Hiring by Federal Appellate Judges* (Mar 2002), online at [http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/19d8ec075Abb8c8588256b9100006a3a/\\$FILE/agreement.pdf](http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/19d8ec075Abb8c8588256b9100006a3a/$FILE/agreement.pdf) (visited Apr 27, 2007).

<sup>15</sup> See *Summary of the Law Clerk Hiring Plan for 2004*, online at [http://www.cadc.uscourts.gov/bin/Lawclerk/Lawclerkpdf/Summary\\_of\\_the\\_Plan\\_for\\_2004.pdf](http://www.cadc.uscourts.gov/bin/Lawclerk/Lawclerkpdf/Summary_of_the_Plan_for_2004.pdf) (visited Apr 27, 2007); *Federal Judges Law Clerk Hiring Plan: Fall 2005 & Fall 2006*, online at [http://www.ca7.uscourts.gov/hr/lc\\_hiring\\_plan.pdf](http://www.ca7.uscourts.gov/hr/lc_hiring_plan.pdf) (visited Apr 27, 2007).

<sup>16</sup> See sources cited in note 15.

<sup>17</sup> See Patricia M. Wald, *Selecting Law Clerks*, 89 Mich L Rev 152, 153 (1990).

<sup>18</sup> See id at 153–54 (describing the various legal roles that clerks play in judicial chambers).

<sup>19</sup> See, for example, Alex Kozinski, *Confessions of a Bad Apple*, 100 Yale L J 1707, 1709 (1991) (stating that a “young lawyer’s choice of a clerkship can have a significant impact” on the lawyer’s future career path).

<sup>20</sup> See generally Avery, Jolls, Posner, and Roth, 68 U Chi L Rev 793 (cited in note 10); Edward R. Becker, Stephen G. Breyer, and Guido Calabresi, *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 Yale L J 207 (1994); Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 Georgetown L J 1749 (1995); Richard A. Epstein, *Ending the Mad Scramble: An Experimental Matching Plan for Federal Clerkships*, 10 Green Bag 2d 37 (2006); Kozinski, 100 Yale L J 1707 (cited in note 19); Abner J. Mikva, *Judicial Clerkships: A Judge’s View*, 36 J Legal Educ 150 (1986); Louis F. Oberdorfer and Michael N. Levy, *On Clerkship Selection: A Reply to the Bad Apple*, 101 Yale L J 1097 (1992); George L. Priest, *Reexamining the Market for Judicial Clerks and Other Assortative Matching Markets*, 22 Yale J Reg 123 (2005); Wald, 89 Mich L Rev 152 (cited in note 17).

rium regime,<sup>21</sup> anecdotal impressions are widespread, but hard data are elusive. So beginning in the fall of 2004 we have annually surveyed both federal appellate judges and law students about the operation of the law clerk market, using the same general approach we took in our earlier study. We describe our survey methodology in the Appendix to this Article. As elaborated in the Appendix, our surveys go through the fall of 2005 for federal appellate judges and through the fall of 2006 for third-year law students.

The responses to our new surveys provide evidence of three important points about the operation of the present system. First, as we expected, the movement of the market to the third year of law school is highly praised by judges responding to our surveys. The move in timing is a significant advantage of the current system.<sup>22</sup> After offering a basic framework for analysis of the law clerk market in Part I, we present in Part II our survey evidence on the additional information made available by the backward movement in timing and on judges' reactions to this beneficial feature of the new system.

Our second main finding is more troubling. As we describe in Part III, our survey responses reveal a level of interviewing and offering of positions prior to the specified start dates that we find surprisingly high even in light of the many anecdotal accounts with which we are familiar. Our surveys provide a quantitative perspective on the frequency of such behavior, suggesting widespread nonadherence to the start dates. We find that in both 2004 and 2005, roughly half of the responding judges had concluded that either "a substantial number" of appellate judges did not adhere or (even worse) "relatively few judges fully adhered"<sup>23</sup> to the start dates for conducting interviews and making offers. And even more directly, as early as the fall of 2004 a third of the judges reported on their survey responses that they *themselves* had commenced interviewing prior to the specified start date for conducting interviews, and just under a quarter reported that they had begun making offers before the specified start date for making these offers. Despite the extent of nonadherence, we can imagine ways in which the law clerk market could stabilize at a point of modest, albeit highly imperfect, adherence to the start dates, and we offer several theories (along with relevant data from our survey responses) along these lines in Part III.

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<sup>21</sup> Avery, Jolls, Posner, and Roth, 68 U Chi L Rev 793 (cited in note 10).

<sup>22</sup> While we were not at all surprised by this finding, not all observers agree on this point. Professor George Priest, in a comprehensive analysis of the law clerk market, questions whether earlier hiring is a problem for judges. See Priest, 22 Yale J Reg at 157 (cited in note 20). Our data paint a picture different from the one he suggests. See Part II.

<sup>23</sup> See note 67 for the full text of the survey question.

Our third set of findings concerns the rapidity with which clerkship matches are made under the present regime—in significant part as a result of the use of “exploding offers” in the law clerk hiring process. Part IV discusses our survey evidence on the quantitative importance of these short-fuse offers, which require students to act on clerkship offers extremely quickly, often before they can determine whether more preferred judges with whom they have had or scheduled interviews will end up offering them positions. (The student whose offer was both made and retracted during a thirty-five minute airplane flight provides an extreme example,<sup>24</sup> though, as noted in Part IV, other students’ experiences were even more extreme.) Part IV also presents further evidence of the high speed at which the law clerk market clears under the present regime. In other markets such high levels of market compression have induced many participants to move before the markets’ designated start dates in order to avoid the congestion. Again, however, we sketch potential ways in which the law clerk market might avoid this outcome and thus achieve at least partial success in keeping clerk hiring in the third year of law school.

Although our primary intended contribution in this Article is descriptive and empirical, the operation of the current law clerk market presents moral issues as well, as suggested by the student quotations with which we began. No judge is required to adhere to the start dates; they are merely recommendations by a committee of judges. Individual judges may have strong reasons to jump the gun. But uneven judicial compliance with the start dates, even if individually rational, may harm the applicant pool, and indeed the judiciary, as a whole. We hope by increasing the understanding of the law clerk market to illuminate some of its ethical dilemmas and assist the search for means of resolving them.<sup>25</sup>

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<sup>24</sup> See text accompanying note 2.

<sup>25</sup> As we discuss below, a prominent avenue for reforming the law clerk market would entail the adoption of a centralized matching system of the sort used in many other markets with timing problems—an approach favored by some commentators on the law clerk market. See note 103. In a typical centralized matching system, such as the one used in the market for medical residents, applicants and employers each submit rank orderings reflecting their preferences to a central clearinghouse following a decentralized process of application and interviewing. See, for example, Alvin E. Roth and Xiaolin Xing, *Jumping the Gun: Imperfections and Institutions Related to the Timing of Market Transactions*, 84 *Am Econ Rev* 992, 997 (1994). In the law clerk market, however, judges have never chosen to so much as experiment with such a system, despite the recurrent and severe problems the law clerk market has experienced over nearly a quarter century. See Part III.A. Thus, a reasonable inference is that judges (if not applicants) prefer to avoid moving to a centralized matching system if at all possible. Our own view, described in our prior study, is that a version of centralized matching, though with very significant alterations to respond to the special features of the law clerk market, would be desirable, see Avery, Jolls, Posner, and Roth, 68 *U Chi L Rev* at 868–84 (cited in note 10), but we will not repeat our previous arguments here.

## I. FRAMEWORK

Our primary concerns in analyzing the market for federal judicial law clerks are how well this market succeeds in maximizing the satisfaction of judges and applicants with their clerkship matches and how well it performs in encouraging participants to conform to, rather than flout, its rules.<sup>26</sup> An ideal measure of how well this market is working might be the degree to which it maximizes the “production of justice”<sup>27</sup>—a metric that, unlike the measures just noted, takes into account the overall quality of the legal system, including effects on those who are not participants in the law clerk market. It is possible, for instance, that failing to match the most desired clerkship candidates to the most desired judges—that is, failing to match in accordance with the parties’ preferences—actually improves the “production of justice” by harnessing the abilities of superior clerks to relatively less desired judges.<sup>28</sup> A contrary possibility is that top law clerks benefit more from the mentoring or the professional networks of more desirable judges, and this may produce broader benefits for society as these clerks pursue their own careers in the law after their clerkships.<sup>29</sup> Moreover, if the effect of matching clerks and judges is multiplicative, the quality of the judicial product may be maximized by sorting the best clerks to the most desired judges.<sup>30</sup> But since it is impossible as a practical matter to say not only how “mismatches” (from the perspective of judges’ and applicants’ preferences) affect the overall quality of the legal system but what *are* genuine mismatches in that system, our analysis focuses on the two criteria noted above.

In analysis of the law clerk market, two distinct attributes of the hiring process are important: the time at which hiring occurs in the applicant’s law school career and the nature of the hiring process itself.<sup>31</sup> We consider these two features in turn below.

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<sup>26</sup> Because judges at the time of our prior study did not have in place any rules related to the timing of transactions in the law clerk market, we did not address participants’ incentives to conform to, versus flout, such rules.

<sup>27</sup> See Avery, Jolls, Posner, and Roth, 68 U Chi L Rev at 804 (cited in note 10).

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 798. For purposes of analysis, it is useful to keep these two attributes of the clerk hiring process separate. See Hao Li and Sherwin Rosen, *Unraveling in Matching Markets*, 88 Am Econ Rev 371, 371–72 (1998) (discussing the distinction between the time in an applicant’s career at which the applicant is hired for a future position and strategic behavior in transactions).

### A. Time of Hiring

Before the current reform, clerks were hired on the basis of only a single year's performance in law school. An obvious advantage of moving the hiring date for clerks later is that information that emerges after the first year of law school may well be relevant to judges' and clerks' satisfaction with the match. Employers may, however, inefficiently hire applicants well before a job will commence even though additional information related to job performance would become available later.<sup>32</sup> Competitive pressure to attract candidates can lead offer dates to move earlier and earlier even if all market participants would be better off with later hiring.<sup>33</sup>

Empirical evidence from another market that has experienced problems with early transactions—the market for college football bowls—suggests that the efficiency gains from later transactions, with the resulting improvement in match quality, may be significant.<sup>34</sup> And because the college bowl market, in contrast to the law clerk market, is one in which prices can adjust freely, the apparent inefficiency of early transactions in the college bowl market cannot be a function of fixed prices.<sup>35</sup> Consistent with all of the analysis just described, most of the existing scholarly literature on the law clerk market extols the virtues of hiring in the beginning of the third year of law school rather than during the second year of law school.<sup>36</sup>

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<sup>32</sup> See, for example, Roth and Xing, 84 *Am Econ Rev* at 1034–35, 1039–40 (cited in note 25).

<sup>33</sup> See *id.* Professor Priest suggests that early hiring in the law clerk market represents not a market failure but rather optimizing behavior by participants in this market. See Priest, 22 *Yale J Reg* at 149–51, 156–58 (cited in note 20). But the economics literature noted in the text shows how individually rational behavior by market participants may lead to an outcome in which all market participants are worse off than they would be if hiring were constrained to occur at a later time.

<sup>34</sup> See Guillaume R. Fréchette, Alvin E. Roth, and M. Utke Ünver, *Unraveling Yields Inefficient Matchings: Evidence from Post-Season College Football Bowls*, *Rand J Econ* (forthcoming).

<sup>35</sup> The inefficiency results in the economics literature apply both to matching with fixed salaries and to matching with flexible salaries, see, for example, Roth and Xing, 84 *Am Econ Rev* at 1034 (cited in note 25) (“Unraveling may be ex ante as well as ex post inefficient, in both the fixed-wage and negotiated-wage models.”), though it is certainly the case that a high proportion of the markets that have been studied that have tendencies toward very early transactions are markets in which, as in the law clerk market, salaries or prices cannot freely adjust.

<sup>36</sup> See, for example, Becker, Breyer, and Calabresi, 104 *Yale L J* at 223–24 (cited in note 20); Oberdorfer and Levy, 101 *Yale L J* at 1100 (cited in note 20). Professor Priest points out that it is not entirely clear whether, or why, a particular point later than the second year of law school but before the *end* of the third year is the precisely optimal time for hiring law clerks. See Priest, 22 *Yale J Reg* at 152 (cited in note 20). It may indeed be difficult to identify the precisely optimal time for hiring to occur, but our suggestion in the text is simply that, in the judgment of most observers, the gap between the second year of law school and the start of employment as a law clerk after graduation is too large to be optimal.



Counterbalancing the informational loss from early hiring is the benefit that risk-averse parties may enjoy from resolving uncertainty earlier, thus insuring themselves against the possibility of facing unfavorable market circumstances down the road.<sup>37</sup> The relevant uncertainty is over the size of the market facing a given market participant;<sup>38</sup> for judges, this would be the size of the group of well-qualified applicants, and for applicants, it would be number of desirable judges for whom to clerk. But while this particular form of uncertainty may be highly relevant in some contexts, it does not loom large in the law clerk market.

### B. Nature of the Hiring Process

Well-functioning markets are valuable in large part because they bring together many buyers and sellers and thus allow them to consider a range of possible transactions and transaction partners.<sup>39</sup> Parties are more likely to match well when they have been able to consider multiple options and select their most preferred alternatives. When markets are thin, parties must choose from a very small set of alternatives; in some cases, they may have no choice at all.<sup>40</sup>

A clear example of a thin market, unavailable at the time of our prior study, is the market for gastroenterology fellows.<sup>41</sup> In the early years of this century, the market became one in which offers had to be acted upon without an opportunity to consider and compare alternatives.<sup>42</sup> As a result, the market became less national, with fewer and fewer applicants changing hospitals, cities, or states to take their positions.<sup>43</sup> Thus many participants' "markets" effectively shrank to the surrounding geographic area.<sup>44</sup>

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<sup>37</sup> See Li and Rosen, 88 Am Econ Rev at 373–74 (cited in note 31).

<sup>38</sup> See *id.* Note that some of the text in Li and Rosen's paper sounds more in terms of uncertainty about individual traits or qualifications than in terms of the aggregate uncertainty that is reflected in their formal model. See, for example, *id.* at 384 ("In labor markets for young professionals and other situations where information is imperfect, . . . uncertainty produces anxiety over how participants will make out and to whom they will be matched . . . Applicants for jobs and for admission to schools are concerned that their preferred firm or school might not want them.").

<sup>39</sup> See Roth and Xing, 84 Am Econ Rev at 992 (cited in note 25).

<sup>40</sup> For a number of examples of this type of dynamic, see Avery, Jolls, Posner, and Roth, 68 U Chi L Rev at 813–29, 851, 853–54 (cited in note 10).

<sup>41</sup> See generally Muriel Niederle, Deborah D. Proctor, and Alvin E. Roth, *What Will Be Needed for the New Gastroenterology Fellowship Match To Succeed?*, 130 Gastroenterology 218 (2006).

<sup>42</sup> See *id.* at 218 ("[M]any potential fellows were faced . . . with a decision about whether to accept an offer from a particular fellowship program, to which they needed to respond before they could learn what other opportunities might be available.").

<sup>43</sup> See Muriel Niederle and Alvin E. Roth, *Unraveling Reduces Mobility in a Labor Market: Gastroenterology with and without a Centralized Match*, 111 J Pol Econ 1342, 1348–50 (2003).

<sup>44</sup> See *id.*

Historically, clerkship applicants have likewise faced thin markets. Indeed, “in many instances the sellers [of clerkship services] can consider only one possible transaction—the one with the judge who first makes them an offer.”<sup>45</sup> In the absence of a highly reliable pre-market sorting mechanism to pair clerkship applicants with their most favored judge among those interested in them, such thin markets will not maximize the satisfaction of judges and clerks. Instead they will produce a substantial number of cases in which judges and applicants not matched to one another would have preferred to be so.

If participants can obtain the information they need to make optimal choices prior to the interview and offer stage, the cost of thin markets is minimized.<sup>46</sup> While it is an empirical question—one that our survey data cannot resolve—whether participants in the law clerk market can perfectly or nearly perfectly sort themselves prior to the first interview, so that there is little cost to a quick pairing off at that point, most existing analyses have assumed that there are tight limits on such presorting because of the highly personal nature of the clerkship relationship.<sup>47</sup>

Thin markets can arise either within a largely unregulated market or in response to market institutions seeking to control the timing or method of transactions. The law clerk market in the period covered by our prior study, when no judicial rules or policies sought to regulate the timing or process of hiring, illustrates the first possibility. And the second is illustrated by the market for clinical psychology interns, in which thin markets arose in significant part as a consequence of a designated start date for making offers in this market.<sup>48</sup>

While thin markets—with the resulting negative effects on market participants’ overall satisfaction with their matches—can occur in either situation, the second case, in which labor market institutions seek to control the timing or method of transactions, also frequently produces situations in which market participants flout, rather than conform to, the market rules. In the clinical psychology market, between 10 and 25 percent of applicants reported violations of rules specifying a start date for the offering of positions.<sup>49</sup> So participants faced limited incentives to conform to the rules. Parts III and IV of this Article examine the extent to which the same is true in the present

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<sup>45</sup> See Avery, Jolls, Posner, and Roth, 68 *U Chi L Rev* at 801 (cited in note 10).

<sup>46</sup> See Priest, 22 *Yale J Reg* at 156 (cited in note 20).

<sup>47</sup> See, for example, Kozinski, 100 *Yale L J* at 1711 (cited in note 19) (“[N]othing can take the place of the personal interview. A thorough, searching interview, conducted with mutual candor, can tell judge and applicant a great deal about each other.”); Wald, 89 *Mich L Rev* at 153 (cited in note 17) (describing the clerkship relationship as “the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair”).

<sup>48</sup> See Roth and Xing, 84 *Am Econ Rev* at 1017 (cited in note 25).

<sup>49</sup> See *id.*

market for federal judicial law clerks; Part II addresses the other attribute of law clerk hiring—the time of hiring.

## II. EVIDENCE ON HIRING IN THE THIRD RATHER THAN THE SECOND YEAR OF LAW SCHOOL

In analyzing the evidence from our surveys about the move from hiring law clerks at the beginning of the second year of law school to hiring law clerks at the beginning of the third year of law school, we shall be emphasizing judges' responses because their status as repeat players makes them the more natural respondents to questions comparing the present regime for law clerk hiring to the regime in effect prior to the 2002 moratorium. The Appendix provides details about the content, distribution, and response rates of both the judge surveys and the student surveys; as we note there, while our surveys were not professionally designed instruments (for example, they were not pretested on subsamples of respondents), we obtained good response rates and gathered information consisting mostly of answers to straightforward factual questions.<sup>50</sup>

That federal appellate judges prefer hiring in the third year of law school is surprising neither to us nor to the judges who in the past argued for postponing hiring until the third year<sup>51</sup>—and it is indeed what our survey responses reveal. One piece of evidence comes from direct questions on our judge surveys about whether judges preferred the current regime to the regime in effect prior to the moratorium; in light of their later written comments (described in the next paragraph), a fair inference is that the judges who preferred the current regime did so at least in part because of the later time of hiring. In quantitative terms, well over 80 percent of the judges responding to our comparative question about the two clerk hiring regimes indicated a preference for the current regime (Table 1).<sup>52</sup>

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<sup>50</sup> A small number of questions led to confusion or different interpretations among some respondents, and so responses to these questions were not used. The full text of all questions the responses to which we use in our analysis is given below. The questions on the judge and student surveys had many similarities—for instance, questions we asked on both surveys about the timing of first interviews and first offers—but also, given these market participants' differing roles in the market, many differences as well.

<sup>51</sup> See sources cited in note 36. As discussed in note 22, Professor Priest has a different view. See Priest, 22 Yale J Reg at 157 (cited in note 20).

<sup>52</sup> The full text of the question on our 2004 Judge Survey was, "Do you prefer hiring clerks the way it was done in practice *this year* (for 2005–2006 clerkships), compared to the system in effect prior to 2003?" The text of the question on our 2005 Judge Survey was identical except that the year reference was 2006–2007 instead of 2005–2006. A few responses were equivocal about the comparison and so were not counted as either affirmative or negative answers.

TABLE 1: FEDERAL APPELLATE JUDGES' COMPARISON OF CURRENT AND PREVIOUS LAW CLERK HIRING REGIMES

	Fall of 2004	Fall of 2005
Number and percentage of responding judges who prefer current system	95 (85%)	70 (86%)
Number and percentage of responding judges who prefer previous system	17 (15%)	11 (14%)
Total number of responses	112	81

Sources: 2004 and 2005 Judge Surveys. See note 52 for the full text of the survey question.

In terms of the written remarks, a number of responses to the open-ended question, “Is there anything else that comes to mind about your experience of the clerkship hiring process that you would like to share with us?,” emphasized a strong preference for the new regime’s later hiring time, as shown in Table 2.

TABLE 2: FEDERAL APPELLATE JUDGES' EXPRESSIONS OF PREFERENCE FOR LATER OVER EARLIER HIRING TIME

Survey	Comment
2004 Survey #8	We much prefer hiring 3rd yr students.
2004 Survey #50	The present system is working—it is far better than when we were fighting to hire as soon as law review selections were made.
2004 Survey #64	[T]he system as a whole was improved by a single factor: moving the interview/hiring year from 2L to 3L.
2004 Survey #75	[M]oving hiring from the 2nd to 3rd year makes [the new process] all worthwhile.
2004 Survey #85	The new system is much better than the old. I had just sent a memo to all the judges on my court saying I was going to hire only 3Ls and graduates when the new rules were proposed.
2004 Survey #92	[T]he plusses of interviewing/hiring in 3d year are substantial and worth resisting the cheaters and playing by the rules.
2005 Survey #56	We <i>greatly</i> like waiting until 2nd year grades [and] law review positions are determined.
2005 Survey #99	It is a vast improvement to consider 3rd year applicants.

Sources: 2004 and 2005 Judge Surveys. See the text just before this table for the full text of the survey question.

Although our judge survey responses provide strong evidence that most judges prefer later hiring to earlier hiring, there is an ambiguity in “prefer.” In one sense *all* judges would prefer to hire late, so that they would have more information about the applicants, but by their behavior some judges reveal a preference for earlier hiring (by them!) in order to steal a march on other judges. Some of these judges might be worse off in a system that allowed no opportunities for strategic timing of the hiring decision. But, as discussed in Part I.A, hiring early in appli-

cants' careers may be inefficient overall even where early hiring is individually rational for some market participants.<sup>53</sup>

### III. ADHERENCE TO START DATES

We turn now to the question of just how much adherence versus nonadherence there is among federal appellate judges to the set of start dates established by the current regime for the hiring of federal judicial law clerks. We report our empirical findings and also draw lessons from other markets and economic analysis for understanding the current pattern of adherence versus nonadherence to those dates.

#### A. Historical Experience with Start Dates in the Law Clerk Market and Beyond

Attempts to set start dates in the law clerk market extend back nearly a quarter century.<sup>54</sup> The previous attempts provide illuminating context for our discussion below of the experience with start dates in recent years.

In 1983 the Judicial Conference recommended a start date for clerkship applications of September 15 of the third year of law school—almost identical to the current start date.<sup>55</sup> After reports of “rampant” defections, however, the recommendation was quickly abandoned.<sup>56</sup> An effort in 1986 to fix a start date of April 1 of the second year of law school for review of applications was likewise soon abandoned because, again, many judges did not adhere to it.<sup>57</sup> In 1989, Judges Edward Becker and Stephen Breyer proposed a March 1 start date for conducting interviews; this, too, was abandoned after a substantial number of judges indicated that they would not adhere.<sup>58</sup> The following year, more than two-thirds of the federal appellate judges agreed not to make clerkship offers before May 1, 1990 (at noon Eastern Daylight Time) of the students' second year of law school.<sup>59</sup> (Review of applications and interviewing of candidates could take place at any time.) This approach elicited broad condemnation for encouraging tacit agreements between judges and clerks prior to May 1; for penalizing judges who called applicants promptly at noon only to learn that they had already

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<sup>53</sup> See notes 32–33 and accompanying text.

<sup>54</sup> See Becker, Breyer, and Calabresi, 104 *Yale L J* at 209 (cited in note 20) (describing a March 1983 initiative requesting that judges not consider applications before the start of students' third year of law school).

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> See *id.* at 210.

accepted offers from judges with “fast watches”; and for the effect on judges who failed to demand on-the-spot responses to offers made at or shortly after the noon starting gate, only to discover that if the offers were declined most of the other desired applicants would already be committed and so would be unavailable to judges whose initial offers had been rejected.<sup>60</sup>

The next attempt at a start date came in 1993. The 1993 attempt imposed a March 1 start date for clerkship interviews and initially appeared more promising than previous efforts.<sup>61</sup> Indeed, its sponsors stated after its first year of operation that although “[w]e entertain no illusions that the March 1 Solution is perfect, . . . we respectfully submit that, like democracy with all its flaws, it is the best system that anyone has conceived thus far.”<sup>62</sup> However, with the passage of time, more and more judges interviewed and made offers prior to the start date, and in 1998 the Judicial Conference abandoned the “March 1 Solution” because it was “not universally followed and, therefore . . . not an accurate reflection of the practice in the courts.”<sup>63</sup>

The law clerk market is far from alone in its historical inability to stick with start dates. In a large range of diverse markets, such start dates have failed—a point we documented at some length in our prior study.<sup>64</sup> The basic problem is that adherence to such start dates is contrary to the self-interest of many market participants even where—following the economic analysis described in Part I.A—widespread adherence is collectively rational.<sup>65</sup> History suggests that the law clerk market is no exception, but let us see what our survey responses reveal about adherence to the new start dates over the last three law clerk hiring seasons.

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<sup>60</sup> See *id.* at 210–11.

<sup>61</sup> See *id.* at 212–16.

<sup>62</sup> *Id.* at 222.

<sup>63</sup> Reports of the Proceedings of the Judicial Conference of the United States 38 (Sept 15, 1998). The regime in effect from 1993–1998 was the last judicially instituted attempt to regulate the law clerk market prior to the current regime. However, for one year following the Judicial Conference’s abandonment of the March 1 start date, “some law schools attempted to enforce a February 1 start date for sending application materials, including faculty recommendations, to judges, but these efforts were largely abandoned the following year (as well as somewhat ignored in the year in which they were nominally in effect).” Avery, Jolls, Posner, and Roth, 68 *U Chi L Rev* at 806 (cited in note 10).

<sup>64</sup> See Avery, Jolls, Posner, and Roth, 68 *U Chi L Rev* at 851–55, 862 (cited in note 10).

<sup>65</sup> See notes 32–33 and accompanying text.

## B. Evidence on Adherence to Start Dates in the Present Law Clerk Market

The two most important start dates under the current regime are a date before which interviews may not be scheduled and a date before which neither interviews nor the making of offers may occur. While in the 1990 reform effort interviews and offers were separated—with interviews allowed before the designated date for making offers—the general view was that this regime strongly encouraged tacit agreements between judges and applicants prior to the designated offer date.<sup>66</sup> Thus subsequent reforms, including the present one, have avoided any gap between the time at which interviews are permitted to occur and the time at which offers may be made. Table 3 reports the relevant calendar dates under the law clerk hiring regimes for 2004, 2005, and 2006.

TABLE 3: START DATES FOR LAW CLERK HIRING

	Calendar date in fall of 2004	Calendar date in fall of 2005	Calendar date in fall of 2006
Scheduling of interviews	Monday, Sept 13	Thursday, Sept 15 (noon EDT)	Thursday, Sept 14 (noon EDT)
Conducting of interviews and making of offers	Monday, Sept 20	Thursday, Sept 22	Thursday, Sept 21

Sources: *Summary of the Law Clerk Hiring Plan for 2004* (cited in note 15); *Federal Judges Law Clerk Hiring Plan: Fall 2005 & Fall 2006* (cited in note 15).

Tables 4A and 4B report the results of a series of questions on our judge surveys about judges' knowledge of adherence or nonadherence to these start dates.<sup>67</sup> For the fall of 2004, 44 percent of responding

<sup>66</sup> See text accompanying note 60.

<sup>67</sup> The full text of the relevant portions of the question on our 2004 Judge Survey was as follows:

Next to each bullet item below from this year's agreed-upon schedule for law clerk hiring, please indicate with an "X" your impression of how well that item was adhered to. Please mark all responses that apply.

- Scheduling of Interviews: Judges may contact applicants to schedule interviews beginning *the first Monday after Labor Day* (September 13, 2004).

I am not aware of any appellate judges who did not adhere  
 To my knowledge almost all appellate judges adhered  
 To my knowledge many appellate judges adhered but a substantial number did not  
 To my knowledge all judges on my circuit adhered  
 At least one judge on my circuit did not adhere  
 Relatively few judges fully adhered

- Interviews and Offers: Judges may conduct interviews and extend offers beginning *the second Monday after Labor Day* (September 20, 2004).

judges stated either that many appellate judges adhered but a substantial number did not adhere, or that relatively few appellate judges adhered, to the start date for conducting interviews and making offers (Table 4A). For the fall of 2005, the corresponding percentage was 58 percent (Table 4B).

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- I am not aware of any appellate judges who did not adhere
  - To my knowledge almost all appellate judges adhered
  - To my knowledge many appellate judges adhered but a substantial number did not
  - To my knowledge all judges on my circuit adhered
  - At least one judge on my circuit did not adhere
  - Relatively few judges fully adhered

The full text of the relevant portions of the question on our 2005 Judge Survey was as follows:

Next to each bullet item below from this year's agreed-upon schedule for law clerk hiring, please indicate with an "X" your impression of how well that item was adhered to. Please mark all responses that apply.

- Scheduling of Interviews: Judges may contact applicants to schedule interviews beginning at noon (EDT) on *the second Thursday after Labor Day* (September 15, 2005).

- I am not aware of any appellate judges who did not adhere
- To my knowledge almost all appellate judges adhered
- To my knowledge many appellate judges adhered but a substantial number did not
- To my knowledge all judges on my circuit adhered
- At least one judge on my circuit did not adhere
- Relatively few judges fully adhered

- Interviews and Offers: Judges may conduct interviews and extend offers beginning *the third Thursday after Labor Day* (September 22, 2005).

- I am not aware of any appellate judges who did not adhere
- To my knowledge almost all appellate judges adhered
- To my knowledge many appellate judges adhered but a substantial number did not
- To my knowledge all judges on my circuit adhered
- At least one judge on my circuit did not adhere
- Relatively few judges fully adhered

We do not make use of the responses "To my knowledge all judges on my circuit adhered" and "At least one judge on my circuit did not adhere" from our 2004 and 2005 Judge Surveys because a number of judges did not select either option but had previously selected "I am not aware of any appellate judges who did not adhere," and we were unsure of how to categorize these responses. ("I am not aware of any appellate judges who did not adhere" could reflect a lower level of confidence or knowledge than the "To my knowledge all judges on my circuit adhered" formulation.) With respect to the four responses used in our analysis, in a few cases a judge indicated ambivalence between two responses (for instance, "To my knowledge many appellate judges adhered but a substantial number did not" and "Relatively few judges fully adhered"), and in such cases we used the response suggesting greater reported adherence, so that if anything our results should overstate the level of reported adherence.



TABLE 4A: FEDERAL APPELLATE JUDGES' REPORTS OF ADHERENCE TO START DATES, FALL OF 2004

	Number and cumulative percentage of responding judges			
	Relatively few judges adhered	To responding judge's knowledge, many judges adhered but a substantial number did not	To responding judge's knowledge, almost all judges adhered	Responding judge not aware of any judges who did not adhere
Start date for scheduling interviews	0 (0%)	34 (34%)	41 (76%)	24 (100%)
Start date for conducting interviews and making offers	1 (1%)	42 (44%)	36 (81%)	19 (100%)

Source: 2004 Judge Survey. See footnote 67 for the full text of the survey question. The total number of responses to the question about the judges' impression of adherence to the start date for scheduling interviews was 99, and the total number of responses to the question about their impression of adherence to the start date for conducting interviews and making offers was 98 (5 judges chose one of the responses used in our analysis for this question but not the question about interview scheduling, and 6 judges chose one of the responses used in our analysis for the question about interview scheduling but not the question about conducting interviews and making offers).

TABLE 4B: FEDERAL APPELLATE JUDGES' REPORTS OF ADHERENCE TO START DATES, FALL OF 2005

	Number and cumulative percentage of responding judges			
	Relatively few judges adhered	To responding judge's knowledge, many judges adhered but a substantial number did not	To responding judge's knowledge, almost all judges adhered	Responding judge not aware of any judges who did not adhere
Start date for scheduling interviews	5 (6%)	41 (52%)	32 (89%)	10 (100%)
Start date for conducting interviews and making offers	4 (5%)	45 (58%)	25 (87%)	11 (100%)

Source: 2005 Judge Survey. See footnote 67 for the full text of the survey question. The total number of responses to the question about the judges' impression of adherence to the start date for scheduling interviews was 88, and the total number of responses to the question about their impression of adherence to the start date for conducting interviews and making offers was 85 (1 judge chose one of the responses used in our analysis for this question but not the question about interview scheduling, and 4 judges chose one of the responses used in our analysis for the question about interview scheduling but not the question about conducting interviews and making offers).

Two points are important in interpreting the judges' responses. First, any selection bias in the judges who chose to respond to our survey—which was anonymous—is unlikely to lead to an overstatement

of reported nonadherence to the start dates. Although some judges may have been eager to express opposition to the current regime by survey responses indicating that the regime was not working, such judges cannot be a significant presence in our response pool because—as discussed in Part II above—the overwhelming majority of our judge respondents spoke positively about the later timing under the current regime. It remains possible that judges who support the current regime but had observed particularly high levels of nonadherence were especially likely to respond to our survey and so were over-represented in our sample, but even if so the numbers (as distinguished from the percentages) in the shaded boxes in Tables 4A and 4B represent lower bounds on the absolute level of reported nonadherence.

Second, although the reported level of nonadherence was higher in 2005 than in 2004, we cannot draw a definitive inference that nonadherence increased because our response pools in the two years may have differed in some systematic way (a possibility that is particularly likely given that our response rates were different in the two years and given that our surveys were mailed at different times—December versus February—in the two years). If, however, nonadherence did increase between the fall of 2004 and the fall of 2005, then the change would be particularly notable because the degree of constraint upon judges was actually lower in an important respect in the fall of 2005 than in the fall of 2004. The rules for 2004 expressly applied to law school graduates as well as third-year law students, and the 2005 rules did not.<sup>68</sup> Although our 2004 Judge Survey did not specifically question judges about their hiring of law school graduates, our 2005 Judge Survey did, and the responses showed the significance of this path of hiring in the law clerk market.<sup>69</sup>

Consistent with the evidence from our judge survey responses, our student survey responses reveal much interviewing for and offering of clerkships before the start dates. As in our previous study, we focus on responses from students who applied for federal appellate clerkships because our judge survey data come exclusively from federal appellate judges.<sup>70</sup>

Tables 5A, 5B, and 5C report the dates on which responding students were first contacted to schedule interviews, were first inter-

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<sup>68</sup> See *Summary of the Law Clerk Hiring Plan for 2004* (cited in note 15); *Federal Judges Law Clerk Hiring Plan: Fall 2005 & Fall 2006* (cited in note 15).

<sup>69</sup> Of the 106 responses to the question “In hiring for clerkships for 2006–2007, did you hire any clerks who had already graduated from law school?” on our 2005 Judge Survey, 64 responses (60 percent) were affirmative.

<sup>70</sup> We received a total of 527 student responses in 2004, a total of 545 student responses in 2005, and a total of 601 student responses in 2006. See the Appendix. Of course, many respondents did not apply for federal judicial clerkships at all. Among those who did apply, most, but not all, applied to at least some federal appellate clerkships.

viewed, and first received clerkship offers.<sup>71</sup> The shaded boxes indicate behavior that is inconsistent with the start dates specified in Table 3. Between 29 and 37 percent of responding students received their first invitations to interview before the start dates for the scheduling of interviews; between 21 and 31 percent had their first interviews before the start dates for interviews; and between 11 and 22 percent received their first clerkship offer before the start dates for offers.<sup>72</sup>

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<sup>71</sup> The full text of the question on the 2004, 2005, and 2006 Student Surveys about interview scheduling was, "If you have received at least one invitation to interview, what was the date at which you received your first invitation to an interview?" The full text of the question on the 2004, 2005, and 2006 Student Surveys about interviewing was, "What was the date and time of your first interview?" Finally, the full text of the question on the 2004, 2005, and 2006 Student Surveys about applicants' first offer was, "If you have received at least one clerkship offer, what was the date and time of your first clerkship offer?"

<sup>72</sup> Our results for the scheduling and conducting of "interviews" are vulnerable to a definitional question that is not presented with respect to "offers." Our 2004, 2005, and 2006 Student Surveys defined "interview" as "either an in-person interview or a conversation other than an in-person interview if such conversation led to an offer of a clerkship." In adopting this formulation, the central case we had in mind was one in which an applicant was hired after a telephone interview. However, it is conceivable that this question also captured cases in which students had a conversation other than an in-person interview under a law clerk hiring rule allowing informal "chat[s]" between judges and law students over the summer if a law student is spending the summer working in the judge's geographic area but attends a law school far from that area. See, for example, *Frequently Asked Questions about the Law Clerk Hiring Plan*, <http://www.cadc.uscourts.gov/internet/lawclerk.nsf/Content/FAQS?OpenDocument> (visited Apr 27, 2007) ("[T]he Plan does not forbid a law student who, say, is from Virginia and working in Tulsa during the [s]ummer from talking with a judge who is otherwise available to chat. This has happened in the past and the judges saw no reason to prohibit it under the new Plan. The main point, however, is that the formal hiring process will take place in the fall."). A student hired after such a chat, followed by (say) a phone conversation during the fall, conceivably could have reported in response to our question that the student's first "interview" occurred over the summer, as the summer chat might have been viewed as a "conversation [that] led to an offer of a clerkship," even though it did not proximately lead to such an offer. It seems unlikely that this phenomenon could have a significant effect on our results. But readers concerned about it may wish to focus on the final row in Tables 5A, 5B, and 5C, as that row reports the date of applicants' first offers and so is not affected by the definitional issue with "interview" just described.

**TABLE 5A: DATE OF STUDENTS' FIRST SCHEDULING OF INTERVIEWS, FIRST INTERVIEWS, AND FIRST OFFERS, FALL OF 2004**

	Number and cumulative percentage of responding students				
	Before Sept 7	Sept 7-12	Sept 13-19	Sept 20-26	After Sept 26/Not yet
Date of first scheduling of interview	8 (5%)	37 (29%)	97 (92%)	8 (97%)	5 (100%)
Date of first interview	8 (5%)	7 (10%)	17 (21%)	107 (90%)	16 (100%)
Date of first offer	3 (2%)	3 (4%)	9 (11%)	89 (78%)	30 (100%)

Source: 2004 Student Survey. See note 71 for the full text of the survey questions. The table reflects responses from students who applied for federal appellate clerkships. The total number of responses to the question about when the students' first interview was scheduled and to the question about when their first interview took place was 155, and the total number of responses to the question about when they received their first offer was 134 (some students who interviewed did not receive any offers). The shaded areas in the table reflect behavior that is inconsistent with the start dates specified in Table 3.

**TABLE 5B: DATE OF STUDENTS' FIRST SCHEDULING OF INTERVIEWS, FIRST INTERVIEWS, AND FIRST OFFERS, FALL OF 2005**

	Number and cumulative percentage of responding students				
	Before Sept 6	Sept 6-14	Sept 15-21	Sept 22-28	After Sept 28/Not yet
Date of first scheduling of interview	9 (7%)	33 (31%)	88 (96%)	1 (96%)	5 (100%)
Date of first interview	8 (6%)	10 (13%)	24 (30%)	87 (93%)	9 (100%)
Date of first offer	3 (3%)	7 (8%)	5 (13%)	92 (89%)	13 (100%)

Source: 2005 Student Survey. See note 71 for the full text of the survey questions. The table reflects responses from students who applied for federal appellate clerkships. The total number of responses to the question about when the students' first interview was scheduled was 136; the total number of responses to the question about when their first interview took place was 138 (3 students answered this question but not the question about interview scheduling, and 1 student did not answer this question but did answer the question about interview scheduling); and the total number of responses to the question about when they received their first offer was 120 (some students who interviewed did not receive any offers). The shaded areas in the table reflect behavior that is inconsistent with the start dates specified in Table 3.

TABLE 5C: DATE OF STUDENTS' FIRST SCHEDULING OF INTERVIEWS, FIRST INTERVIEWS, AND FIRST OFFERS, FALL OF 2006

	Number and cumulative percentage of responding students				
	Before Sept 5	Sept 5–13	Sept 14–20	Sept 21–27	After Sept 27/Not yet
Date of first scheduling of interview	13 (12%)	27 (37%)	66 (97%)	2 (99%)	1 (100%)
Date of first interview	13 (12%)	5 (17%)	16 (31%)	73 (98%)	2 (100%)
Date of first offer	11 (11%)	3 (14%)	8 (22%)	65 (88%)	12 (100%)

Source: 2006 Student Survey. See note 71 for the full text of the survey questions. The table reflects responses from students who applied for federal appellate clerkships. The total number of responses to the question about when the students' first interview was scheduled and to the question about when their first interview took place was 109, and the total number of responses to the question about when they received their first offer was 99 (some students who interviewed did not receive any offers). The shaded areas in the table reflect behavior that is inconsistent with the start dates specified in Table 3.

Now it is possible to imagine ways in which students responding to our surveys—which, like the judge surveys, were anonymous—could be either more or less likely than the average student to have had interviews scheduled, interviews conducted, or offers made before the designated start dates. Students who were successful in obtaining clerkships, especially the most desired clerkships, might be more likely to respond to a clerkship survey than students who were less successful, and the most successful students may also have been more likely than the average ones to receive attention from judges before the start dates. Indeed, even if early attention did not increase the ultimate level of success, students who received such attention might feel good about the attention and thus be more likely to respond to a survey in which they would be reporting such attention. But it is also possible that students who scheduled interviews early, interviewed early, or received early offers would be less likely than other students to respond to our survey because in responding they would be reporting behavior inconsistent with the start dates. (The quotations at the start of this Article suggest that many students attach ethical significance to adhering to these dates.) Whatever one's view of the likely characteristics of our student response pool, however, the numbers (as distinguished from the percentages) in the shaded boxes in Tables 5A, 5B, and 5C represent lower bounds on the absolute level of activity before the start dates among the students at the schools covered by our student survey.

As with the judge survey results above, one cannot draw a definite inference about changes in behavior over time from the results in Tables 5A, 5B, and 5C. This is so because differences across years could reflect changes in the composition of the response pool across years—in the present case, if, say, activity in advance of the start dates became more accepted and, thus, more likely to be reported by students choosing to respond to the survey—rather than changes in behavior in the overall population.

Overall, then, our student responses, like our judge responses, suggest a substantial amount of activity in advance of the start dates in Table 3.<sup>73</sup> These findings mark a clear contrast with the declaration at the end of

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<sup>73</sup> Responses to an additional set of questions on our 2004 Judge Survey further corroborate the conclusion of substantial activity before the start dates. The full text of these questions was as follows:

When did you conduct your *first* interview (including any telephonic interviews that led to offers) for a 2005–2006 clerkship?

Before Sept. 7 \_\_\_\_ Sept. 7–12 \_\_\_\_ Sept. 13–19 \_\_\_\_ Sept. 20–26 \_\_\_\_

After Sept. 26 \_\_\_\_ No interviews yet \_\_\_\_

When did you make your *first* offer for a 2005–2006 clerkship?

Before Sept. 7 \_\_\_\_ Sept. 7–12 \_\_\_\_ Sept. 13–19 \_\_\_\_ Sept. 20–26 \_\_\_\_

After Sept. 26 \_\_\_\_ No offers yet \_\_\_\_

(In our 2005 Judge Survey, the date ranges specified inadvertently did not correspond fully to the start dates for the various stages of the law clerk hiring process, so we do not have comparable information from the responses to the 2005 Judge Survey.)

The table below reports responding judges' answers to the two questions from the 2004 Judge Survey. As in Tables 5A, 5B, and 5C in the text, the shaded fields below indicate behavior that is inconsistent with the start dates specified in Table 3 for the fall of 2004. As the table shows, 35 percent of the judges responding to the 2004 survey question about when they commenced interviewing reported having commenced their interviewing prior to the specified September 20 start date for conducting interviews in the fall of 2004. And nearly a quarter of judges (23 percent) responding to the 2004 survey question about when they commenced making offers reported having commenced making offers prior to the specified September 20 start date for offers in the fall of 2004. These numbers reflect not only interactions with third-year law students from the schools covered by our study but also interactions with law school graduates (who were covered by the start dates in 2004, see note 68 and accompanying text) and third-year law students from schools beyond the four schools covered by our study; as a result, it is not surprising that these numbers are higher than the numbers in Table 5A (which reflect only the experiences of third-year law students from the schools covered by our study). Note also that a rigorous comparison of the two sets of numbers would require one to know, as we do not, how much correlation there is in the students whom judges interview or to whom they make offers before the start dates, and also whether judges who move early at all tend to move early on just one student or most or all of the applicants whom they interview. For all of these reasons, the table below is offered not for purposes of direct comparison with the numbers in Table 5A but as evidence from a different source pointing in the same general direction as above—that is, substantial activity in advance of the start dates.

2004 by the judges responsible for the current regime that the “vast majority of judges complied with the 2004 Plan,” with only “several” judges not adhering to the start dates;<sup>74</sup> in 2004, as well as 2005 and 2006, our survey evidence suggests substantial activity before the start dates.

### C. Stabilization of the Present Law Clerk Market in a Pattern of Mixed Adherence and Nonadherence

*“How did you go bankrupt?”*

*“Two ways. Gradually and then suddenly.”*

—Ernest Hemingway, *The Sun Also Rises*<sup>75</sup>

Departures from the start dates specified by the current law clerk hiring regime have important potential implications for the ability of the law clerk market to preserve the benefits of hiring in the third rather than the second year of law school. While the good news from 2004, 2005, and 2006 is that departures from the start dates generally involved departing by days or weeks rather than months, the history of the previous failures to reform the timing of the law clerk market, described in Part III.A, must make one wonder what the current level of nonadherence bodes for the longer-term prospects of the current regime.

In some settings, an initial nontrivial level of nonadherence to a particular regime precipitates an accelerating cycle in which adherence drops over time. An example of this type of dynamic is Thomas Schelling’s “dying seminar.”<sup>76</sup> A faculty member organizes a group of twenty-five people to meet regularly, and most show up to the first meeting.<sup>77</sup> But some of the initial participants seem unwilling to continue attending given that a few of the initial invitees did not participate.<sup>78</sup> Once these participants stop attending, others may drop out in response, and soon the seminar may fail to draw anyone.<sup>79</sup> Various spe-

	Number and cumulative percentage of responding judges				
	Before Sept 7	Sept 7–12	Sept 13–19	Sept 20–26	After Sept 26/ Not yet
Date of first interview	11 (9%)	8 (16%)	23 (35%)	66 (90%)	12 (100%)
Date of first offer	5 (4%)	9 (11%)	14 (23%)	68 (78%)	27 (100%)

Source: 2004 Judge Survey. See above for the full text of the survey questions. The total number of responses to the question about when the judges commenced interviewing was 120, and the total number of responses to the question about when they commenced making offers was 123 (3 judges responded to this question but not the question about commencing interviewing).

<sup>74</sup> Harry T. Edwards and Edward R. Becker, Memorandum, *Assessment of the 2004 Law Clerk Hiring Plan and Suggestions for the Future 2* (Nov 10, 2004).

<sup>75</sup> Ernest Hemingway, *The Sun Also Rises* 136 (Charles Scribner’s Sons 1926).

<sup>76</sup> Thomas C. Schelling, *Micromotives and Macrobehavior* 91–92 (Norton 1978).

<sup>77</sup> See *id.*

<sup>78</sup> See *id.* at 92.

<sup>79</sup> See *id.*

cific patterns are possible, as Schelling goes on to describe,<sup>80</sup> but the central feature of all of the cases is that people's willingness to participate in some activity may turn on how many others will participate. That is why when Judges Becker and Breyer suggested to their judicial colleagues the adoption of a 1989 start date for law clerk interviews of March 1 of the second year of law school, Becker and Breyer said the proposal would be adopted only if 85 percent of the judges agreed to it.<sup>81</sup> When only 75 percent agreed, the proposal was shelved.<sup>82</sup> But maybe they were wrong and many judges are willing to adhere to start dates in the law clerk market despite their awareness that many of their colleagues are not adhering. As one judge said in response to our 2005 survey, "The key to success for the system is the realization that 100% (or even 93%) adherence isn't necessary."<sup>83</sup> Below we assess potential ways in which a substantial level of nonadherence to start dates can be sustainable in a long-run equilibrium.

We assess this prospect as a matter of positive economic analysis, without attempting a full assessment of the normative desirability of such an equilibrium. An equilibrium with partial adherence would have the virtue that a number of applicants would be hired in the third rather than the second year of law school but the disadvantage that a substantial number of market participants would be flouting the market rules—a situation that leads to moral dilemmas of the sort reflected in the quotations at the beginning of this Article. Normative comparison with regard to the criterion of market thickness—whether participants have the ability to consider and compare multiple offers before making their decisions—is even less determinate; our prior study described the serious limits on market participants' ability to do this in the premoratorium period,<sup>84</sup> while Part IV below describes the difficulties under the present start dates. There are several barriers to direct comparison on this dimension—most obviously the point, noted in our discussion in Part IV.A of exploding offers, that the sample pools may be different across the two studies. Because we believe the normative comparison between an equilibrium with mixed adherence to start dates and the premoratorium law clerk market—bearing in mind the ethical aspects of noncompliance with what are thought to be market "rules"—is ultimately indeterminate, we focus below on positive economic analysis of the prospects for an equilibrium with mixed adherence to the start dates.

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<sup>80</sup> See *id.* at 102–10.

<sup>81</sup> See Becker, Breyer, and Calabresi, 104 *Yale L J* at 209 (cited in note 20).

<sup>82</sup> See *id.*

<sup>83</sup> 2005 Judge Survey #16.

<sup>84</sup> See Avery, Jolls, Posner, and Roth, 68 *U Chi L Rev* at 813–29 (cited in note 10).



### 1. The potential role of psychological breakpoints.

On one view, the extent of nonadherence to the start dates in the law clerk market is limited by a psychological “breakpoint” associated with the start of the third year of law school. Perhaps many judges will be reluctant to begin the process of law clerk hiring during the summer before the third year of law school, as opposed to after the school year begins, even when some degree of early movement is apparent to many market participants. Indeed, the choice of Labor Day as the start date for the market tends to make prior actions conspicuous as violations of the start dates. A hopeful view is that this design might create a breakpoint in timing that helps to stabilize the market. Although selective colleges place considerable emphasis on early application programs for college admissions, for instance, it is rare for a college to solicit applications prior to the start of the twelfth grade.<sup>85</sup>

But it is easy to overstate the importance of seemingly obvious breakpoints. In the market for college athletes, for example, competition led to committing college athletic scholarships to students in the eighth grade,<sup>86</sup> while in the market for medical residents such competition led to recruiting medical students two years before their medical internships would begin.<sup>87</sup> Similarly, the shift in timing to early in the second year of law school for the clerkship process in the period prior to the 2002 moratorium surpassed most reasonable breakpoints previously suggested by observers and participants; most prominently, Judge Kozinski said in 1991 that February or March of the second year of law school was a “natural breakpoint” before which (because of the grades and law review election results that would become known at that time) judges would not be willing to hire,<sup>88</sup> but within a few years the market was moving at the beginning of the fall of the second year of law school, well before this “breakpoint.”<sup>89</sup> In addition, in the law clerk market the current breakpoint is several months *after* the latest information (grades and recommendations from the second semester

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<sup>85</sup> See Christopher Avery, Andrew Fairbanks, and Richard Zeckhauser, *The Early Admissions Game* 19–70, 187 (Harvard 2003) (providing an overview of the timing of many colleges’ early application programs, and giving one example of solicitation of applications prior to the start of the twelfth grade).

<sup>86</sup> See, for example, Ken Bikoff, *QB Should Be Able to Avoid High Expectations—for Now* (ESPN.com May 6, 2003), online at <http://espn.go.com/nfl/s/2002/1218/1479044.html> (visited Apr 27, 2007) (describing the early commitment of basketball player Damon Bailey to attend Indiana University).

<sup>87</sup> See Alvin E. Roth, *The Origins, History, and Design of the Resident Match*, 289 *J Am Med Assoc* 909, 909–10 (2003); Alvin E. Roth, *The Evolution of the Labor Market for Medical Interns and Residents: A Case Study in Game Theory*, 92 *J Polit Econ* 991, 994 (1984).

<sup>88</sup> See Kozinski, 100 *Yale L J* at 1710 (cited in note 19).

<sup>89</sup> See Avery, Jolls, Posner, and Roth, 68 *U Chi L Rev* at 830–33 (cited in note 10).

of the second year of law school) has become available. For all of these reasons, the case for the existence of a psychological barrier to a significant subset of market participants moving prior to Labor Day does not seem strong.

## 2. The potential role of market segmentation.

The present pattern of adherence and nonadherence to the start dates for the law clerk market could also be sustainable in a long-run equilibrium if the market has become or is becoming segmented, with one segment of the market moving largely prior to the start dates but the other segments moving after these dates. Some students might focus their attention on one subset of clerkships in their applications, while others might concentrate their attention on a different set of clerkships. Once a few judges in the early segment violated the start dates, others in that same segment would have a powerful incentive to move early as well, but the other segments could remain largely unaffected and continue to adhere to the start dates.<sup>90</sup>

One possibility is that the law clerk market has become segmented, to a degree, by judges' political background or philosophy.<sup>91</sup> In our initial study of the law clerk market in 1998–2000, we considered asking judges for the political party of the president who nominated them, but we ultimately determined that doing so might significantly lower our response rate. We followed the same approach in our present set of surveys, and so our survey responses provide no quantitative data relating to political segmentation. Very substantial information about individual judges (by name, so that political background or philosophy could be ascertained) is available on a heavily visited clerkship blog site,<sup>92</sup> but, unfortunately, most of the posts do not specify whether scheduling interviews or making offers on the dates stated on the blog was undertaken with respect to law school graduates (in compliance with the law clerk hiring regime after 2004—and the blog was not operating in 2004) or third-year law students (in violation of the regime).<sup>93</sup> It would not be surprising if politically conservative judges were less apt to comply with the start dates, less because con-

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<sup>90</sup> See Schelling, *Micromotives and Macrobbehavior* at 109–10 (cited in note 76) for discussion of this type of segmented outcome.

<sup>91</sup> As one student wrote, “[I]t seems as if the republican/conservative judges were more likely to ‘break the rules’ than the democrat/liberal judges.” 2005 Student Survey #105.

<sup>92</sup> See <http://lawschoolclerkship.blogspot.com> (visited Apr 27, 2007).

<sup>93</sup> Some might also worry (perhaps without great reason) about the reliability of the blog postings. In contrast to the questions in our surveys, which ask about judges' and students' own personal experiences and opinions, the blog postings (for example, “Wilkinson is done,” “Hall has finished hiring”) may reflect gossip students have heard as opposed to events witnessed or experienced by them personally.

servatives are hostile to “regulation” than because, since most law students, especially at elite law schools, are liberal, conservative judges may feel themselves at a disadvantage in the competition for first-rate clerks who share their political orientation. This is speculation. Still, if there is segmentation along political lines, the market’s long-run equilibrium could involve limited adherence to the start dates for clerk hiring in one segment of the market and widespread adherence in the other. Students preferring to work for conservative judges would apply, and frequently be hired, before the start dates, while students preferring to work for liberal judges would apply, and generally be hired, in accordance with the start dates.

Another possibility is segmentation by geographic distance from clusters of elite law schools. Start dates may advantage judges whose chambers are near such clusters because applicants can then schedule more interviews within a compressed time frame.<sup>94</sup> The distant judges might therefore violate the start dates, and the proximate ones adhere to them. But we did not inquire about city or state on our judge surveys.<sup>95</sup>

An extreme form of market segmentation would have the market subdivided a large number of times; recall that in the market for gastroenterology fellows the principal advantages of having markets at all were lost because of large-scale segmentation. The sort of segmentation discussed here, by contrast, potentially involves large enough subsectors of the market to preserve many of the advantages of markets as an allocation mechanism.

### 3. The potential role of informal understandings.

A different—and less benign—form of stabilization of the current pattern of reported adherence and nonadherence would involve increasing departure from the *spirit* of the start dates even among those adhering to the *letter* of those dates. Our surveys did not make reference to this issue, but nonetheless a number of student respondents accused market participants of following the start dates formally but not substantively.<sup>96</sup> As Table 6 reveals, some such violations were bla-

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<sup>94</sup> As one student noted, “[I]t had been made clear to me that several of my judges would complete their hiring by the late morning of the first day, and it was logistically impossible for me to be in more than one city at once during that period!” 2006 Student Survey #488.

<sup>95</sup> Our judge surveys did ask judges for their circuit. But because of the relatively small number of judges in each circuit, together with our roughly 50 percent response rate, we cannot reliably determine whether reported adherence varies by circuit, simply because the (for instance) six judges out of twelve judges who responded from Circuit A could constitute a sample very different from that represented by the six judges out of twelve judges who responded from Circuit B.

<sup>96</sup> As stated in the text, no particular survey question inquired about this issue, so, in contrast to our discussions of the other tables in this Article, we do not quote from our survey questions.

tant. One student respondent remarked that “[m]any judges will nominally ‘follow the rules’ but will also communicate with applicants through a ‘back channel’ or will do everything short of ‘officially’ scheduling an interview or making an offer.”<sup>97</sup>

TABLE 6: STUDENT REPORTS OF DEPARTURES FROM THE SPIRIT  
(THOUGH NOT THE LETTER) OF THE START DATES

Survey	Comment
2004 Survey #59	I received [an] email on Sept. 9 asking me to call to schedule an interview on Sept. 13 [the date on which interviews could be offered].
2004 Survey #296	[C]lerks who knew students called “on their own initiative” early, just to let us know their judge would be in contact.
2004 Survey #299	A number of judges or clerks made or sent “pre-interview” calls or emails (e.g. “I look forward to scheduling an interview with you next week”).
2004 Survey #533	[I] received [an] email before Sept. 13 [the date on which interviews could be offered] notifying me of an intent to offer [an] interview on Sept. 13.
2005 Survey #1	[S]everal judges called me before [September 15, the date on which interviews could be offered] to say that they <i>would</i> be calling me on the 15th for a[n] interview.
2005 Survey #87	I technically did not receive any interviews until Thursday, Sept. 15th (the first “official” day that interview offers could be made). However, at least 4 judges either emailed me or called me between September 9th and 13th to say that they were “very interested” in my application, even though they did not technically offer me an interview yet.
2005 Survey #9	[Judge X] required that I have an “informal conversation” with one of his clerks around September 9 or so (well before the hiring timeline permitted contact with chambers) before he would consider inviting me for an interview. [W]hen I stated that I wished to comply with the hiring timeline, I lost the opportunity to interview.
2005 Survey #140	[A]n e-mail was sent [to me on September 12] letting me know I would be getting an invitation to interview on the 15th [the date on which interviews could be offered].
2005 Survey #154	On Sept. 7, [Judge X’s] clerk responded to me in part as follows: “[Judge X] has asked me to let you know that he is extremely interested in interviewing you. He has decided not to depart from the official hiring schedule, so he won’t call you to schedule until next week, but he’d like to interview you the first day that the rules allow.”
2006 Survey #569	I rec[eive]d an email on 9/11 indicating that I would receive a call on 9/14 [the date on which interviews could be offered].

Sources: 2004, 2005, and 2006 Student Surveys.

Such informal understandings have undermined start dates in other markets. In the case of college football bowls, for instance, teams and bowls were for many years required by the National Collegiate Athletic Association to wait until a specified day, called “Pick-Em

<sup>97</sup> 2005 Student Survey #87. Another student wrote, “I somewhat resented judges who officially adhered to the hiring plan, but did not do so in fact.” 2005 Student Survey #153.

Day,” before making agreements on who would play whom in the major bowls.<sup>98</sup> However, despite formal adherence to Pick-Em Day, informal agreements were reached weeks in advance of the specified date.<sup>99</sup> Similarly, Japanese university graduates may not be formally hired far in advance of their graduation dates.<sup>100</sup> Despite formal adherence to the designated start dates, informal understandings called *naitei* are commonly reached well before graduation.<sup>101</sup> It is too early to tell whether a similar pattern of informal clerkship offers (as distinguished from the informal interview offers reflected in Table 6) will ultimately emerge in the law clerk market.

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Given the mixed pattern of adherence and nonadherence revealed by our data, the best hope for avoiding a downward spiral of nonadherence is segmentation in the market. (Again, we do not offer any independent normative defense of this outcome.) Of course, with an aggressive system of sanctions for nonadherence, it is certainly possible that higher adherence would be achieved (although, as suggested by the discussion just above, it might be more in letter than in spirit). But neither federal appellate judges nor any other actor that might impose official sanctions has chosen to do so.<sup>102</sup> On the more modest possibility of attaining a stable equilibrium through segmentation, the evidence from other markets is not necessarily encouraging, but it remains possible that segmentation—most likely by political orientation or geography—could avoid a trend of growing nonadherence to the start dates; the fact that, as discussed above, judges are able to opt out of the adherence-nonadherence dilemma by hiring law school graduates may increase the likelihood of successful stabilization with meaningful adherence in some segments. We return to the prospect of market segmentation in Part IV. Without such segmentation, the law clerk market is likely either to return to a much earlier point in applicants’ careers or to see the implementation of some form of centralized matching system.<sup>103</sup>

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<sup>98</sup> See Roth and Xing, 84 Am Econ Rev at 1009 (cited in note 25).

<sup>99</sup> See id at 1009–12.

<sup>100</sup> See id at 1015–16.

<sup>101</sup> See id.

<sup>102</sup> See, for example, Avery, Jolls, Posner, and Roth, 68 U Chi L Rev at 864 (cited in note 10) (“[I]n the context of a start date for the law clerk market, the ability of some central authority to mete out punishments to judges who defect is limited by the institutional constraints surrounding the judiciary.”).

<sup>103</sup> The use of a centralized matching system in the law clerk market has been suggested a number of times. See Avery, Jolls, Posner, and Roth, 68 U Chi L Rev at 869–84 (cited in note 10); Epstein, 10 Green Bag 2d at 46–48 (cited in note 20); Trenton H. Norris, *The Judicial Clerkship*

## IV. “EXPLODING OFFERS” AND COMPRESSED MARKET TIMING

*I . . . had an [early morning] interview [on September 22, the first day on which interviews were permitted], which resulted in an exploding offer. The judge wanted an immediate response. [H]e was my 2nd choice of those judges who invited me to interview . . . . I was able to convince my 2nd choice judge [to give] me until the end of the day . . . . Then I rushed to catch a plane to [City X]. I checked into a seedy hotel long enough to shower and change suits, then headed to a [late afternoon] interview with the judge I thought was my top choice. . . . This judge explained that he had wanted to make decisions that first night, but that . . . he had promised . . . he would not fill his slots before interviewing [two applicants the following day]. I explained that he was my first choice but that I had an offer that exploded at the end of the day, and he took my cell number and agreed to make a decision with his current clerks . . . . I went back to the seedy hotel room to wait for his call. Meanwhile my 2nd choice judge’s clerk left a message on my home*

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*Selection Process: An Applicant’s Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 Cal L Rev 765, 791–98 (1993); Oberdorfer and Levy, 101 Yale L J at 1099–1108 (cited in note 20); Wald, 89 Mich L Rev at 160–63 (cited in note 17). Our own proposal in our prior study was a significantly modified version of the medical matching system, limited to clerkships that might precede (“feed into”) Supreme Court clerkships and, most importantly, adapted to some of the distinctive features of the law clerk market—especially the fact that prematch informal agreements would tend to be highly binding. See Avery, Jolls, Posner, and Roth, 68 U Chi L Rev at 869–84. Subsequent economic analysis provides some empirical support from laboratory experiments for the idea that the tendency toward binding early agreements makes successful centralized matching difficult to implement. See generally Ernan Haruvy, Alvin E. Roth, and M. Utku Ünver, *The Dynamics of Law Clerk Matching: An Experimental and Computational Investigation of Proposals for Reform of the Market*, 30 J Econ Dynamics and Control 457 (2006). Addressing the issue of binding prematch agreements was critical even in a medical market—the market for gastroenterology fellows—in re-establishing a lapsed match. See Niederle, Proctor, and Roth, 130 Gastroenterology at 221 (cited in note 41); Muriel Niederle and Alvin E. Roth, *Making Markets Thick: How Norms Governing Exploding Offers Affect Market Performance* (unpublished draft 2006), available online at <http://kuznets.fas.harvard.edu/~aroth/papers/ExplodingOffers.pdf> (visited Apr 27, 2007). It bears noting that other perceived issues with centralized matching—such as the fact that couples will generally want to clerk in the same geographic area—can be accommodated in a centralized matching system. See Avery, Jolls, Posner, and Roth, 68 U Chi L Rev at 868–69, 877–82 (cited in note 10) for a full discussion of the design of these systems.

A 2002 antitrust suit challenged the use of a matching system for medical residents. See generally *Jung v Association of American Medical Colleges*, 2006 US App LEXIS 14079 (DC Cir). The theory of the suit—whose dismissal in 2004 was affirmed on appeal two years later—was that a matching system holds down wages for residents. See *id.* Jeremy Bulow and Jonathan Levin, *Matching and Price Competition*, 96 Am Econ Rev 652 (2006), lends some logical underpinnings to the assertion of downward pressure on wages, while other economic analysis suggests more skepticism about any downward wage effects in actual markets, see Fuhito Kojima, *Matching and Price Competition When Firms Can Hire More than One Worker*, Am Econ Rev (forthcoming); Muriel Niederle, *Competitive Wages in a Match with Ordered Contracts*, Am Econ Rev (forthcoming). Certainly the raw wages of fellows in medical specialties with and without centralized matching do not differ. See Muriel Niederle and Alvin E. Roth, Letter, *Relationship between Wages and Presence of a Match in Medical Fellowships*, 290 J Am Med Assoc 1153 (2003).

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*machine at 6:30pm or so saying that the judge was wondering about my answer. I continued to wait for the [top choice judge's] call, all the while worrying that I would lose the offer with my 2nd choice judge if I didn't respond soon. By 9pm I was curled up in the fetal position [on] the motel's polyester bedspread, completely panicked.*

–2005 applicant for federal judicial clerkships<sup>104</sup>

*I had ten minutes to accept.*

–2005 applicant for federal judicial clerkships<sup>105</sup>

*Judge [X] called me to ask if I would be prepared to accept an offer on the spot if he interviewed me. I honestly replied that I might not be able to do that, and he cancelled my interview.*

–2004 applicant for federal judicial clerkships<sup>106</sup>

*[A]t 9:30am on [September 22, the first day on which offers were permitted, Judge X] said I had until 8:00am the next day. At 3pm on [the same day, Judge X's] secretary called and said the [j]udge really needed a response. I negotiated with the [s]ecretary to get 1 more hour to decide, promising to deliver an answer by 4pm.*

–2005 applicant for federal judicial clerkships<sup>107</sup>

*I had an offer that I needed to respond to by 2pm the same day and my next interview was scheduled in NY for 2:30. I [called] the NY judge, g[ot] the interview moved up, [and] pa[id] \$400 to get on an earlier flight from Boston to NY [to interview with the NY judge].*

–2006 applicant for federal judicial clerkships<sup>108</sup>

*I asked for [an] hour to consider the offer. The judge agreed; however, thirty minutes later [the judge] called back and informed me that [the judge] wanted to rescind my offer.*

–2006 applicant for federal judicial clerkships<sup>109</sup>

*After interviewing with my top two appellate judges I had an interview with a district court judge who would only allow me to interview with*

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<sup>104</sup> 2005 Student Survey #154. In the end, the student wrote, “I finally decided to call the top choice judge’s chambers. The judge answered, explained that they had lost my cell number and were just planning an email, and said it was a ‘No.’” *Id.* The student thereupon accepted with the student’s second choice judge. See *id.*

<sup>105</sup> 2005 Student Survey #64.

<sup>106</sup> 2004 Student Survey #531.

<sup>107</sup> 2005 Student Survey #183.

<sup>108</sup> 2006 Student Survey #111.

<sup>109</sup> 2006 Student Survey #297.

*him at the beginning of the week. He extended me an offer at the end of my interview and gave me an hour to decide only after I told him I couldn't make the decision without first at least talking to my husband since it would involve a move to a new city. During that one hour I called the two appellate judges, both of whom happened to be on the bench at the time. I did not hear back from either appellate judge, so I felt as though I had no choice but to accept the district judge's offer since he was a wonderful man and it was a great position. 30 minutes after I accepted my first choice appellate judge called back and offered me a position.*

—2004 applicant for federal judicial clerkships<sup>110</sup>

While the current reform has succeeded in delaying the timing of hiring until the third year of law school for most law students, the prohibition of transactions prior to the start date has also compressed the process of matching market participants—for those who adhere to the dates—into an exceedingly short period. Once the starting gun goes off, the whole process is concluded very quickly for those who had not transacted prior to the start dates. This is a result in significant part of the practice of “exploding offers,” which (as in the student quotations just above) require the applicant to respond extremely quickly when offered a clerkship. Indeed, in some cases, reflected in the third student quotation above, the response is required to be not only quick but also affirmative. Exploding offers often require applicants to make decisions without knowing whether an offer from a preferred judge later in the applicant's interview schedule would be obtained. (And, as noted above, most commentators on the law clerk market are skeptical of participants' ability to determine their ideal matches prior to interviews having been conducted.<sup>111</sup>) A particularly extreme account was given at the start of this Article; a student checked voice mail after a thirty-five minute flight had landed and found three messages in quick succession—the first extending an offer, the second wondering about the student's response, and the third retracting the offer.<sup>112</sup>

Market compression, in which transactions are concentrated within a very short timeframe, is characteristic of markets with start dates.<sup>113</sup> With the action delayed by the start dates, judges worry that if

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<sup>110</sup> 2004 Student Survey #44.

<sup>111</sup> See note 47 and accompanying text.

<sup>112</sup> See text accompanying note 2.

<sup>113</sup> See note 60 and accompanying text (describing this problem under the May 1 start date attempted in the law clerk market in 1990); Avery, Jolls, Posner, and Roth, 68 *U Chi L Rev* at 850–51 (cited in note 10) (describing this problem in the market for medical residents when that market had a start date).



they then give applicants substantial time in which to respond, it will be difficult to find a replacement if an offer is rejected. Below we present survey evidence both on the frequency of exploding offers and on the general extent of market compression. Both of these features of the market suggest that market participants' ability to consider and compare multiple offers is very limited. But it is at least somewhat reassuring to note that the market did not necessarily work better in these respects in the premoratorium period and that market segmentation may, again, help to mitigate (by localizing) the costs of exploding offers and market compression.

#### A. Exploding Offers

Even the judges responsible for the current regime acknowledge the problem of exploding offers under this regime.<sup>114</sup> But they do not appear unduly concerned because “[f]or all the years that we have been on the bench, judges have extended exploding offers to law clerk applicants.”<sup>115</sup> But they may not be aware of how common the practice of exploding offers is under the current regime. As shown in the right-hand column of Table 7, 34 percent of judges responding to the question, “What was the shortest time you gave any candidate to accept or reject a clerkship offer?” (asked on both our 2004 and our 2005 Judge Survey) said twenty-four hours or less. Any selection bias in our judge response pool is likely to lead to an understatement in Table 7 of the frequency of exploding offers, not only because the judges responding to our survey were overwhelmingly ones who praised the current regime, but because a number of judges would be embarrassed to report that they extended exploding offers.

TABLE 7: TIME-LIMITED OFFERS AS REPORTED BY JUDGES

	1998–1999 and 1999–2000	Fall of 2004 and fall of 2005
Response required within one day	23%	34%
Response required within two days	36%	42%
Response required within a week	67%	76%
Total number of responses	193	161

Sources: Avery, Jolls, Posner, and Roth, 68 U Chi L Rev at 818 table 6 (cited in note 10); 2004 and 2005 Judge Surveys. See the text just before this table for the full text of the survey question. Each column reports the combined results for two years of survey responses, with each survey (rather than each year) weighted equally.

<sup>114</sup> See Edwards and Becker, Memorandum, *Assessment of the 2004 Law Clerk Hiring Plan and Suggestions for the Future* at 3 (cited in note 74).

<sup>115</sup> *Id.*

As a point of comparison, Table 7 (left-hand column) shows that when we asked judges an identical question in our study five years ago, “only” 23 percent of responding judges gave a day or less.<sup>116</sup> Given the possible variation in practices across judges who chose to respond to our surveys in the premortatorium period and now, we cannot be sure that the increase among respondents reflects an underlying increase in the total population of judges. What is clear, however, is that exploding offers are commonplace in the current “reformed” law clerk market. The figures in both columns, moreover, are undoubtedly understatements for the important reason that the data in Table 7 are limited to cases in which the judge places an express time limit on the offer and do not reflect the fact that many applicants are uncomfortable with any significant delay in responding to an offer tendered by a federal judge.<sup>117</sup>

Table 8 presents data on exploding offers from our student surveys for 2004, 2005, and 2006.<sup>118</sup> Again, the numbers suggest that exploding offers occur with considerable frequency in the current law clerk market.<sup>119</sup> As above, potential differences in the response pools mean we do not seek to draw any inferences from changes across our survey years.

<sup>116</sup> Table 7 in the text is similar to Table 6 in our prior study. See Avery, Jolls, Posner, and Roth, 68 U Chi L Rev at 818 table 6 (cited in note 10). However, instead of reporting results separately for the two separate years examined in our prior study (as was done in Table 6 in our prior study), we aggregate the two years’ worth of data for purposes of Table 7. Table 7 also uses the terminology “within one day” and “within two days” instead of “within 24 hours” and “within 48 hours,” the terminology used in our prior study, because the newer terminology matches more closely with the phrasing usually employed by the judges themselves in responding to our surveys.

<sup>117</sup> See Avery, Jolls, Posner, and Roth, 68 U Chi L Rev at 819–20, 824 (cited in note 10) (discussing this phenomenon).

<sup>118</sup> The full text of the question on our 2004, 2005, and 2006 Student Surveys was as follows:

How much time did the judge who made you your first clerkship offer give you to respond to the offer?

- Immediate response required \_\_\_\_
- Response required within an hour \_\_\_\_
- Response required the same day \_\_\_\_
- Response required the next day \_\_\_\_
- Response required within 3–4 days of the interview \_\_\_\_
- Response required within 1 week of the interview \_\_\_\_
- No deadline set for response \_\_\_\_

Several students specifically stated that although an explicit deadline was not set, the offering judge implied that speed in responding was important. Because there is no obvious way to categorize these responses for purposes of Table 8, we do not include them in the table.

<sup>119</sup> Parallel to our discussion in note 73, it is not possible to relate the judge and student figures in Tables 7 and 8 in any precise way without knowing—as we do not—what fraction of judges’ offers were made to applicants included in our survey pool and whether judges give similar deadlines to all applicants to whom they make offers or just to a subset of that group.

TABLE 8: TIME-LIMITED OFFERS AS REPORTED BY STUDENTS

	Fall of 2004	Fall of 2005	Fall of 2006
Response required the same day	21%	30%	21%
Response required either the same day or the next day	48%	48%	38%
Response required within a week	64%	61%	56%
Total number of responses	129	114	98

Sources: 2004, 2005, and 2006 Student Surveys. See note 118 for the full text of the survey question. The table reflects responses from students who applied for federal appellate clerkships.

## B. Market Compression in General

Even beyond the phenomenon of exploding offers, the general degree of market compression around the start dates for the law clerk market is notable. In both the fall of 2005 and the fall of 2006, over half of the responding students (54 of 105, or 51 percent, in the fall of 2005 and 45 of 77, or 58 percent, in the fall of 2006) who received their first clerkship offer on or after the start date for interviewing and making offers received the offer on the start date itself (Table 9).<sup>120</sup> And the clear majority of these students—nearly two-thirds—accepted their first clerkship offers the same day (bottom row of Table 9), so for these students the entire process was concluded on the opening day for interviewing and making offers.<sup>121</sup> As the table shows, there was

<sup>120</sup> For the text of the question regarding offer timing, see note 71.

<sup>121</sup> The full text of the relevant questions on our 2004 Student Survey was as follows:

When did you respond to your first clerkship offer?

Immediately \_\_\_\_\_ Within an hour \_\_\_\_\_ The same day \_\_\_\_\_

The next day \_\_\_\_\_ 3–4 days after the interview \_\_\_\_\_

Within 1 week \_\_\_\_\_ More than 1 week later \_\_\_\_\_

Did you accept your first clerkship offer?

The full text of these questions on our 2005 and 2006 Student Surveys was as follows:

When did you respond to your first clerkship offer?

Immediately \_\_\_\_\_ Within an hour \_\_\_\_\_ The same day \_\_\_\_\_

The next day \_\_\_\_\_ Within 3–4 days \_\_\_\_\_

Within 1 week \_\_\_\_\_ More than 1 week later \_\_\_\_\_

Did you accept your first clerkship offer?

The question about the date of the first clerkship offer was the same in all three years and appears in note 71. The only difference between the questions on the 2005 and 2006 Student Surveys and those on the 2004 Student Survey was that “3–4 days after the interview” (used in 2004, see above) was replaced by “Within 3–4 days,” so that the preprovided categories were comprehensive. Note that our question on time limits imposed by judges (see note 118) used the formu-

also considerable compression in the timing of the market as experienced by student survey respondents in 2004, though not as much as in 2005 and 2006; once again, we cannot draw confident conclusions about changes over time from modest differences in answer patterns across the years of our surveys because of possible differences in the composition of the response pools (although the notion that compression might increase over time is not surprising in light of prior experiences with start dates in other markets<sup>122</sup>).

TABLE 9: MARKET TIMING

	Fall of 2004	Fall of 2005	Fall of 2006
First offer received on start date for interviewing and making offers—number of responding students	40	54	45
First offer received after start date for interviewing and making offers—number of responding students	79	51	32
First offer received either on or after start date for interviewing and making offers—number of responding students	119	105	77
Of first offers received on start date for interviewing and making offers, percentage accepted on start date	41%	65%	64%

Sources: 2004, 2005, and 2006 Student Surveys. See notes 71 and 121 for the full text of the survey questions. The table reflects responses from students who applied for federal appellate clerkships. Table 9 focuses on activity on and *after* the start date for interviewing and making offers. Tables 5A, 5B, and 5C provide information on interviewing and extending of offers *prior* to this start date.

A corollary of the high level of market compression is judges' intense interest in determining, before the start date for interviewing and making offers, not only the candidates in whom they are most interested but *how these candidates will respond to an offer*. This phenomenon is familiar from other markets.<sup>123</sup> In the law clerk market, while some judges content themselves with informal information gathering, through trusted professors or current (or former) clerks, about candidates' level of interest, other judges demand explicit assurances from candidates that

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lation "Response required within 3–4 days of the interview" in all three years. Finally, observe that responses to the questions listed above will slightly understate the overall likelihood of accepting a clerkship offer on the opening day as a student may have accepted a second (or later) clerkship offer on the opening day.

<sup>122</sup> See, for example, Avery, Jolls, Posner, and Roth, 68 U Chi L Rev at 851 (cited in note 10) (discussing the market for medical residents).

<sup>123</sup> See Alvin E. Roth and Xiaolin Xing, *Turnaround Time and Bottlenecks in Market Clearing: Decentralized Matching in the Market for Clinical Psychologists*, 105 J Polit Econ 284, 289–91 (1997).

they will accept an offer if one is forthcoming, as illustrated by the third student quotation at the beginning of this Part.

One of the most important consequences of the high market compression documented here is that it creates a strong incentive for market participants to move before the designated start dates in an effort to avoid the severe congestion. Moving early gives a judge the opportunity to interview and consider multiple candidates without fear that a candidate will be unavailable if the judge does not issue an offer immediately after the interview. In other markets such dynamics have made start dates ultimately unsustainable.<sup>124</sup> In the present law clerk market, however, market segmentation as discussed in Part III.C above may make the start dates sustainable. Compression—like nonadherence to start dates—may be higher in some segments than in others. A segment that has lower compression than the average levels reflected in Table 9—perhaps because of norms against exploding offers that cause rapid transactions<sup>125</sup>—might also have greater adherence to the start dates for hiring law clerks.

## V. CONCLUSION

Our analysis conveys a mixed message about the current market for federal judicial law clerks. The time of hiring has moved back considerably, a positive development, but large departures from the start dates for hiring law clerks—as well as exploding offers, high market compression, and the moral dilemmas highlighted in the introduction—are apparent. The good news about the time of hiring makes it critical to address the problems that threaten to undermine the value of hiring later in students' law school careers. The need is especially great because the current problems are the very ones that have thwarted the many past attempts at start dates in both the law clerk market and other markets that have suffered from problems of early hiring.

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<sup>124</sup> See Avery, Jolls, Posner, and Roth, 68 *U Chi L Rev* at 853–54 (cited in note 10) (describing the 1998 abandonment of the start date in the clinical psychology market after a long struggle with early offers).

<sup>125</sup> See generally Niederle and Roth, *Making Markets Thick* (cited in note 103).

## APPENDIX

This Appendix describes our survey approach. As in our previous study, we surveyed both the federal appellate bench and law students from a few elite schools.<sup>126</sup> As noted in the text, our surveys were not professionally designed instruments; at the same time, we obtained good response rates and gathered information consisting mostly of answers to straightforward factual questions.

On the judge side, a survey was sent by United States mail in December of 2004 (regarding hiring in the fall of 2004) and in February of 2006 (regarding hiring in the fall of 2005) to each active and senior member of the federal appellate bench, with a stamped, preaddressed envelope for return of the completed survey.<sup>127</sup> The judge author of this Article sent the surveys with an accompanying cover letter, but responding judges were asked to send their responses to another of us (Jolls) rather than to the judge author because of confidentiality issues. As detailed in Table A1, we received responses to the 2004 Judge Survey from just over one half of the federal appellate judges, similar to our response rate in our previous study, and we received responses to the 2005 Judge Survey from 48 percent of the federal appellate judges. Because we encountered somewhat more difficulty obtaining responses to the 2005 Judge Survey, and because the only issue addressed in our analysis with respect to which we are entirely dependent upon information from our judge survey responses is an issue on which the data are unequivocal—the judges' view of later hiring, discussed in Part II above—we determined not to attempt a survey of federal appellate judges in the fall of 2006.

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<sup>126</sup> See Avery, Jolls, Posner, and Roth, 68 *U Chi L Rev* at 807–10 (cited in note 10) (discussing the reasons for choosing these pools of judges and students to survey).

<sup>127</sup> For both surveys we used the Harvard Law School Career Service Office's database of federal judges to obtain a comprehensive list of names and addresses for the federal appellate judiciary. As in our previous study, see *id.* at 807 n 33, senior court of appeals judges from the Seventh Circuit who were identified by the sender of the survey (Posner), a judge on that Circuit, as no longer hiring law clerks did not receive surveys. A complete listing of the judges mailed surveys is on file with the authors.

TABLE A1: JUDGE SURVEY RESPONSE RATES  
OVERALL AND BY CIRCUIT

	Number surveyed		Number responding		Response rate	
	2004	2005	2004	2005	2004	2005
All judges	264	253	137	122	52%	48%
1st Circuit	10	10	7	6	70%	60%
2d Circuit	24	23	9	8	38%	35%
3d Circuit	22	20	16	9	73%	45%
4th Circuit	15	14	4	5	27%	36%
5th Circuit	19	18	12	11	63%	61%
6th Circuit	24	24	15	12	63%	50%
7th Circuit	16	14	7	7	44%	50%
8th Circuit	21	20	12	14	57%	70%
9th Circuit	47	47	28	22	60%	47%
10th Circuit	20	19	8	12	40%	63%
11th Circuit	18	17	8	6	44%	35%
D.C. Circuit	12	12	5	6	42%	50%
Federal Circuit	16	15	6	4	38%	27%

Sources: 2004 and 2005 Judge Surveys (number of responses overall and by circuit). See note 127 for information on the number surveyed overall and by circuit.

For students, surveys were distributed in the fall of 2004, the fall of 2005, and the fall of 2006 to all third-year law students at four schools—Harvard, Stanford, the University of Chicago, and Yale—both in hard copy to student mailboxes, with stamped, preaddressed return envelopes, and electronically to student email accounts with the option to respond to the survey electronically. Our response rate was approximately 50 percent in each year (Table A2).<sup>128</sup>

<sup>128</sup> One law school, the University of Chicago Law School, initially sent the electronic version of the 2005 Student Survey to a list that included some law school graduates in addition to the third-year class. We learned of this when we received several inquiries from University of Chicago Law School graduates asking whether their participation was intended given that the cover letter accompanying the survey said “Dear Third-Year Student at the University of Chicago Law School.” A couple of completed surveys that appeared to be from University of Chicago Law School graduates were excluded from our sample.

TABLE A2: STUDENT SURVEY RESPONSE RATES

	Total number of third-year law students at Harvard, Stanford, the University of Chicago, and Yale Law Schools	Number responding	Response rate
2004	1119	527	47%
2005	1149	545	47%
2006	1124	601	53%

Sources: National Association for Law Placement, Inc., *Directory of Law Schools 2005–2006* (number of third-year law students at the surveyed schools in the fall of 2004); National Association of Law Placement, Inc., *Directory of Law Schools 2006–2007* (number of third-year law students at the surveyed schools in the fall of 2005); <http://www.nalplawchoolsonline.org/> (visited Apr 27, 2007) (number of third-year law students at the surveyed schools in the fall of 2006).

Parallel to our prior study, our student survey starts by asking whether the responding student applied for federal court clerkships, and only students who had done so were directed to fill out the body of the survey. Nonetheless, some of the responses by students in the body of the survey may relate to state court applications, even though those were not embraced in the opening question, because the students may have applied for those positions in addition to federal court clerkships. In addition, some of the responses may relate to federal district court rather than federal appellate clerkships. As in our previous study, we did not choose to limit subsequent questions (such as “What was the date and time of your first interview?,” “What was the date and time of your first offer of a clerkship?,” and “Did you receive other clerkship offers before you rejected your first offer?”) to the federal appellate clerkships on which we focus, as this could have produced misleading or incomplete answers because state court or federal district court opportunities might have affected the student’s situation in the market for federal appellate clerkships. However, the implication of our approach is that the data described in the main text, while only for students who applied for federal appellate clerkships, may reflect events in other markets as well.<sup>129</sup>

All surveys returned to us, both by judges and by students, were assigned numbers, which are used to identify the responses in our analysis in the main text.

<sup>129</sup> In a few cases, respondents specifically indicated that a particular answer related to a state court judge, and in those cases we opted to exclude the answer in question from our analysis.