The New Market for Federal Judicial Law Clerks

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ABSTRACT

In the past, judges have often hired applicants for judicial clerkships as early as the beginning of the second year of law school, for positions commencing approximately two years down the road. In the new hiring regime for federal judicial law clerks, by contrast, judges are exhorted to follow a set of start dates for considering and hiring applicants during the fall of the third year of law school. Using the same general methodology as we employed in a study of the market for federal judicial law clerks conducted in 1998-2000, we have broadly surveyed both federal appellate judges and law students about their experiences of the new market for law clerks. This Article analyzes our findings within the prevailing economic framework for studying markets with tendencies toward "early" hiring—a framework we both draw upon and modify in the course of our analysis. Our data make clear that the movement of the clerkship market back to the third year of law school is highly valued by judges, but we also find that a strong majority of the judges responding to our surveys has concluded that nonadherence to the specified start dates is very substantial—a conclusion we are able to corroborate with specific quantitative data from both judge and student surveys. The consistent experience of a wide range of other markets suggests that such nonadherence in the law clerk market will lead to either a reversion to very early hiring or the use of a centralized matching system such as that used for medical residencies. We suggest, however, potential avenues by which the clerkship market could stabilize at something like its present pattern of mixed adherence and nonadherence, thereby avoiding the complete abandonment of the current system.

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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[1]

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.

–2004 applicant for federal judicial clerkships[2]

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[3]

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[4]

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[5]

Many people/professors brazenly cheated. … For a group of individuals nominally committed to the rule of law, this behavior strikes me as unethical and hypocritical.

–2004 applicant for federal judicial clerkships[6]

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

–Federal appellate judge, 2005[7]

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1 2004 Student Survey #254. For further information about our surveys, see the text and Appendix of this Article.

2 2005 Student Survey #132 (parentheses omitted).

3 2005 Student Survey #147.

4 2005 Student Survey #93.

5 2005 Student Survey #193.

6 2004 Student Survey #508.

7 2005 Judge Survey #80.

> 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[8]

> 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[9]

> [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[10]

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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.[11] In an attempt to gain some control, 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, with the primary pool of candidates the now third-year students who under past practice would have been hired in the fall of 2002.[12] Likewise, in subsequent

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[8] 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) ("AJPR") (citing 1999 Student Survey #184).

[9] See AJPR, 68 U Chi L Rev at 839 (cited in note 8) (citing 2000 Student Survey #26).

[10] See AJPR, 68 U Chi L Rev at 835 (cited in note 8) (citing 1999 Judge Survey #7).

[11] See AJPR, 68 U Chi L Rev at 834-45 (cited in note 8), for extensive descriptions based on survey evidence from both federal appellate judges and clerkship applicants.

[12] See Edward Becker and Harry T. Edwards, Law Clerk Hiring by Federal Appellate Judges (memorandum, Mar 2002), online at http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/19d8ec075abb8c8588256b9100006a3a/$FILE/agreement.pdf (visited Feb. 7, 2007).

years judges were to hire students during the fall of their third year of law school.[13] This new system for the hiring of clerks is structured around a set of "start dates" for the transmission of applications, the scheduling and conduct of interviews, and the making of offers.[14]

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, presumably on the functioning of the federal court system.[15] With respect to lawyers' career paths, federal court clerkships provide invaluable knowledge and experience to clerks.[16] Federal court clerkships are also often critical stepping stones to elite legal posts including Supreme Court clerkships, teaching jobs at top-ranked law schools, and positions at the most competitive law firms, which often pay substantial cash signing bonuses to former law clerks, ranging from about $40,000 for court of appeals clerks to $200,000 for Supreme Court law clerks.[17] A series of law review articles over the years in the Yale Law Journal, the University of Chicago Law

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[13] See, for example, Federal Judges Law Clerk Hiring Plan: Fall 2005 & Fall 2006, online at http://www.ca7.uscourts.gov/hr/lc_hiring_plan.pdf (visited Feb. 7, 2007); 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 (visited Feb. 7, 2007).

[14] See sources cited supra note 13.

[15] See Patricia M. Wald, Selecting Law Clerks, 89 Mich L Rev 152, 153 (1990).

[16] See id at 153-54 (describing the various legal roles that clerks play in judicial chambers).

[17] See 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); Charles Lane, Former Clerks' Signing Bonuses Rival Salaries on the High Court, Wash Post A15 (May 15, 2006) (describing the "market rate" bonus for Supreme Court law clerks as "around $200,000"); National Association for Law Placement, Inc., 2005 Associate Salary Survey 78 (listing $35,000 as the highest reported bonus for a federal appellate court clerk); National Association for Law Placement, Inc., 2003 Associate Salary Survey 82 (listing $45,000 as the highest reported bonus for a federal appellate court clerk).

Review, and other leading journals has analyzed the recurrent difficulties experienced by the law clerk market.[18]

The current regime for hiring federal judicial law clerks is a substantial departure from the system (or "non-system," as the federal appellate judge quoted above put it) in effect in this important market 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 clerkship market under the pre-moratorium regime,[19] anecdotal impressions are widespread, but hard data are missing. Accordingly, beginning in fall of 2004 we have annually surveyed both federal appellate judges and law students about the operation of the clerkship market, using the same general approach we took in our earlier study. We describe our survey methodology in the Appendix to this Article.

The responses to our new surveys provide clear evidence of three important points about the operation of the present system. First, as we expected, the movement of the market back 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.[20] After offering a basic framework for

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[18] See generally AJPR, 68 U Chi L Rev 793 (cited in note 8); 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 17); 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 15).

[19] See AJPR, 68 U Chi L Rev 793 (cited in note 8).

[20] While we were not at all surprised by this finding, not all observers agree on this point. Professor Priest questions whether earlier hiring is a problem for judges. See Priest, 22 Yale J

analysis of the clerkship market in Part I, we present in Part II our survey evidence on the additional information that is made available by the backward movement in timing and on judges' reaction to this beneficial feature of the new system.

Our second main finding about the current regime 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 surprising (even in light of the many anecdotal accounts with which we are familiar). Our surveys of federal appellate judges and law students provide a quantitative lens on the frequency of such behavior, and the picture suggests widespread non-adherence to the start dates. In particular, we find that in both 2004 and 2005 more than half of responding judges had concluded that either "a substantial number" of appellate judges did not adhere or (even worse) "relatively few" appellate judges adhered[21] to the start dates for conducting interviews and making offers. And even more directly, as early as the fall of 2004, a third of 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 of judges reported on their survey responses that they had commenced making offers prior to the specified start date for making these offers. Despite this degree of non-adherence, it is certainly possible to imagine ways in which the clerkship market could stabilize at a point of modest, albeit highly imperfect, adherence to the start dates, and—expanding upon existing economic analyses of other markets with marked tendencies toward early hiring—we offer several theories (along with relevant data from our survey responses) along these lines in Part III.

Reg af 157 (2005) (cited in note 18). Our data paint a picture different from the one he suggests. See Part II.

[21] See note 64 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 interviews will end up offering them positions. (The student whose offer was both made and retracted during a thirty-five minute airplane flight provides a particularly extreme example,[22] 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 market for clerks operates under the present regime. As we will discuss, at least in other markets, such high levels of market compression tend to lead many participants to move before the market's designated start dates in an effort to avoid the congestion. Again, however, we use economic analysis to sketch potential ways in which the market for federal judicial law clerks might avoid this outcome and, thus, achieve at least partial success in keeping clerk hiring in the third year of law school without a need to move to a centralized matching system of the sort used for medical residencies and a variety of other markets that have experienced problems with very early hiring.[23]

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[22] See text accompanying note 2.

[23] As discussed below, many commentators on the law clerk market have looked favorably upon such a centralized matching system. (And our own prior study recommended the adoption of a version of this system, though with very significant alterations to respond to the special features of the clerkship market.) See note 80**.** In such a centralized matching system, applicants and employers each submit rank orderings reflecting their preferences to a central clearinghouse—typically after 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.

I. NORMATIVE FRAMEWORK

Our primary normative concerns in analyzing the market for federal judicial law clerks will be how well this market succeeds in maximizing the total satisfaction of judges and applicants with their clerkship matches and how well this market performs in encouraging participants to conform with, rather than flout, its rules.[24] Does the market do a good job matching up judges with candidates who are both of interest to, and interested in, these judges? And does this market make it safe for judges and applicants to interact in an orderly fashion?

To be sure, arguably an ideal measure of how well the market for federal judicial law clerks is working is the degree to which it contributes maximally to the "production of justice"[25]—a metric that, unlike the measure noted above of the satisfaction of judges and applicants with their clerkship matches, takes into account the overall quality of the legal system, including effects on those who are not participants in the clerkship 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.[26] Other effects are imaginable as well. Perhaps it is the case that top law clerks benefit more from the coaching 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.[27] However, because it is impossible as a practical matter to say how "mismatches"

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[24] Because the clerkship market at the time of our prior study did not specify rules governing the timing of transactions, we did not address participants' incentives to conform to, versus flout, such rules.

[25] See AJPR, 68 U Chi L Rev at 804 (cited in note 8).

[26] See id.

[27] Cf. Charles T. Clotfelter, Helen F. Ladd, and Jacob L. Vigdor, Teacher-Student Matching and the Assessment of Teacher Effectiveness, NBER Working Paper No. 11936 (2006) (finding

(from the perspective of judges' and applicants' preferences) affect the overall quality of the legal system, our analysis focuses on the two criteria noted above.

In analyzing the clerkship 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.[28] We consider these two features in turn below.[29]

A. Time of Hiring

Under the regime that prevailed for hiring federal judicial law clerks prior to the current reform, clerks were hired on the basis of only a single year's performance in law school, or one-third of the total time needed to obtain a law degree. 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. An existing economics literature shows that employers may inefficiently hire applicants well before a job will commence, even though additional information related to job performance would be available at a later time.[30] Intuitively, the competitive pressure to attract candidates leads offer dates to move earlier and earlier, despite the fact that all market participants might be better off with later hiring.[31]

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that students from more advantaged backgrounds experience greater math gains from improvements in teacher qualifications than students from less advantaged backgrounds).

[28] See AJPR, 68 U Chi L Rev at 798 (cited in note 8).

[29] 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).

[30] See, for example, Roth and Xing, 84 Am Econ Rev at 1034-35, 1039-40 (cited in note 23).

[31] See id. Professor Priest suggests that early hiring in the clerkship market represents not a market failure but rather optimizing behavior by participants in this market. 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. Moreover, recent empirical evidence suggests the

Consistent with the economic modeling, most existing discussions of the market for federal judicial law clerks extol the virtues of hiring substantially later than the beginning of the second year of law school over hiring at the beginning of the second year of law school.[32]

Counterbalancing the informational loss from early hiring is the benefit that risk-averse parties may enjoy from resolving uncertainty earlier and, in effect, insuring themselves against the possibility that they could face unfavorable market circumstances down the road.[33] For purposes of this argument, the relevant form of uncertainty is uncertainty about the overall size of the market facing a given market participant[34]; for judges, this would be the overall size of the

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inefficiency of early transactions in at least some markets. See Guillaume R. Frechette, Alvin E. Roth, and M. Utke Unver, Unraveling Yields Inefficient Marchings: Evidence from Post-Season College Football Bowls (working paper). It is also notable that the apparent inefficiency in the college bowl market discussed in this study cannot be attributed to the lack of an opportunity for prices to adjust in this market. More generally, 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 23) ("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 disproportionate number of the markets with tendencies toward very early transactions are markets in which, as in the law clerk market, salaries or prices cannot freely adjust.

[32] See, for example, Becker, Breyer, and Calabresi, 104 Yale L J at 223-24 (cited in note 18) (describing the advantages of late over early hiring); Oberdorfer and Levy, 101 Yale L J at 1100 (cited in note 18) (describing the benefits of uniform hiring in the fall of students' third year of law school). Professor Priest points out that it is not entirely clear whether, or why, a particular point substantially later than the beginning of the second year of law school, but before the end of the third year, is the precisely optimal time for the hiring of federal judicial law clerks. See Priest, 22 Yale J Reg at 152 (cited in note18). It may indeed be difficult to identify the precisely optimal time for hiring to occur, but our suggestion in the text is simply that the gap between the beginning of the second year of law school and the start of employment as a law clerk after graduation two years later is much too large to be optimal.

[33] See Li and Rosen, 88 Am Econ Rev at 373-74 (cited in note 29).

[34] See id. Note that some of the text in Li and Rosen's article sounds more in terms of uncertainty about individual traits or qualifications, 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…"), than in terms of the aggregate uncertainty that is reflected in their formal model.

group of well qualified applicants, and for applicants, it would be the overall size of the group of desirable judges for whom to clerk. While this particular form of uncertainty may be highly relevant in some contexts, it doe not seem likely to play a large role 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 allow them to consider a range of possible transactions.[35] Parties are more likely to be satisfied with their match when they have been able to consider multiple options and select their most preferred alternatives. When markets are thin or nonexistent, parties must choose from a very small set of alternatives or, in some cases, may not have a choice at all.[36]

An extreme example of thin markets, not available at the time of our prior study, comes from the experience of the market for gastroenterology fellows in the early part of the present decade.[37] In this period the market developed into one in which offers had to be acted upon without the chance to consider and compare available alternatives.[38] The result was that the market became less national, and more local, with fewer and fewer applicants changing hospital, city or state to take their positions.[39] Thus many participants' "markets" shrunk effectively to the surrounding geographic area.[40]

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35 See Roth and Xing, 84 Am Econ Rev at 992 (cited in note 23).

36 See AJPR, 68 U Chi L Rev at 813-28, 851, 853-54 (cited in note 8) for a number of examples of this type of dynamic.

37 See Muriel Niederle, Deborah D. Proctor and Alvin E. Roth, What Will Be Needed for the New GI Fellowship Match To Succeed? 130 Gastroenterology 218, 218 (2006).

38 See id.

39 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).

40 See id.

Historically, clerkship applicants have likewise faced extremely 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."[41] In the absence of a very reliable pre-market sorting mechanism to pair clerkship applicants with their most favored judge among those interested in them, such thin markets are extremely unlikely to maximize the total satisfaction of judges and clerks with the match; instead they will produce a substantial number of "unstable" matches, in which some judges and applicants not matched to one another would have preferred to have been matched together.

Of course, as just suggested, if participants are able to obtain all or essentially all of the information they need to make optimal choices prior to the interviewing and offer stage, then the cost of very thin markets is far less. While it is ultimately an empirical question—one that our survey data cannot resolve—whether participants in the market for federal judicial law clerks can perfectly or nearly perfectly sort themselves prior to the first interview (so that there is little cost to a quick pairing off at this point), most existing analyses have assumed that there are important limits on participants' ability to sort themselves perfectly before the commencement of the interview and offer stage, given the highly personal nature of the clerkship relationship.[42]

Thin markets can occur either within a largely unregulated market or in response to labor market institutions that seek to control the timing of transactions. The clerkship market at the end of the period covered in our prior study—when no rules or policies sought to regulate the timing

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[41] See AJPR, 68 U Chi L Rev at 801 (cited in note 8).

[42] See, for example, id at 864 ("[O]ne presumes that most judges would not hire applicants for 'the most intense and mutually dependent [relationship] I know of outside of marriage, parenthood, or a love affair,' without an interview") (quoting Wald, 89 Mich L Rev at 153 (cited in note 15)); Kozinski, 100 Yale L J at 1711 (cited in note 17) ("[N]othing can take the place of the personal interview. A thorough, searching interview, conducted with mutual candor, can tell a judge and applicant a great deal about each other.").

or process of hiring in any way—provides an illustration of the first possibility, while the clinical psychology market noted just above—with thin markets developing in significant part as a consequence of a designated start date for making offers in this market[43]—provides an illustration of the second possibility.

While thin markets, with the resulting negative effects on market participants' overall satisfaction with their matches, can occur in either of the two situations, the second case, in which labor market institutions seek to control the timing of transactions, also carries the potential to produce situations in which market participants flout, rather than conform to, the market rules. In the market for clinical psychology internships, for instance, between 10 percent and 25 percent of applicants reported violations of rules specifying start dates for the offering of positions.[44] In this market, then, not only did participants have limited opportunity to consider and compare multiple transactions, but also participants had highly imperfect incentives to conform to, rather than disregard, the market rules. We report below a similar dynamic in the current law clerk market.

II. Evidence on Hiring in the Third Rather Than the Second Year of Law School

As described in the Introduction, beginning in fall of 2004 we have conducted annual surveys of both federal appellate judges and students at four elite law schools in an effort to determine how the current clerkship regime is operating. As elaborated in the Appendix, our surveys go through 2005 for federal appellate judges and through 2006 for third-year law students. In this Part we discuss the evidence from our surveys of judges' views about the move from hiring law clerks at the beginning of the second year of law school to hiring law clerks at

[43] See Roth and Xing, 84 Am Econ Rev at 1017 (cited in note 23).
[44] See id.

the beginning of the third year of law school. We emphasize judges' responses because their repeat-player status makes them the more natural recipients of questions comparing the present regime for clerk hiring to the regime in effect prior to the 2002 moratorium. The Appendix to this Article 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 instance, were not pre-tested on subsamples of respondents), we obtained good response rates and gathered information (from the surveys' highly educated recipients) consisting mostly of answers to straightforward factual questions.[45]

That federal appellate judges prefer hiring in the third year of law school to hiring in the second year of law school is certainly not a surprising finding (neither to us, nor to the judges who in the past argued for a delay until the third year)[46]—and it is indeed what our survey responses reveal. One piece of evidence on judges' reaction to the timing of hiring under the current versus pre-moratorium regimes comes from direct questions on our judge surveys about whether judges preferred the current regime to the regime in effect prior to 2002; interpreted in light of their later written comments (described just below), a fair inference is that the judges who preferred the current regime did so in significant part because of the later time of hiring. In quantitative terms, more than 80% of the judges responding to our comparative question about

[45] A small number of more complex questions led to confusion or different interpretations across respondents, and, thus, responses to these questions were not used. The direct 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.

[46] See sources cited note 32. As discussed in note 20, Professor Priest has a different view.

the two clerk hiring regimes—in both fall of 2004 and fall of 2005—indicated a preference for the current regime over the one in effect prior to 2002 (Table 1).[47]

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

	Fall of 2004	**Fall of 2005**
Number and (in parentheses) percentage of responding judges who prefer current system	94 (84%)	68 (84%)
Number and (in parentheses) percentage of responding judges who prefer system in effect prior to 2002	17 (15%)	11 (14%)
Number and (in parentheses) percentage of responding judges who are indifferent between the two systems	1 (1%)	2 (2%)
Total number of responses to question about former and current law clerk hiring regimes	112	81

Sources: 2004 Judge Survey; 2005 Judge Survey. See note __ for the full text of the survey question.

In terms of the written remarks, a number of comments in response 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 later hiring time under the new regime, as shown in Table 2.

[47] The 2004 survey question read, "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 2005 survey question was identical except that the year reference was 2006-2007 instead of 2005-2006.

TABLE 2: FEDERAL APPELLATE JUDGES' EXPRESSION 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	The plusses of interviewing/hiring in 3d year are substantial and worth resisting the cheaters and playing by the rules.
2005 Survey #34	[T]he additional information is great.
2005 Survey #56	We greatly 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 Judge Survey; 2005 Judge Survey. See the text just before this table for the full text of the survey question.

A further question on our judge surveys provides insight into the specific benefits to judges from a later time of hiring. We listed a series of types of information about clerk applicants and asked judges whether they found each of the types of information that was of value to them more available under the new regime than under the old. Essentially all of the judges responding to this question (97% averaging across the two years) found at least one type of information that was of value to them to be more available under the new regime (Table 3). As shown in the table, the types of information most often selected by judges as valuable to them and more available under the new regime were law school grades (93% of responses across the two years) and recommendations from familiar professors (71% of responses across the two years).[48]

[48] The full text of the question in our 2004 survey was as follows:

TABLE 3: INFORMATION THAT WAS OF VALUE TO FEDERAL APPELLATE JUDGES AND MORE AVAILABLE UNDER THE CURRENT REGIME THAN UNDER THE PRE-MORATORIUM REGIME

	Fall of 2004	**Fall of 2005**
Number and (in parentheses) percentage of responding judges who stated that least one type of information of value was more available	101 (96%)	70 (99%)
Number and (in parentheses) percentage of responding judges who stated that law school grades were of value and more available	94 (90%)	67* (97%)
Number and (in parentheses) percentage of responding judges who stated that recommendations from familiar professors were of value and more available	67 (64%)	56* (81%)
Total number of responses to question about whether information that was of value was more available under the new regime than under the old regime	105	71

Sources: 2004 Judge Survey; 2005 Judge Survey. See note __ for the full text of the survey question.

* Two judges indicated in their 2005 surveys that information of value was more available under the new clerkship regime but did not indicate which type of information of value was more available. These responses are not included in the starred tabulations, so the total number of responses used for these tabulations is 69.

Overall, then, our judge survey responses provide unambiguous evidence of the fact that almost all judges prefer later hiring to earlier hiring. Of course there is an ambiguity in the use of

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In your interviewing and selection of clerks for 2005-2006 clerkships, were you able to obtain and evaluate more information than under the system in place prior to 2003 (check all that were valuable to you and more available under the newer system):

____ Law school grades
____ Recommendations from familiar professors
____ Recommendations from other professors
____ Recommendations from past employers (practicing lawyers)
____ Recommendations from peers (current clerks, future clerks, etc.)
____ Membership in the schools main law review
____ Board position at the schools main law review
____ Writing sample
____ Other (please specify _____)

The question in our 2005 survey was identical except that the year reference was to 2006-2007 instead of 2005-2006.

the word "preference" in this context. Ideally, all judges would prefer to hire late so that they have more information about the applicants, but by their behavior some judges reveal a preference for somewhat earlier hiring to steal a march on other judges. Some of these judges might be worse off in a system in which there were no opportunities for strategic timing of the hiring decision. What our data tell us in clear terms, however, is that, ignoring strategic aspects, most judges strongly prefer hiring sometime in the third year of law school to hiring early in the second year of law school.

We turn now to the more controversial issue 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. The next Part—in many ways the heart of the Article—reports our empirical findings on this issue and then explores the lessons of other markets and of economic analysis for the implications of the current pattern of adherence versus nonadherence to those dates.

III. ADHERENCE TO START DATES

Although the current regime for law clerk hiring was initially instituted as a one-year moratorium on hiring, after the end of the moratorium the plan was obviously equivalent to regimes—familiar from both the past experience of the law clerk market and the experiences of many other markets[49]—that institute a start date or set of start dates before which specified market interactions should not take place. In this Part, we briefly review some of the history of start dates in various markets and then describe the evidence from our judge and student surveys on how well market participants adhered to the start dates in effect in the law clerk market in

[49] See AJPR, 68 U Chi L Rev at 850-55 (cited in note 8) for descriptions of these other markets' experiences.

recent years. After presenting the data, we use economic analysis to assess possible avenues by which the law clerk market might stabilize at something like its present pattern of mixed adherence and nonadherence, and thereby achieve at least partial success in keeping hiring later without a need to move to a centralized matching system.[50]

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

As recounted in an article by Judge Becker, Justice Breyer, and Judge Calabresi, attempts to set start dates in the market for federal judicial law clerks date back nearly a quarter century.[51] These previous attempts to sustain start-date regimes provide illuminating context for our discussion below of the experience with start dates in recent years under the current system for hiring federal judicial law clerks.

In 1983 the Judicial Conference instituted a start date of September 15 of clerkship applicants' third year of law school—strikingly similar to the one in effect under the current regime.[52] After reports of "rampant" departures, however, the date was abandoned the following year.[53] A second attempt at fixing a start date for the law clerk market came in 1986, with an effort to fix a date of April 1 of the second year of law school for the review of applications to commence; but, once again, many judges failed to adhere, and, again, the attempt was abandoned as a failure.[54] Next, in 1989, Judge Becker and then-Judge Breyer proposed a March 1 start date

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50 For further discussion of the matching system possibility, see note 80.

51 See Becker, Breyer, and Calabresi, 104 Yale L J at 209 (cited in note 18**)** (describing a March 1983 initiative requesting that judges not consider applications before the start of students' third year of law school).

52 See id.

53 See id.

54 See id.

for the conducting of interviews; this, too, was abandoned after a substantial number of judges indicated that they would not adhere.[55]

A new attempt came just one year later, when more than two-thirds of federal appellate judges agreed that no offers would be made prior to May 1, 1990 (at 12:00 noon Eastern Daylight Time) for clerkships to begin in mid-1991.[56] (Review of applications and interviewing of candidates could take place at any time.) This approach ended up eliciting broad condemnation for its encouragement of tacit agreements between judges and clerks prior to May 1; its penalizing of judges who called applicants promptly at 12:00 noon only to learn they had already accepted offers from judges with "fast watches"; and its devastating effect on judges who did not demand on-the-spot responses to offers made at or shortly after 12:00 noon on May 1, only to discover that if offers were later declined, most other desired applicants would be otherwise committed.[57]

The next attempt at a start date in the law clerk market did not come until 1993. The 1993 initiative involved the imposition of a March 1 start date for clerkship interviews and initially appeared more promising than the prior efforts[58]. 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." [59] However, with the passage of time, more and more judges were interviewing and making offers prior to the March 1 start date, and in 1998 the Judicial

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55 See id.
56 See id at 210.
57 See id at 210-11.
58 See id at 212-15.
59 Id at 222.

Conference abandoned the March 1 regime because it was "not universally followed and, therefore . . . not an accurate reflection of the practice in the courts."[60]

The law clerk market is far from alone in its historical inability to sustain a start-date regime. In a large range of diverse markets, such start dates have failed to stick—a point we documented at some length in our prior study.[61] The basic problem is that adherence to such start dates is not individually rational for many market participants even where—following the economic analysis described in Part I—widespread adherence is collectively rational.[62] What is worse (given the history of the law clerk market), adherence to measures that are collectively but not individually rational is especially unlikely when past attempts at collective rationality have failed.[63] Of course, this does not mean the law clerk market could not be an exception, and we see no way other than empirical inquiry to examine this possibility. The next Section discusses what our survey responses show about adherence to the specified start dates over the last three law clerk hiring seasons.

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[60] Director of the Administrative Office of the U.S. Courts, ed, Reports of the Proceedings of the Judicial Conference of the United States 38 (GPO Sept 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)." AJPR, 68 U Chi L Rev at 806 (cited in note 8).

[61] See AJPR, 68 U Chi L Rev at 851-55, 862 (cited in note 8).

[62] See notes 30-31 and accompanying text.

[63] See generally James Andreoni, Brian Erard and Jonathan Feinstein, Tax Compliance, 36 J Econ Lit 818 (1998) (describing lower contribution rates in public goods games when contribution has been low in previous games).

B. Evidence on Adherence to Start Dates

The two most important start dates under the current regime for hiring federal judicial law clerks are a date before which interviews may not be scheduled and a date before which interviews and the making of offers may not occur. Table 4 provides the relevant calendar dates for 2004, 2005, and 2006.

TABLE 4: START DATE REGIME FOR LAW CLERK HIRING—CALENDAR DATES

Step of the hiring process	**Calendar date in fall of 2004**	**Calendar date in fall of 2005**	**Calendar date in fall of 2006**
Scheduling of interv	Monday, September 13	Thursday, September 15 (noon EDT)	Thursday, September 14 (noon EDT)
Conduct of interviews and making of offers	Monday, September 20	Thursday, September 22	Thursday, September 21

Sources: Federal Judges Law Clerk Hiring Plan: Fall 2005 & Fall 2006, online at http://www.ca7.uscourts.gov/hr/lc_hiring_plan.pdf (visited Feb. 7, 2007); 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 (visited Feb. 7, 2007).

In discussing the evidence from our judge and student surveys on adherence to these start dates, we note that for both judge and student surveys, any selection bias in our response pool is most likely to bias against finding departures from the specified start dates, as those who do not adhere are probably less eager to report their behavior on a survey. While it is possible that some judges who do not adhere are eager to flaunt their behavior on a survey—perhaps as a way of expressing their opposition to the system—the fact that, as discussed in Part II above, the overwhelming majority of our judge respondents spoke positively about the later timing under the current regime means that judges eager to flaunt opposition to the system cannot be overrepresented in our sample. Likewise, significant underrepresentation of adhering judges based on knowledge of the nonadherence of the judge author of this Article seems very unlikely

to be distorting our sample of judge respondents to a significant degree (as, again, judges who applaud nonadherence are not likely to provide the high praise of the current regime described in Part II above).

Tables 5a and 5b report the results of a series of questions on our judge surveys about judges' knowledge of adherence or nonadherence to the start dates for the law clerk market.[64] In

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[64] The full text of the questions in our 2004 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).
>
> ____ 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 questions in our 2005 survey was as follows:

> Next to each bullet item below from this years 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

fall of 2004, 46 percent of responding judges stated that either a substantial number of appellate judges did not adhere or few appellate judges adhered to the start dates for conducting interviews and making offers (Table 5a). In fall of 2005, the number was still higher; 58 percent of responding judges stated that either a substantial number of appellate judges did not adhere or few appellate judges adhered to the start dates for conducting interviews and making offers (Table 5b).[65]

____ 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

[65] We do not suggest that this evidence implies an increase in the total level of nonadherence between 2004 and 2005 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). If, however, nonadherence did increase between fall of 2004 and 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 fall of 2005 than in fall of 2004. This is so because in fall of 2004 the consideration of law school graduates, as distinguished from third-year law students, prior to the start dates for fall of 2004 was a violation of the regime's rules. (Although a few judges appeared to believe that the consideration of law school graduates prior to the start dates for fall of 2004 was not a violation of the regime's rules, the 2004 rules explicitly stated their application to law school graduates as well as third-year students; as noted just below, this feature of the regime was changed for fall of 2005.) 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 (visited Feb. 7, 2007). In fall of 2005, law school graduates were explicitly exempted from the start date regime. See Federal Judges Law Clerk Hiring Plan: Fall 2005 & Fall 2006, online at http://www.ca7.uscourts.gov/hr/lc_hiring_plan.pdf (visited Feb. 7, 2007).)

TABLE 5A: FEDERAL APPELLATE JUDGES' REPORTS OF ADHERENCE TO START DATES, FALL 2004

Number and (in parentheses) cumulative percentage of responding judges					
	Overall				**Within Circuit**
	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	To responding judge's knowledge, all judges adhered	At least one judge in Circuit did not adhere
Start date for scheduling interviews	3 (3%)	34 (36%)	41 (75%)	26 (100%)	36 (69%)
Start date for conducting interviews and making offers	5 (5%)	43 (46%)	40 (85%)	16 (100%)	36 (73%)

Source: 2004 Judge Survey. See note __ for the full text of the survey question. The total number of judges responding to both the question about their impression of overall adherence to the start date for scheduling interviews and the question about their impression of overall adherence to the start dates for conducting interviews and making offers was 104. The total number of judges responding to the question about their impression of adherence within their own circuit to the start date for scheduling interviews was 52. The total number of judges responding to the question about their impression of adherence within their own Circuit to the start date for conducting interviews and making offers was 49.

TABLE 5B: FEDERAL APPELLATE JUDGES' REPORTS OF ADHERENCE TO START DATES, FALL 2005

Number and (in parentheses) cumulative percentage of responding judges					
	Overall				**Within Circuit**
	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	To responding judge's knowledge, all judges adhered	At least one judge in Circuit did not adhere
Start date for scheduling interviews	5 (6%)	40 (52%)	27 (84%)	14 (100%)	35 (87%)
Start date for conducting interviews and making offers	4 (5%)	44 (58%)	23 (86%)	12 (100%)	34 (81%)

Source: 2005 Judge Survey. See note __ for the full text of the survey question. The total number of judges responding to the question about their impression of overall adherence to the start date for scheduling interviews was 86. The total number responding to the question about their impression of overall adherence to the start dates for conducting interviews and making offers was 83. The total number of judges responding to the question about their impression of adherence within their own Circuit to the start date for scheduling interviews was 40. The total number of judges responding to the question about their impression of adherence within their own Circuit to the start date for conducting interviews and making offers was 42.

Consistent with this evidence from our judge survey responses, our student survey responses point to a substantial amount of interviewing and offering of clerkships prior to the start dates for the law clerk market. We focus our discussion on the subset of responses from students who applied for federal appellate clerkships (rather than all students who applied for

federal clerkships at either the appellate or the district court level) to maximize comparability with our judge survey data.[66]

Tables 6a, 6b, and 6c report the dates at which students responding to our questions about hiring timing were first contacted to schedule interviews, were first interviewed, and first received clerkship offers; the shaded fields indicate behavior that is inconsistent with the start dates specified in Table 4.[67] As the top row of numbers in each table shows, between 31 percent

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[66] We received a total of 544 student responses in 2004, a total of 550 student responses in 2005, and a total of 571 student responses in 2006. See Appendix. Of course, a substantial set of the respondents did not apply for federal judicial clerkships at all. Among those who did apply for federal clerkships, most, but not all, applied to at least some federal appellate clerkships. As noted in the text, we focus on those who applied to at least some federal appellate clerkships to maximize comparability with our judge survey data.

[67] The text of the question on the student survey in 2004, 2005, and 2006 about interview scheduling read, "If you have received at least one invitation to interview, what was the date at which you received your first invitation to interview?" The question in 2004, 2005, and 2006 about interviewing was, "What was the date and time of your first interview?" Finally, the question 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?" "Interview" had been previously defined on our student surveys as follows: "[I]nterview" means 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 our definition of "interview," 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 Feb. 16, 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 language. 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 students 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. While it seems unlikely that this phenomenon could be having a significant effect on our results, readers concerned about it may wish to focus on the final row in Tables 6a, 6b, and 6c, as that row reports the date of

and 38 percent of responding students received their first invitations to interview before the start dates for the scheduling of interviews (31 percent of respondents in 2004, 34 percent of respondents in 2005, and 38 percent of respondents in 2006). Each year between about a quarter and about a third had their first interviews before the start dates for interviews (23 percent of respondents in 2004, 28 percent of respondents in 2005, and 32 percent of respondents in 2006), and between 12 and 22 percent of responding students received their first clerkship offer before the start dates for offers (12 percent of respondents in 2004, 13 percent of respondents in 2005, and 22 percent of respondents in 2006). As noted above, any selection bias in responses would tend to suggest that the true level of departures from the start dates is, if anything, higher than these figures suggest.[68]

applicants' first offers and, thus, is not affected by the definitional issue with interview just described.

[68] See text following Table 4.

TABLE 6A: DATE OF STUDENTS' FIRST SCHEDULING OF INTERVIEWS, FIRST INTERVIEWS, AND FIRST OFFERS, FALL 2004

	Number and (in parentheses) cumulative percentage of responding students				
	Before September 7	**September 7–12**	**September 13–19**	**September 20–26**	**After September 26/Not yet**
Date of first scheduling of interview	8 (5%)	39 (31%)	94 (92%)	8 (97%)	5 (100%)
Date of first interview	9 (6%)	7 (11%)	18 (23%)	101 (91%)	13 (100%)
Date of first offer	4 (3%)	3 (5%)	8 (12%)	84 (77%)	29 (100%)

Source: 2004 Student Survey. See note __ for the full text of the survey question. The table reflects responses from students who applied for federal appellate clerkships. The total number of students in this category who responded to the question about when their first interview was scheduled was 154; the total number who responded to the question about when their first interview took place was 148; and the total number who responded to the question about when they received their first offer was 128. The shaded areas in the table reflect behavior that is inconsistent with the start dates specified in Table 4.

TABLE 6B: DATE OF STUDENTS' FIRST SCHEDULING OF INTERVIEWS, FIRST INTERVIEWS, AND FIRST OFFERS, FALL 2005

	Number and (in parentheses) cumulative percentage of responding students				
	Before September 6	**September 6–14**	**September 15–21**	**September 22–28**	**After September 28/Not Yet**
Date of first scheduling of interview	12 (9%)	35 (35%)	80 (95%)	1 (96%)	5 (100%)
Date of first interview	8 (6%)	10 (13%)	24 (31%)	83 (93%)	9 (100%)
Date of first offer	3 (3%)	7 (9%)	5 (13%)	89 (89%)	13 (100%)

Source: 2005 Student Survey. See note __ for the full text of the survey question. The table reflects responses from students who applied for federal appellate clerkships. The total number of students in this category who responded to the question about when their first interview was scheduled was 133; the total number who responded to the question about when their first interview took place was 134; and the total number who responded to the question about when they received their first offer was 117. The shaded areas in the table reflect behavior that is inconsistent with the start dates specified in Table 4.

TABLE 6C: DATE OF STUDENTS' FIRST SCHEDULING OF INTERVIEWS, FIRST INTERVIEWS, AND FIRST OFFERS, FALL 2006

	Number and (in parentheses) 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 (11%)	31 (38%)	68 (97%)	3 (99%)	1 (100%)
Date of first interview	13 (11%)	6 (16%)	18 (32%)	77 (97%)	3 (100%)
Date of first offer	10 (9%)	3 (12%)	10 (22%)	69 (87%)	14 (100%)

Source: 2006 Student Survey. See note __ for the full text of the survey question. The table reflects responses from students who applied for federal appellate clerkships. The total number of students in this category who responded to the question about when their first interview was schedule was 116; the total number who responded to the question about when their first interview took place was 117; and the total number who responded to the question about when they received their first offer was 106. The shaded areas in the table reflect behavior that is inconsistent with the start dates specified in Table 4.

Overall, then, our student responses, like our judge responses, suggest a substantial amount of nonadherence to the start dates in Table 4.[69] These findings mark a clear contrast

[69] Responses to an additional set of questions on our judge survey for fall of 2004 further corroborate the conclusion in the text. Our 2004 survey asked judges the following two questions:

> When did you conduct your <u>first</u> 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 <u>first</u> 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 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 that survey.) The table below reports responding judges'

with the proclamation at the end of 2004 by the judges responsible for the current regime that the "vast majority of judges complied with the 2004 Plan," with only "several" judges going earlier than the start dates;[70] in 2004, as well as 2005 and 2006, our survey evidence suggests a very substantial degree of nonadherence to the start dates.

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answers to these questions. As in Tables 6a, 6b, and 6c in the text, the shaded fields below indicate behavior that is inconsistent with the start dates specified in Table 4 for fall of 2004. As the table below shows, one-third of 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 fall of 2004. Over one-fifth of judges (21 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 fall of 2004. These numbers reflect interactions with law school graduates as well as third-year students from schools beyond the four schools covered by our study, in addition to interactions with third-year students from the schools covered by our study, and as a result, it is not surprising that these numbers are higher than the numbers in Tables 6a and 6b. Note as well that a rigorous comparison of the two sets of numbers would also 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 Tables 6a, 6b, and 6c, but as evidence from a different source pointing in the same general direction as above.

	Number and (in parentheses) cumulative percentage of responding judges				
	Before September 7	**September 7–12**	**September 13–19**	**September 20–26**	**After September 26/Not yet**
Date of first interview	11 (9%)	6 (15%)	22 (33%)	66 (91%)	11 (100%)
Date of first offer	5 (4%)	9 (12%)	11 (21%)	67 (78%)	26 (100%)

Source: 2004 Judge Survey. The full text of the survey question is given just above. The total number of judges responding to the question about when they commenced interviewing was 116. The total number responding to the question about when they commenced making offers was 118.

[70] Harry T. Edwards and Edward R. Becker, Memorandum, "Assessment of the 2004 Law Clerk Hiring Plan and Suggestions for the Future" (November 10, 2004).

C. Stabilization of the Market at a Pattern of Mixed Adherence and Nonadherence

> "How did you go bankrupt?"
> "Two ways. Gradually and then suddenly."[71]

Departures from the start dates specified by the current federal 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 the substantial set of judges who violated the start dates generally did so by days or weeks rather than months (or years), the history of previous failures to reform the timing of the clerkship market, described in Section A above, naturally raises the question of what the current level of subversive behavior bodes for the longer term prospects of the current regime.

In some settings, a nontrivial level of nonadherence to a particular regime precipitates a growing cycle in which adherence grows smaller and smaller over time. An example of this type of dynamic is Thomas Schelling's "dying seminar."[72] A faculty member organizes a group of twenty-five people to meet regularly, and the first time the vast majority show up.[73] But some initial participants seem unwilling to continue attending given that a few of the initial invitees did not participate.[74] Once these participants stop attending, others may drop out in response, and the seminar may soon fail to draw anyone. Various specific patterns are possible, as Schelling goes on to describe,[75] but the central feature of all of the cases is that people's willingness to participate turns on the level at which they expect others to participate. Consistent with this idea, in the clerkship market itself, when Judges Becker and Breyer suggested to their

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71 Ernest Hemingway, The Sun Also Rises 136 (Charles Scribner's Sons 1926).
72 Thomas Schelling, Micromotives and Macrobehavior 91 (W.W. Norton 1978).
73 See id at 91-92.
74 See id at 92.
75 See id at 102-10.

judicial colleagues the adoption of a 1989 start date of March 1 of the second year of law school, Becker and Breyer indicated that this proposal would only be enacted if 85 percent of the judges agreed to adhere to it.[76] When only 75 percent agreed to do so, this proposal was shelved.[77]

We explore below several theories under which the current pattern of mixed adherence and nonadherence to the start dates in the law clerk market could reflect a stable long-run equilibrium. As suggested above, the experiences of other markets studied in the economics literature are not encouraging. But perhaps some judges are willing to adhere to the start dates despite their awareness—clearly reflected in the survey responses reported above—of violations by a substantial proportion of their colleagues. As one judge opined in responding to our 2005 survey, "[t]he key to the success of the system is the realization that 100 percent (or even 93 percent) adherence isn't necessary."[78] Below we assess potential ways in which some level of non-adherence to a start date regime may be sustainable in a long-run equilibrium.

Our analysis in this Section is limited to the domain of positive economic analysis; we assess the prospects for a long-run equilibrium with mixed adherence and nonadherence to the start dates in the law clerk market, without providing an assessment of the normative desirability of such an equilibrium. The normative assessment would undoubtedly be complex. Relative to the pre-moratorium law clerk market, a clear virtue of an equilibrium with partial, even if not complete, adherence is that at least some significant set of applicants would be hired in the third rather than the second year of law school. An obvious disadvantage of an equilibrium with mixed adherence and nonadherence, relative to the pre-moratorium situation, is that some market participants would be flouting, rather than conforming to, the market rules, though this effect

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76 See Breyer, Becker, and Calabresi, 104 Yale L J at 209 (cited in note 18).
77 See id.
78 2005 Judge Survey #16.

could be mitigated both by transparency about judges who adhere versus do not and by explicit permission issued by law schools for applicants to interact with nonadhering judges before the start dates—so as to avoid the distressing moral dilemmas described by several of those quoted at the start of this Article. Normative comparison with regard to the criterion of market participants' ability to consider and compare multiple offers before making their decisions is even less determinate; our prior study described the serious limits on their ability to do this in the pre-moratorium period,[79] while Part IV below describes the difficulties under the present start date regime. There are several barriers to direct comparison on this dimension—most obviously the point, noted in our discussion below of exploding offers (Part IV.A), that the sample pools may be different across the two studies. And the normative ambiguities already described have not even confronted the possibility of the third basic form of market organization—a centralized matching system in lieu of either the pre-moratorium system or the current start-date regime.[80]

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[79] See AJPR, 68 U Chi L Rev at 813-28 (cited in note 8).

[80] The use of a medical-type centralized matching system in the law clerk market has been proposed numerous times. See id at 869-84; Epstein, 10 Green Bag 2d 37, 46-48 (cited in note 18); Trenton H. Norris, The Judicial Clerkship 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 1098–1108 (cited in note 18); Wald, 89 Mich L Rev at 160–63 (cited in note 15). Our own proposal in our prior study was a 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 pre-match agreements would tend to be highly binding. See AJPR, 68 U Chi L Rev at 869-84 (cited in note 8). Subsequent economic analysis provides empirical support from laboratory experiments for the idea that the tendency toward early agreements that bind makes successful centralized matching very difficult to implement. See Ernan Haruvy, Alvin E. Roth and M. Utku Unver, 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 early agreements proved to be 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 218 (cited in note 37); Muriel Niederle and Alvin E. Roth, Making Markets Thick: How Norms Governing Exploding Offers Affect Market Performance (working paper), available online at http://vu.wu-wien.ac.at/dyn/virlib/materials/mediate_recomm?ID=wu01_c65 (visited Jan 24, 2007).

Because we believe the normative comparison between an equilibrium with mixed adherence to start dates and the pre-moratorium law clerk market—bearing in mind the ethical aspects of noncompliance with what are thought to be market "rules" —is genuinely indeterminate, and because we have previously discussed at length the potential benefits of the centralized matching alternative, if it were appropriately adjusted for the special features of the law clerk market, we focus in this Section on positive economic analysis.

1. The potential role of psychological break points.

Conceivably the degree and scope of nonadherence to the start dates in the law clerk market are limited by a sort of psychological "break-point" associated with the start of the third year of law school. Perhaps many judges will be reluctant to commence the process of law clerk hiring during the summer before the third year of law school, as opposed to after the school year commences, 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 very conspicuous as violations of the start dates. A hopeful view is that this design might

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In 2002, a group of former medical residents brought an antitrust suit challenging the use of a matching system for medical residencies. See Jung v. Association of American Medical Colleges, 2006 WL 1582667 (D.C. Cir. 2006). The theory of the suit—which was dismissed in 2004—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, for example, Kojima, Fuhito Matching and Price Competition when Firms Can Hire More than One Worker, Am Econ Rev (forthcoming). Muriel Niederle provides a model based on the procedures by which matching for medical residencies is conducted and finds that such matching does not necessarily lead to wage suppression. See Muriel Niederle, Competitive Wages in a Match With Ordered Contracts (working paper). Certainly the raw wages of medical specialties with and without centralized matching do not differ. See Letter from Muriel Niederle and Alvin E. Roth, Relationship Between Wages and Presence of a Match in Medical Fellowships, 290 J Am Med Assoc 1153 (2003).

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.[81]

However, it is easy to overstate the importance of seemingly obvious breakpoints. In the markets for college athletes and medical residents, for example, cutthroat competition led to commitment for college athletic scholarships to students in the eighth grade and to the recruitment of medical students for subspecialties while they were still taking basic medical classes—well before any reasonable break point in terms of information necessary for sensible matching.[82] 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 famously, Judge Kozinski confidently pronounced in a 1991 article that February or March of the second year of law school was a "breakpoint" before which (because of the grades and law review election results emerging at that time) judges would not be willing to hire.[83] However, within a few years the market was moving at the beginning of the fall of the second year of law school, well before this

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[81] See Christopher Avery, Andrew Fairbanks, and Richard Zeckhauser, The Early Admissions Game 19-70, 187 (Harvard 2003) (overviewing the timing of many colleges' early application programs, and giving one example of solicitation of applications prior to the start of the twelfth grade).

[82] A well-known story of early recruiting in college basketball is of Damon Bailey, who made a commitment to attend Indiana University in the eighth grade. 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 Jan 23, 2007) (describing Bailley's early commitment). In the medical market prior to the current system of matching for subspecialties, hospitals were hiring applicants two full years before medical internships were to begin. See Alvin E. Roth, The Origins, History and Design of the Resident Match, 289 J Am Med Assoc 909 (2003); Alvin E. Roth, The Evolution of the Labor Market for Medical Interns and Residents: A Case Study in Game Theory, 92 J Pol Econ 991, 994 (1984).

[83] See Kozinski, 100 Yale Law J at 1710 (cited in note 17).

"breakpoint."[84]) In addition, in the market for law clerks, the timing of the current breakpoint means that the breakpoint is many months after the latest relevant new information (grades and recommendations from the second semester of the second year of law school) has become available. For all of these reasons, the case for some sort of psychological barrier that would limit a significant subset of market participants from 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 segmented, with one segment of the market moving prior to the start dates and other segments of the market moving after these dates. For instance, some students might focus their attention on one particular subset of clerkships in their applications, while other students might concentrate their attention on a wholly different set of clerkships. Once a few judges in an "early segment" of the market violated the start dates, others in that same segment of the market would have tremendous incentive to move early as well, but the other segment could remain largely unaffected and could continue to adhere to the start dates[85].

One possibility is that the clerkship market has become segmented, at least to some degree, by the political background or philosophy of judges.[86] In our initial study of the

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[84] See AJPR, 68 U Chi L Rev at 830-33 (cited in note 8)

[85] See Schelling at 109-10 (cited in note 72) for discussion of this type of segmented outcome.

[86] As one student observed on a survey response, "[I]t seems as if the republican/conservative judges were more likely to 'break the rules' than the democrat/liberal judges. It might be that they have far less allegiance (or deference) to Judge Edwards meaning that it might be a good idea for Judge Edwards to reissue the rules along with a conservative cosponsor." 2005 Student Survey #105.

clerkship market in 1998–2000, we considered asking judges—who are not asked for their names—for the political party of the President who nominated them, but we ultimately determined that we should not include this question. We followed the same tack in our present set of surveys. Thus, our survey responses provide no quantitative data that could bear upon the possibility of 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,[87] but, unfortunately, most of the posts do not specify whether behavior on the stated dates was undertaken with respect to law school graduates (in compliance with the law clerk hiring regime) or third year students (in violation of the regime).[88] If, in fact, there is segmentation along political lines, then 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. On this account, students focused on (say) "conservative" judges would apply, and frequently be hired, before the start dates, while students focused on (say) "liberal" judges would apply, and generally be hired, in accordance with the start dates.

Another possible form of market segmentation involves geography or court circuit. From Tables 5a and 5b above we know that in the overwhelming majority of (if not all) circuits there is at least some non-adherence among judges; in 2005, for instance, over 80 percent of responding judges reported that at least one federal appellate judge in their Circuit did not adhere to the start date for conducting interviews and making offers, while 87 percent reported that at least one federal appellate judge in their circuit did not adhere to the start date for scheduling interviews

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87 See http://lawschoolclerkship.blogspot.com (visited January 24, 2007).

88 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.

(Table 5b). Behavior reported by such an overwhelming portion of responding judges as happening within their own circuit is hard to reconcile with a strong version of the geographic or court circuit segmentation theory. Nonetheless, this evidence cannot entirely disconfirm the theory at hand because it is conceivable that non-adherence by one or even two judges within a particular geographic area or circuit—perhaps particularly if the non-adherence is by senior judges—could be consistent with a general norm or practice of adherence within that geographic area or circuit. Thus, ultimately, segmentation by geography or court circuit—like the political segmentation theory discussed above—is, while not confirmable with the data we have available, also not inconsistent with that data.[89]

Note that an extreme form of "market segmentation" would have the market subdivided a large number of times; for example, we discussed above the market for gastroenterology fellows, a setting in which markets became highly localized over time. In such cases, as discussed above, the key advantages of having markets at all are lost. The sort of segmentation discussed here, by contrast, involves potentially much larger subsectors of the market (and much less fine-grained segmentation) and, thus, could preserve many of the advantages of markets as an allocation mechanism.

[89] Our judge surveys did ask judges for their circuit, and thus in principle it is possible to examine whether reported adherence varies by circuit, but because of the relatively small number of judges in each circuit, together with our approximately 50 percent response rate, we are not comfortable drawing inferences from observed patterns across circuits, simply because the (for instance) six judges out of twelve judges who responded from Circuit A could represent a very different sample than the six judges out of twelve judges who responded from Circuit B. That said, if one looks at data on adherence versus nonadherence across circuits, there is presently no apparent pattern of more pronounced adherence in some geographic or circuit segments of the market. While we do not report this data because of its very limited reliability in our view, it is available from us on request.

3. The potential role of informal understandings.

A different—and obviously much less benign—form of stabilization around 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 these dates. Our surveys did not make reference to this type of issue, but, nonetheless, a number of student respondents in 2005 specifically mentioned the practice of market participants following the start dates in a formal fashion while actually violating the spirit of the rules.[90] As Table 7 reveals, some such violations were quite blatant. As one student respondent summarized the dynamic, "many 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."[91]

[90] As suggested in the text, no particular survey question inquired about this issue, so, unlike in our discussions of the other tables in this Article, we do not quote from our survey questions.

[91] 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.

TABLE 7: 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 Sep. 9 asking me to call to schedule an interview on Sep. 13 [the date on which interviews could be offered].
2004 Survey #296	[Clerks] 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., "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 would be calling me on the 15th for a[n] interview.
2005 Survey #87	I technically did not receive any interviews until Thursday, September 15 (the first "official" day that interview offers could be made). However, at least 4 judges either emailed me or called me between September 9 and 13 to say that they were "very interested" in my application, even though they did not technically offer me an interview yet.
2005 Survey #93	[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	[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."

Sources: 2004 Student Survey; 2005 Student Survey. [2006 data needs to be incorporated into this table.]

These sorts of informal in-advance understandings have close analogues in other markets—markets in which such informal understandings have largely undermined start dates even though those dates were formally followed. In the case of postseason college football bowls, for instance, teams and bowls used to negotiate individualized agreements about who

would play whom in the major postseason bowls and were required by the National Collegiate Athletic Association to wait until a specified day, called "Pick 'Em Day," before making these arrangements.[92] However, despite formal adherence to Pick 'Em Day, informal agreements were reached weeks in advance of the specified date.[93] A similar illustration comes from the market for Japanese university graduates, who are not permitted to be formally hired well in advance of their graduation dates.[94] Despite formal adherence to the designated start dates, informal understandings, called naitei, are commonly reached well before graduation.[95] These understandings have an interesting means of enforcement: firms schedule events for students on dates when major examinations for other jobs (such as at the Finance Ministry) are held, with the informal job offers retracted for students who do not show up to the firm events.[96] Thus, the dynamics reflected in the student comments in Table 7 have clear counterparts in other markets in which start dates have been attempted in the past—markets in which informal understandings were not limited to dates for interviews (as in Table 7) but extended to the offer and acceptance process itself. It is too early to know whether a similar pattern will ultimately emerge in the market for federal judicial law clerks.

* * *

Given the mixed pattern of adherence and nonadherence revealed by our data, the best hope for preserving the current regime for law clerk hiring and avoiding a downward spiral of non-adherence involves some sort of segmentation in the market. (Again, we do not offer any independent normative defense of this outcome.) The evidence from other markets is not

92 See Roth and Xing, Am Econ Rev at 1009 (cited in note 23).
93 See id at 1009–12.
94 See id at 1015–16
95 See id.
96 See id at 1016 n35.

necessarily encouraging on this score, but it remains possible that segmentation—most likely by potential orientation, geography, or court circuit—could avoid a trend of growing non-adherence to the start dates for hiring law clerks. We return to the prospect of market segmentation in Part IV below.

IV. "Exploding Offers" and Compressed Timing of the Market

> I . . . had an [early morning] interview [on Sept. 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 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.[97]
>
> I had 10 minutes to accept.[98]
>
> [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 canceled my interview.[99]
>
> [A]t 9:30am on [Sept. 22, the first day on which offers were permitted, Judge X] said I had until 8am the next day. At 3pm on [the same day, Judge X's] secretary

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[97] 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.

[98] 2005 Student Survey #64.

[99] 2004 Student Survey #531.

> called and said the judge really needed a response. I negotiated with the secretary to get 1 more hour to decide, promising to deliver an answer by 4pm.[100]
>
> I asked for an hour to consider the offer. The judge agreed; however thirty minutes later [the judge] called back and informed me that she wanted to rescind my offer.[101]
>
> 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 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.[102]

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. In significant part this is a result of the practice of "exploding offers," which (as in the student quotations with which we began this section) require students to respond extremely quickly when offered positions. 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 market for federal judicial law clerks are highly skeptical of participants' ability to determine their ideal

[100] 2005 Student Survey #183.
[101] 2006 Student Survey #297.
[102] 2004 Student Survey #112.

matches prior to interviews having been conducted.[103]) 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.[104]

Such market compression, in which transactions occur extremely rapidly once the start date has been reached, is characteristic of markets with start dates.[105] Indeed, as described in Part III.A above, judges experienced a dramatic version of this problem under the May 1 start-date regime attempted in the law clerk market in 1990.[106] With all the action compressed in time by the start dates, judges naturally—and reasonably—worry that if they give applicants any substantial measure of time in which to respond to offers, it will be difficult to find replacements if an offer is rejected. As a consequence, judges require students to respond extremely quickly to offers. Our discussion below presents survey evidence both on the frequency of exploding offers—which require very rapid answers by their recipients—and on the general degree to which clerkship transactions in the present market are compressed into an extremely short time frame. Both of these features of the market suggest that market participants' ability to consider and compare multiple offers is very limited. Two notes of at least partial reassurance, however, are that the market did not necessarily fare better on this metric in the pre-moratorium period and that market segmentation may, again, help to mitigate (by localizing) the costs of exploding offers and market compression.

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[103] See note 42 and accompanying text.
[104] See note 2.
[105] See AJPR, 68 U Chi L Rev at 850–51, 863–64 (cited in note 8).
[106] See notes 56–57 and accompanying text.

A. Exploding Offers

Even the judges responsible for the start-date regime in Table 4 readily acknowledge the problem of exploding offers under this regime, but they do not appear unduly concerned, stating that "for all the years that we have been on the bench, judges have extended exploding offers to law clerk applicants."[107] It is not clear to us, however, whether these or other judges are aware of how common the practice of exploding offers actually is under the current regime. In both fall of 2004 and fall of 2005, our survey asked judges, "What was the shortest time you gave any clerkship candidate to accept or reject a clerkship offer?" As shown in the right-hand column of Table 8, we found that over one-third of judges responding to this question gave twenty four hours or less for a response. (Again, note that any bias in those who chose to respond suggests that, if anything, this number understates the overall frequency of exploding offers.) By comparison, when we asked judges an identical question in our study five years ago, "only" 23 percent of responding judges gave a day or less, as shown in the left-hand column of Table 8.[108] Note that we do not assert that the overall frequency of exploding offers has increased under the current regime; given possible variation in practices across judges who chose to respond to our surveys five years ago 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

[107] Harry T. Edwards and Edward R. Becker, Assessment of the 2004 Law Clerk Hiring Plan and Suggestions for the Future (Memorandum, Nov 10, 2004).

[108] Table 8 in the text is similar to Table 6 in our prior study, but instead of reporting results separately for the two separate years examined in our prior study (as was done in Table 6) we aggregate the two years' worth of data for purposes of Table 8, as our interest in the present study is not in comparing the two years from our previous study to each other, but in comparing the general pattern in those years to the pattern observed in the fall of 2004. Table 8 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.

offers are relatively commonplace in the present market for federal judicial law clerks. It also bears emphasizing that the data in Table 8 reflect only explicit time limits placed on offers and do not reflect the fact that some (perhaps many) applicants feel informally obligated to make an immediate acceptance of any offer tendered by a federal judge.

TABLE 8: TIME-LIMITED OFFERS

	1998-1999 and 1999-2000 markets	**2004-2005 and 2005-2006 markets**
Within one day	23%	34%
Within two days	36%	42%
Within a week	67%	76%
Number of responding judges	193	163

Sources: 1998–1999 and 1999–2000 Judge Surveys; 2004 and 2005 Judge Surveys (present study). See the text before the table for the 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.

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 striking. In both fall of 2005 and fall of 2006, for instance, about half of responding students (51 of 103 in fall of 2005 and 45 of 83 in 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).[109] And the clear majority of these students—nearly two-thirds in both fall of 2005 and fall of 2006—accepted their offers the very same day, so for these students the entire process was concluded on the opening day for interviewing and making offers.[110] What is more, among those who accepted

[109] For the text of the offer timing question, see note 67.

[110] The survey text here was simply, "Did you accept your first clerkship offer?"

offers on the opening day for interviewing and making offers, nearly half of these students in both fall of 2005 and fall of 2006 had accepted by 1:00pm local time.[111] One student summarized the situation by saying, "it 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."[112] As Table 9 shows, there was also considerable compression in the timing of the market in 2004, though not as much as in the 2005 and 2006 survey responses; as noted above, we cannot draw any confident conclusions about changes over time from modest differences in answer patterns across our two years of surveys because of possible differences in the composition of the response pools, but the notion that compression might increase over time is not surprising in light of prior experiences with start date regimes in other markets.[113]

[111] A few respondents made specific reference to a time zone in answering the offer timing question. Because such reference suggests the possibility that these respondents were not answering in local time terms, we omit these responses from our analysis.

[112] 2006 Student Survey #___.

[113] See, for example, AJPR, 68 U Chi L Rev at 851 (cited in note 8) (discussing the market for medical residents).

TABLE 9: MARKET TIMING[114]

	Fall of 2004	Fall of 2005	Fall of 2006
First offer received on start date for interviewing and making offers	38	51	45
First offer received after start date for interviewing and making offers	59	52	38
Of first offers received on start date for interviewing and making offers, percentage accepted on start date	42%	63%	62%

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

A clear 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 which the judges are most interested but how these candidates will respond to an offer. This phenomenon is familiar from other markets.[115] In the law clerk market, while many judges may typically content themselves with informal information gathering, through trusted professors or current (or former) clerks, about candidates' level of interest, other judges resort to demands for explicit assurances from candidates that they will accept an offer if one is forthcoming, as clearly illustrated by the third student quote at the beginning of this Section.

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

[114] Table 9 focuses on activity on and after the start date for interviewing and making offers. Tables 6a, 6b and 6c above provide information on interviewing and extending of offers prior to this start date.

[115] See Alvin E. Roth and Xiaolin Xing, Turnaround Time and Bottlenecks in Market Clearing: Decentralized Matching in the Market for Clinical Psychologists, 105 J Pol Econ 284, 289-91 (1997) (discussing the market for clinical psychology internships).

start dates, in an effort to avoid the severe congestion.[116] Moving early gives a judge the opportunity to interview and consider multiple candidates without a fear that a candidate will be unavailable if the judge does not issue an offer immediately after the interview. At least in other markets, such dynamics have made start dates ultimately unsustainable.[117] In the present market for federal judicial law clerks, however, it is conceivable that market segmentation of the sort discussed in Part III.C above will make the start dates sustainable. It may be that compression—like nonadherence—is higher in some segments than in others. If a segment has lower compression than the average levels reflected in Table 9—perhaps because of norms against exploding offers[118]—then, as just noted, this segment might also have lower nonadherence to the start dates for hiring law clerks.

V. CONCLUSION

Our analysis suggests a mixed message about the new market for federal judicial law clerks. The time of hiring has moved back considerably, which is broadly regarded as a positive development, but departures from the start dates for hiring law clerks—as well as exploding offers and high market compression—are apparent. The good news about the time of hiring makes it particularly critical to acknowledge and attempt to address the problems that threaten to undermine the value of hiring later in students' law school careers. The need is especially urgent given that, as described above, these are the very problems that have thwarted the many past

[116] See id at 310-11 for a discussion of this effect in another market with high levels of compression around a designated start date.
[117] See AJPR, 68 U Chi L Rev at 854 (cited in note 8) (describing the 1998 abandonment of the start-date regime in the clinical psychology market, in favor of a centralized matching system).
[118] See generally Niederle and Roth (cited in note 80).

attempts at start date regimes in both the law clerk market and other markets that have suffered from problems of early hiring.

APPENDIX

This Appendix describes our survey approach. Exactly as in our previous study, we surveyed both the federal appellate bench and law students from a few elite schools.[119] As noted in the text, our surveys were not professionally designed instruments; at the same time, we obtained good response rates and gathered information (from the surveys' highly educated recipients) consisting mostly of answers to very straightforward factual questions.

On the judge side, a six-page survey was sent by US mail in December of 2004 (regarding hiring in fall of 2004) and in February of 2006 (regarding hiring in fall of 2005) to each active and senior member of the federal appellate bench, with a stamped, pre-addressed envelope for return of the completed survey.[120] 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 concerns. As detailed in Table A1, in 2004 we received responses from just over one half of the federal appellate judges, similar to our response rate in our previous study, and in 2005 we received responses from 46 percent of the federal appellate judges. In both years, responses from active versus senior judges were also similar in number to responses from these groups in our prior study.[121] Because we encountered more difficulty obtaining responses in 2005 than in 2004, and because the only issue addressed in our analysis with respect to which we are entirely dependent

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[119] See AJPR, 68 U Chi L Rev at 806-11 (cited in note 8) (discussing the reasons for choosing these pools of judges and students to survey).

[120] Parallel to our previous study, a small number of senior court of appeals judges from the Seventh Circuit were not surveyed because the sender of the survey (Posner), a judge on that Circuit, knew that they were no longer hiring law clerks. See id at 807 n 33.

[121] Our response rate from senior judges is lower this time than in our prior study because the number of senior judges on the federal appellate bench has increased dramatically. In our prior study, there were 77 (in 1999) and 79 (in 2000) senior federal appellate judges. See id at 886. As Table A1 shows, there were 99 in 2004 and 95 in 2005.

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 mot to attempt a survey of federal appellate judges in fall of 2006.

As noted, our judge surveys involved only federal appellate judges; they did not involve federal district court judges or state court judges. As in our prior study,[122] we concluded that the number of serious competitors to federal appellate judges among this broader group of judges—while nontrivial—was sufficiently limited, relative to the overall number of federal district court and state court judges, to justify the limitation of the distribution of our survey to federal appellate judges.

[122] See id at 808.

TABLE A1: JUDGE SURVEY RESPONSE RATES BY SENIORITY STATUS AND CIRCUIT

Group of federal appellate judges	Number of judges surveyed		Number of judges responding		Percentage of surveyed judges responding	
	2004	2005	2004	2005	2004	2005
All judges	259	253	135	116	52%	46%
Active judges	160	158	88	74	55%	47%
Senior judges	99	95	44	42	44%	44%
Senior status not listed	N/A	N/A	3	(2)	N/A	N/A
1st Circuit	11	10	7	6	64%	60%
2d Circuit	23	23	9	8	39%	35%
3d Circuit	20	20	16	9	80%	45%
4th Circuit	15	14	3	5	20%	36%
5th Circuit	19	18	11	9	58%	50%
6th Circuit	25	24	15	11	60%	46%
7th Circuit	14	14	7	7	50%	50%
8th Circuit	21	20	12	14	57%	70%
9th Circuit	47	47	28	22	60%	47%
10th Circuit	19	19	7	11	37%	58%
11th Circuit	17	17	8	5	47%	29%
D.C. Circuit	11	12	5	5	45%	42%
Federal Circuit	17	15	6	4	35%	27%

Source: Robin A. Burnett-Wynn, Judicial Yellow Book 7–84 (Leadership Directories Fall 2005) (active and senior judges by circuit); Robin A. Burnett-Wynn, Judicial Yellow Book 7–83 (Leadership Directories Fall 2004) (active and senior judges by circuit); 2004 and 2005 Judge Surveys.

For students, surveys were distributed in fall of 2004, fall of 2005, and the fall of 2006 to all third-year students at four law schools—Harvard, Stanford, University of Chicago, and Yale—both in hard copy to student mailboxes, with stamped, pre-addressed return envelopes, and electronically to student email accounts with the option to respond to the survey electronically. Our response rate was 50 percent in fall of 2004 and 48 percent in fall of 2005 (Table A2). [Need to add 2006 data both here and in the table.]

TABLE A2: STUDENT SURVEY RESPONSE RATES

	Number of students surveyed		Number and (in parentheses) percentage of students responding	
	2004	2005	2004	2005
Chicago	190 (191?)	199 (203?)		
Harvard	538	571		
Stanford	178	176		
Yale	188	195		
Total	1094	1137	544 (50%)	550 (48%)

Source: U.S. News and World Report (law school class sizes); 2004 and 2005 Student Surveys.

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. 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 court clerkships embraced in the opening question, but

this could have produced misleading or incomplete answers, as opportunities might have affected the student's situation in the market for federal court clerkships. However, the implication of our approach is that the data described in the main text, while only for students who applied for federal court clerkships, may reflect events in the state court clerkship market as well.[123]

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.

[123] In a few cases, respondents specifically indicated that a particular answer related to a state court judge, and in those cases the answer in question was excluded from our analysis.