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A MARKET-BASED SOLUTION TO THE JUDICIAL CLERKSHIP SELECTION PROCESS

EDWARD S. ADAMS*

Judges universally agree that the close relationship between a judicial clerk and a judge is one unlike that between typical employers and employees.¹ A judge depends almost totally on the aid of law clerks for her work product; they are sounding boards for legal opinions as well as confidants.² Unfortunately, former judicial law clerks have recently exploited this dependency by publishing “tell-all books” about their experiences.³ This problem may cause judges to be even

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1. See Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153 (1990) (describing, from first-hand knowledge as Chief Judge for the United States Court of Appeals for the District of Columbia Circuit, that “the judge-clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair”); Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1708-09 (1991) (articulating as a United States Court of Appeals Judge for the Ninth Circuit, “the very significant intangible aspects of the judge-clerk relationship”). Judge Kozinski described:

[this] relationship [is] . . . professional only in part; it is also a close human relationship, one that endures long after the clerkship ends. By accepting a judge’s clerkship offer, a young lawyer becomes part of the judge’s extended family, a disciple, an ally, quite possibly a friend. Important as it is to have a clerk who is competent, it is no less important to have one you can get along with, preferably someone you like.

2. See Wald, *supra* note 1, at 153 (explaining that judges seek out the counsel of their clerks because judges are totally dependent on themselves, their law clerks, and their staff “for an output of forty or more published opinions a year and dozens of unpublished, nonprecedent setting opinions” and because judges “need to test ideas before exposing them to the hard probing of colleagues”). See generally Jim Chen, *The Mystery and the Mastery of the Judicial Power*, 59 MO. L. REV. 281, 302 (1994) (asserting that the clerk’s participation in the opinion drafting process, whether “by writing a first draft, researching discrete points, or merely advising the Justice, . . . can supply all the agenda control that is needed to swing outcomes and rationales in individual cases”).

3. See Tony Mauro, *Supreme Court Tightens Secrecy Rules For Clerks*, USA TODAY, NOV. 9, 1998, at A1 (portraying Edward Lazarus’ book *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* as an “airing of the court’s internal disputes” that led the Supreme Court to reemphasize its confidentiality rules). But see David J. Garrow, *The Lowest Form of Animal Life?: Supreme Court Clerks and Supreme Court History*, 84 CORNELL L. REV. 855, 858 (1999) (reviewing the publications and interview comments of former clerks and concluding that clerks have revealed the inner workings and personalities of the Supreme Court “long before Edward Lazarus” was ever born). See generally DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* (1998) (clerk to Justice Byron R. White, October Term 1975); EDWARD LAZARUS,

more selective in their hiring process.⁴ A judge seeks clerks who will outperform those in other chambers and who will enhance the judge's prestige and reputation,⁵ imparting a significant interest in pursuing clerks who are, as Judge Alex Kozinski described:

not merely competent, but brilliant; not merely articulate, but lightning fast and prolific; not merely thoughtful, but persuasive and tactful; not merely dedicated, but driven; not merely cooperative, but single-mindedly committed to easing the judge's burden and advancing the judge's cause in the multitude of disputes and disagreements that naturally arise on a collegial court.⁶

Consequently, having merely a good law clerk rather than a great one can be the difference between a bad and a wonderful year for a judge.⁷ Not surprisingly, this intimate relationship is also of great importance to the clerk, as the judge is typically her first key professional employer and will be in a unique position to comment upon her intellect, ability, and character.⁸

CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998) (clerk to Justice Harry A. Blackmun, October Term 1988); J. HARVIE WILKINSON, III, SERVING JUSTICE: A SUPREME COURT CLERK'S VIEW (1974) (clerk to Justice Lewis F. Powell, October Terms 1971 and 1972). In his acknowledgements Wilkinson noted that

[m]uch of what goes on within the Supreme Court must be kept in confidence if the spirit of frank and informal exchange there is to continue to prevail. The need for such confidence in the Court's deliberations will always be important, and I have tried in every instance to respect it.

Id. at xiii.

4. Judges will be more inclined to consider the possible ramifications of communications with their clerks and hence, judges will seek individuals whom they believe will be discrete and confidential. *See* Mauro, *supra* note 3, at A1 (noting that the Supreme Court recently reemphasized that confidentiality continues after the end of the clerks' terms); *see also* Kozinski, *supra* note 1, at 1709 ("Mutual trust and respect are not merely desirable, they are essential [to the judge-clerk relationship].").

5. *See* Wald, *supra* note 1, at 154 (explaining that "many judges are not looking just for qualified clerks," but rather they are looking for exceptional students who as clerks "will consistently outperform their peers in other chambers" and who "may in part reflect the . . . [judges'] ability" to establish and to maintain a reputation as a "feeder" to the Supreme Court).

6. Kozinski, *supra* note 1, at 1708.

7. *See id.* Judge Kozinski contended that a good working relationship is "absolutely indispensable" to the general operation of a judge's chambers and that a good clerkship can be "a joyful maturing experience" while "a bad clerkship is a year in purgatory." *Id.* at 1709; *see also* Wald, *supra* note 1, at 153 (noting that "judges talk about it being a 'good' or 'bad' year . . . in terms of teamwork and the dynamics of work within their chambers").

8. *See* Kozinski, *supra* note 1, at 1709 (noting that "[a] young lawyer's choice of a clerkship can have a significant impact on his future career development").

As Judge Kozinski noted, a judge and her law clerk are "tethered together by an invisible cord for the rest of their mutual careers. The judge will forever appear on the clerk's

Given the importance of this relationship, it is not surprising that the clerkship hiring process is crucial to judges as well as to potential clerks. Unfortunately, the process has also caused concern for both parties, being described by critics as “‘madcap decision making,’⁹ ‘positively surreal, the most ludicrous thing I’ve ever been through . . . brilliant, respected people . . . behaving like 6-year olds’¹⁰ and a ‘process . . . in which the law of the jungle reigns and badmouthing, spying and even poaching among judges is rife.’”¹¹ In essence, the process has developed into a judicial free-for-all in which judges vie for the top law students.¹² The status quo has spawned jokes about astute federal judges combing kindergartens for “bright young prospects.”¹³

For many years, federal judges and others have labored to reform judicial clerkship hiring so judges might conduct a dignified, collegial, and efficient selection process.¹⁴ To date, however, these reform efforts have had little success.¹⁵ This Article endeavors to forge a solution to the problems endemic to the current judicial clerkship hiring process: lack of collegiality, cut-throat hiring methods, lack of efficiency, and hiring based on inadequate information about candidates.¹⁶ Part I of this Article explores the historical problems in the clerkship hiring process, reviews previously attempted but failed efforts at reform, and identifies problems with such approaches. Part II

resume as his first permanent professional employer; she will receive many inquiries about the clerk’s performance and character.” *Id.* Similarly, the reputation of the judge is enhanced or diminished at the discretion of her current and former clerks, who are in the best position to comment on the “character, work habits, fairness and generosity of the judges they clerked for.” *Id.*

9. Wald, *supra* note 1, at 152 (quoting internal correspondence).

10. *Id.* (quoting David Margolick, *At the Bar: Annual Race for Clerks Becomes a Mad Dash*, N.Y. TIMES, Mar. 17, 1989, at B4 (quoting a Stanford student)).

11. *Id.*

12. See Edward R. Becker et al., *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 YALE L.J. 207, 208-12 (1994) (explaining how competition in hiring has forced judges’ hands and resulted in irrationally early interview and offer dates); Wald, *supra* note 1, at 154-55 (describing the current situation as one of “fervent competition” in which “out of the 400 clerk applications a judge may receive, a few dozen will become the focus of the competition” and noting that “[e]arly identification of these ‘precious few’ is sought and received . . . usually before the interview season begins”).

13. Becker et al., *supra* note 12, at 211-12.

14. See *id.* at 208-15 (discussing various efforts to reform the clerkship hiring process and campaigning ardently for reform).

15. See Kozinski, *supra* note 1, at 1707 (claiming that every proposal to revise the system “cannot, will not and should not” withstand criticism and successfully convert the “bad apples”); Wald, *supra* note 1, at 155-60 (describing past reform attempts as “[f]ailed efforts to reign the beast”).

16. See *infra* Part I.

discusses key impediments to reforming the existing system, including discord in the judiciary and transaction costs, reviews these impediments during a recent hiring season, and finally suggests a behavioral explanation for these barriers to reform. Part III analyzes and critiques proposed solutions to the present process and chronicles their practical and theoretical failures. Part IV proposes a free-market system better able to withstand the failings of previous efforts and employs game theory and other economic concepts to show how the proposed system may provide a lasting solution to past and to present judicial clerkship hiring problems.

I. THE JUDICIAL CLERKSHIP PROCESS: A TROUBLED HISTORY

For several years, the judicial clerkship hiring process has drawn criticism because it lacks collegiality and because the fierce competition for clerks imparts an undignified and unseemly appearance to the judiciary.¹⁷ Generally, judges are expected to conduct themselves in a manner “that will inspire and maintain firm public confidence in the decisions that they make and the way that they make them.”¹⁸ Every year, however, in an effort to enhance their reputation by hiring the most desirable clerks,¹⁹ judges extend clerkship offers in “unseemly haste” and in many instances employ questionable techniques,

17. See Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply to the Bad Apple*, 101 YALE L.J. 1097, 1097-98 (1992) (discussing how judges and clerks are in a frenzy to make and to accept offers, which often leaves an unflattering picture of the judiciary); Wald, *supra* note 1, at 156 (noting that “[f]or almost a decade” judges, law school deans, and faculties “have complained that the clerkship selection process is undignified, even demeaning”); see also 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, 766 (1993) (finding it “remarkable that the method by which judges select their closest professional aides is a free-for-all, an ‘anarchic, Through the Looking Glass process,’ resembling a ‘frenzied mating ritual’” (quoting Oberdorfer & Levy, *supra*, at 1106 n.43 (internal quotation marks omitted)); Margolick, *supra* note 10, at B4)); *supra* notes 12-13 and accompanying text (commenting on the fierce competition for clerks).

18. See Oberdorfer & Levy, *supra* note 17, at 1097. Oberdorfer and Levy contended that “[t]he present method used by federal judges to select their law clerks unnecessarily jeopardizes that confidence.” *Id.* See also MODEL CODE OF JUDICIAL CONDUCT pmbl. (1990) (“Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.”); *id.* Canon 1 (“A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.”).

19. See Norris, *supra* note 17, at 775 (“[S]ince a judge’s reputation may be enhanced by attracting top students . . . the goal of many judges is to hire the most credentialed set of clerks, often without regard to other considerations.”); see also Wald, *supra* note 1, at 154 (explaining how a judge’s “reputation among his own colleagues may in part reflect his ability to garner the most highly-credentialed clerks under his banner”).

so that their peers will be unable to snatch away “prime prospects.”²⁰ Currently, some judges voluntarily impose agreed-upon restrictions while others refuse to abide by those restrictions.²¹ This dissension serves the judges’ individual goals, but does so at the expense of the public interest and of the judiciary.²²

Two inappropriate techniques employed by judges in the clerk selection process are exploding and vanishing offers. The exploding offer typically involves a judge calling a candidate and offering her the clerkship.²³ If the candidate wishes to take time to consider the offer, however, the judge may coerce her by intimating that he will move down his list of candidates if she does not accept quickly.²⁴ A vanishing offer is a similar device, characterized by being abruptly withdrawn.²⁵ In a vanishing offer, the judge makes the offer and agrees to give the candidate time to decide; before that time is up, the judge calls back and withdraws the offer.²⁶ Each of these devices may force students to accept or to decline offers without adequate deliberation. Judges also tend to sabotage other judges’ candidate choices with tactics that range from interference with interviews—by scheduling identical interview times—to making disparaging remarks about other judges’ capabilities or work style.²⁷ Additionally, a judge may race to hire a candidate before other judges are able to interview or to consider her for a clerkship.²⁸ In the unregulated clerkship market, “the preemptive striker sets the time frame for those judges who want to

20. Oberdorfer & Levy, *supra* note 17, at 1098; *see infra* notes 23-30 and accompanying text (describing various questionable hiring practices employed by some judges).

21. *See generally* Becker et al., *supra* note 12, at 212-15 (discussing a September 1993 resolution adopted by the Judicial Conference of the United States establishing March 1 of the preceding year, the year in which the clerkship begins, as a “benchmark” and reporting that while judges on the Eighth Circuit refused to follow the benchmark, the “vast majority of judges complied with the March 1 solution”); *see also infra* notes 44-46 and accompanying text (surveying various failed reform efforts).

22. *See* Norris, *supra* note 17, at 775 (contending that “the current process reflects the individual goals of judges, rather than the interests of the public or of the judiciary as a whole”).

23. *See* Kozinski, *supra* note 1, at 1716. According to Kozinski, in an exploding offer, the judge makes the offer over the phone, and if the candidate wants to think about it, the judge threatens to move on to a candidate who “is as interested in me as I am in her”; this tactic forces the student to decide on the spot and to cancel any other interviews. *Id.*

24. *See id.*

25. *See id.* at 1716-17 (describing one student’s experience with a vanishing offer).

26. *See id.* at 1716.

27. *See id.* at 1717 (articulating various demonstrative remarks made by some judges, or by their staff, when referring to colleagues: “‘He’s a tyrant to work for’; ‘She’s never in the office’; ‘He’s dumb as dirt’”).

28. *See* Wald, *supra* note 1, at 156 (noting that the “[e]arly-bird judges” often retain the most qualified candidates).

compete.”²⁹ This race for candidates has resulted in the clerk selection period migrating from late in a candidate’s third year of law school to the middle of her second year.³⁰

The current selection process causes an additional problem: a high cost to students, both monetarily and in missed class time.³¹ Due to differences in both judges’ and students’ schedules, as well as judges’ wide discretion regarding interview timing, students are often forced to interview at inconvenient times.³² This inflexibility in scheduling often results in multiple trips at different times, producing an even greater strain on students.³³

To one degree or another, judicial efficiency also suffers during each clerkship recruitment season. Judges must sort through numerous resumes and conduct time-consuming interviews, at the expense of their official duties.³⁴ Indeed, some reform efforts cause judges to spend *more* time interviewing than they would *without* reform, thereby exacerbating the efficiency problem.³⁵

Historically, hiring decisions were made at the beginning of a candidate’s third *year* of law school.³⁶ Today, hiring decisions and in-

29. *Id.*

30. *See id.*

31. *See* Norris, *supra* note 17, at 794 (asserting that common dates and short interview periods, in contrast, lower both student travel expenses and the number of missed classes); *see also* Becker et al., *supra* note 12, at 217 (noting that an “early clerkship season” interferes with classes, does not allow time for students “to adjust to the rigors of law school,” and “prevent[s] students from focusing their interests in law before deciding whether to apply for a clerkship”); Wald, *supra* note 1, at 156 (noting that students’ studies are often interrupted mid-term).

32. *But see* Kozinski, *supra* note 1, at 1714 (arguing that no change in the process can wholly avoid disrupting students’ studies).

33. *See* Norris, *supra* note 17, at 794 (noting that a “serious disadvantage of the current system is the high number of interview trips”). Where there is nothing to gain by interviewing early, judges can better schedule interviews at their convenience, and students can coordinate trips to minimize costs and missed class time. When students can trust that no offers will be made before a certain date, they will be able to plan their trips and their interviewing schedules more efficiently. *See id.* (stating that “most reforms established common dates for interviews to begin and/or offers to be made in an attempt to decrease the number of interview trips students must make”).

34. *See* Kozinski, *supra* note 1, at 1707.

35. *See* Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 GEO. L.J. 1749, 1766 (1995) (asserting that the adoption of a matching system would increase the number of applicants that a judge must interview per open position); Wald *supra* note 1, at 159-60 (explaining that during the 1990 clerkship recruiting season the uniform offer date of May 1 caused many judges to interview more candidates because the judges were uncertain about whether or not their top choices would accept).

36. *See* Becker et al., *supra* note 12, at 208 (stating that prior to the mid-1970s, “the prevailing practice was to select law clerks during the fall of their third year of law school”); *see also id.* at 208-12 (chronologizing the shift in hiring dates over the past three decades).

terviews typically fall during a candidate's third *semester*.³⁷ As a result, hiring decisions are based on fewer grades and on less reliable evidence of a candidate's ability.³⁸ By hiring early, judges have access to no more than three semesters of grades and to recommendations from professors who likely have observed students exclusively in large first-year classes.³⁹ Thus, a professor's ability to evaluate student capabilities is limited.⁴⁰ Moreover, a better representation of a student's legal writing ability emerges later in her law school career. Typically, a student's legal writing projects are more fully developed at that time than are those from the student's first year, or early second year.⁴¹ A later selection date would also give judges the chance to speak to attorneys with whom the student worked during the summer between the second and third years of school and who are familiar with the student's capabilities in a practical setting.⁴² Arguably, this evaluation should weigh more heavily with a judge than an assessment of the candidate's first-year academic performance. Perhaps most importantly, a later selection date gives the student more time to decide whether a judicial clerkship is right for her.⁴³

37. See *id.* at 209-10 (asserting that judges now begin their recruiting in the fall of the second year (quoting Margolick, *supra* note 10, at B4)).

38. See *id.* at 223-24 (noting that law school deans believe the fall of the third year is the best time to select clerks because students have had more time to build a record and because it is less disruptive to studying and to exams).

39. See Norris, *supra* note 17, at 777 (explaining that early interviewing means that usually students only participate in a few large classes giving professors only one exam and a few moments of class participation on which to base a recommendation which judges require); Oberdorfer & Levy, *supra* note 17, at 1100 (explaining that a later selection time, such as the fall of the student's third year, would provide access to more grades and to recommendations from professors who have spent more time with the student).

40. See Norris, *supra* note 17, at 777 (explaining that after three semesters "[i]t is hard to imagine that a professor . . . could provide judges with an accurate, insightful picture of a student" because the professor's contact with the student may only include grading one exam or having heard them speak in class "a half-dozen times").

41. See *id.* at 779 (explaining that a first-year student's legal writing is often less demonstrative of a student's abilities than later works); Oberdorfer & Levy, *supra* note 17, at 1100 (explaining that legal writing completed in the third year is often more fully developed than legal writing completed in February of the student's second year).

42. See Becker et al., *supra* note 12, at 223-24 (asserting that conducting interviews in the fall of the student's third year "would . . . furnish judges with the benefit of a full two years of law school accomplishments as well as summer employment to consult when making clerkship decisions"); Norris, *supra* note 17, at 777 (noting that most recommendations are written by professors because only some students have the opportunity to work individually with an attorney during the summer after their first year).

43. See Oberdorfer & Levy, *supra* note 17, at 1100 ("By February of the second year, not every student knows whether clerking is for him or her."). Oberdorfer and Levy noted that Judge Kozinski "only decided that he wanted to clerk 'late in [his] third year of law school.'" *Id.* at 1100 n.14 (quoting Kozinski, *supra* note 1, at 1728 n.40).

Despite numerous efforts to reform the selection process, no proposal has yet been successful.⁴⁴ Attempts to discourage judges from considering clerkship applications before September of a student's third year of law school have been suggested and have ended in dismal failure, with some judges following the suggested guidelines, but many others ignoring them and hiring early.⁴⁵ Despite subsequent adjustments to the deadline dates, judicial attrition has continued and ultimately, efforts at reform have been abandoned.⁴⁶

Recently, controversy has surrounded the United States Supreme Court and its clerkship hiring process. At the beginning of the Court's term in the fall of 1998, nineteen people were arrested for protesting against the perceived discrimination in the hiring of Supreme Court clerks.⁴⁷ In the spring of 1998, *USA Today* released the first-ever demographic profile of the clerks hired by the Supreme Court.⁴⁸ The disproportionate number of minorities hired for judicial clerkships throughout the Court's history has fueled the controversy.⁴⁹ The year 1998 marks the second consecutive year that the Court has had no African-American clerks. In all, less than two percent of the four hundred and twenty-eight clerks hired by the nine sitting Justices of the Court have been black.⁵⁰ Only one percent of Supreme Court clerks have been Latino, and approximately four per-

44. See Norris, *supra* note 17, at 766, 785-91 (discussing the history and shortcomings of previous reform efforts); Wald, *supra* note 1, at 156-60 (noting that past proposals have failed and that presently no workable system exists). See generally Becker et al., *supra* note 12, at 215-16, 219-21 (discussing the failure of the March 1 proposals); Carl Tobias, *Stuck Inside the Heartland with Those Coastline Clerking Blues Again*, 1995 WIS. L. REV. 919, 921, 926-27 (same).

45. See Norris, *supra* note 17, at 785-89 (discussing the failure of post reform efforts due, in part, to judicial noncompliance). For example, in March 1983, the Judicial Conference began a two-year experiment prohibiting the consideration of applicants prior to September 15 of their third year. See *id.* at 786. The following year the date was moved forward to July 15 amid reports of judges' nonparticipation. See *id.* Two years after the experiment began, the Conference discontinued their efforts due to "gun-jumping" and a less than widespread favorable response by the judiciary. See *id.*

46. See *id.* at 786-88 (analyzing the failed attempts at reform during the 1986-1991 seasons, after which "[t]he reformers threw in the towel").

47. See Michael A. Fletcher, *As Term Opens, Lack of Diversity is Decried; Discrimination Alleged in Justices' Hiring of Law Clerks; 19 Arrested at Protest Rally*, WASH. POST, Oct. 6, 1998, at A3 (describing the protest and the events leading up to the arrests).

48. Tony Mauro, *Corps of Clerks Lacking in Diversity*, USA TODAY, Mar. 13, 1998, at A12.

49. See Tony Mauro, *Only 1 New High Court Clerk is a Minority*, USA TODAY, Sept. 10, 1998, at A9 (describing the reactions of civil-rights activists to the lack of diversity among the Supreme Court clerks).

50. See *id.*

cent have been Asian-American.⁵¹ None of the nine current Justices has ever hired a Native American.⁵²

Justices have almost complete discretion over whom they hire for clerkships.⁵³ Chief Justice William Rehnquist, over his twenty-six year tenure, has hired seventy-nine clerks—not one was black and only eleven were women.⁵⁴ Throughout the past twelve years, Justice Antonin Scalia has hired only seven women, and not a single Hispanic, African American, or Asian American.⁵⁵

The statistics show a stark disparity in numbers, but many argue that this does not equate to discrimination based on sex or on race.⁵⁶ Justices recruit the “stars” coming out of the top law schools and base their decisions heavily on recommendations from key judges.⁵⁷ Justices have had particular preferences, nearly forty percent of clerks hired by the current Justices have graduated from Harvard or Yale.⁵⁸ The “stars,” as defined by the name on their diploma and a recommendation from a key “feeder” judge, consist largely of white males.⁵⁹

51. *See id.*

52. *See id.*

53. *See* Norris, *supra* note 17, at 772-73 (discussing the “very few legal or ethical restrictions” imposed on a judge’s selection of law clerks). Norris noted that Congress has placed almost no restrictions “on the manner in which judges, hire, train, supervise, or fire their law clerks. . . . Furthermore, neither Congress nor the President has prohibited judges from discriminating on the basis of race, religion, sex, age, or disability.” *Id.* Norris stated, however, that a judge is restricted from hiring “a first cousin or close relative as a clerk.” *Id.* at 772 n.45 (citing 5 U.S.C. § 3110 (1988); 28 U.S.C. § 458 (1988)).

54. *See* Mauro, *supra* note 48, at A12.

55. *See id.*

56. For example, some minorities self-select themselves out of the process because the clerkship pay does not compare to that available in private practice and many minorities graduate from the top law schools with large debts. *See id.* In addition, judges often rely on the advice of their current and former clerks to screen applicants and to advance the names of likely candidates. *See id.*; *see also* Norris, *supra* note 17, at 774 (describing how the “old-boy network” influences judges’ hiring of clerks).

57. *See* Mauro, *supra* note 48, at A12 (identifying the top feeder judges as Laurence Silberman of the United States Circuit Court for the District of Columbia, Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, and Michael Luttig of the United States Court of Appeals for the Fourth Circuit who have sent 20, 18, and 16 clerks, respectively, to the Supreme Court); *see also* Norris, *supra* note 17, at 774 (noting that some judges “justify[] their ratios by reference to the pool of ‘top’ graduates from the ‘best’ law schools”).

58. *See* Mauro, *supra* note 48, at 12A. The other schools that make up the list of the top ten schools attended by Supreme Court clerks include University of Chicago (12% of clerks), Stanford (9%), Columbia (6%), University of Virginia (5%), University of Michigan (5%), University of California (3%), Northwestern (3%), and University of Pennsylvania (2%). *See id.*

59. *See id.* (explicating through statements made by past clerks, judges, and law school professors, that the “stars” come from Harvard or the other top law schools and that most of these “stars” are white males).

Critics argue that the statistics may prove disproportion, but do not prove discrimination.⁶⁰ Rather, the disproportionate numbers result from a "pool problem," not from racial or sexual discrimination.⁶¹

In the employment discrimination context, whether hiring practices are considered unlawful is based not on analysis of the percentage of the protected class in the general population, but on the "qualified . . . population in the relevant labor market."⁶² In the clerkship hiring context, this pool consists of the top law students or clerks in the country, those the Justices consider "qualified" for the position. When we analyze the situation from this perspective, it becomes evident that the problem is not occurring in the hiring process, but earlier in the system.⁶³

While the lack of minority clerks represents a problem in society,⁶⁴ judges are not necessarily to blame for the disparity in numbers.⁶⁵ Therefore, any proposed solution, short of instituting quotas, will neither help nor harm this situation in a significant manner. The lack of minority clerks directly correlates to the lack of such persons in the "qualified pool," and thus cannot be mitigated by a reform in the hiring process.

II. IMPEDIMENTS TO REFORMING THE EXISTING SYSTEM

Any proposed reform of the judicial clerkship hiring process must overcome four basic hurdles: the discretion with which judges have been able to adopt or to ignore the sorts of reforms typically

60. See Eugene Volokh, *Racial Politics at the Supreme Court*, WALL ST. J., Oct. 12, 1998, at A19 (arguing that "[d]isproportion does not prove discrimination.").

61. See *id.* (arguing that the pool of applicants forces Supreme Court justices to hire in a disproportionate manner); see also *supra* notes 56-57 (explaining the pool rationale and how some judges use it to explain their hiring outcomes).

62. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989) (quoting *Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977)). In *Wards Cove Packing Co. v. Atonio*, the Supreme Court analyzed "the proper application of the Title VII's disparate-impact theory on liability" and reiterated that "the proper basis for the initial inquiry in a disparate-impact case" is a comparison "between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs." *Id.*

63. Cf. Volokh, *supra* note 60, at A19 (arguing that the low number of minority clerks is due, in part, to failings of the K-12 educational system and rejecting the notion that the court may be using "unnecessarily exclusive criteria" to evaluate applicants).

64. See generally Mauro, *supra* note 49, at A9 (recounting statements made by law professors that illustrate some of the possible societal problems that may arise from the shortage of minority clerks).

65. See Volokh, *supra* note 60, at A19 (asserting that the lack of minority clerks may be a result of "the difference between the makeup of the pool of clerks and the pool of top law school graduates—the group from which the justices select their clerks"); see *supra* notes 60-63 and accompanying text.

proposed; the abuses of reputational advantage in which judges engage; the attrition from proposals caused by the classic game theory situation; and high transaction costs. A detailed analysis of the 1990 clerkship selection process illustrates the difficulty in surmounting the obstacles detailed below and demonstrates how and why that reform effort failed. A behavioral explanation for these hurdles is also advanced in hopes of clarifying precisely where efforts should be directed to effectuate reform.

A. *Judicial Discord*

1. *Lack of Consensus.*—The success of any reform effort necessarily depends upon a high percentage of participation among federal judges.⁶⁶ Judges exercise great discretion when deciding which clerks to hire and whether to participate in efforts to reform the hiring process.⁶⁷ Moreover, under the separation of powers doctrine, judges cannot be forced to accept reforms in the clerkship hiring process.⁶⁸ The absence of direct electoral control over the judges encourages them to make decisions based on their own self-interest.⁶⁹

66. See Clark, *supra* note 35, at 1764-65 (commenting that a proposed mimic of a medical matching program would unravel “if even a few judges from prestigious circuits” failed to participate and noting that past attempts at reform were ultimately defeated by a lack of consensus and by judicial defections); Wald, *supra* note 1, at 162-63 (commenting that a potential matching system would not work unless seventy percent of all judges “on the most aggressive courts and at least the same percentage of candidates in the principal law schools” participate); see also Becker et al., *supra* note 12, at 208-12, 215-21 (describing the past reform efforts, the lack of judicial participation in the reforms, and the ultimate lack of success of the reforms). But see Norris, *supra* note 17, at 785 (claiming that previous reforms did not fail because they lacked a consensus, but rather because reforms “have not been enforced against transgressing students, professors, and judges”).

67. See Wald, *supra* note 1, at 157, 162-63 (explaining judges’ adeptness at avoiding reform efforts and at setting personal hiring agendas and attributing this reluctance, potentially, to Article III independence); *supra* note 53 and accompanying text (describing a judge’s discretion in hiring clerks).

68. See Norris, *supra* note 17, at 772-73 (noting that Congress’ statutory prohibitions against whistleblower retaliation, differential treatment according to political affiliation, and discrimination on the basis of nonperformance related conduct—to name a few—are all *inapplicable* to judges). See generally RICHARD A. POSNER, *OVERCOMING LAW* 112 (1995) (because of judges’ unique insulation from the law, they are difficult to fit into economic analyses of the law). But see Norris, *supra* note 17, at 789 (advocating that Congress should enforce reform efforts by denying funding for the salaries of clerks hired contrary to the rules of the reform effort and claiming that although “[t]he thought of congressional regulation may send shivers down judges’ spines, [these] fears of weakening separation of powers or inter-branch comity are unfounded”).

69. See generally Chen, *supra* note 2, at 295 (“[T]he absence of direct electoral control over the federal judiciary merely permits a different bundle of self-regarding interests to influence judicial decisionmaking.”).

Without high levels of participation, any reform system will fail because participating judges will consider themselves disadvantaged relative to nonparticipating judges.⁷⁰ In an effort to successfully compete with nonparticipants for candidates, participating judges will then revert to the tactics that the reforms were designed to eliminate.⁷¹ Therefore, to achieve high levels of participation, a reform system must be structured so that nonparticipants do not gain a recruitment advantage, either real or perceived, over their participating colleagues. With this in mind, any successful reform must gain the initial support of large numbers of judges and eliminate any nonparticipation advantages which would encourage participant attrition.

2. *Reputational Advantage.*—The reputational advantage possessed by certain judges adds to the difficulty of achieving a consensus. This advantage is sometimes used to strong-arm students at elite law schools into making early decisions.⁷² The concept of reputational advantage is fairly self-explanatory. Assume a market situation with several producers and multiple consumers. Consumers may be unable to gauge the quality of goods sold by a particular producer, and so will often purchase a particular good without regard to its quality, based purely upon the reputation of the producer.⁷³ For example, one might purchase a Sony computer, not because Sony is known for producing good computers, but rather because of Sony's reputation in the field of electronics. Given repeated purchases, consumers will begin to make experience-based assumptions about the quality of a particular good made by this producer.⁷⁴ Of course, a producer may always invest in changing its reputation: a reputed low-quality producer may invest funds in producing high-quality goods, and having done so for a sufficient period of time may convince consumers that it is a high-quality producer.⁷⁵ Conversely, the opposite effect may re-

70. See Wald, *supra* note 1, at 156 (noting that when “[e]arly-bird judges skim off those applicants with the brightest of credentials,” other judges are unable to compete effectively).

71. See *generally id.* at 158 (noting the effects of nonparticipation in the 1990 reform efforts).

72. See *supra* notes 23-30 and accompanying text (describing strong-arm tactics such as vanishing and exploding offers).

73. See DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 531-36 (1990) (discussing the effects of reputation on consumers' purchases).

74. See *id.* at 532 (“Consumers form their expectations [about a firm's reputation] by looking at recent production by the firm.”).

75. See *id.* at 532-33 (noting that a producer may invest resources in changing its reputation and thus change future demand for its product).

sult when a high-quality producer lapses in its quality control.⁷⁶ The point is that people make decisions based solely upon reputations when they lack other information.

In the arena of the judiciary, judges and clerks act as producers and consumers, respectively. The product—judicial opinions—are read and evaluated by professors, law students, media, and others, and are judged by the quality of the writing and reasoning. As a result, the clerks that a judge employs are of the utmost importance in maintaining a reputation for high-quality opinions.⁷⁷ The court on which a judge sits also raises or lowers her reputation,⁷⁸ and while this is less directly a result of “product quality,” it affects consumer decisions. So too, a judge’s “reputational clout” is partially determined by her ability to serve as a “feeder” to prestigious and to highly desirable Supreme Court clerkships.⁷⁹ Clerkship candidates will more likely apply to judges with better reputations, and judges will want to employ clerks with the best credentials—experience on law review, high grades, and so on. Because candidates have a desire to work for judges with the best reputations, those judges gain a reputational advantage in hiring and will not easily give up that advantage if a reform proposal threatens it.

While the critical relationship for our purposes is the judge-as-producer and clerk-as-consumer relationship, clerkship candidates are producers of their own educational track records. Law review articles, grades, and class standing are all rabidly consumed by judges in their search to maintain a reputation as high-quality producers.⁸⁰ Not only

76. See *id.* at 532 (noting that a firm with a good reputation can take advantage of consumer expectations and increase the firm’s short-term profits by producing low-quality goods; the firm’s long-term profits, however, would suffer as a result).

77. See Chen, *supra* note 2, at 302 (discussing the significant role clerks play in drafting court opinions); see also Wald, *supra* note 1, at 154 (noting that some judges use clerks to draft opinions).

78. See Kozinski, *supra* note 1, at 1719 (“[N]ot all clerkships are created equal Some circuits, the D.C. Circuit in particular, tend to draw a disproportionate share of the nation’s top applicants.”); Tobias, *supra* note 44, at 924-25 (asserting that “a significant percentage of the most prestigious clerkships from a student’s perspective are with judges located in the Northeast corridor or in California”).

79. See Wald, *supra* note 1, at 154 (noting that “[a] judge’s reputation among his own colleagues” is partially determined by whether he can feed clerks to the Supreme Court); see also Rex Bossert, *Clerks’ Route to Top Court: Their Choices of Circuit and Judge Shapes Chance to Serve Supremes*, NAT’L L.J., Oct. 20, 1997, at A1 (noting that the two top “feeder” judges, Judge Silberman of the D.C. Circuit and Judge Kozinski of the Ninth Circuit, have sent more clerks to the United States Supreme Court over the last ten years than any other judge and that not surprisingly, both refuse to adhere to the hiring guidelines proposed by the Judicial Council).

80. See Wald, *supra* note 1, at 154 (noting that a judge’s ability consistently to hire law review editors and top students benefits their reputation).

are candidates producers in the sense of employment with a judge, but also in forging a life's record of high achievement, which will be consumed by subsequent employers. Thus, candidates will posture and position themselves before judges of the highest possible reputation, who will act as consumers by hiring them as a clerk. Clerks will maintain the reputation of high quality producers only by investing the effort in getting hired by the most reputable judges, and thus ensuring an enhanced opportunity of employment thereafter.⁸¹ All clerks operate behind a backdrop in which they are well aware that a clerkship with what some may consider a below-par judge might diminish or limit whatever long-term reputational advantage the clerk had been accumulating in his or her career.

Reputational advantages for judges tend to work in circular fashion. Successful law students typically clerk for a judge immediately following law school, often using their clerkship to leverage themselves into more favorable subsequent employment opportunities.⁸² The best students, therefore, look for the "best" clerkships. The best clerkships are determined by a number of factors, most importantly the judge's reputation. Reputation is enhanced not only by the quality of the judge's work, but also by the court on which she sits, and by the likelihood that she will send clerks to the Supreme Court.⁸³ The quality of a judge's work is often determined by the quality of the clerks she employs. The judges known to possess such reputational advantages, often eastern judges situated near prestigious law schools,⁸⁴ find little motivation to participate in reform efforts because to do so would only detract from their hiring power.

3. *Game Theory*.—Not only do judges drop out of the current system, but efficient cooperation is not likely to be achieved within the system. In the law clerk selection process, as in most other situations,

81. See Norris, *supra* note 17, at 767 (discussing the increased salary potential a lawyer can expect after clerking for a prestigious judge); Mauro, *supra* note 48, at A12 (noting that some major law firms place a high premium on hiring former Supreme Court clerks and this premium is reflected in large hiring bonuses, which, according to an unidentified source, can exceed \$50,000).

82. See Mauro, *supra* note 48, at A12 (noting that some clerks do not begin looking for employment until "their time at the court is up" because they are confident in their ability to find work).

83. See *supra* notes 78-79 and accompanying text (describing how the court on which a judge sits and her history as a high court feeder effects the judge's reputation).

84. See Kozinski, *supra* note 1, at 1719 (asserting that "[j]udges on the east coast enjoy the advantage of proximity to many of the country's best law schools"); see also Tobias, *supra* note 44, at 923-26 (describing the advantages that judges in the "Northeast corridor" possess in the clerkship hiring process).

judges make strategic decisions.⁸⁵ That being said, no single judge controls the final distribution of the candidates; rather, the outcome results from the separate and distinct decisions of multiple judges.⁸⁶ In choosing a particular course of action, most people consider the consequences of their respective decisions. It may be “perfectly rational,” on an individual basis, for judges to fail to cooperate for their collective good.⁸⁷ Several basic concepts within game theory describe this self-serving behavior.

The underlying theme of all game theory involves the notion that a player will strategize according to what course of action will maximize his personal payoffs.⁸⁸ The simplest, yet most compelling concept of game theory involves “dominant strategy”—individuals choose a course of action based completely on self-interest.⁸⁹ A dominant strategy is a best choice for an individual for every possible choice made by other players.⁹⁰ An individual following a dominant strategy does not need to know the information concerning the actions or rationality of others; he will always choose the course of action that best furthers his own self-interest.⁹¹ Even if an individual signals to others that he will act pursuant to reforms or in consideration of the collective good, he will ultimately choose the course of action that best serves him.⁹² If a majority of players choose a dominant strategy, the

85. See Kozinski, *supra* note 1, at 1719-20 (noting that when judges are deciding whether to extend an early offer they consider that an early offer “foregoes [them] the ability to obtain further information about the applicant” and to interview a better candidate “who might apply later”).

86. This situation is game theory. See JOHN McMILLAN, GAMES, STRATEGIES, AND MANAGERS 5 (1992) (explaining that according to game theory, “players choose their actions from a defined set of available actions” and although a particular action may influence the final outcome heavily, no one person can single-handedly determine the final outcome because the end result is a product of two or more persons’ separate decisions).

87. *Id.* at 12. McMillan quoted mathematician Robert Aumann as stating that “[p]eople who fail to cooperate for their own mutual benefit are not necessarily foolish or irrational; they may be acting perfectly rationally.” *Id.* (internal quotation marks omitted).

88. See DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 19 (1994) (noting that game theory involves the idea that a player will compare the payoffs she will receive under competing strategies and choose the strategy that will “maximize their own payoffs”).

89. See *id.* at 11.

90. See *id.*

91. See *id.* Baird explained that “[o]ne strategy is ‘dominated by’ another strategy when it is never better than that strategy and is sometimes worse. When one strategy is always worse than another, it is ‘strictly dominated.’” *Id.* This leads to “the most compelling precept in all of game theory,” that, whenever possible “[a] player will choose a strictly dominant strategy . . . and will not choose any strategy that is strictly dominated by another.” *Id.*

92. See Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL’Y 101, 108 (1997) (“[P]eople who cooperate often (usually?) do so over a long period of

result is known as a “tragedy of the commons.”⁹³ Action based on individual self-interest, without regard to the collective good, will lead to a worse situation than if the players would all agree to follow proposed guidelines and work cooperatively. In a “tragedy of the commons” scenario, all parties would benefit if they were to cooperate and to work toward a collective good, yet all have a personal incentive to “cheat.”⁹⁴ Professor Carol Rose illustrated this version of game theory using the example of a village with unlimited access to land on which villagers’ cattle can graze.⁹⁵ Each person has two options: to exercise restraint and to curtail the amount of his cattle’s grazing, or to allow his cattle to graze as much as possible.⁹⁶ If all the citizens agree to work cooperatively and to restrain the amount of grazing, the land would have time to replenish and the result would be optimal for the common good.⁹⁷ If one person, however, fears that another will cheat while he restrains his cattle, he will choose to avoid being the fool and therefore will preemptively cheat.⁹⁸ If an individual believes that others will follow guidelines and will restrain grazing, his best option, from a self-serving standpoint, is still to cheat and to allow his cattle to graze without restriction.⁹⁹ Thus, in either situation, an individual’s dominant strategy—to consider immediate personal gains—will result in cheating.¹⁰⁰

In the context of the judicial clerkship selection process, judges, in the pursuit of maximizing their self-interest, have opted,¹⁰¹ and can be expected to continue to opt, to ignore hiring guidelines. Guidelines may further the collective good of both judges and potential clerks by providing an orderly process. If a judge, however, can gain an advantage by operating outside the guidelines, it is in her best interest to do so.¹⁰² If *other* judges decide to follow the guidelines on the

time during which each can observe the actions of others and decide on the basis of those actions whether to continue cooperating or stop.”).

93. BAIRD ET AL., *supra* note 88, at 34.

94. See Carol Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 424 (1992).

95. *Id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

100. *See supra* notes 89-93 (discussing the concept of dominant strategy).

101. *See supra* notes 21-22 and accompanying text (noting that past reform efforts have failed, in part, due to lack of judicial participation).

102. *See* Chen, *supra* note 2, at 298 (explaining that according to the public choice theory, the Supreme Court is merely another system in which “outcomes and legal reasoning reflect nothing but ‘political choices . . . determined by the efforts of individuals and groups to further their own interests.” (quoting Gary S. Becker, *A Theory of Competition*

premise of acting in the mutual interest of all judges, it is still in *her* best individual interest to take advantage of such generosity.¹⁰³ Judge Kozinski, for example, has no incentive to voluntarily follow any recommended selection process. He has a well-recognized reputation as a “feeder” to the Supreme Court, and his clerkship positions are in high demand.¹⁰⁴ He already attracts some of the best students; therefore, restrictions on his selection methods will only diminish his power to attract the best law clerks. Furthermore, as long as Kozinski refuses to follow the recommended policies, he benefits at the expense of those judges who do follow the guidelines. If he knows that most judges will not extend offers until March 1, it is in his best interest to act *before* then to ensure that he continues to avail himself of the services of the best clerks possible.

Note also that given the present difficulty judges face in ascertaining when their colleagues have made hiring or offer decisions,¹⁰⁵ judges may actually agree to participate in a reform system and then quietly refuse to follow through on the agreement. Judges may even explicitly signal to colleagues that they are participating, without actually doing so.¹⁰⁶ This illustrates the difficulty posed by the current lack of available public information about specific judges’ hiring practices.¹⁰⁷ Where failure to cooperate is probable, based on various observable facts, but there is an inability to confirm a lack of cooperation, loyal participants must choose whether to continue to cooperate, or to sanction the black sheep.¹⁰⁸ In the instant case, the observable facts, called “noisy observables,”¹⁰⁹ are the sudden absence of preferred clerkship candidates. The secondary dilemma, thus, is

Among Pressure Groups for Political Influence, 98 Q.J. ECON. 371, 371 (1983))). *But see* Oberdorfer & Levy, *supra* note 17, at 1097 (noting that though it may be in a judge’s individual interest not to comply with hiring guidelines, operating in such a manner under the current system undermines public confidence in the judiciary). *See generally supra* notes 92-100 and accompanying text (explaining the theory known as the tragedy of commons).

103. *See supra* note 99 and accompanying text.

104. *See supra* note 79 and accompanying text.

105. *See supra* notes 28-29 and accompanying text.

106. As Norris noted, “each judge . . . faces great temptations to break the rules in order to corral the most sought after clerks.” Norris, *supra* note 17, at 789.

107. Though it may be difficult to determine a specific judge’s hiring practices, according to Judge Kozinski, a student can learn “a great deal about the judge’s philosophy and writing style, as well as about the clarity of her thinking,” by reading some of the judge’s decisions. Kozinski, *supra* note 1, at 1711. Furthermore, Judge Kozinski noted that a student, during an interview, can gain valuable information about a judge by observing the behavior of the judge, her secretaries, and her current law clerks. *Id.*

108. *See* KREPS, *supra* note 73, at 513-21 (describing possible results when one side is not cooperating, or threatening not to cooperate, in the game).

109. Kreps defined “noisy observables” as “data [that] might indicate that *perhaps* the other side isn’t living up to some cooperative arrangement.” *Id.* at 515.

whether to punish; if participating judges punish the probable non-participants by hiring early themselves, they contribute to the downfall of the reform effort. Conversely, if the participants continue to participate, they stand to lose the prime clerkship candidates. Experience has shown, as is discussed below, that judges tend to assume the worst of their colleagues when it comes to clerkship hiring reform, and accordingly tend to fend for themselves.¹¹⁰

Behavioral sciences, applied with increasing frequency in the context of legal analysis, indicate that cooperation is most likely to prevail in game theory situations where the parties engage in communication, and where group-identity is strong.¹¹¹ That is, where violations are easily observable by others, private enforcement via reputational sanctions encourages behavioral self-regulation.¹¹² Thus, where judges' hiring and offer dates evolve in behind-the-scenes transactions, as presently, reputational self-regulation is unlikely and the "tragedy of the commons" situation will present itself, with all parties pursuing their own self-interest and reputational advantage by whatever means they determine to be necessary.¹¹³

The table below illustrates a "tragedy of the commons" scenario. Judges who choose to follow guidelines find themselves in a disadvantageous position when other players (judges) cheat. This situation often results in all judges determining that cheating is the best option for their self-interest. A lack of respect for the judiciary, however, ensues when such practices dominate the hiring process.¹¹⁴ This negative effect on the collective good in turn causes the diminished worth of the system to the individual judges, giving the players less of a payoff than if they all chose to follow the guidelines.¹¹⁵

110. See *infra* notes 111-115 and accompanying text.

111. See Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1187 (1997) (arguing that group identity and conversation between players often yields cooperation). See generally John O. Ledyard, *Public Goods: A Survey of Experimental Research*, in HANDBOOK OF EXPERIMENTAL ECONOMICS 141-69 (John H. Kagel & Alvin E. Roth eds., 1995) (outlining various factors which have been shown to increase cooperation).

112. See Sunstein, *supra* note 111, at 1187 (stating that if a person's violation can be easily observed, a "behavioral shift[]" may occur allowing for "private enforcement . . . through the imposition of reputational sanctions").

113. See *supra* notes 87-100 and accompanying text.

114. See *supra* notes 17-22 and accompanying text (describing the negative impact that the current system can have on the judiciary); see also *infra* notes 272-274 and accompanying text (arguing that the proposed reform would satisfy Judge Wald's goal of returning dignity to the judiciary).

115. Cf. Rose, *supra* note 94, at 424 (describing the agrarian prisoner's dilemma in which cattle owners choose an "immediate wealth-maximization strategy," resulting in "an over-grazed desert," thereby reducing the value of the grazing field for all).

		JUDGE 1	
		Cheat	Follow Guidelines
JUDGE 2	Cheat	(4, 4)	(-5, 5)
	Follow Guidelines	(5, -5)	(6, 6)

Payoffs: Judge 1, Judge 2

B. *Transaction Costs and the Coase Theorem*

As we have already observed, in a judicial clerkship selection process not governed by mandatory and enforceable rules, there exists the opportunity for judges to abuse the advantages they may possess and to use unfair tactics to hire desired clerks.¹¹⁶ The hiring process is governed by free-market concepts of rationality and scarcity,¹¹⁷ as both judges and potential clerks act rationally and in their own self-interest to obtain the clerk or clerkship they desire most.¹¹⁸ If a level playing field is maintained by rules that are universally followed, the market's "invisible hand" can be expected to allocate clerkship positions efficiently to the benefit of all participants.¹¹⁹ Where the allocation of clerk positions involves resource expenditures extraneous to the allocation itself, however, "transaction costs" are implicated.¹²⁰ In the instant setting, transaction costs of reforming the selection process

116. See *supra* notes 11-13, 23-27 and accompanying text (discussing various questionable techniques employed by judges in hiring clerks).

117. See ROBIN PAUL MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* 14-16 (1990) (noting that the two basic premises of economics are scarcity and rationality).

118. See Norris, *supra* note 17, at 776-82 (discussing the process through which clerks and judges attempt to find a mutually beneficial match); see also MALLOY, *supra* note 117, at 15-16 (explaining that in making choices, people act in a manner that gets the most desirable results possible given their resources).

119. See PAUL MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION AND MANAGEMENT* 28 (1992) (stating that the "invisible hand" of markets and prices will lead participants "to take the actions needed to achieve an efficient, coordinated pattern of choices"). The action participants, whether producers (judges) or consumers (clerkship applicants), need to take is the pursuit of their own self-interests that will result in an efficient allocation of goods (clerkships). In other words, there is "no other allocation that all consumers view as at least as good as the given one and some consumer strictly prefers." *Id.* at 66. These conclusions are known as the fundamental theorem of welfare economics. See *id.* at 73. The fundamental theorem of welfare economics is an intellectual theory that does not necessarily reflect reality because of market failures, such as externalities, that cause the market to operate inefficiently. *Id.* at 73. Externalities are effects that one's decisions have on others, but the costs of which the decisionmaker does not bear. *Id.* at 75.

120. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960) (explaining that in each "market transaction" there are many costs that can greatly increase the cost of the transaction, such as drafting contracts, conducting negotiations, and locating parties with which one wishes to deal).

might include the costs of identifying parties one must bargain with, getting together with those identified parties, the bargaining process itself, and the enforcement of any bargain reached.¹²¹ According to the Coase Theorem, where no transaction costs are expended in allocating scarce resources, the entity that most values a resource ultimately acquires it.¹²² Assuming no transaction costs, in the clerkship hiring process the judge will land the most desirable clerk, and a potential clerk will likewise end up with the job she desires most as well.

Rather expectedly, as in most real-world situations, transaction costs exist in the judicial clerkship selection process.¹²³ The most readily apparent example is the reputational advantage of certain judges and potential clerks from prestigious law schools.¹²⁴ Judges without the benefit of a substantial reputational advantage will need to expend more effort—phone calls, correspondence, interviews—to hire the same clerks that a well-renowned judge could hire with relative ease.¹²⁵ Transaction costs also surface in connection with the ability or inability of potential clerks to travel to many interviews, judicial efficiency in the selection process in the form of judicial time spent interviewing, selecting candidates, determining when and how other judges will act in the selection process, and the minimal academic information on which selection is currently based.¹²⁶ These factors distort the ideal operation of the market system and result in an inefficient distribution of clerks to judges.

121. See MALLOY, *supra* note 117, at 35 (noting that costs are the “costs of negotiating” and that they must be “nominal” for the market to be able to “allocate resources efficiently even when there are externalities”).

122. See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 12-13 (1983) (noting that Coase’s Theorem states that “[i]f there are zero transaction costs, the efficient outcome occurs regardless of the choice of legal rule”; however, if there are transaction costs, “the preferred legal rule is the one that minimizes the effects of transaction costs”).

123. See Norris, *supra* note 17, at 784 (noting that there are externalities in the system because individual judges do not bear the costs of their behavior on the system, even though they make and enforce the rules of the system). According to Norris, these externalities include “increasing travel expenses, disrupting classes, affecting law review elections, skewing students’ decisions in a host of areas, pressuring students to decide without much information or time to reflect with their loved ones, and limiting the ability of other judges to hire a diverse set of clerks.” *Id.*

124. See *supra* notes 57-58 and accompanying text (identifying the top feeder judges and the most prestigious law schools).

125. See Bossert, *supra* note 79, at A1 (stating that because of the “feeder” reputation of the D.C. Circuit, the best clerk candidates “gravitate to that appellate court”). This inherently makes it more difficult for other judges, in other circuits, with no such reputations to obtain an equivalent number of equally qualified applicants.

126. See *supra* notes 14-17, 123 and accompanying text (discussing some of the problems of the clerkship selection process).

In situations where there are significant transaction costs, the preferred rule governing the selection process is the one that minimizes the effects of these transaction costs and results in an efficient outcome despite these costs.¹²⁷ In other words, the ideal system internalizes costs and allocates them to those responsible, so that potential “abusers” of the system cannot continue to do so with impunity.¹²⁸ Where the market is functioning improperly, parties must bargain to reach the desired result, causing strategic behavior that may or may not lead to the most efficient result for all involved.¹²⁹ These bargains, especially where they involve the exploitation of advantages previously discussed, may not be optimal, as illustrated by judicial clerkship selection models that have been used in the past and have failed to achieve desirable results.¹³⁰

Direct regulation through a structured selection process—for example, dates before which offers may not be extended—will not necessarily lead to a better result than would leaving the solution to the workings of the free market.¹³¹ Where advantages are exploited and transaction costs are high, a process is needed to reduce these costs to the lowest possible level, allowing the highest possible market efficiency. Coase’s production possibility curve illustrates that inefficiency results where there is no defined system to manage these costs.¹³² Positions *C* and *D* in the graph below represent the inefficiency of working outside guidelines.¹³³ Positions *A* and *B* represent those who follow guidelines and are therefore efficient.¹³⁴ Thus, inef-

127. See POLINSKY, *supra* note 122, at 13 (stating that when transaction costs exist, the preferred rule is to “minimize[] the effects of the transaction costs”).

128. See Daniel A. Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L. REV. 397, 400-01 (1997) (noting that internalization of costs is one way to prevent actors from ignoring costs of others).

129. See *id.* at 401 (discussing Coase’s idea that bargaining may substitute for the legal rule as a way of reaching efficiency, and if the transaction costs do not prevent bargaining, “the parties will always bargain their way to an economically efficient outcome regardless of the legal rule”) (citation omitted).

130. See POLINSKY, *supra* note 122, at 18 (explaining that parties may use “hold out tactics” that prevent them from reaching an agreement even where an agreement would benefit both parties); Farber, *supra* note 128, at 407 (stating that “bargaining scenarios will not necessarily induce the parties to reveal their true preferences, which means that bargains may not be optimal”).

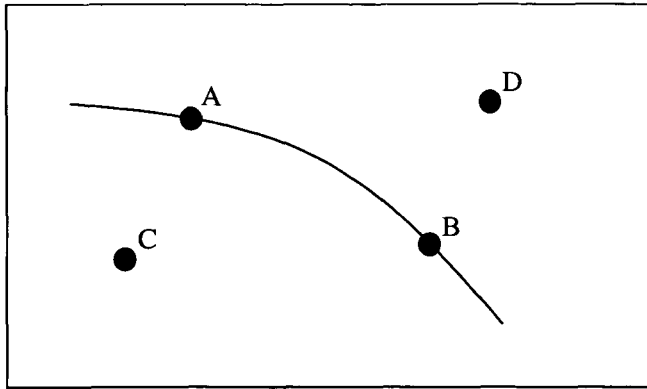
131. See Coase, *supra* note 120, at 18 (noting that governmental administration is not without costs, and does not always increase the efficiency of the economic system, in which case the market may better solve the problem alone).

132. See MALLOY, *supra* note 117, at 19-20 (illustrating that position *C* on Coase’s production possibility curve represents bureaucratic mismanagement and by being at that position, an organization would be operating inefficiently).

133. See *id.* at 19.

134. See *id.*

iciency results from judges departing from proposed "rules," and using coercive tactics to gain the most desirable clerks.



To determine the success of any proposed model, it must be examined in terms of its ability to minimize transaction costs and to maximize efficiency. Past selection models have failed largely because they have not reduced transaction costs to a level that supports maximum efficiency.¹³⁵ Because the desirable result has not been reached, judges and candidates use individualized methods to bargain their way to the results that they want, to the detriment of others and to the system.¹³⁶

C. *The 1990 Season—A Case Study*

In 1989, Judges Becker and Breyer of the Third Circuit, Judge Oakes, Chief Judge of the Second Circuit, and Judge Wald of the District of Columbia Circuit initiated a plan for hiring clerks that attempted to address the criticisms of the hiring process.¹³⁷ Approximately two-thirds of circuit court judges agreed to follow this plan.¹³⁸ Some circuits, notably the Fifth, Seventh, and Eleventh, de-

135. See POLINSKY, *supra* note 122, at 13 (noting that efficiency is achieved by minimizing transaction costs).

136. See Becker et al., *supra* note 12, at 210-11 (discussing the unorganized and self-serving tactics used in the recruitment of clerks, even in the face of resolution guidelines).

137. See *id.* at 210. The plan was enacted through a Resolution by the District of Columbia Judicial Council in an attempt to make it more enforceable than an informal agreement among judges. See Wald, *supra* note 1, at 157. This resolution stated: "Commencing in 1990, the D.C. Circuit Council is committed to the practice that no job offers, tentative or final, shall be made to law clerk applicants before May 1st of the applicant's second year." *Id.*

138. See Wald, *supra* note 1, at 157.

clined to participate, while other circuits predicated compliance upon the agreement of all circuits.¹³⁹

The plan provided that clerkship interviews could take place at any time, but restricted judges from extending offers until May 1 at 12:00 noon Eastern Daylight Time.¹⁴⁰ There was a corresponding effort on behalf of the Association of American Law Schools to urge its faculty members not to release letters of recommendation until April 1, thereby limiting the interviewing period from April 1 to May 1.¹⁴¹ This did not, however, prevent students from contacting judges' offices, causing judges to begin interviews in mid-March, and requiring many faculty recommendations to be written before April 1.¹⁴²

Ultimately this effort failed, and reform efforts were abandoned after the 1990 season.¹⁴³ Although this reform effort saw more widespread adherence than previous efforts, judges quickly sidestepped the guidelines to compete with offers made by those judges who refused to follow the reform measures.¹⁴⁴ Similarly, judges directed their existing clerks to contact prospective clerk candidates to express "continuing interest and to give the students an opportunity to prioritize their choices."¹⁴⁵

Among other weaknesses, the May 1 offer date provided little decorum. First, a few judges vacillated and made calls ahead of the 12:00 noon deadline.¹⁴⁶ Second, those judges who waited until the noon deadline often found that their selections had accepted another offer from a judge with a "fast" watch.¹⁴⁷ Finally, because judges had not decided how long offers would be kept open, there was a "frenzy of offers and acceptances . . . within minutes of the noon hour."¹⁴⁸

139. *See id.* at 157-58. The participating courts included "the D.C., Federal, First, Second, Third, Fourth, Sixth, Eighth, Tenth, and a majority of the judges on the Ninth." *Id.*

140. *See* Becker et al., *supra* note 12, at 210.

141. *See* Wald, *supra* note 1, at 158.

142. *See id.*

143. *See* Becker et al., *supra* note 12, at 211 (stating that after the 1990 clerkship season "Judge Becker and Chief Judges Breyer, Oakes, and Wald abandoned their reform efforts").

144. *See* Wald, *supra* note 1, at 158 (noting that some judges rationalized that in meeting the offer of a noncompliant judge, they were not violating the agreement).

145. *Id.*

146. *See id.* at 159. In turn, this caused students to contact their preferred judges before the noon deadline, causing a "destabilizing flurry of predeadline transactions." *Id.*

147. Becker et al., *supra* note 12, at 211. Students also reported getting phone calls from judges in the weeks before May 1 asking if they would accept if that particular judge extended an offer. *See id.* at 210-11.

148. *Id.* at 211. Consequently, many students and judges did not get their preferred outcome, and judges who gave students time to consider an offer often found their next five or more choices gone within an hour or two. *See id.*

Disappointment and frustration for all involved resulted from this effort at reform.¹⁴⁹

In addition to creating new problems, the May 1 solution did little to reduce transaction costs and in fact, exacerbated virtually all of the existing problems in the process. First, it failed to improve the collegiality or reputation of the federal judiciary. In an effort to secure better candidates, the May 1 solution did not persuade judges to put the reputation of the judiciary ahead of their personal agendas; even judges who agreed to participate in the reform effort engaged in pre-deadline offers.¹⁵⁰ Thus, the May 1 deadline actually highlighted the behavior it sought to avoid.¹⁵¹

Second, the effects of missed class time and the costs of interviewing on students were unclear. Some students thought the postponed selection date allowed them to interview with more judges than in other years.¹⁵² Others, however, responded that their costs increased because they felt compelled to interview with a larger number of judges due to the intense competition for clerkships; in other years, these students explained that early offers had enabled them to avoid much of this expense.¹⁵³ Theoretically, with no threat of early offers, the May 1 solution should have made it easier for students to coordinate travel plans and to cut costs.¹⁵⁴ Similarly, it should have been easier for students to coordinate interviews with class schedules, resulting in much less missed class time.¹⁵⁵ Ultimately, it appears that any

149. See Wald, *supra* note 1, at 159-60 (noting that despite some positive comments about the May 1 deadline, "the critics seemed to prevail").

150. See Norris, *supra* note 17, at 775 (noting that, in practice, the current process furthers judges' own interests in hiring clerks with superlative credentials and that there is relatively minimal emphasis on the public's or on the judiciary's interests); Oberdorfer & Levy, *supra* note 17, at 1097 (observing that while the process of clerkship selection should be dignified, so that public confidence is enhanced, judges currently select clerks in a manner that "unnecessarily jeopardizes that confidence"); *supra* note 144 and accompanying text (noting that some judges initially agreed to the 1990 Resolution but then later reneged).

151. For example, judges complained that they were forced to interview additional candidates out of fear that their first choices would not accept, causing them to neglect their official duties. See Wald, *supra* note 1, at 159-60. Furthermore, students complained about the increased interviewing costs. See *id.*

152. See *id.* at 159 (noting that some candidates appreciated the additional opportunities to meet and interview more judges).

153. See *id.* at 159-60.

154. See Norris, *supra* note 17, at 794 (explaining how the common dates for finishing interviews under the proposed matching system would allow candidates to avail themselves of lower air fares and to combine multiple interviews at a particular destination into one trip, resulting in minimal disruption to the candidates' schedules and studies).

155. See *id.*

gains in flexibility were offset by the greater number of interviews that students scheduled for fear of not getting their first choices.

Third, the May 1 solution diminished overall judicial efficiency.¹⁵⁶ Like many students, some judges felt compelled to interview more candidates than in previous years—taking up “time [that] would have been better spent on the work of the court”—because they were fearful that their favored candidates would accept another offer.¹⁵⁷ On the positive side, judges had more flexibility in scheduling their interviews due to the later offer date.¹⁵⁸

Fourth, the May 1 solution did little to alleviate the informational problem. The interview process in the 1990 clerkship recruitment season ended, by design, before May 1. This timing provided only a few additional months for candidates to get more grades and to complete more legal writing assignments. Spring grades are generally not available by May 1 because the semester has not ended, most spring legal writing projects are not yet finished, and judges still, in most cases, will not have the benefit of recommendations from candidates' summer employers.¹⁵⁹ As a result, any informational gains from this system were negligible. Although professors may have observed the student in a more intimate setting during part of the second year, and may have become more familiar with the student's abilities in the classroom, this deadline severely limited the possible extent of that familiarity.¹⁶⁰ Some judges considered the interviewing process to be “more pleasurable and comprehensive since it was not conducted under the threat of preemptive offers by other judges,” and judges

156. See Wald, *supra* note 1, at 159-60 (observing that both judges and students found that the May 1 selection date consumed additional time and expense).

157. *Id.* at 159.

158. See Norris, *supra* note 17, at 794 (explaining why a uniform date for the start of the interviewing season should improve the reliability of information supplied to judges, ultimately reducing the number of interviews necessary, or even eliminating the need for interviews).

159. See *id.* at 777 (noting that only some students have the opportunity to work with an attorney during the summer after their first year of law school); see *supra* notes 38-42 and accompanying text (describing, in more detail, the lack of information available about students due to early interview deadlines).

160. See *id.* (explaining that even after three semesters of law school, students have had mostly large classes without much interaction with professors and that few have served as research assistants); *supra* note 40 (discussing the lack of one-on-one contact professors have with students after three semesters of law school); see also *infra* notes 195-196 (explaining that evaluating students at a later time in their law school careers provides more information in the form of more grades, more insightful recommendations from professors, and better writing samples).

often had more time to gather information about candidates.¹⁶¹ The utility of this relaxed atmosphere, however, could not be fully realized because the amount of information available for discovery was limited by the May 1 deadline.

Finally, the May 1 solution suffered from the same regionalistic and reputational concerns that have plagued other reform efforts. It is clear from the refusal of several circuits to join this reform effort that there was no consensus of support for the May 1 system.¹⁶² It is also clear that some tactics, such as early offers, were employed that encouraged guideline-breaking. The tactics used to circumvent the deadlines were comparable to responses in previous years from judges who feared that the “cream” would be skimmed off the top before they could get to it.¹⁶³

D. *The Union of Norms and Behavior*

The current system and the 1990 reform effort do not solve the inherent problems of the process. First, they partake of and reinforce inefficient norms—inefficient to the judiciary, to the clerkship applicants, and to the public because of the time and resource demands made on the judges and on the applicants.¹⁶⁴ Second, they fall short of the ideal distribution of wealth according to theories of distributive justice, which hold that resources should be allocated according to “criteri[a] of distribution.”¹⁶⁵ The current system allocates wealth equally to clerks—all clerks receive the same salary, regardless of the clerk’s skill or qualifications—a departure from the merit-based principles that keep the free market operating smoothly. Because judges thus far have hired clerks largely without regulation, and certainly with impunity, “norms” alone have governed the hiring process.¹⁶⁶

161. Wald, *supra* note 1, at 159. Although some judges noted advantages, opponents of the reform effort were more convincing. *See id.*

162. *See supra* notes 138-139 and accompanying text.

163. *See* Wald, *supra* note 1, at 156.

164. *See generally* Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699-1701 (1996) (describing a norm as “a rule that distinguishes desirable and undesirable behavior,” setting forth the tests to determine whether a norm is efficient, or in other words “maximize[s] social benefits”).

165. *See* Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 535-36 (1992) (describing how “[i]n distributive justice, things are allocated to persons in accordance with a criterion of distribution”).

166. *See also supra* notes 47-55 and accompanying text (describing the discretion judges have over whom they hire as judicial clerks).

Norms, like laws, constrain behavior. Unlike laws, which are imposed and enforced by the state, *private* individuals enforce norms.¹⁶⁷ As evidenced in the previous outline of impediments to reform, numerous factors drive the status quo: self-interest, judges' reputational advantages, and the added transaction costs caused by unenforceable and less than universal offer and hiring dates. The current system, however, makes clear that the converse is also true: at least in the context of the clerkship hiring process, behavior governs norms.¹⁶⁸ This has momentous implications for any reform proposal. Intractable human behaviors are not likely to submit easily, if at all, to mere declarations of reform. Thus, to reshape the norms governing the status quo, it becomes necessary either to reshape behaviors or to use them to the advantage of a reform proposal.

Behavioral analyses of law and law-like processes buttress this point.¹⁶⁹ The current system and most proposals allow self-interest and mistrust to govern the outcome of the hiring process. These factors prevent judges from working hand-in-hand to allocate clerks according to their relative worth. Not only do self-interest and mistrust drive judges to exploit their reputational advantages to recruit students when their skills are far from ripe, but they drive all judges, whether of high or of low repute, to assert claims over the "cream of the crop" of the candidate pool to prevent their colleagues from asserting that claim.¹⁷⁰ Because no constraints prevent judges' pure self-interest from harming the collective good, the collective good suffers every hiring season. Self-interested actions cause judges to incur costs and disutility in an effort to prevent others from hiring the top candidates.¹⁷¹ While judges may justify their noncollegial practices by the candidate's high grades or winning personality, the lack of a mature legal education resume, and the time-costs of unnecessary inter-

167. See Posner, *supra* note 164, at 1699-1701 (stating that "a private person sanctions the violator of a norm, whereas a state actor sanctions the violator of a law").

168. See generally Sunstein, *supra* note 111, at 1176-79 (describing the links between behavior and norms in the law).

169. See *id.* at 1177-79 (listing the principal findings of behavioral research as applied to "positive, prescriptive, and normative work in the law").

170. See Posner, *supra* note 164, at 1721-22 (contrasting envious people with distributivists, who would allocate clerks according to the common good—and with deontologists, who would posit a moral obligation on behalf of judges to constrain their hiring practices, and likening envious people with intuitionists, who would without thought agree with the status quo—and with traditionalists, who would voice support for the status quo by dint of its longevity).

171. See *id.* at 1721 (explaining how envious people will choose to incur costs solely to prevent their competitors from obtaining a desired good).

views to students and to judges all illuminate the inefficient status quo.

One might variously allocate the blame for these inefficient norms. Economists argue that the costs of negative externalities should be borne by those who cause the externality, in this case judges;¹⁷² others claim that the problems are inherent in the process, and as such unavoidable.¹⁷³ Still others might argue that students can best deal with some of the problems, perhaps by collectively refusing to apply until a given deadline, or until later in their careers, or by refusing to be intimidated by tactics like exploding and vanishing offers.¹⁷⁴ Yet, if the status quo is viewed with an eye to which parties can best mitigate inefficiencies, judges clearly fit the bill. Whereas in poverty, to which theories of distributive justice are often applied, colorable arguments may be made that the poor are sometimes to blame for their state,¹⁷⁵ even able-bodied students seldom can lift themselves above the hiring quagmire created by the judiciary.¹⁷⁶ Students, particularly early second-year law students, are not prepared to stand firm against judges' intimidating hiring tactics. On the other hand, judges are perfectly situated to modestly tailor their offer dates, and to make offers with collegiality and the reputation of the judiciary in mind.

III. A REVIEW OF CURRENT PROPOSALS

The broad field of current proposals includes: retaining the present relatively unregulated system with all of its attendant problems;¹⁷⁷ commencing interviews with a nonbinding date of March 1;¹⁷⁸ and replacing the current system with one based on the medical school

172. See Lee Anne Fennell, *Interdependence and Choice in Distributive Justice: The Welfare Conundrum*, 1994 Wis. L. REV. 235, 250 ("The economist's answer to a negative externality is to arrange affairs so that the costs of the externality are internalized by the persons engaging in the activity which generates that externality.").

173. See *id.* at 251 (stating that some argue that negative externalities are "necessary and inevitable byproduct[s]" of our economy).

174. See *id.* (suggesting that those adversely affected by negative externalities bear the burden of changing the system).

175. See *id.* at 251-53 (explaining "that society has long assumed that the costs of poverty alleviation should fall on the poor themselves, if they are able-bodied").

176. Similarly, the cost to students of remedying the problems in the current hiring process would be prohibitive; clearly, judges can moderate the process easier than students can. But see Becker et al., *supra* note 12, at 225 (stating that "law students and faculty hold the trump card" that could force judicial compliance with a reform effort).

177. See Kozinski, *supra* note 1, at 1707 (advocating vehemently for an unregulated selection process).

178. See Becker et al., *supra* note 12, at 224-25 (concluding that the March 1 solution is a good starting place for the reform efforts).

residency matching model.¹⁷⁹ Ultimately, as further elucidated below, none of these proposals sufficiently minimizes transaction costs or maximizes efficiency in the judicial clerkship hiring process.

A. *An Unregulated System*

Judge Alex Kozinski advocated either an entirely unregulated system or a system in which judges remain free to reject the “rules” of law clerk recruiting.¹⁸⁰ He opined that a more orderly, structured process is not only unattainable but also undesirable.¹⁸¹ Judge Kozinski argued that the current problems in the selection system are simply unavoidable and contended that an unregulated process is “healthy and constructive.”¹⁸² Judge Kozinski’s unregulated system eschews standardized interviewing and offer periods, and accepts early offers, exploding offers, and the various other tactics that many regard as counterproductive.¹⁸³

For Judge Kozinski, the unregulated interviewing process promotes two key ends. First, he argued, “a student[’s] react[ion] to the pressures, uncertainties and disillusionments of the interview process” reveals aspects of the candidate’s character.¹⁸⁴ He asserted that these reactions are a good indicator of the clerk’s later performance in

179. See Norris, *supra* note 17, at 791-98 (discussing the possibility of using a matching model similar to the medical matching system); Wald, *supra* note 1, at 160-63 (same).

180. Kozinski, *supra* note 1, at 1707-08, 1730. Although Judge Kozinski advocated leaving the judicial clerkship system as it is, he nevertheless suggested a number of improvements that would benefit those involved in the process. *Id.* at 1724-29. Kozinski proposed that improvements center around the role that law schools play in the process; including calling upon law school administrators to ease the burdens of those students interviewing for judicial clerkships, encouraging law schools to disseminate accurate information about the judicial selection process to students, and eliciting more cooperative behavior from law school professors. *Id.*

181. *Id.* at 1707.

182. *Id.* at 1708. According to Judge Kozinski, this process allows judges and clerks to obtain information about each other that would not otherwise be accessible if the selection process was regulated. *Id.* at 1713. He stated:

Indeed, the more a system allows for individual differences in attitudes or behavior, the more it forces individual actors to reveal whether they are willing to abide by the dictates of propriety. A system that forecloses participants from acting in an undignified manner—or from revealing any other trait of character—conceals important information; it puts the cads on equal footing with the saints.

Id.

183. *Id.* at 1721, 1718. While Judge Kozinski frowned upon such undignified practices as “exploding offers, back-stabbing and other abuses,” he felt that these practices may reveal information beneficial to both students’ and judges’ decision-making. *Id.* at 1718. Furthermore, he described early offers as “an entirely rational and efficient device for allocating scarce resources within a free market.” *Id.* at 1721.

184. *Id.* at 1718.

chambers.¹⁸⁵ Furthermore, he suggested that the process reveals aspects of a judge's character by showing how she "acts when her own vital interests are at stake."¹⁸⁶ Similarly, Judge Kozinski valued the unregulated system because it, unlike some of the proposed solutions, allows and indeed encourages students and judges to act in an undignified manner. This freedom, in turn, helps the participants to select the best candidate or clerkship.¹⁸⁷ Judge Kozinski further argued that diminished judicial dignity and collegiality are not caused by the unregulated system itself, but rather by the individuals who participate in the system.¹⁸⁸

While Judge Kozinski's hands-off approach allows the market to function freely, theoretically aspiring to maximize efficiency, he recognized that it actually does little to address the problems associated with the clerkship hiring process.¹⁸⁹ First, his advocacy of the unregulated system does not reduce students' costs. He acknowledged this fact and contended that no system can solve these problems.¹⁹⁰ Kozinski's method also ignores the reduced judicial efficiency caused by the current system. He conceded that each new clerkship recruitment season brings with it the burdensome process of sorting through resumes and interviewing, which distracts the judge from the business of the court.¹⁹¹ He countered, however, that under any possible system, judges will still have to review resumes and to conduct interviews.¹⁹²

Additionally, Judge Kozinski's approach severely restricts the information available to participants in the process. He contended that February or March of the student's second year provides enough information to serve as a proxy for his overall legal ability and law school performance.¹⁹³ He asserted that three semesters of grades and one semester's performance on a law journal or other writing projects is satisfactory.¹⁹⁴ Furthermore, Kozinski argued that after three semesters, professors have had a sufficient amount of time to get to know

185. *Id.*

186. *Id.*

187. *See id.* at 1713.

188. *Id.*

189. *Id.*

190. *Id.* at 1713-14. For example, he noted that students will still not be able to avoid travel for interviews because "the clerkship market is largely national in scope" and that studies will still be disrupted because of the required travel and the differences in law school and judicial schedules. *Id.*

191. *Id.* at 1707.

192. *Id.* at 1713.

193. *Id.* at 1710-11.

194. *Id.* at 1710.

students on an individual level and can therefore provide “a fairly indicative” assessment of their legal skills.¹⁹⁵ Many others who have considered this issue, however, have disagreed with these assertions.¹⁹⁶

It appears, moreover, that Judge Kozinski worried that in abandoning the “free-for-all” marketplace, the ability of the judge and of the student to observe each other as self-interested, free-market actors may be lost.¹⁹⁷ This experience, in Kozinski’s opinion, reveals key elements of the student’s and of the judge’s character.¹⁹⁸ Furthermore, a regulated system would presumably provide students and law school placement offices with more time to compile information from the judge’s former clerks.¹⁹⁹ The former clerks could provide first-hand knowledge of the judge’s general character and tales of the judge’s reactions under pressure.²⁰⁰ If the judge-clerk relationship is truly akin to a marriage as Judge Wald suggests,²⁰¹ the former clerk will have had ample opportunity to observe the judge’s personality in action.

Finally, Judge Kozinski’s position does nothing to address the regionalist rift among judges caused by the current system.²⁰² Although Kozinski’s advocacy of the status quo may suggest it is unnecessary to address this problem, a closer analysis demonstrates that regionalistic rifts indeed threaten the status quo. Many eastern and more prestigious circuits are more likely to advocate reform due to their hiring

195. *Id.* Kozinski explained that after three semesters in law school, students will have taken positions as research assistants, participated in seminars, and the like, affording professors with a greater opportunity to form opinions about students’ legal skills. *Id.*

196. See Becker et al., *supra* note 12, at 224 (asserting that “the best possible time to select applicants would be the fall term of their third year in law school” because judges would then have “two years of law school accomplishments as well as summer employment” with which to judge students); Oberdorfer & Levy, *supra* note 17, at 1099-1100 (identifying inadequate information as “the most noticeable and significant problem with the current system” and claiming that a matching system would provide more information such as four semesters worth of grades, recommendations from individuals more knowledgeable about an applicant’s abilities, better writing samples, and an applicant’s performance at her summer job).

197. See Kozinski, *supra* note 1, at 1718 (noting that he does not condone the abuses of the current system, such as exploding offers, but he does feel that “[t]he way people respond to the pressure of the current selection process is very revealing; it is valuable information that can help the other actors reach a decision”).

198. *Id.*; see *supra* notes 185-187 and accompanying text.

199. See generally Norris, *supra* note 17, at 776 & n.79 (describing the contents of clerkship opportunity meetings held by law school placement offices and noting that these meetings include comments from and information about former clerks).

200. See Kozinski, *supra* note 1, at 1709 (indicating that although clerks must keep substantive work confidential, they “often comment, expressly or by knit of the brow, about the character, work habits, fairness and generosity of the judges they clerked for”).

201. See *supra* note 1 and accompanying text.

202. See *supra* note 84 and accompanying text.

advantages arising from proximity to top-tier law schools, while many western and less prestigious circuits are more likely to argue against regulation.²⁰³

Despite Judge Kozinski's arguments to the contrary, the current system produces a number of notable difficulties that are widely perceived as undesirable by both the judiciary and by the public.²⁰⁴ Problematically, because Judge Kozinski's position is to allow the unregulated system to continue unhindered, all of these problems are likely to continue.

B. A Modest March 1 Solution

In September 1993, the Judicial Conference of the United States adopted a nonbinding resolution providing that judges would not interview clerkship candidates until March 1 of the year preceding the one in which the clerkship would begin.²⁰⁵ The resolution included an explanatory note providing for earlier interviews only in special circumstances.²⁰⁶ The resolution was also transmitted to law schools with a note urging them not to send letters of recommendation before February 1.²⁰⁷

In its first year, the March 1 solution seemed to be somewhat successful in addressing the concerns of lack of judicial collegiality and dignity, even though, not unexpectedly, it was ignored by some judges

203. See Kozinski, *supra* note 1, at 1719 (observing that east coast judges enjoy the advantage of being located close to many elite law schools); see also Clark, *supra* note 35, at 1773 (noting that geographical location is one of several factors that play a role in the judicial clerkship selection process). Kozinski explained that “[t]he problem with many reform proposals is that they tend to reinforce these patterns by decreasing the means by which less-favored clerkships can compete for desirable applicants.” Kozinski, *supra* note 1, at 1719. For example, proposals to have judges conduct interviews on a particular date in the spring “[b]y and large . . . had the widest support among judges on the east coast” while those in the Mid-west objected because they believed it would put them at a “procedural disadvantage.” *Id.* The spring interview dates were during school, and students would have less difficulty interviewing with judges close to their schools than with those farther away because interviews requiring more travel would be more disruptive to their studies and other law school responsibilities. See *id.*

204. See *supra* notes 17-29 and accompanying text (describing how the current process elicits undignified behaviors from the participants and how such conduct may undermine public confidence in the judiciary). There is a general perception that other than the clerkship recruitment process, judges generally handle court matters with dignity. Moreover, judicial dignity is key to maintaining the judiciary's most “important resource: its reputation for fairness.” Norris, *supra* note 17, at 766.

205. See Becker et al., *supra* note 12, at 208, 211-15.

206. See *id.* at 208 (quoting memorandum, dated Sept. 8, 1993, from Judge Becker and Chief Judge Breyer to Members of the Judicial Conference).

207. See *id.* at 208, 214-15.

and criticized by others.²⁰⁸ The March 1 proposal successfully reduced students' travel expenses and missed class time.²⁰⁹ The standardized interviewing period allowed students to coordinate their travel plans, reducing the number of missed classes.²¹⁰ Moreover, the March 1 solution improved judicial efficiency. The response of judges was generally positive because interviews were confined to a discrete period.²¹¹ This factor enabled judges to make "comparisons between applicants still fresh in their minds, and . . . to meet a fair sampling of the best applicants."²¹² Presumably, the concentration of the process eliminated the need to evaluate and to reevaluate candidates for comparison and therefore saved judges time. Finally, the March 1 proposal successfully provided more information for judges to utilize in making their clerkship hiring decisions. With the later interview date, students had more grades available, faculty were able to provide more insightful and complete recommendations, and students had additional time to consider whether or not clerking was right for them.²¹³

The March 1 proposal gained initial acceptance among judges for two main reasons. First, many judges voluntarily observed the guidelines in some form because they supported the reform effort.²¹⁴ Second, other judges were prevented from drifting too far from the recommendations due to the general resolve of law schools and of students not to transmit applications before February 1.²¹⁵ Despite these early successes, the March 1 solution did not ensure continued support. Indeed, even during its first year, the Eighth Circuit refused to participate, the Ninth Circuit devised altered timetables, and other individual judges complied to lesser or greater extents.²¹⁶ Thus, despite many initial successes, the March 1 proposal unfortunately suffered from the same principal defect as previous failed reform

208. *See id.* at 220-21.

209. *See id.* at 217-18.

210. *See id.*

211. *See id.* at 219.

212. *Id.*

213. *See id.* at 217; *supra* notes 36-43 and accompanying text.

214. *See* Becker et al., *supra* note 12, at 215 (explaining that defections were minor and that many circuits that chose to interview early at least refrained from making offers until March 1).

215. *See id.* at 215-16 (noting that in addition to the lack of applications prior to February, some students refused to attend pre-March 1 interviews, or to accept offers before this date).

216. *See id.* at 215. Many other reforms were also initially successful, but failed in later years. For example, the 1986 and 1987 seasons began with initial successes, but the reforms deteriorated by the 1988 hiring season. Norris, *supra* note 17, at 786-87.

efforts.²¹⁷ The March 1 proposal was the same sort of nonbinding attempt at reform that achieved limited success in its first year, but later unraveled when judges defected and support for the reform effort declined.²¹⁸ As a result of these shortcomings, the Judicial Conference agreed in September 1998 to abandon the deadline initiative due to poor compliance.²¹⁹ This result is not surprising given the climate surrounding the reform efforts.²²⁰ It is more evidence that any sort of system which restricts the ability of judges to make their own choices based on market forces is doomed to failure as a result of attrition and notions of game theory.²²¹

C. *The Medical Model*

Proponents of the medical model, which is based on a system used in the medical field for matching medical residents to residency programs, argue that this system solves the problems with the judicial clerkship hiring process.²²² Similarly, the system governing medical intern placement was originally unregulated; the first reform effort was a "gentleman's agreement," wherein residency program directors agreed to a "uniform appointment date."²²³ This reform resulted in problems similar to those that plague the clerkship process, with students being faced with increasingly earlier and more rapid interviewing and offer periods.²²⁴ Later proposals for reform resembling the

217. See generally Norris, *supra* note 17, at 788-91 (describing difficulties with the enforcement of reform in the judicial selection process).

218. For descriptions of previous reform efforts and the short-term lifespans of these plans, see Norris, *supra* note 17, at 785-88, and Wald, *supra* note 1, at 155-60.

219. See Deborah Pines, *Judges Revoke Limits on Hiring of Clerks*, 220 N.Y.L.J. 1 (1998) (discussing how the Judicial Conference "rescinded a 1993 policy that had recommended a March 1 starting interview date").

220. See *id.* (noting specific examples of problems created by the reform effort).

221. See *supra* notes 85-115 and accompanying text (explaining how the principles of game theory apply in the context of the clerkship selection process).

222. See Oberdorfer & Levy, *supra* note 17, at 1108 (concluding that the medical matching system can solve the problems plaguing the current judicial clerkship selection process); Wald, *supra* note 1, at 160-63 (advocating an adoption of a program similar to the medical matching system). *But see* Clark, *supra* note 35, at 1759-87 (weighing the advantages and disadvantages of the medical matching system as it could be applied to clerkship selection and concluding that proponents of such a system do not fully understand the clerkship system's costs and benefits).

223. Clark, *supra* note 35, at 1755.

224. See *id.* at 1751-55 (indicating that problems similar to those found in the judicial clerkship selection process existed early in the history of the medical residency matching system); *supra* notes 36-37 and accompanying text (explaining the historical shift toward earlier hiring decisions in the clerkship selection process).

March 1 and May 1 clerkship proposals likewise failed,²²⁵ leading to the implementation of the matching system in 1951.²²⁶ The matching system was adopted to eliminate these problems by allowing students to make their decisions as late as possible in their final year of school, to increase efficiency, and to reduce pressure on students to make early commitments while allowing them to be placed according to their preferences.²²⁷

As Judge Wald, the leading proponent of the medical matching system suggested, the medical model in the context of the clerkship hiring process would function as follows:

[A]pplicants apply to any program they are interested in; interviews are conducted completely independently of the match. But no offers can be made during the specified interview time. By a predetermined date, each applicant submits a Rank Order List of programs he or she would accept in order of priority; in the case of law clerks it would be a rank order of preferences among judges. The judges, in turn, submit similar lists of their "true preferences." In our case, the matching clearinghouse would then simulate the making of offers by judges and the acceptance or rejection of these offers by applicants based on the information in the rank sheets. Each judge would receive acceptances from her highest ranked applicants who have not already received offers from judges that the applicants prefer. A match between an applicant and a judge would constitute a binding commitment. Following the match, information on positions that remain available would be provided to applicants who had not been matched to a position; correlatively, information on unmatched applicants would be provided to judges with unfilled positions. They could then contact and negotiate with each other at will. All ranking information would be kept confidential.²²⁸

Presumably, the medical matching model would drastically reduce the concerns about judicial collegiality and reputation inherent in the current hiring process. A medical matching model would allow the selection process to be "more orderly and businesslike . . . thereby

225. See Clark, *supra* note 35, at 1755. The "Cooperative Plan for the Appointment of Interns" was an early reform to the medical residency market whereby residency programs made offers to applicants on a preset date in February at 3:00 p.m. Eastern Standard Time. See *id.* The plan was unsuccessful, in part, because applicants delayed responding to offers in hopes of hearing from their preferred programs. See *id.*

226. See *id.* at 1755-56.

227. See *id.*

228. Wald, *supra* note 1, at 161.

furthering judges' legitimate self-interests while also keeping faith with the interest of the public and of the vast majority of judges in maintaining the reputation of the federal judiciary as an orderly and dignified institution."²²⁹

The central clearinghouse of the medical model would replace the frenzy of early offers and of other unbecoming judicial behavior, would improve collegiality among judges, and would enhance the image of the judiciary. Securing and maintaining the confidentiality of all the information would be integral to this system.²³⁰ So long as judges and students refrained from revealing their preferences, no judge would suffer the indignity of knowing that he was rejected by a clerkship candidate in favor of a colleague.²³¹

Unfortunately, there is, however, one key obstacle to achieving the requisite confidentiality. As even Judge Wald recognized, nothing prevents judges and law students from sharing information about their rankings, or from agreeing to rank each other in ways that assure a match between two individuals.²³² The process could develop the same problems as the current system, but with an additional step: instead of utilizing exploding or vanishing offers, judges could apply "pressure on applicants to violate the rules and spirit of the match by making early commitments."²³³ This type of "manipulation of the system would reflect even more poorly on the judiciary than does the present 'free-for-all.'"²³⁴ If this behavior occurred, other judges would quickly abandon the system, and the process would revert to the current unregulated system with all of its accompanying bad behavior and negative stigmas.²³⁵

229. Oberdorfer & Levy, *supra* note 17, at 1108. Furthermore, the matching model would eliminate many of the problems in the clerkship selection process without diminishing the personal nature of the judge-clerk relationship. *See id.*

230. *See* Wald, *supra* note 1, at 162 (discussing the need for confidentiality and explaining how this aspect of the matching system would appeal to the judiciary).

231. *See id.* (stating that "collegiality . . . suffers when a judge loses his first choice to another judge" and that the matching system attempts to minimize this occurrence).

232. *Id.* If a judge, however, does not know how students truly feel, it is difficult for him to list his "true preferences." *Id.* Without this information, judges could be matched with "clerks who were not his top choices and who did not choose him as theirs." *Id.*

233. Clark, *supra* note 35, at 1786.

234. *Id.* (citing Allen S. Lichter, *The Residency Match in Radiation Oncology*, 22 INT'L J. RADIATION ONCOLOGY BIOLOGY PHYSICS 1147, 1153 (1952)).

235. *See id.* at 1764. Clark argued that a matching system would eventually break down unless all of the judges from the prestigious circuits participated, and even a few defections would cause the system to fail. *See id.* Clark also contended that nonparticipant judges would continue employing tactics such as early offers, and when those judges benefit from such practices, the participant judges would eventually abandon the system. *See id.*

Additionally, the medical model would not significantly alleviate student costs. The system may alleviate some costs by providing a more flexible interviewing period, therefore no gain would come from interviewing either early or late in the season.²³⁶ Those who have analyzed the application of the medical model to the clerkship process, however, have argued that the medical model will cause judges to interview more candidates as a precaution to ensure that they fill positions with qualified candidates.²³⁷ This increase in interviews would lead to applicants attending more interviews which would increase students' travel costs.²³⁸ Essentially, the medical model offers greater flexibility in planning interviews, but it does not effectively reduce the overall cost of interviewing.

Problematically, the medical model's impact on judicial efficiency is similar to its impact on student costs and on missed class time. The medical matching model may improve judicial efficiency by allowing judges to "more easily schedule interviews at their convenience,"²³⁹ but judges will spend extra time conducting interviews because they are not assured of getting a particular candidate.²⁴⁰ In the end, judges are permitted greater flexibility when scheduling interviews by this process, but the uncertainty in the process and the resulting increase in the number of candidates interviewed will not likely result in a net gain for judicial efficiency.

236. See Oberdorfer & Levy, *supra* note 17, at 1102; see also *supra* notes 154-155 and accompanying text (explaining that a more flexible interview time should allow students to complete all interviews in a single trip, and schedule interviews around their class schedules).

237. See Clark, *supra* note 35, at 1766 ("Because every clerkship position would remain open until the match date, a judge could never be certain that she had interviewed enough individuals to fill the open positions."); Kozinski, *supra* note 1, at 1721 n.31 (stating that the medical model would "dramatically multiply the number of interviews that would have to be conducted"); Norris, *supra* note 17, at 794 ("Under a matching system, of course, both judges and students who are fearful that they will not get their top matches may feel compelled to engage in more rather than fewer interviews.").

238. See Clark, *supra* note 35, at 1767-68 (explaining that the medical model will cause students to spend more money on additional interviews); Kozinski, *supra* note 1, at 1721 n.31 (noting that the medical model would result in more interviews for each student, which would cause a substantial increase in travel costs for each student so "that some students may be edged out of desirable clerkships by colleagues who are able to pay for more trips"). *But see* Oberdorfer & Levy, *supra* note 17, at 1102 (asserting that the medical matching model would help to minimize travel expenses).

239. Oberdorfer & Levy, *supra* note 17, at 1102.

240. See Clark, *supra* note 35, at 1766-67. Participants in the residency hiring process complain about the high costs of recruiting, and it is likely that the results would be similar with judicial clerkships. See *id.* at 1767. Moreover, further evidencing that interview costs would increase, the 1990 clerkship recruitment season fostered a greater element of uncertainty among judges, and the interviewing burden increased during that season. See *id.*

One of the key advantages of a medical matching model is that it allows the parties to gather more and better information by eliminating the incentives to conduct early interviews and to extend early offers.²⁴¹ By conducting interviews at the beginning of the third year of law school rather than in the second year, judges can rely on more grades, informed professor recommendations, input from summer work experiences, and legal writing at a far more developed stage.²⁴² Similarly, the student has a chance to consider more fully and to decide whether to clerk.²⁴³ Despite this apparent increased access to information, practical experience in the medical arena does not demonstrate that residency programs or students are able to take advantage of this additional information.²⁴⁴

The familiar problem of regionalism also threatens the task of building support for a judicial matching program. The medical model would serve the interests of those judges who compete for the very best clerks.²⁴⁵ East coast and prestigious judges would generally stand to gain because the model would give them access to candidates who are often eliminated from the system because of early offers and similar tactics.²⁴⁶ The medical matching model would cause western and less prestigious judges to lose the advantages that early offers provide.²⁴⁷ In considering the difference between clerkship positions by region and by prestige, and given the intense desire of judges to secure top clerkship candidates,²⁴⁸ it is unlikely that western or less prestigious judges will accept the medical model.

Finally, a key problem with applying the matching system to the judicial clerkship process is that it shows little hope of obtaining the

241. See Oberdorfer & Levy, *supra* note 17, at 1100 (describing how the medical matching model leads to an increase in availability of information).

242. See *id.*

243. See *id.* Students should consider a clerkship "as a valuable and fulfilling personal and professional experience," not just something a successful law student should do. *Id.*

244. Clark, *supra* note 35, at 1777 (explaining that applicants to medical residency programs do not feel that they have "satisfactory access to information on the various programs").

245. See *id.* at 1773 (observing that, because benefits would not be uniformly distributed, the position of some judges would be enhanced at the expense of others).

246. See *id.* (explaining that the benefits of the medical matching program would only accrue to prestigious judges and those located in favorable geographic areas).

247. See *id.* (noting that judges "who have benefitted in the past from their willingness to make early offers would lose this advantage in a matching system"); see also Kozinski, *supra* note 1, at 1719 (arguing that the early offer and related tactics are important tools judges, particularly less prestigious judges, use to attract the best candidates).

248. See Norris, *supra* note 17, at 775 (explaining the motivating forces for judges in selecting their clerks); *supra* notes 5-7, 19 and accompanying text (same).

overall judicial support and participation it needs to succeed.²⁴⁹ Past efforts at reforming the clerkship process have failed due to a lack of consensus and adherence by all judges.²⁵⁰ It is difficult to gain the needed consensus, and judges are reluctant to engage in any sort of reform before knowing it will rebound to their benefit.²⁵¹

Although the medical matching system addresses many of the problems inherent in the current judicial clerkship hiring process, it is unlikely to garner enough support from judges to be successfully implemented. The judicial clerkship selection process suffers many of the ills that prompted the implementation of the medical matching system.²⁵² There exists, however, a key difference between the two situations. The driving force behind the medical model was the presence of a "surplus of residency positions in relation to the number of applicants,"²⁵³ but there is no corresponding shortage of qualified judicial clerkship candidates.²⁵⁴ Instead, the only shortage is of coveted "superstar" clerks,²⁵⁵ and there is no evidence that the medical matching system will remedy this deficit. Moreover, even if a medical model is implemented, it will likely increase student costs and will reduce judicial efficiency.²⁵⁶ In the final analysis, the medical matching system is not the best solution to the problems associated with the clerkship hiring process because the system cannot address judges' demands for "top" law clerks, and because many of the current system's failings would be left unresolved.

IV. A PROPOSED SOLUTION

A. *Outline of the Proposed System*

Under the current system, judges are free to hire clerks in any manner they choose. As has been noted, in hiring clerks, a judge's strategy principally revolves around her ability to vary interview and

249. See Clark, *supra* note 35, at 1764 (asserting that "a matching system is bound to disintegrate unless virtually all programs with positions to offer participate").

250. See *supra* notes 216-221 and accompanying text (discussing how nonparticipation problems caused the demise of the early clerkship selection processes).

251. See Clark, *supra* note 35, at 1764 (observing that any future reform will fail "unless widespread consensus is reached *before* the match is implemented").

252. See *supra* notes 224-227 and accompanying text.

253. Clark, *supra* note 35, at 1759.

254. See *id.* at 1760. It is not unusual for a Circuit Court of Appeals judge to receive 300 to 400 applications for three clerk positions. See *id.* (citing Wald, *supra* note 1, at 152).

255. See *id.* According to Clark, the legal education system is unable to produce more of these highly qualified potential clerks. See *id.* Even if it could, judges would likely create additional defining characteristics to separate them. See *id.*

256. See *supra* notes 237-238 and accompanying text.

offer dates.²⁵⁷ Coincidentally, these same factors have caused considerable controversy among the judiciary. Over the past decade, several judges and scholars have proffered different types of proposals in hopes of restructuring the hiring process to make it more uniform and fair to all judges and to prospective clerks.²⁵⁸ Among the reform proposals this Article has reviewed are the March 1 deadline, the May 1 deadline, and the medical matching model, all of which are variations upon the same theme. Each proposal attempts to control interview and offer dates, and correspondingly each has failed. This Article contends that to succeed, a proposal must overcome the failings of all previous proposals by focusing on providing judges with more than mere timing as leverage to implement their hiring strategies. Judges should be given broad latitude not only in the timing of their offers, but in the financial parameters as well.

Although judges already have tremendous discretion in allocating their annual budgets, the federal government presently predetermines clerkship salaries.²⁵⁹ Clerks in 1999 will earn \$40,714 per year and then often move to much higher-paying positions at large law firms.²⁶⁰ I advocate a different scenario: allocate a lump sum dollar amount for all clerk salaries to each judge, allowing her the discretion to divide this money between the various clerks' salaries, including using this money to entice highly-desirable clerks by offering them a salary in excess of that offered to the average clerk.²⁶¹ Each judge's

257. See *supra* notes 28-30 and accompanying text (observing that some judges use early offers as a preemptive strategy in order to enhance their prospects of hiring a top candidate).

258. See *supra* Part III (analyzing and critiquing previously proposed reform measures and evaluating their potential shortcomings).

259. The administrative office for the courts, "under the supervision and direction of the Judicial Conference of the United States," sets the "compensation of . . . law clerks." 28 U.S.C. § 604(a)(5) (1993). Note also that this salary increases once a candidate or clerk passes the bar. Telephone Interview with Carla Robinson, Personnel Management Specialist, Administrative Office of the U.S. Courts, Central, Washington, D.C. (Sept. 20, 1999). Judges then have the power to appoint law clerks. Each judge is permitted a set number of clerks: Supreme Court justices 4, circuit judges 3, and district judges 2. See Norris, *supra* note 17, at 765 n.3 (citing Alvin B. Rubin & Laura B. Bartell, FEDERAL JUDICIAL CTR., LAW CLERK HANDBOOK 1-2, 4 (rev. ed. 1989)). Under this proposal, if a judge finds it necessary and was able to obtain more than this set number of clerks using the allocated funds, it seems permissible that she may hire as many clerks as she deems necessary. This, of course, assumes that she can find law school graduates willing to work for little or no compensation.

260. This salary is for the D.C. Circuit for a law school graduate without bar membership or legal experience. Salaries for federal judicial clerks vary depending upon legal experience, bar membership, and geographic location. See *supra* note 259.

261. See generally 15 C.F.R. § 917.11 (1999) (describing the guidelines for Sea Grant fellowships). Judicial clerkships, one might argue, are analogous to postdoctoral fellowships.

hiring dates and division of funds—that is, the salaries received by each of her clerks—would then be published and made publicly available. In subsequent hiring periods the public, clerkship candidates, and fellow judges could monitor how any given judge allocated her funds. For example, a judge might wish to offer a prime candidate \$60,000, feeling that the candidate was worth more than the current set salary. Of course, the lump sum would then be diminished to the extent of the offer to the prime candidate, reducing either the number of clerks the judge could hire or the salaries for her remaining clerks. The judge would be free to carry any remaining funds over to the next recruiting season to aid in the inevitable bidding war. In the alternative, the judge could opt to spend the money in other ways—such as purchasing computers or other equipment—to make her job easier.

Other than this financial limit, no timing restrictions would be imposed on judges in the clerkship hiring process, creating a free and open market. This system follows Kozinski's free market approach, but is one step up in the sense that it gives those applying for clerkships the leverage that they need to bargain effectively. At the same time, it may give some leverage to judges who do not possess the reputational advantage of their colleagues. It does not completely even the field, however, because many clerks are interested in more than money from the clerkship experience. Such candidates will likely choose to clerk for a more prestigious judge even if the salary offered is lower. In any event, because of the public disclosure of judges' hiring dates and salary allocations, candidates will gain leverage they previously lacked, allowing both sides to negotiate more effectively. Candidates can crosscheck offers extended to them by judges with previous salaries offered by the same judges or by judges of similar repute. Using this information, candidates applying contemporaneously to those other judges can pressure judges to raise their offers to meet the going rate for similarly-qualified candidates, or risk losing the candidate to more enticing offers. Using salary information from judges of similar repute, candidates who are the most qualified can use these top-tier salaries as a gauge for what they should

The postdoctoral pay structure operates as a model for this market-based judicial clerkship proposal. The United States government allows for cost of living variations, hence the amount of money requested can vary. See 15 C.F.R. § 917.11(e). Graduates can evaluate if they are willing to work for the amount offered by the employer by comparing it to the guidelines for that type of fellowship. Candidates can weigh the prestige of the position, future job possibility, and any other factors against the salary offered coupled with the cost of living. Allowing this free market-based analysis benefits both the graduate and the institution offering the fellowship.

be making—offers falling short would be subject to an informed candidate's pressure. For example, if Judge *A* offers extremely-well-qualified Candidate *X* only \$40,000, whereas Judges *B*, *C*, and *D* have offered their top choices an average of \$60,000 in years past, Candidate *X* could utilize this information to gain leverage in her negotiations with Judge *A*. In essence, we would expect Candidate *X* to convey this information about the past clerkship salaries of Judges *B*, *C*, and *D* coupled with information that *X* is awaiting offers from *B*, *C*, and *D* to Judge *A*, thus pressuring her into making a more rapid and favorable decision.

Taking advantage of this newly available information may increase the amount of time judges and potential clerks will spend comparing salaries and offer dates, but that is a small sacrifice for the advantages that the system offers. Transaction costs in general will not increase over the present system because no more time will be spent comparing salary information than is already spent trying to anticipate when and to which candidates other judges will extend offers.

Because negotiations would occur on more equal footing, both sides would benefit and the need for preemptive and indecorous behavior amongst judges would be lessened. Due to the financial leverage offered judges in this proposed system, early hiring becomes a weaker method of enticing candidates. At the same time, students would be well-equipped to resist judges' requiring on the spot acceptance of offers, because the information available to students would allow for quick evaluation of the adequacy of judges' offers, and allow for immediate counter-offers. This arena of mutual judge-candidate negotiation achieves more order and decorum during the hiring season without stringent regulation.

Under this proposal, a judge might begin her search for clerks at any time in a prospective candidates' education. Of course, an early search increases the judge's pool of potential candidates. In extending offers too many years before the start of the clerkship, however, little useful information would be available concerning a candidate's legal skills. At that time, the judge may see desirable qualities in the candidate, but usually will not have enough information to make a well-informed decision. Judges who hire early would likely offer only small portions of their total budget to these candidates, and would save the rest for candidates with more proven legal skills. Allocating larger sums to unproven clerkship candidates would not only lock-in spending on candidates who might well turn out to be inadequate clerks, but would also empty the coffers of funds that might

otherwise be spent on compensating for such a wildcard in a judge's future budget.

Because of these uncertainties, it would be advantageous for a judge to wait until the student's third year of law school to extend an offer. At that time, a judge would have access to more grades and summer employment references. Based on this information, the judge would be able to assess more accurately the candidate's skills and capabilities with regard to the needs of the court. The system does not attempt to impose stringent time frames for interviewing and for hiring because past proposals have proven the ineffectiveness of such efforts.²⁶² It instead encourages judges to be self-policing by allowing them to allocate salaries as they see fit.

One might expect that under this system judges would structure their offers to reflect not only the skills of the candidate, but also to provide a monetary incentive for the prospective clerk. Thus, highly qualified students would probably be extended offers higher than the current \$40,714, and less qualified students would receive offers below the current fixed salary. This proposal will necessitate some minor changes in the federal law that currently fixes the salary for judicial clerks at a uniform amount.²⁶³ Students would also be free to solicit interviews at any time. Because students under this proposal possess informational leverage about judges' past hiring dates and salary offers, judges—knowing that students who have been solicited might well move on to other judges if no mutual interest is expressed—would be more receptive to students' overtures. Judges may be less likely to engage in unprofessional hiring tactics when candidates are well-armed with such information.

The proposal should please the Kozinski faction because all timing restrictions are removed, and a judge could begin clerk selection at any time using any strategy.²⁶⁴ The system does not impede the functioning of the free market, and in fact, actually enhances it while giving both sides more equal leverage. At the same time it also ultimately encourages judges to wait until more information concerning the legal skills of a candidate becomes available. Instead of jumping at candidates who have high first-year grades but who may turn out to

262. See *supra* notes 143-146, 208-221 and accompanying text (discussing the failures of previous reform efforts).

263. See *supra* notes 259-260 and accompanying text (explaining that the Administrative Office for Courts sets clerkship salaries).

264. See *supra* notes 180-204 and accompanying text. See generally Kozinski, *supra* note 1, at 1723-24 (arguing that the current, no restriction process should be retained because it has demonstrated "an enviable record of accomplishment").

lack adequate analytical skills, judges are more likely to be cautious when allocating limited funds. An inordinately large early offer may later preclude hiring other highly desirable candidates. Furthermore, this system will force judges to make more informed decisions and to extend offers only to truly valued candidates. Instead of a race to see who can fill clerkship positions first, judges will no longer have all of the power. This proposal, therefore, also accomplishes the goal of the Wald faction.²⁶⁵

B. *Lack of Consensus and Game Theory*

The proposed system attempts to alleviate the lack of judicial consensus and the tragedy of the commons dilemmas which plagued previous reform attempts by circumventing the participation and nonparticipation troubles that beset other efforts.²⁶⁶ Judges may hire early or late, but in either case they must divide their funds in the manner that will secure them the most desirable candidates. Judicial participation thus becomes irrelevant because the enforcement mechanism differs radically. Whereas, in previous proposals, participation has been necessarily voluntary, this proposal allocates a lump sum of funds to hiring that effectively mandates enforcement. While judges cannot be constrained in any of the ways envisioned by previous proposals, Congress does control the purse strings.²⁶⁷ Within the parameters of the proposal, judges “participate” by allocating the lump sum amongst their clerks according to their own self-interest, strongly encouraging participation.

So too, the cooperation that best serves the body judiciary will emerge from the negotiations between judges and candidates, leverage of the participants, and from the published nature of the hiring times and salary offers. Previously, clandestine hiring and offer dates provoked judges into waging small wars with one another in the attempt to beat the other guy to the best candidate.²⁶⁸ If a judge’s colleague “won” the race one year, the “losing” judge would surely up the ante by extending earlier offers the next year. These unseemly races have reflected badly on the image of the judiciary. In past proposals, judges ignored hiring guidelines because doing so best served their

265. See *supra* notes 222-231 and accompanying text. See generally Wald, *supra* note 1, at 160-63 (advocating for reform that resembles the medical model).

266. See *supra* notes 144-147, 216-221 and accompanying text (describing past poor compliance in reform efforts).

267. See U.S. CONST. art. I, § 8; see also *supra* notes 259-260 and accompanying text (explaining the compensation structure for judicial clerks).

268. See *supra* notes 20-28 and accompanying text (describing various tactics judges have employed in an effort to secure the most coveted candidates).

self-interest.²⁶⁹ This proposal shifts game theory to a new arena: by giving judges and candidates alike the negotiating leverage of mutable salaries, judges' attentions are redirected toward efficiently allocating and dividing their limited funds. Whereas game theory previously involved following or departing from hiring and offer dates, this proposal transcribes the theory to the arena of the allocation of funds, but includes built-in disutilities for any extreme allocations of such funds, or very early hiring dates, which prevents the "tragedy of the commons" situations from arising.²⁷⁰

If, for example, a judge allocates one hundred percent of his funds to one clerk, she suffers the disutility of not acquiring any further assistants, except of course, those who are willing to work for free. Likewise, if she allocates only one-third of her total to one candidate, and does so extraordinarily early in the student's career, she risks losing a gifted candidate to a later judge who offers a higher salary. As in an unregulated system, given judges *A* and *B*, judge *A* might hire candidates early and offer a high fraction of her total funds to a single candidate if it was in her individual best interests to do so. But this proposal roughly equates the individual to the collective good, as evidenced above.²⁷¹ The disutilities inherent in early and in large offers based on insufficiently developed information about the candidate— inadequate clerks for too high a percentage of a judge's total funds— outweigh the utility of securing a clerk quickly.²⁷² Judge *B* will wait, research his candidates, and reasonably divide his funds according to the more complete information he has attained about his candidates. After a few inadequate clerks, judge *A* will surely realize his folly quickly. Thus, the collective good—more candidate information, hiring times well into the second or early third years, a seemly judiciary— equals the individual good under the proposed system.

C. Distributive Justice and Overcoming Inefficient Norms

1. *Distributive Justice.*—The present system serves ideals of distributive justice poorly. The concept of distributive justice embodies the principles that regulate the fair distribution of burdens and bene-

269. See *supra* notes 86-87, 101-115 and accompanying text (observing the economic costs and benefits of group competitive behavior).

270. See *supra* notes 91-100 and accompanying text (explaining the "tragedy of commons").

271. See *supra* notes 86-100 and accompanying text (explaining game theory, individual behavior, and the common good).

272. See *supra* notes 37-43 and accompanying text (discussing the various disadvantages of early selection of judicial clerks as compared to selecting clerks later in their law school careers).

		JUDGE 1	
		Cheat	Follow Guidelines
JUDGE 2	Market System	(5, 5)	(10, -1)
	Pseudo-Cooperative Present System	(-1, 10)	(4, 4)

Payoffs: Judge 1, Judge 2

fits among individuals.²⁷³ The system of income taxation in the United States typifies distributive justice.²⁷⁴ Theories of distributive justice hold that resources should be allocated according to "criterion of distribution."²⁷⁵ Here, the "resources" are federal funds made available for clerkship salaries, and the "criteria of distribution" are positive or negative traits of clerks, which serve as the bases of resource distribution. Distributive justice also holds that any differences in distributions of resource shares must accord with these criteria.²⁷⁶ This proposal promotes justice as the "way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages of social cooperation," similar to Rawls's theory of justice.²⁷⁷ It is this latter concept, the division of advantages of social cooperation, that is at issue here.

The current hiring process allocates to each new clerk exactly one salary level: approximately \$40,714.²⁷⁸ This salary is allocated despite the legal research and writing skills of the student, despite the intelligence of the student, and indeed, despite the merits of free markets.²⁷⁹ Judges have no leverage to encourage candidates to clerk for them over another judge, aside from the perennial coercive offer tactics and the constantly creeping offer date. Students have no leverage

273. See Benson, *supra* note 165, at 515-16, 535-38 (explaining the concept of distributive justice and stating that "distributive justice has been viewed as including those principles that ought to regulate the fair distribution of common burdens and benefits among individuals or group of individuals").

274. See *id.* at 516.

275. *Id.* at 535. A criterion "refers to a feature or set of features which individuals may embody in different degrees and which is not itself something that is distributed but rather is the basis of distribution." *Id.* A feature "may be an internal quality of capacity, condition, character or achievement, or an external quality of circumstance, whether natural or social." *Id.*

276. See *id.* (noting that although "individuals can be unequal," the theory of distributive justice treats them equally by utilizing the distribution criterion).

277. JOHN RAWLS, A THEORY OF JUSTICE 7 (1971).

278. See *supra* notes 259-260.

279. See Wald, *supra* note 1, at 152 (noting that under the current system judges "ha[ve] no need or ability to dicker on salary or hours or perks").

in weighing clerkship positions aside from outright refusal of a judge's offer—usually an untenable option.

This system gives students the needed leverage by allocating salaries commensurate with candidates' qualifications, roughly analogous to what one might receive in private employment during the first year following graduation. For example, if judges received a lump sum of \$120,000 for one year's clerks, they might choose to allocate \$60,000 to \$80,000 for a prime candidate, and distribute the remainder amongst the one or two remaining clerks. This method serves the good of society for several reasons. First, highly qualified law students who would consider judicial clerkships, but who might be swayed to the private sector because of monetary appeal,²⁸⁰ would now find judicial clerkships a fiscally worthy employment option. Second, the judge gains a well-qualified aide otherwise stolen from the candidate pool by the private sector. Third, the talents of highly-qualified clerks find a noble use unparalleled in importance: clerks presently write a majority of the published opinions of our judiciary.²⁸¹ It serves society's best interest that the best-qualified clerks write and perform research for those opinions. Poor opinion writing may lead to overturned opinions—a needless waste of resources. Thus, society's advantage is best served by giving judges and clerks this "free market" discretion in negotiating clerk salaries. Distributive justice is served because the distribution of societal wealth to judicial clerks according to merit best meets these societal needs. The status quo fails to achieve these advantages because clerks are not presently salaried according to worth, and hence many qualified clerks are lost to the private sector. Additionally, judicial opinions are of a lower quality than one might expect if the most qualified candidates were given the financial incentive to consider judicial clerkships.

2. *A More Blissful Marriage of Norms and Behavior.*—Playing human behavior against itself is an efficient way to change norms—such was the intent of the Founders when they drafted the Constitution.²⁸² While the current system primarily plays on envy, self-interest,

280. See *supra* note 56 and accompanying text (discussing an economic reason why some students may decide not to clerk).

281. See J. Daniel Mahoney, *Law Clerks: For Better or for Worse?*, 54 BROOK. L. REV. 321, 328 (1988) (noting that many believe that the large amount of current litigation has "shifted the decision-making function away from judges and into the hands of young, inexperienced law school graduates").

282. See William Michael Treanor, *Fame, The Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 735 (1997) (discussing Madison's *Federalist No. 10* and explaining that "pitting economic interest against economic interest," passion against passion, was the

or passions, the proposed system makes use of other behaviors which, if pitted against the self-interest driving the current system, in time will transform the current norm into a viable alternative.

The state faces various options in responding to inefficient norms. It may enact *laws* providing punishment for violation of the norms, such as statutory offer and hiring dates; it may attempt to subvert the status quo, *persuading* individuals and group leaders to violate the inefficient norm; or, it can shift attention away from the old norm by *clarifying the property rights* intrinsic to the norm.²⁸³ As we have seen, incentives to violate the inefficient status quo, whether through rewards or punishments, will not be leveled against judges under current law.²⁸⁴ Friendly persuasion likewise has, time and again, given way to unfriendly vituperative between judges. The proposed option, however, optimally suits the clerkship-hiring battlefield.

“Norm-circumvention,” which involves clarifying resource entitlements in such a way that resources are transferred voluntarily to a more efficient disposition, is one way of addressing inefficient norms.²⁸⁵ This option has been applied by Congress to the problem of air pollution: because persuasion and propaganda were ineffective in reducing pollution, and punishments for violating pollution laws were regarded by many as inefficient and draconian, Congress sought to bypass the difficulties inherent in imposing external restraints on pollution.²⁸⁶ The Clean Air Act²⁸⁷ approached the problem by redefining the then-current norm, which permitted small amounts of emissions, into a system of property rights tradable on the free market.²⁸⁸ This new system is more predictable, boasts lowered transaction costs, and reaches the optimal level of pollution by turning-over the reins to

Founders’ modus operandi in solving the difficulties of self-interest and passion in the nascent democracy (citing Martin Diamond, *Democracy and the Federalist: A Reconsideration of the Framers’ Intent*, 53 AM. POL. SCI. REV. 52, 64 (1959)).

283. See Posner, *supra* note 164, at 1728-34 (discussing the minimization of transaction costs by using “legislative solutions,” by convincing individuals and group leaders to violate the norm, and by “refin[ing] the property rights granted by norms”).

284. See Wald, *supra* note 1, at 157-58 (discussing the enactment and ultimate failure of the resolution passed by the District of Columbia Judicial Council, in 1989, to control clerk hiring process); see also Norris, *supra* note 17, at 772-73 (pointing out that neither Congress, nor the President, has placed restrictions on the hiring, firing, or training of judicial clerks and that many employment statutes that affect commercial enterprises do not apply to judges).

285. See Posner, *supra* note 164, at 1733-35 (discussing the use of “norm-circumvention” in the context of the Clean Air Act as a means of reducing or addressing inefficient norms).

286. See *id.*

287. 42 U.S.C. §§ 7401-7671 (1994).

288. See Posner, *supra* note 164, at 1735.

potential polluters, a form of self-policing, self-enforcing efficiency.²⁸⁹ By converting the “entitlement to pollute ‘a little’” into a property right, the total amount of pollution becomes static, and a distinction between high-value and low-value polluters is drawn where before it was non-existent.²⁹⁰ Firms that produce valuable goods and need to pollute more than the previous rigid limit may buy-up more of the pollution property entitlement; conversely, firms that produce little pollution may abandon their property right to the high-value polluters. Like the Founders’ approach to self-government, the Clean Air Act allows a competitive free-market among polluters to temper itself.²⁹¹

Norm-circumvention also works well in the instant case because judges, when given a “property entitlement” in the form of a lump sum to be allocated to clerks’ salaries, will necessarily make hiring and offer decisions with several factors in mind. Judges will behave with more decorum within this system. Whereas the present system pits judges against each other in a race to hire the most qualified clerks quickly, the proposed solution brings into play several human behavioral traits above and beyond mere self-interest, each of which behavioral science suggests will make the clerkship hiring process more predictable and orderly.

First, because cooperation prevails in game theory situations where parties have contact with one another, there will be greater cooperation and less discord between judges.²⁹² Publicly available lists of clerks’ salaries will impose reputational sanctions on all judges and promote cooperation²⁹³ and, within a few years of the system’s start, will produce more realistic and moderated salaries.²⁹⁴ Any judge that gives exorbitant salaries to clerks will, because of the public nature of the salaries, suffer instant censure at the hands of his colleagues. In contrast, the hiring and offer dates, always clandestinely communicated, never became public knowledge until a judge realized she had lost her candidate to a colleague. So too, the public nature of past

289. *See id.*

290. *See id.*

291. *See supra* note 282 and accompanying text.

292. *See* Sunstein, *supra* note 111, at 1187 (noting that “group identity” is important in producing or to sustaining cooperation in the group “especially when one person’s violation can be observed by others”).

293. *See id.* (explaining that cooperation happens through private enforcement which “becomes possible through the imposition of reputational sanctions”).

294. *See supra* note 284 and accompanying text (noting that currently no such sanctions or rules of any kind exist to regulate or to control judges in the process of hiring law clerks).

clerks' salaries gives students leverage in their negotiations with judges.

Because all hiring information would be made public, posturing and false signals to colleagues would become either impossible—what were previously “noisy observables” would become easily ascertainable—or at least punishable by colleagues in subsequent hiring periods.²⁹⁵ Prior systems relied on participation, but made no information public about participants' hiring practices. Unfortunately, game theory correctly predicts that the less able participants are to observe compliance with game rules, the less self-enforcing the system.²⁹⁶ Although nothing in this proposal forbids early hiring, the public nature of hiring times and salary offers will allow colleagues and clerkship candidates to affix reputations to hiring judges, allowing participants to predict hiring judges' future behaviors.²⁹⁷ In any case, knowing that such decisions are made under public scrutiny, judges will abstain from underhanded and backbiting hiring strategies.²⁹⁸

Second, while self-interest may still compel some judges to race to hire candidates, the informational leverage given candidates in the proposed system will allow students to hold out for higher offers and thus subvert judges' reputational advantages that until now compelled candidates to accept offers quickly. The behavioral trait of “extremeness aversion,” which suggests that between given alternatives people seek a compromise,²⁹⁹ will generally prevent judges from splitting their funds drastically in favor of one clerk, for example, \$100,000 to one clerk, the remainder to two others. To heavily weigh the distribution of funds in favor of one candidate would risk too much, with the possible result being one highly paid but incompetent clerk, and insufficient funds to attract any qualified clerks to bolster the judge's brain trust. Distributing funds equally between candidates would risk too little, potentially attracting only several run-of-the-mill clerks. The compromise suggests moderately weighting funds in favor of a pre-

295. See *supra* notes 72-76 and accompanying text (pointing out that the impact of reputation on a decision when little additional information is known).

296. See KREPS, *supra* note 73, at 504-29.

297. See *id.* at 531-36; *supra* notes 73-76.

298. See MILGROM & ROBERTS, *supra* note 119, at 267-68 (explaining that the dissemination of information against local businesses and against merchants by Better Business Bureaus, and information provided by credit bureaus and by consumer agencies, strengthens incentives for reliable behavior by businesses, debtors, and insurance companies).

299. See Sunstein, *supra* note 111, at 1181-82 (explaining the theory that people will avoid extremes and will seek compromise when available).

ferred candidate and reserving sufficient funds to attract other qualified candidates.

Finally, the differences between the utility experienced at the moment of a decision and the utility experienced as a result of that decision,³⁰⁰ will lead slow-adapting judges both to moderate their funds-division and to delay their offers and hiring decisions. Judges will learn to wait to discover whether candidates are worth the added incentive—if a disutility is experienced as the result of a hiring decision where, for example, a clerk reveals herself to be worth far less than the salary offered.

D. *The Coase Theorem*

In any possible judicial clerkship selection system, there are transaction costs. There are compromises involved in every proffered solution to the problems that have plagued this process. Coase posited that the efficient result in any bargaining system would be reached by allowing the free market to operate with minimal restrictions by the reduction of transaction costs.³⁰¹ This proposed system removes all outside restrictions on the system, and thereby allows the market to function in the most efficient manner possible.

This proposal strives to eliminate the problems that have traditionally plagued the selection process. It avoids judges' acting early on established offer dates by eliminating them completely, and improves upon the current system and other proposals by allowing the student to make counter-offers and to consider options before making final decisions. Students thus far have only had their resume to use as leverage, and have had no bartering power with judges. With information about judges' past hiring dates and clerk salaries, candidates can make persuasive counter-offers to hiring judges. These features strengthen the bargaining position of the student in relation to the judge, allowing for a more equal footing between the parties and consequently, a smoother functioning free market system. Due to the nature and the structure of the system, no longer will students be forced to accept offers on the spot for fear of having them revoked. The student will also be in a position to negotiate for her clerkship location and salary, making the position more desirable and better suited to her.

300. *See id.* at 1184.

301. *See* POLINSKY, *supra* note 122, at 13. The preferred legal rule is one which minimizes the incurring of transaction costs as well as the inefficient choices induced by a desire to avoid transaction costs altogether. *See id.*

The evaluation of the student's academic and occupational qualifications is also expanded by lifting the mandatory interview and offer dates and allowing a judge to decide freely when to make offers and how much information she feels is necessary before choosing a candidate. While this may lead to very early offers in some cases, the judge is best served by waiting long enough to be certain that the candidate is going to be worth the amount of money at stake from the judge's allowance at the end of the student's academic career. A large offer too early may well end up wasting a share of the judge's valuable resources and prevent the judge from landing a better-qualified candidate later in the process. This, too, allows the free market to function without interference in the allocation of scarce resources.

The reputational advantage of some judges is also countered by the fact that, under this proposal, all judges would be allotted an equal amount of money with which to hire clerks. The most prestigious judges may have a slight advantage over some others in their ability to attract top candidates with less money, but this is balanced by the fact that these judges will all be in competition with one another, forcing them to expend significant resources to land the most sought-after candidates amidst competition from other reputable jurists. Potentially, candidates may be willing to work for prestigious judges for no compensation. The number of students that will be financially capable of doing so, however, will be small, and both the lure of hefty salaries from private law firms and the pressure from other judges' offers will keep this situation to a minimum. In any case, judges will get what they pay for, which is the point of this free market proposal: well-qualified candidates will be the most generously compensated, and more average candidates will be compensated with more average salaries.

Additionally, judicial consensus can be more easily achieved in a system that allows for more freedom and less concern about the ability of other judges to steal a judge's top prospects by failing to follow strict guidelines.³⁰² This system leaves control of the judge's timeline for selecting clerks entirely in her own hands, allowing her to make determinations about when to act, considering the amount of information available and the demand for a particular candidate. This freedom, along with the natural functioning of the free market, allows the creation of individual schedules that lead to the most efficient result for each individual judge and candidate.

302. See *supra* notes 143-149 and accompanying text (showing that under the previous reform efforts the fact that all judges did not comply with the guidelines caused a breakdown of the process causing disappointment and frustration for all parties involved).

Overall, this system allocates the scarce resource, in this case a highly qualified law clerk, efficiently to the judge who wants her the most as evidenced by the amount of money the judge is willing to expend in hiring her. A market system functioning efficiently should allocate resources to those who desire them the most, and the added variables in this Article's proposed system allow this result to occur with the least possible restriction.

V. CONCLUSION

The status quo in clerkship hiring is one of a sub-optimal equilibrium: as argued at length above and by the many other critics of the current free-for-all, judges pursue only their self-interest in making hiring decisions. Past proposals made participation voluntary, and the chance of losing desired candidates due to adhering to the reforms made nonparticipation more attractive than the alternative. Despite the collective good obvious in participation and adherence to, for example, the March 1 proposal, the ability to hire prime candidates with impunity, while participant judges sat patiently on the sidelines, proved too much of a temptation for many judges to bear. The adoption of any prior proposals only conferred negative value on the "user," because only universal adoption would achieve any individual benefits.

This proposal, on the other hand, offers an optimal equilibrium. Under this proposal, all judges must adopt the system, enacted as it is by Congress and by the Administrative Office for Courts. In essence, as each judge is compelled to adopt it, she imparts value on the proposal itself, because she begins to add to the informational resources that make the proposal attractive in the first place. One judge leaves behind a trail of public information: hiring dates and clerks' salaries. This information, in turn, is valued by others, because it conveys what dates other judges are making hiring and offer decisions—information presently unavailable—and conveys the salaries other judges are offering, and candidates are accepting. The more judges that participate, the more representative both the dates and the salaries will be of optimal conditions. The greater the number of clerks' salaries made publicly available, the more illustrative that information is of how much most judges value their clerks. In turn, as more judges participate, more will be able to use that information in making their own future hiring and offer decisions. As Judge *A* peruses the list, noting with interest the salaries and hiring dates of well-reputed and newly participating Judges *B*, *C*, and *D*, she gains a better understanding of the going rates for clerks. The addition of twenty participating judges,

assuming three clerks per judge, adds sixty salaries and hiring dates to the information pool. If Judges *B*, *C*, and *D* have unrealistic ideas about the value of clerks, the addition of sixty more listings should impart this realization to Judge *A* as she makes note of the averages offered for top clerks and lower-salaried clerks.

Additionally, whereas product monopolies often lead to a sub-optimal competitive equilibrium, some markets actually see aggregate wealth when the self-interested decision-making of individuals is coordinated. Coordination here, involving only enacting a lump-sum distribution of funds to judges and the mandating of salary and information reporting, involves no more transaction costs than the current system, and the collective good is served by the uniform system. Even if somehow judges chose not to participate—for example, if Congress made participation in this system optional—the benefits conferred to participating judges would soon bring most, if not all, nonparticipants into the fold.

This proposal has explained the numerous problems intrinsic to the judicial clerkship hiring process, founded as it often is on inadequate information about student capabilities, rife with judges who refuse to adhere to proposed solutions, costly to judges and students alike both in time and money. This system admits that controlling judges from afar is the wrong game to play: rather, judges should—as the myriad reform proposals have always hoped—police themselves.

By placing the money where judges' mouths are, this Article empowers judges to police themselves. Judges cannot complain of an "unfree" market on the one hand, and an anarchic system on the other. The proposal gives judges a budget, the students the power to bargain with judges for salaries, and then witnesses the caution that a *truly* free market imparts to judges in their hiring decisions. After many reform proposals without enforcement mechanisms, it is time we gave judges the reins and allowed them to make the real hiring decisions. One might expect those decisions to take some thought and to give some pause.