IN RESTRAINT OF TRADE:

THE JUDICIAL LAW CLERK HIRING PLAN

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INTRODUCTION

Consider a talented law student from the Small State College of Law. This student ranks first in her class after her first year, and her professors agree she is the brightest mind to attend law school at Small State in recent memory. A federal judicial clerkship seems a natural culmination of her legal education, yet she is cognizant of the stark reality that few Small State graduates clerk at the federal level. Most federal judges do not interview students from Small State in favor of those from more prestigious institutions, and, in fact, many federal judges will not even consider her application. Talented Small State students, therefore, end up competing for clerkships on the Small State Supreme Court or the Small State Court of Appeals.

This reality presents a cruel dilemma for this particular student. The Small State Supreme Court evaluates applicants at the beginning of their second year in law school. The federal judges participating in the 2002 Law Clerk Hiring Plan ("Hiring Plan"), on the other hand, hire their clerks at the beginning of students' third year. Thus, this student may either apply to the Small State Supreme Court at the beginning of her 2L year and, assuming an offer and acceptance of a job, forego the opportunity to apply to clerk for the federal courts, or she can pass on the State

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Supreme Court for the slim chance with one of the few federal judges who will consider students from Small State.[1]

Other groups of students face similar dilemmas caused by the Hiring Plan. Consider the above-average student, originally from Small State, who attends one of the prestigious law schools. He may land a federal clerkship, but he would certainly be an attractive applicant to the Small State Supreme Court. Should he apply to the Small State Supreme Court at the beginning of his second year or wait to take his chances with the federal judges at the beginning of his third year? What of the extremely talented low-income law student, who aced her 1L year, but anticipates that her grades and class rank will fall because she must work nearly full-time for her remaining two years? Should she apply to various state supreme courts or hold out for a shot with the federal courts despite her potentially falling grades? The Hiring Plan similarly disadvantages the straight-A Prestigious Law School student, whose grades and class rank have nowhere to go but down, by foreclosing his ability to leverage immediately his comparative advantage in pursuit of a federal clerkship. In general, the Hiring Plan works to the detriment of any student who would be better off with the flexibility to apply when the time was best for him or her, rather than at specified dates and times.

Even without the various iterations of this dilemma, the process for hiring judicial law clerks has always been stressful and chaotic for law students and judges alike. Students, facing interviews bordering on interrogations, exploding offers,[2] and the threat of a vanishing offer,[3] de-

1. One can imagine creative alternatives that a student might adopt to resolve this conundrum. For example, a student might apply to Small State Supreme Court, accept a job there, and thereafter still apply to the federal courts. If she is so fortunate to land a federal clerkship, she might attempt to defer one or the other clerkships for a year or perhaps two, depending on which federal judge offered to hire her, or she could simply renege on her promise to clerk at the Small State Supreme Court.

2. Judge Kozinski describes the exploding offer as the most abusive tactic in the clerkship application mating ritual. It operates as follows: A judge offers a position to an applicant, who is hesitant to accept immediately. After the wounded silence, the judge explodes the offer, either withdrawing the offer immediately or suggesting that he should move to the next applicant, who surely is more interested in the clerkship. Even if the applicant thereafter accepts, the relationship is already off to a rocky start. Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1716 (1991) (explaining the mechanics and consequences of exploding offers); Ruggero J. Aldisert, Ryan C. Kirkpatrick & James R. Stevens III, *Rat Race: Insider Advice on Landing Judicial Clerkships*, 110 PENN. ST. L. REV. 835, 850–52 (2006) (criticizing the existence of exploding offers and offering advice on how to deal with them).

3. A vanishing offer operates as follows: If an applicant were to ask for more time to consider an offer extended by a judge, the applicant might find that the offer vanished immediately upon asking for more time to consider. In one particularly infamous example, a student received an offer from an East Coast judge, but demurred on the ground that she had promised to call a judge on the West Coast before accepting another offer. The East Coast judge agreed to allow the applicant time enough to call the West Coast judge, but, half an hour later, the

scribe the clerkship application process as "crazy," "arbitrary," and "ill-designed."[4] Judges, facing students who "learn quickly to hedge, to answer some calls earlier than others, to avoid some calls altogether, and to solicit time in which to seek competing offers,"[5] and peers frantically seeking to snatch away available talent, complain that the process is undignified.[6]

In an effort to bring order to this chaos, various self-designated governing bodies from law schools to the Judicial Conference have sought to regulate the hiring of law clerks over the last thirty-five years.[7] These attempts have uniformly failed[8]—that is, until the most recent reform—the Law Clerk Hiring Plan. This reformation attempt, announced in April 2002, culminated in an agreement among the federal appellate judges to limit law clerk hiring to 3L students and law graduates, thereby excluding from consideration applicants at earlier points of their law school careers. In concert with the federal judges, thirteen prestigious law schools, including Harvard, Yale, and the Universities of Chicago and Michigan, agreed that to facilitate the Hiring Plan they would not release official transcripts or letters of recommendation before a student's third year and that they would actively discourage faculty from writing letters or making telephone calls on behalf of first- and second-year applicants.[9] Unlike previous attempts at regulating the law clerk hiring process, which were undermined by massive cheating by the federal judges and quick disintegration,[10] this most recent attempt has been widely accepted and is still in force. Yet, despite its five years of service, there lurks a significant problem with the current Law Clerk Hiring Plan: it is an unreasonable restraint of trade.

East Coast judge's secretary called and withdrew the offer. Kozinski, *supra* note 2.

4. Christopher Avery et al., *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793, 839 (2001).

5. Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 156 (1990). *See also* Kozinski, *supra* note 2, at 1711–12 (explaining how a student can play off judges in an effort to level the playing field).

6. Wald, *supra* note 5, at 156.

7. 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, 785–88 (1993) (chronicling efforts at reform from the mid-1970s until 1993).

8. Todd Zywicki, *Herding Cats*, 5 Green Bag 2d 239 (2002) ("Every plea and plan has fallen prey to the same problem: Article III (*i.e.*, it is hard to control a federal judge).").

9. Stephanie Francis Cahill, *Clerk Hiring Freeze: Federal Judges to Focus Search on Third Year Students*, ABA JOURNAL E-REPORT, Apr. 19, 2002, at 8.

10. Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 842 (1990) (predicting correctly the unstable nature and ultimate disintegration of "cartel-like" arrangement proposed to handle the clerkship hiring process).

From that premise, this Article analyzes the Law Clerk Hiring Plan through the lens of the federal antitrust laws. Part I considers why law clerks are important enough to warrant such fuss by the federal judiciary. Part II discusses past efforts at reform as well as the current effort, examining in particular why the current effort was successful while the past plans disintegrated quickly. Part III examines the antitrust implications of the current Hiring Plan, ultimately concluding that the federal law clerk hiring agreement among the federal judges and the law schools is an unreasonable restraint of interstate commerce in violation of the Sherman Act. Part IV predicts the eventual reemergence of the free market in the hiring of judicial law clerks.

I. ARE CLERKS IMPORTANT ENOUGH TO MATTER?

Judges invariably agree that good law clerks, however defined and then identified, are critically important for professional as well as personal reasons.[11] Law clerks inevitably shoulder the majority of the day-to-day work of the judge's chamber.[12] Indeed, a judge's chamber consists only of the judge, three or four law clerks, and her administrative assistants, and the chamber's entire output of forty or more published opinions and dozens of unpublished memoranda[13] is produced by these few people. As United States District Judge Dennis Cavanaugh in Newark puts it: "I could not possibly have all the time to do all the research . . . and write my own briefs."[14]

Judge Patricia Wald of the Court of Appeals for the District of Columbia Circuit has explained that, in addition to researching and drafting, law clerks also serve the function of loyal interlocutors to otherwise professionally isolated judges:

> [A judge's] clerks are basically the only persons a judge can talk to in depth about a case. Her colleagues have their own opinions to write; after the initial post-argument case conference, there is usually little time for extended discussions about the fine points of an opinion they are not writing. The judge to whom the opinion is assigned is expected to produce a draft for her colleagues to critique. If she is in doubt, troubled, or just plain frustrated, the clerk is her wailing wall. Most of us are not Holmes or Cardozo; we are often unsure of our

11. Kozinski, *supra* note 2, at 1708–09.

12. Norris, *supra* note 7, at 768–71; *see* Edward S. Adams, *A Market-Based Solution to the Judicial Clerkship Selection Process*, 59 MD. L. REV. 129 (2000).

13. Wald, *supra* note 5, at 153.

14. Kate Coscarelli, *Judges' Verdict: Cease the Mad Dash for Clerks*, THE STAR-LEDGER (Newark, N.J.), May 17, 2002, *available at* 2002 WLNR 12892294.

> analyses or even our conclusions. We need to test ideas before exposing them to the hard probing of colleagues. We need assurances, but even more important, criticism from knowledgeable persons who are loyal and unambiguously committed to us. We have, on occasion, to let our guard down, to speculate, to experiment, to argue, even to make frank and sometimes uncharitable appraisals of our colleagues' drafts and suggestions.[15]

To serve these functions, and the myriad others that are required of law clerks in the close confines of a pressure-filled judicial chamber, it is vital that the law clerks' personalities are compatible with the judge's temperament.[16] Engendered by the close working relationship, judges develop close personal friendships with their clerks.[17] In many cases the judge-clerk relationship evolves as a judge becomes a lifetime mentor to his law clerks, many of whom call "their" judge before making any important life decision, including applying for a particular job or even getting married. One judge has suggested the judge-clerk relationship is the closest arrangement "outside of marriage, parenthood or a love affair."[18]

Whatever the reasons individual to each judge, all judges agree that hiring good law clerks is of paramount importance. Yet there are enough law students floating around[19] that, at first glance, one might think hiring clerks would not precipitate the absence of restraint that has accompanied the process.[20] Perceived abundant resources, like air, ocean water, and apparently law students, are usually of little or no value, and thus, there are generally no great costs in acquiring them. In years past, however, federal judges have engaged in something akin to a frenzy of voracious piranhas when it came to hiring law clerks. As one judge aptly explained: "[w]e are presently embarrassing ourselves with our lack of self-

15. Wald, *supra* note 5, at 153.

16. Norris, *supra* note 7, at 775–76.

17. *See* N.H. SUP. CT. ADMIN. R. 46, Canon 3(B)(2) ("The law clerk enjoys a unique relationship with a judge that combines the best of employer-employee, teacher-student and lawyer-lawyer.").

18. Kozinski, *supra* note 2, at 1708; Wald, *supra* note 5, at 153. *See also* Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply to the Bad Apple*, 101 YALE L.J. 1097, 1099 (1992).

19. Wald, *supra* note 5, at 152 (observing that it is "not unusual for a judge to receive 300–400 applications, most from top-drawer candidates"); *see also* Aldisert, Kirkpatrick & Stevens, *supra* note 2, at 837 ("A random sampling of active judges in the Ninth Circuit showed 228, 400 and 784 applications.").

20. Avery et al., *supra* note 4, at 873. A few of the judges' responses echo this sentiment in the following sample of responses: "There are far more well qualified applicants than there are positions available in the federal system." *Id.* "There are far more good candidates than clerkships. The notion that we judges have to compete with one another is misplaced. It's a buyers' market." *Id. See also* Zywicki, *supra* note 8, at 873–75.

control."[21] Something must account for this competition among federal judges for law clerks, for if law students cum federal law clerks were a dime-a-dozen, then federal judges would not invest such apparently extravagant resources searching for and hiring clerks.

Quality explains part of this conundrum,[22] for a high quality form of a resource can be in short supply, and thus valuable, even when that same resource of average quality is plentiful. Certainly many federal judges perceive that law students of "circuit clerk caliber" are a scarce, and thus valuable resource.[23] The more refined question of how scarce a resource a qualified law clerk is defies easy quantification, as the answer varies with the perception of each judge. Some judges appear to believe that only a small handful of applicants nationwide are acceptable candidates,[24] while other judges accept that numerous applicants could do the job equally.[25]

The Avery et al. article on *The Market for Federal Judicial Law Clerks*, written by Christopher Avery, Christine Jolls, Richard A. Posner, and Alvin E. Roth—"the Chicago-Harvard social scientists"—provides some support for the view that numerous applicants could perform well

21. Avery et al., *supra* note 4, at 835. As discussed in Zywicki, *supra* note 8, at 239, other judge-respondents expressed the same view in equally colorful terms. "This is a 'big, fancy law school' problem. If my colleagues weren't such snobs about where their clerks come from, we'd be a lot better off." *Id.* "This is a big school, fat-headed judge problem. Go away and leave us alone. I'm serious." *Id.*

22. Avery et al., *supra* note 4, 873–74. The following statements were included in the federal judges' survey regarding law clerk hiring:

> "I am disgusted by the 'rat race' to hire prestigious law clerks. I refuse to take part in it, and by doing so I have discovered many highly qualified people passed over by others who have been excellent law clerks."
>
> ...
>
> "The judges who advertise themselves to the law schools as running farm clubs for the Supreme Court seem to be energizing most of the competitive problems."
>
> ...
>
> "[M]y expertise of almost 10 years indicates that regardless of the national strictures, I have a plethora of excellent applicants to choose from *after* the super-stars have been cherry-picked."

Id.

23. Wald, *supra* note 5, at 154.

24. Judges who believe that only a few law students are acceptable clerkship candidates have often been blamed for creating the law clerk hiring chaos. *See* Avery et al., *supra* note 4, at 872. These judges, concerned that their colleagues would snatch the most desirable clerks, were hiring earlier and earlier, culminating in some law clerk hiring during early Fall of students' 2L year during 2000.

25. *See* Kozinski, *supra* note 2, at 1708 (describing competition to hire the best of the best: "I have been fortunate in having many clerks who were superstars, but have had some who were not. I prefer the former, as do my colleagues, and that's much of what the competition is about.").

as law clerks.[26] After a longitudinal analysis of Harvard Law students, the Chicago-Harvard social scientists concluded that the top echelon of law students varies significantly year to year. They found that one-third of the Harvard Law students who had been ranked in the top five percent of the class after their first year dropped out of this prestigious category after their second year.[27] Their research showed even more striking results for the top two percent; only half of those students in this category after their first year remained at the end of their second year.[28] This research suggests that shifting hiring from the 2L to the 3L year should dramatically change the sample of law students hired as law clerks. Yet, if only a small handful of law students were innately qualified to serve as judicial law clerks, as seems to be the perception of some federal judges, the sample of top-notch law students would remain constant, contrary to the empirical findings of the Chicago-Harvard social scientists. While the difference between a good clerk and an "awesome one"[29] may be worth the hunt, these data indicate that at one static moment, judges might not be able to tell the difference.

In addition to the perceived quality differences among applicants, another partial explanation for the judicial frenzy is the risk a judge faces in selecting law clerks. In the unique atmosphere of a judge's chambers, judges personally and professionally bear the brunt of the selection of a poor law clerk.[30] Not only must a judge work in close personal proximity to the clerks every day for an entire year, but the quality of the judge's work is in large part dependent on the preparatory work of the law clerks. Poor performance by a law clerk thus manifests itself either as a dysfunctional chamber where the judge or the other law clerks grudgingly redo the sub-par law clerk's work or a sloppy chamber where the output is blemished by the work of a poor hire. Unlike the normal workplace, in a judge's chamber, replacing a poor law clerk creates a professional nightmare. Dismissing a clerk entails disrupting the orderly flow of work through chambers until a suitable replacement can be identified. It also poses a risk to the judge's professional reputation by potentially tainting the judge in the minds of prospective applicants. And with the advent of websites and chatrooms devoted entirely to the gossip of

26. *See* Avery et al., *supra* note 4, at 872–75.

27. *Id.* at 802.

28. *Id.*; *Cf.* Epstein, *supra* note 10, at 842 (expressing the apparently erroneous belief that "[t]here is little variation in grades from the first to the third year, so the chance of a major mistake [if hiring after the first year] is relatively small").

29. While there are many more distinguished synonyms for "awesome," this Article, from time to time, describes outstanding clerks using Judge Kozinksi's original description of the highest caliber clerk: awesome. Kozinski, *supra* note 2, at 1708.

30. Wald, *supra* note 5, at 153.

the federal bench, every law student has access to dirt on who is a good, bad, or sexy employer.[31] Faced with the costs of replacing a sub-par law clerk, a judge may decide to play ostrich and wait out the year, all the while overburdening the others in the chamber in an attempt to minimize the damage.[32]

The risk of hiring a bad law clerk exists not only in the present but continues well into the future because of the inextricable bond between judges and clerks. As clerks forever carry the credential of having worked for a particular judge, those clerks' future successes and failures reflect upon the judge. Certainly no federal judge wants to risk association with a sub-par lawyer, whose résumé will forever read "clerked for Judge X of the Y Circuit Court of Appeals." Judge Wald, for one, has described this motivation of seeking the "best" clerks in an effort to assure that her reputation is protected by the quality of the clerks graduating from her chamber.[33]

While it appears likely that the pool of qualified applicants is not nearly as small as perceived, in reality, judges expend significant resources identifying and hiring the law students they feel are best qualified to work in their chambers.[34] Between 1998 and 2000, for example, judges were hiring law clerks in a panicked free-for-all at the beginning of students' 2L year, with the benefit of only two semesters' grades and

31. Sites like www.greedyassociates.com and www.underneaththeirrobes.blogs.com provide gossip and insight into the federal judiciary available to any person with an Internet connection. Web-initiated events like the "Vote of the Hottest Ninth Circuit Judge," and the lobbying and campaigning that accompanied that vote, represent an attitude shift for some of the same federal judiciary that decried the publication of the Supreme Court tell-all EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998). *See also* Sally J. Kenney, *Puppeteers or Agents? What Lazarus's Closed Chambers Adds To Our Understanding of Law Clerks at the U.S. Supreme Court*, 25 LAW & SOC. INQUIRY 185, 186 (2000).

32. Wald, *supra* note 5, at 155. Judge Wald explains that judicial law clerk hiring is different from associate hiring at a law firm because law firms hire a relatively large class of new associates, so a miscalculation with regard to one associate is not terribly costly to the firm's enterprise.

33. *Id.* at 154–55. Judge Wald has also suggested that some judges are driven to a frenzy hiring law clerks in an effort to gain status as "feeder judges" to the Supreme Court. According to prospect theory, demonstrated in numerous situations, individuals are loss averse, and thus suffer loss and disappointment to a greater degree than they celebrate gain. *See, e.g.*, Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263, 263–91 (1979). While a judge may seek the future rewards of hiring good law clerks, prospect theory suggests that it is more likely that the risk of a poor selection is driving the law clerk hiring frenzy.

34. Edward R. Becker, Stephen G. Breyer & Guido Calabresi, *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 YALE L.J. 207, 209–12 (1994); Richard D. Cudahy, *Judge Clueless Hires a Law Clerk*, 60 OHIO ST. L.J. 2017, 2020–24 (1999); Oberdorfer & Levy, *supra* note 18, at 1098; *see* Adams, *supra* note 12, at 152–56.

impersonal professor recommendations.[35] Judges were "scooping" other judges for the perceived best students, and students were, in turn, playing one judge against another in order to secure the "best" clerkship.[36] The Law Clerk Hiring Plan was created to quell this frenzied competition, but this was not the first attempt at reforming a process which has long been beset by temptation and greed.

II. EFFORTS AT REFORMING THE LAW CLERK HIRING PROCESS

As catalogued by the Chicago-Harvard social scientists, the law clerk hiring system has historically engendered complaints from judges and law students alike. Judges complained: "The unseemly haste to hire law clerks is a disgrace to the federal bench." Students vented: "I can't overstate how disillusioned, disgusted and depressed the whole clerkship application system has left me." "Some judges scrapped decorum and even bare civility." "The gamesmanship that currently pervades the process is incredibly frustrating to students and . . . corrosive of the dignity of the federal judiciary."[37] Over the last thirty years or so, the system these comments decried frequently underwent calls for change, ranging from minor tinkering to a complete overhaul. Part II reviews the past proposals, from commonplace to ingenious, as informative background in understanding the current Hiring Plan, which is analyzed at the end of Part II.

A. *Reform Proposals*[38]

1. Date and Time Restrictions

The most frequently proposed reform involves setting various dates and windows of time to control aspects of the application process, including, for example, the date students may apply, the period when interviews occur, and what day judges tender offers. In 1989, Judge Becker of the Third Circuit, Judge Breyer of the First Circuit, Judge Wald of the

35. Adams, *supra* note 12, at 135; Avery et al., *supra* note 4, at 801-02.

36. Adams, *supra* note 12, at 134.

37. Avery et al., *supra* note 4, at 835.

38. George L. Priest provides the best—and most accessible—history of judicial law clerk reforms and scholarly debate in *Reexamining the Market for Judicial Clerks and Other Assortative Matching Markets*, 6–13 (Yale Law School John M. Olin Center in Law, Economics and Public Policy, Research Paper No. 286, 2003), *available at* http://lsr.nellco.org/yale/lepp/papers/286; http://papers.ssrn.com/abstract=444220; *see also* Adams, *supra* note 12, at 150–67 (reviewing recent proposals); Becker, Breyer & Calabresi, *supra* note 33 (describing early attempts at reform beginning in 1978).

D.C. Circuit, and Chief Judge James Oakes of the Second Circuit proposed the "modest" May 1 Solution.[39] Under this proposal, students could apply and a judge could interview a student at any time, but judges could not extend offers until noon Eastern Daylight Time on May 1. The Association of American Law Schools ("AALS") attempted an independent, yet complementary effort to restrict faculty letters of recommendation from being sent to chambers until April 1.

Judge Wald notes that approximately two-thirds of the federal appellate judges agreed to abide by this modest proposal, though the judges of the Fifth, Seventh, and Eleventh Circuits declined to participate, and the judges of other Circuits made their compliance contingent on the compliance of all Circuits.[40] Ultimately, however, the entire proposal disintegrated into chaos.[41] At the request of judges, law professors sent letters of recommendation as early as students began applying. More importantly, as May 1 approached, many judges jumped the gun to extend offers before the deadline. Others, who waited until May 1, were aided by a "fast watch," and unashamedly telephoned prospective clerks before the noon deadline.[42] Predictably, some judges who waited until noon on May 1 found that their selected clerks had already accepted other offers. As no rules had been established about the period of time an offer should remain open, an onslaught of offer activity ensued within minutes of the noon hour,[43] with judges using exploding offers and the threat of vanishing offers to secure coveted applicants. Rather than solve the problems of the law clerk hiring process, the May 1 Solution exacerbated its flaws by highlighting the judges' frantic race to hire the perceived best clerks, without regard for decorum or their own self-imposed

39. Adams, *supra* note 12, at 150–56; Becker, Breyer & Calabresi, *supra* note 34, at 210; Priest, *supra* note 38, at 7.

40. Wald, *supra* note 5, at 157–58.

41. Becker, Breyer & Calabresi, *supra* note 34, at 210–11; Priest, *supra* note 38, at 8; Wald, *supra* note 5, at 157–60.

42. Epstein, *supra* note 10, at 842–43. Epstein described a similar effort in 1984 and its result:

> Initially some judges suffered major inconvenience because they were not at work at the time of the original deadline but were on vacation or business trips, often overseas. Forced to choose between selecting too early or too late, they placed enormous pressures on faculty and students alike for early decisions made 'for cause,' lest they lose out altogether. ... The cartel began to unravel.

Id.

43. Avery et al., *supra* note 4, at 863. ("'I got my first choice,' one judge complained 'and after that, having given the applicant a half hour, I found my next 8 or 9 choices gone.' By 12:15 virtually all of the bidding in the D.C. Circuit was over. Between 12:00 and 12:15, judges were making offers on one line as calls came in on a second from frantic applicants trying to learn if they were to get an offer before they responded to the offer of another judge.").

rules. After this dismal experience, reform efforts were temporarily abandoned.[44]

In the intervening three years, from 1990 to 1993, the timing for judicial clerkship application and hiring crept earlier and earlier.[45] To address continuing concerns over the clerkship hiring process, in September 1993, the Judicial Conference of the United States adopted a non-binding resolution providing that judges would forego interviewing clerkship candidates until March 1 of the year preceding the clerkship.[46] An explanatory note allowed for earlier interviews in amorphous "special circumstances."[47] With the resolution, the Judicial Conference also transmitted to the law schools a request not to send letters of recommendation before February 1.[48]

Although some anecdotal evidence suggests that this proposal garnered reasonable support in its first year or two of operation, eventually it was also abandoned due to lack of compliance.[49] Even in its first year; the Eighth Circuit refused to participate; the Ninth Circuit devised its own timetables; and individual judges complied only if it was consonant with their own self-interest.[50] As Professor Adams concluded: "[t]he March 1 proposal was the same sort of non-binding attempt at reform [as previous reform efforts] that achieved limited success in its first year, but later unraveled when judges defected and support for the reform effort declined."[51]

2. Medical Matching System

Betwixt various reform efforts aimed at altering the time periods for application, interviews, or offers, in a 1990 article entitled *Selecting Law Clerks*,[52] Judge Wald proposed a radical law clerk hiring plan akin to the

44. Epstein, *supra* note 10, at 844 ("By the close of the 1990 hiring season, the partial system of hiring restraints had buckled, but had not cracked. When the 1991 hiring season opened this January [1991], there were no signs of any of the prior restraints. . . . The word quickly passed that all restrictions were off."); Priest, *supra* note 38, at 8.

45. Becker, Breyer & Calabresi, *supra* note 34, at 210–12. These authors report that for the 1993 hiring season, the University of Michigan sent a letter to all federal judges stating that Michigan 2L students would be applying beginning in September—then, the earliest date ever. *See* Priest, *supra* note 38, at 11.

46. Priest, *supra* note 38, at 11–12; Becker, Breyer & Calabresi, *supra* note 34, at 213–21.

47. Becker, Breyer & Calibresi, *supra* note 34, at 208.

48. *Id.*

49. Priest, *supra* note 38, at 12.

50. Adams, *supra* note 12, at 161.

51. *Id.* at 162.

52. Wald, *supra* note 5, at 152; *see also* Oberdorfer & Levy, *supra*, note 18, at 1098–99 (accepting the challenge posed by Judge Kozinski in *Confessions of a Bad Apple* to "explain

medical matching system used to select medical students for their residency programs.[53] Judge Wald proposed that judges and student applicants would respectively rank their preferences of clerks and clerkships, and a centralized electronic matching system would pair the parties.[54] A match would constitute a binding commitment.[55] For medical residencies, this system is compulsory, and no residency program initially hires students outside of the match. After the formalized match, residency programs with slots yet to fill and students who did not match are mutually notified and may independently match.

As chronicled in Adams' article, the now-computerized medical matching program, initiated in 1951, arose in response to an unregulated resident hiring process that suffered from the same complaints as the law clerk hiring process.[56] It seems that, in an attempt to secure the best medical students and the best residency, medical faculty and students were forcing the resident hiring process increasingly earlier and earlier, with concomitantly shorter and shorter periods for interviewing. The first efforts to reform the unregulated hiring chaos began as a gentlemen's agreement among residency program directors to adhere to a uniform appointment date.[57] Similar to the problems accompanying the 1990 and 1993 judicial law clerk hiring proposals, however, absent a mechanism to bind the participants, this attempt at reform saw residency program administrators cheating on the appointed date. To address that shortcoming, the current compulsory matching system was instituted.

Judge Wald, the leading proponent of the medical matching system, has suggested that law clerk hiring proceed exactly as outlined above, with the caveat that all ranking information of both the students and the judges remain confidential.[58] Various commentators, and Judge Wald herself, have examined the benefits and detriments of extending the medical matching system to the hiring of judicial law clerks. Most agree that this system would make the process more orderly and dignified.[59] Pushing the law clerk hiring process into students' 3L year would also

why an overhaul of the current [unregulated] system is necessary and *how* the proposed [medical matching] overhaul would improve the situation").

53. Wald, *supra* note 5, at 160–61.

54. *Id.* at 161–62.

55. *Id.* at 161.

56. Adams, *supra* note 12, at 162–67.

57. *Id.*; J. Martin Myers, *Gentlemen's Agreements and the National Residency Matching Program*, 39 J. CLINICAL PSYCHIATRY 689 (1978).

58. Wald, *supra* note 5, at 162.

59. *See id.* at 163; Avery et al., *supra* note 4, at 869–70; Oberdorfer & Levy, *supra* note 18, at 1103. *But see* Kozinski, *supra* note 2, 1721–24 (arguing forcefully and eloquently against a medical matching system in part because it is unable to account for personal and unquantifiable aspects of a clerk).

increase the information available to judges about clerkship applicants. Importantly, however, as discussed by Clark and the Chicago-Harvard social scientists, a matching system is still vulnerable to judge and applicant cheats, who make mutually beneficial "side agreements" outside of the match, ranking each other "first" and thus assuring a match.[60] A match system would also do little to alleviate, and would likely increase, the already substantial costs in time and money students incur applying and interviewing for clerkships.[61] Ultimately, a review of the conflicting scholarship on the cost-benefit analysis of a matching system yields the conclusion that such a system offers no clear solution for hiring law clerks.

3. Modified Medical Matching System

To remedy the perceived potential abuse of a matching system, the Chicago-Harvard social scientists offered a variation—the modified-match system—which would combine a centralized matching system with an enforcement mechanism to prevent anxious judges and applicants from reaching agreements to game the match.[62] To dissuade cheating, the Chicago-Harvard social scientists offered two enforcement proposals: (1) introduce a small element of randomization;[63] and (2) have the Supreme Court enforce compliance with the matching system.[64] The randomization element would discourage judges and applicants from agreeing outside the match by randomly re-ranking a small percentage of applicants' second choices as their first. In this way, no side agreement could be assured success. In addition, the Chicago-Harvard social scientists, reasoning that the matching system would most likely be violated by those students and judges who aspired to be Supreme Court clerks or feeder judges, proposed that the Supreme Court would enforce compliance with the system by refusing to consider any appellate clerk who had not abided by the matching plan or who clerked for a judge refusing to follow the matching plan.[65] While incorporating the Supreme Court as an extrinsic policing mechanism would have been the most effective part of the proposal, assuring the participation of the Supreme Court would

60. Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 GEO. L.J. 1749, 1765–80 (1995) (providing a thorough overview of the costs and benefits of a medical match system); Avery et al., *supra* note 5, at 869–70.

61. Clark, *supra* note 60, at 1766–67.

62. Avery et al., *supra* note 4, at 871–83.

63. *Id.* at 883.

64. *Id.* at 876.

65. *Id.*

prove nigh impossible, as the Justices have consistently remained above the appellate law clerk hiring fray.[66]

Even if the benefits of a matching system clearly outweighed the costs imposed, an impersonal, autocratic matching system will never take hold for hiring law clerks. Judges look not only for an individual law clerk's characteristics, but also for the group characteristics of the year's stable of clerks.[67] A matching system cannot easily account for the necessarily iterative nature of hiring clerks required to amass group characteristics. The first clerk hired affects who is hired second, who in turn affects who is hired third. By hiring clerks sequentially, most judges achieve a diverse group of clerks, who come to the clerkship with different strengths, weaknesses, backgrounds, and perspectives, and thereby produce a synergy in furtherance of the judge's work.[68] Any system that cannot account for each judge's sequential hiring preferences will be roundly rejected. Even if a system could be created to account for the preferences of each judge, it is likely to be too long in beta testing and too expensive. Indeed, all the cost-benefit and game theory analyses notwithstanding, the federal judiciary will simply never cede to anyone else the power to hire "their" clerks.[69]

B. *The Current Hiring Plan*

Despite these innovative suggestions, the Ad Hoc Committee on Law Clerk Hiring tendered a new, but somehow familiar, Law Clerk Hiring Plan in 2002. This plan, similar to those proposed in 1990 and 1993, was little more than a series of start dates before which students and judges could not begin the hiring process. Specifically, the Hiring Plan precluded the hiring of law clerks before the fall of a law student's third year of law school.[70] The Plan did not cover law school graduates, who

66. *See* Priest, *supra* note 38, at 23.

67. It is often rumored, for example, that Justice Scalia hires a "liberal clerk" or "whipping boy" every year in order to have someone to argue against. If Justice Scalia allowed a matching system to choose his clerks, in a given year he might be stuck with two liberal clerks or left with none, depending on his stated preferences, the preferences of each applicant, and the preferences of the other Justices. In a setting as intimate as the chambers of a Supreme Court Justice, such a risk is too great.

68. *See* Kozinski, *supra* note 2, at 1721–24.

69. *See* Adams, *supra* note 12, at 167–72. In addition to the proposals described above, Adams advocated a "variable-salary" free market solution, whereby the federal judges would be allocated a lump sum for all clerk salaries, and the judges could then divide that pot of money among the clerks, using this money as the judge saw fit to entice desirable clerks. *Id.* This proposal never gained any acclaim, probably because of the inequality, and thus envy, it would cause if a judge paid one clerk more than the others.

70. As established in 2003, the Hiring Plan was quite simple: the process could not begin

could apply and interview at any time. Law students, however, must wait to be mail applications until the day after Labor Day. The day after Labor Day until noon EDT on the second Thursday after Labor Day constitutes a "reading period" wherein applications are sorted and reviewed in chambers. After the reading period, judges may schedule interviews; no arrangements to interview may be made before that time. Interviews and offers may begin the third Thursday after Labor Day, thus allowing judges and students a one-week window to complete the complex interview scheduling process.

These various date and time restrictions standing alone would have quickly crumbled just like the previous attempts at similar reform, as judges and students finagled, cheated, or otherwise hedged in their own self-interest. This time, however, the Ad Hoc Committee solicited and received a boost from the AALS, which agreed to enforce the Law Clerk Hiring Plan.[71] As necessary elements in the process, but not direct participants, the law schools were able to ensure that students and judges could not cheat the system, even if they so desired. In particular, the law schools agreed not to facilitate the release of official transcripts or faculty letters of recommendation until the appointed hour. Many law schools met these commitments to the Hiring Plan by creating a central clearinghouse for clerkship applications and bundling official transcripts and letters of recommendation for transmittal on behalf of each individual student, but only on the agreed-upon timetable. Due in large part to the law schools' enforcement of the date and time restrictions, the Law Clerk Hiring Plan is still in place and functioning five years after implementation, though reports of discontent are mounting. In 2005, supported by a grant from the Administrative Office of the U.S. Courts, the law clerk hiring process went online through OSCAR—the Online System for Clerkship Application and Review—an Internet-based system through which law students transmit their clerkship application materials to designated judges.[72] Judges can then review applications quickly and easily using OSCAR's features to sort applicants by law school, GPA, or moot court or law review participation. Currently 258 federal judges have opted into this system,[73] which promises to ease the administrative

until after Labor Day of a student's 3L year. For 2004 and beyond, the Ad Hoc Committee added the additional waiting, reading, and interview period requirements, which now constitute the full scope of the Plan. *Federal Judges Law Clerk Hiring Plan, Fall 2005 & Fall 2006*, *available* at http://www.cadc.uscourts.gov/internet/lawclerk.nsf/Home?OpenForm (follow "The Plan" hyperlink).

71. Cahill, *supra* note 9.

72. United States District Court, District of Columbia, *Second Look at OSCAR—Part II* (May 24, 2005), *available* at http://www.dcd.uscourts.gov/oscar-FAQ.pdf.

73. *Id.*

burden and decrease the transaction costs of sending or receiving hundreds of applications.[74]

III. ANTITRUST ANALYSIS OF THE LAW CLERK HIRING PLAN

In spite of the perceived success of the Law Clerk Hiring Plan, as measured by the adherence of most of the federal judiciary and the prestigious law schools, a few critics have off-handedly suggested that it constitutes an illegal cartel.[75] This Part builds on these suggestions by examining fully the federal Law Clerk Hiring Plan through the lens of the federal antitrust laws.

This Part concludes that the judges and law school members of AALS agreed to restrict certain aspects of clerkship hiring, and that this agreement constitutes an illegal restraint of trade in contravention of the antitrust laws. It also concludes that this agreement succeeded where previous attempts had failed because of the steadfast enforcement of the Plan by the law schools. What the federal judges could not accomplish alone in many previous attempts became possible with the addition of an effective external enforcement mechanism. Following this examination of the antitrust violation, Part IV predicts the dissolution of the cartel and the reemergence of the free market in law clerk hiring.

A. *Relevant Legal Framework*

Section 1 of the Sherman Act of 1890[76] provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .[77]

74. *Id.*

75. James M. Rosenbaum, *Federal Judges Try To Imitate OPEC*, WALL ST. J., Aug. 19, 2002, at A12 (comparing the acts of the federal appellate judiciary to De Beers and OPEC). "[T]he conspirators in question aren't executives on the make. They're federal appeals court judges . . . ." *Id.* Epstein, *supra* note 10, at 842–44 ("I do not pass judgment as to whether the [judges'] cartel is either good or bad."); Zywicki, *supra* note 8, at 239 ("Cartels don't work. . . . Judges cheat. [Law schools] cheat.").

76. 15 U.S.C. §§1–17 (2000).

77. *Id.* §1.

Conspiracies, like those prohibited by the Sherman Act, are often referred to as partnerships in crime.[78] When a person enters into a conspiracy to accomplish an unlawful end, each and every member becomes an agent for the other conspirators in carrying out the conspiracy.[79] In this way, the reasonably foreseeable acts, declarations, statements, and omissions of any member of the conspiracy and in furtherance of the common purpose of the conspiracy are deemed to be the acts of all of the conspiracy's members.[80] Accordingly, if a person joins the conspiracy, he becomes liable for any acts done or statements made in furtherance of it by other co-conspirators, even if such acts were done and statements were made in the person's absence and without his knowledge.[81]

Absent an exemption[82] or defense, a multi-employer agreement "unilaterally imposing uniform industry-wide terms of employment, and thereby restraining competition in the labor market run[s] afoul of the an-

78. United States v. Williams, 341 U.S. 70, 94 (1951) ("A conspiracy by definition is a criminal agreement for a specific venture. 'It is a partnership in crime.'" (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253 (1940))); Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926) (Hand, J.) ("When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a 'partnership in crime.' What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all.").

79. *Van Riper*, 273 U.S. at 967.

80. *See* Pinkerton v. United States, 328 U.S. 640, 646–47 (1946); United States v. Kissel, 218 U.S. 601, 608 (1910) ("It is settled that an overt act of one partner may be the act of all without any new agreement specifically directed to that act.").

81. In a conspiracy to commit mail fraud, for example, all co-conspirators can be found guilty, even though only one conspirator performed the mailing. *See* Blue v. United States, 138 F.2d 351, 359 (6th Cir. 1943); Mackett v. United States, 90 F.2d 462, 464 (7th Cir. 1937); Cochran v. United States, 41 F.2d 193, 199 (8th Cir. 1930).

82. Although the Sherman Act purports to outlaw every combination or conspiracy in restraint of trade, other federal laws carve out particular exceptions where coordinated conduct furthers some public policy. Entities statutorily permitted to act collectively include primary producers of agricultural products, which are permitted to form cooperatives pursuant to the Capper-Volstead Act of 1922, 7 U.S.C. § 291 (2000); exporters of goods from the United States, pursuant to the Export Trading Company Act of 1982, 15 U.S.C. § 4001 (2000); and ocean common carriers under the Shipping Act of 1984, 46 U.S.C. app. § 1701 (2000). Of more potential relevance here, coordinated activities engaged in unilaterally by labor unions and employees, like boycotts and picketing, are exempt from the antitrust laws under Sections 6 and 20 of the Clayton Act, 15 U.S.C. §17, 29 U.S.C. §52 (2000), as well as the Norris-LaGuardia Act, 29 U.S.C. §101 (2000). *See, e.g.*, H.A. Artists & Assoc. v. Actors' Equity Ass'n, 451 U.S. 704, 714–15 (1981) (holding labor unions acting in their self-interest and not in combination with non-labor groups enjoy statutory exemption from Sherman Act); United States v. Hutcheson, 312 U.S. 219, 232 (1941). These statutory exemptions do not, however, exempt bilateral activity, such as concerted action or agreements between unions and non-labor parties. Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 622 (1975); Brown v. Pro Football, Inc., 50 F.3d 1041 (1995), *aff'd*, 518 U.S. 231 (1996). As neither law students seeking federal clerkships, nor federal judges have formed labor unions, this exemption has no application to the antitrust analysis of the Law Clerk Hiring Plan.

titrust laws."[83] Such restraints usually arise in labor markets where perceived top-notch talent is scarce, and competition among employers tends to drive salaries up, especially for the best of the best.[84] As expected, in other labor markets, where securing top-notch talent is not an issue, employers observe that vibrant competition for jobs generally holds down wages, while "producing higher quality and better motivated workers."[85]

In *Anderson v. Shipowners' Association of Pacific Coast*, for example, labor was scarce for qualified seamen and thus employers agreed to restrict aspects of the hiring process.[86] In particular, the owners and operators of trans-Pacific merchant vessels collectively agreed to impose a hiring system wherein every seaman had to register, take a number, and wait his turn on the employment wheel. When a job came up, the seaman was required to "take the employment then offered or none, whether it [was] suited to his qualifications, or whether he wishe[d] to engage on the particular vessel or for the particular voyage...."[87] The Supreme Court held that such a multi-employer agreement, which prevented seamen from independently bargaining for employment suitable to their particular qualifications, restrained interstate commerce and thus violated the antitrust laws.[88] As inimitably expressed by Judge Learned Hand two decades later, "whatever conduct the [antitrust] Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids any one to practice his calling."[89] These general principles demanding the conformity of the general labor market to the antitrust laws have subsequently been applied to a variety of multi-employer agreements restricting labor,

83. *Brown*, 50 F.3d at 1059 (Wald, J. dissenting); *see also* Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 687 (2d Cir. 1995) ("Absent justification . . . or some defense, employers who compete for labor may not agree among themselves to purchase that labor only on certain specified terms and conditions, and such a cartel many not enforce its will through an agreement to boycott those who do not abide by its rules. Such conduct would be *per se* illegal.") (internal quotations and citations omitted).

84. Such oligopsonistic restraints arise when a resource is valuable in its current use, so that even if the price is artificially depressed by agreement among buyers of the resource, sellers are unable to put the resource to alternative use. RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST 150 (1981) (noting that monopsony arises when resources have substantially greater value in some uses than others, allowing the sole purchaser to force the seller to accept the artificially depressed monopsony pricing).

85. *Brown*, 50 F.3d at 1059 (Wald, J. dissenting).

86. 272 U.S. 359, 361–62 (1926).

87. *Id.* at 362.

88. *Id.* at 361–65.

89. Gardella v. Chandler, 172 F.2d 402, 408 (2d Cir. 1949) (Hand, J. concurring).

including agreements not to hire various classes of employees, and in particular, agreements restricting eligibility in professional sports.

Given the scarcity of top-flight athletic talent, owners of professional sports teams have consistently attempted to jointly impose eligibility rules, thereby endeavoring to hold the cost of labor to a minimum.[90] For example, a restriction forbidding players younger than twenty in professional hockey was enjoined because such a restraint was a primary boycott[91] and hence illegal per se.[92] As Justice Douglas declared, in reinstating a district court's injunction against a similar rule by the NBA denying draft eligibility to anyone fewer than four years removed from high school graduation: "This group boycott[93] issue in professional sports is a significant one."[94] The eligibility restrictions imposed by the short-lived United States Football League ("USFL")—forbidding players who had not graduated from college or expended their college eligibility or who were more than five years removed from first entering college—was also struck, as it "constituted a group boycott and was therefore a per se violation."[95] Most recently, Maurice Clarett, a running back from Ohio State University, attacked the NFL's requirement that an athlete be three years removed from his high school graduation before entering the draft.[96] This restriction was initially held by the district court to be a clear restraint of trade.[97] The Second Circuit, reversed, however,[98] saving the restriction only by operation of an exemption from the antitrust laws for collective bargaining agreements, which does not apply to our consideration of the Hiring Plan.[99] Like many other professional sports

90. *See Brown*, 50 F.3d at 108 n.1 (Wald, J. dissenting) (citing cases challenging various restrictions by team owners seeking to restrict athlete employment).

91. A "primary" boycott exists where the actors at one level of trade refuse to deal with actors at another level of the trade. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 466 (1921).

92. Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977).

93. Group boycott is defined as "concerted refusals by traders to deal with other traders." Refusals to deal of this type "cripple the freedom of traders and thereby restrain their ability to sell [or buy] in accordance with their own judgment." Kaiser v. Gen'l Motors Corp., 396 F. Supp. 33, 41 (E.D. Pa. 1975) (citing Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959)).

94. Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1206, *reinstating injunction imposed by* Denver Rockets v. All-Pro Mgmt Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

95. Boris v. United States Football League, No. Cv. 83-4980, 1984 WL 894, at *1 (C.D. Cal. 1984).

96. Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 410–11 (S.D.N.Y. 2004).

97. *Id.*

98. Clarett v. Nat'l Football League, 369 F.3d 124, 131 (2d Cir. 2004).

99. In addition to the statutory exemptions to the antitrust laws described in note 83, *supra*, a judicially created, non-statutory exemption shields from the antitrust laws certain agreements reached between unionized labor and employers which result from free and private collective bargaining over issues of wages, hours, and working conditions. Brown v. Pro

eligibility restrictions, saved only by operation of the non-statutory labor exemption,[100] the restraint in *Clarett* would have violated the antitrust laws.[101]

Football, Inc., 518 U.S. 231, 235–36 (1996). Where the exemption is necessary to promote statutorily authorized collective bargaining, it applies equally to employees and employers. Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 729–32, 735 (1965). "In the face of such allegations, the Court has largely permitted antitrust scrutiny in spite of any resulting detriment to the labor policies favoring collective bargaining." *Clarett*, 369 F.3d at 131. Agreements between an employer or employers and a labor union alleged to have injured or eliminated a competitor in the employers' business or product market, however, have not been accorded this protection from the antitrust laws. *See, e.g.*, Allen Bradley Co. v. Local No. 3 Int'l Bhd. of Elec. Workers, 325 U.S. 797 (1945) (refusing to apply exemption to agreement where union workers agreed with manufacturers and contractors to deal only with others who also employed union workers); United Mine Workers v. Pennington, 381 U.S. 657 (1965) (denying exemption for agreement between miners union and large coal mine operators whereby miners would demand higher pay from small coal mine operators). *But see Amalgamated Meat Cutters*, 381 U.S. 676 (applying non-statutory labor exemption to agreement between butchers union and meat sellers to limit the operation of meat counters to certain hours and noting no allegation of harm to meat sellers business or product market); *Clarett*, 369 F.3d at 131 ("This exemption exists not only to prevent the courts from usurping the [National Labor Relation's Board's] function of determining in the area of industrial conflict what is or is not a reasonable practice, but also to allow meaningful collective bargaining to take place by protecting some restraints of competition imposed through the bargaining process from antitrust scrutiny.") (internal citations and quotations omitted). Given the abundance of collective bargaining agreements in professional sports, most of the recent sports cases involve consideration of whether the exemption applies to particular restraints imposed upon players bound by a bargaining agreement. *See, e.g.*, *Brown*, 518 U.S. at 235 ("The immunity before us rests upon what this Court has called the 'nonstatutory' labor exemption from the antitrust laws."); *Clarett*, 369 F.3d at 130–38; Caldwell v. Am. Basketball Ass'n, 66 F.3d 523, 527–31 (2d Cir. 1995); *Williams*, 45 F.3d at 688–90; Wood v. Nat'l Basketball Ass'n., 809 F.2d 954, 959 (2d Cir. 1987); Robert A. McCormick & Matthew C. McKinnon, *Professional Football's Draft Eligibility Rule: The Labor Exemption and The Antitrust Laws*, 33 EMORY L.J. 375, 381–417 (1984) (condemning professional football's draft eligibility rule – part of its collective bargaining agreement—as applied to college undergraduate athlete Herschel Walker). For three divergent perspectives on the issues in Clarett's case, *see* Jason Abeln, Chris Brown & Neil Desai, *Lingering Questions After* Clarett v. NFL: *A Hypothetical Consideration of Antitrust & Sports*, 73 U. CIN. L. REV. 1767 (2005). Of course, judges and clerkship applicants have no obligation to bargain collectively, and thus this exemption does not apply to the antitrust analysis of the Law Clerk Hiring Plan.

100. *See, e.g.*, *Caldwell*, 66 F.3d at 527 ("We will assume for the purpose of analysis that absent a collective bargaining relationship, the conduct alleged by Caldwell would state a claim under the Sherman Act."); *Brown*, 50 F.3d at 1055 (assuming antitrust laws applied absent non-statutory exemption).

101. Other restrictions, alleged to restrain competition for professional athletes' services and have also been challenged under the antitrust laws to varying success. *See, e.g.*, McCourt v. Calif. Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) (challenging hockey's reserve system); Smith v. Pro-Football, 420 F. Supp. 738 (D.D.C. 1976) (challenging NFL player draft) *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976) (challenging Rozelle Rule, which constrained player mobility); Bridgeman v. Nat'l Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987) (challenging basketball draft, salary cap, and right of first refusal); Bowman v. Nat'l Football League, 402 F. Supp. 754 (D. Minn. 1975); Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975).

Courts have also uniformly decried various sub-types of eligibility restrictions, such as a "blacklist" or "no hire" or "no-switching" agreement, which prohibit a firm from hiring employees of its competitors or impose a waiting period on doing so.[102] In *Radovich*, for example, the Supreme Court held that an agreement by the member teams of the National Football League to blacklist players and coaches from the All-America Conference stated a Sherman Act violation.[103] Likewise in *Nichols*,[104] the Seventh Circuit held contrary to the antitrust laws an agreement between two encyclopedia publishers not to hire the other's former employees for six months after termination.

As initially proclaimed by the Supreme Court in *Anderson* and then again in *Radovich*, and as the subsequent cases make clear, as "a general matter, the antitrust laws . . . apply to restraints on competition in non-unionized labor."[105] Particularly, where employers have banded together to collusively establish the wage of their employees,[106] restrict the conditions precedent to employment (*e.g.*, specific eligibility rules), or set rules limiting the mobility of workers, courts are now almost unanimous in holding that those agreements violate the antitrust laws.

102. Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc., 540 F.2d 824, 827–28 (5th Cir. 1976) (holding agreement not to hire former employees of a competitor constituted an antitrust violation); Nichols v. Spencer Int'l Press, 371 F.2d 332, 334 (7th Cir. 1967) (decrying no switching agreement restricting employee mobility for six months); Union Circulation v. Fed'l Trade Comm., 241 F.2d 652 (2d Cir. 1957) (finding antitrust violation in no switching agreement restricting hiring for one year). *See also* Ostrofe v. H.S. Crocker Co., 740 F.2d 739 (9th Cir. 1984) (allowing suit by employee alleged to have been boycotted based on his failure to participate in bid-rigging scheme); Freeman v. Eastman-Whipstock, Inc., 390 F. Supp. 685, 689–90 (S.D. Tex. 1975) (holding employee had standing to sue for antitrust violation where two or more employers conspired to prohibit his employment and employers had market power to enforce the agreement); Eichorn v. AT&T Corp., 248 F.3d 131, 142 (3d Cir. 2001) (finding employees had standing to sue for antitrust violation where no-hire agreement directly impeded employee's ability to sell their labor to at least three companies in the competitive market).

103. Radovich v. Nat'l Football League, 352 U.S. 445, 446–47 (1957).

104. *Nichols*, 371 F.2d at 334.

105. *Brown*, 50 F.3d at 1054. *See also* James M. Altman, *Antitrust: A New Tool for Organized Labor*, 131 U. PA. L. REV. 127, 141 & nn.81 & 84 (1982) (stating "numerous lower federal courts have acknowledged in recent years that the Sherman Act extends to anticompetitive activities affecting only a labor market" and collecting cases).

106. Agreements to fix outright the price of an employee's compensation unsurprisingly also constitute a violation of the antitrust laws. *See* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998) (holding agreement to restrict entry level coaches annual compensation to $16,000 annually and "any other rules embodying similar compensation restrictions" violated the antitrust laws); Cordova v. Bache & Co., 321 F. Supp. 600 (S.D.N.Y. 1970), *later opinion sub nom*, Jacobi v. Bache & Co., 377 F. Supp. 86 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975) (holding a multi-employer agreement among brokerage firms to restrict the commission compensation of their securities representative employees violated the Sherman Act).

A few commentators have argued that the antitrust laws should not be applied to restraints imposed solely on the market for labor.[107] They argue that despite the broad language of the Sherman Act, forbidding "every" restraint of trade, the central focus of the Sherman Act is not to protect competition per se, but to protect consumers from anticompetitive practices.[108] Thus, if an anticompetitive practice affects only an input, like labor, and hence actually diminishes the price to the consumer in the output market, the practice should not be subject to antitrust scrutiny.[109]

In an attempt to reconcile this position with relevant precedent, which has unambiguously applied the antitrust laws to pure inputs,[110]

107. Archibald Cox, *Labor and the Antitrust Laws – A Preliminary Analysis*, 104 U. PA. L. REV. 252, 254-55 (1955) ("[T]he antitrust laws are not concerned with competition among laborers or with bargains over the price or supply of labor its compensation or hours of service or the selection and tenure of employees."); Theodore J. St. Antoine, Connell: *Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 606 (1976). A corollary argument contends labor agreements do not implicate the antitrust laws because labor is not an article of trade or commerce as required by the Clayton Act. This argument derives, at bottom, from the first sentence of section 6 of the Clayton Act, which provides: "[t]he labor of a human being is not a commodity or article of commerce," 15 U.S.C. § 17 (2000), as well as the Supreme Court's decision in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940), which held the Sherman Act applicable only to restraints upon "commercial competition in the marketing of goods or services." In *Amalgamated Clothing & Textile Workers v. J.P. Stevens & Co.*, 475 F. Supp. 482 (S.D.N.Y. 1979), *vacated as moot*, 638 F.2d 7 (2d Cir. 1980), for example, the district court, purporting to follow *Apex Hosiery*, held that blacklisting and wage fixing do not alone violate the Sherman Act, absent some restraint on commercial competition for goods or services. In this district court's view, Justice Stone's use of the term "commercial competition" in *Apex Hosiery* referred only to the competitive structure of a product market and not a labor market. *Id.* Whatever Justice Stone's original intent in *Apex Hosiery*, recent Supreme Court decisions, *e.g.*, *United States v. Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950), defining "trade" under the Sherman Act to include an employee's labor undermine the limited interpretation of "commercial competition" forwarded by *Amalgamated Clothing*.

The better view, and the one now adopted widely, is that an employee's sale of labor is trade or commerce, and as such, the Sherman Act extends to conspiratorial restraints impairing the labor market. *Compare* Robert H. Jerry, II & Donald E. Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 INDUS. REL. L.J. 173 (1984) (arguing that labor restraint must impact a product market) *with* Altman, *supra* note 105, at 137-42 (taking the opposite view). Also in accord with the modern view that the labor market is protected by the Sherman Act, section 6 of the Clayton Act has been held to concern only the right of labor unions to engage in coordinated activity, not to protect conspiratorial restraints in the labor market. *See, e.g.*, *Quinonez*, 540 F.2d at 829 & n.9; *Cordova*, 321 F. Supp. at 605-08.

108. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (The antitrust laws were enacted for "the protection of *competition*, not *competitors*."); *see also* Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989).

109. Jerry & Knebel, *supra* note 107, at 174; Elinor R. Hoffmann, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOK. L. REV. 1 (1983).

110. Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948) (holding sugar refiners' agreement to restrict price paid for input sugar beets violated Sherman Act, which "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers" but is comprehensive in its reach); *see also Radovich*, 352 U.S. at 454 (applying antitrust laws to labor); *Anderson*, 272 U.S. at 364-65 (same).

these commentators generally concede that an input (*e.g.*, labor) restraint may violate the Sherman Act, if its consequence impairs the output market.[111] While this distinction may have some application in cases where the non-statutory exemption from the antitrust laws operates to protect collective bargaining agreements which impact only the labor market but do not otherwise impact the product market,[112] it has found no traction in a competitive labor market not burdened with collective bargaining.[113] The prevailing view is that the market for employee skills is a market subject to the provisions of the Sherman Act,[114] and, accordingly, a multi-employer agreement "unilaterally imposing uniform industry-wide terms of employment, and thereby restraining competition in the labor market" runs afoul of the antitrust laws.[115] As explained in the leading treatise:

> Antitrust law addresses employer conspiracies controlling terms of employment precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market for buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services.[116]

The antitrust laws protect "the victims of the forbidden practice as well as the public."[117] Indeed, as Areeda and Hovenkamp suggest, it would be "perverse" if the only persons directly and immediately impaired by a conspiratorial agreement restricting the labor market (*i.e.*, the employees) could not challenge the restraint.[118]

111. *See* Jerry & Knebel, *supra* note 107, at 174.

112. *Brown*, 50 F.3d at 1054–55. *Brown* recognized "as a general matter" that the antitrust laws apply to labor markets but noting that inception of a collective bargaining relationship between employer and employee irrevocably alters the legal regime. *Id.* Indeed, "once collective bargaining begins, the Sherman Act paradigm of a perfectly competitive [labor] market necessarily is replaced by the NLRA paradigm of organized negotiation...." *Id.*

113. *Anderson*, 272 U.S. at 364–65; *Brown*, 50 F.3d at 1054.

114. Cesnick v. Chrysler Corp., 490 F. Supp. 859, 866-67 (M.D. Tenn. 1980); *see also Brown*, 50 F.3d at 1054; Roman v. Cessna Aircraft Co., 55 F.3d 542, 545 (10th Cir. 1995) (holding sufficient to assert antitrust standing allegation that competition in the market for services as an employee had been directly impeded by defendants' agreement not to compete for each other's employees).

115. *Brown*, 50 F.3d at 1059.

116. PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 377a (rev. ed. 1995); *see also* Brian R. Henry, *"Sorry We Can't Hire You . . . We Promised Not To:" The Antitrust Implications of Entering into No-Hire Agreements*, 11 ANTITRUST 39 (1996) ("[E]mployees suffer 'injury' recognized by the antitrust laws when their employment opportunities are restricted by a no-hire agreement . . . .").

117. *Radovich*, 352 U.S. at 454.

118. AREEDA & HOVENKAMP, *supra* note 116, at ¶ 377a.

Not only does the position, which would foreclose application of the antitrust laws to all restraints impairing the labor market, lead to illogical consequences, it has been rejected by the developing case law and cannot withstand critical examination. Indeed, input (*e.g.*, labor) restrictions create deadweight loss,[119] which can be just as damaging to consumers in the long run as output restrictions.[120] Faced with an artificial cartelized restraint, some producers of the input (laborers) will inevitably shift their resources to produce other things or cease production altogether.[121] Eventually, the result of this production shift will manifest itself as higher consumer prices, reduced product quality, or the substitution of less desirable alternative products. Therefore, even accepting the view that the antitrust laws are solely consumer welfare statutes, conspiratorial agreements to restrict the hiring and mobility of labor should fall under their purview. Cognizant of these governing legal principles as well as the direction of the prevailing jurisprudential winds blowing headlong against conspiratorially forged restraints of the labor market, the remainder of this Part analyzes whether the Hiring Plan constitutes an agreement to unreasonably restrain trade that affects interstate commerce.

B. *An Agreement*

The Sherman Act specifically proscribes: (1) any agreement, contract, combination, conspiracy or other concerted activity, (2) which constitutes an unreasonable restraint of trade (3) in interstate commerce.[122] There is no serious dispute that the judges and the law schools agreed to enforce the Law Clerk Hiring Plan. In forging the Hiring Plan, the federal judges have publicized and documented their joint agreement to adhere to certain hiring restrictions. Given the dispersed and isolated nature of the federal judges and the law schools, and their general lack of a regular opportunity to communicate, the publication of their individual

119. Deadweight loss represents the lost gained by unachieved economic transactions. Deadweight loss refers generally to the loss to society based on an inefficient allocation of resources. The most common discussion of deadweight loss is the loss of consumer surplus associated with monopolistic pricing. See generally Deadweight Welfare Loss, http://www.bized.ac.uk/educators/he/pearson/models/deadweight.ppt (last visited Nov. 13, 2006) for a good tutorial on the economics of deadweight welfare loss due to a monopoly. On a more interesting note, see Joel Waldfogel, *The Deadweight Loss of Christmas*, AM. ECON. REV., Dec. 1993, at 5, *available at* http://www.economist.com/finance/displayStory.cfm?Story_ID=885748 (discussing the deadweight loss inherent in the western tradition of Christmas gift-giving).

120. ROGER D. BLAIR & JEFFREY L. HARRISTON, MONOPSONY 36–43 (1993).

121. *Id.* at 42–43.

122. Jung v. Am. Ass'n of Med. Colleges, 300 F. Supp. 2d 119, 157–58 (D.D.C. 2004) (outlining the elements of a Sherman Act violation).

agreement was instrumental in implementing a workable Hiring Plan. Where so many past efforts over the last thirty years had failed, a successful effort had to include widespread dissemination of the agreement to all the participants in order to dissuade them from refusing to participate, or cheating based on the fear that their colleagues had not fully agreed to abide by the terms of the Plan. E-mail deserves the credit for the ability of the participants to quickly and easily indicate their acquiescence to the Plan because it provided an efficient means to tabulate who had agreed to the Plan and also left a written record by which a cheat might be held to account.

Ultimately, the Plan was formally announced by Judges Edward Becker of the Court of Appeals for the Third Circuit and Harry Edwards of the Court of Appeals for the District of Columbia Circuit, who stated outright that the Ad Hoc Committee, supported or unopposed by ninety-two percent of all federal appellate judges,[123] had created a Plan whereby law clerk hiring would not occur until the fall of the third year of law school.[124]

The law schools, too, have made certain the world knows they have agreed to enforce the provisions of the Plan by embargoing transcripts and letters of recommendation until the appointed hour.[125] The Ad Hoc Committee sought agreement that the AALS would support the main tenets of the proposed Hiring Plan. In response, deans from thirteen

123. Jeff Blumenthal & Jonathan Groner, *Appeals Judges Push Back Clerk Hiring*, LEGAL TIMES, Mar. 18, 2002, at 8.

124. Editorial, *Law Clerk Hiring: Once More Unto the Breach*, 168 N.J.L.J. 846 (2002). In piecing together the series of events leading to the formal announcement of the Hiring Plan, it appears the Ad Hoc Committee proposed that the appellate judiciary move clerkship hiring into an applicant's third year of law school. By doing so, the Ad Hoc Committee argued, judges would have more information on applicants, and thus theoretically hire better clerks. Months of discussion, debate, and arm-twisting ensued, accompanied by a flurry of emails circulating in every Circuit, in which judges debated the pros and cons of such a proposal. Several preliminary rounds of counting noses followed, and status reports were compiled and circulated. Then, as more judges agreed to abide by the Plan, even more judges signed on, as they could be reasonably assured their colleagues would not cheat to gain an advantage. In the end, ninety-two percent of the appellate judges agreed either to support or not oppose the proposal of the Ad Hoc Committee—enough of a supermajority to rejoice: "We [the federal judiciary] did this on our own." Blumenthal & Groner, *supra* note 123.

For various reasons, several judges refused to sign on to the agreement. Judge Kozinski, a vocal critic of organized law clerk hiring, although nominally not opposing the Plan, retained his stance that he would conditionally hire a kindergartner if he believed that candidate would mature into the world's best law clerk. *See* Kozinski, *supra* note 2. Other judges refused to be bound by the Committee's proposal because of the geographic location of their chambers or simply because of a desire not to be restricted in a decision of vital importance to their work. These dissident judges, however, could not stop the juggernaut, despite more than one using the pejorative "cartel" to describe the Plan. *See, e.g.*, Rosenbaum, *supra* note 75.

125. *See, e.g.*, Rosenbaum, *supra* note 75.

prestigious law schools sent the Committee a letter describing the proposed Hiring Plan as "a good solution to a thorny problem."[126] Printed on the letterhead of Jeffery Lehman, then dean of the University of Michigan Law School, the letter stated that the listed schools will "do nothing to facilitate the early release of official transcripts and will discourage faculty from writing letters or making phone calls on behalf of first- and second-year applicants."[127] Lehman, apparently recognizing the enforcement mission of the law schools, wrote that law school deans bear a special responsibility to adhere to the new Plan even if they hear of people who fail to do so.[128] Subsequently, the American Law Deans Association ("ALDA"), a voluntary membership group consisting of the deans of 171 of the 184 accredited American law schools, parroted the stance of the original thirteen deans, agreeing to discourage students from applying and professors from providing references before the beginning of the third year.

In practice, the law schools have more than discouraged students from applying and professors from penning letters of recommendation early. Encouraged by the Ad Hoc Committee, law schools have largely adopted a procedure whereby the law school serves as a central clearinghouse for the pieces of a student's admission package. To this clerkship clearinghouse, students submit cover letters, writing samples and a bevy of envelopes addressed to the judges of interest. The Office of the Registrar provides the students' official transcripts, and professors add letters of recommendation. The law school then compiles the clerkship packages and mails them to the designated judges. Many law schools even pay the postage to send the applications!

In this case, the agreement has been explicit; one need not infer it from the circumstances or from the actions of the participants.[129] By their own admission, ninety-two percent of the federal appellate judiciary and at least the 171 ALDA law school deans have agreed to abide by the hiring of law clerks in their third year of law school. Since its inception,

126. Cahill, *supra* note 9.

127. *Id.*

128. *Deans' Group Endorses Plan to Fix Hiring System of Judicial Clerks*, BROWARD DAILY BUS. REV., Apr. 11, 2002, at 11.

129. As one court instructed the jury:

> A Sherman Act conspiracy must be viewed as a whole; the parts of the conspiracy are not to be considered separately. A conspiracy may be inferred from the totality of the circumstances, including the acts, statements, words, and conduct of all the co-conspirators. Acts that are by themselves wholly innocent acts may be part of the sum of the acts that make up an illegal conspiracy to restrain trade in violation of the Sherman Act.

Transcript of Trial at 2194–99, United States v. Taubman, No. 01 Crim. 429 (S.D.N.Y. 2001).

the federal judges and the law schools have followed the Plan's terms and conditions, with few (but mounting) reports of defection. Of course, this agreement, as it was intended, effectively foreclosed from any first- or second-year law student the opportunity to compete with the 3Ls for employment as a federal clerk.

C. *In Unreasonable Restraint of Trade*

This type of agreement, whereby the conspirators agree not to consider applications from any student before the third year of law school, amounts to a concerted refusal to deal with students lacking the necessary eligibility requirements.[130] In particular, the Law Clerk Hiring Plan appears to constitute a "primary" boycott, wherein the actors at one level of trade (the judges) refuse to deal with actors at another level of the trade (students before their third year of law school).[131] This Part discusses such concerted refusals to deal and how they are evaluated by the antitrust laws.

As nearly every contract that binds the parties to an agreed-upon course of conduct is a restraint of trade to some degree, the Supreme Court has limited the application of the Sherman Act to unreasonable restraints.[132] Restraints among horizontal competitors that harm consumers, such as price-fixing, bid-rigging, production controls and territorial or customer allocations, have all been held to be unambiguously unreasonable and thus illegal per se.[133] This per se illegality rule applies only where the business practice under attack has no purpose except to stifle

130. A concerted refusal to deal has also been termed a group boycott and the terms are used interchangeably in many opinions. Justice Douglas, for example, referred to the NBA's age eligibility rules as a "group boycott." *Haywood*, 401 U.S. at 1206. In challenging the NFL's draft eligibility rules, Maurice Clarett alleged a group boycott. *Clarett*, 306 F. Supp. 2d at 399–404. In *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 466 (1941), a group of women's clothing manufacturers agreed not to sell their products to any retailer that sold garments which had been copied from guild members. This agreement was termed a group boycott, as was the one in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959), wherein a large department store was alleged to have agreed with major appliance manufacturers to exclude a small retailer or deal with it only on discriminatory terms. From these cases, some commentators argue that a group boycott, properly understood, is one that harms competition in the conspirators' market, whereas a concerted refusal to deal is a broader term for an agreement, which may be aimed at competitors or non-competitors and is initiated to affect competition or for some less insidious purpose. This Article mostly uses concerted refusal to deal to describe the Plan, but the label is immaterial.

131. *Linseman*, 439 F. Supp. at 1321; *Denver Rockets*, 325 F. Supp. at 1061.

132. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

133. Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289–90 (1985) (limiting per se rule to certain defined classes of agreements).

competition,[134] and when it does apply, no proffered justification can save the practice.[135] In these cases, one need not examine whether the restraint is reasonable, because "experience . . . enables the Court to predict with confidence that the Rule of Reason will condemn it."[136]

If a restraint does not fall within the per se rubric it is analyzed under the Rule of Reason, whereby the detriment the restraint causes is balanced against its pro-competitive benefits, and the scale of justice determines its fate. Considering the totality of the circumstances surrounding an alleged restraint, the finder of fact must examine the peculiarities of the relevant business, including the industry's condition before and after the restraint, and the restraint's history, nature, and purpose.[137] If the restraint "produced adverse, anti-competitive effects within the relevant product and geographic markets,"[138] "such as reduction of output, increase in price, or deterioration in quality of goods or services,"[139] and the group that imposed the restraint possessed sufficient market power such that the restraint affected consumers, then the group must justify the challenged conduct by demonstrating that it promotes some pro-competitive objective[140] such as enhancing efficiency or reducing cost.

134. White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

135. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977). A practice that would otherwise be condemned as illegal per se might be permitted, however, where the industry structure requires self-regulation, the collective action is narrowly crafted to accomplish some end consistent with self-regulation, and there exists procedural safeguards to ensure the restraint is not arbitrary. *See* Silver v. New York Stock Exchange, 373 U.S. 341 (1963). Such a practice might also be permitted where the case "involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984) (quoting Broad. Music, Inc. v. Columbia Broad. Sys. Inc., 441 U.S. 1, 19–20 (1979)) (finding league sports one such product); ROBERT H. BORK, THE ANTITRUST PARADOX, 278 (1978) ("When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams.").

136. Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982) ("[E]xperience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it . . . ."); *Broad. Music*, 441 U.S. at 19–20 (holding a per se rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition").

137. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997); NCAA v. Bd. of Regents, 468 U.S. at 101 n.23; *Broad. Music*, 441 U.S. at 19 ("[O]ur inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of our predominantly free-market economy . . . .") (citation omitted); Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918) ("[K]nowledge of intent may help . . . to interpret facts and to predict consequences."); United States v. Brown Univ., 5 F.3d 658, 668 (3d. Cir. 1993) (noting that courts often look at a party's intent to help it judge the likely effects of challenged conduct).

138. *Brown Univ.*, 5 F.3d at 668.

139. *Id.* (citations omitted).

140. *Id.* at 669; Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

In assessing the reasonableness of the restraint, the finder of fact may also examine the group's motive behind the challenged conduct, but good motives alone will not validate an otherwise objectionable anti-competitive practice.[141] Likewise, a group's proffered justification of promoting the social good is not enough to save anti-competitive conduct,[142] and equally inutile is justifying a restraint by decrying the evils of vibrant competition.[143] If the restraint has pro-competitive justifications, the burden shifts back to the plaintiff to demonstrate that the restraint is not reasonably necessary to achieve the proffered objectives,[144] or that there exists a less restrictive alternative.[145]

In some instances only an abbreviated Rule of Reason analysis is appropriate: for example, where the restraint appears inherently anti-competitive, but per se condemnation is inappropriate because of judicial inexperience with a particular restraint.[146] The Supreme Court has approved a "quick look" in these cases.[147] In quick look cases, which often involve restraints that appear to be transmutations of per se violations, the harm is assumed (even in the absence of detailed market analysis indicating actual profit maximization or increased costs) and the proponent must support the alleged restraint with some pro-competitive justification.[148] If the proponent satisfies this hurdle by demonstrating that the restraint makes markets more competitive or otherwise increases economic efficiency or decreases costs, then a full-blown Rule of Reason analysis becomes appropriate, balancing the harms against the benefits.[149]

1. Concerted Refusals To Deal

As described above, the Law Clerk Hiring Plan is, at its core, an elaborate concerted refusal by the federal judiciary and the law schools

141. *Brown Univ.*, 5 F.3d at 672; *see also* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986) (giving extra pause where a bona fide, non-profit professional association adopted a restraint which it claimed was motivated by public service or ethical norms).

142. *Prof'l Eng'rs*, 435 U.S. at 695 (rejecting the public safety justification for an unreasonable restraint, viewing it as nothing more than an attempt to impose defendant's own views of the costs and benefits of competition on the entire marketplace).

143. *Id.* at 696 ("Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.").

144. *Broad. Music*, 441 U.S. at 1; *Brown Univ.*, 5 F.3d at 679; *see also* Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 151–52 n.18 (3d Cir. 1981).

145. *Id.*

146. *Ind. Fed'n of Dentists*, 476 U.S. at 460–61; *NCAA v. Bd. of Regents*, 468 U.S. at 109.

147. *Ind. Fed'n of Dentists*, 476 U.S. at 460–61; *Law*, 134 F.3d at 1020.

148. *NCAA v. Bd. of Regents*, 468 U.S. at 110.

149. *Broad. Music*, 441 U.S. at 19–20.

to deal with a law student (*i.e.* federal clerkship applicant) who does not meet the agreed criterion. Such concerted refusals to deal and group boycotts were once treated as per se antitrust violations.[150] The Supreme Court has signaled, however, that concerted refusals to deal might be more properly probed under the Rule of Reason or quick look analyses,[151] and indeed, the lower courts have recognized that the per se rule against group boycotts is tenuous.[152]

Although many of the past cases involving multi-employer agreements to restrain the price or mobility of labor were analyzed under the per se rubric,[153] in recent cases, judges, cognizant of the Supreme Court's caution in extending the per se rules[154] as well as the uncertain status of group boycotts, have generally analyzed the alleged restraint using the Rule of Reason.[155] Particularly in cases where the conspirators offer a pro-competitive justification for the alleged restraint,[156] or where a restraint was imposed based on pure altruistic motives and there was no allegation that the conspirators had any anti-competitive revenue maximizing purpose,[157] the Rule of Reason appears to be the prevailing standard by which to judge the restraint.[158]

In this case, not only can the judges and law schools offer several pro-competitive justifications for the Plan, but the Plan was instituted by non-commercial actors with altruistic motives. At the very least, these peculiar elements of this multi-employer restraint counsel caution before precipitously extending the per se or quick look rules to an unfamiliar situation. Accordingly, the Hiring Plan should be analyzed under the full

150. *Broadway-Hale Stores, Inc.*, 359 U.S. at 212

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about deterioration in quality.' Even when they operated to lower prices or temporarily to stimulate competition, they were banned.

Id. (quoting *Fashion Originators' Guild*, 312 U.S. at 466, 467–68).

151. *Ind. Fed'n of Dentists*, 476 U.S. at 460–61 (using quick look); *Nw. Wholesale Stationers, Inc.*, 472 U.S. at 294 (using Rule of Reason to analyze concerted refusal to deal).

152. *See, e.g.*, Bogan v. Hodgkins, 166 F.3d 509, 515 (2d Cir. 1999).

153. *Quinonez*, 540 F.2d at 828; *Linseman*, 439 F. Supp. at 1323.

154. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

155. *Brown Univ.*, 5 F.3d at 672; *Clarett*, 306 F. Supp. 2d at 404–06.

156. *Compare Ind. Fed'n of Dentists*, 476 U.S. at 459 (condemning restraint by quick look where defendants failed to offer any justification for the restraint).

157. *Brown Univ.*, 5 F.3d at 672.

158. *But see Clarett*, 306 F. Supp. 2d at 407–08 (examining restraint similar to the Law Clerk Hiring Plan under the quick look standard because the anti-competitive effects of NFL's eligibility rules were obvious).

Rule of Reason, balancing the extent to which the Plan restrains the free market in labor against any plausible pro-competitive justifications.

2. Evaluating the Law Clerk Hiring Plan

The Law Clerk Hiring Plan bars students from applying for a federal clerkship before their third year of law school. Additional aspects of the Plan restrict when applicants may submit their materials and when judges may interview and hire candidates. Fundamentally, the Plan constitutes a form of an eligibility restriction akin to those contested in the professional sports eligibility cases.[159] The Plan has established one no-exceptions-allowed eligibility rule—students must be in their third year of law school in order to apply to clerk. Without this qualification, judges will not consider the application, even if the student circumvents the law schools' embargo of transcripts and recommendation letters. In this way, the Hiring Plan is starkly anti-competitive as it eliminates participants who do not meet the required eligibility criterion from applying, and, thus, competing in the market for judicial law clerks.

That federal clerkships have fixed monetary compensation makes these eligibility restrictions all the more anti-competitive. As applicants cannot compete on the monetary price of their labor, they must compete on other elements of employment, including certainly their impressive qualifications, but also by their willingness to interview and commit early to a particular judge. Stripping students of the right to commit early forecloses from them the ability to exploit an essential truism in the competition for a clerkship: a clerk in the hand is worth two in the bush. Judge Kozinski has also described this restriction as a competitive disadvantage for judges. He believes the Hiring Plan "eliminate[s] a very important bargaining tool for [certain] judges competing for the most gifted clerkship candidates—the ability to make offers early and entice applicants into ending the anxiety and uncertainty by accepting early."[160] That the restraint impacts only non-monetary terms of employment does not alter the fact that it restricts a constituent part of the overall cost of labor over which employees and employers should be able to haggle freely and fiercely until they reach a compromise.[161]

Of course, all students will eventually have an opportunity to convince a federal judge to hire them as a law clerk. But all students are not similarly situated, and what of that student who wants or needs the op-

159. *See, e.g.*, *Haywood*, 401 U.S. at 1206, (reinstating the injunction); *Linseman*, 439 F. Supp at 1318; *Denver Rockets*, 325 F. Supp. at 1061; *Clarett*, 306 F. Supp. 2d at 407–08.

160. Kozinski, *supra* note 2, at 1719.

161. Banks v. NCAA, 977 F.2d 1081, 1096 (7th Cir. 1992) (Flaum, J. dissenting).

portunity to apply now, before her third year of law school, because of competing offers from Small State judges or because of fear her grades and standing will drop due to extrinsic factors? These students are foreclosed by the Hiring Plan from even submitting an application. They are not the sore losers (whining over sour grapes) of a competitive marketplace; they have been temporarily blacklisted by the Plan until their third year of law school.[162] The equal application of the Plan to all law students does not diminish its anti-competitive effects. It is simply not a defense to a group boycott that the group will eventually permit the blacklisted employees to compete.[163] In the sports eligibility cases, for example, the leagues' rules would have eventually permitted each athlete to be drafted and compete as a professional. In each case, however, the eligibility restriction was held anti-competitive. The harm of such a restraint is complete when the employee is foreclosed from freely competing to ply his trade, and that harm does not dissipate if he can work again after six months,[164] or when he turns twenty,[165] or when he begins the third year of law school.

The Hiring Plan is, however, considerably less restrictive and yields fewer pernicious effects than some restrictions condemned by the case law. This is not a per se case where employers conspired to depress employment compensation;[166] nor is it a case where employers blacklisted a group of employees to monopolize the industry.[167] It is even, ultimately, less detrimental than the sports eligibility restrictions, which steal a year's competition, and thus a year's salary, from an aspiring professional athlete.[168]

Although the sports eligibility restrictions are akin to the Hiring Plan in that both restraints foreclose only a candidate's eligibility for a position, the amateur athletes are ready and able to perform immediately as professional athletes, whereas a second-year law student cannot work as a clerk until graduated from law school. Yet, here, as in the sports eligibility cases, the boycotted applicant suffers harm immediately upon being collectively foreclosed from competing for a job. Identifying that anti-competitive harm suffered by a discrete class thus begins our Rule

162. *Nichols*, 371 F.2d at 333–34 (describing temporary blacklist for six months).

163. *Id.* (allowing employment after six month); *see also Clarett*, 306 F. Supp. 2d at 382 (allowing eligibility the following year – three years after athlete's high school graduation); *Linseman*, 439 F. Supp at 1319–21 (allowing eligibility after athlete turned twenty).

164. *Nichols*, 371 F.2d at 334.

165. *Linseman*, 439 F. Supp. at 1318.

166. *Law*, 134 F.3d at 1012; Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc., 540 F.2d 825, 827–28 (5th Cir. 1976).

167. *Radovich*, 352 U.S. at 447; *Roman*, 55 F.3d at 545.

168. *Linseman*, 439 F. Supp. at 1319; *Denver Rockets*, 325 F. Supp. at 1061.

of Reason analysis. The differences, discussed above, that distinguish the sports eligibility restrictions from the Hiring Plan matter only in assessing the magnitude of the harm. This distinction, between the existence of anti-competitive harm and its magnitude, could become significant as the Plan's harms are weighed against its alleged pro-competitive benefits. Through this comparative analysis, the Rule of Reason differentiates between the inept or unobtrusive restraint and the one that restrains competition without justification. Several potential salutary justifications have been offered to support the Plan, which may serve to tip the balance in favor of retaining it. Press releases and anecdotal reports indicate that the Plan was enacted (1) to reduce the costs of the hiring process; (2) to bring order to the chaos; and (3) to provide judges with more information about law clerk applicants.

Critics of unregulated law clerk hiring claim that the process wastes too much of both the judge's and the applicant's time. Law students miss class and judges must review hundreds of applications and interview about a dozen potential clerks. This is time-consuming, and judges and law schools[169] have advocated (and now collectively implemented) limiting the disruption to a short, fixed period in the fall of a student's third year. Yet fixing the dates of applying, interviewing, and extending offers adds inflexibility to the system, and that inflexibility, in fact, increases the process's costs. For example, on September 21, 2004, the Judicial Conference met in Washington, D.C. to review the recommendations of the Committee on Rules of Practice and Procedure. September 21, however, fell amid the interview period, which forced a number of judges to conduct hurried interviews in such unseemly locations as Washington, D.C.'s Union Station. Instead of mandated dates and times, which allow no flexibility to adjust for exigencies, judges could better allocate resources if they could adjust the hiring process to fit their schedules, perhaps moving it to when their workload is lightest.

Students, likewise, will be better off if they can compile applications and schedule interviews during their school breaks or whenever it best suits them. Indeed, timing is one of the most frequent complaints students voice about the Hiring Process.[170] While inflexible dates and

169. Similarly, the law schools have also argued that moving clerkship hiring into the 3L year will re-invigorate the importance of the second year of law school.

170. A review of the student responses in the Avery, et al. survey shows that timing is one of the most difficult aspects of the clerkship hiring process. Avery, et al., *supra* note 4, at 897. A sample of student answers concerning the difficulties of the clerkship hiring process include: "Trying to schedule all of my interviews right before finals." *Id.* "Having to deal with the clerkship application process so soon after the fall summer job interviewing season." *Id.* "Trying to balance applications, interviews for summer associateships, . . . and studying." *Id.* (alteration in original). With a flexible timetable, these students could submit applications and

times are inconvenient at some point for the majority of students, they disproportionately hurt non-traditional students (*e.g.*, summer starters, night students, or part-time students), who progress through law school outside the academic calendar. Moreover, there is no evidence that the Hiring Plan is reducing the amount of time judges or students devote to the clerkship application process. Judges are still reviewing hundreds of applications for each available position, and students are still missing class to interview with judges all around the country on short notice. Ultimately, the rigid dates and times established by the Hiring Plan do not save time, nor do they add a pro-competitive benefit to the market for law clerks. Instead, rigid dates and times add the cost of inflexibility to the market, which in turn decreases competition as some applicants drop out of the market, unable to pay the increased costs of rigidity. Under the Rule of Reason, this rationale, therefore, fails to justify the Hiring Plan.

Another oft-mentioned rationale for the Hiring Plan is to bring order to a process that is "crazy," "frenetic," and "out of hand."[171] Predominantly, judges object that the unregulated process is difficult because they have to search out prime clerks before their colleagues woo them into accepting offers early. This race to secure top clerks has led to the chaos of exploding and vanishing offers as well as students' counterinsurgency techniques, such as scheduling interviews strategically, monitoring the answering machine, and playing offers off of each other. Yet, this free-for-all is just the competitive process, and the complaints lament only the nature of competition.

Judges compete for applicants based on their personal prestige and the quality of their mentoring but also based upon how much attention they lavish on clerkship applicants and when they will make offers.[172] By eliminating variation in the timing of offers greatly curtailing the amount of time judges can spend wooing clerks,[173] the Hiring Plan substantially reduced competition in the market.[174] It is understandable that

arrange interviews when it best suited their academic and work schedules.

171. A number of judges mentioned decreasing the chaos as their motivation for endorsing the Hiring Plan. *See, e.g.*, Cahill, *supra* note 9. *See also id.* (quoting Judge Richard E. Becker: "'[t]here certainly was a race for the best. . . . It was completely crazy.'").

172. Judge Kozinski first observed that this is a very significant area of competition. By offering a position earlier than her peers, a judge may appease "an anxious applicant who wants to put the process behind her." Kozinski, *supra* note 3, at 1720. Competing on date of acceptance is not a novel commercial concept. Buyers and sellers in all markets place a premium on locking up contracts earlier rather than later.

173. This leaves prestige, mentoring and chambers' location as the areas where a judge can compete for top-drawer law clerks, apparently giving judges on the beach an advantage.

174. Judge Richard Cudahy apparently shares the opinion that law clerk hiring plans intend to stifle competition. Richard D. Cudahy, *Judge Clueless Hires a Law Clerk*, 60 OHIO

some wish to eliminate this form of competition, as the evils of competition have often been cited to justify collective conduct,[175] but the Sherman Act values competition precisely because of its benefits to the market as a whole, without regard to the potential increased costs of disorder borne by one party.[176] Forcing collective order on a vibrant, if chaotic, competitive marketplace, however "out-of-control" the marketplace has become, cannot be justified because such competition is "unreasonable."

The final pro-competitive rationale offered to support the Hiring Plan—allowing judges more information to make better hiring decisions—is also the best one. Delaying the law clerk hiring process until an applicant's third year of law school appears to increase the efficiency of the system by allowing both the judge and the student to make better employment decisions based on more information. By ensuring that students' 2L performance matters, postponing law clerk hiring also likely increases the effort expended by students in the classroom during their second year of law school.

Before the Plan, judges evaluated potential clerks based on only one year's grades,[177] uninformative 1L professor recommendations,[178] and interviews that occurred before a student was able to experience the bulk of law school. Students were, likewise, deciding whether to clerk so early in their law school careers that they probably did not know the alternative career paths available, what clerking entailed, or whether it was something they wanted to do two years from the date they applied for the position. This information deficit of both parties suggests that the unregulated hiring process was partially inefficient, and, at least to some degree, judges and students alike may make better decisions with the benefit of more perfect information.[179]

In fact, the improvement in the quality of decisions made by delaying the hiring process may not amount to much. Many judges contend

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ST. L.J. 2017, 2017 (1999) ("The judges themselves, through their cunning efforts to *undermine the rules that used to stifle competition*, have succeeded beyond their wildest dreams in creating a suitably unruly market in law clerks.") (emphasis added). *See also* Epstein, *supra* note 11, at 842 ("[Judges] seek to obtain the best clerks for themselves and have proven markedly resistant to various external efforts to regulate the market.").

175. *Prof'l Eng'rs*, 435 U.S. at 695.

176. Gary R. Roberts, *The NCAA, Antitrust and Consumer Welfare*, 70 TUL. L. REV. 2631, 2643 (1996) ("If holding down costs by the exercise of market power over suppliers, rather than just by increased efficiency, is a procompetitive effect justifying joint conduct, then section 1 can never apply to input markets or buyer cartels. That is not and cannot be the law.").

177. Blumenthal & Groner, *supra* note 123.

178. Cahill, *supra* note 9.

179. *See* Epstein, *supra* note 10, at 842 ("If all judges waited (say until the beginning of the third year) to select their clerks, then perhaps all could make marginally better decisions.").

they have no trouble hiring excellent clerks with little information.[180] As illustrative of some judges' sentiments, the Chicago-Harvard social scientists reported responses such as: "I get excellent clerks in the free market and I see no need for regulation;" "Free trade is the best. I do not believe the system is either chaotic or bad;" and "I have no problems and would be happy if nobody tries to impose rigid rules on me or anyone else."[181] It seems that either these judges identify outstanding clerks with little information or at least that their desire to complete the hiring process early leads them to believe they do. If the former is the case, then the information from a law student's second and third year is not as critical as proponents of the Hiring Plan claim, in which case there is no pro-competitive benefit gained by collectively delaying the hiring process. If the latter is the case, then by hiring early, those judges take themselves out of the market for law clerks, leaving objectively better candidates for their more cautious, late-hiring peers.

While additional information would lead to better decisions, experience with the unregulated hiring process proves that whatever is to be incrementally gained by waiting to hire is not worth the cost. That being the case, this justification for the Hiring Plan again collapses into the criticism that the decisions made by the free market are somehow unwise or untrustworthy. Arguments discrediting competition cannot support an otherwise anti-competitive practice, and thus cannot justify the Plan under the Rule of Reason analysis.[182]

In fact, none of the rationales offered in support of the Plan increases competition or the efficiency in the market for law clerk services. By reducing competition among judges for top-flight law clerks, and thus reducing the incident anxiety, the Plan makes the process appear more civilized and orderly. This benefit, however, is simply the benefit of not having to compete in a vibrant marketplace—a benefit the Sherman Act assuredly does not accommodate in the Rule of Reason analysis. Absent any other viable pro-competitive justification for the Plan, the Rule of Reason analysis ends, and it is unnecessary to consider whether the Plan is narrowly drawn or whether less restrictive alternatives exist to achieve

180. Avery, et al., *supra* note 4, at 873-75. Some judges conversely prefer to hire later than the typical hiring season. *Id.* ("I do not participate in the unseemly 'rush' of second-year law students. . . . I interview in May and June of the year preceding the Court year for which they are hired and find many qualified candidates." "There are always excellent candidates available even late in the year." "I have found many qualified candidates after the somewhat hysterical selection process undertaken by many appellate judges in the early spring." "There are plenty of outstanding applicants. I have always been 'behind the curve' in hiring but have always been able to secure wonderful people to fill these positions!").

181. *Id.* at 860-61.

182. *Ind. Fed'n of Dentists*, 476 U.S. at 459; *Prof'l Engrs*, 435 U.S. at 696.

the same results. The Plan disintegrates as its anti-competitive detriments outweigh its slight benefit. This result was anticipated, for there is no reason why collective action on the part of the appellate judiciary and the law schools is required to hire law clerks.[183] Judges, of course, remain free to impose any unilateral restriction they want, but to do it collectively is unjustifiably anti-competitive.

D. *Interstate Trade or Commerce*

Having concluded that the Hiring Plan constitutes an unreasonable restraint, the analysis concludes by ensuring that it affects interstate commerce. For an agreement to fulfill this element of the Sherman Act, it must have either a substantial economic effect on interstate commerce ("effect theory") or, if it involves only intrastate activities, those activities must substantially impact interstate commerce ("flow theory").[184]

Here, the Law Clerk Hiring Plan directly affects interstate commerce; after all, it fundamentally alters the way federal judges hire law clerks. This type of employer-employee relationship is the touchstone of all commerce. Judges are hiring employees who are vital to a well-functioning judiciary. To do so, judges receive applications from students all over the country; students travel between states to interview; and offers are generally transmitted using the interstate mails or wires. Likewise, professors and the law schools mail or e-mail thousands of letters of recommendation and student transcripts in support of these applications. If selected for one of these prestigious positions, judicial law clerks are (meagerly) salaried by the federal government and paid in interstate commerce. Granted, some clerks are hired to work in a judge's chambers within the same state, but the agreement—the relevant unit—pertains to all law clerk hiring, regardless of the location of applicant, law school, or judge. By altering this hiring process, the Plan directly affects the interstate market in labor for judicial law clerk services, including when applications are transmitted, when law schools release application packages, when interviews are held, who is interviewed, and, ultimately, who is awarded a position as a law clerk.

In addition, the job ultimately performed by those affected by the Hiring Plan—clerking for a federal judge—is fundamentally a job en-

183. *Linseman*, 439 F. Supp. at 1321 ("[T]here is no reason to believe that collective action is required by the industry structure in order to determine who should be permitted to play professional hockey.").

184. *See, e.g.*, McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 241–42 (1980); United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464 (1949); Mandeville Island Farms, Inc., v. Am. Crystal Sugar Co., 334 U.S. 219, 235–37 (1948).

gaged in interstate commerce. A clerk's job is to assist the judge in correctly deciding cases. Clerks write bench memoranda pertaining to cases originating in each state in the Circuit. Clerks also interact frequently with staff from other chambers located in different states and travel with their judge to hear arguments at the courthouses within the Circuit. Finally, the decisions reached in these cases affect the business and legal relationships of those engaged in commercial activity in every state in the Circuit.[185] Accordingly, under either the effect theory or the flow theory, the hiring of law clerks affects interstate commerce.

IV. HOPES AND PREDICTIONS

The Hiring Plan restrains trade by precluding a class of students from competing at a given time for an employment opportunity. No procompetitive justification counterbalances the Plan's pernicious effects, and thus the Plan fails the Rule of Reason analysis required by the antitrust laws.[186] Despite the Plan's early successes, we hope for and expect

185. Generally those engaged solely in the pursuit of education were not subject to the antitrust laws, because that pursuit does not encompass commerce. Marjorie Webster Junior Coll. v. Middle States Ass'n of Colls. & Secondary Sch., 432 F.2d 650, 654 (D.C. Cir. 1970) (holding that absent a commercial motive, process of accreditation is presumptively distinct from commerce). The Supreme Court has now, however, expressly eliminated any blanket exception to the antitrust laws for professional educational entities, learned professions, and professional associations. *See NCAA v. Bd. of Regents*, 468 U.S. at 98, 120 (rejecting under Rule of Reason the NCAA's television restrictions as a restraint that limits supply and increases price). Rather, if the educational institution engages in anti-competitive commercial conduct, even if the conduct has a public service aspect, it is not immune from the broad reach of the Sherman Act. Goldfarb v. Va. State Bar, 421 U.S. 773, 787 (1975). *See also Brown Univ.*, 5 F.3d at 666 ("Courts classify a transaction as commercial or noncommercial based on the nature of the conduct in light of the totality of the circumstances."); Ass'n for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577, 584–85 (D.C. Cir. 1984); *Jung*, 300 F. Supp. 2d at 157–58. In *Jung*, for example, a number of medical students sued the organizations and associations that administer the United States graduate Medical Match program as well as the universities, medical schools, foundations, hospitals and health systems that sponsor medical residency programs. *Jung*, 300 F. Supp. 2d at 125–27. The court held that, despite the educational nature of the defendants, the plaintiffs stated a cause of action against the seven organizations that operate and manage the national medical matching program. *Id.* at 161–62. Those organizations, the plaintiffs alleged, had restricted attempts by employers and applicants to withdraw from the Match, prohibited employment agreements between Match Program participants outside the Match, and required applicants to commit to any assigned position as a condition of enrolling in the Match. *Id.* The court also found that the suit could continue against the Association of American Medical Colleges ("AAMC"), who, the plaintiffs sufficiently alleged, "facilitate[d] the conspiracy by annually gathering and disseminating medical resident compensation information." *Id.* at 165. In *Jung*, the AAMC facilitated the Match by releasing salary information to its member organizations at yearly meetings; here, the law schools enforce the Hiring Plan by refusing to release transcripts, recommendations, and application packages until the deadline. *Id.* at 165–168.

186. The conclusion that the Law Clerk Hiring Plan is an unreasonable restraint of trade in

the expeditious return of the free market to the process for selecting law clerks. Certainly, we prefer the free market. We like the anxiety of a vibrant market, resplendent with each judge and student trying to outdo the other judges and students. We like the advent of the exploding and vanishing offer, and we appreciate the cagey students who learn to schedule interviews strategically and answer the telephone judiciously. Most of all, we like that all this can take place any time both parties want to begin the process.[187]

On the other hand, we cannot abide the cartel. Judges don't need it; they can unilaterally implement any requirement they want. The law schools disadvantage their own students by enforcing it, thus depriving students of the ability to leverage any advantage, whenever it arises, in securing a federal clerkship. We find that reprehensible.

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contravention of the policies underlying the Sherman Act, however, should not be mistaken for an endorsement of a treble damage antitrust action against any individual or organization. As a threshold issue, a plaintiff would have to demonstrate antitrust standing. To do so, a plaintiff must demonstrate that he has suffered the sort of injury that antitrust laws were intended to prevent and that he is the proper person to bring the suit because he has been directly harmed. Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489 (1977). Generally, in the context of employer-employee relations, antitrust standing has been granted to employees alleging injury suffered from an employer's concerted refusal to deal aimed directly at them or at the employment market in which they participate. *See Radovich*, 352 U.S. at 453–54 (reasoning that antitrust laws were enacted to protect victims of illegality); *Quinonez*, 540 F.2d at 827–28; *Nichols*, 371 F.2d at 334; *Clarett*, 306 F. Supp. 2d at 397–98. *See also Cesnik*, 490 F. Supp. at 864; *Freeman*, 390 F. Supp. at 688; Note, *Employee Standing Under Section 4 of the Clayton Act*, 81 MICH L. REV. 1846, 1859–60 n.72 (1983). Assuming a plaintiff might assert sufficient antitrust standing, the suit may still be dismissed based on the judges' or the law schools' immunity from suit. As an arm of the federal government, judges are probably immune from suit under the doctrine of sovereign immunity and possibly otherwise not amenable to suit based on certain statutory proscriptions embedded in the Sherman Act. U.S. Postal Serv. v. Flamingo Indus., 540 U.S. 736, 745 (2004) (holding United States not a person, and thus not amenable to suit under the Sherman Act, 15 U.S.C. § 7). State universities and their law schools, as arms of the State, are likely immune under the Eleventh Amendment. Parker v. Brown, 317 U.S. 341, 350–51 (1943); Walstad v. Univ. of Minn. Hosps., 442 F.2d 634, 641–42 (8th Cir. 1971) (holding university immune based on its status as an instrumentality of the State of Minnesota). Sovereign immunity, however, might not shield either the judges or the law school administrators in their individual capacities against an action for prospective, equitable relief. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689–90 (1949) (describing permissible class of suits against federal officials in their individual capacities where they are doing business in a way the sovereign has forbidden); *see also Ex parte* Young, 209 U.S. 123, 159–60 (1908) (establishing precedent to sue state official in his individual capacity). Finally, the Plan likely finds refuge in the unitary employer doctrine embodied by Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771–73 (1984). In *Copperweld*, the Supreme Court held that two subsidiaries, wholly owned by the same parent, are legally incapable of conspiring with one another for purposes of the Sherman Act. *Id.* The federal judges may likewise be considered akin to subsidiaries of the federal government and thus essentially one employer for the purpose of the antitrust analysis.

187. Epstein, *supra* note 10, at 844 (describing situation after 1990 Plan imploded. "Judges asked for applications and letters of recommendation when the[y] pleased . . . .").

Luckily, economic theory predicts the chaotic free market will re-emerge.[188] "Cartels do not work. People cheat. Judges cheat. Law schools cheat."[189] Judge Easterbrook concluded as much when he examined the demise of law clerk hiring plans of 1984 and 1990. After describing the plans, consisting of collectively agreed date and time restrictions, he wondered: "Could this cartel-like arrangement . . . prove stable over time? Standard economic theory predict[ed] that it would not."[190] Experience confirmed the theory. In 1984, as expected, the cartel unraveled in stages.[191] Initially, some judges, inconvenienced by the date and time restrictions, began to make exceptions "for cause;"[192] then others, hearing rumors of early action, became alarmed and also made inquiries and offers before deadlines.[193] When the appointed hour eventually arrived, many judges had already hired or committed to hire their full complement of law clerks. The remaining judges engaged in a mad scramble to complete the hiring process.[194] Unbridled chaos ensued, and "[t]he system quickly broke down" entirely.[195]

In 1990, the same scenario unfolded, except this time fewer judges agreed to abide by the date and time restrictions from the beginning.[196] "By the close of the 1990 hiring season, the partial system of hiring restraints had buckled, but had not cracked."[197] By 1991, however, "there were no signs of any of the prior restraints" and "word was quickly passed that all restrictions were off."[198]

Now, just as in 1984 and 1990, individual judges and students have strong incentives to "jump the gun" in order to "secure the best possible match."[199] This is especially the case if, as Professor Epstein postulated, "[f]ew judges think that further delay [past law review selection after the first year] . . . will yield more valuable information [about an applicant], [but] each fears that further delay will allow other judges . . . to cream off the best of the clerkship market."[200] These incentives to cheat on the agreed upon restraint multiply if one particular group of conspirators be-

188. Considerable anecdotal evidence suggests that more and more students and judges are ignoring the Hiring Plan and applying and hiring early.
189. Zywicki, *supra* note 8, at 239 (quoting comments drawn from surveys of judges).
190. Epstein, *supra* note 10, at 842.
191. *Id.* at 842–44.
192. *Id.* at 843.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 843–44.
197. *Id.* at 844.
198. *Id.*
199. *Id.* at 842–43.
200. *Id.* at 842.

lieve that others have achieved an unfair institutional advantage through the operation of the agreement.

Through the many successive iterations of Law Clerk Hiring Plans, there have been murmurs of dissent from judges who believe that regulation institutionally favors some of their colleagues. One common complaint is that regulation favors students and judges on the East Coast.[201] Non-East Coast judges grouse that East Coast judges gain an advantage because many preeminent law schools are located on the East Coast and thus students, faced with a compressed period in which to interview,[202] choose to interview preferentially with East Coast judges.[203] Indeed, it is a far easier day trip from Boston to Washington, D.C., than it is from Boston to Boise. It is also far easier for students to coordinate multiple interviews scattered along the eastern seaboard than it is to interview efficiently with judges in Seattle and Phoenix.[204] Judge Kozinski explains the logic behind his take on this complaint:

> For several years there were proposals to regularize the clerkship process by having judges hold off interviews until a particular date in the spring. By and large these dates had the widest support among judges on the east coast; judges in the mid-west and west objected on the ground that this would put them at a procedural disadvantage, or so they believed. The reason is simple: The dates selected for inter-

201. Carl Tobias, *Stuck Inside the Heartland with Those Coastline Clerking Blues Again*, 1995 WIS. L. REV. 919, 924, 928-29 (1995) (describing natural geographic advantage of the East Coast judges located close to some of the best legal markets in the country, and possible student perception that a job with one of these judges may improve the chances for a job in one of these well-paying markets at a prestigious law firm).

202. *Id.* at 923, 929 (arguing that the disadvantage wrought on non-coastal judges would not be as severe if the Hiring Plan allowed interviews over the summer before a student's third year of law school begins, instead of the second Thursday after Labor Day after a student's fifth semester has begun).

203. A review of the data compiled by Avery, et al., *supra* note 4, at 888 highlights the advantage possessed by East Coast law school students. Using a simplistic, school-to-school comparison, East Coast law schools seemed to place more students for clerkships at the courts of appeals than did their peer schools in the West and Midwest, even when those schools were higher ranked.

204. Becker, Breyer & Calabresi, *supra* note 33, at 220.

> It should come as no surprise that some judges have voiced displeasure with the March 1 arrangement. Much of the dissatisfaction is arrayed along geographical lines because of the perceived advantage held by judges on the East Coast. For example, a Texas judge complained that the *de facto* shortening of the interview period compounded the advantages of the East Coast judges, because so many top law schools and judges are concentrated on the East Coast. Apparently, judges in the Northeast corridor benefit from students' desire to schedule their initial interviews along the eastern seaboard where quick and inexpensive travel between chambers enables them to schedule multiple prime interviews in a short time frame.

Id.

> viewing fell during the time many law students were in school. This posed less of a problem for east coast judges, who are within an hour's plane ride of many top schools. For judges further away, it was a distinct disadvantage not to be able to conduct interviews during semester breaks when students could avoid missing two or three full days of classes. Similarly, students on the west coast felt a disadvantage in interviewing with judges on the east coast.[205]

Non-East Coast judges object to the Hiring Plan because by artificially structuring and reducing the interview period and thereby eliminating one of the few areas in which judges can distinguish themselves and the clerkship they offer, it compounds the natural advantages[206] already enjoyed by the East Coast judges.[207] Already disadvantaged by the concentration of many prestigious law schools in the East, certain Midwest and West Coast judges may decide that the Plan's restrictions are simply not in their best interest.

This perception that the Hiring Plan yields an unfair advantage to some of the conspirators, coupled with the inherent incentives to cheat on the agreement and the historic demise of all previous attempts to impose regulation of the law clerk hiring process, bodes poorly for the continued operation of the Plan. Some judges will incrementally defect because of their perception that they are disadvantaged. These judges will seek ways to entice better students to commit earlier to a clerkship. Indeed, we have already received widespread reports—isolated at first, but steadily growing—of judges, sometimes even with the help of law schools, receiving applications and interviewing students well before the Plan's start dates. This year, for example, some judges, particularly those on the Ninth and Tenth Circuits, began *interviewing* clerkships candidates in August 2006, a full month before the process was set to begin.[208]

205. Kozinski, *supra* note 2, at 1719.

206. Tobias, *supra* note 201, at 928–29.

207. Kozinski, *supra* note 3, at 1719 ("The problem with these reform proposals is that they tend to reinforce [patterns of judicial prestige] by decreasing the means by which less-favored clerkships can compete for desirable applicants.").

208. Since the inception of the Hiring Plan, there have been reports that one unintended consequence has been the hiring of more law school graduates as judicial clerks. *See e.g.*, Posting of Saul Levmore, Dean and William B. Graham Professor of Law, University of Chicago School of Law, to http://uchicagolaw.typepad.com/faculty/2005/10/timing_in_the_c.html (Oct. 12, 2005, 18:18 CST). This class of applicant is exempted from the strictures of the Hiring Plan and thus can apply at any time. By exempting a class of applicants from the date and time restrictions, the Hiring Plan unintentionally created an incentive and the means for judges to cheat on the cartel. Judges understandably want to complete the chaotic hiring process as efficiently as possible, which means, in part, all at the same time. Of course, judges already have every incentive to review the applications from law school graduates as soon as they are submitted in an effort to secure an excellent "clerk in the hand." But once the hiring process is underway, it is most efficiently completed immediately, instead of waiting for the artificial

Students, especially those with superlative academic records after their first year, should accelerate this process by applying to judges whenever it suits them. These students should not wait until the appointed deadlines; their GPA and class rank have no where to go but down. Students are also beginning to apply early in an effort to compete with law school graduate applicants, who are not bound by the Hiring Plan. Too many stories of coveted clerkships filled by graduates permeate law school campuses as law school students sat tight until the appointed dates and times of the Hiring Plan. As in 1984, this disintegration will snowball, and the system will quickly break down. Entropy will prevail.

Two aspects of the Hiring Plan, one more potentially daunting than the other, raise a concern that the reemergence of the free market may take longer this time. As discussed above, the law schools are enforcing the Hiring Plan by dissuading early letters of recommendation and embargoing official transcripts, thereby disrupting the proclivities of the free market. Even if judges would accept early applications, they could not receive them because of the laws schools' insistence on not releasing crucial information until the appointed hour. This type of extrinsic policing mechanism effectively counterbalances the predilections of conspirators to cheat on the agreement. Yet, here, the conspirators chose a weak third party to enforce the Plan. Economic theory predicts that the law schools will buckle under pressure from judges and students if they express desire for application materials early. What law school administrator is going to tell a court of appeals judge to wait patiently for a student's transcript until the day after Labor Day? And which law school would be so obdurate as to ignore the demands of their well-paying students, who insist on applying for clerkships whenever they are competitively positioned to do so? The law schools will yield precisely because it is in their institutional interest to provide the materials, as doing so makes it more likely one of their students will secure the clerkship. This very scenario has unfolded historically[209] and will likely recur eventually here.

OSCAR is potentially more difficult to circumvent. As conceived, it is the consummate efficiency-enhancing innovation. By loading all the application materials onto the Internet and allowing access immediately by anyone with the appropriate passwords, OSCAR puts an end to all the paper copies of transcripts, letters of recommendation and writing sam-

dates and times to kick in. So, as predicted, judges have begun to withdraw from the cartel, permitting 3L applications as early as June!

209. Epstein, *supra* note 11, at 844.

ples. It stops dead the hassle of mail merging judges' addresses onto countless manila envelopes, and it will save probably thousands of dollars a year in unnecessary postage expenses, not to mention space in the judges' chambers formerly reserved for banker's boxes filled with clerkship applications.[210] It is the quintessential pro-competitive innovation encouraged by the free market.

OSCAR, however, is fraught with an anti-competitive side. While judges, law schools, and students have distinct incentives to cheat, machines do not cheat. OSCAR is intended to supplant the law schools' function in compiling the clerkship applications and distributing to the judges. It can also be configured to allow access to the materials only upon the appointed hour.[211] In this way, OSCAR could become an even more effective, dispassionate cartel enforcement mechanism than the law schools. Even if OSCAR is configured this way, students could, of course, still compile a black market application and send it to various judges, but in doing so, both parties would have to forego the benefits of using OSCAR. But using OSCAR this way is pernicious and anti-competitive; instead, OSCAR should operate, as it was intended, like an electronic filing cabinet, providing access at any time to anyone with the correct password. If OSCAR were configured like an open-source filing cabinet, the scale might well tip the other direction, and it would hasten the disintegration of the Law Clerk Hiring Plan. Students would then apply at any time, and judges, when ready to review applications, would have them easily accessible. Although it may take longer than in the past to derail the Hiring Plan, the free market will prevail, and judges (and law schools) will eventually act again like frenzied, free-market profiteers.[212]

CONCLUSION

The federal Law Clerk Hiring Plan forecloses students before their third year of law school from applying for the position of judicial law clerk. Forged by the federal judiciary and the law schools, it is an

210. It is our understanding that the efficiency gains of OSCAR extend to allowing judges to search and order candidates by various criteria such as where they attended law school—an innovation that has sparked some concern that it might "accentuate reliance on traditional prestige factors to the detriment of non-traditional applicants." *See* Posting of Publius to http://www.judicialclerkships.com/forums/showthread.php?p=1296 (Mar. 27, 2005, 8:32 AM).

211. Judicialclerkships.com reported that OSCAR was used in the 2005 hiring season to allow access to applicant's materials "about noon EDT on September 7, 2005." Posting of Clerkship Guru to http://www.judicialclerkships.com/forums/showthread.php?p=1296 (June 6, 2005, 5:55 AM).

212. Epstein, *supra* note 11, at 844.

agreement in restraint of trade, and it violates the strictures of the Sherman Antitrust Act. The free market will again prevail, however, as inherent incentives to cheat on the agreement are multiplied by the emerging perception that the Plan favors some judges over others. We wait for that day.[213]

213. Posting of Clerkship Guru to http://www.judicialclerkships.com/forums/showthread.php?t=416 (Jan. 7, 2005, 5:19 PST).