

**USURY AND THE EFFICIENCY OF MARKET CONTROL
MECHANISMS: A COMMENT ON “USURY IN ENGLISH LAW”
REVISITED**

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**I. INTRODUCTION: THE UNCONTROLLABLE, UNPREDICTABLE
ECONOMY AND THE CREDIT MARKET**

Several happy circumstances here coincide. The Arizona Journal of International and Comparative Law, having developed into a fine and well-established review, observes its thirtieth anniversary by soliciting updates from those authors who appeared in its first issue. In our case, we are alive and vigorous enough to undertake the update, and hope that the ensuing decades have left us not only older but also wiser. Over the last thirty years, many things have changed, including the financial markets, their lending practices and the legal norms that regulate them, both in the United States and around the world. Not the least, double-digit interest rates prevailed when last we wrote under this title, and usury—or limits on interest rates—was a topic of heated debate. We had just finished supervising a major study of usury history, policy and regulation and had testified before the Arizona legislature as it became one of the few states to take off all controls on interest rates.¹ Today, borrowers enjoy by far the lowest interest rates in a generation. To use home loans as the standard, rates have gone from 12%–18%² then, to hover in the neighborhood of 3%–4% or even lower for several years now.³ There is not much discussion of usury now.

A generation ago, we wrote at a time when laws wrestled with market forces that seemed to have driven interest rates so high that they had to be capped to protect borrowers, to guarantee them access to credit at “reasonable” interest rates, at least in the minds of many legislators and policy makers.⁴ Today, usury controls to limit high interest rates have virtually ceased to occupy the public

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1. See William J. Boyes, et al., *Usury and the Monetary Control Act of 1980*, 1981 ARIZ. ST. L.J. 27–292 (1981).

2. See *30-Year Fixed Rate Mortgage Average in the United States*, FREDDIE MAC (May 9, 2013, 9:39 AM), <http://research.stlouisfed.org/fred2/data/MORTGAGE30US.txt>; *30-Year Conventional Mortgage Rate*, Board of Governors of the Fed. Reserve System (May 9, 2013, 3:31 PM), <http://research.stlouisfed.org/fred2/data/MORTG.txt>.

3. See *30-Year Fixed Rate Mortgage Average in the United States*, FREDDIE MAC (May 9, 2013, 9:39 AM), <http://research.stlouisfed.org/fred2/data/MORTGAGE30US.txt>; *30-Year Conventional Mortgage Rate*, Board of Governors of the Fed. Reserve System (May 9, 2013, 3:31 PM), <http://research.stlouisfed.org/fred2/data/MORTG.txt>.

4. Kimberly J. Graber, *Arizona Usury Laws*, 1981 ARIZ. ST. L.J. 111, 142–57 (1981) (in *Special Project: Usury and the Monetary Control Act of 1980*).

concern. In fact, many observers now question whether interest rates are too low.⁵ In the meantime, however, other practices by lenders have set off continuing waves of litigation,⁶ legislation,⁷ and public commentary crying for tighter regulation.⁸

Our 1982 article began with the following tradition, from eleventh-century England:

King Canute achieved such power that his followers told him that he was capable of controlling all events by his mere command. Wise Canute responded by taking his fawning advisers to the beach, where he commanded the ocean tide not to come in. Of course, the tide made its customary surge.⁹

We commented then:

Economic forces, like the tides, move according to their own rhythms and designs. However, unlike the tides, the market economy can be affected rather dramatically by the laws of man. And not all temporal powers have Canute's common sense; they often attempt to control events beyond their powers.¹⁰

Subsequent events have substantiated, through several cycles over the last thirty years, our strong respect for the market economy and the salutary effect that results when policies and laws respect it. In 1982, we identified four "immutable laws" that we felt apply to the "interplay between law and economic forces": 1) organized society inevitably attempts to correct aspects of the free market economy that it does not like by imposing legal controls on that economy; 2) when laws try to block the effects of free market forces, the attempt often fails,

5. See Anat Admati & Martin Hellwig, *Emperors of Banking have no Clothes*, BLOOMBERG.COM (Feb. 3, 2013), <http://www.bloomberg.com/news/2013-02-03/emperors-of-banking-have-no-clothes.html>.

6. See, e.g., Jessica Silver-Greenberg, *Mortgage Crisis Presents Banks a New Reckoning*, N.Y. TIMES, Dec. 10, 2012, at A1, available at http://www.nytimes.com/2012/12/10/business/banks-face-a-huge-reckoning-in-the-mortgage-mess.html?_r=0.

7. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 7 U.S.C., 12 U.S.C., 15 U.S.C., 18 U.S.C., 22 U.S.C., 31 U.S.C., and 42 U.S.C. (West, Westlaw, 2012).

8. See generally TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* (2000); ELIZABETH WARREN & AMELIA TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE CLASS MOTHERS AND FATHERS ARE GOING BROKE* (2003).

9. Dale Beck Furnish & William J. Boyes, *Usury and the Efficiency of Market Control Mechanisms: A Comment on "Usury in English Law,"* 1 ARIZ. J. INT'L & COMP. L. 61, 65 (1982).

10. *Id.*

and usually the market develops ways to achieve the same ends by covert or evasive means;¹¹ 3) the ebb and flow of market forces means that their pressure against legal constraints varies dramatically over time; and 4) predicting the ultimate effects of economic legislation is “always difficult, and frequently impossible.”¹² We now have a nice opportunity to reprise our analysis through the prism of interesting and eventful economic history, and to test whether we perceived accurately—both as to usury in particular, and as to economic regulation of market forces in general—or missed our mark.

In 1982, we felt that usury was “perhaps the best current example of economic legislation which attempts to stem the tide of the free market.”¹³ That assessment certainly does not apply today, when interest rates tend to attract little or no attention, unless it is to wonder at how cheap the price of credit is and how long it can last, or even how low it can go. Other aspects of financial markets, however, and of the economy in general, currently do raise heated discussion as to whether certain economic activities need legal controls, how much, and in what form. In 1982, Professor R. M. Goode endorsed rate disclosure and competition, two hallmarks of the free market system, to create an efficient credit economy.¹⁴ He further suggested that, in an England that had removed all limits on interest rates, credit markets also should be controlled by supervision of lenders through licensing, by establishing “a strong enforcement machinery,” and by exercising aggressive judicial review of lending practices to curtail exploitation of consumer borrowers.¹⁵

Our original article commented on Professor Goode’s, and we noted that we had the advantage of after-the-fact criticism then,¹⁶ as we took issue with some of his recommendations for best policies to regulate the credit market. Today, we have the task of measuring our own analysis against Professor Goode’s when the passage of time has removed our advantage; we look back at both articles, and Professor Goode becomes our after-the-fact critic, if only through his earlier article. In 1982, while we agreed that disclosure and competition would support a healthy and efficient credit market, we felt that supervision by licensing offered little meaningful control of lenders.¹⁷ It imposed costs that lenders would pass on to consumers by raising the price of credit.¹⁸ In the same vein, we opined that “strong enforcement machinery . . . should prove itself highly inefficient and almost totally ineffectual,” and again raise the price of credit by imposing another cost that borrowers ultimately would pay.¹⁹ Finally, we feared that consumers most in need of help from the judicial system would find access to that system

11. *See id.* at 65–66, 68–69, 76–78, and authority there cited.

12. *Id.* at 65–66.

13. *Id.* at 66.

14. R.M. Goode, *Usury in English Law*, 1 ARIZ. J. INT’L & COMP. L. 38, 59 (1982).

15. *Id.*

16. Furnish & Boyes, *supra* note 9, at 66.

17. *Id.* at 67, 72.

18. *Id.* at 72.

19. *Id.* at 67.

almost impossible,²⁰ and that any efficiencies brought about through the judicial system do not depend on adopting a calculated, normative approach,²¹ but on simply allowing the flow of litigation to wear the proper channels into the marketplace.²²

In this update to our original paper we will continue to argue that attempting to control interest rates—directly or indirectly—is folly. The interest rate is a price and, just as in any market, an attempt to control or fix prices leads to misallocation of resources and unanticipated negative effects. It leads to consequences that are more detrimental than any market-determined interest rates could be, to both the economy in general and to the individuals that central planners intended their controls to help. We feel that intervening years have provided new facts and new arguments to sustain our original points.

II. THE IMPERATIVE OF THE PRICE, OR MARKET, SYSTEM: ARGUMENTS AGAINST PRICE FIXING AND PROOF THAT IT DOES NOT WORK

In 1982, we summarized the law's treatment of usury "as a steady and salutary retreat from regulation,"²³ after noting that, "usury (in its proper legal sense of charging higher interest rates than those permitted by law) has triumphed over attempted controls whenever market forces have pushed the price of money beyond the legal limit . . . [C]ontrols have not defined the price of credit."²⁴ If anything, that assessment stands truer today, though usury laws still exist on the books in many places,²⁵ and could inhibit the market if the price of credit rises in

20. *Id.* at 67, 79, 81–83.

21. Such a predetermined policy runs against the proper judicial function. Courts simply accept those cases brought before them by litigating parties, and then resolve the dispute by applying the proper written law or judicial precedent. The courts cannot formulate general policies beforehand, since they act only in the context of a specific controversy framed by the parties to litigation. While U.S. (and U.K.) courts adhere to the rule of stare decisis, and profess to decide similar cases consistently with each other, courts avoid pre-judging hypothetical cases and reserve the expression of their judicial opinions for the written decisions they issue in each case.

22. See *Furnish & Boyes*, *supra* note 9, at 73–76, 78–82.

23. *Id.* at 74. We there relied on a much more extensive consideration of the history of usury regulation. See James M. Ackerman, *Interest Rates and the Law: A History of Usury*, 1981 ARIZ. ST. L.J. 61–110 (1981) (*in Special Project: Usury and the Monetary Control Act of 1980*).

24. *Furnish & Boyes*, *supra* note 9, at 68.

25. Perhaps the salient example in the United States was the Arkansas constitutional provision that limited interest rates for "general loans" to a maximum of five percent above the federal discount rate. ARK. CONST. art. XIX, § 13, *repealed by* ARK. CONST. amend. LXXXIX (2011) (West, Westlaw, 2013). While state restrictions still apply to such local consumer loans as those for used cars and other local consumer items, the federal Financial Services Modernization Act of 1999 permits a bank to charge the interest rate permitted by the bank's home state. 12 U.S.C. § 1831u(f)(1) (West, Westlaw 2013). See *Jessup v.*

the future, as it surely will. Even as interest rates move up, we anticipate no wholesale legislative attempts to hold them below market rates by imposing usury laws. Other controls on financial institutions and their practices may regulate the market in the name of allowing it to operate efficiently, but a groundswell movement to enact direct price controls seems unlikely.

A. The Predominance of the Allocation of Goods and Services by Price

The price, or market, allocation system predominates in most industrial societies today because it is generally the most efficient.²⁶ We recognize that no society can manifest a pure market system for all exchanges. Many medical services are provided on a first-come, first-served basis, rather than to those who would pay more. Registration for classes in schools is often allocated on a first-come, first-served basis. Highways and roadways typically serve first those travelers who come first. Governments allocate radio and television broadcast bands, land use (zoning), rights-of-way at intersections, and many other goods by criteria other than price.²⁷ Even luck—random allocation—determines the distribution of items such as concert tickets, lottery winnings and other contest prizes.

If the market system is such an efficient mechanism, why is it not universally relied on? One reason is that for some products people do not like the outcome of the market system. They don't think it is fair, or they prefer some other way, which appears to have greater social value, to allocate scarce goods and services. Second, the market system may not work the most efficient allocation when private property rights or ownership are not defined, as would be the case with the provision of national defense.²⁸ Third, in some circumstances, the market cannot function because a natural resource—a beach or a park, for example—is not privately owned but instead available for common use.

B. Government Price Controls on Goods and Services, and Market Allocation of Goods and Services by Equilibrium Costs

Absent one of the three exceptions that society may impose, price represents the best means of allocating goods and services in the marketplace, and

Pulaski Bank, 327 F.3d 682 (8th Cir. 2003); *Johnson v. Bank of Bentonville*, 269 F.3d 894 (8th Cir. 2001).

26. W. J. BOYES, *MANAGERIAL ECONOMICS, MARKETS AND THE FIRM*, 28–29 (2d ed. 2008).

27. See WILLIAM BOYES & MICHAEL MELVIN, *ECONOMICS*, 39–43 (9th ed. 2013).

28. See Jörg Guido Hülsmann, *Secession and the Production of Defense*, in *THE MYTH OF NATIONAL DEFENSE: ESSAYS ON THE THEORY AND HISTORY OF SECURITY PRODUCTION* 369, 408 (Hans-Hermann Hoppe ed., 2003), available at <http://mises.org/etexts/defensemyth.pdf>.

will assert itself against efforts to restrain its imperative mediation between supply and demand. A price ceiling would restrict prices from rising to their equilibrium level whenever that level is above the legal limit. Such a situation virtually always gives rise to covert or evasive means to increase prices to the equilibrium level, or otherwise circumvent the price ceiling. To cite one example, Los Angeles, San Francisco and New York are among more than 125 U.S. cities that have rent controls.²⁹ A rent control places a ceiling on the rents that landlords can charge for apartments.³⁰

But under the rent control regime, not everyone willing and able to rent the available apartments can do so. Since the price cannot ration the apartments, something else will have to. Perhaps those willing and able to stand in line the longest will get the apartments. Perhaps bribing the right official might procure an apartment. Perhaps relatives of officials and important citizens will get the apartments. Perhaps some owners will devalue their apartments by ignoring maintenance and services, so that the demand for those particular apartments goes down. Other owners may evade the rent controls and get a fair market price for their property by converting their apartments to condominiums and selling them off one by one, or they might sell the whole apartment building to a renters' cooperative, which takes over its operation, and whose members pay more to remain where they are and enjoy a well-maintained place to live. Whatever the form of evasion, however, whenever a price ceiling exists, a shortage results, and some rationing device other than price will arise.³¹ As the reader may have already discerned, the rationing devices often increase the costs to the purchaser up to the equilibrium price, albeit by another name.

Despite the market imperative, price ceilings are not uncommon features in the United States or in other economies. During the First and Second World Wars and during the Nixon administration in the early 1970's, the government imposed wage and price controls—in effect, price ceilings on important goods and services.³² Such price ceilings become fixed prices, since no one will charge less. Suppliers may pare back the amount of goods they offer, since they can reduce

29. BOYES & MELVIN, *supra* note 27, at 61; *Rent Control in the United States*, WIKIPEDIA, http://en.wikipedia.org/wiki/Rent_control_in_the_United_States (last visited May 12, 2013) [hereinafter *Rent Control in the United States*].

30. See *Rent Control in the United States*, *supra* note 29. The ceiling means that more people are willing and able to rent an apartment at the controlled price than there are apartments available. For instance, suppose at the rent control price of \$1,500 per month, 3,000 apartments are available, but 6,000 consumers would willingly pay that rent and take one of the apartments. There is a shortage of 3,000 apartments. In a free market, the monthly rental price would rise until only 3,000 consumers would and could pay it, establishing a price that created equilibrium between supply and demand.

31. See Walter Block, Joseph Horton & Ethan Shorter, *Rent Control: An Economic Abomination*, 11 INT'L J. VALUE-BASED MGMT. 253, 254 (1998).

32. *Incomes Policy*, WIKIPEDIA, http://en.wikipedia.org/wiki/Incomes_policy (last visited May 13, 2013); *How Gas Price Controls Sparked '70s Shortages*, WASH. TIMES (May 15, 2006), <http://www.washingtontimes.com/news/2006/may/15/20060515-122820-6110r/?page=all>.

their losses by selling less. As a result of the ceilings, many people were unable to purchase many of the products they desired. One visible example occurred with gasoline. When the Organization of Petroleum Exporting Countries (OPEC) agreed to restrict the quantity of oil, it drove the price up considerably. The U.S. government responded by placing a ceiling on gasoline, trying to keep its price below the market level.³³ The resulting shortage of gasoline at the pump led to long lines at gas stations as people waited to fill their cars, and often failed when supplies ran out. After several years, the government relented and gasoline again became easily available, at market prices.³⁴

Other governments have clung to price controls—and the market dysfunction they create—more steadfastly. China had a severe housing shortage for thirty years because it fixed the price of housing below equilibrium and kept it there.³⁵ Faced with increasingly unhappy citizens and well aware of the cause of the shortage, officials finally began to lift the restrictions on housing prices in 1985, and the shortage diminished.³⁶ In the same way, the former Soviet Union set fixed prices for all goods and services, usually below the equilibrium price, creating constant shortages.³⁷ Long queues became the only legal way to purchase food and clothing, always beset with the possibility that the wait could be futile if supplies ran out.³⁸

C. Usury Law Limits on Interest Rates: Triggers for Mechanisms of Alternative Compensation for Credit Providers

Usury laws impose a price ceiling on the cost of credit. Where the usury limit stands above the market price of credit—as it does now for most forms of credit—it has no effect.³⁹ But whenever the market price exceeds the usury limit, a shortage in the supply of credit exists, just as it would for any of the other goods and services referred to above.

33. See Christopher R. Knittel, *Transportation Fuels Policy Since the OPEC Embargo: Paved With Good Intentions*, AM. ECON. REV., PAPERS & PROC., May 2013, 1, 1.

34. *How Gas Price Controls Sparked '70s Shortages*, WASH. TIMES (May 15, 2006), <http://www.washingtontimes.com/news/2006/may/15/20060515-122820-6110r/?page=all>; Hugh Rockoff, *Price Controls*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (ed. David R. Henderson, 2d ed. 2007), available at <http://www.econlib.org/library/Enc/PriceControls.html>; Daniel Yergin & Joseph Stanislaw, *Nixon Tries Price Controls*, COMMANDING HEIGHTS, http://www.pbs.org/wgbh/commandingheights/shared/miniextlo/ess_nixongold.html (last visited May 13, 2013).

35. Anthony Xanxiang Gu, *Rent Control and Its Reform in China*, 34 N.Y. ECON. REV. 63, 63, 68–69 (2003).

36. *Id.* at 69.

37. See ROBERT L. SCHUETTINGER & EAMON R. BUTLER, *FOUR CENTURIES OF WAGE AND PRICE CONTROLS: HOW NOT TO FIGHT INFLATION* 77–80, 139–45 (1979).

38. See *id.* at 72, 78 n.5.

39. BOYES & MELVIN, *supra* note 27, at 63.

Usury refers to the interest that a lender charges against the amount loaned to the borrower. The interest rate becomes usurious if the rate exceeds some socially determined maximum, specified by law. As we traced in our article thirty years ago, by earliest traditions that amount might have been anything beyond the principal amount; the Torah and Q'uran ban charging any interest at all.⁴⁰ The early moral strictures against charging interest turned on the proposition that within a common people like the Israelites or the Arabs, loans go to someone who should be treated as a family member rather than an arm's-length borrower.⁴¹ Outside the community, however, Israelites could charge interest to Gentiles, and Arabs could charge interest to non-Arabs.⁴²

The traditional moral basis for usury—religious strictures against charging for loans within a close community sharing a common faith—broke down with the rise of commerce,⁴³ and the growing availability of profitable and relatively safe investments, although the debate over the propriety of charging interest continued for centuries.⁴⁴ Today, typically, usury takes the form of legislatively defined maximum permissible interest rates, operating on the assumption that some interest is appropriate. Adam Smith, for example, thought that no lender in the Great Britain of his time should have charged more than five percent on any loan, although Smith's maximum rate never became law.⁴⁵

40. Ackerman, *supra* note 23, at 72–73; Furnish & Boyes, *supra* note 9, at 68–72; Qur'ān, 2:275–79, 4:161.

41. Ackerman, *supra* note 23, at 64.

42. *See id.* As a result, because of the demand for loans, partnerships developed between Jews and Arabs for the purpose of lending. If the borrower were Jewish, the Arab made the loan; if the borrower were Arab, the Jewish partner handled the loan. In either case, the lender could charge interest, since he was not lending within the family of his people. Today, Muslim investors have no hesitation in investing in money lending operations in the United States or other markets outside their home markets. Dubai can become a major financial center and charge interest on loans by dealing with non-Muslim borrowers and investors.

43. Indeed, commercial societies before the rise of Christianity had allowed charging interest for loans. *See id.* at 65–71.

44. *See id.* at 73–85.

45. ADAM SMITH, *THE WEALTH OF NATIONS*, bk. II, ch. 4, para. 14 (1776). The last edition of Smith's classic, in 1789, left the usury passages unchanged. In Smith's lifetime, Jeremy Bentham took issue with him, arguing that there is "no natural fixed price" for credit, and that credit did not differ from other goods and services for which no fixed prices were set. *Observations on the Usury Laws*, N. STAR OR YORKSHIRE MAG., vol. 2, 368, 369 (1818). A number of subsequent economists, admirers of the author of *WEALTH OF NATIONS* and Smith's general economic philosophy, have found his views on usury inconsistent and perplexing. *See* Milton Friedman, *Defense of Usury*, *NEWSWEEK*, Apr. 6, 1970, at 79 (a salient example of such an expression of chagrin in the twentieth century). *See generally* GEORGE J. STIGLER, *MEMOIRS OF AN UNREGULATED ECONOMIST* (1988). On the other hand, Keynes often noted his support for usury laws and his general agreement with Smith on the subject. *See generally* JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* ch. 23 (1936).

Through the middle ages, secular moral objections arose, based on concerns that loans at interest exploited and impoverished the poorer, uninformed classes. Often propounded by religious scholars such as Luther, Calvin and other reformers, and based in scripture, this school of thought accepted interest-bearing loans in a proper commercial context.⁴⁶ Bentham, singular and universal in his thought, argued that the poorer, more marginalized classes had a better chance of comprehending the single dimension of interest rates than the multiple dimensions involved in factoring the quality of goods against their price.⁴⁷

Few legal regimes retain an absolute bar against interest today, but when they do, accommodations occur. Islamic law, with its scriptural prohibition against interest (or *riba*, an increase over principal), presents a good example.⁴⁸ Under the principles of Sharia, Islamic banks have developed the institution of *murabaha* as a means of respecting the prohibition while profiting from providing credit.⁴⁹ Under this system, rather than directly lend money to buy an item, such as a house or a car, the bank buys the item and then sells it to a third party at a prior mutually-agreed-on profit for the bank. The ultimate buyer then repays that price over time, with no interest per se. Since there is no Qur'anic injunction against reselling at a profit, the operation may compensate the bank for the time value of its money and the risks associated with lending. Similarly, financing leases, called *ijara wa iqtinaa'*, permit a bank to buy an item (often a house) and lease it to a third party, who takes an option to purchase the item at the end of the lease.⁵⁰ Again, the bank charges no interest but nonetheless makes a profit since the lessee-buyer pays the bank more than the price at which it bought the leased item.⁵¹

46. See Ackerman, *supra* note 23, at 72, 77–79.

47. See *id.* at 83–84.

48. See QUR'AN, 2:275–279, 3:130, 4:161, 30:39. Muhammad also listed *riba* as one of the seven heinous sins (*Al-Saba al-Mubiqat*) in his final sermon. See generally Mohammad Nejatullah Siddiqi, *RIBA, BANK INTEREST AND THE RATIONALE OF ITS PROHIBITION* (2004), available at http://www.globalwebpost.com/farooqm/study_res/i_econ_fin/nejatullahs_riba.pdf.

49. See *Murabaha*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/murabaha.asp#axzz2FQseywhk> (last visited May 13, 2013). One of the distinctions between *murabaha* as an “acceptable form of credit sale” and an “interest-bearing loan”—which would violate the *riba* prohibition—is that in a *murabaha* transaction “if the buyer is late on their payments, the intermediary cannot charge any late penalties.” *Id.*

50. Peter Koh, *The Shari'ah Alternative*, EUROMONEY (Oct. 2002), <http://www.euromoney.com/Article/1002919/BackIssue/50042/The-Shariah-alternative.html>.

51. See Patrick O'Gilfoil Healy, *For Muslims, Loans for the Conscience*, N.Y. TIMES, Aug. 7, 2005, at sec. 11, p. 1.

D. Negative Distortion of Interest Rates

Our discussion of usury laws addresses price ceilings—restrictions that don't allow prices to rise to the natural or market level. As we noted at the beginning of this article, since the early 1990s, usury laws have had little or no effect, as the monetary authorities have held down interest rates, keeping them well below any legally established interest ceilings.⁵² This approach troubles the market system in a different way. Interest rates are being set and kept down not by fixing the price directly, but by manipulating the money supply and other mechanisms available to the government to keep interest rates preternaturally low.⁵³

Prices play a critical role in allocating resources by signaling the relative scarcity of resources. When prices are distorted—up or down, by whatever instrumentality—they misallocate resources. Monetary policy distorts relative prices, particularly inter-temporal prices. Interest rates are the time value of money—the intertemporal relative price. When this price is distorted, it tends to lead to too much saving and not enough investment or too much consumption and not enough saving.⁵⁴ For instance, when the return to saving is forced down, then spending increases and resources that would have been available in the future are consumed today.

The smooth operation of markets depends on flows of reasonably accurate information. In a market economy, prices signal to buyers and sellers, consumers and producers, the relative importance of goods and services in the economy.⁵⁵ The interest rate signals the relative importance of different assets and debt in the economy.⁵⁶ But, monetary policy alters the signals and distorts the allocation of resources. A policy of economic stimulation and/or price stabilization is an attempt to depress money rates of interest below the natural or equilibrium rate.⁵⁷ The equilibrium rate of interest renders the plans of savers and investors compatible, but a policy of stabilizing consumer prices or stimulating borrowing and spending by holding the interest rate down renders the plans of savers and investors incompatible. Such a policy can inflate asset bubbles or drive

52. See *supra* note 3 and accompanying text. See generally MATTHEW SHERMAN, A SHORT HISTORY OF FINANCIAL DEREGULATION IN THE UNITED STATES (2009), available at <http://www.cepr.net/documents/publications/dereg-timeline-2009-07.pdf>.

53. See Allan Sloan, *The Fed's Big Dollar Gamble*, CNNMONEY (Feb. 4, 2013, 5:00 AM), <http://finance.fortune.cnn.com/2013/01/16/dollar-trade-war/>.

54. See G. R. Steele, *Austrian Business Cycle Theory, Keynes's General Theory, Soaring Wheat Prices, and Subprime Mortgage Write-Downs*, 11 Q. J. AUSTRIAN ECON. 119, 122 (2008), available at http://mises.org/journals/qjae/pdf/qjae11_2_4.pdf.

55. Friedrich Hayek, who received the Nobel prize in economics in 1974, wrote that “we must look at the price system as . . . a mechanism for communicating information.” F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. R. 519, 526 (1945).

56. See BOYES & MELVIN, *supra* note 27, at 195.

57. Roger W. Garrison, *Natural Rates of Interest and Sustainable Growth*, 32 CATO J. 423, 427–28 (2012), available at <http://www.cato.org/sites/cato.org/files/serials/files/cato-journal/2012/7/v32n2-15.pdf>.

investment booms.⁵⁸ The investment boom or asset bubble thus created is unsustainable, however, and eventually the bubble bursts. This is what happened with the dot.com bubble in late 1990s⁵⁹ and the housing bubble of 2005–2008.⁶⁰

The cause of bubbles is always easy money and low (or even negative) real interest rates; buyers become willing to pay more because they have plenty of money or can get credit at very low rates.⁶¹ The price of an asset departs from its fundamental value, leading to a larger and larger distortion of the allocation of resources.⁶² Driving the interest rate down thus distorts markets as much as an effective usury ceiling on interest rates during a period of rising interest rates. Over the course of the dot.com boom and bust, too much capital was allocated to entrepreneurs in the technology sector; during the housing bubble, too much capital was allocated to housing and real estate.⁶³

Over the course of a bubble, a bloated financial services sector grows at the expense of industrial capacity and nonfinancial services.⁶⁴ During the housing bubble, people built and bought too many houses.⁶⁵ The excess housing stock did not constitute “more” capital, usable elsewhere, but instead was a malinvestment, neither driven nor justified by market forces.⁶⁶ Today, in the midst of the quantitative easing (QE1, QE2, QE3, etc.) by the Federal Reserve that puts more money in circulation and available to loan as credit, debt is rising much more rapidly than would otherwise be the case, if the market allocated debt with existing money supplies.⁶⁷ Today, low interest rates set below the market by the government through the Federal Reserve System misallocate resources among assets and debts.⁶⁸

58. See JANE DOKKO, ET AL., *MONETARY POLICY AND THE HOUSING BUBBLE I* (2009). DOKKO, ET AL., however, merely point out this position, and actually hold the opposite view: “In contrast, we provide evidence that monetary policy was . . . *not* the primary contributing factor to the extraordinary strength in housing markets. The relationship between interest rates and housing activity simply *is not strong enough to explain* the rise in residential investment or house prices.” *Id.* at 2 (emphases added).

59. See *Dot-com Bubble*, WIKIPEDIA, http://en.wikipedia.org/wiki/Dot-com_bubble (last visited Apr. 15, 2013).

60. See *Real Estate Bubble*, WIKIPEDIA, http://en.wikipedia.org/wiki/Real_estate_bubble (last visited Apr. 15, 2013).

61. See generally ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE* (2d ed. 2006).

62. See generally *id.*; see also Steele, *supra* note 54, at 121.

63. See Jeff Holt, *A Summary of the Primary Causes of the Housing Bubble and the Resulting Credit Crisis: A Non-Technical Paper*, 8 J. BUS. INQUIRY, 120, 126 (2009) available at <http://www.uvu.edu/woodbury/jbi/volume8/journals/SummaryofthePrimaryCauseoftheHousingBubble.pdf>.

64. Robert Murphy, *Did the Fed Cause the Housing Crisis?*, MISES DAILY, Apr. 14, 2008.

65. *Id.*

66. *Id.*

67. *Id.*

68. See Robert Jackson Smith, *Government Is Doing Something! (It's Misallocating Resources)*, INFLATIONOMICS, <http://www.inflationomics.com/article/Government%20is%20Doing%20Something.htm> (last visited May 14, 2013).

III. ARIZONA'S USURY LAWS IN 2012

Our home state of Arizona gives us an excellent picture of laws regulating interest rates today, and how they got there in the time since we wrote the article thirty years ago. As a state with a significant, sustained population increase, Arizona must attract imported capital to finance its growth. Curiously, the state today has virtually the same usury law enacted by its territorial legislature in 1864, presumably at a time when the desire for growth mirrored that at the beginning of the twenty-first century. How we got there is worth recounting; it presents in microcosm the policy debate on usury and the imposition of interest rate ceilings, and how that debate played out in the legislature of a polity sensitive to the cost of credit.

A. Historical Summary: 115 Years of Usury Laws in Arizona

In 1864, Arizona's territorial law set a "legal rate" for interest at ten percent,⁶⁹ but allowed agreements in writing to specify "any rate of interest whatever," in effect removing all controls.⁷⁰ From that beginning, the history of Arizona usury legislation between territorial days and today reflects wild fluctuation in policy. The legislature tinkered with regulation of interest rates constantly over the next century, before settling on a policy unchanged since 1980—one that seems set for the duration.

For a long time, Arizona territorial and state law kept the basic approach of setting a general usury rate, but one subject to override by written agreement between borrower and lender. The territorial legislature dropped the legal rate from 10% to 7% in 1887,⁷¹ and then to 6% in 1901,⁷² with no limit on contract rates in either law. In 1909, the last territorial legislature before statehood set the first ceiling for contract rates, 12%, while retaining the general 6% legal, or default, rate.⁷³ At least one commentator felt that the legislators meant the rate ceiling to discourage immigration to the new state, while another posited that it may have signaled "more 'civilized' attitudes accompanying impending statehood."⁷⁴ In any case, for the next seventy years the state maintained its dual approach of setting a general legal rate, but permitting a maximum contract rate

69. THE COMPILED LAWS OF THE TERRITORY OF ARIZONA: 1864–1877 ch. 65, sec. 1 (John P. Hoyt ed., 1877).

70. *Id.* sec. 2.

71. REV. STAT. ARIZ. TERRITORY tit. 38, §§ 1–2 (paras. 2161–2162) (Mar. 10, 1887) (Cameron H. King et al. eds., 1887).

72. REV. STAT. ARIZ. TERRITORY tit. 37, sec. 1 (para. 2774) (1901).

73. Act of Mar. 18, 1909 to Amend Paragraph 2774, Title 37, of the Revised Statutes of Arizona, 1901, secs. 1–2.

74. See Graber, *supra* note 4, at 124 n.89 and accompanying text.

above that; the legal rate stayed at 6%, while the maximum contract rate dropped to 10% in 1913,⁷⁵ then to 8% in 1933,⁷⁶ where it stayed until 1969.

The basic rule persisted in the statutes while Arizona's population boomed after World War II, but only because it gradually became "more . . . a residual provision than . . . a basic norm."⁷⁷ Exceptions so riddled the law that it had turned into "a labyrinthine maze in which virtually every common loan was subject to a special and exceptional regime,"⁷⁸ with limits ranging from 6% to 36%.⁷⁹ Every exception freed lenders to charge higher interest rates for a specific type of loan.

Thus, Arizona bit by bit patched together a complicated, incoherent set of usury laws, whose overall effect was to set ceiling rates comfortably above the market. Nothing truly tested the system. Whenever the market pushed against an existing usury control, the legislature reacted by adjusting the rate for the specific type of loan affected, easing that pressure point. As Arizona entered the decade of the 1970s and ever more rapid growth, the state's patchwork usury laws proved unequal to the economic storm they had to confront. The legislature could no longer apply a quick patch and stop a pressure point; the whole system was leaking.

B. Economic Upheaval in the 1970s: Its Effects on Arizona Usury Laws

When money became generally tighter as the market drove up interest rates in 1969, Arizona's legislature responded by bumping the contract rate back up to 10%.⁸⁰ It was not enough; the market pressure on interest rates had just begun. By 1974, interest rates again had overtaken the statutory ceiling and the legislature increased the basic contract rate to 12%, but attempted to fine tune the increase. The reformed law permitted the 12% rate on loan contracts for over \$25,000, but limited home mortgages to a 10% maximum rate.⁸¹ The differential tried to protect home buyers by keeping the cost of residential credit lower, a true price control against the market. It didn't work; residential credit began to dry up

75. REV. STAT. OF ARIZ. 1913, tit. 25, paras. 3505–3506 (Samuel L. Pattee ed., 1913); REV. CODE OF ARIZ. ch. 37 § 1883 (F. C. Struckmeyer ed., 1930).

76. Act of Mar. 14, 1933, ch. 44, sec. 1, 1933 ARIZ. SESS. LAWS 174, 175 (codified at ch. 37, § 1883).

77. Graber, *supra* note 4, at 128.

78. *Id.* at 131.

79. *See id.* at 131–32, tbl.6.

80. Act of Apr. 12, 1969, ch. 79, secs. 3–4, 1969 ARIZ. SESS. LAWS 179 (codified as amended at ARIZ. REV. STAT. §§ 44-1201–1202 (amended 1974)).

81. Act of May 7, 1974, ch. 94, secs. 1–2, 1974 ARIZ. SESS. LAWS 298–99 (amending A.R.S. 44-1201 and 44-1202) (codified at ARIZ. REV. STAT. §§ 44-1201–1202 (amended 1978)).

in a state experiencing steady, high population increases from immigration.⁸² In 1978, the legislature restored a single contract usury rate, at 12%.⁸³

Upheavals continued to shake the credit market (and the economy) throughout the 1970s, and—driven by Federal Reserve Board monetary policy—interest rates soon passed 12%.⁸⁴ In late 1979, with the prime interest rate approaching 16%,⁸⁵ the Arizona legislature hastily met to reform its embattled maximum interest rates yet again. The emergency sessions provoked spirited debate for more than a month, and resulted in moving the maximum rate to 18%, wishfully mitigated by another special ceiling of 16% for home mortgages.⁸⁶ The legislators hoped that they had set levels safely above the market's high water mark. In just three months, however, the market carried interest rates past Arizona's new ceilings again.

C. Free Market Ascendant: Arizona's 1980 Abandonment of Usury Limits on Credit

As their first order of business in 1980, Arizona's legislators turned to the same problem with which they had just wrestled in special session, the policy debates surrounding usury fresh in their minds. Perhaps its repeated consideration of the matter for over a decade had educated and sharpened the Arizona legislative mind. Its lawmakers certainly had learned the lessons that (1) Arizona relied on attracting capital infusions from outside the state to continue its development and growth; (2) market forces could render legally-fixed interest rates ineffective by exceeding them, and cutting off the supply of credit; and (3) that they could fix no maximum interest rate guaranteed to always exceed the market.

In many ways, the consideration of usury laws under pressures that placed the continued viability of Arizona's economy at risk brought clearer vision and consideration of the full policy ramifications involved. For decades, as it patched together its complicated scheme of rules and exceptions on usury,

82. See, e.g., *State and County Quickfacts: Arizona*, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, <http://quickfacts.census.gov/qfd/states/04000.html> (last updated Mar. 14, 2013) ("Population percent change, April 1, 2010 to July 1, 2012 2.5%.")

83. Act of June 7, 1978, ch. 186 secs. 4–7, 1978 ARIZONA SESSION LAWS 559, 561–62 (amended 1979).

84. *Prime Interest Rate History*, FEDPRIMERATE, http://www.fedprimerate.com/wall_street_journal_prime_rate_history.htm (last visited May 13, 2013).

85. *Id.*; see also BD. OF GOVERNORS OF THE FED. RESERVE SYSTEM, 67TH ANNUAL REPORT 14 (1980), which reported a prime interest rate of 15.75% for this time period.

86. Act of Dec. 14, 1979, Thirty-fourth Arizona Legislature, 2d Special Session, ch. 2, secs. 9(3)–(4), 1980 ARIZ. SESS. LAWS 1076, 1081 (repealed 1980). This act also set different maximum interest rates for a number of special loans including those for new and used automobiles; installment under \$5,000; revolving and check accounts; and retail installment sales of mobile homes. *Id.* secs. 8, 9(2), 9(5), 17, 1980 ARIZ. SESS. LAWS 1080–83, 1085–86.

Arizona had created a disorderly vessel for its credit market. The basic concept of “interest” had taken on five different methods used to compute interest and two methods of loan prepayment, with significant differences in their costs, making it difficult to calculate the rate on a given loan.⁸⁷ Over the years, recurring lawsuits—probably filed “when the borrower encounters financial difficulties which prevent it from paying the loan back in the normal course of events”—had invoked the usury defense, and Arizona’s court decisions had added further gloss and complexity to the already complicated legal regime.⁸⁸ When economic conditions tried the Arizona system, it revealed the structural weaknesses that made it unworkable. Reform became imperative. More important, legislators now realized that Arizona’s legal contraption composed of multi-layered laws, varied forms of calculating interest, and judicial refinements could not sustain credit operations in the state. They needed to scrap the old system and construct a completely new model.

The task was not easy, although the ultimate solution was simple. In March, 1980, Senate Bill 1352⁸⁹ proposed doing away with all usury ceilings and leaving credit to the open market.⁹⁰ Debate raged over the next month.⁹¹ Many legislators still felt usury limits were necessary to protect borrowers and police lenders,⁹² but at the end the majority vote favored the conclusion best expressed by the Chairman of the Senate Judiciary Committee: “the bottom line is that usury rates are price controls, and price controls don’t work.”⁹³

The new law cleaned up Arizona’s scheme from the top to the bottom, beginning by returning to the original territorial standard of a 10% legal rate, “unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to.”⁹⁴ Multiple special rates for specified types of loans were scoured out of the laws, thereby removing the usury limits applicable to them,⁹⁵ with the exception of pawnbrokers and small loans under \$10,000 (renamed “consumer loans”),⁹⁶ for which fixed rates and other regulations continued to apply.

87. See Graber, *supra* note 4, at 111–22. But “the basic concepts involved in interest calculations are generally simple.” *Id.* at 111.

88. *Id.* at 140; *see id.* at 132–40.

89. S.B. 1352, Thirty-fourth Ariz. Legislature, Second Regular Session, ch. 200 (Apr. 23, 1980) (enacted), 1980 ARIZ. SESS. LAWS 567–79.

90. See Graber, *supra* note 4, at 147.

91. *Id.* at 147–49.

92. *Id.* at 147–48.

93. *Id.* at 148.

94. S.B. 1352, Apr. 23, 1980, ch. 200, sec. 9, 1980 ARIZ. SESS. LAWS 573 (codified at ARIZ. REV. STAT. ANN. § 44-1201(A) (1980)). The statute did retain a formal usury provision, against charging anything above “the maximum permitted by law.” *Id.* § 44-1202.

95. Graber, *supra* note 4, at 150–53.

96. A new, separate law passed during the same session set up a detailed scheme for such loans. See Act of Apr. 26, 1980, Thirty-fourth Ariz. Legislature, Second Regular Session, ch. 252, 1980 ARIZ. SESS. LAWS 1012–18 (codified at ARIZ. REV. STAT. ANN. §§ 6-

Perhaps most confirming of the legislative purpose to return to a free market in credit rates, “the legislature properly removed lenders’ hedges and escape devices, leaving a unitary market in which borrowers can more effectively compare interest costs.”⁹⁷ For example, one carefully crafted provision required more straightforward, simplified calculation of interest, abolished the time-price doctrine and prohibited forms of front-loading interest like the Rule of 78ths.⁹⁸ In effect, the law also wrote out of the picture many of the judicial applications of previous rules.

While Arizona’s legislature wrestled with the question of interest rates in 1980, so did the United States Congress. The resulting omnibus federal act preempted state laws in favor of a national scheme imposing some regulation on interest rates for mortgages and business and agricultural loans over \$1,000.⁹⁹ The federal law—set to sunset after three years—then provided that states could opt out of the federal scheme and re-impose their local legislative will, be it interest rate limits or no limits whatever.¹⁰⁰ Arizona should have reiterated its abolition of usury limits on interest rates to make them effective between 1980 and 1983, but did not bother. Apparently the Arizona legislature never felt any temptation to tinker with its law, and simply let matters play out under federal control. Economic conditions remained problematic and interest rates remained high well into the late 1980s. When the federal statute expired in 1983, Arizona’s statute again became effective to abolish all limits on interest rates. The law sits untouched on the books thirty-three years after it passed.

D. One Indicator of a Free Market for Interest Rates: The Lack of Judicial Intervention

Usury litigation, once so frequent and diverse, has become rare and limited in its focus. Today, the Arizona courts essentially play no part in the regulation of interest rates. Tellingly, since 1980, only one significant case in Arizona has argued that the lender should forfeit all interest for charging a usurious rate, under A.R.S. § 44-1202. It illustrates the unlikely basis for such litigation under existing statutes, which permit any interest rate that the parties agree to in writing. A debtor must somehow demonstrate that the interest rate in question—which can never be inherently improper, because any rate is permissible so long as the parties agree to it in writing—somehow exceeds the

601 et seq., repealed by Laws 1997, ch. 248, § 2 (Ariz.), codified at ARIZ. REV. STAT. ANN. §§ 6-601 et seq. (1997)).

97. Graber, *supra* note 4, at 149.

98. ARIZ. REV. STAT. ANN. § 44-1205(A)(1) (West, Westlaw 2013).

99. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132, § 501 (codified as amended at 12 U.S.C. § 1735f-7a (1980)).

100. *Id.*; see Graber, *supra* note 4, at 150 n.285, 198–209; Ralph Jay Wexler, *Federal Control Over the Money Market*, 1981 ARIZ. ST. L.J. 159, 249–73, esp. 269–73 (1981) (*in Special Project: Usury and the Monetary Control Act of 1980*).

rate agreed to in the parties' written agreement. Nonetheless, the ever-varying events of commerce provide a source of circumstances for inventive counsel to try the daunting task.

In *S & N Equipment Co. v. Casa Grande Cotton Financing Co.*, the lender made a crop production loan to a cotton grower for three years, 1988–1991.¹⁰¹ When the grower went bankrupt, it tried to escape the interest portion of its \$3 million loan debt by arguing that the lender had charged more than the rate of interest “contracted for in writing” by imposing losses on the borrower’s sale of cotton seed by-product by obliging the borrower to process its cotton at the lender’s cotton gins.¹⁰² This arrangement gave the lender a first option to purchase the borrower’s cotton seed at close to market price.¹⁰³ The borrower argued that had it been able to process its cotton at competing cooperative gins, it would have made \$200,000 more by selling its cotton seed in bulk with that of the co-ops’ other customers.¹⁰⁴ Presumably, the lender got the benefit of a reduced price on the borrower’s seed, thereby allegedly creating a hidden interest charge for which the parties had not contracted.

The debtor’s argument in *S & N Equipment* is at best a creative reach. Bankruptcy, however, tends to give rise to extreme arguments by debtors who literally have nothing to lose. Here, S & N sought to convince the court that because the contract had not specified the borrower’s lost profit on its cotton seed as interest, the lender had charged more than “the maximum permitted by law,” and therefore should forfeit all interest under A.R.S. § 44-1202.¹⁰⁵ Such a construction of A.R.S. § 44-1201 seems doubtful, because parties may contract for any interest rate, and in *S & N Equipment* the written contract included the borrower’s obligation to process its cotton through the lender’s gin, thus indicating the parties contemplated a loss of profit to the borrower from the arrangement.

Nonetheless, finding tenuous support for such an argument in a 1990 Arizona state court decision,¹⁰⁶ the Federal Court of Appeals recognized two

101. *S & N Equip. Co. v. Casa Grande Cotton Fin. Co.*, 97 F.3d 337, 339 (9th Cir. 1996).

102. *Id.* at 341.

103. *Id.* at 340.

104. *Id.*

105. *Id.* at 341.

106. *Wieman v. Roysden*, 166 Ariz. 281, 802 P.2d 432 (App. 1990), a doubtful precedent at best. The maker of a note that provided for three percent monthly interest and ten percent per annum after default filed a lawsuit claiming the monthly rate after default. *Id.* at 282, 283–84, 802 P.2d at 433, 434–35. Maker answered with a “common law” usury defense, stated extremely inartfully and without focus, and at trial suffered sanctions for bad faith pleading under ARCP 11. *Id.* at 285, 802 P.2d at 436. On appeal, the court reversed, finding that a colorable usury defense could be found in that payee’s complaint had departed from the contract terms, sufficient to overturn the finding of bad faith pleading. *Id.* Thus, it did not find grounds for a forfeiture of interest under § 44-1202, but at the same time appeared not to reject the theory that such a forfeiture might occur under the statute in proper circumstances properly pleaded.

possibilities: 1) the ginning requirement might form an agreement collateral to the loan, which could constitute additional interest if it were not supported by “adequate and commensurate consideration;”¹⁰⁷ or 2) the ginning requirement might involve services related to the loan, which could constitute additional interest if their price were “unreasonable.”¹⁰⁸ In *S&N*, the court found that in fact borrower had received a price for its cotton seed falling within the “range of reason” when compared against the market price for cotton seed for the three years in question, even though the cooperative gins had been able to sell cotton seed for more.¹⁰⁹ Thus, the court cautiously accepted the borrower’s argument that proper facts might constitute charging interest above that contracted for in writing, and then decisively found no facts in the case to support that theory.¹¹⁰ No other reported cases have sought to nullify all interest under A.R.S. §§ 44-1201 and 1202 since.

The most litigated matter under the Arizona usury statutes in recent years, raising no issue as to the interest rate charged, is the question of when interest begins to run under A.R.S. § 44-1201. A continuing number of cases deal with that question, which is essentially an accounting matter.¹¹¹ Another notable case decided that legal interest of 10% did accrue on a mechanic’s lien, when the United States confiscated an airplane used in drug trafficking by taking it from the mechanic who had repaired it but had not received payment.¹¹² Again, this case decided a fringe issue, demonstrating how little the statute intrudes on the free market for credit and interest rates. Thus, today and for the foreseeable future, the role of the Arizona judiciary in policing interest rates appears negligible. The free market and party autonomy in drafting loan contracts determine interest rates, untrammelled by legislative restrictions or judicial precedent.

107. *See* *Sulger v. Maslin*, 90 Ariz. 70, 71, 365 P.2d 1113, 1114 (1961).

108. *S & N Equip.*, 97 F.3d at 341.

109. *Id.* at 342–43.

110. *See id.* at 341 (stating, “While we assume for purposes of this decision that the transactions would be usurious if the ginning agreements were not fair and reasonable, we conclude that *S & N* has not raised a genuine issue of material fact as to the usury issue.”)

111. *See, e.g.*, *Collins v. D. R. Horton, Inc.*, 361 F.Supp.2d 1085 (D. Ariz. 2005), *aff’d* *Collins v. D.R. Horton, Inc.*, 505 F.3d 874 (9th Cir., 2007), *cert. denied* 552 U.S. 1285 (2010) (arbitration award); *DKI Corp./Sylvan Pools v. Indus. Comm’n of Ariz.*, 173 Ariz. 535, 845 P.2d 461 (1993) (workman’s compensation award); *Dos Picos Land Ltd. P’ship v. Pima Cnty.*, 225 Ariz. 458, 240 P.3d 853 (App. 2010), *cert. denied* 132 S.Ct. 250 (2011) (liquidated claims); *Alley v. Stevens*, 209 Ariz. 426, 104 P.3d 157 (App. 2004) (child support).

112. *U.S.A. v. 1980 Lear Jet Model 35A, Serial No. 277*, 38 F.3d 398 (9th Cir. 1994), *superseding* 25 F.3d 793 (9th Cir. 1994).

IV. CONCLUSION: ARIZONA PARTY AUTONOMY ON INTEREST RATES—A PERMANENT FREE-MARKET SOLUTION

We feel vindicated in our judgments as stated thirty years ago in this journal. Competition among lenders is strong, and disclosure of terms and conditions of loans seems open. Neither specified price ceilings on credit in the form of maximum permissible interest rates, nor extensive licensing of lenders, nor strong enforcement machinery (in a credit marketplace where there is little to enforce),¹¹³ nor aggressive judicial intervention to impose fairness and protect consumers have succeeded in regulating interest rates in Arizona. Today, the state continues to be one of the country's most dynamic areas of growth and development, and it attracts a steady stream of investment and credit capital that fuel that growth and development, unhampered by usury statutes that place a ceiling on interest rates.

Interest rates inevitably will rise again at some time in the future, perhaps rekindling the debate over usury controls on the price of credit. Arizona's extensive experimentation with price controls on credit throughout the better part of the twentieth century—characterized by increasingly complex and restrictive statutory schemes, and frequent litigation—did not work when tested against free market forces. The state's need for investment capital has pushed its legislature to deal with the issue in ways that keep credit available in the marketplace at its equilibrium price, and should maintain that purpose going forward. We hope and trust that Arizona has found a wise and durable approach by returning to its original simple rule from territorial days: a legal interest rate of ten percent, variable to any other rate whatever by parties' written agreement.

113. We do not consider the legislation regulating banks' and other lenders' practices in handling the risks of lending to insure that loans are reasonably secure and lenders act fairly and in economically rational ways a proper factor in setting the price of credit in the free market. Recent abuses have made such regulations necessary. The twin propositions that loans should be made to borrowers who can repay them, and that loans should be secured by assets that guaranty the amount of the loan in case of default should be basic tenets that drive any credit market.

On the other hand, beyond interest rates proper, Professor Goode's argument that "strong enforcement machinery" should police and curtail abuses in the credit market recently seems to have proved correct. See *Quietly Killing a Consumer Watchdog*, N.Y. TIMES, Feb. 11, 2013, at A18, noting that the federal Consumer Financial Protection Bureau, in its first eighteen months, even though hampered by Congress's persistent refusal to approve a Director for it had "halt[ed] . . . predatory practices by mortgage lenders, . . . [w]on an \$85 million settlement from American Express [for] deceptive and discriminatory marketing and billing practices . . . [and] opened an investigation into questionable marketing practices by banks and credit card companies on college campuses."

