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THE CORRUPTING SEA LOAN

JUSTINIAN'S FAILED REGULATION OF *PECUNIA TRAIECTITIA*

MA Thesis in Late Antique, Medieval and Early Modern Studies

Central European University

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May 2019

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United States and United Kingdom

Thesis submitted to the Department of Medieval Studies,
Central European University, Budapest, in partial fulfillment of the requirements
of the Master of Arts degree in Late Antique, Medieval and Early Modern Studies.

Accepted in conformance with the standards of the CEU.

Chair, Examination Committee

Thesis Supervisor

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David Rockwell

Abstract

In September 540 CE, Justinian adopted new legislation that enshrined in law certain “long-standing customs” in relation to maritime loans (*pecunia traiecticia*). Less than eight months later, he repealed it. This study attempts to reconstruct the circumstances of this confused episode of imperial lawmaking. It considers and in large part rejects older attempts at explanation that depended on outdated assumptions and underdeveloped arguments. This study presents a range of conjectures to explain the historical circumstances surrounding the passage and repeal of *Novel* 106, conjectures that give more weight to the role played by two notoriously corrupt officials in promulgating the new law. On this reconstruction, earlier legislation by Justinian regulating interest rates had substantially reduced the interest rates that could be earned on maritime loans, which became much less profitable. Lenders sought legislation to return to the *status quo ante*. Their efforts were successful, perhaps as a result of illicit intervention by one or both of the *quaestor sacri palatii*, Tribonian, or the *praefectus praetorio Orientis* John the Cappadocian. The new law led to an increase in the real interest cost of maritime loans. A reaction ensued from the shippers (ναύκληροι) or merchants (ἔμποροι) that relied upon maritime loans to finance their activities. These groups may in turn have applied for redress to the imperial bureaucracy, perhaps to the very same two officials. *Novel* 106 and its repeal through *Novel* 110 may therefore represent an instance of the charge made against Tribonian in Procopius *Wars* 1.24.16, namely that he sold the repeal of some laws and the passage of others, as the needs of his (presumably paying) clients might from time to time require.

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The debts I owe are many and various; listing all those whom I should thank would perhaps double the length of an already long thesis. Family, friends and colleagues who have assisted me know who they are and, I hope, are assured of my gratitude. I should especially like to thank the Medieval Studies Department of Central European University for the opportunity provided to pursue these studies in its flourishing and most congenial intellectual community. I am very grateful for their willingness to take a chance on a candidate whose application must have appeared somewhat unconventional.

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Introduction

*Justinians Novellen, . . . die in der romanistischen Lehre und Forschung unserer Tage hinter Digesten und Codex weit zurückstanden, sind eine Welt für sich, die wir uns heute, von einigen wenigen Pionieren angeführt, gewissermaßen neu erschließen müssen.*¹

In 540 CE, Justinian promulgated new legislation that gave the imprimatur of imperial law to certain purported long-standing customs relating to maritime loans (*pecunia traiectica*).² Less than eight months later, Justinian repealed this new legislation, declaring it “altogether inoperative” as though it “had, in fact, not even been laid down.”³ This somewhat confused exercise in law-making took place just twelve years after Justinian had fundamentally re-regulated the rates of interest that could be charged on all types of loans, including maritime ones.⁴ What prompted Justinian to issue *Novel* 106 in 540, thereby revising the arrangements for maritime loans that he had made in 528? And why did he repeal the new arrangements of 540 just a few months later by *Novel* 110? This study explores those questions based on the provisions of these and other laws promulgated during the first decades of Justinian’s reign.

Prior historiography generally is either silent on this topic or has been reluctant to go further than bland statements to the effect that *Novel* 110 does not tell us the reasons for the repeal of *Novel* 106.⁵ Those few scholars that have ventured an explanation have done so on

¹Hans Erich Troje, “Novelleneditionen der humanistischen Jurisprudenz,” in *Novellae Constitutiones: L’ultima legislazione di Giustiniano tra oriente e occidente da Triboniano a Savigny*, ed. Luca Loschiavo, Giovanna Mancini and Cristina Vano (Naples: Edizioni Scientifiche Italiane, 2011), 301.

² *Nov.* 106 (7 Sept. 540). Unless otherwise specified, all dates given in this study are CE. The form of loan known as the Roman law *pecunia traiectitia* is sometimes referred to by the name *fenus nauticum*. William Warwick Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge: Cambridge University Press, 1921), 463. For the edition of the Novels used herein, see the bibliographic information in note 9 below.

³ *Nov.* 110 (26 Apr. 541).

⁴ *CJ* 4.32.26 (Dec. 528; there is some uncertainty as to whether this constitution should be dated to 11 Dec. or 13 Dec. of that year but the precise date is irrelevant to the argument made in this study). See *The Codex of Justinian*, ed. Bruce W. Frier, vol. 2 (Cambridge: Cambridge University Press, 2016), 953 n.162.

⁵ See, e.g., Walter Ashburner, *The Rhodian Sea-Law, Edited from the Manuscripts* (Oxford: Clarendon, 1909), ccxx; Grégoire Cassimatis, *Les Intérêts dans la Législation de Justinien et dans le Droit Byzantin* (Paris: Recueil

the basis of assumptions that subsequent research has rendered untenable and argumentation that would no longer be considered sufficiently developed.⁶ This study argues that careful analysis of the substantive provisions of both laws allows us to draw certain inferences about the circumstances that prompted them. It then builds on those inferences to develop alternative hypotheses about how corruption on the part of key officials can account for otherwise unexplained aspects of the promulgation and repeal of Justinian's maritime loan legislation.

Novel 106, at least, attests to the circumstances of its issuance, stating that it is the result of the supplication by two individuals for the emperor to give legal force to certain purported customs relating to maritime loans. *Novel* 110 is less forthcoming, stating only that "petitions were subsequently made" to the emperor to repeal *Novel* 106. Whatever the underlying reasons, it is clear that the issues at stake involve real-world commercial issues and not the hypothetical speculations of jurists.⁷ This fact helps us to set aside one of the main concerns with using normative sources for historical purposes, namely that of knowing whether the legal issue raised had any existence outside the study.⁸

The *Novels* constitute the last (and, in the traditional view, very much the least) part of the *Corpus Juris Civilis*, the great compilation of legal materials produced during Justinian's

Sirey, 1931), 54; A.H.M. Jones, *The Later Roman Empire 284–602: A Social Economic and Administrative Survey*, vol. 1 (Norman, Okla.: University of Oklahoma Press, 1964) 350; Max Kaser, *Das römische Privatrecht*, 2nd ed., vol. 2 (Munich: C.H. Beck Verlag, 1975), 342, n.51.

⁶ This study engages with and, in significant part rejects, the accounts offered by (among others) Heinrich Sieveking, *Das Seedarlehen des Altertums* [Ausgewählte Doktordissertationen der Leipziger Juristenfakultät] (Leipzig: von Veit, 1893); Gustav Billeter, *Geschichte des Zinsfusses im griechisch-römischen Altertum bis auf Justinian* (Leipzig: Teubner, 1898); and Arnaldo Biscardi, *Actio Pecuniae Traiecticiae: Contributo alla Dottrina delle Clausole Penali*, 2nd ed. (Turin: G. Giappichelli, 1974).

⁷ See David J.D. Miller and Peter Sarris, *The Novels of Justinian: A Complete Annotated English Translation*, vol. 1 (Cambridge: Cambridge University Press, 2018), 35 ("the novels describe objectively verifiable social realities that gave rise to petitions to the emperor"; and "the novels also provide insights into aspects of sixth-century social and economic relations" such as "the complexity of the late-antique 'banking sector' and the sophistication of financial and credit arrangements"). Unless otherwise specified, all translations of the *Novels* used herein are those given by Miller and Sarris in that work.

⁸ A difficulty noted in the area of ancient banking law at least since Ludwig Mitteis, "Trapezitika," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (romanistische Abteilung)* 19 (1899):199 ("rein der Phantasie der Schriftsteller entsprungen").

reign that also includes the *Codex*, the *Digest* and the *Institutes*.⁹ The *Novels* differ from the other parts of the *Corpus* in several fundamental respects. First, unlike the other components of the *Corpus*, the *Novels* do not purport to represent the historical tradition of Roman law prior to the age of Justinian: they constitute new enactments during reign of that emperor or, in a very few instances, those of his immediate successors. The *Codex*, *Digest* and *Institutes*, on the other hand, purport to represent and restore that historical tradition; somewhat inconsistently with that objective, Justinian also sought to have the compilation reflect the law to be applied in his own reign as well as to render prior legal source materials obsolete.¹⁰ The *Codex* represents the collation of imperial legislation, superseding three previous codes.¹¹ The *Digest* collects extracts from legal commentaries produced by centuries of private Roman jurisprudence. The *Institutes* is a first-year student textbook.

To be sure, each of these three components of the *Corpus* were subjected to substantial revision by the compilers as part of the compilation process, including those that changed

⁹ The primary editions consulted for this study are those in the so-called *editio stereotypica*: *Novels: Novellae* [*Corpus Iuris Civilis*, vol. 3], ed. Rudolf Schoell and Wilhelm Kroll, 4th stereotype ed. (Berlin: Weidmanns, 1912); *Codex: The Codex of Justinian: A New Annotated Translation with Parallel Latin and Greek Text*, ed. Bruce W. Frier, 3 vols. (Cambridge: Cambridge University Press, 2016), incorporating the text of *Codex Iustiniani* [*Corpus Iuris Civilis*, vol. 2], ed. Paul Krüger, 9th–12th eds. (Berlin: Weidmann, 1914–1959); *Digest: The Digest of Justinian*, eds. Theodore Mommsen with Paul Krüger [Latin text] and Alan Watson [English translation], 4 vols. (Philadelphia: University of Pennsylvania Press, 1985); *Institutes: Justinian's Institutes*, trans. with introd. by Peter Birks and Grant McLeod (Ithaca: Cornell University Press, 1987), incorporating the text of *Iustiniani Institutiones* [*Corpus Iuris Civilis*, vol. 1], ed. Paul Krüger (Berlin: Weidmann 1872). With respect to any specific legal provision, references to “pr.” are to its *principium*, or preface; references to “c.” are to the specified chapter number thereof; and references to “ep.” are to its *epilogus*, or conclusion. The literature on the compilation of the *Corpus* is oceanic in scope. For a brief introduction, see Wolfgang Kaiser, “Justinian and the *Corpus Iuris Civilis*,” in *The Cambridge Companion to Roman Law*, ed. David Johnston (Cambridge: Cambridge University Press, 2015), 119–148 and, more extensively, Tony Honoré, *Tribonian* (Ithaca: Cornell, 1978), 44 ff.

¹⁰ Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 33; Bernard Stolte, “Justice: Legal Literature,” in *The Oxford Handbook of Byzantine Studies*, ed. Elizabeth Jeffreys, John Haldon and Robin Cormack (Oxford: Oxford University Press, 2008), 691–692. For Justinian’s use of law as part of his more general program of reform, see Michael Maas, “Roman Questions, Byzantine Answers: Contours of the Age of Justinian,” in *The Cambridge Companion to the Age of Justinian*, ed. Michael Maas (Cambridge: Cambridge University Press, 2005), 6.

¹¹ In fact, the *Codex*, in the form in which it survives, represents a second attempt by the compilers; the first version (now lost) was promulgated in 529 but soon had to be revised to reflect the number of new constitutions issued after the first version was promulgated. Paul du Plessis, *Borkowski's Textbook on Roman Law*, 4th ed. (Oxford: Oxford University Press, 2010), 55, 61; Kaiser, “Justinian and the *Corpus Iuris Civilis*,” 125–126.

substantive legal positions. After a torrential “hunt for interpolation” that characterized much of twentieth-century civil law scholarship, scholars are largely agreed that these three elements of the *Corpus* represent, in the main, the substantive legal position of the so-called “classical” period of Roman law, namely the end of the second and beginning of the third century CE.¹² Because the *Novels* do not reflect this “classical” period of Roman legal science, they have long been seen as something different from, and from the perspective of juridical reasoning, inferior to the other parts of the *Corpus*. They have thus been understudied by comparison.

The *Novels* also differ from the other parts of the *Corpus* in that they do not exist as an official compilation.¹³ Imperial constitutions on preparation and adoption survive for each of the *Codex*, *Digest* and *Institutes*, as do manuscripts in which one can have reasonable confidence. The laws that make up the *Novels* were never so collected.¹⁴ This is not entirely a disadvantage for research: the imperial constitutions making up the *Codex*, for example, underwent an editing process during the process of compilation as a result of which the prefaces recounting the circumstances of their adoption are largely lost. Had the *Novels* been similarly codified, it is likely that their prefaces, too, would have been removed, depriving scholarship of their invaluable information as to the sixth-century circumstances that prompted them.¹⁵

In the absence of any official compilation of the *Novels*, what survive are the remains of private collections, existing in different forms in different manuscripts.¹⁶ The earliest source

¹² du Plessis, *Borkowski's Textbook*, 57–58 and the sources cited therein. Still, many changes by the compilers are identifiable; these were authorized in the imperial constitutions mandating the project and then given the emperor's imprimatur upon publication. *Const. Haec* 2 (13 Feb. 528); *Const. Cordi* (16 Nov. 534); *Const. Deo auctore* 6 ff. (15 Dec. 530); *Const. Tanta* (16 Dec. 533); Charles Pazdernik, “Justinianic Ideology and the Power of the Past,” in *The Cambridge Companion to the Age of Justinian* (Cambridge: Cambridge University Press, 2005), 199–200.

¹³ Stolte, “Justice,” 692.

¹⁴ Caroline Humfress, “Law and Legal Practice in the Age of Justinian,” in *The Cambridge Companion to the Age of Justinian*, ed. Michael Maas (Cambridge: Cambridge University Press, 2005), 175.

¹⁵ Humfress, “Law and Legal Practice,” 174; Kaiser, “Justinian and the *Corpus Iuris Civilis*,” 138–139.

¹⁶ The most accessible brief introduction to the textual tradition of the *Novels* is that provided by Timothy G. Kearsley, “The Creation and Transmission of Justinian's *Novels*,” *Law Library Journal* 102, no. 3 (2010): 377–397. Further detail can be found in Kroll's preface to the *editio stereotypica*, now helpfully translated from Latin

is the *Epitome Juliani*, a compilation in Latin of summaries of 122 distinct *Novels* (plus two repeated ones). It is thought to have been compiled already in the sixth century as an aid to Latin-speaking students. Another important source is the so-called *Authenticum*, a Latin translation of the Greek originals. It has the benefit of giving the full text of the *Novels* included in it, not merely summaries as does the *Epitome Juliani*. The most important collection is the so-called Greek Collection, which collects 168 different pieces of legislation (two of which are repetitions). Other sources include a number of minor collections, as well as fragments and works that have been lost.

Fortunately, there is no need to consult the manuscripts for purposes of this study and others like it, thanks to the herculean efforts of the great German editors of the *editio stereotypica* of the *Corpus* under the leadership of Theodore Mommsen, Paul Krueger, Rudolf Schoell and Wilhelm Kroll. The volume of this edition devoted to the *Novels* was begun by Schoell and finished by Kroll and is widely recognized as the standard edition, reducing earlier editions to the status of mere “auxiliary material.”¹⁷

The framework for analysis adopted herein is that of the New Institutional Economics (NIE), with the law governing maritime loans as the institutional object of analysis.¹⁸ I do not, however, follow customary applications of NIE that analyze historical institutions solely through the prism of “efficiency.” In the period at issue here, one must doubt that a concept of efficiency in anything resembling its modern market-based form was foremost in the mind of

to English in Timothy G. Kearley and David J.D. Miller, “Wilhelm Kroll’s Preface to Justinian’s Novels: An English Translation,” available at https://works.bepress.com/timothy_g_earley/4/.

¹⁷ Wolfgang Kunkel, *An Introduction to Roman Legal and Constitutional History*, trans. J.M. Kelly, 2nd ed. (Oxford: Oxford University Press, 1973), 223, quoted in Kearley, “Creation and Transmission,” 393.

¹⁸ For NIE as a methodology, Douglass C. North, *Institutions: Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990) is fundamental. See also the same author’s *Understanding the Process of Economic Change* (Princeton: Princeton University Press, 2005). For a manifesto of NIE’s application to ancient history, see Peter Fibiger Bang, “The Ancient Economy and New Institutional Economics,” *Journal of Roman Studies* 99 (2009) 194–206. For a recent challenge to the usefulness of NIE in economic history, see Francesco Boldizzoni, *The Poverty of Clío* (Princeton: Princeton University Press, 2011).

the imperial lawmaker, and imputing that as an objective risks anachronism. Rather, the analysis presented here takes on board the criticisms to NIE (as it is too often applied) to the effect that historical institutions require additional axes of analysis beyond efficiency.¹⁹ This paper particularly explores the institution of maritime loan legislation as an instrument of distributional conflict in the sixth-century between those who provided such loans and those who took them out. The working hypothesis is that the lenders, whether members of the bankers' guilds or not, enjoyed influence with the imperial bureaucracy sufficient to obtain frequent, often substantial, changes to the law that worked in their favor. That influence, however, was subject to real limits due to the countervailing influence of shippers and merchants whose interests conflicted with their own.²⁰ Both lenders on the one hand and shippers and merchants on the other would have seen their access to individuals within the imperial administration as an instrument potentially useful for achieving their goals, a fact that would not have been lost on the relevant officials. Perhaps not a few such officials would be able to resist the allure of personal profit that could be gained by influencing lawmaking on behalf of favored constituencies.

This methodological approach has not heretofore been applied to sixth-century economic history, due in part to that period's position at the juncture of the ancient world and medieval Byzantium. Byzantine economic history, as a whole, has remained largely untouched by the theoretical arguments and model-based approaches that have characterized the economic history of the antiquity since Moses Finley's *The Ancient Economy*.²¹ The more

¹⁹ Sheilagh Ogilvie, "'Whatever is, is right'? Economic Institutions in Pre-Industrial Europe," *Economic History Review* 60, no. 4 (2007): 649–684 (offering the examples of accident, culture and distributional conflict as frameworks of analysis beyond efficiency).

²⁰ In this study, "shippers" is used to translate the Greek term ναύκληροι and the Latin term *navicularii*, while "merchants" is used to translate the Greek term ἔμποροι and the Latin terms *mercatores* and *negotiatores*.

²¹ M.I. Finley, *The Ancient Economy* (Berkeley: University of California Press, 1973). For the relatively undertheorized character of Byzantine economic history compared with its ancient counterpart, see Jean-Michel Carrié, "Were Late Roman and Byzantine Economies Market Economies? A Comparative Look at Historiography," in *Trade and Markets in Byzantium*, ed. C. Morrisson (Washington, D.C.: Dumbarton Oaks, 2012), 13–26. One exception is feudalism Chris Wickham, "The Other Transition: From the Ancient World to

theoretically minded economic historiography of the ancient world has thus left the sixth century largely unexplored: the leading contribution to the field, *The Cambridge Economic History of the Greco-Roman World*, relegates all of late antiquity to a single (albeit excellent) chapter, and even that focuses almost exclusively on centuries earlier than the sixth.²²

The plan of this study is as follows: Chapter 1 reviews the development of the maritime loan as an economic and legal institution and explores its function as an early precursor to marine insurance. Chapter 2 study then examines Justinian's earlier efforts to regulate the rates of interest payable on loans, especially his fundamental re-regulation of this area of law in 528. Chapter 3 then closely reads the provisions of *Novel* 106 with a view to assessing the effects of its passage on both lenders and borrowers under maritime loans and the reasons for its almost immediate repeal. This part of the study considers and in large part rejects older attempts to explain this haphazard exercise in Justinianic lawmaking as based on unwarranted assumptions and underdeveloped argumentation. Chapter 4 then explores similar instances of haphazard lawmaking by Justinian before reviewing the role played in the passage of *Novel* 106 by two notoriously corrupt officials, the *praefectus praetorio Orientis*, John the Cappadocian, and the *quaestor sacri palatii*, Tribonian. This study then concludes with a range of conjectures to explain the historical circumstances surrounding the passage and repeal of *Novel* 106 that give more weight to the prominent role played by these officials and to the many possibilities for illicit intervention by them on behalf of interested parties, whether on account of favor or payment.

Feudalism," *Past & Present* 103 (1984): 3–36, especially the comments on Byzantium made at 33–35, though Wickham has subsequently resiled somewhat from those views. Private conversation with Chris Wickham, 14 June 2018, Budapest, Hungary. Another possible exception is Peter Sarris, *Economy and Society in the Age of Justinian* (Cambridge: Cambridge University Press, 2006). That work, however, has little to say about either banking or seaborne commerce, quite understandably given its focus on landed estates.

²² Andrea Giardina, "The Transition to Late Antiquity," in *The Cambridge Economic History of the Greco-Roman World*, ed. W. Scheidel, I. Morris and R. Saller (Cambridge: Cambridge University Press, 2007), 743–768.

Chapter 1: The Maritime Loan

This chapter introduces the maritime loan as an institution of the economic life of antiquity. After brief sketches of the ancient Athenian and Roman contexts for the origins of the maritime loan, this chapter analyzes the institution's principal features, tracing their development from their origins in fourth-century BCE Athens through their adoption and development within the framework of Roman law.²³ The chapter then concludes with an analysis of the risk-shifting function of maritime loans, which provided allocations of risk and reward that led to sharply differentiated interests on the part of lenders and borrowers. Both the survey and the ensuing analytical discussion engage with current scholarly disputes between “primitivists” and “modernists” as to the characterization of maritime loans as an economic institution.²⁴ I reject the extremes of both interpretations in favor of a measured view of the maritime loan as an early, if undeveloped, form of insurance.²⁵ Because the maritime loan balanced the respective interests of lenders and borrowers, changes to the governing legal framework could and, as I will argue in Chapter 3, did disrupt the relative rights, obligations and expectations of parties seeking to finance maritime commerce.

Athenian origins

Our principal early sources relating to maritime loans in classical antiquity date from fourth-century BCE Athens.²⁶ They comprise four speeches of Demosthenes that expressly

²³ The following discussion makes no claim to be comprehensive. For fundamental treatments, see Ashburner, *Rhodian Sea-Law*, ccix–ccxxxiv; G.E.M. de Ste. Croix, “Ancient Greek and Roman Maritime Loans,” in *Debts, Credits, Finance and Profits*, ed. Harold Edey and B.S. Yamey (London: Sweet & Maxwell, 1974), 41–59.

²⁴ For the leading statements of the primitivist and modernist views, respectively, cf. Paul Millett, “Maritime Loans and the Structure of Credit in Fourth-Century Athens,” in *Trade in the Ancient Economy*, ed. Peter Garnsey, Keith Hopkins and C.R. Whittaker (Berkeley: University of California Press, 1983), 44 (restated in Paul Millett, *Lending and Borrowing in Ancient Athens* (Cambridge: Cambridge University Press, 1991)) with Edward E. Cohen, *Athenian Economy & Society: A Banking Perspective* (Princeton: Princeton University Press, 1992).

²⁵ de Ste. Croix, “Ancient Greek and Roman Maritime Loans,” 42 (“the nearest thing to insurance that the ancient world ever knew”).

²⁶ For a brief but useful discussion (and rejection) of the possibility of Mesopotamian precursors to the classical antique maritime loan, see de Ste. Croix, “Ancient Greek and Roman Maritime Loans,” 59. Cf. A.L. Oppenheim,

deal with cases arising out of maritime loans, as well as a few scattered references to maritime loans or parties thereto in orations addressing other issues.²⁷ Only one of these orations purports to provide the actual text of a maritime loan contract.²⁸ Fortunately, the four key speeches address not just the maritime loans at issue but also refer to perhaps 20 or more other maritime loan contracts.²⁹ These sources attest to the existence of an active market for such loans.

Maritime loans made up just one of many forms of lending at interest in fourth-century BCE Athens, many instances of which are attested by both literary and epigraphic sources. Nevertheless, lending at interest generally was considered an inappropriate activity for a citizen, at least for one who was freeborn.³⁰ That said, the practice was not prohibited.³¹ A citizen ordinarily would not choose to take out an interest-bearing loan. Instead, he would apply to friends and family for *eranos* loans — that is, loans that did not bear interest or require security — as and when need arose.³² Interest-bearing loans were therefore generally taken out by those to whom interest-free loans were not, or were no longer, available: those who had tapped their network dry or, more importantly, had no such network to tap. This would commonly be the case for non-citizens, whose status as such perhaps explains why there was no legal cap on interest rates at Athens.³³

“The Seafaring Merchants of Ur,” *Journal of the American Oriental Society* 74, no. 1 (1954): 8–9 (mischaracterizing as “a very primitive form of marine insurance” a simple joint venture in which the provider of funds shared in both losses and profits).

²⁷ The four main orations: Dem. 32; 34; 35; 56. Mentions in other orations: Dem. 33.4; Dem. 27.11; Dem. 52.20; Hyp. 5, fr. 4; Isoc. 17.42; Lys. 32.6. See Millett, *Lending and Borrowing*, 190. Lysias 32 (*Against Diogiton*) is dateable to the very end of the fifth century BCE and thus slightly earlier. de Ste. Croix, “Ancient Greek and Roman Maritime Loans,” 43–44.

²⁸ Dem. 35.10–13. Views differ on whether the text given is genuine, a later insertion, or a standard form adapted to the circumstances of the speech. Cf. Ashburner, *Rhodian Sea-Law*, ccxii (standard form, but representing contemporary practice); Lionel Casson, “New Light on Maritime Loans: P. Vindob. G 40822,” *Zeitschrift für Papyrologie und Epigraphik* 84 (1990), 204, n.25 (later insertion but still useful evidence); and Cohen, *Athenian Economy & Society*, 42, n.4 (“the document is generally accepted as genuine”).

²⁹ Millett, “Maritime Loans,” 41 (admitting that some instances may be figments of the rhetorical imagination).

³⁰ See, e.g., Arist. *Nic. Eth.* 1121b.4.

³¹ Not even compound interest was prohibited, as it would be under Roman law. Millett, *Lending and Borrowing*, 185 (in reliance on Ar. *Nubes* 1155–1156 (τόκοι τόκων) and Theophr. *Char.* 10.10 [*The Pennypincher*]).

³² Millett, *Lending and Borrowing*, 109–126, 153–159.

³³ Lys. 10.18; de Ste. Croix, “Ancient Greek and Roman Maritime Loans,” 46.

Because Athenian citizens largely avoided engaging in trade, merchants and shippers were mainly non-citizens, either *metoikoi* (resident aliens, or metics) or *xenoi* (temporary visitors).³⁴ Inasmuch as they had little or no access to interest-free loans of the sort available to citizens via their kin and other networks, the loans they took out for their commercial activities, including maritime loans, bore interest.³⁵ Maritime loans bore interest at rates higher than other types of loans and thus became a byword for remunerative investment. Xenophon, for example, could describe a particularly promising measure to increase civic revenue as likely to yield returns “like a maritime loan” (ὥσπερ ναυτικόν), and Theophrastus’ Braggart could falsely boast of how much money he had tied up in such investments.³⁶

Roman adoption

It is generally accepted that maritime loans were an institution imported into Roman law from Greek practice.³⁷ Though the timing of the incorporation of maritime loans into Roman law and practice is not known, at least one member of the Roman elite (Cato the Elder) used them no later than the first century BCE.³⁸ Other literary evidence for later Roman practice in relation to maritime loans is meagre, consisting of a few stray references mainly in texts of a religious nature alluding to high interest rates payable.³⁹ In addition, there survives a wax

³⁴ M. M. Austin and P. Vidal-Naquet, *Economic & Social History of Ancient Greece* (Berkeley: University of California Press, 1977), 6 (commerce at Athens “to a great extent left to outsiders”); R.J. Hopper, *Trade and Industry in Classical Greece* (London: Thames & Hudson, 1979), 57 (seafarers of the Athenian corn-trade were rarely citizens); Millett, *Lending and Borrowing*, 206 ff.

³⁵ Millett, “Maritime Loans,” 52.

³⁶ Xen. *Vect.* 3.9; Theophr. *Char.* 23.2 [*The Braggart*]; Millett, “Maritime Loans,” 41–42.

³⁷ Buckland, *Text-Book of Roman Law*, 132. For discussion of a papyrus from Ptolemaic Egypt that indicates that maritime loans continued to be used in the Hellenistic world, see Raymond Bogaert, “Banquiers, courtiers et prêts maritimes à Athènes et à Alexandrie,” *Chronique d’Égypte* 40 (1965): 146 ff.

³⁸ Plut. *Vit. Cat. Mai.*, 21.6–7 (the same Cato who condemned usurers as worse than thieves. Cato, *Agr. Praef.* 1–3); de Ste. Croix, “Ancient Greek and Roman Maritime Loans,” 53; Jean Andreau, *Banking and Business in the Roman World* (Cambridge: Cambridge University Press, 1999), 56, 132.

³⁹ Discussed briefly in de Ste. Croix, “Ancient Greek and Roman Maritime Loans,” 54. Despite their high rates of interest, maritime loans were the one type of lending at interest acceptable to the Church fathers, due to the creditor’s assumption of risk. Julie Vélissaropoulos, *Les Naoclères Grecs: Recherches sur les institutions maritimes en Grèce et dans l’Orient hellénisé* (Paris: EPHE, 1980), 302; Andreau, *Banking and Business*, 54.

tablet documenting a maritime loan.⁴⁰ There are also two papyri that are not themselves maritime loan agreements but relate to them. The first of these is a notification of availability of funds of a maritime loan.⁴¹ The second is more difficult to interpret. Its editors initially considered it a fragment of a loan contract but this view is untenable for textual reasons, and it is now interpreted as a security deed under, or an agreement ancillary to, a maritime loan.⁴²

Because the literary and documentary evidence for Roman maritime loans is so sparse, legal sources constitute our main source of evidence for them. The *Digest* provides an informative chapter devoted to maritime loans, while the *Codex* gives a brief series of constitutions relating to them.⁴³ No actual example of a Roman law maritime loan contract exists, but a model is reproduced in the *Digest*.⁴⁴ In addition, there are the two *Novels*, 106 and 110, that form the basis of this study.⁴⁵

Naturally enough, the adoption of a Greek legal institution into Roman law required certain changes if it was to fit into Roman law's very different conceptual framework.⁴⁶ An example of those changes would be those required to adapt the Greek practice of rendering maritime loan contracts in writing (as συγγραφαί) to Roman legal practice whereby (for most periods) contracts were formed without the need for writing. These changes are discussed where relevant in the following review of the key features of maritime loans.

⁴⁰ *TPSulp* 13. The bankers in whose archive the tablet was found acted as intermediaries. Andreau, *Banking and Business*, 75, n.23 and the sources cited therein.

⁴¹ *P. Vindob. G* 19792. See Casson, Lionel. "New Light on Maritime Loans: *P. Vindob. G* 19792," in *Studies in Roman Law in Memory of A. Arthur Schiller*, Roger S. Bagnall and W.V. Harris, eds. (Leiden: Brill, 1986), 16; Vélissaropoulos, *Les Naucrètes Grecs*, 310–11; W.V. Harris, "A Revisionist View of Roman Money," *The Journal of Roman Studies* 96 (2006): 11; Morris Silver, "Finding the Roman Empire's Disappeared Deposit Bankers," *Historia: Zeitschrift für Alte Geschichte* 60, no. 3 (2011), 307. For the revised text of the papyrus, see Biscardi, *Actio Pecuniae Traiecticiae*, 211–214.

⁴² Casson, "New Light on Maritime Loans: *P. Vindob. G* 40822," 202–206.

⁴³ *Dig.* 22.2; *CJ* 4.33. Maritime loans are also mentioned in several other provisions of the *Codex*, including notably *CJ* 4.32.26 (Dec. 528).

⁴⁴ *Dig.* 45.1.122.1. See the discussions at notes 94 and 271 below.

⁴⁵ *Nov.* 106 (7 Sept. 540); *Nov.* 110 (26 Apr. 541).

⁴⁶ Andreau, *Banking and Business*, 55.

Key features

The features of the maritime loan as a legal and economic institution demonstrate remarkable continuity in both legal and economic terms from its origins in Hellenic antiquity through the Roman period, and from that period to medieval times.⁴⁷

Purpose

At Athens, maritime loans generally were made for purposes of a commercial voyage.⁴⁸ Roman law was more specific. A maritime loan was formally defined as a loan of money to be carried overseas or, if used to purchase goods, the goods were to be carried overseas, but only if the risks of voyage were borne by the lender; if the risks of voyage remained with the borrower, the loan was not a maritime loan.⁴⁹ The consequences of a loan's failure to qualify as a maritime loan could be significant. As discussed more fully in Chapter 2, before December 528 maritime loans were not subject to the limitations on the maximum interest rate that applied to loans generally under Roman law. After that date, the interest rates payable on maritime loans were subject to caps, though these caps were higher than those that applied to other types of loans. A "failed" maritime loan would therefore earn interest at a rate lower, perhaps much lower, than what the parties had initially bargained for. In addition, a failed maritime loan could

⁴⁷ Ashburner, *Rhodian Sea-Law*, ccx; Andreau, *Banking and Business*, 54–55; M.T.G. Humphreys, *Law, Power, and Imperial Ideology in the Iconoclast Era c. 680–850* [*Oxford Studies in Byzantium*], (Oxford: Oxford University Press, 2015), 183.

⁴⁸ There is one known instance of an Athenian loan, customarily treated as maritime, in respect of a military expedition. Ps.-Demosthenes 50.17 (of the two loans, the smaller took the form of a maritime loan). There are reasons to doubt this was typical: the principal amount was small (800 drachmas), the interest rate was much lower than that provided for by other known maritime loans of the period, and the collateral was a warship. de Ste. Croix, "Ancient Greek and Roman Maritime Loans," 50–51. The discussion over whether this loan is typical, or a maritime loan at all, is at bottom an argument over definition. Was the defining feature of a maritime loan the basis of the interest-rate calculation? Cohen, *Athenian Economy & Society*, 44–60, especially 52 ff. Or were features such as commercial purpose, the nature of security taken and the risk-transfer mechanism also definitional? Raymond Bogaert, "Review: 'Athenian Economy and Society: A Banking Perspective' by Edward E. Cohen," *Gnomon* 67, no. 7 (1995): 606. Such are the risks inherent in seeking to work via formalized definition when analyzing the Athenian legal system, which did not know the concept. David Cohen, *Theft in Athenian Law* [*Münchener Beiträge zur Papyrusforschung und Antiken Rechtsgeschichte* 74] (Munich: C.H. Beck, 1983).

⁴⁹ *Dig.* 22.2.1.

fail to generate any interest at all (even at a lower rate) depending on the form that the contract had taken. Interest on maritime loans could be agreed by way of a “pact.”⁵⁰ By contrast, a promise to pay interest on other types of loans generally required a more formal contractual covenant (usually *stipulatio*) to be enforceable.⁵¹ Thus, if a lender was so improvident as to take the interest covenant in the form of a pact rather than *stipulatio*, he could find himself without any enforceable right to interest at all.

Lenders

The question of who provided maritime loans at Athens has been a central battlefield in the increasingly arid debate between “primitivists” and “modernists” that has loomed large in the field since Moses Finley published *The Ancient Economy* in 1973.⁵² One of the few areas of consensus is that there were several different types of loan providers at Athens: those who might today be called “friends & family,” other traders engaged in lending on an incidental basis, and professional non-bank lenders.⁵³

The astute reader will have noticed an obvious omission: bankers. Did Athenian bankers extend maritime loans themselves, or did they serve merely as intermediaries? There is no consensus, with scholars reading the sometimes obscure evidence of the Demosthenic corpus in radically different ways. Primitivists, along with more traditionally minded scholars, maintain that none of the maritime loans at ancient Athens for which the borrowers are known

⁵⁰ *Dig.* 22.2.7; Ashburner, *Rhodian Sea-Law*, ccxvi–ccxvii; Buckland, *A Text-Book of Roman Law*, 545; Kaser, *Das römische Privatrecht*, vol. 2, 371, n.17. A pact was an agreement that did not generally benefit from full enforceability because it did not meet the formal requirements of an enforceable contract. Without a specific exemption, a pact was only partially enforceable, usually only as a defense; it could not by itself give rise to a ground of action. *Dig.* 2.14.7.4; Paulus, *Sententiae*, 2.14.1, in *Fontes iuris Romani antejustiniani*, vol. 2, ed. J. Baviera (Florence: Barbéra, 1968) (*Si pactum nudum de praestandis usuris interpositum sit, nullius est momenti: ex nudo enim pacto inter cives Romanos actio non nascitur*); du Plessis, *Borkowski’s Textbook*, 309 ff.

⁵¹ *Dig.* 19.5.24; *CJ* 4.32.3 (27 Sept. 200); du Plessis, *Borkowski’s Textbook*, 297.

⁵² Finley, *The Ancient Economy*. Cf. Millett, *Lending and Borrowing*, 5–23 with Cohen, *Athenian Economy & Society*, 136 ff. As Finley himself noted, the question of the primitive or modern character of the Athenian economy goes back much further, to the so-called “Bücher-Meyer debate.”

⁵³ Millett, “Maritime Loans,” 49–50.

mention bankers as lenders as opposed to intermediaries.⁵⁴ The arch-modernist Edward Cohen, reading the same evidence, maintains that participation by Athenian banks in making loans is “easily demonstrated.”⁵⁵ The dispute extends further, to non-maritime loans, with primitivists like Millett denying bankers a major role in any kind of loan-making in fourth-century Athens, except perhaps for short-term emergency loans.⁵⁶ Modernists like Cohen read the same sources and see bank lending everywhere.⁵⁷ It is not necessary decide the point for purposes of this study. It is enough to note that non-bank lenders constituted an important source of supply of capital for maritime loans, and that such loans were often organized through intermediaries, who may or may not have been bankers.⁵⁸

Of the various sources of maritime loan finance at Athens, the non-bank professional lenders appear to have been the most important. Such loans were too risky or too large for the other sources of supply. Lenders who were current or former merchants themselves were best placed to assess the risks and thus were the natural suppliers for such loans.⁵⁹ Non-bank professional lenders generally had a bad reputation in fourth-century BCE Athens, akin to the kind today associated with providers of small-scale, high-interest loans such as payday lenders, and they occupied what might be characterized as a niche position within the overall Athenian

⁵⁴ Bogaert, “Banquiers,” 141; Millett, *Lending and Borrowing*, 192. We need not get bogged down in the underlying controversy of whether bankers could make loans out of customer deposits. The primitivist view is summarized in Millett, *Lending and Borrowing* 197–206; for criticism, see Cohen, *Athenian Economy & Society*, *passim*, and Edward M. Harris, “Review: ‘Lending and Borrowing in Ancient Athens’ by Paul Millett,” *The Classical Review* 43, no. 1 (1993): 106 ([Millett's position] “flatly contradicted by Dem. 36.11”).

⁵⁵ Cohen, *Athenian Economy & Society*, 137. For criticism of Cohen’s “highly controversial” reading of the sources, see Bogaert, “Review: ‘Athenian Economy and Society,’” 604–609.

⁵⁶ Millett, *Lending and Borrowing*, 217 (“Greek bankers were not primarily money-lenders”). For Millett, an Athenian banker was primarily engaged in money-changing, the taking of customer deposits, the provision of guarantees and acting as general agent for non-citizen traders. *Id.* 211.

⁵⁷ Cohen, *Athenian Economy & Society*, *passim*, especially 224.

⁵⁸ Thus, Demosthenes’ father, a prolific provider of maritime credit, had large amounts of such loans outstanding upon his death. These were deposited with a certain Xuthus, who has plausibly been identified as a specialist intermediary. Dem. 27.11; Bogaert, “Banquiers,” 141, n.4; Millett, *Lending and Borrowing* 192. To say that Xuthus acted as intermediary does not, however, necessarily compel the conclusion that he was a banker. Bogaert, “Banquiers,” 141–144, de Ste. Croix, “Ancient Greek and Roman Maritime Loans,” 51, n.39.

⁵⁹ Bogaert, “Banquiers,” 142.

credit economy.⁶⁰ Providers of maritime loans, however, formed a case apart and were not subject to the same level of disdain in which small-time usurers were held, perhaps because the risk-assessment skills needed to engage in that activity for any length of time meant that they would have been successful merchants (or ex-merchants) themselves.⁶¹

The situation under Roman law was, if anything even more complex than that at Athens. Bankers were just one of many providers of loan capital and, for the classical period at least, by no means the most important.⁶² In addition to bankers, several other status groups engaged in the provision of loan finance, either regularly or from time to time: members of the political elite, those primarily engaged in large businesses other than banking, other merchants, and even slaves.⁶³ With respect to maritime loans in particular, the main sources of funds appear to have been members of the landed elite, non-bank businessmen and other merchants.⁶⁴ Evidence that Roman bankers of the classical period themselves made maritime loans is scanty. The traditional view is that they did not do so because of the risks involved and because it is thought that Roman bankers tended to concentrate on more local activities. This view has, however, been challenged in recent years by those who point to documentary evidence suggestive of significant bank involvement in business lending generally, among which loans to finance maritime trade figured prominently.⁶⁵ In any event, it is certain that Roman bankers acted in ancillary capacities for maritime loans, as brokers, paying agents, custodians and witnesses.⁶⁶

⁶⁰ Theophr. *Char.* 6.9 [*The Man of Ill Repute*]; Millett, *Lending and Borrowing*, 180, 182.

⁶¹ Millett, *Lending and Borrowing*, 188–189.

⁶² Members of the landowning elite were especially active, as both lenders and borrowers, though much of their lending activity was conducted via freedmen or slaves. Andreau, *Banking and Business*, 9–29, 71–97.

⁶³ Andreau, *Banking and Business*, 3–6 and, for a survey of the different groups, 9–70.

⁶⁴ Andreau, *Banking and Business*, 56, 151.

⁶⁵ Silver, “Finding the Roman Empire’s Disappeared Deposit Bankers,” 305 ff.; see also Harris, “Revisionist View,” 11.

⁶⁶ Andreau, *Banking and Business*, 56.

Borrowers

The borrower under a maritime loan could be a shipper (ναύκληρος), its captain (κυβερνητής) or a merchant (ἔμπορος) proposing to ship goods on it.⁶⁷ In the case of the shipper or captain, the use of proceeds from the loan could be the ship itself, the expenses of its kit and repair or its running costs, such as the expenses of crew. In the case of a merchant, the funds would be used to finance the purchase of goods to be loaded on board the ship at the port of embarkation or, in the event of a return voyage, the port of destination, or both. Since in both the Greek and Roman periods those engaged directly in trade ordinarily would not have commanded substantial wealth, it is unlikely that they would have had substantial reserves of ready cash to repay a loan unless their commercial venture came to a successful end.⁶⁸ Thus, the borrower's ability to repay depended in some sense on the successful completion of the enterprise. In the case of a shipper or captain, that meant earning freight from the merchants whose goods were shipped; for the merchants, it meant the sale of the goods shipped. In either case, repayment was subject to risks of voyage. This was also the case in late antiquity.⁶⁹

Shifting the Risks of Voyage

In an ordinary loan, the borrower is unconditionally committed to repay the principal when contractually due. In the case of a maritime loan, however, the borrower's obligation to repay depended upon the success of the venture that the loan funded. For Athens, this meant

⁶⁷ These roles could be, and often were, fulfilled by a single person. Jones, *Later Roman Empire*, vol. 2, 868.

⁶⁸ de Ste. Croix, "Ancient Greek and Roman Maritime Loans," 42, n.3; Jones, *Later Roman Empire*, vol. 2, 855–872.

⁶⁹ Simon T. Loseby, "The Mediterranean Economy," in *The New Cambridge Medieval History*, vol. 1, ed. Paul Fouracre (Cambridge: Cambridge University Press, 2005), 628–629 ("all but the richest merchants needed backers with capital, commodities and ships ... or who might bail them out when things went wrong."). To be clear, the discussion here relates to private shippers and merchants, not to the *navicularii* of the *annona*, whose voyages enjoyed state subsidy. On the subsidy, see Chris Wickham, "Marx, Sherlock Holmes, and Late Roman Commerce," *The Journal of Roman Studies* 78 (1988): 183–193; and Bryan Ward-Perkins, "Specialized Production and Exchange," in *The Cambridge Ancient History*, vol. 14, ed. Averil Cameron, Bryan Ward-Perkins and Michael Whitby (Cambridge: Cambridge University Press, 2000), 177 ff.

safe arrival of the ship and/or merchandise at the port of destination (for a one-way voyage) or the original port of departure (for a round trip).⁷⁰ In other words, the borrower's obligation to repay was subject to a contingency, one determined by the success or failure of the commercial venture that constituted the purpose of the loan.

The same was true under Roman law: a maritime loan did not have to be paid back unless the ship and/or the goods reached their destination safely.⁷¹ The risk-shifting function of the loan functioned on both a full basis and a partial one. Full loss of cargo meant that the borrower would not have to repay any portion of the loan, but total loss was not the only risk protected against.⁷² In cases of less than complete loss or damage, the repayment obligation would be reduced. Partial losses could result, for example, from acts of jettison or payments of ransom to pirates or reprisals by enemies.

Of course, this risk-shifting effect was subject to certain conditions: any loss of the ship or cargo had to be due to a reason other than the fault of the borrower. As an example of the kind of fault that would defeat the shift of risk to the creditor, the *Codex* gives a case where the debtor failed to adhere to the agreed route.⁷³ Other instances that would cause risk of loss to shift back to the debtor on account of fault included both *dolus* and *culpa* by the debtor.⁷⁴ Thus, deliberate acts of unnecessary scuttling, running aground and jettison or destruction of cargo would void the shifting of risk onto the shoulders of the lender.⁷⁵ Moreover, it seems to have

⁷⁰ The precise terms of the loan provisions could differ over time, but this does not necessarily imply any difference in practice. Ashburner, *Rhodian Sea-Law*, ccx.

⁷¹ *CJ* 4.33.[5] (294); Buckland, *Text-Book of Roman Law*, 463; David Johnston, *Roman Law in Context* (Cambridge: Cambridge University Press, 1999), 95.

⁷² Sieveking, *Das Seedarlehen des Altertums*, 33.

⁷³ *CJ* 4.33.[4] (undated) (debtor departs from agreed route; when goods are seized as a result, the loss cannot be allocated to the creditor); de Ste. Croix, "Ancient Greek and Roman Maritime Loans," 56.

⁷⁴ Sieveking, *Das Seedarlehen des Altertums*, 33. While the governing Roman law principles are tolerably clear, we have little evidence beyond *CJ* 4.33.[4] (undated) on unauthorized change of route.

⁷⁵ In one particularly vivid Athenian case, a ship captain had allegedly attempted to scuttle his own ship deliberately to avoid having to repay. Dem. 32.

been standard under Roman law for the parties to agree that the creditor's exposure to the risk of voyage would fall away if the voyage were not completed by a specified date.⁷⁶

Interest

Maritime loans earned interest. At Athens there was no legal cap to limit the interest rates payable on them.⁷⁷ Rates could vary enormously but were in any event substantially above the rates attainable on all but the most usurious non-maritime loans.⁷⁸ Maritime loans differed from other types of loans at Athens in that the rate of interest was calculated per voyage rather than on the more typical monthly basis.⁷⁹

Under Roman practice, too, the interest rate payable on maritime loans was substantially higher than on other loan types.⁸⁰ Maritime loans generally were excluded from otherwise applicable maximum interest-rate caps, though the precise legal basis for this exclusion is not known.⁸¹ The creditor could, however, charge the higher rates that maritime loans could bear only for the period that the creditor bore the risks of voyage.⁸² This period began on the date upon which it was agreed that the ship would sail.⁸³ It ended on the date the ship pulled into the harbor at the agreed final destination.⁸⁴ Outside the lender's risk period,

⁷⁶ Dig. 45.1.122.1; Sieveking, *Das Seedarlehen des Altertums*, 33; Buckland, *A Text-Book of Roman Law*, 464.

⁷⁷ Lys. 10.18; de Ste. Croix, "Ancient Greek and Roman Maritime Loans," 46.

⁷⁸ On this point, at least, primitivists and modernists agree. Millett, *Lending and Borrowing*, 189; Cohen, *Athenian Economy & Society*, 53–55, n.70.

⁷⁹ de Ste. Croix, "Ancient Greek and Roman Maritime Loans," 46, n.20; Millett, *Lending and Borrowing*, 189; Cohen, *Athenian Economy & Society*, 52 ff. Cohen goes further, making the difference in the basis of interest rate calculation out to be the defining characteristic of maritime (ναυτικά) vs. terrestrial (ἔγγαια) loans. Cohen, *Athenian Economy & Society*, 48. This view has not found widespread acceptance inasmuch as it disregards other features of maritime loans that may equally be regarded as characteristic, such as their purpose and the nature of the security. See, e.g., Raymond Bogaert, "Review: 'Athenian Economy and Society,'" 606. See note 48 above.

⁸⁰ Andreau, *Banking and Business*, 16, 54.

⁸¹ Buckland, *Text-Book of Roman Law*, 463; Jean-Jacques Aubert, "Commerce," in *The Cambridge Companion to Roman Law*, ed. David Johnston (Cambridge: Cambridge University Press, 2015), 233.

⁸² Buckland, *Text-Book of Roman Law*, 463.

⁸³ Dig. 22.2.3.

⁸⁴ CJ 4.33.[2] (12 Mar. 286).

the interest rate caps applicable to other loan types applied. The exclusion from rate caps for maritime loans was abolished in 528, when Justinian imposed a cap of 12% per year.⁸⁵

Roman practice as to the basis upon which interest rates were calculated is uncertain. Jean Andreau has suggested that different bases of calculation may have been used concurrently.⁸⁶ To the extent Roman practice followed the Greek precedent in relation to the basis for calculating interest, interest would have been calculated not per annum but per voyage. If so, then the interest charge on maritime loans was calculated on a basis fundamentally different from the time-based calculation applicable to other types of loan under Roman law.⁸⁷ If that is the case, then Justinian's legislation of 528, capping maritime interest at 12% per year, would have brought about a substantial change in practice indeed.⁸⁸

Security

Both at Athens and under Roman law, the borrower's obligations typically were secured with collateral. Where the borrower was a shipper, the ship itself would serve as collateral and perhaps also the freight to be earned; where the borrower was a merchant, the goods to be shipped were hypothecated or pledged as security for the loan.⁸⁹ But that did not constitute the entirety of the security that would customarily be provided to the lender. It seems to have been Athenian practice that the lender was granted security over assets amounting to at least twice the value of the principal amount.⁹⁰ Thus, a borrower might hypothecate or pledge additional goods conveyed on other vessels or stored in a warehouse in favor of the lender. The Roman law sources similarly indicate that additional credit support could be provided, such as goods

⁸⁵ *CJ* 4.32.26.2 (Dec. 528). See Chapter 2.

⁸⁶ Andreau, *Banking and Business*, 55.

⁸⁷ This difference in the basis for calculating interest may explain why maritime loans were long exempted from otherwise applicable interest-rate caps under Roman law. Cohen, *Athenian Economy & Society*, 53, n.69.

⁸⁸ See Chapter 3.

⁸⁹ This position was formerly contested insofar as relates to Roman practice but has been confirmed by *P. Vindob. G* 19792. Andreau, *Banking and Business*, 55.

⁹⁰ de Ste. Croix, "Ancient Greek and Roman Maritime Loans," 50.

of the borrower located on other ships or even land.⁹¹ Credit support for a maritime loan, in any form, was subject to the same condition as the borrower's obligation to repay principal. That is, if the ship (or merchandise) did not arrive safely, the borrower did not have to repay, and the lender had no recourse to the main collateral, to any surplus collateral or to any other form of credit support that may have been provided.⁹²

Any security interest taken by the lender over the ship or merchandise to secure the loan would persist until repayment. Because the security provided no protection if the condition of safe arrival was not met, the real protection provided by the security was to provide the lender with remedies if the borrower would not or could not pay even after safe arrival at port.⁹³ If the goods were not sold by the agreed-upon time period, the lender could execute on the security, seizing the goods or selling them himself. The lender was not limited to rights *in rem*, however: so long as the condition for repayment was met, he also had a remedy against the borrower, which would be useful in cases where the collateral provided was insufficient to cover the amount owed, for example, due to a fall in prices.

Insurance?

Loans to finance maritime trade did not have to be made in the form of maritime loans: the parties could agree that the loan would be made as an ordinary, non-maritime loan. In such a case, the legal caps on the interest rate that could permissibly be charged on loans generally would apply but risks of voyage would remain with the borrower. The borrower would thus remain liable to repay even if ship and merchandise were lost. The two forms of loan, maritime and non-maritime, could even be combined. In one well-known instance (which is likely a

⁹¹ *Dig. 22.2.6*; Ashburner, *Rhodian Sea-Law*, ccxviii.

⁹² *Dig. 22.2.6*; Ashburner, *Rhodian Sea-Law*, ccxi–ccxii.

⁹³ Ashburner, *Rhodian Sea-Law*, ccxviii.

model rather than an actual example), a loan was structured so that the terms applicable to a maritime loan (including the shift of risks of voyage to the lender) applied if the ship sailed by a specified date; if it did not, the applicable terms would be those of an ordinary loan, with risks of voyage remaining with the borrower.⁹⁴

The use of the maritime loan structure therefore represented a choice on the part of both lender and borrower. The decision to employ a maritime loan as opposed to an ordinary loan depended on the respective risk assessments, and risk appetites, of both borrower and lender. As a preliminary matter, a borrower's decision to take out a maritime loan turns first on his need for funds and secondly on their availability.⁹⁵ The lender's perspective is the converse: he requires first availability of funds to invest and secondly shippers or merchants willing to borrow. Once these relatively straightforward pre-conditions are met, borrower and lender alike would then face a choice between the maritime loan structure and an ordinary loan structure.

The fundamental point of decision between the two structures rests in the trade-off between risk and reward. Because maritime loans were exempt from Roman law caps on interest rates that applied other loan types (or were subject to higher caps), the incremental interest comprises the *pretium periculi* — the compensation for bearing the risks of voyage.⁹⁶ The borrower's use of the maritime loan structure therefore implies a judgment that the costs of the risks of voyage shifted to the lender are somehow greater than the additional interest payable. Such a judgment naturally depends on a range of factors, many of which are

⁹⁴ Dig. 45.1.122.1; Boudewijn Sirks, "Sailing in the Off-Season with Reduced Financial Risk," in *Speculum Iuris*, ed. Jean-Jacques Aubert and Boudewijn Sirks (Ann Arbor: University of Michigan, 2002), 134–150.

⁹⁵ In light of the relatively humble circumstances of most shippers and merchants throughout all periods considered, the need for debt finance can be assumed: for fourth-century BCE Athens and Rome in the classical period, see the discussion at note 68 above. For late antiquity, see Jones, *Later Roman Empire*, vol. 2, 866–872, especially 871. Some scholars have sought to argue that maritime loans fell out of frequent use at Rome from the second century BCE, but these arguments are based on the silence of the evidentiary record. The fact is that we lack evidence for nearly all kinds of commercial transactions at Rome in these periods. It is unsafe to conclude that there were none. Andreau, *Banking and Business*, 55.

⁹⁶ Andreau, *Banking and Business*, 54; Johnston, *Roman Law in Context*, 95–96.

subjective, including the expertise of captain and crew; the seaworthiness of the vessel; the proposed route; and the season of sailing with its associated weather risks. In addition, the borrower would have to consider his own appetite for bearing risk, as well as his own ability to bear loss if the risks of voyage should materialize. All these factors would have to be weighed (explicitly or implicitly) against the incremental cost of borrowing at maritime interest.

The lender's perspective is the converse. Lending under a maritime loan structure necessarily involves a judgment that the risks of loss involved in a proposed voyage are less than the amount of incremental interest that would accrue. Such a judgment takes into account the same voyage-related factors as the expertise of captain and crew, the nature of the vessel and the proposed route, which the creditor could seek to control via contract, as well such risks as the weather, which he could not.⁹⁷ In addition, the lender also has to consider his own appetite for risk and ability to bear loss. Just like the borrower, the lender would have to assess these factors against the incremental gain that could accrue by virtue of the higher interest rates at which one could lend using a maritime loan structure.

It is immediately apparent that the respective interests of borrower and lender are opposed. Use of the maritime loan structure rather than another loan structure necessarily implies that the borrower assesses the risks of voyage as greater than the cost of the incremental interest payable, whereas the lender assesses the incremental interest to be earned as greater than the costs of such risks. In part, this tension can be explained as a function of risk aversion on the part of borrowers. To the extent the shippers, captains and merchants that took out maritime loans were men of modest means, a loss incurred on any one voyage could be enough to bankrupt them.⁹⁸ This consideration might increase the amount a borrower might be willing

⁹⁷ Vélassaropoulos, *Les Naoclères Grecs*, 306–307.

⁹⁸ While it is conceivable that a shipper or merchant might borrow on a maritime basis for the express purpose of shifting risks of voyage on to the lender despite having sufficient own funds to finance the venture, no source indicates that this occurred. H. Edwin Anderson, III, "Risk, Shipping and Roman Law," *Tulane Maritime Law*

to pay for protection. But this is unlikely to provide an entire explanation for how the opposed interests of borrower and lender were resolved in the context of a maritime loan. It is far more likely that such tensions were in fact closely balanced by adjusting the respective risks and rewards against each other through adjustments to price and other terms.

Traces of this balancing and adjustment are visible in several provisions of Roman law governing maritime loans. While there is little evidence as to how maritime risk was priced during the Roman period, one entry in the *Digest* sheds interesting light on the measures by which some lenders sought to improve yields.⁹⁹ This entry relates to the practice of lenders to supervise voyages for which they assumed risk by installing a dependent, usually a slave, as “supercargo.”¹⁰⁰ The *Digest* provision limits, with impressive precision, amounts that could be charged for the services of the slave. The need for such precise specification of so prosaic a matter suggests that there was a practical need for it: creditors evidently were alert to the possibility that (over-)charging for the slave’s services as supercargo could increase the effective yield earned on the maritime loan.¹⁰¹

Similar efforts to balance risk and reward are evident in various legal provisions on risk control. Because maritime loans shifted the risks of voyage from borrower to lender, lenders would understandably be concerned to monitor and control such risks. These controls could take several forms. It was customary for the route to be specified in the contract: the borrower would lose the benefit of risk-shifting if the route varied from what was agreed, subject to whatever flexibility contract itself provided.¹⁰² Similarly, where the venture involved a round

Journal 34 (2009): 204–205, n.136. Cf. Jones, *Later Roman Empire*, vol. 2, 868, who appears more open to the possibility (without, however, adducing evidence) that shippers may have taken out maritime loans solely for purposes of risk management rather than as capital.

⁹⁹ *Dig.* 22.2.4.1.

¹⁰⁰ Buckland, *Text-Book of Roman Law*, 463.

¹⁰¹ Ashburner, *Rhodian Sea-Law*, ccxix. Similar traces of structuring to increase yields and evade interest-rate caps may be seen in Justinian’s railing against a range of such measures in *CJ* 4.32.26.4–5 (Dec. 528).

¹⁰² As discussed at notes 73–76 above, other types of fault also could cause risks of voyage to revert to the borrower.

trip, a merchant borrower would be obligated to apply the proceeds from the sale of the first set of shipped goods at the destination port to the purchase of goods for sale upon return. Part of the duties of the supercargo was to ensure these obligations were observed. These examples illustrate that at least some lenders not only assessed the risks of voyage they would assume *ab initio* but also monitored such risks on an ongoing basis.

In view of these considerations, is it correct to view the maritime loan as a form of insurance? The traditional view has been that it was, at least in a primitive form, by virtue of the way it shifted risks of voyage from borrower to lender by conditioning repayment upon safe return of ship and/or cargo.¹⁰³ While it might be argued that the absence of premium payments argues against characterizing maritime loans as a form of insurance, it remains the case that the lender is in fact compensated for assuming risks of voyage through the incremental interest that a maritime loan could bear. Just as in the case of a modern single-premium insurance policy, a maritime loan is no less insurance because the compensation payable to the protection provider takes the form of a single payment rather than periodic ones. The principal characteristic of insurance — the assumption of a defined class of risk by a third party paid an agreed sum for doing so — is manifest.

Millett, however, has denied the insurance-like character of maritime loans, claiming that they are more akin to non-productive loans.¹⁰⁴ In his view, since traders “always” sailed with their goods, the insurance element was of little importance inasmuch as the trader, having drowned along with his cargo, would not be repaying his debt in any event. To be sure, merchants regularly accompanied their goods on board.¹⁰⁵ But maritime loans could equally be made to borrowers who did not accompany their goods, such as shippers (when not the same

¹⁰³ de Ste. Croix, “Ancient Greek and Roman Maritime Loans,” 42 (the key purpose of insurance – the reallocation of risk – being achieved despite the absence of premium payments).

¹⁰⁴ Millett, “Maritime Loans,” 44.

¹⁰⁵ Jones, *Later Roman Empire*, vol. 2, 867.

person as the captain or the merchant) or merchants represented on the voyage only via a proxy, such as a freedman or slave.

More importantly, Millett's argument neglects the full scope of the risk protection that maritime loan provided. Complete loss of ship and cargo were not the sole circumstance releasing a borrower from the obligation to repay. For example, traders and crew could survive even when cargo was lost, for example because the ship was saved from foundering by jettison, or because the passengers were spared or rescued or otherwise managed to make it to shore.¹⁰⁶ The obligation to repay could also be reduced in part, for example in the amount of partial jettison or ransom paid to pirates. To be sure, the scope of protection offered by the risk-shifting provisions of the maritime loan does not equate to the full suite of protection offered by modern maritime insurance policies.¹⁰⁷ But maritime loans can and did provide a risk-shifting protection from lender to borrower in a range of circumstances, including where the borrower might reasonably expect to survive despite his cargo being lost.

Millett's argument must instead be viewed in the context of ongoing disputes between primitivists and modernists as to the extent to which credit in antiquity was "productive." While Millett is in all likelihood correct that most credit at Athens took the form of non-productive loans for consumption, even he is constrained to recognize that maritime loans were productive in an economic sense.¹⁰⁸ Millett's commitment to primitivist interpretations is such, however, that even in midst of this concession he likens maritime loans to consumption credit. But maritime loans share few, if any, features of consumption credit. From a lender's perspective, the incremental interest that can be earned from lending on a maritime structure is the

¹⁰⁶ For an example where an entire fleet was saved by jettison, see Leontius, *Life of St. John the Almsgiver*, c.28 in *Three Byzantine Saints: Contemporary Biographies of St. Daniel the Stylite, St. Theodore of Sykeon and St. John the Almsgiver*, trans. Elizabeth Dawes (Oxford: Blackwell, 1948).

¹⁰⁷ Neville Morley, *Trade in Classical Antiquity [Key Themes in Ancient History]* (Cambridge: Cambridge University Press, 2007). For a brief overview of modern marine insurance and how it differs from the protection provided by maritime loans, see Anderson, "Risk, Shipping and Roman Law," 185–186, 204–205.

¹⁰⁸ Millett, "Maritime Loans," 42–43.

functional equivalent of an investment for profit, *i.e.*, one that engages in risk for reward.¹⁰⁹ The borrower's perspective is more ambiguous: absent evidence as to how the profits from commercial ventures financed by maritime loans may or may not have been reinvested, it is difficult to conclude that whether or not a maritime loan was "productive" — that is, whether it was aimed at increasing the borrower's wealth or financing his consumption.¹¹⁰ In any event, the question of whether a maritime loan was productive or for consumption purposes has little to do with whether it functioned as insurance.

¹⁰⁹ Anderson, "Risk, Shipping and Roman Law," 204.

¹¹⁰ For a more conventional view that loans during the period of Justinian's reign were primarily for consumption and nearly never for productive purposes, see Cassimatis, *Les Intérêts*, 66.

Chapter 2: Justinian's Prior Efforts to Regulate Interest Rates

This chapter reviews Justinian's efforts prior to 540 to legislate the rates of interest that lenders could permissibly charge for loans of all types. The purpose of this review is to establish the context for an understanding of his measures in 540 and 541 to regulate maritime loans and the lobbying efforts that prompted them. The number and circumstances of Justinian's interventions in this area of law are such as to make manifest what one recent commentary has termed the emperor's "readiness to be responsive" to business interests.¹¹¹ Among such business interests, those relating to banking figured prominently, and legislation of this period evinces a generally favorable attitude toward banking interests. Even so, Justinian on several occasions denied requests made by bankers, or granted such requests only subject to conditions that materially limited their utility. He also issued rulings that favored groups whose interests ran counter to those of bankers.

In order to provide context for understanding Justinian's interest rate legislation, this chapter first gives a very brief summary of the development of Roman law rules governing interest rates on loans over the preceding centuries.¹¹²

Background

History

At their earliest stages of development, Roman law loan contracts did not provide for the payment of interest.¹¹³ Rather, loans were often made on a gratuitous basis, particularly

¹¹¹ Miller and Sarris, *The Novels of Justinian*, vol. 2, 697 n.2.

¹¹² Roman law provisions governing interest rates in other contexts, such as so-called "legal" and "judicial" interest, do not form part of this study. For more information on these types of interest under Roman law of the sixth century, see Cassimatis, *Les Intérêts*, 79 ff.

¹¹³ See the discussion at notes 138–143 below.

when contracted between members of the elite. This was the case both during the earliest centuries of the Republic and in later periods when lending at interest was prohibited by law. That said, interest-free loans would have been of little utility for commercial purposes and were in any event not generally available to Romans outside elite circles.¹¹⁴ As commercial activities developed, and as demand for loans expanded beyond elites, there arose a need for loans contracted on a different, interest-bearing footing.

Prior to the Twelve Tables (ca. 450 BCE), the interest rate that could be charged on loans was not regulated.¹¹⁵ The Twelve Tables changed this by prohibiting interest at rates exceeding the so-called *unciario faenore*. The meaning of this term has been the subject of different interpretations by modern scholars, ranging from a little more than 8% per annum to 100% per annum.¹¹⁶ For purposes of this study, however, the actual level of the rate cap imposed by this early legislation is less important than the fact of its imposition: It marked the beginning of a concern to regulate usury that would characterize Roman law for centuries.¹¹⁷

The level at which the interest rate chargeable on loans was capped would be the subject of repeated legislation, with the caps changing periodically in response to political and economic developments.¹¹⁸ The maximum rate set by the Twelve Tables was halved a few years later, only for lending at interest to be prohibited entirely in 342 BCE.¹¹⁹ Subsequent centuries would see periods of relaxation (or desuetude) of this prohibition, followed by its re-enactment in various forms until the practice of lending at interest was, finally, legalized by the *lex Cornelia Pompeia* of 88 BCE. While this legislation most likely imposed a maximum

¹¹⁴ Buckland, *A Text-Book of Roman Law*, 461.

¹¹⁵ Tac. *Ann.* 6.16.

¹¹⁶ See the discussion in Andreau, *Banking and Business*, 90–91 and the sources cited in note 3 therein.

¹¹⁷ Cassimatis, *Les Intérêts*, 49.

¹¹⁸ Andreau, *Banking and Business*, 90–99. For many periods there is substantial doubt as to whether the applicable legal caps were in fact observed. de Ste. Croix, “Ancient Greek and Roman Maritime Loans,” 55 (legislative limits were “seldom, it appears, with much effect”).

¹¹⁹ By a plebiscite under the name of the *lex Genucia* (342 BCE).

rate of interest that could be charged for loans, scholars have not yet reached consensus as to the level at which that maximum was set at that time.¹²⁰ In any event, the maximum permissible rate was reset, or perhaps merely reestablished, at the level of 12% per annum in 51 BCE.¹²¹

Our sources are less forthcoming for the period of the High Empire. Lending at interest was not prohibited, but it is uncertain whether interest rates continued to be capped at 12% per year and, if so, whether that cap was of general application or limited to certain provinces (such as Egypt).¹²² In any event, one may doubt whether statutory rate caps were in fact needed to control usury during much of the High Empire, due to lack of demand. There are several attestations of money being lent out at rates well under 12% per annum.¹²³ This practice suggests that capital seeking remunerative investment opportunities exceeded demand for loans for much of this period.

While the ascendancy of Christianity brought with it a change of attitude toward the lending of money at interest, it is uncertain how much actually changed in practice. The Church opposed the lending of money at interest but did not actually ban it save for loans made by its own clergy.¹²⁴ In any event, maritime loans appear to have been accepted even by the Church fathers as an acceptable form of lending at interest, due to the creditor's assumption of risk.¹²⁵ It seems that concerns about the supply of capital were more widespread, however, judging by

¹²⁰ Cf. Adolf Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: Transactions of the American Philosophical Society, 1953), 550 s.v. *lex Cornelia Pompeia* (suggesting a rate cap of 10%) with Andreau, *Banking and Business* 91–92 (giving alternatives ranging from 8 1/3% to 12% per year).

¹²¹ Cic. *Att.* 5.21.13; Andreau, *Banking and Business*, 92. The same rate of 12% per year may also have been the legal cap from time to time in prior periods. de Ste. Croix, “Ancient Greek and Roman Maritime Loans,” 55.

¹²² Andreau, *Banking and Business*, 92. Cf. Buckland, *Text-Book of Roman Law*, 461 (asserting, without citation to primary sources, that “the maximum rate for money loans in the Empire was 12 percent”).

¹²³ Petr. *Satir.* 53.4; Pliny *Epist.* 10.54, 10.55; Andreau, *Banking and Business*, 93.

¹²⁴ Demetrios Gofas, “The Byzantine Law of Interest,” in *The Economic History of Byzantium: From the Seventh to the Fifteenth Century*, ed. Angeliki E. Laiou, vol. 3 (Washington, D.C.: Dumbarton Oaks, 2002), 1096. This prohibition was against lending at interest. Lending per se was not prohibited, and the Church engaged in it regularly, as well as in a range of other forms of funding for commerce. Leontius, *Life of St. John the Almsgiver*, cc. 10 and, especially, 35; Loseby, “The Mediterranean Economy,” 627.

¹²⁵ Vélissaropoulos, *Les Nautilères Grecs*, 302; Andreau, *Banking and Business*, 54.

frequently expressed concerns about “hoarding.”¹²⁶ This suggests that the need for statutory caps on interest rates was more acutely felt than was previously the case. Several pieces of legislation from such indubitably Christian emperors as Constantine, Theodosius, Arcadius and Honorius expressly contemplate the continued extension of loans at interest, subject to interest rate caps.¹²⁷

As discussed more fully below, however, none of the foregoing legislative restrictions on the maximum interest rate that could be charged on a loan applied to maritime loans.¹²⁸ It was not until Justinian’s constitution of December 528 that maritime loans would, for the first time, be subjected to a maximum interest-rate cap under Roman law.¹²⁹

Banking Conventions

From mid-first century BCE, interest rates in the Roman world were expressed in units of the *centisimae usurae*, i.e., hundredths, or percentage points, per month.¹³⁰ Thus, interest at the full *centisimae usurae* equated to 12% per annum. Interest rates ordinarily were expressed as fractions thereof, such as one-half or two-thirds of a *centesima usura*, equating to 6% or 8% per annum respectively. In the later empire, rates of interest might alternatively be expressed as a duodecimal fraction of a *solidus/nomisma*.¹³¹ This calculation method leads to fractionally higher rates than the *centisimae usurae* when calculated as percentages, but the differences are too small to be significant.¹³² Justinian himself appeared to use the two systems nearly

¹²⁶ Andreau, *Banking and Business*, 93–94.

¹²⁷ *CTh* 33.1 (17 Apr. 325) (imposing caps on certain loans in kind); *CTh* 33.2 (25 Oct. 386) (reasserting cap of 12% per annum for cash loans); *CTh* 33.4 (12 June 405) (limiting loans by senators to one-half the otherwise applicable rate).

¹²⁸ Paulus, *Sententiae*, 2,14, 3 in *Fontes iuris Romani antejustiniani*, vol. 2, ed. J. Baviera (Florence: Barbéra, 1968) (*traiectitia pecunia propter periculum creditoris quamdiu navigat navis, infinitas usuras recipere potest*).

¹²⁹ *CJ* 4.32.26 (Dec. 528).

¹³⁰ Andreau, *Banking and Business*, 92.

¹³¹ See, e.g., *Nov.* 32 (15 June 535), which provides for an interest rate cap expressed in *siliquae per solidus*.

¹³² Gofas, “Byzantine Law of Interest,” 1095.

interchangeably.¹³³ By way of example, in legislation of 535 setting maximum interest rates for loans extended in famine-stricken Illyria to protect peasants there, Justinian set a maximum interest rate of 12.5% for loans in kind. If read literally, this would actually exceed the pre-existing cap for such loans of 12%, yet there can be no suggestion that Justinian intended to increase the permissible interest rates on such loans.¹³⁴

While Roman law loan contracts could take written form, that was not always or, for earlier periods, even generally the case.¹³⁵ Both written and unwritten forms of contract were in use in the sixth century.¹³⁶ That said, there is some evidence to suggest that written forms were of increasing importance during the period.¹³⁷ Loan agreements were subject to the same caps on interest rates regardless of whether they were concluded in written or unwritten form.

The standard classical Roman loan contract required no writing, as the contract to repay principal could take the form of a *mutuum* (a contract arising solely by delivery of funds for consumption), supplemented by separate oral *stipulatio* for interest.¹³⁸ This structure was the norm for maritime loans, as well.¹³⁹ By the sixth century, though, the trend of later Roman law toward the increased use of writing meant that it was customary for even *stipulationes* to be reduced to writing.¹⁴⁰ A *stipulatio* could also cover principal not just interest, in which case it novated or even duplicated the *mutuum*.¹⁴¹ Under classical Roman law, interest was not payable

¹³³ As a simplification measure, at the cost of some loss of precision. For the correspondences, see Karl-Éduard Zachariae von Lingenthal, *Histoire du droit privé gréco-romain: Droit civil II* (Paris: Lacroix, Verbeckhoeven, 1869), 134–135.

¹³⁴ See the discussion at notes 181–184 below.

¹³⁵ See, e.g., *Edict* 7 pr. (1 Mar. 542).

¹³⁶ Cf. *Nov.* 136 c.4 (1 Apr. 535) (bankers accustomed to making loans without a contract in writing) with c. 5 (some debtors execute documents or statements of account).

¹³⁷ *Nov.* 73, cc. 2, 4 (4 June 538) (debtor's signature insufficient evidence to establish existence of debt in court; the attestation of three witnesses additionally required).

¹³⁸ See, e.g., *CJ* 4.32.1 (undated), 4.32.3 (27 Sept. 200); *Dig.* 22.1.30; Buckland, *Text-Book of Roman Law*, 461; Boudewijn Sirks, "Law, Commerce, and Finance in the Roman Empire," in *Trade, Commerce and the State in the Roman World*, ed. Andrew Wilson and Alan Bowman (Oxford: Oxford University Press, 2018), 82, 100.

¹³⁹ Kaser, *Das römische Privatrecht*, vol. 2, 370–371, n.17.

¹⁴⁰ *Stipulationes* reduced to writing did not, however, lose their legal character as oral contracts under Roman law. Cassimatis, *Les Intérêts*, 26.

¹⁴¹ Johnston, *Roman Law in Context*, 84–85.

on most types of loan unless required by *stipulatio* or other enforceable form of agreement — in other words, no action for interest on most loan types could arise from a mere pact.¹⁴² For maritime loans, no separate *stipulatio* was required even in the classical period; a mere pact to pay interest sufficed.¹⁴³

Rate Caps

As discussed in Chapter 1, maritime loans were not originally Roman but rather derived from Greek practice. Perhaps as a result, they were generally exempt from Roman law caps on the interest rates, at least with respect to that portion of the loan that related to the time the ship was under sail. This freedom from legislative interference was brought to an end in 528, when maritime loans were first subjected to interest rate caps as part of a general re-regulation of interest rates by Justinian.¹⁴⁴ It is to a discussion of this legislation that this study now turns.

Justinian's General Regulation of Interest Rates

Justinian's constitution on general interest rates, promulgated in December 528 and codified at *CJ* 4.32.26 (hereinafter, **Law 26**), amended and restated the many previous imperial constitutions on interest.¹⁴⁵ Law 26 established four tiers of maximum permissible interest rates, each expressed as a proportion of the customary *centisimae usurae* (12% per annum). The first three tiers were based on the status of the lender; the fourth provided two exceptions from the lender-based tiered structure for two special loan types. The base case was that lenders could demand interest at rates no higher than 6% per annum.¹⁴⁶ *Illustres* and still higher ranks,

¹⁴² *Dig.* 19.5.24; *CJ* 4.32.3 (27 Sept. 200); du Plessis, *Borkowski's Textbook*, 297.

¹⁴³ See the discussion of pacts at notes 50–51 above. In 535, Justinian would extend this rule to all loans made by bankers. *Nov.* 136 c. 4 (1 Apr. 535). See the discussion at notes 174–175 below.

¹⁴⁴ *CJ* 4.32.26 (Dec. 528); Buckland, *Text-Book of Roman Law*, 463.

¹⁴⁵ *CJ* 4.32.26.1 (Dec. 528) evinces clear intent to supersede prior legislation (*etiam generalem sanctionem facere necessarium esse duximus, veteram duram et gravissimam earum molem ad mediocritatem deducentes*).

¹⁴⁶ *CJ* 4.32.26.2 (Dec. 528). It is clear that the 6% rate was intended to be the base case, from which the other rates were departures. See *CJ* 10.8.3 (6 Apr. 529) (*usque ad dimidiam centesimae usuras stipulari creditoribus exceptis certis personis permisimus*); Billeter, *Geschichte des Zinsfusses*, 333.

however, were limited to demanding 4% per annum; those in charge of workshops (*qui ergasteriis praesunt*) or engaged in permitted business activity (*qui . . . aliquam licitam negotiationem gerunt*) could agree to rates up to 8% per annum.¹⁴⁷ Finally, rates of up to a full *centisimae usurae* (12% per annum) were permissible for maritime loans (*pecunia traiectica*) and loans in kind (*specierum fenori dationes*).¹⁴⁸ Of logical necessity, these loan-type rate caps provided exceptions to the three tiers of status-based loan caps provided in Law 26: if they did not, no-one would be eligible to extend such loans.

The overall effect of this new legislation was a substantial reduction in the rates of interest that could permissibly be charged by lenders generally.¹⁴⁹ Justinian's motivation for promulgating Law 26 has long been a matter of scholarly discussion. Was his primary motivation in establishing new, lower permissible interest rates the protection of debtors, the enforcement of Christian morality or something else? Some scholars of the *Novels*, notably Grégoire Cassimatis, have sought to argue that the structure of the regulation itself gives the clue to its objectives.¹⁵⁰ Cassimatis points to the fact that Law 26 established different rates of return based on the status of the creditor rather than the status of the debtor as evidence that the protection of oppressed debtors was not its main aim.¹⁵¹ Perhaps, as Cassimatis suggests, precepts of Christian morality are at work in these provisions, whereby the lower interest rate caps applicable to those higher on the social scale might imply that such creditors should more closely approach the Christian ideal of not charging interest at all.¹⁵² But this argument needs

¹⁴⁷ *Id.* Bankers clearly fell within the rubric of businessmen under this law. *CJ* 8.13.[27] (1 June 528) (*Super hypothecis, quas argenti distractores vel metaxarii vel alii quarumcumque specierum negotiatores pecunias sibi credentibus dare solent...*); *CJ* 12.34.1 pr. (528–529) (*Eos, qui vel in hac alma urbe vel in provinciis cuidam ergasterio praesunt, militare de cetero prohibemus, exceptis argenti distractores...*); Billeter, *Geschichte des Zinsfusses*, 319, n.4, 332–333.

¹⁴⁸ *CJ* 4.32.26.2 (Dec. 528).

¹⁴⁹ Cassimatis, *Les Intérêts*, 49; Kaser, *Das römische Privatrecht*, vol. 2, 341.

¹⁵⁰ For the discussion that follows in this paragraph, see Cassimatis, *Les Intérêts*, 50–53.

¹⁵¹ Protection of debtors would, however, come to play a more important role in certain of Justinian's later legislation on interest rates. See the discussion at notes 178–184 and at note 204 below.

¹⁵² Cassimatis, *Les Intérêts*, 51–52. Cassimatis' argument that discouraging lending by high status would make it less likely that they would draw popular resentment upon themselves is less persuasive. Justinian's energetic

more to be persuasive. An element of Christian morality to discourage lending by those of high social rank does not exclude a concern for the protection of borrowers. The general reduction in the permissible rates of interest established by Law 26 across the board can equally be construed as evidence of concern for those who have to pay interest, among whom the impoverished masses featured prominently. Moreover, there could be other reasons to set lower rate caps for *illustres*, such as an imperial policy of making the business of lending less attractive to them, thus leaving the field to others (perhaps the bankers?).¹⁵³ On balance, we might rather conclude that, *pace* Cassimatis, Justinian's policy in promulgating Law 26 did not exclude protection of borrowers, but rather that it served both that objective and others, too.

As noted above, prior to Justinian's re-regulation, maritime loans had not been subject to rate caps at all. The higher rates of interest that could be charged on maritime loans compared with other loans were thought justified because they involved the transfer of risks of voyage to the creditor.¹⁵⁴ This assumption of risk was thought to warrant the greatest degree of liberty for the parties to agree suitable rates of interest between themselves.¹⁵⁵ But this contractual freedom was available only in respect of the period during which the creditor bore the risk of voyage. For periods during which the creditor did not bear such risk, the otherwise applicable caps on interest rates applied with full force.¹⁵⁶

This legal position would change in 528, with the emperor promulgated Law 26 and imposed a cap of 12%.¹⁵⁷ The wording of Law 26 is perhaps less clear than it might be

reform program of the late 520s and early 530s makes it implausible to believe that he feared for the stability of his regime in 528, well before the Nika riots apprised him otherwise.

¹⁵³ Cf. Cassimatis, *Les Intérêts*, 51.

¹⁵⁴ See Chapter 1 above. For more information on the interest rates chargeable on maritime loans generally, see Andreau, *Banking and Business*, 54–56, 132; David Johnston, *Roman Law in Context* (Cambridge: Cambridge University Press, 1999), 95; Sirks, "Sailing in the Off-Season," 145.

¹⁵⁵ Cassimatis, *Les Intérêts*, 53.

¹⁵⁶ *CJ* 4.33.[2] (12 Mar. 286); *CJ* 4.33.[3] (14 Mar. 286); *CJ* 4.33.[4] (undated); *CJ* 4.33.[5] (8 Oct. 294); Paulus, *Sententiae*, 2,14, 3 (*traiectitia pecunia propter periculum creditoris quamdiu navigat navis, infinitas usuras recipere potest*); Buckland, *Text-Book of Roman Law*, 463–464.

¹⁵⁷ *CJ* 4.32.26.2 (Dec. 528). See Billeter, *Geschichte des Zinsfusses*, 351; Cassimatis, *Les Intérêts*, 53.

regarding the basis of calculation.¹⁵⁸ It is, however, clear from context that the 12% cap was to be figured per annum: Law 26 subjects maritime loans and loans in kind to the same rate cap, in the same clause. There can be no question of calculating interest on a loan in kind on a per-voyage basis; such loans can accrue interest solely based on units of time (such as the month).¹⁵⁹ The structure of Law 26 therefore required the same rate cap, figured on the same basis of the passage of time, on maritime loans, even it did not state that expressly.¹⁶⁰

As noted above, maritime loans under Greek law had borne interest at rates calculated per voyage rather than per month or year, and it is likely that when the institution of the maritime loan was adopted into Roman law, the per-voyage basis of calculation was taken over, too.¹⁶¹ If in fact this was the case immediately prior to Justinian's legislation of 528, then that legislation would have effected a profound change indeed upon the law and practice governing maritime loans. Not only would the prior practice of uncapped rates be reduced to a maximum of 12%, the prior practice of calculating interest rates per voyage would have been changed to a calculation per annum. Such a change would be revolutionary, and profoundly to the detriment of those who extended maritime loans.

The change was the subject of bewilderment on the part of the great nineteenth-century legal historians who sought to explain it.¹⁶² For the most part, those generations of scholars viewed the reduction in permissible interest rates on loans for risky maritime adventures as

¹⁵⁸ *CJ* 4.32.26.2 (Dec. 528) (*in traiectionibus autem contractibus vel specierum fenori dationibus usque ad centesimam tantummodo centesimae usurarum posse stipulari*). The reference to *centesimam* clearly points to a rate of 1% per month (as for the preceding clauses of Law 26). Cassimatis, *Les Intérêts*, 54.

¹⁵⁹ The Code provision does not state why it was thought permissible for loans in kind to be subject to a less stringent cap than applied to equivalent loans in cash. Cassimatis' theory that the higher cap was justified by the price risk inherent in assets other than cash is attractive. Cassimatis, *Les Intérêts*, 55.

¹⁶⁰ Billeter, *Geschichte des Zinsfusses*, 337; Cassimatis, *Les Intérêts*, 54.

¹⁶¹ See the discussion at notes 86–88 above.

¹⁶² For the matters addressed in this paragraph, see the discussion in Billeter, *Geschichte des Zinsfusses*, 334 ff., which is highly illuminating even if it is impossible to agree with Billeter's own proposed explanation for the reasons discussed at notes 286–288 below.

economically irrational.¹⁶³ To explain Justinian’s decision to make such a change, they devised a variety of rationalizations that share nothing in common except perhaps their implausibility. Some scholars sought to explain the new interest-rate regime for maritime loans by creative interpretation to limit its scope of application. Thus, one can read accounts that purport to explain the new rate cap as limited solely to maritime loans characterized by “low risk.” Others sought to explain the new rate cap as applicable solely to the interest element of the compensation to be paid to the lender, who remained otherwise free to demand additional compensation for shouldering the risks of voyage (the *pretium periculi*). Rudolf von Jhering, followed by many, went so far as to argue that the 12% cap applied only to the land-based element of the maritime loan, *i.e.*, the period after the risks of voyage had passed.

Needless to say, none of these interpretations finds support within the text of Law 26. And *Novel* 106 demonstrates that references to maritime loans within Justinian’s legislation are to the institution of *pecunia traiecitia*, including its risk-shifting features, as described in Chapter 1 above. The new rate cap of Law 26 thus applied to maritime loans within the general Roman law understanding of the term. And it was a mistake: maritime loans could no longer generate the returns needed to compensate lenders for assuming the risks of voyage.

Evasion and correction

There are indications in the text of Law 26 itself that prior rate caps had been the object of attempts to evade them. Thus, Law 26 expressly mentions (and forbids) any of the “customary” techniques by which the rate of interest could be increased beyond the level that could legally be stipulated.¹⁶⁴ The law goes on to ban a wide range of mechanisms used to

¹⁶³ Sieveking, *Das Seedarlehen des Altertums*, 45–46 (“Die Beschränkung Justinians wird daher mit Grund allseitig als verkehrt und ungerecht anerkannt”).

¹⁶⁴ *CJ* 4.32.26.2 (Dec. 528) (... *et eam quantitatem usurarum etiam in aliis omnibus casibus nullo modo ampliari, in quibus citra stipulationem usurae exigi solent.*)

evade rate caps, including loans for sales tax, judicial fees or charges imposed for any other reason.¹⁶⁵ Law 26 also banned intermediary structures, whereby a lender subject to cap at a low rate would seek to substitute as legal lender a middleman subject to a less stringent cap.¹⁶⁶

The lower interest rate caps on all kinds of loans established by Law 26 naturally enough led to continued efforts by lenders to evade applicable caps in order to achieve higher yields. At least some creditors sought to impose tax indemnities, fees or intermediary structures to evade applicable interest-rate caps. In one notable example almost exactly contemporaneous with *Novels* 106 and 110, a Constantinople banker loaned 20 *solidi* to two impecunious visitors from Egyptian Aphrodito on condition that they should pay an ingenious (but nevertheless illegal) “restitution” charge in the amount of 8% of the principal for just two months, beyond interest at the maximum permitted rate of 8% per annum.¹⁶⁷

A few months after Law 26 was adopted, Justinian would be compelled to issue a further constitution clarifying and extending its application, in a manner adverse to the interests of money-lenders generally and bankers in particular. In this constitution of 529, Justinian complained of the “perverse” (*pravam*) interpretation that certain parties had made of the provisions of Law 26 on interest rates. Evidently, lenders had sought to argue that the new (lower) rate caps applied only to loans contracted after the adoption of Law 26, with pre-existing loans grandfathered. Justinian rejected such an interpretation of his earlier law and reiterated that the rate caps specified therein applies to all loans, whenever concluded, as from

¹⁶⁵ CJ 4.32.26.4 (Dec. 528) (*interdicta . . . detrahare vel retinere siliquarum vel sportularum vel alterius cuiuscumque causae gratia*).

¹⁶⁶ CJ 4.32.26.5 (Dec. 528) (*Machinationes etiam creditorum, qui ex hac lege prohibiti maiores usuras stipulari alios medios subiciunt, quibus hoc non ita interdictum est. rescantes iubemus, si quid tale fuerit attemptatum, ita computari usuras, ut necesse esset, si ipse qui alium interposuit fuisset stipulatus*).

¹⁶⁷ P. Cair. Masp. 67126 (7 Jan. 541) (ἀποκατάστασις); see Raymond Bogaert, “La banque en Égypte Byzantine,” *Zeitschrift für Papyrologie und Epigraphik* 16 (1997): 125; Dimitri Gofas, “La banque lieu de rencontre et instrument d’échange à Byzance,” *Cahiers du Centre Gustave Glotz* 7 (1996): 149–150.

the date of passage of Law 26.¹⁶⁸ Higher rates of interest could, however, be charged in respect of periods prior to that date if the parties had stipulated such higher rates.

Still, uncertainties remained. Were loans made by bankers eligible for the 8% rate cap applicable to ordinary business loans? Or did the lower, status-based rate caps apply to loans made by bankers depending on their own respective individual statuses? In 535, the bankers (ἀργυροπρᾶται) would make a concerted lobbying effort through their guild (σύστημα) to obtain various legislative changes favorable to themselves.¹⁶⁹ These requests included changes to rules governing the order in which creditors had to sue various obligors on a debt;¹⁷⁰ the treatment in bankruptcy of the asset represented by any offices they had purchased for themselves or their sons;¹⁷¹ and the provision of a security interest for the benefit of the creditor over assets purchased by a debtor with borrowed money.¹⁷² More importantly for our purposes, the bankers also sought and obtained via *Novel* 136 various clarifications beneficial to themselves of certain

¹⁶⁸ *CJ* 4.32.27 pr. (1 Apr. 529) (*ex tempore lationis*). See Cassimatis, *Les Intérêts*, 65. The constitution of 529 also limited the total amounts on interest that could be paid on a loan, prohibiting payments in excess of the principal amount. This feature — the prohibition on repayments *ultra duplum* — is discussed more fully below.

¹⁶⁹ *Nov.* 136 pr. (1 Apr. 535).

¹⁷⁰ Foremost among these changes was a reversal of a position taken under *Nov.* 4 (16 Mar. 535), which had been promulgated just 15 days earlier. *Novel* 4 had changed the procedural rules for actions on debt, requiring creditors to sue the primary debtors first, and “secondary” obligors (such as μανδατόρες, ἀντιφωνηταί and ἐγγυηταί) only if the primary debtor proved insolvent. *Nov.* 4 c. 1, 2 (16 Mar. 535); Salvatore Cosentino, “La Legislazione di Giustiniano sui Banchieri e la Carriera di Triboniano,” in *Polidoro: Studi offerti ad Antonio Carile*, ed. Giorgio Vespignani (Spoleto: Fondazione Centro Italiano di Studi sull’Alto Medioevo, 2013), 350–351. Bankers, crucially, had been excluded from the benefit of these provisions. *Nov.* 4 c. 3.1 (16 Mar. 535). This meant that bankers could be sued directly when they served as secondary obligors but, in their own suits, could proceed against secondary obligors only after having exhausted remedies against the primary obligor. The bankers sought legislation to level the playing field. The emperor granted this request by permitting the bankers to proceed directly against a secondary obligor if the relevant agreement contemplated that. *Nov.* 136 c.1 (1 Apr. 535). At least one recent commentary has characterized Justinian’s response as a rejection of the bankers’ request (Miller and Sarris, *Novels of Justinian*, vol. 2, 906, n.6), but one may question the extent to which it really was. Insofar as the bankers’ guilds could coordinate effective collective action by their members, it would be a simple matter for bankers collectively to impose such clauses as standard conditions to future lending. The bankers’ existing books of business without the newly contemplated clause would “run off” over time; eventually the new clause would appear in all, or substantially all, such bank loan contracts. For a survey of the development under Justinian of the legal treatment of bankers when acting as secondary obligors, see Antonio Díaz Bautista, *Estudios sobre la Banca Bizantina: Negocios bancarios en la legislación de Justiniano*. (Murcia: Universidad de Murcia, 1987).

¹⁷¹ The bankers had asked that imperial offices they had purchased for themselves or their sons be protected in the event of their insolvency. Justinian granted this request if the banker (or his son) could demonstrate that the office was a gift from the emperor or had been purchased from the mother’s funds. *Nov.* 136 c.2 (1 Apr. 535). This limitation substantially decreased the utility of the grant.

¹⁷² Justinian granted this request. *Nov.* 136 c.3 (1 Apr. 535).

interpretive questions arising under Justinian's prior legislation on interest rates. Thus, Justinian dispelled any remaining uncertainty that bankers could demand interest on loans at the ordinary business rate of 8%.¹⁷³ The bankers also persuaded the emperor to clear away the long-standing Roman law position that interest was not payable unless expressly stipulated for.¹⁷⁴ Justinian put an end to such "pettifogging" (λεπτότης), permitting loan interest to accrue on the basis of a pact alone or automatically, with no agreement at all.¹⁷⁵ This same law also provided that, when a contract specified that a loan was to be made at interest without specifying the rate, an 8% rate would apply.¹⁷⁶

The bankers' lobbying efforts of 535 did not, however, meet with unmitigated success. Even on the sensitive matter of interest-rate caps, the bankers perhaps did not achieve all of their objectives. *Novel* 136 removed any possibility that a banker could use alternative forms of contract to avoid otherwise applicable rate caps. Law 26 had set the rates of interest to which a party might demand by way of stipulation (*licere stipulari*). This left open the (to a banker) tantalizing possibility that higher rates of interest might be agreed to using form of contract other than the unilateral *stipulatio*. Even in the unlikely event that so creative an interpretation was practically available, *Novel* 136 foreclosed it by expressly subjecting interest rates on ordinary business loans made otherwise than by *stipulatio* to the same 8% cap.¹⁷⁷

Finally, it is worth noting that, as a consequence of famine in the northern Balkan region in 535, Justinian separately issued special regulations to protect peasants from the predations

¹⁷³ *Nov.* 136 c. 4–5 (1 Apr. 535). Later, Justinian would expressly state that bankers were entitled to demand interest at the rate of 8% irrespective of whether they had obtained a post as a civil servant. *Edict* 9 c.6 (undated, but between April 535 and March 542). Civil servants, as *illustres* or higher, could otherwise demand interest at a rate of no more than 4% per annum. *CJ* 4.32.26.2 (Dec. 528).

¹⁷⁴ See discussion at notes 51 and 142 above.

¹⁷⁵ *Nov.* 136 c. 4 (1 Apr. 535).

¹⁷⁶ *Nov.* 136 c.5 (1 Apr. 535). This was not a maximum, but a fixed rate. Giuliano Cervenca, *Contributo allo Studio delle 'Usurae' c.d. Legali nel Diritto Romano* (Milan: Dott. A.S. Giuffr  Editore, 1969), 293.

¹⁷⁷ *Nov.* 136, c.4 (1 Apr. 535). This provision gives no reason to doubt that the other interest-rate caps expressed in Law 26 also applied regardless of contractual form. Cervenca, *Contributo*, 282–283.

of creditors seeking to take advantage of their exigency.¹⁷⁸ These famine-inspired *Novels* reflect a more pronounced emphasis on the protection of borrowers than was evident in Law 26. As mentioned above, that legislation had capped maximum interest rates based mainly on the status of the lender, which suggests that the protection of debtors was not the emperor's sole concern and perhaps not even his foremost one. By contrast, the *Novels* addressing loans made in the famine zones regulated interest rates by the status of the borrower, explicitly mentioning protection of oppressed debtors as their object.¹⁷⁹ The bulk of these provisions thus prohibited the taking or holding of peasant land through the exercise of security by the creditor in connection with loans in-kind of grain.¹⁸⁰ In addition, these provisions also capped the interest rates creditors could charge for loans to such borrowers, at 4% per annum for loans in cash and 12.5% per annum for loans in kind.¹⁸¹ In setting rate caps for loans in kind higher than those for loans in cash, the imperial lawgiver followed long-standing practice whereby loans in kind, the sort likely to be of most importance to the small holder, were subject to less stringent protections than were loans of cash.¹⁸²

Only the new cap upon cash loans actually represented relief to the impoverished peasant. The 12.5% per annum maximum for loans in kind, if read literally, would actually exceed the 12% maximum established by Law 26. It is unlikely that the emperor intended to increase the maximum interest rate permitted; rather, it is more likely that he simply intended to adopt a measure that was more usable for loans of commodities. A rate of 12.5% is a proportion of 1/8, which would be easier for impoverished peasants to calculate for

¹⁷⁸ *Nov.* 32, 33 and 34 (15 June 535).

¹⁷⁹ See Cassimatis, *Les Intérêts*, 56, 58.

¹⁸⁰ We need not enter here into the discussion of whether such provisions prevented execution on the security at all (as understood by contemporaries) or merely its retention following payment in full. See Van der Wal, *Manuale Novellarum Justiniani*, 101, n.36; Miller and Sarris, *Novels of Justinian*, vol. 1, 340, n.4.

¹⁸¹ *Nov.* 32 c. 1 (15 June 535).

¹⁸² See, e.g., *CTh* 33.1 (17 Apr. 325) (loans of farm produce to be compensated by an additional 50% of quantity lent, without reference to time; cash loans, by contrast, subject to a cap of 12% per annum).

commodities than the more cumbersome 12%.¹⁸³ In other words, the rate cap applicable to loans in kind was effectively left unchanged despite the famine conditions. Its repetition may suggest that the reduction of permissible interest rates effected by Law 26 had not been widely observed and that lenders were in fact charging more than 12% for loans in kind.¹⁸⁴

Compound Interest

Roman law regulation of interest payments was not limited solely to capping the rate. Compounding of interest — that is, the charging of interest on interest due — had long been prohibited under Roman law.¹⁸⁵ Thus, the debt legislation of 51 BCE discussed above (permitting lending at interest, subject to a rate cap) permitted only simple interest.¹⁸⁶ The *Digest* reports categorical statements by Ulpian to the effect that interest on interest (*usurarum usurae*), whether present or future, could neither be stipulated for or required.¹⁸⁷

Justinian himself would reiterate and strengthen this long-standing feature of Roman law through legislation in 529.¹⁸⁸ Decrying excessively literal interpretations of pre-existing prohibitions against compound interests in terms of “words” rather than “facts,” the legislation makes clear what was perhaps already obvious prior to its promulgation: namely, that just as interest could not be demanded on interest, neither could it be demanded on interest that the creditor purported to add to principal.¹⁸⁹ In other words, amounts due as interest would always

¹⁸³ Cassimatis, *Les Intérêts*, 57. As for the new maximum rate for loans of cash to peasants of the affected provinces of 4.5%, it would have adversely affected the ability of lenders who otherwise would have the ability to lend at higher rates under *CJ* 4.32.26.2 (Dec. 528) (bankers and merchants: 8%; lenders to whom no other rate applied: 6%). Billeter, *Geschichte des Zinsfusses*, 342. Could lenders with a status of *illustres* or higher (who were otherwise limited to demanding no more than 4%) take advantage of it? Unlikely, and unlikely that the additional half percent increment in annual interest would provide much incentive for them to try their luck.

¹⁸⁴ Cassimatis, *Les Intérêts*, 59.

¹⁸⁵ Buckland, *Text-Book of Roman Law*, 461; Kaser, *Das römische Privatrecht*, vol. 2, 342.

¹⁸⁶ Andreau, *Banking and Business*, 92.

¹⁸⁷ *Dig.* 12.6.26.1

¹⁸⁸ *CJ* 4.32.28 (1 Oct. 529). Law 26 had implicitly continued the pre-existing position by providing that payments of “excess interest” must be deducted from principal. *CJ* 4.32.26.4 (Dec. 528).

¹⁸⁹ The creditors’ approach appears to have taken the form of requiring the debtor to novate the old debt via a new *stipulatio* to pay an amount comprising the sum of both the principal amount and past and/or future interest. *CJ*

retain their character as interest and could never be converted to principal upon which additional interest could accrue.

Repayments *Ultra Duplum*

Quite apart from statutory caps on the rates and types of interest that could be charged for loans, Roman law also imposed an aggregate cap on the total amount that could be repaid. Generally, the total amount of interest payable on a loan could not, in aggregate, exceed the principal amount. This was the case regardless of the loan's duration or the extent of time over which interest accrued. Despite the clarity of the principle and its frequent (re-)statement, the prohibition against repayments *ultra duplum* may not have been observed in practice.¹⁹⁰

In our period, Justinian would on several occasions reconfirm the long-standing principle that a creditor's total aggregate recoveries could not exceed double the original principal amount of the loan. The first attested instance is a constitution of 529.¹⁹¹ In it, the emperor capped aggregate interest payable on loans at the level of the respective principal amounts.¹⁹² This would be the case irrespective of whether or not security had been provided — according to the text of the constitution, some older laws had provided for an exemption from the prohibition on payments *ultra duplum* in circumstances where pledges had been provided.¹⁹³ Justinian abolished this long-standing exception, putting all types of loan on an equal footing with regard to the prohibition of repayments *ultra duplum*.

4.32.28.1 (1 Oct. 529) (*nullo modo licere cuidam usuras praeteriti vel futuri temporis in sortem redigere et earum iterum usuras stipulari*); Cassimatis, *Les, Intérêts*, 61–62.

¹⁹⁰ Cf. Andreau, *Banking and Business*, 93.

¹⁹¹ *CJ* 4.32.27 (1 Apr. 529).

¹⁹² *CJ* 4.32.27 c. 1 (1 Apr. 529).

¹⁹³ *CJ* 4.32.27 c. 1 (1 Apr. 529).

Justinian would have further occasion to return to the question of repayments *ultra duplum* a few years later, in 535, with the promulgation of *Novel* 121.¹⁹⁴ *Novel* 121 clarified the circumstances in which Justinian's earlier prohibition of interest *ultra duplum* applies.¹⁹⁵ It states that, whereas prior to his earlier legislation the prohibition against interest *ultra duplum* applied only where no payments had previously been made, the intended effect of Justinian's constitution of 529 had been to make the prohibition of interest payments in excess of principal applicable to all cases, including those where substantial prior payments had been made.¹⁹⁶

The specific application of the provisions of *Novel* 121 was confirmed by *Novel* 138, promulgated shortly thereafter.¹⁹⁷ Whereas *Novel* 121 was a response to a specific appeal from a provincial judicial decision, *Novel* 138 was addressed to the *magister officiorum*, effectively head of the empire's central civil service.¹⁹⁸ Despite its form as a response to a petition, it is clear that the provisions prohibiting demand for payments in excess of double the principal amount were intended to be of the broadest possible application.

While the import of Justinian's legislation prohibiting the demand for interest *ultra duplum* in all circumstances was perhaps not fully appreciated at the time of *Novel* 121, it would go on to be understood sufficiently well to be deployed creatively by certain prominent citizens of Aphrodisias, a city in Caria. *Novel* 160, a pragmatic sanction that is undated but certainly no earlier than 535, addresses a plea made on behalf of the city of Aphrodisias by its

¹⁹⁴ *Nov.* 121 (15 Apr. 535). This law took the form of a "pragmatic sanction," which in theory marked it out as of being both important in principle and of general applicability Berger, *Encyclopedic Dictionary*, 648 s.v. *pragmatica sanctio*. In practice, however, distinctions between the various forms new laws could take were increasingly disregarded in late antiquity, with the result that it is difficult to reconstruct the relative status of the different forms. Alexander Demandt, *Die Spätantike: Römische Geschichte von Diocletian bis Justinian 284–565 n. Chr.* (Munich: C.H. Beck, 1989), 235, n.27.

¹⁹⁵ Miller and Sarris, *Novels of Justinian*, vol. 2, 796, n.5 *Appendix* 9 c.5 (undated) also refers to this earlier law.

¹⁹⁶ *Nov.* 121, c. 2 (15 Apr. 535). The earlier legislation was a constitution, attributed to Caracalla, codified at *CJ* 4.32.10 (undated), which expressly stated that it did not apply to interest already paid (*Usurae per tempora solutae non proficiunt ad dupli computationem*). See Cassimatis, *Intérêts*, 63–64.

¹⁹⁷ *Nov.* 138 (undated, but likely of 535 or 536). Miller and Sarris, *Novels of Justinian*, vol. 2, 921.

¹⁹⁸ J.F. Haldon, "Economy and Administration: How Did the Empire Work?" in *The Cambridge Companion to the Age of Justinian*, ed. M. Maas (Cambridge: Cambridge University Press, 2005), 41.

πατήρ πόλεως (*pater civitatis*). The city had entered into arrangements with a number of its citizens whereby it had handed over significant sums to be invested in return for payment of a fixed amount per year.¹⁹⁹ The citizens, invoking Justinian's prohibition against interest *ultra duplum*, sought to argue that their obligation to make payments ceased at the point where such annual payments totaled up to double the amounts handed over by the city. In other words, they sought to characterize the money handed over as a loan, and the annual payments as interest.²⁰⁰ The city objected and sought imperial relief. Justinian gave the citizens' argument short shrift, (correctly) characterizing the annual payments as "a kind of rent" (τι τέλος), not subject to the prohibition against interest *ultra duplum*. In response to what was viewed as a "criminal interpretation" (τῆς κακούργου ἐρμηνείας) of his law, the *Novel* concludes with a provision requiring those seeking to make the same clever argument in future both to reimburse the provider of funds for the additional rent payments and to repay the principal twice over.²⁰¹

Subsequent Developments

Despite Justinian's repeated prohibition against demands for total repayment beyond double the principal amount, the imperial government would be compelled in times of general exigency to bend the rule. Thus, *Edict* 9, another piece of legislation prompted by lobbying of the bankers' guild, exempts from that recovery cap payments to bankers made

¹⁹⁹ *Nov.* 160 pr. (undated).

²⁰⁰ Miller and Sarris, *Novels of Justinian*, vol. 2, 1000, n.5. state that the citizens acted as fund managers, but this is incorrect insofar as fund management involves the payment of investment returns to the owner, who bears the risks and benefits from the rewards of investment, with a fee retained by the managers. In the case of Aphrodisias, the citizens bore the risks and benefitted from the rewards, paying the city only a fixed "kind of rent." The arrangement therefore is more properly likened to an annuity. Separately, Justice Fred H. Blume's note censuring the reasoning of this *Novel* is unwarranted: *pace* Blume, the preface does not characterize the amount received by the citizens as a loan or the payments as interest, so there is no inconsistency between the statement of facts and the legal conclusion. Fred H. Blume, trans., "Annotated Justinian Code," ed. Timothy Kearley, 2nd ed. (Laramie, Wyo.: University of Wyoming George H. Hopper Law Library, 2010), note to *Nov.* 160 (at https://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/novels/141-168/novel%20160_replacement.pdf, accessed 11 May 2019),

²⁰¹ *Nov.* 160, c.1 (undated).

under pre-existing loan contracts.²⁰² The need for the exemption suggests that the cap on the lender's total recoveries had not actually been observed in practice. The justification for this grandfathering exception may be found in a roughly contemporary edict, the fanciful rhetoric of which proclaims that of "our whole realm's transactions, the most important and most necessary" are handled by bankers.²⁰³

Later still, in 544, Justinian would act to protect the Church as an institution by capping interest rates on loan to it at the rate of 3% per annum.²⁰⁴ Like the famine-inspired *Novels* discussed above, this act on behalf of the Church marks a further departure from the regime established by Law 26, which was based on the status of the lender. Much later, after the reconquest of Italy from the Franks in 553–555,²⁰⁵ Justinian would impose a moratorium on the payment of interest on loans taken out by debtors in Italy or Sicily prior to the Frankish invasion.²⁰⁶ The moratorium applied to all loans incurred prior to the Frankish invasion until the fifth anniversary of the re-establishment of Roman rule.²⁰⁷ In a corrupt passage in the sole surviving manuscript, this legislation may also reiterate the prohibition against adding interest to principal.²⁰⁸ Given the late dates of these enactments – long after the repeal of *Novel* 106 by *Novel* 110, further discussion of their provisions is outside the scope of this study.

²⁰² *Edict* 9 pr., c.5 (undated but in any event between April 535 and March 542). Cosentino, *Legislazione di Giustiniano*, 354–355. A date toward the end of this range is more likely.

²⁰³ *Edict* 7 c.8 (1 Mar. 542).

²⁰⁴ *Nov.* 120 (9 May 544).

²⁰⁵ Agathias, *Histories* 2.4–9.

²⁰⁶ *Appendix* 8 (undated, but attributable to 555 or slightly later).

²⁰⁷ *Appendix* 8 also provided mechanisms for the settlement of remaining debt claims, pursuant to which the debtor could offer creditors either half the principal amount or half his own property. It also made extensive provision for the allocation of collateral or other security lost or destroyed during the invasion.

²⁰⁸ Cf. Miller and Sarris, *Novels of Justinian*, vol. 2, 1132, n.6.

Chapter 3: Justinian's Maritime Loan Legislation and its Repeal

Having reviewed in the preceding chapter Justinian's numerous early measures to regulate the interest rates chargeable on loans, this study now turns to an analysis of the circumstances surrounding the promulgation and repeal of his maritime loan legislation of 540. An understanding of those circumstances first requires an excursus into the identity and role of lenders in sixth-century Constantinople.

Lenders and Bankers

Bankers were not the only lenders in sixth-century Constantinople. The very structure of the interest-rate regime introduced by Law 26, with its status-based gradations of maximum rate caps, demonstrates that the category of lender encompassed many who were not bankers.²⁰⁹ *Illustres* and higher ranks may have been particularly sought out as lenders, not just because their 4% rate cap would have made loans from them cheaper, but perhaps also due to their powers of patronage. Others, including non-bank businessmen and private individuals, could also make loans, as the provisions made for them in Law 26 show.²¹⁰ Maritime loans could be extended by non-bank lenders.²¹¹ The business of extending maritime loans necessarily required the careful assessment of risk and therefore presumed detailed knowledge of shipping routes, weather patterns, the seaworthiness of vessels and crew skills. Accordingly, it is likely that such loans were the province of specialized lenders, perhaps mainly current or former shippers and merchants.²¹²

²⁰⁹ See the discussion at notes 145–147 above.

²¹⁰ In fact, the only class of persons for whom it is certain that lending at interest was prohibited during this period is clergy. See the discussion at note 124 above.

²¹¹ *Novel* 106 identifies two. See the discussion at notes 235–238 below.

²¹² Jones, *Later Roman Empire*, vol. 2, 868. See also the discussion at note 61 above.

Unlike what may or may not have been the case in fourth-century BCE Athens,²¹³ bankers in sixth-century Constantinople made loans. Several provisions of *Novel* 136 of 535 expressly indicate that bankers were important sources for lending.²¹⁴ For example, *Novel* 136 facilitated bank lending by granting bankers a security interest over assets purchased with funds lent by them; this was a privilege granted to no other class of lender.²¹⁵ Another provision of the same law states expressly that its purpose was to encourage bankers to continue to lend.²¹⁶ Documentary evidence for bank lending during this period also survives in the form of the Aphrodito papyrus discussed above.²¹⁷ The terms of that loan, involving repayment to the banker's agent (or branch) in Alexandria, demonstrates that bankers of this period could have extensive and far-flung operations.²¹⁸

There were two kinds of professional bankers in Constantinople: silversmiths (*ἀργυροπράται/argentarii*) and money-changers (*τραπεζῖται/collectarii*). The distinction between the two had been eroding for at least a century prior to *Novel* 106, and by the time of its promulgation there was significant overlap.²¹⁹ In addition, there were many other names in use to refer to those involved in activities commonly associated with banking (*e.g.*, *argenti distractores*). Whereas the *argentarii* of the High Empire had been bankers rather than

²¹³ See the discussion at notes 52–61 above.

²¹⁴ See the discussion at notes 169–177 above.

²¹⁵ *Nov.* 136, c. 3 (1 Apr. 535).

²¹⁶ *Nov.* 136, c.1 (1 Apr. 535).

²¹⁷ *P. Cair. Masp.* 67126 (7 Jan. 541). See the discussion at note 167 above.

²¹⁸ Bogaert, “La Banque en Égypte Byzantine,” 91–92, 125–126.

²¹⁹ See, *e.g.*, *CJ* 11.18.1 (23 Mar. 439). The precise extent of the overlap is uncertain. Cf. Michael F. Hendy, *Studies in the Byzantine Monetary Economy c. 300 – 1450* (Cambridge: Cambridge University Press, 1985), 242 with Gilbert Dagron, “The Urban Economy: Seventh–Twelfth Centuries,” in *The Economic History of Byzantium: From the Seventh Through the Fifteenth Century*, ed. A. Laiou (Washington, D.C.: Dumbarton Oaks, 2002), 432–436. The distinction was maintained in Egypt, where the *τραπεζῖται* were treated as petty tradesmen, whereas *ἀργυροπράται* performed more important functions (including public ones). Bogaert, “La banque en Égypte Byzantine,” 90–91. The two professions are clearly distinguished in the tenth-century Book of the Eparch, but the evidence of that source is outside the scope of the argument presented here due to the difficulties in determining which, if any, of its provisions can be securely traced back to prior periods. The blithe confidence that such later evidence can be read straight back to the sixth century (shown by, *e.g.*, Albert Stöckle, *Spättrömische und byzantinische Zünfte; Untersuchungen zum sogenannten ἐπάρχικον βιβλίον Leos des Weisen* (Leipzig: Dieterich, 1911)) is misplaced.

silversmiths, those sophisticated banking institutions had disappeared by the fourth century, done in by the inflation that ensued upon serial devaluations of the imperial coin.²²⁰ By the sixth century the banking profession had revived somewhat, if not to its previous level of sophistication. At the very least, though, sixth-century bankers took deposits and made loans, including, it seems likely, maritime loans.²²¹

As was the case with many other professions, the *ἀργυροπράται* and *τραπεζῖται* were organized into guilds.²²² Guilds were a long-standing feature of late-Roman society, though their objectives and roles differed from those of the medieval period.²²³ The principal distinguishing characteristic was their different relationship with state authority: although late-antique guilds coordinated private activity, they did so subject to careful state oversight by the urban prefect, and subject to duties to perform burdensome public functions such as firefighting and, for bankers, the policing of counterfeiting.²²⁴ Though originally social in function, Roman guilds were already by the third century institutions through which political pressure could be brought to bear on behalf of members. Guilds likely initiated much imperial regulation governing their activities, and their lobbying is well attested for sixth-century Constantinople.²²⁵ As late-imperial *dirigisme* developed, the guilds also became instruments by which emperors could implement their schemes of economic planning.²²⁶ For the sixth

²²⁰ W.V. Harris, "The Nature of Roman Money," in *The Monetary Systems of the Greeks and Romans*, ed. W.V. Harris (Oxford: Oxford University Press, 2008), 204 ff.; Silver, "Finding the Roman Empire's Disappeared Deposit Bankers," 301–327.

²²¹ Sieveking, *Das Seedarlehen des Altertums*, 46; N. van der Wal, *Manuale Novellarum Justiniani: Aperçu systématique du contenu des Novelles de Justinien*, 2nd ed. (Groningen: Chimaira, 1998), 109 n.12

²²² Hendy, *Byzantine Monetary Economy*, 242. For the *ἀργυροπράται*, see *Nov.* 136, pr. (1 Apr. 535).

²²³ Carrié, "Were Late Roman and Byzantine Economies Market Economies?" 21; see also Stöckle, *Spätromische und byzantinische Zünfte*.

²²⁴ State supervision and public services: Stöckle, *Spätromische und byzantinische Zünfte*, 11–16; Jones, *Later Roman Empire*, vol. 1, 695; Bogaert, *La banque en Égypte Byzantine*, 90–91. Urban prefect: *CJ* 1.28.4 (15 Apr. 391); Gofas, "La banque lieu de rencontre," 148. Cf. Carrié, "Were Late Roman and Byzantine Economies Market Economies?" 21 (placing more emphasis on free market forces than on state control). Late antique guilds had also facilitated the collection of the *collation lustralis* until that tax on trade was abolished by Anastasius. Jones, *Later Roman Empire*, vol. 2, 858, 871.

²²⁵ As was the case at Rome. Jones, *Later Roman Empire*, vol. 1, 357.

²²⁶ Dagron, "The Urban Economy," 405–406.

century, the evidence of Procopius, as well as several of the *Novels* discussed herein, suggest that Justinian used the guilds as instruments of government policy.²²⁷

Bankers, like other professions engaged in trade or business, did not enjoy high social status in the late empire.²²⁸ Provincial bankers had long been prohibited from holding office, even minor local ones.²²⁹ All bankers, including metropolitan ones, were barred from office in the imperial administration until 528–529, when the silver merchants (*argenti distractores*) managed to win for themselves an exemption from the general ban.²³⁰ They could lay out substantial amounts to acquire such offices, so much so that a few years later they petitioned Justinian to make special provision for how the asset represented by the office should be treated in the event of their bankruptcy.²³¹ Even so, bankers generally limited their ambitions to seeking minor sinecures for themselves or for their sons.²³² That said, Peter Barsymes — a provincial money-changer who worked his way up the imperial bureaucracy to occupy the important financial post of *comes sacrarum largitionum* and then the prefecture — is a notable exception.²³³ Procopius gives an unflattering description of his skills in increasing imperial revenue and squeezing expenditure.²³⁴ Not every detail of that account need necessarily be believed, but it is perhaps indicative of the suspicion in which bankers were held.

²²⁷ Procop. *Hist. Arcana* 25.13 (Ἐπεὶ δὲ οἱ βασιλεῖς οὗτοι τῶν ὀνίων τὰ πλεῖστα <εἰς τὰ> καλούμενα περιστήσαντες μονοπώλια, τοὺς τι ὠνήσασθαι βουλόμενους ἀεὶ καθ' ἑκάστην ἀπέπνιγον, μόνα δὲ αὐτοῖς ἀνέφαπτα τὰ τῆς ἐσθῆτος ἐλέλειπτο πωλητήρια, μηχανῶνται καὶ ἄμφ' αὐτοῖς τάδε.). All citations to Procopius' *Historia Arcana* in this study are to the text in *Historia Quae Dicitur Arcana* [Procopii Caesariensis Opera Omnia, vol. 3], ed. Jakob Haury (Leipzig: Teubner 1963).

²²⁸ Hendy, *Byzantine Monetary Economy*, 242.

²²⁹ *CJ* 12.57.12.3 (3 Apr. 436).

²³⁰ *CJ* 12.34.1–2 (528 or 529). They remained barred from holding military office. *CJ* 12.34.3 (528 or 529).

²³¹ *Nov.* 136 c.2 (1 Apr. 535). See the discussion at note 171 above.

²³² Jones, *Later Roman Empire*, vol. 2, 864, 871. The Aphrodito papyrus provides an example: the lending banker, a certain Anastasius, held the minor title καθοσιωμένος καστρατιανός [τῆς] θείας τραπέζης. *P. Cair. Masp.* 67126, l.61–62 (7 Jan. 541), with the edits suggested by Gofas, “La banque lieu de rencontre,” 149, n.25.

²³³ Barsymes was the addressee of the *Edict 7* as *comes sacrarum largitionum*. *Edict 7* c. 6 (1 Mar. 542); Cosentino, *Legislazione di Giustiniano*, 353. For the course of his career, see Procop. *Hist. Arcana* 22.2–5, especially 3 (ὅς πάλαι μὲν ἐπὶ τῆς τοῦ χαλκοῦ τραπέζης καθήμενος κέρδη αἰσχροτάτα ἐκ ταύτης δὴ ἐπορίζετο τῆς ἐργασίας) and Kaldellis' notes thereon in *Procopios: The Secret History with Related Texts*, ed. and trans. Anthony Kaldellis (Indianapolis/Cambridge: Hackett, 2010), 97, nn.37–38; Hendy, *Byzantine Monetary Economy*, 243; Gofas, “La banque lieu de rencontre,” 151, n.32., 161 (Barsymes career “était un cas bien à part”).

²³⁴ Procop. *Hist. Arcana* 22.

Novel 106

Adoption

The preface to *Novel* 106 contains an unusually detailed account of the procedures followed in its promulgation. It states that the new law was the result of an approach by a certain Peter and Eulogetus, whose business it was “to lend money to shippers, or to traders, especially those whose business is maritime.”²³⁵ *Novel* 106 states that Peter and Eulogetus “make their living” by extending maritime loans, but it does not state that they were bankers. Some scholars have deemed it likely that they were, but this identification is unproveable since neither *Novel* 106 nor *Novel* 110 makes any mention of consulting bankers.²³⁶ By contrast, *Novel* 136, issued five years earlier, demonstrates that when bankers lobbied for new laws in their favor there was no reluctance to identify them as bankers.²³⁷ The later *Edicts* 7 and 9, too, state expressly that they were prompted by lobbying by bankers.²³⁸

Peter and Eulogetus made their approach to the *praefectus praetorio Orientis*, a post then held by John the Cappadocian. He reported it to the emperor, relaying their statement that “disputes” had arisen in respect of customary practice for maritime loans, as well as their request for existing custom to be clarified by imperial enactment.²³⁹ The prefect was instructed to summon the shippers (ναύκληροι) for consultations to ascertain the customary practices for

²³⁵ *Nov.* 106, pr. (7 Sept. 540). Peter and Eulogetus are not otherwise attested. Miller and Sarris, *Novels of Justinian*, vol. 2, 697 n.2. For the tantalizing but unproveable conjecture that the Peter mentioned is Peter Barsymes, see Díaz Bautista, *Estudios sobre la Banca Bizantina*, 117, n.22 (“podría tratarse de Barsymes”).

²³⁶ See, e.g., van der Wal, *Manuale Novellarum Justiniani*, 109 n.12 (“Probablement, ces requérants étaient des banquiers de Constantinople”). No mention is made of consulting merchants either. It is perhaps possible that consultation of the merchants, or the bankers, or both took place and was omitted, inadvertently or otherwise.

²³⁷ *Nov.* 136 pr. (1 Apr. 535).

²³⁸ *Edict* 7 (1 Mar. 542); *Edict* 9 (undated, but in any event between April 535 and March 542). Cosentino, *Legislazione di Giustiniano*, 354–355. A date toward the end of this range is more likely.

²³⁹ *Nov.* 106 pr. (7 Sept. 540) (ἀμφισβητήσεων ἀνισταμένων).

maritime loans.²⁴⁰ Consultations were held, and the customs sworn to in them were found to be “of various kinds.”²⁴¹ The prefect then reported the findings back to the emperor.

One need not necessarily believe that the “disputes” or the “variety” complained of actually existed, or that what is described in *Novel* 106 as customs accurately reflected pre-existing practice. There are several reasons for this. First, to judge by their description in *Novel* 106, the existing customs for maritime loans appear to have been neither disputed nor various. Only two forms of loan are described, each with straightforward terms and conditions. *Novel* 106 betrays no hint of dispute among the shippers as to either the number and nature of the loan structures that were in use or as to their respective terms.²⁴² Secondly, if the customs described in *Novel* 106 were in fact prevailing, this would indicate widespread violation, if not outright disregard, of the interest rate regime for maritime loans introduced by Law 26. To see why, let us examine the two loan structures identified in *Novel* 106.

Loan Structures

The shippers described two different forms of maritime loan, the choice between which was at the election of the lender. In the first type of loan (the “Freight Structure”), the rate of interest was capped at 10%.²⁴³ Under the Freight Structure, the lender was entitled to ship

²⁴⁰ The consultations were likely coordinated via the guilds. Miller and Sarris, *Novels of Justinian*, vol. 2, 698 n.5.

²⁴¹ *Nov.* 106, pr. (7 Sept. 540) (τρόπους ποικίλους). One might rather translate ποικίλους as “complicated.”

²⁴² Billeter, *Geschichte des Zinsfusses*, 324–325 sought to identify variety in presumptive differences of subordinate importance not described in the legislation. There is no indication any such undescribed complexities in the text. And if such differences were too minor to be identified, why would they have led to ἀμφισβήτησεις sufficient to prompt Peter and Eulogetus to seek a new law? Why would the legislative draftsman have bothered to mention them as ποικίλους? And how would the new legislation have resolved them?

²⁴³ *Nov.* 106 pr. (7 Sept. 540) (κατὰ δέκα χρυσοῦς ἓνα κομίζεσθαι μόνον ὑπὲρ τόκων). The period over which interest was calculated under the Freight Structure is not expressly stated. It is assumed for purposes of the following argument that the per-voyage basis of calculation applicable to the Pure Insurance Structure described below applied to the Freight Structure. Accord: Billeter, *Geschichte des Zinsfusses*, 325. If the Freight Structure was instead subject to interest calculated per annum, the conclusions herein would be unaffected: the choice between the two structures fell to the lenders, who could be expected to choose the one that would generate the higher yield for themselves.

onboard a specified amount of wheat or barley — one *modius* (ca. nine litres) per *solidus* lent.²⁴⁴ The borrower was liable for any applicable port duties.²⁴⁵ It is uncertain whether the creditor was obliged to pay shipping charges on the *modii* shipped or whether these, too, fell to the account of the borrower.²⁴⁶ Risk of loss of the creditors' cargo, at least, remained with the creditor; the text is ambiguous as to whether risk of loss on other (non-creditor) cargo also lay with the creditor, but in all likelihood it was.²⁴⁷

Scholars have long assumed that the Freight Structure was a variant of the second, more commercially important type of maritime loan provided for in *Novel* 106.²⁴⁸ This second type of loan (the "Pure Insurance Structure") involved no shipment of wheat or barley on behalf of the creditor but bore a higher interest rate of 12.5%.²⁴⁹ Loans made under this structure were

²⁴⁴ The restriction of the freight feature to wheat or barley suggests that the Freight Structure was intended for lenders other than professional lenders. But professionals could conduct other forms of business alongside lending.

²⁴⁵ *Nov.* 106 pr. (7 Sept. 540). If one were to figure the port duties payable under the Freight Structure as part of the interest expense, the all-in interest expense paid under the Freight Structure could perhaps in some cases exceed the 12.5% payable under the Pure Insurance Structure. In this period, tolls may have applied at rates of around 5% of the value of the goods in transit. Neil Middleton, "Early Medieval Port Customs, Rolls and Controls on Foreign Trade," *Early Medieval Europe* 13, no. 4 (2005) 313–358; followed by Miller and Sarris, *Novels of Justinian*, vol. 2, 698, n.7. The exorbitant figures for port fees given by Procopius in *Hist. Arcana* 25.10 (fees leading to tripling the price of shipped merchandise) should be treated with caution. For purposes of calculating the charge applicable to Freight Structure loans, however, the 5% would be calculated based on the value of the lender's cargo, since only that represents a lender expense borne by the borrower. The total principal amount of the loan would ordinarily have been significantly larger, covering all or at least most of the total amount of shipper/merchant's own cargo, otherwise the loan would have lacked commercial sense. A 5% charge on the smaller amount of cargo would be unlikely to exceed the 2.5% of the total loan amount that is the headroom between the 10% permitted under the Carry Structure and the 12.5% permitted under the Pure Insurance Structure. The same holds true for foregone shipping fees, if the creditor was in fact relieved of these. It is, in any event, unclear that port duties or foregone shipping fees had to be included in the calculation of interest at all. If so, they would perhaps rather have been deducted from the total principal amount for purposes of calculating interest, by analogy to the anti-evasion measures of *CJ* 4.32.26.4 (Dec. 528) applicable to sales tax payments and tips paid by borrowers to lenders. Cf. Billeter, *Geschichte des Zinsfusses*, 327, n.3 (rejecting, without evidence or argument, the possibility that tolls could exceed 2.5% of principal).

²⁴⁶ Blume, "Annotated Justinian Code," *Nov.* 106 (7 Sept. 540), note a. (available at https://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/novels/101-120/novel%20106_replacement.pdf, accessed 11 May 2019).

²⁴⁷ The Greek text states that the creditors bore "the risk on the venture" (τὸν ἐκ τῶν ἀποβησομένων κίνδυνον). By contrast, both the text of the *Authenticum* (in *ipsos* autem creditores respicere ex eventibus periculum) and the Latin translation of Schoell and Kroll (ad *ipsos* autem creditores spectare periculum ex iis que eventura sit) can be read to suggest that creditors bore the risk only of their own cargo. *Novellae* [*Corpus Iuris Civilis*, vol. 3], 508 ad loc. *Nov.* 106 (emphasis supplied). The fact that the 10% rate payable on the Freight Structure exceeded the 8% payable on ordinary business loans suggests that the lender bore the risk on the entirety of the cargo financed, not just the portion that represented his free freight. Only that would provide justification for the higher rate of interest.

²⁴⁸ Billeter, *Geschichte des Zinsfusses*, 326–327.

²⁴⁹ *Nov.* 106 pr. (7 Sept. 540) (τὴν ὀγδόην μοίραν λαμβάνειν ὑπὲρ ἐκάστου νομίσματος).

subject to repayment upon return (if a further voyage was to ensue consecutively) or within 20 days after return of the ship to port (in the case of the final voyage of the sailing season).²⁵⁰ The grace period was provided to allow the cargo to be sold to provide funds for repayment. If the loan was not paid by the due date, the interest rate would go down because the creditor no longer bore the risk of loss at sea.²⁵¹ It is this provision — whereby the interest rate decreases if the loan is not paid when due — that confirms the insurance element of the Pure Insurance Structure. Insofar as the rate of interest declines when the risks of voyage have passed, it is because the higher rate of interest is compensating the lender for shouldering those risks.

Even more important than these structural provisions, however, was the different interest-rate calculation regime applicable to loans made on the Pure Insurance Structure (and likely to those made under the Freight Structure, as well). Under the *Novel* 106, the interest rate was to be calculated on per-voyage basis, unlike the per-annum basis applicable to maritime loans under Law 26.²⁵² This was a fundamental difference, one that had the potential to fundamentally alter the balance of commercial interests between lenders and borrowers. To see why, one must consider the limitations of ancient navigation.

Sailing Season and Duration

Trading at sea was always risky, even for experienced captains and crew.²⁵³ In all periods of antiquity, navigation by sea was more or less restricted to the months of late spring,

²⁵⁰ *Nov.* 106 pr. (7 Sept. 540).

²⁵¹ *Nov.* 106 pr. (7 Sept. 540) (εἰ δὲ μένοι περαιτέρω τὸ χρέος οὐκ ἀποδιδόμενον, τὸν ἐκ διμοίρου τῆς ἑκατοστῆς τοῖς κυρίοις τῶν χρημάτων διδόναι τόκον, καὶ μεταβάλλειν εὐθὺς τὸ δάνεισμα καὶ εἰς τὸν τῶν ἐγγείων μεταχωρεῖν τρόπον, οὐκέτι τῶν θαλαττίων κινδύνων τὸν δανειστὴν ἐνοχλοῦντων); Miller and Sarris, *Novels of Justinian*, vol. 2, 699, n.11.

²⁵² *Nov.* 106 pr. (7 Sept. 540) (τὴν ὁγδοὴν μοῖραν λαμβάνειν ὑπὲρ ἐκάστου νομίσματος ὀνόματι τόκων οὐκ εἰς χρόνον τινὰ ῥητὸν ἀριθμουμένων, ἀλλ' ἕως ἂν ἡ ναὺς ἐπανέλθοι σεσωμένη. κατὰ τοῦτο δὲ τὸ σχῆμα. . . θᾶπτον γε μὴν ἐπανιούσης αὐτῆς τὸν χρόνον εἰς ἓνα μόνον ἢ δύο παρελκυσθῆναι μῆνας, καὶ ἐκ τῶν τριῶν κερατίων ὠφέλειαν ἔχειν, κἂν οὕτως Βραχὺς διαγένηται χρόνος κἂν εἰ περαιτέρω παρὰ τῷ δανεισαμένῳ μένοι το χρέος).

²⁵³ See, e.g., Leontius, *The Life of St. John the Almsgiver*, c. 28; Loseby, “The Mediterranean Economy,” 617. For an excellent introduction to the matters discussed in this section, see Lionel Casson, *Ships and Seamanship in the Ancient World* (Baltimore: Johns Hopkins University Press, 1971), 270–299.

summer and early autumn; the seas were thus practically, even if not ever completely, closed to sailing during winter.²⁵⁴ These limitations on ancient shipping are reflected in the legal sources, notably an imperial constitution of 380 that directed shipmasters transporting the *annona* from Africa to accept cargos at any time between 1 April to 1 October of each year, and to sail between 13 April until 15 October.²⁵⁵ In addition, Vegetius tells us that in the fourth century the sailing season ran from 27 May to 14 September of each year for galleys and from 10 March to 10 November for sailing ships, with the periods from 10 March to 26 May and from 14 September to 10 November considered fraught with risk.²⁵⁶ There is little reason to think that sixth-century conditions were significantly different from fourth-century ones in this respect: nearly the same limits to the sailing season were preserved well into the Middle Ages.²⁵⁷ Nevertheless, there appear always to have been sailors brave, or foolhardy, enough to sail during the closed period.²⁵⁸

Due to the limitations of ancient sailing, voyages were as a rule completed within a single sailing season and thus shorter than one year.²⁵⁹ Shorter voyage durations are amply attested. Diodorus Siculus states that a voyage from the Sea of Azov to Rhodes – a distance of at least 1600 kilometers – could take as few as ten days, and a voyage from Rhodes to

²⁵⁴ Michael McCormick, *Origins of the European Economy: Communications and Commerce AD 300–900* (Cambridge: Cambridge University Press, 2001), 98.

²⁵⁵ In other words, the ships of the *annona* did not sail from November to April. *CTh.* 13.3.3 (*Novembri mense navigatione subtracta, Aprilis, qui aestati est proximus, susceptionibus adplicetur. Cuius susceptionis necessitas ex kal. Aprilib. in diem kal. Octob. mansura servabitur; in diem vero iduum earumdem navigatio porrigetur*); de Ste. Croix, “Ancient Greek and Roman Maritime Loans,” 43, n.8; Casson, *Ships and Seamanship*, 270–271, n.3.

²⁵⁶ *Veg. Mil.* 4.39 (*a die VI. kal. Iunias usque in Arcturi ortum, id est in diem VIII. decimum kal. Octubres, secura navigatio creditur . . . post hoc tempus usque in tertium idus Novembres incerta navigatio est ... ex die... tertio idus Novembres usque in diem sextum idus Martias maria clauduntur*); Casson, *Ships and Seamanship*, 270, n.3.; John Pryor, “Shipping and Seafaring,” in *The Oxford Handbook of Byzantine Studies*, ed. Elizabeth Jeffreys, John Haldon and Robin Cormack (Oxford: Oxford University Press, 2008), 483.

²⁵⁷ Casson, *Ships and Seamanship*, 270, n.3.

²⁵⁸ The seas were never wholly closed (Pliny *HN* 2.125), but sailing out of season was considered exceptionally risky, even by those who did so. de Ste. Croix, “Ancient Greek and Roman Maritime Loans,” 43, n.8. For a self-congratulatory example from the fifth century, see Richard Price and Michael Gaddis, *The Council of Chalcedon*, vol. 2 (Liverpool: Liverpool University Press, 2006), 55. The Rhodes-Alexandria route, however, was described by Demosthenes as open year-round. *Dem.* 56.30 (ἀκέραιος ὁ πλοῦς); Casson, *Ships and Seamanship*, 271, n.3.

²⁵⁹ Jones, *Later Roman Empire*, vol. 2, 868 (“a normal round trip was a matter of two to three months.”).

Alexandria as few as four.²⁶⁰ Even the ships of the western *annona*, sailing as a fleet and hindered by official paperwork, could manage two round trips per year between Rome and Alexandria if starting from Alexandria.²⁶¹ This distance, ca. 2,300 kilometres each way, is greater than the distances between Constantinople and the other principal commercial centers of the sixth-century empire.²⁶² One exception is the Constantinople–Carthage route, a distance of 2,556 kilometers, which opened up after the Vandal conquest in 533, but the attestation to that is for grain ships of the *annona*, which were out of scope for maritime loans on account of the state subsidy that made private financing unnecessary.²⁶³

There is comparatively little data on voyage times to and from Constantinople but Mark the Deacon gives a voyage time from there to Rhodes of just five days (with fair winds) and a return trip of just twice that (with adverse winds).²⁶⁴ The same author reports sailing times from Constantinople to Gaza and back again at ten days and 20 days, respectively.²⁶⁵ Of course, duration of any given voyage would depend upon the direction of travel in relation to the prevailing winds and on the strength of those winds. Even so such evidence as exists points to average voyage duration of well under a full year.

Two legal texts from the late fourth century have been construed as indicating typical sailing times of longer than one year. The first of these legal texts, from 392, required

²⁶⁰ Diod. 3.34.7 (ἀπὸ γὰρ τῆς Μαιώτιδος λίμνης . . . πολλοὶ τῶν πλοῖζομένων οὐριοδρομούσαις ναυσὶ φορτίσιν εἰς μὲν Ῥόδον δεκαταῖοι . . . ἐξ ἧς εἰς Ἀλεξάνδρειαν τεταρταῖοι καταντῶσιν); Cohen, *Athenian Economy & Society*, 56, n.83 (noting, however, that the return voyage would be substantially longer due to adverse winds); Casson, *Ships and Seafaring*, 287, nn.76, 77.

²⁶¹ Casson, *Ships and Seafaring*, 297–299.

²⁶² The Stanford Geospatial Network Model of the Roman World (ORBIS) (<http://orbis.stanford.edu>) gives the following one-way voyage distances: Constantinople to Alexandria: 1,505 kilometres; Constantinople to Antioch: 1,664 kilometres; Constantinople to Gaza: 1,789 kilometres. Routes from Black Sea ports to various ports of the Mediterranean could involve potentially greater distances, but such voyages would have bypassed the ready market of the metropolis without stopping only rarely, if allowed to at all.

²⁶³ Theophanes, *Chronographia*, AM 6100; McCormick, *Origins of the European Economy*, 104; Loseby, “The Mediterranean Economy,” 626. For the importance of the *annona* system in subsidizing commercial trade, see Wickham, “Marx, Sherlock Holmes, and Late Roman Commerce,” 183–193; Ward-Perkins, “Specialized Production and Exchange,” 177 ff.

²⁶⁴ Marcus Diaconus, *Vit. Porph.* 55 and 37, respectively; Casson, *Ships and Seafaring*, 288–290, nn.78, 89.

²⁶⁵ Marcus Diaconus, *Vit. Porph.* 27 and 26, respectively; Casson, *Ships and Seafaring*, 288–290, nn.79, 88.

shipmasters to provide cargo receipts within two years of the date of sailing.²⁶⁶ The second, dated four years later, reduced that period, granting only one year to produce receipts, which were to be dated within the same consular year; the shipmaster would have the benefit of an additional year only in cases of poor winter weather or *force majeure*.²⁶⁷ It has been suggested that these provisions indicate that sailing times of longer than one year may have been the norm in late antiquity.²⁶⁸ There are several reasons to doubt this. First, the time periods are given as maxima, not as averages or indicative times.²⁶⁹ Secondly, both provisions establish deadlines for the return of documents, not for the completion of voyages. Especially where a ship was making a voyage of several stops, or where it was sailing from a port other than its home port, it might be some time after completion of the relevant voyage for a shipper to return to the port where the documents could be delivered.²⁷⁰ In addition, the sole surviving example of the provisions of a Roman law maritime loan contract (which is likely a form rather than an actual example) provides for a period of 200 days. It is uncertain whether that period relates to the expected duration of the journey — a round trip between Beirut and Brundisi — or to the sailing season as a whole.²⁷¹ On either view, the voyage would last less than one year.

The average duration of voyage during our period therefore was substantially less than one year. Under the new interest rate calculation and payment provisions of *Novel* 106, then, the average duration of maritime loans, too, would be substantially less than one year. The shorter the journey, the higher the effective interest rate would be.²⁷² Because maritime loan

²⁶⁶ *CTh.* 13.5.21 (16 Feb. 392).

²⁶⁷ *CTh.* 13.5.26 (23 Dec. 396).

²⁶⁸ Richard Duncan-Jones, *Structure and Scale in the Roman Empire* (Cambridge: Cambridge University Press, 1990), 21.

²⁶⁹ *CTh* 13.5.1 (*intra biennium*); *CTh* 13.5.26 (*intra annum*. Also: *biennium autem propter adversa hiemis et casus fortuitos*).

²⁷⁰ Sirks, “Sailing in the Off-Season,” 140 ff.

²⁷¹ *Dig.* 45.1.122.1. Cf. Duncan-Jones, *Structure and Scale*, 21 with Sirks, “Sailing in the Off-Season,” 146–149.

²⁷² Hermann Kleinschmidt, *Das Foenus Nauticum und dessen Bedeutung im römischen Recht* (Heidelberg: Hörning, 1878), 29.

interest was to be calculated per voyage rather than per annum under the new legal regime, the result would have been a substantial increase in the interest costs payable on such loans.²⁷³

Increased Interest Costs

Let us made some sample calculations, based on admittedly theoretical figures. If one assumes a maritime loan on the Pure Insurance Structure and a voyage time of six months, a nominal interest charge of 12.5% per voyage would equate to 25% per annum; for a three-month voyage, 50% per annum. The change becomes immediately apparent when one contemplates the possibility of multiple voyages within a single shipping season. Let us assume, for purposes of achieving a conservative calculation, voyages between Constantinople and Alexandria solely within Vegetius' "safe" sailing season of 27 May to 14 September.²⁷⁴ For the respective months (June, July, August and September), the Stanford Geospatial Network Model of the Roman World (ORBIS) generates indicative fast voyage durations of ca. eight days for the Constantinople to Alexandria leg and ca. 18 days for the return leg.²⁷⁵ On these assumptions, a shipper starting no earlier than Vegetius' safe start date of 27 May could complete five distinct legs of this route without extending past Vegetius' safe end date of 14 September by more than a couple days, provided that turnaround time in the respective

²⁷³ In addition, to the extent bankers operated out of multiple cities, loan contracts could specify that repayment could be made at ports along the way (rather than at the point of origin), reducing repayment periods still further. Jones, *Later Roman Empire*, vol. 2, 863. The conduct by bankers of operations in multiple cities is a complex subject, to be addressed in future research. For purposes of this study, it is enough to note that at least some metropolitan bankers were equipped to receive loan repayments in other cities during this period. For an example contemporaneous with the events analyzed here, see the Aphrodito papyrus mentioned above. *P. Cair. Masp.* 67126 (7 Jan. 541). It called for repayment at the banker's ἀποθήκη in Alexandria of a loan drawn in Constantinople. We need not take a view on the question of whether the place of repayment (ἀποθήκη) in Alexandria constituted a "branch" of the bank in Constantinople (Gofas, "La banque lieu de rencontre," 150) or the seat of an unrelated non-banking business owned by the same banker. (Bogaert, "La banque en Égypte Byzantine," 92, 97 and especially 125).

²⁷⁴ In other words, Vegetius' shoulder seasons, when sailing is possible but risky, are excluded from consideration. The route between Constantinople and Alexandria was perhaps the most heavily travelled in this period. Theophylactus Simocatta, *Historiae*, 2.14.7, in *Theophylacti Simocattae Historia*, ed. Immanuel Berkerus (Bonn: Weber, 1834), 96–97. Even if a substantial portion of the ships on it were in service to the *annona*, there still would have been much private commercial traffic. McCormick, *Origins of the European Economy*, 109.

²⁷⁵ Stanford Geospatial Network Model of the Roman World (ORBIS) (<http://orbis.stanford.edu>) (accessed 2 May 2019). These figures comport with the evidence of Diodorus Siculus and Mark the Deacon discussed under the caption "Sailing Season and Duration" above for the different legs in and out of Rhodes.

ports could be limited to ten days. If one extends the turnaround time in each port to 20 days (the maximum permitted for the sale of goods at the end of season under *Novel* 106), the number of legs achievable in the safe sailing season is three.²⁷⁶ Again, these calculations assume no significant use (*i.e.*, beyond a couple days) of Vegetius’ “shoulder” periods.²⁷⁷

If one assumes loans of 1,000 *solidi* for each of these three legs — one round trip and one single journey — then under the Pure Insurance Structure the shipper/merchant would owe 375 *solidi* (3 x 12.5% of 1,000 *solidi*) in interest for the season. Under Law 26, by contrast, the amount of interest payable for the same loans would have been between 30 and 40 *solidi* in total (roughly 3.5 months of interest on 1,000 *solidi* at the rate of 12% per annum). Even this latter amount is conservatively high, as it assumes there were no gaps between loans such that there were no days in the period on which interest did not accrue.

But there is no need to assume multiple voyages per seasons to demonstrate that the adoption of *Novel* 106 led to an increase in interest payable on maritime loans of any given size. The change in interest rate regime would have been significant even for a borrower making just one voyage per sailing season. If we assume a loan to a shipper making one voyage from Constantinople to Alexandria in June, a loan of 1,000 *solidi* on the Pure Insurance Structure would generate an interest bill of 125 *solidi* at the specified rate of 12.5% per voyage. Under Law 26, that same maritime loan would, for a voyage of ca. nine days, generate interest of ca. three *solidi* (12% of 1,000 for nine days, using a 360-day count convention) or ca. ten *solidi* if the borrower made full use of a 20-day grace period of the sort provided by *Novel* 106.

²⁷⁶ The risks of voyage and the investment in human capital needed to manage them made it likely that ships would ply the same routes and destinations repeatedly. McCormick, *Origins of the European Economy*, 90–91.

²⁷⁷ Taking into account the shoulder periods, ships running between Alexandria could perhaps achieve three round trips – six legs – per sailing season. McCormick, *Origins of the European Economy*, 106.

The Repeal: *Novel* 110

Less than eight months after promulgating *Novel* 106, Justinian repealed it with retroactive effect.²⁷⁸ Unlike the case with *Novel* 106, *Novel* 110 does not describe the circumstances of its adoption beyond a curt indication that “petitions were subsequently made.” Neither the identity of the petitioners nor their reasons are given. The speed of repeal of *Novel* 106 is astonishing, especially in light of the mechanics of making a new law known to citizens during this period. Ordinarily, a new law took effect only two months after its date of issue or receipt, and new laws may have been sent out to the provinces only in bundles once every six months.²⁷⁹ And *Novel* 106 was promulgated in mid-September; its communication to the provinces thus would have been subject to the vagaries of off-season sailing.

Prior Accounts

The following discussion examines various explanations that have been put forward to explain the adoption of *Novel* 106 and its almost immediate repeal by *Novel* 110. Such accounts have to grapple with two of the main difficulties in understanding these pieces of legislation. First, did *Novel* 106 constitute a change from pre-existing law? Secondly, were the customs described in it actual customs?

On the first question, the text, at least, is clear: *Novel* 106 states expressly that the “existing customs” given legal force by it are “not in conflict with already-enacted laws.”²⁸⁰ This statement is difficult to credit at face value. By operation of arithmetic, a loan on the Pure

²⁷⁸ *Nov.* 110 (26 Apr. 541).

²⁷⁹ Effective date: *Nov.* 66 (1 May 538); six-monthly dispatch: Pierre Noailles, *Les collections de nouvelles de l'empereur Justinien*, vol. 1 (Paris: Recueil Sirey, 1912), 87; Miller and Sarris, *Novels of Justinian*, vol. 1, 16. Dissemination of new legislation to the provinces was, in any event, uneven. S. Puliatti, “Eas quas postea promulgavimus constitutiones”: Sui rapporti Novellae-Codex nella prospettiva giustiniana,” in *Novellae Constitutiones: L'ultima legislazione di Giustiniano tra oriente e occidente da Triboniano a Savigny*, ed. Luca Loschiavo, Giovanna Mancini and Cristina Vano (Naples: Edizioni Scientifiche Italiane, 2011), 19–22.

²⁸⁰ *Nov.* 106 c.1 (7 Sept. 540) (μηδὲ τοῖς ἤδη τεθειμένοις μάχεται νόμοις).

Insurance Structure made at the newly specified interest rate of 12.5% would exceed the 12% per annum rate permitted under Law 26 for any voyage (and loan) with a duration of less than one year.²⁸¹ Gustav Billeter, the Swiss philologist whose magnum opus on interest rates in the ancient world remains unsurpassed despite being in need of updating, attempted to reconcile the two calculations by arguing for an assumed average commercial voyage time of one year.²⁸² There is little reason to believe that this was in fact the case, for the reasons discussed under the caption “Sailing Season and Duration” above, and Billeter offers no evidence for it. Even if one grants Billeter his premise, the new basis of calculation under *Novel* 106 would conflict with Law 26. If commercial voyages lasted on average precisely one year, at least some of those voyages would be shorter than one year. For any voyage shorter than one year, a maritime loan taken out at the new rate applicable under the Pure Insurance Structure would, again by operation of arithmetic, yield interest in excess of what was permitted under Law 26. The statements within *Novel* 106 to the effect that the customs given legal effect by it were consistent with prior law must therefore be viewed critically.

One may also question whether the customs described in *Novel* 106 were, in fact, real customs. To be sure, the text states in at least four different forms that the customs described were real.²⁸³ One may wonder whether this insistent repetition indicates that users of the new law might have required some reassurance on the point. Billeter, however, took these statements at face value, in particular those that claimed the customs were current and of long standing, predating the adoption of Law 26 in 528.²⁸⁴ The conflict between those customs and the provisions of Law 26, however, suggests that Billeter’s reading of the evidence was too

²⁸¹ This would be the case even if we equate 12% with 1/8, or 12.5%, as discussed at notes 130–134 above.

²⁸² Billeter, *Geschichte des Zinsfusses*, 338.

²⁸³ The preface alone tells us that: Peter and Eulogetus had sought publication and legal force be given to “the prevailing usage in these matters”; that the inquiry made of the shippers was to ascertain “the precise nature of the long-standing practice”; and that the shippers gave their testimony under oath. Chapter 1 of the *Novel* adds a description of the customs described as “what has been in use and force, unaltered, over such long periods.”

²⁸⁴ Billeter, *Geschichte des Zinsfusses*, 323–324.

credulous. He rejected without substantive argument any explanation that assumed the description of customs in *Novel* 106 was an act of deception to evade the restrictions of Law 26.²⁸⁵ But in doing so, he failed to offer any explanation of his own for the inconsistency.

A Revolt by Provincial Businessmen?

Billeter instead sought to explain the repeal of *Novel* 106 as the result of presumptive differences in maritime-loan customs as between Constantinople and the provinces.²⁸⁶ On his reconstruction, the customs described in *Novel* 106 were creatures of the metropolitan business community which, when enshrined in law, inconvenienced the business communities of the provinces. These provincial merchants, who Billeter conjectured practiced customs different to those that *Novel* 106 made legally binding, then mounted a rearguard lobbying action to persuade Justinian to rescind the new law. Billeter offered no evidence for these purported differences in customs.

Billeter failed to notice that his argument of a swift reaction by those in the provinces is in tension with his argument that voyages during the period lasted on average one full year. He asks us to believe that provincial business interests, presumably located in the same provincial ports to which commercial voyages sailed, could learn about the new law, form consensus within their own communities (and possibly also between the relevant communities of other provinces), sail to the capital, persuade the emperor and the bureaucracy to reverse course on a highly technical matter, and see the repeal to fruition, all within the course of less than eight months. This seems unlikely if, as Billeter argued, average voyage durations to those same ports were one year.

²⁸⁵ Billeter, *Geschichte des Zinsfusses*, 323–324. Sieveking, for example, had seen *Novel* 106 as a scam (*Schliche*) on the part of the business community (*Handelswelt*) to evade Law 26 and make maritime loans economically rational again. Sieveking, *Das Seedarlehen des Altertums*, 46. Sieveking's views are considered below.

²⁸⁶ Billeter, *Geschichte des Zinsfusses*, 338.

Billeter's assumption about average voyage durations was of course ill-founded. But even if one assumes much shorter average voyage durations, his explanation still appears implausible inasmuch as the eight-month interval between adoption and repeal of *Novel* 106 included the entirety of the winter period, during which the seas were closed for all but the most urgent of needs.²⁸⁷ Particularly problematic in this regard is the question of how quickly those in the provinces could have learned of the new law. *Novel* 106 was promulgated in mid-September 540. Even if no great interval elapsed between the date of promulgation and the date of the regular six-monthly dispatch of new laws to the provinces, *Novel* 106 would have needed a good deal of time to reach them given the end of the season: New laws passed in autumn "practically never reached Africa till the following spring or early summer."²⁸⁸ These factors make it implausible that the repeal of *Novel* 106 represented a response by provincial businessmen to arrangements improvidently agreed to by their metropolitan counterparts.

The Rage of an Emperor Scammed?

Novel 106 is relatively short, and the draftsman's repeated insistence as to the actuality of the customs described in it suggest that users of the new law might have had to be persuaded of that fact. As discussed above, the conflict between the customs as described and the provisions of Law 26 gives reason to doubt that those customs were either current or of long-standing when *Novel* 106 promulgated. These considerations led commentators such as Heinrich Sieveking and Hermann Kleinschmidt to suggest that the customs described in *Novel* 106 were, to use Sieveking's expression, a "scam" (*Schliche*) on the part of the "business community" (*Handelswelt*) to escape the strictures of Law 26.²⁸⁹ On this reconstruction, the reason for the repeal of *Novel* 106 was a result of Justinian seeing through the scam and reacting

²⁸⁷ See the discussion at notes 254–258 above.

²⁸⁸ Jones, *Later Roman Empire*, vol. 1, 403. See the discussion at note 279 above.

²⁸⁹ Sieveking, *Seedarlehen des Altertums*, 46. Accord: Kleinschmidt, *Das Foenus Nauticum*, 29.

against it in a fit of foolish agitation.²⁹⁰ This explanation is not wholly persuasive. The accounts of both Sieveking and Kleinschmidt are thinly argued and fail to account for the statement in the preamble of *Novel* 110 that “petitions were ... made.” Admittedly, this statement could have been a ruse. But the explanations also fail to account for the consultation of the shippers as a preliminary to adopting *Novel* 106. Why would the shippers swear under oath to fake customs when the effect of enshrining those customs in law would be to increase, substantially, the cost to themselves of maritime loans and the insurance-like protection they provided?

The line of reasoning of Sieveking and Kleinschmidt is unpersuasive for more substantive reasons, too. First, each assumes a single, monolithic business community (*Handelswelt*) and neglects the possibility that the business community of Constantinople comprised multiple constituencies with different, potentially conflicting interests. This is especially the case with maritime loans where, as explained in Chapter 1, the interests of lenders and borrowers are in balanced opposition to each other. Secondly, Sieveking’s argument relies heavily on a teleological reading backward from the provisions of the Rhodian Sea Law governing cooperative partnerships to infer a negative judgment by Justinian on the arms’-length arrangements established by maritime loans. To be sure, the relative unprofitability of maritime loans after *Novel* 110 may have led, after some greater or lesser period of time, to the development of new, more cooperative structures to finance maritime trade. But that subsequent development, in itself, does not speak to the circumstances surrounding, or the reasons for, the adoption of *Novel* 106 and its repeal.

A Collapse in Seaborne Commerce?

More recently, Arnaldo Biscardi sought to explain the adoption and repeal of *Novel* 106 by reference to a presumptive immediate decline in seaborne commerce that ensued upon the

²⁹⁰ Sieveking, *Seedarlehen des Altertums*, 46 (“sein thörichter Eifer”).

passage of Law 26.²⁹¹ On Biscardi's reconstruction, the 12% per annum cap imposed by Law 26 did not adequately compensate lenders for the risks of voyage assumed by them under maritime loans. Supply plummeted; shippers and merchants went begging for capital; seaborne commerce declined; the economy of the empire suffered. On this view, the emperor adopted *Novel* 106 to arrest the decline in maritime commerce only to reverse his decision when he belatedly realized the new law's inconsistency with Law 26.²⁹² The per annum interest-rate calculation method of Law 26 then sprang back into force, and the effective interest rates payable on maritime loans declined to their pre-*Novel* 106 lows.

Biscardi's explanation makes for an attractive tale of economically rational lenders behaving in ways that modern theories of capitalist behavior would lead one to expect, but there are many reasons to question it. While earlier generations of historians may have been prepared to accept the projection of capitalist motives back onto antiquity, Moses Finley has taught us to be more careful.²⁹³ There are many reasons why late antique lenders might have continued to lend after Law 26, even at rates lower than what would be required to compensate them fully for shouldering the risks of voyage: patronage; the need to maintain good relations to win new business or protect existing loan exposures; public duty; pressure from imperial circles, the urban prefect or one's guild; and similar factors. In addition, if the adoption of Law 26 had led to the grave and immediate decline in maritime commerce and economic well-being postulated by Biscardi, one might expect to find some evidence for that in the historical record. But there is none, and Biscardi does not offer any. Moreover, if the economic consequences were as dire as Biscardi makes them out to be, why did it take 12 years from the adoption of Law 26 for corrective measures to be implemented via *Novel* 106? And why would it have

²⁹¹ Biscardi, *Actio Pecuniae Traiecticiae*, 54–56.

²⁹² To the same effect, Karl-Éduard Zachariae von Lingenthal, "Aus und zu den Quellen des römischen Rechts," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (romanistische Abteilung)* 13 (1892): 31–36.

²⁹³ Finley, *Ancient Economy*.

been the lenders who took the initiative to seek those corrective measures, rather than the shippers and merchants whose voyages were, in Biscardi's view, starving for capital?

To be sure, Biscardi's reconstruction provides a possible explanation for why the shippers would be prepared to testify to the practice of calculating maritime-loan interest on a per-voyage basis, even if that would make maritime loans vastly more expensive.²⁹⁴ On this view, shippers would be prepared to accept the possibility of (much) higher rates of interest as the price of once again accessing much needed capital. If the shippers were as desperate for financing as Biscardi makes them out to be, one still would expect to see some evidence in the decline of seaborne commerce in the years following adoption of Law 26. More tellingly, Biscardi's reconstruction of events cannot explain the repeal of *Novel* 106. If the legal regime implemented by Law 26 had had the catastrophic effects on seaborne commerce and overall economic activity that Biscardi posits, why would the emperor be keen to reintroduce it?

An Alternative Reconstruction

I suggest that the text of *Novel* 110 and the circumstances of the repeal allow us to draw certain inferences and from them to derive certain alternative hypotheses as to the reasons for it. The first point to note is that *Novel* 110 repealed *Novel* 106 retroactively. Unlike other instances where Justinian reversed prior legal positions, *Novel* 110 did not preserve agreements entered into under the repealed legislation.²⁹⁵ Instead, *Novel* 106 was declared "altogether inoperative," with the legal position being reinstated "as if the said law had, in fact, not even been laid down"; judges were instructed that all cases should be determined under the law as it

²⁹⁴ Biscardi, *Actio Pecuniae Traiectitiae*, 56.

²⁹⁵ Examples where Justinian amended or repealed legislation but preserved pre-existing rights include: *Nov.* 4 c. 2–3 (16 Mar. 535) (preserving bankers' guarantees); *Nov.* 7 c.1 (15 Apr. 535) (past dispositions of Church property); *Nov.* 35 (23 May 535) (right of senior assistants to the quaestor to sell office without being subject to price cap); *Nov.* 55 pr. (18 Oct. 537) (past dispositions of Church property via the emperor); *Nov.* 99 c. 1.2 (undated) (responsibilities of co-obligors); *Nov.* 115 ep. (1 Feb. 542) (sundry matters, expressly applicable to cases not yet finished); *Nov.* 120 (9 May 544) (alienations of Church property); *Edict* 7 c.8 (1 Mar. 542) (payments in excess of twice principal). But cf. *Nov.* 138 (undated) (past recoveries exceeding twice principal not protected).

existed prior to *Novel* 106.²⁹⁶ These facts make it unlikely that the repeal resulted from some intervening change in factual circumstance. If that had been the case, there would have been no reason to declare *Novel* 106 void *ab initio* instead of following the more customary procedure of protecting existing legal rights and obligations.

Instead, the fact that *Novel* 106 was declared “altogether inoperative” suggests that the reason for its repeal is to be found in problems caused by the law itself. *Novel* 106 brought about one key change to pre-existing law, namely the change to the basis for calculating interest rates from the annual basis of Law 26 to the per-voyage basis. Despite statements made in chapter 1 of *Novel* 106 to the effect that it did not change in pre-existing law, nothing could be further from the truth. The change was fundamental.²⁹⁷

These considerations suggest an alternative hypothesis about the reasons for the swift repeal of *Novel* 106, one that does not require us to share Billeter’s credulous assumptions, to accept Sieveking’s assumption that the business community joined together as one to bamboozle the emperor, or to assume with Biscardi a putative collapse in seaborne commerce and consequent economic downturn following the adoption of Law 26. On this reconstruction, the customary practices described in *Novel* 106 were perhaps of long standing in that they reflected maritime practice as it existed prior to the adoption of Law 26. That law had, however, imposed per annum rate caps that substantially reduced the interest maritime loans could yield. As shown in Chapter 2, however, much of Justinian’s interest-rate related legislation, in both *Codex* and *Novels*, betrays hints of substantial non-compliance with prior interest rate caps.²⁹⁸

²⁹⁶ *Nov.* 110 c.1 (26 Apr. 541) (θεσπίζομεν τὸν τοιοῦτον νόμον παντοίως ἀργεῖν . . . καὶ οὕτω Βουλόμεθα τὸ πρᾶγμα προῖεναι, ὥς εἰ μὴδὲ γραφεῖς ἐτύγγανεν ὁ εἰρημένος νόμος, ἀλλὰ κατὰ τοὺς ἤδη περὶ τῶν τοιούτων τεθέντας νόμους παρ’ ἡμῶν τὰς ὑποθέσεις ἐξετάζεσθαι καὶ κρίσεως ἀξιούσθαι).

²⁹⁷ See Chapter 2 above. The per-voyage of calculating interest thus represented a return to a much older practice. Gofas, “Byzantine Law of Interest,” 1097, esp. n.17. Gofas does not, however, develop the commercial implications of the per-voyage basis of calculation or consider what they imply for the repeal.

²⁹⁸ *CJ* 4.32.36.4–5 (Dec. 528) (additional charges; intermediary structures); *CJ* 4.32.27 (1 Apr. 529) (attempts to avoid the rate caps of Law 26 on pre-existing loans); *CJ* 4.32.28 (1 Oct. 529) (attempts to evade the prohibition

If one assumes a similar culture of non-compliance with respect to maritime loans after Law 26, some lenders had perhaps attempted to continue pre-existing practice, perhaps meeting with some success.

Gradually, however, continuation of that practice, in contravention of Law 26, became untenable. Maritime loans lost their profitability. Some 12 years after the adoption of Law 26, the lending community sought legislation to return to the old system of voyage-based interest. As a negotiating strategy, they offered as a gambit an upfront concession to cap rates at 12.5% (functionally equivalent to the 12% established by Law 26), but that would hardly matter if the principle of voyage-based interest could be reinstated. Their efforts were successful. *Novel* 106 was adopted and brought in its train a very substantial increase in the real interest cost of maritime loans: the fact that most voyages were shorter than one year meant that the new interest rate regime would bring in its train significantly higher effective interest rates. The immediate effect would have been a substantial increase in the cost of maritime loans and, in time, to a substantial transfer of wealth from shippers and merchants to lenders. If demand for maritime loans was high and capital to provide them short, shippers and merchants might not have been able to resist demands for interest at the highest legally permissible rate.²⁹⁹ In these circumstances, pushback was to be expected. When it came, and the full import of the recent change in law was made clear, repeal swiftly followed.

Why the shippers initially would have agreed to the change in basis of calculation is unknown. Were they, as Biscardi implies, so desperate for financing that in order to free up

on payments *ultra duplum*); *Novels* 32, 33 and 34 (15 June 535) (needing to reiterate rate caps on loans in kind) and *Edict* 9, c.5 (grandfathering past receipts *ultra duplum*) (undated, but between April 535 and March 542).

²⁹⁹ There is reason to believe that this was the case. Nearly all the *Novels* relating to bankers contain language indicating the importance, even necessity, of their lending activities. See, e.g., *Nov.* 136 c.1 (1 Apr. 535). *Edict* 9 c.8 (undated, but between April 535 and March 542) and especially *Edict* 7 c.8 (1 Mar. 542). *Novel* 136 contains express language to the effect that it was aimed at encouraging bank lending. See note 216 above. Even allowing for the excesses of late imperial legal rhetoric, it would be unwise to discount the truth value of such language entirely.

capital for maritime loans they would attest to the existence of fictitious customs that, when adopted into law, would vastly increase the cost of such loans? Or did the shippers miss a trick during the consultation process preceding the adoption of *Novel* 106? If so, then why? Was it inadvertence? Or was the change in basis surreptitiously inserted into the law's text afterward? If so, at whose behest? And how did the borrowers fight back? It is to these questions that this study now turns.

Chapter 4: Avenues of Corruption

The sources do not indicate who sought repeal of *Novel* 106 beyond the laconic statement in *Novel* 110 that “petitions were subsequently made.” The speed of the repeal, however, suggests that the reaction from those affected by *Novel* 106 was swift and vehement. Billeter sought to locate the objecting parties in unidentified provincial business communities that he imagined practiced different customs than those enshrined in *Novel* 106.³⁰⁰ Sieveking conjectured that it was the emperor himself, furious at discovering a “scam” (*Schliche*) perpetrated by the business community (*Handelswelt*) and seeking to bring the law back into line with the strictures of Law 26.³⁰¹ Biscardi, too, conjectured a return to Law 26 as soon as Justinian belatedly realized that *Novel* 106 conflicted with it.

None of these explanations can persuade. Billeter and Sieveking saw the law-making process in crudely binary terms, with interest groups such as the “provincial merchants” or “the business community” on the one side and the imperial government on the other. Biscardi evinced a more sophisticated understanding of how the interests of “*capitalisti*” and “*commercianti*” could differ, but he could not explain why the emperor would wish to return to the pre-*Novel* 106 legal regime that, on Biscardi’s own account, had led to a collapse in maritime commerce, with serious effects on the imperial economy.³⁰² In addition, Biscardi could offer no account why the inconsistency came to light only later or how it did so.

We have already had occasion to explore in Chapter 1 the differing, even conflicting, interests on the part of different parts elements within the business community (lenders vs. borrowers). This chapter addresses how the imperial government, too, was not as monolithic

³⁰⁰ Billeter, *Geschichte des Zinsfusses*, 338.

³⁰¹ Sieveking, *Seedarlehen des Altertums*, 46. To the same effect, Kleinschmidt, *Das Foenus Nauticum*, 29–30.

³⁰² Biscardi, *Actio Pecuniae Traiectitiae*, 54–56.

as previous accounts of *Novel* 106 have assumed or as emperors might have liked; it explores how an emperor's necessary reliance on officials could render his legislative efforts vulnerable to exploitation. In doing so, this chapter makes tentative conjectures to explain what previous accounts could not – namely, how the increase in maritime-loan interest costs that *Novel* 106 entailed might have gone unnoticed at the time of the law's adoption, and how it was subsequently brought to the emperor's attention.

Justinian as Legislator

The Pace

Justinian's activist approach to legislation, and to much else, manifested itself quickly upon his accession to sole rule in 527.³⁰³ His program of reform was far-reaching, and law was a prominent element of it.³⁰⁴ By February of the next year, he had initiated the project of producing the compilations of Roman law that were perhaps the most lasting achievement of his reign, by appointing the law commission that produced the first version of the *Codex* from the mass of legislation comprised in its three predecessor codes.³⁰⁵

But the pace of Justinian's legislative activity in no way eased once the compilations were completed and promulgated. New laws continued to pour forth.³⁰⁶ These not only addressed new areas but also amended or supplemented existing laws, including those that had been only very recently adopted. In some areas, Justinian would return again and again to the same or related points to get fix errors and omissions in his own legislation. One example is his reform of the area of family law, with no fewer than 14 different overlapping and often

³⁰³ Averil Cameron, "Justin I and Justinian," in *The Cambridge Ancient History*, vol. 14, ed. Averil Cameron, Bryan Ward-Perkins and Michael Whitby (Cambridge: Cambridge University Press, 2000), 57.

³⁰⁴ Pazdernik, "Justinianic Ideology," 188, 198.

³⁰⁵ Humfress, "Law and Legal Practice," 161–162. See the remarks in the Introduction to this study.

³⁰⁶ Procop. *Hist. Arcana* 28.16 (Ταῦτα δὲ οὐ μόνον ἐς τοὺς νόμους ἀεὶ καὶ καθ' ἐκάστην εἰργάζετο τοὺς Ῥωμαίων, ἀλλὰ καὶ οὓς Ἑβραῖοι τιμῶσι καταλύειν ὅδε βασιλεὺς ἐν σπουδῇ εἶχεν); Humfress, "Law and Legal Practice," 175.

conflicting *Novels* issued in the period from 535 to 542.³⁰⁷ In addition to *Novel* 110 itself, many of Justinian's *Novels* acknowledge the need to correct or improve the emperor's own prior legislation.³⁰⁸ The emperor was keenly aware of his habits in this regard: many of his *Novels* expressly contemplate their own evanescence, acknowledging the prospect that their imperfections would require further amendment.³⁰⁹

As one might expect from the torrid pace of legislation, many of the emperor's new laws were hasty and ill thought-out.³¹⁰ Some of this was perhaps the result of overwork: many of the *Novels* attest to the tireless of the emperor's efforts on his subjects' behalf.³¹¹ Whatever the reason, however, the pressures of the law-making process were such that the emperor did not always foresee the consequences of his legislation and how it might apply to different circumstances. For this, we have the emperor's own admission, of a sort:

[S]ome may complain at the large number of laws daily being promulgated by us, without reflecting that it is the call of necessity that obliges us to enact laws to suit the circumstances, when those already enacted cannot provide remedies for the succession of unexpected problems that arise.³¹²

Indeed, he was prepared not merely to amend or supplement his own prior law-making, but to reverse course entirely, replacing his own prior dispensations with diametrically opposed policy solutions. Similarly to the words quoted above, the emperor's preface to one later law betrays a defensive tone: "Every time we find the appropriate remedy for a given situation as

³⁰⁷ *Nov.* 2 (16 Mar. 535); *Nov.* 22 (18 Mar. 535); *Nov.* 12 (16 May 535); *Nov.* 19 (16 Mar. 536); *Nov.* 61 (1 Dec. 537); *Nov.* 68 (25 May 538); *Nov.* 74 (4 June 538); *Nov.* 89 (1 Sept. 539); *Nov.* 91 (1 Oct. 539); *Nov.* 97 (17 Nov. 539); *Nov.* 100 (20 Nov. 539); *Nov.* 98 (16 Dec. 539); *Nov.* 109 (7 May 541); Honoré, *Tribonian*, 19, n.178. See also *Nov.* 117 (18 Dec. 542); Kaiser, "Justinian and the *Corpus Iuris Civilis*," 138.

³⁰⁸ See, e.g., *Nov.* 2 pr. (16 Mar. 535); *Nov.* 22 pr and cc. 31, 48 (18 Mar. 535); *Nov.* 36 pr. (1 Jan. 535); *Nov.* 111 pr. and c. 1 (1 June 541); and *Nov.* 117 cc. 4, 5, 8, 11 (18 Dec. 542).

³⁰⁹ Puliatti, "Eas quas postea promulgavimus constitutions," 1–24; Miller and Sarris, *Novels of Justinian*, vol. 1, 13.

³¹⁰ Procopius dedicates much of the third part of his *Secret History* to a critique of it. Peter Sarris, "Introduction" to *Procopius: The Secret History*, ed. Peter Sarris and G.A. Williamson (London: Penguin, 2007), vii–xx.

³¹¹ *Nov.* 8, pr. (15 Apr. 535); *Nov.* 30, c.11 (18 Mar. 536); Anthony Kaldellis, *Procopius of Caesarea* (Philadelphia: University of Pennsylvania Press, 2004), 156. Procopius would make much of the emperor's sleeplessness. *Procop. Hist. Arcana* 12.27, 13.28–33; Miller and Sarris, *Novels of Justinian*, vol. 1, 331, n.44.

³¹² *Nov.* 60, pr. (1 Dec. 537).

it arises, once the need has passed we resume our previous positions: when the malady is over, we stop the treatment just there.”³¹³

The promulgation of *Novel* 106 and its almost immediate repeal provides just such an example of “about-face” law making on the part of the emperor. The swift turnabout is characteristic of Justinian’s activism in the early part of his reign. In 540 and 541, to which *Novels* 106 and 110 are respectively dated, the disappointed exhaustion of the emperor’s later years had yet to sink in. The unexpectedly quick conquest of the Vandals and the enormous intellectual achievement of the law codifications were still fresh in the mind, the emperor’s authority had been forcefully reasserted following the Nika riots, plague had not yet struck the capital, the war against the Persians was only just getting started, and hostilities in Italy had not yet turned into the war of attrition that would bleed the empire dry. Justinian’s confidence was high — high enough that he could confidently repeal a law that he himself had promulgated just a few months before.³¹⁴

Making New Law

As a general matter, proposals for new legislation could emerge from several different sources in late antiquity.³¹⁵ Though there is some evidence (especially for Justinian) that emperors and their officials at times formed policy in advance pursuant to pre-conceived plans, more often law-making was reactive, in response to petitions. Insofar as much late antique legislation related to matters of governmental administration, proposals for new law-making frequently sprang from the affected departments themselves. In private law, more

³¹³ *Nov.* 145 pr. (8 Feb. 553); Miller and Sarris, *Novels of Justinian*, vol. 1, 46 and vol. 2, 945, n.1. This law reversed an earlier one on the scope of authority of certain senior law enforcement officers over the provinces of Phrygia and Pisidia; that earlier law was itself a reversal of a still earlier one.

³¹⁴ On Justinian’s self-assurance, see Pazdernik, “Justinianic Ideology,” 193–194

³¹⁵ The discussion of policy formation in this section draws heavily upon the fundamental discussion in Jones, *Later Roman Empire*, vol. 1, 347 ff.

thoroughgoing reform projects likely were initiated by the *quaestor sacri palatii*, while specific proposals tended to result from promptings from outside the imperial administration. These could take the form of actual court cases, whether on appeal from lower, provincial courts or upon referral by provincial officials or lawyers faced with difficult legal questions. Petitions also issued from interested parties, as was the case with *Novel* 106. Lower level officials, bishops, delegations of local assemblies, guilds and even ordinary private citizens are all attested as petitioners for new laws.

Once a proposal had been submitted for the emperor's consideration, the late antique process of law-making typically followed an iterative process. The responsible officials prepared a proposal for reform and introduced it for discussion. In the fourth century, that discussion typically took place in the emperor's council, the *consistorium*, which had assumed much of the role of the senate.³¹⁶ By the sixth century, however, the *consistorium* had fallen into desuetude for purposes of actual law-making; its role was reduced to approbatory or ceremonial functions.³¹⁷ Though the sources do not shed much light on what replaced the *consistorium* in its legislative function, its role in the formulation and implementation of policy appears to have been assumed by an informal "inner cabinet."³¹⁸ The composition of this inner cabinet is unknown but it likely comprised the principal office holders with whom the emperor dealt bilaterally rather than in the setting of any officially constituted body. If it was agreed to act in response to a petition, the responsible official — usually the *quaestor sacri palatii* — prepared draft legislative text. The draft text would then be discussed and commented

³¹⁶ Detlev Liebs, "Roman Law," in *The Cambridge Ancient History*, vol. 14, ed. Averil Cameron, Bryan Ward-Perkins and Michael Whitby (Cambridge: Cambridge University Press, 2000), 238. The *consistorium* acted not only as form of state council but also as a court of appeal and a formal reception body for foreign envoys.

³¹⁷ Jones, *Later Roman Empire*, vol. 1, 338; Michael McCormick, "Emperor and Court," in *The Cambridge Companion to Ancient History*, vol. 14, ed. Averil Cameron, Bryan Ward-Perkins and Michael Whitby (Cambridge: Cambridge University Press, 2000), 156–157.

³¹⁸ Jones, *Later Roman Empire*, vol. 1, 358–359.

on by relevant officials in the *consistorium* (or successor council).³¹⁹ Once approved, the measure was communicated to the relevant persons and, in cases of general application or importance, to the public, including in the provinces, by various means.³²⁰

The Problem of Reliance

The nature of the legislative process and the relentless pace of legislative activity in the early part of his reign meant that Justinian necessarily depended on the efforts of trusted officials both to formulate new laws and to carry them out. To be sure, it was customary for late antique emperors to rely, heavily, on their officials.³²¹ Justinian was no exception. The volume of official business coming before him was immense. Even if he had the ability, it is unlikely that he had sufficient time to master the full import of much of it. There was thus much scope for abuse.³²² In many instances, Justinian would sign documents or laws that ran counter to his own previously stated objectives, in circumstances where it is as best unclear that this was his intention. Justinian's successive legislation on the disposition of church property provides an illustrative example, one worth examining at some length.

Properties owned by the Church and other “holy estates” (εὐαγεῖς οἶκοι, or eleemosynary institutions) were attractive to the wealthy and well-connected elite, who

³¹⁹ Demandt, *Die Spätantike*, 235. Unusually for an emperor, Justinian may have drafted some legislation himself. Procop. *Hist. Arcana* 14.3. Nov. 106 (7 Sept. 540) and Nov. 110 (26 Apr. 541) have been attributed to Tribonian on the basis of their Greek drafting style. Honoré, *Tribonian*, 127–129.

³²⁰ The general topic of how new legislation was communicated to the public is a complex one beyond the scope of this study. For matters specific to *Novel* 106, see the discussion at note 279 above.

³²¹ Jones, *Later Roman Empire*, vol. 1, 351–354.

³²² Procopius would have us believe that the emperor was a ready mark for such abuse due to his susceptibility to flattery by officials, to whose irony he was oblivious. Procop. *Hist. Arcana* 13.10–12 (ὁ μὲν γὰρ κονιορτοῦ τὰ ἐς τὴν γνώμην κουφότερος ἦν, ὑποκείμενος τοῖς αἰεὶ παράγειν ὅποι ποτ' ἐδόκει βουλομένοις αὐτὸν . . . θωπὰς τε λόγους ἐνδελεχέστατα προσιέμενος. ἔπειθον γὰρ αὐτὸν οἱ κολακεύοντες οὐδενὶ πόνῳ ὅτι μετέωρος ἄρθείη καὶ ἀεροβατοίη. Καὶ ποτε αὐτῷ παρεδρεύων Τριβωνιανὸς ἔφη περιδεῆς ἀτεχνῶς εἶναι μὴ ποτε αὐτὸν ὑπὸ εὐσεβείας ἐς τὸν οὐρανὸν ἀναληφθεὶς λάθοι [ταῦτα]. τοιούτους δὲ τοὺς ἐπαίνους ἤτοι σκώμματα ἐν τῷ τῆς διανοίας ἐποιεῖτο βεβαίῳ); 22.29 (τοῖς δὲ αὐτὸν ἐξαπατῶσι καὶ κολακεύουσιν οὐ χαλεπῶς εἰκὼν); Kaldellis, *Procopius of Caesarea*, 59. The argument made in this chapter does not depend upon Procopius' possibly malicious characterization of the emperor's vanity; it merely presupposes that Justinian was reliant on his officials in the law-making process to roughly the same extent as other late antique emperors were.

constantly sought means of making them their own.³²³ Previous emperors had sought to restrict acquisitions of Church property but the most recent such pre-Justinianic legislation was of limited scope and provided many exceptions.³²⁴ Even these lax restrictions were subject to evasion. In 535 Justinian clamped down, broadening the scope of the ban and prohibiting future exemptions from it, even by himself.³²⁵ Notably, however, he permitted an exception for exchanges between such institutions and the sovereign.³²⁶ This legislation would prove too strict, and Justinian would be compelled to relax it in successive stages.³²⁷

Even in relaxed form, the law was subject to abuse, in particular by those who noticed the exemption for exchanges of property between the Church and the sovereign. These abuses would come to the emperor's attention in 537. In the stentorian words of *Novel 55*, "we have become aware that certain persons have converted the [sovereign exception] into the device, contrary to the law, of requesting us to receive property from the most holy church, and then to give it them."³²⁸ In these words, one sees wealthy (and well advised) citizens seeking to instrumentalize the imperial bureaucracy to make acquisitions indirectly that could not be made directly.³²⁹ To the extent that the transactions complained of in *Novel 55* involved dispositions of former Church property then in imperial hands, one can assume that they had required and received approval by the emperor himself. Given Justinian's repeated legislation to protect Church property and the vehemence of his language in *Novel 55*, it is unlikely that he would have approved such grants had he been aware of their circumstances.³³⁰

³²³ Bryan Ward-Perkins, "Land, Labour and Settlement," in *The Cambridge Ancient History*, vol. 14, ed. Averil Cameron, Bryan Ward-Perkins and Michael Whitby (Cambridge: Cambridge University Press, 2000), 338.

³²⁴ *CJ* 1.2.17 (undated, but dateable to the period 491 to 518), superseding *CJ* 1.2.14 (470); see *Codex of Justinian*, ed. Bruce W. Frier, *ad loc.* n.51; Miller and Sarris, *Novels of Justinian*, vol. 1, 111, n.1. and 112, n.5.

³²⁵ *Nov.* 7, pr., c. 9 (15 Apr. 535).

³²⁶ *Nov.* 7, c.2.1 (15 Apr. 535).

³²⁷ *Nov.* 40 (18 May 536); *Nov.* 46 (18 Aug. 536); *Nov.* 54 c.2 (1 Sept. 537).

³²⁸ *Nov.* 55, pr. (18 Oct. 537).

³²⁹ See Miller and Sarris, *Novels of Justinian*, vol. 1, 441, n.1.

³³⁰ *Nov.* 55, pr. (18 Oct. 537) says as much: "[W]e have become aware..."

One may infer from this example that it was not necessarily universal practice among the bureaucracy to apprise the emperor of all relevant circumstances when putting acts before him for approval. This would especially be the case where such acts constituted an end-run around the his own prior legislation. To be sure, the sovereign could seek to put prophylactic measures in place. But he could not catch everything: effective oversight is difficult and required more constant vigilance than a busy emperor could always give. At least some subterfuges would escape his watchful eye.

Might the adoption of *Novel* 106 have involved subterfuge of this sort? To assess this question, this study assesses the opportunities for mischief offered by the description of the legislative process contained in *Novels* 106 and 110. First, however, we must review the careers, and the reputations, of two bureaucrats directly involved with *Novel* 106 and its repeal: the *praefectus praetorio Orientis* (Praetorian Prefect of the East), John the Cappadocian, who was the addressee of both *Novels*; and Tribonian, the *quaestor sacri palatii*, or legislative draftsman, who would have had responsibility for preparing the text of both laws.

The People

John the Cappadocian

As Praetorian Prefect of the East, John the Cappadocian was responsible for Justinian's thoroughgoing system of administrative reform that, while ultimately ineffective in reviving the vitality of the civil service in the longer term, provoked the wrath of senatorial and bureaucratic elites against the regime.³³¹ "Efficiency drives" rarely meet with the approval of those whose roles are marked for streamlining, and it was no different for John the

³³¹ On the office of the pretorian prefecture, see Sam Barnish, A.D. Lee and Michael Whitby, "Government and Administration," in *The Cambridge Ancient History*, vol. 14, ed. Averil Cameron, Bryan Ward-Perkins and Michael Whitby (Cambridge: Cambridge University Press, 2000), 174.

Cappadocian's.³³² One of the affected civil servants, John Lydus included a scathing account of the Cappadocian's career in his treatise *De Magistratibus*.³³³ His account and that of Procopius' agree that he the Cappadocian enjoyed great power.³³⁴ Both historians also attest to his corruption, wealth, and decadent lifestyle.³³⁵

The Cappadocian was the object of intense hatred because his program of administrative reform infringed upon the vested interests of Lydus and his class.³³⁶ Some scholars have interpreted this program as aimed at restraining corruption among the administrative units of the metropolis and its provinces.³³⁷ It is perhaps more likely that this program was not so aimed at reducing corruption *per se* at improving efficiency.³³⁸ One might wonder whether the opportunities for corruption were not so much reduced as redirected, away from men like Lydus and Procopius and toward men like the Cappadocian himself. In any event, it inspired both historians to leave vivid accounts of the latter's corruption.

If those accounts are to be believed, that corruption was widely known amongst the populace of Constantinople. Popular outcry was raised against the Cappadocian by the urban masses at the time of the Nika riots, and, in a futile attempt at appeasement, Justinian dismissed

³³² Barnish, Lee and Whitby, "Government and Administration," 180, 196.

³³³ John Lydos, *On Powers or The Magistracies of the Roman State*, ed. Anastasius C. Bandy (Philadelphia: American Philosophical Society, 1982), the edition to which all references to John Lydus' *On Powers* herein refer.

³³⁴ John Lydus, *De Mag.* 3.57 (οὗτος ὥρμητο μέν, ὡς ἔφην, ἐξ ἐκείνης, τοῖς δὲ τῆς στρατηγίδος ἀρχῆς σκρινιαρίοις συναριθμούμενος, δολερῶς, οἷα Καππαδόκης, παρεισδύς οἰκειοῦται τῷ βασιλεῖ καὶ κρείττονα πίστεως ἐπαγγεῖλάμενος πρᾶξαι ὑπὲρ τῆς πολιτείας εἰς λογοθέτας προῆλθεν. εἴτ' ἐκείθεν, ὥσπερ ἐπιβάθραν, ἐπὶ τοὺς λεγομένους ἰλλουστρίους ἀνελθὼν καὶ μήπω γνωσθεὶς ὁποῖός τις ἐστὶ τὴν φύσιν ἀθρόως εἰς τὴν ὕπαρχον ἀνηρπάσθη τιμὴν); Procop. *Wars* 1.24.12 (φύσεως δὲ ἰσχύϊ πάντων γέγονε δυνατώτατος ὢν ἡμεῖς ἴσμεν). In this study all references to Procopius' *Wars* are to the text published in *History of the Wars*, trans. H.B. Dewing (Cambridge, Mass.: Harvard University Press [Loeb], 1914).

³³⁵ John Lydus, *De Mag.* 3.57 (torture and death of a certain Antiochus to obtain his gold); 3.59 (torture of a certain Petronius for the sake of precious gems); 3.60 (persecution of a certain Proclus to suicide for 20 gold coins); 3.62 (Συνήχθη οὖν πλοῦτος ἄπειρος τῷ δικαιοτάτῳ ὑπάρχει); 3.62 and 65 (gluttony and sexual license); Procop. *Wars* 1.24.13–14 (πονηρότατος δὲ γεγωνὶς ἀνθρώπων ἀπάντων τῇ τῆς φύσεως δυνάμει ἐς τοῦτο ἐχρήτο, καὶ οὔτε θεοῦ λόγος οὔτε ἀνθρώπων αὐτον αἰδῶς τις ἐσῆει, ἀλλὰ βίους τε αὐτῶ ἀνθρώπων πολλῶν ἀπολλύναι κέρδους ἔνεκα καὶ πόλεις ὅλας καθελεῖν ἐπιμελὲς ἦν. χρόνου γοῦν ὀλίγου χρήματα μέγала περιβαλόμενος, ἐς κραπιάλην τινὰ ἐκλελάκτικεν ὄρον οὐκ ἔχουσιν, ἄχρι μὲν ἐς τὸν τοῦ ἀρίστου καιρὸν ληιζόμενος τὰς τῶν ὑπηκόων οὐσίας); and 1.24.15 (τὰ χρήματα κλέπτειν μὲν ἦν ἐς αἰετοειδὲς).

³³⁶ Averil Cameron, *Procopius and the Sixth Century* (London: Duckworth, 1985), 245.

³³⁷ Haldon, "Economy and Administration," 49–50.

³³⁸ Barnish, Lee and Whitby, "Government and Administration," 196.

the Cappadocian from office.³³⁹ But the qualities of ruthless efficiency that had made so hated by Lydus and Procopius were precisely those that made him invaluable to Justinian.³⁴⁰ After an interval of less than one year, during which Justinian had quelled the riots and reasserted his authority, the Cappadocian was restored to his post as *praefectus praetorio Orientis*.³⁴¹ He would remain there until his downfall in 541.

John the Cappadocian therefore was the pretorian prefect of the east at the time that *Novel* 106 was issued. As such, he was its addressee and thus a key player in its passage: it was the Cappadocian who had informed the emperor of the approach by Peter and Eulogetus; it was the Cappadocian who was charged by the emperor with conducting an inquiry and making a proposal to the emperor; it was the Cappadocian who summoned the shippers and conducted the consultation; it was the Cappadocian who reported the findings of the consultation to the emperor, for them to be given the force of law; and it was the Cappadocian whose responsibility it was to oversee observance of it.³⁴²

John the Cappadocian was also the addressee also of *Novel* 110, though with its date of late April 541, this *Novel* must have been issued shortly before, or perhaps during the early stages of the plot that would lead to his downfall.³⁴³ On Anthony Kaldellis' reconstruction, the plot began in May 541, when Antonina departed to Rouphinianai for her rendezvous with the Cappadocian.³⁴⁴ It is tempting to speculate that the emperor may have been disappointed with his prefect on account of his role in the creation of the embarrassing legislative about-face

³³⁹ Procop. *Wars* 1.24.17 (διὸ δὴ βασιλεὺς ἐταιρίζεσθαι τὸν δῆμον ἐθέλων ἄμφω τῆς ἀρχῆς ἐν τῷ παραυτίκα παρέλυσε); Christopher Kelly, *Ruling the Later Roman Empire* (Cambridge, Mass.: Belknap, 2004), 223.

³⁴⁰ Procopius confirms that the Cappadocian was a man of great practical ability. Procop. *Wars* 1.24.13 (γυνῶναί τε γὰρ τὰ δέοντα ικανώτατος ἦν καὶ λύσιν τοῖς ἀπόροις εὐρεῖν).

³⁴¹ Procop. *Wars* 1.25.1 (Τριβωνιανὸς δὲ καὶ Ἰωάννης τῆς τιμῆς οὕτω παραλυθέντες χρόνῳ ὕστερον ἐς ἀρχὰς τὰς αὐτὰς κατέστησαν ἄμφω).

³⁴² *Nov.* 106, pr. and ep. (7 Sept. 540).

³⁴³ Chronology and details of the plot are given at Procop. *Wars* 1.25, with additional details at *Hist. Arcana* 17.38 ff. For a brief account, see Cameron, *Procopius and the Sixth Century*, 69 ff.

³⁴⁴ Kaldellis, *Prokopios*, 160, n.56.

involving the banking, shipping and merchant communities and that such disappointment may have played a role in diminishing the Cappadocian's political "cover" against Theodora's machinations.] Ultimately, however, such a connection must remain speculative.

Tribonian

Tribonian is known to posterity as Justinian's *quaestor* or, to give the office its formal name *quaestor sacri palatii*. Since the reign of Constantine, this was the official charged with, among other things, preparing the text of new legislations; he also acted spokesman for the regime.³⁴⁵ Tribonian was Justinian's first appointment to the post.³⁴⁶ He served in this role from his appointment in 528 until 532, when he, too, was dismissed upon demand of the urban populace in the Nika riots.³⁴⁷

His dismissal from office in no way meant the end of his imperial service.³⁴⁸ Indeed, his work on the Justinianic compilation of Roman law continued unabated: the compilation was an inherently political (and politicized) exercise, and the emperor needed practiced hands for it.³⁴⁹ Tribonian remained chairman of the so-called second law commission, the one tasked with preparing the *Digest* and *Institutes*.³⁵⁰ He then continued service as a member of the subcommittee that produced the second version of the *Codex*.³⁵¹ Perhaps as a reward for these efforts, his rehabilitation was swift, and by December 533 he was serving in the powerful position of *magister officiorum*.³⁵² The *magister officiorum*, or master of offices, was arguably

³⁴⁵ *Not. Dig. or. xii, occ. x (sub dispositione viri illustris quaestoris: leges dictandae, preces)*; Jones, *Later Roman Empire*, vol. 1, 368, 504; Honoré, *Tribonian*, 8–9, 69 ("minister for legislation and propaganda"); Barnish, Lee and Whitby, "Government and Administration," 175. The office was thus fundamentally different from the office of similar name during the republican period, when it was a junior office with limited financial responsibility. Demandt, *Die Spätantike*, 235.

³⁴⁶ Procop. *Hist. Arcana* 20.16. (ὁ δὲ βασιλεὺς οὗτος πρῶτον μὲν ἐπὶ ταύτης Τριβωνιανὸν κατεστήσατο).

³⁴⁷ Procop. *Wars* 1.24.17, the text of which is given at note 339 above.

³⁴⁸ Procop. *Wars* 1.25.1, the text of which is given at note 342 above.

³⁴⁹ Sarris' Introduction to Miller and Sarris, *Novels of Justinian*, vol. 1, 25.

³⁵⁰ Honoré, *Tribonian*, 56; Liebs, "Roman Law," 250–251; Kaiser, "Justinian and the *Corpus Iuris Civilis*," 124.

³⁵¹ Honoré, *Tribonian*, 57; Kaiser, "Justinian and the *Corpus Iuris Civilis*," 125–126.

³⁵² *Const. Tanta* pr. (16 Dec. 533); Honoré, *Tribonian*, 57.

the head of the central civil service of empire, responsible for virtually all aspects of the civil administration other than the fiscal functions; the office also held sway over a selected of military (imperial guard and the secret agents) and economic functions.³⁵³

By 535 (or perhaps 536), however, Tribonian was back to his old post as *quaestor sacri palatii*, responsible once again for preparing imperial legislation; at least initially, he held this post simulatenously with his appointment as *magister officiorum*.³⁵⁴ He continued to hold this post for several years until his death, perhaps as a result of the plague.³⁵⁵ The exact date of death is uncertain, but Tony Honoré, in his exhaustive survey, demonstrates a *terminus post quem* of 1 March 542 and a *terminus ante quem* of December 542.³⁵⁶ He had not let his dismissal persuade him to mend his corrupt ways. Though he was perhaps better at keeping his avarice from showing too obviously, he was still notoriously “addicted to making money.”³⁵⁷ The emperor, in any event, was not fooled: Upon Tribonian’s death, Justinian confiscated a portion of his estate on the basis that much of its wealth was ill-gotten.³⁵⁸

Accordingly, Tribonian was *quaestor sacri palatii* when *Novel* 106 was adopted and, in all likelihood, *Novel* 110, as well.³⁵⁹ In that capacity, he would have been responsible for preparing the text of both laws. One specific charge laid against Tribonian is perhaps of special relevance when considering his function in that role. To wit, Procopius states that Tribonian engaged daily in the proposing of some laws and the repealing of others, in accordance with

³⁵³ For the wide sweep of the powers of the *magister officiorum* and its place within the imperial hierarchy, see Demandt, *Die Spätantike*, 232–235; Haldon, “Economy and Administration,” 41–48.

³⁵⁴ *Nov.* 23 (3 Jan. 535) (addressed to *Triboniano illustri magistro officiorum et quaestori sacri palatii*). For the uncertainties of the dating, see Honoré, *Tribonian*, 57; Miller and Sarris, *Novels of Justinian*, vol. 1, 276, n.14.

³⁵⁵ Procop. *Wars* 1.25.2 (ἀλλὰ Τριβωνιανὸς μὲν ἔτη πολλὰ ἐπιβιούς τῇ τιμῇ ἐτελεύτησε νόσῳ ἄλλο οὐδὲν ἄχαρι πρὸς οὐδενὸς παθὼν); Kaldellis’s note in *Prokopios*, 158, n.48.

³⁵⁶ Honoré, *Tribonian*, 63, 128–129.

³⁵⁷ Procop., *Wars* 1.24.16 (Τριβουνιανὸς . . . ἐς δὲ φιλοχρηματίαν δαιμονίως ἐσπουδακὼς οἷός τε ἦν κέρδους ἀεὶ τὸ δίκαιον ἀποδίδοσθαι); 1.25.2 (ἦν γὰρ αἰμύλος τε καὶ τᾶλλα ἡδὺς καὶ τῆς φιλοχρηματίας τὸ νόσημα ἐπισκιάσαι ἱκανώτατος τῆς παιδείας περισυσία). The translation in the text above is that of Kaldellis in *Prokopios*, 139.

³⁵⁸ The emperor presumably wanted his cut. Procop. *Hist. Arcana* 20.17 (ἐπεὶ δὲ ὁ Τριβωνιανὸς ἐξ ἀνθρώπων ἠφάνιστο, μοῖραν μὲν αὐτοῦ τῆς οὐσίας ἀφεῖλετο); Honoré, *Tribonian*, 64 (“retribution for his corrupt practices”).

³⁵⁹ Honoré, *Tribonian*, viii–ix, 8–9, 117–123, 237.

the needs of those he thought of as his clients.³⁶⁰ If one conceives of Tribonian's role along the lines of Procopius's description of him, could the adoption of *Novel* 106 represent an instance of his selling a new law to just such a group of clients (the lenders)? And could *Novel* 110 be an example of selling repeal of the same law to another group of clients (the shippers and merchants) just eight months later? It is to these questions that this study now turns.

A Process Rife with Opportunity for Mischief

When one considers the economic and legal institution of the maritime loan as one in which the interests of lenders and borrowers were conflicting and finely balanced, the possibility that one or the other interest group might resort to bureaucratic means of tipping that balance in its own favor immediately suggests itself. The lenders as a group thus had motive to tip the scales in their favor and, as the preceding section showed, both John the Cappadocian and Tribonian were potentially open to persuasion, remunerated or otherwise, to help them do so. This section demonstrates that, in addition to motive, the two officials also had opportunity. The legislative procedures detailed in *Novel* 106, especially, offer much scope for mischief on the part of officials inclined (or paid) to intervene on behalf of a favored constituency. Prior scholarship on *Novel* 106 generally has failed to explore the explanatory possibilities that such considerations might provide in reconstructing the circumstances of the adoption and repeal of *Novel* 106. I offer the following possibilities for consideration.

First, was there in fact any need for new legislation in the area of maritime loans? Or, more precisely, did the “disputes” that Peter and Eulogetus reported in fact exist? The preface to *Novel* 106 states that it was initiated by a petition to this effect by the two lenders, which then formed the subject of a report by John the Cappadocian to the emperor. Yet the law's

³⁶⁰ Procop., *Wars* 1.24.16 (τῶν τε νόμων ἡμέρα ἐκ τοῦ ἐπὶ πλεῖστον ἐκάστη τοὺς μὲν ἀνήρει, τοὺς δὲ ἔγραψεν, ἀπεμπολῶν τοῖς δεομένοις κατὰ τὴν χρεῖαν ἑκάτερον).

description of maritime loan-related customary practices provides little reason to believe that any such “disputes” in fact existed. Can we perhaps resuscitate and develop Sieveking’s conjecture that the law was, in its very proposal, a scam (*Schliche*), not on the part of the “business community” (*Handelswelt*) in general (as Sieveking thought) but on the part of maritime-loan lenders, perhaps with the support of the bankers and their guilds? It would be a simple matter for such a cash-rich lobby to make an approach through the prefect, either misleading him as to the existence of “disputes” or perhaps even conniving with him to craft an approach best calculated to prompt legislative action in their favor. Assertions of fact included in such approach need not necessarily have been true.

Secondly, one must consider the possibilities inherent in the consultation process. Once the Cappadocian’s initial report (truthful or not) had elicited the desired mandate from the emperor to seek views, the process rested in the prefect’s hands. His responsibilities would presumably have encompassed both selection of those whose views were to be canvassed and the conduct of the consultations. Each would offer multiple opportunities to skew the process in a manner favorable to lenders if he so wished. For example, he could select for consultation, or privilege the views of, those shippers who might be easily bamboozled, or bought off, to overlook the commercial effects of a shift to a per-voyage basis for calculating interest. Biscardi’s conjecture that the shippers were prepared to offer perjured testimony in order to access much-needed capital is not inconsistent with these views, and we may alternatively consider that at least some shippers were willing to do so. In either case, we may well ask whether the omission of any mention in *Novel* 106 of consulting the other class of affected borrowers —the merchants — was in fact inadvertent. Were they as a class perhaps more sensitive than the shippers to increases in the effective rates payable on maritime loans? If so, perhaps the reason no consultation of merchants was mentioned in *Novel* 106 is because they were excluded by a prefect eager to achieve a pre-ordained (or pre-purchased) outcome.

Thirdly, whatever was actually said during the consultations, there is the matter of the report to the emperor of the evidence they gave. This, too, was in the Cappadocian's hands. It would be a simple matter to falsify the evidence by slipping into the minutes key statements favorable to the lenders. These might include statements as to matters contrary to what was addressed in the consultations or, perhaps more likely, matters not addressed in them at all. The per-voyage basis of calculation is one obvious suspect: was it in fact mentioned during the consultations? Or was it subsequently dropped into the minutes prepared for the emperor? Nor does this exhaust the possibilities: one should also evaluate critically the assertions made in *Novel* 106 to the effect that the customs described in it were of long standing, that they were current, and that they did not conflict with the pre-existing legal regime of Law 26. Could any or all such statements have been included for the sake of misleading a busy emperor into thinking there would be no conflict?

Fourthly, we must consider the possibilities for illicit intervention in the drafting of the law. Statements made in the *Novel* 106 about the conformity of maritime loan customs described therein with prior law are manifestly incorrect. They might perhaps be ascribed to the pen of the legislative draftsman, the *quaestor sacri palatii*, again for the purpose of lulling the emperor into overlooking the inconsistency between the new law and Law 26. So, too, might the change from the per annum basis of interest to the per voyage basis might have been a late addition, whether to benefit a favored constituency or as a service bought and paid for.

Fifthly, there is the prospect for mischief by officials in the review of the legislation once drafted. The prefect would have had a role in the iterative process that led to new legislation under Justinian's reign and, as the official responsible for its initiation, his views presumably would have been accorded some weight. So, too, with the *quaestor sacri palatii*: as the chief legal officer of the regime he would have had scope to review and comment upon

the draft at various stages, even in the unlikely event that he was not responsible for its drafting. Slipping in a change in the basis of calculation of interest from per annum to per voyage might have been a simple matter for either or both of the two officials. This would especially be the case if other officials of the “inner cabinet” were oblivious to the commercial import of the change or, alternatively, too cowed (or bribed) to object.

None of the possibilities adumbrated in the previous paragraphs is exclusive. One, some, or all may have occurred, and evidence to decide which is scanty. That said, certain statements in *Novel* 106 stand-out as particularly difficult to square with other evidence: the statement that it was the practice to calculate maritime-loan interest on a per-voyage basis; the statement that this practice was both current and of long standing; and the statement that this basis of calculation was in conformity with prior law. Together, these difficulties suggest that the account of events given in the preface to *Novel* 106 may be misleading in material respects.

And what of the repeal? *Novel* 110 is less forthcoming than *Novel* 106 as to the circumstances preceding its promulgation. We are told only that “petitions were made.” It is possible that these words were a ruse designed to save face for an emperor who was quickly reversing himself on his own initiative, but this is unlikely. To be sure, a nearly contemporaneous constitution makes much of Justinian’s solicitousness for his subjects: “and we do not cease to investigate whether anything in our state is susceptible of correction.”³⁶¹ It is, however, implausible that a busy emperor initiated his own investigation, of his own volition, into so prosaic and technical a matter as changes in maritime loan practice as a result of *Novel* 106. It is far more likely that, if problems resulted from the adoption of the new legal regime for maritime loans, those problems were brought to his attention by others.

³⁶¹ *Nov.* 114, pr. (1 Nov. 541); Pazdernik, “Justinianic Ideology,” 191.

By whom? Or to phrase the question more precisely, who would have had incentive to do so? Certainly not the lenders. Once they had succeeded in persuading the emperor to promulgate *Novel* 106, thereby introducing a legal regime entailing much higher real interest costs for maritime loans, the lending community would have little to gain and much to lose from revisiting that victory. Similarly, any imperial officials that had intervened in the legislative process on the lenders' behalf, whether due to patronage or bribery, would have had little reason to reopen the question. Rather, if petitions were in fact made to the emperor, they would most likely stem from the community of shippers or merchants – *i.e.*, the borrowers under maritime loans. It is this group that would feel the pinch of higher interest costs compared with what had previously been the case under Law 26.

If, as seems likely, shippers and merchants were the constituency responsible for lodging petitions seeking repeal, that sheds light on how *Novel* 106 came into being in the first place. The effective increase in the cost of maritime loans caused by the change to a per-voyage basis of interest rate would have been immediately apparent to any reasonably experienced borrower. While one may conjecture that the shippers missed this obvious point in the consultations preceding *Novel* 106, it is more likely that they missed the point because it was not in fact there at the time. Instead, the change to a per-voyage basis of interest rate calculation was in all likelihood not a part of those consultations but slipped into the text of *Novel* 106 later. The Cappadocian would have had the opportunity to do so when reporting the results of the consultations to the emperor. Tribonian would have had the opportunity to do so when preparing the draft legislation. And both officials would have had the opportunity to do so during the process of shepherding that draft legislation through the approval process.

Which of these possibilities is most plausible? That is impossible to determine on the current state of the evidence. But any of them is more plausible and more securely rooted in a

close reading of the evidence than previous accounts, with their unwarranted assumptions on average voyage duration (Billeter), the unity of the “business community” (Sieveking) or an otherwise unattested collapse of maritime commerce as a result of Law 26 (Biscardi).

Conclusion

We thus arrive at the end of a long essay. To summarize its findings:

Chapter 1 tracked the origin of the economic and legal institution of the maritime loan from its Athenian origins through its adoption into Roman law, explaining its key features and their development. This part of the study then went on to analyze how the legal provisions governing maritime loans reflected a balancing of interests between the parties thereto, with the lender assuming well-defined set of risks of voyage in return for specified compensation in the form of high(er) rates of interest than could be attained on other types of loans. These features argue in favor of characterizing maritime loans as an early form of insurance, in all likelihood the only kind that existed in antiquity.

Chapter 2 analyzed Justinian's efforts to regulate the rates of interest that could permissibly be charged on various types of loans, including maritime loans. Law 26 (*CJ* 4.32.26 of Dec. 528) received extended attention, especially in regard to its reduction of the rates of interest that could be charged on maritime loans to levels that were unlikely to compensate lenders adequately for assuming the risks of voyage. In addition, this chapter reviewed the other restrictions on interest rates beyond rate caps (the prohibition against compound interest and interest *ultra duplum*), as well as subsequent pieces of legislation that had the effect of undermining the interest-rate regime established by Law 26. Attention was drawn to evidence that Justinian's legislation on interest rates was subject to a considerable degree of non-compliance.

Chapter 3 analyzed *Novel* 106, addressing both its substantive provisions and the circumstances of its adoption. Close attention was given to the change in the way interest rates on maritime loans were calculated, from a per annum basis to a per voyage one. This

change increased the real interest costs of those maritime loans (the vast majority) that were for voyages with durations of less than one year. This chapter then engaged with prior scholarship as to the reasons for the adoption and repeal of *Novel* 106, criticizing prior explanations that rely on unwarranted assumptions regarding, among other things, speed of communications of new law to the provinces, average duration of voyages, the extent to which the interests of various constituencies within the business community were aligned, and the impact of Law 26 on seaborne commerce and the imperial economy.

Finally, Chapter 4 reviewed the pace of legislative activity of the emperor, Justinian, and how this rapid pace left him reliant on, and susceptible to manipulation by, the officials of the imperial bureaucracy. The study then proceeded to examine the careers of the two key officials involved with the promulgation of *Novel* 106, namely the *praefectus praetorio Orientis*, John the Cappadocian, and the *quaestor sacri palatii*, Tribonian, with particular attention given to the evidence for their corruption. This study concludes with an exploration of how both officials potentially had not just motive but also opportunity to intervene illicitly in the adoption of *Novel* 106 by virtue of their respective roles in the process.

This study thus criticizes previous explanations of the promulgation and repeal of *Novel* 106 for failing to account for the possibility (indeed, the likelihood) of corruption on the part of some or all of the participants in the legislative process. Prior scholarship generally has failed to consider the possibility of active connivance by parts of the imperial bureaucracy with (cash-rich) lenders to shape the contours of the new law. This omission is particularly notable in light of the reputation for corruption enjoyed by two of the main actors in the promulgation of *Novel* 106. Even those few scholars who have guessed at fraud in the preparation of the new law have failed to explore its possible mechanisms and to consider the ways in which interests of various constituencies within the business community did not

align, especially in the context of maritime loans, an institution characterized by conflicting interests between lender and borrower.

By contrast, this study identifies a range of different touch points within the legislative process in which either John the Cappadocian, Tribonian or both could have intervened to shape the direction of *Novel* 106 during its promulgation in favor of lenders. Many of these same touch points would have been available after passage of the *Novel* 106 to motivate for its repeal on behalf of a separate interest group, the shippers and merchants who relied on maritime loans to fund their commercial activities. It may not be possible to conclude definitively that the Cappadocian, for example, skewed his report of the shippers' consultation to favor the lenders, or that Tribonian slipped into the law's text a change to a per-voyage method of calculating interest at a late stage. Nevertheless, alternate scenarios contemplating the possibility of illicit intervention by officials involved in the lawmaking process of the sort laid out by this study provide a more plausible explanation for the adoption and repeal of *Novel* 106 than previous accounts have managed.

Procopius' accusation against Tribonian — “Just about every day he would repeal some laws and propose others, selling each service according to the needs of his customers” — are highly resonant in the context of *Novel* 106 and its repealing statute, *Novel* 110.³⁶² Previous scholarship has not securely identified any instance where this can be said with confidence to have occurred. It is submitted that just such an example may have been staring out at us from the dusty, understudied pages of the *Novels* all this time.

³⁶² Procop. *Wars* 1.24.16, the text of which is given in note 360 above. The translation is that of Kaldellis in *Prokopios*, 139.

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