

The Legal Regimes of Bitcoin: “A Form of Order Without Law”? A Comparative Study Between El Salvador and the United States.

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Abstract

On September 7, 2021, El Salvador became the first country to adopt Bitcoin as its legal tender by establishing the “Bitcoin Law.”¹ The Bitcoin Law is the first statute that describes its main objectives and endows Bitcoin with the status of a legal tender in El Salvador.² Pursuant to the Bitcoin Law, El Salvador not only accepts Bitcoin as a means of payment methods for taxes and outstanding debts, but also requires all business enterprises to adopt Bitcoin as a medium of exchange for all commercial transactions.³ However, the soul of Bitcoin is not the state; instead, it belongs to a decentralized entity with incentives to maintain this currency.⁴ Therefore, the essence of Bitcoin is “a form of order without law.”⁵ A successful Bitcoin ecosystem would generate a mixture of law and nonlegal orders.⁶ In the midst of growing literature on digital currency, El Salvador offers a rare opportunity to understand the functions and limitations of Bitcoin as a legal tender in a monetary sovereignty.⁷

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1. Introduction

Currency is a creature of law.⁸ As the father of monetary theory, Georg Friedrich Knapp put it in 1924, “the soul of currency is not in the material of the pieces, but in the legal ordinances which regulate their use.”⁹ Knapp contends that currency must be constituted by law because only central governments have the right to confer the requisite legitimacy to gain inclusion of the public.¹⁰ Consequently, the underlying value of a currency is intrinsically tied to the trust of the public in that legal system.¹¹ Bitcoin is the first decentralized

¹ F. Alvarez et al., *Are Cryptocurrencies Currencies? Bitcoin as Legal Tender in El Salvador*, Science 382, (2023).

² Ibid.

³ Ibid.

⁴ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

⁵ Ibid.

⁶ Ibid.

⁷ F. Alvarez et al., *Are Cryptocurrencies Currencies? Bitcoin as Legal Tender in El Salvador*, Science 382, (2023).

⁸ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

cryptocurrency that bases on peer-to-peer technology and is essentially an innovative payment method with unique properties that are different from other online payment systems.¹² However, Bitcoin transactions are often conducted in a manner that circumvents traditional contract and tax law.¹³

On September 7, 2021, El Salvador became the first country to adopt Bitcoin as its legal tender by establishing the “Bitcoin Law.”¹⁴ The Bitcoin Law is the first statute that describes its main objectives and endows Bitcoin with the status of a legal tender in El Salvador.¹⁵ Pursuant to the Bitcoin Law, El Salvador not only accepts Bitcoin as a means of payment methods for taxes and outstanding debts, but also requires all business enterprises to adopt Bitcoin as a medium of exchange for all commercial transactions.¹⁶ However, the soul of Bitcoin is not the state; instead, it belongs to a decentralized entity with incentives to maintain this currency.¹⁷ Therefore, the essence of Bitcoin is “a form of order without law.”¹⁸ As Bitcoin includes more users by competing against other monetary regimes, it may at some point transform into other more established regimes, leading to the direct result of a currency law.¹⁹ A successful Bitcoin ecosystem would generate a mixture of law and nonlegal orders.²⁰ In the midst of growing literature on digital currency, El Salvador offers a rare opportunity to understand the functions and limitations of Bitcoin as a legal tender in a monetary sovereignty.²¹

This research summarizes, compares, and contrasts a wide range of relevant articles. The structure of the research is as follows. In introduction, the author provides background information on money theory. Section 2 presents literature review. And section 3 encompasses the current situation of Bitcoin as a legal tender and Bitcoin regulation in El Salvador. In section 4, the author counts the current regulatory regimes of Bitcoin in the United States. In this section, the author advocates the legality of Bitcoin²² and proposes a mixture of legal regimes for Bitcoin regulation. The conclusion summarizes the findings and concludes the paper.²³

2. Literature Review and Contributions of the Research

This research examines relevant articles concerning the regulation of Bitcoin and forms a literature review. Bitcoin is structured based on cryptocurrency, which stems from Satoshi Nakamoto and his work “Bitcoin: A Peer-to-Peer Electronic Cash System.”²⁴ Kaponda summarizes the five traits of Bitcoin as the opposite to traditional currency.²⁵ Caldararo analyzes the advantages and disadvantages of Bitcoin as contrasted to traditional currency.²⁶ Baur carefully analyzes trading data generated by Bitcoin users.²⁷ Gandal examines the price control of Bitcoin trading.²⁸ Makarov analyzes the trading data from 15 digital currency trading platform from different areas around the world.²⁹ Surda contends that Bitcoin is an exchange medium of commercial

¹² Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

¹³ *Ibid.*

¹⁴ F. Alvarez et al., *Are Cryptocurrencies Currencies? Bitcoin as Legal Tender in El Salvador*, Science 382, (2023).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ F. Alvarez et al., *Are Cryptocurrencies Currencies? Bitcoin as Legal Tender in El Salvador*, Science 382, (2023).

²² Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

²³ *Ibid.*

²⁴ Wu Linxiu. A Review of Bitcoin Research Literature: From the Perspective of Monetary Standard Theory [J]. Journal of Jixi University, 2015, 15(07): 80-83. DOI: 10.16792/j.cnki.1672-6758.2015.07.024

²⁵ Liu Xin. A Literature Review on Bitcoin Research [J]. Economic Data Translation Series, 2018, (04): 17-31

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

transaction.³⁰ Pavel and Miroslava points out to analyze Bitcoin from three aspects - exchange, value, and storage.³¹ Folkinshtely denies the notion that “Bitcoin is merely a mirage” and believes that it contains value as a type of currency.³² Luther, White, and Yermack notes that Bitcoin is a type of investment tool.³³ Brauneis examines three Bitcoin trading platforms in Asia, United States, and Europe—Bitfinex, Bitstamp, and GDAX.³⁴ Jafari points out that lawmakers should legislate to curb cybersecurity risk and tax avoidance that associate with Bitcoin transaction.³⁵ Charles Feremdna contends that digital currency cannot take place of central banks and their services.³⁶ Easley researches on the costs of Bitcoin transaction and its transformation.³⁷ Kaponda contends that it is essential to regulate Bitcoin transaction and to aware users about the risks of Bitcoin trading.³⁸

2.1. Research Methodology

The methodologies used in this research contain: comparative study, theoretical and empirical study, legislative study, statutory analysis, textual analysis, and historical study.

2.2. Monetary Theory, Payment System and Currency Law

As society developed, civilizations flourished, and money evolved with time, legal philosopher Montesquieu wrote in 1748 that money is a sign that represents the value of all merchandise.³⁹ Although money has been a different commodity in different societies, it has always maintained primarily the same function.⁴⁰ Basically, there are three types of money: “commodity money, representative money, and fiat money.”⁴¹ Commodity money constitutes the oldest form of money.⁴² Silver or ancient gold coins are examples of commodity money.⁴³ It has intrinsic value that can be used for something other than mere money—for instance, food grain.⁴⁴ Food grain not only can be used to sustain life, but also to evaluate other goods and services.⁴⁵ Regarding representative money, tokens or certificates that can be traded for a fixed quantity of gold constitute representative money.⁴⁶ Nowadays, fiat money constitutes the cornerstone of modern economies.⁴⁷ For instance, currency is a form of fiat money and it a “fungible, transferable, divisible, and recognizable legal tender.”⁴⁸ Cash is the most common form of tangible currency.⁴⁹

³⁰ Liu Jingli. A Literature Review on the Monetary Attributes of Bitcoin [J]. *Modern Business*, 2018, (24): 175-176. DOI: 10.14097/j.cnki.5392/2018.24.085

³¹ Liu Jingli. A Literature Review on the Monetary Attributes of Bitcoin [J]. *Modern Business*, 2018, (24): 175-176. DOI: 10.14097/j.cnki.5392/2018.24.085

³² Ibid.

³³ Ibid.

³⁴ Liu Xin. A Literature Review on Bitcoin Research [J]. *Economic Data Translation Series*, 2018, (04): 17-31

³⁵ Ibid.

³⁶ Wu Linxiu. A Review of Bitcoin Research Literature: From the Perspective of Monetary Standard Theory [J]. *Journal of Jixi University*, 2015, 15(07): 80-83. DOI: 10.16792/j.cnki.1672-6758.2015.07.024

³⁷ Liu Xin. A Literature Review on Bitcoin Research [J]. *Economic Data Translation Series*, 2018, (04): 17-31

³⁸ Ibid.

³⁹ Brian M. McCall, *How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender*, 74 OKLA. L. REV. 313 (Spring 2022).

⁴⁰ Ibid.

⁴¹ Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

⁴² Brian M. McCall, *How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender*, 74 OKLA. L. REV. 313 (Spring 2022).

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

Historically, there have been various uses of different forms of money.⁵⁰ Since the dawn of trade and civilization, money has been a characteristic of most commercial transactions.⁵¹ With the advancement of money, people have reshaped how they conduct their commercial transactions and have introduced new variations.⁵² The basic four functions of money include: “a medium of exchange, an overall standard, a measure of value, as well as a store of wealth.”⁵³ There are two major theories of how money emerged.⁵⁴ The dominant theory advocates that money creates the market, by arising out of swaps and fundamentally serving to facilitate commodity exchange.⁵⁵ On the contrary, the alternative theory argues that money is a deliberate and positive creation of the state.⁵⁶

Digital currencies are monetary currencies that evidenced electronically but not in physically tangible form.⁵⁷ One category includes digital currencies that are sponsored by governmental central banks.⁵⁸ Another category belongs to privately issued digital currencies.⁵⁹ These currencies, such as blockchain, take a token-based digital form is “secured by cryptography.”⁶⁰ For this reason, privately issued digital currencies are commonly referred to as “cryptocurrencies.”⁶¹ Those privately issued digital currencies that are not backed by assets with intrinsic value constitute simply generic cryptocurrencies, as exemplified by Bitcoin.⁶²

Bitcoin is the first decentralized cryptocurrency that bases upon blockchain technology⁶³ and a peer-to-peer network.⁶⁴ It is a novel online payment method with unique properties that substantially distinguish it from other online payment systems.⁶⁵ Bitcoin is essentially a “digital asset,” of which the transfer and ownership is “recorded on blockchain.”⁶⁶ The value of Bitcoin does not derive from any commodity or government, but only from what people believe they are worth.⁶⁷ Sovereignty only embraces currency because of the power they confer to the currencies, such as the monopoly to issue a legal tender.⁶⁸ The term “legal tender” refers to the form of money that has been recognized by a legal system, usually a central government.⁶⁹ Legal tender means that this payment method has been accepted by the legal authority of the land, and government dues that are paid in this form will be accepted.⁷⁰

Legal regimes can generate a framework of order to preserve the value of currency.⁷¹ Georg Friedrich Knapp, the father of monetary theory, wrote in 1924 that “the soul of currency is not in the materials of the

⁵⁰ Brian M. McCall, *How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender*, 74 OKLA. L. REV. 313 (Spring 2022).

⁵¹ *Ibid.*

⁵² Brian M. McCall, *How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender*, 74 OKLA. L. REV. 313 (Spring 2022).

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Steven L. Schwarcz, *Regulating Digital Currencies: Towards an Analytical Framework*, 102 B.U. L. REV. 1037 (2022).

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Brian M. McCall, *How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender*, 74 OKLA. L. REV. 313 (Spring 2022).

⁶⁴ Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

⁶⁵ *Ibid.*

⁶⁶ Brian M. McCall, *How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender*, 74 OKLA. L. REV. 313 (Spring 2022).

⁶⁷ Sean Greenwalt, *Bitcoin: The Conflicting Currency*, 4 LINCOLN MEM’L U. L. REV. 81 (Fall 2016).

⁶⁸ Brian M. McCall, *How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender*, 74 OKLA. L. REV. 313 (Spring 2022).

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

pieces, but in the legal ordinances which regulate their use.”⁷² Knapp argues that “currency must be constituted by law since only governments can confer the requisite legitimacy to gain acceptance. Thus, the underlying value of a currency is intrinsically tied to the public’s trust in that legal system.”⁷³

Modern currency is a creature of law⁷⁴ - “when money is created by the rule of law, it inherits the same strengths and weaknesses of law.”⁷⁵ John Locke contends the theoretical justifications for the limited yet important function of the law on regulating currency - that is to maintain a stable value to facilitate market activities.⁷⁶ He argues that the primary function of government is not to manipulate interest rates, but to maintain a stable currency, and to fix the value of the currency to a stable commodity - for instance, gold or silver.⁷⁷ In contrast, the theory of modern central banking contends that modern government is supposed to maintain the economy for the benefits of its people.⁷⁸ The powers conferred to a modern central bank raise the question as to whether the government should use its power over currency to help the regulators.⁷⁹

The objective of financial regulation is and should be to correct market failures.⁸⁰ Cryptocurrencies can pose externalities to central governments that undermine the government’s ability to affect monetary policy with its fiat currency.⁸¹ We can understand the promise of Bitcoin only by understanding the limits of currency law on Bitcoin regulation - an innovation that reflects neither a private nor public law of currency.⁸² The uncertainty and vagueness of existing Bitcoin regulation post a substantial amount of legal risks to Bitcoin stakeholders and regulatory authorities.⁸³

The regulatory approaches to virtual currencies vary widely across the world.⁸⁴ Legal regimes have not only embraced different definitions of what constitutes a “digital currency,” they have also encountered other legal and policy questions brought by this financial technology.⁸⁵ These questions range from financial privacy, tax treatment, anti-money laundering, to corporate and institution compliances.⁸⁶ Many central authorities have attempted to include virtual currencies into existing regulatory frameworks, by explicitly or implicitly extending the boundary of existing laws.⁸⁷ For this reason, some states have established currency-friendly frameworks based on a wholesale virtual currency approach.⁸⁸ By contrast, others are actively considering how to encourage controlled growth of cryptocurrency sector.⁸⁹ Lacking clarity about the legal status of cryptocurrency may lead to the application of unexpected laws.⁹⁰

When concerning the question whether a country would adopt a cryptocurrency like Bitcoin as its legal tender, D.G Thomas and D.S Bywaters state that “Different forms of money are evolving as virtual currencies like Bitcoin, although this format has limitations because it is not legal tender in any economy. States and

⁷² John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

⁸⁰ Steven L. Schwarcz, *Regulating Digital Currencies: Towards an Analytical Framework*, 102 B.U. L. REV. 1037 (2022).

⁸¹ *Ibid.*

⁸² John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

⁸³ Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

⁸⁴ Brian M. McCall, *How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender*, 74 OKLA. L. REV. 313 (Spring 2022).

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

monetary authorities have no control over the supply, which is costly to generate by private agents in terms of computer power, which means high transaction costs. The technology of transactions is not transparent, so it is liked by agents who operate in the criminal sector. It is the monetary monitoring and recording of the deposit base of retail banks as a medium of exchange and a store of value that is usually efficient and not too expensive to administer. Therefore, the credit creation-destruction technology of bank liabilities sustains production and trade at low transaction costs and provides a memory of records.”⁹¹

3. Bitcoin as Legal Tender and The Legal Regimes of Bitcoin Law⁹² in El Salvador

El Salvador, officially called the Republic of El Salvador, is located in Central America and “bordered on the northwest by Guatemala, on the Northeast by Honduras, and on the south by the Pacific Ocean.”⁹³ On September 7, 2021, El Salvador became the first country to adopt Bitcoin as its legal tender by establishing the “Bitcoin Law.”⁹⁴ Since this date, bitcoin can be used to conduct tax payments or buy goods and services in El Salvador.⁹⁵ With the adoption of bitcoin, the nation operates two currencies as legal tender.⁹⁶ The official currencies in El Salvador are Bitcoin and the United States Dollar.⁹⁷ El Salvador adopted Bitcoin as its legal tender partially because Bitcoin can stem from one of the most precious energy resources in the country—geothermal energy.⁹⁸

How did El Salvador’s government facilitate and promote the adoption of Bitcoin?⁹⁹ The government’s response was “Chivo Wallet.”¹⁰⁰ Additionally, El Salvador government also launched an app called “Chivo Wallet” that allows users to digitally trade both bitcoins and US Dollars, both of which are official currencies within the territory without paying transaction fees.¹⁰¹ The “big push” policy exerted by El Salvador’s government include: granting bitcoin with legal tender status through the Bitcoin Law, \$30 bonus, gas price discounts, and no user fees.¹⁰² Many people in the world are still unbanked.¹⁰³ Two billion people, or thirty percent of the world population, do not have accesses to bank accounts.¹⁰⁴ In developing countries, and even in some developed countries, many people lack bank accounts.¹⁰⁵ These unbanked individuals represent a huge opportunity for bitcoin.¹⁰⁶

The Bitcoin system is designed as a traditional money system that bases off precious metals or commodity because the amount of Bitcoin that can be mined has been limited to 21 million as portion of the software’s parameters.¹⁰⁷ Bitcoin was originally designed as an alternative system to traditional centralized payment system that suffers “from the inherent weakness of the trust-based model.”¹⁰⁸ The beauty of bitcoin system’s

⁹¹ Brian M. McCall, How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender, 74 OKLA. L. REV. 313 (Spring 2022).

⁹² F. Alvarez et al., *Are Cryptocurrencies Currencies? Bitcoin as Legal Tender in El Salvador*, Science 382, (2023).

⁹³ Brian M. McCall, How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender, 74 OKLA. L. REV. 313 (Spring 2022).

⁹⁴ F. Alvarez et al., *Are Cryptocurrencies Currencies? Bitcoin as Legal Tender in El Salvador*, Science 382, (2023).

⁹⁵ Brian M. McCall, How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender, 74 OKLA. L. REV. 313 (Spring 2022).

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ F. Alvarez et al., *Are Cryptocurrencies Currencies? Bitcoin as Legal Tender in El Salvador*, Science 382, (2023).

¹⁰² Ibid.

¹⁰³ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Sean Greenwalt, *Bitcoin: The Conflicting Currency*, 4 LINCOLN MEM’L U. L. REV. 81 (Fall 2016).

¹⁰⁸ Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

design is that its enforcement mechanism can not only be more powerful than the informal mechanism to enforce social norms, but also be more powerful, in certain aspects, than the formal mechanism of rule of law.¹⁰⁹ This system opposes to most government monetary structures that operate under fiat currency where the number of currencies in circulation can be continuously created.¹¹⁰ However, Bitcoin system is similar to the mechanism of fiat currency is that fact that the value of Bitcoin is merely as much as the public ascribes to it.¹¹¹

The main categories of Bitcoin stakeholders include users, miners, exchanges, and merchants.¹¹² The Bitcoin miners are those Bitcoin stakeholders who contribute to the power of their computer systems to the mining process.¹¹³ Bitcoin miners are now compensated with newly minted bitcoins.¹¹⁴ Another category of Bitcoin stakeholders constitutes Bitcoin exchanges that provide the online trading platforms where the registered members can trade their Bitcoins for traditional money or vice versa.¹¹⁵ The exchange rate of bitcoin is determined exclusively by supply and demand, and therefore, the network of bitcoin buyers and sellers determine what bitcoin is worth.¹¹⁶

Bitcoin system now resembles a modern version of privately issued currencies that operated by the rule of law.¹¹⁷ We are witnessing the beginning of an “economy of cryptocurrencies.”¹¹⁸ As various types of cryptocurrencies evolve to meet different market demands, individuals may complete the commercial transactions with different cryptocurrencies, while in this process, rely less and less on the use of traditional fiat currency.¹¹⁹ The emergence of Bitcoin addresses some fundamental issues of monetary theory.¹²⁰ For example, many commentators note that Bitcoin’s high volatility constitutes the structural flaws that underlie in bitcoin itself.¹²¹

Creating a decentralized currency based on a peer-to-peer network poses a unique problem—How can a Bitcoin user trust that a unit of virtual currency has any value without a certain sort of tangible note or coin for which it can be ultimately redeemable by the rule of law?¹²² This is one of the issues that the inventors of Bitcoin set to solve.¹²³ At its core, a Bitcoin is merely a string of computer code.¹²⁴ The blockchain is decentralized, meaning that there is not an absolute “correct” chain.¹²⁵ Ultimately, the market of cryptocurrency users has the power to determine the relative value of bitcoin cash—a decision that the market will make in order to be free from a centralized state authority.¹²⁶ Many bitcoin critics incorrectly conflate bitcoin’s high volatility with the structural, underlying flaw in bitcoin itself.¹²⁷ Consequently, some commentators have speculated that the advent of bitcoin will lead to massive market suppression and manipulation by bitcoin whales.¹²⁸

¹⁰⁹ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

¹¹⁰ Sean Greenwalt, *Bitcoin: The Conflicting Currency*, 4 LINCOLN MEM’L U. L. REV. 81 (Fall 2016).

¹¹¹ *Ibid.*

¹¹² Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

¹¹³ *Ibid.*

¹¹⁴ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

¹¹⁵ Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

¹¹⁶ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

The Bitcoin Law is the first statute that describes its main objectives and endows Bitcoin with the status of a legal tender in El Salvador.¹²⁹ Pursuant to the Bitcoin Law, El Salvador not only accepts Bitcoin as a means of payment methods for taxes and outstanding debts, but also requires all business enterprises to adopt Bitcoin as a medium of exchange for all commercial transactions.¹³⁰ The Bitcoin Law provides that all economic agents in El Salvador must accept Bitcoin, but this statute does not necessarily translate into all firms effectively that are compliance with the legislation.¹³¹ In April 2022, the Central African Republic (CAF) was the second country, after El Salvador, to make bitcoin legal tender, the same month in which Panama approved its own Crypto Law.¹³²

The first Article of the Bitcoin Law provides the main objective of the statute and endows Bitcoin as legal tender status in El Salvador.¹³³ Article 7 of the statute reads: “Every economic agent must accept bitcoin as payment when offered to him by however acquires a good or service.”¹³⁴ Article 8 of the statute is related to how bitcoin will be implemented in the country by mandating the government to provide payment methods of bitcoin to conduct transactions.¹³⁵ In addition to accepting bitcoin as legal tender, El Salvador’s Bitcoin Law generally requires “every economic agent” to “accept bitcoin as payment when offered to him by whoever acquires goods and services.”¹³⁶ Outside of the country, a seller’s willingness to accept this form of payment method is essential to the transaction.¹³⁷ However, under El Salvador’s new rule, a seller must accept bitcoin as payment, even when receiving value in this form is opposite to his will.¹³⁸ However, an exception to this compliance rule for those who “do not have access to the technologies that allow them to carry out transactions in bitcoin” has created ambiguity as to whether businesses are required to adopt bitcoin as payment methods.¹³⁹

The World Bank stands at a crossroads as to whether it should recognize El Salvador’s adoption of Bitcoin as legal tender.¹⁴⁰ However, the World Bank has already manifested that it does not intend to support El Salvador’s adoption of bitcoin as legal tender for “environment and transparency” concerns.¹⁴¹ The International Monetary Fund indicated that it has economic and legal concerns over the adoption of bitcoin as a parallel legal tender with US Dollar in El Salvador.¹⁴²

4. The Legal Regimes of Bitcoin in the United States: A Mixture of Currency Laws¹⁴³ and Nonlegal Orders¹⁴⁴

4.1. The Legal Classifications of Bitcoin

The United States legislatures have not passed any definitive law concerning bitcoin regulation at this time.¹⁴⁵ A central power of the Congress, conferred power by the U.S. Constitution, is the authority to “coin

¹²⁹ F. Alvarez et al., *Are Cryptocurrencies Currencies? Bitcoin as Legal Tender in El Salvador*, Science 382, (2023).

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Brian M. McCall, *How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender*, 74 OKLA. L. REV. 313 (Spring 2022).

¹³⁴ Ibid.

¹³⁵ F. Alvarez et al., *Are Cryptocurrencies Currencies? Bitcoin as Legal Tender in El Salvador*, Science 382, (2023).

¹³⁶ Brian M. McCall, *How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender*, 74 OKLA. L. REV. 313 (Spring 2022).

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

¹⁴⁴ Ibid.

¹⁴⁵ Sean Greenwalt, *Bitcoin: The Conflicting Currency*, 4 LINCOLN MEM’L U. L. REV. 81 (Fall 2016).

money and regulate the value thereof.”¹⁴⁶ Federal courts are unlikely to classify Bitcoins as money.¹⁴⁷ However, the logical question following is: why should they?¹⁴⁸ Since Bitcoins are a new invention, it is the lawmakers’ job to “discover” the law through a multitude of factors, including legal instrument, public policy, and social norms.¹⁴⁹

The legal classifications of Bitcoin and Bitcoin stakeholders are very complex.¹⁵⁰ Bitcoin may be considered as a good, a commodity, a security, a payment method, so on and so forth.¹⁵¹ At the same time, it has been proved that Bitcoin cannot be classified as an e-money/e-money institution, a payment instrument, an investment firm, a credit institution, or a payment service/payment service provider.¹⁵² Also, they can be classified as financial assets transforming from a pure medium of exchange advantages to a pure store of value advantages.¹⁵³ Bitcoin system poses considerable risks and challenges to users and regulators when they try to fit the new technology into the older legal framework.¹⁵⁴

We should also take historical perspectives into consideration when thinking about the appropriate regulatory framework for bitcoin regulation.¹⁵⁵ Currencies have changed forms over centuries, with currency laws evolving to adapt to the changes.¹⁵⁶ In the United States, early currencies were gold or silver coins, and therefore currency itself has intrinsic value as a commodity.¹⁵⁷ These forms change into “silver certificate,” which is theoretically exchangeable for silver.¹⁵⁸

As noted above, Bitcoin has all the essential functions of money.¹⁵⁹ Like fiat currency, Bitcoin has no intrinsic value that is backed by commodity.¹⁶⁰ However, Bitcoin is scarce and endowed with deflationary properties at the same time, since its supply is limited by the Bitcoin protocol.¹⁶¹ It can be argued that, like a legal tender, Bitcoin is “fungible, transferable, divisible, and recognizable.”¹⁶² While Bitcoin’s volatility is more than that of gold or silver, its absolute return has far more value beyond the precious metal.¹⁶³ In addition, Bitcoin can be classified as a payment service system, a financial instrument, or e-commerce.¹⁶⁴

4.2. The Current Legal Regimes of Bitcoin Regulation in the United States

The current U.S. government regulates Bitcoins by breaking the topic into subparts for each government branch: Subpart A for judicial branch, Subpart B for executive branch, Subpart C for legislative branch, and Subpart D for state sovereign Bitcoin treatment.¹⁶⁵ Currently, although no federal legislation has been created on virtual currencies, there are various regulatory instruments and entities concerning bitcoin regulation.¹⁶⁶

¹⁴⁶ Sean Greenwalt, Bitcoin: The Conflicting Currency, 4 LINCOLN MEM’L U. L. REV. 81 (Fall 2016).

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Sean Greenwalt, Bitcoin: The Conflicting Currency, 4 LINCOLN MEM’L U. L. REV. 81 (Fall 2016).

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Brian M. McCall, How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender, 74 OKLA. L. REV. 313 (Spring 2022).

¹⁵⁴ Ibid.

¹⁵⁵ Steven L. Schwarcz, Regulating Digital Currencies: Towards an Analytical Framework, 102 B.U. L. REV. 1037 (2022).

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Sean Greenwalt, Bitcoin: The Conflicting Currency, 4 LINCOLN MEM’L U. L. REV. 81 (Fall 2016).

¹⁶⁶ Ibid.

These regulatory bodies include the Internal Revenue Service (“IRS”), the U.S. Securities and Exchange Commission (“SEC”), and the U.S. Department of Treasury and Financial Crime Enforcement Network (“FinCEN”), just to name a few.¹⁶⁷ They have been established and reached to interpret existing legislation against this new form of monetary medium.¹⁶⁸

Although no specific law has been passed to regulate Bitcoin in the United States, Bitcoin legislations are commonly finding treatment under two major fields of law: federal anti-money laundering and tax legislation.¹⁶⁹ Federal Anti-Money Laundering Law such as 18 U.S.C. Section 1956 and 1957, are issued to prohibit engagement in financial transactions that are designed to finance illegal activities.¹⁷⁰

4.2.1. The Bitcoin Protocol¹⁷¹

Created in 2008 and launched in 2009, Bitcoin constitutes both virtual currency and digital payment system within which transaction in this form of currency are made.¹⁷² Under the Bitcoin Protocol, this payment method is based on a peer-to-peer network system and is not controlled or owned by any entity.¹⁷³ The Bitcoin protocol determines the primary rules under which the Bitcoin system operates, the same way as any Internet protocol determines rules for any specific technology.¹⁷⁴ The Bitcoin protocol is open-source, however, the open-source nature of Bitcoin protocol does not mean that any modification of the protocol will instantaneously become an effective rule for the Bitcoin system.¹⁷⁵

4.2.2. Uniform Commercial Code¹⁷⁶

The definition of “money” is contained in Article 1 of UCC Section 1-201(b)(24).¹⁷⁷ Article 1 defines “money” as “a medium of exchange *currently authorized or adopted by a domestic or foreign government*. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.”¹⁷⁸ The provision of Article 1 provides that UCC applies to transactions that are subject to the scope of the rest of the Articles of the Code.¹⁷⁹ To address the regulatory challenges of digital currencies, UCC epitomizes a uniform model law that is enacted into national law and designed to facilitate various commercial legislation of U.S. states in multistate commercial transactions.¹⁸⁰ As a result of the specific definition of money in UCC, El Salvador’s adoption of Bitcoin as its legal tender has brought changes to the commercial law of all U.S. states that accepted the UCC.¹⁸¹

¹⁶⁷ Sean Greenwalt, Bitcoin: The Conflicting Currency, 4 LINCOLN MEM’L U. L. REV. 81 (Fall 2016).

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Brian M. McCall, How El Salvador Has Changed U.S. Law by a Bit: The Consequences for the UCC of Bitcoin Becoming Legal Tender, 74 OKLA. L. REV. 313 (Spring 2022).

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Steven L. Schwarcz, *Regulating Digital Currencies: Towards an Analytical Framework*, 102 B.U. L. REV. 1037 (2022).

¹⁸¹ Ibid.

4.2.3. A Trilogy of Cases: *SEC v. Shavers*, *U.S. v. Ulbricht*, and *Faiella*¹⁸²

On August 6, 2013, in *SEC v. Shavers*, the Eastern District of Texas decided whether investments in a Bitcoin Trust should be considered as securities under federal securities law.¹⁸³ This case was the first bitcoin definition case around the world.¹⁸⁴ The Court held that the Bitcoin Trust investment amounts to an investment of money, and, more importantly, the Court specifically classified Bitcoins as a “currency or form of money.”¹⁸⁵ The Court notes that “it is clear the bitcoins can be used as money.”¹⁸⁶ Bitcoins can be “used to purchase goods or services, and the Defendant stated, used to pay for living expenses.”¹⁸⁷ While the Court notes that Bitcoins are limited to “those places that accept it as currency,” the Court also reasoned that bitcoins can also be exchanged for many strong currencies, and therefore, the Court decides that Bitcoins qualify as a “form of money.”¹⁸⁸

The *Ulbricht* was the second case in a line of trilogy of District Court cases that resists any persuasive authority regarding to the monetary status of Bitcoins.¹⁸⁹ On July 9, 2014, the Southern District of New York, in *United States v. Ulbricht*, charged the Defendant under 18 U.S.C. Section 1956(h) for participation in a money laundering conspiracy.¹⁹⁰ Pursuant to 18 U.S.C. Section 1956(h), a financial transaction is defined as “the movement of funds by wire or other means...or involving one or other means...or involving one or more monetary instruments.”¹⁹¹ The term “monetary instrument” include: personal checks, bank checks, coinage or banknote of a country, money orders, investment securities, or negotiable instruments.¹⁹² 18 U.S.C. Section 1960 refers to the terms “money” and “funds.”¹⁹³ Pursuant to Section 1960, “money transmitting” means the “transferring funds on behalf of the public by any and all means.”¹⁹⁴ Consequently, the Defendant argues that Bitcoins do not qualify as money pursuant to Section 1960, and FinCEN Guidance ruling states that bitcoins are not classified as a currency.¹⁹⁵

Faiella was the final case of three U.S. District Court to address the issue on how to classify Bitcoins, and it was the first case that starts using persuasive judicial and legislative authority.¹⁹⁶ However, what makes the *Faiella* case unique, as compared to *Ulbricht* and *Shavers*, is that the “ordinary” definition of Bitcoin is much more comprehensive than either of the previous cases.¹⁹⁷ Where *Shavers* simply states that a practical common knowledge view that Bitcoins are money because they act like money, in *Ulbricht*, judges seem to solidify the notion that Bitcoins are money by suing a dictionary definition by not citing to *Shavers*.¹⁹⁸

The governance model of bitcoin has drawn significant amount of criticism.¹⁹⁹ Compared with other traditional payment systems, bitcoin lacks a regulatory structure other than its underlying software.²⁰⁰ Commonly, the ordinary processes of criminal law are used to reinforce bitcoin’s order with the lack of a

¹⁸² Sean Greenwalt, Bitcoin: The Conflicting Currency, 4 LINCOLN MEM’L U. L. REV. 81 (Fall 2016).

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Sean Greenwalt, Bitcoin: The Conflicting Currency, 4 LINCOLN MEM’L U. L. REV. 81 (Fall 2016).

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

²⁰⁰ Ibid.

currency law.²⁰¹ Bitcoin payment has already been debated and criticized because it is frequently connected with criminal activities.²⁰²

How a balanced regulation can be achieved?²⁰³ The answer is: optimizing a possible balance between the interests of Bitcoin shareholders and regulatory entities.²⁰⁴ As has been concluded above, a full regulation is achievable only through the issuance of a conceptually new legislation that, as we have already seen, would not have any practical effect.²⁰⁵ At conceptual level, Bitcoin may be considered by analogy with other decentralized neutral technologies such as Internet and email.²⁰⁶ These technologies are decentralized, not owned or controlled by any central entities, and are unregulated or underregulated.²⁰⁷ Nearly all central authorities manage their money supply in the form of central banking under the shadow of public law.²⁰⁸ However, bitcoin represents a potential third currency system that is far more resistant to state control, since it mints monetary units that do not exist in any physical place, and relies on scientific principles from cryptography to ensure a numerical ceiling and verify any peer-to-peer transfer.²⁰⁹

5. Conclusion

Consequently, there is a necessity for a clear strategy for bitcoin's regulation that maintains the maximum balance between the interests of bitcoin users and financial regulators.²¹⁰ However, bitcoin's legal framework is still unclear, and sufficient clarity in the legal regulation of bitcoin has not yet achieved.²¹¹ These vagueness and uncertainty have posted a substantial amount of legal risks to Bitcoin users and stakeholders, resulting challenges for regulatory authorities: for instance, bitcoin users are legally unprotected as consumers; bitcoin transactions are often conducted out of traditional contract and tax law; and the properties and the lack of clear regulation of bitcoin are often exploited by criminals who often use bitcoin for the purpose of money laundering.²¹² In this paper, the author develops a legal regime of balanced regulation of bitcoin.²¹³ When currency is created by the rule of law, at the same time, it inherits the strengths and weaknesses of law.²¹⁴ Legal regimes can create a pattern of order to preserve the value of currency.²¹⁵

Since money is a creature of law, government control over currency is a form of oppression.²¹⁶ The advent of cryptocurrencies, exemplified by bitcoin, poses both a theoretical challenge to the view that currency law is the necessary foundation of monetary system, and a practical challenge to the sovereign regimes that are monetarily oppressive.²¹⁷ If the El Salvador's Bitcoin Law is notable for its brevity, U.S. legislations on Bitcoin regulation is exemplified for its complexity.²¹⁸ Because of this multi-faceted approach to Bitcoin regulation in

²⁰¹ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

²⁰² *Ibid.*

²⁰³ Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

²⁰⁴ *Ibid.*

²⁰⁵ Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

²⁰⁹ *Ibid.*

²¹⁰ Sergii Shcherbak, *How Should Bitcoin Be Regulated*, 7 EUR. J. LEGAL STUD. 41 (Summer 2014).

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ Joseph Parampathu, *From Securities to Currencies: The Regulatory Consequences of Adopting Cryptocurrencies as Legal Tender*, 31 ASIAN BUS. LAW. 35 (2023).

the United States, it is necessary to examine a series of currency laws that play a role in Bitcoin regulation within the U.S. before discussing the potential effects of the Bitcoin Law in El Salvador.²¹⁹

The legislative branch locates in a unique position because they will ultimately act lastly on Bitcoin law, however, will have the final authority on the subject as well.²²⁰ The question is how, and will these Bitcoin legislations be constitutional?²²¹ The potential order of bitcoin contrasts with the legal regimes that have already laid the foundation of all currencies—the theoretical and historical practice of the so-called “free banking.”²²² Consequently, bitcoin represents a third currency regime that is different from both theories of central banking and free banking.²²³

However, the soul of Bitcoin is not the state; instead, it belongs to a decentralized entity with incentives to maintain this currency.²²⁴ Therefore, the essence of Bitcoin is “a form of order without law.”²²⁵ As Bitcoin includes more users by competing against other monetary regimes, it may at some point transform into other more established regimes, leading to the direct result of a currency law.²²⁶ A successful Bitcoin ecosystem would generate a mixture of law and nonlegal orders.²²⁷ In the midst of growing literature on digital currency, El Salvador offers a rare opportunity to understand the functions and limitations of Bitcoin as a legal tender in a monetary sovereignty.²²⁸ Just as the Internet, Bitcoin is multijurisdictional, and moreover, we are witnessing that some central authorities are embracing bitcoin system.²²⁹ The strategy of balanced regulation determines the legal issues on the concept of Bitcoin, clarifies the legal rules applicable to Bitcoin stakeholders, and provides regulatory authorities to supervise Bitcoin compliance with these applicable laws.²³⁰

Declaration of the Use of Generative AI

During the preparation of this work, the author(s) did not use any tools related to AI.

Conflicts of Interest

No conflict of interest.

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²²⁰ Sean Greenwalt, Bitcoin: The Conflicting Currency, 4 LINCOLN MEM'1 U. L. REV. 81 (Fall 2016).

²²¹ Ibid.

²²² John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

²²³ Ibid.

²²⁴ Ibid.

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²²⁸ F. Alvarez et al., *Are Cryptocurrencies Currencies? Bitcoin as Legal Tender in El Salvador*, *Science* 382, (2023).

²²⁹ John O. McGinnis & Kyle Roche, *Bitcoin: Order without Law in the Digital Age*, 94 IND. L.J. 1497 (Fall 2019).

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