

Cryptocurrency as the Modern-Day Bretton Woods: A Comparative Analysis of Legal Approaches to Blockchain Technology

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I. INTRODUCTION

From 1944 to 1971, the Bretton Woods system was forged as a mechanism for currency conversion between its forty-four participating nations.¹ The Bretton Woods system utilized an adjustable peg exchange rate in which each nation's currency was fixed to the U.S. Dollar but could be readjusted to account for changing market conditions and to regain economic competitiveness.² With the fall of the Bretton Woods system, cryptocurrencies may pose a new opportunity to create long-run stabilization of global currencies. However, the relative immaturity of cryptocurrencies and its underlying blockchain technology suggests unexplored potential and cautionary risk.

This note provides a brief historical overview of global currency systems from the gold standard to floating exchange rates before illustrating the more recent development of cryptocurrencies and their underlying blockchain technology. This note then addresses several major international concerns regarding cryptocurrency as well as the various responses and policy concerns used by governments around the world to combat these potential pitfalls. Specifically, we compare the effectiveness of a cautious approach to cryptocurrency law—as taken by the United States—to a more stringent approach—as exemplified by China. Then, this note discusses the Cryptoqueen's OneCoin scam and the exploitation of cryptocurrency amidst ill-informed investors before commenting upon the lack of global regulatory harmonization.

Next, this note analyzes changes in the world order since the Bretton Woods system and attempts to fit cryptocurrency within existing legal frameworks. This note then advocates for the (i) creation of a regulatory body that blends modern-day soft law and traditional international conferences and for (ii) the international harmonization of cryptocurrency law as a method of potentially utilizing distributed ledger technology as a modern-day Bretton Woods system. Finally, this note evaluates the effectiveness of cryptocurrency as an adjustable peg system to function as a new “gold standard.”

II. A BRIEF PRIMER ON THE HISTORICAL DEVELOPMENT OF GLOBAL CURRENCY SYSTEMS

To better understand the historical development of international currency systems, this section provides an abridged history, beginning from (i) the rise and fall of the gold standard to (ii) the subsequent creation of the Bretton

¹ Sandra Kollen Ghizoni, *Creation of the Bretton Woods System*, FED. RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/bretton_woods_created.

² *Overview: Adjustable Peg*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095351514> (last visited May 4, 2021).

Woods system and (iii) its culmination into the modern adoption of floating exchange rates.

A. *The Classical Gold Standard*

From 1880 to 1914, the global fixed exchange rate was linked to gold.³ This monetary system, known as the gold standard, pegged the price of each nation's domestic currency to a specified quantity of gold.⁴ Its primary purpose was to create long-run price stability.⁵ This allowed for the unrestricted conversion of gold into non-gold money and provided a method for measuring the relative value of currencies between participating countries.⁶ This period, known affectionately as the classical gold standard, was characterized by extraordinary economic growth and the liberalized exchange of capital, goods, and labor.⁷ However, economies under the gold standard were left vulnerable to short-run price instability.⁸ Because the gold standard limited a government's ability to manipulate fiscal policy, participating countries struggled to offset or avoid economic shocks, which led to increased rates of unemployment.⁹ The gold standard fell during World War I, as major belligerents resorted to inflationary finance.¹⁰ Today, there is still support for the gold standard found from critics and scholars who wish to limit the central bank's market influences and from those who yearn for the exchange rate fixity of this era.¹¹ Still, governments are unlikely to prioritize long-run price stability over full employment; the unemployment caused by short-run instability indicates that this system is unlikely to be revived.¹²

B. *From the Bretton Woods System to Floating Exchange Rates*

Established in 1944, the Bretton Woods system revisited the gold standard in an adjusted fashion. The system attempted to re-establish the gold standard's fixed exchange rates while retaining each nation's flexibility to

³ See Michael D. Bordo, *Gold Standard*, LIBR. ECON. & LIBERTY, <https://www.econlib.org/library/Enc/GoldStandard.html> (last visited Nov. 10, 2020).

⁴ *Gold Standard*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/gold%20standard> (last visited May 4, 2021).

⁵ Bordo, *Gold Standard*, *supra* note 3 (juxtaposing an average annual inflation rate of 0.1% between 1880-1914 with an average annual inflation rate of 4.1% between 1946-2003).

⁶ CRAIG K. ELWELL, CONG. RESEARCH SERV., R41887, BRIEF HISTORY OF THE GOLD STANDARD IN THE UNITED STATES (2011).

⁷ Bordo, *Gold Standard*, *supra* note 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Aimee Pichee, *Trump Fed pick wants to revive the gold standard. Here's what that means*, CBS NEWS (July 10, 2019), <https://www.cbsnews.com/news/trumps-fed-pick-judy-shelton-gold-standard-explained/>.

¹² See Michael D. Bordo, *The Classical Gold Standard: Some Lessons for Today*, 63 FED. RES. BANK ST. LOUIS REV. 1, 2-17, 15 (1981).

preserve economic stability. In essence, the system instituted an adjustable peg system based on the U.S. dollar—which was pegged to the price of gold—while granting members the monetary authority to preserve high levels of employment.¹³ The system created the International Monetary Fund (IMF), which serves as a lending bank to provide short-term relief.¹⁴

Beginning in 1965, inflationary monetary policy in the United States led to the breakdown of the Bretton Woods system. Ending over the period of 1968 to 1971, the Bretton Woods system was flawed and short lived, albeit impactful in shaping stable economic performance during the post-war period.¹⁵ Many modern commentators look to Bretton Woods as a learning example of restoring order and stability to the present international monetary system.¹⁶ Most countries have presently adopted a floating exchange rate, which fluctuates pursuant to supply and demand on the free market.¹⁷ This system favors domestic control at the expense of lower consumption and higher volatility.¹⁸

III. THE ADVENT AND FUNCTION OF CRYPTOCURRENCY

Since the adoption of floating exchange rates, the recent advent of electronic currencies—better known as cryptocurrencies—marks an evolutionary shift in currency regimes and an opportunity for a creative renewal of the Bretton Woods system.¹⁹ Cryptocurrencies are an implementation of blockchain technology; they can act as a form of electronic money that does not require the use of an intermediary, such as a bank.²⁰ Instead, transactions are validated through cryptographic protocols and recorded onto a public ledger.²¹

¹³ See Michael D. Bordo, *The operation and demise of the Bretton Woods system: 1958 to 1971*, CEPR POL'Y PORTAL (Apr. 23, 2017), <https://voxeu.org/article/operation-and-demise-bretton-woods-system>.

¹⁴ *Id.* Today, the IMF has 189 member countries and aims to maintain global financial stability. *About the IMF*, INT'L MONETARY FUND, <https://www.imf.org/en/About> (last visited Nov. 10, 2020).

¹⁵ *Id.*

¹⁶ *The end of the Bretton Woods System (1972-81)*, INT'L MONETARY FUND, <https://www.imf.org/external/about/histend.htm> (last visited Nov. 10, 2020).

¹⁷ Floating Exchange Rate, FINANCIAL DICTIONARY, <https://financial-dictionary.thefreedictionary.com/floating+exchange+rate> (last visited Nov. 10, 2020).

¹⁸ Michael B. Devereux & Charles Engel, *Fixed vs. Floating Exchange Rates: How Price Setting Affects the Optimal Choice of Exchange-Rate Regime*, NAT'L BUREAU OF ECON. RES. WORKING PAPER SERIES 6867, 2 (1998), <https://www.nber.org/papers/w6867.pdf>.

¹⁹ Barbara Matthews, *The Relevance of Bretton Woods in a Distributed, Cryptocurrency Age*, BRETTON WOODS COMM. (Aug. 15, 2019), <https://www.brettonwoods.org/article/the-relevance-of-bretton-woods-in-a-distributed-cryptocurrency-age>.

²⁰ *Id.*

²¹ *Id.*

Cryptocurrencies serve three primary economic functions: “(1) a medium of exchange, (2) a unit of account, and (3) a store of value.”²² The importance of cryptocurrency relies heavily on its ability to satisfy these functions relative to existing monetary systems.²³ Cryptocurrencies promise economic efficiency and the bypassing of existing intermediaries.²⁴ Yet, potential technological challenges may affect cryptocurrencies’ ability to fulfill its necessary economic functions.²⁵

While cryptocurrency has been largely evangelized as a force for good, it is a largely unregulated market.²⁶ The recent entrance of cryptocurrencies into the public imagination has exposed criminal vulnerabilities such as money laundering, tax evasion, financial sanction evasion, and concern over striking a balance between under and over-regulation.²⁷

A. *Fitting Cryptocurrency into Current Legal Models*

Fundamental questions regarding issues of ownership, taxation, transfer, and conflict of laws are applied differently between common-law and civil-law systems.²⁸ European Union (EU) law is generally receptive to regulating blockchain, as exemplified by the General Data Protection Regulation (GDPR).²⁹ The GDPR applies to actors of a blockchain who have an establishment within the EU, or the personal data of subjects located within the EU who are processed by the blockchain.³⁰

Historically, precious metals such as gold, silver, and copper have been used as money to varying degrees of success.³¹ Silver and copper mining heavily influenced the economic value of the metals.³² As a fixed asset, gold

²² See DAVID W. PERKINS, CONG. RESEARCH SERV., R45427, CRYPTOCURRENCY: THE ECONOMICS OF MONEY AND SELECTED POLICY ISSUES (2018) at 2-3.

²³ Michael Abramowicz, *Cryptocurrency-Based Law*, 58 ARIZ. L. REV. 359, 360 (2016).

²⁴ *Id.* at 368-76.

²⁵ *Id.* at 404-18.

²⁶ See generally ROBERT HERIAN, REGULATING BLOCKCHAIN: CRITICAL PERSPECTIVES IN LAW AND TECHNOLOGY (1st ed. 2019).

²⁷ *Id.*

²⁸ See generally DAVID FOX, CRYPTOCURRENCIES IN PUBLIC AND PRIVATE LAW (David Fox & Sarah Green, 2019). See also ROY GIRASA, REGULATION OF CRYPTOCURRENCIES AND BLOCKCHAIN TECHNOLOGIES: NATIONAL AND INTERNATIONAL PERSPECTIVES (2018).

²⁹ See generally Michèle Finck, Blockchain Regulation and Governance in Europe (2018).

³⁰ Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of such Data and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1.

³¹ Peter Bernholz, *Money in History Based on Precious Metals*, in Mining, Money and Markets in the Early Modern Atlantic 19-28 (Renate Pieper et al. eds., 2019). See generally Renate Pieper et al., Mining, Money and Markets in the Early Modern Atlantic (Renate Pieper et al. eds., 2019).

³² See generally Renate Pieper et al., *supra* note 31, at 85-208.

provides a self-regulating and stabilizing effect on the economy.³³ Cryptocurrency may, in theory, provide a similar effect by its use as a finite asset and its limited mining capabilities.

The adoption and acceptance of cryptocurrency by governments are subject to many valid concerns. Among them the use of cryptocurrencies for money laundering and securities fraud.³⁴ The use of cryptocurrency in today's legal systems requires ownership and financial accountability.³⁵ Confidentiality should not conceal; instead, transparency strategies must be in place to counter potential financial crime.³⁶

B. Cryptocurrency Concerns and Various International Approaches

This section outlines three important concerns regarding cryptocurrencies: energy consumption, international disharmony, and risk of a speculative bubble. This note will then discuss three international approaches that attempt to respond to these concerns—the liberal approach, the stringent approach, and the balanced approach—and examples of the governments that have employed them.

i. Three International Concerns Regarding Cryptocurrency

First, cryptocurrency mining has become an extremely energy intensive activity.³⁷ Proof-of-Work (PoW) is a widely used mining algorithm in which miners verify the legitimacy of transactions by solving computationally intensive puzzles.³⁸ Bitcoin is a well-known example of one such cryptocurrency that employs this mining system.³⁹ Policies and regulations reacting to increased energy consumption vary widely.⁴⁰ While some areas have been over-consumed, others have reduced electricity rates to attract miners.⁴¹ For example, despite China's stringent regulation of cryptocurrencies, it attracted a high level of mining activity in 2018 through

³³ *Id.*

³⁴ Abramowicz, *supra* note 23, at 368-76.

³⁵ See generally Paul Beckett, Ownership, Financial Accountability and the Law: Transparency Strategies and Counter-Initiatives (2019).

³⁶ *Id.*

³⁷ See CORRIE E. CLARK & HEATHER L. GREENLEY, CONG. RESEARCH SERV., R45863, BITCOIN, BLOCKCHAIN, AND THE ENERGY SECTOR 1 (2019). See also Christopher Malmo, *Bitcoin Is Unsustainable*, VICE (June 29, 2015, 11:23 AM), https://www.vice.com/en_us/article/ae3p7e/bitcoin-is-unsustainable (finding that “the energy cost of a single Bitcoin transaction could power 1.5 American homes for a day”).

³⁸ Mohammad A. AlAhmad et al., *Comparison Between PoW and PoS Systems of Cryptocurrency*, 10 INDON. J. ELEC. ENG'G & COMPUT. SCI. 1251, 1253 (2018).

³⁹ *Id.* at 1251

⁴⁰ See generally CORRIE E. CLARK & HEATHER L. GREENLEY, CONG. RESEARCH SERV., R45863, BITCOIN, BLOCKCHAIN, AND THE ENERGY SECTOR 1 (2019).

⁴¹ *Id.* at 7.

low-energy-cost incentives.⁴² In the United States, policy options are being considered that include the implementation of standards for energy conservation and efficiency.⁴³ Congress has yet to adopt a policy to improve the energy efficiency of cryptocurrency mining operations.⁴⁴

To address energy concerns, the cryptocurrency industry is shifting towards more sustainable protocols such as the Proof-of-Stake (PoS) system.⁴⁵ PoS is a less energy-intensive alternative to the PoW system in which miners can validate transactions according to how many coins they hold.⁴⁶ Because this system allocates mining power according to the proportion of coins held by a miner, a PoS miner is limited to mining a percentage of transactions pursuant to their ownership stake.⁴⁷ Thus, developments are being made within the cryptocurrency industry to reduce the high level of computing power necessary to verify transactions on the blockchain.

Second, there exists a wide-ranging international response towards security concerns and trade barriers. Issues of interest include “trade barriers for cross-border data flows, international standards, privacy and security concerns, and regulatory implications.”⁴⁸ There is a high level of disharmony among independent nations regarding the regulation and standards of blockchain technology and cryptocurrency law.⁴⁹ As such, cryptocurrencies must traverse an inconsistent global regulatory environment.⁵⁰ The regulatory disharmony between governments would pose difficulty in the creation of an international regulatory body. Most notably, differences in the regulatory frameworks of the United States and China pose significant hurdles for international harmonization.⁵¹

⁴² MICHEL RAUCHS ET AL., UNIV. OF CAMBRIDGE CTR. FOR ALT. FIN., 2nd GLOBAL CRYPTOASSET BENCHMARKING STUDY 78-79, 85 (2018), <https://www.jbs.cam.ac.uk/wp-content/uploads/2020/08/2019-09-ccaf-2nd-global-cryptoasset-benchmarking.pdf>.

⁴³ *Id.*

⁴⁴ *See generally* CLARK & GREENLEY, *supra* note 40.

⁴⁵ *Id.* at 7.

⁴⁶ ALAhmad et al., *supra* note 38, at 1254.

⁴⁷ *Id.*

⁴⁸ Rachel F. Fefer, Cong. Research Serv., IF10810, Blockchain and International Trade 2 (2019).

⁴⁹ *See id.* at 1–2.

⁵⁰ Many skeptics consider the cryptocurrencies too volatile, vulnerable to consumer protection and illegal financing, and too demanding of energy resources. Rebecca M. Nelson, Cong. Research Serv., 7-5700, Examining Regulatory Frameworks for Digital Currencies and Blockchain 3 (2019). Others claim that cryptocurrencies are nothing more than modern a Ponzi scheme. *Id.*

⁵¹ *Id.* *See also* Garrick Hileman & Michel Rauchs, Univ. of Cambridge Ctr. for Alt. Fin., Global Cryptocurrency Benchmarking Study (2017), <https://cointelegraph.com/storage/uploads/view/2017-global-cryptocurrency-benchmarking-study.pdf>. The importance of harmonization between the United States and China is highlighted by a 2017 study, which found that “nearly three-quarters of all major mining pools are based in just two countries: 58% of mining pools with greater than 1% of the total bitcoin hash rate are based in China, followed by the US with 16%.” *Id.* at 92.

Third, major regulatory concerns question whether cryptocurrencies are here to stay or whether they are a speculative bubble. Take, as a classic example, the tulip bulbs in 17th century Holland; they became extraordinarily valuable and then dramatically collapsed.⁵² Since then, there have been many more speculative bubbles such as the dot-com bubble near the end of the 20th century.⁵³ The fear that cryptocurrency may be another socio-economic phenomenon has led to stark differences in cryptocurrency regulation among international governments.⁵⁴ There is very little regulatory harmonization among countries and a quickly emerging patchwork of complex regulation.⁵⁵

International regulatory harmonization is needed to ensure global effectiveness in an interconnected financial system. With regard to cryptocurrencies, the Financial Stability Board (FSB) has found that cryptocurrencies pose an immaterial risk to global financial stability.⁵⁶ This is an overly passive approach. Many governments are beginning to take interest⁵⁷ in developing their own cryptocurrencies—most recently including China⁵⁸—as discussed in Section IV.

ii. Three Approaches for Addressing Cryptocurrency Concerns

Several countries have embraced cryptocurrencies and blockchain technology; these countries have implemented regulations to encourage its development.⁵⁹ Switzerland, for instance, has taken an active step in fostering cryptocurrency industries through the early adoption of crypto-friendly regulations.⁶⁰ Recent regulation has recognized the innovative potential of

⁵² The tulip bubble is one of the oldest and most well-known examples of public excitement over a particular good causing the price of that good to skyrocket to absurd levels. This phenomenon can hold equally true in the modern-day technology industry. *See generally* Pieter Cos, VERZAMELING VAN EEN MEENIGTE TULIPAANEN, NAAR HET LEVEN GETEEKEND MET HUNNE NAAMEN, EN SWAARTE DER BOLLEN, ZOO ALS DIE PUBLICQ VERKOGT ZIJN, TE HAARLEM IN DEN JAARE A. 1637, DOOR P. COS, BLOEMIST TE HAARLEM (1637); Mike Dash, TULIPOMANIA: THE STORY OF THE WORLD'S MOST COVETED FLOWER AND THE EXTRAORDINARY PASSIONS IT AROUSED (1999).

⁵³ Similarly, excessive speculation in internet-related companies in the late 1990s led to a period of massive growth in the stock equity valuations of these internet-based companies, and was quickly followed by a spectacular market crash, resulting in a loss of almost \$8 trillion of wealth. JOHN CASSIDY, DOT.CON: HOW AMERICA LOST ITS MIND AND MONEY IN THE INTERNET ERA (2009).

⁵⁴ *See generally* Rebecca M. Nelson, Cong. Research Serv., 7-5700, Examining Regulatory Frameworks for Digital Currencies and Blockchain 8 (2019).

⁵⁵ *Id.*

⁵⁶ *Regulatory Issues of Stablecoins*, Fin. Stability Bd. (Oct. 18, 2019), <https://www.fsb.org/2019/10/regulatory-issues-of-stablecoins/>.

⁵⁷ *See* Nelson, *supra* note 50, at 9-11.

⁵⁸ *Id.* at 12

⁵⁹ *Id.*

⁶⁰ FINMA Guidance 04/2017, Regulatory treatment of initial coin offerings, Sept. 29, 2017, at 4 (Switz.).

blockchain technology and the rise in initial coin offerings.⁶¹ Switzerland has taken steps to combat money laundering and terrorist financing through the Anti-Money Laundering Act,⁶² which imposes due diligence obligations⁶³—particularly to “verify the identity of the contracting party and to establish the identity of the beneficial owner”⁶⁴—onto parties involved in professional cryptocurrency trading. The Swiss Financial Market Supervisory Authority has also created banking, securities trading, and investment scheme provisions that serve to encourage the creation of initial coin offerings within the country.⁶⁵

On the other hand, China is a prime example of the stringent regulation of cryptocurrencies.⁶⁶ Although China does not directly regulate cryptocurrencies, they place heavy regulation—if not outright prohibition—on the ways in which users typically interact with cryptocurrencies.⁶⁷ China has banned initial coin offerings and severely limited cryptocurrency trading.⁶⁸ Because cryptocurrencies promote the circumvention of financial intermediaries,⁶⁹ China may see this as a major threat to the heavy-handed control it holds over its financial systems and a threat to its existing communist regime.⁷⁰

⁶¹ *Id.* (initial coin offerings are a form of fundraising in which cryptocurrency is sold in the form of “tokens” to investors. These tokens become units of currency if or when the initial coin offering’s funding goal is met and the cryptocurrency successfully launches). *See also* Shane Shifflett & Coulter Jones, *Buyer Beware: Hundreds of Bitcoin Wannabes Show Hallmarks of Fraud*, Wall St. J. (May 17, 2018, 12:05 PM) <https://www.wsj.com/articles/buyer-beware-hundreds-of-bitcoin-wannabes-show-hallmarks-of-fraud-1526573115> (reinforcing concerns that initial coin offerings are often used as a vehicle for scams and fraud due to the lack of regulation and enforcement of securities law).

⁶² Bundesgesetz über die Bekämpfung der Geldwäscherei und der Terrorismusfinanzierung [Geldwäschereigesetz, GwG] [Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector (Anti-Money Laundering Act, AMLA)] Apr 1, 1998, 955.0 (Switz.).

⁶³ *Id.* arts. 3, 4.

⁶⁴ Federal Council, Federal Council Report on Virtual Currencies in Response to the Schwaab (13.3687) and Weibel (13.4070) Postulates (June 25, 2014), <https://www.news.admin.ch/NSBSubscriber/message/attachments/35355.pdf>, at 17 (concluding that the “purchase and sale of bitcoins on a professional basis” fall within the scope of the AMLA, and is therefore compelled to comply with the AMLA’s due diligence requirements).

⁶⁵ *Id.*

⁶⁶ *See* Jacob Blacklock & Shi Lei, *China*, in *Blockchain & Cryptocurrency Regulation 2020* 316-326 (Josias N. Dewey ed., 2nd ed. 2020).

⁶⁷ *Id.*

⁶⁸ Peoples Bank of China [hereinafter PBOC], *Circular* (2013), <http://www.miit.gov.cn/n1146295/n1652858/n1652930/n3757016/c3762245/content.html> (last visited Mar. 14, 2021); PBOC *Circular* (2017), <http://www.pbc.gov.cn/goutongjiaoliu/113456/113469/3374222/index.html> (last visited Mar. 14, 2021). *See also* Laney Zhang, *Regulation of Cryptocurrency: China*, Library of Congress (updated Aug. 16, 2019), <https://www.loc.gov/law/help/cryptocurrency/china.php> (last visited Mar. 31, 2021).

⁶⁹ *See* Perkins, *supra* note 22, at 5-6.

⁷⁰ *See, e.g.*, Jaroslaw Adamowski, *China Hopes New Book Will Verse Communist Party Members in Crypto*, CryptoNews (Jan. 13, 2020), <https://cryptonews.com/news/china-hopes-new-book-will-verse-communist-party-members-in-c-5511.htm> (finding that China hopes to educate its party members in blockchain technology whilst remaining cautious regarding its threat to state-

The United States has instead taken a balanced approach that seeks to balance financial innovation with the risks of cryptocurrencies.⁷¹ Generally speaking, cryptocurrencies have been a topic of focus by both federal and state governments.⁷² While little formal rulemaking has occurred at the federal level, state regulation of cryptocurrencies can vary widely from favorable to restrictive.⁷³ Looking to the future—as banks, cross-border corporations, and governments begin to develop their own cryptocurrencies—widespread adoption will create sweeping policy repercussions in the realm of financial stability, national security, and consumer protection.⁷⁴

IV. A DEEPER DIVE INTO CRYPTOCURRENCY LAW IN THE UNITED STATES AND CHINA

This section illustrates the stark difference between the United States and China with regard to the regulation of blockchain technology and cryptocurrency. This note will then analyze the implications of these two approaches and attempt to weigh risks and benefits of both approaches.

A. *Blockchain and Cryptocurrency Regulation in the United States*

In the United States, the federal government has addressed the topic of cryptocurrencies through various agencies, including the Securities and Exchange Commission,⁷⁵ the Commodities and Futures Trading Commission,⁷⁶ the Federal Trade Commission,⁷⁷ the Internal Revenue System,⁷⁸ and the Financial Crimes Enforcement Network,⁷⁹ albeit with little formal rulemaking.⁸⁰ While U.S. agencies and policymakers acknowledge the

controlled financial system). *See also* Alessandro Arduino, *Does Bitcoin Pose a Threat to China's Economic Security?*, CoinDesk (Feb. 27, 2016, 6:00 A.M. PST), <https://www.coindesk.com/bitcoin-and-cryptocurrencies-chinas-security-concerns> (regarding the perceived threat of cryptocurrency over P.R.C. capital controls).

⁷¹ Josias N. Dewey, *USA*, in *Blockchain & Cryptocurrency Regulation 2020* 565-575 (Josias N. Dewey ed., 2nd ed. 2020).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *See, e.g., Spotlight on Initial Coin Offerings (ICOs)*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/ICO> (last visited Nov. 10, 2020).

⁷⁶ *See, e.g., An Introduction to Virtual Currency*, U.S. COMMODITY FUTURES TRADING COMMISSION, https://www.cftc.gov/sites/default/files/2019-12/oceo_aivc0218.pdf (last visited Nov. 10, 2020).

⁷⁷ *See, e.g., What to Know About Cryptocurrency*, FED. TRADE COMMISSION (Oct. 2018), <https://www.consumer.ftc.gov/articles/what-know-about-cryptocurrency>.

⁷⁸ *See, e.g., Virtual Currencies*, INTERNAL REVENUE SERV. (last updated Feb. 21, 2020), <https://www.irs.gov/businesses/small-businesses-self-employed/virtual-currencies> (last visited Nov. 10, 2020).

⁷⁹ *See, e.g., Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies*, DEPT. OF THE TREASURY FIN. CRIMES ENFORCEMENT NETWORK (May 9, 2019), <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf> [hereinafter *FinCEN Regulations*].

⁸⁰ *Id.*

importance for the United States to set a commanding example on the world-stage, there remains skepticism of the technology's promise.⁸¹ In addition, policymakers have been wary of over-regulating to an extent that discourages domestic blockchain development.⁸²

At the state level, cryptocurrency and blockchain technology law has followed two approaches. On one hand, states seek to encourage local investment, improve public services, and stimulate the state's economy.⁸³ Wyoming, for instance, has enacted a bill "exempting cryptocurrencies from property taxation."⁸⁴ Likewise, Colorado passed a bipartisan bill in May 2018 to promote the use of "blockchain for government record-keeping" as a means of protection and to mitigate record manipulation and theft.⁸⁵ On the other hand, some states such as New York seek to mitigate custodial risk for institutional investors by passing restrictive laws that require strict regulatory oversight.⁸⁶ Additionally, states like New Mexico have issued advisories warning residents of the high-risk and price volatility associated with cryptocurrencies.⁸⁷

At the federal level, the Securities and Exchange Commission (SEC) regulates the issuance or resale of any "digital asset that constitutes a security."⁸⁸ Under U.S. law, a security is defined as an "investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others."⁸⁹ The SEC provides an analytical framework based on the "investment contract" analysis articulated by the Supreme Court in *SEC v. W.J. Howey Co.* for determining whether "federal securities laws apply to the offer, sale, or resale of a particular digital asset."⁹⁰ The reach of the Securities Act relies on substance rather than form and may include any device that is characterized as an "investment contract" or as "any interest or

⁸¹ *Id.*

⁸² *Id.*

⁸³ DEWEY, *supra* note 71.

⁸⁴ *See, e.g.* WYO. SB 18LSO-0509 (2018). This Wyoming bill provides that cryptocurrencies are exempt from property taxation. Wyoming is widely considered to be the most crypto-friendly jurisdiction in the United States. *Id.*

⁸⁵ *See, e.g.* COLO. SB 18-086 (2018).

⁸⁶ *See* N.Y. BITLICENSE (2015).

⁸⁷ Ellen Marks, *State Warns of Cryptocurrency Investing Pitfalls*, ALBUQUERQUE J. (Feb. 18, 2018, 12:02 AM), <https://www.abjournal.com/1135027/state-warns-of-cryptocurrency-investing-pitfalls.html>.

⁸⁸ *Framework for "Investment Contract" Analysis of Digital Assets*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> (last visited Mar. 18, 2021), ¶ 2.

⁸⁹ *See id.* (citing *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946)). Under the SEC, a token issued in an initial coin offering is considered a security "regulated under the Securities Act if it meets elements of the *Howey* test." In other words, a token can still be a security even if it is referred to as a "utility token" or if it structured with utilitarian purposes.

⁹⁰ *Framework for "Investment Contract" Analysis of Digital Assets*, *supra* note 88.

instrument commonly known as a security.”⁹¹ Congress may regulate investments in any form or under whatever name in order to fulfill its regulatory responsibilities.⁹² Notably, the framework is ambiguous and can lead to uncertainty in many situations because it provides little guidance on the relative weights that should be ascribed to the various factors in the framework.⁹³

Additional regulations have been set by the Financial Crimes Enforcement Network (FinCEN), which regulates money service businesses under the Bank Secrecy Act.⁹⁴ FinCEN requires that a money service business assess its operational risks of money laundering and to maintain a program to protect against money laundering and terrorist financing.⁹⁵ Additionally, foreign nationals published on the Office of Foreign Assets Control’s Specially Designated Nationals and Blocked Persons list may not conduct business with U.S. citizens.⁹⁶

The Internal Revenue Service (IRS) announced, in March 2014, that cryptocurrencies are subject to taxation by the IRS as property rather than currency.⁹⁷ This implicates the need for individuals and businesses to maintain complete records of their cryptocurrency transactions and to pay taxes on liquidated earnings, on transactions paid using cryptocurrency, and on mined cryptocurrency.⁹⁸ Furthermore, individuals filing a federal income tax return are required to report gains and losses resulting from the sale of any cryptocurrency held as a capital asset.⁹⁹ Those held for one year or less are taxed at ordinary income rates, while those held for more than one year are taxed at capital gains rates.¹⁰⁰

Through the use of state and federal regulation, the United States has taken a fairly cautious approach in implementing cryptocurrency. Most jurisdictions have refused to articulate a comprehensive legal definition for cryptocurrencies, which wisely broadens the ability to regulate as blockchain

⁹¹ SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943).

⁹² *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990).

⁹³ *Framework for “Investment Contract” Analysis of Digital Assets*, *supra* note 88. See also Edmund J. Zaharewicz, *SEC Adds to Guidance on Digital Assets*, NAT. L. REV. (July 18, 2019), <https://www.natlawreview.com/article/sec-adds-to-guidance-digital-assets>.

⁹⁴ See FIN-2019-G001, FINCEN GUIDANCE (May 9, 2019), <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>.

⁹⁵ *Id.* at 10.

⁹⁶ 31 C.F.R. § 501 (2020).

⁹⁷ I.R.S. Notice 2014-21, 2014-26 I.R.B. 938.

⁹⁸ *Id.*

⁹⁹ *Frequently Asked Questions on Virtual Currency Transactions*, INTERNAL REVENUE SERV., <https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions> (last visited Mar. 31, 2021).

¹⁰⁰ *Id.*

technology expands and evolves.¹⁰¹ Lawmakers have considered the dangers of over-regulating and discouraging investment while providing safeguards to protect the public's faith in the utility and security of cryptocurrencies.

The recent Trump presidency has modeled itself in many aspects on the Reagan Era.¹⁰² The ongoing trade war between China and the United States in combination with a recent rise in nationalist rhetoric certainly conveys a few cold war parallels.¹⁰³ Sweeping deregulation of the U.S. economy under the recent Presidency of Donald Trump sharply contrasts the highly regulated nature of the Chinese economy under the rule of Xi Jinping.¹⁰⁴

B. Blockchain and Cryptocurrency Regulation in China

China has taken a more stringent and restrictive position toward cryptocurrencies, despite taking great interest in the underlying blockchain technology.¹⁰⁵ China called for an increased exploration and advancement into blockchain technology in the 13th Five-Year Plan on National Economic and Social Development.¹⁰⁶ The plan put forth an innovation driven strategy which places blockchain as an important part of China's future.¹⁰⁷ To reinforce the Plan, Chinese President Xi Jinping has emphasized China's endorsement of blockchain technology and China's need to focus on the development of blockchain technology to become the global center of science and innovation.¹⁰⁸

Still, China views cryptocurrencies as a source of potential financial and social instability. China's skepticism towards cryptocurrency can be traced as far back as 2013, when Bitcoin was the only major cryptocurrency.¹⁰⁹ China issued an official notice that reaffirmed the Renminbi as the only official

¹⁰¹ DEWEY, *supra* note 71.

¹⁰² Daniel W. Drezner, *How Donald Trump is like Ronald Reagan*, WASH. POST (Feb. 8, 2018, 7:15 AM), <https://www.washingtonpost.com/news/posteverything/wp/2018/02/08/how-donald-trump-is-like-ronald-reagan/>.

¹⁰³ *Id.*

¹⁰⁴ Deregulation continues to take place across various areas of the economy. The Brookings Institution monitors these changes on their website. See *Tracking deregulation in the Trump Era*, BROOKINGS INST. (Feb. 21, 2020), <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/>.

¹⁰⁵ *Id.*

¹⁰⁶ Zhōnghuá Rénmín Gònghéguó Guómín Jīngjì Hé Shèhuì Fāzhǎn

Dì Shísān Gè Wǔ Nián Guīhuà Gāngyào (中华人民共和国国民经济和社会发展

第十三个五年规划纲要)[Outline of the 13th Five-Year Plan for the National Economic and Social Development of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2016).

¹⁰⁷ *Id.*

¹⁰⁸ Evelyn Cheng, *Chinese President Xi Jinping Calls Blockchain a 'Breakthrough' Technology*, CNBC (May 30, 2018, 9:18 AM), <https://www.cnbc.com/2018/05/30/chinese-president-xi-jinping-calls-blockchain-a-breakthrough-technology.html>.

¹⁰⁹ Gerry Mullany, *China Restricts Banks' Use of Bitcoin*, N.Y. TIMES (Dec. 5, 2013), <https://www.nytimes.com/2013/12/06/business/international/china-bars-banks-from-using-bitcoin.html>.

currency of China.¹¹⁰ The Notice prohibits China's financial institutions from using Bitcoin and has since expanded these prohibitions to other cryptocurrencies as well.¹¹¹ In September 2017, China banned initial coin offerings, deeming them "unauthorized and illegal public fundraising," and made all cryptocurrency exchanges illegal within China.¹¹²

Thus, China has been receptive towards the exploration of blockchain technology but reserved towards its citizens' use of cryptocurrency. In February 2019, China implemented the Blockchain Information Service Management Regulations (BISMR), which created a legal framework for blockchain-based businesses operating in China.¹¹³ The BISMR requires these businesses to register with regulators, collect personal information for identifying users, and closely monitor use of the blockchain for illegal activity.¹¹⁴

Whereas the United States sees value in blockchain's ability to preserve anonymity and protect individual privacy, China has instead opted for an enclosed and independent blockchain network closely tied to its government. In October 2019, China announced the development of a state-issued cryptocurrency.¹¹⁵ This cryptocurrency will be used to compile data regarding citizen's spending habits, effectively granting China extraordinary visibility into its financial system.¹¹⁶ This form of controlled anonymity aims to maintain state control and reinforce the idea that virtual currency must be issued by the state central bank to be considered valid.¹¹⁷ Since its development, numerous patents have been submitted regarding its related technologies.¹¹⁸ China's close treatment of cryptocurrency regulation comports with the China Internet Security Law, enacted in 2016 to increase data protection and to protect nationalist interests.¹¹⁹

¹¹⁰ *Id.*

¹¹¹ BLACKLOCK & LEI, *supra* note 66.

¹¹² *China bans fundraising through ICOs*, CHINA.ORG.CN (Sept. 5, 2017), http://www.china.org.cn/business/2017-09/05/content_41531863.htm. See also *China bans initial coin offerings calling them 'illegal fundraising'*, BBC NEWS (Sept. 5, 2017), <https://www.bbc.com/news/business-41157249>.

¹¹³ Global Legal Monitor, *China: Rules of Blockchain-Based Information Services Issued Requiring Authentication of Users' Real Identities*, LIBRARY OF CONG. (Feb. 12, 2019), <https://www.loc.gov/law/foreign-news/article/china-rules-on-blockchain-based-information-services-issued-requiring-authentication-of-users-real-identities/>.

¹¹⁴ *Id.*

¹¹⁵ Raymond Zhong, *China's Cryptocurrency Plan Has a Powerful Partner: Big Brother*, N.Y. TIMES (Oct. 18, 2019), <https://www.nytimes.com/2019/10/18/technology/china-cryptocurrency-facebook-libra.html>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See generally Zhōnghuá rénmín gònghéguó wǎngluò ānquán fǎ (中华人民共和国网络安全法) [Cyber Security Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 7, 2016, effective June 1, 2017) 2018 China Sec. Regul. Comm.

China is far more interested in developing blockchain and distributed ledger technology than facilitating the growth of cryptocurrencies in the capitalist marketplace. While the United States has taken a careful approach towards balancing privacy concerns with corporate and economic interests, China has taken a hard stance against cryptocurrencies in the free market and has instead developed a state-controlled version of this technology.¹²⁰ China's approach disregards privacy concerns and instead prioritizes the prevention of potential criminal activity and money-laundering that could be possible through the anonymous nature of blockchain technology.¹²¹

V. CRYPTOCURRENCY RISKS: MOVING FROM THE CRYPTOQUEEN TO DIEM

China's restrictive approach towards cryptocurrencies is based upon a desire to maintain strict central control over the country's finances and to avoid criminal activity.¹²² These desires are not unfounded; the anonymous and decentralized nature of blockchain and distributed ledger technology—when combined with currency—could arguably become a hotbed for illegal activity and money laundering.¹²³

Cryptocurrencies remain vulnerable to crime and place a burden on criminal justice agencies to promote greater awareness of these dangers.¹²⁴ Additional challenges include the risks of initial coin offerings and the risk of significant privacy breaches.¹²⁵ A common criticism of blockchain technology is that the decentralized nature of blockchain technology could be disastrous for financial systems and that the relative mystery of blockchain technology in the public eye may lead to poor investment decisions.¹²⁶

A. *The Case of the Cryptoqueen*

Dr. Ruja Ingatova, a.k.a. the Cryptoqueen, exemplifies the risk that cryptocurrency promotes criminal behavior. Dr. Ruja, an elusive Bulgarian tech entrepreneur, scammed billions of Euros from naïve investors of her

http://www.csrc.gov.cn/pub/newsite/flb/flfg/flxzsf/201805/t20180518_338285.html [hereinafter *POC Cyber Security*].

¹²⁰ See generally *FinCEN Regulations*, *supra* note 79; Danny Vincent, 'One day everyone will use China's digital currency', BBC NEWS (Sept. 25, 2020), <https://www.bbc.com/news/business-54261382>.

¹²¹ See generally *POC Cyber Security*, *supra* note 119.

¹²² *Id.*

¹²³ Cryptocurrency, as some critics have pointed out, is vulnerable to criminal activity due in part to the public general lack of understanding of blockchain technology. See generally Steven David Brown, *Cryptocurrency and Criminality: The Bitcoin opportunity*, 89(4) POLICE J.: THEORY, PRAC. & PRINCIPLES, 327-339 (2016).

¹²⁴ *Id.*

¹²⁵ MUHAREM KIANIEFF, BLOCKCHAIN TECHNOLOGY AND THE LAW: OPPORTUNITIES AND RISKS 125–184 (2019).

¹²⁶ *Id.*

cryptocurrency OneCoin and mysteriously vanished.¹²⁷ Dr. Ruja presented herself as a hero who would champion a new cryptocurrency; one that didn't require an understanding of blockchain. OneCoin was promoted as the harbinger of a financial revolution that would help the masses take back control of their money.¹²⁸ In reality, OneCoin was a multilevel marketing scheme disguised as a cryptocurrency;¹²⁹ an old-fashioned scam using new technology. There was no ledger, no blockchain, and no OneCoin.¹³⁰ OneCoin attracted investors from over 175 countries spanning from China to the United States and quickly grew to over 1 million investors.¹³¹ The total amount invested between 2014 and early 2017 was estimated to be between 4 billion to 15 billion Euros.¹³² Then, in October of 2017, Dr. Ruja vanished.

OneCoin leaders were arrested at the Los Angeles International Airport in early 2020 in relation to their crimes.¹³³ While cryptocurrency holds much promise, the case of the Cryptoqueen exemplifies how society's lack of understanding with regard to blockchain technology and cryptocurrency can be exploited. OneCoin showcases the highly speculative investment of cryptocurrencies by ill-informed individuals. Thus, the accountability of initial coin offerings and stability in the market are crucial for the wide-spread acceptance of cryptocurrencies and for preserving faith in the system. In addition, the novelty of cryptocurrencies and new initial coin offerings may lead to high volatility rates and market instability.¹³⁴ Even after the fall of OneCoin, other "cryptocurrencies" have appeared that seem remarkably similar.¹³⁵

¹²⁷ Damian Thompson, *Holy Smoke Podcast: The Strange Religion of Cryptocurrency*, SPECTATOR (Oct. 2, 2019, 7:00 PM), <https://www.spectator.co.uk/article/holy-smoke-podcast-the-strange-religion-of-cryptocurrency>.

¹²⁸ *The CryptoQueen*, NAT. PUB. RADIO: PLANET MONEY (Feb. 14, 2020, 11:27 PM), <https://www.npr.org/2020/02/14/806137130/episode-972-the-cryptoqueen>.

¹²⁹ *Id.* To accentuate the weight of Dr. Ruja's influence, fans of Dr. Ruja wrote music and poetry for her. See, e.g., Jem P. Ronnie, *Together For More (OneCoin) Song*, YOUTUBE (Oct. 25, 2018), <https://www.youtube.com/watch?v=dmKa4RMiyE8>.

¹³⁰ *The CryptoQueen*, *supra* note 128.

¹³¹ *Id.*

¹³² *Id.*

¹³³ See Chris Dolmetsch, *OneCoin Leaders Charged in Multibillion-Dollar Pyramid Scheme*, BLOOMBERG (Mar. 8, 2019, 11:04 AM), <https://www.bloomberg.com/news/articles/2019-03-08/onecoin-leaders-charged-in-u-s-with-operating-pyramid-scheme>. See also Press Release, Dept. of Justice for the S.D. of N.Y., Manhattan U.S. Attorney Announces Charges Against Leaders Of "OneCoin," A Multibillion-Dollar Pyramid Scheme Involving The Sale Of A Fraudulent Cryptocurrency (Mar. 8, 2019), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-charges-against-leaders-onecoin-multibillion-dollar> (reporting that Ruja Ignatova, Konstantin Ignatov, and Mark S. Scott were charged with various counts of fraud and money laundering).

¹³⁴ Dolmetsch, *supra* note 133.

¹³⁵ See generally DAGCOIN, <https://dagcoin.org> (last visited Nov. 10, 2020).

B. Diem's Push Towards Mainstream Adoption

Similarly, a Facebook-led initiative aims to deliver on OneCoin's promises with the launch of a new global cryptocurrency named Diem (formerly known as Libra).¹³⁶ Unlike OneCoin, many respectable institutions support Diem.¹³⁷ Nonetheless, it will be difficult to convince governments that cryptocurrency does not facilitate a means to launder money or finance terrorism,¹³⁸ or that Facebook is a trustworthy company to spearhead Diem's introduction to the masses.¹³⁹ More importantly, Diem is pushing lawmakers to clarify legal guidelines regarding cryptocurrency.¹⁴⁰ The United States held congressional hearings in July of 2019 to assess whether regulatory changes are needed for Diem and the cryptocurrency industry.¹⁴¹ At these hearings, although Facebook denied being a bank and denied the need to comply with banking regulations, the company set in motion the development of a program to combat anti-money laundering and to protect the financial system.¹⁴² Facebook will not launch Diem until it appeases the regulatory concerns of Congress.¹⁴³ European Union antitrust regulators have also scrutinized Diem for potential anti-competitive behavior.¹⁴⁴ Diem marks an unprecedented attempt to make cryptocurrency accessible to the masses.

¹³⁶ DIEM, <https://www.diem.com/en-us/> (last visited Mar. 18, 2021).

¹³⁷ Diem is supported by a number of banking and venture capital institutions including Women's World Banking and Union Square Ventures, as well as household names such as Lyft, Uber, and Spotify. *Members*, DIEM https://www.diem.com/en-us/association/#the_members (last visited Mar. 18, 2021).

¹³⁸ See Rory Cellan-Jones, *Mystery of the disappearing 'Cryptoqueen' Ruja Ignatova*, BBC NEWS (Sept. 25, 2019), <https://www.bbc.com/news/technology-49826161>. See generally *The Missing Cryptoqueen*, BBC <https://www.bbc.co.uk/programmes/p07nkd84/episodes/downloads> (last visited Jan. 21, 2021).

¹³⁹ Data harvesting and the misuse of Facebook user data has arguably tarnished the reputation of Facebook and the trust of its users. See, e.g., *Facebook Pays \$643,000 Fine For Role in Cambridge Analytica Scandal*, NAT. PUB. RADIO (Oct. 30, 2019, 1:16 PM), <https://www.npr.org/2019/10/30/774749376/facebook-pays-643-000-fine-for-role-in-cambridge-analytica-scandal>. See also Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>.

¹⁴⁰ Clare Duffy & Shannon Liao, *Facebook's Libra could massively help the cryptocurrency industry — or hurt it badly*, CNN Bus. (July 29, 2019, 12:50 PM),

<https://www.cnn.com/2019/07/29/tech/libra-cryptocurrency-implications/index.html>.

¹⁴¹ See *Examining Facebook's Proposed Cryptocurrency and its Impact on Consumers, Investors, and the American Financial System: Hearing Before the H. Comm. on Fin. Serv.*, 116th Cong. (2019) [hereinafter *Cryptocurrency Hearings*]; *Examining Facebook's Proposed Digital Currency and Data Privacy Considerations: Hearing Before the S. Comm. on Banking, Hous., and Urb. Aff.*, 116th Cong. (2019) [hereinafter *Digital Currency Hearings*].

¹⁴² See *Cryptocurrency Hearings*, *supra* note 141; *Digital Currency Hearings*, *supra* note 141.

¹⁴³ See *Cryptocurrency Hearings*, *supra* note 141; *Digital Currency Hearings*, *supra* note 141.

¹⁴⁴ Lydia Beyoud & Aoife White, *Facebook's Libra Currency Gets European Union Antitrust Scrutiny*, BLOOMBERG (Aug. 20, 2019, 11:41 AM), <https://www.bloomberg.com/news/articles/2019-08-20/facebook-s-libra-currency-gets-european-union-antitrust-scrutiny>.

Diem and China's state-controlled cryptocurrencies will surely inspire other companies and central banks to accelerate the development of their own cryptocurrencies.¹⁴⁵ Regardless of whether regulators suppress Diem, other companies will follow in its footsteps.¹⁴⁶ The result will undoubtedly affect the United States' ability to regulate the economy and utilize the dollar to promote international policy goals.¹⁴⁷

VI. CRYPTOCURRENCY'S GLOBAL IMPACT DEMANDS GLOBAL HARMONIZATION

This section discusses the recent fall of hard law in favor of soft law and proposes the creation of an international body for addressing cryptocurrency concerns that utilizes elements of both soft law and hard law.¹⁴⁸ Then, this note will conclude its analysis with a cumulative finding that the global economy is not yet ready to consider the possibility of using cryptocurrency as a modern-day Bretton Woods system.

A. Blockchain in Today's Dynamic Global Landscape

As the impact of blockchain technology expands, Congress has held several hearings to evaluate its utility in government operations and its potential effects on the economy.¹⁴⁹ A compliance-based theory of international financial law—such as that of G20—may not be enough to protect against the dangers of the next global financial crisis.¹⁵⁰ Traditional regulatory regimes (hard law) are struggling to keep pace with the rapid evolution of technology. As a result, soft law systems and other informal governance mechanisms have been quickly filling the governance gaps in the 21st century. Soft law foregoes the legitimacy and market certainty of traditional regulatory regimes in favor of speed and

¹⁴⁵ Kenneth Rogoff, *A Chinese Digital Currency is the Real Threat, Not Facebook's Libra*, GUARDIAN (Nov. 11, 2019, 6:07 AM), <https://www.theguardian.com/business/2019/nov/11/chinese-digital-currency-facebook-libra>.

¹⁴⁶ See Zhong, *supra* note 115.

¹⁴⁷ See DEWEY, *supra* note 71.

¹⁴⁸ The European Center for Constitutional and Human Rights (ECCHR) states as follows:

The term soft law is used to denote agreements, principles and declarations that are not legally binding. Soft law instruments are predominately found in the international sphere. UN General Assembly resolutions are an example of soft law. Hard Law refers generally to legal obligations that are binding on the parties involved and which can be legally enforced before a court.

Hard Law/Soft Law, EUR. CTR. FOR CONST. & HUM. RIGHTS, <https://www.ecchr.eu/en/glossary/hard-law-soft-law/> (last visited Nov. 10, 2020).

¹⁴⁹ CHRIS JAIKARAN, CONG. RESEARCH SERV., BLOCKCHAIN: BACKGROUND AND POLICY ISSUES (2018).

¹⁵⁰ G20, <https://www.g20.org> (last visited Mar. 18, 2021). The G20 is an international forum for discussing global financial stability. A compliance-based theory stems from reputation compliance of rational, self-interested states. See also CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY* 218–275 (2015); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Cal. L. Rev. 1823, 1840 (2017).

flexibility.¹⁵¹ Soft law rules may not exhibit characteristics of formal law or formal validity. Nonetheless, they create a genuine impact on people's lives. Thus, soft law regimes are still powerful instruments for sparking regulatory guidance and discourse.¹⁵²

Globalization, the rise of China's role in global banking regulation, and the revival of Beggar-Thy-Neighbor economics¹⁵³ in the wake of Trumponomics and the "America First" rhetoric have made international regulation and financial harmonization increasingly important.¹⁵⁴ Since the creation of the Bretton Woods system, support for currency as international reserves is growing, yet network effects have become weaker as transactions could be made without incurring costs as high as before.¹⁵⁵ The economy can attribute these changes to policies that encourage macroeconomic stability and capital account openness.¹⁵⁶ Whereas China had earlier policies of discouraging use of the Renminbi abroad, it now seeks to promote it.¹⁵⁷

B. An International Regulatory Body Can Address the Concerns of Cryptocurrency Whilst Balancing Hard Law and Soft Law Principles

The optimal regulatory effectiveness of cryptocurrency finds a fine balance within the crossroads of modern soft law and the regulatory regimes of hard law. By balancing these two concepts, the result would offer the flexibility of soft law with the regulatory power of hard law. The United States should propose the creation of an international regulatory body that utilizes both soft law and hard law principles to address concerns regarding energy consumption, international disharmony, and risks of speculative bubbles. Because cryptocurrency remains an emerging issue, soft law instruments provide a platform for parties to test the results of regulations while circumventing the

¹⁵¹ Ryan Hagemann et al., *Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future*, 17 *COLO. TECH. L. J.* 37, 42–46 (2019).

¹⁵² See generally PAULINE WESTERMAN ET AL., *LEGAL VALIDITY AND SOFT LAW* (2018); ABRAHAM L. NEWMAN & ELLIOT POSNER, *VOLUNTARY DISRUPTIONS: INTERNATIONAL SOFT LAW, FINANCE, AND POWER* (2018).

¹⁵³ Adam Hayes, *Beggar-Thy-Neighbor*, INVESTOPEDIA (Oct. 24, 2019), <https://www.investopedia.com/terms/b/beggartyneighbor.asp> ("Beggar thy neighbor refers to economic and trade policies that a country enacts that end up adversely affecting its neighbors and/or trading partners.").

¹⁵⁴ Douglas W. Arner, *The Politics of International Financial Law in the Aftermath of the Global Financial Crisis of 2008*, in *THE CHANGING LANDSCAPE OF GLOBAL FINANCIAL GOVERNANCE AND THE ROLE OF SOFT LAW* 81-99 (Friedl Weiss & Armin Kammel eds., 2015).

¹⁵⁵ Caroline Banton, *Network Effect*, INVESTOPEDIA (Dec. 1, 2020), <https://www.investopedia.com/terms/n/network-effect.asp> ("The network effect is a phenomenon whereby increased numbers of people or participants improve the value of a good or service. The internet is an example of the network effect.").

¹⁵⁶ *Id.*

¹⁵⁷ Barry Eichengreen et al., *Stability or Upheaval? The Currency Composition of International Reserves in the Long Run* (Eur. Cent. Bank, Working Paper No. 1715, 2014).

burden of implementing of hard law.¹⁵⁸ Thus, a workable framework could involve the use of soft law mechanisms—such as voluntary codes of conduct—as a method of gathering knowledge about a rule’s effect. Then, after sufficient testing and adjusting has been accomplished, parties may deliberate and negotiate the introduction of this rule as a hard law.

Employing a balanced approach—as opposed to the liberal approach exemplified by Switzerland and the stringent approach exemplified by China—should appeal to a larger number of participating governments and ease negotiation tensions. Major players including the European Central Bank and the Bank of Japan would be crucial for the success of such a regulatory body. Most importantly, the time for the global harmonization of cryptocurrency standards and regulations has ripened. Cryptocurrency scandals such as the case of the Cryptoqueen and the upcoming launch of mainstream cryptocurrencies such as Diem pose major international implications regarding trust and safety. Without regulatory consistency among nations, bad actors will be largely held unaccountable for their crimes and mainstream global cryptocurrencies will be forced to work amongst complex and conflicting regulations.

Moreover, the growing influence of cryptocurrency on the global stage is unavoidable, for better or for worse. Global issues require global solutions, and in this case, regulatory consistency among nations could support the growth of legitimate mainstream cryptocurrencies while punishing those who attempt to prey on the trust and safety vulnerabilities of this technology. In an attempt to regulate international exchange through cryptocurrency, the proposed international body would ideally offer the flexibility of soft law to respond to rapid changes in blockchain development as well as the authority of traditional regulatory regimes to enforce international adherence to laws that protect the sustainability of such a system.

C. We Are Not Yet Ready to Consider the Creation of a Modern-Day Bretton Woods System Based on Cryptocurrency

A new gold standard based upon Bretton Woods may leverage the transparency of blockchain to create financial stability between countries and encourage greater global interdependence, particularly amidst the increased global and ideological divide emerging from the COVID-19 pandemic.¹⁵⁹ The increase in Beggar-Thy-Neighbor economics may pose a foreboding indication

¹⁵⁸ Samantha Bradshaw & Kyle Harris, *Internet Governance via Hard and Soft Laws: Choosing the Right Tools for the Job*, CTR. FOR INT’L GOVERNANCE INNOVATION (Jan. 30, 2013), <https://www.cigionline.org/publications/internet-governance-hard-and-soft-laws-choosing-right-tools-job>.

¹⁵⁹ Ruolin Su & Wensong Shen, *Is Nationalism Rising in Times of the COVID-19 Pandemic? Individual-Level Evidence from the United States*, 26 J. OF CHINESE POL. SCI. 169, 183-184 (2021) (discussing concern that post-COVID-19, “threatening nationalism and ideological division” will exacerbate hostility among nations with competing ideologies and intensify the current shift away from globalization).

of financial crisis. Historically, times of deep financial crisis are met with increasing support for gold standard adoption.¹⁶⁰

Here, cryptocurrency may be a potential answer to requests for a new gold standard in the post-Bretton-Woods age. However, the public's lack of understanding of blockchain technology, the emergence of security concerns, and the absence of regulatory harmonization between countries may pose serious hurdles in the adoption of such an idea. In order for cryptocurrency to be adopted as a functional gold standard, the effects of cryptocurrency on energy consumption, international trade, regulatory concerns, and criminal vulnerabilities are all complex considerations that must be addressed. Although an international conference could ideally bring about international change, there is no political will at the moment. Realistically, it would take a recession or an economic downturn to bring about a greater interest in such a proposal.

VII. CONCLUSION

In conclusion, due to regulatory differences in our current political and economic landscape, the international adoption of cryptocurrency as a gold standard may not be a viable solution at this time. China's position against the free flow of cryptocurrencies poses major difficulties for international harmonization. As the United States continues to strengthen "America First" rhetoric, and as China continues to build internal infrastructures independent from other countries, the cooperative abilities between international superpowers grows weaker. Recent movements for independence—including that of Great Britain and Hong Kong—present examples of a growing sense of nationalistic identity in the age of 21st century globalization.¹⁶¹

Nevertheless, the adoption of a regulatory body to facilitate regulatory harmonization among member nations may be a useful tool for overcoming many concerns with blockchain technology. While it may be too soon to gain widespread cooperation for these ideas, a future economic downturn may provide a springboard for a more serious look at cryptocurrency as a global "gold standard."

¹⁶⁰ Gold continues to hold value as a real asset. In times of recession or looming inflation, investors return to gold as a safe haven. AARON GRINHAUS, *A PRACTICAL GUIDE TO SMART CONTRACTS AND BLOCKCHAIN LAW* (2019). *See also*, LEGAL TECH, *SMART CONTRACTS AND Blockchain* (Marcelo Corrales et al. eds., 2019). *See generally* James Chen, *Real Asset*, INVESTOPEDIA (Mar. 8, 2020), <https://www.investopedia.com/terms/r/realasset.asp>.

¹⁶¹ *See generally* *Brexit*, GUARDIAN, <https://www.theguardian.com/politics/eu-referendum> (last visited Nov. 10, 2020); *Hong Kong Protests*, CNN WORLD, <https://www.cnn.com/specials/asia/hong-kong-protests-intl-hnk> (last visited Nov. 10, 2020).