BITCOIN: CURRENCY OR FOOL’S GOLD?: A COMPARATIVE ANALYSIS OF THE LEGAL CLASSIFICATION OF BITCOIN

By: Seth Litwack*

I. INTRODUCTION

I’m sure that in 20 years there will either be very large transaction volume or no volume.
—Satoshi Nakamoto, RE: what’s with this odd generation?

On May 1, 2010, Laszlo Hanyecz paid the May 22, 2014 market equivalent of about $5,000,000 for just two Papa John’s pizza pies. Hanyecz did not pay a fellow internet-user in U.S. dollars for the pizza, or any other national currency for that matter—he paid BTC10,000 (bitcoin).

Satoshi Nakamoto attracted an unusual following of technologists and libertarians from all over the world when he created the bitcoin protocol and software in 2009. Bitcoin, a decentralized digital currency that is not backed by...
any government or legal entity, went from trading at less than $0.05 per BTC in 2010 to exceeding $1,200 in 2013. In November 2013 alone, bitcoin prices increased 500 percent, leading many to cite bitcoin’s use as a speculative investment as the reason for the dramatic increase in valuation. The response by the U.S. federal government to the rise of bitcoin has been ad hoc and is likely not a permanent solution.

Although revolutionary in its technology, bitcoin presents many regulatory and legal issues. Most importantly, many countries are having difficulty defining bitcoin’s nature. Is it a currency, commodity, security, payment system, or something else entirely? The characterization of bitcoin has significant implications because it determines what laws and regulations will apply, particularly within the United States. For instance, whether or not bitcoin is a currency, security, or commodity will determine the amount of tax the Internal Revenue Service (IRS) places on bitcoin transactions. Furthermore, classifying bitcoin will determine which U.S. federal agency has jurisdiction over bitcoin-related activities in regulatory and criminal matters.

In this comment, I will examine whether bitcoin should be considered a currency, commodity, security, or some other classification. First, I will give an explanation of bitcoin, including its history, functionality, and competitors. Second, I will analyze the positions that other nations have taken on the categorization of bitcoin and how those positions have affected both taxation and regulation. Third, I will present arguments for and against the categorization of bitcoin as a currency, commodity, or security. Finally, I will argue that the U.S. government and regulatory agencies should follow Germany, Australia, and

8. See Lo & Wang, supra note 3, at 2 (“What attracted unprecedented interest in Bitcoin around the turn of the year...was the meteoric rise of bitcoin’s price.”).
9. See Kaplanov, supra note 5, at 3 (concluding that bitcoin use is not contemplated under U.S. law).
12. See Grinberg, supra note 6, at 194–203 (discussing the question of whether bitcoin is a currency, commodity, investment, or note/stock).
14. See Kaplanov, supra note 5, at 26 (noting that the Securities and Exchange Commission will have jurisdiction over bitcoin if it is classified as a security).
Canada by classifying bitcoin as both a currency and an investment/asset, and regulating and taxing bitcoin transactions according to the purpose for which they are conducted and the context in which income on such transactions is generated.

II. BITCOIN IN CONTEXT

A. History of Money

In general, currency can be defined as "the coin and paper money of . . . any . . . country that [i] is designated as legal tender and that [ii] circulates and [iii] is customarily used and accepted as a medium of exchange in the country of issuance."15

Barter, the "exchange of resources or services for mutual advantage," predates the use of money, and may have existed at the start of mankind.16 Cattle and grain were used as money as early as 9000 B.C.17 Later, in 1200 B.C., cowrie shells, the shells of molluscs, available in the Indian and Pacific Oceans, became the most widely and longest-used currency in history.18 In fact, imitations of cowries were made in bronze and copper in China around 500 B.C., becoming what is considered the earliest forms of metal coins.19

In 269 B.C., the Romans introduced a silver coin, the denarius, manufactured in the temple of Juno Moneta,20 from which the English word "money" is derived.21 In 1290 A.D. the travels of Marco Polo introduced the idea of paper money to the Europeans.22 This had a huge impact on business because it allowed them to mass-produce money without relying on the supply of certain metals.23 By 1860 A.D., Western Union and other companies revolutionized money by allowing electronic fund transfers via telegram.24 This technology was largely replaced with the advent of the "Charg-It" card, the first credit card in 1946 A.D.25 Since then, aside from the addition of online and mobile payments, currency

17. Id.
18. Id.
19. Id.
21. Id.
23. Id.
24. Id.
25. Id.
technology and innovation has been relatively stagnant.  

B. Pre-Bitcoin Digital Currencies

Within the latter half of the twentieth century, electronic money was created, prompting governments to define this new form of exchange. Electronic money is defined by the European Commission on Banking and Finance as the following:

[E]lectronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions . . . which is accepted by a natural or legal person other than the electronic money issuer.

The first proposal for a digital currency dates back to a paper written in 1982 by David Chaum. Although the proposal was not popular, Chaum commercialized his research in 1994 with the creation of DigiCash. In 1996, e-gold was established in the Caribbean, quickly becoming the forerunner to today’s virtual currency. By November of 2003, e-gold boasted over one million accounts, many of which were suspected of being used for criminal purposes. In 2007, before the shutdown of e-gold by the U.S. government, many of its users had already switched to a competing digital currency, WebMoney. WebMoney was anonymously established in 1998 and claimed over seven million users at its height in 2009.

Liberty Reserve, a digital currency launched in 2001, is alleged to have helped launder more than $6 billion in criminal proceeds before the U.S. government shut it down in 2013. The founders of Liberty Reserve were

26. Id.
27. See id. (using a diagram to illustrate very few advancements since 2014).
31. E-gold was an online service that did not require verification of account holder identity and allowed customers to transact in the e-gold currency while easily being able to anonymously convert it back to real money. See RAJ SAMANI, FRANCOIS PAGET & MATTHEW HART, DIGITAL LAUNDRY: AN ANALYSIS OF ONLINE CURRENCIES, AND THEIR USE IN CYBERCRIME 8 (2013), http://www.mcafee.com/us/resources/white-papers/wp-digital-laundry.pdf (explaining the history of online currencies and their various uses in cybercrime).
32. Id.
33. See id. (noting e-gold’s reputation for attracting cybercriminals).
34. See id. (discussing how many users of e-gold switched to WebMoney, specifically criminal actors).
35. Id.
36. See id. (providing a summary of the rise and fall of Liberty Reserve). In addition to
sentenced to five years in federal prison for transmitting money without a license.37 After Liberty Reserve was shut down, Perfect Money, a newer digital currency with anonymous founders, banned U.S. citizens from using their service in order to mitigate the risk of going to prison.38

In 1998, a member of the “Cypherphunks” group,39 Wei Dai, published an innovative description of an anonymous virtual currency where government intervention was unnecessary.40 Dai’s proposal is often cited as the main influence for Satoshi Nakamoto’s creation of the bitcoin protocol.41

C. Bitcoin Explained

In 2008, Satoshi Nakamoto42 published the first paper on a “peer-to-peer version of electronic cash,” called “bitcoin.”43 Specifically, Nakamoto proposed a system whereby payments would be sent from one party to another without the need to go through a financial institution, government, or other central party.44 A
year after publishing his proposal, Satoshi Nakamoto released the entire bitcoin code and network.  

The bitcoin system can be segmented into a number of complex systems including mining, transactions, exchanges, and wallets. In the forthcoming section, I will explain these segments, in addition to bitcoin’s purpose and advantages for both users and merchants.

1. Advantages

There are three main purposes for the use of bitcoin: (1) cost; (2) security; and (3) anonymity. First, bitcoin transactions cost less than existing transactions in other worldwide payment systems. The higher transaction cost of current payment systems is largely due to government regulation, monopolization of certain systems, and/or the implementation of certain fraud protection systems. However, once bitcoin regulation advances, the cost of bitcoin transactions may be much closer to that of its competitors. Due to cheaper transaction costs and lack of governmental backing, it may become a staple in cross-border transactions. Second, due to cryptography and its decentralized nature, bitcoin transactions are extremely secure. This is different from the security of a user’s bitcoin wallet, which may be less secure depending on the technologies used. Third, bitcoin’s decentralized nature allows for partial anonymity. Many libertarians, who view bitcoin as a way to stay under the government’s radar, champion this anonymity.


46. See generally Kaplanov, supra note 5.

47. Id. at 11.

48. See id. (explaining that the cost of a direct transaction is less than one with a third party).


50. See Steven Witzel, Bitcoin and Virtual Currency Regulation, N.Y. L. J. (Sept. 4, 2014), http://www.newyorklawjournal.com/id=1202668742780/Btc-currency-regulation?slreturn=20140923201619 (asserting that many small businesses will not be able to shoulder the costs from the increase in bitcoin regulation).

51. Id.


2. Merchants

Unsurprisingly, bitcoin, as a partially anonymous and decentralized currency, was largely used for illegal product sales shortly after its introduction. The Silk Road Marketplace launched in 2011, promptly became the “eBay for drugs.” The Silk Road was and continues to be an online marketplace that facilitates anonymous transactions between buyers and sellers, placing few restrictions on what type of goods can be sold. It works solely through an anonymous web-browser. Although the Federal Bureau of Investigation halted the Silk Road in October 2013, a number of replacements have been created, including Silk Road 2.0, which continues to post the sale of illegal products online. Bitcoin’s association with the Silk Road gave it an early reputation and association with lawlessness.

Although the Silk Road greatly furthered the adoption of bitcoin, it also stigmatized the technology as one used by criminals. In 2012, however, Wordpress began accepting bitcoin as a method of payment for account upgrades,


57. But see JUDITH ALDRIDGE & DAVID DECARY-HETU, NOT AN ‘EBAY FOR DRUGS’: THE CRYPTO MARKET’S ‘SILK ROAD’ AS A PARADIGM SHIFTING CRIMINAL INNOVATION (May 13, 2014), http://dx.doi.org/10.2139/ssrn.2436643 (arguing that the Silk Road is not the “eBay for drugs,” but rather a marketplace where drug dealers can obtain drugs via “business-to-business” transactions).


59. Tor consists both of software that you can download to browse the web and a network of computers that allows for anonymity when browsing. The Tor “exit relay” allows for an IP address to be rerouted anywhere in the world, making it nearly impossible to track. The more relays available, the more anonymous the network will be. Tor was originally commissioned by the U.S. Navy in order to protect government communications. For more information, see Tor Overview, TORPROJECT, https://www.torproject.org/about/overview (last visited Oct. 29, 2014).


61. VERMACk, supra note 7, at 6.


63. WordPress is a publishing platform that allows anyone to create blogs or websites. The site uses their own open source software to host others’ publications. About Us, WORDPRESS.COM, https://wordpress.com/about/ (last visited Oct. 11, 2015).
citing PayPal’s and many credit issuers’ exclusion of numerous countries.\textsuperscript{64} Overstock.com, an online retailer with $1.3 billion in revenue,\textsuperscript{65} added bitcoin as a payment choice in 2014.\textsuperscript{66} Dell also recently added bitcoin, with the CEO stating, “Dell is now the world’s largest e-commerce business to accept bitcoin.”\textsuperscript{67} As of September 2012, an estimated 80,000 merchants have begun accepting bitcoin.\textsuperscript{68}

On September 23, 2014, PayPal announced that it would be integrating its payments hub with leading bitcoin merchant payment processors.\textsuperscript{69} This will allow merchants to easily integrate bitcoin into their payment platform.\textsuperscript{70} While PayPal noted it has not yet added bitcoin to the PayPal wallet system, due to the size and prominence of PayPal, this announcement demonstrates bitcoin’s success. Accordingly, the adoption of bitcoin as a method of payment among these reputable businesses has helped to legitimize bitcoin as a legal method of transaction.

3. Transactions, Mining, and Fraud

The backbone and most innovative aspect of bitcoin is the “blockchain” (“public ledgers”), a publicly distributed ledger where all financial transactions are publicly recorded.\textsuperscript{71} In combination with the “private keys” held by a bitcoin user, the blockchain allows for bitcoin to be decentralized and semi-anonymous.\textsuperscript{72} Each

\begin{itemize}
  \item 64. See Andy Skelton, \textit{Pay Another Way: Bitcoin}, \textsc{Wordpress.com} (Nov. 15, 2012, 10:21 PM), http://en.blog.wordpress.com/2012/11/15/pay-another-way-bitcoin (announcing that Wordpress, a popular website publishing service, now accepts bitcoin as a form of payment).
  \item 66. See id. (referencing acceptance of bitcoin in a disclaimer); see also Jane McEntegart, \textit{TigerDirect is Now Accepting Bitcoin as Payment}, \textsc{Tom’s Hardware} (Jan. 26, 2014, 7:58 PM), http://www.tomshardware.com/news/tigerdirect-bitcoin-bitpay-payments,25859.html (reporting that TigerDirect is using BitPay to accept bitcoin payments).
  \item 70. \textit{Id.}
  \item 71. See id. (noting that PayPal will support bitcoin in some aspects, but will proceed slowly and will not integrate bitcoin support site-wide).
  \item 72. Kaplanov, supra note 5, at 6.
\end{itemize}
time a bitcoin is sent from one user to another it is verified via the blockchain.\textsuperscript{74}

In order to send and receive bitcoin, users download and use bitcoin “wallets,”\textsuperscript{75} allowing users to generate “addresses” to receive bitcoin.\textsuperscript{76} Bitcoin transactions are free, but a fee can be added to process the transaction faster.\textsuperscript{77} Transactions take about eight to ten minutes for one confirmation on the blockchain.\textsuperscript{78}

The blockchain is maintained by the computing power of those who “mine” bitcoin.\textsuperscript{79} Individuals (“miners”) use their computing power to locate bitcoin “blocks” by solving computationally intense problems.\textsuperscript{80} The first miner to post a solution to the mathematical problem is rewarded with newly created bitcoins and transactional fees.\textsuperscript{81} Miners generally mine in “mining pools,” where miners combine their computing power to increase their odds of solving the computational problems first.\textsuperscript{82} By the time it is fully mined in 2140, bitcoin will have twenty-one million coins in existence.\textsuperscript{83} As of September 28, 2014, there have already been over thirteen million bitcoin mined.\textsuperscript{84}

The cryptographic technology used by bitcoin allows it to prevent counterfeiting of each bitcoin code.\textsuperscript{85} Network nodes and the publicly available

\textsuperscript{74} Id. (explaining how the blockchain works).

\textsuperscript{75} There are a number of different kinds of bitcoin wallets, including but not limited to, iPhone, Android, Web browser, and desktop. See Choose Your Bitcoin Wallet, BITCOIN PROJECT, https://bitcoin.org/en/choose-your-wallet (last visited Oct. 6, 2014) (displaying different types of bitcoin wallets).

\textsuperscript{76} See Grinberg, supra note 6, at 167 (discussing sites that provide Bitcoin transactional services). In order to use a bitcoin, a user must submit a “public key” and a “private key” for verification on the blockchain. See Lo & Wang, supra note 3, at 2 (explaining the process of using a bitcoin).

\textsuperscript{77} See Grinberg, supra note 6, at 165 (explaining that the only fee associated with bitcoin is an expedited transaction fee).

\textsuperscript{78} See Median Transaction Confirmation Time, BLOCKCHAIN.INFO, https://blockchain.info/charts/avg-confirmationtime?timespan=all&showDataPoints=false&daysAverageString=7&show_header=true&scale=0&address= (last visited Mar. 20, 2015) (displaying a chart of median transaction confirmation time data over the course of a few months).

\textsuperscript{79} See Lo & Wang, supra note 3, at 2 (explaining the process of “mining” bitcoin).

\textsuperscript{80} In addition to mining, miners also use their computational power to verify the authenticity of bitcoins sent from one user to another. Id.

\textsuperscript{81} See id. at 2–3 (explaining the rewards of the mining process).

\textsuperscript{82} See Benjamin Johnson et al., Game-Theoretic Analysis of DDoS Attacks Against Bitcoin Mining Pools, 1ST WORKSHOP ON BITCOIN RESEARCH BITCOIN 2014 1, 2 (2014), http://lyle.smu.edu/~tylerm/bitcoin14gt.pdf (describing the use of mining pools as a means of increasing output).

\textsuperscript{83} See Lo & Wang, supra note 3, at 3 (discussing limitations on the amount of bitcoin in existence).

\textsuperscript{84} See Total Bitcoin in Circulation, BLOCKCHAIN.INFO, http://blockchain.info/charts/total-bitcoin (last visited Oct. 6, 2014) (showing a chart of the total amount of bitcoin in existence over time).

\textsuperscript{85} See Dan Kaminsky, I Tried Hacking Bitcoin and I Failed, BUSINESS INSIDER (Apr. 12, 2013, 10:45 AM), http://www.businessinsider.com/dan-kaminsky-highlights-flaws-bitcoin-2013-


blockchain validate all payments. Unlike other payment methods, there are no chargebacks since bitcoin transactions are irreversible. This irreversibility may sometimes cause problems because a bitcoin user’s “private keys” are stored in wallets on his or her computer. A private key, which is a non-public cryptographic code, is matched with the blockchain to verify a transaction. This allows anyone with access to either the user’s wallet or computer to transfer the bitcoin to another wallet. Consequently, security against cybercriminals, who can potentially gain access to users’ and merchants’ bitcoin wallets, is a major concern for bitcoin. One company, Xapo, specializes in placing customers’ bitcoin keys in guarded, underground mountain vaults.

Another issue with the bitcoin protocol is that it may allow for a “Double-Spend” attack. This occurs when a cyber-attacker dispatches two transactions, using the same exact bitcoin. An attack is considered successful when the transaction going to a second address used by the attacker is deemed valid, while the other transaction going to a merchant is not. This allows the attacker to retain both bitcoins, and scam the merchant. Although it was thought that the bitcoin protocol would succeed in fixing this problem, studies have shown that it may be worse than initially thought.

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4 (explaining the technology that keeps bitcoin code safe from hacking). Kaminsky, one of the world’s best cryptographers, could not crack the bitcoin code. Id.


87. Chargebacks usually occur when a customer “refuses to accept responsibility for a charge on his credit card.” Chargeback Management and Prevention, CHASE PAYMENTECH (last visited Jan. 12, 2016), https://www.chasepaymentech.com/chargebacks.html. For instance, if a customer claims that his or her card was fraudulently used to purchase an item from the merchant, the merchant loses any potential revenue from the sale. Id.

88. See Grinberg, supra note 6, at 165 (comparing bitcoin transactions to cash transactions). See id. at 180 (discussing the possibility of bitcoin theft). However, there are many other ways to store bitcoin including on the Web, iPhone, and Android wallets. See Choose Your Bitcoin Wallet, supra note 75 (displaying the different types of bitcoin wallets).

89. Grinberg, supra note 6, at 180.


94. See id. (explaining the process of a Double-Spend attack).

95. See id. at 5–6 (describing the conditions for a successful Double-Spend attack).

96. See id. (diagramming the effect of a Double-Spend attack on the merchant, and the benefit for the attacker).

97. See id. at 5 (discussing the assumptions that must be made for the bitcoin protocol to fix double-spend attacks).
4. Exchanges and Payment Processors

In addition to mining for bitcoin, individuals can purchase bitcoin through online exchanges where bitcoin floats against digital and fiat currencies. One such exchange, Mt. Gox, launched in 2010 in Japan as a bitcoin to fiat exchange. By 2013, it was handling 70% of bitcoin exchange transactions. However, Mt. Gox’s success was short lived; In 2014, the exchange terminated trading and filed for bankruptcy in both Japan and the United States. Mt. Gox alleges that over $450 million of users’ bitcoin were stolen by unknown hackers, although this has not been verified.

After launching out of beta in 2013, a U.S.-based exchange, Coinbase, quickly became a success, receiving a $25 million investment from Andreessen Horowitz, Union Square Ventures, and Ribbit Capital in the same year. Coinbase currently works with 36,000 merchants and has 1.6 million user wallets. It recently launched in a number of countries outside of the United States. Another platform, Circle, launched in March 2014 to enable ease-of-use for online and in-person payments, quickly becoming a competitor to Coinbase in the bitcoin exchange space.

98. On the online exchanges, bitcoin has the same worth as digital currency (electronic money) and fiat currency (money that is backed by a government). See Kaplanov, supra note 5, at 8–9 (discussing online bitcoin exchanges).
101. See Ben McLannahan, Bitcoin Exchange Mt Gox Files for Bankruptcy Protection, THE FINANCIAL TIMES (Feb. 28, 2014), http://www.ft.com/cms/s/0/6636e0e8-a06e-11e3-a72e-00144feab7de.html (discussing Mt. Gox’s decision to file for bankruptcy).
105. See id. (discussing Coinbase’s statistical information).
There are a number of payment technologies competing for the replacement of cash purchases. Alternative Cryptocurrencies (“altcoins”) are cryptocurrencies other than bitcoin, with the majority being “forks” of the bitcoin software. Other major competitors include Paypal, credit cards, Apple Pay, and Money


108. A fork is a clone of the bitcoin software with a number of changes that differentiate it from the original bitcoin source code. The first major fork of bitcoin was “litecoin,” created by an ex-google employee. Id. Litecoin adapted many of the features of the bitcoin software, but also increased transaction times. See Charles Lee (Coblee), [ANN] Litecoin - A Lite Version of Bitcoin. Launched!, BITCOINTALK.ORG (Oct. 9, 2011, 6:14 AM), https://bitcointalk.org/index.php?topic=47417.0 (reporting the launch of the litecoin wallet and source code); Alistair Charlton, Litecoin Value Leaps 100% in a Day as Market Cap Passes $1bn, INT. BUSINESS TIMES (Nov. 28, 2013), http://www.ibtimes.co.uk/litecoin-value-leaps-100-percent-market-cap-525867 (showing that litecoin can be mined more quickly and with less processing power).

109. Some of the altcoins with the largest marketcap include litecoin, dogecoin, NXT, and peercoin. See Crypto-Currency Market Capitalizations, COINMARKETCAP.COM, http://coinmarketcap.com/ (last visited Nov. 3, 2014) (displaying a chart of current crypto-currency market capitalization data). Bitcoin’s popularity has had a large impact in raising awareness of other cryptocurrencies. See Gandal & Halaburda, supra note 86, at 13 (discussing how Bitcoin has helped pave the way for the success of other cryptocurrencies to be successful). In particular, Dogecoin, based on the doge meme, gained a following after raising donations for particular charitable causes. Paul Vigna & Michael J. Casey, BitBeat: Much Good, Dogecoin; So Hip, WALL ST. J., (Mar. 13, 2014, 4:26 PM), http://blogs.wsj.com/moneybeat/2014/03/13/bitbeat-much-good-dogecoin-so-hip (discussing how Dogecoin was invented). Unlike bitcoin, 100 billion dogecoins will have been generated approximately one year after it launched, and 5 billion in subsequent years. Additionally, instead of confirming within 8-10 minutes as with bitcoin, dogecoin transactions take approximately three minutes to confirm. Rob Wile, DOGECOIN: How a Thing That Started as a Joke Became the Hottest Digital Currency in the World, BUSINESS INSIDER (Dec. 19, 2013, 10:51 AM), http://www.businessinsider.com/what-is-dogecoin-2013-12 (providing background information on one of bitcoin’s competitors, dogecoin).


111. See Interview with Fred Ehrsam, TOP OF MIND, at 8 (Mar. 11, 2014), http://www.paymentlawadvisor.com/files/2014/01/GoldmanSachs-Bit-Coin.pdf (stating that while bitcoin transactions are basically free, credit card companies charge 2-3%, which is also substantially
Transmitters/Electronic Funds Transfer. 113

III. BITCOIN AROUND THE WORLD

Bitcoin case law, regulation, and guidance are growing around the world. 114 A number of nations have either explicitly or subtly defined the nature of bitcoin in terms of regulation and taxation. 115 The nations selected below offer the most extensive information available on the regulation and classification of bitcoin. 116 They provide the best guidance for determining the proper regulation and taxation in the United States. 117 Furthermore, some nations, such as the United Kingdom, are hoping to use their regulatory positions to leverage themselves as contenders for the headquarters of bitcoin, electronic currency, and payment system companies worldwide. 118 Examining other nations provides a point of comparison and advice for classification of bitcoin in the United States.

Since bitcoin regulation is relatively new, most of the guidance comes from national taxing authorities. 119 Financial regulation by these nations is not divided among various governmental agencies as it is in the United States, and therefore classification in terms of regulation is not as important in these countries. 120 Nevertheless, many nations classify bitcoin as both a currency and

more than the 1% coinbase charges).

112. On September 6, 2014, Apple announced Apple Pay, a system that uses near field technology to conduct credit card transactions. See Apple Announces Apple Pay: Transforming Mobile Payments with an Easy, Secure & Private Way to Pay, APPLE.COM, (Sept. 9, 2014) https://www.apple.com/pr/library/2014/09/09/Apple-Announces-Apple-Pay.html (explaining the process of using Apple Pay). A user places an iPhone near a compatible credit card scanner and uses his or her fingerprints on the iPhone to authenticate the transaction. Id. The system creates a “dynamic security code,” or uses a cryptographic “token,” to securely verify each transaction, similar to bit coin. See Juli Clover, Apple Pay Roundup: Everything We Know, Coming in October, MACRUMORS.COM (Sept. 26, 2014, 2:03 PM), http://www.macrumors.com/2014/09/26/apple-pay-roundup/ (explaining the security processes behind Apple Pay).


115. See id. (discussing the regulation and taxation of bitcoin).

116. See id. (showing different countries’ regulation of bitcoin).

117. See generally id.

118. See Jemima Kelly, In Boon for Bitcoin, UK to Regulate Digital Currency Exchanges, REUTERS (Mar. 18, 2015, 3:54 PM), http://www.reuters.com/article/2015/03/18/us-britain-budget-digital-currencies-idUSKB00ME1XD20150318 (discussing the steps the UK has taken to regulate bitcoin).


120. See id. (discussing how different countries’ tax regulations affect the regulation of bitcoin in comparison to the United States).
investment/asset due to its broad and flexible nature within tax classifications.\textsuperscript{121}

A. United Kingdom

The United Kingdom classifies bitcoin essentially as a currency, with some limitations.\textsuperscript{122} Although the United Kingdom has not issued any regulatory guidelines formally classifying bitcoin, it has provided some guidance on the issue of taxation.\textsuperscript{123} On March 3, 2014, Her Majesty’s Revenue and Customs Department (HMRC)\textsuperscript{124} exempted most bitcoin related activities (trading, mining, etc.) from taxation.\textsuperscript{125} HMRC did state, however, that where companies buy, sell, or exchange bitcoin “the profits or losses on exchange movements between currencies are taxable.”\textsuperscript{126} Notably, bitcoin businesses will not be charged on the marginal gains or losses when they receive bitcoin for products.\textsuperscript{127} This classification of bitcoin bases its policy on European Union (E.U.) law that exempts payments and transfers of negotiable instruments from tax.\textsuperscript{128} Previously, HMRC classified bitcoin as “single purpose vouchers,” rendering any sales or product purchase liable to a value-added tax of 10-20\%.\textsuperscript{129}

HMRC’s guidance treats bitcoin as private money and avoids clearly answering the difficult question of whether bitcoin is a currency.\textsuperscript{130} Although the ruling does not answer the question of whether to treat bitcoin as a currency, according to Serbian attorney Miljan Mimic, it “effectively treats it as such.”\textsuperscript{131} By

\begin{thebibliography}{10}
\bibitem{122} See id. (explaining the United Kingdom’s classification of bitcoin).
\bibitem{123} See generally id.
\bibitem{124} Previously, it had been reported that HMRC would classify bitcoin as “single purchase vouchers.” See Tom Gullen, Bitcoin’s UK Future Looks Bleak, SCIRRA BLOG (Nov. 11, 2013), https://www.scirra.com/blog/tom/4/bitcoin-uk-future-looks-bleak (discussing HMRC’s report and its effects on bitcoin users). This would require any sales of bitcoin to pay a 10–20\% tax in any instance. Id.
\bibitem{125} See Revenue and Customs Brief 9, supra note 121 (detailing tax exemptions related to bitcoin for VAT purposes).
\bibitem{126} Id.
\bibitem{130} See Revenue and Customs Brief 9, supra note 122 (containing HMRC’s policy guidance on bitcoin).
\bibitem{131} Mimic, supra note 128, at 14.
\end{thebibliography}
taxing “profits or losses” on certain transactions for businesses and not individuals, HMRC treats bitcoin partially as a financial investment.\(^{132}\) This is very similar to the taxation of the profits made by trading foreign currencies in the United Kingdom.\(^{133}\) Significantly, the ruling exempts from taxation any gains in transactions that involve the purchase of tangible and intangible goods with bitcoin.\(^{134}\)

Besides HMRC’s taxation reports, there are no other rules or regulations in the United Kingdom that guide the classification of bitcoin.\(^{135}\) However, on August 6, 2014, Chancellor George Osborne commissioned the United Kingdom Treasury to explore the risks and benefits of cryptocurrencies.\(^{136}\) This may lead to the regulation of bitcoin and other cryptocurrencies, and potentially call for a separate classification of bitcoin for regulatory purposes. Nevertheless, HMRC noted that the position adopted on bitcoin in the United Kingdom will likely be consistent with any measures that may eventually be implemented throughout the E.U.

**B. Germany**

Germany became the first European country to recognize bitcoin as a payment mechanism when the Federal Ministry of Finance recognized bitcoins as unit of accounts or “private money” in 2013.\(^{137}\) In its February 17, 2014 report, the Federal Financial Supervisory Authority\(^{138}\) (BaFin) further affirmed the Ministry’s ruling of bitcoin as a “unit of account.”\(^{139}\) Units of accounts, BaFin stated, have the “function of private means of payment in barter transactions, as well as any other substitute currency used by virtue of private-law agreements as a means of payment in multilateral settlement accounts.”\(^{140}\) In other words, bitcoin is a form of “private money” that “can be used for tax and trading purposes” in Germany.\(^{141}\)

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134. See Rizzo, supra note 127.

135. See id (noting the lack of clear rules on bitcoin in the UK).


140. Id.

141. Matt Clinch, *Bitcoin recognized by Germany as ‘private money’*, CNBC (Aug. 13,
BaFin asserted that bitcoins are not “e-money,” as defined by the German Payment Services Supervision Act, because there is no central issuer of bitcoin.142 E-money under German law is the “digital equivalent of cash” and thus Germany does not consider bitcoin to be a currency.143 BaFin stated that “units of account,” and thus bitcoins, do not qualify as a foreign currency.144

BaFin’s classification of bitcoin as a “unit of account” subjects bitcoin to authorization pursuant to the Kreditwesengesetz,145 or the Banking Act of the Federal Republic of Germany.146 Nevertheless, BaFin is the sole financial regulator;147 therefore, they are the regulator of bitcoin. By classifying bitcoin as a “unit of account,” any profit from bitcoin is subject to a 25% capital gains tax, unless held for more than a year.148

C. Sweden

The Swedish government has classified bitcoin as a capital investment object.149 However, Swedish law is outdated and is likely unadapted to the complexities of the modern financial world.150 According to the Swedish Financial Supervisory Authority,151 anyone who “engage[s] in currency exchange or other financial activities” qualifies as a financial institution.152 This places all qualified financial institutions under the umbrella of the Swedish Financial Supervisory Authority for purposes of Anti-Money Laundering Rules.153 Additionally, bitcoin

142. Id.
143. Id.
144. Id.
145. See Kreditwesengesetz [KWG] [Banking Act], Sep. 9, 1998, BGBL I at 2776 (Ger.), http://www.iuscomp.org/gla/statutes/KWG.htm (outlining the law for all “unit accounts”).
146. See Bitcoin: Supervisory Assessment, supra note 139 (explaining the Banking Act and its relationship to bitcoin).
150. See id. (describing the effect of Sweden’s treatment of bitcoin).
153. See generally id.
and virtual currency exchanges and businesses must register with the Financial Supervisory Authority and meet the stringent requirements that all other financial institutions face in Sweden.\textsuperscript{154}

Originally, in October 2003, the Swedish Tax Board ruled that bitcoin was considered a currency for tax and regulation purposes.\textsuperscript{155} The Board stated that bitcoin transactions would not be subject to any Swedish tax implications.\textsuperscript{156} Similar to other European nations, the Swedish Tax Board ruled bitcoin would be subject to the jurisdiction of the Financial Supervisory Authority, the sole financial Swedish regulator, for regulatory purposes.\textsuperscript{157} Soon after the decision, the Swedish Tax Authority\textsuperscript{158} appealed the ruling by the Swedish Tax Board.\textsuperscript{159}

Reversing the position the government had previously taken, the Swedish Tax Authority ruled on April 24, 2014 that for tax purposes bitcoin would not be considered a currency or foreign currency.\textsuperscript{160} Instead, the Authority declared that bitcoin is a “capital investment object,” similar to its classification of copyrights and commodities.\textsuperscript{161} This classification subjects bitcoin to capital gains tax under Chapter 52 of the Swedish Income Act.\textsuperscript{162} Significantly, this would require the Swedish consumers to record the price they paid for the bitcoin and the price at which they spent the bitcoin.\textsuperscript{163} Consequently, Sweden places an undue burden on individuals seeking to use bitcoin through its classification of bitcoin as a capital investment object.\textsuperscript{164}

\begin{itemize}
\item \textsuperscript{155} See Mervårdesskatt: Handel med bitcoins [VAT: Trade with Bitcoin], SKATTERÅTNÄMNDEN, http://skatterattsnamnden.se/skatterattsnamnden/forhandsbesked/2013/forhandsbesked2013/mervardesskathandelmedbitcoin.5.46ae6b26141980f1e2d29d9.html (last visited Nov. 19, 2014) (explaining that, since the supply of bitcoins requires notification obligations such as financial services, bitcoin is a means of payment used in a similar way as legal tender and is similar to electronic money).
\item \textsuperscript{156} Id.
\item \textsuperscript{158} In Swedish, the Swedish Tax Authority is known as “Skatterättsnämnden.” See SKATTERÅTNÄMNDEN, supra note 155 (containing regulations issued by the Swedish Tax Board in which the Board is named as Skatterättsnämnden).
\item \textsuperscript{159} Regulation of Bitcoin in Selected Jurisdictions: Sweden, supra note 157.
\item \textsuperscript{160} See Taxation on mining of bitcoin and other virtual currencies, etc., SKATTEVERKET (Apr. 23, 2014), http://www4.skatteverket.se/rattsligvagledning/338713.html?q=131+191846-15%2F111 (showing the Swedish Tax Authority’s ruling that the mining of bitcoin is not taxable activity for VAT purposes).
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} See id. (explaining how disposing of bitcoin means imposing a capital gains tax).
\item \textsuperscript{164} See Rizzo, supra note 127 (stating that the United Kingdom’s tax system of classifying bitcoin as currency is the most progressive and comprehensive in the world).
\end{itemize}
D. Australia

The Australian government has only passed laws or issued guidance on the regulatory classification of bitcoin for tax purposes.\(^{165}\) A bitcoin transaction in Australia is treated, for tax purposes, “like barter transactions with similar taxation consequences.”\(^{166}\) According to the Australian Tax Office, “[b]itcoin is neither money nor a foreign currency, and the supply of bitcoin is not a financial supply for goods and services tax (GST) purposes.”\(^{167}\) Consequently, where bitcoin is used for personal transactions, such as the consumption of personal goods and services, there is generally “no income tax or GST implications.”\(^{168}\) On the other hand, a business accepting bitcoin as a payment for goods or services must calculate and record the fair market value of the bitcoin in Australian dollars at the time the transaction took place.\(^{169}\) Despite the additional work required for accepting bitcoin transactions, more and more Australian companies started accepting bitcoin, leading to a growth of 30% per month in bitcoin transactions at Australian retailers.\(^{170}\) The business must pay GST taxes on the fair market value of the transaction and deductions can be made on expenses bought with bitcoin.\(^{171}\) Controversially, GST is “also payable when a business supplies Bitcoin in the course of its operations.”\(^{172}\) This requires bitcoin exchanges to pay GST taxes on every transaction.\(^{173}\)

For “capital gains tax purposes” bitcoin is considered an asset.\(^{174}\) This requires bitcoin investors to record the date of the buying or selling transaction, the amount in Australian dollars, the purpose of the transaction, and the identity of the other party.\(^{175}\) Tax must then be paid (or deducted) on “the difference between what


\(^{167}\) Australian Tax Treatment, supra note 165.

\(^{168}\) However, a major exception is that “the cost of the [b]itcoin” must be AU $10,000 or less. Id.

\(^{169}\) Id.


\(^{171}\) Id.

\(^{172}\) Id.; see also Supratim Adhikari, Bitcoin to Cop GST: ATO, AUSTRALIAN BUSINESS REVIEW (Aug. 21, 2014), http://www.theaustralian.com.au/business/latest/bitcoin-to-cop-gst-ato/story-c6fec90f-12270309760118?nk=9e83ef3147831c471b2df1787b2c7ba7 (asserting that the “double GST” may convince bitcoin-related businesses to conduct business offshore from Australia).

\(^{173}\) See generally id.

\(^{174}\) Australian Tax Treatment, supra note 165.

\(^{175}\) See id. (providing a summary of what users must report from bitcoin transactions).
it cost you to get an asset and what you received when you disposed of it.”¹⁷⁶ This increased regulation coupled with constant concerns linking bitcoin to crime caused Australian banks to close 13 of the 17 bitcoin exchanges in the country, possibly signaling an end for the once growing market for bitcoin in the country.¹⁷⁷

E. Canada

Canada is one of the only nations to have laws or guidance on both regulation and taxation at the national level.¹⁷⁸ Similar to Australia, Canada announced in April 2013 that bitcoin is classified in two different ways for taxation purposes.¹⁷⁹ When bitcoins are used to pay for goods and services it will be considered bartering.¹⁸⁰ The Canada Revenue Agency states that in a barter transaction, “we [the agency] generally consider that the value of whatever is received is at least equal to the value of whatever is given up.”¹⁸¹ If a user is trading bitcoin for profit, the Canada Revenue Agency will essentially treat bitcoin like a commodity.¹⁸² Depending on the specific circumstances, the resulting gains or losses could be treated as income or capital.¹⁸³

¹⁷⁹. See Bonnie Allen, Bitcoin Aren’t Tax Exempt, Revenue Canada Says, CBC NEWS (Apr. 26, 2013, 5:02 PM), http://www.cbc.ca/news/business/bitcoin-arent-t-tax-exempt-revenue-canada-says-1.1395075 (showing that the price swing in bitcoin cash value caused buyers and sellers to lose or gain money which raised the question of how these gains or losses would be handled during tax-time). But see Michael Cooke, 2014-0525191E5 E – Virtual Currencies (Bitcoins), TAX INTERPRETATIONS (Mar. 28, 2014), http://www.canadianlaw.com/wp-content/uploads/2014/04/2014-0525191E5.txt (stating that the amount that bitcoin transactions will be taxed will be decided on a case-by-case basis). Whether an activity is for-profit “is a question of fact that can only be determined on a case-by-case basis.” Id.
¹⁸⁰. Cooke, supra note 179.
¹⁸². See Allen, supra note 179 (showing that bitcoin is treated as a commodity because it is bought and sold as a commodity).
¹⁸³. Id.
On June 29, 2014, “the Parliament of Canada approved what is likely the world’s first national law on digital currencies,” Bill C-31. This Bill amends the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTF Act) to gain authority over digital currency transactions in terms of anti-money laundering laws. Bill C-31 subjects any person or business “dealing in virtual currencies” to commit to record keeping, verification procedures, suspicious transaction reporting and registration requirements under the PCMLTF Act as a money service business. Additionally, these persons or businesses must register with the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). Finally, banks are barred from opening accounts for those “dealing in virtual currencies” that are unregistered as a money service business. Furthermore, it is unclear who “deals in virtual currencies”—does this pertain to bitcoin exchanges, users, and/or merchants? This lack of clarity may deter Canadians from using bitcoin or creating bitcoin-based companies.

F. Finland

Bitcoin in Finland is classified differently in terms of regulation and taxation. Similar to other nations, the Finnish Tax Authority, Vero Skatt, has issued taxation guidance that classifies bitcoin separately in two situations. The Finnish rules on taxation of capital gains apply when bitcoin is transferred to another currency. On the other hand, if bitcoin is used as a payment for goods and services, it is treated as a trade for taxation purposes, “and the increase in value that the currency might have gained after it was obtained is taxable.” Additionally, any loss that may accompany the sale or transfer of bitcoin is not deductible under the Finnish Income Taxation Act; since this type of loss is not

184. Duhaime, supra note 178.
186. Duhaime, supra note 179.
187. An Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 11, 2014 and Other Measures, R.S.C. 2014 c. C-31 (Can.), http://www.parc.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6671392&File=344. The law does not define “dealing in virtual currencies.” Id. This could be very problematic since we do not know if this would apply to every bitcoin user, although unlikely. Id.
188. Id.
189. Id.
190. Id.
193. Id.
194. Id.
explicitly stated in the legislation, it is therefore not deductible.\textsuperscript{195}

While bitcoin in Finland is taxed in two separate ways, officials from the Bank of Finland have stated that bitcoin is “more comparable to a commodity.”\textsuperscript{196} The head of oversight at the Bank of Finland in Helsinki stated that bitcoin does not fit within the definition of an official currency under Finnish law.\textsuperscript{197} Additionally, he stated that in order for bitcoin to be considered simply a payment system the “law stipulates that a payment instrument must have an issuer responsible for its operation.”\textsuperscript{198} Thus, bitcoin is regulated in Finland similar to the regulation of a commodity.\textsuperscript{199}

\textbf{G. Netherlands}

While the Dutch government has not explicitly defined bitcoin, it has specified what bitcoin is not classified as through both guidance reports and case law.\textsuperscript{200} In the Netherlands bitcoin is neither legal tender nor electronic money.\textsuperscript{201} The Dutch Minister of Finance stated that bitcoin does not fall within the scope of the Act on Financial Supervision\textsuperscript{202} of the Netherlands.\textsuperscript{203} This Act defines electronic money as “a monetary value stored on an electronic device or stored on-distance in a central accounting record,” and an “electronic money institution” as “a party, not being a bank, whose business it is to obtain the disposal of funds in exchange for which electronic money with which payments can be made is issued, also to parties other than the party issuing the electronic money.”\textsuperscript{204} According to one leading Dutch lawyer, because bitcoins “do not represent a claim on the issuer and aren’t necessarily issued in exchange for money, they aren’t electronic

\textsuperscript{195. Id.}
\textsuperscript{197. Id.}
\textsuperscript{198. Id.}
\textsuperscript{199. Id.}
\textsuperscript{201. See Anita Ramasatry, \textit{Is Bitcoin Money? Lawmakers, Regulators and Judges Don’t Agree}, Verdict (Sept. 9, 2014), https://verdict.justia.com/2014/09/09/bitcoin-money (“At present there is no consensus as to what we should call Bitcoin or how it should be defined for purposes of applying legal rules.”)).
\textsuperscript{202. In Dutch, the Act on Financial Supervision is called the Wet op het financieel toezicht.}
A Dutch district court judge recently ruled on the nature of bitcoin, holding that it is not “legal tender.” In this case, a buyer attempted a purchase of BTC2,750 from the seller; however, after only BTC990 was handed over and there were several delays of delivering the balance, the buyer filed suit. The court ordered the defendant seller to pay back the original value of the unpaid amount, plus interest and legal costs. The court also awarded the buyer damages due to the surge in price of bitcoin after the transaction took place. In ruling for the buyer, the court held “that Bitcoin, like gold, is a medium of exchange that is an acceptable form of payment in the country but that cannot be defined as legal tender, common money, or electronic money.” Consequently, bitcoin in the Netherlands is currently not a currency, legal tender, or electronic money.

IV. U.S. LAW

A. Current Status

While U.S. law and guidance on bitcoin is probably the most advanced in the world, serious complexities are present due to various federal and state agencies as well as common law. There are a number of concerns that regulators are currently seeking to address. For instance, the IRS and other federal agencies are extremely concerned with tax evasion and money laundering via bitcoin. Due to its anonymity, the federal government is also apprehensive about its use in crime and terrorism. Government agencies are looking to address the security risks that


206. Wirdum, supra note 200.


208. Id.

209. Id.

210. Id.

211. Ramasatry, supra note 201.


213. See EDWARD V. MURPHY, M. MAUREEN MURPHY & MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., R43339, BITCOIN: QUESTIONS, ANSWERS, AND ANALYSIS OF LEGAL ISSUES 19 (2015) (discussing existing concerns relating to bitcoin, including legal and regulatory issues at the federal, state, and international level).

214. See id. (showing that such concerns exist because bitcoin earnings are not reported to the IRS, users are provided some level of anonymity, and such digital currencies are able to operate without involving a financial institution).

215. See id. at 29 (describing the need for countries to take a risk-based approach to identify and mitigate money laundering and terrorist financing risks implicated in virtual currency.
exchanges and individuals face in terms of the storage of their bitcoins. Consequently, bitcoin presents a number of challenges for the federal government, furthering the need for clarity in the classification of bitcoin; classification is necessary in order to determine which federal agency has regulatory power over bitcoin and how they should regulate bitcoin.

This section will first examine the guidance and papers issued by the United States Financial Crimes Enforcement Network (FinCEN), the Federal Reserve, and the Internal Revenue Service.

1. FinCEN

On March 18, 2013, FinCEN issued guidance on the application of its regulations to the usage of virtual currencies. FinCEN described virtual currencies and bitcoin as “a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency.” FinCEN contrasts bitcoin to “real currency,” and states that bitcoin/virtual currencies “either have equivalent value in real currency, or act as... substitutes for real currency.” The guidance further states that a person who obtains or creates decentralized virtual currencies and uses them to purchase goods or services is not subject to regulation as a money transmitter. Next, it will review the recent case, SEC v. Shavers, where a U.S. District Court judge held that bitcoin is a currency. Finally, regulations and proposals of New York and California, the states most involved in the regulation of bitcoin, will be discussed.

activities).

216. See id. at 8 (detailing notable breaches of the bitcoin network that have occurred).
217. See Fed. Bureau of Investigation, (U) Bitcoin Virtual Currency: Unique Features Present Distinct Challenges for Deterring Illicit Activity, (Apr. 24, 2012), http://www.wired.com/images_blogs/threatlevel/2012/05/Bitcoin-FBI.pdf (showing the FBI’s assessment that it is likely that bitcoin will be used to launder money and to move or steal funds).
218. FinCEN is a bureau of the U.S. Department of Treasury. FinCEN’s mission is to “safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities.” What We Do, FinCEN, http://www.fincen.gov/about_fincen/wwd (last visited Jan. 17, 2014).
219. See Guidance (FIN-2013-G001) – Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies, supra note 15 (containing information regarding how FinCEN’s regulations apply to virtual currency).
220. Id.
221. FinCEN’s regulations define “real currency” as “the coin and paper money of the United States or of any other country that [i] is designated as legal tender and that [ii] circulates and [iii] is customarily used and accepted as a medium of exchange in the country of issuance.” 31 CFR § 1010.100(m), available at http://www.gpo.gov/fdsys/granule/CFR-2011-title31-vol3/CFR-2011-title31-vol3-sec1010-100.
222. Id.
223. Id.
2. Federal Reserve Working Paper

On October 7, 2014, the Federal Reserve released a working paper, *Bitcoin: Technical Background and Data Analysis.* The paper gives an in-depth technical analysis of bitcoin transactions and computes the amount of users and transactions taking place on the bitcoin ecosystem every day. Interestingly, the Federal Reserve analyzed the “velocity” of bitcoin, or the number of bitcoin addresses that are used to store bitcoin without active use. This is significant because it may help determine whether bitcoin is used as an investment or a currency. The Federal Reserve found that “less than 50 percent of all bitcoin in circulation are used in transactions,” with about half of these transactions being small in value. They also found that “while the number of daily users may have doubled every eight months, the transaction volume is negligible compared to the domestic volume of U.S. payment systems.”

3. Internal Revenue Service

In March 2014, the IRS declared all virtual currency, and thus bitcoin, “property” for federal tax purposes. Controversially, taxpayers must calculate for each transaction a “gain or loss upon an exchange of virtual currency for other property,” and therefore any “payment made using virtual currency is subject to information reporting.” In other words, a taxpaying consumer must calculate the “fair market value” in U.S. dollars each time a bitcoin is purchased, and also

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226. See id. at 1 (“We present the micro-structure of the Bitcoin transaction process and highlight the use of cryptography for the purposes of transaction security and distributed maintenance of a ledger.”).
227. Id. at 21–22.
228. See id. (showing that the statistics generated by this study provide an estimate of the proportion of demand that is driven by payment motives compared with the proportion that is driven by investment motives).
229. Id. at 22. The Federal Reserve defines small value transactions as those that involve less than a $100 U.S. dollar equivalent. Id.
230. Id. at 26–27.
231. The IRS describes virtual currency as “a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value. In some environments, it operates like ‘real’ currency—i.e., the coin and paper money of the United States or of any other country that is designated as legal tender, circulates, and is customarily used and accepted as a medium of exchange in the country of issuance—but it does not have legal tender status in any jurisdiction.” I.R.S. Notice 2014-21, 2014-16 I.R.B. 938.
232. Id. at 938.
233. Id. at 939.
234. Id. “If a virtual currency is listed on an exchange and the exchange rate is established by market supply and demand, the fair market value of the virtual currency is determined by converting the virtual currency into U.S. dollars (or into another real currency which in turn can be converted into U.S. dollars) at the exchange rate, in a reasonable manner that is consistently applied.” Id.
when they are spent on goods or services.\textsuperscript{235} This situation may unfold even if a person simply “used [b]itcoin to purchase something as small as a cup of coffee at . . . [a] coffee shop, he would realize a gain or loss.”\textsuperscript{236} Consequently, by classifying bitcoin as property, the IRS threatens the widespread consumer adoption of bitcoin.

The IRS classification of bitcoin as property also has an effect on the taxation of bitcoin miners and merchants.\textsuperscript{237} An individual or group that invests in bitcoin has a gain or loss depending upon whether the fair market value received for the bitcoin is higher or lower than the adjusted basis.\textsuperscript{238} Similarly, for a person/company that mines bitcoin, the fair market value at the time the bitcoin is received is includible in gross income.\textsuperscript{239} A merchant or individual who receives payment via bitcoin for goods or services must include the fair marketing value in computing gross income.\textsuperscript{240}

4. SEC v. Shavers

In \textit{Sec. & Exch. Comm’n v. Shavers},\textsuperscript{241} the U.S. District Court in Sherman, Texas held that bitcoin is a currency, but also meets the definition of an investment contract and/or note.\textsuperscript{242} The court found that from February 2011 to August 2012, Shavers created and operated a Ponzi scheme called Bitcoin Savings and Trust (BTCST), defrauding investors of more than 700,000 bitcoin worth $4.5 million U.S. dollars at the time.\textsuperscript{243} He was able to solicit investments from users in various

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\textsuperscript{235} Id. at 938.


\textsuperscript{237} See I.R.S. Notice 2014-21, supra note 231, at 939 (showing that the classification of bitcoin as property means that the sale or exchange of convertible virtual currency, or the use of convertible virtual currency to pay for goods or services in a real-world economy transaction, has tax consequences that may result in a tax liability).


\textsuperscript{239} I.R.S. Notice 2014-21, supra note 231, at 939.

\textsuperscript{240} Id. at 938.


online forums and chats. The Securities and Exchange Commission (SEC) argued that investments in BTCST were "both investment contracts and notes, and, thus, are securities." According to the court, it is clear that bitcoin can be used as money, even if only a limited amount of businesses accept it. Additionally, bitcoin can be exchanged for "conventional currencies," such as the U.S. dollar. Consequently, those who invested in BTCST "provided an investment of money" via bitcoin, similar to using U.S. dollars to purchase stock in a corporation; therefore, according to the court, bitcoin is a currency.

5. U.S. State Regulations

a. California

California has been particularly assertive in its regulation of bitcoin. California government officials have determined that they have the power to regulate bitcoin under state law. From 2013 to 2014, California state law prohibited the use of "alternative currency that is redeemable for lawful money of the United States," such as bitcoin. However, on January 23, 2014, California's legislature passed an amendment to the "Lawful Money: Alternative Currency" bill legalizing the use of alternative currencies within the state of California. It is still unclear how California will regulate bitcoin. Notably, the bill also appears to recognize bitcoin and other alternative currencies as a freedom of speech issue, explaining that these currencies have become a "form of political protest as some communities that use such currency do so in protest of U.S. monetary policies, or large financial institutions." and Exchange Commission, SEC Charges Texas Man With Running Bitcoin-Denominated Ponzi Scheme (July 23, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539730583.

244. Shavers was ordered to pay $40 million, accounting for the appreciation of bitcoin. See id.


246. See id.

247. See id.

248. See id.


250. Id.


253. See id. ("The question of how and whether to regulate bitcoin has confounded regulators around the world since it emerged in software form in 2009 from a paper authored by an anonymous computer scientist and cryptographer.").

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b. New York (BitLicense)

Following the legalization of bitcoin in California, on July 17, 2014, the New York State Department of Financial Services (NYSDFS) released a proposal for a regulatory framework for businesses that hold, transmit, or convert virtual currencies to everyday currencies.255 The framework defines “virtual currency” as “any type of digital unit that is used as a medium of exchange or a form of digitally stored value or that is incorporated into payment system technology.”256 This broad definition gives the NYSDFS power over the various types of digital currencies.257 Nevertheless, most criticism of the proposal has not come from the definition of “virtual currency.”258 Rather, disapproval has been targeted at the reporting requirements placed on those businesses that are forced to obtain a BitLicense from the NYSDFS in order to operate.259 The new reporting rules, which “require more than the current federal guidelines,” require businesses to not only keep track of the physical addresses of their customers, “but also of anybody who sends their customers money using the bitcoin network.”260 Bitcoin businesses must also “file frequent reports to Lawsky’s organization, the [NYSDFS]...to detail changes in ownership, financial forecasts, [and] even strategic business plans.”261 The concern is that new businesses will not be able to cope with the “extremely frequent and extremely detailed” reporting requirements given their limited resources.262

B. Possibilities Under Applicable Federal Laws

This section will examine three possible classifications of bitcoin under current U.S. federal law—a currency, security, or commodity. Classifying bitcoin as either a currency, security, or a commodity will help to determine how bitcoin is regulated and which federal government agency should regulate bitcoin.


256. Id. The framework: (1) defines virtual currency and businesses involved in its use; (2) establishes rules to prevent money laundering and fraud with virtual currency; (3) requires virtual currency businesses to have a cybersecurity program; (4) requires disclosure, recording, and capital requirements on virtual currency businesses; (5) elaborates on consumer protection and complaints. Alan McQuinn, “BitLicenses” Explained, INNOVATION FILES (Sept. 2, 2014), http://www.innovationfiles.org/bitlicenses-explained (outlining thoroughly the NYSDS BitLicense proposal).

257. Id.

258. See id.


260. Id.

261. Id.

262. Id.
1. Currency

The U.S. Constitution gives Congress the sole power to regulate and coin “Money.” The Constitution states, “[n]o state shall . . . emit Bills of Credit; make any Thing but gold and silver coin a Tender in Payment of Debts . . .” and that, “[t]he Congress shall have the Power . . . To coin Money, regulate the Value thereof, and of foreign Coin.” In *Hepburn v. Griswold*, the U.S. Supreme Court held that while Congress “had the power to mint coin and issue bills or notes, it did not have the power to issue notes as legal tender,” or force a particular kind of payment upon a debtor. The Court soon overturned this decision, ruling that paper money did not conflict with the Constitution. The Court has also found that Congress has the power to regulate legal currency.

It is arguable that bitcoin is legal currency and therefore illegal under the Stamp Payments Act of 1862 (Stamp Act). The Stamp Payments Act proscribes:

> Whoever makes, issues, circulates, or pays out any note, check, memorandum, token, or other obligation for a less sum than $1, intended to circulate as money or to be received or issued in lieu of lawful money of the United States, shall be fined under this title or imprisoned not more than six months, or both.

Accordingly, the Stamp Act makes it difficult for bitcoin to be considered a legal currency under U.S. law. Although the Stamp Act makes money illegal if it is circulated in “lieu of lawful money of the United States,” courts have taken the position that the purpose of the Stamp Act is to prevent other currencies from undermining U.S. currency. Consequently, according to court interpretation, if a currency does not compete with U.S. currency, it may be considered legal under U.S. law.

In *United States v. Gellman*, a Minnesota court ruled on a case involving an individual who created coins that were for “amusement only” and “had no cash value.” The court focused on whether the coins would “deceive [a] person exercising ordinary caution,” and found that there would be no way that an

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263. U.S. CONST. art. I, § 8, cl. 5.
264. *Id.*
265. 75 U.S. 603, 626 (1870).
267. Legal Tender Cases, 79 U.S. 457, 553 (1870).
269. July 17, 1862, ch. 196, 12 Stat. 592; R.S. Sec 3583.
271. *Id.*
272. *Grinberg*, *supra* note 6, at 183.
274. 44 F. Supp. 360 (D. Minn. 1942).
275. *Id.* at 362.
ordinary person would be deceived into using it as a currency. Unlike bitcoin, the court found that the coins were not used as a “medium of exchange.” Thus, if bitcoin were to pose a real threat to the U.S. government-issued currency, it would likely be an illegal currency under U.S. law.

Reuben Grinberg, author of *Bitcoin: An Innovative Alternative Digital Currency*, stated that a currency will likely be considered legal under the Stamp Act if it were to: (1) serve a particular community; (2) is for repayment in goods; and (3) does not compete with U.S. coins. Currently, bitcoin is used particularly by the libertarian and technologically savvy communities. Bitcoin has a market-cap *de minimis* to the current U.S. gross domestic product (GDP) and U.S. currency in circulation, and therefore does not compete with U.S. coins. Additionally, bitcoin is often used for repayment of goods and services. Thus, it seems plausible that bitcoin, especially under Grinberg’s analysis, is legal under the Stamp Act.

2. Security

A security is broadly defined by the Securities Act of 1933 § 2(a)(1) as “any note, stock, . . . transferable share, [or] investment contract . . . .” Accordingly, bitcoin is not a stock within the meaning of the Securities Act because it lacks qualities such as the “right to receive dividends contingent upon an apportionment

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276. *Id.* at 363.
277. *Id.* at 364.
278. Dion, *supra* note 266, at 175.
279. See Tu & Meredith, *supra* note 273, at 319 (describing the circumstances in which bitcoin could challenge the U.S. dollar).
of profits” and “voting rights in proportion to the number of shares owned.” Nevertheless, courts have used the investment contract as a catch-all provision in analyzing and classifying securities.

In Sec. & Exch. Comm’n v. W.J. Howey Co., the U.S. Supreme Court formulated a test to determine whether a financial instrument qualifies as an investment contract for the purposes of the Securities Act. To qualify as an investment contract the instrument must meet four prongs: (1) investment of money due to, (2) an expectation of profits arising from, (3) a common enterprise, (4) which depends solely on the efforts of a promoter or third party. The strongest argument against the definition of bitcoin as an investment contract lies within the third prong. Bitcoin users either purchase bitcoin from exchanges or “mine” the bitcoin themselves. Those who “mine” bitcoin do not depend on the efforts of others. There is also no one entity that is seeking to raise funds through investments in bitcoin, and bitcoin holders and promoters are completely independent of one another. Each bitcoin has a separate code and therefore is distinct from every other bitcoin generated or transacted, defeating the common enterprise prong. Consequently, bitcoin fails to meet the minimum threshold established by the Howey test, and to qualify as an investment contract under U.S. law.

The U.S. Supreme Court has noted that:

[t]he fundamental purpose undergirding the Securities Acts is to eliminate serious abuses in a largely unregulated securities market . . . . Congress therefore did not attempt to precisely cabin the scope of the Securities Acts. Rather, it enacted a definition of ‘security’ sufficiently broad to encompass virtually any instrument that might be sold as an investment.

Due to the high number of recent serious abuses by criminals using bitcoin, a court may find the classification of bitcoin as a security valid. Accordingly, under this interpretation by the Court, the SEC may argue that they have the broad power to regulate bitcoin. However, bitcoin still lacks many of the qualities inherent in a

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289. This test is referred to as the “Howey Test.” Grinberg, supra note 6, at 196.
290. W. J. Howey Co., 328 U.S. at 301.
291. Id. at 298–99.
292. Grinberg, supra note 6, at 197.
293. Id. at 167.
294. Id.
295. Id. at 197.
296. Id. at 174.
297. 328 U.S. 293 (1946).
298. Grinberg, supra note 6, at 196.
common security. Bitcoin also likely fails to meet the Howey test, and thus would likely not be considered an investment contract.

3. Commodity

Bitcoin may also be considered a commodity investment under U.S. law. Generally, a commodity is considered “in the commercial sense . . . any moveable and tangible thing ordinarily produced or used as the subject of barter or sale.” During a recent Senate Committee Hearing on Banking, Housing, and Urban Affairs, various senators and experts asserted the opinion that bitcoin could be regulated as a commodity if its volatility continued.

Under the Commodity Exchange Act a commodity is “wheat, cotton, rice, corn, oats, barley, rye, . . . livestock, livestock products, . . . and all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in.” Bitcoin, under this broad definition, is arguably a commodity because there are contracts, which exist, for the future delivery of bitcoin. However, since these futures contracts are rare, the regulation of bitcoin as a commodity under the Commodity Exchange Act seems unlikely.

V. Discussion

Despite its growing use in the international market, there is little agreement about how to legally categorize bitcoin. The following section will analyze the ramifications of categorizing bitcoin as a currency, security, commodity, as both a currency and an investment, and finally with no legal categorization at all. Furthermore, bitcoin not only lacks many of the characteristics of a currency, but also may be deemed illegal if classified as such. With respect to the classification of bitcoin as either a security or commodity, such characterization may present

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300. See Landreth Timber Co. v. Landreth, 471 U.S. 681, 686 (holding that the definition of security under the Securities Act of 1933 is broad and includes both instruments whose names alone carry well-settled meaning, as well as instruments of more variable).
301. 328 U.S. 293 (1946).
302. See notes 285–293 and accompanying text for an explanation of why bitcoin likely fails to meet the threshold of the Howey test.
305. See Bradbury, supra note 303 (showing that bitcoin may need to be regulated as a commodity or security, based on its market behavior).
307. Id.
308. Here, miners are attempting to lock in a price for future bitcoin. While these contracts are rare, they still exist. See Jeffrey I. Snyder, Bitcoin: Currency, Commodity or None of the Above?, NATIONAL L.R. (Oct. 16, 2014), http://www.natlawreview.com/article/bitcoin-currency-commodity-or-none-above (discussing whether bitcoin is a commodity under U.S. law).
309. See id. (explaining that it is likely that mainstream adoption of Bitcoin will be only for the purpose of immediate conversion to cash).
regulatory and tax challenges. Nevertheless, classification of bitcoin as both a currency and investment help to solve some of these challenges, as demonstrated by its success in Germany.

A. Bitcoin as a Currency

Although bitcoin is considered a “medium of exchange” by nations such as the Netherlands, and “effectively” a currency by the United Kingdom, it has not been explicitly declared a currency by any of the nations studied. Additionally, bitcoin “prices seemingly move separately from the values of the world’s major currencies,” and thus do not follow the major currencies. If bitcoin were to be considered a currency, it would be regulated by the Office of the Comptroller of the Currency, U.S. Department of the Treasury.

There are a number of reasons that nations across the world have chosen not to classify bitcoin as a currency. According to FinCEN, a currency is “the coin and paper money of . . . any . . . country that [i] is designated as legal tender and that [ii] circulates and [iii] is customarily used and accepted as a medium of exchange in the country of issuance.” Bitcoin does not fit any of these criteria for a currency. Bitcoin wallet addresses regularly used in transactions are relatively few, demonstrating that bitcoin may be hoarded, rather than spent. Furthermore, since the number of bitcoin generated is capped at a maximum amount, the system will likely cause deflation. Accordingly, “[e]ach bitcoin will be worth more and more as the total number of Bitcoin maxes out,” and thus early adopters will be heavily and unfairly rewarded. Additionally, currencies are generally believed to be vehicles that are insured by either a commodity or a government’s capability to tax and protect it, and bitcoin is clearly not.

Although bitcoin is arguably legal under the Stamp Act, if bitcoin were to be
considered a currency, the Stamp Act may act as a barrier to its legality and regulation. While unlikely, legislation may be passed to amend or replace the Stamp Act. Nevertheless, if bitcoin were to be deemed illegal, the government could likely never stop it from existing due its decentralized nature. It is unlikely that the government will be able to shut down bitcoin operations, and any interference will further move bitcoin underground. Bitcoin may pose substantial risk if it were forced to go completely underground and therefore it is necessary for the U.S. government to recognize bitcoin. Bitcoin, if declared illegal, may be used even more so to conduct illegal activity. The utility of bitcoin in illicit marketplaces has already been demonstrated through the Silk Road, and a further ban on certain activities could actually increase the demand in these illicit goods.

The underground world of selling drugs, gambling, and tax evasion would likely become more popular, as seen with alcohol during the Prohibition Period, where a governmental ban “meant to foster temperance instead fostered intemperance and excess.” Consequently, bitcoin regulation as a currency does not appear to be the best way to classify bitcoin.

B. Bitcoin as a Security

Although it is possible that bitcoin may be considered a security under U.S. law, none of the other nations discussed have classified bitcoin as such. The question then becomes: why have these nations declined to define bitcoin as a security? Internationally, a security generally “implies an investment method or instrument that is secured against something else.” A stock, for example, is secured against the equity of a company. Although a method of exchange can be a security, bitcoin would generally not be considered a security. Bitcoin is not

319. Grinberg, supra note 6, at 190.
320. Id.
325. See supra notes 115–212 and accompanying text for a discussion of international classifications of bitcoin.
327. Id.
328. For instance, the U.S. dollar was backed by gold, which was ended by the Nixon
secured or “backed” by another entity, and therefore is not a security under the general definition.\(^{330}\)

The legal definition of a security under U.S. law is much more expansive and broad than that of other nations.\(^ {331}\) For instance, under German law, securities are defined as “shares, certificates representing shares, bonds . . . and . . . other securities which are comparable to shares or bonds.”\(^ {332}\) Australia classifies securities as “debentures, stocks or bonds issued or proposed to be issued by a government . . . .” On the other hand, under U.S. law, the “investment contract(s) as a catch-all instrument, capable of capturing capital-seeking transactions that [fall] outside the more orthodox categories of securities, such as stocks or bonds.”\(^ {333}\) Under this catchall phrase, it is possible that bitcoin could be considered a security under U.S. law.\(^ {335}\) As previously demonstrated, however, bitcoin likely does not pass the threshold under the \textit{Howey}\(^ {336}\) test to be deemed an investment contract, and therefore is not a security.\(^ {337}\) Bitcoin most likely fails the fourth prong of the \textit{Howey}\(^ {338}\) test which requires an instrument to rely on “the efforts of a promoter or a third party.”\(^ {339}\) Because bitcoin can function in complete independence between bitcoin holders and investors, bitcoin would fail to qualify as an investment contract under the \textit{Howey}\(^ {340}\) test.\(^ {341}\)

If bitcoin were to be deemed a security under U.S. law, it would be subject to extensive reporting requirements for tax and regulatory purposes.\(^ {342}\) The IRS currently labels bitcoin as “property” and requires extensive reporting,\(^ {343}\) which has been met with substantial criticism.\(^ {344}\) For instance, the IRS “force[s] the average administration.

329. \textit{See} Nelson, \textit{supra} note 212 (arguing that bitcoin does not fall under regulations of federal securities law).


333. \textit{Corporations Act 2001} (Cth) s 92 (Austl.).


335. \textit{Id.}


337. \textit{See} Grinberg, \textit{supra} note 6, at 196.


341. \textit{Id.} at 299.


343. \textit{Id.} at 2.

344. Jose Pagliery, \textit{New IRS Rules Make Using Bitcoin a Fiasco}, \textit{CNN MONEY} (Mar. 31,
Bitcoin user to keep a strict record of every purchase made all year long — then perform difficult calculations to account for the changing value of a bitcoin.\textsuperscript{345} This reporting requirement would be the same if bitcoin were deemed a security for taxation purposes.\textsuperscript{346} Thus, it appears that bitcoin, under taxation policy, should not be considered a security.

In terms of regulation, if bitcoin were classified as a security, it would be subject to SEC rules and oversight.\textsuperscript{347} This would require bitcoin exchanges, companies, and maybe even users, to register with the SEC and file a number of reports.\textsuperscript{348} The exchanges would be liable for any fraud that its users commit, which could inhibit the amount of exchanges and innovation of bitcoin.\textsuperscript{349} All of these requirements would greatly increase the transaction costs of bitcoin and potentially bring it in line with the costs of its competitors, greatly defeating the purpose of the technology.\textsuperscript{350} These regulations could also add to the legitimacy of bitcoin and protect investors or consumers from instances of fraud.\textsuperscript{351} Nevertheless, the United States should follow the classification taken by a number of other nations and decline to classify bitcoin solely as a security.

\textbf{C. Bitcoin as a Commodity}

According to Jeff Currie, head of Goldman Sachs’ commodities research, “[a] commodity is any item that ‘accommodates’ our physical wants and needs. And one of these physical wants is the need for a store of value.”\textsuperscript{352} Finnish regulatory officials have stated that bitcoin essentially acts like a commodity.\textsuperscript{353} However, while bitcoin may fulfill our “need for a store of value,” and thus may be considered a commodity, it is not necessarily the best way for bitcoin to be taxed and regulated, due in part to the onerous requirements it would entail.\textsuperscript{354}

If bitcoin were to be classified as a commodity, it would garner similar criticism as if it were deemed a security.\textsuperscript{355} For instance, Sweden considers bitcoin to be a “capital investment object,” which is treated similar to a commodity in terms of taxation and regulation.\textsuperscript{356} This has led to criticism, due to the requirements that Swedish consumers must record the price that they paid for the

\textsuperscript{345} Id.
\textsuperscript{346} Id.
\textsuperscript{347} Dion, supra note 266, at 194.
\textsuperscript{348} Id.
\textsuperscript{349} Id.
\textsuperscript{350} Id.
\textsuperscript{351} Id.
\textsuperscript{352} See Currie, supra note 326.
\textsuperscript{353} See supra notes 191–199 and accompanying text for a discussion on Finnish classification of bitcoin.
\textsuperscript{354} Id.
\textsuperscript{355} See supra notes 151–165 and accompanying text.
\textsuperscript{356} Regulation of Bitcoin in Selected Jurisdictions: Sweden, supra note 157.
bitcoin and the price at which they spent the bitcoin.\textsuperscript{357} If U.S. regulation followed Swedish guidance and classified bitcoin as a commodity, it may garner the same criticism. Bitcoin regulation and taxation would stifle bitcoin’s use as a currency and inhibit its ability to gain popularity.\textsuperscript{358}

In addition to difficulty with taxation, labeling bitcoin as a commodity poses problems in terms of regulation.\textsuperscript{359} For example, as explained above, the U.S. Commodity Futures Trading Commission (CFTC) may have difficulty in establishing jurisdiction over bitcoin.\textsuperscript{360} Due to the insignificant amount of futures contracts in bitcoin, it does not meet the definition of commodity under the Commodity Exchange Act and thus would likely not fall under CFTC jurisdiction.\textsuperscript{361} If the CFTC were unable to regulate bitcoin, it would likely be unclear as to who holds jurisdiction over bitcoin as a commodity.\textsuperscript{362} In other words, bitcoin regulation may be non-existent if it were to be considered a commodity. Although the bitcoin system may thrive without regulation, as demonstrated in the Netherlands,\textsuperscript{363} it may also lead to further actions of lawlessness as shown by the Silk Road network.\textsuperscript{364}

\textbf{D. Bitcoin as both a Currency and Investment/Asset}

Nations that have issued guidance or regulation on bitcoin seem to generally favor characterizing bitcoin as both a currency and investment.\textsuperscript{365} Classifying bitcoin in this manner has a number of advantages, including the flexibility to tax and regulate bitcoin in two separate ways.\textsuperscript{366} The United Kingdom, for example, hopes to be able to use its classification of bitcoin as a payment service, a possible mix between a currency and investment, to become the “capital” of bitcoin around the world.\textsuperscript{367} Other nations, including Germany, Australia, and Canada, have more definitive classifications of bitcoin as both a currency and investment/asset.\textsuperscript{368}

\begin{thebibliography}{99}
\bibitem{357} Id.
\bibitem{358} Primavera de Filippi, \textit{Bitcoin: A Regulatory Nightmare to a Libertarian Dream}, \textsc{INTERNET POLICY REVIEW}, (Oct. 9, 2015 at 12:41 PM), http://policyreview.info/articles/analysis/bitcoin-regulatory-nightmare-libertarian-dream.
\bibitem{359} \textit{What U.S. Regulations Apply to Bitcoin as Commodities?}, \textsc{BITCOIN TITAN & TRADING TITAN} (2012), http://blog.bitcointitan.com/post/17789738826/what-u-s-regulations-apply-to-bitcoin-as
\bibitem{360} Id.
\bibitem{361} 7 U.S.C. § 1a(4).
\bibitem{362} See generally \textit{What U.S. Regulations Apply to Bitcoin as Commodities?}, supra note 359.
\bibitem{363} See supra notes 200-211 on Netherland regulations of bitcoin.
\bibitem{364} See Yermack, supra note 7.
\bibitem{365} \textit{See Regulation of Bitcoin in Selected Jurisdictions: Sweden}, supra note 157 (detailing the regulation of bitcoin in 40 jurisdictions).
\bibitem{366} See supra notes 302–338 for a discussion on bitcoin as a currency and investment.
\bibitem{368} See supra notes 138–148 and 164–190 and accompanying discussion for information
\end{thebibliography}
In terms of tax, the classification of bitcoin as both a currency and investment/asset allows regulations to adapt to particular situations. Currently, the IRS taxes bitcoin as “property.” Characterizing bitcoin as property is ill-advised for several reasons. The government is severely curtailing the advantages of bitcoin by making individuals and businesses record the exact amount each time bitcoin is spent. Due to this requirement, bitcoin’s potential of being a highly efficient way to trade could be stifled. Consequently, the current classification of bitcoin as property by the IRS is not a viable approach.

Germany has classified bitcoin as a “unit of account” or “private money.” Accordingly, Germany regulates and taxes bitcoin as both a private means of payment in barter transactions and as an investment, subject to capital gains tax. This has afforded Germany great flexibility in tailoring regulation and taxation to particular situations. For instance, if a bitcoin user simply buys a product with his or her bitcoin, they do not have to record or report the market price at which they purchased the bitcoin and the market price at which they spent the bitcoin. Instead, the customer can use bitcoin as one would use any other currency. On the other hand, if the user’s motive is to profit from the use of bitcoin, his or her profit is subject to capital gains tax.

The main issue with classifying bitcoin as both a currency and investment/asset is that it is left up to the individual to subjectively determine, for tax purposes, whether he or she held bitcoin for profit. For instance, if an investor first gets into bitcoin for profit-making purposes, but then decides to spend the

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372. Id.

373. Id.

374. Yves Smith, As Predicted, IRS Deems Bitcoin Property, Limiting its Usefulness in Commercial Transactions, NAKED CAPITALISM (Mar. 26, 2014), http://www.nakedcapitalism.com/2014/03/predicted-irs-deems-bitcoin-property-limiting-usefulness-commercial-transctions.html (showing that the record-keeping burden of having to track bitcoin prices against the dollar at the time of acquisition rather than the time of use will be a substantial deterrent to bitcoin’s use in commerce).

375. See Mimic, supra note 128, at 12.


378. Id.

379. Id.

380. Id.
bitcoin on products or services after a dramatic increase in bitcoin's fiat price, the
government has no way of objectively determining their intentions. This may pose
issues for nations like Germany, which currently classify bitcoin in this way. 381

E. No Classification

By not actually defining the currency and therefore not placing regulations on
bitcoin transactions, the Dutch government has allowed bitcoin to flourish in the
nation. 382 Unlike counterparts in other nations, Dutch Banks are willing to do
business with domestic companies that focus on bitcoin and other digital
currencies. 383 According to reports, "neither the central bank nor any other official
body has required any bitcoin-related businesses to obtain a license or face any
type of official scrutiny." 384 Because of this, Amsterdam and other parts of the
Netherlands have become an attraction for bitcoin-related companies. 385 Due to the
lack of definition and regulation of bitcoin in the Netherlands, the Dutch are
"willing to let this technological experiment unfold." 386 However, this lack of
regulation and taxation may also aid the expansion of the bitcoin "dark web" in
this European nation. 387

VI. Final Thoughts

In recent months, the bitcoin industry has not only attracted an immense
amount of venture capital investment, 388 but has also been very influential and
disruptive in the financial technology realm. 389 In order to achieve a reasonable
balance between the advantages and innovations of bitcoin and the risks it
presents, the U.S. government should classify bitcoin as both a currency and
investment/asset. Bitcoin needs clear and uniform guidance from federal and state
governments in the United States. However, regulation should not be burdensome
and stifle innovation. Government regulation is necessary in order to tax huge

381. Germany Plans Tax on Bitcoin After Virtual Currency Recognised as ‘Private Money’,
supra note 148.

382. See Wendy Zeldin, Netherlands: Central Bank Statement on Virtual Currencies, LAW
(last visited Nov. 15, 2014) (“The Dutch regulators, unlike their foreign counterparts, are not
cracking down on big Bitcoin startups, and so those enterprises are setting up business in
Amsterdam.”).

383. Id.

384. Id.

385. Id.

386. Id.

387. See generally id.

388. Bitcoin venture capital investment reached approximately $440 million by Jan. 15,
(last updated Jan. 21, 2015).

389. See Tim Swanson, The 10 Most Promising Startups Building Stuff With Blockchain
Technology, BUSINESS INSIDER (May 1, 2014, 5:36 PM), http://www.businessinsider.com/10-
most-promising-blockchain-companies-2014-5 (showing as an example the number of companies
that are using bitcoin technology to innovate in the financial technology space).
sources of revenue, protect individuals using bitcoin, and prevent crime through the usage of bitcoin. Arguably, the classification of bitcoin should be exclusively federal because bitcoin or another virtual currency may present future threats to the U.S. dollar as the leading use of legal tender. Nevertheless, the role of the government in regulating bitcoin should be to maximize the overall advantages and minimize the risk.

Broad classification of bitcoin as both a currency and investment/asset allows the U.S. government flexibility in determining how to regulate bitcoin. The bitcoin system has a complex, decentralized structure, and the ability to flexibly classify bitcoin affords the government the power to effectively regulate and tax bitcoin. The governments of other nations recognize this complex nature, and many have determined that the best ways are to regulate and tax bitcoin as both a currency and investment/asset. Specifically, this allows them to target the exchanges that facilitate the transfer between fiat and bitcoin. Requiring these exchanges to monitor the usage and addresses associated with bitcoin accounts, allows the government to regulate and monitor the flow of bitcoin.

Another issue that may arise is whether bitcoin should be regulated under current law or whether new regulations should be specifically produced for bitcoin and virtual currencies. Classification of bitcoin as both a currency and investment/asset may present some challenges as to where bitcoin fits in the current legal framework. For instance, there is no tax and regulatory guidance on how to deal with a classification of both a currency and investment/asset. An additional concern with bitcoin and virtual currencies in general is that technology usually outpaces the implementation of rules and regulations. Even if current bitcoin legal issues are settled, it likely will not be long before new issues arise or additional, distinctive alternative currencies are created. Consequently, the classification of bitcoin broadly would allow newly minted regulations to efficiently evolve alongside future laws and technology.

One of the most promising ways bitcoin can be used is by migrant workers for international remittances. Banks and payment companies extract huge fees from these migrant workers sending small amounts of money home to their family and friends. Bitcoin has the capability to dramatically lower the transaction costs in

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390. Coinbase has already setup a monitoring system to make sure funds transferred from their exchange were spent on legal products and services. Williams, supra note 103.


394. For instance, Western Union, one of the most popular payment processors in the developing world charges approximately 10% of the total amount that is sent. Katie Lobosco,
international remittance. However, if bitcoin transactions were always taxed under the current “property” rules in the United States and other nations, bitcoin may be too expensive to use as the backbone of remittance payment systems. Therefore, in order to allow bitcoin to continue to revolutionize the financial payment industry, it should be classified as both a currency and investment/asset in terms of regulation and taxation.


395. Some companies are already doing this. See, for example, “Rebit,” which transfers remittances from across the world to the Philippines for no cost. Rebit, Compare Us Against Other Remittance Providers, https://rebit.ph/compare (last visited Jan. 25, 2015).

396. See generally McKinnon & Tracy, supra note 371, for a discussion about the ramification of taxing bitcoins as property.