When I became a member of the small band that the Federalist Society was thirty-seven years ago, it would have been impossible to imagine discussing the subject of cryptocurrency as part of its proceedings, let alone before such a substantial crowd. But ultimately, the Society and the Constitution that it celebrates are concerned with the relation of liberty and the state. And there’s no issue of modern technology more appropriate for us to consider, with cryptocurrency on the cutting edge of the divide between liberty and the state—between a centralized, coercive order, and a decentralized, voluntary one. And that divide, here, comes in that most important matter of money.

Modern fiat currency, like the dollars in your pocket and bank account, is quintessentially a creature of the state. Early in the twentieth century, Georg Frederick Knapp, the father of modern monetary theory, wrote, “The soul of currency is not in the material of the pieces, but in the legal ordinances which regulate their use.” Knapp argued that currency must be constituted by law, since only government could confer the requisite legitimacy to gain acceptance and public trust. Thus, the underlying value of a currency is intrinsically tied to a public’s trust in that legal system.

Of course, some citizens have little trust in their legal system, particularly when it comes to currency. Nation states can manipulate their currency, printing more money to fund projects for their favorite supporters. Savings then lose their value, as

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*George C. Dix Professor in Constitutional Law, Northwestern University Pritzker School of Law.


3. See id. at 1–3.
prices are driven up by inflation.\footnote{See N. GREGORY MANKIW, MACROECONOMICS 130 (9th ed. 2016).} Citizens become less certain of money as a store of value and economic growth suffers.\footnote{K. Peren Arin & Tolga Omay, Inflation and Growth: An Empirical Study for the Comparison of the Level and Variability Effects, in TRENDS IN INFLATION RESEARCH 207, 212 (Barbara T. Credan ed., 2006).} Government control over money thus can be a form of oppression no less than the denial of civil liberties. Because, for instance, of its hyperinflation today, Venezuela is about the most extreme example of what I would call a monetarily oppressive regime.\footnote{See, e.g., Emma Graham-Harrison, Patricia Torres & Joe Parkin Daniels, Barter and dollars the new reality as Venezuela battles hyperinflation, GUARDIAN (Mar., 14, 2019, 2:00 AM), https://www.theguardian.com/world/2019/mar/13/venezuela-hyperinflation-bolivar-banknotes-dollars [https://perma.cc/PGH5-4VAQ] (describing the extreme economic hardships in Venezuela, as a result of hyperinflation, such as power outages disrupting electronic transactions and a lack of plastic to make debit and credit cards).}

The recent advent of cryptocurrencies, Bitcoin chief among them, poses both a practical challenge to such monetarily oppressive regimes, and a theoretical challenge to the view that the public law of currency is the necessary foundation of money. Thus, while the creation of Bitcoin and other cryptocurrencies is impressive as a technological innovation, their central innovation is in trust, the essential characteristic of any currency that will have long-term success.\footnote{See, e.g., The promise of the blockchain: The trust machine, ECONOMIST (Oct. 31, 2015), https://www.economist.com/leaders/2015/10/31/the-trust-machine [https://perma.cc/WY58-7UHR] [hereinafter The trust machine] (describing how the blockchain, the core technology underlying the Bitcoin innovation, enables transactions between individuals who do not have an established trust relationship, in the absence of a third party).} Bitcoin does not require faith in any public institution, such as the Federal Reserve, a monarch, or any other central authority, but rather, trust in the computer logic and the effectiveness of a decentralized order that maintains it.\footnote{In traditional bank-to-bank transactions, trust is created by a third party. In the United States, the automated clearinghouse (ACH) system is a network through which banks send each other “batches of electronic credit and debit transfers.” Automated Clearinghouse Services, BOARD GOVERNORS FED. RES. SYS., https://www.federalreserve.gov/paymentsystems/edach_about.htm [https://perma.cc/2BWX-WZT8] (last visited Sept. 11, 2019). The ACH was responsible for moving $51.2 trillion worth in financial transactions in 2018. What is ACH, NACHA, https://www.nacha.org/content/what-is-ach [https://perma.cc/7UUY-VRPK] (last visited Sept. 11, 2019). However, centralized trust comes at a cost: transaction fees processed by the ACH range between $0.15 and $0.95, costing financial institutions}
Thus, Bitcoin is nothing less than a fundamental assault on the idea that a public law of currency is a necessary prerequisite of the modern monetary order. In fact, Bitcoin has the potential to outperform the currencies produced by legal regimes as a store of value, precisely because it requires no trust in political process, but rather trust in a transparent set of rules and transactions that follow those rules. The basic problem for public or fiat currencies is that a legal system cannot generally make the precommitments necessary to completely isolate the governance of its money supply from all political pressure. Bluntly, no one can insulate the stability claimed by public law from the hurly burly of politics.

To be sure, the U.S. dollar is the world’s most trusted currency. Despite its many critics, the dollar has formed the basis for 90 percent of international trade over the last thirty years. Companies, consumers, and central banks around the world trust in the relative stability of the Federal Reserve and the U.S. government. Yet, the dollar has been subject to periods of severe and unexpected inflation. In fact, since the creation of the Federal Reserve, the purchasing power of the dollar roughly $20 billion a year.


12. Id.
has fallen by 97 percent.\textsuperscript{13} And that’s not a surprise. Since the Progressive Era, the Federal Reserve has had, by law, other political objectives than maintaining the value of the currency, such as getting to full employment.\textsuperscript{14} But individuals only have one desire for a currency: that it maintain its value.\textsuperscript{15} The basic divergence between the social objectives of fiat money and the individual’s objectives of maintaining value is what necessarily limits the trust that any fiat currency can enjoy.\textsuperscript{16}

I emphasize that I have only spoken of Bitcoin’s potential, not its current reality. If Bitcoin succeeds as a currency, it will do so only by climbing the rungs left open by the frailties of the public law of money. It has already gained strength and stability by competing successfully against monetarily oppressive regimes, and performing payment functions for the poor that the bank regulations have made difficult. Looking at its past history, Bitcoin has been an enormous success. It has had substantial volatility of late, but if one had been an investor early on, one could be a millionaire, indeed even a billionaire today.\textsuperscript{17}

Bitcoin could become even more competitive, and climb other open rungs, because even the best currencies are subject to the political risks built into any public law of currency. But while Bitcoin is used as a currency in monetarily oppressive regimes (the people of Venezuela are using it right now),\textsuperscript{18} it does not


\textsuperscript{16} See Melloan, supra note 15, at 279–81.


function as a currency in more established regimes.\(^{19}\) That does not mean that people don’t hold it in the United States. Some do, but even most of those hold it only for small investments, and use it to pay for a few items—often as a kind of hobby.\(^{20}\)

The vast majority of us hold most of our investments in dollar denominated assets, and use cash to pay day-to-day expenses.\(^{21}\) For most people, Bitcoin is not yet a good enough store of value. It’s simply too volatile compared to the dollar, and risk-averse people don’t want to hold their cash or assets in a unit account so volatile.\(^{22}\)

I conclude by outlining what needs to happen for Bitcoin, or possibly some other cryptocurrency, to gain greater market share against more mature currencies—and ultimately against the dollar itself. It needs to continue to gain in price to attract investors, but also to lessen in volatility to attract people who would like to hold it for general purposes of payment. For a cryptocurrency with a fixed supply, like Bitcoin, these two forces may sometimes be in tension. For instance, although rampant speculation may drive up a currency’s value, the inherent volatility that comes along with such upward swings can be destabilizing for a currency. But that might not be a fatal

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flaw.23 If Bitcoin comes to enjoy steady growth and demand, it will be able to attain an acceptable level of volatility, while at the same time reaching a broader market.

To become more successful and widely used, Bitcoin does not need to become less volatile and more accepted than the dollar. There are many less successful currencies against which it could compete, and it would gain much value simply by replacing, or even complementing, gold as the basic hedge against currency devaluation.24 There are two important conditions to facilitate such developments. First, there have to be monetarily oppressive currencies so as to give substantial impetus to the use of Bitcoin as an alternate currency. Given the renewed enthusiasm about socialism throughout the world,25 this condition is already being satisfied. When socialists run out of other people’s money, they print more of it for themselves.

The second condition is more open ended. There has to be continued strength in the “Bitcoin ecosystem.” Most people don’t have the skills to use Bitcoin directly. There are amusing stories about people somehow losing their Bitcoin key, and looking around for it in some of their papers, having lost a million dollars.26 Bitcoin owners need to keep an open key wallet. They need mechanisms to ensure the security of dealing with Bitcoin. Thus, they need cryptocurrency wallets and exchanges. Fortunately, these institutions have gotten a lot more profes-


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sional since the day Mt. Gox lost hundreds of millions of dollars’ worth of Bitcoin.27

Even more importantly, there needs to be continued growth in the markets around Bitcoin. Futures and forward markets make the price discovery process for Bitcoin, and other cryptocurrencies, more efficient and help dampen volatility.28 Permitting funds that invest in Bitcoin, and other cryptocurrencies, will allow more people to hold Bitcoin or cryptocurrencies as part of their portfolio. That will also thicken the market, and have a stabilizing effect.29

Now, note that these wallets, futures markets, and investment funds are not order without law. They are institutions regulated by our law, and by our administrators.30 And indeed, the SEC recently rejected—in my view wrongly—the Winklevoss twins’ application for an ETF investment fund that would have been devoted to Bitcoin.31

Thus, paradoxically, the success of Bitcoin may depend on the state’s willingness to apply the neutral principles of its laws to an innovation that may itself turn out to be a competitor to one of the greatest powers of the state: its ability to print fiat money. That


shows why cryptocurrency is directly in the Federalist Society's wheelhouse. Its success depends, ultimately, on the rule of law and the constitutional respect for a new form of property.