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ALL THE COOL KIDS ARE DOING CRYPTO— *ET TU*, POWELL?
DEAN W. MELCHIONDA¹

INTRODUCTION

The rapid increase in popularity of cryptocurrencies, non-fungible tokens (“NFT’s”), and the crypto culture has exponentially increased the prevalence of cryptocurrency importance to the world markets. Many governments remain recalcitrant to regulate this emerging space, preferring instead to see how other nations respond to this decentralized trend. Other governments are beginning to formulate cryptocurrency regulations to protect their respective fiat currencies.

Over the past two months, the cryptocurrency world has seen two major developments: I) major Western companies have added, or are researching the possibility of adding, cryptocurrencies to their balance sheets, and; II) crypto ETFs, companies, and careers are becoming more mainstream in the United States.

The United States, with its global investing power and status as the world’s foremost reserve currency, is in a uniquely precarious position. Congress may have to play a balancing act when regulating other forms of cryptocurrency because the US government will face pressure from major Fortune 500 companies who will want the Securities and Exchange Commission (“SEC”) and Internal Revenue Service (“IRS”) to be friendly towards cryptocurrency use in the financial realm; but, Congress may want to delay creating extensive cryptocurrency regulations until the Federal Reserve provides more guidance about its plans to roll-out a digital dollar.

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The Federal Reserve’s project to implement a digital dollar is underway.² Powell has expressed that the United States is in no rush to roll-out this plan.³ It is likely that the United States, with its currently strong dollar, is in the position to see how other countries adopt digital forms of fiat. This wait-and-see approach, while prudent, presents an increasing narrative for Americans to invest in decentralized, digital currencies.

Recently, under the Biden Administration, Congress has drafted “Eliminate Barrier to Innovation Act of 2021” addressing the need for a formal investigation and fact-finding into cryptocurrency regulations (or the current lack thereof).⁴ Moreover, Biden appointed Gary Gensler, as Chair of the SEC, who is openly pro-crypto.⁵ In fact, Gensler worked on blockchain applications during his time at MIT.⁶ This is interesting because Gensler is in stark contrast to Biden’s appointed Treasury Secretary, Janet Yellen, because she differs widely from Gensler in terms of how the US should regulate cryptocurrencies.⁷

With the increased interest in cryptocurrency from citizens and institutions alike, the US needs to adopt coherent, instructional regulations so that cryptocurrency traders and holders can have guidance on issues such as taxation. Having a cohesive, federal classification and framework

² Gareth Jenkinson, *Powell Says Digital Dollar Is Still a High Priority Project for US Federal Reserve*, TheDailyChain.com, (February 24, 2021), <https://thedailychain.com/powell-says-digital-dollar-is-still-a-high-priority-project-for-us-federal-reserve/>.

³ *Id.*

⁴ Nikhilesh De, *US Lawmakers Introduce Bill to Clarify Crypto Regulations*, Coindesk, (March 9, 2021), <https://www.coindesk.com/lawmakers-digital-asset-regulation>.

⁵ Nikhilesh De, *State of Crypto: How SEC Chair Gary Gensler Could Differ From Predecessor Jay Clayton*, Coindesk (March 2, 2021), <https://www.coindesk.com/gary-gensler-sec-crypto>.

⁶ Aislinn Keely, *Hester Peirce: A Gensler-led SEC Could Lead to A “Very Productive Few Years’ for Crypto*, The Block (May 1, 2021), https://www.theblockcrypto.com/linkedin/103532/sec-hester-peirce-gary-gensler-productive-crypto?utm_source=rss&utm_medium=rss

⁷ Jeff Cox, *Janet Yellen’s Nomination as First Female Treasury Secretary Clears Key Senate Hurdle*, CNBC, (January 22, 2021), <https://www.cnbc.com/2021/01/22/yellen-nomination-as-first-female-treasury-secretary-clears-key-senate-hurdle.html>; Nikhilesh De, *Senate Confirms Gary Gensler as Next SEC Chief*, Coindesk, (April 14, 2021), <https://www.coindesk.com/senate-confirms-gary-gensler-as-next-sec-chief>.

for cryptocurrency, vis-à-vis the current patch-work model, will allow people to more accurately and confidently engage in crypto-markets.⁸

I. GENERAL OVERVIEW OF THE LEADING MARKETS, 2019-2020

To first understand why the US needs an overarching regulatory framework for cryptocurrency, one ought to understand, at least generally, the dialectic, economic pressures that have led to the expansive cryptosphere, which is now valued at a total market capitalization of over \$2,000,000,000,000.00USD.⁹

With this twenty-year trend towards zero (or negative) interest rates, central banks, lenders of last resort, and the Federal Reserve (“Fed”) (as the global reserve currency) have increasingly played a role in artificially supporting late-stage capitalist economies. A myriad of economic problems – phantom inflation, decreased economic output, rising unemployment, lethargic interest rates, quantitative easing, stimulus spending – have parabolically raised instability factors in the world’s advanced economies. One of the newest threats, decentralized cryptocurrencies, adds to the central banks’ pressures because they threaten to undermine fiat currencies. Governments, and their leaders, have difficulty classifying cryptocurrencies, but increasingly recognize the threat of the rising popularity of vehicles like Bitcoin. Such cryptocurrencies rose in popularity during 2019-2020, exactly when the central banks became increasingly stressed dealing with the economic turbulence of the world-wide lockdowns.

As the world enters in 2021, the European markets are seeming to recede, China’s markets are leveling out, and the US is expected to catapult forward. Experts believe that pent up consumer

⁸ Chris Matthews, *U.S. is “Behind the Curve” on Crypto Regulations, Says SEC Commissioner Peirce*, MarketWatch, (April 7, 2021), <https://www.marketwatch.com/story/u-s-is-behind-the-curve-on-crypto-regulations-says-sec-commissioner-peirce-11617824160>

⁹ Olga Kharif, *Crypto Market Cap Surpasses \$2 Trillion After Doubling This Year*, Bloomberg, (April 5, 2021), <https://www.bloomberg.com/news/articles/2021-04-05/crypto-market-cap-doubles-past-2-trillion-after-two-month-surge>.

demand, increased liquidity, and decreasing middle class debt will lead to sharp Q2 growth for the US. Others, however, remain skeptical – they do not believe the Federal Reserve and fear sharp inflation.

Equities grew steadily during history’s longest bull-run. The March 2020 crash produced a profound buying opportunity for investors as the equity market dramatically scaled throughout the rest of 2020, guided by generous stimulus, a detachment from Main Street woes, and a friendly Federal Reserve printing historic amounts of fiat currency.

Both the realization of actual inflation and the fear that the Federal Reserve will have to begin admitting inflation have spurred investors to seek alternative vehicles to store their money. With equities becoming over-valued, the Bond market producing near negative returns, and cash diminishing through inflation, many investors see the volatile cryptosphere as a venue to counter the inflation eroding their portfolio.

Institutions and Main Street do not believe the narrative that Congress and Powell are projecting about what they call “transitory” inflation, or the state of the economy generally. Many believe that the stimulus bills will only worsen actual inflation and will, at best, provide only a brief respite from the underlying issues of the economy burdened by national lockdowns for the past fourteen months. Many are looking to Europe, whose low – and negative – interest rates and heavily centralized economies have been poor performers in terms of investment opportunities, as a potential warning of what Wall Street may become if Congress’ spending continues to be supported by the Federal Reserve.

A. Countries Around the World Offer a Mixed-Bag of Sentiment

In the interest of brevity, the following paragraphs offer a sampling of the various statuses and positions that governments are currently taking regarding cryptocurrency regulation. The

absence of global consensus in this decentralized sphere allows countries that are favorable to crypto trading to become desirable jurisdictions for crypto traders. Lack of global regulations also make it difficult for governments to enforce harsh cryptocurrency regulations without becoming uncompetitive in this industry.

These realities will impact how Congress decides to ultimately draft encompassing crypto regulations because the interconnectedness of the world means that federal regulations will have a profound impact on whether the crypto industry finds home within the United States or whether the United States loses substantial capital to crypto-friendly countries.

B. Asia and the Pacific

Apart from the United States, Asia remains a hub for crypto innovation, mining, and trading. For example, by the latter half of 2019, approximately 60% of the biggest firms for cryptocurrency resided in Asia.¹⁰ Annabelle Huang, a partner at Amber Group, believes that traders in Korea, Japan, and parts of Asia find crypto trading appealing because yields remain low in many traditional investment vehicles leading residents to be more receptive of new investment methods.¹¹ Indeed, Mira Christanto of Messari recently detailed that a majority of the cryptocurrency “unicorns” are in Asia, with 98% and 94% of Ethereum and Bitcoin futures originating from Asia.¹²

C. China

China, with its heavily authoritarian regime, has been particularly hostile towards cryptocurrency and mining. For example, in 2017 Beijing began cracking down on digital currency

¹⁰ Namrata Shukla, *Why Countries Like the US Can Do Better in Terms of Crypto Adoption*, AMB Crypto, (March 2, 2021), <https://ambcrypto.com/why-countries-like-the-us-can-do-better-in-terms-of-crypto-adoption/>.

¹¹ *Id.*

¹² Jamie Redman, Report: *Asia's Cryptocurrency Landscape the Most Active, Most Populous Region "Has an Outsize Role"*, Bitcoin.com, (February 28, 2021), <https://news.bitcoin.com/report-asias-cryptocurrency-landscape-the-most-active-most-populous-region-has-an-outsize-role/>.

trading and banned initial coin offerings.¹³ Recently, the National Development and Reform Commission of China has been reported as seeking to ban crypto mining in Inner Mongolia, citing energy waste concerns.¹⁴

D. India

India, a large country with staggering wealth disparity, has become another hub for crypto enthusiasts. The government, however, is becoming increasingly hostile towards non-fiat cryptocurrency trading.¹⁵ The Cryptocurrency and Regulation of the Official Digital Currency Bill was penned by the Indian Parliament and is targeted at “prohibit[ing] all private cryptocurrencies” to pave the way for a digital rupee minted through the Reserve Bank of India.¹⁶ India’s Reserve Bank, which operates as the nation’s central bank, argues that cryptocurrencies can harm the stability of India’s financial stability, thus, the Reserve Bank governor, Shaktikanta Das, believes cryptocurrencies remain a “major” concern.¹⁷ Rakesh Jhunjhunwala, a billionaire known as the “Warren Buffet of India”, believes that India should create a digital rupee and ban Bitcoin

¹³ Amy Day, *BTC Recovers Further as China’s Stance on BTC Shudders*, Beincrypto.com, (March 1, 2021), <https://beincrypto.com/btc-recovers-further-as-chinas-stance-on-btc-shudders/>.

¹⁴ Namrata Shukla, *Why Countries Like the US Can Do Better in Terms of Crypto Adoption*, AMB Crypto, (March 2, 2021), <https://ambcrypto.com/why-countries-like-the-us-can-do-better-in-terms-of-crypto-adoption/>; and Alfred Cang, *China Region Declares War on Crypto Mining, Stirring Wider Fear*, Bloomberg, (March 1, 2021), <https://www.bloomberg.com/news/articles/2021-03-01/bitcoin-rises-after-china-region-declares-war-on-crypto-mining>.

¹⁵ Tuner Wright, *Crypto Bank Opens Physical Location in India’s Capital as Potential Regulatory Ban Looms*, Cointelegraph, (March 1, 2021), <https://cointelegraph.com/news/crypto-bank-opens-physical-location-in-india-s-capital-as-potential-regulatory-ban-looms>; Yogita Khatri, *India’s Central Bank Has “Major Concerns” About Crypto, but is Working on Digital Rupee, Governor Says*, TheBlock, (February 24, 2021), https://www.theblockcrypto.com/post/95908/india-central-bank-rbi-major-concerns-crypto-working-digital-rupee-governor-comments?utm_source=rss&utm_medium=rss.

¹⁶ Tuner Wright, *Crypto Bank Opens Physical Location in India’s Capital as Potential Regulatory Ban Looms*, Cointelegraph, (March 1, 2021), <https://cointelegraph.com/news/crypto-bank-opens-physical-location-in-india-s-capital-as-potential-regulatory-ban-looms>.

¹⁷ Shaurya Malwa, *India’s RBI Says Cryptocurrencies Can Cause “Financial Instability”*, Decrypt, (February 24, 2021), <https://decrypt.co/59236/indias-rbi-says-cryptocurrencies-can-cause-financial-instability>.

altogether.¹⁸ This sentiment aligns with India’s government advocating for a total ban on “all private cryptocurrencies”.¹⁹

Many young citizens and crypto-centric businesses in India are opposed to the government’s intended ban. Kumar Gaurav, the CEO of Cashaa, said in an interview that the Indian government will have difficulty banning non-fiat cryptocurrency due, partially, to the fact that the decentralized finance system is global.²⁰ Others expressed concern that such a harsh ban is unnecessary and may also hinder citizens’ abilities to generate wealth.²¹

E. Others

In other parts of Asia and the Pacific, countries remain skeptical of unregulated cryptocurrency. Lee Ju-Yeol, who heads the Bank of Korea, stated that cryptocurrencies are deficient in intrinsic value.²² In Thailand, regulators warn that cryptocurrency trading carries high risk and are seeking to implement regulations, such as income verification, for individual traders.²³

F. Europe

The European continent, with its historically competing economies, offers a mixed-bag of cryptocurrency sentiment as countries try to either profit off of the new industry or safeguard the importance of their established fiat and banking systems.

¹⁸ Kevin Helms, *India’s Warren Buffet Wants Regulators to Ban Bitcoin and Focus on Digital Rupee*, Bitcoin.com, (February 24, 2021), <https://news.bitcoin.com/indias-warren-buffett-ban-bitcoin-digital-rupee/>.

¹⁹ Shaurya Malwa, *India’s RBI Says Cryptocurrencies Can Cause “Financial Instability”*, Decrypt, (February 24, 2021), <https://decrypt.co/59236/indias-rbi-says-cryptocurrencies-can-cause-financial-instability>.

²⁰ Tuner Wright, *Crypto Bank Opens Physical Location in India’s Capital as Potential Regulatory Ban Looms*, Cointelegraph, (March 1, 2021), <https://cointelegraph.com/news/crypto-bank-opens-physical-location-in-india-s-capital-as-potential-regulatory-ban-looms>.

²¹ Shaurya Malwa, *India’s RBI Says Cryptocurrencies Can Cause “Financial Instability”*, Decrypt, (February 24, 2021), <https://decrypt.co/59236/indias-rbi-says-cryptocurrencies-can-cause-financial-instability>.

²² Zhelyazko Zhelyazkov, *Bank of Korea Head Says Cryptocurrencies Have No Intrinsic Value*, CryptoPotato, (February 21, 2020), <https://cryptopotato.com/bank-of-korea-head-says-cryptocurrencies-have-no-intrinsic-value/>.

²³ Jai Pratap, *New Crypto Rules in Thailand Might Require Retail Investors to Show Income Before Opening Trading Accounts*, Coinnouce, (February 25, 2021), <https://coinnouce.com/new-crypto-rules-in-thailand-might-require-retail-investors-to-show-income/>.

For example, the United Kingdom (“UK”) is a contrary example to China and India. The United Kingdom, faced with economic isolation post-Brexit due to an increasingly hostile European Union, may become a cryptocurrency hub in Europe. The former London Stock Exchange chief, Xavier Rolet, is advocating for UK institutions to adopt crypto services to help the UK post-Brexit so that the UK can maintain financial importance within Europe.²⁴

In other parts of Europe, some smaller countries are expressing interest in cryptocurrencies either through their bureaucrats or major institutions. For example, in Switzerland Bordier & Cie SCmA, a Nineteenth Century Bank, began cryptocurrency services for its clients.²⁵ Meanwhile, Vikto Karankevich, Belarus’ Energy Minister, recently stated that the country was planning on building crypto “mining farms”.²⁶ Citing other countries like China and the United States, where a large percentage of the global crypto mining occurs, Karankevich expressed desire for Belarus to join the global crypto mining marketplace.²⁷

II. THE UNITED STATES

The United States, as the global financial hegemon, is positioned to either become a leader in the crypto world or one of crypto’s staunchest enemies. Becoming a leader in the cryptosphere will allow the United States to gain capital inflows from worldwide digital investors; becoming an enemy of crypto will not only benefit potentially adversarial countries, but will result in the United States losing citizen capital through outflows to trading hubs domiciled overseas.

²⁴ Prashant Jha, *Former London Stock Exchange Chief Calls for Crypto Adoption in Post Brexit Era*, CoinGape, (February 24, 2021), <https://coingape.com/former-london-stock-exchange-chief-calls-for-crypto-adoption/>.

²⁵ Liam Frost, *177-Year-Old Swiss Bank Adds Bitcoin, Ethereum Trading*, Decrypt, (February 24, 2021), <https://decrypt.co/59262/177-year-old-swiss-bank-adds-bitcoin-ethereum-trading>; Alisha Roy, *Swiss Private Bank Bordier & Cie SCmA Offers Trading in Bitcoin, Ether, and Tezos*, AMB Crypto, (February 24, 2021), <https://ambcrypto.com/swiss-private-bank-bordier-cie-scma-offers-trading-in-bitcoin-ether-and-tezos/>.

²⁶ Adeniyi Olowoporoku, *Belarus Government Could Consider Exploring Crypto Mining Says Energy Minister*, BTC Manager, (February 26, 2021), <https://btcmanager.com/belarus-government-rypto-mining-energy-minister/>.

²⁷ *Id.*

A. Courts

Thus far, courts have been relatively quiet in terms of securities litigation involving cryptocurrencies. Recently, a case in the New York District Court was dismissed against Bancor, a crypto company.²⁸ The plaintiff(s) in the case alleged that Bancor’s digital asset should be considered a security, and thus subject to U.S. Securities Code.²⁹ The judge dismissed the case, avoiding the Securities question, and instead holding that the New York District Court was not the most “reasonable and convenient place to conduct this litigation” since the parties were based in Europe and the Pacific Islands.³⁰

Perhaps the most frequently discussed American lawsuit in the cryptoworld has been between the Securities and Exchange Commission (“SEC”) and Ripple.³¹ In December of 2020, the SEC charged Ripple and two of the company’s executives with violating federal securities laws in their use of their crypto currency, XRP.³² The case became contentious and openly hostile, with each side digging in and upping the stakes through legal jabs across the metaphorical aisle.³³ The cryptocommunity became heavily interested in the case because the SEC, if it won, could use this case’s precedent to charge other cryptocompanies, which operate similarly to Ripple.³⁴ Ripple argued that the SEC should turn over internal communications because the evidence “could show

²⁸ Samyuktha Sriram, *NYC Court Dismisses Lawsuit Against Bancor Alleging Securities Law Violation*, AMB Crypto, (February 24, 2021), <https://ambcrypto.com/nyc-court-dismisses-lawsuit-against-bancor-alleging-securities-law-violation/>.

²⁹ *Id.*

³⁰ *Id.*; Terence Zimwara, *US Judge Dismisses Motion Against Bancor After Finding Allegations Inadequate to Give it Jurisdiction*, Bitcoin.com, (February 24, 2021), <https://news.bitcoin.com/us-judge-dismisses-motion-against-bancor-after-finding-allegations-inadequate-to-give-it-jurisdiction/>.

³¹ *SEC Charges Ripple and Two Executives with Conducting \$1.3 Billion Unregistered Securities Offering*, U.S. Securities and Exchange Commission, (December 22, 2020), <https://www.sec.gov/news/press-release/2020-338>.

³² *Id.*

³³ Stephanna Sotkowski, Jonathan Green, Kathleen Reilly, et al, *Discovery Ruling Gives Ripple and Its Executives Access to SEC Communications with Third Parties Concerning XRP, Bitcoin, and Ether*, Arnold & Porter, (April 21, 2021), <https://www.mondaq.com/unitedstates/securities/1062672/discovery-ruling-gives-ripple-and-its-executives-access-to-sec-communications-with-third-parties-concerning-xrp-bitcoin-and-ether>.

³⁴ *Id.*

the SEC’s own uncertainty around the regulation of cryptocurrencies”.³⁵ The SEC maintained it was going to argue the case using *Sec. & Exch. Comm’n v. Howey Co.*, 328 U.S. 293 (1946) test, which has been the gold standard for determining whether an investment vehicle should be considered a security for SEC purposes.³⁶

The *Howey* test, as it is known among Securities experts, is a landmark test that has stood its ground as valid common law for the past eight decades.³⁷ In *Howey*, the defendant was an organizer of leases for an orange farm in Florida.³⁸ In interpreting the federal Securities laws, the court ultimately ruled that the test for whether an investment vehicle is a security under federal regulation is determined by “whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. If that test is satisfied, it is immaterial whether the enterprise is speculative or non-speculative or whether there is a sale of property with or without intrinsic value”.³⁹

While this traditional method may have helped the SEC formulate cases for the past eight decades, its use in the Ripple case has been problematic because government agencies do not have a cohesive definition of how cryptocurrencies are classified and how said digital constructs should be regulated across the federal spectrum.⁴⁰ As the case reaches a settlement, Ripple is rumored to IPO, the cryptocommunity celebrates, and the SEC failed to create new common law addressing the status of cryptocurrencies as federally recognized Securities.⁴¹

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *SEC v. W. J. Howey Co.*, 328 U.S. 293, 294, 66 S. Ct. 1100, 1101 (1946).

³⁹ *Id.* at 301.

⁴⁰ Stephanna Szotkowski, Jonathan Green, Kathleen Reilly, et al, *Discovery Ruling Gives Ripple and Its Executives Access to SEC Communications with Third Parties Concerning XRP, Bitcoin, and Ether*, Arnold & Porter, (April 21, 2021), <https://www.mondaq.com/unitedstates/securities/1062672/discovery-ruling-gives-ripple-and-its-executives-access-to-sec-communications-with-third-parties-concerning-xrp-bitcoin-and-ether>.

⁴¹ William White, *XRP Alert: 10 Top Twitter Reactions to Today’s SEC v. Ripple Hearing*, InvestorPlace, (April 30, 2021), <https://investorplace.com/2021/04/xrp-alert-10-top-twitter-reactions-to-todays-sec-vs-ripple-hearing/>;

While the advent of new investing vehicles has occurred throughout history, cryptocurrency is more widespread and influential than, for example, a citrus grove leasing agreement. The increasing adoption and tremendous wealth that is pouring into this new field means that the SEC requires coherent and formulaic guidance from Congress and the Federal Reserve. As this lawsuit has shown, it would be hard, if not counterproductive, for the government to try to pave a path towards regulation through ramming cryptocurrency activities into old common law precedents and adapting them accordingly.

It is likely that the increased mainstream adoption of cryptocurrency will generate future litigation around crypto investing. Without an overarching regulation program in place for this new industry, courts will have to rely on current and traditional Securities regulations and common law tests.

B. The Trump Administration vis-à-vis Biden Administration

The Trump Administration took a relatively hands-off approach to crypto. While it is too early to fully ascertain how Biden's Administration will handle the questions revolving around cryptocurrency regulation, it is clear that Janet Yellen is openly hostile towards crypto. Yellen has recently called for "curtailing" cryptocurrency use and refers to crypto as "extremely inefficient".⁴² Yet, Gensler may be a balancing force against Yellen. With these two dynamic leaders digging trenches on opposite sides of the crypto debate, the future of US regulation remains unclear.

Helen Partz, *Ripple Wants To Go Public After Settling Lawsuit, SBI CEO Says*, Cointelegraph, (April 29, 2021), <https://cointelegraph.com/news/ripple-wants-go-public-after-settling-sec-lawsuit-sbi-ceo-says>.

⁴² Jeff Cox, *Yellen Sounds Warning About "Extremely Inefficient Bitcoin"*, CNBC, (February 22, 2021), <https://www.cnbc.com/2021/02/22/yellen-sounds-warning-about-extremely-inefficient-bitcoin.html>; Harry Robertson, *Janet Yellen Suggests "Curtailing" Cryptocurrencies Such as Bitcoin, Saying They are Mainly Used for Illegal Financing*, Markets Insider, (January 20, 2021), <https://markets.businessinsider.com/currencies/news/bitcoin-price-cryptocurrency-should-be-curtailed-terrorism-concerns-yellen-2021-1-1029985692>.

C. Yellen on Regulation

Yellen is openly against cryptocurrencies and Bitcoin in particular. As Yellen was claiming that Bitcoin is “extremely inefficient”, the Federal Reserve’s systems were down forty-eight hours later.⁴³ Largely popular investors were quick to criticize Yellen for her claims and the irony of the Federal Reserve system’s crash. Cathie Wood, of the famous ARK Fund, pushed back on Yellen’s remarks that Bitcoin is a center for nefarious transactions and is energy inefficient; Wood also accused Yellen of not understanding cryptocurrency, calling Bitcoin “far more energy efficient than gold”.⁴⁴ Wood’s Ark website goes on to explain that:

“as measured by electricity costs alone, Bitcoin is much more efficient than traditional banking and gold mining on a global scale. Traditional banking consumed 2.34 gigajoules (GJ) per year and gold mining 500 million GJ, while Bitcoin consumers 184 million GJ, less than 10% and 40% of traditional banking and gold mining [...] Bitcoin mining’s estimated dollar cost per GJ expended is 40 times more efficient than that of traditional banking and 10 times more efficient than that than for gold mining”.⁴⁵

D. Securities and Exchange Commission

The SEC is already dealing with exchange entities for cryptocurrency. Coinbase, a popular trading app for cryptocurrencies, is conducting a direct listing IPO on the NASDAQ.⁴⁶ The

⁴³ Ben Jarvie, *Janet Yellen Sounds Like She’s Scared of Bitcoin*, Bitcoin Magazine, (February 24, 2021), <https://bitcoinmagazine.com/articles/janet-yellen-sounds-like-shes-scared-of-bitcoin>.

⁴⁴ Daily Hodl Staff, *Cathie Wood Says Janet Yellen Doesn’t Understand Cryptocurrency, Bitcoin Far More Energy Efficient Than Gold*, The Daily Hodl, (March 1, 2021), <https://dailyhodl.com/2021/03/01/cathie-wood-says-janet-yellen-doesnt-understand-cryptocurrency-bitcoin-far-more-energy-efficient-than-gold/>.

⁴⁵ Yassine Elmandjra, *Debunking Common Bitcoin Myths*, ARK Invest, (June 26, 2020), <https://ark-invest.com/articles/analyst-research/bitcoin-myths/>.

⁴⁶ Kevin Helms, *Coinbase Files for IPO via Direct Listing on Nasdaq – Valuation Soars Above \$100 Billion*, Bitcoin.com, (February 25, 2021), <https://news.bitcoin.com/coinbase-files-ipo-direct-listing-nasdaq-valuation-100b/>.

valuation of Coinbase soared to over \$100,000,000,000 with many traders enticed by Coinbase's healthy revenue from transaction fees.⁴⁷ This event, though, is occurring under the traditional SEC IPO framework. While this does not provide ample evidence to how the SEC is planning on issuing guidance for actual cryptocurrency trading, the SEC's approval of Coinbase's IPO does give increased institutional legitimacy to this new age market.

The Commissioner at the U.S. Securities and Exchange Commission, Hester Peirce, stated that decentralized finance (known as "DeFi") could be "alluring" as an alternative trading system given growing anger towards Wall Street and the systems it uses: "The digital economy does pose some new regulatory challenges, but it also gives us new tools to meet those challenges. We should use those tools with genuine care for the freedom of the people we regulate."⁴⁸ Peirce also stated that the DeFi markets pose new hurdles for the SEC on a legal front because it is probable that many DeFi projects are technically under the umbrella of US Securities Law, and that many may resemble a "traditional security".⁴⁹ Peirce's comments on DeFi are centered around the analysis of DeFi functions under the traditional regulatory framework – it will be interesting to see how these questions of DeFi regulations develop. For example, will Securities' common law evolve to encompass DeFi, or will Congress amend Securities laws to create specific provisions for DeFi? At the time of this writing, the answer is unclear and seems it will remain so for the near future.

E. Internal Revenue Service

Interestingly, the IRS labels cryptocurrencies "virtual currency", but appears to treat these intangible assets for tax purposes like ordinary property. As the IRS describes, "Virtual currency

⁴⁷ *Id.*

⁴⁸ Turner Wright, *DeFi Will Provide Good Regulatory Test for SEC, Says Commissioner Peirce*, Cointelegraph, (February 23, 2021), <https://cointelegraph.com/news/defi-will-provide-good-regulatory-test-for-sec-says-commissioner-peirce>.

⁴⁹ *Id.*

transactions are taxable by law just like transactions in any other property.”⁵⁰ The IRS has also made it clear that Americans who exchange cryptocurrency for a good or service – for example, purchasing a Tesla – will have to declare a “capital gain or loss”.⁵¹ This essentially means that the government is treating cryptocurrencies currently as an asset for tax purposes while also claiming that using cryptocurrency as a medium for exchange, in lieu of a fiat currency, is a taxable event. While this approach contains a degree of commonsense justification, it does present issues for crypto adopters who circumvent conversions of crypto to fiat currencies for transactions. While skipping the traditional step of liquidating an asset for cash to purchase another good is efficient, under the current IRS framework, it may cause future unintended taxation consequences. To further elaborate, the IRS describes its position on what “virtual currency” is as:

“Virtual currency is 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. Cryptocurrency is a type of virtual currency that utilizes cryptography to validate and secure transactions that are digitally recorded on a distributed ledger, such as a blockchain. Virtual currency that has an equivalent value in real currency, or that acts as a substitute for real currency, is referred to as ‘convertible’ virtual currency. Bitcoin is one example of

⁵⁰*Virtual Currencies*, Internal Revenue Service, <https://www.irs.gov/businesses/small-businesses-self-employed/virtual-currencies>.

⁵¹*Frequently Asked Questions on Virtual Currency Transactions*, Internal Revenue Service, <https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions>.

a convertible virtual currency. Bitcoin can be digitally traded between users and can be purchased for, or exchanged into, U.S. dollars, Euros, and other real or virtual currencies.”⁵²

This excerpt is telling because it shows how the IRS understands the utility and commercial use of virtual currency, yet how the IRS is nonetheless considering cryptocurrencies as a more traditional, intangible asset. Traders and holders (affectionately called “HODLers” in the cryptoworld), dislike current IRS guidance because it makes calculating taxable events and capital gains complicated.⁵³ Moreover, it presents questions about how cost-basis and long-term capital gains structures may be under the Biden Administration. Clarity and reform on these issues will allow for more mainstream crypto adoption.

D. US Politicians on Regulation

Unsurprisingly, given the polarization of American politics, politicians’ positions remain varied on whether to regulate cryptocurrencies and to what extent regulation may be beneficial.⁵⁴

Some politicians who favor draconian crypto regulations regurgitate an old but popular argument that the “average” American needs to be protected from themselves. This argument is heightened by the recent animosity between the Reddit community and Wall Street institutional corruption involving stocks such as Gamestop, AMC, NOK, etcetera.

Certain financial and tech heavy states have begun to weigh in on the uncertainty of crypto regulations in the absence of encompassing federal guidance. New York state, for example, has

⁵² *Virtual Currencies*, Internal Revenue Service, <https://www.irs.gov/businesses/small-businesses-self-employed/virtual-currencies>.

⁵³ Ali Montag, “HODL”, “Whale” and 5 Other Cryptocurrency Slang Terms Explained, CNBC, (August 26, 2018), <https://www.cnbc.com/2018/01/23/what-hodl-whale-and-other-cryptocurrency-slang-terms-mean.html>.

⁵⁴ Sebastian Sinclair, *Warren Says Yellen Left No Room for Ambiguity in “Speculative” Bitcoin Comments*, Coindesk.com, (March 3, 2021), <https://www.coindesk.com/bitcoin-warren-yellen-speculative-nature>; Shalini Nagarajan, *Crypto Advocate Andrew Yang Plans to Transform New York City into a Bitcoin Hub if He’s Elected Mayor*, Markets Insider, (February 12, 2021), <https://markets.businessinsider.com/currencies/news/andrew-yang-new-york-bitcoin-hub-cryptocurrencies-elected-mayor-candidate-2021-2-1030078017>.

been positioning itself as unfavorable to crypto trading. A March 1, 2021 article stated that the New York Attorney General warned crypto businesses “you either play by the rules or we will shut you down”.⁵⁵ The Attorney General for New York continued to justify the state’s anti-crypto position by warning that cryptos carry high risk and that there are “greedy industry players”.⁵⁶ These boogeyman accusations echo Yellen’s and Warren’s rhetoric towards Bitcoin.

From a legal perspective, New York officials were quick to point out that, “crypto firms [] are not exempt from state registrations since virtual currencies are considered commodities in New York [...] those parties who are obligated to register, but do not, are subject to both civil and criminal enforcement under the law.”⁵⁷

Contrary to many officials in New York, Andrew Yang, whose running for New York mayor, recently announced his support for crypto and his plans to “transform New York City into a Bitcoin hub if [...] elected”.⁵⁸ These contrasting stances on cryptocurrencies by individuals in power present uncertain forecasts on how – and to what extent – major financial regions will treat cryptocurrency trading and adoption.

Some states, looking to poach Americans from traditionally wealthy states, have been broadening progressive policies towards crypto. Wyoming, for example, has pushed the bounds of state-created crypto friendliness.⁵⁹ As Cointelegraph reported:

⁵⁵ Aislinn Keely, *New York AG Warns That if Crypto Firms Don’t “Play by the Rules” They Will Get Shut Down*, The Block, (March 1, 2021), https://www.theblockcrypto.com/linked/96674/nyag-crypto-enforcement-rules?utm_source=rss&utm_medium=rss.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Shalini Nagarajan, *Crypto Advocate Andrew Yang Plans to Transform New York City into a Bitcoin Hub if He’s Elected Mayor*, Markets Insider, (February 12, 2021), <https://markets.businessinsider.com/currencies/news/andrew-yang-new-york-bitcoin-hub-cryptocurrencies-elected-mayor-candidate-2021-2-1030078017>.

⁵⁹ Andrew Singer, *While Washington Dithers, Wyoming and Other US States Mine for Crypto Gold*, Cointelegraph, (February 27, 2021), <https://cointelegraph.com/news/while-washington-dithers-wyoming-and-other-us-states-mine-for-crypto-gold>.

“Others have opined that innovation centers like Wyoming were merely filling the void left by the federal government, which has yet to take a coherent stance vis-a-vis the burgeoning crypto market. Benjamin Sauter, a lawyer at Kobre & Kim LLP, told Cointelegraph: ‘Wyoming is showing that individual states can play a meaningful role in crafting a coherent legal framework for the crypto/blockchain industry — particularly when it comes to state taxation as well as commercial and some banking issues.’ By comparison, according to him, the U.S. federal government ‘hasn’t really made an effort to create such a framework, and this has led to a lot of regulatory inefficiencies and general confusion’.”⁶⁰

On the federal level, certain members of Congress have advocated recently for fact-finding investigations into cryptocurrency.⁶¹ The new “Eliminate Barriers to Innovation Act of 2021” is intended to outline circumstances when it would be proper for the Commodity Futures Trading Commission and the Securities and Exchange Commission to have respective jurisdictions over cryptocurrency activities.⁶² The bill also seeks to have a report finalized within a year’s time with input from non-governmental specialists from other fields, such as the financial technology sector.⁶³ While it is uncertain what the results of these investigations will yield, or what direction it will ultimately influence regulations to take, members of the cryptocommunity see this Congressional activity as an acceptance of the cryptocurrency market – a market that is no longer possible to ignore.

⁶⁰ *Id.*

⁶¹ Nikhilesh De, *US Lawmakers Introduces Bill to Clarify Crypto Regulations*, Coindesk.com, (March 9, 2021), <https://www.coindesk.com/lawmakers-digital-asset-regulation>; Nikhilesh De, *State of Crypto: Congress Takes One Step Closer to Regulatory Clarity*, Coindesk.com, (April 27, 2021), <https://www.coindesk.com/congress-regulatory-clarity>.

⁶² Sarah Tran, *US Congress to Clarify Crypto Regulations Once the Senate Passes Bipartisan Bill*, FXStreet, (April 22, 2021), <https://www.fxstreet.com/cryptocurrencies/news/us-congress-to-clarify-crypto-regulations-once-the-senate-passes-bipartisan-bill-202104220424>.

⁶³ *Id.*

America is currently seeing a polarization of cryptocurrency regulation in politics that largely aligns with political party identity: Republican states are increasingly advertising themselves as favorable to cryptobusiness while Democrat leaning states are either negative towards cryptocurrency operations or threatening to pass non-competitive, unfriendly regulations against cryptocurrency trading and mining.⁶⁴

E. Wall St. and Main Street Resistance to Regulation

One of the innovative mavericks to take the investing world by storm in 2020 is veteran investor Cathie Wood, Chief Executive Officer and Founder of Ark Invest.⁶⁵ Wood's ETFs offer a variety of innovate and tech-heavy companies within their portfolios.⁶⁶ Positioning herself as a forward thinker, Wood has remained a strong advocate of cryptocurrency and is quick to spar with Yellen on Bitcoin claims. Ark Invest explains its position, defending Bitcoin as a feasible investment vehicle:

“Based on the trilemma, we can understand why volatility is a natural consequence of Bitcoin's monetary policy. In contrast to modern central banking, it does not prioritize exchange rate stability. Instead, based on a quantity rule of money, Bitcoin limits the growth of money supply and allows the free flow of capital, forgoing a stable exchange rate. As a result, Bitcoin's price is a function of demand relative to its supply. Its volatility should come as no surprise. That said, Bitcoin's volatility is diminishing over time, as shown below. As its adoption increases, the marginal demand for Bitcoin should become a

⁶⁴ Andrew Singer, *While Washington Dithers, Wyoming and Other US States Mine for Crypto Gold*, Cointelegraph, (February 27, 2021), <https://cointelegraph.com/news/while-washington-dithers-wyoming-and-other-us-states-mine-for-crypto-gold>.

⁶⁵ *Meet ARK A Group of People Who Currently Are Working Remotely, Staying Healthy, and Always Passionate About Disruptive Innovation*, ARK Invest, <https://ark-invest.com/our-team/>.

⁶⁶ *ETFs Focused on Disruptive Innovation*, <https://ark-funds.com>.

smaller percentage of its total network value, diminishing the magnitude of price swings.”⁶⁷

Ark Invests’ position on cryptocurrency is an important example of how many Wall St. institutions are warming up to the idea that cryptocurrencies are a legitimate tool for investment. For example, Twitter, Morgan Stanley, BlackRock, Motley Food, indicated interest in Bitcoin.⁶⁸ Goldman Sachs is reopening Bitcoin futures, it is believed Goldman’s restart of their crypto trading is in response to competitors such as Bank of New York Mellon offering crypto services.⁶⁹ Goldman also is offering its qualifying clients a derivative investment vehicle that is pinned to futures of Bitcoins predicted price.⁷⁰ JP Morgan recently trialed using satellites to facilitate blockchain payments to test autonomous payments and the “ongoing development of the Mars habitation program”.⁷¹ Still, others are seeking to reallocate their portfolios into the cryptosphere, which realigns their relative weight with the health of their cryptoassets instead of equities.⁷²

A Citibank report recently expressed that: “A focus on global reach and neutrality could see Bitcoin become an international trade currency. This would take advantage of Bitcoin’s decentralized and borderless design, its lack of foreign exchange exposure, its speed and cost advantage in moving

⁶⁷ Yassine Elmandjra, *Debunking Common Bitcoin Myths*, ARK Invest, (June 26, 2021), <https://ark-invest.com/articles/analyst-research/bitcoin-myths/>.

⁶⁸ Thomas Meyer, *The Elon Effect – Companies Now Racing for a Piece of the Bitcoin Pie*, The Daily Hodl, (March 1, 2021), <https://dailyhodl.com/2021/03/01/the-elon-effect-companies-now-racing-for-a-piece-of-the-bitcoin-pie/>.

⁶⁹ Prashant Jha, *Goldman Sachs Set to Restart Dealing in Bitcoin Futures; Also Exploring Bitcoin ETF Potential*, CoinGape, (March 1, 2021), <https://coingape.com/goldman-sachs-set-to-restart-dealing-in-bitcoin-futures-also-exploring-bitcoin-etf-potential/>.

⁷⁰ Nicholas Pongratz, *Goldman Sachs Reopens Cryptocurrency Trading Desk*, Beincrypto.com, (March 1, 2021), <https://beincrypto.com/goldman-sachs-reopens-cryptocurrency-trading-desk/>.

⁷¹ Nivesh Rustgi, *JP Morgan Experiments with Blockchain Payments in Outer Space*, Cryptobriefing.com, (February 25, 2021), <https://cryptobriefing.com/jp-morgan-experiments-blockchain-payments-outer-space/>.

⁷² Birajmaan Tamuly, *How Have Bitcoin’s Recent Price Woes Impacted Institutional Interest*, AMB Crypto, (February 25, 2021), <https://ambcrypto.com/how-has-recent-bitcoins-recent-price-woes-impacted-institutional-interest/>.

money, the security of its payments, and its traceability.”⁷³ Citi went on to elaborate their position by saying: “In this scenario, Bitcoin may be optimally positioned to become the preferred currency for global trade. It is immune from both fiscal and monetary policy, avoids the need for cross-border foreign exchange (FX) transactions, enables near instantaneous payments, and eliminates concerns about defaults or cancellations as the coins must be in the payer’s wallet before the transaction is initiated.”⁷⁴ Such bullish predictions from a major bank, which are typically more conservative than their venture capital Wall Street neighbors, indicate that there is a growing institutionalization of cryptocurrency even among the regulated institutions. Helping fuel this increased mainstream adoption is the repeated news coverage of Bitcoin by famous pundits like Jim Cramer who recently told his viewers that “it would be irresponsible for corporations not to put any Bitcoin on their balance sheet[s].”⁷⁵

Still, others express a view that US regulations for cryptocurrency could stifle its growth. Niall Ferguson commented, “the main risk to Ethereum is regulatory”.⁷⁶ This view is shared by many in the cryptosphere, who are skeptical that the US government will be able to effectively regulate cryptocurrencies in a manner that will also foster its continued growth.⁷⁷

Despite regulatory uncertainties, such bullish sentiments by large institutions and celebrities have exponentially increased cryptocurrency interest in 2020 and the beginning of 2021.

⁷³ Alisha Roy, *Here’s Why Bitcoin Could Become the Currency of Choice for International Trade*, AMB Crypto, (March 2, 2021), <https://ambcrypto.com/heres-why-bitcoin-could-become-the-currency-of-choice-for-international-trade/>.

⁷⁴ Gareth Jenkinson, *Citi Report Tips Bitcoin as a Future Currency of Choice for International Trade*, thedailychain.com, (March 1, 2021), <https://thedailychain.com/citi-report-tips-bitcoin-as-a-future-currency-of-choice-for-international-trade/?cookie-state-change=1614640199118>.

⁷⁵ Thomas Meyer, *The Elon Effect – Companies Now Racing for a Piece of the Bitcoin Pie*, The Daily Hodl, (March 1, 2021), <https://dailyhodl.com/2021/03/01/the-elon-effect-companies-now-racing-for-a-piece-of-the-bitcoin-pie/>.

⁷⁶ NAIL FERGIUSION, *THE ASCENT OF MONEY, A FINANCIAL HISTORY OF THE WORLD*, 405 (Penguin Random House LLC 2018).

⁷⁷ *Id.*

D. Opposites

There are many notable influencers and investor veterans who oppose cryptocurrency, its mainstream adoption, and the surrounding hype around the crypto community at large. Charlie Munger, Warren Buffet’s business partner and friend, restated his dislike of Bitcoin and cryptocurrencies as investments.⁷⁸ Quoting Oscar Wilde, Munger said “it [is] the pursuit of the uneatable by the unspeakable”.⁷⁹ Specifically, Munger has been quoted as calling Bitcoin “rat poison” and compared trading crypto to “trading turds”.⁸⁰ Others, like Kenneth Rogoff, a former chief economist for the International Monetary Fund and current Harvard Professor of Economics, believes that cryptocurrencies have not yet begun to seriously compete with fiat currencies and that if they do central banks and governments will regulate cryptocurrencies from going mainstream and eroding central banks’ control over marketplaces.⁸¹ Perhaps more alarmist is the Economic and Social Research Council’s director, who predicts that cryptocurrency’s potential displacement of fiat currencies may lead to a “technocratic dystopian society”.⁸²

⁷⁸ Amara Khatri, *Charlie Munger Relates Oscar Wilde’s Fox Hunting Quote to Recent Bitcoin Frenzy*, Cryptodaily.com, (February 25, 2021), <https://cryptodaily.co.uk/2021/02/charlie-munger-bitcoin>; Kevin Helms, *Berkshire Hathaway’s Charlie Munger Advises Investors to Never Buy Bitcoin or Gold*, Bitcoin.com, (February 25, 2021), <https://news.bitcoin.com/berkshire-hathaways-charlie-munger-advises-investors-never-buy-bitcoin-or-gold/>.

⁷⁹ Amara Khatri, *Charlie Munger Relates Oscar Wilde’s Fox Hunting Quote to Recent Bitcoin Frenzy*, Cryptodaily.com, (February 25, 2021), <https://cryptodaily.co.uk/2021/02/charlie-munger-bitcoin>.

⁸⁰ Kevin Helms, *Berkshire Hathaway’s Charlie Munger Advises Investors to Never Buy Bitcoin or Gold*, Bitcoin.com, (February 25, 2021), <https://news.bitcoin.com/berkshire-hathaways-charlie-munger-advises-investors-never-buy-bitcoin-or-gold/>.

⁸¹ Kevin Helms, *Harvard Professor Kenneth Rogoff Warns Central Banks Will Never Allow Bitcoin to Go Mainstream*, Bitcoin.com, (May 2, 2021), <https://news.bitcoin.com/harvard-professor-kenneth-rogoff-warns-central-banks-will-never-allow-bitcoin-mainstream/>.

⁸² Jamie Redman, *Hyperbitcoinization’s Small Minority: Economist Says Bitcoin’s Growing Success Will Lead to Perverse Consequences*, Bitcoin.com, (March 1, 2021), <https://news.bitcoin.com/hyperbitcoinizations-small-minority-economist-says-bitcoins-growing-success-will-lead-to-perverse-consequences/>.

E. Mainstream Popularity, Anger at Establishment Wall Street, Government

In order to fully appreciate the critiques and obstacles inherent in creating crypto regulations, one ought to understand cryptos' political movements, and the supporters of decentralized currency.

Driving the mainstream adoption of crypto as of late are, perhaps, economically motivated individuals. Mohamed El-Erian, Allianz's Chief Economic Officer, believes that there are three types of investors looking at Bitcoin: those who are confident Bitcoin is money; those who are pushed out of negative investment vehicles like bonds; and profit seekers who like cryptos volatility.⁸³

Yet there are those, especially the longest supporters, who believe in crypto as a revolution against this historical epoch. The crypto-community is heavily concentrated with libertarian-esque, anti-regulation individuals.⁸⁴ Indeed, many crypto vehicles were created specifically to promote democratic functions, avoid government imposed regulations, and foster a more globalized world.⁸⁵ Crypto advocates like Elon Musk even go so far as to mock governmental agencies attempting to crack down on more *laissez-faire* crypto trading; Elon recently tweeted a mocking meme at the SEC in response to rumors that they were investigating him for pumping Dogecoin.⁸⁶

Although cryptocurrency was slightly after his time, Milton Friedman's *magnum opus* describes succinctly how many in the crypto-sphere view economic and social freedom. He writes:

⁸³ Daniel Roberts, *Mohamed El-Erian: Bitcoin Captures 3 Things Central Banks Should Be Concerned About*, Decrypt, (February 25, 2021), <https://decrypt.co/59317/el-erian-bitcoin-3-things-concerning-central-banks>.

⁸⁴ Brady Dale, *Crypto Is the Libertarian Cheat Code in the Final Battle Over State Coercion*, Coindesk, (February 4, 2021), <https://www.yahoo.com/entertainment/crypto-libertarian-cheat-code-final-160513838.html>.

⁸⁵ Sonya Mann, *Peter Thiel Says, "Crypto Is Libertarian, A.I. Is Communist." What the Heck Does That Mean?*, Inc., (February 24, 2021), <https://www.inc.com/sonya-mann/thiel-ai-cryptocurrency.html>.

⁸⁶ Alex Dovbnya, *Elon Must Trolls SEC with "Dogecoin Meme Shield"*, UToday, (March 1, 2021), <https://u.today/elon-musk-trolls-sec-with-dogecoin-meme-shield>.

“Viewed as a means to the end of political freedom, economic arrangements are important because of their effect on the concentration or dispersion of power [...] historical evidence speaks with a single voice on the relation between political freedom and the free market [...] A liberal is fundamentally fearful of concentrated power [...] the need of the dispersal of power raises an especially difficult problem in the field of money. There is widespread agreement that government must have some responsibility for monetary matters. There is also widespread recognition that control over money can be a potent tool for controlling and shaping the economy [...]” Friedman goes on to explain that modern governments can wield dangerously concentrated power by, “sophisticated modern techniques [like] turning the printing press or simply altering book entries. The problem is to establish institutional arrangements that will enable government to exercise responsibility for money, yet at the same time limit the power thereby given to government and prevent this power from being used in ways that will tend to weaken rather strengthen a free society”.⁸⁷

This politicization of what is now becoming an emerging financial instrument makes crypto an interesting industry for Congress to regulate because it has: I) sustained intensive support by activists; II) increasing capital power; III) attraction for many as alternative investments from traditional asset classes.

⁸⁷MILTON FRIEDMAN, CAPITALISM AND FREEDOM, 9, 39 (The University of Chicago Press Chicago and London, 2002).

III. UNITED STATES' ADOPTION OF THE DIGITAL DOLLAR

Some experts believe that “the most discussed financial innovation of the past decade has been the advent of blockchain-based cryptocurrencies”.⁸⁸ Whether Central Banks are willing to agree is immaterial; what is apparent is their openness about creating fiat-backed cryptocurrencies. For example, a digital dollar would be a central bank digital currency, issued by the government, yet not necessarily dependent on blockchain structures.⁸⁹ Recently, around the time of Powell’s Congressional hearings, the Federal Reserve Chair commented that the Federal Reserve is prioritizing the creation of a digital dollar.⁹⁰ When reporting on the implementation of a digital dollar, Powell did make clear to Congress that the Federal Reserve may seek Congressional authorization for a digital dollar launch.⁹¹ Powell also clarified that: “one thing we need to be very mindful about is that we have a functioning financial system and a banking system and capital markets which intermediate between savers and borrowers, and they’re the best markets, and I would say the strongest banks in the world [...] we need to be careful with our design of the digital dollar that we don’t create something that will undermine the very healthy market-based function.”⁹²

Part of Congress’ questioning Powell about a US backed digital dollar stems from China’s advancement of a digital Yuen. The Federal Reserve’s position echoes those who believe that a

⁸⁸ NAIL FERGIUSON, *THE ASCENT OF MONEY, A FINANCIAL HISTORY OF THE WORLD*, 400 (Penguin Random House LLC 2018).

⁸⁹ Will Gottsegen, *Digital Dollar Must Not “Undermine” Banking System: Fed Chair Powell*, Decrypt, (February 24, 2021), <https://decrypt.co/59287/fed-digital-dollar-undermine-banks>.

⁹⁰ Gareth Jenkinson, *Powell Says Digital Dollar Is Still a High Priority Project for US Federal Reserve*, Thedailychain.com, (February 24, 2021), <https://thedailychain.com/powell-says-digital-dollar-is-still-a-high-priority-project-for-us-federal-reserve/>.

⁹¹ Turner Wright, *Fed Chair Says It’s Up to Congress to Bring A Digital Dollar to Market*, Cointelegraph, February 24, 2021), <https://cointelegraph.com/news/fed-chair-says-it-s-up-to-congress-to-bring-a-digital-dollar-to-market>

⁹² Will Gottsegen, *Digital Dollar Must Not “Undermine” Banking System: Fed Chair Powell*, Decrypt, (February 24, 2021), <https://decrypt.co/59287/fed-digital-dollar-undermine-banks>.

digital fiat race between China and the United States does not exist – yet.⁹³ For example, Kollen Post penned an article on February 26, 2021 arguing that China’s race to digitize its currency is centered around the government’s desire to reduce the control of Tencent’s WeChat Pay and Ant Group’s Alipay.⁹⁴ Many believe that the Federal Reserve is observing countries who are trialing digital currencies to learn from their future successes and mistakes.⁹⁵ In other words, with the dollar strengthening, Powell is in no rush to become the first large country with a government-backed digital currency.

Congress has increased its questioning of the Federal Reserve’s plans for a digital currency as of late. It is likely that these two bodies are trying to coordinate an effective national strategy of fiat generation and crypto regulation. If the primary mandates of the Federal Reserve remain unchanged, the Congress’ views on the virtue of the dollar as a reserve currency continue, it is apparent that both entities will want a successful roll-out of a digital dollar, where, as Powell cautioned, the US banking system remains undisrupted, and where cryptocurrency does not pose a threat to the digital dollar. This is a balancing act. The new technology does not afford many – if any – historical parallels. Moreover, there is no uniform consensus on whether cryptocurrency threatens the US dollar, yet there is growing evidence that the crypto industry presents opportunities for governments to attract wealth, innovation, and increased tax bases.

IV. THE EMERGING NFT MARKET, CRYPTO’S NEW FRONTIER

NFTs, or non-fungible tokens, are an emerging and highly anticipated area of the cryptosphere. In non-technical terms, NFTs are unique tokens or coins that can be a part of the

⁹³ Kollen Post, *China’s CBDC is About Domestic Dominance, Not Beating the Dollar*, Cointelegraph, (February 26, 2021), <https://cointelegraph.com/news/china-s-cbdc-is-about-domestic-dominance-not-beating-the-dollar>.

⁹⁴ *Id.*

⁹⁵ *Id.*

Ethereum blockchain or other blockchains.⁹⁶ By being unique, NFTs can be used to represent IP assets such as digital art.⁹⁷ This digital art opportunity has taken the cryptosphere by storm. This growing attraction has spilled over to mainstream pundits and non-crypto activists as well. Recently Christie's auctioned one of Beeple's NFT videos for \$6,600,000; similarly, an NFT video by artist Grimes sold for \$390,000.⁹⁸ More remarkably, another artist sold a "virtual home" as an NFT for \$500,000.⁹⁹ These unique token creations allow artists, collectors, and traders the opportunity to bring traditional art and collector's markets into the digital realm.¹⁰⁰ With older internet memes being in high demand for the NFT market, the adoption of this burgeoning market is compounding through early 2021.¹⁰¹

NFT exchanges add to the need for coherent crypto regulations because these exchanges not only provide users the ability to purchase and sell digital works, they act as a method for persons to swap alternative stores of wealth. In a sense, NFTs are a new digital commodity. Ludwig Von Mises, in his famous discourse, described one alternative to fiat as "commodity money":

"The decisive characteristic of commodity money is the employment for monetary purposes of a commodity in the technological sense [...] it is a matter of complete indifference what particular commodity this is; *the important thing is that it is the commodity in question that constitutes the money, and that the money is merely this*

⁹⁶ Mitchell Clark, *NFTs, Explained, I Have Questions About This Emerging...Um...Art Form? Platform?*, The Verge, (March 11, 2021), <https://www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq>.

⁹⁷ *Id.*

⁹⁸ *Id.*; Bobby Allyn, *What's An NFT? And Why Are People Paying Millions to Buy Them?*, NPR, (March 5, 2021), <https://www.npr.org/2021/03/05/974089381/whats-an-nft-and-why-are-people-paying-millions-to-buy-them>.

⁹⁹ *Id.*

¹⁰⁰ Robyn Conti, John Schmidt, *What You Need to Know About Non-Fungible Tokens (NFTs)*, Forbes, (April 29, 2021), <https://www.forbes.com/advisor/investing/nft-non-fungible-token/>.

¹⁰¹ Kalhan Rosenblatt, *A Meme Gold Rush? Classic Viral Images Are Selling as NFTs For Thousands of Dollars*, NBC News, (April 29, 2021), <https://www.nbcnews.com/pop-culture/pop-culture-news/meme-gold-rush-classic-viral-images-are-selling-nfts-thousands-n1265875>; Avie Schneider, *"Disaster Girl", The Stuff of Memes, Sells for Nearly \$500,000 As NFT*, NPR, (April 30, 2021), <https://www.npr.org/2021/04/30/992383825/disaster-girl-the-stuff-of-memes-sells-for-nearly-500-000-as-nft>.

commodity. The case of fiat money is quite different. Here the deciding factor is the stamp and it is not the material bearing the stamp that constitutes the money, but the stamp itself. The nature of the material that bears the stamp is a matter of quite minor importance.” (Emphasis added.)¹⁰²

While Von Mises did not live long enough to see the digital age’s commodities, his general monetary theory fits aptly within the NFT realm. While the “nature” of what the dollar is made of bears no relevance to its perceived value store, an NFT inherently holds value only relative to what artistic or IP creation it embodies *combined* with the market’s overall desire to attach a price to said NFT’s ownership. Although NFTs thus function as a newer medium of, for example, art exchange, their designed liquidity and decentralized structure allow them to also function as alternative currencies.

While the technological merits of this innovative construct are of little relevance here, what is relevant is the way in which this hybrid creation fails to fit nicely into existing United States laws and regulations. By acting as both a commodity and, arguably, a currency, NFTs represent an even newer area of the cryptoworld that Congress and the respective federal agencies must address because NFTs straddle the grey area between two separate regulatory bodies – mainly, the SEC and the CFTC.

The aforementioned is important because increasing excitement for opportunity within the NFT compatible blockchains among traders, artists, mainstream celebrities, athletes, and the public at large, represent another area of high demand in the cryptosphere. This widespread enthusiasm further necessitates coherent government regulation and frameworks regarding digital coins and tokens. Such regulations will help artists and athletes better plan their IP projects; it will allow

¹⁰² LUDWIG VON MISES, *THE THEORY OF MONEY AND CREDIT*, 62 (Skyhorse Publishing 2013).

auction houses like Christie's to have greater clarity on the tax implications of their clients' assets; it will also provide stability to the cryptomarket by signaling the government's acceptance of these emerging alternative exchanges.

CONCLUSION

This increased prevalence of non-fiat currencies threatens certain central banks' controls over their economies. It is likely that we will see the emergence of government-backed cryptocurrencies tied to traditional fiat currencies in the near future. This shift has already prompted some central banks to pressure their governments to regulate or ban competing, non-governmental cryptocurrencies.

As a result, many governments, like India and China, are seeking to regulate cryptocurrencies with all deliberate speed. These countries' central banks want to regulate (or even ban) non-governmental-backed cryptocurrencies because such constructs may: create capital outflows, diminish central banks' powers to control their money supplies, make it easier to commit tax fraud, diminish banking income, etcetera.

Compared to China and India, the United States' central bank has taken a more cautious approach to cryptocurrency. Congress has followed the Federal Reserve's response. As a result, the status of uniform and overarching cryptocurrency regulations in the United States remains pending. Powell has made it clear that the Federal Reserve is in no rush to roll-out the digital dollar, but is working diligently behind the scenes to create the infrastructure necessary for its unveiling.

As the mainstream adoption of cryptocurrency grows in the United States, calls for coherent regulations have increased accordingly. Pro-crypto regulations would allow the United States to remain an attractive sphere for investors and persons around the world to trade their

assets. It would also place the United States in an attractive position vis-à-vis China as trade tensions between the two nations continue to increase. Until Congress and the Federal Reserve disclose a more concrete timeline for cryptocurrency regulations, the crypto-community waits to see whether to run to – or from – the bounds of American jurisdiction. As one expert bluntly put it, “if the United States fails to realize the full financial potential of today’s technology, the days of its ascendancy will surely be numbered”.¹⁰³

¹⁰³ NAIL FERGUSON, *THE ASCENT OF MONEY, A FINANCIAL HISTORY OF THE WORLD*, 408 (Penguin Random House LLC 2018).