The Discreet Charm of Conveyancing on the Blockchain

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Jeanne L. Schroeder, *Bitcoin and the Uniform Commercial Code*, 24 **U. Miami Bus. L. Rev.** 1 (2016).

When Adam Levitin and I taught The Law of Money seminar a year ago, not one student chose to write about bitcoin. We congratulated ourselves on drawing young people hip enough to ignore the hype emanating from googly-eyed technophiles and smug pundits, and beefed up the readings on silver in 18th century China. The rude awakening came last spring, when bitcoin gobbled up half the class and forced me to wrestle with the problem of legal writing about financial innovation. Jeanne Schroeder's lovely *Bitcoin and the Uniform Commercial Code* saved the day. The article reads at first like an old-fashioned doctrinal piece of the sort that have become rare. That would be valuable enough, but the bigger payoff for me was seeing a patient sifting of bitcoin through the UCC illuminate the work of legal institutions at the intersection of finance and technology.

Most students said that they wanted to write about fintech-y stuff because it was new and hot and law firms were all over it. However, defining "it" became a problem, especially for bitcoin. At a high level of generality, bitcoin is a protocol designed to extract, represent, and circulate value using a decentralized system for recording transfers (blockchain).[1] Putting transfer verification in the hands of the public at large makes the blockchain hard to manipulate, and makes transfers faster and cheaper.

Depending on your perspective, bitcoin could be a currency, a payment system, a commodity, an economy, a political system, or a flash in the pan. Law papers about bitcoin tend to follow a handful of templates. For example, they might survey the regulatory response (are regulators competing for turf?… stifling innovation? …fueling regulatory arbitrage?), compare institutional designs for a given function (what makes a good parallel currency? …how have payment systems built trust?), or analyze internal governance (is blockchain democratic? … fair? …stable?).

Schroeder eschews a comprehensive take on bitcoin, and zeroes in on the challenge it poses for the UCC's taxonomic worldview. Her analysis is of serious practical importance, because bitcoin's classification as collateral under Article 9 of the UCC could make or break its ability to function as a payment medium. The UCC also makes a great lens for thinking about bitcoin because of its self-consciously modern roots and fascination with commercial practice. The result is a scale model for the broader task of managing financial innovation in a fragmented regulatory regime.

The article first lays out why bitcoin cannot be money under the UCC, and why it matters. Along the way, the reader gets to ponder the logic of physical possession and the magic of proceeds under the UCC, including a supremely teachable hypothetical. Schroeder makes a compelling argument that bitcoin's exclusion is not primarily a matter of outdated definitions limiting money to government payment media (Sec. 1-201(b)(24)), but is part of the fabric of the Code. Money under the UCC is essentially physical cash, which is hard to encumber and easy to move. Cleansed of its past each time it passes from hand to hand, money can zip through the stream of commerce. Physical possession is central to the UCC's regime for transferring cash, but make zero sense for electronic currencies. As a result, even if the definition were fixed, the functionality would be impaired. Instead of super-negotiable money, bitcoin is most likely be classified as a "general intangibles," a catch-all category prone to lingering encumbrances, which would make it hard to transfer and useless as a payment medium.[2]

Wading through the weeds of attachment and perfection (which somehow feels urgent in Schroeder's telling), the reader might miss a bigger point about financial innovation and the UCC. The Code still stands as one of the most ambitious statutory modernization projects in U.S. history; it swept centuries of legal contrivance off the field with a flourish, and became indispensable to the financialization of the U.S. economy, including derivatives and structured finance. This flamboyantly modern code seems to hold an oddly quaint view of money, securities, and financial assets. Bitcoin looks like a blip in what has already been a decades-long story of friction and adaptation.

Illustrating the point, the second half of the article revisits the history of amending Article 8 of the UCC to create a regime for transferring investment securities not represented by physical certificates. The initiative was meant to reflect market and regulatory responses to the Wall Street paperwork crisis of the late 1960s and early 1970s, which saw brokerage houses buried in an avalanche of paper that they could not process.

All else equal, it makes sense to model a regime for transferring electronic money on the one for transferring securities that lack physical form—except that the reform process for securities was a mess. UCC revisions for "uncertificated securities" had initially stumbled over the clunky way they recorded transfers. Technology has since caught up with the law: blockchain solves the recording problem. But market participants did not wait around for blockchain; they found a workaround using custodial holding in the late 1970s. Federal legislation and more UCC revisions adapted to the new market-institutional reality, elaborating a category of "securities entitlements" (essentially, claims on the intermediaries), which coexists with the ill-fated uncertificated securities. Today's bitcoin holders could also achieve negotiability using the securities entitlement regime, but they may have to sacrifice some of bitcoin's decentralization ethos by having to rely on intermediaries.

In the end, blockchain's capacity to replace "confusing metaphors of tracing rules … with the reality of actual tracing" seems a lot more promising and a lot more scary than bitcoin's monetary designs. For this reason, and doctrinal dividends notwithstanding, the lasting contribution of Schroeder's article is probably not in the law of bitcoin. The value is in her careful case study of how a legal system should assimilate potentially disruptive innovation. The UCC is massively invested in its taxonomies, while innovations such as bitcoin often defy existing categories. Schroeder's article guides its readers through the history and policy behind the Code's taxonomies, taking its architecture and bitcoin's political aspirations

seriously throughout. The result is a pragmatic and novel meshing of the two.

1. The Khan Academy has a very helpful set of videos on the basic idea. [?]
2. Schroeder offers an amendment, which would assemble elements of super-negotiability under the UCC and adapt them for bitcoin and other cryptocurrencies; however, that is properly a minor part of her argument. [?]

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