

THE NEW FRONTIER OF CAMPAIGN FINANCE REGULATIONS: CRYPTOCURRENCY

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I. INTRODUCTION

Campaign finance is a controversial and divisive topic in America's modern political landscape. At the heart of almost all campaign finance legislation is the issue of corruption—both actual and perceived. Trends show campaign spending is on the rise, and candidates are spending an ever-growing amount of time fundraising.¹ In the last few years, a new type of campaign contribution has emerged in the form of cryptocurrency—a misunderstood and largely unknown invention.² Regulation on cryptocurrency is limited; multiple government organizations believe they have jurisdiction over it, and the question of whether cryptocurrency is a currency at all has not been definitively answered.³ Moreover, the regulations of this digital asset are inconsistent, especially among campaign finance regulations.⁴ As the prevalence of cryptocurrency ownership, use, and contributions increase, the United States will need to create new regulations or amend old rules to ensure that individuals have the freedom to financially contribute to the candidates they wish while ensuring that the electoral process is not compromised by this new technology.

Part II of this Note discusses the history of campaign finance laws and regulations, and reflects on how the federal government has tried to address the major problems with campaign finances throughout history. Part II also discusses cryptocurrency, focusing primarily on Bitcoin, including how it was created, the technology that allows it to exist, and the implications of the asset. Part III analyzes ethical opinions from various states, a Federal Elections Commission (FEC) advisory opinion, current case law, and

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¹ Chris W. Bonneau & Damon M. Cann, *Campaign Spending, Diminishing Marginal Returns, and Campaign Finance Restrictions in Judicial Elections*, 73 THE J. OF POL. 1267, 1269 (2011).

² Tal Yellin et al., *What is Bitcoin?*, CNNMONEY (Dec. 2013), <https://money.cnn.com/infographic/technology/what-is-bitcoin/index.html>.

³ See Dirk G. Baur et al., *Bitcoin: Medium of Exchange or Speculative Assets?*, 54 J. INT'L FIN. MKT. INSTITUTIONS & MONEY 177, 178–81 (2018).

⁴ See *infra* Part III.

government regulatory authority to determine the legal approach that should be taken regarding cryptocurrency contributions. Lastly, Part IV offers a model statutory scheme to bring uniformity to the treatment of Bitcoin and other cryptocurrencies—providing clarity to what is allowed and what is prohibited. This Note advocates for state and federal election commissions to actively consider the effects of cryptocurrencies, and contemplate how stricter regulation is necessary to ensure a corruption-free campaign funding process.

II. BACKGROUND AND HISTORY

This section examines the history of campaign finance law in the United States and the development of Bitcoin and other cryptocurrencies. The first subsection discusses early campaign finance laws pre-dating the Federal Election Campaign Act of 1971 (FECA). This Act was the first and most comprehensive attempt to create a regulatory scheme around campaign finance laws. The second subsection examines the effects of the Federal Election Campaign Act and the modern history of campaign finance laws. The third subsection discusses the invention of Bitcoin and the technology that allows cryptocurrencies to exist and function. The fourth subsection discusses ownership and how an individual can obtain cryptocurrency. Finally, the last subsection brings campaign finance laws and cryptocurrencies together and elaborates on the current state of crypto-contribution laws.

A. Pre-Federal Election Campaign Act of 1971 Laws and Regulations

Before FECA, there was almost one hundred years of legislation that sought stricter regulation of campaign financing.⁵ The goals of this legislation were to limit campaign contributions in order to prevent wealth from having a disproportionate influence on federal elections, limit campaign spending, require public disclosure of campaign finances, and prohibit certain contributions.⁶ The first of this legislation was a law passed in 1867 prohibiting federal officers from requesting contributions from navy yard workers.⁷ However, true reform began with the Tillman Act of 1907.⁸ The Tillman Act prohibited corporations and national banks from

⁵ See *The Federal Election Campaign Laws: A Short History*, FED. ELECTION COMM'N, <https://transition.fec.gov/info/appfour.htm> (last visited Apr. 28, 2020).

⁶ See *id.*

⁷ *Id.*

⁸ See *id.*

giving contributions to federal campaigns.⁹ The Publicity Act of 1910 soon followed, which created disclosure requirements for elections to the House of Representatives.¹⁰ The Publicity Act was amended in 1911 to cover all congressional elections by including the Senate, and it set spending limits for congressional candidates.¹¹

The Federal Corrupt Practices Act of 1925 restricted activity associated with general elections only,¹² imposing increased limits on campaign expenditures and strengthening disclosure requirements.¹³ The 1940 amendments to the Hatch Act gave Congress the right to regulate primary elections and included express provisions limiting contributions and expenditures for congressional elections.¹⁴ Lastly, the Taft-Hartley Act banned unions and corporations from making contributions or expenditures in federal elections.¹⁵ However, the 1940 amendments did not stifle the campaign corruption problems because their regulatory schemes were not comprehensive enough and did not provide an institutional framework to administer their provisions effectively.¹⁶ A major example of the inadequacy of these laws was a candidate's ability to avoid liability for violations based on spending made on their behalf by pleading ignorance of the violation.¹⁷ It was clear that a new comprehensive set of laws was needed to prevent issues such as this, which led to the passage of FECA in 1971.¹⁸

B. Post-Federal Election Campaign Act of 1971 Laws and Regulations

In 1971, Congress passed FECA, which replaced the Federal Corrupt Practices Act.¹⁹ FECA established a regulatory framework that applied to federal financing for primary elections, general elections, and conventions.²⁰ The goal was for this legislation to decrease political corruption by limiting campaign contributors' ability to influence the

⁹ *Id.*

¹⁰ *See id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ *See id.*

¹⁹ Gerard J. Clark & Steven B. Lichtman, *The Finger in the Dike: Campaign Finance Regulation After McConnell*, 39 SUFFOLK U. L. REV. 629, 630 (2006).

²⁰ *Id.*

political process.²¹ The Act included strict requirements such as mandatory disclosures of contributions in excess of one hundred dollars and expenditures in excess of one thousand dollars.²² FECA also set limits on the following: corporate and union spending on political action committees; campaign contributions from candidates and their families; and it placed ceilings on spending for media advertising.²³ In 1972, campaign spending reached \$425 million.²⁴ In 1974, Congress voted on amendments to FECA.²⁵ These amendments resulted in the creation of the FEC to act as the central regulatory body for federal elections.²⁶ The other long-lasting effect of these amendments was the creation of provisions related to public financing of presidential elections.²⁷

There were constitutional challenges to these amendments, however. Notably, these constitutional claims were heard by the Supreme Court in *Buckley v. Valeo*,²⁸ where Senator James Buckley and former Senator Eugene McCarthy challenged the constitutionality of the 1974 amendments to FECA.²⁹ This decision was monumental, and “was essentially the synthesized product of three decisions the Court made concerning the constitutional status of political money.”³⁰ First, the Court applied the most rigorous standard of First Amendment review to restrictions of campaign financing.³¹ Second, the Court split the legal definition of “political money” into two distinct categories—contributions and expenditures.³² Third, the Court chose to accept only specific justifications by the government for regulatory actions of campaign finance.³³ These three rulings were essential to the Court’s ultimate holding in *Buckley*—to uphold limits on campaign contributions and invalidate limitations on expenditures.³⁴ The Court justified the latter half of its ruling because it viewed limitations on

²¹ Michael W. Carroll, *When Congress Just Says No: Deterrence Theory and The Inadequate Enforcement of The Federal Election Campaign Act*, 84 GEO. L.J. 551, 553 (1996).

²² Clark & Lichtman, *supra* note 19, at 630.

²³ *Id.*

²⁴ *Id.* at 631.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *The Federal Election Campaign Laws: A Short History*, *supra* note 5.

²⁸ See Clark & Lichtman, *supra* note 19, at 632; *Buckley v. Valeo*, 424 U.S. 1 (1976).

²⁹ See Clark & Lichtman, *supra* note 19, at 632.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 633.

expenditures as limitations on speech, which violated the First Amendment.³⁵

The basis for the current codification of the restrictions on campaign contributions of foreign nationals came from the 1974 amendments to FECA.³⁶ Former Texas Senator Lloyd Bentsen led the charge to prohibit campaign contributions from foreign nationals, and his proposals passed as part of the 1974 amendments.³⁷ Justification for the 1974 amendments was to lower corruption from outside interference.³⁸ During the ratification process of the amendments, the late Senator stated: “I do not think foreign nationals have any business in our political campaigns. They cannot vote in our elections so why should we allow them to finance our elections? Their loyalties lie elsewhere”³⁹ In the years following enactment of the 1974 amendments, the Federal Election Commission went on to expand the restrictions against foreign nationals.⁴⁰ One of the more notable instances occurred in 1989, when the FEC stated that foreign nationals could no longer contribute to campaigns, nor could they make expenditures for a political campaign.⁴¹

Several decades after the enactment of FECA, new legislation was proposed to modify federal campaign laws: the Bipartisan Campaign Reform Act (BCRA).⁴² BCRA was written into law in 2002, and it introduced two primary changes to federal campaign finance laws.⁴³ The first major change expanded pre-existing limitations to cover contributions given to political parties.⁴⁴ The second major change restored the ban on corporate money—originally established by the Tillman Act—and restored the limits on union treasury expenditures—originally created by the Taft-Hartley Act.⁴⁵

³⁵ *Id.*

³⁶ Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 YALE L. & POL'Y REV. 503, 511 (1997).

³⁷ *Id.* at 510-11.

³⁸ *Id.* at 511.

³⁹ *Id.*

⁴⁰ *See id.* at 513.

⁴¹ *Id.* at 513 & n.48.

⁴² Clark & Lichtman, *supra* note 19, at 638.

⁴³ *Id.* This new legislation was enacted as a recourse against millions of dollars spent in soft money to elect specific party candidates. *Id.* Clark and Lichtman summarize this phenomenon with a quote from Anthony Corrado, a professor of government at Colby College and a scholar on campaign finance and the BCRA: “[S]uddenly the federal campaign finance system seemed to be awash in undisclosed money from sources that were supposed to be banned by the FECA.” *Id.* (citing Anthony Corrado, *The Legislative Odyssey of BCRA*, in LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 28 (Michael Malbin ed., 2003)).

⁴⁴ Clark & Lichtman, *supra* note 19, at 638.

⁴⁵ *Id.*

Title I of the BCRA regulates soft money, or money that is given to a political party and not to a candidate.⁴⁶ The soft money regulations limit contributions made to national parties by capping individual contributions at twenty-five thousand dollars.⁴⁷ There was a two thousand dollar limit on contributions made to individual candidates.⁴⁸ The FEC had to be notified of contributions and expenditures in excess of two hundred dollars.⁴⁹

Title II of BCRA imposes regulations on electioneering communications.⁵⁰ The statute defines electioneering communications as: (1) any communication through broadcast, cable, or satellite that refers to clearly identified candidate for Federal office;⁵¹ (2) made within sixty days before a general, special, or runoff election for the office sought by the candidate or thirty days of a primary, convention, or caucus of a political party that has authority to nominate a candidate;⁵² and (3) can be received and viewed by 50,000 persons or more.⁵³ Furthermore, BCRA allows corporations and unions to disperse monies from political action committees or separate segregated funds.⁵⁴

There have been two major Supreme Court cases challenging provisions of BCRA. In the first case, *McConnell v. FEC*, Senator Mitch McConnell challenged the constitutionality of the BCRA the day it was signed into law in 2002.⁵⁵ In *McConnell*, the soft money limits in Title I were justified by Congress' goal to prevent actual and apparent corruption.⁵⁶ The Court reasoned that soft money restrictions on state and local party committees were necessary to prevent circumventing strategies and that limits on expenditures were invalid.⁵⁷ In the second case, *Citizens United v. FEC*, the Supreme Court held that the BCRA's ban on corporate funded independent expenditures violated the First Amendment because free speech could not be suppressed on the basis of the speaker's identity as non-profit or for-profit.⁵⁸

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 638–39.

⁴⁹ *Id.* at 639.

⁵⁰ *Id.*

⁵¹ 52 U.S.C. § 30104(f)(3)(A)(i)(I) (2012).

⁵² *Id.* § 30104(f)(3)(A)(i)(II).

⁵³ *Id.* § 30104(f)(3)(C).

⁵⁴ Clark & Lichtman, *supra* note 19, at 639.

⁵⁵ *Id.* at 640.

⁵⁶ *See id.* at 641–42; *see also* *McConnell v. FEC*, 540 U.S. 93, 136 (2003).

⁵⁷ *McConnell*, 540 U.S. at 114.

⁵⁸ *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

C. What are Bitcoin and Other Cryptocurrencies?

Bitcoin is an entirely electronic cash source that is decentralized from any central authority.⁵⁹ Bitcoin consists of the Bitcoin Network and the Bitcoin token that is used throughout the network.⁶⁰ Traditional currency issued by a government is based on a central authority, such as a national bank.⁶¹ In lieu of a central authority, Bitcoin uses the network of users and technology to deal with issues of currency creation, or the settlement and validation of transactions.⁶² Bitcoin was created by Satoshi Nakamoto when he published his white paper in late 2008 describing the technology that enables Bitcoin to exist in such a decentralized state.⁶³ As of March 2015, fourteen million bitcoins were in circulation, with a total dollar value of \$3.5 billion.⁶⁴ Bitcoin is not the first attempt at a digital currency, however.⁶⁵ Others have been developed as far back as the late 1980s.⁶⁶ These early attempts to create a digital currency eventually became heavily regulated because they were centralized.⁶⁷ The currency was also usually backed by a government currency or another store of value, such as gold.⁶⁸ These currencies failed due to extensive litigation and crashes when the parent company liquidated its holdings.⁶⁹

Bitcoin has avoided these problems because it is based on technology designed to be completely decentralized.⁷⁰ Decentralization eliminates the need for a central clearing house to settle all transactions, which was something that previous digital currencies required.⁷¹ Bitcoin remains completely autonomous of a central bank or authority by using a system based on cryptographic proof instead of trust.⁷² Cryptographic proof comes from a validation of transactions by Bitcoin miners.⁷³ These validations are

⁵⁹ See generally ANDREAS M. ANTONOPOULOS, *MASTERING BITCOIN: PROGRAMMING THE OPEN BLOCKCHAIN* 3 (2d ed. 2017).

⁶⁰ *Id.* at 1.

⁶¹ *Id.*

⁶² *Id.* at 3.

⁶³ See *id.* at 4 (citing SATOSHI NAKAMOTO, *BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM* (2008)).

⁶⁴ Rainer Böhme et al., *Bitcoin: Economics, Technology, and Governance*, 29 *J. ECON. PERSP.* 213, 214 (2015).

⁶⁵ See ANTONOPOULOS, *supra* note 59, at 3.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² NAKAMOTO, *supra* note 63, at 1.

⁷³ Böhme et al., *supra* note 64, at 217.

referred to as “proof of work.”⁷⁴ The idea behind proof of work is that in order to avoid a central authority overseeing all transactions, the public users must validate the transactions themselves.⁷⁵

Proof of work is achieved through a public ledger that is published to the network for all to see.⁷⁶ The transactions on the ledger are grouped together in a block every ten minutes.⁷⁷ Once the transactions are grouped, users on the network can validate the transactions by solving an algorithm that is associated with that block.⁷⁸ These algorithms are very computer intensive and can be incredibly difficult to solve.⁷⁹ Once the algorithm is solved, the user publishes the block to the network for all to see. It contains a proof of work that the algorithm was solved, all observed transactions are recorded, and a reference to the previous block is attached.⁸⁰ Once published, the block links to others, creating a block chain that shows the history of all transactions and shows that the network has universally agreed to the history of the transactions.⁸¹ This verification process is called mining, and users who lend their computer to verifying and solving the algorithms are referred to as Bitcoin miners.⁸²

There are hundreds of cryptocurrencies available for purchase today.⁸³ However, not all of these coins are meant to be used as mediums of exchange in the same way Bitcoin is designed to be. Many of these are introduced to the public in the form of an initial coin offering (ICO).⁸⁴ An ICO acts as a type of crowd-funding for startup companies and projects.⁸⁵ The introduction of these coins is very similar to the way a company may go public and sell stock through an initial public offering.⁸⁶ The tokens these companies sell are compatible with their technology or software that is at the heart of the company, allowing buyers to access the technology.⁸⁷ Once issued, the tokens can be sold on exchanges like any other

⁷⁴ NAKAMOTO, *supra* note 63, at 3.

⁷⁵ *Id.*

⁷⁶ Böhme et al., *supra* note 64, at 216–17.

⁷⁷ *Id.* at 217.

⁷⁸ *Id.*

⁷⁹ *Id.* at 218.

⁸⁰ *Id.* at 217.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See generally Nathaniel Popper, *An Explanation of Initial Coin Offerings*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/technology/what-is-an-initial-coin-offering.html>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

cryptocurrency.⁸⁸ These “practical use case” cryptocurrencies are fairly common.⁸⁹ Some examples include Factom, an attempt to create a decentralized notary technology; Sia, an attempt to solve cloud storage logistics; and XRP (the Ripple Network), a cryptocurrency made specifically for quicker bank-to-bank transfers.⁹⁰

D. Ownership and Usage of Bitcoin

An individual can obtain Bitcoin in two ways: through a transfer or transaction, or by being granted the rewards for mining the coin.⁹¹ Creating an account to purchase Bitcoin is free, minimally regulated, and does not require you to provide a real name.⁹² Once an account is made, Bitcoin can be purchased, sold, or exchanged at specialized exchanges for currency—whether that is a government currency or a different cryptocurrency.⁹³ Being a miner—someone who validates the blockchain and transactions—carries the incentive of being rewarded Bitcoin.⁹⁴ This is how new bitcoins are created and ultimately added into circulation.⁹⁵ When someone purchases Bitcoin, it is stored in a “wallet.”⁹⁶ Wallets are files that store account information, recorded transactions, and the personal private key needed to spend or transfer bitcoins.⁹⁷ The personal private key is a system that allows for proof that bitcoins were sent by one party and received by another.⁹⁸ Bitcoin transactions are irreversible.⁹⁹ Bitcoin’s price fluctuates like many other currencies with a floating exchange rate,¹⁰⁰ and its value fluctuates according to supply and demand in the markets it is traded in.¹⁰¹

Bitcoin has gained popularity for its ability to be pseudo-anonymous.¹⁰² However, this anonymity has also attracted individuals and enterprises that

⁸⁸ *Id.*

⁸⁹ See *What is Cryptocurrency? The Practical Use Cases of Cryptocurrency*, COINDIRECT (Sept. 7, 2018), <https://blog.coindirect.com/what-is-cryptocurrency-the-practical-use-cases-of-cryptocurrency/>.

⁹⁰ See Sudhir Khatwani, *Top 10 Cryptocurrencies with Practical Use Cases*, COINSUTRA, <https://coinsutra.com/cryptocurrencies-practical-usecases/> (last updated Oct. 13, 2018).

⁹¹ ANTONOPOULOS, *supra* note 59, at 9, 177.

⁹² Böhme et al., *supra* note 64, at 214.

⁹³ *Id.* at 220.

⁹⁴ See ANTONOPOULOS, *supra* note 59, at 214.

⁹⁵ See Böhme et al., *supra* note 64, at 218.

⁹⁶ See ANTONOPOULOS, *supra* note 59, at 9–10.

⁹⁷ Böhme et al., *supra* note 64, at 220.

⁹⁸ *Id.* at 216.

⁹⁹ *Id.* at 213.

¹⁰⁰ ANTONOPOULOS, *supra* note 59, at 12.

¹⁰¹ *Id.*

¹⁰² See Mauro Conti et al., *A Survey on Security and Privacy Issues of Bitcoin*, 20 IEEE COMM.

are involved in criminal activity.¹⁰³ The Silk Road—one of the largest black-market retail sites on the internet before being shut down in 2013—was a site where vendors commonly accepted Bitcoin as their preferred currency.¹⁰⁴ Although technically anything could be bought on the Silk Road, illegal drugs were most popular.¹⁰⁵ The government examined thirty months of data in a case against the creator of the Silk Road, Ross Ulbricht.¹⁰⁶ This evidence revealed that 9.9 million bitcoins were used in transactions on the site.¹⁰⁷ Accounting for the varying exchange rates, this corresponded to a value of \$214 million dollars in 2013—the price would be much higher now.¹⁰⁸ Other unethical uses of bitcoin have occurred in gambling and to avoid international capital controls in foreign countries.¹⁰⁹

In recent years, the most prominent uses of Bitcoin have been in consumer payments and investment strategies.¹¹⁰ In terms of consumer usage, many view Bitcoin as an alternative to debit and credit card networks.¹¹¹ This could mean that fees associated with these networks will be lowered.¹¹² This is especially advantageous for smaller businesses because it lowers their operating costs.¹¹³ Fees associated with accepting Bitcoin as payment are very small—usually around one percent at the most after passing an earnings threshold.¹¹⁴ Many other people buy and trade Bitcoin in the same way someone might trade a stock or commodity that is similar to gold or other precious metals.¹¹⁵ Owners of tokens created from ICOs view the tokens as investments under the belief that once a company's project or goal comes to fruition, the value of the token will increase due to demand.¹¹⁶

Bitcoin and other cryptocurrencies have very volatile price valuations that fluctuate on a whim.¹¹⁷ This can be seen in the drastic price increases

SURV. & TUTORIALS 3416, 3444 (2018).

¹⁰³ *Id.* at 3424.

¹⁰⁴ Böhme et al., *supra* note 64, at 222.

¹⁰⁵ *See id.* at 222–23.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 223.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.* at 223–24.

¹¹⁰ *Id.* at 224–25.

¹¹¹ *See id.* at 224.

¹¹² *See id.*

¹¹³ *See id.*

¹¹⁴ *Id.*

¹¹⁵ *See* Wenjun Feng et al., *Informed Trading in the Bitcoin Market*, FIN. RES. LETTERS, Sept. 2018, at 63, 64 (2018).

¹¹⁶ *See* Popper, *supra* note 83.

¹¹⁷ *See generally* Feng et al., *supra* note 115.

and falls at the end of 2017 and early 2018.¹¹⁸ In December of 2017, the price of a single Bitcoin surpassed twenty thousand dollars.¹¹⁹ In January, it was less than half of that.¹²⁰ Longer-term investors aside, many people buy Bitcoin and other cryptocurrencies because of this volatility and use it to their financial gain through trading.¹²¹

E. Where Cryptocurrency and Campaign Finance Meet

The American public is not unfamiliar with impropriety in political campaigns. The 2016 presidential election was marred by scandals among political candidates and foreign governments.¹²² For example, former President Bill Clinton's election was tainted by the foreign contribution scandal involving former Democratic Chair John Huang.¹²³ Without careful regulation, cryptocurrency threatens to aid in election impropriety as well. The FEC has allowed cryptocurrency donations in federal elections since an advisory opinion was published in 2014, which concluded that campaigns "may accept bitcoin contributions[,] . . . purchase bitcoins with funds from its campaign depository for investment purposes[,] but [the campaign] may not make disbursements using those purchased bitcoins."¹²⁴ Since then, many states have allowed this type of political contribution in their elections as well.¹²⁵ However, because cryptocurrency is so new, and there are so few laws specifically addressing cryptocurrency contributions, it has created a grey area in campaign finance law. This grey area allows for a perceivable threat that current campaign finance laws may be circumvented through this new technology. New laws and regulations must bring

¹¹⁸ See Jonathan Berr, *Winklevoss Twins Become First "Bitcoin Billionaires,"* CBS MONEYWATCH (Dec. 4, 2017, 5:17 PM), <https://www.cbsnews.com/news/winklevoss-twins-bitcoin-billionaires-investment-price-surges/>.

¹¹⁹ See *id.*

¹²⁰ See Frances Coppola, *Bitcoin's Bubble is Bursting. How Long Will Prices Fall?*, FORBES (Mar. 20, 2018, 2:02 PM), <https://www.forbes.com/sites/francescoppola/2018/03/20/bitcoins-bubble-is-bursting-how-low-will-prices-fall/#1807cc80724e>.

¹²¹ Feng et al., *supra* note 115, at 68.

¹²² See generally Matthew Nussbaum, *The Definitive Trump-Russia Timeline of Events*, POLITICO, (Mar. 3, 2017, 7:30 PM), <https://www.politico.com/trump-russia-ties-scandal-guide/timeline-of-events>.

¹²³ See generally Thomas B. Edsall & Edward Walsh, *FEC Issues Record Fines in Democrats' Scandals*, THE WASH. POST (Sept. 21, 2002), https://www.washingtonpost.com/archive/politics/2002/09/21/fec-issues-record-fines-in-democrats-scandals/2d2ed242-98e1-40a8-8574-caef4b7570e3/?noredirect=on&utm_term=.a00f6d6cbdad.

¹²⁴ FEC Advisory Op. 2014-02 (May 8, 2014), <https://www.fec.gov/files/legal/aos/2014-02/2014-02.pdf>.

¹²⁵ See, e.g., *infra* notes 136, 144–49 and accompanying text.

campaign finance laws into the 21st century to ensure fair elections and safeguard faith in the political process.

III. ANALYSIS

When creating a cryptocurrency-specific regulatory scheme, there are issues that must be addressed in order to create a uniform statute. There must be a consensus on whether cryptocurrency is a monetary contribution or an in-kind contribution; how cryptocurrency will be valued as a contribution; if Bitcoin should be the only accepted cryptocurrency by political campaigns; and how campaigns will store their contributions before expenditures can be made. This analysis examines the various views of these key issues.

A. Cryptocurrency is an In-kind Contribution

Regulatory schemes for contributions will generally classify them as a specific type of contribution. A campaign contribution is defined by the Federal Election Campaign Reform Act of 1971 as “[a] gift, subscription, loan (except for a loan made in accordance with 11 C.F.R. § 100.82 and § 100.83), advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”¹²⁶ This statutory provision has specific sections that concern two main contribution types: direct monetary contributions and in-kind contributions.¹²⁷ In-kind contributions are defined as “any goods or services.”¹²⁸ Goods or services may include securities, the use of facilities, equipment, supplies, and personnel.¹²⁹ Money is defined as “currency of the United States or of any foreign nation,”¹³⁰ which includes “checks, money orders or other negotiable instruments payable on demand.”¹³¹

Cryptocurrency can fit into either of these two definitions, ultimately creating a problem of how much cryptocurrency can be donated to campaigns since these two types of contributions are subject to different monetary limits.¹³² Cryptocurrency should be viewed as an in-kind contribution. This conclusion is based on multiple campaign specific

¹²⁶ 11 C.F.R. § 100.52(a) (2020).

¹²⁷ *See id.* § 100.52(c)–(d).

¹²⁸ *Id.* § 100.52(d).

¹²⁹ *See id.* § 100.52(d)(1).

¹³⁰ *Id.* § 100.52(c).

¹³¹ *Id.*

¹³² *Compare* §§ 100.82–83, *with* § 100.52.

regulations and advisory opinions calling for this categorization, current case law, and specific examples of how the government treats cryptocurrencies as assets and not a form of money.

1. Campaign-Specific Regulations and Advisory Opinions

Cryptocurrency is treated as an in-kind contribution by many state election guidelines and statutes. In 2018, the Secretary of State of Oregon codified revisions to their Campaign Finance Manual to include cryptocurrency as an in-kind contribution, which is treated almost identically to how stocks are to be treated by Oregon's political campaigns.¹³³ The new rules apply to cryptocurrency under the same contribution rules as stock contributions.¹³⁴ This includes reporting liquidation as well as gains or losses on the value of the stock or cryptocurrency.¹³⁵ A 2014 advisory opinion out of Montana stated that once a contribution of Bitcoin has been accepted, its liquidated value is to be reported as an in-kind contribution.¹³⁶ Similarly, Washington, D.C.'s local election commission allows contributions in the form of Bitcoin, and classifies them as in-kind contributions.¹³⁷ The FEC treats cryptocurrency as an in-kind contribution as well.¹³⁸ While Washington, D.C. does not expand on more than just the procedure of reporting, the FEC opinion gives more details and reasoning for the in-kind classification.¹³⁹ In an advisory opinion to a political committee, the FEC claims that the contributions should be reported as in-kind due to the shared characteristics of Bitcoin and contributions that fall under 11 C.F.R. § 104.13(a)–(b), which deals with the disclosure of in-kind contributions.¹⁴⁰

Despite the FEC's opinion, some states have begun to view cryptocurrency as a form of money by expanding their statutory definitions

¹³³ See OR. SEC'Y OF STATE ELECTIONS DIV., 2018 CAMPAIGN FINANCE MANUAL (2018).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Op. Comm'r of Political Practices COPP-2014-AO-001 (2014), <https://politicalpractices.mt.gov/Portals/144/5campaignfinance/EricFultonBitcoinUseOpinion.pdf> (administrative advisory opinion by Montana Commissioner Jonathan Motl explaining that "Montana law does not allow a candidate to maintain a bitcoin wallet for accumulation of resources and to pay for services... [However,] Montana law does allow acceptance of a bitcoin contribution by a campaign . . .").

¹³⁷ D.C. Mun. Regs. tit. 3, § 3-3008.9(a) (LEXIS through D.C. Register, Vol. 67, Issue 5, Jan. 31, 2020).

¹³⁸ See FEC Advisory Op. 2014-02, *supra* note 124, at 5.

¹³⁹ See *id.*

¹⁴⁰ *Id.*

of currency to include them.¹⁴¹ Tennessee created a provision in its campaign finance laws to allow “digital currencies as a contribution”¹⁴² and it considers digital currency to be a “monetary contribution.”¹⁴³ The State of Colorado has recently made new rules governing cryptocurrency’s use in elections.¹⁴⁴ The new provisions add a section stating that cryptocurrency is to be treated as a cash or coin contribution, and is subject to the campaign contribution limits attached to this classification.¹⁴⁵ Vermont has revised its monetary transmission regulations to include virtual currencies.¹⁴⁶ While there are statutes and advisory opinions supporting this designation, case law and jurisdictional control give greater weight to the idea that cryptocurrency is more attributable to an in-kind contribution as opposed to monetary.

2. Cryptocurrency Case Law

There is limited case law regarding how cryptocurrency should be viewed in the eyes of the government, and what government bodies have regulatory authority over it. The most relevant case is *CFTC v. McDonnell*.¹⁴⁷ There, a federal district court discussed cryptocurrency and which government agency had jurisdiction.¹⁴⁸ One of the main sections of the court’s opinion looked to what government agency or body had jurisdiction to regulate and oversee cryptocurrencies.¹⁴⁹ This discussion stemmed from a lack of clear comprehensive regulation on the matter and the need to identify the appropriate governing body.¹⁵⁰ The court mentioned various governing bodies that had jurisdictional power to regulate in this area.¹⁵¹ Among those mentioned were the Commodity Futures Trading Commission (CFTC), the Securities and Exchange Commission (SEC), the Treasury Department’s Financial Enforcement Network (FinCEN), and the Internal Revenue Service (IRS).¹⁵²

¹⁴¹ See, e.g., TENN. CODE ANN. § 2-10-113 (LEXIS through Ch. 517 of the 2020 Reg. Sess.); 8 COLO. CODE REGS. § 1505-6(10.7) (LEXIS through all regulations in effect as of Apr. 25, 2020).

¹⁴² TENN. CODE ANN. § 2-10-113.

¹⁴³ *Id.*

¹⁴⁴ See 8 COLO. CODE REGS. § 1505-6(10.7).

¹⁴⁵ *Id.*

¹⁴⁶ VT. STAT. ANN. tit. 8, § 2500(22) (LEXIS through Act 85 of the 2019 Regular Session).

¹⁴⁷ *CFTC v. McDonnell*, 287 F. Supp. 3d 213 (E.D.N.Y. 2018).

¹⁴⁸ *Id.* at 220.

¹⁴⁹ *Id.* at 220–23.

¹⁵⁰ *Id.* at 220.

¹⁵¹ *Id.* at 220–21.

¹⁵² *Id.* at 221.

The court ultimately ruled that virtual currency falls under the definition of a commodity under 7 U.S.C. § 1a(9).¹⁵³ This statute states that commodities are “wheat, cotton, rice . . . and all other goods and articles . . . and all services, rights and interests . . . in which contracts for future delivery are presently or in the future dealt in.”¹⁵⁴ The court reiterated the holding of *Andres v. Blick Art Materials, LLC*, which stated that the Commodity Exchange Act—the CFTC’s enabling statutory framework—covers intangible commodities.¹⁵⁵ Therefore, the CFTC has the authority to regulate virtual currencies.¹⁵⁶ By holding that the CFTC has regulatory authority over cryptocurrency, and that cryptocurrency meets the definition of a commodity, the court effectively declared that cryptocurrency is more like a good or asset as opposed to money or currency.

3. Government Treatment of Cryptocurrency

Other government regulations of cryptocurrency lend evidence to the classification of cryptocurrency as an asset, not as cash or currency. One example of government treatment of cryptocurrency occurred in September 2015, when the CFTC asserted its jurisdiction over cryptocurrency in an order against Coinflip, Inc.—a corporation that conducted activity that was related to commodity options in the form of cryptocurrency.¹⁵⁷ In its order, the CFTC stated that “Bitcoin and other virtual currencies are encompassed in the definition [of commodity] and properly defined as commodities.”¹⁵⁸ This aligns more with the concept that cryptocurrency is an asset and is less like cash or currency. Since then, the CFTC has prosecuted many individuals for violations related to cryptocurrency.¹⁵⁹

Another example of government treatment is that the SEC has been active in regulating ICOs, though less involved with Bitcoin.¹⁶⁰ The SEC applies the Howey Test when determining if an asset meets the definition of a security.¹⁶¹ In the landmark case *SEC v. W.J. Howey Co.*, the Court

¹⁵³ *Id.* at 217.

¹⁵⁴ *Id.* at 225.

¹⁵⁵ *Id.* (citing *Andres v. Blick Art Materials, LLC*, 268 F. Supp. 2d 381, 395–96 (E.D.N.Y. 2017)).

¹⁵⁶ *Id.* at 226.

¹⁵⁷ *In re Coinflip, Inc.*, CFTC No. 15-29, 2015 WL 5535736 (Sept. 17, 2015).

¹⁵⁸ *Id.* at *3.

¹⁵⁹ See Michelle Price, *U.S. CFTC Sues Three Virtual Currency Operators for Fraud*, REUTERS (Jan. 19, 2018, 8:45 AM), <https://www.reuters.com/article/us-usa-cftc-bitcoin/u-s-cftc-sues-three-virtual-currency-operators-for-fraud-idUSKBN1F81K9>.

¹⁶⁰ See generally J. Scott Colesanti, *Trotting Out the White Horse: How the S.E.C. Can Handle Bitcoin's Threat to American Investors*, 65 SYRACUSE L. REV. 1 (2014).

¹⁶¹ See *id.* at 27–30.

defined a “security” as an investment contract.¹⁶² An investment contract is an investment of money in a common enterprise with profits deriving solely from the efforts of others.¹⁶³ Jay Clayton, Chairman of the SEC, stated that all initial coin offerings are securities, and that the SEC will not be adjusting rules or exceptions for cryptocurrency.¹⁶⁴ William Hinman, Head of Corporate Finance at the SEC, explained that Bitcoin is not included in the definition of a security because it is decentralized, meaning that there is no central party influencing the enterprise.¹⁶⁵

Additionally, the IRS treats virtual currency as property.¹⁶⁶ Therefore, tax principles used for property transactions also apply to virtual currencies.¹⁶⁷ The IRS expands on this by stating that virtual currency is not treated as currency under current law and that any gains from the trading of virtual currency is subject to capital gains tax laws.¹⁶⁸ A final example comes from the Financial Crimes Enforcement Network, which defines 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.”¹⁶⁹ Virtual currency was intentionally excluded from this definition, and is defined separately as “a medium of exchange that operates like a currency in some environments but does not have all the attributes of real currency.”¹⁷⁰

The government may not have one agency that possesses sole jurisdiction over cryptocurrency, but cryptocurrency is instead covered thoroughly by multiple agencies. Bitcoin and other decentralized currencies are covered by the CFTC, other cryptocurrencies that are created through initial coin offerings are covered by the SEC, the IRS treats and taxes cryptocurrency as real property and not money, and the Department of the

¹⁶² SEC v. W. J. Howey Co., 66 S. Ct. 1100, 1104 (1946).

¹⁶³ *Id.*

¹⁶⁴ Kate Rooney, *SEC Chief Says Agency Won't Change Securities Laws to Cater to Cryptocurrencies*, CNBC (Jun. 6, 2018, 10:45 AM), <https://www.cnbc.com/2018/06/06/sec-chairman-clayton-says-agency-wont-change-definition-of-a-security.html>.

¹⁶⁵ Bob Pisani, *Bitcoin and Ether Are Not Securities, but Some Initial Coin Offerings May Be*, SEC Official Says, CNBC (Jun. 14, 2018, 12:27 PM), <https://www.cnbc.com/2018/06/14/bitcoin-and-ethereum-are-not-securities-but-some-cryptocurrencies-may-be-sec-official-says.html>.

¹⁶⁶ See I.R.S. Notice 2014-21, § 4, at A-1 (Mar. 25, 2014).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* § 4, at A-2.

¹⁶⁹ DEP'T OF THE TREASURY: FIN. CRIMES ENF'T NETWORK, FIN-2013-G001, APPLICATION OF FINCEN'S REGULATIONS TO PERSONS ADMINISTERING, EXCHANGING, OR USING VIRTUAL CURRENCIES 1 (2013), <https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf>.

¹⁷⁰ *Id.*

Treasury's FinCEN does not classify cryptocurrency in its definition of currency.

B. Political Campaigns Should Only Accept Bitcoin

As mentioned earlier, there are hundreds of different cryptocurrencies available to be purchased and transferred among individuals.¹⁷¹ Some of these cryptocurrencies are meant to be mediums of exchange while others have specific practical purposes.¹⁷² Political campaigns should only be allowed to accept Bitcoin due to the fact that most states only accept Bitcoin, or have explicitly discussed only accepting Bitcoin because of the increased burden of tracking so many cryptocurrencies while also trying to maintain transparency in the political process.

Some electoral bodies only allow for contributions in Bitcoin, or only discuss whether Bitcoin—and not other types of cryptocurrency—is acceptable as a contribution.¹⁷³ Montana's Commissioner of Political Practices published an advisory opinion that only addressed whether a campaign may accept Bitcoin.¹⁷⁴ The opinion does not expand on whether other cryptocurrencies may be accepted or not.¹⁷⁵ This is a similar approach to how the FEC addressed Bitcoin contributions in its opinion.¹⁷⁶ In this opinion, there was no mention of other cryptocurrencies being acceptable, and the question posed to the committee was only on the permissibility of a Bitcoin contribution.¹⁷⁷ Similarly, Washington, D.C.'s election rules specifically allow for Bitcoin contributions.¹⁷⁸

Aside from legal precedent, there is also a tracking feasibility argument that supports prohibiting all kinds of cryptocurrencies from being used in the political process.¹⁷⁹ Compared to other cryptocurrencies, Bitcoin is easier to track because of its prevalence and wider usage.¹⁸⁰ The open-source ledger component of Bitcoin also allows governing bodies to track contributions by analyzing the blockchain data used in the contribution.¹⁸¹

¹⁷¹ Khatwani, *supra* note 90.

¹⁷² *Id.*

¹⁷³ See, e.g., Op. Comm'r of Political Practices COPP-2014-AO-001, *supra* note 136.

¹⁷⁴ *Id.* at 2.

¹⁷⁵ *Id.*

¹⁷⁶ See FEC Advisory Op. 2014-02, *supra* note 124.

¹⁷⁷ See *id.* at 2.

¹⁷⁸ D.C. CODE MUN. REGS. tit. 3 § 3008.9 (LEXIS through D.C. Register, Vol. 67, Issue 5, Jan. 31, 2020).

¹⁷⁹ See Conti et al., *supra* note 102, at 3425–26.

¹⁸⁰ See *id.*

¹⁸¹ *Id.*

Other research has shown that analyzing certain data—such as clustering and flows of transactions—can be an effective way to track the owner of transactions.¹⁸² While Bitcoin and some other cryptocurrencies are designed to give the public full transparency, others are designed to be more anonymous, making them incompatible with the public policy goals of campaign finance laws. Two of these cryptocurrencies are Monero and Zcash.¹⁸³ Monero is a type of cryptocurrency made specifically to address the lack of anonymity in Bitcoin.¹⁸⁴ Zcash is a cryptocurrency that uses the same payment scheme as Bitcoin, but adds a layer of shielding to keep identities anonymous.¹⁸⁵ These types of cryptocurrency pose a potential threat to the political process and should not be allowed into it. Therefore, to avoid these threats, Bitcoin should be the only cryptocurrency allowed in the political process.

C. Cryptocurrency Should be Valued at Time of Receipt

A common trait among Bitcoin and other cryptocurrencies is their extreme volatility, meaning their prices change often and drastically over a short period of time.¹⁸⁶ This extreme volatility has led to inconsistencies in valuation because states and the federal government differ in the ways they report the value of the asset received. To solve this problem, a crypto-contribution should be valued at the time of its receipt, and at the current fair market value of the asset.

Beginning with the states, Tennessee gives specifics on reporting the value of the digital currency at the time the contribution is received.¹⁸⁷ Any increase in value from when the currency is received to the moment of its exchange to legal tender must be reported as interest.¹⁸⁸ Montana has similar rules.¹⁸⁹ Its Commissioner of Political Practices, Jonathon R. Motl, stated in an advisory opinion on cryptocurrency contributions that a contribution of Bitcoin must be “valued and converted to U.S. Dollars or used to purchase some service or product . . . upon receipt.”¹⁹⁰ Motl goes on to explain that the purpose of this rule is to provide a definitive value of the contribution for disclosure in accordance with state campaign finance

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ NICOLAS VAN SABERHAGEN, CRYPTONOTE V. 2.0, 1 (2013).

¹⁸⁵ DAIRA HOPWOOD ET AL., ZCASH PROTOCOL SPECIFICATION, 7 (Ver. 2020.1.2 2020).

¹⁸⁶ See Berr, *supra* note 118.

¹⁸⁷ TENN. CODE ANN. § 2-10-113(a) (LEXIS through Ch. 517 of the 2020 Reg. Sess.).

¹⁸⁸ *Id.* § 2-10-113(b).

¹⁸⁹ Op. Comm’r of Political Practices COPP-2014-AO-001, *supra* note 136, at 2.

¹⁹⁰ *Id.*

laws.¹⁹¹ The new rules in Colorado regarding cryptocurrency contributions fall in line with the other state opinions and statutes, stating that the value of the contribution is based on the value of the cryptocurrency at the time of receipt.¹⁹² Under the Washington, D.C. election rules, Bitcoin contributions are reported as received according to the date the contribution is exchanged or liquidated into U.S. Dollars.¹⁹³ Oregon recently made changes to its campaign finance manual that now states cryptocurrency contributions should be reported in the same way stocks are to be reported—the market value on the day of receipt.¹⁹⁴

The FEC has stated similar guidelines for reporting, but explains the process and reasoning in more depth than the state opinions and guidelines provided. The FEC guidelines state that a contribution should be valued based on the market value of the Bitcoin at the time the contribution is received.¹⁹⁵ This reasoning is based on 11 C.F.R § 104.13(a), the reporting statute for in-kind contributions.¹⁹⁶ The FEC also outlines the process a political campaign should use to determine market value.¹⁹⁷ To determine market value, a political campaign should use the exchange rate provided from the “processor” of the contribution.¹⁹⁸ If there is no exchange rate, the campaign should value the contribution using another exchange with a reasonable exchange rate.¹⁹⁹ An exchange rate is reasonable if it is a “publicly available rate of bitcoins traded for dollars on a high-volume public bitcoin exchange that is open to transactions within the United States.”²⁰⁰ Considering that almost all advisory opinions, election guidelines, and statutes are unanimous on the issue of cryptocurrency as an asset, Bitcoin and other cryptocurrencies should be reported at the time they are received and valued based on their fair market value at the time of receipt.

¹⁹¹ *Id.*

¹⁹² 8 COLO. CODE REGS. § 1505-6(10.7) (LEXIS through all regulations in effect as of Apr. 25, 2020).

¹⁹³ D.C. CODE MUN. REGS. tit. 3 § 3008.10(b) (LEXIS through D.C. Register, Vol. 67, Issue 5, Jan. 31, 2020).

¹⁹⁴ OR. SEC’Y OF STATE ELECTIONS DIV., *supra* note 133, at 29.

¹⁹⁵ FEC Advisory Op. 2014-02, *supra* note 124, at 6.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 7.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

D. *Crypto-Contributions Should be Liquidated Immediately*

To ensure that political campaigns use the exact amount of contribution being donated to them, they should liquidate their cryptocurrency contributions immediately upon receipt. Currently, jurisdictions have different approaches to keeping accounts of campaign contributions made with cryptocurrency. In Tennessee, cryptocurrency received as a contribution cannot be stored in a coin wallet; it must be liquidated and then deposited into a campaign account.²⁰¹ Montana requires that the money be put into a campaign depository upon liquidation of the contributions.²⁰² Washington, D.C. and Colorado have no specifications with regard to storing contributions in a cryptocurrency coin wallet or liquidating them and putting them in a depository account.²⁰³

The FEC states that normally, campaign contributions are subject to 11 C.F.R. § 103.3(b), which provides that within ten days of receipt of a contribution, the treasurer of a committee must deposit the contribution into a campaign depository or return the contribution.²⁰⁴ This means it must be deposited specifically into a state bank, a federally chartered depository institution, or a depository institution which is insured by certain federal agencies.²⁰⁵ Bitcoin is an exception, however, since it is treated more like a stock or other security. A committee may receive and hold Bitcoin contributions in a Bitcoin wallet for longer than ten days until the committee decides to liquidate them.²⁰⁶

The FEC's opinion on allowing campaigns to hold on to Bitcoin for more than ten days seems to show disregard for the previously mentioned volatility of cryptocurrency.²⁰⁷ Cryptocurrency, including Bitcoin, are considered volatile when compared to traditional asset markets, and contributions should be liquidated upon receipt in order to prevent donors from using volatility as a tool to circumvent campaign finance laws.²⁰⁸ Because the cryptocurrency market, in general, is volatile due to its relative newness, and federal organizations (like the FEC) have yet to offer an

²⁰¹ TENN. CODE ANN. § 2-10-113(c) (LEXIS through Ch. 517 of the 2020 Reg. Sess.).

²⁰² Op. Comm'r of Political Practices COPP-2014-AO-001, *supra* note 136, at 2.

²⁰³ See generally D.C. CODE MUN. REGS. tit. 3 § 3008.10 (LEXIS through D.C. Register, Vol. 67, Issue 5, Jan. 31, 2020); see also 8 COLO. CODE REGS. § 1505-6(10.7) (LEXIS through all regulations in effect as of Apr. 25, 2020).

²⁰⁴ FEC Advisory Op. 2014-02, *supra* note 124, at 4–6.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See *id.*

²⁰⁸ Brenton Garen, *Among Cryptos, Bitcoin Isn't the Most Volatile*, ETF TRENDS (Jun. 29, 2018), <https://www.etftrends.com/among-cryptos-bitcoin-isnt-the-most-volatile/>.

adequate solution,²⁰⁹ policy decisions on this topic should follow the path forged by state rules and opinions.

IV. RESOLUTION

The late Supreme Court justice Louis D. Brandeis called for states to be laboratories of democracy and to try novel and innovative ideas.²¹⁰ These courageous states may find solutions to problems, and the federal government may benefit from those solutions. The following model statute follows this view of legislative creation. It takes the innovative ideas various states have used in their regulatory schemes of cryptocurrency contributions and creates a unified statute that may be applicable to the already existing federal and state campaign finance laws.

A. Defining the Contribution

1. Model Statute

(A) Candidates, political campaign committees, and political action committees may accept cryptocurrency contributions in the form of Bitcoin (BTC).²¹¹ Other cryptocurrencies may not be accepted as contributions.

(B) Cryptocurrency contributions shall be considered “in-kind” contributions and subject to contributions limits currently in place for in-kind contributions.²¹²

2. Reasoning for Statutory Language

Limiting cryptocurrency contributions to Bitcoin is a crucial provision for a successful regulatory statute.²¹³ Requiring Bitcoin to be the only medium for this type of contribution is done for numerous reasons. Firstly, multiple state rules for accepting cryptocurrency only allow for the

²⁰⁹ *See id.*

²¹⁰ *Top of Form* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). *Bottom of Form*

²¹¹ *See* FEC Advisory Op. 2014-02, *supra* note 124; D.C. CODE MUN. REGS. tit. 3 § 3008.10(a) (LEXIS through D.C. Register, Vol. 67, Issue 5, Jan. 31, 2020); Op. Comm’r of Political Practices COPP-2014-AO-001, *supra* note 136, at 2.

²¹² *See* FEC Advisory Op. 2014-02, *supra* note 124; D.C. CODE MUN. REGS. tit. 3 § 3008.10(a); Op. Comm’r of Political Practices COPP-2014-AO-001, *supra* note 136, at 2.; OR. SEC’Y OF STATE ELECTIONS DIV., *supra* note 133, at 29.

²¹³ *See supra* notes 183–85 (discussing the design of specific cryptocurrencies and their ability to be transferred anonymously).

acceptance of Bitcoin.²¹⁴ The Federal Election Committee has the same requirement as well.²¹⁵ Secondly, Bitcoin is the most widely used, implemented, and recognizable cryptocurrency in existence.²¹⁶ It also is the largest in terms of market capitalization value.²¹⁷ Lastly, this provision acts as a safeguard for campaigns, protecting them from receiving donations of extremely volatile assets. Some cryptocurrencies vary in price so rapidly that a contributor could theoretically attempt to circumvent contribution limits through donating an asset which raises in price rapidly after donation.²¹⁸

Classifying cryptocurrency contributions as an in-kind contribution falls in line with the majority of state and federal opinions on the issue.²¹⁹ These opinions usually group contributions with other in-kind contributions, give requirements that are almost identical to other forms of in-kind contributions, or explicitly state that these contributions are in-kind as opposed to monetary.²²⁰ As previously stated, while cryptocurrency is hard to regulate, regulation from the SEC and the CFTC has become more comprehensive and nuanced to specific environments and uses.²²¹ These government agencies deal directly with assets as opposed to currency. With all these asset-based agencies claiming jurisdiction over cryptocurrencies, this lends more weight—in the federal government’s view—that cryptocurrencies are assets and should be treated as such when given as contributions to campaigns.

²¹⁴ D.C. CODE MUN. REGS. tit. 3 § 3008.10; Op. Comm’r of Political Practices COPP-2014-AO-001, *supra* note 136, at 2.

²¹⁵ FEC Advisory Op. 2014-02, *supra* note 124, at 4.

²¹⁶ See generally Jaysing Bhosale & Sushil Mavale, *Volatility of Select Crypto-currencies: A Comparison of Bitcoin, Ethereum, and Litecoin*, 6 ANN. RES. J. OF SCMS, PUNE 132, 133–34 (2018) (discussing the number of cryptocurrency users, the majority of which are using Bitcoin, and discussing the number of vendors accepting Bitcoin).

²¹⁷ GEORGE DANIEL & AMANDA GREEN, ACCOUNTING FOR CRYPTO-ASSETS, 3 (2018).

²¹⁸ See Garen, *supra* note 208 (discussing why Bitcoin is the least volatile of commonly traded cryptocurrencies).

²¹⁹ See, e.g., *supra* notes 124, 133, and 136; D.C. CODE MUN. REGS. tit. 3 § 3008.10.

²²⁰ *Id.*

²²¹ See *In re Coinflip, Inc.*, CFTC No. 15-29, 2015 WL 5535736 (Sept. 17, 2015).

B. Reporting Requirements and Procedures

1. Model Statute

(A) The value of the contribution shall be the fair market value of the Bitcoin upon receipt.²²² The contribution must then be liquidated within twenty-four hours of receipt.

(B) Bitcoin contributions shall be reported as received based on the day liquidation occurs.²²³ Any increase in value between receipt and liquidation that causes the contribution to exceed the contribution limit shall be returned to the contributor in the amount that exceeded the contribution limit.²²⁴

(C) Any losses in value between receipt and liquidation will not count against the contributor's personal contribution limit.

(D) If a refund is required, the refund must be made within ten days of liquidation.²²⁵

2. Reasoning for Statutory Language

The reporting requirements are a culmination of various state and federal laws and opinions on the subject of assessing the value of an in-kind contribution. The requirement that Bitcoin be liquidated within twenty-four hours comes from the need to prevent the contribution from being subject to volatility swings in the cryptocurrency market.²²⁶ Returning funds that exceed the contribution limit is standard practice among campaign finance laws.²²⁷ Losses on the value of Bitcoin should not hurt the contributor who wishes to donate. Therefore, (A)(ii) has been included in this model statute.

²²² TENN. CODE ANN. § 2-10-113(a) (LEXIS through Ch. 517 of the 2020 Reg. Sess.).

²²³ D.C. CODE MUN. REGS. tit. 3 § 3008.10(b).

²²⁴ *Id.* § 3008.10(d).

²²⁵ 8 COLO. CODE REGS. § 1505-6(10.6) (LEXIS through all regulations in effect as of Apr. 25, 2020).

²²⁶ See Coppola, *supra* note 120.

²²⁷ FEC Advisory Op. 2014-02, *supra* note 124, at 6; D.C. CODE MUN. REGS. tit. 3 § 3008.10(d).

C. Campaign Accounts and Expenditures

1. Model Statute

(A) A candidate, political campaign committee, or political action committee must sell all Bitcoin and deposit the proceeds from the sale into a campaign depository account before spending the funds.²²⁸

(B) Bitcoins cannot be used to make expenditures.²²⁹

(C) A Bitcoin wallet does not meet the definition of a campaign depository account in accordance with 52 U.S.C. 30102(h).²³⁰

2. Reasoning for Statutory Language

Requiring a campaign or committee to sell all Bitcoin and prevent them from using contributed Bitcoin as a medium of exchange is important for two main reasons. The first of these is transparency. This transparency comes in the form of a regulated entity—a bank or any other depository institution insured by certain federal agencies—keeping a paper trail of funds received and withdrawn from a campaign. Allowing a campaign or committee to keep bitcoins in their Bitcoin wallet does not provide necessary oversight because federal and state governments do not regulate many wallets.²³¹

Second, allowing Bitcoin to be used as a medium of exchange undermines the previously stated provisions in the model statute calling Bitcoin an in-kind contribution as opposed to currency. Therefore, campaigns should not be able to accept Bitcoin as an in-kind contribution while also having the ability to spend it as a monetary contribution.

D. Information a Cryptocurrency Contributor Must Provide

1. Model Statute

(A) A candidate, political campaign committee, or political action committee has the obligation to determine the eligibility and legality of contributions received.²³²

²²⁸ TENN. CODE ANN. § 2-10-113 (LEXIS through Ch. 517 of the 2020 Reg. Sess.).

²²⁹ *Id.*

²³⁰ 52 U.S.C. 30102(h) (2012).

²³¹ See Conti et al., *supra* note 102, at 3426.

²³² FEC Advisory Op. 2014-02, *supra* note 124, at 5.

(B) For a contribution to be legal and eligible, a candidate, political campaign committee, or political action committee must obtain the following information:

(i) The contributor's full name;²³³

(ii) Physical address;²³⁴

(iii) Current employer;²³⁵

(iv) An affirmation that the contributor is in-fact the owner of the bitcoins being donated; and²³⁶

(v) An affirmation that the contributor is not a foreign national.²³⁷

(C) After receipt of the required information, the contributor may donate to a specific and unique linked address that is provided to them by the candidate, political campaign committee, or political action committee.²³⁸

2. Reasoning for Statutory Language

The States are surprisingly silent when it comes to regulations on how to verify the identity of contributors wishing to donate cryptocurrency. For this reason, the FEC's opinion on Bitcoin contributions provides safeguards to ensure the valid identity of contributors. The majority of these safeguards have been adopted in the model statute. The requirements stated in the provision are necessary in order to prevent individuals from donating anonymously.

The requirements are set up in a way that ensures necessary information is provided and verified before the contributor has the ability to contribute. This requirement is much stricter and safer than the typical donation system where an individual contributes while simultaneously providing necessary reporting information. Stricter measures may be needed in the future depending on the level of ownership and usage of Bitcoin in everyday American life.

This model statute will help state and federal governments eliminate the grey area in campaign finance laws concerning cryptocurrency. As a result of this model statute, only Bitcoin may be accepted by a campaign, and that campaign must treat the contribution as an in-kind contribution. A campaign must liquidate the funds within twenty-four hours of receipt and

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

can only use the liquidated funds for expenditures, as opposed to using the Bitcoin itself. Along with these actions, campaigns will also be responsible for collecting specific information with the intent of ascertaining the identity of the contributor to ensure they are within legal compliance of existing campaign finance laws.

IV. CONCLUSION

Cryptocurrency is viewed by many as an invention that will continue to grow and innovate in the coming years. The technology that comes from this invention will change how many businesses, organizations, and individuals use money and make purchases. Eventually, this invention will have an influence on the American political system. When that occurs, having a proper and clearly defined set of regulations in place will be crucial to ensure cryptocurrency is not used to circumvent campaign finance rules. To this end, the model statute put forward in this Note represents a step toward ensuring transparency and fairness in the election system while allowing individuals to exercise their freedom of speech by contributing to political campaigns in the manner they prefer.

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