

# LOCATING BITCOIN: JURISDICTIONAL CHALLENGES AND SOLUTIONS IN DIGITAL ASSET LAW

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## Abstract

As Bitcoin penetrates the global financial system, its legal classification becomes crucial for determining the appropriate substantive law in both public international law and private international law. This Note argues that Bitcoin, a decentralized digital commodity, is analogous to tangible, movable property for purposes of defining prescriptive jurisdiction. Bitcoin's unique attributes—its inherent value and rivalrous nature—qualify it as digital, yet tangible property, and suggests that it can have a physical situs. The property's situs can determine which jurisdiction's substantive law can apply. By examining different Bitcoin custody models, including single-key wallets, multi-signature wallets, and brain wallets, this Note explores the challenges of locating Bitcoin's situs and applying existing territorial legal principles. Highlighting the necessity for legal frameworks to evolve alongside technological innovations, this Note contributes to the discourse on how digital assets like Bitcoin should integrate within the international legal system, ultimately supporting a more equitable and effective regulatory environment.

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## INTRODUCTION

In October 2008 a computer programmer going by the pseudonym Satoshi Nakamoto emailed a cryptography mailing list and announced that they created “a new electronic cash system that’s fully peer-to-peer, with no trusted third party.”<sup>1</sup> Since then, Bitcoin’s market cap has swelled to over one trillion dollars,<sup>2</sup> is held in a nation’s treasury,<sup>3</sup> and ushered in the biggest opening day for an ETF in Wall Street’s history.<sup>4</sup> The continued growth of Bitcoin adoption globally necessitates analyzing how Bitcoin fits in the current legal paradigm. Similar to the challenges of defining adequate minimum contacts for personal jurisdiction in the digital age, Bitcoin significantly broadens the scope of cross-jurisdictional transactions.<sup>5</sup> Crucially, this Note seeks to determine how Bitcoin fits in the international system’s prescriptive jurisdiction framework. The international legal system has long rested on the primacy of territorial power and respect for sovereign state borders. Yet in the age of digital property, it is unclear where a Bitcoin transaction occurs, let alone where Bitcoin resides at rest. In the following discussion this Note will assess the state of prescriptive jurisdiction in the international system, explore its treatment of tangible and intangible property as the characteristics separating these two groups, and apply this framework to Bitcoin and the broader cryptoasset ecosystem.

## I. PRESCRIPTIVE JURISDICTION

Jurisdiction is a government’s “power to exercise authority over all persons and things within its territory.”<sup>6</sup> International legal scholars categorize a state’s exercise of jurisdiction into three groups: prescriptive

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1. Jameson Lopp, *Bitcoin and the Rise of the Cypherpunks*, COINDESK (Apr. 9, 2016), <https://www.coindesk.com/markets/2016/04/09/bitcoin-and-the-rise-of-the-cypherpunks/> [https://perma.cc/M52M-97JQ].

2. *Bitcoin*, COINMARKETCAP, <https://coinmarketcap.com/currencies/bitcoin/> [https://perma.cc/BVZ9-CDFG].

3. Michael Bellusci, *El Salvador Purchases 410 More Bitcoins Amid Market Drop, President Bukele Says*, COINDESK (Jan. 21, 2022), <https://www.coindesk.com/business/2022/01/21/el-salvador-purchases-410-more-bitcoins-amid-market-drop/> [https://perma.cc/9ULV-QHHS].

4. Emily Graffeo & Katie Greifeld, *Bitcoin ETF Trades Top \$4.6 Billion in ‘Ground-Breaking’ Day*, BLOOMBERG (Jan. 11, 2024), <https://www.bloomberg.com/news/articles/2024-01-11/bitcoin-etf-trading-volumes-soar-in-ground-breaking-first-day> [https://perma.cc/7QDL-N3GH].

5. *See No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1823–25 (2003).

6. *Jurisdiction*, BLACK’S LAW DICTIONARY (11th ed. 2019).

(or legislative), adjudicative (or judicial), and enforcement (or executive) jurisdiction.<sup>7</sup> Underlying all three forms of jurisdiction is the principle of territoriality.<sup>8</sup> The territorial principle limits states from reaching inside the borders of other states, and is premised on the principle that states are sovereign equals.<sup>9</sup> “[Territorial jurisdiction] is the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power.”<sup>10</sup> Though territory as a basis for jurisdiction is “universally recognized,”<sup>11</sup> in the face of globalization and the internet, territoriality has given way to limited forms of extraterritorial jurisdiction.<sup>12</sup>

The focus of this Note, prescriptive jurisdiction, is the state’s authority “to apply its substantive law to particular persons or events.”<sup>13</sup> Traditionally, a state’s prescriptive jurisdiction was limited to people, things, and conduct within its geographical bounds. However, in keeping with the overall trend, prescriptive jurisdiction has adopted some extraterritorial reach to accommodate new realities.<sup>14</sup> A common exercise of extraterritorial jurisdiction is based on the “effects doctrine.” Under the effects doctrine, a state has prescriptive jurisdiction over conduct beyond its territorial limits, provided such activity has or intended to have effects within its territory.<sup>15</sup> Securities regulations are one area where states employ extraterritorial legislation.<sup>16</sup>

States exercise prescriptive jurisdiction in two ways. The first is through legislation and regulation, referred to as public international

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7. Susan Emmenegger, *Extraterritorial Economic Sanctions and Their Foundation in International Law*, 33 ARIZ. J. INT’L & COMP. L. 631, 638 (2016).

8. *Id.* at 645.

9. *Id.*

10. *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 921 (D.C. Cir. 1984); see, e.g., Joseph M. Isanga, *The U.S. Withdraws: Impact on the U.S. and International Rule of Law*, 32 FLA. J. INT’L L. 215, 253 (2020) (discussing the presumption against extraterritorial application of the Alien Tort Statute); Andy Ingram, Case Comment, *Standard of Review Foreign Statutory Law and International Law*, 17 FLA. J. INT’L L. 439, 440 (2005) (“The ‘U.N. Convention on the Law of the Sea’ ... gives every coastal nation twelve nautical miles of territorial sea in which to exercise exclusive jurisdiction.”).

11. *Laker Airways Ltd.*, 731 F.2d at 921.

12. See *S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7); *United States v. Yunis*, 681 F. Supp. 896, 900 (D.D.C. 1988) (discussing universal principle as a basis for prosecuting certain crimes regardless of the defendant’s nationality or where the crime was committed).

13. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401 (AM. L. INST. 1987).

14. Michael Wallace Gordon, *United States Extraterritorial Subject Matter Jurisdiction in Securities Fraud Litigation*, 10 FLA. J. INT’L L. 487, 491 (1996) (discussing extraterritorial application of the Securities Exchange Act of 1934).

15. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (AM. L. INST. 1987).

16. Gordon, *supra* note 14.

law.<sup>17</sup> The second is through applying its substantive law to disputes between private parties, referred to as private international law.<sup>18</sup> Previously, the discourse on prescriptive jurisdiction was largely limited to public international law; however, “[t]he application of private law, no less, than public law, constrains and compels individual behavior in pursuit of national policy interests” and are both limited by international jurisdictional norms.<sup>19</sup>

#### A. Prescriptive Jurisdiction Over Property

Prescriptive jurisdiction over property is generally based on its location.<sup>20</sup> This is referred to as the *lex situs* of the property.<sup>21</sup> Land is always governed by the *lex situs* rule.<sup>22</sup> Movable property however, while often regulated by its *lex situs*,<sup>23</sup> is sometimes governed by the law of the owner’s domicile (*lex domicil*).<sup>24</sup> The *lex situs* rule is attractive because it aligns with party expectations and the property is located within the jurisdiction of the *lex situs*, however, the ease with which movable property can leave a jurisdiction is one reason for application of the *lex domicil* rule.

In public international law, the *lex situs* rule is most often used because of the presumption in many countries against reading legislation to have an extraterritorial effect.<sup>25</sup> In private international law, the *lex situs* rule is often applied, but some forums will apply the law of the owner’s domicile.<sup>26</sup> In a forum applying the *lex situs* rule, a preliminary determination of the location of the property is necessary to establish what applicable substantive law applies. While the question appears straightforward, it can become quite complicated depending on the property in dispute.

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17. Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRIT. Y.B. OF INT’L L. 187, 201 (2014).

18. *Id.*

19. *Id.* at 204.

20. *Id.* at 201

21. *Id.* at 205.

22. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 455 (AM. L. INST. 1987). Though the section refers to adjudicative jurisdiction, the restatement illustrates the close relationship between the forum state and land in its territory. The relationship is so strong in fact that the doctrine of sovereign immunity is waived in cases concerning land owned by a foreign government.

23. *E.g.*, *Glencore Int’l AG v. Metro Trading Int’l, Inc.* (No.2), (2001) C.L.C. 1732 (QB).

24. *E.g.*, *Sill v. Worswick* (1791) 126 Eng. Rep. 379, 389.

25. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (“longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”).

26. *Compare* *Glencore Int’l AG v. Metro Trading Int’l Inc.* (No.2), (2001) C.L.C. 1732 (QB), *with* *Sill v. Worswick* (1791) 126 Eng. Rep. 379.

### B. Tangibles and Intangibles

Tangible property has an easily identifiable physical *situs*. Objects such as cars, houses, and physical currency can be observed, and their *situs* is readily discerned. But, when the property is intangible, determining its *situs* is far more complex and some even argue arbitrary.<sup>27</sup> For example, the location of a bond could be the location of the documents evidencing the bond, the domicile of the holder, the domicile of the obligor, or even wherever the obligor is found.<sup>28</sup> The complications determining the proper *situs* of intangibles is caused by the inherent lack of one. Courts must create a fictional *situs* for the purposes of jurisdiction over intangibles.

Determining a property's *lex situs* first requires determining whether the property is tangible or intangible. Previously, a “know when you see it” approach to this question sufficed and little thought was paid to the distinction between tangible and intangible property. But in the age of digital property, further analysis of what differentiates the two is required. The natural distinction in law between property that is tangible, and intangible has been whether the property “possess[es] physical form” and is “[c]apable of being touched and seen.”<sup>29</sup> But the rivalrous and possessory characteristics of cryptoassets despite their incorporeal nature challenge this distinction requiring a deeper analysis of what separates tangible and intangible property.

At the core of the distinction between tangible and intangible property is whether it has inherent value and is capable of exclusive possession. “Intangible property is property which has no intrinsic value, but is merely the representative or evidence of value, such as certificates of stock, bonds, promissory notes, and franchises.”<sup>30</sup> In *Blodgett v. Silberman*, the Supreme Court further elaborated on this distinction when asked to determine the nature of an ownership interest in a partnership and bonds in a safe-deposit box.<sup>31</sup> A partnership interest is “simply a *right* to share in what would remain of the partnership assets after its liabilities were satisfied.”<sup>32</sup> It is “a chose in action” that carries with it a “right to

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27. Fletcher R. Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 YALE L.J. 241, 241 (1939); see also Hamish Patrick, *Receivership of Foreign Based Companies: Scottish Government Acts*, 27 SCOTS L. TIMES 213, 214 (2011); Joanna Benjamin, *Determining the Situs of Interests in Immobilized Securities*, 47(4) INT'L & COMPAR. L. Q. 923, 925 (1998).

28. Andrews, *supra* note 27, at 242.

29. Compare *Tangible*, BLACK'S LAW DICTIONARY (11th ed. 2019), with *Intangible*, BLACK'S LAW DICTIONARY (11th ed. 2019).

30. *Neuman v. Travelers Indem. Co.*, 319 A.2d 522, 642 (Md. 1974) (holding that leasehold interest to occupy property is intangible property).

31. *Blodgett v. Silberman*, 277 U.S. 1, 3–4 (1928).

32. *Id.* at 11 (emphasis added).

an accounting.”<sup>33</sup> Likewise, bonds are merely “*evidences of debt*.”<sup>34</sup> Intangible property usually takes the form of a legal right and lacks inherent value on its own, therefore lacking a physical *situs*. Instead, they rely on courts to construct a fictional *situs* for jurisdictional purposes.

The other key distinction between tangible and intangible property is whether a person can exercise possession over the thing itself. In *Curry v. McCanless*, the Supreme Court recognized the ability to physically possess property as a distinguishing characteristic between tangible and intangible property.<sup>35</sup> In its opinion the Court described rights in intangibles as “relationships between persons . . . which the law recognizes by attaching to them certain sanctions enforceable in courts.”<sup>36</sup> What makes property intangible is that “the power of government over them and protection which it gives them *cannot be exerted through control of a physical thing*.”<sup>37</sup>

The important elements separating tangible and intangible property are not their corporeal or incorporeal characteristics, but whether the property has inherent value, and is capable of exclusive possession. Compare typical forms of intangible property (bonds, promissory notes, stock, and checks),<sup>38</sup> with that of tangible property (cars, homes, land, and precious metals). The historic distinction in law between tangible and intangible property by their physical attributes is really a proxy for that which carries inherent value and can be exclusively possessed. Understanding what separates these two forms of property at their fundamental level is important in the age of cryptoassets because property can now take the form of an intangible but bear the effects of a tangible.

## II. CRYPTOASSETS AND THEIR CHARACTERISTICS

Cryptoassets represent a diverse and rapidly evolving sector of the economy. As of early 2023, the British Financial Conduct Authority estimates that there are 20,000 different cryptoassets on the market.<sup>39</sup> These coins vary in form and function, and as discussed later, are important to determining who has jurisdiction to prescribe. Broadly

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33. *Id.*; see also *Chose*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A proprietary right *in personam*, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort.”).

34. *Blodgett*, 277 U.S. at 14 (emphasis added).

35. *Curry v. McCanless*, 307 U.S. 357, 366 (1939).

36. *Id.* at 365–66.

37. *Id.* at 366 (emphasis added).

38. Andrews, *supra* note 27, at 272.

39. Financial Conduct Authority, *Crypto: The Basics*, <https://www.fca.org.uk/investsmart/crypto-basics> [<https://perma.cc/Q8C8-ZQVF>] (last visited Dec. 12, 2023).

speaking, cryptoassets fall into three categories: equity tokens, utility tokens, and cryptocurrencies.<sup>40</sup>

Equity tokens, sometimes called security tokens, “represent a claim (equity or debt) on an issuer or a means of benefiting from the enterprise of others.”<sup>41</sup> They are analogous to shares of a company, except that they exist on a blockchain. BCAP, a tokenized share of the venture capital firm Blockchain Capital is one example of an equity token.<sup>42</sup>

Utility tokens represent “a right to use or have access digitally to some sort of blockchain based application or service.”<sup>43</sup> Storj, a decentralized blockchain for file storage that uses the Storj token to pay for services on the network is an example of a utility token.<sup>44</sup>

The final category, cryptocurrencies, comprise the most popular form of cryptoassets. Cryptocurrencies are “digital currencies used as a means of payment or exchange.”<sup>45</sup> The largest cryptoassets by market capitalization today, Bitcoin and Ethereum, are cryptocurrencies.<sup>46</sup>

### III. THE CASE FOR BITCOIN AS A TANGIBLE ASSET

Bitcoin, despite its digital nature, possesses inherent value and is capable of exclusive possession and therefore should be treated as tangible property. Rather than relying on the legal framework to create a relationship between Bitcoin and an external right, Bitcoin confers property rights in itself. Moreover, Bitcoin is separable from its owner and cannot be simultaneously used without mutual interference making it capable of exclusive possession. The implication of this is that Bitcoin can have a physical *situs* and satisfy the *lex situs* rule. Fitting Bitcoin in the existing legal paradigm where possible not only helps judges navigate unfamiliar territory, it frees courts from the often complex and arduous task of ascertaining the fictional *situs* of an intangible.<sup>47</sup>

#### A. Inherent Value

Unlike traditional financial instruments, Bitcoin is not tied to physical property, future earnings, or corporate equity—yet it captures significant

40. Timothy G. Massad, *It's Time to Strengthen the Regulation of Crypto-Assets*, BROOKINGS, at 29 (Mar. 2019), <https://www.brookings.edu/wp-content/uploads/2019/03/Economis-Studies-Timothy-Massad-Cryptocurrency-Paper.pdf> [<https://perma.cc/3UQY-Y4J3>].

41. *Id.*

42. E.g., Andrew Marshall, *\$10 Mln ICO: Blockchain Capital Outlines Terms of Funding Round*, COINTELEGRAPH (Apr. 4, 2017), <https://cointelegraph.com/news/10-mln-ico-blockchain-capital-outlines-terms-of-funding-round> [<https://perma.cc/FWU3-42MT>].

43. Massad, *supra* note 40.

44. E.g., STORJ, <https://www.storj.io/how-it-works> [<https://perma.cc/E6E2-DTNG>] (last visited Dec. 12, 2023).

45. Massad, *supra* note 40.

46. Massad, *supra* note 40.

47. Andrews, *supra* note 27.

market value.<sup>48</sup> Instead, it derives its value from its utility as a permissionless payment network, and the absolute scarcity embedded in its code.<sup>49</sup> Bitcoin's value does not come from its relationship with something outside of it, its value is within the network, itself. This becomes clear when contrasting Bitcoin with general forms of intangible property.

Intangibles, like bonds and promissory notes confer rights in something else. They require a court to fabricate a connection between the rights they represent and its physical representative.<sup>50</sup> If a court refused to recognize such a right it instantaneously becomes worthless. Who is willing to pay for the assignment of a nullified contract right? But a court's nonrecognition of a property interest in a tangible has little to no effect on the value of the thing. The idea even sounds absurd, but that does not mean states do not try. The Chinese government has banned Bitcoin and other cryptocurrencies on multiple occasions, with no avail.<sup>51</sup> The attributes of Bitcoin that give it value (i.e., its decentralized ledger, scarcity, and network effect)<sup>52</sup> still exist irrespective of any tribunal or government refusing to recognize it.

### B. Exclusive Possession

Additionally, because Bitcoin can be separated from its owner, it is both alienable and rival, making it capable of exclusive possession.<sup>53</sup> Bitcoin uses cryptography to create digital tangibility. It is transferable only by the possessor of the Bitcoin wallet's private key.<sup>54</sup> The consequence of this is that Bitcoin can be separated from a person and

48. At the time of writing this Bitcoin is trading at \$69,485. *Bitcoin*, COINMARKETCAP, <https://coinmarketcap.com/> [<https://perma.cc/3FNU-WCLL>] (last visited Mar. 29, 2024).

49. YASSINE ELMANDJRA, *Bitcoin as an Investment*, ARK INVEST 1, 5–10 (2020), [https://research.ark-invest.com/hubfs/1\\_Download\\_Files\\_ARK-Invest/White\\_Papers/ARKinvest\\_091729\\_Whitepaper\\_Bitcoin\\_II\\_An%20Investment.pdf?hsCtaTracking=71be7529-9a39-404e-97b3-04fd4ccf80ec%7C07365ce1-0ed3-4835-9c3c-ac33c030cd70](https://research.ark-invest.com/hubfs/1_Download_Files_ARK-Invest/White_Papers/ARKinvest_091729_Whitepaper_Bitcoin_II_An%20Investment.pdf?hsCtaTracking=71be7529-9a39-404e-97b3-04fd4ccf80ec%7C07365ce1-0ed3-4835-9c3c-ac33c030cd70) [<https://perma.cc/N3PZ-29ZX>].

50. *See Blodgett*, 277 U.S. at 14; *Curry*, 307 U.S. at 366.

51. Conghui Chen & Lanlan Liu, *How Effective is China's Cryptocurrency Trading Ban?*, 46 FIN. RSCH. LETTERS 1, 1, 6 (2022); Vidya Ranganathan & Summer Zhen, *Bruised by Stock Market, Chinese Rush into Banned Bitcoin*, REUTERS (Jan. 25, 2024), <https://www.reuters.com/technology/bruised-by-stock-market-chinese-rush-into-banned-bitcoin-2024-01-25/> [<https://perma.cc/DC7Q-XJWZ>].

52. *E.g.*, ELMANDJRA, *supra* note 49; *What Gives Bitcoin its Value?*, GEMINI, <https://www.gemini.com/cryptopedia/btc-bitcoin-what-gives-it-value-what-gives-bitcoin-its-worth> [<https://perma.cc/P7T7-4SKK>] (last edited Oct. 4, 2023).

53. João Marinotti, *Tangibility as Technology*, 37 GA. ST. U. L. REV. 671, 683 (2021).

54. Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN 1, 2 (2008), <https://bitcoin.org/bitcoin.pdf> [<https://perma.cc/UEN8-BZ5G>] [hereinafter *Bitcoin Whitepaper*] (“Each owner transfers the coin to the next by digitally signing a hash of the previous transaction.”).

can have a physical *situs*. An explanation of how users hold Bitcoin and a comparison to other financial instruments will show why this element is important and how cryptography creates property that is both digital and tangible.

A user holds Bitcoin in a “wallet”—a pair of cryptographically generated keys, one that is public and one that is private.<sup>55</sup> The public key identifies the wallet on Bitcoin’s decentralized ledger and is used to generate “addresses.”<sup>56</sup> The private key functions similarly to the PIN to a bank account and is used to transfer or spend Bitcoin in the wallet.<sup>57</sup> But there is a critical difference between the PIN and the private key. Unlike a bank account PIN where the bank and the user both know the PIN, only the user has the private key to their Bitcoin wallet.<sup>58</sup> When a user holds his own private key like in the aforementioned example, this is referred to as a noncustodial wallet. This is akin to dollars in a physical wallet, and just like the wallet in one’s pocket, if a Bitcoin holder loses their private key, their Bitcoin is lost forever.

This comparison is difficult to visualize at first because in form, a Bitcoin wallet looks like an E-Trade account or an online checking account. Relying only on form, however, is misleading. Unlike a Bitcoin wallet, an E-Trade user does not have custody over their stocks. They trust E-Trade to hold their stocks for them.<sup>59</sup> The same is the case for the standard checking account. When a depositor hands cash to a bank teller, they relinquish the monetary object (i.e., cash) and monetary title over the cash to the bank, in exchange for a *right* to an equivalent monetary value.<sup>60</sup> The physical asset they once held is exchanged for a legal right. To the depositor it may make no difference, but under the law their property rights have changed from a right in a tangible to a right in an intangible. The dispositive question distinguishing a checking account from a Bitcoin wallet is: does the person have title over *specific* money, or a right to value in the object’s equivalent? In a noncustodial Bitcoin wallet, the owner has possession and title over *specific* Bitcoin, the same as cash in their physical wallet, if they have possession of their private key.<sup>61</sup>

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55. Marinotti, *supra* note 53, at 721.

56. *Id.*; *Invoice Address*, BITCOIN WIKI (last edited Oct. 23, 2020), [https://en.Bitcoin.it/wiki/Invoice\\_address](https://en.Bitcoin.it/wiki/Invoice_address) [<https://perma.cc/4G7R-3KDV>].

57. Marinotti, *supra* note 53, at 722; *see also Private Key*, BITCOIN WIKI (last edited May 4, 2019), [https://en.Bitcoin.it/wiki/Private\\_key](https://en.Bitcoin.it/wiki/Private_key) [<https://perma.cc/6MP2-DG74>].

58. Marinotti, *supra* note 53, at 722.

59. How stock certificates are held is far more complex than this explanation and includes layers of abstraction that further highlights the point, but that is beyond the scope of this Note.

60. JERRY BRITO ET AL., *THE LAW OF BITCOIN* 192 (2015) (ebook).

61. Depositing cryptocurrency in an exchange like Coinbase is similar to an online checking account. *Id.* at 194 (“[A]ny rights, including title, in specific Bitcoin addresses, and the units

The private key associated with the wallet grants its holder full, exclusive control over the Bitcoin in the wallet. Anyone in possession of the private key can spend or transfer the Bitcoin.<sup>62</sup> This cryptographic exclusivity creates a possession mechanism analogous to physical things and is independent of the law. The reason this works is because of the immutable nature of a blockchain ledger, preventing the reversal of transactions and verifying that the Bitcoin transferred or spent has not already been used.<sup>63</sup>

Unlike traditional financial transactions that rely on third-party intermediaries who can reverse transactions or seize assets, Bitcoin transactions are irreversible. Once a transaction is confirmed on the blockchain, it cannot be undone.<sup>64</sup> The immutable nature of the Bitcoin ledger, and the ability to exclusively possess Bitcoin by holding the private key, makes it analogous to possessing a physical thing.<sup>65</sup> Moreover, property which can be exclusively possessed can also be separated from any individual entirely, unlike an intangible. A Bitcoin holder can write down their private key, store it somewhere, and walk away forever. Assuming the original holder does not remember the key, the Bitcoin wallet is alienated from its original owner and can be found and taken by someone else like any other form of tangible property.

Simply put, the *situs* of a Bitcoin wallet is wherever a private key capable of spending it is located. Deriving Bitcoin's *situs* from its private key aligns with the "jurisdiction as power" approach underlying the territorial principle in international law.<sup>66</sup> Only a possessor of the private key has actual control of the Bitcoin wallet.

### C. Contrasting Bitcoin with Other Digital Assets

#### 1. Bitcoin, Utility Tokens and Equity Tokens

Bitcoin is unique in this respect. Utility tokens and equity tokens do not possess the key elements that make Bitcoin tangible. They lack inherent value, represent legal rights, and are digital representations of ownership in something else. These cryptoassets are nothing new and are solutions looking for a problem.

Though these other cryptoassets are held in a wallet with a private key similar to Bitcoin, they operate more like a bearer instrument than a

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associated therewith, would be extinguished upon transfer to a Bitcoin address to which the depositor does not have knowledge of the access credentials. If the depositor does not have the access credentials, the depositor likely does not own the specific Bitcoins deposited.”).

62. *Bitcoin Whitepaper*, *supra* note 54.

63. *Some Things You Need to Know*, BITCOIN, <https://Bitcoin.org/en/you-need-to-know#irreversible> [<https://perma.cc/9SUS-UJW8>] (last visited Apr. 4, 2024).

64. *Id.*

65. See Marinotti, *supra* note 53, at 699–704.

66. Mills, *supra* note 17, at 203.

digital tangible. Ownership can be proven by showing possession of the wallet's private key, but they require the legal system to create a relationship between the digital record and the value they represent. This is analogous to courts giving legal significance to possession of bearer instruments.<sup>67</sup> And just as courts of equity in England could provide equitable relief for lost or destroyed bonds,<sup>68</sup> what separates these cryptoassets from Bitcoin is that the relationship between these tokens and their underlying value or legal rights is severable—it is impossible to sever Bitcoin and its inherent value. In essence, utility tokens and equity tokens are not rivalrous because their value can be interfered with by someone other than the possessor. But this distinction does not stop at cryptocurrencies—and everything else.

## 2. Bitcoin and Other Cryptocurrencies

Recall that tangibility requires both inherent value *and* exclusive possession. A cryptocurrency lacking the capability of exclusive possession looks more like a bank deposit—an intangible right—than digital property. So, what makes a cryptocurrency lack exclusive possession? To answer that question, it is best to start with what makes a cryptocurrency capable of exclusive possession.

The technology that launched the crypto industry and the lynchpin of the private-key-as-possession theory discussed earlier is blockchain, sometimes called “decentralized ledger technology.” A blockchain is “a chronological database of transactions recorded by a network of computers.”<sup>69</sup> Each transaction is verified by multiple network participants, known as nodes, using a consensus mechanism that validates the transaction's authenticity and truthfulness.<sup>70</sup> Once verified, transactions are bundled into a block, each tagged with a unique, cryptographic signature—a hash—sealing the block's contents.<sup>71</sup>

This newly created block is then chained to the previous one in chronological order, creating a linked sequence of blocks.<sup>72</sup> The ingenious part of this process is the cryptographic hash. It's not just a

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67. W. H. Bates S.Ed., *Conflict of Laws - Negotiable Instruments - Situs of Bearer Bonds Under The Trading With The Enemy Act*, 50 MICH. L. REV. 1057, 1058 (1952).

68. *Id.*

69. Aaron Wright & Primavera De Filippi, *Decentralized Blockchain Technology and the Rise of Lex Cryptographia*, SSRN 1, 6 (Mar. 12, 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2580664](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2580664) [<https://perma.cc/2MFY-W29P>].

70. *Id.* at 6–8; see also Jiaying Jiang, *Technology-Enabled Co-Regulation as a New Regulatory Approach to Blockchain Implementation*, 82 U. PITT. L. REV. 829, 832 (“[B]lockchain can increase efficiency from transparent records for a single source of truth. Its distributed databases can avoid reconciliation by creating one version of a ledger that is synchronized across computers.”).

71. See Wright & De Filippi, *supra* note 69, at 6–8.

72. See *id.*

marker of identity; it is a guardian of history. Changing even the smallest detail of a single transaction in a block alters the hash. And because each block contains not only its own hash but the hash of the previous block, modifying one block alters the hashes of all subsequent blocks in the chain.<sup>73</sup> New blocks are only added to the blockchain after the nodes on the network have reached a consensus.<sup>74</sup> This makes it harder for an attacker to corrupt the blockchain without controlling a majority of the network's computer power.<sup>75</sup>

Key to the security and immutability of a blockchain is the decentralization of the network's nodes and the amount of computer power dedicated to securing the blockchain. If the network is sufficiently decentralized and secured, then the network has no controlling operator or common enterprise. For this reason, the CFTC and SEC have come to a consensus that Bitcoin is a commodity,<sup>76</sup> but the debate continues over Ethereum should enjoy the same treatment.<sup>77</sup>

If the network is successfully attacked thereby halting or reversing a transaction, the spender, and all other network users lose exclusive possession of their asset. There has been a long debate in the industry over two different types of consensus mechanisms: proof-of-work, the consensus mechanism used by Bitcoin,<sup>78</sup> and proof-of-stake, an alternative mechanism used by the second largest cryptocurrency, Ethereum.<sup>79</sup> One of the biggest criticisms of proof-of-stake is the threat of centralization of the network's nodes and the technical challenges that proof-of-stake cryptoassets have faced.<sup>80</sup> Centralization of a blockchain's

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73. *Id.*

74. *Id.* at 7 n.25.

75. *Id.* at 6–7.

76. Taylor Anne Moffett, *CFTC & SEC: The Wild West of Cryptocurrency Regulation*, 57 UNIV. RICH. L. REV. 713, 723–25 (2023).

77. See *Oversight of the Commodity Futures Trading Comm'n: Hearing Before the S. Comm. on Agric., Nutrition, & Forestry*, 118th Cong. (2023) (statement of Rostin Behnam, Chairman, CFTC) (Video: 1:18:35-1:21:55), <https://www.agriculture.senate.gov/hearings/oversight-of-the-commodity-futures-trading-commission-03-08-2023> [<https://perma.cc/5SS9-RP49>]; Prashant Jha, *Ethereum at the Center of Centralization Debate as SEC Lays Claim*, COINTELEGRAPH (Oct. 24, 2022), <https://cointelegraph.com/news/ethereum-at-the-center-of-centralization-debate-as-sec-lays-claim> [<https://perma.cc/R3KW-NT38>]; Turner Wright, *SEC is Attempting to Classify Ether as a Security: Report*, COINTELEGRAPH (Mar. 20, 2024), <https://cointelegraph.com/news/sec-ether-security-classification> [<https://perma.cc/JY3E-6FWF>].

78. See *Proof of Work*, BITCOIN WIKI, [https://en.bitcoin.it/wiki/Proof\\_of\\_work](https://en.bitcoin.it/wiki/Proof_of_work) [<https://perma.cc/6SKU-2JE2>] (last visited Apr. 6, 2024).

79. *Proof-of-Stake (POS)*, ETHEREUM, <https://ethereum.org/en/developers/docs/consensus-mechanisms/pos/> [<https://perma.cc/Z5NS-HNWM>] (last visited Apr. 4, 2024).

80. In 2021, the Solana blockchain went down for 17 hours. *Solana Blames 'Denial of Service Attack' for Last Week's Downtime*, DECRYPT, <https://decrypt.co/81375/solana-blames-denial-of-service-attack-for-last-weeks-downtime> [<https://perma.cc/2MZE-7H74>]. As of April 2,

computer power into a handful of nodes makes it possible for a bad actor to manipulate or halt transactions on the ledger thereby undermining the exclusive possession of that blockchain's asset.

Unsurprisingly, Ethereum's use of two proof-of-stake has raised concerns over whether its network is sufficiently decentralized to make its blockchain immutable, and calls into question whether it can be considered a commodity like Bitcoin.<sup>81</sup>

Bitcoin is unique from all other cryptoassets and is the only one positioned for treatment as a tangible. Its value is located nowhere else than within the grasp of the private key's possessor, and its *situs* is tied to the location of the private key. Admittedly however, not all Bitcoin is held in a wallet with one private key located in one place.

#### IV. COMPLICATIONS DETERMINING SITUS OF BITCOIN

The complications that arise when determining a Bitcoin wallet's *situs* is a result of the numerous and varied ways users' custody their Bitcoin. While this list is by no means exhaustive, many of the issues that arise when determining *situs* can be considered in the context of three different custody models: (1) wallets with private keys spread across multiple jurisdictions; (2) wallets that require multiple private keys to sign a transaction ("multi-sig" wallets); and (3) wallets without a physical private key and instead are memorized by the holder ("brain wallets").

Naturally, these situations raise questions about the feasibility of the *situs* approach, however, these scenarios merely highlight how the *situs* of Bitcoin is like other movable property and can change quickly. Each of these scenarios require what the law over movable property has always required—consideration of the facts and circumstances surrounding the dispute. While property's *situs* is instructive to determine the boundaries of prescriptive jurisdiction over property,<sup>82</sup> in some circumstances other areas of the law may better serve this question.

##### A. Same Private Key in Multiple Jurisdictions

The first scenario is a situation in which multiple copies of the same private key exist in multiple jurisdictions. It is common and even

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2024, seventy-eight percent of the value staked on Ethereum was controlled by three entities: Lido, Binance, and Coinbase. *Liquid staking TVL Rankings*, DEFILLAMA, <https://defillama.com/protocols/liquid%20staking/Ethereum> (last visited Apr. 4, 2024). See also *Ethereum centralization is becoming a serious problem*, PROTOS (Sept. 27, 2023), <https://protos.com/ethereum-centralization-is-becoming-a-serious-problem/>.

81. See Keke Wu et al., *A Coefficient of Variation Method to Measure the Extents of Decentralization for Bitcoin and Ethereum Networks*, 22 INT'L J. NETWORK SEC. 191, 198–99 (2019).

82. See Mills, *supra* note 17; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. d (AM. L. INST. 1987).

recommended among users to keep multiple copies of their private key in secure locations.<sup>83</sup> Recall, wherever a private key capable of spending the Bitcoin exists actual control can be ascertained,<sup>84</sup> and therefore is the property's *situs*. Theoretically, the property then exists in any jurisdiction where there is a key. More concerningly, the property can also easily escape any one of these jurisdictions. But this does not mean that Bitcoin is like other digital files such as music or word documents that "can be copied or emulated freely."<sup>85</sup> Unlike music and word documents, Bitcoin cannot be simultaneously used "without direct mutual interference."<sup>86</sup> Moreover, this complication with Bitcoin is nothing new for movable property. So, it must be determined which state is the true *situs* and therefore the applicable law? Overlapping jurisdiction, even in the face of inconsistent law, is nothing new in the international system.<sup>87</sup>

One solution to this is an interest-based analysis limited to only those locations where a private key is located at the time the action is filed. This aligns with the territorial principles of jurisdiction while giving the forum the necessary flexibility to apply the substantive law most applicable. Moreover, limiting a court's discretion to only those states with a valid *situs* preserves party expectations. Bitcoin holders are often deliberate when deciding where to place their private keys, given its necessity to keeping their assets secure. Some potential disputes over Bitcoin wallets with keys in multiple locations include disputes over who owns a Bitcoin wallet or theft or conversion of a Bitcoin wallet. In either case, the *situs* of the wallet is highly relevant to the dispute.

Another solution is to look to the owner's domicile. The owner's domicile may be easier to determine than deciding which jurisdiction has the most significant interest to the dispute. Additionally, it could reduce forum shopping because of the increased difficulty changing domicile than changing the Bitcoin's *situs*. However, the *lex domicil* approach has its drawbacks. For one, the domicile approach undermines party autonomy by taking away an owner's ability to choose where to store their assets and choose which jurisdiction should regulate its interest in the Bitcoin wallet. Eliminating party choice could hurt global allocation of capital and undermine the ability of states to entice Bitcoin into its jurisdiction. Moreover, this invites state regulatory power into the

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83. *E.g.*, *How to Keep Your 24-Word Recovery Phrase and PIN Code Safe?*, LEDGER (Sept. 11, 2024), <https://support.ledger.com/article/360005514233-zd> [<https://perma.cc/67UR-FGDQ>] (last updated Oct. 23, 2025) (recommending users write down their private key in addition to having their Ledger hardware wallet).

84. *Bitcoin Whitepaper*, *supra* note 54; Marinotti, *supra* note 53.

85. Marinotti, *supra* note 53, at 697.

86. *Id.*

87. Mills, *supra* note 17, at 200.

territories of other states leading to the potential for subjecting property to conflicting laws and undermine comity in the international system.

Despite the potential difficulties with the interest-based analysis limited to those jurisdictions with a private key, this solution is best applied to Bitcoin as a tangible, digital asset. The solution provides parties with autonomy when deciding where to store their property while maintaining party expectations. When someone stores property in a location, that person can reasonably expect that the property is subject to the laws of its location. Whether using the *lex situs* or *lex domicil* rule, both require the implicit adoption that Bitcoin is a tangible, otherwise a forum has to endure the unclear task of giving an intangible a fictional *situs*.

### B. The Brain Wallet

The second scenario is a Bitcoin wallet held in the memory of its owner, sometimes called the “brain wallet.”<sup>88</sup> Rather than memorializing the wallet’s private key in a physical medium the user commits it to memory.<sup>89</sup> This may sound impossible, but the most common way to record a private key is to use a “seed phrase”<sup>90</sup>—a list of 12 or 24 words that store the user’s private key.<sup>91</sup> With a seed phrase, a user can import their Bitcoin wallet into any phone, computer, or hardware wallet, and spend it accordingly.

In this case, the location of the possessor is the Bitcoin’s *situs*. This situation is arguably where Bitcoin is the least tangible, yet the easiest for determining Bitcoin’s *situs*. It is difficult to imagine a dispute over property committed to the owner’s memory, but so long as it is a way to store property, litigation over it is not impossible.

### C. Multi-Signature Wallets

The third, and most complicated scenario for ascertaining a *situs*, is the case of the multi-signature wallet. The previous discussion has dealt with custody solutions where possession of a Bitcoin wallet required only one key. A multi-signature wallet requires multiple private keys to approve a transfer and move Bitcoin held in that wallet.<sup>92</sup> This is referred to as an “m-of-n quorum” where “m” is the number of private keys *required* to sign a transaction and “n” is the number of private keys

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88. *Brain Wallet*, BITCOIN, <https://en.bitcoin.it/wiki/Brainwallet> [https://perma.cc/9J3S-DTRC] (last visited Apr. 6, 2024).

89. *Id.*

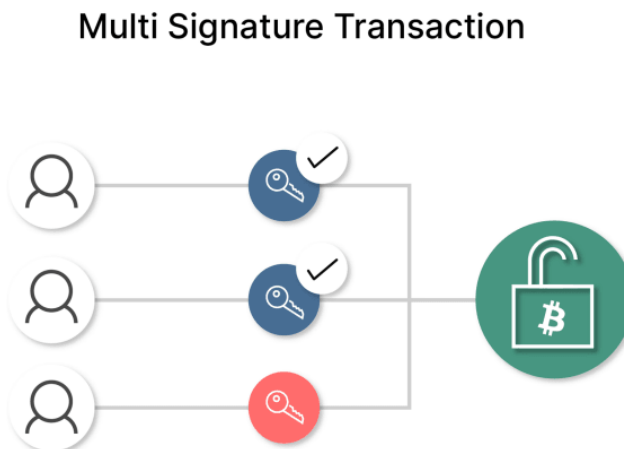
90. *Id.*

91. *Seed Phrase*, BITCOIN, [https://en.bitcoin.it/wiki/Seed\\_phrase](https://en.bitcoin.it/wiki/Seed_phrase) [https://perma.cc/D2X7-CVBF] (last visited Apr. 6, 2024).

92. Tom Honzik & Stephen Hall, *What is Multisig?*, UNCHAINED CAPITAL (last updated Feb. 28, 2025), <https://unchained.com/features/what-is-multisig> [https://perma.cc/Y7NZ-BLLN].

capable of signing the transaction.<sup>93</sup> A common arrangement is the 2-of-3 key multi-signature demonstrated in the illustration below.

Figure 1<sup>94</sup>



In this arrangement, all the keys could be held by one party, or each key held by three different parties. To transfer Bitcoin out of the wallet, at least two of three signatures are required to sign the transaction. There are several different possible key combinations, even ones requiring unanimous approval of a transaction.<sup>95</sup>

This custody arrangement is appealing to those holding large sums of Bitcoin like corporate entities and high net worth individuals because it reduces counterparty risk.<sup>96</sup> While multi-signature wallets offer enhanced security,<sup>97</sup> they pose the biggest challenge to siting Bitcoin to a specific location. And not only is it the most challenging to prescriptive jurisdiction, because of its appeal to large holders it carries the highest stakes for regulators and litigants. This ensures that sooner or later courts will have to deal with these questions.

The multi-signature wallets versatility makes it difficult to paint in broad strokes and requires consideration of the unique circumstances of

93. *Id.*

94. Illustration of a 2-of-3 multi-signature wallet transaction, *What is a Multisignature (Multisig) Wallet?*, BITCOIN MAG. (Mar. 23, 2023), <https://bitcoinmagazine.com/guides/what-is-a-multisignature-wallet> [<https://perma.cc/KVY9-URTA>].

95. *Multisig Wallets*, ELECTRUM, <https://electrum.readthedocs.io/en/latest/multisig.html> [<https://perma.cc/FJU5-ZVXN>] (explaining potential variations of multi-signature wallets); *Multi-signature*, BITCOIN, <https://en.bitcoin.it/wiki/Multi-signature> [<https://perma.cc/PW4B-SNU6>] (list of potential use cases for multi-signature wallets).

96. See Office of the Comptroller of the Currency, Interpretive Letter 1170 on Authority of a National Bank to Provide Cryptocurrency Custody Services for Customers, at 2 (July 22, 2020).

97. Honzik & Hall, *supra* note 92.

each situation. Multi-signature wallets are not only useful for corporate custody,<sup>98</sup> they can be used for smart contracts,<sup>99</sup> backup and recovery solutions,<sup>100</sup> inheritance,<sup>101</sup> and even Bitcoin-backed loans.<sup>102</sup>

Applying the *lex situs* rule is no more complicated than a single-signature wallet when the requisite number of keys to sign a transaction are in the same jurisdiction. If enough keys are in one jurisdiction to make it possible for that state to seize it, then the territorial principle deems that state to have prescriptive jurisdiction over it.<sup>103</sup> But what about when the keys are dispersed across enough jurisdictions making it impossible for any state to seize it? Presumably the Bitcoin wallet has no *situs* and no state has prescriptive jurisdiction. Clearly, that cannot be the case.

Determining the proper governing law of a multi-signature wallet requires categorizing disputes into ones of property and ones of contract. On the one hand it is a digital asset, and what should be regarded as property. But on the other hand, it is a contract, vesting parties with rights and duties. Ascertaining the proper prescriptive jurisdiction will depend on first determining the character of the dispute. Only then can a court determine which state has prescriptive jurisdiction.

Consider a corporation with Bitcoin in its treasury. The corporation might store its Bitcoin in two different ways. It could self-custody its Bitcoin treasury in a 2-of-3 multi-signature wallet with three employees holding a key. If a dispute were to arise internally, the corporation's state

98. *E.g.*, *Security Features on the Bitfinex Platform*, BITFINEX, <https://support.bitfinex.com/hc/en-us/articles/213892469-Security-Features-on-the-Bitfinex-Platform> [<https://perma.cc/3X2E-4SES>] (“Our cold storage holds about 99.5% of user funds in an offline, multisignature wallet, which requires the approval of all transactions via three of five hardware security modules (HSMs) held by internationally scattered management team members.”); *Business Vaults*, UNCHAINED CAPITAL, <https://unchained.com/business> [<https://perma.cc/A6RY-NM2E>] (“Secure bitcoin in a business vault and never lose access to your money.”).

99. *E.g.*, Stuart D. Levi & Alex B. Lipton, *An Introduction to Smart Contracts and Their Potential and Inherent Limitations*, HARV. L. SCHOOL F. ON CORP. GOVERNANCE (May 26, 2018), <https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations> [<https://perma.cc/F837-MRSH>].

100. *E.g.*, *Vaults*, UNCHAINED CAPITAL, <https://unchained.com/vaults> [<https://perma.cc/U7RP-5E86>]. In Unchained Capital's collaborative custody model, the owner holds two of the three keys to their multi-signature wallet and Unchained Capital holds the third key. *Id.* This ensures that the owner retains complete control over their wallet and Unchained has no control over the wallet. *Id.* Unchained Capital only steps in if the user loses one of their keys. *Id.*

101. *E.g.*, *Self-custody*, CASA, <https://casa.io/learn-more/self-custody> [<https://perma.cc/3D3Z-S68D>]; *Inheritance*, UNCHAINED CAPITAL, <https://unchained.com/inheritance> [<https://perma.cc/W3TB-FJYV>]; *Inheritance Planning*, NUNCHUK, <https://nunchuk.io/inheritance> [<https://perma.cc/7Z8Y-V3PL>].

102. *E.g.*, *Commercial Loans*, UNCHAINED CAPITAL, <https://unchained.com/loans> [<https://perma.cc/38AF-L7VM>].

103. Mills, *supra* note 17, at 205.

of incorporation most likely has prescriptive jurisdiction.<sup>104</sup> This is in accord with party expectations and autonomy and avoids the potential to subject a corporation to conflicting laws.

Alternatively, the corporation could enter into a custody agreement with another corporation specializing in digital asset security. A dispute between the custodian and its client is one of contract. Absent a choice-of-law clause, the applicable law will depend on the forum state's conflicts-of-law rules for contracts.<sup>105</sup> If the custodian were vested with possession of the wallet, then the custodian's place of business, the place the contract was made, or the location of the keys would determine the applicable law. But in this case, the location of the private keys is determinative not because of the *situs* of the wallet, it is because that demonstrates where the contract was *performed*.

In disputes over multi-signature wallets that arise between the holders of the private key or pursuant to a custody agreement, the dispute is one of contract and not property. Therefore, in keeping with the modern view of contract, party autonomy and the agreement's choice-of-law should control.<sup>106</sup> However, where a dispute over Bitcoin held in a multi-signature wallet is not one between a custodian and a client, but relates to the wallet, the dispute is probably a matter of property rather than contract.

An example of this is inheritance. Multi-signature wallets are often suggested for digital asset inheritance.<sup>107</sup> Here, the law of the deceased's domicile could govern if the forum adopts the view that Bitcoin, is movable property. Another example is theft or in the civil justice system, conversion. In either case, the effects doctrine permits the state where the Bitcoin was when it was stolen to apply its law to the dispute.<sup>108</sup> Despite the added complications of the multi-signature wallet, determining the proper reach and limits of prescriptive jurisdiction is manageable when categorizing disputes over multi-signature wallets as ones of contract or property.

## CONCLUSION

As Bitcoin continues to integrate into the global financial system, its classification becomes increasingly more important. The debate over Bitcoin's status not only impacts its legal treatment, but it also influences

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104. See *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); see also RESTATEMENT (THIRD) OF FOREIGN REL. L. § 414 (AM. L. INST. 1987).

105. *Principles on Digital Assets and Private Law*, at 38–39, INT'L INST. FOR THE UNIFICATION OF PRIVATE L. (Sept. 2023), <https://www.unidroit.org/wp-content/uploads/2024/01/Principles-on-Digital-Assets-and-Private-Law-linked-1.pdf> [<https://perma.cc/394T-3PS9>].

106. *Id.* at 38.

107. *Commercial Loans*, *supra* note 102.

108. RESTATEMENT (THIRD) OF FOREIGN REL. L. § 402 cmt. d (AM. L. INST. 1987).

broader regulatory strategies and international law considerations. By examining various custody models, such as single-key wallets, multi-signature arrangements, and brain wallets, the complexity in pinpointing Bitcoin's *situs* is highlighted and, by extension, whose law applies.

As digital assets like Bitcoin become increasingly prevalent, the legal community must adapt its approaches to incorporate these new forms of property without wiping away established doctrines. The challenge lies not in creating entirely new categories but in adapting existing ones to better reflect the realities of a digital age. In continuing to refine these legal constructs, the role of Bitcoin and other digital assets in international law will undoubtedly become clearer, contributing to a more precise and equitable regulatory environment globally.