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BREAKING THE CODE: CRYPTOCURRENCY AND PROGRAMMING PROPOSAL

Allan C. Hutchinson*

The problem to be faced in regulating cryptocurrency is the general thrust of the ‘governance paradox’¹—how do you regulate an innovative scheme that demands some regulation in the public interest, when you know that any regulation will transform the very features of that scheme that not only makes it what it is, but also makes it especially useful and attractive to that same public? More specifically, how do you regulate an off-the-grid, decentralized and distributed scheme without making it into an on-the-grid, centralized and undistributed scheme? This is the challenge to be met in devising any kind of proposal to create a tailored and efficacious regulatory regime for cryptocurrency. Consequently, in making this effort, it will be important to remember that regulation is not a technical end in itself, but a means to a larger and more substantive end. As regards cryptocurrency, this means that regulation must serve to advance and protect broader social and democratic goals—the shared notion of putting ordinary people and their interests at the heart of any regulated society, not those of many civic or state-controlled institutions that tend to put their own interests ahead of others. Accordingly, any proposals to regulate cryptocurrency must be guided by that broader and more encompassing ambition.

In this paper, I explore how to go about that exciting and, some might say, daunting task of designing and implementing such a regulation scheme. In the first section, I examine the present self-regulatory arrangements that underpin cryptocurrency; it is important to appreciate where things presently stand if there is any chance of making progress forward. In the second section, I pull back the institutional curtain and reveal the people and processes that maintain the blockchain technology that drives cryptocurrency; the nature of its operation and alleged consensus-based character are examined. The third section looks at some of the objections that are made to any effort to monitor the work of the code-makers and programmers; an important distinction is made between what is possible and what is desirable. In the fourth section, I draw comparisons and contrast between programmers and corporate directors with an eye to adopting some disciplinary strategies from corporate governance. The fifth section examines the difficulties to applying a

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¹ Kevin Werbach, *The Blockchain and the New Architecture of Trust* (Cambridge, MA: The MIT Press, 2018) at 133–38.