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# Emerging Payment Systems and the Primacy of Private Law

Mark Edwin Burge

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One of the most far-reaching legacies of twentieth century law is the establishment of comprehensive public regulation as the norm for governance of vast swaths of commerce. The reality of persistent and rapid technological change is, however, proving fatal for this paradigm in the field of payment systems.

Non-cash payment systems in the United States have been dominated by public-law regulatory schemes for well over a century, ranging from the 1896 Uniform Negotiable Instruments Law to the payment articles in today's Uniform Commercial Code. The law of checks—long the dominant form of non-cash payments—was comprehensively codified in the UCC. By the time of the UCC's widespread acceptance in the late 1960s, one could reasonably assume that the way of the code—that is, "a preemptive, systematic, and comprehensive enactment of a whole field of law" purporting "to give the answers to all relevant questions"[1] in its field—was the way of the future for the law of payments.

Events since that time have proven the assumption wrong. The shift in noncash payments away from checks since the dawn of the 21st century has been dramatic, as statistics from the most recent Federal Reserve Payments Study demonstrate. In 2000, 41.9 billion checks were paid in the United States, accounting for a solid 58% of all noncash payments. By 2012, the number of paid checks had declined to 18.3 billion, representing only 15% of noncash payments. People made fewer payments *by check*, but not fewer payments. The overwhelming majority of the reduction in check volume in that twelve-year period was attributable to increased use of credit cards and debit cards. Back in 2000, these two types of payment cards accounted for 21.7 billion payments—roughly one-third of all non-cash payments in the United States. For 2012, credit and debit card use collectively had ballooned to 73.2 billion payments that constituted 59% of all noncash payments in the country. [2]

While the shift away from checks to card-based systems was a testament to convenience, it also showed that payment systems could function based primarily upon private law and absent a comprehensive code. Card systems are built on a network of contracts—typically between issuing banks and users, between issuing banks and card networks, between card networks and merchant "acquirer" banks, and between acquirer banks and card-accepting merchants. Growth in the use of credit cards, however, eventually piqued the interest of Congress, resulting in federal public law.

The 1970 amendments to the Truth in Lending Act[3] (TILA), for example, upended some parts of the web of contracts by shifting liability for fraud losses from the cardholder to the card issuer. The amended TILA, as is still the law today, limited the liability of a cardholder for unauthorized use to $50.[4] Debit cards were regulated with a similar, but slightly less protective scheme when Congress passed the Electronic Funds Transfer Act (EFTA) in 1978.[5] Notably, the explosive growth of card systems occurred in this environment where consumers were protected against unauthorized use and issuers would take the losses, incentivizing a development of fraud-protection mechanisms that continues today.[6] Electronic transfer of funds is today also experiencing explosive growth through the Automated Clearing House (ACH) system. Consumers who have abandoned checks in favor of their bank's on-line bill pay services are using the ACH system,[7] but are protected from unauthorized use by the same EFTA that helped fuel the mass acceptance of debit cards.

Payment systems now stand in an era of rapid technological change typified by two streams of innovation: mobile payments (such as Apple Pay) and cryptographic virtual currencies (most prominently Bitcoin). Apple Pay builds its payment structure on top of existing ecosystems, serving as a conduit for payments by credit card, debit card, and ACH. The end-user legal protections in TILA and EFTA for the underlying payments do not, however, obviously apply to the mobile payment overlay uncontemplated at the time of the 1970s adoptions. This situation raises questions about the scope and applicability of those protections when mobile device hardware or software is the cause-in-fact of unauthorized payments. Even further outside of existing legal ecosystems are cryptocurrencies. Bitcoin, for instance, not only can exchange monetary value outside the existing paradigm of legal tender, but its use of "blockchain" technology and a distributed network as a verification system means that it can dispense with the need for trusted institutional

intermediaries.[8] The once unthinkable is now possible—electronic payments without banks in the middle.

Do the lessons of the last fifty years of payments law and technology hold any lessons for a foreseeable future of developments that were once as unforeseeable as mobile payments and cryptocurrency? In this paper, I argue that they do. Payment systems have now clearly exceeded the regulatory capacity of public legal institutions to govern them via a comprehensive code like the UCC. Public law protection of the end user, however, has proven so successful and facilitated such industry growth that complete privatization of payments law is not the best response either. Emerging payment systems should be subject to a division between private law and public law in which private law is predominant, but not exclusive.

Private contract law is best equipped to deal with both current and future developments as the primary governance mechanism for emerging systems of payment. This market-friendly primacy of private law is only assured, nonetheless, by ceding to public law specific protections for payment system end users against oppression, fraud, and mistake. This allocation between private law and public law will not only avoid stifling rapid innovation, but, as happened with TILA and EFTA for the card-based systems, create a legal environment conducive to payment users comfortably adopting those innovations.

ENDNOTES

[1] Robert E. Scott, *The Uniformity Norm in Commercial Law: A Comparative Analysis of Common Law and Code Methodologies* 171, in Jody D. Kraus & Steven D. Walt, The Jurisprudential Foundations of Corporate and Commercial Law (2000).

[2] *See generally* Federal Reserve System, *The 2013 Federal Reserve Payments Study: Recent and Long-Term Trends in the United States* (July 2014), at 16, https://www.frbservices.org/files/communications/pdf/general/2013_fed_res_paymt_study_detailed_rpt.pdf.

[3] Pub. L. No. 91-508, 84 Stat. 1126 (1970) (codified as amended in scattered sections of 15 U.S.C.).

[4] 15 U.S.C. § 1643(a)(1)(B) (2012).

[5] *See generally* Pub. L. No. 95-630, Title XX, 92 Stat. 3641 (1978), codified as 15 U.S.C. §§ 1693 – 1693r.

[6] *See* Lewis Mandell, The Credit Card Industry: A History 69 (1990) (observing that by the end of the 1970s a "wide array of laws and regulations" that protected consumers served the function of "stabilizing the industry," priming it for subsequent growth).

[7] *See generally* NACHA – The Electronic Payments Association, *ACH Network: How it Works*, https://www.nacha.org/ach-network.

[8] For a helpful and readable introduction to the functioning of Bitcoin, see Jerry Brito and Andrea Castillo, *Bitcoin: A Primer for Policymakers*, https://coincenter.org/wp-content/uploads/2013/08/Brito_BitcoinPrimer_v1.3.pdf (2013).

*The preceding post comes to us from Mark Edwin Burge, Associate Professor of Law at Texas A&M University School of Law. The post is based on his article, which is entitled "Apple Pay, Bitcoin, and Consumers: The ABCs of Future Public Payments Law" and is available* here.

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