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Ripple Effect: The SEC's Major Questions Doctrine Problem

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NOTES

RIPPLE EFFECT: THE SEC'S MAJOR QUESTIONS DOCTRINE PROBLEM

*Matt Donovan**

Crypto assets and blockchain technology have the potential to create unprecedented equitable access to financial institutions. Despite this potential, there is a robust debate regarding federal agencies' jurisdiction over the novel asset class. Without clear statutory guidelines, federal agencies have been forced to resolve this debate through the rulemaking process. However, agency rules regarding jurisdiction over crypto assets could be scrutinized by a reviewing court under the major questions doctrine. Once highly deferential to agency rules, the U.S. Supreme Court in recent terms has repeatedly struck down agency rules when an agency claims an unheralded power to regulate an issue of deep economic and political significance. The U.S. Securities and Exchange Commission (SEC) arguably claims such a power by interpreting most crypto assets to be "investment contracts" and thus under SEC jurisdiction. But although a decision on major questions doctrine grounds in the high-profile case SEC v. Ripple Labs, Inc. could help clarify how we classify crypto assets, it leaves many jurisdictional questions unanswered and could complicate the application of the SEC's disclosure regime to risky crypto asset offerings. This Note argues that Congress should pass the Lummis-Gillibrand Responsible Financial Innovation Act to create joint jurisdiction between the SEC and the Commodities Futures Trading Commission over most crypto asset offerings to balance consumer protection and innovation at the frontier of financial innovation. This Note also endorses a new standard to evaluate whether a crypto asset is sufficiently decentralized to further clarify the SEC's role in regulating crypto asset offerings.

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INTRODUCTION

Many people lamented *West Virginia v. EPA*¹ as a major blow to the U.S. Environmental Protection Agency's (EPA) ability to combat climate

1. 142 S. Ct. 2587 (2022).

change.² However, the U.S. Supreme Court's first explicit use of the major questions doctrine raises broader concerns for the entire body of administrative law.³ Although courts have long given deference to federal agencies' interpretations of their own organic statutes,⁴ the major questions doctrine weakens this deference and perhaps swallows it whole.⁵

As the Court is more alert than ever to addressing the "particular and recurring problem" of agencies asserting more authority than Congress granted,⁶ the U.S. Securities and Exchange Commission (SEC) faces a compelling challenge under the major questions doctrine to its regulation of crypto assets.⁷ The SEC argues that most crypto assets are "investment contracts"⁸ within the definition of the Securities Act of 1933⁹ and thus fall under SEC jurisdiction.¹⁰ But the SEC's interpretation of crypto assets as securities and its corresponding regulation of crypto assets are drawing criticism from industry participants and fellow regulators.¹¹ Critics argue

2. See Alice C. Hill, *What Does the Supreme Court's Decision in West Virginia v. EPA Mean for U.S. Action on Climate?*, COUNCIL ON FOREIGN RELS. (July 19, 2022, 12:19 PM), <https://www.cfr.org/blog/what-does-supreme-courts-decision-west-virginia-v-epa-mean-us-action-climate> [<https://perma.cc/D5A5-55K3>]; *West Virginia*, 142 S. Ct. at 2626–27 (Kagan, J., dissenting).

3. See Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENV'T & ADMIN. L. 479, 489 (2016); see also David F. Engstrom & John E. Priddy, *West Virginia v. EPA and the Future of the Administrative State*, LEGAL AGGREGATE (July 6, 2022), <https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state/> [<https://perma.cc/AE88-7457>].

4. See Engstrom & Priddy, *supra* note 3. See generally *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (establishing a framework for judicial deference to an agency's interpretation of its statute).

5. Brandon Johnson, Marc Martin & Belinda Nixon, *Supreme Court Decision Portends Greater Judicial Scrutiny of FCC*, JDSUPRA (July 15, 2022), <https://www.jdsupra.com/legalnews/supreme-court-decision-portends-greater-8986008/> [<https://perma.cc/9UYT-848H>].

6. See *West Virginia*, 142 S. Ct. at 2609.

7. See Andrea Tinianow, *The Supreme Court's Wrecking Ball Could Impact SEC Authority*, FORBES (July 1, 2022, 3:31 PM), <https://www.forbes.com/sites/andreatinianow/2022/07/01/the-supreme-courts-wrecking-ball-could-impact-sec-authority> [<https://perma.cc/45DV-KR7V>]; see also Defendants Ishan and Nikhil Wahi's Motion to Dismiss at 49–56, *SEC v. Wahi*, No. 22-cv-01009 (W.D. Wash. Feb. 6, 2023), ECF No. 33. See generally Adam Kuegler, Note, *Cryptocurrency and the SEC: How a Piecemeal Approach to Regulating New Technology Selectively Stifles Innovation*, 52 CONN. L. REV. 989 (2020).

8. 15 U.S.C. § 77b(a)(1).

9. *Id.* §§ 77a–77bbb.

10. Gary Gensler, Chair, Sec. Exch. Comm'n, SEC Speaks: Kennedy and Crypto (Sept. 8, 2022), <https://www.sec.gov/news/speech/gensler-sec-speaks-090822> [<https://perma.cc/M9BT-J5GS>] ("Of the nearly 10,000 tokens in the crypto market, I believe the vast majority are securities.").

11. See Roslyn Layton, *The Crypto Uprising the SEC Didn't See Coming*, FORBES (Aug. 30, 2021, 11:24 AM), <https://www.forbes.com/sites/roslynlayton/2021/08/30/the-crypto-uprising-the-sec-didnt-see-coming/> [<https://perma.cc/RS8W-9YGJ>] (discussing the SEC's suit against Ripple and subsequent backlash); Caroline Pham, Comm'r, Commodities Futures Trading Comm'n, Statement of Commissioner Caroline D. Pham on *SEC v. Wahi* (July 21, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement072122> [<https://perma.cc/Z64Q-AYLF>] (describing *SEC v. Wahi* as "regulation by enforcement").

that the SEC is inappropriately applying the test set forth in *SEC v. W.J. Howey Co.*¹² to crypto assets that exhibit few properties characteristic of traditional securities, forcing start-ups to comply with onerous SEC disclosure requirements.¹³ The major questions doctrine poses a colorable challenge to the SEC's regulation of the novel, trillion-dollar crypto asset market.¹⁴

Although some actors in the crypto asset industry would rejoice in the SEC's sudden lack of jurisdiction over crypto assets, what then? This Note examines how a major questions determination does not solve the most pressing regulatory questions in the crypto asset sector and complicates the SEC's role in regulating crypto assets that could benefit from sound regulation.¹⁵ This Note ultimately proposes legislation that clearly defines which agencies can regulate which aspects of the crypto asset industry, including a path with more objective criteria for crypto assets to transition from one regulatory regime to another.¹⁶

Part I of this Note gives a background on crypto assets, including their current regulatory landscape and legislative efforts to clarify crypto asset regulation, as well as the major questions doctrine and its rise to prominence in the Court's jurisprudence. Part II examines how the SEC's use of the *Howey* test in *SEC v. Ripple Labs, Inc.*¹⁷ creates a compelling challenge under the major questions doctrine and the consequences of such a determination. Part III proposes that Congress should pass the Lummis-Gillibrand Responsible Financial Innovation Act¹⁸ to clarify jurisdictional boundaries in the crypto asset market but with changes to the bill's process for removal of disclosure requirements to clarify when a crypto asset is sufficiently decentralized.

12. 328 U.S. 293, 299 (1946).

13. Cf. LEWIS R. COHEN, GREGORY STRONG, FREEMAN LEWIN & SARAH CHEN, THE INELUCTABLE MODALITY OF SECURITIES LAW: WHY FUNGIBLE CRYPTO ASSETS ARE NOT SECURITIES 106–07 (2022), <https://dixlaw.com/wp-content/uploads/2022/11/The-Ineluctable-Modality-of-Securities-Law-DLx-Law-Discussion-Draft-Nov.-10-2022.pdf> [<https://perma.cc/Q76Z-8CDY>]; Hester M. Peirce, Comm'r, Sec. Exch. Comm'n, Running on Empty: A Proposal to Fill the Gap Between Regulation and Decentralization (Feb. 6, 2020), <https://www.sec.gov/news/speech/peirce-remarks-blockress-2020-02-06> [<https://perma.cc/L85B-BWNC>] (proposing a safe harbor for new crypto assets to freely trade subject to modified reporting requirements).

14. See *infra* Part II.A; see also *Crypto Market Cap Charts: Altcoin Market Cap Chart*, COINGECKO, <https://www.coingecko.com/en/global-charts> [<https://perma.cc/U93N-NANL>] (last visited Apr. 3, 2023) (valuing the total market capitalization of all crypto assets other than bitcoin at over \$650 billion). SEC officials have routinely stated that bitcoin is not a security. See *SEC Chair Gary Gensler Discusses Potential Crypto Regulation and Stablecoins*, CNBC (June 27, 2022, 10:43 AM), <https://www.cnbc.com/video/2022/06/27/sec-chair-gary-gensler-discusses-potential-crypto-regulation-and-stablecoins.html> [<https://perma.cc/DY45-LLSN>].

15. See *infra* Part II.B.

16. See *infra* Part III.

17. No. 20-cv-10832 (S.D.N.Y. filed Dec. 22, 2020).

18. S. 4356, 117th Cong. (2022).

I. CRYPTO ASSET REGULATION AND THE MAJOR QUESTIONS DOCTRINE

Crypto assets and blockchain technology present paradigm shifts for financial institutions and the broader concept of currency.¹⁹ Developing countries and financial superpowers alike recognize crypto assets' importance in promoting equitable access to financial institutions and building the future of finance.²⁰ But federal regulators are struggling to bring crypto assets under their respective regimes.²¹ While the SEC believes most crypto assets are unregistered securities,²² fellow regulators, lawmakers, and commentators question the SEC's application of securities laws to crypto assets and argue that the Commodities Futures Trading Commission (CFTC) is the appropriate regulator for most crypto assets.²³

The Supreme Court developed the major questions doctrine to address "a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."²⁴ Based on the Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁵ the major questions doctrine arose in cases like *FDA v. Brown & Williamson Tobacco Corp.*²⁶ as a canon of statutory interpretation.²⁷ However, the Court began invoking the major questions doctrine as a clear statement rule outside the *Chevron* framework in cases such as *King v. Burwell*²⁸ to determine that agencies did not possess the authority to make rules on a given issue.²⁹ After the Court continued this trend in *West Virginia*, it is unclear how the major questions doctrine interacts with *Chevron*—or if *Chevron* deference still exists.³⁰ If *West Virginia* has truly done away with *Chevron* deference,³¹ that may strengthen a challenge to the SEC's jurisdiction over crypto assets.

Part I.A provides background on crypto assets and their current federal regulatory landscape, as well as on efforts to reform regulatory jurisdiction over crypto assets. Part I.B discusses the rise of the major questions doctrine and its increasing importance in the Court's jurisprudence.

A. Crypto Assets and Their Current Regulation

Crypto assets and blockchain technology have existed for less than fifteen years, yet innovations using both have created a trillion-dollar market.³²

19. See *infra* Part I.A.

20. See *infra* Part I.A.

21. See, e.g., *infra* Part I.A.2.

22. See *infra* Part I.A.2.

23. See *infra* Parts I.A.2–3.

24. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

25. 467 U.S. 837 (1984).

26. 529 U.S. 120 (2000).

27. See Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 794–95 (2017); *infra* Part I.A.1.

28. 576 U.S. 473 (2015).

29. See Coenen & Davis, *supra* note 27, at 795.

30. See Johnson et al., *supra* note 5; see also Engstrom & Priddy, *supra* note 3.

31. See Johnson et al., *supra* note 5.

32. See *Crypto Market Cap Charts: Altcoin Market Cap Chart*, *supra* note 14.

However, crypto assets and blockchain technology are nascent and riddled with obstacles to achieving widespread adoption.³³ Multiple regulatory bodies have asserted jurisdiction over the crypto asset sector, but it is unclear how crypto assets fit into current regulatory frameworks.³⁴

1. Crypto Assets Generally

Blockchain technology is reconceptualizing money, currency, and financial instruments while also presenting solutions for property ownership and human governance.³⁵ Since Bitcoin's³⁶ launch in 2009,³⁷ crypto assets have hit a market capitalization as high as three trillion dollars³⁸ and have been recognized as a way for nations to gain or maintain economic competitiveness.³⁹

Bitcoin was the first functioning digital currency to operate without a centralized authority.⁴⁰ Unlike earlier digital currencies, bitcoin has no asset backing, central issuer, or single entity checking each transaction, allowing users to send money directly to one another while trusting that nobody sent their money twice.⁴¹

Bitcoin created the first functioning, decentralized cryptocurrency by inventing the first blockchain.⁴² A blockchain is a network of unrelated computers that maintain a public ledger of the users' transactions.⁴³ Computers on a blockchain timestamp and package new transactions into a "block."⁴⁴ The first computer to package these transactions broadcasts the new block to the other computers, which check to make sure that the

33. See *infra* Part I.A.1.

34. See *infra* Part I.A.2.

35. See VITALIK BUTERIN, ETHEREUM: A NEXT-GENERATION SMART CONTRACT AND DECENTRALIZED APPLICATION PLATFORM 19, 23 (2014), https://ethereum.org/669c9e2e2027310b6b3cdce6e1c52962/Ethereum_Whitepaper_-_Buterin_2014.pdf [<https://perma.cc/Q2VK-J9LV>] (discussing the Ethereum blockchain's ability to clarify property ownership and open voting mechanisms).

36. This Note uses "Bitcoin" to refer to the Bitcoin Network and "bitcoin" to refer to the cryptocurrency that exists on the network.

37. See Brian Nibley, *Bitcoin Price History: 2009–2023*, SOFI LEARN (Mar. 1, 2023), <https://www.sofi.com/learn/content/bitcoin-price-history/> [<https://perma.cc/QZD6-SWWQ>]; see also SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM (2008), <https://bitcoin.org/bitcoin.pdf> [<https://perma.cc/T2YT-DZR7>].

38. Yvonne Lau, *Cryptocurrencies Hit Market Cap of \$3 Trillion for the First Time as Bitcoin and Ether Reach Record Highs*, FORTUNE (Nov. 9, 2021, 1:32 AM), <https://fortune.com/2021/11/09/cryptocurrency-market-cap-3-trillion-bitcoin-ether-shiba-inu/> [<https://perma.cc/A4MJ-9Z5B>]; see also *Crypto Market Cap Charts: Altcoin Market Cap Chart*, *supra* note 14.

39. See Nelson Renteria, Tom Wilson & Karin Strohecker, *In A World First, El Salvador Makes Bitcoin Legal Tender*, REUTERS (June 9, 2021, 11:24 PM), <https://www.reuters.com/world/americas/el-salvador-approves-first-law-bitcoin-legal-tender-2021-06-09/> [<https://perma.cc/M7EU-XXPH?type=image>]; see also Exec. Order No. 14,067, 87 Fed. Reg. 14143 (Mar. 9, 2022).

40. See BUTERIN, *supra* note 35, at 4.

41. See NAKAMOTO, *supra* note 37, at 1, 8.

42. See BUTERIN, *supra* note 35, at 1.

43. See NAKAMOTO, *supra* note 37, at 1, 8.

44. See *id.* at 3.

transactions in the block are valid before attaching the new block to the most recently approved block.⁴⁵ Each new block has a piece of the last one in it.⁴⁶ Thus, if a bad actor changes one block, they will be forced to alter every block in the chain after.⁴⁷ Such a change alerts the network that the bad actor's version of the chain is incorrect and directs the honest computers not to add new blocks to this version.⁴⁸ This makes the longest chain of blocks immutable as long as a majority of the computers are acting honestly.⁴⁹ A bitcoin is simply a piece of code on this ledger.⁵⁰

Blockchain technology and its applications to contexts beyond peer-to-peer currency may be more important than Bitcoin itself.⁵¹ For example, Ethereum is a blockchain that allows anyone to write and store pieces of code on its blockchain that automatically execute certain functions based on predetermined inputs.⁵² These “smart contracts” can receive, store, and send funds from one person or smart contract to another.⁵³ Smart contracts allow users to create and access sophisticated financial instruments, such as by lending, borrowing,⁵⁴ and swapping crypto assets,⁵⁵ without a centralized authority to execute their functions.⁵⁶ Moreover, users can create their own crypto assets, governance models, or non-fungible tokens: verifiably unique crypto assets with a public provenance.⁵⁷ Ethereum uses its native asset, ether, as “gas” for users to interact with smart contracts and applications.⁵⁸

The XRP Ledger is a blockchain designed to create a more efficient money transfer regime.⁵⁹ Launched by two of the eventual founders of software

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.* at 4, 8.

50. *See* Lewis R. Cohen, *Ain't Misbehavin': An Examination of Broadway Tickets and Blockchain Tokens*, 65 WAYNE L. REV. 81, 111 (2019).

51. *See* BUTERIN, *supra* note 35, at 1.

52. *See id.* at 1, 13. The self-executing nature of smart contracts is akin to that of vending machines. If you put one dollar in a vending machine, then you can choose a soda, and the machine will give it to you. If you put in five dollars, the machine will give you your soda and four dollars in change.

53. Finematics, *Code Is Law?: Smart Contracts Explained (Ethereum, DeFi)*, YOUTUBE (June 13, 2020), <https://www.youtube.com/watch?v=pWGLtjG-F5c> [<https://perma.cc/2564-WG6K>].

54. *See generally* ERNESTO BOADO, AAVE PROTOCOL WHITEPAPER V1.0 (2020), https://github.com/aave/aave-protocol/blob/master/docs/Aave_Protocol_Whitepaper_v1_0.pdf [<https://perma.cc/B7CR-PT9S>].

55. *See generally* Hayden Adams, *Uniswap White Paper—Introduction*, HACKMD (2018), <https://hackmd.io/@HaydenAdams/HJ9jLsfTz#Introduction> [<https://perma.cc/Q64G-HW4L>].

56. *See* BUTERIN, *supra* note 35, at 1.

57. *See id.* at 19 (discussing token systems and decentralized autonomous organizations (DAO) on Ethereum).

58. *See id.* at 1.

59. *See* Marcel T. Rosner & Andrew Kang, Note, *Understanding and Regulating Twenty-First Century Payment Systems: The Ripple Case Study*, 114 MICH. L. REV. 649, 657–60 (2016).

company Ripple Labs, the XRP Ledger allows any person or financial institution to use the XRP Ledger as a single source of accurate information for international money transfers to quickly settle payments.⁶⁰ The XRP Ledger and its native XRP token also act as a bridge between currencies, eliminating the need for costly foreign exchange transactions.⁶¹ Ripple Labs and other companies use the XRP Ledger to create new applications used by hundreds of financial institutions across the world.⁶² Although Ripple does not own or operate the XRP Ledger, it holds just under half of the supply of XRP in escrow, which is released at predetermined times.⁶³ Given Ripple's past statements about XRP's value and its use of the XRP Ledger, Ripple and XRP drew significantly closer regulatory scrutiny than bitcoin and ether did.⁶⁴

Despite its promising future, blockchain technology has substantial intrinsic and extrinsic barriers to its adoption. Most crypto asset prices are highly volatile, making those assets less feasible as currency.⁶⁵ Additionally, many blockchains are relatively slow at verifying transactions and are energy intensive.⁶⁶ Smart contracts are also susceptible to coding mistakes that hackers can exploit to siphon funds out of the contract.⁶⁷ Bad actors have also leveraged blockchain technology for illicit purposes.⁶⁸

Moreover, crypto assets are susceptible to high speculation. The crypto sector saw its largest speculative bubble from 2017 to 2018 thanks to initial coin offerings (ICOs), in which start-ups created new crypto assets and sold these assets to early purchasers to fund their ventures.⁶⁹ Although mainstay

60. See Chris Giancarlo & Conrad Bahlke, *Cryptocurrencies and US Securities Laws: Beyond Bitcoin and Ether*, IFLR (June 17, 2020), <https://www.iflr.com/article/2a644yk131snh9bzqpou8/cryptocurrencies-and-us-securities-laws-beyond-bitcoin-and-ether> [<https://perma.cc/97UQ-6CP3>]. Ripple typically settles transactions in three to five seconds. Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment at 5, SEC v. Ripple Labs, Inc., No. 20-cv-10832 (S.D.N.Y. Sept. 17, 2022), ECF No. 643.

61. See Rosner & Kang, *supra* note 59, at 675.

62. See Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 60, at 6, 8. Unlike Bitcoin or Ethereum, the XRP Ledger is secured by a system of XRP Ledger users who are nominated by fellow users to approve transactions. See Rosner & Kang, *supra* note 59, at 659.

63. See Rosner & Kang, *supra* note 59, at 651; see also Giancarlo & Bahlke, *supra* note 60.

64. See generally Complaint, SEC v. Ripple Labs, Inc., No. 20-cv-10832 (S.D.N.Y. Dec. 22, 2020), ECF No. 4 (alleging XRP is an unregistered security).

65. See Economic Lowdown, *Functions of Money*, FED. RSRV. BANK OF ST. LOUIS (Sept. 3, 2012, 8:59 PM), <https://www.stlouisfed.org/education/economic-lowdown-podcast-series/episode-9-functions-of-money> [<https://perma.cc/98CS-JPW2>].

66. See Nitish Srivastava, *Drivers and Barriers for Adoption of Blockchain*, BLOCKCHAIN COUNCIL (Nov. 19, 2020), <https://www.blockchain-council.org/blockchain/drivers-and-barriers-for-adoption-of-blockchain/> [<https://perma.cc/L6FK-8Q6F>].

67. CHAINALYSIS, THE 2022 CRYPTO CRIME REPORT 6 (2022), <https://go.chainalysis.com/rs/503-FAP-074/images/Crypto-Crime-Report-2022.pdf> [<https://perma.cc/5PBD-F45C>].

68. See generally *id.* Financial crimes, such as money laundering and fraud, account for 0.15 percent of all cryptocurrency transactions. *Id.* at 4. Scams are the most common cryptocurrency-based crime, netting over seven billion dollars in 2021. See *id.* at 79.

69. Annika Feign, *What Is an ICO?*, COINDESK, <https://www.coindesk.com/learn/what-is-an-ico/> [<https://perma.cc/S8T2-AWP4>] (Dec. 11, 2022, 2:32 PM). ICOs allowed start-ups

blockchain projects like Ethereum and Bancor launched with ICOs, many projects leveraged excitement around blockchain innovation to promote projects with little substance.⁷⁰ In response to rampant fraud and speculation in the ICO market, federal regulators brought enforcement actions against token issuers.⁷¹ Since the ICO era, a regulatory turf war has arisen in the United States regarding which agencies have jurisdiction over what aspects of the crypto asset sector.⁷²

2. Crypto Asset Regulation

Prominent figures within the largest federal agencies fundamentally disagree about each agency's application of the law to crypto assets.⁷³ The SEC believes that most crypto assets are securities.⁷⁴ But fellow regulators and commentators highlight the distinction between crypto asset offerings and crypto assets themselves, noting that most crypto assets share few properties with securities.⁷⁵ Commentators and regulators alike posit that eliding this distinction has devastating consequences for both the asset's issuer and those who transact in the asset.⁷⁶ A growing number of legislators believe that the CFTC would be the appropriate regulator for crypto assets, but they recognize that the CFTC does not currently possess this authority.⁷⁷

Section 5 of the Securities Act of 1933 requires any offering of a nonexempt security to be registered with the SEC.⁷⁸ SEC registration must include "information about the issuer's financial condition, the identity and background of management, and the price and amount of securities to be offered."⁷⁹ Because securities offerings "seek the use of the money of others

to raise funds without giving away equity while also "establish[ing] a community of incentivized users who want the project to succeed so their . . . tokens rise in value." *Id.*

70. *See id.* At the time, half of all ICO-backed projects failed within four months. *Id.* It was common for projects with an anonymous founder and a four-page white paper to raise millions of dollars in an ICO. *See* Jakub, *History of DeFi—from Inception to 2021 and Beyond*, FINEMATICS (Apr. 1, 2021), <https://finematics.com/history-of-defi-explained/> [<https://perma.cc/LMT4-WPLU>].

71. *See generally* The DAO, Exchange Act Release No. 81,207, 117 SEC Docket 745 (July 25, 2017) (analyzing the DAO token as a security).

72. *See* Cheryl L. Isaac, Keri E. Riemer, Christine Mikhael & Stephen M. Humenik, *CFTC and SEC Perspectives on Cryptocurrency and Digital Assets—Volume I: A Jurisdictional Overview*, K&L GATES (May 6, 2022), <https://www.klgates.com/CFTC-and-SEC-Perspectives-on-Cryptocurrency-and-Digital-Assets-Volume-I-A-Jurisdictional-Overview-5-6-2022> [<https://perma.cc/Z85Q-7SGX>].

73. *Compare* Gensler, *supra* note 10, with Brian Quintenz (@CFTCquintenz), TWITTER (Aug. 4, 2021, 9:30 AM), <https://twitter.com/cftcquintenz/status/1422912721637580803> [<https://perma.cc/B7S9-6C2Z>] ("[T]he SEC has no authority over pure commodities or their trading venues, whether those commodities are wheat, gold . . . [or] crypto assets.").

74. *See* Gensler, *supra* note 10. *See generally* Complaint, *supra* note 64.

75. *See* COHEN ET AL., *supra* note 13, at 55–56; *see also* Peirce, *supra* note 13.

76. *See* Peirce, *supra* note 13; Cohen, *supra* note 50, at 96–97.

77. *See infra* Part III.A.

78. 15 U.S.C. § 77e(a), (c).

79. SEC v. Cavanagh, 1 F. Supp. 2d 337, 360 (S.D.N.Y.), *aff'd*, 155 F.3d 129 (2d Cir. 1998).

on the promise of profit,”⁸⁰ the SEC’s disclosure regime “assure[s] public access to material facts bearing on the value of . . . securities.”⁸¹ Securities include stocks, bonds, and “investment contract[s].”⁸²

The Supreme Court defined what constitutes an investment contract in *SEC v. W.J. Howey Co.* The *Howey* Court held that a leaseback agreement and service contract for parcels of an orange grove constituted an investment contract within the meaning of the Securities Act.⁸³ The Court established a four-prong test to determine what constitutes an investment contract, requiring (1) an investment of money (2) in a common enterprise⁸⁴ (3) with a reasonable expectation of profit⁸⁵ (4) to be derived from the efforts of a promoter or a third party.⁸⁶ Because W.J. Howey Co. took funds and promised investors a right to the grove’s future profits that depended solely on Howey’s upkeep of the land and sales of oranges, the entire arrangement was an investment contract.⁸⁷ The term investment contract “embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes.”⁸⁸ In defining investment contracts, “[f]orm [is] disregarded for substance and emphasis [is] placed on economic reality.”⁸⁹ The *Howey* test thus focuses on the character of a commercial agreement and the expectations and obligations of the parties in a particular transaction regardless of the underlying asset.⁹⁰

80. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946).

81. *SEC v. Aaron*, 605 F.2d 612, 618 (2d Cir. 1979).

82. 15 U.S.C. § 77b(a)(1).

83. 328 U.S. at 294–97.

84. Courts in different jurisdictions disagree on certain aspects of the test. For instance, some jurisdictions require vertical commonality, which is when the investor and the promoter’s fortunes are interwoven and dependent on the promoter or a third party. *See, e.g.*, *Hector v. Wiens*, 533 F.2d 429, 433 (9th Cir. 1976). Other jurisdictions require horizontal commonality, which is defined by a “pooling of interests, usually combined with a pro rata sharing of profits.” *See, e.g.*, *Brodt v. Bache & Co.*, 595 F.2d 459, 460 (9th Cir. 1979).

85. Courts use an objective test to determine whether the seller created a reasonable expectation of profit based on the efforts of a promoter. For instance, in *United Housing Foundation v. Forman*, the Court held that a “stock” in a New York City cooperative was not an investment contract because the purchasers bought their apartments to live in and were not “‘attracted solely by the prospects of a return’ on [their] investment.” 421 U.S. 837, 852 (1975) (quoting *SEC v. W.J. Howey Co.*, 328 U.S. 293, 300 (1946)).

86. *See W.J. Howey Co.*, 328 U.S. at 298–99. Although *Howey* required an expectation of profit derived *solely* from the efforts of others, courts have interpreted this requirement loosely. *See SEC v. Edwards*, 540 U.S. 389, 395 (2004).

87. *W.J. Howey Co.*, 328 U.S. at 299–300. The owners of the leaseback agreements had no desire to occupy or manage the parcels of land because most lived far away. *See id.* at 300. Thus, Howey’s efforts were crucial to the land’s profitability. *See id.*

88. *See id.* at 299.

89. *See id.* at 298.

90. COHEN ET AL., *supra* note 13, at 56, 60; Plaintiff Securities and Exchange Commission’s Memorandum of Law in Support of Its Motion for Summary Judgment at 19, *SEC v. LBRY, Inc.*, No. 21-cv-260 (D.N.H. May 4, 2022), ECF No. 55-1 (“If digital assets, or anything else, are offered in a way that meets . . . *Howey*, an investment contract exists and the securities laws apply.”).

Although broad, the SEC's jurisdiction is not unlimited. Neither the oranges nor the land in *Howey* alone were investment contracts.⁹¹ Even though commodities like wheat, sugar, tobacco, and oranges can be a part of an investment contract,⁹² they are not securities, even if they are sold as futures contracts.⁹³ Precious metals like gold and silver purchased to speculate on a global market are not securities without any post-sale obligations undertaken by the seller.⁹⁴ Although the SEC has alleged that some crypto assets are securities,⁹⁵ other regulators define crypto assets as commodities,⁹⁶ currencies,⁹⁷ or property.⁹⁸

In its first report providing guidance on crypto assets, the SEC examined an asset that closely resembled a traditional security and concluded that it constituted an investment contract.⁹⁹ Promoted as a decentralized venture fund, software start-up Slock.it launched “The DAO” in 2016.¹⁰⁰ The DAO sold “DAO tokens” in exchange for ether.¹⁰¹ The DAO pooled deposited ether and allowed DAO token holders to vote to allocate The DAO's funds to new projects on Ethereum and to share in their potential profits.¹⁰² Slock.it appointed “curators” who determined what proposals were posed for a vote and who could decrease the votes needed for a successful quorum.¹⁰³ Slock.it heavily promoted The DAO as a secure, for-profit entity to earn a return for investors.¹⁰⁴ Shortly after it launched, The DAO lost one-third of its funds—which were then worth around fifty million dollars—in a hack.¹⁰⁵

After the DAO hack, the SEC concluded in the “DAO Report” that DAO tokens constituted investment contracts and were thus subject to SEC

91. See William Hinman, Dir., Sec. Exch. Comm'n Div. of Corp. Fin., Digital Asset Transactions: When *Howey* Met Gary (Plastic), Remarks at the Yahoo Finance All Markets Summit: Crypto (June 14, 2018), <https://www.sec.gov/news/speech/speech-hinman-061418> [<https://perma.cc/Q9F6-YUNS>]; see also *Rodriguez v. Banco Cent. Corp.*, 990 F.2d 7, 10 (1st Cir. 1993).

92. See generally *Miller v. Cent. Chinchilla Grp., Inc.*, 494 F.2d 414 (8th Cir. 1974) (finding that a sale and management agreement for chinchillas was an investment contract).

93. See *SEC v. Glen-Arden Commodities, Inc.*, 493 F.2d 1027, 1034 (2d Cir. 1974).

94. See *SEC v. Belmont Reid & Co.*, 794 F.2d 1388, 1391 (9th Cir. 1986); *Future Sys. Inc.*, SEC Staff No-Action Letter, 1973 WL 9653 (June 8, 1973).

95. See Complaint, *supra* note 64, at 34.

96. Complaint at 4, *CFTC v. Gemini Tr. Co.*, No. 22-cv-04563 (S.D.N.Y. June 2, 2022), ECF No. 1 (noting that “[d]igital assets such as bitcoin and other virtual currencies” are encompassed by the definition of “commodity”).

97. See Press Release, U.S. Dept. of Just., Ripple Labs Inc. Resolves Criminal Investigation (May 5, 2015), <https://www.justice.gov/opa/pr/ripple-labs-inc-resolves-criminal-investigation> [<https://perma.cc/UQD7-LRDY>].

98. See, e.g., Rev. Rul. 2019-24, 2019-44 I.R.B. 1004 (2019).

99. See The DAO, Exchange Act Release No. 81,207, 117 SEC Docket 745, 745 (July 25, 2017).

100. See *id.* at 746–47; COHEN ET AL., *supra* note 13, at 74.

101. See The DAO, 117 SEC Docket at 746–47.

102. See *id.* at 747–48, 751. The DAO raised over ten million ether, currently worth over fifteen billion dollars. See *Ethereum Price*, COINGECKO, <https://www.coingecko.com/en/coins/ethereum> [<https://perma.cc/77GX-UV53>] (last visited Apr. 3, 2023).

103. See The DAO, 117 SEC Docket at 749.

104. See *id.* at 751–52.

105. See *id.* at 745–46.

jurisdiction.¹⁰⁶ Under the first prong of the *Howey* test, the SEC first concluded that ether deposited for DAO tokens constituted an investment of money.¹⁰⁷ Second, The DAO was a common enterprise because deposited ether was pooled and token holders stood to share in potential profits proportionate to their DAO tokens.¹⁰⁸ Third, because Slock.it extensively marketed The DAO for its return on investment, token holders had a reasonable expectation of profit.¹⁰⁹ Finally, DAO token holders had to rely heavily on Slock.it's day-to-day management of the pooled funds, security protocols, and promotional efforts as well as the curators' extensive control over proposals to realize a return on their investment.¹¹⁰

Although The DAO Report clarified that some crypto assets could be investment contracts,¹¹¹ subsequent SEC actions focused on fundraising transactions with crypto assets as opposed to crypto assets themselves.¹¹² Even though some ICOs were blatantly fraudulent,¹¹³ many appeared genuine—taking funds and giving buyers the right to purchase a discounted token that would function like a currency or commodity when the project completed a blockchain.¹¹⁴ Issuers argued that these token offerings were commodities offerings, yet courts held that some token offerings were also investment contracts.¹¹⁵ Because token offerors took investors' funds to build a blockchain in exchange for the right to buy tokens at a discount, investors relied on the offeror to provide a functioning blockchain so that early investors could profit by selling their discounted tokens after the blockchain launched.¹¹⁶

Despite the DAO Report and ICO cases, it was not clear when crypto assets themselves constituted investment contracts and were thus subject to SEC jurisdiction. Although they define crypto assets as securities, commentary

106. *See id.* at 745.

107. *See id.* at 751.

108. *See id.* at 747, 751.

109. *See id.* at 751.

110. *See id.* at 751–52.

111. *See* Hester M. Peirce, Comm'r, Sec. Exch. Comm'n, *Wolves and Wolverines: Remarks at the University of Michigan Law School* (Sept. 24, 2018), <https://www.sec.gov/news/speech/speech-peirce-092418> [<https://perma.cc/L55J-3FML>]; Joseph H. Nesler, *When It Comes to Analyzing Utility Tokens, the SEC Staff's "Framework for 'Investment Contract' Analysis of Digital Assets" May Be the Emperor Without Clothes (or, Sometimes an Orange Is Just an Orange) (Part I)*, WINSTON & STRAWN LLP (Oct. 28, 2019), <https://www.winston.com/en/crypto-law-corner/when-it-comes-to-analyzing-utility-tokens-the-sec-staffs-framework-for-investment-contract-analysis-of-digital-assets-may-be-the-emperor-without-clothes-or-sometimes-an-orange-is-just-an-orange.html> [<https://perma.cc/U3SG-Q52G>].

112. *See generally* *Munchee Inc.*, Securities Act Release No. 10445, 118 SEC Docket 975 (Dec. 11, 2017).

113. *See* *United States v. Zaslavskiy*, No. 17-CR-0647, 2018 WL 4346339, at *2 (E.D.N.Y. Sept. 11, 2018).

114. *See* *Munchee Inc.*, 118 SEC Docket at 978–79. Despite promoting an application for which users would earn MUN tokens for reviewing restaurants and use tokens for in-app transactions, these functions did not exist when Munchee sold their token. Thus, the future utility of the token did not remove its sale from *Howey*'s scope. *See id.* at 980.

115. *See* *SEC v. Telegram Grp. Inc.*, 448 F. Supp. 3d 352, 367–68 (S.D.N.Y. 2020).

116. *See id.* at 358.

from SEC officials acknowledged that some crypto assets function more like a currency or commodity and run on networks in which too many actors perform managerial tasks for there to be a reasonable expectation of profit or common enterprise.¹¹⁷ Commentators note that owning such an asset, unlike Howey's contracts or DAO tokens, does not grant the holder a legal claim on an enterprise's assets or future profits, but rather, it bestows a nominal interest in and the right to access a network not owned or guaranteed by a single, coordinated entity.¹¹⁸ SEC officials noted that applying securities laws to these kinds of assets would add little value for investors given the lack of information asymmetries between the purchaser and the token issuer.¹¹⁹ Moreover, assets that do not confer an ownership or profit-sharing interest in a venture, that impose no post-sale obligations on the seller,¹²⁰ and that have a bona fide consumptive use seem to fall outside of the SEC's purview.¹²¹ Other regulators have classified such crypto assets as commodities or currencies.¹²²

The crypto asset industry continues to chide the SEC for failing to clarify whether and when crypto assets themselves are securities or are offered as securities.¹²³ In its early enforcement actions, the SEC maintained that crypto assets themselves were securities, despite mostly regulating crypto asset offerings.¹²⁴ Commentators and regulators note that such a position has disastrous consequences for the token issuer and secondary transactions.¹²⁵ Notably, if crypto assets themselves are securities, all subsequent transactions with crypto assets are securities transactions, thus transforming users, exchanges, and even networks into broker-dealers under the Securities Exchange Act of 1934.¹²⁶ Token issuers would have to register their offering

117. *See id.* (“[A]n investment of money in a cryptocurrency utilized by members of a decentralized community connected via blockchain technology, which itself is administered by this community of users rather than by a common enterprise, is not likely to be deemed a security”); Hinman, *supra* note 91.

118. *See* Peter Van Valkenburgh, *Framework for Securities Regulation of Cryptocurrencies 2.0*, COIN CTR. (Aug. 2018), <https://www.coincenter.org/framework-for-securities-regulation-of-cryptocurrencies/> [<https://perma.cc/2KT6-D6YM>]; J. Carl Cecere, *Cryptocurrency's Future in the U.S. Is Threatened by SEC Action Against Ripple*, BLOOMBERG L. (Apr. 19, 2021, 4:00 AM), <https://news.bloomberglaw.com/securities-law/cryptocurrencys-future-in-the-u-s-is-threatened-by-sec-action-against-ripple> [<https://perma.cc/A635-SQEE>].

119. *See* Hinman, *supra* note 91; Peirce, *supra* note 111.

120. *See* Cecere, *supra* note 118; Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 60, at 17.

121. *See* United Hous. Found., Inc. v. Forman, 421 U.S. 837, 858 (1975); COHEN ET AL., *supra* note 13, at 86.

122. *See* Complaint, *supra* note 96, at 4; *see also* Press Release, U.S. Dept. of Just., *supra* note 97.

123. *See* Peirce, *supra* note 13; Nesler, *supra* note 111.

124. *See* Munchee Inc., Securities Act Release No. 10445, 118 SEC Docket 975, 979 (Dec. 11, 2017); *see also* COHEN ET AL., *supra* note 13.

125. *See* Peirce, *supra* note 13; Cohen, *supra* note 50, at 96–97.

126. 15 U.S.C. §§ 78a–78qq; *see also* Cohen, *supra* note 50, at 96–97. Broker-dealers must meet net capital requirements, maintain anti-money laundering programs, submit to SEC examinations, and comport with heightened duties of care to their counterparties in subsequent transactions. *See id.* at 97 n.74. *See generally* BARRY R. TEMKIN, CYNTHIA L. KING &

under the Securities Act, and the network would be subject to reporting requirements and heightened duties under the Exchange Act.¹²⁷ As former SEC chair Jay Clayton noted, the costs of compliance with SEC capital raising rules for companies valued up to \$100 million are impractically high.¹²⁸ Thus, most new token issuers would be wiped out trying to comply with existing SEC rules, likely explaining why no token issuer has attempted to do so.¹²⁹

The SEC again posited that crypto assets themselves are securities in its complaint against Ripple, arguing that all XRP tokens are investment contracts with Ripple.¹³⁰ Both Ripple and commentators argue that the SEC is incorrectly applying *Howey* to XRP.¹³¹ Commentators note that XRP's use as a bridge currency and the decentralization of the XRP Ledger should force XRP to fail the "common enterprise" and "reasonable expectations" prongs.¹³² Further, commentators note that the SEC improperly applies *Howey* to secondary purchasers of XRP, who cannot reasonably rely on Ripple's efforts because they have no legal relationship with Ripple.¹³³ Moreover, XRP holders express frustration that, by labeling XRP itself as a security, the SEC forced cryptocurrency exchanges to remove XRP to comply with securities laws, wiping out billions in XRP holders' funds.¹³⁴

The SEC under Chair Gary Gensler has argued that most crypto assets are securities,¹³⁵ has continued to litigate *Ripple Labs*, and has walked back guidance on decentralization and utility.¹³⁶ In response to enforcement

MITCHELL MARKARIAN, SEC REGULATION BEST INTEREST: A PRACTICAL GUIDE FOR BROKER-DEALERS AND INVESTMENT ADVISERS (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3566610 [<https://perma.cc/62ZT-J9RL>].

127. STEVEN LOFCHIE, CONOR ALMQUIST & SEBASTIAN SOUCHET, THE SECURITIES LAW TREATMENT OF UTILITY TOKENS (OR WHY IT IS PAST TIME FOR THE SEC TO ENGAGE WITH THE HARD QUESTIONS) 7 (2022), <https://www.friedfrank.com/uploads/siteFiles/Publications/The%20Securities%20Law%20Treatment%20of%20Utility%20Tokens.pdf> [<https://perma.cc/9EVX-6SLC>].

128. See Jay Clayton, Chair, Sec. Exch. Comm'n, Statement on Harmonizing, Simplifying and Improving the Exempt Offering Framework; Benefits to Small and Medium-Sized Business and Their Investors (Nov. 2, 2020), <https://www.sec.gov/news/public-statement/clayton-harmonization-2020-11-2> [<https://perma.cc/YLZ3-JP4D>].

129. LOFCHIE ET AL., *supra* note 127, at 7.

130. See Complaint, *supra* note 95, at 34.

131. See Giancarlo & Bahlke, *supra* note 60; see also Cecere, *supra* note 118; Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 60, at 5.

132. See Giancarlo & Bahlke, *supra* note 60 (discussing XRP's utility and decentralization); see also Cecere, *supra* note 118.

133. See Giancarlo & Bahlke, *supra* note 60; Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 60, at 17.

134. See Memorandum in Support of Writ of Mandamus at 13, 15, *Deaton v. SEC*, No. 21-cv-00001 (D.R.I. Jan. 1, 2021), ECF No. 1-1; Cecere, *supra* note 118.

135. See SEC Chair Gary Gensler Discusses Potential Crypto Regulation and Stablecoins, *supra* note 14.

136. See Matt Levine, Opinion, *Gary Gensler Wants to Regulate Crypto*, BLOOMBERG (Sept. 8, 2022, 2:33 PM), <https://www.bloomberg.com/opinion/articles/2022-09-08/gary-gensler-wants-to-regulate-crypto> [<https://perma.cc/NB9E-QF5W>] ("Gensler's posture is that he should be in charge of writing the rules for crypto, but not write them.").

actions like *SEC v. Wahi*,¹³⁷ commentators and regulators have described Gensler's approach as "regulation by enforcement."¹³⁸

A growing, bipartisan group in Congress believes that the CFTC is the appropriate regulator for a large part of the crypto asset sector.¹³⁹ The CFTC was originally designed to regulate agricultural products and contracts based on the underlying value of assets such as futures, derivatives, and swaps.¹⁴⁰ The CFTC now regulates similar contracts in the financial world.¹⁴¹ The CFTC has declared numerous crypto assets—including bitcoin,¹⁴² ether,¹⁴³ litecoin, and tether—as commodities per the Commodity Exchange Act¹⁴⁴ because they are goods exchanged in a market for uniform quality and value.¹⁴⁵ However, the CFTC's jurisdiction over crypto assets only allows it to regulate fraudulent and manipulative activities in commodities markets rather than commodities themselves.¹⁴⁶ Nor does the CFTC's authority extend to spot transactions absent fraud or manipulation.¹⁴⁷ Current CFTC chair Rostin Behnam maintains that the CFTC's principles-based regulation would balance innovation and consumer protection in the crypto asset markets.¹⁴⁸ Moreover, some CFTC officials have taken issue with the SEC's regulation of crypto assets.¹⁴⁹ However, CFTC officials acknowledge that

137. No. 22-cv-01009 (W.D. Wash. filed July 21, 2022) (establishing jurisdiction by naming nine crypto assets as securities but not naming them as defendants).

138. See Pham, *supra* note 11. See generally Peirce, *supra* note 13.

139. See Lummis-Gillibrand Responsible Financial Innovation Act, S. 4356, 117th Cong. § 403(a)(1)(F)(i)(I) (2022) (granting the CFTC primary jurisdiction over nonequity digital assets).

140. 7 U.S.C. § 1a(9)–(10).

141. See DAWN D. STUMP, COMMODITIES FUTURES TRADING COMM'N, DIGITAL ASSETS: CLARIFYING CFTC REGULATORY AUTHORITY & THE FALLACY OF THE QUESTION, "IS IT A COMMODITY OR A SECURITY?" (2021), https://www.cftc.gov/media/6306/DigitalAssetsAuthorityInfographic_CommStump082321/download [<https://perma.cc/7WSD-BUDU>].

142. See *In re BFXNA Inc.*, CFTC No. 16-19, 2016 WL 3137612 (June 2, 2016).

143. See Daniel Roberts, *CFTC Says Cryptocurrency Ether Is a Commodity, and Ether Futures Are Next*, YAHOO! FIN. (Oct. 10, 2019), <https://finance.yahoo.com/news/cftc-says-cryptocurrency-ether-is-a-commodity-and-is-open-to-ether-derivatives-133455545.html> [<https://perma.cc/V3QH-8DST>]. But see Leo Schwartz, 'Inaction Is Paralysis': CFTC Chair Rostin Behnam Calls for Regulation in the Wake of FTX's Collapse, FORTUNE CRYPTO (Nov. 30, 2022, 11:39 AM), <https://fortune.com/crypto/2022/11/30/inaction-is-paralysis-cftc-chair-rostin-behnam-calls-for-regulation-in-the-wake-of-ftxs-collapse/> [<https://perma.cc/D83A-QAA3>] (explaining that the CFTC chair stated that bitcoin is the only crypto asset that should be considered a commodity).

144. 7 U.S.C. §§ 1–26; see also Isaac et al., *supra* note 72.

145. See Stump, *supra* note 141; Isaac et al., *supra* note 72.

146. See Stump, *supra* note 141.

147. See *id.*; Isaac et al., *supra* note 72. Spot transactions are transactions in which delivery of an asset takes place in under two days, as most cryptocurrency transactions do. See Isaac et al., *supra* note 72.

148. See Rostin Behnam, Chairman, Commodities Futures Trading Comm'n, Keynote Address at the Brookings Institution Webcast on the Future of Crypto Regulation (July 25, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam24> [<https://perma.cc/6CM6-9ZDU>].

149. See Quintenz, *supra* note 73; Pham, *supra* note 11.

the law is currently unclear regarding the point at which a crypto asset becomes a commodity instead of a security.¹⁵⁰

3. Legislative Efforts to Clarify Crypto Asset Regulatory Jurisdiction

Pending legislation, such as the Lummis-Gillibrand Responsible Financial Innovation Act, provides creative solutions to the crypto asset regulatory jurisdiction problem.¹⁵¹ The Lummis-Gillibrand bill introduces the idea of an ancillary asset to address jurisdictional issues.¹⁵² An ancillary asset is a digital asset purchased as part of an investment contract under *Howey*, but it does not provide the purchaser with legally enforceable rights—such as a debt or equity interest, a profit or revenue share derived from the efforts of others, or an entitlement to an interest or a dividend payment.¹⁵³ If a crypto asset grants the holder one of the aforementioned rights, the token is a security.¹⁵⁴ If the asset does not confer one of these rights, the asset is a commodity, and the CFTC regulates its market.¹⁵⁵ Under the Lummis-Gillibrand bill, the issuer of an ancillary asset is entitled to a presumption that their asset is a commodity if the issuer meets modified SEC disclosure requirements within six months of the token's first sale and there is active trading of the asset.¹⁵⁶ Spot market transactions in ancillary assets are monitored by the CFTC, while token issuers must make periodic disclosures to the SEC until the issuer's entrepreneurial and managerial efforts are no longer the driving force behind their token's value.¹⁵⁷ If and when an asset reaches this point, the asset's market remains regulated by the CFTC, and the issuer is no longer subject to SEC disclosure requirements.¹⁵⁸

The Lummis-Gillibrand bill lays out an exhaustive list of what must be disclosed by an ancillary asset issuer.¹⁵⁹ The team must disclose their experience developing and selling crypto assets and any past transactions with the asset, as well as the asset's economics, the team's plans to support the asset, any third-party code audits, and the technology underlying the asset.¹⁶⁰

The Lummis-Gillibrand bill also establishes a procedure for token issuers to be excused from disclosure requirements by proving that their token is not

150. See Behnam, *supra* note 148.

151. See Lewis Cohen & Freeman Lewin, *RFIA Proposals Introduce Innovative Digital Asset Regulation Through Ancillary Assets*, IFLR (June 14, 2022), <https://www.iflr.com/article/2a89wn78h6ljzwr097xts/rfia-proposals-introduce-innovative-digital-asset-regulation-through-ancillary-assets> [<https://perma.cc/SP7B-GQEW>].

152. See *id.*; Lummis-Gillibrand Responsible Financial Innovation Act, S. 4356, 117th Cong. § 403(a)(1)(F)(i)(I) (2022).

153. See *id.* § 301(a)(1)(A)–(B).

154. See *id.* § 301(a)(1)(B).

155. See *id.* §§ 101(a)(2), 403(a)(1)(F)(i)(I); Cohen & Lewin, *supra* note 151.

156. See Cohen & Lewin, *supra* note 151.

157. See Lummis-Gillibrand Responsible Financial Innovation Act §§ 302(i)(1)–(2), 403(a)(1)(F)(i)(I).

158. See *id.* § 403(a)(1)(F)(i)(I).

159. See *id.* § 301(c)(1)–(2).

160. See *id.*

reliant on the issuers' entrepreneurial or managerial efforts.¹⁶¹ This provision imports the fourth prong of the *Howey* test and its extensive jurisprudence to determine which crypto asset offerings warrant the protection of securities laws.¹⁶² But commentators note that SEC guidance is unclear regarding when an asset is no longer reliant on the efforts of a single, coordinated group—a point commonly referred to as sufficient decentralization.¹⁶³ The SEC suggests that the “efforts of others” prong is met when a crypto asset’s “essential tasks or responsibilities . . . [are] expected to be performed by an [active participant], rather than an unaffiliated, dispersed community of network users.”¹⁶⁴ However, what the essential tasks on and off of a blockchain are and how many people must perform these tasks before a network is sufficiently decentralized are unclear.¹⁶⁵

To resolve this ambiguity, one commentator proposes a sufficient decentralization test featuring a flexible standard with a blockchain-focused factual analysis, as well as a separate bright-line rule for sufficient decentralization.¹⁶⁶ Under the flexible standard, the SEC would first ask whether a single person or coordinated group controls any material component of the relevant network.¹⁶⁷ Material components include validating transactions, changing the protocol’s code, holding a high percentage of the project’s tokens, and controlling a high percentage of capital raised by the asset’s sales.¹⁶⁸ If a person or group controls a material component of the asset, then the SEC should ask (1) whether the control over other material components is held by a diffuse group of unrelated parties and (2) whether the diffuse group’s authority over these components meaningfully limits the controlling person’s ability to alter the network or infringe on other users’ interests.¹⁶⁹ For example, if one group controlled half of Bitcoin’s computing power, a judge could still find that the Bitcoin network is sufficiently decentralized and thus exempt from SEC disclosure requirements due to other Bitcoin users’ ability to sell their bitcoin.¹⁷⁰ The

161. *See id.* § 302(i)(1)–(2).

162. *See* Cohen & Lewin, *supra* note 151; *Bipartisan Crypto Bills Could Clarify Current Regulatory Confusion—If They Tackle Howey*, DAVIS POLK (Aug. 10, 2022), <https://www.davispolk.com/insights/client-update/bipartisan-crypto-bills-could-clarify-current-regulatory-confusion-if-they> [<https://perma.cc/HL4A-N8MF>].

163. *See* Cohen & Lewin, *supra* note 151; *Bipartisan Crypto Bills Could Clarify Current Regulatory Confusion—If They Tackle Howey*, *supra* note 162; *see also* Gabriel Shapiro, *Defining Decentralization for the Law*, MEDIUM (Apr. 15, 2020), <https://lex-node.medium.com/defining-decentralization-for-law-58ca54e18b2a> [<https://perma.cc/8T7J-QKPY>].

164. *Framework for “Investment Contract” Analysis of Digital Assets*, SEC. EXCH. COMM’N, <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [<https://perma.cc/F5F6-G6XR>] (Mar. 8, 2023).

165. *See* Shapiro, *supra* note 163; COHEN ET AL., *supra* note 13, at 33.

166. *See* Shapiro, *supra* note 163.

167. *See id.*

168. *See id.*

169. *See id.*

170. *See id.*

test should also have a number of objective guidelines that indicate centralization, such as controlling 20 percent of the token's supply or 50 percent of the network's computing power.¹⁷¹

Conversely, this decentralization inquiry would feature a bright-line rule that indicates that a network is sufficiently decentralized.¹⁷² Under this test, a network is sufficiently decentralized when (1) the issuer owns less than 10 percent of the token supply, (2) the issuer owns less than 10 percent of the means of determining consensus, (3) there is substantial funding independent of the issuer to develop the blockchain, and (4) the token issuer's stated goals in their disclosure statements have been materially accomplished.¹⁷³

While such legislation is pending, without clear statutory authority for any agency to regulate crypto assets and their offerings, the SEC and CFTC are left to confront the crypto asset gap in securities and commodities laws through the rulemaking process. However, the way in which they do so could draw scrutiny from the Supreme Court.¹⁷⁴

B. *The Major Questions Doctrine*

Since 1994, the major questions doctrine has become an increasingly powerful tool for the Court to curb federal agencies' abilities to interpret their authority granted by Congress.¹⁷⁵ Although its scope is uncertain, commentators and sitting justices note that the major questions doctrine will be a clear statement rule in administrative law jurisprudence going forward.¹⁷⁶ A strengthened major questions doctrine creates an increasingly compelling challenge to federal agencies' authority to regulate crypto assets.¹⁷⁷

1. *Chevron* and the Major Questions Doctrine's Roots

In *Chevron*, the Court created a framework for judicial review of a federal agency's interpretation of its governing statute. The Court posited that when an agency's statute is ambiguous regarding a specific issue, a reviewing court will defer to the agency's reasonable interpretation of the statute.¹⁷⁸ The Court divided this analysis into two steps.¹⁷⁹ At "Step One," the reviewing court should examine the language of the statute and ask whether Congress clearly addressed the specific issue at hand.¹⁸⁰ If the relevant language is

171. *See id.*

172. *See id.*

173. *See id.*

174. *See infra* Part II.A.

175. *See generally* MCI Telecomms. Co. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994) (holding that the Federal Communications Commission's interpretation of its power to "modify" rate-filing requirements was not entitled to *Chevron* deference).

176. *See infra* Part I.B.3.

177. *See infra* Part II.A.

178. *See* *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

179. *Id.* at 842–43.

180. *See id.*

ambiguous, the court should move to “Step Two” and examine whether the agency’s interpretation of the statute is reasonable.¹⁸¹ Step Two of *Chevron* is highly deferential to the agency’s interpretation.¹⁸² This framework rests on the assumption that when passing legislation, Congress leaves statutory gaps for agencies to fill in using their industry expertise.¹⁸³ Thus, a reviewing court should not provide its own interpretation of the statute to fill these gaps.¹⁸⁴ But *Chevron* sparked constitutional concerns that the deferential framework gave agencies excessive lawmaking power, which led to an effort to limit judicial deference to agencies.¹⁸⁵

The major questions doctrine was first used as a tool for statutory interpretation as part of the Court’s *Chevron* Step One analysis. In *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,¹⁸⁶ Justice Antonin Scalia posited that Congress does not grant agencies the fundamental power to revise a statute that it passed, even a statute using subtle language.¹⁸⁷ This presumption resurfaced in *Brown & Williamson Tobacco Corp.*¹⁸⁸ The Federal Food, Drug, and Cosmetics Act¹⁸⁹ created the U.S. Food and Drug Administration (FDA) and allowed the FDA to regulate, among other things, “drugs” and “devices.”¹⁹⁰ In the past, the FDA repeatedly claimed that it did not have the authority to regulate tobacco products such as cigarettes, and Congress rejected requests to give the FDA such authority.¹⁹¹ Despite this, the FDA under the Clinton administration interpreted “drugs” and “devices” to include nicotine and tobacco products, thus falling under its jurisdiction.¹⁹²

Applying *Chevron* Step One,¹⁹³ the Court found that the Food, Drug, and Cosmetics Act and legislation that regulated tobacco labeling clearly showed that nicotine and cigarettes were not “drugs and devices.”¹⁹⁴ The Court stated that it was “confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”¹⁹⁵ Despite the key assumption that Congress leaves

181. *See id.* at 843.

182. *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 315 (2014).

183. *See Chevron*, 467 U.S. at 865–66 (discussing agencies’ role in policymaking).

184. *See id.*

185. *See* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1970–74 (2017) (describing multiple justices’ “constitutionally inspired anxieties about the modern administrative state”).

186. 512 U.S. 218 (1994) (holding that the Federal Communication Commission’s power to *modify* rate-filing requirements for telephone services providers did not include the power to *eliminate* rate-filing for most providers).

187. *See id.* at 231–32; *Whitman v. Am. Trucking Ass’ns. Inc.*, 531 U.S. 457, 468 (2001) (“[Congress] does not, one might say, hide elephants in mouseholes.”).

188. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

189. Ch. 675, 52 Stat. 1040 (1938) (codified as amended in scattered sections of 21 U.S.C.).

190. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 126.

191. *See id.* at 142–48.

192. *See id.* at 125.

193. *See id.* at 159.

194. *Id.* at 160.

195. *Id.*

ambiguity for agencies to “fill in the statutory gaps,”¹⁹⁶ the Court stated that there are “extraordinary cases” in which it will not assume this delegation.¹⁹⁷ Thus, the FDA’s claim of unheralded authority over a decision of high economic and political significance was not the sole factor for withholding *Chevron* deference, but the significance of the issues was one factor in determining if a statute was ambiguous.¹⁹⁸

But the Court did not consistently invoke the major questions doctrine at Step One in future cases,¹⁹⁹ leading some scholars to believe that the doctrine was dead.²⁰⁰ After a fourteen-year hiatus, the major questions doctrine resurfaced at the deferential Step Two of *Chevron*.²⁰¹ After the Court in *Utility Air Regulatory Group v. EPA*²⁰² found the relevant organic statute to be ambiguous at Step One of *Chevron*, the Court then held that the EPA’s interpretation of greenhouse gases as “air pollutants” under its jurisdiction was unreasonable “because it would bring about an enormous and transformative expansion in [the] EPA’s regulatory authority without clear congressional authorization.”²⁰³ This novel use of the major questions doctrine created a clear path for the Court to further scrutinize agency rules.²⁰⁴

2. Major Questions Outside of the *Chevron* Two-Step

Although *Utility Air* brought the major questions doctrine back into the Court’s jurisprudence, the Court subsequently began to apply the doctrine outside of the *Chevron* framework, solidifying the major questions doctrine as a clear statement rule.

*United States v. Mead Corp.*²⁰⁵ announced a “Step Zero” to the *Chevron* framework²⁰⁶: for an agency to be entitled to *Chevron* deference, Congress must have intended to give the agency the authority to create rules with the

196. *Id.* at 159 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

197. *See id.*

198. *See Coenen & Davis, supra* note 27, at 794–95.

199. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497 (2007). *Massachusetts* addressed whether the EPA had the authority to regulate vehicular emissions of greenhouse gases, which some commentators suggest was a major policy question. *See Jacob Loshin & Aaron Nielson, Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 62 (2010). However, not one justice mentioned the major questions canon. *Id.*

200. *See* Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Non-Interference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593, 594 (2008); Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 180 (2022).

201. *See, e.g., Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014).

202. 573 U.S. 302 (2014).

203. *Id.* at 310, 324; *see also* Yoav Doatan, *Deference and Disagreement in Administrative Law*, 71 ADMIN. L. REV. 761, 792 (2019) (describing Step Two of *Chevron* as a highly deferential reasonableness standard).

204. *See* Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 483 (2021).

205. 533 U.S. 218 (2001).

206. *See generally* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) (discussing *Mead* as a caveat to *Chevron*).

force of law on a certain issue, and the relevant agency must treat its own actions as having the force of law.²⁰⁷ If either of these requirements are not met, then the deferential *Chevron* framework does not apply, and the court will perform an independent analysis of the statute.²⁰⁸ This analysis is a far cry from the deferential *Chevron* standard and creates a stronger challenge to agency authority.²⁰⁹

In *King v. Burwell*, the Supreme Court applied the major questions doctrine at Step Zero of *Chevron*, finding that Congress did not intend to give the agency the authority to issue rules with the force of law.²¹⁰ *King* concerned a provision of the Patient Protection and Affordable Care Act²¹¹ that required states to create health insurance exchanges through which low-income residents could redeem tax credits for health insurance.²¹² Amid ambiguity in the provision, the Internal Revenue Service (IRS) stated that tax credits applied to insurance purchased on both federal and state exchanges.²¹³ Despite finding the provision ambiguous, the Court refused to apply *Chevron* deference to the IRS's interpretation and resolved the issue at Step Zero.²¹⁴ Because the tax credit provision was a key feature of the Affordable Care Act and involved billions of dollars of annual spending, the Court labeled the provision a question of "deep 'economic and political significance.'"²¹⁵ Given the provision's importance, the Court noted that if Congress wanted an agency to resolve this question "it surely would have done so expressly."²¹⁶

Although the Court eventually agreed with the IRS's interpretation of the statute, *King* represented a significant change in the implementation of the major questions doctrine.²¹⁷ Unlike previous major questions cases, in which the Court used the doctrine as a "soft" . . . guiding factor" for the interpretation of a statute, the *King* Court invoked the doctrine on its own as a "hard, 'on/off' trigger" to avoid the *Chevron* framework.²¹⁸ Instead of deferring to an agency's interpretation of an ambiguous statute, the Court required a clear grant of authority to an agency when ambiguity created a major question.²¹⁹ The Court has continued invoking the major questions doctrine at Step Zero to withhold deference.

207. *See Mead Corp.*, 533 U.S. at 226–27.

208. *See Sunstein*, *supra* note 206, at 194.

209. *See infra* Parts I.B.3, II.A.

210. *See King v. Burwell*, 576 U.S. 473, 492 (2015).

211. Pub. L. No. 111-148, 124 Stat. 119 (2018) (codified as amended in scattered sections of the U.S.C.).

212. *King*, 576 U.S. at 479.

213. *See id.* at 484–85.

214. *See id.* at 492.

215. *Id.* at 486 (quoting *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

216. *See id.*

217. Coenen & Davis, *supra* note 27, at 795.

218. *See id.*

219. *See id.* at 796.

In the recent case *Alabama Ass'n of Realtors v. Department of Health and Human Services*,²²⁰ the Court struck down the Centers for Disease Control and Prevention's (CDC) national eviction moratorium. The Court noted that because the moratorium would have affected 80 percent of the population and had seemingly no limits, the CDC's moratorium was of "vast 'economic and political significance'" and asserted "a breathtaking amount of authority."²²¹ Citing a tenuous connection between halting evictions and preventing the spread of disease, as well as the CDC's comparatively minor past regulations, the Court held that the CDC did not have the power to impose an eviction moratorium, and the Court did so without mentioning *Chevron* or "deference."²²² Thus, the Court clarified that a claim to unheralded, seemingly limitless power affecting a large swath of the population invoked the major questions doctrine.²²³

The Court applied a similar line of reasoning in *National Federation of Independent Business v. OSHA*²²⁴ (*NFIB*). In a challenge to an Occupational Safety and Health Administration (OSHA) vaccine mandate, the Court found that because the mandate was "a significant encroachment into the lives—and health—of a vast number of employees,"²²⁵ the mandate was of "vast economic and political significance."²²⁶ Requiring a plain authorization for the vaccine mandate,²²⁷ the Court found that the Occupational Safety and Health Act of 1970²²⁸ empowered OSHA "to set *workplace* safety standards, not broad public health measures."²²⁹ Thus, OSHA had no authority to issue a vaccine mandate.²³⁰ The Court established that a polarizing issue such as the vaccine mandate affecting millions of workers was also sufficient to trigger the major questions doctrine.²³¹

3. *West Virginia v. EPA* and *Chevron*

Given past cases demonstrating the Court's path toward limiting agency power, *West Virginia* was the logical progression in the major questions canon. However, the major questions doctrine's relationship with *Chevron*

220. 141 S. Ct. 2485 (2021) (per curiam).

221. *Id.* at 2489 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

222. *See id.* ("Section [264(a)] is a wafer-thin reed on which to rest such sweeping power."); *see also* 42 U.S.C. § 264(a) (allowing the CDC to "make and enforce such regulations as in [its] judgment are necessary to prevent the . . . spread of communicable diseases").

223. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

224. 142 S. Ct. 661 (2022) (per curiam).

225. *Id.* at 665.

226. *Id.* (quoting *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)).

227. *See id.*

228. Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended in scattered sections of the U.S.C.).

229. 29 U.S.C. § 652(8) (authorizing OSHA to issue workplace standards "reasonably necessary or appropriate to provide safe or healthful employment"); *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665.

230. *See id.*

231. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring).

remains unclear. By affirming the major questions doctrine's importance, the Court strengthened a potential challenge to the SEC's authority to regulate crypto assets.²³²

West Virginia examined whether the EPA's authority to set emissions standards by determining the "best system of emission reduction" permitted the EPA to enact the Clean Power Plan, which set strict emissions standards that would force all existing coal plants to implement a sector-wide shift in electricity production.²³³ The Court held that the "previously little-used" section 111(d) of the Clean Air Act²³⁴ was not a "clear congressional authorization" of the EPA's Clean Power Plan.²³⁵ Because the Clean Power Plan sought to induce an unprecedented shift in the nation's power grid using a "gap filler" provision of the Clean Air Act,²³⁶ the Court held that the EPA exceeded its statutory authority, explicitly invoking the major questions doctrine for the first time.²³⁷

Commentators note that after *West Virginia*, the major questions doctrine has "effectively swallow[ed] the rule" of agency deference.²³⁸ Justice Gorsuch emphasized the major questions doctrine's importance, describing the doctrine as a clear-statement rule and not merely an ambiguity canon.²³⁹ Moreover, the majority continued its major questions trend of neither citing *Chevron* nor mentioning "deference."²⁴⁰ Although the Court in *West Virginia* downplayed the importance of the major questions doctrine,²⁴¹ the broadening power to disrupt a settled principle of administrative law warrants attention.²⁴² The strengthening major question doctrine creates a plausible challenge to administrative agencies seeking to expand their regulatory jurisdiction to account for developments in their respective industries.²⁴³

Even though a major questions determination appears to be the death knell to an agency's ability to regulate,²⁴⁴ what exactly triggers the major questions doctrine is unclear. Although the Court originally viewed major questions

232. See *infra* Part II.A.

233. See *West Virginia*, 142 S. Ct. at 2599–600, 2603; see also Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64731 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (discussing the implications of the Clean Power Plan on existing coal plants).

234. 42 U.S.C. §§ 7401–7671q.

235. *West Virginia*, 142 S. Ct. at 2613, 2614 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

236. See *id.* at 2610–11.

237. See *id.* at 2610; Engstrom & Priddy, *supra* note 3.

238. Johnson et al., *supra* note 5; see also Coenen & Davis, *supra* note 27, at 792–93 (discussing the major questions doctrine as a potential tool to curb *Chevron* in the wake of *King v. Burwell*).

239. See *West Virginia*, 142 S. Ct. at 2620 n.3 (Gorsuch, J., concurring).

240. See Richardson, *supra* note 200, at 177.

241. See *West Virginia*, 142 S. Ct. at 2609–10.

242. See Johnson et al., *supra* note 5.

243. See *infra* Part II.A.

244. See *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (requiring a "clear congressional authorization" for an agency to decide an issue of deep economic and political significance).

cases as “extraordinary,”²⁴⁵ the *West Virginia* Court described the phenomenon of agencies asserting highly consequential power beyond what Congress intended as a “recurring problem.”²⁴⁶ This sentiment may signal a more aggressive application of the doctrine going forward.²⁴⁷ The Court seemingly interprets a “highly consequential” power to be the ability to regulate issues of “deep ‘economic and political significance.’”²⁴⁸ Justice Gorsuch noted in *West Virginia* that a question of economic significance exists when an agency seeks to regulate a large portion of the American economy or to “require ‘billions of dollars in spending’ by private persons and entities.”²⁴⁹ Significantly “encroach[ing] into the lives . . . of a vast number of employees” may also constitute economic significance.²⁵⁰ Further, Justice Gorsuch noted that an issue of political significance exists when there is earnest and robust debate in the legislature over an issue.²⁵¹

Moreover, most major questions doctrine cases occur “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate.”²⁵² But agency claims to authority are not as outrageous or novel in other cases²⁵³: the Court in *West Virginia* referred to the EPA’s case and OSHA’s claim to authority in *NFIB* as “colorable.”²⁵⁴ The Court also considers the agency’s past interpretations of the relevant statutory language.²⁵⁵

Put simply, most major questions determinations focus on what the agency is trying to regulate (questions of deep economic and political significance) and how the agency wishes to do so (the agency’s claim to authority). The Court disfavors claims to broad power and the use of previously unused or underapplied statutory provisions.²⁵⁶ If an agency asserts a novel authority to regulate, and that authority implicates a sufficiently important economic

245. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–160 (2000).

246. *West Virginia*, 142 S. Ct. at 2609.

247. *See* Johnson et al., *supra* note 5.

248. *See West Virginia*, 142 S. Ct. at 2609; *see also* King v. Burwell, 576 U.S. 473, 486 (2015) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

249. *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (quoting King v. Burwell, 576 U.S. 473, 485 (2015)); *see also* Ala. Ass’n of Realtors v. Dep’t Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (determining that an eviction moratorium was of economic significance because Congress spent fifty billion dollars on it).

250. *See* Nat’l Fed’n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022). Like the Affordable Care Act, vaccine mandates were certainly of high political significance, further suggesting that questions of high economic *or* political significance may trigger the major questions doctrine.

251. *See West Virginia*, 142 S. Ct. at 2620–21.

252. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

253. *See id.*

254. *See West Virginia*, 142 S. Ct. at 2609. *But see* Coenen & Davis, *supra* note 27, at 791–96 (discussing King v. Burwell as the first usage of the major questions doctrine absent an agency claim to unheralded power).

255. *See West Virginia*, 142 S. Ct. at 2613 (“The last place one would expect to find [the authority for the Clean Power Plan] is in the previously little-used backwater of Section 111(d.)”; *see also id.* at 2593–94 (citing Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. 64662, 64667 (Oct. 23, 2015)) (discussing the EPA’s past interpretation of section 111(d) as inadequate authority to implement the Clean Power Plan).

256. *See, e.g., Util. Air Regul. Grp.*, 573 U.S. at 324.

or political issue, the Court will likely withhold *Chevron* deference and instead search for a clear congressional authorization for the agency's power in the statute's text.²⁵⁷

Although it is unclear exactly when an agency action invokes the major questions doctrine, the Court has shown an increasingly heightened skepticism for agencies' broad, novel claims to power.²⁵⁸ Considering this skepticism, the SEC's position that most crypto assets are securities could lead the Court to invoke the major questions doctrine.²⁵⁹

II. *Crypto Asset Regulation as a Major Question*

This part examines how the current major questions doctrine could be applied to the SEC's regulation of crypto assets. Part II.A conducts a major questions doctrine analysis of the case in *Ripple Labs*, examining the history and the implications of the SEC labeling crypto assets as investment contracts and comparing *Ripple Labs* to other major questions cases. Part II.B then explores whether a major questions decision in *Ripple Labs* resolves the SEC's role in crypto asset regulation, examining how the SEC's power after a major questions decision could be either relatively the same or significantly limited.

A. *The SEC's Regulation of Crypto Assets as a Major Question*

The SEC's application of the *Howey* test to crypto assets like XRP could trigger the major questions doctrine if the Supreme Court hears a case like *Ripple Labs*. Crypto assets like XRP share few similarities with other investment contracts regulated by the SEC.²⁶⁰ The breadth of the SEC's interpretation of the term "investment contract" bears similarities to other agencies' interpretations that have raised major questions doctrine issues for the Court.²⁶¹ Finally, the SEC's interpretation of "investment contract" allows it to regulate the vast majority of crypto assets and transactions, which is arguably an issue of deep economic and political significance in line with the Court's major questions jurisprudence.²⁶²

1. The SEC's Use of "Investment Contract"

Consistent with the Court's approach in *West Virginia*, the Court would first examine the "history and the breadth of the authority" the agency is asserting.²⁶³ The Court would ask whether an agency "'discover[ed] in a long-extant statute an unheralded power' representing a 'transformative

257. See Richardson, *supra* note 200, at 187.

258. See *supra* Parts I.B.1–3.

259. See *infra* Part II.A.

260. See *infra* Part II.A.1.

261. See *infra* Parts II.A.2–3.

262. See *infra* Part II.A.

263. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

expansion in [its] regulatory authority.”²⁶⁴ By expanding *Howey* to declare that crypto assets like XRP are investment contracts, the Court could find that the SEC is expanding its jurisdiction beyond what Congress intended.

The Court in *Howey* stated that the term “investment contract” was intended “to be ‘flexible’ and ‘capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits’” to give investors the necessary tools to make informed investment decisions.²⁶⁵ Like equities and other securities, an investment contract represents a legal interest in an enterprise with a promise from a promoter or manager to improve the value of the legal right.²⁶⁶ But unlike a stock, note, or security equivalent, in which all of the parties’ rights are boiled down to a specific document,²⁶⁷ the investment contract is a catchall category that examines all of the facts and circumstances of a specific transaction to determine if the agreement constitutes a security.²⁶⁸

The application of the *Howey* test is a point of controversy in *Ripple Labs*.²⁶⁹ Hundreds of companies use the XRP token and its open-source blockchain, the XRP Ledger, to facilitate cross-border payments and foreign currency transactions.²⁷⁰ Although Ripple neither created nor owns the XRP Ledger, it uses the XRP Ledger in its products, it made over one billion dollars selling XRP, and it publicly discussed its plans to use XRP in its products.²⁷¹ The SEC alleges that XRP is an unregistered investment contract,²⁷² but Ripple and commentators argue that the SEC is incorrectly applying *Howey* to the XRP token.²⁷³

264. *Id.* at 2610 (second alteration in original) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

265. See Plaintiff Securities and Exchange Commission’s Memorandum of Law in Support of Its Motion for Summary Judgment at 5, *SEC v. Ripple Labs*, No. 20-cv-10832 (S.D.N.Y. Sept. 17, 2022), ECF No. 640 (quoting *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946)).

266. See Giancarlo & Bahlke, *supra* note 60; Hinman, *supra* note 91.

267. See, e.g., *Tcherepnin v. Knight*, 389 U.S. 332, 343 (1967); *COHEN ET AL.*, *supra* note 13, at 38–39.

268. *COHEN ET AL.*, *supra* note 13, at 39–42, 56. For instance, in *Howey*, despite not being a stock or note, the land sale, W.J. Howey Co.’s promises to cultivate the land, and dividends paid taken together resulted in the finding of a security in *Howey*. See *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946).

269. See generally Gabriel Shapiro, *How SEC vs. Ripple Stems from an Age-Old Philosophical Debate*, LEX_NODE’S OFF. CRYPTO LAW NEWSL. (May 10, 2021), <https://lexnode.substack.com/p/how-sec-vs-ripple-stems-from-an-age> [https://perma.cc/S93W-JGD4].

270. See Defendants’ Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 60, at 6–9.

271. See Giancarlo & Bahlke, *supra* note 60; see also Plaintiff Securities and Exchange Commission’s Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 265, at 16–18.

272. See Complaint, *supra* note 95, at 34.

273. See Defendants’ Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 60, at 13–28; Giancarlo & Bahlke, *supra* note 60; *COHEN ET AL.*, *supra* note 13, at 68–71.

Ripple posits that “blue sky law” cases²⁷⁴ that interpreted “investment contract” and cases after *Howey* had three factual similarities. Each case involved (1) a contractual relationship²⁷⁵ that (2) imposed post-sale obligations on the issuer of a security to benefit the investor²⁷⁶ and (3) entitled the investor to profits generated by the issuer.²⁷⁷ For example, the investors in *Howey* agreed to give up their money in exchange for a right to receive “an allocation of the net profits” based on the *Howey* company’s efforts in growing and marketing an orange grove.²⁷⁸ By examining all of the facts of the arrangement, including the land sale, service contract, and *Howey*’s promises, the Court in *Howey* found that this economic reality showed that the agreement was an investment contract with *Howey* that warranted the SEC’s protections.²⁷⁹

The ICO cases demonstrate the flexibility of the *Howey* test. *SEC v. Kik Interactive, Inc.*²⁸⁰ and *SEC v. Telegram Group Inc.*²⁸¹ both involved fundraising transactions in which token offerors entered into an agreement to receive investor funds through an exempt securities offering—allowing an offeror to sell an unlimited number of securities to accredited investors.²⁸² In exchange, investors obtained the right to purchase the offeror’s token at a discount in the future, when the offeror completed the blockchain.²⁸³ In both cases, the court found that the purported exempt securities offering and the delivery of tokens were the same, nonexempt securities offering, as opposed to an exempted securities offering followed by an arm’s-length commodities

274. Blue sky laws are state securities laws that preceded the Securities Act of 1933. The Securities Act drew heavily from blue sky laws and used similar phrases, such as “investment contract.” See *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946). The Court in *Howey* examined blue sky law cases to help interpret the term “investment contract,” and the SEC has relied on blue sky law cases to interpret the elements of *Howey*. See generally *id.* See Brief for the Securities and Exchange Commission at 18, *SEC v. Edwards*, 540 U.S. 389 (2004) (No. 02-1196), 2003 WL 21498455 (SEC urging the Court to follow blue sky law cases, which made no distinction between fixed and variable returns in an investment contract).

275. See Defendants’ Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 60, at 18–19; COHEN ET AL., *supra* note 13, at 52.

276. Compare *People v. White*, 12 P.2d 1078, 1079, 1081 (Cal. Ct. App. 1932) (finding an investment contract when seller had a contractual obligation to flip foreclosed properties and return a profit to investors), with *Hanneman v. Gratz*, 211 N.W. 961, 963 (Minn. 1927) (finding no investment contract when the buyer agreed to purchase shares of title in leases for oil-rich land without any post-sale obligation on the seller). See generally Defendants’ Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 60, at 13–23 (arguing that all blue sky law cases prior to *Howey* had the same “essential ingredients” of an investment contract).

277. See Defendants’ Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 60, at 21; COHEN ET AL., *supra* note 13, at 63–64.

278. See *W.J. Howey Co.*, 328 U.S. at 295–96; Defendants’ Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 60, at 21–22.

279. See *W.J. Howey Co.*, 328 U.S. at 298.

280. 492 F. Supp. 3d 169 (S.D.N.Y. 2020).

281. 448 F. Supp. 3d 352 (S.D.N.Y. 2020).

282. See 17 C.F.R. § 230.506 (2023); see also COHEN ET AL., *supra* note 13, at 77–81.

283. See *Kik Interactive, Inc.*, 492 F. Supp. 3d at 181–82; *Telegram Grp. Inc.*, 448 F. Supp. 3d at 367.

sale.²⁸⁴ Neither court found the tokens in the transaction to be investment contracts,²⁸⁵ but all the facts of the agreements taken together constituted an investment contract.²⁸⁶ Unlike the DAO token, which arguably solely represented the holder's right to share in the profits of The DAO based on the efforts of Slock.it and its curators,²⁸⁷ Telegram and Kik's tokens represented the right to access a blockchain and had a bona fide consumptive use.²⁸⁸ However, the manner in which these tokens were offered and sold—often in bulk to large venture capital funds—showed that the purchasers were motivated by financial gain from the resale of their tokens, which could only occur if the token issuer completed their blockchain.²⁸⁹ Thus, in cases in which the underlying asset in an agreement does not represent a legal relationship with the issuer, a proper *Howey* analysis examines all the facts of a particular transaction together—here, the entire crypto asset offering—to see if an investment contract exists.²⁹⁰ This way, any transaction, regardless of the subject of the transaction, can be an investment contract depending on the parties' obligations and rights.²⁹¹

However, as commentators argue, *Howey*'s flexibility does not transform the underlying asset in an investment contract into a security.²⁹² For example, if the *Howey* corporation sold an orange to a grocery store, the store would not need to be a registered broker-dealer to purchase the orange.²⁹³ Without a transfer of the benefits and the promises of the specific initial transaction, courts do not treat subsequent transactions that do not involve the original offeror as investment contracts.²⁹⁴ Because secondary purchasers of crypto assets are unaware of the facts and circumstances of the original offer and most crypto assets do not grant rights typically afforded by securities, commentators argue that secondary transactions in most crypto assets are not securities transactions.²⁹⁵

Ripple and commentators argue that the XRP token itself cannot pass the *Howey* test.²⁹⁶ Unlike equities or other securities, owning XRP does not

284. See *Kik Interactive, Inc.*, 492 F. Supp. 3d at 180; *Telegram Grp. Inc.*, 448 F. Supp. 3d at 367.

285. See *Telegram Grp. Inc.*, 448 F. Supp. 3d at 358; *Kik Interactive, Inc.*, 492 F. Supp. 3d at 182–83.

286. See *Telegram Grp. Inc.*, 448 F. Supp. 3d at 367; *Kik Interactive, Inc.*, 492 F. Supp. 3d at 182–83.

287. See The DAO, Exchange Act Release No. 81,207, 117 SEC Docket 745, 750–53 (July 25, 2017); Nesler, *supra* note 111.

288. See Nesler, *supra* note 111 (discussing the differences between crypto assets with consumptive use and those used purely for an investment purpose).

289. *Telegram Grp. Inc.*, 448 F. Supp. 3d at 367, 374–75.

290. See COHEN ET AL., *supra* note 13, at 64–65.

291. See *id.* at 68–69.

292. See *id.* at 57–58; Brief of Amicus Curiae the Chamber of Digital Commerce at 5, SEC v. Ripple Labs, Inc., No. 20-cv-10832 (S.D.N.Y. Sept. 21, 2022), ECF No. 649.

293. See Van Valkenburgh, *supra* note 118.

294. See *Hocking v. Dubois*, 885 F.2d 1449, 1460–62 (9th Cir. 1989) (en banc); COHEN ET AL., *supra* note 13, at 57–58.

295. See COHEN ET AL., *supra* note 13, at 68–70; Cecere, *supra* note 118.

296. See Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 60, at 13–28; Giancarlo & Bahlke, *supra* note 60.

create an ownership interest in Ripple Labs.²⁹⁷ Like bitcoin or ether, holding XRP only confers the right to access and utilize a blockchain, which is not guaranteed by Ripple Labs.²⁹⁸ Ripple Labs does not own the XRP Ledger, and the XRP Ledger would continue operating if Ripple Labs ceased its involvement with XRP.²⁹⁹ Ripple does not have any proprietary information about XRP or the XRP Ledger that could be cured by SEC disclosures.³⁰⁰ Unlike DAO tokens, which arguably constituted a security equivalent like a stock or note, XRP has substantial utility as a bridge currency.³⁰¹ Under this reading, the *Howey* analysis in *Ripple Labs* should focus not on XRP itself, but whether the facts and circumstances of each of Ripple's XRP's sales show that the purchaser bought XRP with a reasonable expectation of profit to be derived from Ripple's efforts.³⁰²

The SEC, however, takes a much broader position. The SEC first argued that XRP itself is an investment contract in *Ripple Labs*.³⁰³ The SEC later clarified that the XRP token "is the embodiment of [the] facts, circumstances, promises, and expectations" of the original sale of XRP and was thus a security.³⁰⁴ The SEC argues that the term "investment contract" is sufficiently broad to cover any "[sale of] digital assets to publicly raise capital" for a "profit-seeking business venture."³⁰⁵ The SEC argues that by pooling funds from over one billion dollars of sales of XRP to grow Ripple Labs, retaining XRP, touting XRP's future use in its products, and creating more uses for the XRP Ledger, XRP holders are investing money in a common enterprise and have a reasonable expectation of profit based on Ripple's efforts.³⁰⁶ The SEC equates early XRP sales to ICO sales given XRP's speculative nature, Ripple's ownership of XRP tokens and involvement in the XRP Ledger's growth, and XRP's minimal utility when it was created.³⁰⁷

Some of the SEC's staunchest critics give credit to the argument that Ripple's early XRP sales constituted investment contracts.³⁰⁸ As the SEC argues, XRP likely would not have gained traction as a bridge currency or

297. See Giancarlo & Bahlke, *supra* note 60.

298. See *id.*; Van Valkenburgh, *supra* note 118.

299. See Giancarlo & Bahlke, *supra* note 60.

300. See *id.*

301. See *id.*; Nesler, *supra* note 111.

302. See COHEN ET AL., *supra* note 13, at 86.

303. Complaint, *supra* note 95, at 34.

304. Plaintiff Securities and Exchange Commission's Memorandum of Law in Opposition to Motion to Intervene at 24, SEC v. Ripple Labs, Inc., No. 20-cv-10832 (S.D.N.Y. May 3, 2021), ECF No. 153. Although this theory clarifies that crypto assets can evolve past security status, it still treats tokens as securities. See COHEN ET AL., *supra* note 13, at 90.

305. See Plaintiff Securities and Exchange Commission's Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 265, at 6; see also *id.* at 47 (quoting SEC v. W.J. Howey Co., 328 U.S. 293, 300 (1946)).

306. See *id.* at 2–3.

307. See *id.* at 3; see also Complaint, *supra* note 95, at 1, 34–37.

308. See Plaintiff Securities and Exchange Commission's Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 265, at 2–3; see also Memorandum in Support of Writ of Mandamus, *supra* note 134, at 37–38.

payment settlement tool without Ripple's support.³⁰⁹ Ripple was fundamental in creating uses for the XRP Ledger and a liquid secondary market for users to speculate on XRP's value.³¹⁰ Because Ripple used the funds from XRP sales to create new uses for the XRP Ledger and touted their efforts to create utility and value for the XRP Ledger and XRP, there is a strong argument that Ripple's early XRP sales contracts were actually investments of money in Ripple, which created a reasonable expectation of profit to be derived primarily from their efforts.³¹¹ Even if Ripple's sales contracts expressly disclaimed any post-sale obligations to create value,³¹² the economic reality is that these early contracts likely had the "essential ingredients" of an investment contract given Ripple's close control of the supply of XRP and Ripple's public assurances and efforts to create uses and value for the XRP Ledger and XRP early on.³¹³

Had the SEC constrained its allegations against Ripple to early XRP sales, it would have been consistent with the holdings in the ICO cases. Although the XRP Ledger was operational at launch in 2012,³¹⁴ Ripple was critical in increasing XRP's value after XRP sales by supporting a secondary trading market and creating uses for the XRP Ledger.³¹⁵ Like in *Telegram Group Inc.*, in which early purchasers expected profit solely from Telegram's ability to build a blockchain,³¹⁶ early XRP purchasers expected to profit from Ripple's substantial efforts to expand the XRP Ledger.³¹⁷ The SEC could have argued that the court should extend the holdings in the ICO cases to *Ripple Labs* and thus require a new token to have both a functioning and sufficiently decentralized network to be exempt from SEC disclosure requirements.³¹⁸ Former SEC director William H. Hinman alluded to this position when discussing the Ethereum Foundation and ether's ICO before declaring ether a nonsecurity.³¹⁹ But instead, the SEC took the novel position

309. See Plaintiff Securities and Exchange Commission's Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 265, at 10.

310. See *id.* at 2–3.

311. See *id.* at 2–3, 26.

312. See Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 60, at 31.

313. Plaintiff Securities and Exchange Commission's Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 265, at 2–3.

314. See Giancarlo & Bahlke, *supra* note 60.

315. See Plaintiff Securities and Exchange Commission's Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 265, at 55, 59.

316. See *SEC v. Telegram Grp. Inc.*, 448 F. Supp. 3d. 352, 368 (S.D.N.Y. 2020).

317. See Plaintiff Securities and Exchange Commission's Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 265, at 2–3, 26.

318. See *Munchee Inc.*, Securities Act Release No. 10445, 118 SEC Docket 975, 979–80 (Dec. 11, 2017). *But see* Peirce, *supra* note 13 (arguing that requiring both a functioning, decentralized blockchain before distributing a token creates a "regulatory Catch 22").

319. See Hinman, *supra* note 91. Even though the Ethereum Foundation—a small group of developers who created Ethereum—sold ether to fund improvements to the Ethereum blockchain, Director Hinman stated that regulating sales of ether as securities years after its offering would make little sense, given the Ethereum Foundation's decreased control over the network. See *id.*; Memorandum in Support of Writ of Mandamus, *supra* note 134, at 45–46. *But see* Petitioner's Memorandum of Law in Support of the Verified Petition at 21–22, New

that the underlying asset in an offering (here, XRP) is an investment contract.³²⁰ This means that merely holding XRP—whether purchased from Ripple, an exchange, or a third party—is an investment contract with Ripple.³²¹

2. Whether the SEC’s Use of the Term “Investment Contract” Invokes the Major Questions Doctrine

The SEC’s interpretation of “investment contract” resembles agency interpretations that the Court has scrutinized in its major questions cases. Like the agency’s novel assertion of power in *Brown & Williamson Tobacco Corp.*, in which the FDA changed course by claiming the authority to regulate nicotine products as “drugs and devices,”³²² the SEC had not previously understood the underlying asset in an investment contract as an investment contract itself until its actions against crypto assets.³²³ Commentators note that the SEC has never successfully applied *Howey* during an initial offering and then re-applied *Howey* to secondary transactions to conclude that the underlying asset “is the embodiment of [the] facts, circumstances, promises, and expectations” of the original offer of the underlying asset.³²⁴ Although the SEC has advocated for this approach for crypto assets,³²⁵ courts historically have not adopted this position when the underlying asset functions like a commodity, focusing instead on the offering of the asset.³²⁶

The SEC’s novel application of *Howey* creates numerous consequences for secondary transactions in crypto assets and strengthens a potential major questions challenge. As critics note, under the SEC’s current approach to

York v. MEK Glob. Ltd., No. 23-cv-0450703 (N.Y. Sup. Ct. Mar. 9, 2023), https://ag.ny.gov/sites/default/files/2023.03.09_-_memorandum_of_law_-_people_v_mek_global_limited_and_phoenixfin_pte_ltd_dba_kucoin.pdf [https://perma.cc/6RYV-3BZJ] (New York attorney general alleging that ether is a security).

320. See Complaint, *supra* note 95, at 34; see also Brief of Amicus Curiae the Chamber of Digital Commerce, *supra* note 292, at 8.

321. See Defendants’ Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 60, at 33; see also Brief of Amicus Curiae the Chamber of Digital Commerce, *supra* note 292, at 8.

322. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126, 145–46 (2000).

323. Cf. *SEC v. Kik Interactive, Inc.*, 492 F. Supp. 3d 169 (S.D.N.Y. 2020); *SEC v. Telegram Grp. Inc.*, 448 F. Supp. 3d 352 (S.D.N.Y. 2020).

324. See COHEN ET AL., *supra* note 13, at 96; see also Brief of Amicus Curiae the Chamber of Digital Commerce, *supra* note 292, at 9.

325. See Brief of Amicus Curiae the Chamber of Digital Commerce, *supra* note 292, at 9; see also Plaintiff’s Reply Memorandum of Law in Further Support of Their Motion for Summary Judgment at 1, *SEC v. Telegram Grp. Inc.*, 448 F. Supp. 3d 352 (S.D.N.Y. Jan. 27, 2020) (No. 20-1076-cv), ECF No. 119.

326. Cf. *Kik Interactive, Inc.*, 492 F. Supp. 3d 169; *Telegram Grp. Inc.*, 448 F. Supp. 3d 352; *Hodges v. Harrison*, 372 F. Supp. 3d 1342, 1349 (S.D. Fla. 2019). But see *SEC v. LBRY, Inc.*, No. 21-cv-260, 2022 WL 16744741, at *7 (D.N.H. Nov. 7, 2022) (holding that a token that could be purchased with an expectation of profit constitutes a security regardless of consumptive use). The court in *LBRY, Inc.* appears to apply the same reasoning that the en banc appellate court in *Hocking v. Dubois*, 885 F.2d 1449 (9th Cir. 1989) (en banc), and the SEC expressly rejected. See COHEN ET AL., *supra* note 13, at 85–86.

regulating the underlying crypto asset beyond the initial offering of the asset, the resale of the orange grove from the *Howey* case, even without the service contract, would constitute a security requiring public disclosure.³²⁷ Like the purchaser of the orange grove without the service contract and *Howey*'s promises, a secondary token purchaser often has no knowledge of the facts and circumstances of the original offer and thus has no legal relationship with the original offeror.³²⁸ Further, if the SEC could apply *Howey* to investment contracts, and then again to the subjects of the contract after the fact, it likely would have applied this reasoning to cases before crypto assets.³²⁹ Critics argue such a position has no clear limits and infringes on the authority of other agencies.³³⁰

The Court in *West Virginia* and *Brown & Williamson Tobacco Corp.* gave weight to past interpretations by the agency and its officials.³³¹ Thus, the Court would likely consider it significant that, in the past, SEC officials have expressed doubt that the SEC can regulate crypto assets that function like currencies or commodities, even if they were offered as securities in the past.³³² The SEC has also advocated against automatically applying *Howey* to secondary transactions.³³³ Given the novelty of the SEC's *Howey* application in cases like *Ripple Labs*, the Court could find parallels to other major questions cases if it heard a case like *Ripple Labs*.

However, "investment contract" is not the sort of rarely used gap-filler provision the Court expressed concern about in some major questions cases.³³⁴ As the Court in *Howey* noted, "investment contract" is broad by design.³³⁵ The phrase is a key component of the SEC's authority to regulate bad actors seeking to evade securities laws.³³⁶ But past use of the relevant statutory language alone does not defeat major questions scrutiny.³³⁷ Although *West Virginia* probed the application of little-used gap-filler provisions,³³⁸ *MCI Telecommunications Co.*, *Brown & Williamson Tobacco*

327. See Brief for Chamber of Digital Commerce as Amicus Curiae, *supra* note 292, at 10; VAN VALKENBURGH, *supra* note 118.

328. See COHEN ET AL., *supra* note 13, at 72.

329. See Brief of Amicus Curiae the Chamber of Digital Commerce, *supra* note 292, at 5. See generally *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941) ("[T]he want of assertion of power by those who presumably would be alert to exercise it, is . . . significant in determining whether such power was actually conferred.")

330. Cf. Brief of Amicus Curiae the Chamber of Digital Commerce, *supra* note 292, at 5; *infra* Part II.A.3.

331. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2604–05 (2022); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 150–53 (2000).

332. See *Hinman*, *supra* note 91; *Peirce*, *supra* note 111.

333. See COHEN ET AL., *supra* note 13, at 59 (discussing the SEC's amicus brief in *Hocking*).

334. See *West Virginia*, 142 S. Ct. at 2610.

335. See *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946).

336. See *Van Valkenburgh*, *supra* note 118; *Peirce*, *supra* note 111.

337. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000).

338. See *West Virginia*, 142 S. Ct. at 2610.

Corp., and *NFIB* all concerned frequently used,³³⁹ but vague, sections of their respective statutes that the agency used to transform its authority.³⁴⁰ Thus, the next inquiry is whether the SEC's interpretation of "investment contract" to regulate crypto assets expands its authority to regulate an area of economic and political significance that Congress has not spoken clearly on.

3. Breadth of Authority

Under a major questions analysis, the Court examines whether the agency claims the power to regulate without a clear limit and whether that power transforms the nature of the agency's authority.³⁴¹ Critics argue that the SEC's application of *Howey* in *Ripple Labs* is not only novel, but also that it has no clear limits and contradicts other agencies' interpretations.³⁴²

First, the SEC's *Howey* application puts countless crypto asset users in violation of securities laws. If XRP itself is an investment contract, all secondary transactions of XRP, including resales and purchases on exchanges that do not involve Ripple, are unregistered sales of investment contracts in violation of securities laws.³⁴³ Industry participants took this threat seriously: almost every crypto asset exchange blocked access to XRP from its U.S. customers days after the SEC's enforcement action.³⁴⁴ Further, if the vast majority of all crypto assets are securities,³⁴⁵ then every transaction with those assets are securities transactions, putting countless users in violation of securities laws.³⁴⁶ Like in *Alabama Ass'n of Realtors*, in which the Court found that the CDC's eviction moratorium asserted "a breathtaking amount of authority" because the CDC's interpretation had no clear limit,³⁴⁷ the SEC's interpretation of "investment contract" here is similarly broad. If a crypto asset could represent all of the facts and circumstances of a securities offering, any underlying asset of an investment contract could be transformed

339. See *Brown & Williamson Tobacco Corp.*, 529 U.S. at 156; *MCI Telecomms. Co. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 220–21 (1994); *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 666 (2022).

340. See *West Virginia*, 142 S. Ct. at 2607–09.

341. See *id.* at 2610; *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

342. See Brief of Amicus Curiae The Chamber of Digital Commerce, *supra* note 292, at 9–10; Nesler, *supra* note 111.

343. See Brief of Amicus Curiae The Chamber of Digital Commerce, *supra* note 292, at 9–10; Plaintiff Securities and Exchange Commission's Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 265, at 24 n.10.

344. See Plaintiff Securities and Exchange Commission's Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 265, at 9–10; see also Paul Grewal, *We Asked the SEC for Reasonable Crypto Rules for Americans. We Got Legal Threats Instead.*, COINBASE (Mar. 22, 2023), <https://www.coinbase.com/blog/we-asked-the-sec-for-reasonable-crypto-rules-for-americans-we-got-legal> [<https://perma.cc/E59J-CEW5>].

345. See Gensler, *supra* note 10.

346. Plaintiff Securities and Exchange Commission's Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 265, at 24 n.10; see also Peirce, *supra* note 13 (noting that labeling tokens securities "has had disastrous consequences for the ability of token networks to become functional").

347. See *Ala. Ass'n Realtors v. Dep't Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

into a security, and all subsequent transactions of the asset would subject buyers and sellers to costly SEC disclosure requirements.³⁴⁸

Critics also argue that the SEC's interpretation contradicts other agencies' guidance.³⁴⁹ Like in *Brown & Williamson Tobacco Corp.*, in which the Court examined other agencies' regulations to determine that the FDA did not have the authority to regulate tobacco,³⁵⁰ the SEC's position in *Ripple Labs* could contradict other agencies' interpretations and infringe on their authority. The CFTC classifies crypto assets such as bitcoin, ether, and litecoin as commodities.³⁵¹ The IRS views digital assets as property.³⁵² The U.S. Department of Justice and the Financial Crimes Enforcement Network define XRP as a virtual currency.³⁵³ Former SEC chair Jay Clayton stated that a crypto asset that is designed to be a replacement "for sovereign currencies . . . is not a security."³⁵⁴ No federal agency other than the SEC has defined XRP as a security.³⁵⁵ Thus, given the novelty and breadth of the SEC's application of *Howey*, a court could find the SEC's interpretation similarly overbroad in line with the Court's major questions cases.

4. Economic and Political Significance

Next, the Court will review whether the agency's assertion of authority allows it to regulate an issue of "deep 'economic and political significance.'"³⁵⁶ The Court identified agency actions with respect to the tobacco industry, tax credits for the Affordable Care Act, a national vaccine mandate, and an eviction moratorium as major questions.³⁵⁷ Although the Court has not defined clear lines for this inquiry, major questions cases suggest that the regulation of the crypto asset industry has become an issue of deep economic and political significance in the United States.

What constitutes a question of deep economic and political significance is uncertain—in 2017, then Judge Kavanaugh noted that the inquiry "has a bit of a 'know it when you see it' quality."³⁵⁸ The Court tends to weigh both

348. See Brief of Amicus Curiae the Chamber of Digital Commerce, *supra* note 292, at 10–11.

349. See *id.* at 11; Giancarlo & Bahlke, *supra* note 60.

350. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 150–51 (2000) (examining the Federal Communications Commission's and the Federal Trade Commission's rulemakings on tobacco).

351. See Complaint, *supra* note 96, at 4.

352. See, e.g., Rev. Rul. 2019-24, 2019-44 I.R.B. 1004 (2019).

353. Press Release, U.S. Dept of Just., *supra* note 97.

354. Kate Rooney, *SEC Chief Says Agency Won't Change Securities Laws to Cater to Cryptocurrencies*, CNBC (June 6, 2018, 10:45 AM), <https://www.cnbc.com/2018/06/06/sec-chairman-clayton-says-agency-wont-change-definition-of-a-security.html> [<https://perma.cc/8UC6-6ZEF>].

355. See Giancarlo & Bahlke, *supra* note 60.

356. *King v. Burwell*, 576 U.S. 473, 486 (2015) (quoting *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); see also Richardson, *supra* note 200, at 187.

357. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

358. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting); see Loshin & Nielson, *supra* note 199, at 46–48 (discussing

economic and political considerations equally in its inquiry.³⁵⁹ Justice Gorsuch noted in *West Virginia* that a question of economic significance exists when an agency seeks to regulate a large portion of the American economy or seeks to “require ‘billions of dollars in spending’ by private persons and entities.”³⁶⁰ Further, Justice Gorsuch noted that an issue of political significance exists when there is earnest and robust debate in the legislature over an issue.³⁶¹

By labeling almost all crypto assets as securities, a court could find that the SEC is asserting authority over a question of deep economic significance. If the SEC enforced this position, token issuers would have to register their offering under the Securities Act, and the network would be subject to reporting requirements under the Securities Exchange Act of 1934.³⁶² SEC officials have noted that the costs of compliance with SEC capital raising rules for small companies are impractically high, surpassing the threshold suggested by Justice Gorsuch.³⁶³ Thus, most nascent token issuers would be wiped out in trying to comply with one portion of SEC rules.³⁶⁴ Moreover, all subsequent transactions with a token would become securities transactions, transforming any user, exchange, and even network into a broker-dealer under the Exchange Act.³⁶⁵ As broker-dealers, these entities must meet net-capital requirements, maintain anti-money laundering programs, submit to SEC examinations, and comport with heightened duties of care to their counterparties in subsequent transactions.³⁶⁶ U.S. residents purchased hundreds of billions of dollars in crypto assets other than bitcoin from July 2021 to July 2022.³⁶⁷ The SEC’s interpretation could render these transactions infeasible with onerous disclosure requirements, and it could wipe out billions of dollars in compliance costs and drops in token prices.³⁶⁸ And though the crypto-asset industry may not be a critical part of the American economy, a determination that tokens are securities would frustrate

justices’ differing opinions regarding what constitutes deep economic and political significance).

359. See Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent “Major Questions” Doctrine*, 49 CONN. L. REV. 355, 382–85 (2016).

360. *West Virginia v. EPA*, 142 S. Ct. 2587, 2621 (Gorsuch, J., concurring) (quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)); see also *Ala. Ass’n Realtors v. Dep’t Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (determining that an eviction moratorium was of economic significance because Congress spent fifty billion dollars on it).

361. See *West Virginia*, 142 S. Ct. at 2620–21.

362. 15 U.S.C. §§ 78a–78qq; LOFCHIE ET AL., *supra* note 127, at 7.

363. See Clayton, *supra* note 128; see also *West Virginia v. EPA*, 142 S. Ct. 2587, 2621 (Gorsuch, J., concurring) (quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)).

364. LOFCHIE ET AL., *supra* note 127, at 7.

365. See Cohen, *supra* note 50, at 96–97.

366. See *id.* at 97 n.74 (discussing duties of a broker-dealer under the Exchange Act); TEMKIN ET AL., *supra* note 126 and accompanying text.

367. CHAINALYSIS, THE 2022 GEOGRAPHY OF CRYPTO REPORT 16 (2022), <https://go.chainalysis.com/rs/503-FAP-074/images/2022-Geography-of-Cryptocurrency.pdf> [<https://perma.cc/AZ7Z-MZH8>].

368. See Defendants’ Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 60, at 9–10 (noting that XRP’s total market value decreased by fifteen billion dollars after the SEC’s complaint in *Ripple Labs*).

American businesses' ability to use crypto assets and blockchain technology in order to maintain power in the global financial industry and promote equitable access to financial products.³⁶⁹ Because the SEC's power to define tokens as securities would result in billions of dollars in compliance costs and lost profits, the SEC's ability to regulate crypto assets could qualify as a question of economic significance.

Crypto asset regulation has arguably become a question of deep political significance. Congress has introduced over fifty bills and resolutions related to digital asset regulation.³⁷⁰ There is growing bipartisan support to grant the CFTC the express authority to regulate crypto assets that do not grant the holder an equity or profit-sharing interest in a business entity, as well as to give it split authority with the SEC over nascent assets that are reliant on the issuer's significant entrepreneurial and managerial efforts.³⁷¹ However, ranking members of Congress dispute the merits of crypto assets and have pressed the SEC to "use its full authority to address . . . [the] risks" of crypto assets.³⁷² One prominent think tank asserts that the SEC's authority is sufficiently clear, and it advocates for "bringing digital asset securities under the jurisdiction of the securities laws to the greatest extent possible."³⁷³ Other commentators argue that the SEC's authority over crypto assets is not as clear and that such a determination would create disastrous consequences for the budding industry.³⁷⁴

Although the crypto asset regulatory-jurisdiction debate has not risen to the level of contention caused by vaccine mandates,³⁷⁵ reasonable minds

369. See Exec. Order No. 14,067, 87 Fed. Reg. 14143 (Mar. 9, 2022). The Biden administration has seemingly changed its tune on crypto assets in recent reports. See COUNCIL OF ECON. ADVISERS, THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS 272 (2023) (positing that crypto assets "are too risky at present to function as payment instruments or to expand financial inclusion").

370. Jason Brett, *Congress Has Introduced 50 Digital Asset Bills Impacting Regulation, Blockchain, and CBDC Policy*, FORBES (May 19, 2022, 11:59 PM), <https://www.forbes.com/sites/jasonbrett/2022/05/19/congress-has-introduced-50-digital-asset-bills-impacting-regulation-blockchain-and-cbdc-policy/> [<https://perma.cc/J8TT-C8CZ>].

371. See Lummis-Gillibrand Responsible Financial Innovation Act, S. 4356, 117th Cong. §§ 403(a)(1)(F)(i)(I), 301(b)(1)(B) (2022); Zachary Warmbrodt, *Elizabeth Warren's Anti-Crypto Crusade Splits the Left*, POLITICO (Mar. 15, 2022, 4:30 AM), <https://www.politico.com/news/2022/03/15/democrats-divided-crypto-future-00015804> [<https://perma.cc/2884-GUMX>].

372. Andrea Shalal, *Sen. Warren Warns of Cryptocurrency Risks, Presses SEC on Oversight Authority*, REUTERS (July 8, 2021, 6:08 PM), <https://www.reuters.com/technology/sen-warren-warns-cryptocurrency-risks-presses-sec-oversight-authority-2021-07-08/> [<https://perma.cc/W5EG-896K>]; see also *Building a Stronger Financial System: Opportunities of a Central Bank Digital Currency Before the Subcomm. on Econ. Pol'y of the S. Comm. on Banking, Hous. & Urb. Affs.*, 117th Cong. 1–3 (2021) (statement of Sen. Elizabeth Warren, Chair, S. Subcomm. on Econ. Pol'y) (describing crypto assets as "bogus digital private money").

373. See TODD PHILLIPS, CTR. FOR AM. PROGRESS, THE SEC'S REGULATORY ROLE IN THE DIGITAL ASSET MARKETS 11 (2021), <https://www.americanprogress.org/wp-content/uploads/2021/10/SECs-Regulatory-Role-in-the-Digital-Asset-Markets-1.pdf> [<https://perma.cc/CZ93-FM3U>].

374. See LOFCHIE ET AL., *supra* note 127, at 7; Cohen, *supra* note 50 at 96–97.

375. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2620–21 (2022) (Gorsuch, J., concurring).

strongly disagree on how to approach the “opportunity to reinforce American leadership in the global financial system and at the technological frontier.”³⁷⁶ Recent gross mismanagement and alleged fraud by some of the digital asset industry’s biggest players have also warranted increased scrutiny.³⁷⁷ By claiming the vast majority of crypto assets are securities, the SEC claims the power to resolve this debate—a scenario that invites major questions scrutiny.³⁷⁸

Given the novelty and breadth of the SEC’s application of *Howey* to crypto assets, the SEC could invoke heightened scrutiny if the Court heard a case like *Ripple Labs*. Although some players in the crypto asset industry would see such a decision as liberating, a decision on major questions grounds may have numerous unforeseen consequences.³⁷⁹

*B. Questions Beget Questions: Why a Major Questions Ruling in
Ripple Labs Fails to Solve the Howey Problem*

This section examines why a major questions determination in a case like *Ripple Labs* would leave the SEC’s role in crypto asset offerings ambiguous. By leaving the SEC’s role in crypto asset offerings unclear, the SEC could stymie competition in the crypto asset market or, conversely, be stripped of a substantive role in securing the future of financial innovation.

Although a major questions case would resolve the issue in *Ripple Labs*, it leaves other crucial regulatory questions unanswered. If a court holds that the term “investment contract” does not give the SEC the authority to regulate tokens like XRP as investment contracts, it does not answer when a token offering is an investment contract.³⁸⁰ This threshold question has existed since the ICO cases, which targeted token offerings for networks that did not exist and tokens that were not yet distributed.³⁸¹ Even after a major questions decision, the SEC would retain some authority to regulate new crypto asset offerings as securities.³⁸² But would the SEC’s jurisdiction over token offerings apply until a token has a functioning network or until the network is sufficiently decentralized? Cases like *Telegram* seem to indicate the former,³⁸³ while statements by SEC officials and guidance documents

376. *Fact Sheet: President Biden to Sign Executive Order on Ensuring Responsible Development of Digital Assets*, WHITE HOUSE (Mar. 9, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/09/fact-sheet-president-biden-to-sign-executive-order-on-ensuring-responsible-innovation-in-digital-assets/> [<https://perma.cc/C38T-BE7A>].

377. *See generally* David Jeans & Sarah Emerson, ‘*The Devil in Nerd’s Clothes*’: How Sam Bankman-Fried’s Cult of Genius Fooled Everyone, FORBES (Nov. 12, 2022, 12:46 PM), <https://www.forbes.com/sites/davidjeans/2022/11/12/the-devil-in-nerds-clothes-how-sam-bankman-frieds-cult-of-genius-fooled-everyone/> [<https://perma.cc/3U5E-ZHFM>] (discussing the collapse of one of the biggest centralized cryptocurrency exchanges in the world).

378. *See West Virginia*, 142 S. Ct. at 2620.

379. *See infra* Part II.B.

380. *See* COHEN ET AL., *supra* note 13, at 85–86.

381. *See* Peirce, *supra* note 111.

382. *See id.*; Hinman, *supra* note 91.

383. *See* SEC. v. Telegram Grp. Inc., 448 F. Supp. 3d 352, 358 (S.D.N.Y. 2020).

support the latter.³⁸⁴ Without controlling law on when SEC jurisdiction applies to token offerings, it is unclear which token offerings the SEC could regulate and for how long, even after a major questions decision.³⁸⁵

First, a broad reading of the SEC's authority over crypto asset offerings after a major questions decision may lead to similar problems to those that token issuers face today.³⁸⁶ Even though a decision on major questions grounds would likely remove established tokens with substantial user bases from SEC registration, the SEC would retain some power to regulate new crypto asset offerings.³⁸⁷ If this power is broad, perhaps extending up to token offerings in which the network is sufficiently decentralized, the SEC would have clearer authority to enforce against new, smaller token offerors and define sufficient decentralization.³⁸⁸ But years of confusion surrounding sufficient decentralization has shown this line "does not foster reproducible results that market participants can rely on with reasonable confidence."³⁸⁹ Further, how can a new network attain this unknown level of sufficient decentralization if the issuer is wiped out by compliance and potential litigation costs?³⁹⁰ In a broad reading of the SEC's power after a major questions decision, the SEC could prevent new tokens from effectively competing against established tokens by forcing new token issuers to face obstacles that established tokens did not have to overcome.³⁹¹

Conversely, a narrow reading of the SEC's power after a major questions decision could have unforeseen consequences for consumer protection. For example, if the SEC's jurisdiction over crypto asset offerings only exists until the token's network is built, the SEC would have little authority over crypto asset offerings. But such a limited interpretation creates a risky environment for investors.³⁹² Unlike stocks and traditional securities, new crypto assets, for which utility and price are heavily reliant on the efforts of a small team, often have vibrant secondary trading markets.³⁹³ Given these small teams, there are opportunities for extensive information asymmetry, similar to the

384. See *Framework for "Investment Contract" Analysis of Digital Assets*, *supra* note 164; Hinman, *supra* note 91.

385. See Peirce, *supra* note 13.

386. See *id.*

387. See *id.*

388. See *id.*

389. See *Bipartisan Crypto Bills Could Clarify Current Regulatory Confusion—If They Tackle Howey*, *supra* note 162. Moreover, a major questions doctrine determination regarding the SEC's interpretation of the term "investment contract" would not foreclose the SEC from classifying crypto assets under another enumerated category in the Securities Act, such as a "securities-based swap." See Complaint at 4, SEC v. Terraform Labs PTE Ltd., No. 23-cv-1346 (S.D.N.Y. Feb. 16, 2023), ECF No. 1.

390. See Peirce, *supra* note 13.

391. See *id.* See generally Brief of Amicus Curiae the Chamber of Commerce of the United States of America in Support of Petitioner at 2, *Grayscale Inv., LLC v. SEC*, No. 22-1142 (D.C. Cir. Oct. 18, 2022), ECF No. 1969579 (asserting that the SEC picks winners and losers by not approving certain crypto assets products).

392. See COHEN ET AL., *supra* note 13, at 13–14; Peirce, *supra* note 13.

393. See COHEN ET AL., *supra* note 13, at 88–89, 103; see also Peirce, *supra* note 13.

imbalance that exists in the context of other securities.³⁹⁴ A narrow reading of the SEC's jurisdiction after a major questions decision would prevent the SEC from exercising its disclosure authority over these secondary markets and could prevent the SEC from compelling disclosure from teams supporting new tokens,³⁹⁵ thus creating the exact problem that securities laws were designed to remedy.³⁹⁶ The CFTC cannot currently regulate crypto spot market transactions, nor does the CFTC have the SEC's disclosure authority for commodities issuers.³⁹⁷ Absent this authority, token purchasers will not have access to information about a token or its supporting team before making an investment.³⁹⁸ It is thus no wonder that both crypto skeptics and proponents recognize that the SEC's disclosure regime has a role to play in the future of crypto asset regulation—a role that would be put into doubt by a major questions determination.³⁹⁹

III. FILLING THE GAP: HOW THE LUMMIS-GILLIBRAND BILL CAN CLARIFY SEC JURISDICTION OVER CRYPTO ASSETS WHILE BALANCING INNOVATION AND CONSUMER PROTECTION

Part III argues that given the gap that crypto assets expose in our securities and commodities laws, the Court has made clear that it is Congress's duty to decide who regulates what parts of the crypto asset sector.⁴⁰⁰ Part III.A argues that the Lummis-Gillibrand bill is a strong step in resolving the crypto asset jurisdiction problem. The Lummis-Gillibrand bill constitutes a clear congressional grant of authority to the SEC and CFTC over most crypto assets and balances both consumer protection and innovation in the crypto asset sector.⁴⁰¹ Part III.B argues that, to clarify the SEC's role in crypto asset regulation, the Lummis-Gillibrand bill should codify a test with specially tailored criteria and more objective standards to determine when an issuer is exempt from SEC disclosure.⁴⁰²

A. The Lummis-Gillibrand Bill Eases Major Questions Concerns and Responsibly Regulates Crypto Assets

This Note examined how crypto assets function like commodities, but because their value and utility are often dependent on the efforts of small, undisclosed teams, crypto assets have risks similar to securities.⁴⁰³ However, neither the CFTC nor the SEC alone have adequate statutory authority to

394. See COHEN ET AL., *supra* note 13, at 13–14.

395. See *supra* Part II.A.

396. See Peirce, *supra* note 13.

397. See Isaac et al., *supra* note 72.

398. See Peirce, *supra* note 13; Gensler, *supra* note 10.

399. See Peirce, *supra* note 13; Gensler, *supra* note 10; Lummis-Gillibrand Responsible Financial Innovation Act, S. 4356, 117th Cong. § 301(a)(1), (b) (2022) (creating authority split between the CFTC and SEC for such assets).

400. See *supra* Parts I.B, II.A.

401. See *infra* Part III.A.

402. See *infra* Part III.B.

403. See *supra* Part II.B.

regulate crypto asset markets or compel disclosures.⁴⁰⁴ Because attempts by either agency to claim such authority could invoke the major questions doctrine, Congress must speak clearly to resolve this gap in the commodities and securities laws.⁴⁰⁵ In addition to establishing clear regulatory jurisdictional boundaries, a legislative response must balance innovation in the crypto asset sector and consumer protection. Fortunately, the SEC and the CFTC have overseen the most robust capital markets in human history for decades.⁴⁰⁶ With clear jurisdictional guidelines, the SEC's disclosure regime and the CFTC's principles-based regulation and market oversight can balance consumer protection and innovation in the crypto asset sector.

The Lummis-Gillibrand bill identifies and fills the hole in the commodities and securities laws while leveraging the established authority and expertise of two effective regulators.⁴⁰⁷ The concept of an ancillary asset solves the SEC's major questions doctrine problem because the bill clarifies that issuers of ancillary assets are subject to modified SEC reporting requirements without extending security status to most underlying crypto assets.⁴⁰⁸ The distinction between crypto asset offerings and most crypto assets themselves reflects an accurate application of decades of appellate and Supreme Court *Howey* jurisprudence.⁴⁰⁹ The bill acknowledges this application and rejects the SEC's logistically untenable and endlessly broad position that most crypto assets themselves are securities by defining which crypto asset offerings trigger reporting requirements and for how long.⁴¹⁰ Instead of relying on a strained, overbroad application of *Howey*, the SEC would have clear jurisdiction over the vast majority of crypto asset issuers for as long as their tokens reflect the principles of securities laws.⁴¹¹

Not only is the "ancillary asset" concept consistent with established law, it also promotes innovation. Because most crypto assets themselves would be considered commodities and not securities, most assets would avoid the secondary market limitations imposed on securities transactions.⁴¹² Crypto asset secondary markets would thus remain liquid and subject to CFTC oversight.⁴¹³ Finally, the bill limits compliance costs for token issuers by imposing disclosure requirements only on actively traded ancillary assets.⁴¹⁴

404. *See supra* Parts I.A, II.A.

405. *See supra* Part II.A.

406. *See Bipartisan Crypto Bills Could Clarify Current Regulatory Confusion—If They Tackle Howey, supra* note 162.

407. *See id.*; Cohen & Lewin, *supra* note 151.

408. *See supra* Part I.A.3.

409. *See supra* Part II.A.

410. *See* Cohen & Lewin, *supra* note 151; *Bipartisan Crypto Bills Could Clarify Current Regulatory Confusion—If They Tackle Howey, supra* note 162.

411. *See* Cohen & Lewin, *supra* note 151.

412. *See supra* Part I.A.2.

413. *See supra* Parts I.A.2–3.

414. *See* Cohen & Lewin, *supra* note 151.

However, the bill does not ignore reality for the sake of legal formality or innovation.⁴¹⁵ There are clear consumer-protection risks in the crypto asset sector.⁴¹⁶ Crypto asset offerings and their issuers' heavy involvement pose similar risks, such as the risk of information asymmetry, that Congress intended to mitigate with securities laws.⁴¹⁷ These risks are even more pronounced given the lively secondary markets and instant transferability of crypto assets.⁴¹⁸ The SEC's disclosure regime largely remedied these problems by compelling the disclosure of information about a company that an investor would want to know before exchanging their hard-earned money for a promise of profit.⁴¹⁹ The Lummis-Gillibrand bill compels information disclosure from the correct party, the token issuer, for as long as such information matters—as long as there is an active trading market or until the token is sufficiently decentralized.⁴²⁰

SEC chair Gensler and consumer protection think tanks argue that the Lummis-Gillibrand bill would undermine consumer protection in the crypto asset sector and, “in the name of fostering innovation, . . . legitimize bad actors and bad practices.”⁴²¹ Chair Gensler posits that the SEC does not need to expand its authority because many crypto assets possess qualities characteristic of securities and thus should be treated as such.⁴²² One think tank posits that because crypto assets resemble securities and lack widespread uses, legislators should prioritize mitigating consumer protection risks and not promoting innovation when assigning regulatory jurisdiction.⁴²³

However, the SEC's novel application of *Howey* proves that the test is unclear as applied to most crypto assets.⁴²⁴ Such a broad, novel use of vague statutory text could cause a reviewing court to require a clear congressional authorization for the SEC's regulation of crypto assets that does not exist in the phrase “investment contract.”⁴²⁵ Creating the concept of an “ancillary asset” thus does not strip the SEC of any authority, but it clarifies who the SEC can compel disclosure from and for how long. And contrary to some

415. See generally Shapiro, *supra* note 269 (discussing the differences between essentialism and functionalism in the crypto regulatory debate).

416. See *supra* Part I.A.1.

417. See COHEN ET AL., *supra* note 13, at 8; Peirce, *supra* note 13; Peirce, *supra* note 111.

418. See COHEN ET AL., *supra* note 13, at 88–89, 103.

419. See Peirce, *supra* note 13; Peirce, *supra* note 111.

420. See Cohen & Lewin, *supra* note 151, Peirce, *supra* note 13; COHEN ET AL., *supra* note 13, at 105.

421. See Press Release, Ams. for Fin. Reform, New Cryptocurrency Bill a Giveaway to Industry in the Name of Innovation (June 7, 2022), <https://ourfinancialsecurity.org/2022/06/news-release-new-cryptocurrency-bill-a-giveaway-to-industry-in-the-name-of-innovation/> [<https://perma.cc/662G-YAXZ>]; Paul Kiernan, *Crypto Legislation Could Undermine Market Regulations, Gensler Says*, WALL ST. J. (June 14, 2022, 3:39 PM), <https://www.wsj.com/articles/crypto-legislation-could-undermine-market-regulations-gensler-says-11655231512> [<https://perma.cc/8T3R-G9DE>].

422. See Kiernan, *supra* note 421.

423. See Press Release, Ams. for Fin. Reform, *supra* note 421.

424. See *supra* Part II.A.

425. See *supra* Part II.A.

think tanks' arguments, the Lummis-Gillibrand bill is hardly a "giveaway" to the crypto asset industry at the expense of consumer protection.⁴²⁶

Under the Lummis-Gillibrand bill, the SEC would have clear disclosure authority over most crypto asset issuers.⁴²⁷ The bill's modified disclosure requirements acknowledge that most issuers cannot afford to comply with current SEC rules.⁴²⁸ Thus, the bill promotes a culture of disclosure that does not exist in crypto asset offerings today, facilitating significantly improved consumer protection. And although the current practical uses of crypto assets are scant, the Biden administration as well as prominent regulators have recognized their value in the future of financial innovation.⁴²⁹ Therefore, the regulation of crypto assets must promote both innovation and consumer protection—priorities that the Lummis-Gillibrand bill balances well. However, the Lummis-Gillibrand bill fails to clarify the point at which a crypto asset is sufficiently decentralized and thereby the extent of the SEC's ability to compel disclosures.⁴³⁰

B. Clarifying Sufficient Decentralization in the Lummis-Gillibrand Bill

To further clarify the SEC's role in regulating crypto assets, the Lummis-Gillibrand bill should adopt a flexible standard with a blockchain-focused factual analysis and a bright-line rule for when a network is sufficiently decentralized and thus exempt from SEC disclosure.⁴³¹

Although some commentators laud the Lummis-Gillibrand bill for importing the "efforts of others" prong of *Howey* to the bill's disclosure requirement removal procedure,⁴³² the bill leaves open the question of when a crypto asset has reached the point of "sufficient decentralization."⁴³³ By leaving this point unclear, the bill allows the SEC to use aspects of its current *Howey* analysis, which features a nonexhaustive fifty-factor balancing test that "does not foster reproducible results that market participants can rely on with reasonable confidence."⁴³⁴ Given that the Lummis-Gillibrand bill grants the SEC the authority to rebut a token issuer's removal from disclosure requirements, the SEC could use this ambiguity to prevent token issuers from ending their reporting requirements.⁴³⁵ Because ending a token issuer's

426. See Press Release, Ams. for Fin. Reform, *supra* note 421.

427. See Cohen & Lewin, *supra* note 151.

428. LOFCHIE ET AL., *supra* note 127, at 7.

429. See Exec. Order No. 14,067, 87 Fed. Reg. 14143 (Mar. 9, 2022); Kiernan, *supra* note 421 (discussing CFTC Chair Behnam's positive reception of the Lummis-Gillibrand bill). *But see* COUNCIL OF ECON. ADVISERS, *supra* note 369, at 272.

430. See *Bipartisan Crypto Bills Could Clarify Current Regulatory Confusion—If They Tackle Howey*, *supra* note 162.

431. See generally Shapiro, *supra* note 163.

432. See Cohen & Lewin, *supra* note 151.

433. See Shapiro, *supra* note 163; *Bipartisan Crypto Bills Could Clarify Current Regulatory Confusion—If They Tackle Howey*, *supra* note 162.

434. See *Bipartisan Crypto Bills Could Clarify Current Regulatory Confusion—If They Tackle Howey*, *supra* note 162.

435. See *id.*

reporting requirements hinges on the decentralization inquiry, the SEC and token issuers need more objective guidelines tailored to crypto assets.⁴³⁶

The Lummis-Gillibrand bill should codify both a flexible, blockchain-focused test and the bright-line rule for sufficient decentralization in the bill's decentralization inquiry.⁴³⁷ The flexible standard with a blockchain-focused factual analysis allows regulators and judges to examine the core points of power on numerous different networks in order to determine which networks are not reliant on the efforts of an identifiable party.⁴³⁸ Because the test focuses on common aspects of all distributed ledgers—such as validating transactions, changing the protocol's code, and controlling the token's supply—the test is repeatable and broadly applicable.⁴³⁹ Further, instead of having a vague, fifty-factor balancing test, the new standard examines only a handful of the core points of power in a network.⁴⁴⁰ By focusing on these core points, token issuers and regulators have a small set of common rules to determine if a token is decentralized. And by examining these points of power with quantifiable figures as opposed to soft principles, regulators and token issuers will share common criteria to determine whether a network is decentralized.⁴⁴¹ Token issuers are thus incentivized to create a network with established checks and balances on key points of power.⁴⁴² Finally, by introducing a bright-line rule with quantifiable criteria for decentralization, token issuers have a clear point at which the SEC may no longer compel disclosure.⁴⁴³ Although this point is difficult to reach, it does not completely preclude the removal of disclosure requirements under the bill, but merely establishes a definitive point where a network is, as a matter of law, decentralized and free from SEC disclosure requirements.⁴⁴⁴

The ancillary asset framework clarifies who the SEC can compel disclosure from. However, this new standard for evaluating sufficient decentralization clarifies how long the SEC has jurisdiction over ancillary asset issuers. By introducing a blockchain-focused factual analysis with objective criteria and a bright-line rule for sufficient decentralization, the SEC would have clearer jurisdictional guidelines and token issuers would have more predictable results and measurable goals for the removal of disclosure requirements under the Lummis-Gillibrand bill.

436. *See generally id.*

437. *See infra* Part I.A.3. *See generally* Shapiro, *supra* note 163.

438. *See* Shapiro, *supra* note 163.

439. *See id.*

440. *See id.*

441. *See id.*

442. *See id.*

443. *See id.*

444. *See id.*; Peirce, *supra* note 13.

CONCLUSION

Crypto assets expose a gap in the commodities and securities laws.⁴⁴⁵ Most crypto assets function like currencies or commodities.⁴⁴⁶ However, the functionality and value of many crypto assets are reliant on the efforts of a small, often undisclosed, team and thus comport with the spirit of securities laws.⁴⁴⁷ But most crypto assets are not enumerated securities like stocks or notes and, unlike many of their offerings, most crypto assets themselves are not investment contracts as defined by Supreme Court and appellate *Howey* jurisprudence.⁴⁴⁸ The SEC's current position on crypto assets poses an existential threat to the crypto asset industry and invites heightened scrutiny under the major questions doctrine.⁴⁴⁹ Meanwhile, the CFTC does not have the authority to regulate crypto assets or their spot market transactions in most cases.⁴⁵⁰ It is thus Congress's duty to fill this regulatory gap.

Pending legislation like the Lummis-Gillibrand Responsible Financial Innovation Act proposes thoughtful solutions to difficult regulatory jurisdictional questions, leveraging the SEC's disclosure regime and CFTC's market oversight to balance consumer protection and innovation.⁴⁵¹ However, the bill could provide greater clarity for the SEC's jurisdiction over crypto asset issuers by establishing a tailored test with objective rules to determine when a crypto asset is sufficiently decentralized.⁴⁵²

445. *See supra* Part II.B.

446. *See supra* Parts I.A.1–2.

447. *See Peirce, supra* note 13.

448. *See supra* Part II.A.

449. *See supra* Part II.A.

450. *See supra* Part I.A.2.

451. *See supra* Part III.A.

452. *See supra* Part III.B.