Securities and Exchange Commission vs. Kim Kardashian, Cryptocurrencies and the "Major Questions Doctrine"

Jerry W. Markham
SECURITIES AND EXCHANGE COMMISSION VS.
KIM KARDASHIAN, CRYPTOCURRENCIES AND
THE “MAJOR QUESTIONS DOCTRINE”

JERRY W. MARKHAM*

ABSTRACT

The SEC has brought some highly publicized enforcement actions against Kim Kardashian and other celebrity social media influencers who received undisclosed payments for their endorsement of cryptocurrencies. This Article describes those cases and analyzes whether the SEC exceeds its authority under the Constitutional “major questions doctrine” recently applied by the Supreme Court in West Virginia v. EPA. That doctrine prohibits a federal agency from regulating activities that raise a major question that Congress, rather than the agency, must resolve. Such a question is one in which there is major political and economic interest and over which the agency has no clear authority from Congress to act. As this Article relates, the cryptocurrency market is of major political and economic interest to millions of individuals and businesses. It is also the subject of intense policy-making efforts in the Executive Branch and Congress. This Article further analyzes whether Congress granted the SEC clear authority to regulate the cryptocurrency market. It finds no such authority. In its absence, the SEC relies on the 1946 Supreme Court decision in SEC v. Howey as the basis for its jurisdictional claims. This Article finds that decision, which involved the sale of Florida orange grove investments to tourists, to be vague at best and anything but clear on whether cryptocurrencies are “securities” that are subject to SEC regulation.

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Any celebrity or other individual who promotes a virtual token or coin that is a security must disclose the nature, scope, and amount of compensation received in exchange for the promotion. A failure to disclose this information is a violation of the anti-touting provisions of the federal securities laws.

—Statement by the U.S. Securities and Exchange Commission.¹

INTRODUCTION

Section 17(b) of the Securities Act of 1933 requires disclosure of payments for endorsements that may influence the price of a security.² The Securities and Exchange Commission (SEC) is using that provision to attack celebrities receiving undisclosed payments for their touting of cryptocurrencies.³ One such defendant was reality show star and social media influencer Kimberly Kardashian, who failed to disclose payments received for promoting a cryptocurrency through her Instagram account.⁴ In another such action, the SEC charged actor Steven Seagal with failing to disclose $1 million of payments in cash and cryptocurrency for promoting an “initial coin offering” (ICO) through his Facebook and

² 15 U.S.C. § 77q(b).
Twitter accounts. Professional boxer Floyd Mayweather Jr. was similarly charged by the SEC with failing to disclose payments received for promoting ICOs.

These actions were settled by consent orders in which there was no admission or denial of wrongdoing, but those settlements imposed significant monetary fines. Those penalties, as well as the associated adverse publicity, were intended by the SEC to force celebrities to conform to the Section 17(b) anti-touting mandates. This Article analyzes whether the SEC is overreaching its statutory authority in those cases under the “major questions doctrine” that was enunciated by the Supreme Court in *West Virginia v. EPA*.

I. SECTION 17(B) OF THE SECURITIES ACT OF 1933

Section 17(b) of the Securities Act of 1933 was passed after congressional investigations into the Stock Market Crash of 1929

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7 See Chapman, supra note 4; SEC, Steven Seagal, supra note 5; SEC, supra note 6.

8 See, e.g., SEC, supra note 6; SEC, Steven Seagal, supra note 5. The cryptocurrency anti-touting cases are not the first effort by the SEC to garner headlines through the prosecution of statements made by a celebrity on social media. See Jerry W. Markham, *Securities & Exchange Commission vs. Elon Musk & the First Amendment*, 70 CASE W. RSRV. L. REV. 339, 343 (2020) (analyzing the application of the First Amendment to charges brought by the SEC against Elon Musk for statements that he made on Twitter about taking Tesla private).

9 142 S. Ct. 2587, 2609 (2022).
revealed a number of questionable practices in stock promotion schemes. Among other abuses, professional publicists and reporters had been paid large sums of money to plant favorable reports in newspapers and radio broadcasts about the operations of publicly traded companies. Before those stories were released, traders who were paying the publicists bought the stock and profited from the increase in price that followed publication. In response to those revelations, Congress included Section 17(b) in the Securities Act of 1933, which declared such practices to be fraudulent.

An essential element required to prove a violation of Section 17(b) is that the endorsement must concern a “security.” As will be described below, much uncertainty abounds over whether cryptocurrencies are securities that fall within the SEC’s jurisdictional mandate. The SEC has, nevertheless, unilaterally decreed that cryptocurrency offerings are securities that it can

10 23 JERRY W. MARKHAM & THOMAS L. HAZEN, BROKER-DEALER OPERATIONS UNDER SECURITIES AND COMMODITIES LAW § 2:2 at 2-9 & 2-10.
11 Id.
12 2 JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM J.P. MORGAN TO THE INSTITUTIONAL INVESTOR (1900–1970) 144 (2002). One such publicist, A. Newton Plummer, was paid $300,000 to circulate 20,000 planted stories touting stocks to some 700 newspapers. Id. Also promoting stocks for undisclosed endorsement fees were radio personalities such as William J. McMahon, an economist and the head of the McMahon Institute of Financial Research. Id.; see also MARKHAM & HAZEN, supra note 10, at 2-9 & 2-10 (further describing those practices and bribes paid to reporters at leading newspapers for printing favorable stories).
13 Section 17(b) states that:
It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.
14 Id. “Congress did not... ‘intend to create a broad federal remedy for all fraud.’” Reves v. Ernst & Young, 494 U.S. 56, 61 (1990) (quoting Marine Bank v. Weaver, 455 U.S. 551, 556 (1982)).
regulate.\textsuperscript{15} This means that ICOs must register with the SEC under the Securities Act of 1933\textsuperscript{16} or structure their offerings to comply with SEC exemptions from that requirement.\textsuperscript{17}

The SEC is also using other antifraud provisions in the federal securities laws to attack cryptocurrency trading and is threatening cryptocurrency trading platforms with registration violations.\textsuperscript{18} For example, the SEC brought insider trading charges under Section 10(b) of the Securities Exchange Act of 1934\textsuperscript{19} against defendants engaging in cryptocurrency transactions on the basis of insider information.\textsuperscript{20} The SEC alleged that defendants used non-public knowledge of the planned listing of tokens on Coinbase, a crypto trading platform with over 100 million users,\textsuperscript{21} to profit from increases in the value of the tokens when their listings were made public.\textsuperscript{22} The SEC’s complaint in that action asserted that nine listings on Coinbase that were targeted by the defendants had been created through unregistered ICOs.\textsuperscript{23} This raised the question of whether Coinbase is operating illegally as an unregistered national securities exchange since it is listing and trading what the SEC asserts are securities.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{16} 15 U.S.C. § 77e.
\item \textsuperscript{17} See, e.g., SEC Regulation D, 17 C.F.R. § 230.500 (2021).
\item \textsuperscript{19} 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b5-1 (2000).
\item \textsuperscript{21} About Coinbase, COINBASE, https://www.coinbase.com/about#:~:text=Approximately%20108%20million%20verified%20users,%2C%20earn%2C%20and%20use%20crypto [https://perma.cc/4D9Q-DW2X].
\item \textsuperscript{22} Complaint & Demand for Jury Trial, \textit{supra} note 20, at 1–2.
\item \textsuperscript{23} \textit{Id.} at 22.
charges have yet been brought against Coinbase, SEC chair Gary Gensler has directed the SEC staff to regulate cryptocurrency trading platforms in the same manner as securities exchanges.25

II. THE MAJOR QUESTIONS DOCTRINE

The SEC has made cryptocurrency cases a leading part of its securities law enforcement efforts.26 The agency created a “Crypto Assets and Cyber Unit” in its Division of Enforcement and has brought over eighty cryptocurrency actions, which resulted in more than $2 billion in fines and restitution orders.27 The SEC is creating a regulatory structure for cryptocurrencies through those lawsuits without legislative guidance.28 In so doing, the SEC is ignoring the “major questions doctrine.” “Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding trading in these securities must register unless they are exempt.”); see also Clara Hudson & Amanda Iacone, SEC Cedes No Ground on Crypto With Coinbase Insider Trading Case, BLOOMBERG L. (July 25, 2022, 5:00 AM), https://news.bloomberglaw.com/securities-law/sec-cedes-no-ground-on-crypto-with-coinsider-trading-case [https://perma.cc/TVC3-MSX6]; Aislinn Keely, Crypto Firms Could Face Fallout From SEC Insider Trading Case Against Former Coinbase Employee, THE BLOCK (July 22, 2022, 8:12 PM), https://www.theblock.co/post/159239/crypto-firms-could-face-fallout-from-sec-insider-trading-case-against-former-coinbase-employee [https://perma.cc/4TX5-YZ4E].


SEC Commissioner Hester Peirce has warned that Gensler’s decree has created a regulatory “Catch 22” that will impede the creation of new crypto networks that are not able to register or qualify for an exemption under the federal securities laws. Hester M. Peirce, Comm’r, SEC, Running on Empty: A Proposal to Fill the Gap Between Regulation and Decentralization (Feb. 6, 2020) [hereinafter Running on Empty], https://www.sec.gov/news/speech/peirce-remarks-blockress-2020-02-06 [https://perma.cc/N5QB-J4GM].


27 Id.

of legislative intent, the agency must point to ‘clear congres-
sional authorization’ for the authority it claims.”29 “Agencies have
only those powers given to them by Congress, and ‘enabling leg-
islation’ is generally not an ‘open book to which the agency
[may] add pages and change the plot line . . . .”30 “We presume
that ‘Congress intends to make major policy decisions itself, not
leave those decisions to agencies.”31 “Under the major questions
doctrine, the Supreme Court has rejected agency claims of regu-
laratory authority when (1) the underlying claim of authority con-
cerns an issue of ‘vast “economic and political significance,”’ and
(2) Congress has not clearly empowered the agency with authority
over the issue.”32

As will be described below, the cryptocurrency market has
vast economic and political significance, and the SEC has not
clearly been empowered by Congress to regulate that market.

A. The Cryptocurrency Market Has Vast Economic and Political
Significance

A new financial asset class appeared in 2008 in the form of
a “cryptocurrency” called Bitcoin.33 Bitcoins are created through
computer “blockchains” that utilize decentralized networks of com-
puters independently owned and operated, but linked in a peer-
to-peer network.34 Blockchains are touted as providing security
and efficiency in creating and transferring Bitcoins without the
intermediation of a third party.35 This is a major departure from

29 West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).
30 Id. at 2609 (citation omitted).
31 Id.
32 KATE BOWERS, CONG. RSCH. SERV., IF12077, THE MAJOR QUESTIONS DO-
[https://perma.cc/RDM3-5JGR] (citation omitted).
33 See, e.g., GREGORY S. ROWLAND & TREVOR I. KIVIAT, CRYPTOCURRENCY
AND OTHER DIGITAL ASSETS FOR ASSET MANAGERS, GLOBAL LEGAL INSIGHTS—
www.davispolk.com/sites/default/files/cryptocurrency_and_other_digital_assets
_for_asset_managers.pdf [https://perma.cc/968K-S97A].
-is-blockchain [https://perma.cc/3UZB-C9CT] (describing blockchain technology).
35 Trevor I. Kiviat, Note, Beyond Bitcoin: Issues in Regulating Blockchain
Transactions, 65 DUKE L.J. 569, 574 (2015); see also Matt Levine, The Crypto
traditional securities markets where broker-dealers and stock exchanges act as intermediaries in the execution of customer trades.\(^{36}\)

The Bitcoin concept quickly led to the creation of other cryptocurrencies, such as Dogecoin, Ethereum, Ripple, and Eos.\(^{37}\) There are now over 19,000 cryptocurrencies in circulation,\(^{38}\) which are sometimes referred to as “tokens.”\(^{39}\) The cryptocurrency market that the SEC seeks to regulate through its lawsuits is a broad one that has major economic significance. “As of 2020, almost 36.5 million people in the [United States] alone had ownership of some form of crypto.”\(^{40}\) “In August 2021 there were 969.5

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\(^{36}\) Kiviat, \textit{supra} note 35, at 577. The disintermediation available through blockchain technology does not conform to the business models of the exchanges and broker-dealers regulated by the SEC:

A core benefit of a token network is its non-reliance on intermediaries; people transact directly with one another. Having to buy or sell tokens through a registered broker-dealer or on a registered exchange certainly puts a damper on the development of a thriving, decentralized crypto network. Particular problems arise because there are unique challenges related to broker-dealers and exchanges handling digital assets.

\textit{Running on Empty, supra} note 25.


million total visits to the top 60 crypto websites worldwide.” Cryptocurrency coins and tokens have also “established their foundations as viable forms of investment and currency.” Several major businesses have accepted payment in cryptocurrencies in exchange for their goods and services. They include Tesla, Microsoft, Overstock.com, AT&T, Whole Foods, Starbucks, Home Depot, Dish Network, and PayPal.44

“[C]ourts have generally considered an agency action to be of vast economic significance if it requires ‘billions of dollars in spending.’” In April 2022, the cryptocurrency market that the SEC seeks to regulate through its enforcement actions was valued by SEC Chair Gary Gensler at $2 trillion.46 That number

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42 Weston, supra note 40.


declined to under $1 trillion later that year, but it remained a major trading market.47

By suing celebrities, the SEC is tacitly conceding that the cryptocurrency market is of major economic and political interest. Kim Kardashian had 228 million followers on her Instagram account when she posted the cryptocurrency advertisement that was the subject of the SEC’s suit.48 The fact that cryptocurrencies were promoted through Super Bowl advertisements that were broadcast to some 100 million viewers is a further indication of the major social importance of this market.49 “[f] you watch any sports on television, it seems difficult not to notice that the crypto sector has gone on an ad-buying binge . . . . And crypto is starting to draw interest from pension funds and sovereign wealth funds.”50 “What was formerly an alternative investment solely in the domain of speculators is now being openly discussed as a viable option for a portion of any investor’s portfolio, even in their retirement plans.”51

The major economic importance of the cryptocurrency concept is further underscored by the fact that blockchain technology is being considered by governments for use as an official currency. For example, the U.S. Federal Reserve is exploring the

51 John Csiszar, 6 Reasons Crypto Has Become So Popular in the Past Two Years, NASDAQ (June 1, 2022, 8:00 AM), https://www.nasdaq.com/articles/6-reasons-crypto-has-become-so-popular-in-the-past-two-years [https://perma.cc/SQD9-JCFV].
use of a central bank cryptocurrency. The Chinese government announced that it was creating its own cryptocurrency, the digital yuan. Several other countries have also announced the introduction of digital currencies. The City of Miami, Florida, created its own cryptocurrency called MiamiCoin.

The cryptocurrency market is also the subject of major political interest. On March 9, 2022, President Joe Biden issued an executive order, which stated that “[w]e must take strong steps to reduce the risks that digital assets could pose to consumers, investors, and business protections; financial stability and financial system integrity; combating and preventing crime and illicit finance; national security; the ability to exercise human rights; financial inclusion and equity; and climate change and pollution.” The Executive Order directed a coordinated inter-agency approach to develop plans for regulating cryptocurrencies. In response to the President’s Order, the U.S. Treasury Department created a framework for inter-agency and international cooperation and the development of standards addressing the risks of cryptocurrencies. The Treasury Department stated that “uneven

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57 Id. at 14,149.

regulation, supervision, and compliance across jurisdictions creates opportunities for arbitrage and raises risks to financial stability and the protection of consumers, investors, businesses, and markets.”

By September 2022, nine governmental reports had been submitted in response to the President’s Executive Order. Among other things, they warned that crypto markets “risk harming everyday Americans’ financial stability and our national security.” The Financial Stability Oversight Council (FSOC), which is responsible for assessing systemic risks to the U.S. financial system, also warned that financial institutions’ “crypto-asset activities could pose risks to the stability of the U.S. financial system.” In its 2022 annual report, FSOC further advised of a regulatory gap in the regulation of cryptocurrencies and recommended that Congress pass legislation to cure that concern. On January 27, 2023, the President’s National Economic Council issued a statement that set forth the Biden Administration’s policy views on regulating cryptocurrencies and called for Congress to enact legislation. The Council’s report asserted that:

Congress should expand regulators’ powers to prevent misuses of customers’ assets—which hurt investors and distort prices—and

59. Id.
63. FISCAL STABILITY OVERSIGHT COUNCIL, ANNUAL REPORT 11, 34, 72 (2022).
to mitigate conflicts of interest. Congress could also strengthen transparency and disclosure requirements for cryptocurrency companies so that investors can make more informed decisions about financial and environmental risks. To aid law enforcement, it could strengthen penalties for violating illicit-finance rules and subject cryptocurrency intermediaries to bans against tipping off criminals. It could fund greater law-enforcement capacity building, including with international partners.65

Perhaps most telling of whether Congress would view regulation of the cryptocurrency market to be a “major question” is through the consideration of its own actions in similar circumstances. Historically, Congress enacted legislation when it thought that new or additional regulation was needed for a commodity-related financial product.66 Both the SEC and the Commodity Futures Trading Commission (CFTC) agree that at least Bitcoin and some other cryptocurrencies are “commodities” but differ on whether financial transactions involving cryptocurrencies are also securities.67 In the past, jurisdictional boundary disputes between the SEC and CFTC were resolved by legislation.68 That legislation was frequently amended as an asset class evolved or additional regulation was deemed necessary after disruptive market events.69

65 Id.
69 See id.
To illustrate, Congress enacted the Grain Futures Act in 1922 to regulate trading in “commodity” futures traded on commodity exchanges in certain “enumerated” “commodities,” such as wheat. The SEC, which was not created until 1934, was given no regulatory responsibility under that statute. Instead, the Grain Futures Act was administered by a “Grain Futures Commission,” which was composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General. The Grain Futures Act proved to be ineffective and was replaced by the Commodity Exchange Act of 1936 (CEA). Again, the SEC was given no jurisdiction to regulate commodity trading. Instead, the renamed Commodity Exchange Commission” retained its role as regulator. Also like its predecessor, the CEA applied only to commodities enumerated in the statute. Several subsequent legislative amendments were needed to add additional enumerated commodities that became the subject of futures trading.

The CEA proved ineffective in regulating the explosion of trading in derivative instruments that occurred in the 1970s. In response to concerns raised by that trading, the CFTC Act of

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71 See §§ 4–12, 42 Stat. at 1000–03.
74 See Commodity Exchange Act § 3(b), 49 Stat. at 1492.
75 See CFTC, supra note 72.
76 See §§ 2–3, 49 Stat. at 1491.
77 See GAO, THE COMMODITY FUTURES TRADING COMMISSION REAUTHORIZATION, GOVINFO (May 5, 1999), https://www.govinfo.gov/content/pkg/GAOREPORTS-GGD-99-74/html/GAOREPORTS-GGD-99-74.htm [https://perma.cc/PTL5-BUR4]. As described by the Government Accountability Office (GAO), “[a]s Congress periodically amended the CEA, it added other agricultural commodities to the list . . . . In aggregate, the regulated agricultural commodities became known as the enumerated commodities; all others became known as the non-enumerated commodities.” Id.
78 See MARKHAM, supra note 72, at 56–61.
created the CFTC and granted it “exclusive” jurisdiction over futures and options trading on all commodities, not just the previously enumerated ones. This exclusive grant of jurisdiction to the CFTC excluded the SEC from regulating commodity-related financial instruments that the SEC had previously claimed were securities. For example, just before the creation of the CFTC, a number of boiler room operations were defrauding retail investors of millions of dollars through high-pressure sales of options on unregulated commodities. The SEC charged those firms with federal securities law violations, which led to a debate over whether those instruments were “securities” that could be regulated by the SEC. Congress intervened with the CFTC Act of 1974, which granted the CFTC “exclusive” jurisdiction over commodity options.

The CFTC Act of 1974 also regulated “leverage contracts” that were used to trade precious metals. Before that legislation was enacted, the SEC sued Monex International Ltd., a leader in marketing leverage transactions in precious metals to the public. The SEC charged that Monex’s leverage contracts were illegal unregistered securities. The SEC suit was dropped after the CFTC was created and given exclusive jurisdiction over leverage contracts. In 2010, Congress enacted the Dodd-Frank Wall

81 Russo & Lyon, supra note 80, at 59.
82 See MARKHAM, supra note 72, at 186–88.
85 MARKHAM, supra note 72, at 179–91.
88 See MARKHAM, supra note 72, at 179–80.
Street Reform and Consumer Protection Act (Dodd-Frank Act), which broadly restructured the CFTC’s regulation of leveraged OTC precious metals contracts.\(^{89}\) Ironically, the CFTC is using the Dodd-Frank Act authority to compete with the SEC in regulating cryptocurrencies through enforcement actions.\(^{90}\) This has led to much confusion over whether and when cryptocurrencies are “securities” that are regulated by the SEC or whether they are “commodities” regulated “exclusively” by the CFTC.\(^{91}\)

Tellingly, for purposes of the major questions doctrine, the CFTC and the SEC have a long-running history of competing for jurisdiction over new commodity related financial instruments.\(^{92}\) Congress was called upon to resolve those disputes on several occasions.\(^{93}\) For example, the CFTC and SEC got into a jurisdictional wrangle over the regulation of options and futures on stock indexes and GNMA securities.\(^{94}\) Congress resolved that fight through the Futures Trading Act of 1982, which allocated jurisdiction over those instruments between the two agencies through a somewhat complex formula.\(^{95}\) Single stock security


\(^{93}\) See id. at 569–70, 570 n.186.

\(^{94}\) See id. at 569–71.

futures contracts were another new financial instrument that was regulated and had jurisdiction allocated by Congress between the SEC and CFTC through the Commodity Futures Modernization Act of 2000 (CFMA).  

The Futures Trading Practices Act of 1992 allowed the CFTC to exempt swaps and other over-the-counter transactions from its jurisdiction. After a number of large losses from swap transactions, the SEC and CFTC began competing for jurisdiction over the then-still-developing swaps market. In 1999, the President’s Working Group on Financial Markets recommended legislation clarifying that issue. Congress responded with the CFMA, which allowed the CFTC to exempt institutional swaps transactions from CFTC regulation. After scandals and more large losses arose from swap trading during the Financial Crisis of 2008, the CFTC and SEC published a Joint Report, ironically just when Bitcoins first appeared, that expressed concern with the then-existing legal uncertainty on the issue of which agency had jurisdiction over new financial instruments. The Joint Report asserted that this uncertainty “at times has caused lengthy delays in bringing new products to market. The lack of legal certainty can be costly and confusing, and it can impede innovation and competition.” The Joint Report concluded that

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98 See Markham, supra note 86, at 22.  


a “mechanism should be developed to break deadlocks between the CFTC and the SEC over disagreements regarding jurisdiction over new products.”

The Joint Report recommended the enactment of legislation that would provide a process for expedited judicial review of jurisdictional matters regarding new products. Specifically, the SEC and the CFTC support legislation to establish and clarify: (i) legal certainty with respect to the agencies’ authority over products exempted by the other agency; and (ii) a review process to ensure that any jurisdictional dispute is resolved by the Commissions against a firm timeline.

Congress declined to adopt such a regulation by enforcement approach in which the courts would act as referee. The CFMA’s hands-off approach was abandoned in the Dodd-Frank Act. That legislation imposed broad regulation over swaps and allocated jurisdiction over those instruments between the CFTC and SEC.

Another commodity-related financial product that was the subject of specific legislation that set jurisdictional boundaries were derivative transactions in foreign currencies. The so-called “Treasury Amendment” in the CFTC Act of 1974 allocated jurisdiction over trading in foreign currencies among the CFTC and bank regulators. The CEA was amended in 1982 to divide jurisdiction over foreign currency contracts traded on exchanges between the CFTC and SEC. In 2000, the CFMA amended the CEA to clarify that the CFTC could regulate retail over-the-counter

other things, those bills address the regulation of cryptocurrencies by the SEC and CFTC, including the possible designation of the CFTC as the principal regulator of cryptocurrencies and other digital assets.\footnote{See, e.g., The Digital Commodities Consumer Protection Act Closes Regulatory Gaps U.S. SENATE COMM. AGRIC. NUTRITION & FORESTRY, WASHINGTON D.C. (Aug. 3, 2022), https://www.agriculture.senate.gov/imo/media/doc/crypto_one-pager1.pdf [https://perma.cc/U8UD-TJNG].}

Its failure resulted in worldwide consternation, and the fallout from that scandal dominated the financial business press and social media.122

The SEC is seeking to preempt the ongoing legislative efforts to regulate cryptocurrencies through its enforcement actions.123 That is not an appropriate approach for policymaking on major questions of national economic and political interest.124 As CFTC Commissioner Caroline Pham has observed, the SEC claims over cryptocurrency trading jurisdiction is a “striking example of regulation by enforcement.”125 Moreover, after the failure of FTX, it was clear that the SEC’s “regulation by enforcement isn’t working and merely fuels market uncertainty.”126 As charged in the press:


124 See Tessa E. Shurr, Comment, A False Sense of Security: How Congress and the SEC are Dropping the Ball on Cryptocurrency, 125 DICK. L. REV. 253, 253 (2020). As one law review comment asserts, “policymaking by enforcement is harmful to the financial technology industry and perpetuates the lack of clarity surrounding regulation of digital assets.” Id. at 253.

125 Hudson & Iacone, supra note 24. This was not the first time that the SEC had been the target of such criticism. See ROBERTA S. KARMEL, REGULATION BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VS. CORPORATE AMERICA 15–17 (1982).

Over the last two U.S. administrations, the U.S. Securities and Exchange Commission (SEC) has promoted an all-encompassing policy of “regulation by enforcement” for U.S.-based digital asset markets like Coinbase and the enterprise blockchain industry . . . . This “enforcement” produces little clarity for the market or protection of investors, which is the ostensible point of the regulatory exercise.\footnote{Roslyn Layton, SEC Spin Doctors Trying to Hide Crypto Regulation Disaster, FORBES (Jan. 8, 2023, 7:41 AM), https://www.forbes.com/sites/roslynlayton/2023/01/08/sec-spin-doctors-trying-to-hide-crypto-regulation-disaster/?sh=436ee9762039 [https://perma.cc/8ZEJ-PV4A].}

As an industry participant complained, the SEC is inhibiting the expansion of cryptocurrencies through its “one-dimensional approach of regulation by enforcement” and that the agency’s actions are forcing “American investors to use offshore crypto businesses ‘with less protection and oversight.’”\footnote{Jesse Coghlan, SEC’s ‘One-Dimensional’ Approach Is Slowing Bitcoin Progress: Grayscale CEO, COINTELEGRAPH.COM (Jan. 24, 2023), https://coindesk.com/news/sec-s-one-dimensional-approach-is-slowing-bitcoin-progress-grayscale-ceo [https://perma.cc/YN9S-WXKD].}

\section*{1. Congress Has Not Clearly Granted the SEC Authority to Regulate Cryptocurrencies}

Before the Kardashian case, SEC Chairman Jay Clayton advised Congress that the SEC “does not have direct oversight over transactions in currencies or commodities, including currency trading platforms.”\footnote{Jay Clayton, Chairman’s Testimony Before the Senate Banking Committee on Virtual Currencies: The Roles of the SEC and CFTC, SEC (Feb. 6, 2018), https://www.sec.gov/news/testimony/virtual-currencies-oversight-role-us-securities-and-exchange-commission [https://perma.cc/9RZE-BX5N].} Clayton nevertheless asserted that “financial products that are linked to underlying digital assets, including cryptocurrencies, may be structured as securities products subject to the federal securities laws even if the underlying cryptocurrencies are not themselves securities.”\footnote{Id.}

In West Virginia v. EPA, the Supreme Court held that agency claims of authority to regulate a matter that raises a major question are to be treated with “skepticism.”\footnote{West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).} The agency
must point to “clear congressional authorization” for regulatory action that involves a major question.\textsuperscript{132} As described below, there is no clear authority in the federal securities laws for the SEC’s regulation of cryptocurrencies as “securities.”\textsuperscript{133} Rather than seeking clarifying legislation, or even conducting formal rulemaking, the SEC published a unilateral investigative report (the DAO Investigative Report)\textsuperscript{134} and some muddied staff guidance (\textit{SEC Staff Crypto Advice})\textsuperscript{135} on how the agency would determine whether cryptocurrency transactions are securities.\textsuperscript{136} The SEC asserts in those documents that cryptocurrencies are securities if their offerings meet the so-called \textit{Howey} test that was articulated in a 1946 Supreme Court decision.\textsuperscript{137}

In \textit{Howey}, the Court formulated a test that is to be used to determine whether a transaction is an “investment contract,” which is a form of “security” under the Securities Act of 1933.\textsuperscript{138} The \textit{Howey} case involved an orange grove owner in Florida who sold tourists deeded property rights for small plots of land

\begin{itemize}
\item \textsuperscript{132} See id. at 2595.
\item \textsuperscript{134} DAO Investigative Report, \textit{supra} note 24. The purpose of that report was to provide guidance on the applicability of the federal securities laws “to a new paradigm—virtual organizations or capital raising entities that use distributed ledger or blockchain technology to facilitate capital raising and/or investment and the related offer and sale of securities.” Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81,207, at 2 (July 25, 2017).
\item \textsuperscript{136} \textit{Id.} at 2–3.
\item \textsuperscript{137} See \textit{S.E.C. v. W.J. Howey Co.}, 328 U.S. 293, 298–99 (1946).
\item \textsuperscript{138} \textit{See id.}; 15 U.S.C. § 77b(a)(1) (defining the term “security” to include an “investment contract” but providing no definition of the latter term).
\end{itemize}
planted with citrus trees. The defendants also offered separate service contracts for maintaining the trees, marketing their fruit and transmitting the net proceeds from sales to investors. The Court held that this arrangement was an “investment contract” that fell within the SEC’s jurisdiction. In so doing, the Court adopted a four-prong test (which, evidencing its lack of clarity, is sometimes broken down into two, three, or even five prongs) that has the following elements: (1) an investment of money; (2) in a common enterprise; (3) with a reasonable expectation of profit; (4) that is to be derived “solely” from the efforts of others.

Under the major questions doctrine, “extraordinary grants of regulatory authority are rarely accomplished through ‘modest words,’ ‘vague terms,’ or ‘subtle device[s].’” On its face, equating cryptocurrency transactions to investments in an orange grove through the vague and subtle term “investment contract” is quite a stretch. It is also confusing and unclear, causing market participants concern and curbing what is otherwise legitimate conduct. As SEC Commissioner Hester Peirce has observed, the broad application of the Howey test by the agency “has limited secondary trading and has had disastrous consequences for the ability of token networks to become functional.” Peirce further noted that “[t]he SEC has tried to apply the Howey analysis to crypto but doing so is not particularly easy.”

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139 See Howey, 328 U.S. at 295.
140 See id.
141 Id. at 299–300.
142 See supra note 133 and accompanying text.
143 See Howey, 328 U.S. at 298–99.
144 West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (citation omitted).
146 Running on Empty, supra note 25.
147 Id.
The Howey test’s application to cryptocurrencies is problematic because it “does not foster reproducible results that market participants can rely on with reasonable confidence.” 148 The SEC Staff Crypto Advice is indeed troublesome. Among other things, it advises consideration of “a non-exclusive list of 50 or 60 ‘characteristics,’ none of which is ‘necessarly determinative,’ on the understanding that when their ‘presence’ is ‘stronger’ it is ‘more likely’ that the digital asset is an ‘investment contract’ and thus a security.” 149

The SEC Staff Crypto Advice asserts that “[t]he first prong of the Howey test is typically satisfied in an offer and sale of a digital asset because the digital asset is purchased or otherwise acquired in exchange for value, whether in the form of real (or fiat) currency, another digital asset, or other type of consideration.” 150 This broad application of the Howey test is somewhat meaningless since almost every commercial transaction involves an exchange of value. For example, a purchase by a consumer of a commodity in a grocery store involves an exchange of value, e.g., dollars for donuts. 151

The SEC Staff Crypto Advice declares that the second prong of the Howey test, i.e., a “common enterprise,” is met by cryptocurrencies. 152 “Based on our experiences to date, investments in digital assets have constituted investments in a common enterprise because the fortunes of digital asset purchasers have been linked to each other or to the success of the promoter’s efforts.” 153 Again that guidance is too vague to be of any real assistance in determining whether a cryptocurrency transaction is a security. The same could be said equally of circumstances that are not considered to be investment contracts. For example, an employee is in a common enterprise with the promoter of the business and with fellow employees, but that arrangement is not an “investment contract.” 154 Contracts for the building of a residence involve

148 Davis Polk, supra note 91.
149 Id.
150 SEC Staff Crypto Advice, supra note 135, at 2.
152 SEC Staff Crypto Advice, supra note 135, at 2.
153 Id. at 13 n.11 (citation omitted).
a contract for a common enterprise between the homeowner and the builder, but that does not create an “investment contract.”  

The “commonality” prong in the Howey test also raises the vexing question of whether the commonality must be “horizontal” or “vertical.” That exercise is rendered more confusing by the fact that the SEC Staff Crypto Advice states that the agency “does not require vertical or horizontal commonality per se, nor does it view a ‘common enterprise’ as a distinct element of the term ‘investment contract.’”

The third prong of the Howey test, i.e., an expectation of profits, provides no real help in determining whether a cryptocurrency is a security. The SEC Staff Crypto Advice states that a reasonable expectation of profit is present where, among other things, there is an expectation that the value of the digital asset will appreciate and be resold for a profit. However, there are a wide variety of non-security transactions in which purchases are made of commodities that, like Bitcoins, carry an expectation, or at least a hope, they will increase in value. For example, it is common for investors to make purchases of real property with

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155 See generally United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975) (ownership interests in a cooperative housing project were not investment contracts).

156 See, e.g., Long v. Shultz Cattle Co., Inc., 881 F.2d 129, 140 (5th Cir. 1989) (describing the split in circuit courts on whether to apply vertical or horizontal commonality under the Howey test). In SEC v. SG Ltd., a pre-cryptocurrency case, the First Circuit applied a horizontal commonality test and held that virtual shares in a virtual enterprise were securities. See SEC v. SG Ltd., 265 F.3d 42, 50 (1st Cir. 2001). The court pointed to the fact that the defendant “unambiguously represented to its clientele that participants’ funds were pooled in a single account that was used to settle participants online transactions. Therefore, pooling is established.” Id. The court noted that horizontal commonality also requires investors to share in the profits and risks of the business. Id.

157 SEC Staff Crypto Advice, supra note 135, at 13 n.10 (citations omitted).

158 Id. at 2–3.
the goal of making profits from an increase in its market value. The acquisition of works of art, the purchase of coins by a numismatist, and stamp purchases by philatelists may be made for the purpose of making a profit from an increase in their value. As SEC Commissioner Peirce has observed:

If the token seller is simply discussing the potential for an increase in the value of a token in the same manner that a seller of any number of other consumer products might appeal to purchasers' desire to buy a product of lasting or even increasing value, is there an investment contract? The subjective intent of any particular purchaser should not be controlling. If it were, then is there any end to the Commission's authority? How would that logic apply to a shoe company, which, as it sells you a pair of sneakers, promises to hire some prominent athletes to promote the brand, thus focusing your mind on how sky high the price will go on StockX [an online consignment store] rather than on how high your new kicks will enable you to jump on the basketball court?

An ICO is different from an initial public offering (IPO) of a security because the ICO participants are not being sold an ownership or debt interest in a corporate or corporate-like organization. Instead, the crypto purchaser is buying a "commodity" in the form of a crypto token. This makes them purchasers of a "thing" that may or may not increase in value. The mere purchase of a "thing," such as real estate, artworks, or stamps, does not bestow voting, dividend, liquidation, interest payments or principal repayment, or other rights commonly associated with a security investment.

161 Running on Empty, supra note 25.
163 See Moskowitz, supra note 160.
The SEC’s DAO Investigative Report addressed a token that varies from the Bitcoin model. The target of that investigation was an unincorporated Decentralized Autonomous Organization (DAO),\textsuperscript{164} which the SEC described as “a ‘virtual’ organization embodied in computer code and executed on a distributed ledger or blockchain.”\textsuperscript{165} The DAO was created with the object of raising funds through the sale of DAO tokens in exchange for Ether, a cryptocurrency.\textsuperscript{166} The sponsors of the DAO used the ether tokens to fund “projects” they selected for investment returns.\textsuperscript{167} The SEC likened the purchasers of DAO tokens to investors in a company that pays dividends, i.e., the DAO token purchasers were to be given “rewards” by sharing in the anticipated earnings from the “projects” selected by the DAO promoters.\textsuperscript{168} That sharing would also occur through an increase in the value of the DAO tokens.\textsuperscript{169}

The \textit{Howey}-oriented co-owner profit sharing analysis in the DAO Investigative Report equates DAO tokens to a “stock” investment, i.e., “the voting rights of DAO Token holders [was] akin to those of a corporate shareholder.”\textsuperscript{170} Using a “stock” analogy in a \textit{Howey} analysis of whether this arrangement created an “investment contract” ignores the fact that “stock” is treated as a “special case” under the federal securities laws with its own distinctive meaning,\textsuperscript{171} i.e., “an instrument bearing the name ‘stock’ that, among other things, is negotiable, offers the possibility of

\begin{footnotesize}
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\item[166] See \textit{id.} at 2–3.
\item[167] See \textit{id.} at 4.
\item[168] \textit{Id.}
\item[169] See \textit{id.} at 11–12.
\item[170] \textit{Id.} at 15.
\end{itemize}
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capital appreciation, and carries the rights to dividends contingent on the profits of a business enterprise . . . ”

The DAO tokens offered the possibility of capital appreciation, a form of dividend, and at least titular voting rights, so why did the SEC not categorize them as “stock” instead of an “investment contract?” This may be due to the fact that the DAO was a “new paradigm” that was created in order to “supplant traditional mechanisms of corporate governance and management with a blockchain such that contractual terms are ‘formalized, automated and enforced using software.’” As stated in the SEC Staff Crypto Advice, “[b]oth the Commission and the federal courts frequently use the ‘investment contract’ analysis to determine whether unique or novel instruments or arrangements, such as digital assets, are securities subject to the federal securities laws.” The SEC was also faced with the fact that, unlike the DAO tokens, holders of Bitcoins and other similarly created decentralized cryptocurrencies do not normally receive dividends and have no voting or other rights commonly associated with stock. Instead, those cryptocurrencies will make or lose money based, not on investments made by the creator of the token, but on their price valuations as a commodity, ever how ephemeral the way in which that value is derived or perceived.

The SEC avoids the differences between stocks and most cryptocurrencies by labeling them “investment contracts” under the subtle, catch all provisions of the Howey test. That claim ignores the admission of an SEC chair that Bitcoins and other decentralized cryptocurrencies are “commodities” rather than “securities.” To illustrate how classification as a “commodity” places cryptocurrencies outside the scope of the SEC’s jurisdiction consider the case of “notes.” Like “stock,” “notes” are a separate category of securities regulated under the federal securities laws.

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172 Id. at 62.
174 Id. at 3.
175 SEC Staff Crypto Advice, supra note 135, at 1.
176 See Metjahic, supra note 164, at 1556–57.
177 See id.
178 See SEC Staff Crypto Advice, supra note 135, at 1–3.
179 See Clayton, supra note 129.
Notes are defined, not by the *Howey test*, but by a separate test set forth by the Supreme Court in *Reves v. Ernst & Young*.\textsuperscript{181} There, the Court rejected the *Howey* test for use in defining “notes” in favor of a four part “family resemblance test.”\textsuperscript{182} Under the family resemblance test, such things as pawn shop loans and consumer promissory notes secured by automobiles or residential homes are not “securities.”\textsuperscript{183}

Cryptocurrencies normally bear no family resemblance to notes that are regulated under the federal securities laws.\textsuperscript{184} Cryptocurrencies also do not ordinarily bear a family resemblance to the “margin” loans secured by stock that fall within the SEC’s jurisdiction.\textsuperscript{185} Bitcoin and other commodities may be traded on “margin,” but that trading is not subject to the federal securities laws.\textsuperscript{186} This is because commodity margins bear no family resemblance to stock “margin” loans.\textsuperscript{187} Stock margin regulations impose maximum loan limits on loans secured by stocks.\textsuperscript{188} Those limits are set by the Federal Reserve Board and enforced by the SEC.\textsuperscript{189} They are designed to limit speculation by restricting the leverage obtained from a loan used to buy stock.\textsuperscript{190}

\textsuperscript{182} See id. at 67.
\textsuperscript{183} See id. at 63–64.
\textsuperscript{184} See id. at 56. This is not to say that cryptocurrencies cannot be used for loans. The SEC charged a crypto lending operation called BlockFi Lending LLC with violations of the Investment Company Act of 1940 (15 U.S.C. §§ 80a-1 et seq.). See Press Release, SEC, BlockFi Agrees to Pay $100 Million in Penalties and Pursue Registration of Its Crypto Lending Product (Feb. 14, 2022), https://www.sec.gov/news/press-release/2022-26 [https://perma.cc/BUE2-E35B]. There, the respondent borrowed more than $10 billion in cryptocurrencies from some 570,000 investors. See Patrick Thompson, *SEC chief Gary Gensler fires warning shot at ‘crypto’ companies*, COINGEEK (Aug. 26, 2022), https://coin geek.com/sec-chief-gary-gensler-fires-warning-shot-at-crypto-companies/ [https://perma.cc/5KBT-EPJZ]. The investors’ cryptocurrencies were placed in “BlockFi Interest Accounts,” (BIA) which the SEC charged were securities. See Press Release, supra. BIA investors were promised a variable rate of interest as a return on their loan. See id. BlockFi pooled the BIA accounts and loaned the cryptocurrencies to institutional investors. See id.

\textsuperscript{186} See 15 U.S.C. § 78g.
\textsuperscript{187} See generally id.; *Reves*, 494 U.S. at 67–68.
\textsuperscript{188} See 15 U.S.C. § 78g(a).
\textsuperscript{189} See § 78g(c)(2)(B).
\textsuperscript{190} See § 78g(a).
In contrast, commodity margins act only as a “good faith” deposit of money to ensure performance on the contract. Historically, minimum commodity futures margin requirements were set by the commodity exchanges. Debates raged in Congress decades before and after the creation of the CFTC over whether commodity futures margins should be federally regulated. Those debates included unsuccessful efforts by the SEC to have Congress authorize the Federal Reserve Board to set margins on all stock index contracts in order to assure uniformity in margin requirements for stock index contracts traded on commodity and security exchanges. Further evidencing the existence of a “major question,” Congress granted the CFTC only limited authority over commodity futures margins through the Futures Trading Act of 1982. In 2010, Congress enacted the Dodd-Frank Act that, among other things, adopted federal margin requirements for swap contracts and allocated that jurisdiction among the CFTC, SEC and bank regulators.

The fourth prong of the Howey test, i.e., expectation of profits derived “solely” from the efforts of others, is even more problematic and complex. Indeed, the SEC Staff Crypto Advice writes out the “solely” requirement, citing SEC v. Glenn W. Turner Enter., Inc. In that case, the Ninth Circuit concluded that “the word ‘solely’ should not be read as a strict or literal limitation on the definition of an investment contract, but rather must be construed realistically, so as to include within the definition those schemes which involve in substance, if not form, securities.” Some “courts have eased the rigidity of the need to have

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191 See Jerry W. Markham, Federal Regulation of Margin in the Commodity Futures Industry—History and Theory, 64 TEMPLE L. REV. 59, 105 n.335 (1991) (describing the differences between stock and commodity margin trading).
192 See id. at 69.
193 See id. at 66–99 (describing those debates).
194 See id. at 91–99.
196 See Markham, supra note 107, at 36–37 (describing that legislation).
197 See SEC Staff Crypto Advice, supra note 135, at 13 n.14.
198 See 474 F.2d 476 (9th Cir. 1973).
199 See id. at 482. The Supreme Court took notice of this broadening of the “solely” requirement in United Housing Found., Inc. v. Foreman, 421 U.S. 837, 852 n.16 (1975).
the profits derived ‘solely’ from the efforts of others by including profits that come ‘primarily,’ ‘substantially,’ or ‘predominantly’ from the efforts of others.”

That disparity further demonstrates that there is nothing clear about the application of the Howey test to cryptocurrencies.

In the case of Bitcoins and many other cryptocurrencies, participants in decentralized blockchain peer-to-peer transactions may operate more like a business partnership or a joint venture than as an investment contract. To be sure, some participants may be more active than others. This raises the issue of whether the role of each participant must be analyzed to determine whether they have the requisite participation in management to make them something more than just passive investors. The SEC Staff Crypto Advice tried to draw such a distinction by focusing on “Active Participants” (APs) in a blockchain as persons on whom others might depend for profits. APs would include persons creating or maintaining a market in a digital asset, as opposed to “an unaffiliated, dispersed community of network users (commonly known as a “decentralized”


201 See Metjahic, supra note 164, at 1554–62.

202 See SEC Staff Crypto Advice, supra note 135, at 2–3. “A general partnership interest is presumed not to be an investment contract because a general partner typically takes an active part in managing the business and therefore does not rely solely on the efforts of others.” See SEC v. Merchant Capital, LLC, 483 F.3d 747, 755 (11th Cir. 2007). In contrast, a passive participant’s ownership interest in a partnership or in a limited liability company may be viewed to be a security. See James B. Porter, Modern Partnership Interests as Securities: The Effect of RUPA, RULPA, and LLP Statutes on Investment Contract Analysis, 55 WASH. & LEE L. REV. 955, 968 (1998) (“[L]imited partners’ positions are analogous to those of corporate stockholders because limited partners have limited liability, cannot dissolve the partnership, cannot bind other partners, and have no authority to actively manage the partnership.” (footnote omitted)). See generally, 2 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 961–63 (3d ed. 1989) (analyzing circumstances in which partnership interests may be securities); Elaine A. Welle, Limited Liability Company Interests As Securities: An Analysis of Federal and State Actions Against Limited Liability Companies Under the Securities Laws, 73 DENV. U. L. REV. 425, 446 (1996); Marc H. Morgenstern, Real Estate Joint Venture Interests as Securities: The Implications of Williamson v. Tucker, 59 WASH. U. L.Q. 1231, 1246 (1982).

203 See SEC Staff Crypto Advice, supra note 135, at 2–3.
network).” Again, this vague guidance does not reflect a clear authorization from Congress on how cryptocurrencies are to be regulated.

To date, there has been only limited judicial consideration of whether cryptocurrencies are securities under the Howey test. None of those courts directly considered the major questions doctrine. However, in SEC v. Ripple Labs, Inc., the district court denied an SEC motion to strike an affirmative defense, which asserted that the defendant’s due process rights were violated.

204 Id. at 4. This guidance further asserted with respect to the “solely” requirement that:

We recognize that holders of digital assets may put forth some effort in the operations of the network, but those efforts do not negate the fact that the holders of digital assets are relying on the efforts of the AP. That a scheme assigns “nominal or limited responsibilities to the [investor] does not negate the existence of an investment contract.” If the AP provides efforts that are “the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise,” and the AP is not merely performing ministerial or routine tasks, then there likely is an investment contract . . . . Managerial and entrepreneurial efforts typically are characterized as involving expertise and decision-making that impacts the success of the business or enterprise through the application of skill and judgment.

Id. at 13 n.16. See generally Henderson & Raskin, supra note 145, at 460–63 (proposing a “Bahamas Test” for determining whether a digital asset is sufficiently decentralized to avoid being classified as a security).

205 See U.S. v. Zaslavskiy, No. 17 CR 647 (RJD), 2018 WL 4346339, at *4 (E.D.N.Y. Sept. 11, 2018) (a reasonable jury could determine that an ICO was an investment contract under the Howey test); SEC v. Shavers, No. 4:13-CV-416, 2013 WL 4028182, at *2 (E.D. Tex. Aug. 6, 2013) (Bitcoin investment promising daily interest was an investment contract under the Howey test); SEC v. Blockvest LLC, No. 18CV2287-GPB(BLM), 2019 WL 625163, at *7 (S.D. Cal. Feb. 14, 2019) (Howey test applied to find that an offering of digital tokens was a “security” transaction); Balestra v. ATBCOIN LLC, 380 F. Supp. 3d 340, 346 (S.D.N.Y. 2019) (applying the Howey test, the district court denied a motion to dismiss a class action which charged that an ICO of a digital asset was an illegal unregistered security); Audet v. Fraser, 605 F. Supp. 3d 372, 299 (D. Conn. 2022) (a jury acted unreasonably in finding that a cryptocurrency did not meet the Howey test).

206 See Zaslavskiy, 2018 WL 4346339, at *4; Shavers, 2013 WL 4028182, at *2; Blockvest LLC, 2019 WL 625163, at *7; Balestra, 380 F. Supp. 3d at 346; Audet, 605 F. Supp. 3d at 399.

because it lacked fair notice that dealings in digital tokens were in violation of the federal securities laws. That seems to suggest that the SEC's authority to regulate the cryptocurrency space is not clearly evident.

CONCLUSION

The SEC is running afoul of the major questions doctrine in seeking to unilaterally regulate cryptocurrency transactions through enforcement actions and staff declarations. The cryptocurrency market has major economic and political significance, and the SEC has not clearly been empowered by Congress to regulate that market. Instead, the agency is relying on the vague standards in the Howey decision that were formulated over seventy-five years ago in a completely different context. That decision was written decades before the appearance of blockchain technology or even computers. The subtle differences between securities, on the one hand, and Bitcoins, DAO-like tokens and other cryptocurrencies, on the other, needs to be sorted out by Congress through express language or by delegating specific rule-making authority to what it deems to be the appropriate agency or agencies.

209 See supra Section II.A.1.