THE KEYS TO THE KINGDOM: THE UNEXPECTEDLY UNSETTLED DEFINITIONS OF *SECURITY* AND *SALE* AND THE OVERRULING OF *CHEVRON*

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ABSTRACT

This article explores two important unresolved questions for Federal Securities regulation: The definition of *security* and the definition of *sale*. Recent judicial decisions have made the long-settled law regarding both of these definitions increasingly contested. The Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo* which overruled the *Chevron* doctrine have added to the instability.

The stakes could not be higher after *Loper Bright*. The definitions of *security* and *sale* are the foundational issues for Government and private securities enforcement. These figuratively are the keys to the kingdom. If, for example, the Supreme Court held that recent cases, extending SEC and private litigant claims to communication through social media, were wrongly decided, securities law enforcement and deterrence would be crippled.

Compounding these judicial developments are the profound political implications of the Trump Administration's embrace of a much lighter touch to cryptocurrency enforcement. Beginning in February 2025, the SEC's most important initiatives against cryptocurrency were all ended.

This article explores how much has been fundamentally changed by these and other steps. In several instances, the courts will weigh in. But the tectonic shifts already underway in Federal Securities law can best be appreciated by examining how much has changed and how much remains at stake.

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TABLE OF CONTENTS

INTRODUCTION

This article explores two important unresolved questions for the Federal Securities regulation under the Securities Act of 1933[1] and the Securities Exchange Act of 1934.[2] The definition of *security* and definition of *sale* were increasingly contested and potentially unstable before the United States Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*[3] overruled the *Chevron* doctrine.[4]

The implications of this instability are profound. If cryptocurrency is not classified as a security, the SEC lacks the jurisdiction to regulate massive

1. 15 U.S.C. §§ 77a–77mm. In 2022, I published an article recommending that Congress create a single independent Federal regulatory agency to replace the current multiple Federal and state regulators overseeing cryptocurrency. *See* Joel Seligman, *The Rise and Fall of Cryptocurrency: The Three Paths Forward*, 19 N.Y.U. J. L. & BUS. 127 (2022). After Donald Trump's election in November 2024, change is more likely to occur with respect to cryptocurrency regulation. Per Microtrends, U.S. GDP from 1960 to 2023 shows that cryptocurrency remains a minor part of the United States' economy, which had a gross domestic product exceeding $25 trillion gross domestic product in 2022. In November 2024, according to data from CoinMarketCap.com, the total crypto market cap was $2.94 trillion. *See* Nikiti Tambe & Aashika Jain, *Why is the Crypto Currency Market Rising*? (Nov. 24, 2024), https://www.forbes.com/advisor/in/investing/cryptocurrency/why-is-crypto-going-up/. The use of cryptocurrency, crypto trading platforms and crypto sales processes have broad implications for our financial markets.

2. 15 U.S.C. §§ 78a–78rr.

3. 603 U.S. 369, 412 (2024); *see* discussion *infra* at notes 126-42.

4. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (holding that courts are required to defer to reasonable agency interpretations of ambiguous statutes).

securities frauds such as those involving FTX[5] and Binance.[6] Both instances of fraud involved violations of the securities registration provisions, failure to register crypto platforms as securities exchanges[7], alternative trading systems[8]

5. In November 2022, the empire of thirty-year-old Sam Bankman-Fried collapsed first into Chapter 11 bankruptcy reorganization and then in November 2023 to his and others criminal convictions. *See* LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 90-95 (7th ed. 2024); MICHAEL LEWIS, GOING INFINITE: THE RISE AND FALL OF A NEW TYCOON (2024); Corin Ramey & James Fanelli, *Bankman-Fried Faces Lengthy Sentence, Long Odds on Appeal*, WALL ST. J. (Nov. 3, 2023), https://www.wsj.com/finance/currencies/sam-bankman-fried-faces-lengthy-sentenceand-long-odds-on-appeal-419e2994. FTX by 2023 had a shortfall of $8.9 billion, much of which was the result of wrongful transfers of FTX customers' funds to Alameda Research, a separate Bankman-Fried dominated company. LOSS, SELIGMAN & PAREDES, *supra* note 5 at 91. The collapse of FTX had wide repercussions for the crypto market and associated firms. In 2022, Coinbase, which then held 53% of all crypto (or market price) trading in the United States, saw its market capitalization decline from $85 billion to $11 billion. In 2023, Coinbase was sued by the SEC for violations of the Federal Securities law broker, securities exchange, and securities registration provisions. *Id*. at 104-07. During the last three months of 2022, Silvergate Capital experienced $8.1 billion in withdrawals, 68% of its crypto related deposits. In 2023, Silvergate announced it would liquidate. *Id*. at 94-95.

6. In 2023, the Commission filed a complaint against Binance, then the world's largest cryptocurrency exchange and its Chief Executive Officer Changheng Zhao for failure to register its securities or trading platforms with the SEC and a series of false statements. Binance was five times larger than FTX with a U.S. Trading Platform generating $24 billion in average monthly trading volume between September 2021 and April 2022. *Id*. at 99-103. In November 2023, Binance agreed to pay a $4.3 billion fine and Zhao stepped down as CEO and faced a potential criminal sentence up to 18 months. Kowsmann, Berwick, Ostroff & Michaels, *Inside Binance's Guilty Plea, Biggest Fine in Crypto History*, WALL ST. J. (Nov. 24, 2023), https://www.wsj.com/finance/inside-binances-guilty-plea-and-the-biggest-fine-in-crypto-history-e959fca0.

7. *See* LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 2-54 (6th ed. 2021). Section 5 of the Securities Exchange Act requires each securities exchange to register unless it can claim an exemption. Securities Exchange Act, 15 U.S.C. § 78(e). Section 78c(a)(1) defines an *exchange* to mean: "Any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood. . ."; *Id.* § 78c(a)(1). In 2023, the SEC reproposed amendments to Rule 3b-16 to clarify that the definition of *exchange* could include cryptoplatforms with a requirement that they register as exchanges or alternative trading systems when they traded securities. Definition of "Exchange" Reopening Release, Exchange Act Release No. 34-97309, 2023 Fed. Sec. L. Rep. (CCH) ¶ 83,762 (Apr. 14, 2023). The stakes are very high with respect to the applicability of the Federal Securities Exchange Act concept of exchanges to cryptoplatforms. By 2023, there were some 500 cryptocurrency platforms. *Id*. at 81.

8. An Alternative Trading System (*ATS*) under the Securities Exchange Act is subject to a trading volume cap of five percent or less of covered securities. *See* LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, FUNDAMENTALS OF SECURITIES REGULATION 1043 (6th ed. 2011). Under Rule 3b-16(b), an ATS does not: (1) have governing rules for the conduct of its subscribers or (2) disciplines subscribers other than for expulsion from trading. *Id.*

and/or brokers.[9] Additionally, major cases involving Terraform Labs[10] and Coinbase would also fall outside the SEC's regulatory authority.[11]

Similarly, the distribution of cryptocurrency and other securities through social media has left the meaning of *sale* unsettled under the Federal Securities laws.

The stakes could not have been higher after *Loper Bright*. The definitions of *security* and *sale* are the foundational issues for Government and private securities enforcement. If the court held that recent cases involving social media and cryptocurrency did not fall under the definition of *securities* and *sales*, the ability of the SEC and private litigants to enforce the Federal Securities laws would be crippled.

Then on June 28, 2024, the Supreme Court held in *Loper* that the *Chevron* doctrine (delegation to administrative agencies to reasonably interpret

9. Brokers, as with securities exchanges and alternative trading systems, are subject to regulation under § 15 of the Securities Exchange Act with a panoply of rules that regulate registration, recordkeeping, reporting, financial responsibility, inspections, credit regulation and several other aspects of the business of conducting business as a broker (which refers to a firm) and a registered representative (which refers to employees of a brokerage firm). *See* LOSS, SELIGMAN & PAREDES, *supra* note 8, at 1135-38, 1181-1224.

10. In April 2024, a jury found that Terraform Labs and its founder Do Hyeong Kwon were liable for orchestrating a multi-billion-dollar fraud involving the development, marketing and use of unregistered cryptocurrencies. *See*, e.g., SEC v. Terraform Labs Pte Ltd., 708 F. Supp. 3d 450 (S.D.N.Y. 2023); Dave Michaels & Alexander Osipovich, *SEC Gains in Battle to Regulate Crypto*, WALL ST. J. (Apr. 7, 2024), https://www.wsj.com/finance/currencies/do-kwon-lost-to-the-sec-the-u-s-is-piling-up-other-crypto-wins-too-6c12bdde. Among other fraudulent schemes or misrepresentations, Terraform and Kwon misrepresented that UST was permanently pegged to a $1 price through an automatic self-stabilizing algorithm, when in reality, it was maintained through the intervention of a third party trading firm with which defendants had a secret deal and materially false claims that Chai, a Korean mobile payment application, was using the Terraform blockchain to process and settle transactions in cryptocurrencies when in fact, the defendants were merely replicating Chai transactions on a Terraform server.

In SEC v. Genesis Glob. Cap., LLC, No. 23-cv-00287 (ER), 2024 U.S. Dist. LEXIS 44372, at *1 (S.D.N.Y. Mar. 13, 2024), the court denied defendants' motions to dismiss a Commission claim under FRCP Rule 12(b)(6) against Genesis Global Capital, which was "the world's largest digital asset lender."

11. In SEC v. Coinbase Inc., Judge Failla successively held that Coinbase's sales of 13 crypto assets were securities, focusing on SOL and CHZ. 726 F. Supp. 3d 260, 272-74 (S.D.N.Y. 2024). The court also found that these sales required Coinbase, at the pleading stage, to comply with the Securities Exchange Act's registration requirements for an exchange, a broker, and a clearing agent. *Id*. at 290. Coinbase Global, Inc. was also held liable at the pleading phase under § 20(a) as a control person because at all relevant times, it exercised power over Coinbase, its wholly-owned subsidiary. *Id*. at 290. The court declined to hold that a crypto-asset owner's ownership of a wallet alone amounted to an investment contract. *Id*. at 297–99. However, in 2025, Judge Failla granted Coinbase's motion to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b). SEC v. Coinbase, Inc., 23 Civ. 4738, 2025 U.S. Dist. LEXIS 3223, at *42 (S.D.N.Y. Jan. 7, 2025).

Separately, in *Coinbase*, the court declined to order the SEC to propose new rules addressing how and when digital assets qualify as securities subject to the Federal securities law. No. 23-3202, 2025 U.S. App. LEXIS 653, at *83 (3rd Cir. Jan. 13, 2025).

The court, however, remanded the Order for additional investigation or explanation: "The SEC was not presumptively required to engage in notice-and-comment rulemaking for digital assets. Nor has Coinbase identified a fundamental change in a significant factual predicate underlying existing securities regulations sufficient to require rulemaking. But the SEC's order was arbitrary and capricious because it was conclusory and insufficiently reasoned. We thus grant Coinbase's petition in part. The remedy is not at this stage to order the SEC to institute rulemaking proceedings but to remand to the agency for a sufficiently reasoned disposition of Coinbase's petition." *Id.* at *59.

ambiguous Federal statutes) was overruled. The implications of *Loper* are immense. Both future and certain previous SEC interpretations regarding the statutory basis of SEC rules are to an uncertain degree now unsettled. This uncertainty is reenforced by a series of Supreme Court decisions discussed in Part III begrudgingly interpreting SEC and other Federal statutes.

There also are profound political implications to the dispute concerning cryptocurrency.

Soon after the election, the Blockchain Association, which represents more than 100 industry participants, reported that they had contributed more than $429 million to oppose SEC crypto initiatives. The Stand with Crypto Alliance similarly stated that more than 260 pro-crypto House candidates and 18 Senate candidates won their elections. Eric Trump remarked that Donald Trump will be the U.S.'s most pro-crypto president.[12]

Even the crypto industry, according to an article in the *Wall Street Journal*, "was reeling" in January 2025 after new meme coins with no economic purpose, dubbed $TRUMP and $MELANIA, were issued and briefly soared to an economic value of nearly $9 billion.[13]

The Republican Party Platform adopted on July 8, 2024, included for the first time a Commitment Concerning Crypto: for the first time "Republicans will end Democrats' unlawful and unAmerican Crypto crackdown and oppose the creation of a Central Bank Digital Currency. We will defend the right to mine Bitcoin, and ensure every American has the right to self-custody of their Digital Assets and transact free from Government Surveillance and Control."[14]

On July 28, 2024, Presidential candidate Donald Trump addressed the Bitcoin Conference in Nashville and stated he intends to create a strategic national bitcoin stockpile, appoint a bitcoin and crypto presidential advisory council, and fire SEC Chair Gary Gensler. The *Wall Street Journal* stated: "Donald Trump wants to be the crypto president." In September 2024, Trump

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12. Ismaeel Naar, Eric Lipton & David Yaffe-Bellany, *Eric Trump Vows Father Will Be U.S.'s 'Most Pro-Crypto President'*, N.Y. TIMES (Dec. 10, 2024), https://www.nytimes.com/2024/12/10/us/politics/eric-trump-cryptocurrency-conference.html.

13. The conflict of interest was widely recognized: "Trump benefits directly from the sale of the tokens while setting the policy that affects how markets are valued and regulated . . . Ryan Selkis, the former chief executive of Crypto research firm Messari and a vocal supporter of Trump, urged the president to fire the adviser who recommended the launch of the second coin. '1. They don't know what they're doing. 2. They cost you a lot of $ and goodwill. 3. They don't have your interests in mind,' said Selkis in a social-media post shortly after the $MELANIA token launch." Vicky Ge Huang & Caitlin Ostroff, *Crypto Thought Trump Would Bring It Legitimacy. Then He Launched a Meme Coin*., WALL. ST. J. (Jan. 21, 2025), https://www.wsj.com/livecoverage/trump-inauguration-president-2025/card/crypto-thought-trump-would-bring-it-legitimacy-then-he-launched-a-meme-coin—Veu0AszKecbMDYbEwMwu.

Anthony Scaramucci went further and labelled the Trump meme coins as "bad for the industry. Don't delude yourself. It's Idi Amin level corruption." Natalie Venegas, *Trump Meme Coin Price: Ex-Aid Blasts "Corruption" as Market Cap Surges*, NEWSWEEK (Jan. 18, 2025), https://www.newsweek.com/trump-meme-coin-price-anthony-scaramucci-blasts-corruption-market-cap-surges-2017211.

14. Project 2025 would go far further and dismantle the administrative state, which the Project characterized as "a top priority of the next conservative President." PROJECT 2025: MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 7 (2024).

announced the formation of his own crypto company, World Liberty Financial.[15] Trump explained to the Nashville Bitcoin Conference: "The moment I'm sworn in, the persecution stops and the weaponization ends against your industry."[16]

In January 2025, Trump nominated former SEC Commissioner Paul Atkins to succeed Gary Gensler.[17]

In February 2025, the SEC's most important initiatives against crypto were all but ended. The SEC reached a deal to recommend dismissal of its lawsuit against Coinbase, followed in rapid succession by similar announcements from Gemini, OpenSea, and Uniswap Labs as well as an agreement to withdraw a lawsuit against Consensys. The SEC separately announced that it would not exercise regulatory authority over Memecoins, such as those created recognizing President Trump and Melania Trump, and that it would pause a fraud suit against Justin Sun who had invested $30 million in World Liberty Financial, for which President Trump and his sons agreed to act as promoters. The SEC also requested a 60-day pause in its lawsuit against Binance. On March 6, 2025, President Trump created a United States Bitcoin Reserve and United States Digital Asset Stockpile capitalized with all Bitcoin held by the Department of Treasury that was finally forfeited as part of criminal and civil asset forfeiture. The Secretary of the Treasury similarly shall establish an office to administer and maintain control of all digital assets owned by the Department of the Treasury.[18]

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15. Vicky Ge Huang & Caitlin Ostroff, *Trump Adds Crypto to His 'America First' Agenda*, WALL ST. J. (July 27, 2024), https://www.wsj.com/politics/elections/trump-adds-crypto-to-his-america-first-agenda-71ceb046; David Yaffe-Bellany, Sharon LaFraniere & Matthew Goldstein, *Trump Rolls Out World Liberty Financial, A New Cryptocurrency Venture*, N.Y. TIMES (Sept. 16, 2024), https://www.nytimes.com/2024/09/16/technology/trump-crypto-world-liberty-financial.html.

16. *Trump Becomes a Crypto Convert,* WALL ST. J. REVIEW & OUTLOOK, July 30, 2024.

17. The Wall Street Journal in an opinion on December 5, 2024, warmly endorsed Atkins. Atkins, a critic of the PCAOB, has specifically criticized the PCAOB salaries ($673,000 for the Chair) and what he characterized as overly prescriptive PCAOB standards. *See* Mark Mauren, *Audit Regulation Set to Ease with SEC Pick*, WALL ST. J. (Dec. 10, 2024), https://www.wsj.com/articles/pcaob-critic-picked-for-sec-chair-raising-potential-for-a-smaller-audit-watchdog-49bf6e7e. *See also* John C. Coffee, Jr. & Joel Seligman, *About Face: How Much of Current SEC Policy Will the Trump Administration Reverse?*, CLS BLUE SKY BLOG (Dec. 3, 2024), https://clsbluesky.law.columbia.edu/2024/12/03/about-face-how-much-of-current-sec-policy-will-the-trump-administration-reverse/; *see generally* DAVID R. BURTON, S*ecurities and Exchange Commission and Related Agencies*, *in* FINANCIAL REGULATORY AGENCIES 829–37 (2025 Pres. Transition Project ed., 2025).

Even before Atkins's confirmation hearing, SEC Commissioner Mark T. Uyeda was named Acting Chair. *See* Press Release, U.S. Sec. & Exch. Comm'n, *Mark T. Uyeda Named Acting Chairman of the SEC* (Jan. 21, 2025), https://www.sec.gov/newsroom/press-releases/2025-29. Almost immediately, Uyeda launched a crypto task force "dedicated to developing a comprehensive and clear regulatory framework for crypto assets," and Commissioner Peirce was named to chair the new task force. *See* Press Release, U.S. Sec. & Exch. Comm'n, *SEC Crypto 2.0: Acting Chairman Uyeda Announces Formation of New Crypto Task Force* (Jan. 21, 2025), https://www.sec.gov/newsroom/press-releases/2025-30. Effective January 30, 2025, the Commission in Staff Accounting Bulletin 122 rescinded the interpretive guidance in Staff Accounting Bulletin 121 entitled Accounting for Obligations to Safeguard Crypto-Assets on Entity Holds for its Platform Users. *See* SEC Staff Accounting Bulletin No. 122 (2025).

18. Dave Michaels & Vicky Ge Huang, *Coinbase says SEC Intends to Drop Lawsuit Against Crypto Exchange P*, WALL ST. J., (Feb. 21, 2025), https://www.wsj.com/finance/regulation/coinbase-says-sec-intends-to-drop-lawsuit-against-crypto-exchange-4b3b0c36; David Yaffe-Bellany, *Crackdown on Crypto is Bulldozed under Trump*, N.Y. TIMES, Mar. 1, 2025, at B1; Matthew Goldstein, *SEC Declares Memecoins are Not Subject to Oversight*, N.Y. TIMES (Mar. 1, 2025), https://www.nytimes.com/2025/02/27/business/sec-memecoins.html; Vicky Ge Huang, *Bitcoin Surges on*

This article explores how much it has been fundamentally changed by these and other steps. In several of these matters, the courts will weigh in. But these tectonic shifts in the bases of Federal Securities law are best appreciated by explaining how much is proposed to change.

Part I of this Article describes the recent challenges to the Federal Securities law definition of *security* and includes discussion of the SEC's apparent reluctance to investigate with respect to investigating the status of Bitcoin, the largest cryptocurrency.

Part II focuses on the definition of *sale*, expanded in two recent Court of Appeals decisions to apply to sales through social media, tweets, online videos and podcasts and poses the question whether this interpretation will survive future Supreme Court review.

Part III concludes with the implications of the Supreme Court's *Loper* decision to federal administrative law generally. The basic legal foundation of the administrative state is eroding. Time will tell how far this counter-revolution will reach. Given recent decisions such as *Loper*, no reasonable person can doubt that this revolution has begun.

I. THE DEFINITION OF *SECURITY*

The definition of *security* in § 2(a)(1) of the Securities Act and the Securities Exchange Act is comprehensive, encompassing approximately twenty or so different types of financial instruments. These range from familiar ones, such as stocks and bonds, to catch-all terms like *investment contract*. The definition was intended to be all-encompassing. The pivotal House Report stated that the Securities Act defines "the term *security* in sufficiently broad and general terms so as to include within the definition the many types of instruments that in our commercial world fall within the ordinary concept of a security."[19] The definition of *security* is notable for the prefatory phrase "unless the context otherwise requires," which provides a basis for judicial interpretation of the definition provisions.[20] The Supreme Court in 2004 explained: "Congress's purpose in enacting the securities laws was to regulate investments, in whatever form they are made and by whatever name they are called . . . . To that end, it

Plans for Crypto Reserve, WALL ST. J. (Mar. 3, 2025) at C2; Establishment of the Strategic Bitcoin Reserve and United States Digital Asset Stockpile, Exec. Order No. 14233, 90 Fed. Reg. 11789 (Mar. 6, 2025); *see generally*, *The Fool's Gold of Crypto Reserve*, WALL ST. J. (Mar. 9, 2025), https://www.wsj.com/opinion/the-fools-gold-of-a-crypto-reserve-trump-executive-order-audit-bitcoin-f4dd347a; David Yaffe-Bellany, *At Crypto Summit, Trump Says U.S. Will be the 'Bitcoin Superpower',* N.Y. TIMES (Mar. 9, 2025), https://www.nytimes.com/2025/03/07/technology/trump-crypto-summit.html; *Trump Goes All in for Crypto after his $Trump Epiphany*, WALL ST. J. (Mar. 8, 2025), https://www.wsj.com/public/resources/documents/nq3AyblllHEyn0Rm0GU8-WSJNewsPaper-3-8-2025.pdf.

19. H.R. No. 85, 73d Cong., 1st Sess. 11 (1933).

20. *See generally* LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 1106-09 (6th ed. 2019).

enacted a definition of *security* sufficient 'to encompass virtually any instrument that might be sold as an investment.'"[21]

For close to eighty years, the United States Supreme Court's 1946 decision in *SEC v. W.J. Howey Co.*[22] articulated the basic framework for determining when an *investment contract* is a *security*. In *Howey*, the Court distinguished between a physical asset, which alone is not a security (such as an orange grove in *Howey*) and the combination of land with additional rights, which would constitute an *investment contract* and thus fall under the definition of a security.[23]

The construction in *Howey* is partially based on pre-1933 state law cases defining *investment contracts*. The Supreme Court earlier had previously recognized that an investment contract could be found with "novel, uncommon or irregular devices."[24] The term *investment contract* "had been broadly construed by state courts so as to afford the investing public a full measure of protection. Form was disregarded for substance and emphasis was placed upon economic reality."[25] It was "immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise."[26] The definition of *investment contract* embodies "a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variables schemes devised by those who seek the use of the money of others on the promise of profits."[27] *Howey* rejected the notion that an investment contract is limited to speculative investments. The decision clarified that the classification did not depend on whether the enterprise is speculative or non-speculative, nor on whether the sale involves property with or without intrinsic value. "The statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae."[28]

Howey adopted what is by now the familiar test to determine whether an investment was an *investment contract*: "An investment contract for the purposes of the Securities Act means a contract, transaction or scheme whereby a person (1) invests money (2) in a common enterprise and (3) is led to expect profits (4) solely from the efforts of the promoter or a third party." Each of the *Howey*

21. SEC v. Edwards, 540 U.S. 389, 393 (2004); *see also* Reves v. Ernst & Young, 494 U.S. 56, 60-61 (1990): "The fundamental purpose undergirding the Securities Acts is 'to eliminate serious abuses in a largely unregulated securities market.' [I]n defining the scope of the market that it wished to regulate, Congress painted with a broad brush. It recognized the virtually limitless scope of human ingenuity, especially in the creation of 'countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.'[C]ongress therefore did not attempt precisely to cabin the scope of the Securities Acts. Rather, it enacted a definition of '*security'* sufficiently broad to encompass virtually any instrument that might be sold as an investment."

22. 328 U.S. 293 (1946).

23. *See also,* SEC v. C.M. Joiner Corp., 320 U.S. 344, 352-53 (1943).

24. *Id*. at 351.

25. *Howey*, 328 U.S. at 298.

26. *Id.* at 299.

27. *Id*.

28. *Id*. at 301.

definitions has been broadly construed by subsequent courts consistent with the principles of interpretation in *Howey*.

Howey involved cash payments for the investment in land, a warranty deed, and the option to purchase a service contract. In the *International Brotherhood of Teamsters* decision, the Supreme Court later rejected the position "that a person's investment . . . must take the form of cash only, rather than goods and services."[29] What is required is that "the purchaser gave up some tangible and definable consideration in return for an interest that had substantially the characteristics of a security."[30] Subsequent lower court decisions have extended the investment element to include promises of best efforts in the operation of a franchise,[31] a loan or rehypothecated collater[32], or an exchange of cryptocurrency or Euros for a separate cryptocurrency.[33]

In *Howey,* common enterprise involved a pooling of investments in a common fund with *pro rata* distributions to investors, which established what is now popularly known as horizontal commonality. A common enterprise can be established through horizontal commonality, but lower courts have also extended the common enterprise element to reach strict vertical commonality, in which "the fortunes of the investor are interwoven with and dependent upon the success of those seeking the investment."[34] This means if the promoter or sponsor of a security and investors share in the profitability of an investment, a common enterprise can be established even if there is as few as one investor and one promoter. Most circuits have rejected broad vertical commonality where, for example, a commodities broker "merely furnish[es] . . . counsel to another for a commission."[35]

In *Howey*, the expectation of profits element was established by the return of payments to investors and their right to sell their interests. The Supreme Court based its determination of whether there was an expectation of profits in part on the examination of a firm's Information Bulletin.[36] Lower courts have recognized that the expectation of profits can be based on advertisements,[37] a marketing campaign including websites and listing on an exchange,[38] and the

29. Int. Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 560 n.12 (1979).

30. *Id*. at n.21.

31. Crowley v. Montgomery Ward & Co., 570 F.2d 877, 880 (10th Cir. 1978).

32. El Kahdem v. Equity Sec. Corp., 494 F.2d 1224, 1228–29 (9th Cir. 1974); Hector v. Wiens, 533 F.2d 429, 432–33 (9th Cir. 1976).

33. Balastra v. ATB Coin LLC, 380 F. Supp. 3d 340, 353 (S.D.N.Y. 2019); SEC v. Telegram Group, Inc., 448 F. Supp. 3d 352, 368–369 (S.D.N.Y. 2020).

34. SEC v. Glenn W. Turner Enter., 474 F.2d 476, 482 n.7 (9th Cir. 1973); SEC v. Goldfield Mines Co. of Nev., 758 F.2d 459, 463 (9th Cir. 1985); SEC v. R.G. Reynolds Enter., 952 F.2d 1125, 1130 (9th Cir. 1996); SEC v. NAC Found., LLC, 512 F. Supp. 3d 988, 996 (N.D. Cal. 2023); DeFord v. Loutoulas, No. 22-cv-652, 2023 WL 2709816, at *14 (M.D. Fla. 2023).

35. *See*, *e.g*., Brodt v. Bache & Co., 595 F.2d 459, 462 (9th Cir. 1973).

36. United Hous. Found., Inc. v. Forman, 421 U.S. 837, 853–54 (1975).

37. SEC v. Banner Fund, Int'l, 211 F.3d 602, 614 (2d Cir. 2000).

38. Balestra v. ABTCOIN LLC, 380 F. Supp. 3d 340, 355–56, 356 n.14 (S.D.N.Y. 2019).

representations of the defendant.[39] Central to this test is the promotional emphasis of the developer.[40]

In 2004, the Supreme Court held that the term *profits* would include a scheme that offered a fixed return, rather than a variable one. Notably, the Court rephrased the *Howey* expectation of profits to refer to a "reasonable expectation of profits" and supported "the common sense understanding of 'profits' in the *Howey* test as simply 'financial returns on investments.'"[41]

Subsequent lower court opinions have interpreted *Howey*'s fourth element, "solely from the efforts of the promoter or a third party," to include instances where the efforts of a promoter or a third party were "undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."[42] The "efforts of others" test has been widely adopted by the circuits.[43] The gravamen of this test is whether investors are dependent upon the managerial efforts of a promoter or a third party. The reluctance to insist upon a requirement that the return comes "solely from the efforts of the promoter or a third party" also acknowledges how easily a strict interpretation of this test could be evaded.

Presumably, a strict reading would not have found liability had the passive investors in *Howey* picked even a single orange in their small orange properties they purchased, where the *Howey* defendants were responsible for planting, harvesting, and marketing.[44] *Howey* developed its standard in a case in which investors, in fact, had no actual participation in the investment scheme. The Court in *Howey* did not have the occasion to consider an investment plan involving any participation by investors in managerial functions. To strictly apply the "solely" test would be inconsistent with the "economic realities" principle of interpretation stressed by *Howey*.

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39. *See, e.g.*, SEC v. Kik Interactive, Inc., 492 F. Supp. 3d 169, 179–80 (S.D.N.Y. 2020) (limitations on supply of cryptocurrency in increase demand); SEC v. NAC Found., LLC, 512 F. Supp. 3d 988, 996 (N.D. Cal. 2021) (defendants retained a healthy share of crypto tokens for their personal and corporate offers for trading); SEC v. Genesis Glob. Cap., LLC, No. 23-cv-00287(ER), 2024 U.S. Dist. LEXIS 44372, at *6, *22–25 (S.D.N.Y. 2024) ("The website included additional claims that Gemini Earn could receive more than 100x the average national interest rate").

40. Aldrich v. McCulloch Prop., 627 F.2d 1036, 1039 (10thCir. 1980) (promotional materials, merchandising approaches, oral assurances and contractual agreements have been considered in determining whether there is an expectation of profits); Diamond Fortress Techs., Inc. v. EverID, Inc., 274 A.3d 287, 301 (Del. 2022) ("Indeed, an investor's expectation of profits relies on the 'essential efforts' of investee when he or she wholly depends on that investee 'to develop, launch and support [the blockchain].'"

41. SEC v. Edwards, 540 U.S. 389, 395-96 (2004).

42. SEC v. Glenn W. Turner Enter., Inc., 474 F.2d 476, 482 (9th Cir. 1973); SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 480-483 (5th Cir. 1980).

43. Rivianna Trawlers Unlimited v. Borchart, 840 F.2d 236, 240 n.4 (4th Cir. 1988); United States v. Leonard, 529 F.3d 83, 88 (2d Cir. 2008); SEC v. Genesis Global Capital LLC, 2024 U.S. Dist. LEXIS 44372, at *13 (S.D.N.Y. 2024).

44. Lower court cases have enforced the *Howey* test where a purchaser contributed "a modicum of effort." SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 480 (5th Cir. 1974); SEC v. Aqua-Sonic Prod. Corp., 687 F.2d 577, 582 (2d Cir. 1982).

Howey with these amplifications has been applied in hundreds of lower court and SEC cases and guidelines involving managerial arrangements. These include condominium timeshares,[45] general partnerships when a plaintiff can establish that the partnership agreement leaves so little actual power in the hands of one or more general partners that they are dependent on the managerial abilities of the promoter or manager,[46] franchises in which the franchisee is a passive investor,[47] insurance or annuity policies or contracts dependent upon variable returns,[48] and *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, where investors in certificates of deposit relied on Merrill Lynch's implicit promise to maintain its marketing efforts and invested in "reliance upon the efforts, knowledge and skill of Merrill Lynch."[49]

The law in *Howey* seemed long settled. It was almost routinely extended to cryptocurrency when an *investment contract* could be established based on a combination of the issuing firm and often its founders retaining a substantial percentage of the cryptocurrency, thus limiting distributions through agreements or lockups to a specified designated percentage of the cryptocurrency during a set designated time period. The sales proceeds of the cryptocurrency were a major source of income for the firm, often providing support for associated research and development activities. Managers coordinated and dominated new product or distribution design, promotions, incentive payments, share giveaways, firm use of social media, enterprise reports, managerial interviews, and firm agreements with trading platforms or exchanges to trade the currency. Each of these activities were, at least in part, intended to boost the cryptocurrency's value, rather than having a purpose such as facilitating international payments. The SEC position on cryptocurrency essentially began with its 2017 Report on Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO. Here, the Commission followed *Howey* and concluded that the DAO's tokens were securities because investor profits were derived from the managerial efforts of the issuer, Slock.it, while token holders' voting rights were limited.[50]

William Hinman, then the Director of the SEC's Division of Corporation Finance, generalized in a 2018 speech[51] that not all cryptocurrencies are securities, but cryptocurrency could be an investment contract when "[f]unds are raised with the expectation that the promoters will build the system and investors can earn a return on the investment – usually by selling their token in the secondary market once the promoters create something of value with the

45. Sec. Act Release. 5347 (1973), 5382 (1983).

46. Williamson v. Tucker, 645 F.2d 404, 419 (5th Cir. 1981). The *Williamson* test has been widely followed. *See, e.g.*, Hocking v. DuBois, 885 F.2d 1449 (9th Cir. 1989); United States v. Leonard, 529 F.3d 83, 90, 91 (2d Cir. 2008); SEC v. Shields, 744 F.3d 633, 643, 644 (10th Cir. 2014).

47. SEC v. Aqua-Sonic Prod. Corp., 687 F.2d 577 (2d Cir. 1982).

48. SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959); SEC v. United Benefit Life Ins. Co., 398 U.S. 202 (1967).

49. 756 F.2d 230, 241 (2d Cir. 1985). For close to 200 other illustrations, see Loss, Seligman & Paredes, *supra* note 9, at 1209-1221.

50. Sec. Ex. Act Release 81, 207 (July 25, 2017).

51. William Hinman, *When Howey Met Gary Plastic*, REMARKS AT THE YAHOO FIN. ALL MKTS. SUMMIT (June 14, 2018), https://www.sec.gov/newsroom/speeches-statements/speech-hinman-061418.

proceeds and the value of the digital assets increases . . . . And as in *Howey*, the investors are passive. The purchaser usually has no choice but to rely on the efforts of the promoter to build the network and make the enterprise a success."

In 2019, the SEC Strategic Hub for Innovation and Financial Technology provided a *Framework for Investment Contract* Analysis of Digital Assets, which amplified the approach of the *DAO* case and Hinman's 2018 remarks, explaining:

> Does the purchaser reasonably expect to rely on the efforts of an AP (Active Participant)?
> An AP is responsible for the development, improvement (or enhancement), operation, or promotion of the network…
> An AP creates or supports a market for, or the price of the digital asset…
> An AP had a lead role in the direction of the ongoing development of the network…
> The digital asset is marketed in terms that indicate it is an investment or that the solicited holders are investors.

Several subsequent cryptocurrency cases have followed the logic of *Howey, DAO*, the 2018 Hinman Statement and the 2019 SEC Framework.[52]

However, the settled law of *Howey* has been subject to a series of increasingly pointed attacks. Most distantly in 1996, Judge Douglas Ginsburg wrote in *SEC v. Life Partners*, a 2-1 decision for the District of Columbia Federal Court of Appeals holding that the *Howey* "expectation of profits" test could only be satisfied in the context of a viatical settlement to provide resources to AIDs victims when there were post-purchase activities on the part of the seller.[53] Judge Patricia Wald dissented, writing in part: "I believe that the third prong of the *Howey* text can be met by prepurchase managerial activities of a promoter when

52. *See, e.g.*, Balestra v. ABT Coin LLC, 380 F. Supp. 3d 340 (S.D.N.Y. 2019) ("Plaintiff plausibly alleges that the 'potential profits from the future valuation of the ABT Coins w[ere] entirely reliant on the success of the Defendants' new blockchain'"); SEC v. Telegram Group, 448 F. Supp. 3d 352 (S.D.N.Y. 2020) ("The Court finds that the SEC has shown a substantial likelihood of success in proving that the contracts and understandings at issue, including the sale of 2.9 billion Grams to 175 purchasers in exchange for $1.7 billion are part of a larger scheme to distribute those Grams into a secondary public market, which would be supported by Telegram's ongoing efforts"); SEC v. Kik Interactive, Inc., 492 F. Supp. 3d 169 (S.D.N.Y. 2020) (sales of $50 million in a private sale to 50 sophisticated investors at a 30 percent discount followed by $49.2 million in public sales to 10,000 purchasers from 90 percent of the Kin Tokens held by Kik or an associated Foundation led the court to conclude: "The economic reality is that Kik . . . pooled proceeds from the sales of Kin in an effort to create an infrastructure for Kin, and thus boost the value of the investment . . . . The stronger the ecosystem that Kik built, the greater the demand for Kin, and thus the greater the value of each purchaser's investment"); SEC v. LBRY, Inc., 2022 U.S. Dist. LEXIS 202738 (D.N.H. 2022) ("From its inception, LBRY's profitability turned on the ability to grow the value of LBRY by increasing usage of the LBRY Network"); Audet v. Fraser, 605 F. Supp. 3d 372 (D. Conn. 2022) (the court reversed the jury's determination that the company's new cryptocurrency Paycoin was not a security in part because its purchasers "reaped their profits in the form of increased value of Paycoin"); Friel v. Dappers Labs, Inc., 657 F. Supp. 3d 422, 435 (S.D.N.Y. 2023) (the court both applied horizontal and strict vertical commonality, noting that *Revak* neither accepted nor rejected strict vertical commonality).

53. 87 F.3d 536 (D.C. Cir. 1996).

it is the success of these activities, either entirely or predominantly, that determines whether profits are eventually realized."[54] Judge Wald's view has been followed by a majority of subsequent cases that have concluded that prepurchase activities in viatical settlements would suffice.[55]

A more far-reaching challenge to *Howey* was loosely based upon a 2022 article by Lewis Cohen, et al., *When Fungible Crypto Assets Are Not Securities*,[56] a survey of 266 relevant cases. Their proposed test argued that virtually all investment contracts had three essential ingredients: (1) a contract between a promoter and an investor that establishes the investor's right to an investment; (2) an imposition of post-sale obligations on the promoter to take specific actions for the investor's benefit; and (3) a grant to the investor of a right to share in profits from the promoter's efforts to generate a return on the use of investor funds.

An initial District Court review of this argument in *SEC v. Ripple Labs, Inc.* dismissed this theory because it called for the court "to read beyond the plain words of *Howey* and impose additional requirements not mandated by the Supreme Court." Judge Torres added that the "Defendants do not cite a single case that had applied their test."[57]

Each of the three essential ingredients is an overstatement. First, by its express terms, the *Howey* test is not limited to contracts but reaches "contracts, transactions or schemes." [58] Subsequent cases have found that the term *investment contract* "broad enough to include unwritten instruments."[59] To put

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54. *Id*. at 551.

55. *See* SEC v. Mutual Benefits Corp., 408 F.3d 737, 744 (11th Cir. 2005); Living Benefits Asset Mgmt. LLC v. Kestrel Co. (In re Living Bens. Asset Mgmt. LLC), 916 F.3d 528, 541 (5th Cir. 2019) (citing several cases that sided with the 11th Circuit analysis in *SEC v. Mutual Benefits* and concluding that the sale of viatical settlements satisfied the *Howey* definition of an investment contract based on Living Benefits' substantial pre-purchase activities); SEC v. Barry, 2023 U.S. Dist. LEXIS 92, 676 (C.D. Cal. 2023) (agreeing "with the weight of authority finding that . . . courts [need not] disregard pre-purchase managerial efforts that are specialized and essential to the profits of the venture as life settlement agreements").

56. Lewis Rinaudo Cohen, Gregory Strong, Freeman Lewin, & Sarah Chen, *The Ineluctable Modality Of Securities Law: Why Fungible Crypto Assets Are Not Securities, Discussion Draft* (Nov. 10, 2022), https://cclg.rutgers.edu/wp-content/uploads/Lewis-Cohen-Paper-March-3-2023-Presentation.pdf.

57. SEC v. Ripple Labs, Inc., 682 F. Supp. 3d 308 (S.D.N.Y.). There were two cases currently being litigated against Ripple. The author was an expert witness for the plaintiff in the separate private lawsuit, Zakinov v. Ripple Labs., Inc., Case No. 18-cv-06753-PJH (N.D. Cal. June 30, 2023). *See also* Ripple Labs. Inc., Litig., 2024 U.S. Dist. LEXIS 109,252 (N.D. Cal. 2024); SEC v. Ripple Labs, Inc. 2023 U.S. Dist. LEXIS 178, 300 (S.D.N.Y. 2023) (denying SEC Motion for Interlocutory Appeal).

58. *See* SEC v. Ripple Labs, Inc., 682 F. Supp. 3d at 321.

59. McKinney v. Panico, 2022 WL 4,551,695 at *9 (N.D. Ill. 2022). *See also* Canadian Imperial Bank of Comm. Tr. Co. v. Fingland, 615 F.2d 465, 467 n.5 (8th Cir. 1980) (contracts of course may be oral or written); SEC v. Sg. Ltd., 265 F.3d 42, 49-55 (1st Cir. 2021) (finding investment contract found based on defendant's statements on a website); SEC v. Scotville, 913 F.3d 1204 (10th Cir. 2019) (finding that plaintiff's evidence supported reasonable expectation that defendant's Adpacks would share in defendant's revenue despite defendant's website stating that there was no guarantee that there would always be revenue to share); Ford v. Koutolas, 2023 U.S. Dist. LEXIS 55,399 at *40 (M.D. Fla. 20023) ("The 'investment of money' required for an *investment contract* need not be made in cash or refers to more generally to 'an arrangement whereby an investor commits assets to an enterprise or venture in such a manner as to subject himself to financial losses'); SEC v. Friendly, 49 F. Supp. 2d 1363, 1368-1369 (S.D. Fla. 1999). *See also* under Rule 10b-5, SEC v. Zandford, 535 U.S. 813 (2002); Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc., 532 U.S. 588 (2001).

this differently, a "transaction or scheme" need not be a contract at all, a point conceded by Cohen, after a review of his 266 case survey. They found that while "a traditional written contract is indeed present in almost every instance where an investment contract transaction or scheme has been found by an appellate court," there are some notable exceptions. In their view, "the broad remedial objectives of the Securities Act do not support a formalistic requirement that a written contract agreement [must] always be present in every contract scheme if 'facts and circumstances' of the particular scheme transaction merit otherwise,"[60] which is a fairly convoluted way of acknowledging that a contract between a promoter and an investor is not an essential ingredient.[61]

A requirement of post-sale obligations was recognized in the divided holding in the 1996 viatical settlement case previously discussed.[62] Subsequent cases have almost unanimously rejected this requirement when "pre-purchase managerial efforts . . . are . . . essential to the profits of the venture."[63] Post-sale obligations are not so much "an essential ingredient" as a legal theory that did not galvanize a case following. As *Howey* emphasized, the definition of *investment contract* embodies "a flexible rather than a static principle, one that is capable of adaption to meet the countless and variable schemes devised by those who seek to use the money of others in the promise of profits . . . the statutory policy of affording broad protection to investors is not to be thwarted by unrealistic or irrelevant formulae."[64]

The third essential ingredient, "a grant to the investor of a right to share in profits from the promoter's efforts to generate a return on the use of investor funds," confuses the requirement of strict vertical commonality in which "the fortunes of the investors are interwoven with and dependent upon the success of those seeking the investment," with the more common means of establishing a common enterprise, horizontal commonality. The latter merely requires a pooling of investments regardless of whether the promoter is directly involved in efforts to generate a return on the use of investor funds.[65] In *Howey*, there was no requirement that the promoter directly share in the return from the investor's pool of returns from its orange grove purchases. However, *Howey* does require that an investor in an investment contract "is led to expect profits solely [or now primarily] from the efforts of the promoter or a third party." The "essential ingredients" test strings the bow too tightly. These profits were the investors', with no requirement that the promoter be a participant in this common enterprise.

60. Cohen, et al., *supra* note 56, at 51-52.

61. Judge Torres in *SEC v. Ripple*, did not address whether a written contract was required since the Defendants in that case had argued that either an oral or written contract would suffice.

62. *See* SEC v. Life Partners, 87 F.3d 536 (D.C. Cir. 1996).

63. SEC v. Barry, 2023 U.S. Dist. LEXIS 92, 676 (C.D. Cal. 2023).

64. *See Howey*, 328 U.S. 293 (1946).

65. *See generally supra* notes 32-33.

A more formidable challenge for the *Howey* doctrine separately occurred in Judge Torres's July 2023 opinion in *SEC v. Ripple*. In this opinion, Judge Torres granted in part the SEC's motion for summary judgment while also granting in part the Defendants' motion for summary judgment.[66] Since its founding in 2012, Ripple owned between fifty and eighty billion XRP, the cryptocurrency associated with its network. There were 100 billion XRP since its founding. The SEC made four allegations against Ripple. First, it claimed that Ripple through wholly owned subsidiaries sold $728.9 million worth of XRP in institutional sales primarily to institutional buyers and hedge funds.[67] Second, the SEC contended that Ripple sold $757.9 million worth of XRP in programmatic sales through digital asset exchanges in blind bid/ask transactions to public or noninstitutional buyers.[68] Third, it argued that Ripple distributed $609 million of XRP as a form of payment for services to employees and third parties to help fund development of new applications for XRP.[69] Fourth, the SEC alleged that Christian Larsen, who served as CEO through 2016 and continued to serve as Chair of the Ripple Board at the time of the case, sold $450 million of XRP on digital asset exchanges programmatically and made at least $450 million from his sales between 2013 and 2020.[70] Bradley Garlinghouse who became COO in 2015 and succeeded Larsen as CEO in 2017 sold $150 million of XRP and also received XRP as part of his overall compensation. Larsen and Garlinghouse were named as Defendants in this case. Ripple in fact did not file a securities registration statement for any offers or sales of XRP or establish any exemption.

Ripple had engaged in an extensive years-long marketing effort to promote the sale and value of XRP. Beginning in 2013, this marketing effort included the distribution of brochures, including "Ripple for Gateways," a "Ripple Primer" and "Deep Dive for Financial Professionals," all of which "were distributed publicly to prospective and existing XRP investors." The Ripple Primer had widespread distribution.

Starting at the end of 2016, Ripple began publishing a quarterly report called "XRP Market Reports" on its website to provide "clarity and visibility" regarding Ripple's market activities. Ripple and its senior leaders used a variety of social media platforms including Twitter, Facebook, Reddit, and XRP Chat, to communicate about XRP and Ripple. Larsen and Garlinghouse were interviewed by media outlets including *The Financial Times, Bloomberg* and CNBC and spoke with organizations and conferences, such as The Economic Club of New York and conferences such as DC Fintech, respectively.[71]

Judge Torres concluded that the $728.9 million of institutional sales to sophisticated investors satisfied *Howey* test. There was little question that the

66. SEC v. Ripple Labs, Inc., 682 F. Supp. 3d at 335 (S.D.N.Y.).
67. *Id*. at 317.
68. *Id*. at 318.
69. *Id*.
70. *Id*.
71. *Ripple*, 697 F. Supp. 3d at 134.

sales involved an investment of money. Moreover, Judge Torres found that a common enterprise was established through horizontal commonality.

Ripple pooled the proceeds of its Institutional Sales into a network of bank accounts under the names of various subsidiaries. Although Ripple maintained separate bank accounts for each subsidiary, Ripple controlled all its accounts and used the funds raised from the Institutional Sales to finance its operation.

Moreover, Judge Torres also found an expectation of profit for the Institutional Buyers whose:

> ability to profit was tied to Ripple's fortunes and the fortunes of other Institutional Buyers because all Institutional Buyers received the same fungible XRP. Ripple used the funds it received from its Institutional Sales to promote and increase the value of XRP by developing uses for XRP and protecting the XRP trading market. When the value of XRP rose, all Institutional Buyers profited in proportion to their XRP holdings.[72]

The opinion described Ripple's marketing of XRP to potential investors, including the Institutional Buyers, with brochures, including "Deep Dive," where Ripple explained that its "business model is predicated on a belief that demand for XRP will increase . . . if the Ripple protocol becomes widely adopted;" the "Ripple Primer," which stated that Ripple "hopes to make money from SRP if the world finds the Ripple network useful"; and XRP Market Reports, which "continued to connect XRP's price and trading to its own efforts . . . . The Q2 2017 XRP Market Reports highlights XRP's 'dramatic' and 'stunning' price increase and notes 'the market responded favorably to [Ripple's] escrow and decentralization announcements.'"[73]

Significantly, Ripple's senior leaders stressed that what "really set[s] XRP apart from any other digital asset is the amazing team of dedicated professionals that Ripple has amassed to develop an ecosystem around XRP" and its "huge strategic asset," Ripple's ability to "invest in its ecosystem." In July 2017, Ripple's Chief Cryptographer David Schwartz wrote on Reddit that "Ripple can justify spending $100 million on a project if it could reasonably be expected to increase the price of XRP by one penny over the long term. In November 2017, Schwartz posed on CRP Chat that Ripple would use its 'war chest' to put upward pressure on XRP's price."[74] Judge Torres concluded that "[c]learly the Institutional Investors would have understood that Ripple was pitching a speculative value proposition for XRP with potential profits to be derived from Ripple's entrepreneurial and managerial efforts."[75] Judge Torres found further support for the conclusion that sales to Institutional Buyers were an investment from the fact that some Institutions in their sales contracts agreed to lockup

72. *Id*. at 325-26.
73. *Id*. at 326-27.
74. *Id*. at 327.
75. *Id*. at 328.

provisions or resale restrictions. Judge Torres stated: "These restrictions are inconsistent with the notion that XRP was used as a currency or for some other consumptive use. Simply put, a rational economic actor would not agree to freeze millions of dollars . . . if the purchaser's intent was to obtain a substitute for fiat currency."[76]

These conclusions were consistent with earlier cases that found cryptocurrencies to be investment contracts. The novelty of Judge Torres's decision was in her treatment of programmatic sales to "public buyers" meaning non-institutional buyers that are typically retail, individual investors. Judge Torres articulated factual differences between Institutional Buyers and Programmatic Buyers: "Whereas the Institutional Buyers reasonably expected that Ripple would use the capital it received from its sales to improve the XRP ecosystem and thereby increase the value of XRP, Programmatic Buyers would not reasonably expect the same. Indeed, Ripple's Programmatic Sales were blind bid/ask transactions, and Programmatic Buyers could not have known if their payments went to Ripple, or any other seller of XRP. Since 2017, Ripple's Programmatic Sales represented less than 1% of its global XRP trading volume."[77] This led Judge Torres to a decisive conclusion:

> Lastly, the Institutional Buyers were sophisticated entities, including institutional investors and hedge funds . . . An 'examination of the entirety of the parties' understanding and expectation,' including the 'full set of contracts, expectations, and understandings centered on the sales and distributions of' XRP supports the conclusion that a reasonable investor, situated in the position of Institutional Buyers, would have been aware of Ripple's marketing campaign and public statements concerning XRP's prices to its efforts . . . . There is no evidence that a reasonable Programmatic Buyer, who [is] generally less sophisticated as an investor, shared similar 'understandings and expectations' and could parse the multiple documents and statements that the SEC highlights which include statements (sometimes inconsistent) across social media platforms and new sites from a variety of Ripple speakers (with different levels of authority) over an extended eight-year period.[78]

This conclusion is backwards. The purpose of the Securities Act of 1933 was to provide broad protection for securities investors, particularly less sophisticated investors who were unable to "fend for themselves"[79], to protect institutional investors who are by definition able to fend for themselves, and leave unsophisticated retail investors unprotected under the Securities Act is to turn the very purpose of the Securities Act on its head.

Judge Torres reached no conclusion as to whether Larsen and Garlinghouse, who led a company that presided over an intense public relations campaign to

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76. *Id*. (quoting SEC v. Telegram Grp., 488 F. Supp. 3d at 373).

77. *Id*.

78. *Id*. at 329-30. This was the critical conclusion in Judge Torres's opinion. She also concluded that distributions to Ripple employees and third parties did not satisfy the investment of money element.

79. SEC v. Ralston Purina Co., 346 U.S. 119, 124-25 (1953).

sell XRP and boost its price, made programmatic sales.[80] This is particularly question-begging since she separately found that the sales campaign itself was actionable.[81] This was rationalized with the argument that the programmatic buyers did not know the identity of the seller. In registered securities offerings, buyers and secondary sellers trade through an exchange, buyers, and sellers of a security often do not know the identity of the counterparty. What matters is whether the prospectus, other sales materials, or other public statements included false statements. Nor is it of consequence that Ripple programmatic sales were less than one percent of global XRP trading volume. When there is a securities fraud, it is not excused because of its magnitude. Imagine an insider trader making the defense: "Your honor I only illegally sold less than one percent of the total volume." No reasonable judge would care. The issue is whether fraud occurred.

Judge Jed Rakoff in *SEC v. Terraform Platform Labs Pte Ltd.*[82] soon addressed Judge Torres' novel distinction between Institutional and Programmatic Buyers and expressly rejected it:

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80. SEC v. Ripple Labs, Inc., 682 F. Supp. 3d at 334-35 (S.D.N.Y.).

81. *Id*. at *330-35.

82. SEC v. Terraform Platform Labs Pte Ltd., 684 F. Supp. 3d 170 (S.D.N.Y. 2023).

In SEC v. Coinbase, Inc., the court followed Judge Rakoff in *Terraform* and rejected Judge Torres' distinction between token offerings based on their manner of sale. SEC v. Coinbase, Inc., 726 F. Supp. 3d 260 (S.D.N.Y. 2024). Judge Failla inferred three things from Judge Rakoff's "thoughtful decisions." First, a formal contract is not required between transacting parties for an investment contract under *Howey*. Second, when conducting a *Howey* analysis, courts are not to consider crypto-assets in isolation following *Terraform*, which declined to erect an "artificial barrier between tokens and the investment protocols with which they are closely related." *See* SEC v. Terraform, 684 F. Supp. 3d at 194. Third, "in assessing the circumstances as surrounding the sale of a crypto-asset, courts should look to what the offeror invites investors to reasonably understand and expect. To do so, courts should examine how, and to whom, issuers or promoters market the crypto-asset." SEC v. Coinbase, Inc., 726 F. Supp. 3d at 289.

See similar analysis in Patterson v. Jump Trading LLC, 710 F. Supp. 3d 692 (N.D. Cal. 2024); People v. Mashinsky, No. 450040, slip op. (N.Y. Aug. 4, 2023).

In another case, *In re Ripple Labs, Inc. Litig*., the court dismissed four class actions on other grounds, but on a fifth individual claim, declined to follow Judge Torres' analysis and denied the defendants' summary judgment motion: "While this court agrees that certain promotional materials were distributed on a limited basis, the evidentiary record also contains numerous promotional materials that were distributed to the general public via widely-viewed Internet posts and videos. In addition to the above Internet posts from Schwartz cited by the S.D.N.Y. court, plaintiff in this case has also identified other statements regarding Ripple's entrepreneurial and/or managerial efforts. In particular, plaintiff cites publicly-disseminated statements regarding Ripple's efforts with regard to the cross-border payments industry, an area that defendants acknowledge they have 'expressly targeted' as part of their 'mission' to 'realize an 'Internet of Value' – using technology to enable value to move as seamlessly as information does today over the Internet.' *In re* Ripple Labs, Inc. Litig., 2024 U.S. Dist. LEXIS 109252, at *28 (N.D. Cal. June 20, 2024). Overall, given the relative novelty of cryptocurrency, and given the lack of any controlling law regarding the motivation of a reasonable cryptocurrency investor, the court declines to find as a matter of law that a reasonable investor would have derived any expectation of profit from general cryptocurrency market trends, as opposed to Ripple's efforts to facilitate XRP's use in cross-border payments, among other things. Accordingly, the [court] cannot find as a matter of law that Ripple's conduct would not have led a reasonable investor to have an expectation of profit due to the efforts of others." *Id*. at **29-30.

Cf. SEC v. Binance Holdings Ltd., 2024 U.S. Dist. LEXIS 114924, at *53(D.D.C. June 28, 2024) (citing Judge Torres, finding an investment contract for several counts, by raising questions on Count One such as: "Will an evaluation of the totality of the circumstances surrounding sales after the ICO [Initial Coin Offering] support the requisite finding that Binance's representations created an expectation on the part

> *Howey* makes no distinction between purchasers. And it makes good sense that it did not. That a purchaser bought the coins directly from the defendants, or, instead, in a secondary resale transaction has no impact on whether a reasonable individual would objectively view the defendants' actions and statements as evincing a promise of profits based on their efforts. Indeed, if the Amended Complaint's allegations are taken as true – as again, they must be at this stage – the defendants embarked on a public campaign to encourage *both* retail and institutional investors to buy their crypto-assets by touting the profitability of the crypto-assets and the managerial and technical skills that would allow the defendants to maximize returns on the investors' coins.
>
> As part of this campaign, the defendants said that sales from purchases of *all* crypto-assets – no matter where the coins were purchased – would be fed back into the Terraform Blockchain and would generate additional profits for *all* crypto-asset holders. These representations would presumably have reached individuals who purchased their crypto-assets on secondary markets – and, indeed, motivated those purchases – as much as it did institutional investors.[83]

I was an expert witness in a separate private case involving similar issues as *Ripple*.[84] That does not influence the point I am making here. If Judge Torres's institutional-retail investor distinction becomes the law, *Howey*'s broad protection of investors will be reduced.

Furthermore, the essential ingredients theory and Judge Torres's institutional-retail investor distinction are not the only important open question with respect to *Howey*.

The SEC long has operated under the assumption that Bitcoin is *not* a security. The SEC Director of the Commission's Division of Corporation Finance, for example, stated the following in a 2018 address: "When I look at Bitcoin today, I do not see a central third party whose efforts are a key determining factor in the enterprise. The network on which Bitcoin functions is operational and appears to have been decentralized for some time, perhaps from inception."[85]

This is too blithe an assumption, particularly for a cryptocurrency that represented 52.7 percent of the $2.52 trillion global cryptocurrency market

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of the reasonable purchaser of profits in the form of a financial return on the investment?") See also Count Three regarding Simple Earn. *Id*. at **71-72.

83. SEC v. Terraform, 684 F. Supp. 3d at 198. In April 2024, a jury found Terraform Labs and Kwon, its founder, liable for virtually all of the counts in the SEC's complaint. Jury Verdict, SEC v. Terraform Labs Pte Ltd., 1:23-cv-1346 (JSR) (S.D.N.Y. Apr. 5, 2024).

84. *See* Zakinov v. Ripple Labs, Inc., 2020 WL 922815 (N.D. Cal. Feb. 26, 2020).

85. Hinman, *supra* note 51. Bitcoin initially was created to be a peer-to-peer currency. *See* SELIGMAN, *supra* note 1, at 99-106. Securities, commodities and Department of Justice cases have held that Bitcoin is not a security. *See, e.g*., Teed v. Chen, 2022 U.S. Dist. LEXIS 204272 (N.D. Cal. 2022) (holding that Bitcoin was not a security because no horizontal or vertical commonality had been established); CFTC v. McDaniel, 287 F. Supp. 3d 213 (E.D.N.Y. 2018) (applying commodities law because Bitcoin is a virtual currency that is a commodity); CFTC v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492, 498 (D. Mass. 2018) (virtual currencies, including Bitcoin, can be regulated as commodities); United States v. Murgio, 209 F. Supp. 3d 698, 707-08 (S.D.N.Y. 2016) (Bitcoin are funds under 18 U.S.C. § 1960); United States v. Faiella, 39 F. Supp. 3d 544 (S.D.N.Y. 2014) (Bitcoin are funds under 18 U.S.C. § 1960).

capitalization on November 4, 2024. Further, this percentage and market capitalization is likely to rise over time after the Commission, on a 3-2 vote, approved the trading of Bitcoin by eleven asset managers, including Blackrock, Fidelity, and Grayscale, through spot exchange traded funds that directly purchase and sell Bitcoin. This would permit investors to directly own Bitcoin, and trade it through ETFs, which offer similar convenience to mutual funds.[86]

The Securities and Exchange Commission has never reported a serious review of Bitcoin's claim to be an effectively decentralized system, thus putting it beyond the scope of *Howey*'s concept of a common enterprise. This is remarkable, as the origins of Bitcoin read like a fairy tale. An anonymous person or persons using the pseudonym of Satoshi Nakamoto supposedly established Bitcoin without raising any outside funds during a period when many, if not most, other cryptocurrencies relied on raising capital through Initial Coin or Securities Token Offerings.[87] Who is Satoshi Nakamoto? Where did he get the money to create Bitcoin? How much of Bitcoin does he retain? Is he a front for others? Since Bitcoin is not a reporting company under the Federal Securities laws, we do not know the answers to these and many other questions about Bitcoin. Since its creation, Bitcoin has persisted in crypto mining through a Proof of Work system that "consumes more energy than a number of countries"[88] and is unnecessary given that its nearest competitor, Ethereum, has successfully converted to a Proof of Stake system that reduces energy usage by as much as ninety-nine percent.[89] In December 2023, the secrecy of Bitcoin mining was described by the *New York Times* as facilitating secret Chinese investments to avoid United States banking regulation and to sidestep Chinese limits on money leaving China. Why? It can be argued that a conversion to a Proof of State System would undermine the value of crypto miners' very expensive IT systems. That may be so, but it did not stop Ethereum and many other cryptocurrencies from trading through less controversial alternative systems.[90] Do a small pool of miners in fact dominate Bitcoin?

According to a February 2023 Wall Street Journal report, Bitcoin is buttressed by five maintainers who serve as stewards of Bitcoin Core, the Bitcoin

86. Sec. Ex. Act Release 99,306 (Jan. 10, 2024); Vicky Ge Huang & Paul Kiernan, *SEC Vote Broadens Investors' Access to Bitcoin*, WALL ST. J. (Jan. 11, 2024), https://www.wsj.com/public/resources/documents/FHsxcm3Qeyjh7crZXh4u-WSJNewsPaper-1-11-2024.pdf; David Yaffe-Bellany, *SEC Gives Bitcoin Fund Its Approval*, N.Y. TIMES, Jan. 11, 2024.

87. *See* Seligman, *supra* note 1, at 116-17.

88. Digiconomist, *Energy Consumption Index* (Jan. 22, 2022), https://digiconomist.net/bitcoin-energy-consumption/; Gabriel J.X. Dance, Tim Wallace & Zach Levitt, *Bitcoin Devours Energy and Others Pay the Price*, N.Y. TIMES (Apr. 11, 2023), https://static01.nyt.com/images/2023/04/11/nytfrontpage/scan.pdf (focusing on 34 United States Bitcoin mines "all putting immense pressure on the power grid").

89. *See* Seligman, *supra* note 1 at 106-07.

90. Michael Forsythe & Gabriel J.X. Dance, *A Crypto Mine Brings Secrets to the Surface*, N.Y. TIMES, Dec. 26, 2023.

software that keeps the cryptocurrency working and[91] an account that alone raises questions about how they were selected and how decentralized Bitcoin in fact is.

A 2023 detailed book by Jens Ducree, *Satoshi Nakamoto and The Origins of Bitcoin*, analyzes a vast trove of relevant emails and background literature, and nominates a short list of credible candidates who might be Nakamoto.[92] Ducree acknowledged: "There is an open debate whether mining pools considerably compromise the paradigm of decentralization in Bitcoin."[93]

The Commission's quiescence with respect to Bitcoin is in stark contrast to its pursuit of FTX, Binance and Coinbase,[94] Ripple,[95] and Terraform,[96] as well

91. Paul Kiernan, *Tiny Group of Coders is Critical to Bitcoin*, WALL ST. J., Feb. 17, 2023. In 2021, Andrey Sergeekov published *Who Are Bitcoin Core's Developers?*, Crypto Basics, identified Square Cryptos "an independent research team created by Square with the aim of improving Bitcoin's open source software" as a funder of Bitcoin Core Development, as well as Chainode, MIT DCI, Blockstream, Gemini, Coinbase, BitMEX and Hardcore Fund as other funders and naming Waldimir van de Lann, Pieter Wuille, Marco Falke, Michael Ford, Jonas Schnelli and Samuel Dobson as maintainers.

92. JENS DUCREE, SATOSHI NAKAMOTO AND THE ORIGINS OF BITCOIN (2023) (discussing potential Nakamoto candidates, including Adam Back, Hall Finney, Wei Dai, and Nick Szobo). *Id*. at 27.

93. *Id*. at 27. The Ducree book provides little analysis of the initial investment in Bitcoin but does explain at 37, that Bitcoin has been promoted by "a small cohort of influential high-tech entrepreneurs, like Elon Musk, Peter Thiel, Tim Draper, Michael Saylor, Cathie Wood, Michael Novogratz, Kevin O'Leary, Jack Dorsey, Anthony Pompliano (*Pomp*) or the Winklevoss twins." *Id*. at 81. "At the time of writing (2023), the five largest pools, which are AntPool, Foundry USA, F2Pool, ViaBTC and Binance Pool, provide about 80% of the extra network hash rate . . . ." *See also id*. at 80 ("Regarding his plentiful BTC assets, there are (unconfirmable) rumors of an inner circle of early miners, owning large stacks of BTC, and trading them off-chain."). *Id*. at 93. "From 2011 to 2013, "bitcoin.org" was primarily used for releasing new versions of the software now called Bitcoin Core. In 2013, the sign was redesigned, adding numerous pages, listing additional Bitcoin software, and creating the translation system [1141]. To the author's best knowledge, bitcoin.org was moved to "Louhi Net Oy" in Finland on 18 May 2011 [782], then registered to "WhoisGuard" in Panama on 26 December 2016 [1165-67], and on 23 September 2021 [1168] to "namecheap", with the country tag "Iceland." At the time of writing, the owner of bitcoin.org is listed as an anonymous person/group "Cobra" [783], and possibly/formerly the contentious "theymos" [784]." *Id*. at 153. "Nowadays, the leading owners of more than 50,000 BTC are reported to be select companies (e.g., Grayscale, Block.one, MicroStrategy), exchanges (e.g., Binance, Bitfinex, OKEX, Robinhood Markets, Mt.Gox hack 2011, see above) [1686, 1687] . . . , There are six mostly unidentified individuals holding between about 50,000 BTC and 100,000 BTC at single Bitcoin addresses, plus the Winklevoss twins Cameron and Tyler (approx. 70,000 BTC)."

94. See *supra* notes 5-6 and accompanying text regarding FTX and Binance. The SEC suit against Coinbase, then the largest crypto asset trading platform in the United States, was announced the day after the Commission's June 2023 suit against Binance and contains highly similar allegations. Loss, Seligman & Paredes, *supra* note 5, at 18-19, 26, 28. See Sec. & Exch. Comm'n v. Coinbase, Inc., 761 F. Supp. 3d 702 (S.D.N.Y. 2025) (holding that sales of Coinbase crypto-assets were securities and that Coinbase at the pleading stage was required to register as an exchange, broker, and clearing agency).

Chair Gensler has acknowledged the different treatment of BitCoin: "'Everything other than bitcoin,' Gensler told me, 'you can find a website, you can find a group of entrepreneurs, they might set up their legal entities in a tax haven offshore, they might have a foundation, they might lawyer it up to try to arbitrage and make it hard jurisdictionally or so forth.' In other words, there are people behind these cryptocurrencies using a variety of complex and legally opaque mechanisms, but at the most basic level, they are trying to promote their tokens and entice investors." Ankush Khardori, *Can Gary Gensler Survive Crypto Winter?, DC's Top Financial Cop on Bankman-Fried Blowback,* N.Y. MAG. (Feb. 23, 2023), https://nymag.com/intelligencer/2023/02/gary-gensler-on-meeting-with-sbf-and-his-crypto-crackdown.html.

95. SEC v. Ripple Labs, Inc., 682 F. Supp. 3d 308 (S.D.N.Y.).

96. SEC v. Terraform Platform Labs Pte Ltd., 684 F. Supp. 3d 170 (S.D.N.Y. 2023).

as its skepticism about Special Purpose Acquisition Companies which led it to propose a full disclosure regime.[97]

I do not claim that Bitcoin is a security based on the paucity of definitive public information known about Bitcoin. But it is striking to contrast how much the SEC was able to learn about FTX or Binance when the Commission and Department of Justice began serious investigations. FTX, for example, was discovered to have routed billions of dollars to a separate Sam Bankman-Fried dominated company, Alameda Research, where much of it was misappropriated by Bankman-Fried and associates.[98] Binance evaded United States securities registration laws through deceptive practices and false statements. Both FTX and Binance operated in part offshore to camouflage securities violations. Both have now been convicted.

We do not fully know how Bitcoin today operates, but given a lengthy list of money laundering, tax evasion, or enabling legal transactions, this would seem a highly worthwhile topic of SEC investigation if it could establish a predicate common enterprise theory.[99]

II. THE DEFINITION OF *SALE*

Paralleling this uncertainty with respect to the definition of *investment contract* under the Securities Act of 1933 gives rise to a new uncertainty as to how far to extend the definition of *sale* under that and other Federal Securities Acts in the age of electronic and social media.

The law here long seemed settled. Section 5 of the Securities Act requires registration of a security before it is offered to the public unless the securities issuer can establish an exemption. Section 5 is largely enforced through §§ 11 and 12 of the Securities Act which prohibit issuers and specified persons from selling a security to the public. Section 11 addresses registered offerings.[100] Section 12 prohibits in § 12(a)(1) sales of an unregistered security and § 12(a)(2) prohibits specified persons who offer or sell an unregistered security by means of a prospectus or oral communication including an untrue statement or omission of a material fact.[101]

The term *solicitation of an offer to buy a security or interest in a security, for value* is within the definition of § 2(a)(3) of the Securities Act. The concept of sale has reached, among other types of transactions, exchanges of securities and

97. Sec. Act Release 11,048 (2022) (proposal), summarized in Loss, Seligman & Paredes, *supra* note 5, at 762-70.

98. *See* Loss, Seligman & Paredes, *supra* note 5, at 99-104.

99. *See* Seligman, *supra* note 1, at 102, 104 n.58.

100. *See* Loss, Seligman & Paredes, *supra* note 5, 1566-70, 345-406 (6th ed. 2011).

101. *Id*. at 1566-70.

alterations of their terms;[102] gifts;[103] pledges;[104] stock dividends;[105] spin-offs;[106] and employee benefit plans.[107]

There is no definition of *solicitation* within the Act. In *Pinter v. Dahl*,[108] the leading case on point under § 12(a)(1), the Court largely relied on statutory interpretation and earlier United States Supreme Court decisions to define the terms *sale* and *solicitation*, stating in part: "Indeed, the Court has made clear, in the context of interpreting Section 17(a) of the Securities Act, that transactions other than traditional sales of securities are within the scope of Section 2(3) and passage of title is not important."[109] *Pinter* quoted *United States v. Naftalin:*[110] "The statutory terms ['offer' and 'sell'] which Congress expressly intended to define broadly . . . are expansive enough to encompass the entire selling process, including the seller/agent transaction." The Court in *Pinter* also quoted *Rubin v. United States:*[111] "It is not essential under the terms of the Act that full title pass to a transferee for the transaction to be an 'offer' or a 'sale.'" The Court cited *Cady v. Murphy*,[112] which found that a broker acting as an agent of the owner was liable as a statutory seller. "An interpretation of statutory seller that includes brokers and others who solicit offers to purchase securities furthers the purposes of the Securities Act – to promote full and fair disclosure of information to the public in the sale of securities. Congress' intent that Section 12(a) civil liability be in *terrorem*, see Douglas & Bates, 43 Yale L.J. at 173 . . . , the risk of its invocation should be felt by solicitors of purchases."[113]

In *Pinter*, the Court extended the concept of liability to persons "who successfully solicits the purchase, motivated at least in part by a desire to serve its own financial interests or those of the securities owner."[114] In *Pinter*, liability potentially could be extended to Dahl, for fractional oil and gas leases, who told other investors about the oil and gas venture. The *Pinter* case was remanded to determine whether Dahl received a financial benefit or was motivated by a gratuitous desire to share an attractive investment opportunity with his friends and associates.

Specifically, *Pinter stated*:

> The solicitation of a buyer is perhaps the most critical stage of the selling transaction. It is the first stage of a traditional securities sale to involve the buyer, and it is directed

102. *Id*. at 449-50.
103. *Id*. at 451.
104. *Id*. at 451-52; Rubin v. United States, 449 U.S. 425, 431 (1981).
105. *Id.* at 452.
106. *Id.* at 452-54.
107. *Id.* at 455-57.
108. 486 U.S. 624, 643 (1988).
109. *Id.*
110. 441 U.S. 770, 773 (1979).
111. 449 U.S. 425, 430 (1981).
112. 113 F.2d 989, 990 (1st Cir. 1940).
113. *Pinter*, 486 U.S. at 646.
114. *Id.* at 647.

> at producing the sale. In addition, brokers and other solicitors are well positioned to control the flow of information to a potential purchaser, and, in fact, such persons are the participants in the selling transaction who most often disseminate material information to investors. Thus, solicitation is the stage at which an investor is most likely to be injured, that is, by being persuaded to purchase securities without full and fair information. Given Congress' overriding goal of preventing this injury, we may infer that Congress intended solicitation to fall under the mantle of § 12(a).[115]

Recent caselaw has kept pace with new technology and found solicitations in public offerings when social media, tweets, online videos, podcasts, and internet communication of articles are used to reach untargeted investors. *Wildes v. BitConnect says*:

> Securities Act precedents do not restrict solicitations under the Act to targeted ones. The leading case interpreting section 12, *Pinter v. Dahl*, says nothing about what solicitation entails. It instead focuses on the result and intent necessary for section 12 liability: the solicitation must succeed, and it must be motivated by a desire to serve the solicitor's or the security owner's financial interests. Three years later, this Court touched on the meaning of solicitation. But we held only that, for solicitation to occur, a person must "urge or persuade" another to buy a particular security. We never added that those efforts at persuasion must be personal or individualized.
>
> Technology has opened new avenues for both investment and solicitation. Sellers can now reach a global audience through podcasts, social media posts, or, as here, online videos and web links . . . . A seller cannot dodge liability through his choice of communication – especially when the Act covers "any means" of "communication. Id. § 77e(a)(1).[116]

Later in 2022, in *Pino v. Cardone Capital LLC.*,[117] the Ninth Circuit concurred with *Wildes* that § 12 does not require "that solicitation must be direct or personal to a particular purchaser to trigger liability under the statute. Put differently, nothing in the Act indicates that mass communications, directed to multiple potential purchases, at once, fall outside the Act's protections." *Pino* further stated:

> In this case, Defendants allegedly relied significantly on social media to source investors for the Funds at issue here. Cardone posted on social media that Fund V was funded through "crowdfunding using social media," and touted the use of social media as an intentional strategy to reduce promotional costs. Accordingly, through their social media engagement, Cardone and Cardone Capital were significant participants in the selling transaction because they disseminated material information to would-be investors. To conclude that their social media communications fall outside the Act's protections would be at odds with Congress's remedial goals. As observed by the Eleventh Circuit in *Wildes*, under the Defendants' interpretation of

115. *Id*. at 646-47.
116. Wildes v. Bitcoin Int'l PLC, 25 F.4th 1341, 1346 (11th Cir. 2022) (cleaned up).
117. 55 F.4th 1253, 1258 (9th Cir. 2022).

the Act, a seller liable "for recommending a security in a personal letter could not be held accountable for making the exact same pitch for an internet video."[118]

The holdings of *Wildes* and *Pino* have not been validated by the United States Supreme Court. In a period when the Court has used the major questions doctrine to unsettle established administrative agency law[119] and overruled judicial deference to administrative interpretation under the *Chevron* doctrine[120], it is uncertain whether the Supreme Court will validate extension of the concept of *offer* and *sale* under the Federal Securities laws to communications media that were unimaginable during the New Deal.

The Supreme Court should support *Wildes* and *Pino* as an extension of solicitation to electronic media including untargeted solicitations. The Securities Act in § 2(a)(10) long included radio communications offering a security for sale as part of the definition of *prospectus*. Similarly by 1995, the use of electronic media for information delivery already had evolved into a fundamental aspect of the Federal Securities laws.[121] In 1995, the SEC took the position that "the use

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118. *Id*. at 1260. In *Owen v. Elastos Found*., 2021 WL 5868171, at *16 (S.D.N.Y. 2021), the court cited *Ripple Labs*, 2020 WL 922815, at *12 in which the defendants qualified as "sellers where plaintiff alleged that 'defendants "have earned over $1.1 billion through the sale of XRP"' and 'that defendants published various tweets, interviews, and articles pushing the adoption of XRP' (a blockchain platform similar to Elastos)." In *Ford v. Koutoulas*, 2023 U.S. Dist. LEXIS 55399, at *44 (M.D. Fla. 2023), the court relied on *Wildes v. BIT Connect* and rejected a defendant's argument "that mere social media posts cannot make him a seller of securities in the Eleventh Circuit." The court explained: "Defendant Koutoulas's extensively documented alleged promotion of LGBCoin in-person or online in videos, on social media, and on podcasts are thus enough to make him a seller under Section 12(1). (*See id.* ¶¶66-79, 87-89, 99-100, 172-76, 281-82). Moreover, Defendant Koutoulas is plausibly alleged to have made these solicitations to serve his own financial interests. (*Id.* ¶¶163-70). In contrast, no allegations show Defendant Norden received value or made these solicitations to serve his own financial despite allegations he promoted LGBCoin and thought it was, in total, worth several hundred million dollars in market capitalization. (*See id.* ¶¶29, 88, 115-16, 175, 268). Thus, even when these sparse promotional allegations specifically mentioning Defendant Norden are included and all reasonable inferences are drawn in Plaintiffs' favor, Defendant Norden defeats this claim." *Id.* at *45–46.

In *SEC v. Genesis Glob. Cap. LLC*, 2024 U.S. Dist. LEXIS 44372 at *42–44 (S.D.N.Y. 2024), the court stated: "The complaint alleges that Gemini published the list of crypto assets eligible for investment in the Gemini Earn program, while both Defendants advertised the program to the public." *Id.* ¶¶ 29, 33-37. Genesis then obtained crypto assets from investors in exchange for a promise to pay interest on those assets. *Id.* ¶¶ 1, 25-27. And Gemini deducted an agent fee from investors' returns. *Id.* ¶ 28. These activities fall within the sweeping definition of an *offer* or *sale* under the statute, which encompasses "every attempt to offer or dispose of . . . a security or interest in a security, for value." Here, the complaint alleges that Gemini was involved in creating, advertising, and facilitating the Gemini Earn program. *E.g.*, Doc. 1 ¶¶ 25-37. Gemini deducted an agent fee from investors' returns and collected approximately $2.7 million in fees during one three-month period. *Id.* ¶¶ 28, 30. At this juncture, therefore, the SEC has sufficiently alleged that Gemini was a necessary participant or substantial factor in the scheme. *See, e.g.*, *SEC v. Mattera*, No. 11 Civ. 8323 (PKC), 2013 WL 6487949, at *11 (S.D.N.Y. Dec. 9, 2013) (finding that defendant was substantial factor in sale of unregistered securities where he was "actively involved in the process and compensated for his role" and "the sales at issue would not have taken place but for [his] introductions").

119. *See infra* notes 142-143.

120. *See* Loper Bright, 603 U.S. 369, 412 (2024).

121. *See* JOHN F. OLSON & HARVEY L. PITT, SECURITIES IN THE ELECTRONIC AGE: A PRACTICAL GUIDE TO THE LAW AND REGULATION (1998); INSIGHTS: THE CORP. & SEC. L. ADVISOR, no. 7 (1997); John C. Coffee Jr., *Brave New World? The Impact(s) of the Internet on Modern Securities Regulation,* 52 BUS. LAW. 1195 (1997); James D. Cox, *The Fundamentals of an Electronic-Based Federal Securities Act*, 75 WASH. U. L. Q. 857 (1997).

of electronic media should be at least an equal alternative to the use of paper-based media."[122]

In the last decade, electronic technology in securities transactions has become ubiquitous. In 2018, the Department of Treasury Report, a *Financial System that Creates Economic Opportunities: Nonbank Financials, FinTech, and Innovation*, emphasized the digital revolution of the recent past:

> The key driver of this digital business environment is the increasingly widespread use of digital devices by Americans. Consider that nearly 90% of U.S. adults are online. Moreover, 77% own a mobile phone with advanced digital capabilities, 53% own a tablet, and 46% have used digital voice assistants. Most Americans use a combination of phone calls, text messages, and e-mails to manage their business and personal relationships. As a result, Americans' digital addresses (e.g., e-mail, device, chat ID) have increasingly become the equivalent of what a physical mailing address or

122. Securities Act Release No. 7233, 60 SEC Docket 1091, 1094 (Oct. 26, 1995). *See also* SEC Interpretative Release on Use of Electronic Media, Securities Act Release No. 7856, 72 SEC Docket 763 (June 12, 2000); Securities Act Release. No. 38591, 85 SEC Docket 2871 (Jan. 3, 2005) (permitting access to equal delivery for a final prospectus).

In 1996 Spring Street Brewing Company announced plans to "build the world's first investment bank and brokerage firm dedicated to arranging the public offering of securities through the World Wide Web." *Brewing Company Founder Cites Plans for Internet Investment Bank, Brokerage*, 28 Sec. Reg. & L. Rep. (BNABLBNA) 469 (Apr. 5, 1996). *See also* Spring St. Brewing Co., SEC Staff No-Action Letter, 1996-1997 [1993-2001 Transfer Binders] Fed. Sec. L. Rep. (CCH) ¶7772,2017,201 (avail. Apr. 17, 1996); Real Goods Trading Corp., SEC Staff No-Action Letter, [1993-2001 Transfer Binders] 1996-1997 Fed. Sec. L. Rep. (CCH) ¶77727,226 (avail. June 24, 1996) (allowing *off the grid* passive bulletin board without registration under the Securities or Investment Advisers acts); 110 HARV. L. REV. 959 (1997); Angel Capital Elect. Network, SEC Staff No-Action Letter, [1993-2001 Transfer Binders]1996-1997 Fed. Sec. L. Rep. (CCH) ¶77,305 (avail. Oct. 25, 1996) (Internet site to list small corporate offerings that will be accessible by accredited investors with passwords, who may also download offering circulars).

Electronic road shows conducted over the Internet also began occurring in the mid- to late-1990s in reliance on a series of no-action letters issued by the Commission staff. These no-action letters included various conditions on the proposed electronic road shows, such as only conducting the road show after the issuer has filed a registration statement, limiting access to the electronic road show to certain qualified investors who are given a special password and a prior copy of the issuer's prospectus, allowing viewers to view the road show only during a single 24-hour period, and prohibiting viewers from copying, downloading, or distributing the content of the road show. *See*, e.g., Private Financial Network, SEC Staff No-Action Letter, [1993-2001 Transfer Binders]1997 Fed. Sec. L. Rep. (CCH) ¶ 77,332 (avail. Mar. 12, 1997); Net Roadshow, Inc., SEC Staff No-Action Letter, [1993-2001 Transfer Binders]1997 Fed. Sec. L. Rep. (CCH) ¶77,367 (avail. Sept. 8, 1997); Bloomberg L.P., SEC Staff No-Action Letter, 1997 WL 739,085 (avail. Dec. 1, 1997); Thomson Fin. Serv., Inc., SEC Staff No-Action Letter, 1998 WL 575, 139 (avail. Sept. 4, 1998); Charles Schwab & Co., Inc., SEC Staff No-Action Letter, [1993-2001 Transfer Binders] 1999-2000 Fed. Sec. L. Rep. (CCH) ¶ 77,650 (avail. Nov. 15, 1999); Charles Schwab & Co., Inc., SEC Staff No-Action Letter, [1993-2001 Transfer Binders] 2000 Fed. Sec. L. Rep. (CCH) ¶ 77,814 (avail. Feb. 9, 2000).

The Commission in 2005 in Rule 405, *see* Securities Exchange Act Release No. 8998, 94 SEC Docket 3379 (Aug 3, 2005), defined *written communication* to include "any communication that is written, printed, a radio or television broadcast, or a graphic communication as defined in [Rule 405]." Graphic communication as defined in Rule 405 includes "all forms of electronic media, including, but not limited to audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, Internet Web sites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, and other forms of computer data compilation."

In 2012, as part of the JOBS Act, Congress authorized in what is now Section 4(a)(6) the sale of securities through electronic crowdfunding. *See* LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 457-516 (6th ed. 2020).

> telephone landline was in the past – the most effective way to reach a person for a business purpose.[123]

New challenges will soon be posed by self-generative Artificial Intelligence.[124]

The broader implication of a rejection of the holdings in *Wildes* and *Pino* would be to undercut the SEC's ability to keep pace with technological change.

III. THE IMPLICATIONS OF THE *LOPER* DECISION FOR SEC ENFORCEMENT

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court overruled the *Chevron* doctrine.[125] The overruling of *Chevron* represents the heaviest artillery to date of the judicial assault on the administrative state. [126]

For 40 years, *Chevron* doctrine provided that when Congress had enacted a regulatory statute that is silent or ambiguous with respect to a precise question at issue, the courts should defer to the agency's interpretation if it is "based on a permissible construction of the statute."[127] Unlike the major questions doctrine, which is limited to extraordinary cases, *Loper* will apply generally, supplanting the more general *Chevron* doctrine, which through 2024 had been cited in 18,000 federal court decisions.[128]

The 6-3 Roberts majority in *Loper* is based on § 706 of the Administrative Procedure Act, which directs courts:

> [t]o the extent necessary . . . and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. 5 U.S.C. § 706. It further requires courts to 'hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law.' § 706(2)(A).[129]

The *Loper* case acknowledged that Congress may authorize an agency to exercise a degree of discretion:[130]

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123. *Id*. at 17.

124. *See*, *e.g.*, WALTER ISAACSON, ELON MUSK (2023), tracing Musk's decades long focus on AI. *See also* Charles Duhigg, *The Optimists: The Full Story of Microsoft's Relationship with Open AI*, NEW YORKER (Dec. 1, 2023), https://www.newyorker.com/magazine/2023/12/11/the-inside-story-of-microsofts-partnership-with-openai.

125. Joel Seligman, T*he Judicial Assault on the Administrative State*, 100 WASH. U. L. REV. 1687 (2023).

126. See *id*. at 1706-17.

127. Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

128. Kent Barrett & Christopher Walker, *Chevron and Stare Decisis*, 31 GEO. MASON L. REV. 475, 477 & n.11 (2024).

129. Loper Bright Enter. v. Raimondo, No. 22-451 slip op. at *13-14 (June 28, 2024).

130. *Id*. at *17. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term. Batterton v. Francis, 432 U.S. 416, 425 (1977) (emphasis deleted). Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, Wayman v. Southard, 10 Wheat. 1, 43 (1825), or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," Michigan v. EPA, 576 U.S. 743, 752 (2015), such as "appropriate" or "reasonable."

> When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, fix[ing] the boundaries of [the] delegated authority, and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries. [Citations omitted.][131]

The role of expert administrative agencies interpreting their own rules was subordinated to the courts in *Skidmore v. Swift & Co.*,[132] which the Roberts majority commended in *Loper,*[133] and presumably is the new standard. In *Skidmore*:

> the Court explained that the 'interpretations and opinions' of the relevant agency, 'made in pursuance of official duty' and 'based upon . . . specialized experience,' 'constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance,' even on legal questions . . . . 'The weight of such a judgment in a particular case,' the Court observed, would 'depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'[134]

But the Roberts majority stressed, even when the Court deferred to an administrative interpretation of a statutory term as in *U.S. v. Pelzerl*[135] or *NLRB v. Hearst Pub., Inc.,*[136] the enactment in 1946 of the APA codified:

> for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide '*all* relevant questions of law' arising on review of agency action, § 706 (emphasis added) – even those involving ambiguous laws – and set aside any such action inconsistent with the law as they interpret it. and it prescribes no deferential standard for courts to employ in answering those legal questions.[137]

The Roberts majority rejected the notion that administrative agencies have special competence in resolving statutory ambiguities, as Roberts put it "Courts do":

> *Chevron* gravely erred, though, in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the

131. *Id*. at 17-18.
132. 323 U.S. 134 (1944).
133. 682 F. Supp. 3d at 325.
134. *Id.*
135. 312 U.S. 402 (1941).
136. 322 U.S. 111 (1944).
137. Loper Bright Enter. v. Raimondo, No. 22-451 slip op. at 14. (June 28, 2024).

> traditional tools of statutory construction – the tools courts use every day – is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power – perhaps the occasion on which abdication in favor of the agency is *least* appropriate.[138]

Nor was the Roberts majority impressed by the complexity of the questions involved in agency interpretation of ambiguous statutory language or the greater expertise of the administrative agencies:

> But even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency . . . . Courts, after all, do not decide such questions blindly. The parties and *amici* in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives. In an agency case in particular, the court will go about its task with the agency's 'body of experience and informed judgment,' among other information, at its disposal.[139]

The Roberts majority, however, did not call into question earlier cases that relied on *Chevron*:

> The holdings of those cases that specific agency actions are lawful – including the Clean Air Act holding of *Chevron* itself – are still subject to statutory *stare decisis* despite our change in interpretive methodology. Mere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding because to say a precedent relied on *Chevron* is, at best, 'just an argument that the precedent was wrongly decided.' That is not enough to justify overruling a statutory precedent.[140]

Justice Kagan, joined by Justices Sotomayor and Jackson, wrote a spirited dissent, brusquely criticizing the Roberts majority decision:

> The majority today gives itself exclusive power over every open issue – no matter how expertise-driven or policy-laden – involving the meaning of regulatory law. As if it did not have enough on its plate, the majority turns itself into the country's administrative czar. It defends that move as one (suddenly) required by the (nearly 80-year-old) Administrative Procedure Act. But the Act makes no such demand. Today's decision is not one Congress directed. It is entirely the majority's choice.[141]

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138. Loper Bright Enter. v. Raimondo, No. 22-451 slip op. at 23 (June 8, 2024).

139. *Id.* at 24-25.

140. *Id.* at 34-35.

141. Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 369-372 (2024).

Justice Kagan's dissent concludes: "At its core, *Chevron* is about respecting that allocation of responsibility – the conferral of primary authority over regulatory matters to agencies, not courts. Today, the majority does not respect that judgment. It gives courts the power to make all manner of scientific and technical judgments. It gives courts the power to make all manner of policy calls, including about how to weigh competing goods and values. (See *Chevron* itself.) It puts courts at the apex of the administrative process as to every conceivable subject – because there are always gaps and ambiguities in regulatory statutes, and often of great import. What actions can be taken to address climate change or other environmental challenges? What will the Nation's health-care system look like in the coming decades? Or the financial and transportation systems? What rules are going to constrain the development of A.I.? In every sphere of current or future federal regulation, expect courts from now on to play a commanding role. It is not a role Congress has given to them, in the APA or any other statute. It is a role this Court has now claimed for itself, as well as for other judges." *Id*. at 478-79.

Both the Kagan dissent and the Roberts majority recognized that the overruling of *Chevron* is a tectonic shift in administrative law.

Seen in context, *Loper*, as far-reaching as it is, is not a standalone decision. Effectively beginning in 2010, the United States Supreme Court, under Chief Justice Roberts, had reduced the authority of the administrative agencies under the separation of powers and removal policies, the Constitution's Commerce Clause, and the major questions doctrine.

In 2010, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[142] the Supreme Court held that the novel structure of the PCAOB was unconstitutional.[143] While the Court held that the Sarbanes-Oxley Act which created the PCAOB "remained fully operative as a law," only the full SEC could appoint PCAOB members if they were removable at will.[144]

In the 2012 case, *National Federation of Independent Business v. Sibelius*, the Supreme Court held that Congress did not have the power under the Commerce Clause, the mainstay of Federal agency authority since 1937, to adopt the Affordable Care Act.[145]

In 2018, the Court held in *Lucia v. SEC* that the Commission's Administrative Law Judges were officers of the United States subject to the Appointments Clause and could only be appointed by the full Commission.[146]

In 2021, after Justices Gorsuch and Kavanaugh had joined the Court, in *Seila Law LLC v. Consumer Financial Protection Bureau*,[147] the Court held that CFPB's leadership by a single individual, removable only for inefficiency, neglect or malfeasance, violated the Constitution's separation of powers. The CFPB Director "must be removable by the President at will."[148]

In 2024, in *SEC v. Jarkesy*,[149] the Supreme Court partially overruled the Fifth Circuit which had held that the Commission's in-house adjudication of the petitioner's case amounted to (1) an unconstitutional delegation of legislative power to the Commission "by failure to provide an intelligible principle by which the SEC would exercise the delegated power in violation of Article I's vesting of

142. 561 U.S. 477 (2010).

143. *Id*. at 480-81.

144. *Id*. at 510-14.

145. 567 U.S. 519, 588 (2012). The Supreme Court also held that the Affordable Care Act's Medicaid expansion provisions were unconstitutional. *Id*. at 581, 588. Chief Justice Roberts stated the Affordable Care Act's individual mandate was authorized by the taxing power of Article I § 8 of the Constitution. *Id*. at 661-69. *See generally* SELIGMAN, *supra* note 118, at 1703-06.

146. 138 S. Ct. 2044, 2049 (2018).

147. 591 U.S. 197, 205 (2020). In another case, see CFPB v. Community Fin. Serv. Ass'n of Am., Ltd., 601 U.S. 416 (2024), the Supreme Court, however, in a 7-2 decision written by Justice Thomas, authorized the CFPB funding system by which the Bureau draws funds from the combined earnings of the Federal Reserve System is valid under the Constitution's Appropriation Clause.

148. *Id*. at 205.

149. 603 U.S. 416.

'all' legislative power in Congress;"[150] and (2) a violation by the SEC's Administrative Law Judges of the Take Care Clause of Article II.[151]

The Supreme Court affirmed the Fifth Circuit on its third theory of unconstitutionality and held that the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties for securities fraud. The SEC's choice to proceed before an in-house Administrative Law Judge ends when a defendant seeks a jury trial. However, Justice Sotomayor noted in her dissent that by 1986, there were over 200 statutes that allowed administrative agencies to collect civil penalties without a federal district court trial.[152] Justice Sotomayor was bitter: "Make no mistake: Today's decision is a power grab once again. The majority arrogates Congress's policymaking role to itself."[153]

In its 2022 decision in *West Virginia v. Environmental Protection Agency*,[154] the Supreme Court amplified the major questions doctrine,[155] in a pre-*Loper* case decided consistent with *Chevron* that precluded an administrative agency from interpreting an ambiguous statute when the agency decision was of vast "economic and political significance."[156]

Loper appears to subordinate the major questions doctrine into its more generic overruling of *Chevron*. The Supreme Court's interpretation of agency powers under the Constitution, statutory law or administrative regulation, will become increasingly important.

This past term, the Court majority's jurisprudence often seemed outcome-determinative. Consider *Garland v. Cargill*,[157] in which the Court reached the question-begging conclusion that the National Firearm Act of 1934's [158] definition of a machine gun, a firearm with the ability to "shoot, automatically more than one shot . . . by a single function of the trigger," did not include bump stocks that enabled semiautomatic firearms to rapidly reengage the trigger and achieve a high rate of fire.

The Supreme Court majority analyzed the textual meaning of the term *machine gun* and largely ignored the objective meaning of the statute and a Trump Administration Rule concerning machine guns enacted after the October 2017 mass shooting of 58 people and wounding of 500 more. "The gunman," Justice Thomas wrote in his majority opinion, "equipped his weapons with bump stocks, which allowed him to fire hundreds of rounds in a matter of minutes."[159]

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150. Jarkesy v. SEC, 34 F.4th 446, 449-50 (5th Cir. 2022).

151. *Id.*

152. SEC v. Jarkesy, 603 U.S. 109, 167-68 (2024).

153. *Id*. at 202, quoting Garland v. Cargill, 602 U.S. 406, 442 (2024) (Sotomayor, J., dissenting).

154. West Virginia v. EPA, 597 U.S. 697 (2022).

155. For review of what are now called major questions cases dating back to FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), see SELIGMAN, *supra* n.115, at 1714-17.

156. West Virginia v. EPA, 597 U.S. 697, 700 (2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-160 (2000)).

157. Garland v. Cargill, 602 U.S. 406, 416 (2024).

158. *See* 26 U.S.C. § 5845(b).

159. Garland v. Cargill, 602 U.S. 416 at 413.

The purpose of the 1934 firearm legislation, the Senate Report explained, was that the "gangster as a law violator must be deprived of his most dangerous weapon, the machine gun."[160] "[W]hile there is justification for permitting the citizen to keep a pistol or revolver for his own protection . . . , there is no reason why anyone except a law officer should have a machine gun."[161]

Bump stocks did not exist in 1934 with their capacity to transform semiautomatic rifles such as the AR-15 into rapid-fire weapons equivalent to a machine gun. If the meaning of a statutory term is frozen in its original meaning, legislative purpose and the ability of law to evolve over time to address unanticipated circumstances is frustrated.

Precisely because of the disconnect between the Supreme Court majority's literal or textual interpretation of the National Firearms Act of 1934, the case is relevant to the Court's future interpretation of the 1933 and 1934 Federal Securities Act's definitions of *security* and *sale*.

In both the National Firearms Act and the 1933 and 1934 Federal Securities Acts, simple terms like *machine gun*, *security* and *sale* were defined within federal statutes which sought broad reformist objectives, such as the elimination "of the most dangerous weapon– the machine gun," and establishing "the statutory policy of affording broad protection to investors is not to be thwarted by unrealistic or irrelevant formulae."[162]

That said, there are critical differences between the Court's interpretation of *machine gun* and its interpretations of *security* and *sale*. The Court had never defined *machine gun* before *Garland*. The Court had addressed *security* on several occasions since its seminal 1946 decision in *Howey*[163] and had issued several decisions on *sale*, including a much-followed explanation of solicitation in its 1988 decision in *Pinter v. Dahl*.[164]

The Court may be wary of upsetting long-settled precedent concerning Rule 10b-5. Most recently, in *Macquarie Infrastructure Corp. v. Moab Partners*,[165] a Rule 10b-5 case, the Court affirmed Stoneridge, which "found a right of action implied in the words of [§ 10(b)] and its implementing regulation."[166] A unanimous Court made a technical ruling that: "Pure omissions are not actionable under Rule 10b-5(b) which makes it unlawful '[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.'" The convoluted language of Rule 10b-5(b) aside, Justice

160. *See id.* at 431 (Sotomayor, J., dissenting) (quoting S. Rep. No. 1444, 73d Cong., 2d Sess., 1-2).
161. *See id.*
162. *See* SEC v. W. J. Howey Co., 328 U.S. 293, 301 (1946).
163. *See supra* notes 21-48 and accompanying text for discussion of long-settled law.
164. *See supra* notes 108-115 and accompanying text.
165. Macquarie Infrastructure Corp. v. Moab Partners, 601 U.S. 257, 260 (2024).
166. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008) (citing Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 (1971)).

Sotomayor wrote that "Rule 10b-5(b) does not proscribe pure omissions", but half-truths remain actionable under Rule 10b-5, explaining that "half-truths . . . are 'representations that state the truth only as far as it goes, while omitting critical qualifying information.'"[167] Sotomayor continued: "A classic example of an actionable half-truth in contract law is the seller who reveals that there may be two new roads near a property he is selling, but fails to disclose that a third potential road might bisect the property." [168] Justice Sotomayor further recognized:

> 'Silence, absent a duty to disclose, is not misleading under Rule 10b-5.' Even a duty to disclose, however, does not automatically render silence misleading under Rule 10b-5(b). Today, this Court confirms that the failure to disclose information required by Item 303 can support a Rule 10b-5(b) claim only if the omission renders affirmative statements made misleading.[169]

The comfort that long-standing precedents defining *security* and *sale* and technical rulings, such as *Macquarie* interpreting Rule 10b-5, appear to provide may prove evanescent. *Macquarie* interpreted clear statutory language. Earlier Supreme Court and lower court decisions interpreting *security* and *sale* provide no such comfort. A term such as *investment contract* or *solicitation* is not self-defining. Earlier cases may be wise and long-settled, but they are not inevitable.

Nor is there much comfort in the Roberts majority in *Loper* ruling that it would not call into question "prior cases that relied on the *Chevron* framework. The holdings of those cases that specific actions are lawful – including the Clean Air Act holding of *Chevron* itself – are still subject to statutory *stare decisis* despite the Court's change in interpretive methodology."[170]

This ruling, too, is more limited than it may appear. When the Court has made a specific earlier ruling on a statute's specific application such as that in *Chevron* to the Clean Air Act, this language has force.

But with regard to Federal Securities Act's application of statutory language to new industries such as cryptocurrency, there often are no earlier decisions concerning new applications on which to invoke *stare decisis*. Thus, much now appears to be open to Supreme Court interpretation.

Under *Howey*, the Supreme Court has never held that vertical commonality, either strictly or broadly applied, is appropriate.[171]

The Court has not addressed a case such as *Gary Plastic Packaging* in which reliance upon Merrill Lynch's implicit promise to maintain its marketing efforts

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167. *Macquarie*, 601 U.S. at 263-64 (quoting Universal Health Servs., Inc. v. U.S. ex rel. Escobar, 579 U.S. 176, 188 (2016)).

168. *Id*. at 263 (quoting Universal Health Servs., Inc. v. U.S. ex. rel. Escobar, 579 U.S. 176, 188-89 (2016)).

169. *Id*. at 265 (quoting Basic Inc. v. Levinson, 485 U.S. 224, 239 (1988)).

170. *Loper*, 603 U.S. at 376.

171. *See supra* notes 34-35 and accompanying text.

was held sufficient under *Howey* to establish "reliance upon the efforts, knowledge and skill of Merrill Lynch."[172]

The Court has not addressed whether, as Judge Douglas Ginsburg wrote in 1996 in *SEC v. Life Partners*, the expectation of profits element could only be satisfied when there were post-purchase activities on the part of the seller.[173]

Judge Torres's 2023 decision in *SEC v. Ripple* limiting application of *Howey* to sophisticated institutional investors, but not retail investors, has prompted criticism from Judges Rakoff and Failla, but no analysis by the Supreme Court to date.[174]

Similarly, questions under the Federal Securities Law definition of *sale* have not been addressed by the Supreme Court.

New technology has transformed the way in which securities are sold from person-to-person contacts, printed prospectuses and newspaper communications to reliance on solicitations of public offerings in social media, tweets, online videos, podcasts and internet-communicated text to reach untargeted investors. Two recent Court of Appeals decisions concluded the 1933 Federal Securities Act can apply to these types of offerings.[175] The Supreme Court declined certiorari in both cases.[176]

CONCLUSION

After *Loper*, we are launched on a sea of uncertainty. The Supreme Court can decide how aggressively or quiescently to interpret the Federal Securities Laws without earlier restraint such as *Chevron*'s delegation doctrine. The Court, as Justice Kagan wrote in her *Loper* dissent, has taken for itself the position of "the country's administrative czar."[177]

Is this even feasible? Each year, there are hundreds of SEC orders, rules and court decisions in the field of Federal Securities law alone which can be challenged under *Loper*, whose ultimate resolution will now occur in the federal

172. Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 756 F.2d 230, 241 (2d Cir. 1985).

173. *See supra* notes 53-55 and accompanying text.

174. *See supra* notes 66-78 and accompanying text.

175. *See* discussion of Wildes v. BitConnect Int'l, PLC, 25 F.4th 1341 (11th Cir. 2022) and *Pino v. Cardone Capital LLC*, 55 F.4th 1253 (9th Cir. 2022); *see supra* note 111 and accompanying text for further discussion.

176. Wildes v. BitConnect Int'l, PLC, cert. denied., 143 S. Ct. 427 (2022) (denying certiorari in Arcaro v. Parks); Cardone Capital LLC v. Pino, cert. denied, 144 S. Ct. 75 (2023).

177. *See* U.S. v. Pelzerl, 312 U.S. 402 (1941).

courts.[178] Federal Securities cases, of course, are a small portion of all Federal cases.[179]

Will the Supreme Court dramatically increase its case load to handle a potential influx of matters that are best resolved in the highest court? Will the Court tolerate a growth in circuit conflicts to reduce its caseload?

Inevitably, *Loper* will result in greater delays in accomplishing basic goals within administrative agencies, such as the SEC reaching enforceable rules. For those who view administrative agencies as an affront to the 1787 Constitution's Tripartite Constitutional Model of separation of powers, this may be viewed positively.[180]

The policy issues are far broader. It is a time-honored axiom of modern corporate law that courts should defer to the business judgment of directors in instances where there are no conflicts of interest or legal violations.[181] The consequence of *Loper* is essentially to state that corporate directors are entitled to deference, but administrative agencies are not. Corporate directors were long afforded the protection of the business judgment rule in making decisions because of their greater expertise than courts in making business decisions with respect to the administrative decisions involving agency expertise.[182] This was the basis of the *Chevron* doctrine.[183]

Chief Justice Roberts' majority decision in *Loper* renders administrative agency interpretations of ambiguous statutes the same as judicial interpretations of the law.[184] They are not. The whole point of administrative agencies is to address "intricate and technical facts," not legal interpretations, in areas where the judiciary has little capacity "to maintain a long-time, uninterrupted interest in a relatively narrow and carefully defined area of economic and social activity."[185]

We have now begun a new and increasingly libertarian era in judicial interpretation of federal and state statutory law. Supreme Court cases dating back to *Free Enterprise Fund*[186] forcefully illustrate this point. The tectonic shift

178. In 2023, the SEC was involved in 784 securities enforcement matters. Federal civil securities cases totaled 282 with the United States as the plaintiff. See U.S. Securities and Exchange Commission, Press Release, 2023-234, https://www.sec.gov/newsroom/press-releases/2023-234; U.S. Courts, Federal Judicial Caseload Statistics, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023.

179. On December 31, 2023, there were 806,384 pending criminal and civil cases in Federal Courts of Appeals and Federal District Courts. See U.S. Courts, Federal Judicial Caseload Statistics, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023.

180. *See* Project 2025, *supra* note 14.

181. *See*, e.g., 8 Del. C. § 141(a) as quoted in Aronson v. Lewis, 473 A.2d 805, 811 (1984): "A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." See generally ALI PRINCIPLES OF CORPORATE GOVERNANCE § 4.01 (2024); Bayless Manning, *The Business Judgment Rule in Overview*, 45 OHIO ST. L.J. 615 (1984).

182. *See*, e.g., Joy v. North, 692 F.2d 880, 885-86 (2d Cir. 1982), cert. denied, 460 U.S. 1051.

183. *See generally Chevron*, 467 U.S. 837 (1984).

184. *See generally Loper Bright,* 603 U.S. 369 (2024).

185. Seligman, *supra* note 119, at 1688-89, quoting JAMES LANDIS, THE ADMINISTRATIVE PROCESS (1938).

186. *See supra* notes 142-160.

wrought by overruling *Chevron* is not merely about administrative delay and potential inconsistencies in federal circuit court rulings but reflects the music of a new age. The basic legal foundation of the administrative state is eroding. Time will tell how far this counter-revolution will reach. No reasonable person can doubt that the revolution has begun.