Written Statement of
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Committee on Agriculture
Subcommittee on Commodity Markets, Digital Assets, and Rural Development

The Future of Digital Assets:
Identifying the Regulatory Gaps in Spot Market Regulation

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I am a partner in the law firm of Davis Polk & Wardwell LLP in New York City, where I began my career in 1989. As a member of the firm's capital markets group, I advise public and private companies, asset managers and financial intermediaries on transactional, corporate governance and securities compliance and enforcement matters. In the last decade my practice has focused increasingly on the intersection of federal securities law with cryptoassets and participants in the digital asset industry.

From 2003 to 2005, I served on the staff of the Securities and Exchange Commission, ultimately as managing executive for policy under Chairman William H. Donaldson. From 1988 to 1989 I served as a law clerk for the Hon. Phyllis A. Kravitch of the U.S. Court of Appeals for the 11th Circuit in Savannah and Atlanta, Ga. I am a graduate of the University of North Carolina at Chapel Hill and Columbia Law School.

Today I am presenting my own views, and not those of my firm or any client of the firm.

Chairman Johnson, Ranking Member Caraveo and members of the Committee:

Thank you for the privilege to speak before you today.

My name is Joe Hall and I am a partner in the law firm of Davis Polk & Wardwell, where I have practiced securities law for the last three decades. Earlier in my career—a few years before anyone had heard of Satoshi Nakamoto—I served as a senior staff member of the Securities and Exchange Commission.

The question of where blockchain-based digital assets fit into our regulatory framework frustrates and bewilders entrepreneurs, small businesses and large public companies, and continues to divide regulators[1] and experts in financial services regulation.[2] I believe the persistent lack of certainty and workable rules has had real costs in terms of consumer confidence and protection, foregone investment, lost economic activity, and unnecessary hurdles to our ability to compete with foreign markets. And so when I hear that blockchain technology "hasn't lived up to the hype,"[3] I sometimes wonder how we would even know.

I would like to focus my remarks on a pair of questions:

- *Is the regulatory environment really uncertain?*
- *Even if it is, why not simply go ahead and register with the SEC—just to be careful?*

Regulatory uncertainty is real

I acknowledge that there are well-informed and thoughtful people who hold the view that claims of regulatory uncertainty are overblown at best,[4] but from my perspective as a practitioner having advised clients on a wide range of digital asset matters, I respectfully disagree.

At the root of the problem lies this simple observation: Many kinds of digital assets are qualitatively different from the stocks, bonds, options and futures that we have experience with and that our existing market regulatory structures were purpose-built for. These new assets may not represent a claim on the revenues or properties of a business, or look much like useful resources with fluctuating prices that producers, manufacturers and consumers need to hedge. Instead, digital assets might be deployed to verify the details of a transaction between two strangers, or to facilitate decisionmaking by a dispersed and ever-changing network of coders, or to encourage honest behavior in the fulfillment of a bargained-for obligation. Because they combine inherent functionality with qualities of an easily tradable

[1] *E.g.*, CFTC, Statement of Commissioner Caroline D. Pham on *SEC v. Wahi* (Jul. 21, 2022), https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement072122.

[2] *See generally* Davis Polk & Wardwell, Client Update: *Bipartisan crypto bills could clarify current regulatory confusion—if they tackle* Howey (Aug. 10, 2022), https://www.davispolk.com/insights/client-update/bipartisan-crypto-bills-could-clarify-current-regulatory-confusion-if-they.

[3] *E.g.*, *12 Examples of "Revolutionary" Tech That's Not Living up to the Hype*, FORBES (Aug. 24, 2022), https://www.forbes.com/sites/forbestechcouncil/2022/08/24/12-examples-of-revolutionary-tech-thats-not-living-up-to-the-hype/?sh=233e56663d22.

[4] *See, e.g.*, Gary Gensler, *Getting Crypto Firms to Do Their Work Within the Bounds of the Law*, THE HILL (Mar. 9, 2023), https://thehill.com/opinion/congress-blog/3891970-getting-crypto-firms-to-do-their-work-within-the-bounds-of-the-law.

and storable instrument, one could say that digital assets are *different in kind* from what preceded them.[5]

And just as digital assets are different from traditional assets, their trading markets—shaped by economic and business decisions made over time by a growing industry—are structured differently from the markets for traditional stocks, bonds, options and futures. For example, some functions that are split between intermediaries in traditional asset markets are often combined within a single firm in digital asset markets.

As the Committee knows well, our federal system of financial market regulation depends on the ability to distinguish securities from commodities.[6] If a particular asset is a security, then trading of the asset in both the spot and derivatives markets is subject to comprehensive oversight by the SEC under the federal securities laws. On the other hand, if the asset is a commodity, then we do not impose comprehensive federal regulation over the spot market for that asset,[7] but trading in the derivatives market is subject to comprehensive oversight by the Commodity Futures Trading Commission under the federal commodities laws.

If a digital asset is a security, it cannot be offered and sold into the public markets without federal registration, a regulatory review process and a prospectus containing prescribed business, management and financial information. After the security has been sold and begins to trade in the secondary markets, virtually all intermediaries who touch it—exchanges, broker-dealers, clearinghouses, transfer agents, custodians—are themselves subject to pervasive SEC registration and oversight, and the issuer remains subject to ongoing reporting requirements. But if the digital asset is a commodity, none of these advance and ongoing requirements apply.

And so—and not for the first time in the history of federal financial market oversight[8]—we have to determine whether these new assets are securities under the jurisdiction of the SEC, or commodities under the jurisdiction of the CFTC.

As it turns out, making this call is not so clear-cut.

[5] Elsewhere I've argued that because the digital asset class is far from monolithic, a variety of regulatory approaches may be needed to protect consumer interests and foster competition and innovation. *Regulating Crypto: A Guide to the Unfolding Debate*, BLOOMBERG LAW (Dec. 2022), https://www.davispolk.com/sites/default/files/2022-12/Joe%20Hall%20-%20Bloomberg%20Law%20-%20Regulating_Crypto.pdf. This in turn suggests the need for a statutory taxonomy based on the describable characteristics of major groupings of digital assets, rather than an approach that builds on generic "investment contract" terminology, as discussed in note 30 below. *E.g.,* Lee A. Schneider, *Introduction: A "Sensible" Token Classification System*, CHAMBERS GLOBAL PRACTICE GUIDES: FINTECH 2022, https://drive.google.com/file/d/1v4JM8Dk4R8pi1LvZYU4pILNIIXl1jdQ1/view.

[6] As a technical matter, securities are also commodities. The Commodity Exchange Act definition of "commodity" is broad and encompasses securities along with substantially "all other goods and articles," but Section 2 of that act allocates regulatory authority over securities to the SEC. *See* 7 U.S.C. §§ 1a(9), 2(a)(1)(A) ("nothing contained in this section shall … supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission").

[7] Although the CFTC does not have comprehensive regulatory authority over commodity spot markets, in 2010 Congress granted the CFTC antifraud, false reporting, and antimanipulation enforcement authority over commodity spot markets in interstate commerce, including digital asset spot markets. *See* Section 6(c)(1) of the Commodity Exchange Act, 7 U.S.C. § 9(1)(A); Cong. Research Svc., CRYPTO-ASSET EXCHANGES: CURRENT PRACTICES AND POLICY ISSUES (Jul. 23, 2021), at 2, https://crsreports.congress.gov/product/pdf/IN/IN11708.

[8] The CFTC and SEC reached an agreement in 1981 known as the "Shad-Johnson Jurisdictional Accord" to resolve a dispute between the agencies over the regulation of single-stock and stock-index futures; futures on single stocks and "narrow-based" stock indices were thereafter agreed to be regulated as securities, while futures on "broad-based" stock indices were to be regulated as commodity futures. Congress codified the accord into law in 1983. *See* GAO, REPORT: CFTC AND SEC: ISSUES RELATED TO THE SHAD-JOHNSON JURISDICTIONAL ACCORD (2000), at 1, https://www.gao.gov/products/ggd-00-89.

The point is often made that the federal securities laws are flexible enough to encompass digital assets, and indeed Justice Thurgood Marshall once observed that "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."[9] But as Justice Powell pointed out a few years earlier in an opinion that Justice Marshall joined, "when a purchaser is motivated by a desire to use or consume the item purchased … the securities laws do not apply."[10]

Determining whether a particular digital asset is a commodity and not a security can thus turn on its consumptive uses, and as I noted earlier, many digital assets offer a use case separate and apart from any investment appeal. Because of this, serious arguments can usually be made on both sides of the question of whether any widely traded digital asset is a security, even if some dealings in the asset share hallmarks of a securities transaction.

The SEC has emphasized that the question of whether a particular digital asset is a security is a facts-and-circumstances determination[11]—and that the answer can change over time.[12] When analyzing a digital asset transaction, the SEC suggests market participants should consider a non-exclusive list of 50 or 60 "characteristics," none of which is "necessarily determinative," on the understanding that when their "presence" is "stronger" it is "more likely" that the digital asset, or the transaction in which it is offered and sold, involves a security.

This is not a recipe for predictability and regulatory certainty.

The CFTC has determined that both Bitcoin and Ether are commodities.[13] The SEC agrees that Bitcoin, the Ur-digital asset, is not a security, though unfortunately it has never published its analysis and so we don't know how the SEC weighed the dozens of relevant characteristics in arriving at this conclusion.[14] In the past, SEC officials have indicated that Ether was not a security,[15] though today there is some question whether the agency continues to hold this view.[16]

[9] *Reves v. Ernst & Young*, 494 U.S. 56, 60-61 (1990).

[10] *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 852-853 (1975).

[11] *See* SEC, FRAMEWORK FOR "INVESTMENT CONTRACT" ANALYSIS OF DIGITAL ASSETS (Apr. 3, 2019), at 2, https://www.sec.gov/files/dlt-framework.pdf ("Whether a particular digital asset at the time of its offer or sale satisfies the *Howey* test depends on the specific facts and circumstances.").

[12] *Id.* at 5 and 8 (discussing considerations for "evaluating whether a digital asset previously sold as a security should be reevaluated at the time of later offers or sales").

[13] *See, e.g.*, CFTC, *In re Coinflip, Inc.*, No. 15-29 (Sept. 17, 2015), https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliprorder09172015.pdf ("Bitcoin and other virtual currencies are … properly defined as commodities."); CFTC, *IN CASE YOU MISSED IT: Chairman Tarbert Comments on Cryptocurrency Regulation at Yahoo! Finance All Markets Summit*, Press Release Number 8051-19 (Oct. 10, 2019), https://www.cftc.gov/PressRoom/PressReleases/8051-19 ("It is my view as Chairman of the CFTC that ether is a commodity, and therefore it will be regulated under the CEA.").

[14] *E.g.*, Letter from Brent J. Fields, Assoc. Dir., Div. of Inv. Mgt., SEC, to Jacob E. Comer (Oct. 1, 2019), https://www.sec.gov/Archives/edgar/data/1776589/999999999719007180/filename1.pdf ("[W]e disagree with your conclusion that bitcoin is a security. We think that conclusion is incorrect under both the reasoning of *SEC v. Howey* and the framework that the staff applies in analyzing digital assets.").

[15] William Hinman, Dir., Div. of Corp. Fin., SEC, Remarks at the Yahoo Finance All Markets Summit: *Digital Asset Transactions: When* Howey *Met* Gary (Plastic) (Jun. 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418 ("And putting aside the fundraising that accompanied the creation of Ether, based on my understanding of the present state of Ether, the Ethereum network and its decentralized structure, current offers and sales of Ether are not securities transactions.").

[16] *See, e.g.*, Paul Kieran and Vicky Ge, *Ether's New "Staking" Model Could Draw SEC Attention*, WALL ST. J. (Sept. 15, 2022), https://www.wsj.com/articles/ethers-new-staking-model-could-draw-sec-attention-11663266224.

The SEC has never affirmatively stated that any other popularly traded digital asset is not a security, and senior officials have often expressed the view that the "vast majority" of digital assets are in fact securities.[17] Of course, with more than 23,000 digital assets estimated to have been created,[18] but only a handful making up the bulk of the market's value,[19] two propositions can simultaneously be true: (1) the vast majority of digital assets are securities, but (2) the digital assets that people most commonly use, trade and hold are not.

Perhaps an understatement, but it's not easy for businesses to plan and invest when the answer to their most pressing question is: "*Maybe what you want to do is OK, but maybe it's not*."

SEC registration is not currently practical

Given the uncertainty over whether any particular digital asset is a security, and the risk of severe and costly consequences for the organization that created it, any investor who buys and resells it within a short period of time, and any entity who facilitates trading, custodying or clearing it,[20] a couple of questions naturally arise:

- *Why not just register with the SEC?*
- *Sure, it might take longer and be more expensive, but isn't it just completing some paperwork and paying a fee? After all, people have been registering with the SEC for nearly a century!*

And given how well-trod the path of SEC registration is, are people who take the position that their digital assets are commodities simply scofflaws trying to evade compliance?

That has not been my experience.

Let me pause to acknowledge the obvious: there has been plenty of fraud in the digital asset market. This does not come as a surprise; there are always bad actors in the financial sector, and no asset class in our financial markets is exempt from fraud, manipulation and misrepresentation—indeed, this is one of the primary reasons we have financial services regulation and strong regulators like the CFTC and SEC to begin with. But just as we do not impute the conduct of Bernie Madoff to all asset managers, so we should not impute the conduct of Sam Bankman-Fried to all participants in the digital asset industry.

The problem is that simply registering with the SEC in order to avoid the potential risk that the regulator will later say that your digital asset is a security is not, today, a practical alternative. There are two principal reasons.

[17] *See, e.g.*, SEC, Testimony of Chair Gary Gensler Before the United States House of Representatives Committee on Financial Services (Apr. 18, 2023), https://www.sec.gov/news/testimony/gensler-testimony-house-financial-services-041823.

[18] *See* CoinMarketCap, https://coinmarketcap.com (last visited Apr. 25, 2023).

[19] *Id*. According to CoinMarketCap, on April 25, 2023 the market capitalization of all traded digital assets was in excess of $1 trillion. Bitcoin accounted for approximately 45% of this total, and the 10 digital assets with the largest market capitalizations (including Bitcoin) accounted for approximately 85%.

[20] These consequences include SEC fines and sanctions for conduct (including that which is neither fraudulent nor manipulative) in violation of any registration requirement under the federal securities laws, as well as private causes of action for participation in an unregistered public offering of securities. *See, e.g.*, 15 U.S.C. §§ 77k ,77l 78ff. Willful violations of the federal securities laws are also subject to criminal penalties. *See, e.g.*, 15 U.S.C. §§ 77x, 78ff(a).

First, the regulatory obligations that attach to transactions in securities make it impractical to use them for everyday commercial purposes—as a means of payment or transmission of value, or for uses like peer-to-peer lending, file storage or gaming. This is because secondary-market transactions in securities occur within a framework in which intermediaries who trade or facilitate trading in securities,[21] clear transactions in securities, effect transfers of securities or custody securities for third parties, are subject to extensive regulation and supervision by the SEC and self-regulatory organizations under SEC oversight. This framework was not built to govern simple commercial activities like a consumer's sending a payment with a widely available medium of exchange.[22]

But despite our experience with blockchain technology over the past decade, the SEC has taken little apparent action—no rule proposal, no concept release—to adapt its rulebook to facilitate secondary-market activities involving digital assets.[23] Indeed, the SEC has not broached questions as basic as whether a blockchain would itself somehow need to be registered as a securities clearinghouse.[24]

I have a sense as to why the SEC may not have acted, and I certainly do not believe it is because the agency has been ignoring the issues or somehow favors enforcement over rulemaking—this agency never hesitates to use all available tools in its kit.

Instead, it would be extremely difficult—some would say impermissible[25]—for the SEC to architect a regulatory framework for a new industry without express congressional authority. And, as we know from past efforts to introduce significant market structure changes,[26] the sort of effort that would be required could rapidly become all-consuming for an agency that already has many important priorities on its plate.

[21] The SEC recently reopened for public comment a proposal to require exchange registration when "the activities of any combination of actors constitute, maintain, or provide, together, a market place or facilities for bringing together buyers and sellers for securities." *See* SEC, *Supplemental Information and Reopening of Comment Period for Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange,"* Rel. No. 34-97309 (Apr. 14, 2023), at 29, https://www.sec.gov/rules/proposed/2023/34-97309.pdf. For a discussion of some of the interpretive questions this could raise in the digital asset marketplace, *see* Statement of Hester M. Peirce, Comm'r, SEC, *Rendering Innovation Kaput: Statement on Amending the Definition of Exchange* (Apr. 14, 2023), https://www.sec.gov/news/statement/peirce-rendering-inovation-2023-04-12.

[22] My colleague Zach Zweihorn describes the consequences of this framework for the digital asset markets in testimony today before the Financial Services Committee. *See* Testimony of Zachary J. Zweihorn Before the United States House of Representatives Committee on Financial Services, Subcommittee on Digital Assets, Financial Technology, and Inclusion (Apr. 27, 2023), https://www.davispolk.com/sites/default/files/2023-04/written-statement-zachary-zweihorn.pdf.

[23] And far from seeking to avoid regulation, industry participants have repeatedly sought SEC engagement and guidance, including calling on the SEC for rulemaking. *E.g.*, Letter from Paul Grewal, Chief Legal Officer, Coinbase Global Inc., to Vanessa Countryman, Sec'y, SEC, *Petition for Rulemaking—Digital Asset Securities Regulation* (Jul. 21, 2022), https://www.sec.gov/rules/petitions/2022/petn4-789.pdf.

[24] Congress has given the SEC broad authority under Section 28 of the Securities Act of 1933, 15 U.S.C. § 77z-3, and Section 36 of the Securities Exchange Act of 1934, 15 U.S.C. § 78m, to tailor the federal securities laws to transactions in digital asset securities upon a finding that doing so is consistent with the public interest and the protection of investors.

[25] It is easy to predict challenges to such an administrative effort based on the "major questions" doctrine. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (holding that an agency cannot bring about a major policy absent "'clear congressional authorization' for the authority it claims" (quoting *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (counseling courts against accepting an agency's interpretation if it would result in a sweeping claim of new authority, even if the statutory text is ambiguous or the agency's interpretation is plausible); *Utility Air*, 573 U.S. at 324 (an agency may not "discover" "unheralded power" in a "long extant-statute" that it has never relied on to regulate a business in the manner it seeks in a new, major policy).

[26] For an example, the Committee could revisit the contentious history behind the 2005 adoption of Regulation NMS, which introduced changes to the national market system for equities. *See, e.g.*, Comment Letters of Rep. Peter King, Member of Congress, et al. (Jan. 25, 2005), https://www.sec.gov/rules/proposed/s71004/s71004-727.pdf; Rep. Paul E. Kanjorski, Member of Congress (Jan. 25, 2005), https://www.sec.gov/rules/proposed/s71004/s71004-730.pdf; Reps. Deborah Pryce and Eric Cantor, Members of Congress (Feb. 7, 2005), https://www.sec.gov/rules/proposed/s71004/s71004-775.pdf.

Second, even if the SEC did adapt the rulebook to facilitate secondary-market activities involving digital assets, market participants would continue to face near-insurmountable barriers to conducting business across state lines. This is because each state has "blue sky" laws governing the offer and sale of securities, each with its own registration, review and approval process.[27] Unlike the disclosure-based federal regime, the state process is "merit based," with each regulator exercising broad power to forbid the offer and sale of securities within its state's borders if it concludes that a security is too speculative, too expensive or otherwise not suitable for the public.

The blue sky process varies widely from state to state and can be slow and inscrutable. There is no coordination among the states on an approach to standardize or harmonize the review and approval of digital asset securities, and Congress has already recognized the practical problems that even well-administered blue sky laws pose for businesses who, having successfully negotiated the SEC registration process, nevertheless find themselves hamstrung by the gauntlet of 50 state securities commissions. Indeed, this is why in 1996 Congress preempted blue sky registration requirements for any security listed on the New York Stock Exchange or Nasdaq Stock Market.[28]

And so if there were practical routes and predictable consequences to registration, then I am highly confident that many responsible businesses would eagerly register despite the well-grounded position that their activities are not subject to regulation under federal securities law. But the net impact of the two consequences I have described means that today, treating a digital asset as a security generally means that it loses all ability to trade and function.

Consumers and businesses need Congress to weigh in

I believe consumers want and deserve better comparative information about digital assets, given their complexity and variety, than they do about traditional agricultural, mineral and industrial commodities. This suggests that our historic approach to the regulation of commodity markets is no more appropriate to the digital asset class than our historic approach to the regulation of securities markets.

But responsible businesses are effectively compelled to rely on the position that their digital assets are commodities and not securities, even though this yields a situation in which consumers and the market as a whole lack consistent information about specific digital assets, and intermediaries in the spot market are not subject to sensible, fairly applied standards for handling customer assets and orders. It is not wrong to wonder whether standards like these, enforced by an energetic regulator like the CFTC or SEC, could have prevented the FTX debacle.

And so I have described a quandary which yields a status quo that is not acceptable. The binary "security-or-not" question means that if a digital asset is a security then it is regulated

[27] Although it might be possible for the SEC to preempt blue sky laws through rulemaking, this would be unprecedented and controversial. The SEC could use its authority under Section 18(b)(3) of the Securities Act of 1933, 15 U.S.C. § 77r(b)(3), in order to provide that any purchaser of a digital asset security sold in a transaction meeting specified conditions, which could include the availability of SEC-prescribed disclosure, is a "qualified purchaser" of that security, which would result in it being a "covered security" and therefore exempt from blue sky registration requirements (though not from state antifraud authority). The SEC would be required to conclude that the qualified-purchaser designation for these digital asset securities was consistent with the public interest and the protection of investors.

[28] National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416.

out of existence, but if it isn't a security then consumers lack both reliable information and the protection of federal market oversight.[29]

How then to address this quandary?

I do not believe tasking the regulators with sorting it out among themselves is a practical solution. The genius behind our federal approach to financial services regulation is competition. We *want* our federal financial services regulators to push at the boundaries of their jurisdiction; to guard their turf. That is how we make sure things don't fall through the cracks in our massive and endlessly changing economy. A unified financial services regulator may be fine for a less dynamic economy, but not for ours: Competition among regulators is a feature of our system, not a bug. Hoping the regulators can resolve these thorny jurisdictional issues among themselves is therefore not the answer.

It's my belief that we should move past the tired debate over whether digital assets are securities under existing law. Instead, Congress should step in with a new regulatory approach tailored to this asset class, with a clear allocation of authority over both the primary and secondary markets. Although concepts drawn from both federal commodities and securities law can inform a new regulatory paradigm, the appropriate regulators will need clear direction from Congress on how these precedents should apply.[30] For example, Congress may direct the regulators not to impose structural changes on the market simply because functional activities in the securities or commodities markets have historically been carried out with different organizational forms. Or Congress may direct the regulators not to impose financial statement requirements on a digital asset creator whose digital asset does not represent a debt or equity interest in the creator itself.

All of these decisions can and should be on the table when Congress decides to act.

I appreciate the Committee's time today and look forward to addressing any questions you may have. Thank you.

[29] *See* Financial Stability Oversight Council, REPORT ON DIGITAL ASSET FINANCIAL STABILITY RISKS AND REGULATION (2022), at 112-114, https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf.

[30] I believe any new legislation should avoid terminology drawn from investment-contract jurisprudence developed under *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) and succeeding cases. The "*Howey* test," as it is known, is essential to the SEC's regulatory and enforcement program because it enables the agency to police activities that are squarely within the zone of federal securities law, regardless of what they are called or how they are structured. This is illustrated by the facts of the *Howey* case itself, in which Mr. Howey offered his investors passive equity-like returns from a citrus fruit business, albeit not in the form of common stock—and was therefore judged to have sold an "investment contract," which is a security. Of course the oranges, tangerines and grapefruits produced by the business were not themselves securities.

Or were they? The seemingly obvious distinction between a transaction (the investment contract) and a valuable product or object of the transaction (the orange) has proven exceedingly difficult to pin down in the digital asset context, as others have pointed out. *E.g.*, Jai Massari, *Why Cryptoassets Are Not Securities*, HARVARD L. SCH. FORUM ON CORP. GOVERNANCE (Dec. 6, 2022), https://corpgov.law.harvard.edu/2022/12/06/why-cryptoassets-are-not-securities/, in which the author discusses Lewis Rinaudo Cohen, Gregory Strong, Freeman Lewin and Sarah Chen, THE INELUCTABLE MODALITY OF SECURITIES LAW: WHY FUNGIBLE CRYPTO ASSETS ARE NOT SECURITIES (discussion draft Nov. 10, 2022), https://dlxlaw.com/wp-content/uploads/2022/11/The-Ineluctable-Modality-of-Securities-Law-DLx-Law-Discussion-Draft-Nov.-10-2022.pdf.

Part of the difficulty is attributable to encrustations from nearly 80 years of wielding *Howey* in all manner of factual circumstances, many involving questionable conduct or even outright fraud. As the maxim goes, bad facts make bad law. Writing on a clean slate and steering clear of the term "investment contract" and hoary concepts like "investment of money," "common enterprise," "expectation of profits" and "entrepreneurial or managerial efforts of others," Congress has the opportunity to liberate the digital asset industry once and for all from worn-out and obfuscating analogies to chinchillas, whiskey warehouse receipts, New York City co-ops—and yes, Mr. Howey's oranges.