THIS IS *HOWEY* DO IT: RETHINKING THE SECURITY

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ABSTRACT

One of the most novel and hotly debated questions in the nascent Web3 space is 'what exactly is a token, and how should it be regulated?' The truth is, there is not any clear answer. Despite attempts to adapt to an ongoing flood of innovation, the Securities Exchange Commission has not given any clear guidance. Moreover, the available case law fails to provide any clear indication of how to proceed. This paper offers a framework to converge historical thinking about securities — traditionally regulated investment products — and cryptocurrencies — products that do not attach to value in a traditional way, but nevertheless resemble securities through components of price appreciation and tradability. Within the framework, this paper argues that statutory aid would both satisfy innovators and guide regulators by elucidating exactly what a token is and how it should be regulated.

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INTRODUCTION

Beyond hunting and gathering to collect food or finding shelter to rest safely, speculation has been as innate to the human experience as anything else. Naturally, a simple question asked endlessly as a child of 'why?' leads to a similar question of 'what happens?' Daily, when people lack an answer to either question, they turn to speculation. A farmer might stockpile grain for their family to prepare for a long winter season. Or with a more profit-oriented motive in mind, as the famous Homer Simpson quote goes, the farmer might invest in pumpkins: "They've been going up the whole month of October. And I got a feeling they're going to peak right around January and bang! That's when I'll cash in.[1]"

As societies scaled and became more interconnected, the need for formal market mechanisms arose. An obvious consideration was location, as a centralized place for every transacting party made more sense than arranging separate meetings with each interested party in case a deal fell through. Another obvious consideration was having some sort of neutral third party present to ensure each person got what they paid for. By 1730, purportedly, the concept of 'futures markets' had been developed in Osaka, Japan, with rice sold in advance of subsequent harvests through 'tickets' to guarantee a price against wild fluctuations between them.[2] This style of market definitively existed in the United States in Chicago during the 1850s, with the first corn future being sold at the Board of Trade in March 1851.[3] However, speculation in Chicago was not limited to harvesters, merchants, or consumers. Anyone with money in their pocket who wanted to buy and sell contracts could do so. Here arose the concept of a speculator in commodities purely as a *trader* who bought and sold contracts with no intention of taking delivery of the underlying commodities, rather than as a merchant acquiring inventory or as a farmer planning on offloading future harvests. In fact, this was necessary for a functioning market — such a trader was a critical intermediary that provided liquidity for the producer and the acquirer to transact at their convenience.

Predating futures, stocks and bonds have become the colloquial default of an 'investment,' maintaining an approachable simplicity. Stocks provide a stake in something (a.k.a. equity), while a bond effectively provides the repayment rights

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[1] Reverendhotrod, *Homer's Pumpkin Investment*, YOUTUBE (Oct. 30, 2010), https://www.youtube.com/watch?v=3w5D9yJUMOc [https://perma.cc/89PJ-L84F].

[2] KARA NEWMAN, THE SECRET FINANCIAL LIFE OF FOOD: FROM COMMODITIES MARKETS TO SUPERMARKETS 6 (2013).

[3] EMILY LAMBERT, THE FUTURES: THE RISE OF THE SPECULATOR AND THE ORIGINS OF THE WORLD'S BIGGEST MARKETS 5 (2011).

for a loan (a.k.a. debt). Someone alive in 1648 could have bought a Dutch perpetual bond that still pays 5% to this day, a version of an issue that originated out of Venice in the 1100s.[4] While these bonds were directly issued from the borrowers themselves, the same concepts of centralization and transaction verification played a role in formal exchanges opening up, such as the New York Stock Exchange. The traders played the same role here as in the commodities market —their activity allowed investors to gain or reduce exposure in a more liquid fashion. Of course, the practice of trading stocks to make money off of short-term movement rather than investing for the long-term was extremely popular, as highlighted in 1923 by *Reminiscences of a Stock Operator*,[5] the definitive account of the infamous boom-and-bust trading career of Jesse Livermore.

I. U.S. SECURITIES REGULATION

In the aftermath of the Great Depression, there was a significant push to regulate and monitor speculation more closely, as many powerful individuals naturally felt that manic speculation had accentuated the market collapse. This led to the creation of the Securities Act of 1933[6] ("1933 Act"), the Securities Exchange Act of 1934[7] ("1934 Act") (1933 and 1934 Acts collectively as "Acts"), and the Securities and Exchange Commission ("SEC") to enforce the Acts. While additional financial regulations have been codified over the years, these Acts, the SEC, and the associated case law remain largely influential on how securities are monitored. Of course, any securities regulation cannot be enforced without first answering the following question: what exactly *is* a security?

There are definitions in the Acts themselves. In the 1933 Act,[8] a security is defined as:

> "any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call,

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[4] Robin Wigglesworth, *How Bonds Ate the Entire Financial System*, FIN. TIMES (Aug. 2, 2023), https://www.ft.com/content/5631cc22-a04d-405c-9154-e307f938f8f3 [https://perma.cc/FCQ8-JND3].

[5] EDWIN LEFEVRE, REMINISCENCES OF A STOCK OPERATOR (1923).

[6] Securities Act of 1933, 15 U.S.C. §§ 77a-77aa.

[7] Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78aa.

[8] Securities Act of 1933 §2(a).

> straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing,"

which is largely replicated in the 1934 Act.[9] The comprehensive definition covers stocks, bonds, and any related derivatives. Still, most notably, the term "investment contract" and the phrase "any interest or instrument commonly known as a security" are used as a catch-all to allow regulation of any products deemed securities that were not originally defined.

II. THE *HOWEY* TEST

The 1946 landmark Supreme Court case *SEC v. W.J. Howey Co.*[10] created the aptly named *Howey* test that is still used to determine whether a transaction constitutes an investment contract and would thereby be subject to securities regulation. The *Howey* test states that a security exists if a person (1) invests his money (2) in a common enterprise (3) with the expectation of profit (4) solely from the efforts of the promoter or a third party.

Though the latter three elements have been extensively litigated, such litigation is largely beyond this paper's scope. However, some rulings maintain principal relevancy to common understanding of the *Howey* elements. When a transaction is being assessed under the *Howey* test, the court assesses the "economic reality" of the transaction rather than strictly adhering to elements.[11] Different circuits have used varying interpretations of the third element, "common enterprise," by looking at how the risk is shared between investors and promoters.[12] Some courts have looked for investors to share risk with *other* investors, while others have assessed whether the promoter has skin in the game as well.

The elements "expectation of profit" and "solely from the efforts of others" can be combined, although they are technically distinct. "Profit" could be anything from direct payment of dividends to an increased value of the investment overall

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[9] Securities Act of 1934 §3(a).

[10] SEC v. W. J. Howey Co., 328 U.S. 293, 298–99 (1946).

[11] Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

[12] Miriam R. Albert, *The Howey Test Turns 64: Are the Courts Grading this Test on a Curve?*, 2 WM. & MARY BUS. L. REV. 1, 16 (2011).

— essentially, it is referring to an expectation of return on the investment.[13] The "solely" language from the original *Howey* case has generally been interpreted as "primarily," "substantially," or "predominantly" from the efforts of others going forward, as otherwise, a thorny situation might arise if investors participated in any way and exempted themselves from securities law protections.[14]

III. RECENT APPLICATIONS OF THE *HOWEY* TEST

Over time, the *Howey* test has become the de facto method for assessing whether or not an offering qualifies as a security. It has held up when assessing sale-and-leaseback transactions regarding payphones[15] and private share sales of lumber businesses.[16] Even when Initial Coin Offerings (ICOs) roared into vogue in the 21st century as an investment opportunity structured well beyond anything dreamed up in 1946, *Howey* held up as recently as 2022 in SEC v. LBRY.[17] In *LBRY*, the three-part *Howey* test was used to assess whether the LBC tokens LBRY sold to fund their ecosystem constituted a security. Beyond being mineable, the token was supposed to be utilized to 'publish content,' create 'channels' for single users, pay tips, and more on the LBRY network. The SEC won summary judgment in New Hampshire District Court due to promotional statements made at the sale of tokens and other later statements referring to the market capitalization of the token ecosystem. These statements indicated an expectation of a return through LBC as the LBRY ecosystem continued to grow.

Two motives spurred the creation of the Acts and the SEC: first, the government wanted to protect investors against the false, unrealistic promises that are marketed to them but do not quite amount to fraud (or other criminal conduct), and second, the government wanted to know exactly what is being offered as an investment and monitor it. The broadness of *Howey* and the discretion of the SEC's exercise should remain attached to those principles. Certainly, the ICO market was rife with sketchy activity, with an estimated ~$10 billion lost out of ~$15 billion raised, according to one analysis.[18] However, many of the non-LBRY ICOs *were*

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[13] *Id.* at 19.

[14] *Id.*

[15] Sec. & Exch. Comm'n v. Edwards, 540 U.S. 389 (2004).

[16] Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985).

[17] Sec. & Exch. Comm'n v. LBRY, Inc., 639 F. Supp. 3d 211 (D.N.H. 2022).

[18] Klaus Grobys, Timothy King & Niranjan Sapkota, *A Fractal View on Losses Attributable to Scams in the Market for Initial Coin Offerings*, 15 J. RISK FIN. MGMT. 579, 13 (Nov. 10, 2022).

prosecuted as fraud charges first and foremost by the SEC.[19] The *LBRY* case indicated something different in that the SEC was now motioning for and winning summary judgment against companies who were cognizant of the market capitalization attached to their tokens and made public statements referring to it in any way. In a weird way, it might have been *worse* if management had not commented on it from a business development standpoint, as it could have signaled a lack of enthusiasm or awareness regarding the sentiment surrounding the company. Should company insiders be totally precluded from commenting on the fluctuating value of an attached token lest it be deemed a security?

Another concern about the *LBRY* ruling is that many things trade like a quasi-security but are not treated as such, especially in a high-tech age where designer shoes, luxury goods, and trading cards all have internet-based real-time candlestick charts and bid-ask platforms that enable their trading. A speculative purchase of a pair of limited edition Nike shoes could reasonably be thought of as a bet on the employees' efforts to increase the brand's reputation and be electronically traded in a similar manner to a token, yet the shoe will obviously never be treated as a security by the SEC even though counterfeit designer shoes[20] and trading cards are regularly produced in quantities worth well above eight figures to scam speculators.[21] In fact, SEC Chair Gary Gensler himself struggles to distinguish between the purchase of a trading card and a tokenized trading card.[22] If the tokenization aspect itself is treated differently and made to fall under *Howey*, it is hard to see how any token with utility created by a company that fluctuates in value can avoid being categorized as a security by this interpretation if *any* comment made by employees regarding the market capitalization of the coin or the future productivity of the ecosystem triggers this classification. Currently, this is how Chair Gensler seems to treat every cryptocurrency other than Bitcoin.

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[19] Ven, *The SEC Won't Let You Be*, MALT LIQUIDITY (May 11, 2023), https://maltliquidity.substack.com/p/the-sec-wont-let-you-be [https://perma.cc/ZL8E-YCR5].

[20] Jake Silbert, *Authorities Bust $472 Million USD Counterfeit Sneaker Ring*, HYPEBEAST (Jan. 3, 2020), https://hypebeast.com/2020/1/nike-louis-vuitton-footwear-counterfeiters-fake-sneaker-ring-busted [https://perma.cc/9X46-33VA].

[21] Dylan Horetski, *Pokemon Card Seller Reveals Logan Paul Got his Money Back from $3.5m Fake Box*, DEXERTO (Jan. 14, 2022), https://www.dexerto.com/entertainment/pokemon-card-seller-reveals-logan-paul-got-his-money-back-from-3-5m-fake-box-1740786/ [https://perma.cc/LF8H-FFV5].

[22] DEGEN NEWS (@Degeneratenews), TWITTER (Sept. 27, 2023, 9:33 AM), https://twitter.com/DegenerateNews/status/1707071049857196456 [https://perma.cc/Z8ND-MRB6].

IV. APPLICATION OF *HOWEY* TO MODERN TOKENS

A few months after *LBRY*, a much bigger crack in the *Howey* analysis was exposed in SEC v. Ripple.[23] The SEC motioned for summary judgment once again by claiming that three types of XRP token sales — Institutional, Programmatic, and Other Distributions (e.g., employee sales or private transactions) — were unregistered securities offerings, while Ripple claimed the opposite. Interestingly, the SEC won on institutional sales, but Ripple won on the others at the trial court level (and the decision is now under appeal to the Second Circuit). Certainly, the *Howey* elements were trivial to clear on the Institutional sales (which were to high-value, accredited investors) due to marketing materials Ripple used to tout XRP and how it would appreciate in value from the planned expansion of the Ripple ecosystem, thereby creating a common enterprise and an expectation of profit. However, the Programmatic sales (defined as trades made by Ripple into a market through blind auto-liquidation) are much more interesting, as the various buyers could not have known whether this money was flowing to Ripple directly due to the method of the transaction, so the Court could not determine the buyers' intentions. After all, the Court cannot baselessly speculate on what the buyers were thinking. Many Programmatic buyers were unaware of Ripple's existence as a company and could not have known if Ripple was on the other side of the XRP transactions in question.

Intuitively, this is confusing, as something cannot concurrently be a security and not a security. And, considering the original idea behind securities regulation, the ordinary people buying XRP programmatically on the electronically traded, publicly available market should be protected just as the wealthy, sophisticated institutional purchasers are protected by securities regulation. Looking back to Jesse Livermore and the development and prominence of the market-agnostic day trader — does trading in and out of a market to make money imply an expectation of profits from the *efforts* of others or in the fact that other potential speculators (with indeterminable intentions) might reprice the market in one's favor in the future? The point that Judge Torres made by distinguishing the types of sales is that the accredited investors that treated XRP like a security did not automatically make it a security for *everyone* transacting in XRP. Rather, *each type of sale* would need to be assessed "on the totality of circumstances and the economic reality of that specific contract, transaction, or scheme."[24]

This is not a situation that is specific to XRP transactions; this logic applies to

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[23] Sec. & Exch. Comm'n v. Ripple Labs, Inc., 2021 U.S. Dist. LEXIS 69563 (S.D.N.Y. Apr. 9, 2021).

[24] Sec. & Exch. Comm'n v. Ripple Labs, Inc., 682 F. Supp. 3d 308 (S.D.N.Y. 2023).

the buyers of most 'meme' cryptos that trade on electronic markets where the identity of the matched seller is not known, as is the case in a vast majority of traditional and cryptocurrency markets. Take HarryPotterObamaSonic10Inu ("HPOS10i") coin, for example, which has a market cap of over $100 million,[25] or DogeCoin, which holds a market cap above $10 billion and a daily trading volume of hundreds of millions of dollars.[26] These coins trade like stocks in the sense that they have elaborate charts, indicators, order books, and market makers, but what exactly *are* they? The *Howey* test simply does not make sense when applied to HPOS10i:

1. Did investors invest money? Yes, HPOS10i was created by its founders and sold for money.
2. Was there a common enterprise? Possibly. HPOS10i operates as a satire of meme coins and could gain value through the virality of the memes created by the general community (who may or may not hold the coin themselves.) In no way are the community or the memes attached to the value of the coin itself — they just make memes and share them online, and the coin does what it will.
3. Is there an expectation of profits? Probably. Many memes touch upon the coin 'going to the moon' (i.e., rapidly appreciating in price), but that has been a long-running meme in all sorts of communities, including ones entirely unrelated to investing. It is not a realistic assumption upon investment that a buyer has a quantified expectation of HPOS10i 'going to the moon,' as there is no explicit reason for purchasing it in the first place. Frankly, there might not be any reason at all, as a common phrase bandied about is, "It's funnier if you don't sell."[27]
4. Do the profits come primarily from the efforts of others? Not necessarily. Supposedly HPOS10i can go up in value because of the virality of the memes made in its community extending awareness of the coin, but it is impossible to tell if this counts as "efforts of others" or if it even has any relation whatsoever to potential profits.

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[25] COINMARKETCAP, https://coinmarketcap.com/currencies/harrypotterobamasonic10inu-eth/ (last visited Dec. 9, 2023) [https://perma.cc/K8GX-FKKZ].

[26] COINMARKETCAP, https://coinmarketcap.com/currencies/dogecoin/ (last visited Dec. 9, 2023) [https://perma.cc/UUV8-D2CT].

[27] *See, e.g.*, Tom DecCico (@TomOverChaplin), TWITTER (Apr. 4, 2024, 3:04 PM), https://x.com/TomOverChaplin/status/1776007899321421923 [https://perma.cc/YY97-HGTU].

In essence, people buy it because it is fun to play along with and it might appreciate. People trade it because there is enough volatility in the price action to buy low and sell high. The market capitalization itself is a meme, so it could hardly be considered a promotion from someone touting the benefits of an attached, extended ecosystem.

Notably, albeit without anywhere near the same levels of ironic meme generation (though there are plenty of meme communities surrounding Bitcoin), all of these non-answers also apply to Bitcoin, which the SEC uniquely treats as a commodity amongst cryptocurrencies, despite an unwillingness to do the same with similar instruments like Ethereum.[28] It is unclear what the common enterprise behind Bitcoin is, why it appreciates beyond people with unknowable expectations bidding it up, or whose primary efforts would cause price appreciation (the miners, ETF issuers, etc.). However, due to Bitcoin's enormous market capitalization, which has ranged from trillions to its current level of $1.19 trillion,[29] it seems to get a pass.

V. PROBLEM: THE INCONSISTENCIES OF THE CURRENT PARADIGM WITHIN THE CURRENT MARKET

The core issue with *Howey* and what application to meme coins (and Bitcoin) reveal is that the manner in which humans speculate has fundamentally transformed both in the rate at which an individual can do it and in how it is thought about. The *Howey* framework assumes that the investor wants to make a legitimate investment that creates profit *through someone's effort*, thus determining whether that investment deserves legal protection. However, in the modern age, people increasingly speculate for the sake of speculation and profit potential, regardless of whether this expectation of profit is rational or even exists. Placing a sports bet or trading crypto can be done within seconds at any time of day by picking up your phone — in fact, you can get even faster access to some cryptocurrencies than the markets by using telegram bots. Prices move twenty-four hours a day and seven days a week in crypto markets, but *reasons* why the prices move rarely appear day-to-day beyond the essential mechanics of supply and demand. Even good or bad news that moves traditional stock markets might come as infrequently as once a week — meanwhile, Dogecoin has done billions of dollars in volume by that point.

Bitcoin and Dogecoin have proven that "a common enterprise" is an outdated

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[28] Daniel Kuhn, *SEC's Gensler Reiterates Bitcoin Alone is a Commodity. Is He Right?*, COINDESK (May 11, 2023), https://www.coindesk.com/layer2/2022/06/28/secs-gensler-reiterates-bitcoin-alone-is-a-commodity-is-he-right/ [https://perma.cc/8W4F-86HY].

[29] YCHARTS, https://ycharts.com/indicators/bitcoin_market_cap (last visited Dec. 9, 2023) [https://perma.cc/24KM-NEAR].

threshold as to why a reasonable speculator might put their money in something, while HPOS10i completely turns the concept of "efforts of others" on its head. The depth, liquidity, and volatility of all three of those instruments (and many other coins) are *reason enough* to generate some form of the expectation of profit whether or not there is any relation to the underlying idea behind the coin (if it exists) at all — that fact that it *does* trade means that people *will* trade it, creating a sort of self-fulfilling recursion that *Howey* was never meant to handle.

The *Ripple* ruling highlights that this contradiction cannot just be ignored in the hopes it goes away like the SEC's classification of Bitcoin as a commodity tried to do, especially if Judge Torres' treatment of each type of transaction on its own merits remains the valid way to analyze such cases. This is certainly up for dispute — note that in SEC v. Terraform Labs, a different Judge in the same District Court explicitly stated that he disagreed with applying *Howey* separately to each tranche of transactions.[30] For that matter, the concept of a traded security might be outdated due to how high-tech markets have gotten.

While AAPL shares were registered as a security before trading on public markets, are all the intraday speculators really *investing* in Apple? Are their expectations of profits derived from the day-to-day work of employees who build Apple products or the fact that the market volatility might work out in their favor? On a higher frequency level, is anyone market-making the stock or arbitraging a basket of stocks to their combined ETF value[31] profiting "primarily from the efforts of others"? The original intent of securities regulation was to prevent systemic risk due to massive losses in volatile markets by reducing the number of suspect offerings available to speculate on through heightening standards and increasing protections for products that meet those standards. But now, speculation occurs while *knowing* there is nothing to an offering other than the liquidity and the volatility — this is a feature, and if one product is clamped down on by the SEC stretching to fit *Howey* to it, another will take its place. The SEC has no authority over the desire to speculate, and the purposelessness of a market is not something people are demanding any protection from.

VI. SOLUTION: LEGISLATING CRYPTOCURRENCIES TO ALIGN WITH STANDARDS

The format of regulation going forward should not be trying more *Howey* cases regarding cryptocurrencies in court. Beyond prosecuting outright fraud, labelling

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[30] SEC v. Terraform Labs Pte. Ltd., 684 F. Supp. 3d 170, 193 (S.D.N.Y. 2023).

[31] Kent Thune, *What is the Creation/Redemption Mechanism?*, ETF.COM (Jan. 25, 2024), https://www.etf.com/etf-education-center/etf-basics/what-is-the-creationredemption-mechanism [https://perma.cc/U5M6-T432].

coins as unregistered securities seems to be a largely futile endeavor at this point. Furthermore, a blanket ban on transacting in cryptocurrencies appears similarly ill-advised. With the regulatory troubles of FTX and Binance, Coinbase seems like the player best suited to gain a significant share of cryptocurrency trading going forward. Although Coinbase has been charged by the SEC for securities violations,[32] a complete offshore of all cryptocurrency trading would only kill the possibility of continued industry growth. Most importantly, Coinbase *is* a publicly traded company in the United States and is therefore subject to a fair amount of regulation and compliance. As such, it is in Coinbase's best interests to be transparent in their disclosures and forward guidance, creating an alignment of incentives that does not exist with Binance, for example, who directly benefits from the increased need to circumvent securities laws. Endless cases do not need to be brought to court to get an idea of what is happening in the broader cryptocurrency space.

The most logical path forward is enabling businesses that want to build in the crypto space not to face a gamut of regulation because of an attached token or product trades. At the end of the day, LBRY *was* building an actual product. Although tokens might trade in a quasi-equity style, they *are not* equity — they have no place in the cap stack and do not actually represent any ownership in the company. They operate almost as a tradable representation of 'hype,' like how a wine from a vineyard that is growing in reputation might appreciate. Certainly, market manipulation should be monitored by the SEC in these tokens' markets, but this should be trivially doable with the time and sales data across major chains mirroring the data they use to charge insider trading cases.

Perhaps a different categorization entirely can be drawn up for token-attached businesses to allow for such compliance. Clear legislation that modifies the interpretation of tokenization, whether attached to a real product or not, would provide much-needed clarity to businesses that have adopted them as part of a marketing/hype mechanism and reduce the need for businesses to move offshore lest Chair Gensler's sweeping purview homes in on them. A "Tokenization Act of 2025" could still allow the SEC to regulate tokens, but full-scale Securities Act protections could be curtailed so legitimate businesses can operate without the fear of being shut down if their attached token is deemed to be a security (as this is effectively a death sentence for a business right now). Of course, if the token constituted some stake in the business, it would fall under *Howey* and be regulated

[32] Press Release, Sec. & Exch. Comm'n., SEC Charges Coinbase for Operating as an Unregistered Secs. Exch., Broker, & Clearing Agency (June 6, 2023), https://www.sec.gov/news/press-release/2023-102 [https://perma.cc/ZE7U-YK6Z].

as normal — providing a carveout for tokens outside the cap stack. Additionally, such legislation could allow for some amount of regulation over meme coins as they are still susceptible to manipulation and insider trading tactics that would be prosecutable in traditional securities. A meme coin classification would no longer force the SEC to contort the vapidness of HPOS10i or Dogecoin to the *Howey* framework just to afford traders some protection.

This legislation would be mutually beneficial to all parties: business owners can safely market to a demographic that displays high enthusiasm for such projects. The SEC could crack down on illicit trading without blanketing the transacted vehicle itself, cryptocurrency traders would not have to go through sketchy entities to transact in the market, and U.S. companies could collect fees from facilitating such trading without fear of getting charged for operating an unregistered securities exchange. The *Howey* framework is incredibly useful, simple, and gets a vast majority of cases correct without controversy — it doesn't need to go anywhere or be reimagined. But for this class of assets, the application is highly unclear, sways with political winds, and only begets further litigation and confusion. At least for cryptocurrencies, it's best to give *Howey* some rest.