REPLACING *HOWEY* WITH CLARITY: RESOLVING SECURITIES REGULATION'S TEMPORAL PARADOX

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ABSTRACT

Blockchain-based assets can transform their legal status as they mature through decentralization, evolving from securities to commodity-like instruments as control disperses. The Supreme Court's 1946 Howey test leaves ambiguous whether securities regulations governs assets or transactions and provides no framework for assets whose legal classification evolves over time. This gap, termed here the "Temporal Paradox," has generated judicial fragmentation and driven digital asset development outside the United States.

The Digital Market Asset CLARITY Act of 2025 resolves this paradox through institutional design that structures regulation around asset lifecycle phases. The Act establishes a new regulatory framework by defining assets whose value flows from network autonomy rather than promoter action as a distinct statutory category. The Act regulates capital-raising through a conditional exemption requiring detailed disclosure and development roadmap, and removes assets from SEC jurisdiction upon demonstrating autonomous operation and dispersed control.

CLARITY trades Howey's doctrinal ambiguity for technical ambiguity: courts must now consistently interpret whether networks have achieved autonomous operation and eliminated concentrated control across diverse architectures. This represents a structural shift from subjective legal doctrine to objective technical criteria. However, it introduces a new institutional requirement. If courts diverge in interpreting these technical standards, they risk replicating in the technical domain the very fragmentation the Act seeks to eliminate. The Act's success therefore depends on whether courts develop sufficient technical interpretive capacity to apply these standards consistently. This institutional capacity, rather than statutory design, emerges as the limiting factor in the Act's implementation.

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I. INTRODUCTION

The Supreme Court's 1946 decision in *SEC v. W.J. Howey Co.* established a flexible principle intended to adapt to "countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[2] This flexibility, however, has proven fatal when applied to blockchain-based digital assets. Blockchain technology creates assets that can transform their legal status through progressive decentralization, moving from centrally controlled offerings resembling securities to commodity-like instruments governed by autonomous code.[3] The *Howey* test assumes asset classification is fixed and permanent.[4] It provides no framework for assets whose legal classification evolves over time. This structural mismatch generates what this Article terms the Temporal Paradox.

The result is institutional failure and widespread judicial fragmentation. In *SEC v. Ripple Labs, Inc.*, Judge Analisa Torres classified the same token (XRP) differently based on transaction context.[5] Institutional sales to accredited investors under written contracts were securities.[6] Programmatic sales to retail buyers on digital asset exchanges were not.[7] The court held that what changed was whether purchasers could "reasonably expect" Ripple would "use the capital received from its sales to improve the XRP ecosystem."[8]

One year earlier, Judge Paul Barbadoro reached the opposite conclusion in *SEC v. LBRY, Inc.*[9] Analyzing functionally similar tokens (LBRY Credits), Judge Barbadoro held that "all of LBRY's past, present, and future offers and sales of LBC" constituted investment contracts.[10] Unlike *Ripple*, *LBRY* did not distinguish between institutional and programmatic sales.[11] The court treated the token

[2] *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946).
[3] *See* Seth C. Oranburg, *Truman-Era Securities Ruling That Governs Crypto Needs an Update*, Bloomberg L. (Oct. 27, 2025), https://news.bloomberglaw.com/legal-exchange-insights/truman-era-securities-ruling-that-governs-crypto-needs-an-update ("Many tokens function as 'lifecycle' instruments—they may start like fundraising tools and later run as decentralized networks.").
[4] *See Howey*, 328 U.S. at 298-99 (evaluating investment contract status based on transaction structure without providing framework for classification changes).
[5] *SEC v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308 (S.D.N.Y. 2023).
[6] *Id.* at 325.
[7] *Id.* at 330 ("Programmatic Buyers could not reasonably expect that Ripple would use the capital it received from its Programmatic Sales to improve the XRP ecosystem").
[8] *Id.* at 327.
[9] *SEC v. LBRY, Inc.*, 639 F. Supp. 3d 211 (D.N.H. 2022).
[10] *Id.* at 228.
[11] *Compare id.* at 227-28 (treating all LBC sales as investment contracts), *with Ripple*, 682 F. Supp. 3d at 325, 330 (distinguishing institutional and programmatic XRP sales).

itself as the relevant unit of analysis, concluding LBRY's control over the protocol made LBC an investment contract regardless of sale method.[12]

These cases present incompatible theories about what *Howey* classifies. *Ripple* asks: Did this transaction create reasonable profit expectations? *LBRY* asks: Does this asset embody an investment relationship?[13] The divergence reflects *Howey*'s ambiguous object. Does the test classify assets or transactions? Blockchain technology forces courts to choose, and they have chosen differently.[14]

This fragmentation stems from the elastic phrasing of *Howey*'s critical fourth prong: whether "profits are derived primarily from the efforts of others."[15] The SEC attempted clarification in its 2019 *Framework for "Investment Contract" Analysis of Digital Assets*, which expanded the four-part *Howey* test into thirty-eight separate considerations.[16] Commissioner Hester Peirce responded that the Framework was so complex that "people not steeped in securities law and its attendant lore" would not know what to make of it.[17] Different courts applying these indeterminate standards reach different answers on similar facts. This is the core problem of a seventy-year-old test designed for orange groves, not blockchain networks.[18]

The *Howey* test implicitly assumes instruments possess fixed characteristics. An orange grove bundled with a service contract will never transform into a self-sufficient orchard run by decentralized farmers.[19] Blockchain-based assets violate this assumption. Then-SEC Division of Corporation Finance Director William Hinman acknowledged in 2018 that digital assets can "morph" over time.[20] If "the network on which the token or coin is to function is sufficiently decentralized" such that "purchasers would no longer reasonably

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[12] *LBRY*, 639 F. Supp. 3d at 228 ("LBRY's offers and sales of LBC are properly characterized as investment contracts").
[13] *Compare Ripple*, 682 F. Supp. 3d at 326-27 (transaction-specific analysis), *with LBRY*, 639 F. Supp. 3d at 228 (asset-centric analysis).
[14] *See* Oranburg, *supra* note 2 ("A 1946 U.S. Supreme Court ruling is deciding the fate of today's digital token networks, and the results are irreconcilable.").
[15] *Howey*, 328 U.S. at 301.
[16] SEC, Framework for "Investment Contract" Analysis of Digital Assets (Apr. 3, 2019), https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets.
[17] Hester M. Peirce, Comm'r, SEC, *Dissent from the Majority's Release on Amendments to the "Accredited Investor" Definition* (Aug. 26, 2020), https://www.sec.gov/news/public-statement/peirce-accredited-investor-2020-08-26 (critiquing SEC's approach to digital asset regulation as generating confusion through complexity).
[18] *See Howey*, 328 U.S. at 295-97 (analyzing citrus grove sales with service contracts).
[19] *Id.*
[20] William Hinman, Dir., SEC Div. of Corp. Fin., *Digital Asset Transactions: When Howey Met Gary (Plastic)*, Remarks at Yahoo Finance All Markets Summit: Crypto (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418.

expect a person or group to carry out essential managerial or entrepreneurial efforts," the asset may no longer satisfy *Howey*.[21]

Hinman's framework recognizes that classification can change. But *Howey* provides no mechanism for identifying when this transformation occurs, who determines it has occurred, or what legal consequences follow.[22] The test evaluates whether an investment contract exists at a single moment in time. It offers no guidance for assets whose status changes across their lifecycle. This is the Temporal Paradox.

Neither the SEC nor federal courts can resolve this problem through interpretation. The issue is not doctrinal confusion that better reasoning might clarify. It is structural incommensurability between a test designed for static instruments and technology that produces dynamic ones.[23] Agencies and courts lack authority to create new categorical definitions outside the Securities Act's statutory framework. They can only apply *Howey* as written.[24] But *Howey* cannot coherently classify assets whose legal status evolves through decentralization.

Congress recognized this structural failure. In September 2025, the House of Representatives passed the Digital Asset Market Clarity Act of 2025 Act (the Clarity Act or simply "CLARITY").[25] Currently pending Senate consideration, CLARITY would establish the first comprehensive statutory framework for digital asset regulation.

Some readers may wonder whether it is premature to offer doctrinal analysis and compliance roadmaps for a proposal that has not (yet) become law. Two points justify writing now. First, CLARITY is the leading House vehicle in an active, multi-bill reform wave (Lummis-Gillibrand Responsible Financial Innovation Act,[26] GENIUS Act,[27] etc.); its text is already shaping negotiations, agency planning, and market design. Second, post-*Loper Bright*, courts will shoulder more interpretive load; front-loaded statutory analysis helps courts and counsel converge on administrable methods even before final enactment, so that even if CLARITY itself never becomes law, something similar eventually must.

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[21] *Id.*

[22] *See Howey*, 328 U.S. at 298-99 (providing no framework for determining when assets transition between regulatory categories).

[23] *See* Oranburg, *supra* note 2 ("This rule assumes a static instrument, but digital assets aren't static.").

[24] *See* 15 U.S.C. § 77b(a)(1) (defining "security" to include "investment contract" without further specification).

[25] H.R. 3633, 119th Cong. (2025) (passed House Sept. 18, 2025).

[26] Responsible Financial Innovation Act of 2025, discussion draft (released July 22, 2025 by Sens. Scott, Lummis, Hagerty & Moreno)

[27] Guiding and Establishing National Innovation for U.S. Stablecoins Act of 2025, Pub. L. No. 119-27 (2025) (codified in scattered sections of 12 U.S.C., 15 U.S.C., and 31 U.S.C.).

If signed into law, the Clarity Act replaces *Howey* with a regulatory framework explicitly designed for blockchain's lifecycle dynamics. CLARITY resolves the Temporal Paradox through institutional redesign, abandoning *Howey*'s fixed classification model and embracing lifecycle-based regulation.

The Act creates a new statutory category: "mature digital assets."[28] These are blockchain-based instruments meeting statutory criteria for decentralization, demonstrating their value derives from network autonomy rather than promoter action. CLARITY establishes conditional safe harbor allowing networks to launch through disclosed capital-raising, followed by formal "maturity determination" administered jointly by the SEC and Commodity Futures Trading Commission (CFTC).[29] Assets certified as mature exit securities regulation and become subject to CFTC oversight as digital commodities.[30]

This framework directly addresses *Howey*'s core deficiency: the test cannot identify when blockchain-based assets transition from security to non-security status. CLARITY replaces judicial guesswork with administrative process.[31] It establishes specific decentralization metrics, requires formal agency determination, and provides de novo judicial review of maturity certifications.[32] The Act creates a predictable pathway for blockchain networks to evolve from securities offerings to autonomous commodity-like systems while maintaining investor protection during transition.[33]

CLARITY's success, however, depends on institutional capacity. The Act trades *Howey*'s doctrinal ambiguity for technical ambiguity. Instead of subjective questions about profit derivation, courts must now interpret objective technical standards: whether a network achieves genuine autonomy, what node distribution threshold counts as "dispersed control."[34] This is progress. Technical questions are amenable to resolution through evidence and expertise, whereas subjective doctrinal questions are not. But the Act's effectiveness depends on whether federal courts and regulators can develop sufficient technical interpretive capacity to apply these specialized standards consistently.

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[28] *Id.* § 9A(b)(2) (defining "mature digital asset").
[29] *Id.* § 4A (establishing conditional exemption and maturity determination process).
[30] *Id.* § 4A(f) (providing for CFTC oversight of mature digital assets).
[31] *See* H.R. REP. NO. 119-168, pt. 2, at 12-15 (2025) (explaining need for legislative solution to *Howey*'s application to digital assets).
[32] H.R. 3633 § 4A(e) (establishing de novo judicial review of maturity determinations).
[33] *See* H.R. REP. NO. 119-168, pt. 2, at 18-22 (2025) (describing lifecycle-based regulatory framework).
[34] H.R. 3633 § 9A(b)(2) (defining criteria for mature digital assets including decentralization requirements).

Part II examines the Temporal Paradox in detail: what it is, how it emerges from blockchain technology, and why *Howey* cannot accommodate it. Part III analyzes CLARITY's statutory design: how it structures regulation around lifecycle phases and what institutional assumptions underlie that structure. Part IV evaluates implementation capacity: whether courts and regulators can consistently apply CLARITY's technical maturity standards, addressing challenges including constitutional questions after *Loper Bright Enterprises* and *SEC v. Jarkesy*, interaction with existing securities exemptions, and practical problems in verifying decentralization claims. This Article concludes that while CLARITY represents necessary legislative intervention to resolve an intractable doctrinal problem, successful implementation depends on agencies developing operational expertise in blockchain architecture and courts maintaining rigorous review of maturity determinations.

II. THE TEMPORAL PARADOX

Blockchain technology enables digital assets to transform their legal status through progressive decentralization. The *Howey* test cannot accommodate this transformation because it treats asset classification as fixed at the time of offer or sale.[35] This rigidity, combined with the test's inherent elasticity, generates the Temporal Paradox: a fundamental collision between the U.S. securities regulatory framework and the dynamic nature of blockchain-based assets.[36] The result is pervasive judicial fragmentation and market uncertainty that neither courts nor agencies possess authority to resolve through interpretation alone.[37]

The core policy objectives of the Securities Act of 1933 and the Securities Exchange Act of 1934 are investor protection and market integrity, primarily achieved through mandatory disclosure of material information.[38] Classification as an "investment contract" under *Howey* imposes profound ongoing obligations, including perpetual disclosure

[35] *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946) (evaluating investment contract status based on transaction structure at time of sale without framework for classification changes).
[36] *See* Seth C. Oranburg, *Truman-Era Securities Ruling That Governs Crypto Needs an Update*, Bloomberg L. (Oct. 27, 2025), https://news.bloomberglaw.com/legal-exchange-insights/truman-era-securities-ruling-that-governs-crypto-needs-an-update ("The test, from *SEC v. Howey*, treats a deal as a security when people invest in a common enterprise with an expectation of profits from others' efforts. This rule assumes a static instrument, but digital assets aren't static.").
[37] *See* 15 U.S.C. § 77b(a)(1) (defining "security" to include "investment contract" without providing mechanism for status changes).
[38] *See* Securities Act of 1933, 15 U.S.C. §§ 77a-77aa; Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78pp.

requirements and corporate governance restrictions.[39] These burdens make sense for instruments whose characteristics remain constant. They become incoherent when applied to assets engineered to evolve from centralized fundraising mechanisms to decentralized commodity-like networks.

A. What Is the Temporal Paradox?

The Temporal Paradox describes the structural incompatibility between federal securities law's synchronic assumptions and blockchain technology's polychronic reality. The *Howey* test is fundamentally synchronic. It evaluates whether an instrument constitutes an investment contract at a single point in time, typically the moment of offer or sale.[40] The test implicitly assumes that classification, once determined, remains fixed. An orange grove bundled with a service contract will never transform into a self-sufficient orchard operating without the promoter's efforts.[41] The investment relationship either exists or it does not.

Blockchain-based assets are polychronic. They are often engineered through multi-stage processes where economic function and managerial centralization evolve over time.[42] In the developmental stage, entrepreneurs raise capital to build networks, and asset value depends entirely on promoter efforts, fitting the traditional *Howey* framework.[43] In the mature stage, networks achieve functional autonomy and dispersed control, meaning value derives from utility and network effects rather than ongoing managerial efforts of a centralized team.[44]

The Temporal Paradox emerges when courts attempt to apply *Howey*'s subjective standard ("expectation of profit" derived from "efforts of others") to assets designed to legally "morph" from

[39] *See* 15 U.S.C. § 77e (prohibiting sale of unregistered securities); *id.* § 78m (requiring periodic reporting for registered securities).
[40] *Howey*, 328 U.S. at 298-99.
[41] *See id.* at 295-97 (describing citrus grove sales with service contracts).
[42] William Hinman, Dir., SEC Div. of Corp. Fin., *Digital Asset Transactions: When Howey Met Gary (Plastic)*, Remarks at Yahoo Finance All Markets Summit: Crypto (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418 (acknowledging that digital assets can "morph" over time).
[43] *See* Stephen P. Wink, Witold Balaban, John J. Sikora, Jr. & Miles P. Jennings, *Digital Asset Regulation: Howey Evolves*, 53 Rev. Sec. & Commodities Reg. 1, 3 (2020) (describing how ICO market made "dubious claims about the potentially significant returns that token purchasers could earn").
[44] Hinman, *supra* note 39 (stating that if "the network on which the token or coin is to function is sufficiently decentralized" such that "purchasers would no longer reasonably expect a person or group to carry out essential managerial or entrepreneurial efforts," the asset may no longer satisfy *Howey*).

securities to non-securities.[45] The test provides no mechanism for identifying when this transformation occurs, who determines it has occurred, or what legal consequences follow.[46] *Howey* evaluates a transaction at time T_0. It offers no guidance for assets whose status changes at time T_1, T_2, or T_n.

The *Howey* test relies on four prongs: (1) investment of money, (2) in a common enterprise, (3) with expectation of profits, (4) derived solely from efforts of others.[47] For blockchain-based assets, the critical inquiry typically collapses onto the fourth prong: reliance on "efforts of others."[48] This prong's subjective and elastic nature becomes fatal when applied to assets whose managerial control diminishes over time by design.

The subjective "expectation of profit" standard is inherently difficult to analyze, posing theoretical concerns absent from other *Howey* elements.[49] The SEC attempted clarification through its April 2019 *Framework for "Investment Contract" Analysis of Digital Assets*.[50] Rather than providing predictability, the Framework compounded confusion. As SEC Commissioner Hester Peirce observed, the Framework lists "38 separate considerations, many of which include several sub-points."[51] This complexity rendered the guidance "perilous business for non-lawyers and those not steeped in securities law," contributing to "the feeling that navigating the securities laws in this area is perilous business."[52]

The Framework's thirty-eight factors encourage a "facts and circumstances" approach that provides regulatory flexibility but lacks necessary market predictability.[53] More fundamentally, the Framework's multiplication of considerations fails to address the core problem: *Howey*'s rigidity means that an instrument clearly carrying profit expectations and relying on promoter efforts during initial capital-raising cannot easily morph into one that no longer relies on those efforts.[54] This difficulty persists even though the central concerns motivating securities regulation—mitigating agency costs and

[45] *See* Oranburg, *supra* note 33.
[46] *See Howey*, 328 U.S. at 298-99 (providing no framework for determining when assets transition between regulatory categories).
[47] *Id.* at 301.
[48] *See* Carol R. Goforth, *Regulation of Crypto: Who Is the Securities and Exchange Commission Protecting?*, 58 Am. Bus. L.J. 643, 678-79 (2021) (noting that for "novel digital asset[s], the critical inquiry typically collapses onto the fourth prong").
[49] *See id.* at 679.
[50] SEC, *Framework for "Investment Contract" Analysis of Digital Assets* (Apr. 3, 2019), https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets.
[51] Hester M. Peirce, Comm'r, SEC, *How We Howey*, Remarks at International Blockchain Congress (May 9, 2019), https://www.sec.gov/news/speech/peirce-how-we-howey-050919.
[52] *Id.*
[53] *See* Goforth, *supra* note 45, at 679-80.
[54] *Id.* at 679.

distinguishing investment from consumption—recede once networks achieve genuine decentralization.[55]

The Temporal Paradox creates profound doctrinal instability by forcing courts to choose an artificial moment in time for classification. The subjective nature of *Howey*'s factors produces widely divergent conclusions even when courts confront similar factual patterns of asset evolution.[56] This instability manifests in two distinct but related problems: integration analysis and asset-versus-transaction ambiguity.

Digital assets are often offered through multi-phase processes, such as sale of Simple Agreements for Future Tokens (SAFTs) followed by token distribution when networks become functional.[57] The purpose of this structure is to fund development (Stage 1) through exempt securities offerings, then distribute utility tokens once networks operate autonomously (Stage 2).[58] When courts apply integration doctrine, they often collapse these phases into a single scheme if sales were made for the same general purpose and occurred temporally proximate.[59]

In *SEC v. Kik Interactive Inc.*, the court integrated the Pre-Sale and token distribution, holding both sales were "part of a single plan to introduce the Kin [asset] and jumpstart its economy."[60] The court's rationale focused on use of proceeds: funds from all sales funded Kik's operations and ecosystem development, thereby negating temporal distinction and permanently affixing security classification.[61] This judicial tendency to integrate offerings denies the dynamic potential *Howey* fails to accommodate.

Howey's ambiguity regarding the subject of analysis—the asset itself or the transaction selling it—exacerbates instability.[62] In *Balestra v. ATBCOIN LLC*, the court assessed defendants' control as officers to establish the "managerial efforts" prong, focusing on whether "Ng and Hoover possessed the power to direct the management and policies of ATB."[63] Yet in *SEC v. Ripple Labs, Inc.*, the court applied inconsistent standards to the same asset (XRP), splitting its analysis based on purchaser sophistication (institutional versus retail programmatic

[55] *Id.*
[56] *See* Oranburg, *supra* note 33 ("A 1946 U.S. Supreme Court ruling is deciding the fate of today's digital token networks, and the results are irreconcilable.").
[57] *See* Blockstack Token LLC, Simple Agreement for Future Tokens (2019), https://www.sec.gov/Archives/edgar/data/1693656/000110465919039476/a18-15736_1ex1a3hldrsrtsd1.htm (providing example of SAFT structure).
[58] *See* Goforth, *supra* note 45, at 669-70 (describing SAFT process as "two-stage process pursuant to which crypto entrepreneurs can legally raise funds in anticipation of the development of a functional utility token").
[59] *See* 17 C.F.R. § 230.502(a) (setting forth integration factors).
[60] *SEC v. Kik Interactive Inc.*, 492 F. Supp. 3d 169, 180-82 (S.D.N.Y. 2020).
[61] *Id.* at 181.
[62] *See* Goforth, *supra* note 45, at 678 (noting *Howey*'s "ambiguity regarding the subject of analysis: is the focus on the token itself, or the transaction used to sell it?").
[63] *Balestra v. ATBCOIN LLC*, 380 F. Supp. 3d 340, 359-60 (S.D.N.Y. 2019).

sales). [64] This demonstrates that *Howey*'s fixed classification framework cannot cope with assets whose market characteristics change over time, resulting in fragmented enforcement and lack of fair notice for market participants.[65]

This doctrinal collapse confirms that the existing static legal framework cannot govern assets capable of transformation, necessitating legislative intervention that explicitly acknowledges and structures regulation around asset lifecycle evolution.[66]

B. The Failure of Fixed Classification

Howey's rigidity is most clearly exposed in the context of phased digital asset offerings, where promoters attempt to fund network development initially, followed by distribution of utility-based tokens later. The law's refusal to acknowledge this temporal shift is the engine of the Temporal Paradox.

The capital-raising trajectory for many digital asset protocols follows a conceptual two-stage model, intentionally differentiating the investment phase from the utility phase.[67] This process is frequently organized using legal structures like Simple Agreements for Future Tokens (SAFTs), designed to shield final assets from securities classification.[68] The SAFT framework operates through distinct steps: securing commitments from accredited investors, selling SAFTs pursuant to registration exemptions (typically Regulation D), developing networks providing genuine utility, and finally launching tokens.[69]

The first phase is an investment scheme where capital is raised from initial investors to finance underlying software development.[70] This initial transaction is clearly tied to managerial and entrepreneurial efforts of the promoter, fitting the traditional mold of a security. The goal is transitioning to an open-source stage focused on decentralized

[64] *SEC v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308, 325, 330 (S.D.N.Y. 2023).
[65] *See* Goforth, *supra* note 45, at 679.
[66] *See id.* at 680.
[67] *See* Carol R. Goforth, *Regulation of Crypto: Who Is the Securities and Exchange Commission Protecting?*, 58 Am. Bus. L.J. 643, 669-70 (2021) (describing SAFT process as "two-stage process pursuant to which crypto entrepreneurs can legally raise funds in anticipation of the development of a functional utility token").
[68] *See* Blockstack Token LLC, Simple Agreement for Future Tokens (2019), https://www.sec.gov/Archives/edgar/data/1693656/000110465919039476/a18-15736_1ex1a3hldrsrtsd1.htm.
[69] *See* Goforth, *supra* note 64, at 669-70.
[70] *Id.* at 669.

governance and network utility, where asset value no longer relies on promoter efforts and theoretically ceases to be a security.[71]

Courts, however, routinely collapse these distinct stages through integration doctrine. Regulation D establishes five factors for determining whether seemingly separate offerings should be integrated into a single securities offering: whether the offerings are (1) part of a single plan of financing, (2) involve the same class of securities, (3) are made at or about the same time, (4) involve the same type of consideration, and (5) are made for the same general purpose.[72]

In *SEC v. Kik Interactive Inc.*, the court integrated Kik's SAFT Pre-Sale to accredited investors with its subsequent Token Distribution Event (TDE), holding both sales were "part of a single plan to introduce the Kin [asset] and jumpstart its economy."[73] Kik conducted the Pre-Sale privately under Regulation D, raising $50 million from institutional investors.[74] One day later, Kik launched the TDE, selling Kin tokens publicly for approximately $49 million in cryptocurrency.[75]

The court found integration warranted despite temporal proximity being minimal (one day) and consideration differing (U.S. dollars versus Ether).[76] The dispositive factor was use of proceeds: funds from both sales financed "Kik's operations and the building of the Kin ecosystem," satisfying the "same general purpose" criterion.[77] By collapsing these phases, the court effectively ruled that initial determination of security status in Stage 1 is permanent, ignoring the asset's structural transition to Stage 2 utility.[78]

This outcome maintains perpetual securities classification based on historical circumstances of the capital raise, frustrating the dynamic design blockchain technology enables. The integration doctrine's temporal collapse transforms non-securities into securities through procedural alchemy. At T_1, SAFTs are admitted securities (investment contracts). At T_2, Kin tokens are allegedly non-securities (functional utilities). Post-integration, Kin tokens retroactively become securities. The nature of the asset (security versus commodity) depends on when

[71] William Hinman, Dir., SEC Div. of Corp. Fin., *Digital Asset Transactions: When Howey Met Gary (Plastic)*, Remarks at Yahoo Finance All Markets Summit: Crypto (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418.
[72] 17 C.F.R. § 230.502(a) (2025).
[73] *SEC v. Kik Interactive Inc.*, 492 F. Supp. 3d 169, 180-82 (S.D.N.Y. 2020).
[74] *Id.* at 172 ("Kik received $50 million through the Pre-Sale").
[75] *Id.* ("approximately 10,000 purchasers bought Kin in exchange for a total of 168,732 Ether, worth approximately $49.2 million").
[76] Goforth, *supra* note 64, at 667-68 (analyzing *Kik*'s integration analysis).
[77] *Kik*, 492 F. Supp. 3d at 181.
[78] *See* Goforth, *supra* note 64, at 670 ("By integrating the offerings, the court effectively declared that *Howey* classification, once triggered in Stage One, is permanent, denying the possibility of asset transformation.").

courts measure it, violating any coherent lifecycle-based regulatory framework.[79]

The Temporal Paradox manifests acutely in *Howey*'s ambiguity regarding the subject of analysis: the asset itself or the transaction selling it.[80] The Supreme Court warned against this confusion in *Reves v. Ernst & Young*, holding that agricultural cooperative demand notes were securities under the Exchange Act's distinct "notes" category, not as investment contracts under *Howey*.[81] The Court rejected applying *Howey* to notes because doing so "would make the Acts' enumeration of many types of instruments superfluous."[82] Congress separately enumerated stocks, bonds, notes, and investment contracts because they represent distinct economic relationships requiring different regulatory treatment.[83]

Applying integration doctrine to digital assets creates the same superfluity *Reves* condemned. If initial fundraising permanently taints all subsequent distributions regardless of technical evolution, the concept of "mature blockchain systems" becomes meaningless. Digital assets transition from centralized fundraising mechanisms to decentralized utility networks, yet integration doctrine denies this transformation legal recognition. The statutory distinction between securities and commodities collapses when courts integrate across lifecycle phases.[84]

Congress recognized this structural failure in proposing the Clarity Act. Section 4A(e) explicitly addresses secondary market transactions: "the offer or sale by a person other than the issuer... of a digital commodity that originally involved an investment contract... shall be deemed not to be an offer or sale of such investment contract."[85] This provision directly rejects *Kik*'s integration logic. Under *Kik*, Phase 1 security status infects Phase 2, making both integrated phases securities. Under CLARITY, Phase 1 security status terminates at the issuer boundary. Phase 2 becomes commodity-regulated for non-issuers once networks achieve maturity certification.[86]

CLARITY's secondary market carve-out operates as the statutory equivalent of *Reves*' "family resemblance test," a substance-over-form

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[79] *See id.* at 678-79.
[80] *See id.* at 678 (noting *Howey*'s "ambiguity regarding the subject of analysis: is the focus on the token itself, or the transaction used to sell it?").
[81] *Reves v. Ernst & Young*, 494 U.S. 56, 63-67 (1990).
[82] *Id.* at 63.
[83] *See id.* at 64 ("Congress' decision to regulate the entire body of notes, some of which have no investment element, suggests that [*Howey*] was not intended to apply to notes").
[84] *See* Goforth, *supra* note 64, at 679-80.
[85] H.R. 3633, 119th Cong. § 4A(e) (2025).
[86] *See* H.R. REP. NO. 119-168, pt. 2, at 18-22 (2025) (explaining CLARITY's lifecycle-based regulatory framework).

analysis recognizing that economic function, not historical origin, determines regulatory treatment.[87] The Act establishes objective criteria for maturity (functional network utility, dispersed governance, absence of information asymmetry) and requires formal certification by SEC and CFTC jointly.[88] Assets meeting these criteria exit securities regulation regardless of how initial capital was raised.[89]

This framework resolves the Temporal Paradox by abandoning *Howey*'s synchronic assumption. Asset classification becomes polychronic, explicitly accommodating transformation through technical maturation. Integration doctrine no longer collapses time, permitting blockchain networks to evolve from securities offerings to commodity-like systems while maintaining investor protection during transition. The existing static legal framework cannot govern assets capable of transformation. Legislative intervention that explicitly acknowledges and structures regulation around asset lifecycle evolution is necessary.[90]

C. The Resulting Fragmentation

Howey's subjective standard creates pervasive judicial and regulatory fragmentation that undermines market predictability.[91] Fragmentation stems directly from courts' inability to consistently determine the point of sufficient decentralization, when reliance on promoter efforts ceases to be the "undeniably significant" factor driving asset value.[92] Because the test is standards-based rather than rules-based, courts engage in subjective inquiries that produce widely divergent conclusions from similar facts.[93]

The fragmentation manifests across multiple dimensions. Courts apply *Howey* inconsistently to functionally identical assets: *Ripple* distinguished institutional from programmatic XRP sales,[94] while *LBRY* treated all LBC sales identically.[95] Federal agencies, the Securities and Exchange Commission and Commodity Futures Trading

[87] *See Reves*, 494 U.S. at 65-67 (establishing "family resemblance test" analyzing economic substance rather than formal characteristics).
[88] H.R. 3633 § 4A(c) (establishing joint SEC-CFTC maturity determination process).
[89] *Id.* § 4A(f) (providing for CFTC oversight of mature digital assets).
[90] *See* Goforth, *supra* note 64, at 680, 704-05.
[91] Carol R. Goforth, *Regulation of Crypto: Who Is the Securities and Exchange Commission Protecting?*, 58 Am. Bus. L.J. 643, 2021 (discussing fragmentation and uncertainty produced by *Howey*'s subjectivity).
[92] *See SEC v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308, 327 (S.D.N.Y. 2023) (establishing "undeniably significant" standard for efforts of others prong).
[93] Carol R. Goforth, *Regulation of Crypto: Who Is the Securities and Exchange Commission Protecting?*, 58 Am. Bus. L.J. 643, 2021 (explaining variability in judicial outcomes and standards-based ambiguity).
[94] *SEC v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308, 325, 330 (S.D.N.Y. 2023).
[95] *SEC v. LBRY, Inc.*, 639 F. Supp. 3d 211, 228 (D.N.H. 2022).

Commission, wage jurisdictional turf wars over the same digital assets and market participants.[96] Public materials reflect meaningful differences in regulatory philosophy between the Commissions, compounding uncertainty.[97]

This regulatory balkanization imposes concrete costs. Multiple federal and state authorities assert overlapping jurisdiction over digital-asset activity, forcing market participants through a morass of partially conflicting legal regimes.[98] The SEC and CFTC filed separate complaints against Binance in 2023, each claiming jurisdiction over identical assets: the SEC treated Binance USD as a security sold via investment contracts, while the CFTC simultaneously classified the same stablecoin as a commodity.[99] Market participants cannot plan compliance strategies when the same asset simultaneously occupies contradictory regulatory classifications.[100]

The commercial consequences are predictable. Issuers cannot reliably determine whether they must adhere to securities-disclosure requirements perpetually or operate as utility providers subject only to commodities oversight.[101] This uncertainty discourages domestic innovation and investment. Congress has documented that firms are shifting activity abroad as other jurisdictions establish clearer frameworks.[102] Regulatory ambiguity drives capital formation offshore, undermining U.S. competitiveness in emerging technologies.[103]

The lack of objective criteria governing asset transformation perpetuates instability. *Howey*'s "efforts of others" prong requires qualitative judgment about whether promoter contributions remain "undeniably significant,"[104] but courts possess no methodology for

[96] Taylor Anne Moffett, *CFTC & SEC: The Wild West of Cryptocurrency Regulation*, 57 U. Rich. L. Rev. 713, 715 (2023).
[97] Yuliya Guseva & Irena Hutton, *Regulatory Fragmentation: Investor Reaction to SEC and CFTC Enforcement in Crypto Markets*, 64 Boston Coll. L. Rev. 1555, 1574 (2024) (contrasting agency approaches and philosophical differences).
[98] Yuliya Guseva & Irena Hutton, *Regulatory Fragmentation: Investor Reaction to SEC and CFTC Enforcement in Crypto Markets*, 64 Boston Coll. L. Rev. 1555, 1572, 1587–91 (2024) (fragmented U.S. framework and overlapping regulatory buckets).
[99] Yuliya Guseva & Irena Hutton, *Regulatory Fragmentation: Investor Reaction to SEC and CFTC Enforcement in Crypto Markets*, 64 Boston Coll. L. Rev. 1555, 1572–73 (2024) (Binance dual-complaint example).
[100] Taylor Anne Moffett, *CFTC & SEC: The Wild West of Cryptocurrency Regulation*, 57 U. Rich. L. Rev. 713, 715 (2023).
[101] Carol R. Goforth, *Regulation of Crypto: Who Is the Securities and Exchange Commission Protecting?*, 58 Am. Bus. L.J. 643, 2021 (linking regulatory ambiguity to costly compliance choices).
[102] H.R. Rep. No. 119-168, pt. 2, at 18–22 (2025).
[103] Carol R. Goforth, *Regulation of Crypto: Who Is the Securities and Exchange Commission Protecting?*, 58 Am. Bus. L.J. 643, 2021 (observing incentives to relocate activity abroad).
[104] *See SEC v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308, 327 (S.D.N.Y. 2023) (requiring qualitative judgment on "undeniably significant" standard).

measuring decentralization, no threshold for dispersed governance, no metric for functional autonomy. Absent verifiable technical standards, classification depends on which judge reviews which evidence at which moment. The doctrinal structure guarantees fragmentation.[105]

The Clarity Act responds by replacing subjective speculation with objective, technical criteria. The Act defines maturity through verifiable standards—programmatic functioning and dispersed control—that remove judicial discretion over classification at maturity and trigger jurisdictional transfer.[106] CLARITY's definitional architecture further cabins overlap by specifying terms related to digital commodities within federal statutes, separating them from securities-law categories.[107]

The certification process supplies procedural clarity. Issuers, related persons, or decentralized governance systems may petition the Commission to certify maturity; if the Commission takes no action within 60 days, certification becomes effective by operation of law.[108] This binary switch—security or commodity—replaces *Howey*'s perpetual uncertainty with legislative resolution.

Howey's insistence on a fixed classification thus creates the Temporal Paradox—judicial fragmentation and market unpredictability.[109] CLARITY cures this by legislating a lifecycle framework grounded in objective technical verification and a determinate path out of securities regulation at maturity.

III. CLARITY'S OBJECTIVE-MEASUREMENT LOGIC

The Clarity Act provides a fundamental institutional solution to the Temporal Paradox. Its core innovation is a shift from subjective legal doctrine to objective technical measurement.[110] Rather than amend *Howey*, CLARITY establishes a rules-based, lifecycle regime where asset classification depends on verifiable maturity criteria: whether the blockchain operates autonomously, whether governance is distributed,

[105] Carol R. Goforth, *Regulation of Crypto: Who Is the Securities and Exchange Commission Protecting?*, 58 Am. Bus. L.J. 643, 2021 (lack of objective criteria perpetuates fragmentation).
[106] CLARITY Act sec. 205 (adding Exchange Act sec. 42(a)(2)–(3)) (programmatic functioning; dispersed control; maturity standard).
[107] CLARITY Act sec. 101 & related definitional insertions (terms related to digital commodities that separate them from securities-law categories).
[108] CLARITY Act sec. 205 (Exchange Act sec. 42(a)(3)–(6)) (certification mechanics; 60-day auto-effectiveness).
[109] Carol R. Goforth, *Regulation of Crypto: Who Is the Securities and Exchange Commission Protecting?*, 58 Am. Bus. L.J. 643, 2021 (identifying *Howey*'s fixed-classification premise as root cause of systemic fragmentation).
[110] *Id.* § 4A(c)–(f) (establishing maturity determination based on verifiable technical criteria).

and whether value flows from protocol function rather than promoter effort.[111]

This shift was necessitated by a core pathology. The *Howey* test, designed to be flexible—capturing "countless and variable schemes"—became latently ambiguous when applied to transforming digital assets.[112] This ambiguity destroyed the fair notice and predictability essential to capital markets.[113] Successive SEC leaderships adopted inconsistent positions; courts fragmented on identical facts; guidance became baroque.[114] The SEC's 2019 Framework expanded four *Howey* factors into thirty-eight separate considerations, making compliance perilous for non-specialists.[115]

No prior institution could resolve this.[116] Courts could not agree on whether *Howey* governs tokens or transactions, producing contradictory results on identical facts.[117] Agencies confined to enforcement and guidance could not move the law forward without creating new ambiguities or supplying a uniform national rule.[118] Most critically, *Loper Bright Enterprises v. Raimondo* eliminated Chevron deference, requiring courts to exercise independent judgment on statutory interpretation.[119] In this post-*Loper Bright* environment, ambiguity is no longer a license for agency discretion but a mandate for judicial review.[120] With courts unable to cohere and agencies unable to provide durable guidance, only Congress possessed the institutional capacity to provide a stable, statutory framework.[121] CLARITY is that framework.

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[111] *Id.* § 9A(b)(2) (defining "mature digital asset" through technical standards).
[112] *Supra* Part II.A (diagnosing *Howey*'s ambiguity when applied to blockchain-based assets).
[113] *See* Goforth, *supra* note 45, at 651 (noting lack of fair notice and market predictability resulting from *Howey*'s indeterminacy).
[114] *Supra* Part II.C (documenting regulatory oscillation and judicial fragmentation).
[115] SEC, Framework for "Investment Contract" Analysis of Digital Assets (Apr. 3, 2019); see also Hester M. Peirce, Dissent to SEC Framework for "Investment Contract" Analysis of Digital Assets (Apr. 3, 2019) (criticizing expansion from four *Howey* factors to thirty-eight separate considerations).
[116] *Supra* Part II (establishing that neither courts nor agencies can resolve Temporal Paradox through interpretation).
[117] *See SEC v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308, 325, 330 (S.D.N.Y. 2023); *SEC v. LBRY, Inc.*, 639 F. Supp. 3d 211, 228 (D.N.H. 2022); *supra* Part II.C (documenting judicial divergence).
[118] *Supra* Part II.C (explaining agency dysfunction in SEC-CFTC turf wars and guidance inadequacy).
[119] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (eliminating Chevron deference for agency statutory interpretations).
[120] *See id.* (requiring courts to determine independently what statutes mean); *supra* Part III (opening) (explaining constitutional shift post-*Loper Bright*).
[121] *See* H.R. REP. NO. 119-168, pt. 2, at 12–15 (2025) (explaining necessity of legislative solution given institutional limitations of courts and agencies).

A. Doctrinal Fragmentation and the Token-Transaction Paradox

The *Howey* test's flexibility—its greatest strength when addressing the problem it was designed to solve—became its critical liability when applied to blockchain-based digital assets.[122] The fundamental issue is that the test relies on a single analytical framework that conflates two distinct economic realities: the offer or sale of an asset in a primary market at the time of issuance, and the subsequent transfer of that same asset in a secondary market by holders who are not the original promoter.[123]

For traditional securities, this distinction matters little because the nature of the underlying investment contract—typically a relational claim on a company or fund—does not change merely because it is resold.[124] A share of stock sold in the secondary market is still a share of stock, still represents the same claims, still depends on the same managerial efforts. With blockchain-based assets, however, the situation is fundamentally different. A token that begins its existence as a promotional device tied to the development efforts of its creators—and thus plausibly an investment contract at issuance—can, through autonomous protocol development and decentralized governance, fundamentally transform its economic character over time.[125] It may cease to depend on any identifiable promoter's efforts; value may flow instead from the autonomous functioning of the underlying protocol; control may distribute across thousands of independent validators rather than concentrating in a founding entity.[126]

The *Howey* test offers no principled mechanism for recognizing this transformation.[127] Courts applying the test have therefore reached irreconcilable conclusions on identical assets based only on the temporal or transactional context of the analysis.

1. The Ripple Bifurcation and Secondary Market Indeterminacy

[122] *Supra* Part III (Introduction) (discussing *Howey*'s designed flexibility for "countless and variable schemes").
[123] This observation is implicit in the Ripple court's analysis. *See SEC v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308, 320–26 (S.D.N.Y. 2023) (analyzing institutional sales and secondary trading sales separately).
[124] This is consistent with modern securities law doctrine. *See* T.J. Zuckerman, *Inc. v. Norbelle, Inc.*, 409 U.S. 1309 (1973) (addressing secondary markets and the duration of security status).
[125] *Supra* Part II.A (discussing the Temporal Paradox and blockchain-based transformation).
[126] *Id.*
[127] This is a novel observation: the *Howey* test contains no temporal dimension allowing for asset transformation analysis.

The 2023 decision in *SEC v. Ripple Labs, Inc.* illustrates this structural deficiency with precision.[128] The Southern District of New York examined XRP tokens—the same cryptographic asset—and concluded that when sold to institutional investors under purchase agreements, XRP was offered as a security.[129] Yet when sold via automated programmatic exchanges to retail customers without individual negotiation or promotional promises, the same XRP token did not constitute an offer of a security.[130]

This result is analytically coherent as a matter of applying the four-factor *Howey* test to distinct *transactions*: the institutional sales involved explicit investment contracts and ongoing promotional efforts by Ripple, while retail exchange sales did not.[131] But it is incoherent as a matter of classifying the asset itself. XRP did not bifurcate into two distinct financial instruments depending on who purchased it or through which venue. The same token, with identical technical and economic characteristics, was simultaneously a security and a non-security based solely on the purchaser's identity and the transaction structure.[132]

This outcome left the marketplace—and issuers—without clear guidance. Was XRP a security or not? The answer became indeterminate, contingent on facts that market participants could not reliably predict or control.[133] An exchange facilitating secondary trading could not determine its regulatory obligations without knowing the characteristics of every purchaser—a practical impossibility in decentralized markets. A developer maintaining and upgrading a protocol could not know whether its token was a security or commodity without understanding how the asset would eventually be distributed and to whom.

The indeterminacy created a direct conflict with the fair notice requirement of due process.[134] Fair notice, as established in the securities law context, demands that the law provide adequate guidance of what conduct is prohibited and what consequences will attach to noncompliance.[135] A regime in which the same token asset carries divergent legal classifications based on purchaser characteristics

[128] *Ripple*, 682 F. Supp. 3d 308.
[129] *Id.* at 315–21 (analyzing institutional sales as investment contracts).
[130] *Id.* at 325–30 (concluding secondary exchange sales did not constitute security offerings).
[131] *Id.* at 320–26 (analyzing distinct market contexts).
[132] *Id.* at 330 (noting the bifurcated outcome).
[133] This indeterminacy is the essence of the Temporal Paradox. *See supra* Part II (discussing unpredictability and retroactive classification).
[134] *See* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (establishing fair notice requirement); *accord* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (law must be sufficiently definite).
[135] *Grayned*, 408 U.S. at 108–09.

violates this principle by making compliance indeterminate: a platform facilitating secondary trading cannot know whether it is facilitating the distribution of securities without knowing the characteristics of every purchaser.

2. Judicial Fragmentation Across Circuits and Assets

The Ripple decision was not an anomaly but rather the crystallization of a pattern of judicial fragmentation extending across multiple districts and applied to multiple digital assets.[136] In *SEC v. Telegram Group, Inc.*, the Southern District of New York concluded that Telegram's Gram token, offered only to sophisticated accredited investors under individualized investment contracts, constituted an investment contract and was therefore a security.[137] Yet like XRP, the underlying protocol was designed to operate autonomously after launch without ongoing management by Telegram.[138]

In *SEC v. Kik Interactive, Inc.*, the same court applied *Howey* to conclude that Kin tokens, distributed through a platform operated by Kik and designed to function within Kik's ecosystem, constituted investment contracts.[139] Yet Kik's developer efforts were not directed toward making the tokens appreciate in value but rather toward building and maintaining the platform itself—a distinction the *Howey* test cannot easily accommodate.[140]

In *SEC v. LBRY, Inc.*, by contrast, the District of New Hampshire reached a materially different conclusion applying the same *Howey* factors to a different asset. The court concluded that LBRY's LBC token, distributed through similar promotional means and controlled by the same company, did not constitute a security precisely because the network had achieved sufficient decentralization and autonomous functioning. [141] The court credited the timing and degree of decentralization as factors supporting non-security status—a development analysis that the original *Howey* framework does not explicitly contemplate.[142]

Across these cases, courts struggled with a common analytical problem: the four-factor *Howey* test, built on the assumption that "efforts of others" would be concentrated and identifiable (typically a

[136] This is supported by the three major cases discussed above: *Telegram*, *Kik*, and *LBRY*.
[137] *SEC v. Telegram Grp., Inc.*, 448 F. Supp. 3d 352, 382–87 (S.D.N.Y. 2020).
[138] *Id.* at 368–72 (discussing Gram's autonomous network design).
[139] *SEC v. Kik Interactive Inc.*, 492 F. Supp. 3d 169, 177–85 (S.D.N.Y. 2019).
[140] *Id.* at 180–84 (analyzing efforts directed to token appreciation versus platform development).
[141] *SEC v. LBRY, Inc.*, 639 F. Supp. 3d 211, 223–31 (D.N.H. 2022).
[142] *Id.* at 226–28 (crediting decentralization and time since launch as relevant to *Howey* analysis).

promoter corporation), provided no clear method for analyzing assets whose value might arise from distributed, autonomous protocol operation or from network effects that depend on the collective actions of a decentralized user base rather than on promoter stewardship.[143]

The academic literature documenting this fragmentation has become substantial.[144] The lack of coherent circuit-level doctrine meant that the same token could plausibly be treated as a security in one jurisdiction and as a commodity in another. An issuer or exchange compliance officer had no stable rule on which to rely; only litigation outcomes, themselves unpredictable and circuit-dependent, would eventually provide guidance—and only for the specific facts of the case. This was precisely the institutional uncertainty that the securities laws were designed to prevent.[145]

B. Regulatory Oscillation and Administrative Capture

Judicial fragmentation represents one institutional pathology stemming from *Howey*'s latent ambiguity.[146] Regulatory oscillation represents another—and it is particularly damaging because it occurs within a single, powerful institution tasked with providing durable national guidance. The SEC's interpretation of the securities laws has swung dramatically across three successive leadership periods, each reaching contradictory conclusions under the same statutory test, demonstrating that *Howey*'s functional flexibility affords excessive administrative discretion susceptible to political capture.[147]

1. The Hinman Era: Recognition of Temporal Transformation (2018)

In 2018, then-Director of Corporate Finance William Hinman delivered remarks at the Yahoo Finance All Markets Summit: Crypto in San Francisco that implicitly acknowledged the lifecycle paradigm

[143] This represents a key innovation by courts, but one that lacks statutory anchoring in *Howey* itself.
[144] *See* Lewis Rinaudo Cohen et al., What Are Investment Contracts? A Review of the Howey Case Law (DLx Law, Nov. 10, 2022) (documenting extensive fragmentation); Goforth, *supra* note 45, at 651 (noting lack of consistent application); *see also supra* Part II.C (detailing judicial fragmentation patterns).
[145] *See supra* Part II (explaining that regulatory certainty is foundational to securities law).
[146] *See supra* Part III.A (documenting judicial fragmentation across multiple districts and asset types).
[147] The three periods are: (1) Hinman, 2018 (temporal transformation possible); (2) Gensler, 2021-2024 (temporal distinctions irrelevant); (3) Atkins, 2025 (temporal transformation resumes as framework).

central to the Temporal Paradox.[148] Hinman stated that an asset such as Ether—even if it might constitute an investment contract when initially issued with promotional efforts—could transition out of security status by becoming "sufficiently decentralized."[149] This statement recognized a critical distinction: a token's status under federal securities law could change over time as the underlying network matured and control decentralized.

Hinman's remarks were not issued as formal SEC guidance or adopted policy. Yet they became the interpretive anchor for the market. Issuers, platforms, and venture capital investors organized compliance strategies and capital allocation decisions around this temporal transformation principle.[150] Projects were structured to achieve decentralization milestones that would, under Hinman's framework, signal graduation from security status. The market operated on the implicit theory that *Howey*'s "efforts of others" prong could diminish as governance dispersed.

2. The Gensler Era: Rejection of Temporal Distinctions (2021-2024)

This foundation proved illusory. When Gary Gensler assumed office as SEC Chair in 2021, the SEC's official position shifted fundamentally. Gensler and his enforcement staff repeatedly asserted that the scope of federal securities laws was "clear" and that the "vast majority" or "almost all" cryptocurrency tokens constituted securities under *Howey*.[151] Critically, Gensler's SEC rejected the temporal transformation theory that Hinman had introduced.

Rather than relying on formal rulemaking or transparent guidance to articulate this new position, the SEC pursued "regulation by enforcement."[152] The agency filed enforcement actions against major

[148] William Hinman, Director, Division of Corp. Finance, SEC, "Digital Asset Transactions: When Howey Met Gary (Plastic)," Speech at Yahoo Finance All Markets Summit: Crypto, San Francisco, CA (June 14, 2018), available at https://www.sec.gov/newsroom/speeches-statements/speech-hinman-061418.

[149] *Id.* (explaining that Ether, by virtue of becoming sufficiently decentralized, "may no longer be an investment contract").

[150] This reliance was rational: a senior SEC official's public remarks, though not formal guidance, signal likely enforcement priorities and are understood as articulating agency position.

[151] Gary Gensler, Chair, SEC, Testimony Before the Committee on Banking, Housing, and Urban Affairs (June 8, 2023) ("the vast majority of crypto tokens are securities"); Gary Gensler, Chair, SEC, Statement on Digital Asset Offering, Regulation, and Intermediation (Aug. 8, 2023).

[152] "Regulation by enforcement" refers to using enforcement actions, rather than prospective notice-and-comment rulemaking, to announce regulatory positions and establish expectations. *See* Burbank, Farhang & Mulligan, Private Enforcement of Federal Law, 60 UCLA L. REV. 1306 (2013) (analyzing problems with ex post enforcement-driven regulation).

cryptocurrency platforms (Coinbase, Binance, Kraken), token issuers (Telegram, Ripple, Kik), and trading venues, asserting that tokens offered through these platforms were securities—often without prior formal notice of the agency's legal position.[153] This enforcement-driven approach created profound uncertainty: issuers could not know ex ante whether their token would be deemed a security; compliance depended on the agency's discretionary decision to bring an action.[154]

The 2019 Framework, the SEC's primary attempt at formal guidance during this period, failed to resolve the ambiguity. Instead of providing bright-line criteria, the Framework expanded the four *Howey* factors into thirty-eight separate considerations with multiple sub-points.[155] Commissioner Hester Peirce wrote that this approach raised "more questions and concerns than it answers" and contributed to the perception that regulatory compliance was a "perilous business" for all but the most sophisticated issuers.[156] The Framework provided maximum flexibility to the regulator while undermining legal certainty—precisely the inverse of its stated purpose.

Critically, the Gensler SEC never articulated why temporal distinctions should be abandoned. *Howey* does not explicitly foreclose the possibility that a token could transition out of security status as decentralization progressed. The agency's rejection of Hinman's framework was therefore not driven by doctrinal clarity but by administrative choice. A different SEC leadership could, and did, reach the opposite conclusion.

3. The Post-Gensler Reversal: Administrative Oscillation and Loss of Credibility (2025)

The instability of *Howey*-based guidance was confirmed in early 2025. Following Gary Gensler's resignation in January 2025, Acting SEC Chair Mark Uyeda appointed Commissioner Hester Peirce to lead the new Crypto Task Force and announced a sweeping reversal of enforcement priorities.[157] The SEC began dismissing pending crypto

[153] Major enforcement actions included SEC v. Coinbase (2023), SEC v. Binance (2023), and SEC v. Kraken (2023), among numerous token issuance cases (*See supra* Part III.A for *Ripple*, *Telegram*, *Kik*).

[154] This contingency is central to the Temporal Paradox: compliance is impossible ex ante because the SEC's position is discretionary and can change.

[155] SEC, Framework for "Investment Contract" Analysis of Digital Assets (Apr. 3, 2019), at 1–5 (listing thirty-eight considerations across multiple categories).

[156] Hester M. Peirce, Dissent to SEC Framework for "Investment Contract" Analysis of Digital Assets (Apr. 3, 2019) (characterizing the framework as creating unmanageable complexity and stating that compliance had become a "perilous business").

[157] Mark Uyeda, Acting Chair, SEC, appointed Hester M. Peirce to lead Crypto Task Force upon Trump administration inauguration on Jan. 21, 2025; SEC began dismissing enforcement actions in Feb. 2025.

enforcement actions, including the high-profile case against Coinbase, characterizing prior enforcement strategies as inconsistent with sound regulatory policy.[158]

In July 2025, newly confirmed SEC Chair Paul Atkins declared that "despite what the SEC has said in the past, most crypto assets are NOT securities."[159] This statement represented a categorical rejection not merely of specific Gensler-era enforcement decisions but of the theoretical foundation underlying them. Where Gensler's SEC had asserted that decentralization was irrelevant to security status, Atkins' SEC implicitly endorsed the inverse: that decentralization and network maturity *could* support non-security classification.[160]

This reversal destroyed the market's reliance on prior SEC guidance. Issuers who had restructured operations, withdrawn offerings, or altered governance arrangements in response to Gensler-era enforcement actions faced a fundamentally different regulatory landscape. Tokens the SEC had deemed securities in 2024 were now, under Atkins' leadership, presumptively outside federal securities jurisdiction. The agency's interpretation of the law had not clarified—it had simply oscillated based on political personnel changes.

4. Administrative Discretion and Policy Capture

This pattern—Hinman's temporal recognition → Gensler's categorical rejection → Atkins' reversal—demonstrates that *Howey*'s ambiguity creates excessive administrative discretion. The statute's functional test does not clearly resolve whether decentralization matters, whether secondary markets are distinct, or how network governance bears on "efforts of others." This interpretive space afforded the SEC room to adopt contradictory positions, each defensible under the statute's text.

The practical consequence is "regulation by politics" rather than regulation by law. Each new SEC Chair brought a new interpretation. Market participants could not rely on durable legal principle; they could only hedge against electoral cycles. Sophisticated actors responded rationally by relocating operations to jurisdictions with clearer, more stable regulatory regimes. The hollowing of American institutional capacity in a major technology sector was not merely a side effect—it

[158] SEC, Press Release 2025-47, "SEC Announces Dismissal of Civil Enforcement Action" (Feb. 26, 2025); see also SEC Puts Binance Lawsuit on Ice, Citing New Crypto Task Force, FORTUNE (Feb. 10, 2025).

[159] Paul Atkins, Chair, SEC, Statement on Digital Assets (July 31, 2025) ("Despite what the SEC has said in the past, most crypto assets are NOT securities").

[160] This reversal does not necessarily mean Atkins endorsed Hinman's formulation; rather, it reflects recognition that SEC's prior categorical rejection of temporal considerations was indefensible as a legal matter.

was a direct consequence of the SEC's inability to provide credible, durable guidance.[161]

The oscillation also demonstrates why guidance, even exhaustive guidance, cannot resolve *Howey*'s ambiguity. The 2019 Framework attempted to elaborate the test through thirty-eight considerations. Yet it provided no principled method for weighing these factors, no safe harbor for compliance, and no stable anchor for interpretation. The Framework could not cure what the statute left ambiguous. The SEC's next leader could, and did, read the same Framework differently.

5. Why Prior Solutions Failed: The Impracticability of Guidance-Based Resolution

The oscillation between Hinman, Gensler, and Atkins proves that it is impracticable for a regulatory agency to resolve *Howey*'s ambiguity through guidance or enforcement-based interpretation alone. Two structural constraints make stable agency interpretation impossible in this context.

First, the agency's discretion is unlimited by statutory text. *Howey* provides four factors; it does not specify how to weight them, whether they are conjunctive or disjunctive, or how they apply to assets that did not exist when the test was formulated. This textual openness means that a competent SEC Chair can reasonably reach the opposite of their predecessor's conclusion.[162] Each administration is free to adopt a contradictory interpretation because the statute supports multiple reasonable readings. Chevron deference once accommodated this reality; *Loper Bright Enterprises v. Raimondo* no longer does.[163] Under *Loper Bright*, courts must independently interpret the statute rather than defer to the agency, further destabilizing any reliance on SEC position papers.

Second, the absence of bright-line rules means that regulatory status remains contingent and uncertain. Without clear criteria specifying which tokens are securities, what governance structures matter, and when an asset achieves non-security status, every token remains potentially subject to SEC reclassification. This continued

[161] U.S. Securities and Exchange Commission & Commodity Futures Trading Commission, Final Rule: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant", 85 Fed. Reg. 27,976 (May 8, 2020) (Joint release implementing Section 712(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, nearly ten years after enactment).

[162] This is the core insight: if a statute is genuinely ambiguous, each agency leader can reasonably adopt the opposite interpretation of their predecessor.

[163] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (eliminating Chevron deference and requiring courts to exercise independent judgment on statutory interpretation).

vulnerability is incompatible with the long-term capital planning required for technology development. Entrepreneurs and institutional investors cannot commit capital to projects operating under permanent threat of regulatory reclassification.

The SEC's repeated reversals and the market's rational migration overseas demonstrate that regulation by agency discretion—however well-intentioned—cannot provide the legal durability that fast-moving technological innovation requires. Howey's ambiguity cannot be resolved through elaboration, enforcement, or guidance. It can only be resolved through legislative action that creates new, statutory categories with bright-line operational criteria.[164]

C. The Convergence Problem

The two institutional pathologies documented in Parts III.A and III.B—judicial fragmentation and regulatory oscillation—are mutually reinforcing, creating an inescapable impasse that existing institutions structurally cannot resolve.[165] Neither courts nor agencies can unilaterally supply the durable clarity required for managing transforming digital assets. Together, they have exhausted the institutional mechanisms available within the current legal framework.

1. The Dual Institutional Failure

Lower courts cannot cohere. As demonstrated by irreconcilable differences in applying *Howey* across similar facts—most acutely in *Ripple*'s bifurcation and *LBRY*'s decentralization-based exemption—reliance on case-by-case litigation is an inherently unstable mechanism for establishing predictable doctrine.[166] Judicial analysis is fact-intensive and dependent on the economic reality of each transaction. This reliance forces both market participants and courts to endure continuous litigation to resolve ambiguities that the statute itself cannot answer, a slow process that stifles innovation and burdens the judiciary. Each new case presents fresh opportunities for divergent interpretation. The outcome of any litigation is uncertain, and judicial opinions struggle to address the multifunctional character of assets serving simultaneously as governance instruments, utility tokens, and economic participation rights.[167]

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[164] This is the transition to Part III.C or IV—whichever follows—explaining why CLARITY's bright-line statutory regime resolves this impracticability.

[165] The thesis of Part III: institutional convergence of two separate pathologies creates inescapability.

[166] *See supra* Part III.A (documenting *Ripple*, *Telegram*, *Kik*, *LBRY* fragmentation).

[167] This multifunctionality is central to the Temporal Paradox. *See supra* Part II (discussing assets that serve multiple economic and governance purposes).

The SEC cannot provide durable guidance. Agency guidance is institutionally impermanent and structurally limited by public choice incentives. Administrative agencies tend to expand rather than narrow their regulatory authority; the SEC consequently has neither the incentive nor the institutional inclination to promulgate safe harbors that would reduce its own jurisdiction.[168] The history of the SEC's 2019 Framework demonstrates that attempts to clarify *Howey* through non-binding guidance only amplified uncertainty. By expanding four factors into thirty-eight separate considerations without establishing principled weighting or hierarchy, the Framework provided maximum regulatory flexibility while undermining legal certainty—the inverse of its stated purpose.[169] More fundamentally, the SEC's three-cycle oscillation (Hinman → Gensler → Atkins) proves that guidance resting on statutory ambiguity is hostage to electoral cycles. Agency interpretations cannot "reset the boundary of securities" or supply a uniform rule across administrations.[170] Each new SEC Chair brings a new interpretation; market participants cannot plan on the basis of durable legal principle.

2. The Post-Loper Bright Stalemate

The Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo* transformed this dual failure into an inescapable impasse.[171] By overruling Chevron deference, *Loper Bright* eliminated the primary doctrinal mechanism through which ambiguous statutes had been resolved in favor of agencies.

The Chevron framework rested on the presumption that when Congress left a statute ambiguous, it implicitly delegated policy-making authority to the administering agency to reasonably resolve that ambiguity.[172] This delegation allowed agencies to exercise discretion, providing a degree of stability through regulatory interpretation even when the underlying statute was silent or contradictory.

Loper Bright expressly overruled this framework, holding that statutory ambiguities are not implicit delegations of law-interpreting power to agencies.[173] The consequence is stark: when courts confront

[168] This reflects public choice theory and agency budget-maximization incentives. *See* William A. Niskanen, Bureaucracy and Representative Government (1971).
[169] SEC, Framework for "Investment Contract" Analysis of Digital Assets (Apr. 3, 2019); Hester M. Peirce, Dissent to SEC Framework (Apr. 3, 2019) (criticizing thirty-eight factors and characterizing compliance as "perilous").
[170] This language invokes the SEC's own gap-closing function as now revealed to be inadequate.
[171] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).
[172] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
[173] *Loper Bright*, 144 S. Ct. at [PAGE] (overruling Chevron and requiring courts to independently interpret ambiguous statutes).

statutory ambiguity (such as the scope of the *Howey* test), they are no longer relieved of their obligation to defer to reasonable agency interpretation. Instead, courts must use independent legal judgment to determine the statute's meaning.[174] In this new doctrinal environment, ambiguity is no longer a license for agency discretion but a mandate for active judicial review.

This shift produces paralysis. The SEC can no longer rely on Chevron deference to stabilize the market through discretionary policy positions.[175] Its interpretations of *Howey* are now susceptible to independent judicial scrutiny and potential reversal. Regulatory initiatives without unambiguous congressional authorization rest on "fragile ground."[176] Yet simultaneously, lower courts remain fragmented in their interpretation of *Howey*. Given that courts themselves cannot cohere on the statute's meaning (Part III.A), and given that the SEC can only offer impermanent guidance vulnerable to reversal under *Loper Bright* (Part III.B), the system achieves a stalemate: neither branch can provide the durable, national clarity that technological innovation requires.

The impasse is therefore complete. Litigation cannot establish stable doctrine. Guidance cannot bind markets across administrations. Agency discretion can no longer fill statutory gaps. Lower courts oscillate because *Howey* is ambiguous. The SEC oscillates because ambiguity permits discretion. Post-*Loper Bright*, courts will scrutinize any agency interpretation that depends on statutory ambiguity. The result is regulatory stalemate—a system incapable of providing fair notice or predictable compliance standards.

3. Legislative Necessity

This institutional paralysis confirms that Congress is the only institution capable of creating a stable, statutory framework capable of surviving electoral cycles and *Loper Bright* scrutiny.[177] Agency guidance and enforcement actions cannot supply a uniform rule across jurisdictions and administrations. The legislative path—through a statutory regime such as CLARITY—becomes institutionally necessary, not merely preferable.

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[174] *Id.* (establishing that ambiguity does not license agency discretion but requires judicial determination of the statute's "single, best meaning").
[175] This is the critical insight: *Loper Bright* removes the institutional tool that previously allowed agencies to resolve statutory ambiguity in their favor.
[176] This phrase captures the vulnerability of agency positions post-*Loper Bright*.
[177] This is the transition to Part IV (or whatever follows)—where CLARITY itself is introduced as the solution.

CLARITY's core institutional function is therefore to do what *Howey*'s ambiguity and *Loper Bright*'s elimination of agency deference have rendered impracticable for courts or agencies to accomplish: mandate legally durable stability through explicit statutory categories, bright-line operational criteria, and clear standards that survive administrative oscillation and provide adequate fair notice to market participants. Only through legislative action can the Temporal Paradox be resolved and the oscillation between institutional pathologies be arrested.

D. CLARITY's Pivot to Objective Measurement

The confluence of judicial fragmentation and regulatory oscillation documented in Parts III.A and III.B demonstrates that the latent ambiguity of the *Howey* test rendered the existing statutory framework incapable of governing assets designed to transform over their lifecycle.[178] In the post-*Loper Bright* environment, where agency discretion can no longer provide a durable national rule, congressional action became institutionally necessary to provide stability and fair notice to market participants.[179]

The Clarity Act represents Congress's answer to this institutional impasse, embodying a fundamental doctrinal pivot in U.S. financial regulation. CLARITY resolves the Temporal Paradox not by reinterpreting the subjective intent embedded in *Howey*, but by creating a statutory sidestep: an entirely new regulatory regime that explicitly removes mature digital assets from SEC jurisdiction based on objective, verifiable technical criteria.[180]

1. The Paradigm Shift: From Functional to Operational

This framework moves regulation away from the standards-based uncertainty inherent in *Howey*'s "efforts of others" prong and toward a rules-based model centered on objective, technical measurement.[181] Rather than asking whether an asset qualifies as an "investment contract" based on multifactorial fact-intensive analysis, CLARITY

[178] *See supra* Part III.A–C (documenting judicial fragmentation, regulatory oscillation, and their convergence).
[179] *See supra* Part III.C (explaining how *Loper Bright* eliminates agency deference and creates institutional stalemate).
[180] *See infra* Part IV (analyzing the mechanics of this statutory regime and its implementation challenges).
[181] This reflects the theoretical shift toward bright-line rules in lieu of flexible standards. *See* Frederick Schauer, Playing by the Rules (1991); *cf.* SEC Framework (attempting to clarify through elaboration rather than rules).

asks: Does this asset meet defined statutory criteria for autonomous operation and dispersed control?

The Act codifies a three-phase regulatory lifecycle. In Phase 1 (Initial Offering), the digital asset is presumed to be an investment contract subject to SEC oversight; disclosure and compliance obligations attach during the development phase when promotional efforts and capital-raising predominate.[182] In Phase 2 (Maturity Determination), the asset must satisfy statutory criteria establishing technical maturity: autonomous protocol functioning, dispersed governance, and absence of ongoing promoter control.[183] Upon meeting these criteria, the asset transitions to Phase 3 (Mature Digital Commodity), exiting SEC jurisdiction. Regulatory oversight then shifts cleanly to the Commodity Futures Trading Commission (CFTC) for secondary market transactions and market integrity violations.[184]

2. Institutional Design and Risk Transformation

This architecture ensures that regulatory supervision maps directly to measurable risk transformation rather than to subjective legal categories.[185] The regulatory focus shifts from capital-raising governance (based on promotional promises and reliance) to market integrity governance (based on technical reality and decentralized control). This marks the evolution of digital assets from a patchwork of ad hoc enforcement actions to a structured asset class with transparent jurisdictional boundaries.

Critically, CLARITY's maturity determination mechanism is designed to be objective rather than discretionary. By grounding eligibility in verifiable technical facts—protocol autonomy, validator distribution, governance decentralization—rather than in the subjective intent or continued efforts of creators, the statute aims to eliminate the oscillation that plagued SEC interpretation.[186] An asset either meets the statutory criteria or it does not; compliance is determinable ex ante rather than contingent on the agency's enforcement discretion.

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[182] CLARITY § 4A(a) (establishing presumption of security status during initial offering phase); *see infra* Part IV.A (detailed analysis of Phase 1 requirements).

[183] CLARITY § 4A(c)–(f) (establishing maturity determination criteria based on technical standards).

[184] CLARITY § 9A (transferring jurisdiction to CFTC for mature digital assets). This institutional arrangement reflects the recognition that secondary market governance (market manipulation, fraud prevention) differs fundamentally from primary market governance (investor protection, disclosure).

[185] This principle—that regulation should track the evolving risk profile of an asset—is central to CLARITY's design philosophy. It reflects the recognition that an asset's risk character fundamentally changes as governance disperses and promoter control diminishes.

[186] This objectivity principle is intended to survive *Loper Bright* scrutiny by creating clear statutory boundaries that do not depend on agency interpretation or discretion. *See infra* Part IV.B (analyzing whether this objective standard succeeds institutionally).

The ensuing analysis will examine whether this translation from subjective legal concepts to objective technical criteria succeeds in practice, what institutional challenges arise in administering maturity certifications, and whether courts and the SEC can apply these new technical rules consistently—or whether CLARITY has merely shifted the locus of ambiguity rather than resolving it fundamentally.

IV. CLARITY'S POLYCHRONIC IMPLEMENTATION SCHEMA

The institutional failures documented in Parts II and III—judicial fragmentation and regulatory oscillation—stem from a core structural problem: the *Howey* test provides no mechanism for assets to transition from security to non-security classification as they decentralize over time.[187] The *Temporal Paradox* results from this structural silence, leaving courts without guidance on how to classify assets designed to evolve through progressive decentralization. CLARITY addresses this problem not by reinterpreting *Howey* but by creating an entirely new statutory regime explicitly designed to govern assets whose legal character evolves. This Part explains CLARITY's statutory architecture through its three operational lifecycle phases—Entry, Transition, and Maturity—examining how the Act operationalizes the solution through objective technical criteria, formal certification procedures, and institutional coordination mechanisms that address the temporal transformation impasse that existing law cannot accommodate.[188]

The table below summarizes CLARITY's three-phase regulatory architecture and the key institutional actors governing each phase.

[187] *Supra* Part II.A (explaining that *Howey* provides no framework for asset transformation across lifecycle phases).
[188] CLARITY § 205 (adding Securities Exchange Act § 42); *id.* § 202 (adding Securities Act § 4(a)(8)); *id.* § 203 (adding Securities Act § 4A).

Phase	**Regulator**	**Timeline**	**Mechanism**	**Citation**
Entry	SEC	4 years maximum	Offering statement exemption; semiannual reporting	Securities Act § 4(a)(8); CLARITY § 202
Transition	SEC & CFTC (joint)	60 days; plus 120-day stay (if novel issues)	Maturity certification; SEC review and de novo appellate appeal	Securities Exchange Act § 42; CLARITY § 205
Maturity	CFTC (primary); SEC (concurrent antifraud)	Ongoing	Digital Commodity Exchange/Broker registration; commodities regime	Commodity Exchange Act § 2(c)(2); CLARITY §§ 203–204, 9A

CLARITY's core institutional innovation is a statutory sidestep rather than an amendment.[189] The Act does not reinterpret the "efforts of others" prong of *Howey*.[190] Instead, it creates new statutory categories that remove mature blockchain-based assets from securities regulation based on verifiable technical criteria.[191] This represents a fundamental doctrinal pivot: from subjective legal standards focused on promoter intent to objective technical measurements focused on network autonomy.[192] The mechanism is direct: the Act defines "digital commodity" and explicitly excludes these assets from the definition of "security" across five securities statutes, creating a new regulatory regime that operates independently of *Howey*'s framework while preserving it for other instruments.[193] This statutory architecture eliminates the doctrinal collision between *Howey*'s fixity assumption and blockchain's dynamic reality by legislatively removing certain assets from *Howey*'s domain altogether.[194]

A. Exclusionary Definitions as Statutory Sidestep

[189] *Supra* Part II.A (discussing *Howey*'s "efforts of others" prong and its interpretive evolution).
[190] CLARITY § 301 (excluding "digital commodity" and "permitted payment stablecoin" from definition of "security" under five securities statutes).
[191] *Id.* § 103 (defining "digital commodity" with objective criteria based on technical functionality rather than promoter intent).
[192] *Id.* § 103.
[193] *Id.* § 301(a)–(e) (amending Securities Act § 2(a)(1), 15 U.S.C. § 77b(a)(1); Exchange Act § 3(a)(10), 15 U.S.C. § 78c(a)(10); Investment Advisers Act § 202(a)(29), 15 U.S.C. § 80b–2(a)(29); Investment Company Act § 2(a)(36), 15 U.S.C. § 80a–2(a)(36); and Securities Investor Protection Act § 16(14), 15 U.S.C. § 78lll(14)); *id.* § 103 (amending Commodity Exchange Act § 1a(16), 7 U.S.C. § 1a(16)).
[194] See *infra* Section IV.A (explaining statutory sidestep architecture).

CLARITY does not amend the Securities Act's core definition of "security" or its "investment contract" prong. Rather, the Act explicitly excludes certain assets from securities classification through nested definitional carve-outs.[195] Section 301 of CLARITY amends the Securities Act § 2(a)(1), the Securities Exchange Act § 3(a)(10), the Investment Advisers Act § 202(a), the Investment Company Act § 2(a), and the Securities Investor Protection Act § 16(14), each time inserting identical language: the term "security" (or "investment contract") "does not include a digital commodity or permitted payment stablecoin."[196]

This definitional approach operates through multiple statutory layers.[197] First, the Act defines "digital commodity" in the Commodity Exchange Act § 1a(16)(F) as "a digital asset that is intrinsically linked to a blockchain system, and the value of which is derived from or is reasonably expected to be derived from the use of the blockchain system."[198] A digital asset qualifies as intrinsically linked if it relates to the blockchain's functionality, operation, or the activities for which the system is created, including cases where the asset is issued by the blockchain's programmatic functioning, used to transfer value between participants, accessed to use the system, used for governance participation, used to pay transaction fees, or used as payment or incentive for network participants.[199]

Second, the Act creates an explicit rule of construction to prevent courts from importing *Howey* analysis into the statutory regime.[200] The statute provides: "No presumption shall exist that a digital asset is a security, nor shall a digital asset be excluded from being a digital commodity" based solely on the asset's voting or economic rights, the potential for appreciation in response to blockchain operations, or appreciation flowing from blockchain use.[201] This language directly addresses the danger that courts might apply *Howey* reasoning to digital commodities, importing analysis of profit expectations and promoter efforts into the new statutory regime.[202]

Third, Section 201 of CLARITY creates an exclusion within the "investment contract" category itself.[203] The term "investment contract" now excludes "investment contract assets"—assets that are

[195] CLARITY § 301 (establishing exclusions).
[196] *Id.* § 301(a)–(e); *id.* § 103 (CEA § 1a(16)(F)).
[197] *Id.* § 103.
[198] *Id.* § 103 (amending Commodity Exchange Act § 1a by adding § 1a(16)(F)(i)).
[199] *Id.* § 103 (CEA § 1a(16)(F)(ii)).
[200] *Id.* § 103.
[201] *Id.* § 103 (CEA § 1a(16)(F)(iv)) (rule of construction).
[202] See *supra* Part II.A (explaining danger that courts might apply *Howey*'s profit-expectation analysis to blockchain assets).
[203] CLARITY § 201.

digital commodities meeting CLARITY's maturity criteria and have been certified as mature.[204] This creates a clean jurisdictional boundary: once an asset crosses from initial offering to maturity, it is no longer an investment contract under securities law, regardless of its historical origin as a securities offering.[205] As explained below, this statutory architecture directly rejects integration doctrine: Section 4A(e) provides that "the offer or sale by a person other than the issuer of a digital commodity that originally involved an investment contract shall be deemed not to be an offer or sale of such investment contract."[206] This provision eliminates the *Kik* analysis that retroactively collapses phases into unified securities offerings.[207]

This statutory mechanism directly addresses Part II's diagnosis.[208] *Howey* cannot be reinterpreted to accommodate transformation because the test is structurally premised on fixed classification at the moment of offer or sale.[209] Amending *Howey* itself would destabilize the entire securities framework, which depends on the assumption that once an instrument is classified as a security, it remains a security.[210] Integration doctrine crystallizes this rigidity: courts collapse temporal phases into unified schemes precisely because securities law assumes fixed status.[211] CLARITY's statutory sidestep avoids this problem by creating a parallel regime—not a reinterpretation of the existing one, but an exclusion from it.[212]

B. The Entry Phase: Initial Coin Offerings and Securities Regulation

The first phase of CLARITY's lifecycle regime governs the initial offer and sale of tokens to raise capital.[213] During Entry, digital assets are presumptively securities subject to SEC oversight and the full apparatus of securities regulation.[214] Yet CLARITY establishes a conditional exemption from full securities registration through a new Securities Act § 4(a)(8) exemption, allowing issuers to raise capital

[204] *Id.* § 201 (amending Securities Act § 2(a) to add § 2(a)(36) definition of "investment contract asset").
[205] *Id.* § 201.
[206] *Id.* § 203(a) (adding Securities Act § 4A(a)).
[207] *Supra* Part II.B (analyzing *SEC v. Kik Interactive, Inc.*, 492 F. Supp. 3d 169 (S.D.N.Y. 2020)).
[208] *Supra* Part II.A.
[209] *Id.* (explaining *Howey*'s synchronic assumption).
[210] *Supra* Part II (discussing how securities classification is presumptively fixed).
[211] *Supra* Part II.B (analyzing integration doctrine).
[212] See CLARITY § 301 (creating parallel regime distinct from *Howey*).
[213] CLARITY § 202(a).
[214] Securities Act § 4(a)(8), 15 U.S.C. § 77d(a)(8).

under modified disclosure requirements if certain conditions are satisfied.[215]

1. Exemption Conditions

The Entry exemption operates as a bounded safe harbor with four conjunctive requirements.[216] First, the issuer must establish that the blockchain system either is already certified as mature under the Act's maturity determination process, or the issuer intends for it to achieve maturity within a defined timeframe.[217] The statutory language specifies "the later of (i) the date that is four years after the first sale of the investment contract involving a unit of such digital commodity in reliance on the exemption provided under this paragraph, subject to any extensions as may be granted by the Commission or (ii) the date that is four years after the effective date of this paragraph."[218] This creates a binding temporal obligation: issuers cannot remain indefinitely in Entry Phase.[219] The four-year runway provides sufficient time for protocol development while preventing perpetual capital-raising under securities exemptions.[220]

Second, the offering must comply with a $50 million annual raise limit, adjusted annually for inflation.[221] The statute specifies: "the sum of all cash and other consideration to be received by the digital commodity issuer in reliance on the exemption provided under this paragraph, during the 12-month period preceding the date of such offering, including the amount received in such offering, is not more than $50,000,000 (as such amount is annually adjusted by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor)."[222] This ensures that Entry offerings remain modest in scale, appropriate for development-stage networks.[223] The limit applies to all capital raised by the issuer and related persons during the preceding twelve-month period, including consideration received in the offering itself.[224]

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[215] CLARITY § 202(a)(1) (adding Securities Act § 4(a)(8)).
[216] *Id.* § 202(a)(1).
[217] *Id.* § 202(a)(1) (requiring blockchain be "certified as a mature blockchain system under section 42 of the Securities Exchange Act of 1934, 15 U.S.C. § 78u, or the issuer intends for the blockchain system...to be a mature blockchain system by the later of...").
[218] *Id.* § 202(a)(1)(A).
[219] *Id.*
[220] *Id.* (four-year runway design).
[221] *Id.* § 202(a)(1)(B) ("the sum of all cash and other consideration to be received by the digital commodity issuer...not more than 50,000,000 as such amount is annually adjusted by the Commission").
[222] *Id.* § 202(a)(1)(B) (full statutory language).
[223] *Id.*
[224] *Id.*

Third, no purchaser may own more than 10 percent of total outstanding units following the transaction.[225] The statute provides: "after the completion of the transaction, a purchaser does not own more than 10 percent of the total amount of the outstanding units of the digital commodity." [226] This ownership dispersion requirement prevents concentration that would perpetuate promoter control and is expressly designed to facilitate decentralization progression.[227]

Fourth, the issuer must satisfy certain negative criteria: it must be organized under U.S. law (a State, territory, or the District of Columbia), must not be a development-stage company lacking a specific business plan, must not be an investment company, and must not be subject to certain SEC disqualification orders.[228] These negative criteria filter for legitimate development entities while excluding speculative structures.[229]

2. Disclosure Requirements

The central innovation of Entry disclosure is that CLARITY replaces full registration with focused, development-stage disclosures.[230] Rather than requiring audited financial statements and governance provisions appropriate for mature operating companies (which are meaningless for software development), the Act requires an "offering statement" containing a detailed "Plan of Development."[231] The Plan of Development must disclose: the current state and timeline for blockchain maturation; how and when the network will achieve autonomous functioning and dispersed control; the roles of various participants (developers, validators, governance participants); mechanisms by which control is exerted or intended to be eliminated; and critical operational dependencies.[232]

The Plan of Development is supplemented by granular technical disclosures.[233] Issuers must disclose the source code (or a publicly accessible webpage displaying it), including information on whether code was audited by third parties and material results of such audits.[234] Issuers must explain the blockchain's transaction history, how participants can independently access and verify it, and describe the

[225] *Id.* § 202(a)(1)(C).
[226] *Id.* (full statutory language).
[227] *Id.* (ownership dispersion requirement).
[228] *Id.* § 202(a)(1)(D).
[229] *Id.* (explaining negative criteria).
[230] *Id.* § 202(b).
[231] *Id.* § 202(b)(1).
[232] *Id.* § 202(b)(2)(E).
[233] *Id.* § 202(b)(2).
[234] *Id.* § 202(b)(2)(B).

consensus mechanism and validation process.[235] Most critically, issuers must explain the "mechanism for driving value" to the digital commodity and the "governance mechanisms for implementing changes" to the blockchain system.[236] These disclosures directly address the *Howey* "efforts of others" concern by forcing full transparency about how value flows and how control is structured.[237]

3. Insider Identification and Ongoing Reporting

The Entry disclosure regime includes ownership information.[238] Issuers must file information identifying "digital commodity related persons" (core development team, persons receiving material compensation from the project) and "digital commodity affiliated persons" (entities acquiring 5 percent or more of outstanding units).[239] Critically, the Act defines a "digital commodity related person" as one "that is or was in the previous 6-month period a promoter, senior employee, advisory board member, consultant, advisor, or person serving in a similar capacity" or "that acquires or has any right to acquire 1 percent or more of the total outstanding units of such digital commodity."[240] Most importantly, the Act provides that "the decentralized governance system" shall not be treated as a digital commodity related person.[241] This statutory language prevents courts or the SEC from treating decentralized systems as unified entities with concentrated control.[242]

Once an offering statement is filed, the issuer is subject to ongoing semiannual reporting requirements until the blockchain is certified as mature.[243] These reports must update the development timeline, describe efforts by the issuer and related persons to develop the blockchain, detail how capital raised has been deployed across activity categories, and provide financial statements where applicable.[244] This creates an accountability mechanism: issuers cannot use capital-raising proceeds for unrelated purposes without SEC visibility.[245] Importantly, antifraud authority under Securities Act § 17(a) and Exchange Act § 10(b) persists throughout Entry: the SEC retains full power to police

[235] *Id.* § 202(b)(2)(C).
[236] *Id.* § 202(b)(2)(D).
[237] See *supra* Part II.A (explaining *Howey* "efforts of others" concern).
[238] CLARITY § 202(b)(2)(F).
[239] *Id.*
[240] *Id.* § 101 (amending Securities Act § 2(a) to add § 2(a)(29) definition of "digital commodity related person", 15 U.S.C. § 77b(a)(29)).
[241] *Id.* § 101 (CEA § 2(a)(29)(A)(ii)).
[242] *Id.* (statutory language preventing unified-entity treatment of decentralized governance).
[243] CLARITY § 202(b)(3).
[244] *Id.* § 202(b)(3)(A)–(B).
[245] *Id.*

fraud and misstatement in Entry disclosures and may enforce against issuers making false statements about progress toward decentralization.[246]

4. Temporal Discipline

Critically, Entry is time-limited.[247] If the blockchain does not achieve maturity certification within four years (extended by SEC discretion), CLARITY provides that the issuer faces enhanced disclosure obligations or loses the ability to conduct further capital-raising.[248] The statute contemplates that systems failing to achieve autonomy within this window may lose their exemption status, forcing either full registration or cessation of public capital-raising.[249] This temporal discipline directly addresses the market dysfunction documented in Part II: perpetual capital-raising that funded projects indefinitely without delivering functional networks.[250]

C. The Transition Phase: Maturity Determination and Certification

When a blockchain network achieves technical maturity, the Transition phase begins—a formal process during which the issuer or other qualified parties petition the SEC and CFTC jointly to certify the network's maturity.[251] Upon certification, the asset exits securities regulation and enters mature commodity status.[252]

1. Maturity Certification Mechanism

The maturity determination process is governed by Securities Exchange Act § 42 (added by CLARITY § 205).[253] The statute establishes a certification mechanism with a critical institutional feature: broad eligibility to file.[254] The statute provides: "A digital commodity issuer, digital commodity related person, digital commodity affiliated person, decentralized governance system of the blockchain system, or a registered digital commodity exchange, or any other appropriate person as designated by the Commission, may certify

[246] Securities Act § 17(a), 15 U.S.C. § 77q(a); Securities Exchange Act § 10(b), 15 U.S.C. § 78j(b); CLARITY does not waive antifraud authority during Entry phase.
[247] CLARITY § 202(e).
[248] *Id.*
[249] *Id.* (explaining consequences of failure to mature).
[250] *Supra* Part II (documenting perpetual capital-raising dysfunction).
[251] CLARITY § 205.
[252] *Id.* § 203.
[253] *Id.* § 205 (adding Exchange Act § 42, 15 U.S.C. § 78u).
[254] *Id.* § 205 (Exchange Act § 42(a)(1)).

to the Commission that the blockchain system to which a digital commodity relates is a mature blockchain system."[255] This breadth reflects congressional recognition that by the time a network approaches decentralization, no single entity may have clear authority; therefore, whoever is in the best position to attest to maturity (even a community governance body) should be able to initiate the process.[256]

The petition must include evidence demonstrating that the network is not controlled by any single person or coordinated group.[257] The statute requires "such information that is reasonably necessary to establish that the blockchain system is not controlled by any person or group of persons under common control," including information regarding the operation of the blockchain, functionality of the digital commodity, how market value derives from programmatic functioning, any decentralized governance system, and the roles of the issuer and related persons if material to the system's operation.[258] The certification is supported by detailed, objective technical evidence.[259]

2. SEC Review and Automatic Approval

The SEC's review is tightly time-bound and creates automatic approval.[260] By statute, the SEC has 60 days to evaluate the certification.[261] If the Commission does nothing, the certification automatically becomes effective after 60 days, and the blockchain is deemed a mature blockchain system by operation of law.[262] The SEC can respond in two ways within the 60-day window: (1) rebut the certification, if it determines the network does not meet statutory maturity criteria, or (2) issue a stay of up to 120 additional days if there are novel or complex issues or inadequate information.[263] A stay triggers a public comment process, indicating that the SEC might seek outside input on whether the criteria are met in borderline cases.[264] Ultimately, if the SEC affirmatively objects (rebuts) the certification, it must notify the filer and provide reasons; the filer then has 90 days to submit additional materials or to appeal the SEC's denial to the D.C. Circuit Court of Appeals, which reviews the SEC's decision de novo—an important check that prevents undue SEC intransigence.[265] This

[255] *Id.* (full statutory language).
[256] *Id.* (explaining broad eligibility design).
[257] *Id.* § 205 (Exchange Act § 42(a)(2)).
[258] *Id.* (specific filing requirements).
[259] *Id.* (emphasizing evidentiary support requirement).
[260] *Id.* § 205 (Exchange Act § 42(a)(3)–(4)).
[261] *Id.* § 205 (Exchange Act § 42(a)(3)).
[262] *Id.* § 205 (Exchange Act § 42(a)(4)(A)).
[263] *Id.* § 205 (Exchange Act § 42(a)(5)(A)).
[264] *Id.* (describing stay and public comment process).
[265] *Id.* § 205 (Exchange Act § 42(a)(8)(A)–(B)).

timeline forces administrative closure.[266] The maximum review period is 180 days (60 + 120 if stayed).[267] After that deadline, certification becomes effective.[268]

This automatic approval mechanism is architecturally critical.[269] It directly addresses the regulatory oscillation documented in Part III: the SEC can no longer indefinitely defer maturity determination or reverse course based on administrative preference.[270] CLARITY imposes a hard statutory deadline.[271] If the SEC intends to rebut the certification, it must notify the petitioner within 60 days.[272] No further stays or extensions are available after the initial 120-day stay period.[273] This automatic approval mechanism prevents regulatory limbo—the indefinite deferral state that plagued the digital asset market from 2018-2024.[274]

3. De Novo Appellate Review

De novo appellate review is a critical institutional safeguard.[275] The statute specifies: "In an appeal under subparagraph A, the court shall have de novo review of the determination to rebut the certification."[276] This differs significantly from *Chevron* deference and from arbitrary-and-capricious review under the Administrative Procedure Act.[277] De novo review means courts exercise independent legal judgment on whether the blockchain meets the statutory criteria, not whether the SEC's decision was reasonable.[278] The presence of de novo review statutory language reflects congressional intent to prevent the SEC from obtaining deference on technical maturity determinations.[279] This is particularly important post-*Loper Bright Enterprises*, as courts are now required to exercise independent judgment anyway; CLARITY simply clarifies that de novo review is the applicable standard.[280]

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[266] *Id.*
[267] *Id.* (calculating maximum 180-day timeline).
[268] *Id.* (automatic effectiveness provision).
[269] See *supra* Section IV.C (explaining architectural significance).
[270] *Supra* Part III.B (documenting regulatory oscillation).
[271] CLARITY § 205 (Exchange Act § 42(a)(3)–(4)) (60-day deadline with no indefinite deferral mechanism).
[272] *Id.* § 205 (Exchange Act § 42(a)(3)).
[273] *Id.* § 205 (Exchange Act § 42(a)(5)(A)) (one-time 120-day stay only).
[274] *Supra* Part III (documenting regulatory limbo 2018-2024).
[275] CLARITY § 205 (Exchange Act § 42(a)(8)(B)).
[276] *Id.* (full statutory language specifying de novo standard).
[277] *Supra* Part III (referencing post-*Loper Light* landscape and *Chevron* elimination).
[278] CLARITY § 205 (Exchange Act § 42(a)(8)(B)).
[279] *Id.* (congressional intent reflected in statutory language).
[280] *Supra* Part III (discussing *Loper Light Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024)).

4. SEC Discretionary Constraints

Critically, § 42(b)(3)(A) constrains SEC discretion during rulemaking: "Nothing in this subsection may be construed to permit the Commission to impose additional criteria to the criteria in subsection c for certifying that a blockchain system is a mature blockchain system pursuant to subsection c."[281] The Commission may identify alternative criteria by which blockchain systems may qualify as mature, accommodating technological change.[282] But the Commission cannot impose requirements beyond those codified in § 42(c).[283] This statutory constraint directly rejects the SEC's practice of expanding guidance through interpretive complexity: the *Framework for Investment Contract Analysis of Digital Assets* added 38 considerations to four *Howey* factors without establishing clear thresholds or hierarchies.[284] CLARITY prohibits this doctrinal elaboration, establishing instead a bright-line statutory set of maturity criteria.[285]

5. The Statutory Maturity Criteria

Exchange Act § 42(c)(2) establishes verifiable criteria that a blockchain system must satisfy to be deemed mature.[286] All of the following conditions must be satisfied simultaneously for certification to be granted:[287]

a. System Value Derivation

§ 42(c)(2)(A) requires that the digital commodity's market value be "substantially derived from the use and functioning of the blockchain system," and if the issuer published a development plan describing how value would derive from programmatic functioning, "the development of such mechanisms has been substantially completed."[288] "Substantially derived" is not numerically defined but contemplates that value flows primarily from network utility rather than from expected future promoter efforts.[289] The second prong creates an estoppel-like doctrine: if issuers made public representations about how value would arise, they cannot later claim value derives from

[281] CLARITY § 205 (Exchange Act § 42(b)(3)(A)) (critical constraint on SEC discretion).
[282] *Id.* § 205 (Exchange Act § 42(b)(3)(B)).
[283] *Id.* § 205 (Exchange Act § 42(b)(3)(A)).
[284] Supra Part II.A (analyzing 2019 SEC Framework for Investment Contract Analysis of Digital Assets).
[285] CLARITY § 205 (Exchange Act § 42(c)(2)) (establishing bright-line criteria).
[286] *Id.* § 205 (Exchange Act § 42(c)(2)).
[287] *Id.* (conjunctive structure).
[288] *Id.* § 205 (Exchange Act § 42(c)(2)(A)).
[289] *Id.* (defining "substantially derived" concept).

promoter control if they have implemented the promised mechanisms.[290]

b. Functional System

§ 42(c)(2)(B) requires a functional system: "The blockchain system allows network participants to engage in the activities the blockchain system is intended to provide," including using, transmitting, or storing value; deploying or accessing software and services; participating in consensus or governance; or operating computational infrastructure (nodes, validators, clients).[291] This requirement does not demand perfection but rather that the intended functions are operational.[292] A payment blockchain must allow payments; a smart contract platform must allow contract deployment; a governance system must allow voting.[293]

c. Open and Interoperable System

§ 42(c)(2)(C) specifies open and interoperable system requirements with two distinct prongs: the blockchain must be "composed of source code that is open source," and it "does not restrict or prohibit based on the exercise of unilateral authority any person, other than a digital commodity issuer, digital commodity related person, or digital commodity affiliated person from engaging in the activities the blockchain system is intended to provide."[294] Open-source code is verifiable through examination; its presence means anyone can audit the software and fork the network if they choose.[295] The second prong prevents issuers from using unilateral control to restrict participation: participants cannot be excluded from consensus, governance, or utility provision based on issuer discretion.[296]

d. Programmatic System

§ 42(c)(2)(D) establishes the programmatic system requirement: "The blockchain system operates, executes, and enforces its operations and transactions based solely on pre-established, transparent rules encoded directly within the source code of the blockchain system."[297] This requirement directly addresses the *Howey* "efforts of others"

[290] *Id.* (estoppel-like doctrine).
[291] *Id.* § 205 (Exchange Act § 42(c)(2)(B)).
[292] *Id.* (discussing "operationality" standard).
[293] *Id.* (providing examples).
[294] *Id.* § 205 (Exchange Act § 42(c)(2)(C)).
[295] *Id.* (explaining open-source verifiability).
[296] *Id.* (second prong restriction).
[297] *Id.* § 205 (Exchange Act § 42(c)(2)(D)).

concern.[298] If the blockchain executes based on pre-established code without human discretion or judgment, then ongoing efforts of promoters are not driving profits.[299] This is the critical definitional distinction from securities: for securities, value depends on ongoing discretionary decisions by managers; for programmatic systems, value depends on algorithm execution.[300]

e. System Governance

§ 42(c)(2)(E) requires system governance: "No person or group of persons under common control may: (i) have the unilateral authority, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, to control or materially alter the functionality, operation, or rules of consensus or agreement of the blockchain system or its related digital commodity; or (ii) have the unilateral authority to direct the voting, in the aggregate, of 20 percent or more of the outstanding voting power of such blockchain system by means of a related digital commodity, nodes or validators, a decentralized governance system, or otherwise, in a blockchain system which can be altered by a voting system."[301]

This criterion contains two independent prohibitions.[302] The first prong prevents "unilateral authority" to control the system.[303] "Unilateral authority" means sole or dominant control that permits one actor to impose decisions without consensus.[304] The second prong establishes a bright-line 20 percent threshold: no person or group under common control may direct 20 percent or more of voting power.[305] This bright-line threshold provides certainty that might be absent from the more elastic "unilateral authority" standard.[306] Critically, the definition of "group of persons under common control" includes digital commodity related persons, affiliated persons, and others whose conduct is coordinated or whose interests are aligned through contractual arrangements, family relationships, or economic relationships.[307] This prevents Balkanization: if three separate entities each own 10 percent but coordinate voting, they constitute a "group

[298] See *supra* Part II.A (discussing *Howey* "efforts of others").
[299] CLARITY § 205 (Exchange Act § 42(c)(2)(D)).
[300] *Id.* (distinguishing from securities regime).
[301] *Id.* § 205 (Exchange Act § 42(c)(2)(E)) (full statutory language).
[302] *Id.* (two independent prohibitions).
[303] *Id.* (first prong).
[304] *Id.* (defining "unilateral authority").
[305] *Id.* (second prong 20% threshold).
[306] *Id.* (explaining threshold benefit).
[307] *Id.* § 101 (amending Securities Act § 2(a) to add § 2(a)(29) definition and cross-referencing related definitions).

under common control" with 30 percent aggregate power, triggering the criterion.[308]

f. Impartial System

§ 42(c)(2)(F) requires an impartial system: "No person or group of persons under common control may possess a unique permission or privilege with respect to functionality, operation, or rules of consensus or agreement of the blockchain system or its related digital commodity," unless such alteration "(i) addresses errors, regular maintenance, or cybersecurity risks of the blockchain system that affect the programmatic functioning of the blockchain system; and (ii) is adopted through the consensus or agreement of a decentralized governance system."[309] This prevents special administrative privileges that would allow issuers to unilaterally fork the blockchain or impose changes. [310] The exception for error-correction and security maintenance permits legitimate protocol upgrades without full consensus.[311]

g. Distributed Ownership

§ 42(c)(2)(G) establishes distributed ownership: "No digital commodity issuer, digital commodity related person, or digital commodity affiliated person may beneficially own, in the aggregate, 20 percent or more of the total amount of units of the digital commodity."[312] This numerical threshold parallels the voting power threshold and prevents both governance dominance and economic dominance by insiders.[313]

6. Conjunctive Application of Maturity Criteria

These seven criteria are conjunctive.[314] An asset meets the maturity definition only if it satisfies ALL seven.[315] This conjunctive structure differs markedly from *Howey*, which is disjunctive: an asset is a security if all four prongs are satisfied, but courts often collapse the inquiry onto the fourth prong.[316] By establishing conjunctive technical criteria rather than disjunctive doctrinal factors, CLARITY eliminates

[308] *Id.* (Balkanization prevention).
[309] *Id.* § 205 (Exchange Act § 42(c)(2)(F)) (full statutory language).
[310] *Id.* (preventing unilateral administrative privileges).
[311] *Id.* (exception for maintenance).
[312] *Id.* § 205 (Exchange Act § 42(c)(2)(G)).
[313] *Id.* (parallel 20% threshold).
[314] *Supra* Section IV.C (explaining conjunctive structure).
[315] CLARITY § 205 (Exchange Act § 42(c)(2)) (all seven criteria required simultaneously).
[316] *Supra* Part II.A (discussing *Howey* disjunctive structure and judicial collapse).

argument about which element is "most important."[317] Compliance is determinable through technical analysis rather than through subjective judicial interpretation.[318]

D. The Maturity Phase: CFTC Jurisdiction and Commodity Regulation

Once a blockchain is certified as mature, the digital commodity transitions to the Maturity phase and exits SEC securities jurisdiction entirely.[319] CFTC takes primary authority over the asset for purposes of secondary market transactions and commodity trading.[320] Substantively, CLARITY § 203 provides that "the offer or sale of a digital commodity that originally involved an investment contract by a person other than the issuer of such digital commodity, or an agent or underwriter thereof, shall be deemed not to be an offer or sale of such investment contract" under any securities statute.[321] This language directly rejects the integration doctrine discussed in Part II.B.[322] Under *Kik*, the court integrated the SAFT and token distribution into a single scheme, ruling that all phases were subject to securities regulation because they shared a common purpose.[323] CLARITY § 203 explicitly bifurcates: the issuer remains subject to securities regulation even post-maturity; secondary market sales by non-issuers are deemed not to involve investment contracts.[324] This distinction preserves investor protection for primary markets while permitting secondary trading to proceed as commodity trading once maturity is achieved.[325]

1. Secondary Market Treatment and Agent Definition

The secondary market treatment clarifies that issuers retain exposure to securities laws, including antifraud provisions.[326] Under § 203(c), an "agent" means any person "directly or indirectly controlled by the issuer or under direct or indirect common control with the issuer."[327] This definition prevents issuers from evading securities requirements by using controlled entities to distribute holdings

[317] CLARITY § 205 (establishing conjunctive bright-line criteria).
[318] *Id.* (technical determinability).
[319] *Id.* § 203.
[320] *Id.* § 9A (transferring to CFTC).
[321] *Id.* § 203(a) (adding Securities Act § 4A(a), 15 U.S.C. § 77d-2(a)).
[322] See *supra* Part II.B (analyzing integration doctrine).
[323] *SEC v. Kik Interactive, Inc.*, 492 F. Supp. 3d 169 (S.D.N.Y. 2020).
[324] CLARITY § 203(a).
[325] *Id.* (bifurcating primary and secondary markets).
[326] *Id.* (issuer securities exposure persists).
[327] *Id.* § 203(c).

incrementally.[328] If the SEC determines that a person is an agent—controlled by or operating under common control with the issuer—sales by that person remain subject to securities restrictions even after certification.[329] Critically, antifraud authority persists on both sides and creates concurrent jurisdiction: SEC antifraud provisions under Securities Act § 17(a) and Securities Exchange Act § 10(b) remain applicable to the conduct of issuers and agents throughout Entry and Transition phases, while CFTC antifraud and anti-manipulation authority under CEA § 4c(h) applies to post-maturity trading by all participants and to the conduct of CFTC-regulated intermediaries.[330] This overlap ensures no regulatory gap in investor protection.[331]

2. Insider Trading Restrictions in Transition and Maturity

CLARITY § 204 separately addresses sales by "digital commodity related persons" and "digital commodity affiliated persons" during Transition and after Maturity certification, establishing a tiered insider-trading regime.[332] Prior to maturity, such persons can only sell units if semiannual reports have been filed with the SEC, the person has held units for at least 12 months, and sales amount fall within specified percentage bands set by the SEC.[333] After maturity certification, "digital commodity related persons" may freely sell holdings.[334] "Digital commodity affiliated persons" may sell if the required post-maturity information is publicly available, the person has held units for the earlier of 12 months or 3 months following certification, and sales do not exceed specified percentages (5 to 10 percent of total outstanding tokens annually as determined by SEC rulemaking).[335] This creates a tiered regime: insiders remain subject to some restrictions even after maturity, but restrictions relax to reflect changed information asymmetry once networks operate autonomously.[336]

3. CFTC Commodity Regulation Framework

The CFTC's role in Maturity is defined by CLARITY § 9A, which amends the Commodity Exchange Act § 2(c)(2) to treat mature digital

[328] *Id.* (defining "agent" to prevent evasion).
[329] *Id.* (agent restrictions).
[330] Securities Act § 17(a), 15 U.S.C. § 77q(a); Securities Exchange Act § 10(b), 15 U.S.C. § 78j(b); Commodity Exchange Act § 4c(h), 7 U.S.C. § 6c(h).
[331] See *supra* Section IV.D (explaining dual antifraud regime).
[332] CLARITY § 204.
[333] *Id.* § 204(c)(1).
[334] *Id.* § 204(c)(2)(A).
[335] *Id.* § 204(c)(2)(B).
[336] *Id.* (tiered restriction structure).

assets as commodities.[337] The CFTC gains authority over spot market transactions in mature digital commodities, primarily to regulate market manipulation and fraud.[338] The Act establishes new categories of CFTC registration for digital asset intermediaries: "Digital Commodity Exchanges," "Digital Commodity Brokers," and "Digital Commodity Dealers."[339] These roughly correspond to familiar entities like exchanges, brokers, and dealers in commodities markets.[340] A Digital Commodity Exchange must register with the CFTC and comply with core principles (preventing market manipulation, providing price transparency, safeguarding customer assets, etc.) akin to those for traditional futures exchanges.[341] Digital Commodity Brokers and Dealers must follow regulations protecting customer funds and avoiding conflicts of interest, subject to capital and conduct requirements analogous to futures commission merchants or swap dealers.[342] By importing many tried-and-true regulations from the commodities and securities worlds, the Act ensures that as the industry matures, it operates under familiar investor protection standards (recordkeeping, anti-fraud rules, capital requirements).[343] This addresses practitioners' concern that a new legal category might otherwise create an unregulated shadow sector.[344]

E. SEC-CFTC Jurisdictional Coordination and Institutional Redesign

The Act's jurisdictional handoff from SEC to CFTC is carefully structured to avoid gaps.[345] When the SEC receives a maturity certification filing, it must provide a copy to the CFTC and make the outcome public, ensuring the CFTC is aware when a token exits securities jurisdiction to become a fully regulated commodity.[346] This coordination prevents either regulator from losing track of digital assets transitioning between jurisdictions.[347]

More fundamentally, CLARITY establishes a new institutional architecture for sustained SEC-CFTC coordination.[348] The Act codifies SEC FinHub (Strategic Hub for Innovation and Financial Technology)

[337] *Id.* § 9A (amending Commodity Exchange Act § 2(c)(2), 7 U.S.C. § 2(c)(2)).
[338] *Id.* (CFTC spot market authority).
[339] *Id.* §§ 404–406 (establishing registration categories).
[340] *Id.* (comparing to traditional commodities framework).
[341] *Id.* § 404(b) (core principles for Digital Commodity Exchanges).
[342] *Id.* §§ 405–406 (registration and regulation).
[343] *Id.* § 402–413 (importing securities and commodities protections).
[344] *Supra* Part IV.D (addressing shadow-sector concern).
[345] CLARITY § 205 (Exchange Act § 42(a)(9)).
[346] *Id.* (requiring SEC-CFTC notification).
[347] *Id.* (coordination mechanism).
[348] *Id.* § 502–503.

as a permanent statutory office under Securities Exchange Act § 4(l) and CFTC LabCFTC as a permanent statutory office under Commodity Exchange Act § 18(c), each with explicit mandates.[349] Previously, FinHub and LabCFTC existed as internal offices within their respective agencies.[350] CLARITY elevates them to statutory status, providing permanent funding, reporting requirements, and explicit operational mandates.[351]

SEC FinHub is charged with facilitating communication between the SEC and fintech businesses, providing outreach and guidance on digital assets to innovators.[352] FinHub maintains a permanent committee drawing staff from divisions like Trading & Markets, Corporation Finance, and Investment Management.[353] The Act requires FinHub to report annually on its activities, and its mandate includes establishing mechanisms through which entrepreneurs can seek informal guidance on novel structures.[354] During Entry and Transition phases, a token issuer can approach FinHub to discuss the form and content of required disclosures, or to structure decentralization milestones satisfying the maturity criteria.[355] Having an internal SEC champion for innovation improves regulatory clarity: FinHub can internally advise the SEC on where existing rules might need updating or where no-action relief might be appropriate for novel situations.[356]

CFTC LabCFTC is similarly cemented as an office reporting directly to the CFTC Commission, with duties to "provide outreach" to innovators and to recommend regulatory improvements for CFTC rules as they relate to new technology.[357] LabCFTC's statutory charter to encourage engagement and obtain feedback from innovators means that as projects approach Maturity and beyond, they have a formal avenue to discuss how a decentralized exchange or a DeFi protocol might comply with commodity trading regulations.[358] The Act requires LabCFTC to keep records of its public engagements and adhere to confidentiality rules, reflecting sensitivity to both transparency and protection of proprietary information.[359]

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[349] *Id.* § 502 (codifying SEC FinHub as Securities Exchange Act § 4(l)); *id.* § 503 (codifying CFTC LabCFTC as Commodity Exchange Act § 18(c)).
[350] *Id.* (elevating from internal to statutory status).
[351] *Id.* (statutory mandate and funding).
[352] *Id.* § 502(b).
[353] *Id.* (committee structure).
[354] *Id.* § 502(c) (annual reporting requirement).
[355] *Id.* (Entry and Transition phase applications).
[356] *Id.* (advisory and internal guidance function).
[357] *Id.* § 503(b).
[358] *Id.* (Maturity phase applications).
[359] *Id.* § 503(c)–(d).

These codified institutions represent a regulatory philosophy shift.[360] Rather than adopting a reactive enforcement-driven approach, the statute contemplates that regulators will engage iteratively with industry to refine how laws apply.[361] By formalizing FinHub and LabCFTC at the statutory level, Congress signals its expectation that effective implementation of CLARITY requires sustained dialogue with evolving blockchain markets.[362]

Additionally, CLARITY § 304 calls for SEC-CFTC rulemaking for dual-registered entities, anticipating that some exchanges or firms may register with both the SEC (for securities activities) and CFTC (for digital commodity activities).[363] The regulators are instructed to streamline requirements in such cases, which is critical for market participants who operate in both realms.[364] This provision prevents regulatory arbitrage while reducing compliance burden for legitimate multi-regulator participants.[365]

F. SEC-CFTC Joint Rulemaking Authority and Constraints

CLARITY § 105(a) requires that the SEC and CFTC jointly issue rules within 270 days to implement the statutory maturity regime.[366] Section 42(e) provides that "not more than 270 days after the date of enactment of this section, the Commission shall issue rules to carry out this section."[367] The 270-day deadline creates institutional urgency: agencies cannot indefinitely delay implementation.[368] SEC FinHub and CFTC LabCFTC serve as dedicated channels facilitating the SEC-CFTC coordination necessary to meet this timeline.[369] As of November 2025, final rules implementing § 42 have not yet been issued; the 270-day deadline runs from CLARITY's enactment.[370] Current reports indicate the SEC and CFTC remain in interagency coordination.[371] This delay illustrates the practical challenge of translating statutory language into operational procedure, particularly when interagency coordination is required.[372]

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[360] See *supra* Section IV.E (explaining institutional philosophy shift).
[361] CLARITY § 502–503 (codifying iterative regulatory engagement).
[362] *Id.* (congressional signal about implementation requirements).
[363] *Id.* § 304.
[364] *Id.* (dual registration streamlining instruction).
[365] *Id.* (preventing regulatory arbitrage while enabling legitimate operations).
[366] *Id.* § 105(a)(1).
[367] *Id.* § 205 (Exchange Act § 42(e)).
[368] *Id.* (270-day institutional deadline).
[369] *Id.* § 502–503 (FinHub and LabCFTC coordination roles).
[370] Based on current regulatory timeline reports as of November 4, 2025: SEC and CFTC remain in joint rulemaking process but have not published proposed rules.
[371] *Id.*
[372] *Id.* (challenges of interagency coordination).

1. Rulemaking Substantive Questions

The joint rulemaking must address multiple interpretive questions.[373] The statute defines maturity criteria but does not provide numerical specificity for all terms.[374] What counts as "substantially derived" value—80 percent? 90 percent?[375] The statute specifies 20 percent voting thresholds for governance and ownership but does not address multi-stage decision-making systems where preliminary decisions are made by one group and final decisions by another.[376] Does a system with a core development team making technical decisions (within 5 percent ownership) and governance token holders (each under 5 percent) satisfy the criteria even if effective control remains concentrated in the developers' discretionary design authority?[377]

2. SEC-CFTC Rulemaking Constraints

Section 42(b)(2) constrains SEC-CFTC rulemaking: the rules must be "consistent with the protection of investors, maintenance of fair, orderly, and efficient markets, and the facilitation of capital formation."[378] This standard-setting constraint mirrors language throughout the securities laws.[379] Agencies cannot constrain the maturity determination process such that it becomes impossible to achieve.[380] If rulemaking makes maturity determinations so burdensome that no network can satisfy them, the rulemaking is inconsistent with "facilitation of capital formation."[381] Conversely, if rulemaking makes maturity determinations so permissive that demonstrably controlled systems qualify, the rulemaking is inconsistent with "protection of investors."[382]

3. Limitation Principle on SEC Discretion

Section 42(b)(3)(B) provides a counterbalancing grant of authority: "Nothing in this subsection or subsection c may be construed to limit

[373] CLARITY § 205 (Exchange Act § 42(c)(2)) (statutory criteria with interpretive gaps).
[374] *Id.* (lacking complete numerical specificity).
[375] *Id.* ("substantially derived" value threshold undefined).
[376] *Id.* § 205 (Exchange Act § 42(c)(2)(E)) (20% thresholds silent on multi-stage decision structures).
[377] *Id.* (interpretive question for rulemaking).
[378] *Id.* § 205 (Exchange Act § 42(b)(2)).
[379] Securities Act § 2(b), 15 U.S.C. § 77b(b); Securities Exchange Act § 3(f), 15 U.S.C. § 78c(f).
[380] CLARITY § 205 (Exchange Act § 42(b)(2)) (agencies must balance investor protection and capital formation).
[381] *Id.* (facilitation of capital formation constraint).
[382] *Id.* (protection of investors constraint).

the Commission's ability to identify alternative conditions and criteria by which a blockchain system may be considered a mature blockchain system."[383] This preserves agency flexibility to evolve standards as technology changes.[384] If a novel blockchain architecture emerges that does not fit the enumerated criteria but genuinely achieves decentralization and autonomy, the SEC can identify alternative pathways to maturity certification.[385] However, this alternative pathways authority must remain secondary to the statutory criteria; it cannot supplant them.[386]

The rulemaking constraint represents a deliberate institutional choice to prevent regulatory drift.[387] By limiting the SEC's ability to expand criteria unilaterally, the statute prevents regulatory capture through elaboration.[388] It also prevents the SEC from shifting standards based on administrative preference.[389] Whereas prior SEC Chairs could adopt contradictory positions on *Howey* (Hinman, Gensler, Atkins), the statutory constraints here force consistency.[390] Future SEC leadership can apply the criteria more stringently or develop additional alternative pathways, but they cannot unilaterally add new requirements beyond the statute or contract existing ones.[391]

G. Temporal Architecture and Institutional Discipline

CLARITY's three-phase regime creates institutional discipline through temporal structure and automatic approval mechanisms.[392] This architecture directly addresses the regulatory oscillation documented in Part III.B.[393]

1. Entry Phase Temporal Binding

The first discipline is the four-year Entry runway.[394] Issuers cannot remain indefinitely in development status raising capital under exemptions.[395] The statute establishes a binding deadline: maturity must be achieved within four years (subject to SEC extension

[383] *Id.* § 205 (Exchange Act § 42(b)(3)(B)).
[384] *Id.* (technological flexibility).
[385] *Id.* (alternative pathways authority).
[386] *Id.* (alternative pathways remain secondary).
[387] See *supra* Section IV.F (explaining rulemaking constraint as institutional choice).
[388] CLARITY § 205 (Exchange Act § 42(b)(3)(A)).
[389] *Id.* (preventing standards shift).
[390] *Supra* Part III (documenting Hinman, Gensler, Atkins oscillation).
[391] CLARITY § 205 (Exchange Act § 42(b)(3)(A)) (statutory constraint on future SEC discretion).
[392] See *supra* Section IV.G (explaining temporal architecture).
[393] *Supra* Part III.B (documenting oscillation).
[394] CLARITY § 202(a)(1)(A) (four-year Entry deadline).
[395] *Id.* (binding temporal obligation).

authority) or the issuer loses exemption status.[396] This prevents the perpetual capital-raising that characterized early ICO markets where projects raised funds for years without demonstrating functional networks.[397] The deadline is strict enough to incentivize genuine network development but flexible enough to permit protocols to achieve sufficient maturity.[398]

2. Automatic Transition Phase Approval

The second discipline is automatic Transition Phase approval.[399] Unlike most regulatory determinations where agencies maintain discretion to approve or deny indefinitely, CLARITY provides that failure to rebut a maturity certification within 60 days results in automatic approval.[400] The SEC can extend this review period once for up to 120 additional days for "novel or complex issues."[401] But after 180 total days, the certification is effective.[402] This automatic approval mechanism prevents regulatory limbo—the indefinite deferral state that plagued the digital asset market from 2018-2024.[403] The contrast with *Howey* litigation is stark.[404] In *Ripple*, the case proceeded for three years before Judge Torres issued a decision.[405] In *LBRY*, similar timeframes applied.[406] The *Kik* litigation spanned multiple years.[407] During such periods, the asset's regulatory status remained indeterminate, preventing issuers or exchanges from planning compliance strategies.[408] CLARITY's 180-day determination window forces administrative closure, with hard statutory deadlines.[409]

3. Binary Maturity Transition

The third discipline is the binary Maturity transition.[410] Once maturity is certified, the asset is no longer a security under the federal

[396] *Id.* (exemption loss consequence).
[397] *Supra* Part II (documenting perpetual capital-raising dysfunction).
[398] CLARITY § 202(a)(1)(A) (four-year flexibility balance).
[399] *Id.* § 205 (Exchange Act § 42(a)(4)(A)) (automatic approval mechanism).
[400] *Id.* (60-day rebut period).
[401] *Id.* § 205 (Exchange Act § 42(a)(5)(A)) (120-day stay provision).
[402] *Id.* § 205 (Exchange Act § 42(a)(4)(A)) (certification effective after expiration).
[403] *Supra* Part III (documenting regulatory limbo 2018-2024).
[404] *SEC v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308 (S.D.N.Y. 2023); *SEC v. LBRY, Inc.*, 639 F. Supp. 3d 211 (D.N.H. 2022); *SEC v. Kik Interactive, Inc.*, 492 F. Supp. 3d 169 (S.D.N.Y. 2020).
[405] *Ripple*, 682 F. Supp. 3d at 308 (three-year litigation).
[406] *LBRY*, 639 F. Supp. 3d at 211 (multi-year proceeding).
[407] *Kik*, 492 F. Supp. 3d at 169 (extended litigation).
[408] *Supra* Part III (discussing regulatory indeterminacy effects).
[409] CLARITY § 205 (Exchange Act § 42(a)(3)–(4)) (hard statutory deadlines).
[410] *Id.* § 203(a) (binary security/commodity transition).

securities laws.[411] There is no middle ground or conditional status.[412] This contrasts with *Howey* regimes where an asset might be "mostly" a security or where courts distinguish transaction types (Ripple's institutional versus programmatic sales).[413] CLARITY eliminates ambiguity through binary classification: mature or immature, security or commodity.[414]

4. Addressing Institutional Pathologies

This temporal architecture addresses the specific institutional pathologies documented in Part III.[415] Regulatory oscillation occurred because the SEC could indefinitely defer classification decisions, adopt contradictory positions, and reverse course based on administrative preference.[416] CLARITY prevents this through automatic approval and statutory criteria that constrain agency discretion.[417] Judicial fragmentation occurred because different courts applied *Howey*'s subjective factors to similar facts and reached different conclusions.[418] CLARITY replaces subjective standards with technical criteria that courts can apply more consistently.[419]

5. Implementation Dependency

Whether this discipline succeeds depends on institutional compliance.[420] If courts diverge in interpreting whether a blockchain meets "programmatic functioning," "unilateral authority," or "distributed ownership" standards, they risk replicating the very fragmentation CLARITY seeks to eliminate.[421] This institutional dependency foreshadows the implementation capacity questions examined in Part V: whether federal courts and the SEC possess sufficient technical expertise to apply CLARITY's objective standards consistently across diverse blockchain architectures and evolving protocols.[422] The question is not whether CLARITY's statutory design

[411] *Id.* (securities law exclusion).
[412] *Id.* (no conditional intermediate status).
[413] *Ripple*, 682 F. Supp. 3d at 308 (institutional vs. programmatic distinction); *Supra* Part II.B (analyzing transaction-type analysis).
[414] CLARITY § 203(a) (binary classification).
[415] See *supra* Part III (documenting institutional pathologies).
[416] *Id.* Part III.B (regulatory oscillation).
[417] CLARITY § 205 (Exchange Act § 42(a)–(b)) (automatic approval and statutory constraint).
[418] *Supra* Part III.A (judicial fragmentation).
[419] CLARITY § 205 (Exchange Act § 42(c)(2)) (technical conjunctive criteria replacing subjective *Howey* factors).
[420] See *infra* Part V (examining implementation capacity).
[421] *Id.* (technical interpretive capacity question).
[422] *Id.* (institutional capacity dependency).

is theoretically sound, but whether institutional actors can develop and deploy sufficient interpretive discipline to apply these technical standards uniformly over time.[423]

H. State Securities Law Pre-emption

While CLARITY § 308 exempts digital commodities from state blue-sky securities laws by treating mature digital commodities as "covered securities" under Securities Act § 18(b)(5), this exemption applies only upon maturity certification.[424] During Entry and Transition phases, issuers must comply with both federal SEC requirements and applicable state securities regulation, creating a multi-layer compliance framework that practitioners must carefully navigate.[425] Whether states will voluntarily honor federal preemption on digital commodities depends on state legislative and regulatory action, creating a secondary implementation question distinct from federal institutional capacity and creating an ongoing coordination challenge between federal regulators and state securities administrators.[426]

V. FROM DESIGN TO DELIVERY: ENTRY DEFAULTS AND INSTITUTIONAL CAPACITY

Parts I–IV established that the Clarity Act resolves the Temporal Paradox through structural legislative redesign.[427] Where *Howey* treats asset classification as permanently fixed at the moment of offer or sale, CLARITY establishes a lifecycle regime acknowledging that blockchain-based assets can legitimately transform their legal character as networks decentralize and promoter control diminishes.[428] This Part confronts a necessary but difficult question: does CLARITY's elegant statutory architecture translate into reliable institutional practice? The Act moves regulation away from subjective legal standards toward objective technical measurement, but that paradigm shift does not eliminate interpretive challenges; it relocates them.[429] Courts and agencies must now demonstrate sufficient technical literacy to apply CLARITY's maturity criteria consistently across diverse blockchain

[423] *Id.* (interpretive discipline requirement).
[424] CLARITY § 308 (state blue-sky treatment); Securities Act § 18(b)(5), 15 U.S.C. § 77r(b)(5) (covered securities).
[425] *Id.* (multi-layer compliance structure for Entry and Transition phases).
[426] *Id.* (state-level implementation question and federal-state coordination challenge).
[427] *Supra* Parts II–IV (explaining statutory structure and lifecycle mechanism of CLARITY Act).
[428] *Supra* Part II (Temporal Paradox); Part IV.D (Maturity phase transition).
[429] *Infra* Sections V.B–V.C (examining implementation challenges).

architectures, evolving protocols, and novel governance mechanisms.[430] This Part supplies five narrow interpretive defaults grounded in settled doctrine to guide entry-phase adjudication, then diagnoses the institutional pressures—jurisdictional coordination, appellate capacity, federalism friction, technological evolution, and rational gaming—that could undermine CLARITY's implementation even if its statutory design is sound.

A. Entry at the Edge: Five Narrow Defaults

CLARITY leaves entry-phase analysis less explicit than later stages, creating interpretive gaps that courts can stabilize through five narrow defaults rooted in established doctrine and statutory coherence.[431] These defaults do not purport to supply a comprehensive entry test; rather, they channel judicial discretion through familiar doctrinal filters, allowing the lifecycle framework to function as intended while preserving regulatory flexibility if the SEC or Congress determine that more complete guidance is needed.[432]

The first default returns to the scheme-not-object principle foundational to *Howey*.[433] *SEC v. W.J. Howey Co.* and *United Housing Found., Inc. v. Forman* direct courts to examine the arrangement's economic reality, not the asset's label.[434] Read entry-phase classification as a transaction-focused inquiry: did purchasers, at the moment of purchase, reasonably expect profits from the promoter's efforts?[435] This framing distinguishes the asset's eventual technological form from its initial capital-raising scheme. CLARITY's separation of "investment contract" from "investment-contract asset" confirms this principle.[436] The security exists in the scheme at time *t*, not permanently in the token across all chronological time.[437] When courts encounter secondary-market tokens originally distributed as investment vehicles, they should ask whether the investment rationale

[430] *Infra* Section V.B (discussing technical interpretive capacity and appellate role).
[431] These defaults do not exhaust entry doctrine but channel judicial discretion through established filters. They are conservative in scope: rooted in *Howey*, the canon against surplusage, established *Ripple* and *Terraform* precedent, and constitutional fair notice principles.
[432] This is the working presumption: the statute provides sufficient guidance for courts, but leaves flexibility for future refinement through SEC rulemaking or Congressional amendment as technology and case law develop.
[433] *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946); *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 849–52 (1975).
[434] *Id.*
[435] This formulation prioritizes the transactional moment and the parties' reasonable expectations at that moment.
[436] CLARITY § 101 (amending Securities Act § 2(a)(25) to separate "investment contract" and "investment-contract asset").
[437] *Supra* Part II.A (scheme-not-object principle).

persists at the moment of analysis, not assume historic classification binds present transactions.[438]

The second default applies the canon against surplusage to harmonize entry interpretation with transition and maturity stages.[439] Interpretations that effectively re-label secondary trades as investment contracts would render CLARITY's transition disclosures and maturity certifications superfluous, contrary to the principle that courts should give effect to every statutory provision.[440] The statute's architecture—separating entry, transition, and maturity into distinct phases with differentiated regulatory consequences—signals that courts should interpret entry doctrine to preserve genuine work for each stage.[441] This is not permission to ignore entry-stage securities fraud, but rather instruction to construe entry doctrine in a way that respects Congress's decision to map regulatory treatment to lifecycle evolution rather than freezing status at issuance.[442]

The third default anchors "expectation of profit" in context and knowledge at the point of sale. *Howey*'s "expectation" prong is inherently fact-sensitive and contextual.[443] *SEC v. Ripple Labs, Inc.* distinguished institutional purchasers who received investment contracts and contractual commitments from programmatic exchange purchasers without direct interaction with the issuer.[444] *SEC v. Terraform Labs Pte. Ltd.* recognized that vigorous marketing campaigns could carry investment expectations into secondary markets even among distant participants unconnected to the promoter.[445] Courts should weigh promotional messaging, purchaser sophistication, mode of sale, and whether the promoter pledged ongoing operational efforts.[446] A white paper promising that token-sale proceeds will fund continued development by a core team signals investment contract status; a network launched when fully operational and user-governed points away from reliance on others' efforts.[447] The inquiry is

[438] This reflects *Ripple*'s distinction between institutional and programmatic sales contextualized to each transaction.
[439] Hibbs v. Winn, 542 U.S. 88, 101 (2004) (canon against surplusage).
[440] *Id.* (every provision should be given effect).
[441] CLARITY § 201–205 (establishing three-phase lifecycle with distinct entry, transition, and maturity provisions).
[442] This respects the legislative judgment that temporal evolution is legitimate and should be accommodated rather than denied.
[443] *Howey*, 328 U.S. at 301 (defining expectation as core element).
[444] *SEC v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308, 325, 330 (S.D.N.Y. 2023) (institutional sales constituted investment contracts; programmatic exchange sales did not).
[445] *SEC v. Terraform Labs Pte. Ltd.*, 684 F. Supp. 3d 170, 183–92 (S.D.N.Y. 2023) (promotional messaging established expectations).
[446] These factors reflect the fact-intensive inquiry *Howey* contemplates and *Ripple*/*Terraform* operationalize.
[447] This distinction tracks the capital-raising phase (where investment expectations are promoted) versus utility phase (where function replaces promise).

necessarily contextual, and that contextuality is appropriate; it reflects *Howey*'s foundational commitment to substance over form.[448]

The fourth default tailors remedies to the period during which the investment-contract scheme actually existed. When a blockchain network is genuinely mature—a determination CLARITY § 205(a)(2) provides formal process for recognizing—the rationale for securities remedies recedes.[449] The Commodity Exchange Act's antifraud and anti-manipulation provisions, codified in 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1, govern secondary market conduct post-maturity.[450] This avoids unfairly hobbling a now-decentralized network and respects Congress's jurisdictional hand-off.[451] Remedial proportionality is itself a rule-of-law virtue: enforcement tools should be calibrated to the temporal period and risk profile they address.[452] Extending securities remedies indefinitely to a network that is demonstrably mature contravenes this principle by applying sanctions to conduct occurring under conditions no longer presenting the agency costs that justified securities regulation.[453]

The fifth default requires fair notice at the borderline. In a novel regulatory domain with inherent ambiguity, courts should resist retroactively punishing conduct that was not clearly unlawful ex ante.[454] *Loper Light Enterprises v. Raimondo* eliminated Chevron deference, requiring courts to exercise independent judgment on statutory interpretation.[455] Due process principles demand that persons be punished only for conduct they could reasonably understand to be illegal.[456] *FCC v. Fox Television Stations, Inc.* established this foundational protection.[457] Where a promoter operated in borderline territory between merely promoting a technology and explicitly making profit guarantees tied to promoter efforts, retroactively extending investment-contract classification would violate fair notice

[448] *Supra* Part V.A (scheme-not-object default).
[449] CLARITY § 205 (adding Securities Exchange Act § 42, establishing maturity recognition process).
[450] 7 U.S.C. § 9(1) (CEA § 6(c)(1), CEA antifraud authority); 17 C.F.R. § 180.1 (CEA anti-manipulation rule).
[451] CLARITY § 204 (CFTC jurisdiction post-maturity); id. § 203 (secondary sales deemed not to involve investment contracts once mature).
[452] This is a core rule-of-law principle: proportionality between conduct, harm, and remedy.
[453] *Supra* Part IV.D (Maturity Phase mechanism).
[454] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012) (fair notice requirement in due process).
[455] *Loper Light Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273–74 (2024) (eliminating Chevron deference and requiring independent judicial judgment).
[456] *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (fair notice requirement); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (law must be sufficiently definite).
[457] *Fox*, 567 U.S. at 253–54.

principles.[458] This default is not a license for wrongdoing, but a guard against retroactive legal surprise—a hallmark of rule-of-law governance.[459]

These five defaults converge on a core thesis: interpret entry doctrine to focus on the arrangement's economic reality at the moment it mattered—the initial capital-raising—rather than retroactively extending that classification through time based on subsequent technical evolution.[460] They preserve the lifecycle coherence that CLARITY's statutory design contemplates.[461]

B. Institutional Coordination and Appellate Capacity

CLARITY assigns entry-stage oversight to the SEC (offerings, transition certification, maturity review) and post-maturity trading to the CFTC, creating a dual-regulator structure that functions only through genuine institutional coordination.[462] The Dodd-Frank experience demonstrates the difficulty. Meaningful SEC–CFTC harmonization on swap-dealer definitions consumed nearly a decade, with both agencies pursuing overlapping rulemaking, conflicting guidance, and divergent enforcement priorities creating substantial market confusion.[463] This was not incompetence; it was structural friction. Lisa Schultz Bressman's analysis of administrative procedures demonstrates that procedures are bargaining tools through which institutional actors with divergent interests leverage process to advance preferred policies.[464] Joint rulemaking deadlines and coordination mandates become contested battlegrounds. Without powerful incentives to converge, agencies protect turf and diverge on interpretation.[465]

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[458] This reflects the principle articulated in *Fox*: when law leaves conduct ambiguous, due process counsels against retroactive enforcement.

[459] Rule-of-law values include not only clarity but also non-retroactivity—the principle that persons are not punished for conduct not clearly unlawful at the time.

[460] This thesis harmonizes the entry defaults: all five ensure that entry analysis focuses on the economic reality when capital-raising occurred, not on retrospective reclassification based on subsequent technical events.

[461] *Supra* Part IV (explaining lifecycle architecture and its dependence on distinct treatment of entry, transition, and maturity).

[462] CLARITY § 205 (joint SEC-CFTC rulemaking and coordination mandate); id. § 204 (CFTC jurisdiction post-maturity).

[463] SEC & CFTC Joint Press Release No. 2020-264 (Oct. 22, 2020) (finalizing swap-dealer margin harmonization); U.S. Gov't Accountability Office, *Derivatives Market Regulations: Regulators' Efforts to Improve Oversight and Coordination*, GAO-13-8, at 15–23 (Nov. 2012) (documenting implementation delays and coordination challenges across decade-long process).

[464] Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 98 Colum. L. Rev. 1389, 1399–1402 (2007) (explaining how procedures become bargaining tools for inter-agency leverage).

[465] *Id.* (absent convergence incentives, agencies pursue divergent interests).

CLARITY's 270-day joint rulemaking deadline creates urgency Dodd-Frank lacked, but urgency alone does not guarantee alignment.[466] The statute does create institutional incentive through reputation. Both agencies must submit annual coordination reports to Congress explaining progress on joint guidance, including documentation of areas of agreement and disagreement.[467] Congressional oversight of coordination failure creates visibility and accountability that private-sector pressure cannot achieve.[468] Daniel P. Carpenter's research on institutional reputation demonstrates that agencies with genuine technical competence and procedural integrity generate compliance and trust across courts and market participants.[469] If FinHub and LabCFTC function as authentic coordination hubs—maintaining ongoing dialogue on maturity standards, developing aligned guidance on custody and market integrity, and jointly flagging where formal rulemaking requires adjustment—they can reduce friction that procedural mandates alone cannot overcome.[470]

De novo appellate review of maturity determinations creates institutional risk that must be frankly assessed.[471] Richard A. Posner's analysis of appellate court capacity documents a constraint: courts lack laboratories for technical protocol analysis and depend on expert testimony and lengthy administrative records that extend timelines despite statutory deadlines.[472] After *Loper Light*, courts must exercise independent judgment on statutory meaning; agency views are persuasive only.[473] This increases divergence risk. Courts could fragment in interpreting "unilateral authority," "substantially derived," or "distributed ownership," replicating the very fragmentation CLARITY seeks to eliminate.[474]

Yet de novo review creates valuable systemic feedback. Cass R. Sunstein's analysis of judicial minimalism shows that narrow, case-specific rulings either accumulate into coherent doctrine through

[466] CLARITY § 105(a) (270-day joint rulemaking deadline for SEC-CFTC standards).
[467] CLARITY § 205(b) (annual coordination reporting requirement).
[468] Congressional oversight creates political accountability that market pressure or internal agency coordination cannot achieve, as it makes coordination success or failure visible to elected representatives.
[469] Daniel P. Carpenter, *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA* 3–10, 52–87 (Princeton UP 2010) (explaining how agency reputation generated by competence and integrity creates compliance across institutional boundaries).
[470] FinHub and LabCFTC are described in CLARITY §§ 502–503 as permanent offices with explicit coordination mandates.
[471] De novo review creates risk because courts make independent legal judgments that might diverge.
[472] Richard A. Posner, *The Federal Courts: Challenge and Reform* 79–95 (Harv. UP 1996) (documenting appellate court information costs and capacity constraints for complex technical decisions).
[473] *Loper Light*, 144 S. Ct. at 2273–74.
[474] *Supra* Part III.A (judicial fragmentation on *Howey* across similar facts); Part II.C (core doctrinal problem of integration and asset-transaction ambiguity).

incremental convergence or fragment into ad hoc precedent when courts treat similar cases inconsistently.[475] Observable divergences become diagnostic. If appellate courts split on whether a specific blockchain architecture meets maturity criteria, that split exposes ambiguity and forces either convergence or explicit legislative clarification.[476] Performance can be measured through four indicators: (1) variance in maturity outcomes across functionally similar blockchain architectures (same facts, different classifications signal interpretive divergence); (2) appellate reversals of SEC maturity determinations on technical grounds (reversals indicate inconsistent review standards); (3) SEC requests for extension of transition timelines governed by CLARITY § 205(a)(2) deadlines (deadline slippage signals implementation strain); and (4) existence of joint SEC–CFTC guidance on custody, market-integrity, and dual-registration standards (absence indicates coordination failure).[477] If these metrics track favorably in years one through three, institutional performance is succeeding. If they diverge, the system signals strain requiring Congressional attention and possible textual amendment.

C. Federalism, Technology, and Regulatory Gaming

CLARITY excludes mature tokens from state blue-sky laws only post-maturity (§ 308).[478] Entry and Transition remain federal–state hybrids where both regimes apply. Bulman-Pozen and Gerken's analysis of uncooperative federalism documents that states resist even textually clear federal preemption through sub-implementation, reinterpretation, and strategic leverage of their institutional position.[479] State attorneys general and financial regulators often maintain digital-asset licensing frameworks independent of federal requirements, creating de facto dual-compliance obligations that frustrate federal policy.[480] New York's virtual-currency licensing architecture, for instance, imposes separate registration, capital, and custody requirements constraining token distribution during entry even when

[475] Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 10–18 (Harv. UP 1999) (explaining how narrow rulings either converge through incrementalism or fragment through inconsistency).
[476] This feedback role is critical: visible divergence in maturity determinations would signal that CLARITY's technical standards are insufficiently specific and require legislative clarification.
[477] These metrics operationalize the feedback mechanism: they are observable, measurable, and tied to the statutory architecture's functioning.
[478] CLARITY § 308 (treating mature digital commodities as "covered securities" under Securities Act § 18(b)(5), preempting state blue-sky laws post-maturity).
[479] Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 2182, 1278–82 (2009) (documenting state sub-implementation, reinterpretation, and strategic resistance to federal law even when preemption is textually clear).
[480] *Id.* (state resistance to federal mandates through licensing and regulatory structure).

federal law permits it.[481] The practical consequence is a patchwork nudging offerings toward particular jurisdictions or offshore venues, precisely what CLARITY's clarity was designed to prevent.[482] Early federal–state memoranda of understanding and public model guidance can mitigate friction, but preemption on paper often differs from practice once implemented through state institutional actors with divergent incentives.[483]

CLARITY's technical maturity criteria fit current blockchain architectures—proof-of-stake, proof-of-work, smart contracts, DAOs—but face pressure as protocols evolve.[484] Lawrence Lessig's foundational insight that "code is law" applies directly: protocol design embeds governance structures, and architectural changes shift the legal categories applicable to them.[485] Criteria keyed to "voting power" or "unilateral authority" may misfire for proof-of-humanity systems, delegated-governance models, or consensus mechanisms not yet deployed.[486] CLARITY's alternative-pathway provision (§ 205(c)) allows the SEC to identify supplementary maturity criteria, accommodating technological evolution.[487] But agencies must interpret, not rewrite; this requires institutional restraint that regulatory agencies often lack under pressure.[488]

The deeper challenge is that rational market participants will arbitrage regulatory criteria. Founders can hold ownership just below statutory thresholds, split wallets to simulate distribution, engineer technically "open" governance paths with non-functional participation while retaining de facto control, or temporarily off-load holdings before certification and reacquire afterward.[489] George J. Stigler's regulatory capture theory explains the mechanism: regulated industries

[481] *Cf.* New York Department of Financial Services virtual-currency licensing framework (imposing registration and operational requirements independent of federal regime); Bulman-Pozen & Gerken, *supra* note 479 (noting state licensing regimes create dual-compliance burdens despite federal preemption).
[482] *Supra* Part II.C (consequences of jurisdictional uncertainty and fragmentation).
[483] Federal–state coordination requires good-faith state implementation of federal preemption, which cannot be guaranteed by statute alone.
[484] CLARITY § 205 (maturity criteria defining "programmatic functioning," "unilateral authority," "distributed ownership" applicable to current architectures).
[485] Lawrence Lessig, *Code and Other Laws of Cyberspace* xii–xiv, 5–29 (Basic Books 1999) (code embeds governance; design choices regulate behavior as law does).
[486] Novel governance mechanisms—proof-of-humanity, delegated consensus, AI-assisted governance—may not map onto traditional voting or ownership structures.
[487] CLARITY § 205(c) (SEC authority to identify alternative maturity criteria through notice-and-comment rulemaking).
[488] Wendy E. Wagner, *The "Bad Science" Fiction: Reclaiming the Integrity of the Regulatory Process*, 66 L. & Contemp. Probs. 63, 64–65 (2003) (documenting how agencies under pressure often exceed statutory boundaries).
[489] George J. Stigler, *The Citizen and the State: Essays on Regulation* 5–21 (U. Chi. Press 1975) (regulatory capture thesis: regulated industries shape compliance rules to advantage through strategic behavior).

exploit regulatory ambiguity for strategic advantage.[490] Counter-measures cannot depend solely on ex-post enforcement; they require transparent measurement systems. If the SEC specifies verifiable indicators—validator concentration over time, proposal-passage dependency on core developers, correlated wallet behavior, governance participation rates—courts and regulators can assess genuine versus artificial decentralization without expert guesswork.[491] Measurement grounds enforcement in observable fact rather than contested interpretation, reducing gaming incentives and improving predictability.[492] But building such systems demands sustained institutional technical expertise and commitment that may exceed regulatory capacity if agencies are simultaneously managing coordination, appellate engagement, and state relations.[493]

D. Synthesis and Forward

CLARITY solves a doctrinal problem by making time explicit in regulatory structure.[494] That creates an institutional question: can courts, agencies, and states reliably perform time? The entry defaults supply interpretive discipline for entry adjudication; the coordination, capacity, federalism, technology, and measurement analyses map the institutional seams where execution can fail. If entry defaults are applied consistently across courts, SEC–CFTC coordination functions despite structural friction, appellate courts develop sufficient technical literacy, states respect preemption, agencies exercise interpretive restraint, and measurement systems deter gaming, then lifecycle regulation will succeed.[495]

Under *Howey*, courts lacked temporal guidance, producing the fragmentation documented in Parts II–III.[496] CLARITY provides architecture: entry governs capital formation; transition provides transparency toward decentralization; maturity transfers authority to commodities oversight once control disperses.[497] Yet elegant design does not guarantee competent execution. Part VI proposes targeted

[490] *Id.*
[491] These indicators are "hard facts" amenable to technical analysis rather than subjective interpretation.
[492] Transparent measurement systems reduce opportunities for strategic arbitrage by making compliance determinable ex ante.
[493] Institutional overload occurs when regulatory agencies lack capacity to simultaneously manage multiple complex functions. *Supra* Part III.C (convergence of institutional pathologies).
[494] CLARITY makes time explicit through three distinct phases with different regulatory regimes for each.
[495] This is the conditional thesis: IF all institutional actors meet performance standards, THEN lifecycle regulation works.
[496] *Supra* Parts II–III (fragmentation analysis).
[497] *Supra* Parts II–IV (explaining *Howey* deficiency and CLARITY's structure).

textual amendments to eliminate residual entry ambiguity, cement the lifecycle approach into black-letter law, and provide agencies the procedural roadmap needed to sustain coordination and measurement systems. The goal is converting interpretive defaults into explicit doctrine—not because courts cannot manage gaps, but because reducing variance among institutional actors is essential to credibility in a regime built on clarity and temporal precision.

CONCLUSION

The Howey test has endured for eighty years because it captured a structural truth about investment: where people pool capital and rely on others' efforts, the securities laws should apply. Its weakness was temporal. Howey froze a moment in a scheme's life and then tried to extrapolate that moment indefinitely. The result, across Kik, Telegram, LBRY, Ripple, and Terraform, was that static doctrine met dynamic technology and broke.

The Clarity Act answers that failure by treating time as a legal variable. It divides the digital-asset lifecycle into entry, transition, and maturity, assigning appropriate disclosure, oversight, and market rules to each phase. That structural insight—law calibrated to the temporal evolution of economic systems—is this Article's central claim: time belongs in the test.

Parts I through IV demonstrated how CLARITY re-codes Howey's functional inquiry into statutory architecture; Part V showed that even the best design must still be performed. The statute's success will turn on how institutions inhabit its timeline: how courts interpret entry-phase ambiguity with technical discipline, how the SEC and CFTC coordinate through FinHub and LabCFTC rather than compete across a moving jurisdictional frontier. The Dodd-Frank experience reminds us that coordination deadlines can harden into procedural battlegrounds; success will require not only shared authority but shared reputation. States, meanwhile, will test the limits of pre-emption through licensing and consumer-protection law, a reminder that federal clarity still depends on local cooperation. Agencies must also sustain technical literacy as blockchain code changes faster than regulation can.

The test for CLARITY is thus not whether it is elegant, but whether it is executable. The Act converts doctrinal uncertainty into an institutional experiment—asking whether Congress, agencies, and courts can coordinate across time as well as across jurisdictions. That experiment will measure the American administrative state's capacity to regulate evolving systems without stifling them.

Still, CLARITY offers a normative advance that transcends crypto. It models how law can govern temporal systems—domains where value and control evolve continuously—through staged accountability rather than static classification. Similar lifecycles could structure the law of artificial intelligence training data, climate-transition finance, or automated supply-chain contracts. The method is general: build temporal checkpoints into legal categories, then align regulatory jurisdiction and remedies with those checkpoints. Doing so makes the rule of law compatible with continuous innovation.

Whether CLARITY fulfills that promise will depend on ordinary virtues: interpretive discipline, procedural transparency, and sustained expertise. Transparency also means measurable decentralization—public metrics on validator concentration, governance participation, and insider control (the measurable signs of genuine decentralization)—that keep objectivity from eroding into theater. If courts apply the entry-phase defaults consistently, if agencies resist jurisdictional turf wars through institutionalized coordination mechanisms, if states respect the boundaries of federal preemption, and if Congress remains willing to adjust the statutory timeline as technology evolves, the Act can replace the arbitrary with the predictable—turning post-Howey chaos into coherent lifecycle law. If not, the test of time will once again become the test that time defeats.

For now, CLARITY marks a turning point. It reminds us that good law is not only about who governs or what is governed, but when governance occurs. The future of financial regulation—and perhaps of adaptive legislation more broadly—depends on institutions that can perform time with fairness, precision, and restraint. In that performance lies the possibility that securities law, born in the age of orange groves—can still govern the digital orchards of the twenty-first century.