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Cryptocurrency and the SEC: How a Piecemeal Approach to Regulating New Technology Selectively Stifles Innovation

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Note

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The Securities and Exchange Commission (SEC) recently took steps to regulate certain forms of cryptocurrency as substitute securities. However, the SEC has not provided clear guidance regarding which forms of cryptocurrency it deems worthy of regulation. This creates a dilemma. While some cryptocurrencies, like those involved in capital-raising via initial coin offerings (ICOs), do indeed seem like securities, others do not. For example, J.P. Morgan is developing a cryptocurrency that appears to be more like fiat currency than a security. This Note discusses how the SEC recently convinced a federal judge that certain ICO-related cryptocurrencies can be considered securities under the Howey *test, as well as how the major questions doctrine—which asserts that issues of major importance should not be left to the discretion of federal agencies absent clear congressional guidance—relates to the topic of cryptocurrency regulation. Furthermore, this Note discusses why it is undesirable that the SEC is regulating cryptocurrency without clear guidance from Congress regarding which cryptocurrencies the Commission has the authority to regulate. Because cryptocurrency is such a rapidly developing field, the gray area between forms of cryptocurrency that seem to be securities and those that do not will only become more complex. As a result, piecemeal cryptocurrency regulation will continue to deprive innovators of sufficient guidance regarding issues such as whether their cryptocurrency must be registered with the SEC. Ultimately, this Note argues that the regulation of cryptocurrency—as a developing technology—is a "major question," and thus Congress should authorize a new commission or sub-agency that can adequately address this varied and everchanging field.*

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ADAM J. KUEGLER *

INTRODUCTION

In recent months, the Securities and Exchange Commission (the "SEC" or the "Commission") has inserted itself into cryptocurrency regulation in various ways. First, the SEC fined three individuals involved in managing a hedge fund that falsely advertised the fund as the first regulated firm of its kind to focus on cryptocurrency.[1] Second, the Commission fined a cryptocurrency firm for not registering as a brokerage firm.[2] Finally, in the same month, a federal judge ruled for the first time that initial coin offerings (ICOs) could be the subject of securities laws.[3] Yet, the lines that the SEC

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* J.D. 2020, University of Connecticut School of Law; B.A. 2017, University of Connecticut, Storrs. Special thanks to Professor Kiel Brennan-Marquez for his outstanding advising throughout the process of writing this Note, and to Professor Jennifer Taub for her review and comments from a securities law perspective. Thanks also to the superb staff of the *Connecticut Law Review* for reviewing and editing this Note. Finally, a sincere thank you to my family, friends, and loved ones, especially my parents and my brother, Zachary, for their support throughout my law school endeavors.

1 Dave Michaels, *SEC Takes First Action Against Hedge Fund Over Cryptocurrency Investments*, WALL ST. J. (Sept. 11, 2018, 3:48 PM), https://www.wsj.com/articles/sec-takes-first-action-against-hedge-fund-over-cryptocurrency-investments-1536688661. The Commission charged the hedge fund with violations of sections 5(a), 5(c), and 17(a)(2) of the Securities Act, section 7(a) of the Investment Company Act, and section 206(4) of the Advisers Act, along with corresponding Rule 206(4)-8. Crypto Asset Mgmt., LP, Securities Act Release No. 10544 (Sept. 11, 2018), https://www.sec.gov/litigation/admin/2018/33-10544.pdf. Section 5(a) prohibits the sale of unregistered securities through interstate commerce or the mail. 15 U.S.C. § 77e(a) (2012). Section 5(c) prohibits offering to sell unregistered securities through interstate commerce or the mail. § 77e(c). Section 17(a)(2) prohibits "any person in the offer or sale of any securities" from "obtain[ing] money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made . . . not misleading." § 77q(a)(2). Section 7(a) prohibits investment companies that are not registered with the SEC from "engag[ing] in any business in interstate commerce." § 80-7(a). Finally, Rule 206(4)-8 prohibits untrue statements or omissions of material facts by investment advisers "to any investor or prospective investor in [a] pooled investment vehicle." 17 C.F.R. § 275.206(4)-8 (2019). The SEC fined the hedge fund $200,000. Crypto Asset Mgmt., LP, Securities Act Release No. 10544, *supra*, at 5.

2 Michaels, *supra* note 1.

3 Alexander Osipovich, *Judge Lets Cryptocurrency Fraud Case Go Forward, In Win for SEC*, WALL ST. J. (Sept. 11, 2018, 6:34 PM), https://www.wsj.com/articles/judge-lets-cryptocurrency-fraud-case-go-forward-in-win-for-sec-1536704792. An ICO occurs when "a firm creates a new cryptocurrency and sells it to investors to raise money." *Id.* The federal judge did not go so far as to resolve the question of whether the cryptocurrencies in that case were securities, as his ruling "only settled the question of

and the federal judge have set are far from bright. As a reporter for the *Wall Street Journal* noted, "[t]he SEC didn't reveal which tokens or cryptocurrencies were implicated [in two of the cases discussed above], making it impossible to tell which digital coins the regulator considers to be securities."[4] One of the firms penalized by the SEC cited this uncertainty as the reason for closing its doors, stating that its shutdown was "due to the ever changing regulatory landscape of cryptocurrency space in our jurisdiction."[5]

Cryptocurrency and ICOs represent an unresolved area of federal regulation. ICOs are devices for raising capital.[6] Put simply, when a firm carries out an ICO, it "creates a new cryptocurrency and sells it to investors to raise money."[7] ICOs differ from traditional initial public offerings (IPOs) in that the purchaser in an ICO does not receive equity in a company.[8]

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whether [the] case would go to trial." *Id.* Rather, the judge found that "the Indictment alleges sufficient facts that, if proven at trial, could lead a reasonable jury to find that [the cryptocurrencies] constituted 'investment contracts.'" Memorandum & Order at *10, United States v. Zaslavskiy, No. 17 CR 647 (RJD), 2018 WL 4346339 (E.D.N.Y. 2018), ECF No. 37 (slip copy) [hereinafter Zaslavaskiy Memorandum & Order].

4 Michaels, *supra* note 1; *see also* Jay Clayton, *Statement on Cryptocurrencies and Initial Coin Offerings*, U.S. SEC. & EXCHANGE COMM'N (Dec. 11, 2017), https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11#_ftnref6 ("It has been asserted that cryptocurrencies are not securities and that the offer and sale of cryptocurrencies are beyond the SEC's jurisdiction. Whether that assertion proves correct with respect to any digital asset that is labeled as a cryptocurrency will depend on the characteristics and use of that particular asset."). More recently, the SEC has offered additional guidance regarding how cryptocurrencies may be classified as securities. *See Framework for "Investment Contract" Analysis of Digital Assets*, U.S. SEC. & EXCHANGE COMM'N, https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets (last updated Apr. 3, 2019) (providing "a framework for analyzing whether a digital asset has the characteristics of one particular type of security–an 'investment contract'"). However, while this guidance is instructive, it still leaves uncertainty. The SEC cautions:

> These factors are not intended to be exhaustive in evaluating whether a digital asset is an investment contract or any other type of security, and no single factor is determinative; rather, we are providing them to assist those engaging in the offer, sale, or distribution of a digital asset, and their counsel, as they consider these issues. We encourage market participants to seek the advice of securities counsel and engage with the Staff through www.sec.gov/finhub.

Id.

5 Michaels, *supra* note 1.

6 Zachary Missan, Note, *The SEC and Initial Coin Offerings: How Securities Laws Affect ICOs*, 37 B.U. REV. BANKING & FIN. L. 85, 85 (2017); Osipovich, *supra* note 3.

7 Osipovich, *supra* note 3. For further background on ICOs, see Arjun Kharpal, *Tokenization: The World of ICOs*, CNBC (July 16, 2018, 2:09 AM), https://www.cnbc.com/2018/07/13/initial-coin-offering-ico-what-are-they-how-do-they-work.html; Joon Ian Wong, *Ethereum Unleashed the "Initial Coin Offering" Craze, But It Can't Handle Its Insane Success*, QUARTZ (June 15, 2017), https://qz.com/1004892/the-bancor-ico-just-raised-153-million-on-ethereum-in-three-hours/. *See also ICOs Explained: 5 Examples of Successful Coin Offerings*, MEDIUM (Apr. 23, 2018), https://medium.com/boosto/icos-explained-5-examples-of-successful-coin-offerings-2ddcb780ef58 (providing examples of other ICOs).

8 Kharpal, *supra* note 7.

Rather, the purchaser hopes: (a) to be able to use the cryptocurrency on a product to be created in the future, and/or (b) that the value of the coin itself will increase so that the investor can profit by trading it.[9] In 2017, initial coin offerings became extremely popular because firms saw them as a method of bypassing the regulatory and fee structure associated with initial public offerings.[10]

The SEC, however, remains "wary" of ICOs.[11] In reference to ICOs, the Commission issued a report in July 2017 "in order to stress that the U.S. federal securities law may apply to various activities, including distributed ledger technology, depending on the particular facts and circumstances, without regard to the form of the organization or technology used to effectuate a particular offer or sale."[12] Still, from January through June 2018—months after the SEC issued the report—firms raised approximately $12 billion through ICOs.[13] Following the SEC's July 2017 Report, some cryptocurrency companies have attempted to offer cryptocurrencies in compliance with the registration requirements of section 5 of the Securities Act or its exemptions. For example, one company—Filecoin—raised more than $257 million through an offering under Rule 506(c) of Regulation D, which allows general solicitation for offerings that involve sales exclusively to accredited investors.[14]

Cryptocurrency regulation is largely uncharted legal territory. The first time a federal judge ruled that ICOs could be the subject of SEC regulation was in September 2018 in the case of *United States v. Zaslavskiy*.[15] Notably, a court in another federal district has already cited *Zaslavskiy* in finding that a plaintiff had a private cause of action against a corporation that had not registered its cryptocurrency as a security.[16] As *Zaslavskiy* and other similar cases gain traction and rise through the federal court system, the SEC's toughest test in cryptocurrency regulation—a legal battle before the Supreme Court—could be in the making.

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[9] *Id.*

[10] Osipovich, *supra* note 3.

[11] *Id.*

[12] *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207, at 10 (July 25, 2017), https://www.sec.gov/litigation/investreport/34-81207.pdf [hereinafter July 2017 SEC Report of Investigation].

[13] Osipovich, *supra* note 3.

[14] Michael Mendelson, *From Initial Coin Offerings to Security Tokens: A U.S. Federal Securities Law Analysis*, 22 STAN. TECH. L. REV. 52, 85 (2019) (citing 17 C.F.R. § 230.144 (2018) and 17 C.F.R. § 230.905 (2018)).

[15] *See* Zaslavskiy Memorandum & Order, *supra* note 3, at *10 (ruling that a jury could find that the cryptocurrencies in this case were "investment contracts"); Osipovich, *supra* note 3 ("Regulators scored a victory in their crackdown on cryptocurrency crimes as a judge ruled that initial coin offerings are subject to U.S. securities-fraud laws.").

[16] Solis v. Latium Network, Inc., No. 18-10255 (SDW) (SCM), 2018 WL 6445543, at *4–6 (D.N.J. Dec. 10, 2018).

As a subject of federal regulation, cryptocurrency provides an important opportunity for analysis and reflection. Its current value stems from the fact that it is so new that the Federal Government has not completely solidified its regulatory approach.[17] Meanwhile, the Supreme Court might decide to drastically change the *Chevron* doctrine[18] and restrict the power of federal agencies to act without express statutory authority. This possibility became especially plausible with the confirmation of Justice Brett Kavanaugh to the Supreme Court in 2018, replacing Justice Anthony Kennedy.[19] Justice Kennedy frequently served as the swing vote in administrative law cases.[20] Justice Kavanaugh, who has criticized the *Chevron* doctrine,[21] may push the Court towards ending the *Chevron* doctrine as we know it. This could severely curtail the SEC's power to regulate cryptocurrency absent clear congressional authorization to do so.

This Note does not take a position on the broad question of whether the Supreme Court should fundamentally transform *Chevron*. Rather, this Note argues more narrowly that there are legitimate and persuasive doctrinal and policy reasons for why the SEC should not be involved in regulating cryptocurrency at this time. This reasoning is based on three main premises. First, cryptocurrency is an everchanging subject that will likely continue to evolve into myriad uses as it rapidly becomes a major part of the U.S. economy. Thus, cryptocurrency regulation falls within the major questions doctrine, which directs that "agencies need clear authorization from Congress to pass regulations with major economic and political significance."[22] The doctrine further advises courts against deferring to "an agency's interpretation of a statutory provision . . . where the interpretive

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[17] Osipovich, *supra* note 3 (describing how the SEC "has said many ICOs are unregistered securities offerings, making them *potentially* illegal, and warned that many could be fraudulent" (emphasis added)).

[18] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984) (setting out the process by which courts should analyze statutory interpretations by federal agencies).

[19] Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html.

[20] ANDREW NOLAN & CAITLAIN DEVEREAUX LEWIS, CONG. RESEARCH SERV., R45293, JUDGE BRETT M. KAVANAUGH: HIS JURISPRUDENCE AND POTENTIAL IMPACT ON THE SUPREME COURT 44 (2018) [hereinafter CRS KAVANAUGH REPORT].

[21] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151 (2016) [hereinafter *Fixing Statutory Interpretation*] (arguing that the *Chevron* doctrine allows a deviation from the best reading of a statute).

[22] CRS KAVANAUGH REPORT, *supra* note 20, at 51. For scholarly literature defining the major questions doctrine in terms of economic and political significance, see, for example, Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2022 (2018); Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 479 (2016); Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 358 (2016); Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1102–03 (2019).

question could effectuate an enormous and transformative expansion of the agency's regulatory authority."[23] The second premise relates to policy considerations. Due to the rapid evolution of cryptocurrency, cryptocurrency regulation requires a comprehensive approach. To allow one federal agency, such as the SEC, to regulate one aspect of cryptocurrency allows for a piecemeal approach that may lead to obscure results and stifle innovation. The third and final premise relates to distributive justice. Put simply, smaller cryptocurrency companies will be disproportionately affected by regulatory uncertainty.

Cryptocurrency regulation is a complex issue. It requires balancing the hardships and barriers to entry that uncertain regulation creates, on the one hand, with adequately addressing the need to protect cryptocurrency consumers and investors, on the other. While the observation that smaller companies find it more difficult to comply with regulations than larger companies is generally true—that is, it is not a dynamic unique to cryptocurrency—this Note's argument is more specific. Namely, regulatory uncertainty is especially detrimental to young industries that rely on emerging, rapidly developing technologies, because these industries are more susceptible than mature industries to the possibility that smaller companies will be left behind by regulatory uncertainty. In other words, this Note does not focus on how general costs of compliance disproportionately affect smaller companies. Rather, it argues that smaller companies will be left behind because they will not know *whether* they have to comply with specific regulations—or even which agencies are responsible for regulating them. Technologies like cryptocurrency, being both new and poorly understood, run the risk of creating a piecemeal regulatory system that is incapable of keeping up with innovation. This only leads to more uncertainty and, subsequently, more inequality.

Ultimately, this Note argues that Congress should authorize a new federal commission or a sub-agency within a federal agency—perhaps even the SEC—to deal exclusively with cryptocurrency. This, of course, is a bold proposal. However, cryptocurrency is not only a topic of major consequence, but it also spans many areas of the technological and financial landscape. ICOs have the potential to revolutionize investing practices. In fact, they are already having a major effect.[24] Meanwhile, cryptocurrency could drastically change the ways in which corporations and banks move money

[23] Leske, *supra* note 22, at 480. *See also* Richardson, *supra* note 22, at 358 (noting that the major questions doctrine "claws back interpretive authority for judges in certain 'extraordinary' cases" and that "it says that when the legal stakes are sufficiently high, agency interpretations of law carry little or no weight, contrary to the standard rule in everyday cases where those interpretations are often determinative" (citation omitted)).

[24] *See* Osipovich, *supra* note 3 (noting that entities used ICOs to raise $12 billion in the first half of 2018).

around the world.[25] The diversity in the ways in which cryptocurrency can be used results in complex legal and regulatory issues. Through a single regulatory agency or sub-agency that deals exclusively with cryptocurrency, the Federal Government can be prepared to deal with new cryptocurrency devices as they arise. In addition, by adopting a unified channel for regulation, the Federal Government can facilitate innovation, which is extremely important to the financial sector and other industries.

Importantly, this Note does not argue that it is completely nonsensical for certain federal agencies, including the SEC, to assert jurisdiction over certain aspects of cryptocurrency. Nor does this Note necessarily argue for more cryptocurrency regulation or less cryptocurrency regulation. Rather, this Note argues for *smarter* cryptocurrency regulation. It is understandable that some federal agencies see aspects of cryptocurrency as falling within their jurisdiction. It follows that the proper place for cryptocurrency regulation might be a sub-agency within an existing federal agency, such as the Federal Trade Commission. But development in cryptocurrency is creating gray areas—areas within the field that do not neatly fit within the jurisdiction of any single, currently-existing federal agency. As this Note discusses, when one or multiple ill-suited agencies attempt to deal with a rapidly changing innovative technology, the result is inefficiency—and uncertainty—in regulation. This uncertainty can be cured, at least in part, by the congressional authorization of a single regulator—a "one stop shop" for cryptocurrency innovators—to determine the appropriate methods of cryptocurrency regulation as the field develops.

This Note introduces the problem, in Part I, through a careful analysis of *United States v. Zaslavskiy*, a 2018 case holding that cryptocurrency could be the subject of federal securities regulation. Next, Part II focuses on the *Chevron* doctrine, the major questions doctrine, and why these doctrines could matter to an eventual U.S. Supreme Court decision addressing cryptocurrency regulation. Part III discusses why an agency or sub-agency focused exclusively on cryptocurrency would be preferable to piecemeal regulation involving the SEC and other federal agencies. Finally, the Note ends with some concluding thoughts.

I. SECURITIES REGULATION, SECURITIES CASE LAW, AND THEIR RELATIONSHIP TO CRYPTOCURRENCY: THE *ZASLAVSKIY* CASE

A review of recent cryptocurrency case law, foundational securities cases, and SEC regulations provides insight into how the Commission is asserting itself into cryptocurrency regulation and how courts are reacting.

[25] *See J.P. Morgan Creates Digital Coin for Payments*, J.P. MORGAN (Feb. 14, 2019), https://www.jpmorgan.com/global/news/digital-coin-payments [hereinafter *J.P. Morgan JPM Coin Announcement*] (describing J.P. Morgan's creation of its own cryptocurrency, "JPM Coin").

Judge Raymond J. Dearie's recent memorandum and order in *United States v. Zaslavskiy*[26] is a natural starting point. It both exemplifies the SEC's position on cryptocurrency and provides a review of relevant securities cases from *SEC v. W.J. Howey Co.*[27] through the present day.[28]

In *Zaslavskiy*, the defendant allegedly collected money from investors under the false premise that his cryptocurrencies, "REcoin" and "Diamond," were backed by real estate and diamonds, respectively.[29] He promised that those who invested in REcoin "could change their money into a 'more stable and secure investment: real estate,' which 'grows in value.'"[30] He also stated that the proceeds of REcoin were "invest[ed] . . . into global real estate."[31] As for Diamond, the defendant falsely claimed that the cryptocurrency was hedged by actual diamonds and that through Diamond's efforts, the cryptocurrency could be excepted to grow by at least ten or fifteen percent each year.[32]

The Government charged Zaslavskiy with securities fraud under the Securities Exchange Act of 1934 (Exchange Act) and SEC Rule 10b-5.[33] The Government argued that investments in the cryptocurrencies that the defendant peddled were "investment contracts" within the definitions for securities in the Exchange Act and the Securities Act of 1933 (Securities Act).[34] The defendant moved to dismiss the charges against him based in part on the argument that his cryptocurrencies did not qualify as securities.[35] Zaslavskiy claimed that his supposed cryptocurrencies were currency rather than "investment vehicles," and as a result, they should be excluded from the federal law definitions of securities.[36] He also argued that the cryptocurrencies did not fall under the *Howey* definition of an investment contract because: (1) they involved purchases that did not include money;[37] (2) there was neither horizontal nor strict vertical commonality because the government alleged neither the pooling of assets nor that the fortunes of the purchasers depended on the fortunes of the defendants;[38] and (3) purchaser

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26 Zaslavskiy Memorandum & Order, *supra* note 3.

27 328 U.S. 293 (1946).

28 *See* Zaslavskiy Memorandum & Order, *supra* note 3, at *6–17 (reviewing securities case law as it relates to the cryptocurrencies in *Zaslavskiy*).

29 *Id.* at *2–3.

30 *Id.* at *3 (citations omitted).

31 *Id.* (alteration in original).

32 *Id.* at *4 (citations omitted).

33 *Id.* at *1–2.

34 *Id.*

35 *Id.* at *1.

36 Memorandum of Law Supporting Maksim Zaslavkiy's Motion to Dismiss Indictment at 11–14, United States v. Zaslavskiy, No. 17-CR-0647 (RJD) (RER) (E.D.N.Y. 2018), ECF No. 27.

37 *Id.* at 15–16.

38 *Id.* at 16–17.

profits did not depend on the efforts of the cryptocurrency promoters.[39] Notably, the defendant argued that the "decentralized" nature of blockchain is "resistant" to horizontal commonality.[40] Furthermore, the defendant argued that the "context" did not indicate that the cryptocurrencies were investment contracts in part because "purchasers . . . did not purchase any interest in a legal entity."[41]

Judge Dearie of the Eastern District of New York ruled that a reasonable jury could find the Government's argument persuasive and consequently consider the defendant's cryptocurrencies to be investment contracts.[42] However, the court stressed that "[w]hether a transaction or instrument qualifies as an investment contract is a highly fact-specific inquiry."[43] Therefore, the court left to the jury the ultimate question of whether the cryptocurrencies in this case amounted to securities. This case highlights how the way in which a court interprets the definition of "securities" under relevant securities laws and regulations is the predominant factor in determining whether cryptocurrency can be regulated by federal securities laws. The court concluded that if the jury found that the three prongs of the *Howey* test were satisfied, then that jury could reasonably find that the cryptocurrencies constituted securities.[44] In its discussion of the three prongs of the *Howey* test, the court provided useful insights regarding other cases that have guided securities law jurisprudence since *Howey*.[45]

The first prong of the *Howey* test is whether "individuals *invested* money (and other forms of payment) in order to participate in [the defendant's] schemes."[46] In discussing this prong, the court cited persuasive authority to stress the importance of an investment to the definition of a security. First, the court cited *SEC v. SG Ltd.*,[47] which stated that for the first *Howey* prong, "[t]he determining factor is whether an investor 'chose to give up a specific consideration in return for a separable financial interest with the characteristics of a security.'"[48] Next, the court cited *SEC v. Brigadoon Scotch Distributors, Ltd.*,[49] in which the Southern District of New York put weight in evidence that the defendants advertised the money they sought as

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[39] *Id.* at 18–20.

[40] *Id.* at 17.

[41] *Id.* at 20.

[42] Zaslavskiy Memorandum & Order, *supra* note 3, at *10.

[43] *Id.* at *9 (citing SEC v. W.J. Howey Co., 328 U.S. 293 (1946) and Marine Bank v. Weaver, 455 U.S. 551, 560 n.11 (1982)).

[44] *Id.* at *10–16.

[45] *Id.* at *6–17.

[46] *Id.* at *10–11 (emphasis added) (citing *Howey*, 328 U.S. at 299–300).

[47] *Id.* (quoting SEC v. SG Ltd., 265 F.3d 42, 48 (1st Cir. 2001)).

[48] *SG Ltd.*, 265 F.3d at 48.

[49] Zaslavskiy Memorandum & Order, *supra* note 3, at *11 (citing SEC v. Brigadoon Scotch Distrib., Ltd., 388 F. Supp. 1288, 1291 (S.D.N.Y. 1975)).

an "investment."[50] Finally, and perhaps most importantly for the purposes of this Note, Judge Dearie cast disfavor on the defendant's argument that those who paid for the cryptocurrency did so as an "exchange of one medium of currency for another."[51] The judge pointed out that the indictment alleged that the "exchange" was actually for "membership" in the cryptocurrency "ventures."[52] This "exchange," as this Note previously described, was premised on the promise that the purchasers would receive interests in diamond and real estate-backed tokens, which would purportedly increase in value based on real estate investments and/or the growth of the cryptocurrencies.[53]

Next, the court discussed the second prong of the *Howey* test: that the cryptocurrency "constituted a 'common enterprise.'"[54] The court cited *International Brotherhood of Teamsters v. Daniel*,[55] which declared that "the 'touchstone' of the *Howey* test 'is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.'"[56] Judge Dearie stressed the necessity of "commonality" and noted that "horizontal commonality" is enough to demonstrate a common enterprise—at least in the Second Circuit.[57] He described horizontal commonality as when assets or funds are shared and each investor's return depends on "the profitability of the enterprise as a whole."[58] Judge Dearie found that the Government could satisfy *Howey*'s second prong because the cryptocurrencies purportedly relied on the pooling of funds for buying real estate and diamonds and because the defendant promised the investors virtual pieces of currency that were in proportion to their investment interest.[59] The court referenced how the courts in both *Howey* and *SG Ltd.* found significance in the fact that investors were given "shares" or "capital units" that were proportional to their interests in the respective enterprises.[60] Notably, the court stated that evidence that the defendant promised pieces of virtual currency to investors did not detract from the allegation that he had pooled assets as part of his scheme.[61]

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[50] *Brigadoon Scotch Distrib., Ltd.*, 388 F. Supp. at 1291.

[51] Zaslavskiy Memorandum & Order, *supra* note 3, at *11 (internal quotation marks omitted) (also noting that the defendant made this argument "glibly").

[52] *Id.* (citations omitted).

[53] *Id.* at *3–4.

[54] *Id.* at *12 (citations omitted).

[55] *Id.* (citing Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551, 561 (1979)).

[56] *Daniel*, 439 U.S. at 561 (quoting United Hous. Found., Inc. v. Forman, 421 U.S. 837, 852 (1975)).

[57] Zaslavskiy Memorandum & Order, *supra* note 3, at *12 (quoting Revak v. SEC Realty Corp., 18 F.3d 81, 87 (2d Cir. 1994)).

[58] *Id.* at *13 (quoting *Revak*, 18 F.3d at 87).

[59] *Id.* (quoting *Revak*, 18 F.3d at 87–88).

[60] *Id.* at *13–14 (citations omitted).

[61] *Id.* at *14.

For the third prong of *Howey*, the court stated that in order to find the defendant guilty of securities fraud, the jury would have to find that "investors were led to expect profits in [the defendant's cryptocurrencies] to be derived solely from the managerial efforts of [the defendant] and his co-conspirators, not any efforts of the investors themselves."[62] The court cited *SEC v. Edwards*,[63] which held that a key aspect of an investment contract is "the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."[64] Relying on *Edwards*, *Forman*, and the SEC's July 2017 Report of Investigation, the court found that the "grow[th] in value" that the defendant promised to investors qualified as profits for purposes of the third prong of the *Howey* test.[65] The court further reasoned that investors "could have reasonably expected" that any profits they gained would be "primarily" from the efforts of the defendant and his co-conspirators rather than from the investors themselves.[66] The court gathered this from evidence that the defendant advertised having "the soundest" investment strategies and from evidence that the investors did not have any control over how the defendant used the investments he collected.[67] Judge Dearie made this ruling—even though investors would purportedly have the opportunity to trade their virtual coins for profit—because the investors did not have oversight in the management of the pooled investments of the cryptocurrencies.[68]

Finally, the *Zaslavskiy* court rejected the defendant's argument that the cryptocurrencies could not be securities because they were currency.[69] The court pointed out that no currency ever existed in this fraud case and cited *Edwards* and *Forman* in emphasizing that the definition of security should focus on substance and economic reality, rather than form.[70] Judge Dearie later referenced *SEC v. Zandford* in noting that "securities laws are meant to be interpreted 'flexibly to effectuate [their] remedial purpose.'"[71] Furthermore, he stated that the purpose of the Exchange Act and Rule 10b-5 is to prevent the exact conduct which the defendant allegedly committed—the potentially fraudulent "use [of] the money of others on the promise of

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[62] *Id.* (citations omitted).

[63] *Id.* (citing SEC v. Edwards, 540 U.S. 389, 395 (2004)).

[64] *Edwards*, 540 U.S. at 395 (citation omitted).

[65] Zaslavskiy Memorandum & Order, *supra* note 3, at *14–15 (citations omitted).

[66] *Id.* at *15.

[67] *Id.* at *15–16 (citations omitted).

[68] *Id.*

[69] *Id.* at *16–17 (citing, in part, 15 U.S.C. § 78c(a)(10) (2012), which precludes currency from being a security if certain conditions are met).

[70] *Id.* at *17 (citing SEC v. Edwards, 540 U.S. 389, 393 (2004) and United Hous. Found., Inc. v. Forman, 421 U.S. 837, 848 (1975)).

[71] *Id.* at *19 (alteration in original) (quoting SEC v. Zandford, 535 U.S. 813, 819 (2002)).

profits."[72] As such, the conduct that the Government charged in the indictment fell within the purpose of the statute.[73]

This review of *Zaslavskiy* is important, not only because it was a groundbreaking decision, but also because it demonstrates the cutting edge of judicial decision making involving cryptocurrency and securities regulation. It shows the arguments that the Federal Government, other plaintiffs, and defendants in securities litigation might use in such conflicts, and it illustrates the authorities that judges might cite in justifying their decisions to include cryptocurrency and ICOs in the purview of securities regulations. Finally, *Zaslavskiy* supplies an example of the type of case that might come to the Supreme Court on appeal. It shows the type of reasoning that the Supreme Court might need to reverse if it intends to curtail the ability of the Federal Government to regulate cryptocurrency under securities regulations.

Based on the way Judge Dearie described the cryptocurrencies in *Zaslavskiy*, it may seem obvious that ICOs will always constitute securities. Based on this assessment, some might argue that failing to classify such cryptocurrencies as securities only serves to leave those seeking to raise capital with a way to evade securities laws and thereby put investors at risk. But this is hardly true of all cryptocurrency-based capital raises. Imagine, for example, an ICO for a cryptocurrency that can only be used within a specific network. As Attorney Michael Mendelson noted, certain "digital tokens sold for use in established networks that only have utility within those networks . . . might appear less likely to be considered securities" under the Supreme Court's holding in *Forman*.[74] However, SEC Chairman Jay Clayton stated that "[m]erely calling a token a 'utility' token or structuring it to provide some utility does not prevent the token from being a security."[75] Attorney Mendelson concluded that "[h]istory will ultimately decide whether the courts will follow *Forman* or Clayton in assessing whether the token purchases are motivated by the desire to build and use a product or to generate investment profits."[76]

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[72] *Id.* at *21 (citation omitted).

[73] *Id.*

[74] Mendelson, *supra* note 14, at 78 (citing *Forman*, 421 U.S. at 838).

[75] *Id.* at 78–79 (quoting Jay Clayton, *Public Statement: Statement on Cryptocurrencies and Initial Coin Offerings* (Dec. 11, 2017), https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11).

[76] *Id.* at 79. It is important to note that Michael Mendelson came to the opposite conclusion from this Note regarding the SEC's regulation of cryptocurrency. Attorney Mendelson stated that "[t]he SEC was right" to "lay[] down the law" and "declare[] its jurisdiction" over ICOs. *Id.* at 52. Attorney Mendelson further declared that "[t]here is no doubt that the overwhelming majority of ICOs involve the sale of securities and companies who ignore this conclusion do so at their own risk." *Id.* Still, his work offers support to a central premise of this Note. Importantly, Attorney Mendelson continued on to say: "Yet the law of ICOs and digital token financing is by no means final or clear, and with little official guidance to go on, startups are left to fend for themselves in a sea of self-declared experts." *Id.*

Thus, so-called "utility tokens" provide an example of how there is still uncertainty regarding which cryptocurrencies must be registered with the SEC, even when those cryptocurrencies involve ICOs. In fact, despite the SEC's assertion of authority over certain ICOs, it remains the case that "companies must perform a thorough technical network analysis and an equally thorough regulatory analysis to determine whether their tokens could be considered a security."[77] Indeed, Commissioner Hester M. Pierce noted in September 2018 that "the application of *Howey* to a particular ICO does not answer every question."[78] Commissioner Pierce also noted: "Crypto tokens are still evolving, and there are many people thinking through these issues right now."[79]

II. THE MAJOR QUESTIONS DOCTRINE AND CRYPTOCURRENCY REGULATION

About thirty-five years ago, *Chevron* changed the way in which courts assess the role of administrative agencies. In *Chevron*, the Supreme Court directed that when reviewing an agency's interpretation of a statute, courts should first ask "whether Congress has directly spoken to the precise question at issue."[80] If the answer is yes, then Congress's "unambiguously expressed intent" must prevail.[81] However, if Congress has not spoken directly to the matter, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[82] The Court further explained that where Congress has implicitly allowed regulatory discretion to federal agencies on specific issues, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[83] Yet, while the *Chevron* doctrine allows federal agencies to exercise considerable discretion, another doctrine—the "major questions doctrine"—provides a way to restrain them.

A. *Major Questions Doctrine Precedent*

The major questions doctrine insists that "agencies need clear authorization from Congress to pass regulations with major economic and political significance."[84] In *Brown & Williamson*, a case regarding tobacco

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[77] *Id.* at 54.

[78] *Id.* at 82 (citing Hester Pierce, *Wolves and Wolverines: Remarks at the University of Michigan Law School*, U.S. SEC. & EXCHANGE COMM'N (Sept. 24, 2018), https://www.sec.gov/news/speech/speech-peirce-092418).

[79] Pierce, *supra* note 78.

[80] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

[81] *Id.* at 842–43.

[82] *Id.* at 843.

[83] *Id.* at 844.

[84] CRS KAVANAUGH REPORT, *supra* note 20, at 51 (footnote omitted).

regulation, the Supreme Court stated that it "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[85] The Court further asserted that there are "extraordinary cases" in which "there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation" of authority to a federal agency.[86]

A review of major questions doctrine precedent reveals a few important themes. First, the Supreme Court has been hesitant to defer to administrative agencies on questions that carry political significance. For example, in *Brown & Williamson*, the Court noted that "[o]wing to its unique place in American history and society, tobacco has its own unique political history."[87] The Court found importance in Congress's "distinct regulatory scheme for tobacco products" and its rejection of proposals to give the FDA power over tobacco regulation.[88] The Court ultimately decided not to defer to the FDA's statutory interpretation.[89] Similarly, in a case involving the Attorney General's jurisdiction over the issue of physician-assisted suicide, the Court stated that "[t]he importance of the issue of physician-assisted suicide, which has been the subject of an earnest and profound debate across the country, makes the oblique form of the [Attorney General's] claimed delegation all the more suspect."[90]

Additionally, the Supreme Court has been hesitant to defer to federal agencies in cases involving issues of major economic significance. In *Brown & Williamson*, the Supreme Court observed that the FDA had "asserted jurisdiction to regulate an industry constituting a significant portion of the American economy."[91] In the recent case of *Utility Air Regulatory Group v. EPA*, the Supreme Court quoted *Brown & Williamson* in finding that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."[92] Furthermore, in *MCI Telecommunications Corp.*, the Supreme Court discussed the question of whether the Federal Communications Commission

[85] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

[86] *Id.* at 159.

[87] *Id.*

[88] *Id.* at 159–60.

[89] *Id.*

[90] Gonzales v. Oregon, 546 U.S. 243, 262, 267–68 (2006) (internal citation and internal quotation marks omitted).

[91] *Brown & Williamson*, 529 U.S. at 159.

[92] 134 S. Ct. 2427, 2444 (2014) (quoting *Brown & Williamson*, 529 U.S. at 159). *See also* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980) ("In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view of §§ 3(8) and 6(b)(5), coupled with OSHA's cancer policy[.]").

(FCC) had the ability to eliminate rate-filing requirements under a statutory provision that allowed it to "modify" such requirements.[93] The Court found that the FCC did not have such authority and noted that "an elimination of the crucial provision of the statute for 40% [of the customers] of a major sector of the industry is much too extensive to be considered a 'modification.'"[94] These cases demonstrate that the Supreme Court has hesitated to extend *Chevron* deference not only when the regulation would affect a significant portion of the American economy, but also when the regulation would affect an industry that constitutes a significant portion of the American economy.

Furthermore, some lower courts have exhibited a willingness to invoke the major questions doctrine in cases involving technological innovation. For example, Judge O'Malley of the Federal Circuit Court of Appeals recognized this theme in a recent concurring opinion regarding internet regulation.[95] Finding support in Supreme Court precedent, Judge O'Malley wrote that "the responsibility lies with Congress to decide how best to address these new developments in technology."[96] The two cases that Judge O'Malley cited—*Gottschalk* and *Microsoft Corp.*—involved the patentability of computer programming.[97] In *Gottschalk*, the Supreme Court opined that:

> If these programs are to be patentable, considerable problems are raised which only committees of Congress can manage, for broad powers of investigation are needed, including hearings which canvass the wide variety of views which those operating in this field entertain. The technological problems tendered in the many briefs before us indicated to us that considered action by the Congress is needed.[98]

Similarly, in *Microsoft Corp.*, the Court stated that "[i]f the patent law is to be adjusted better to account for the realities of software distribution, the alteration should be made after focused legislative consideration, and not by the Judiciary forecasting Congress' likely disposition."[99] Such cases are examples of a judicial desire for clear guidance from Congress when agencies make policy that affects developing technologies, especially computer programs and the internet.

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[93] MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994).

[94] *Id.*

[95] ClearCorrect Operating, LLC v. Int'l Trade Comm'n, 810 F.3d 1283, 1303 (Fed. Cir. 2015) (O'Malley, J., concurring).

[96] *Id.* (citing Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 458–59 (2007) and Gottschalk v. Benson, 409 U.S. 63, 73 (1972)).

[97] *Microsoft Corp.*, 550 U.S. at 458; *Gottschalk*, 409 U.S. at 71.

[98] *Gottschalk*, 409 U.S. at 73.

[99] *Microsoft Corp.*, 550 U.S. at 458–59 (citation and internal quotation marks omitted).

Major questions doctrine precedent could play an important role in how the Supreme Court decides whether the SEC can regulate cryptocurrency. The Court might decide that cryptocurrency regulation is a matter of major economic, political, or technological importance and consequently restrict the SEC from exercising jurisdiction over the field.

On a broader scale, the major questions doctrine is poised, going forward, to play an increasingly prominent role in reshaping administrative law. This is largely due to recent shifts in Supreme Court membership. In 2018, Justice Brett Kavanaugh replaced former Justice Anthony Kennedy.[100] Justice Kavanaugh might be the swing vote on issues regarding the regulatory power of federal agencies and, more specifically, agency power to regulate cryptocurrency.[101] In several cases heard during his time on the Court, Justice Kennedy was the deciding vote in decisions involving the *Chevron* doctrine.[102] Just days before announcing that he would retire from the Court, Justice Kennedy signaled that the Court should rethink its approach to *Chevron*, a position that he seemed to think at least three of his colleagues would support.[103] Justice Kavanaugh has both voiced disagreement with *Chevron* and indicated support for the major questions doctrine. His influence might lead the Court to reexamine the *Chevron* doctrine and, if not change it radically, at least rein in regulatory agencies on issues of major importance.

B. *The Potential Shift in Supreme Court Doctrine Applied to Cryptocurrency Regulation*

The definitions for "security" in both the Exchange Act and the Securities Act list a variety of devices that could qualify as securities.[104] These lists include devices like stocks, bonds, and put and call options.[105] As

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[100] Stolberg, *supra* note 19.

[101] CRS KAVANAUGH REPORT, *supra* note 20, at 44 (noting that Justice Kennedy "often [found] himself as a decisive vote in important administrative law cases during the Roberts Court era").

[102] *Id.*

[103] *Id.* (citing Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring)) (also noting that this "signals to some that the Court may be on the verge of recrafting foundational administrative law doctrines"); *see Pereira*, 138 S. Ct. at 2120–21 (citing Michigan v. EPA, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring); City of Arlington v. FCC, 569 U.S. 290, 312–28, 327 (2013) (Roberts, C.J., dissenting); and Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring)) ("[W]hen deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still. Given the concerns raised by some Members of this Court, it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.").

[104] 15 U.S.C. § 78c(a)(10) (2012); 15 U.S.C. § 77b(a)(1) (2012).

[105] 15 U.S.C. § 78c(a)(10); 15 U.S.C. § 77b(a)(1).

this Note previously discussed, the Acts' inclusion of "investment contracts" in their definitions for securities has been used by a federal judge to allow cryptocurrency to be the subject of federal securities regulations.[106] But, notably missing from the list of items that Congress explicitly stated could qualify as securities is the word "cryptocurrency." Justice Kavanaugh has demonstrated a propensity to restrain the powers of federal agencies, especially where there is no explicit guidance from Congress about how that agency should act.[107] Based on Justice Kavanaugh's written opinions, it is entirely possible that he would hold—and lead the Supreme Court to hold—that, because the Exchange Act and the Securities Act do not specifically list cryptocurrency within their "securities" definitions, cryptocurrency is not a valid subject for securities regulation. If this view prevails, the SEC might need to look to Congress for a more specific grant of authority over cryptocurrency and ICOs. As a result, Justice Kavanaugh's judicial philosophy could have a drastic effect on the use of securities laws to regulate cryptocurrency and ICOs.

Under existing administrative law, the question of whether cryptocurrency qualifies as a security is subject to *Chevron* deference. Hypothetically, in order to determine whether to defer to the SEC's interpretation of the Exchange Act and the Securities Act, courts should first look to whether the definition for "security" as defined by federal law—or a specific part of that definition—is clear or ambiguous. But under Justice Kavanaugh's proposal for modified *Chevron* analysis, courts should only defer to agency interpretations when the statutory language in question involves words like "reasonable," "practicable," "appropriate," or "feasible."[108] Notably, neither of the federal definitions for "security" involve this type of language.[109] Rather, these definitions involve what Justice Kavanaugh would call, "specific statutory term[s] or phrase[s]."[110] Thus, Justice Kavanaugh would likely try to determine the "best reading of the statutory text" of the definitions.[111] It is unlikely, under that standard, that the definition sections of federal securities statutes include cryptocurrency. Not only do they fail to list "cryptocurrency" as a security, but the definition in the Exchange Act specifically excludes "currency or

[106] *See supra* Part I (discussing Judge Dearie's memorandum and order in *Zaslavskiy*).

[107] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 WL 6621785, at *14 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of reh'g en banc). *See also* Jacob Gershman, *Brett Kavanaugh Has Shown Deep Skepticism of Regulatory State*, WALL ST. J. (July 9, 2018, 11:14 PM), https://www.wsj.com/articles/nominee-has-shown-deep-skepticism-of-regulatory-state-1531186402 ("Judge Kavanaugh praised the late Justice Antonin Scalia for putting more focus on the text of statutes—and the meaning of words and phrases in the law—when evaluating regulations.").

[108] *Fixing Statutory Interpretation*, *supra* note 21, at 2153.

[109] 15 U.S.C. § 78c(a)(10); 15 U.S.C. § 77b(a)(1).

[110] *Fixing Statutory Interpretation*, *supra* note 21, at 2154.

[111] *Id.*

any note."[112] While the Federal Government has tried to define cryptocurrencies as securities in specific instances,[113] it is at best unclear whether cryptocurrencies as a whole qualify as securities. As such, since Justice Kavanaugh has written that in administrative law cases, it is often most important to look to "the precise wording of the statutory text,"[114] he would likely be hesitant to insert cryptocurrency into the federal definitions of securities.

Even under the Supreme Court's current *Chevron* analysis framework, Justice Kavanaugh would be unlikely to include cryptocurrency in the definitions of "security" under federal law. First, given his propensity to find statutes clear rather than ambiguous,[115] Justice Kavanaugh might simply find that the definitions clearly do not include cryptocurrencies. But, even if he were to find the Acts ambiguous, Justice Kavanaugh would still be unlikely to find that the SEC has the power to regulate cryptocurrency. This is due to the potential for Justice Kavanaugh to apply the major questions doctrine. There are plenty of reasons to argue that cryptocurrency regulation is of "major economic and political significance."[116] Not only are ICOs being utilized to raise billions of dollars,[117] but also, as will be discussed at greater length in Part III of this Note,[118] a "major U.S. bank" has created a cryptocurrency for potential use in connection with its wholesale payments business that "moves . . . $6 trillion around the world every day."[119] The implications of developments like these may well place cryptocurrency regulation into the same league as "regulating cigarettes" and "eliminating telecommunications rate-filing requirements"[120] for Justice Kavanaugh. Even when following the traditional *Chevron* analysis, Justice Kavanaugh views such "major regulatory action[s]" as requiring clear congressional authorization.[121] Accordingly, he might be unlikely to defer to the SEC over

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[112] 15 U.S.C. § 78c(a)(10).

[113] *See, e.g.*, Zaslavskiy Memorandum & Order, *supra* note 3, at *1–2 ("The Government, meanwhile, asserts that the investments made in REcoin and Diamond were investment contracts and thus securities . . . ." (citation and internal quotation marks omitted)).

[114] Brett M. Kavanaugh, *The Courts and the Administrative State*, 64 CASE W. RES. L. REV. 711, 716 (2014) [hereinafter *The Courts and the Administrative State*].

[115] *See Fixing Statutory Interpretation*, *supra* note 21, at 2137 ("I tend to be a judge who finds clarity more readily than some of my colleagues but perhaps a little less readily than others. In practice, I probably apply something approaching a 65-35 rule. In other words, if the interpretation is at least 65-35 clear, then I will call it clear and reject reliance on ambiguity-dependent canons." (footnote omitted)).

[116] CRS KAVANAUGH REPORT, *supra* note 20, at 51.

[117] Osipovich, *supra* note 3.

[118] *See infra* Part III.A.

[119] Hugh Son, *JP Morgan Is Rolling Out the First US Bank-Backed Cryptocurrency to Transform Payments Business*, CNBC (Feb. 14, 2019, 5:59 AM), https://www.cnbc.com/2019/02/13/jp-morgan-is-rolling-out-the-first-us-bank-backed-cryptocurrency-to-transform-payments--.html.

[120] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 421 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[121] *Id.*

the question of whether it can regulate cryptocurrency. He might lead a changed Supreme Court to do the same.

III. THE UNDESIRABILITY OF PIECEMEAL CRYPTOCURRENCY REGULATION BY THE SEC

In an August 2018 interview with the *Wall Street Journal*, John L. Hennessy—who chairs Alphabet Inc., Google's parent company—said the following in regards to technology regulation: "There's a bigger role for somebody to play here, whether it's government or the nonprofit sector. The challenge with government is, it tends to operate at a pace that is so slow. I get nervous about government's ability to legislate in fast-moving, deep technology fields."[122] This type of skepticism—about whether the Federal Government can keep up with innovations in the area of technology—bears directly on the debate over whether the SEC should have a role in regulating cryptocurrency. If the SEC is struggling to keep up with everchanging technology, will allowing it to regulate ICOs—and cryptocurrency more broadly—only lead to confusion and instability?

Before going further, it must be noted that, while skepticism of federal agencies is not uncommon,[123] there are strong arguments against such skepticism. On the other side of the coin is the question of whether, by taking cryptocurrency regulation out of the hands of the SEC, the Supreme Court would effectively extinguish any chance that the Federal Government has to keep up with the issue. In fact, rather than having the inability to keep up, one criticism of federal agencies is that they can move entirely too fast.[124]

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[122] Douglas MacMillan, *Alphabet's Chairman on Government, China and Fake News*, WALL ST. J. (Aug. 31, 2018, 9:00 AM), https://www.wsj.com/articles/alphabets-chairman-on-government-china-and-fake-news-1535720400.

[123] *See, e.g.*, Elizabeth Slattery, *Who Will Regulate the Regulators? Administrative Agencies, the Separation of Powers, and* Chevron *Deference*, HERITAGE FOUND. (May 7, 2015), https://www.heritage.org/courts/report/who-will-regulate-the-regulators-administrative-agencies-the-separation-powers-and#_ftn7 (criticizing federal agencies, using Justice Breyer's statement that "[a]gency decisions will also occasionally reflect 'tunnel vision,' an agency's supreme confidence in the importance of its own mission to the point where it leaves common sense aside" (quoting Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2195 (2011))); Jonathan Turley, Opinion, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html?utm_term=.96bae49004cd ("Our carefully constructed system of checks and balances is being negated by the rise of a fourth branch, an administrative state of sprawling departments and agencies that govern with increasing autonomy and decreasing transparency.").

[124] Clyde Wayne Crews Jr., *How Many Rules and Regulations Do Federal Agencies Issue?*, FORBES (Aug. 15, 2017, 12:48 PM), https://www.forbes.com/sites/waynecrews/2017/08/15/how-many-rules-and-regulations-do-federal-agencies-issue/#10a2aa4e1e64 ("[I]ncreasingly, since the federal government is so pervasive, it can regulate private activity without waiting for Congress to pass a law, and without even going through the normal notice-and-comment rulemaking process to which agencies 'must' adhere. That threatens conservative and liberal values alike.").

From 1995 through 2016, federal agencies created 88,890 rules and regulations, while Congress passed only 4312 public laws.[125] With a policymaking rate much greater than that of Congress, some would argue that federal agencies like the SEC are best equipped to handle a quickly developing issue like cryptocurrency regulation.

Another potential argument against curtailing the regulatory state in a way that restricts the SEC's power to regulate cryptocurrency is that such a restriction would reject the guidance in *Howey*—a case upon which much of the federal securities regulation jurisprudence is based.[126] In *Howey*, the Supreme Court stated that a security "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[127] This interpretation has allowed the SEC wide latitude to group a variety of devices into the definition of a "security" for more than seventy years.[128] Thus, to carve out cryptocurrency as one device that is *not* a security could lead to instability in the law. Consequently, it could have the opposite effect of one of the exclusion's potential goals: creating a more stable regulatory structure by only allowing the SEC to regulate the securities that Congress clearly listed in the Securities Act and the Exchange Act. The sudden shift in jurisprudence could cause an avalanche of lawsuits challenging whether other devices are in fact securities under this new precedent.

Furthermore, some might argue that forcing the SEC and federal prosecutors to look to Congress for explicit authority to regulate cryptocurrency is simply an exercise in procedure for the sake of procedure. They might argue that asking Congress to add the word "cryptocurrency" to the definitions for securities in the Exchange Act and the Securities Act simply bogs down the Federal Government in procedure for no difference in substance. The argument might be stated as: if Congress would surely add the word, then why waste our time as cryptocurrency grows without proper regulations? But this argument rests on two shaky assumptions. First, the argument assumes without certainty that Congress would simply add "cryptocurrency" to the list of items to be considered securities. Second, on a broader public policy level, the argument assumes that Congress would decide that securities regulations are the best way to regulate this field.

[125] *Id.*

[126] *See, e.g.*, Zaslavskiy Memorandum & Order, *supra* note 3, at *20 (noting the "abundance of case law interpreting and applying *Howey* at all levels of the judiciary").

[127] SEC v. W.J. Howey Co., 328 U.S. 293, 299 (1946).

[128] *See* Zaslavskiy Memorandum & Order, *supra* note 3, at *19–20 (noting that "courts are clear that the securities laws are meant to be interpreted flexibly to effectuate [their] remedial purpose" and that "the test expounded in *Howey* has—for over 70 years—provided clear guidance to courts and litigants as to the definition of investment contract under the securities laws" (alteration in original) (internal quotation marks and citations omitted)).

Perhaps, after hours of legislative hearing testimony and pages of legislative research reports, Congress would decide that another regulatory structure, such as one involving other banking regulators, would be best fit to regulate cryptocurrency. Or, perhaps, Congress would decide that the unique nature of cryptocurrency places it within an overlap of multiple existing regulatory structures and thereby authorize the applicable federal agencies to take charge. Or, to expand the spectrum of possibilities even further, perhaps Congress would opt to craft a new regulatory structure altogether to deal with this new and everchanging field.[129]

Despite the counterarguments discussed above, the SEC should not be regulating cryptocurrency at this time. The arguments in this Section begin with the basic premise that innovation is an asset to society. More specifically, this Section is premised on the idea that innovation in the area of cryptocurrency is generally positive and something that should be encouraged. Some argue that innovation in financial instruments has led to detrimental consequences, including the 2008 financial crisis.[130] However, innovation has brought to the economy automated teller machines, debit cards, mutual funds, and venture capital funds, to name just a few financial developments since the 1960s.[131] Such innovations have had many positive effects on the U.S. economy. They have revolutionized investing and the way money moves throughout the United States and the world. Despite the fact that developing financial instruments can be abused, their benefits outweigh their potential risks. When innovation is unleashed and spreads between companies and industries—a process called "diffusion"—the process promotes economic growth.[132]

The innovation that provides the benefits discussed above does not occur in a straight line. It is not always clear how innovators will change a product or an industry. This is especially true for a rapidly developing, multi-faceted subject like cryptocurrency. Because cryptocurrency development can occur in a variety of ways, it inherently creates a certain amount of gray area. That is to say that cryptocurrency can develop in both foreseen and unforeseen ways that are not easily placed into the jurisdiction of any particular federal agency. It is helpful to think of the current state of cryptocurrency and the

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[129] *See* Sarah Jane Hughes & Stephen T. Middlebrook, *Advancing a Framework for Regulating Cryptocurrency Payments Intermediaries*, 32 YALE J. ON REG. 495, 495 (2015) ("We conclude that, in addition to whatever 'money services' or 'money transmission' prudential regulation the States or federal government may adopt, the operation of wallets and exchanges requires a new commercial law that lays out rights and liabilities of cryptocurrency users in a robust and transparent fashion.").

[130] Douglas J. Elliott, *Op-Ed: The Pros and Cons of Financial Innovation*, BROOKINGS (Feb. 25, 2010), https://www.brookings.edu/opinions/the-pros-and-cons-of-financial-innovation/.

[131] *Id.*

[132] Jason Douglas et al., *The Problem with Innovation: The Biggest Companies Are Hogging All the Gains*, WALL ST. J. (July 15, 2018, 2:45 PM), https://www.wsj.com/articles/the-problem-with-innovation-the-biggest-companies-are-hogging-all-the-gains-1531680310.

possibilities for cryptocurrency innovation as existing on a spectrum. On one end, there is the group of cryptocurrencies that are simply used as a medium of exchange, like Bitcoin. These are the cryptocurrencies that may more closely resemble fiat currency or electronic payment systems and do not appear to be securities.[133] On the other end of the spectrum are ICOs that are solely used as investment vehicles and seem the most like securities. In the middle of the spectrum exist cryptocurrencies such as "utility tokens," which do not neatly fit into the categories at either end of the spectrum and may not exhibit all of the traits necessary to meet the *Howey* test.[134] With this spectrum in mind, it appears that while some areas of cryptocurrency—such as cryptocurrencies involving ICOs—might be appropriately suited for SEC regulation, other forms of cryptocurrency are not. In fact, there may even be aspects of cryptocurrencies involving ICOs that seem ill-suited for SEC regulation. This gray area will continue to expand as cryptocurrency continues to develop in a non-linear fashion. This leads to uncertainty for cryptocurrency innovators. If these innovators could turn to a single regulator as a sort of "one stop shop" for the regulations that they must follow, the innovators could be more certain that they are complying with all applicable rules. In addition, that regulator would be better suited to adapt to the changing field of cryptocurrency than currently-existing federal regulators because cryptocurrency would be the new regulator's exclusive focus.

With the benefits of innovation in mind, this Note expresses concern for allowing the SEC to regulate cryptocurrency absent clearer congressional authorization for three main reasons. First, cryptocurrency regulation is developing into a major question because cryptocurrency is a subject of immense innovation and a growing aspect of the U.S. economy. Next, the SEC's involvement could lead to an overall piecemeal approach to cryptocurrency regulation on the part of the Federal Government. Finally, a lack of certainty in regulation harms smaller innovators more than larger innovators. Consequently, this Note argues that specific agencies like the SEC should not assert authority over individual aspects of cryptocurrency without clear congressional guidance. This Note further argues that, due to the changing nature of cryptocurrency, mere coordination between federal agencies will not provide sufficient clarity to cryptocurrency innovators. Rather, Congress should authorize a new commission or sub-agency to grapple with cryptocurrency issues as they arise and provide a "one stop shop" to which cryptocurrency innovators can turn for regulatory guidance.

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[133] *See* Gerelyn Terzo, *SEC: ICO Tokens Should Be Regulated as Securities, Not Bitcoin*, YAHOO! FIN. (Apr. 27, 2018), https://finance.yahoo.com/news/sec-ico-tokens-regulated-securities-205650102.html ("Bitcoin, [SEC] Chairman Clayton said, has 'been determined by most people to not be a security.'").

[134] Mendelson, *supra* note 14, at 78.

A. *Cryptocurrency Regulation as a Major Question*

While federal agencies move quicker than Congress and while *Howey* may set a precedent for some degree of flexibility in defining securities, there is danger in allowing a federal agency to regulate a new technology on the basis of authority that Congress delegated when it had never contemplated such a technology. However quickly government agencies may be able to move, technology moves faster.[135] This is a multilayered dilemma in the area of cryptocurrency. Individuals and institutions will continue to invent uses for blockchain technology and cryptocurrency in ways that are difficult to foresee.[136] When Congress defined securities in the 1930s, not only had it not considered cryptocurrency and blockchain as we know it today, but Congress also had not considered the myriad ways in which these mechanisms will be used in the future.[137] Such rapid innovation requires carefully deliberated regulations. Without such deliberation, federal agencies can be too quick to become involved in areas in which they do not completely belong—both for lack of expertise and for lack of their regulatory power's applicability. Moreover, if courts read into federal law SEC authorization to regulate cryptocurrency where it does not exist, they fail to respect the "compromise" that Justice Kavanaugh described as integral to the legislative process.[138] Worse than this, they "tak[e] sides" in a debate that should be left to the people's representatives in Congress.[139]

The need for clear congressional direction will be evident with each innovation that utilizes cryptocurrency in a new way. This will be especially true as cryptocurrency becomes even more of a major component in the U.S. economy. Thus, Justice Kavanaugh's textualist approach correctly leads to the conclusion that cryptocurrency regulation invokes the major questions doctrine, and accordingly, courts should refuse to extend *Chevron* deference to the SEC as the Commission regulates cryptocurrency without clear guidance.[140] Take, for example, J.P. Morgan Chase's recent announcement

[135] *See* MacMillan, *supra* note 122 ("The challenge with government is, it tends to operate at a pace that is so slow. I get nervous about government's ability to legislate in fast-moving, deep technology fields.").

[136] *See* Mohit Kaushal & Sheel Tyle, *The Blockchain: What It Is and Why It Matters*, BROOKINGS: TECHTANK (Jan. 13, 2015), https://www.brookings.edu/blog/techtank/2015/01/13/the-blockchain-what-it-is-and-why-it-matters/ ("The Blockchain is a foundational technology, like TCP/IP, which enables the Internet. And much like the Internet in the late 1990s, we don't know exactly how the Blockchain will evolve, but evolve it will.").

[137] *See* Securities Act of 1933, 15 U.S.C. § 79b (Supp. 1935) (offering a definition of securities, including items that could not be securities, in a draft resolution).

[138] *The Courts and the Administrative State*, *supra* note 114, at 716.

[139] *Id.* at 716–17.

[140] *See* CRS KAVANAUGH REPORT, *supra* note 20, at 54 ("[T]he FCC net neutrality rule, in Judge Kavanaugh's view, clearly qualified as a major rule for purposes of the major rules doctrine. . . . Because Congress did not clearly authorize the FCC to promulgate the net neutrality rule, Judge Kavanaugh ultimately concluded it was invalid." (internal citations omitted)).

of "JPM Coin."[141] This is a new, groundbreaking development that could eventually lead to a vast increase in cryptocurrency's use throughout the world. JPM Coin is one of the first cryptocurrencies that a major U.S. bank has crafted.[142] According to J.P. Morgan, "a JPM Coin always has a value equivalent to one U.S. dollar."[143] Additionally, the bank states that the cryptocurrency is "redeemable in fiat currency held by J.P. Morgan (e.g., US$)" and is "designed to make instantaneous payments using blockchain technology."[144] The bank plans to use JPM Coin "for international payments for large corporate clients," "for securities transactions," and "for huge corporations that use J.P. Morgan's treasury services business to replace the dollars they hold in subsidiaries across the world."[145]

When a development like JPM Coin is viewed along with other uses of cryptocurrency, such as the massive amounts of money that have been raised through ICOs,[146] it becomes clear that cryptocurrency regulation should be deemed to have "major economic . . . significance."[147] JPM Coin is essentially a fiat currency, even if just for an instant while two parties execute a transaction. This cryptocurrency—and others like it—could have a massive effect on the banking industry, which, similar to tobacco as referenced in *Brown & Williamson*, is an "industry constituting a significant portion of the American economy."[148] In 2016, the finance sector of the U.S. economy consisted of twenty percent of the U.S. gross domestic product.[149] Furthermore, J.P. Morgan could soon be using JPM Coin to help it move six trillion dollars *each day*.[150] Based on the large portion of the economy that it could affect, cryptocurrency regulation should be deemed a major question.

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[141] Son, *supra* note 119.

[142] *Id.*; *see also* Benjamin Pirus, *Signature Bank Beats JPMorgan to Ethereum-Based Token Services*, FORBES (Feb. 22, 2019, 9:00 AM), https://www.forbes.com/sites/benjaminpirus/2019/02/22/signature-bank-already-has-hundreds-of-clients-using-private-ethereum-jpm-coin-still-in-testing/#51bf0d8d3359 ("JPMorgan Chase recently released a digital asset called JPM Coin, pegged to the U.S. dollar, set for testing later in 2019. Misconceptions, however, included JPM Coin was the first of its kind, when Signature Bank actually beat them to the punch.").

[143] *J.P. Morgan JPM Coin Announcement*, *supra* note 25.

[144] *Id.*

[145] Son, *supra* note 119.

[146] Osipovich, *supra* note 3 (noting that "$12 billion was raised in ICOs from January through the end of June" of 2018).

[147] CRS KAVANAUGH REPORT, *supra* note 20, at 51.

[148] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

[149] Christopher Witko, *How Wall Street Became a Big Chunk of the U.S. Economy—and When the Democrats Signed On*, WASH. POST: MONKEY CAGE (Mar. 29, 2016, 12:00 PM), https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/29/how-wall-street-became-a-big-chunk-of-the-u-s-economy-and-when-the-democrats-signed-on/?utm_term=.9a240df524c8 ("Modern economies depend on a thriving financial sector, and the U.S. finance, insurance and real estate (FIRE) sector now accounts for 20 percent of GDP—compared with only 10 percent in 1947.").

[150] Son, *supra* note 119 (stating that J.P. Morgan Chase currently moves about six trillion dollars per day).

Furthermore, how such a powerful tool like JPM Coin should be regulated is a major issue for the U.S. economy because it has the potential to revolutionize how transactions are completed within the United States and internationally.[151] When cryptocurrency is viewed with JPM Coin in mind, the Supreme Court should "greet" the SEC's "announcement" that it has the power to regulate cryptocurrency based on the Securities and Exchange Acts "with a measure of skepticism."[152] This was the protocol the Court expressed in *Utility Air Regulatory Group* when an "agency claim[ed] to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy."[153] Here, the SEC has found the power to regulate cryptocurrency in statutory language from the 1930s.[154] The SEC should not be able to use less than explicit statutory language that has been in existence since long before the inception of cryptocurrency to regulate an issue of such profound importance and impact.[155]

It is important to note that Congress has already begun to propose ways in which cryptocurrency should be regulated. In fact, four bills "focused on investigating the criminal use of cryptocurrencies and improving government agencies' ability to address the problem" passed the U.S. House of Representatives in 2018.[156] Two bills related to the Department of Homeland Security assessing the use of cryptocurrencies in terrorist acts.[157] Another pertained to studying how cryptocurrencies are used in sex and drug trafficking.[158] Meanwhile, a fourth bill would allow the Financial Crimes Enforcement Network (FinCEN) to incorporate cryptocurrencies into its anti-money laundering work.[159] These bills demonstrate that there are a variety of ways in which cryptocurrency might be addressed—and a variety of ways in which Congress has contemplated doing so. But, in contrast to

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[151] *Id.* ("J.P. Morgan is preparing for a future in which parts of the essential underpinning of global capitalism, from cross-border payments to corporate debt issuance, move to the blockchain.").

[152] Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014).

[153] *Id.* (internal quotation marks omitted).

[154] Colin Harper, *"Guidance by Enforcement": How the SEC Is Slowly Shaping ICO Regulation*, BITCOIN MAG. (Nov. 30, 2018), https://bitcoinmagazine.com/articles/guidance-enforcement-how-sec-slowly-shaping-ico-regulation/.

[155] *See id.* ("The foundation of the securities laws dates back to the 1930s, long before anyone could have imagined the concept of a digital asset issued via the internet through the use of blockchain technology. This old legal framework simply wasn't designed for the digital age, and as a result, it doesn't provide the regulatory clarity that the crypto industry needs to move forward." (quoting Jake Chervinsky, an attorney at Kobre & Kim law firm)).

[156] DAVID W. PERKINS, CONG. RESEARCH SERV., R45427, CRYPTOCURRENCY: THE ECONOMICS OF MONEY AND SELECTED POLICY ISSUES 17 (2018), https://fas.org/sgp/crs/misc/R45427.pdf.

[157] *Id.* (citing Homeland Security Assessment of Terrorists Use of Virtual Currencies Act, H.R. 2433, 115th Cong. (1st Sess. 2017) and Financial Technology Protection Act, H.R. 5036, 115th Cong. (2d Sess. 2018)).

[158] *Id.* (citing Fight Illicit Networks and Detect Trafficking Act, H.R. 6069, 115th Cong. (2d Sess. 2018)).

[159] *Id.* (citing FinCEN Improvement Act of 2018, H.R. 6411, 115th Cong. (2d Sess. 2018)).

the SEC's attempts to regulate cryptocurrency without clear guidance, these bills are examples of explicit guidance that Congress can provide to federal agencies to address this major issue.

Without definitive guidance regarding cryptocurrency regulation, federal agencies lack firm footing to regulate the field. This is a predictable result—it is to be expected that a federal agency that was not designed to address cryptocurrency would not be able to definitively stake a claim of jurisdiction over the field as it develops at a rapid pace of technological innovation. This lack of footing showed through when the SEC warned that it was looking to exert its regulatory power over cryptocurrency. In its July 2017 Report of Investigation, the SEC "advise[d] those who would use a Decentralized Autonomous Organization ('DAO Entity'), or other distributed ledger or blockchain-enabled means for capital raising, to take appropriate steps to ensure compliance with the U.S. federal securities laws."[160] Yet, the SEC issued the warning in such a way that did not promote confidence that Congress had, in fact, provided a clear answer to the question of whether the SEC had the authority to regulate such mechanisms. The Commission stated that the Report was being disseminated "in order to stress that the U.S. federal securities law *may* apply to *various activities*, including distributed ledger technology, *depending on the particular facts and circumstances*, without regard to the form of the organization or technology used to effectuate a particular offer or sale."[161] Note that, in this statement, the Commission did not definitively state that "securities laws *do* apply" to cryptocurrency. Nor does this announced purpose of the Report definitively indicate that Congress gave the Commission the authority to regulate distributed ledger technology at all. Rather, the Commission must qualify its purpose by noting that whether securities laws apply "depend[s]."[162]

But a more deliberate approach—taken by Congress and aided by legislative research and hearing testimony—could provide much clearer guidance to empowered federal agencies regarding how to regulate cryptocurrency. It would also recognize, in accord with the Supreme Court's decision in *Gottschalk*, that there are "technological problems" for which "considered action by the Congress is needed."[163] Congress is uniquely suited to address cryptocurrency regulation because of its "broad powers of investigation" that would allow it to "canvass the wide variety of views which those operating in this field entertain."[164] This consideration would allow empowered federal agencies—whether Congress decides to empower

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[160] July 2017 SEC Report of Investigation, *supra* note 12, at 1–2.

[161] *Id.* at 10 (emphasis added).

[162] *Id.* at 10; *see also* Terzo, *supra* note 133 (noting that in a Congressional hearing, SEC Chairman Jay Clayton described cryptocurrency as a "complicated area").

[163] Gottschalk v. Benson, 409 U.S. 63, 73 (1972).

[164] *Id.*

the SEC or a new federal agency or sub-agency as this Note proposes—to confidently proceed into this area of regulation with the proper foundation to fulfill the important function of preventing the use of cryptocurrency for improper ends. When the SEC produces warnings and guidance in an area of such importance without clear congressional guidance, it runs the risk of losing legitimacy. As cryptocurrency technology develops, it exposes holes in the SEC's guidance that would better be filled through Congress's unequivocal statement about which agency should move forward into the area of cryptocurrency.

With cryptocurrency becoming such a major, developing asset to the U.S. economy, it should be viewed alongside regulatory subjects like tobacco, telecommunications rate-filing requirements, and technological developments in software. Notably, the Supreme Court has resisted federal agency regulation of all of these subjects absent clear statutory authority from Congress.[165] Cryptocurrency should be no different. The SEC should not be able to infer that it has the authority to regulate such a major issue when no statute explicitly gives the Commission such authority. In addition, judges should refrain from issuing rulings that allow the SEC to take such authority, as such holdings fly in the face of the Separation of Powers, which directs the Congress in conjunction with the President to make the laws.[166]

B. *Guarding Against a Piecemeal Approach to Cryptocurrency Regulation*

Allowing federal agencies to regulate cryptocurrency without clear statutory authority could lead to a piecemeal approach to cryptocurrency regulation that does not fully account for all of its uses. Of course, the cryptocurrency industry would not be the first field to be regulated by multiple agencies. For example, agencies that regulate the food industry include the Food and Drug Administration, Food Safety Inspection Service, Centers for Disease Control and Prevention, Environmental Protection Agency, United States Department of Agriculture, Federal Trade Commission, Department of Commerce, and Department of Labor, among other state and federal regulatory bodies.[167] Any multifaceted industry will be subject to a variety of regulators. This Section does not argue that any company or industry that engages in the cryptocurrency field should not be subject to the various applicable regulators. For example, this Note does not

[165] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 420–21 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (citations omitted).

[166] *See Fixing Statutory Interpretation*, *supra* note 21, at 2120 ("Article I assigns Congress, along with the President, the power to make laws. Article III grants the courts the 'judicial Power' to interpret those laws in individual 'Cases' and 'Controversies.' When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature's Article I power." (footnotes omitted)).

[167] *US Agencies Involved with Food Safety*, N.D. ST. U., https://www.ndsu.edu/pubweb/~saxowsky/aglawtextbk/chapters/foodlaw/USagencies.html (last visited Oct. 2, 2019).

argue that if a major bank creates a cryptocurrency, then that bank should no longer have to comply with the various federal banking regulators. Rather, this Section argues for single agency regulation—a "one stop shop"—of *cryptocurrency* regulation, specifically.

A comparison to, for example, the food industry provides a useful juxtaposition. The food industry is much more mature than the cryptocurrency field. While innovations are constantly taking place, even in mature fields like the food industry, food production generally is, of course, not a new subject for regulation. Piecemeal regulation does not endanger food production, as a whole, in the same way it endangers a new, developing technology like cryptocurrency. While companies that take part in the food industry may argue that they must deal with too many regulators—and smaller companies in that industry might claim that they are disproportionately affected by the cost of compliance of engaging the multitude of regulators—there is inherently more regulatory clarity for mature industries, at least in general. This is the product of mature industries having been regulated for so long. Cryptocurrency is different. Cryptocurrency is new and developing. Unfortunately, "with little official guidance to go on, startups are left to fend for themselves in a sea of self-declared experts."[168]

While securities regulations might practically be used for some cryptocurrency regulation, securities laws are not applicable to all forms of cryptocurrency.[169] This point is illustrated by the striking differences between JPM Coin and the cryptocurrencies at issue in *Zaslavskiy*.[170] On the one hand, Zaslavskiy allegedly defrauded investors through misrepresentations that his coins were "backed by investments in real estate and diamonds" when, in fact, they were not.[171] Furthermore, Zaslavskiy staged an initial coin offering and lied to investors about both how much he had raised and a supposed "team of lawyers, professionals, brokers, and accountants."[172] On the other hand, J.P. Morgan—a vast and established institution[173]—is promoting a form of cryptocurrency that is "redeemable in

[168] Mendelson, *supra* note 14, at 52.

[169] *See* Hughes & Middlebrook, *supra* note 129, at 528–29 ("[A]lthough it is highly desirable for the Securities and Exchange Commission (SEC) to continue to regulate and supervise those who would offer securities based on cryptocurrencies, . . . any role played by securities regulators, including the SEC, would not resolve all of the issues involved with the use of cryptocurrencies in payment transactions." (footnote omitted)).

[170] *See* Zaslavskiy Memorandum & Order, *supra* note 3, at *2–3 (discussing the defendant's alleged fraudulent scheme involving cryptocurrencies).

[171] *SEC Exposes Two Initial Coin Offerings Purportedly Backed by Real Estate and Diamonds*, U.S. SEC. & EXCHANGE COMM'N (Sept. 29, 2017), https://www.sec.gov/news/press-release/2017-185-0 [hereinafter *SEC Zaslavskiy Press Release*].

[172] *Id.*

[173] Son, *supra* note 119 ("The lender moves more than $6 trillion around the world every day for corporations in its massive wholesale payments business.").

fiat currency held by J.P. Morgan" and corresponds in value with the U.S. dollar.[174] To reiterate, JPM Coin will reportedly be used for purposes including "international payments for large corporate clients" and "securities transactions," as well as "for huge corporations that use J.P. Morgan's treasury services business to replace the dollars they hold in subsidiaries across the world."[175] These differences between JPM Coin and the *Zaslavskiy* cryptocurrencies raise the question of whether cryptocurrencies that are so different can be sensibly regulated in the same way. Furthermore, if the answer is no, how should the regulatory structures for different types of cryptocurrency be constructed?

J.P. Morgan provides some insights regarding the complexity of these regulatory questions. In announcing its new cryptocurrency, the bank touts the fact that it is "a nationally chartered U.S. bank" that "must comply with banking laws and regulations."[176] J.P. Morgan further touts that it is "supervised by banking regulators in the United States and in the international jurisdictions in which it operates."[177] According to the bank, this "[r]egulatory [o]versight," combined with other factors such as its "expertise in blockchain," allow it to "seamlessly and securely transfer and settle money for clients around the world."[178] J.P. Morgan is wise to tout this regulatory structure, as it helps to portray JPM Coin as less risky than other cryptocurrencies.[179] As to the question of whether regulators support JPM Coin, J.P. Morgan responds, "JPM Coin is currently a prototype. As we move towards production we will actively engage our regulators to explain its design and solicit their feedback and any necessary approvals."[180] With this in mind, the following questions remain: Should these regulators include the SEC? Is JPM Coin truly a security? Should the SEC regulate JPM Coin in the same way that it regulated Zaslavskiy's cryptocurrencies?

By proposing that courts guard against the piecemeal regulation of cryptocurrency, this Note does not intend to allow frauds and other crimes involving cryptocurrency to go unregulated. Accordingly, before moving any further, this Note will separate Zaslavskiy's alleged fraud from the broader question of the use of securities regulations to regulate cryptocurrency. This separation is important to avoid the appearance that by

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[174] *J.P. Morgan JPM Coin Announcement*, *supra* note 25.

[175] Son, *supra* note 119.

[176] *J.P. Morgan JPM Coin Announcement*, *supra* note 25.

[177] *Id.*

[178] *Id.*

[179] *See, e.g.*, Hughes & Middlebrook, *supra* note 129, at 528 ("Online wallet operators and exchanges in the cryptocurrency industry do not have comparable regulatory requirements and, as a result, their customers are exposed to higher credit and liquidity risks of cryptocurrency wallets and exchanges than are customers of traditional money service businesses or money transmitters or depository institutions.").

[180] *J.P. Morgan JPM Coin Announcement*, *supra* note 25.

refusing to classify cryptocurrency as a security, courts would allow alleged fraudsters like Zaslavskiy to avoid accountability for their actions. A finding that cryptocurrency does not fall within the definition of a security would not have left the state and federal governments without a remedy through which it could have prosecuted Zaslavskiy for his fraud—a fraud that it seems clear he committed if the allegations against him are true.[181] For example, as long as such a fraud involved interstate wire transmittals or the mail, the Federal Government likely could have prosecuted Zaslavskiy for wire fraud[182] or mail fraud.[183] This means that, under such circumstances, the Federal Government could have charged Zaslavskiy with or without the SEC and with or without relying on a court to define his cryptocurrencies as securities. Note that the mail fraud statute includes using the mail in connection with fraudulently "sell[ing]" and "exchang[ing] . . . any counterfeit or spurious coin, obligation, security, or other article."[184] Zaslavskiy's cryptocurrencies could have fallen within such language, which includes securities, but covers a far more expansive landscape than just securities. These general fraud statutes would have been the proper avenue for prosecution in such a case lacking clarity as to whether cryptocurrencies are securities. In contrast to these more general fraud statutes, the Supreme Court has noted "that Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud."[185] But, by defining Zaslavskiy's cryptocurrencies as securities, the Federal Government gained access to more prosecutorial tools. By way of

[181] *See* McClellan v. Cantrell, 217 F.3d 890, 893 (7th Cir. 2000) ("Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth. No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated." (citing Stapleton v. Holt, 250 P.2d 451, 453–54 (Okla. 1952))).

[182] *See* 18 U.S.C. § 1343 (2012) ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.").

[183] *See id.* § 1341 (prescribing punishment for "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use *any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article,* for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service" (emphasis added)).

[184] *Id.*

[185] Marine Bank v. Weaver, 455 U.S. 551, 556 (1982) (citations omitted).

the SEC, the Federal Government also charged Zaslavskiy with violating the "registration provisions of the federal securities laws."[186]

If Zaslavskiy's cryptocurrencies should have been filed as securities, it is important to ask whether that means that *all* cryptocurrencies, including JPM Coin, should be registered as securities. For purposes of this Note's analysis, it is helpful to first hypothetically attempt to bring a cryptocurrency, like JPM Coin, under the purview of securities laws in the same way that the Federal Government brought Zaslavskiy's cryptocurrencies under such regulation: by defining the cryptocurrency as an investment contract. Such an analysis seems appropriate because this is the only way that the Federal Government has, thus far, been able to subject cryptocurrency to securities laws. This Note argues that it would be difficult for the Federal Government, under such an analysis, to successfully define JPM Coin as a security. As this Note previously stated, the three requirements for an "investment contract" under the *Howey* test are: (1) an investment of money (2) in a "common enterprise" in which someone (3) "is led to expect profits solely from the efforts of the promoter or third party."[187] Without even examining the first two requirements, it appears as though the Federal Government would fail on the third prong of the *Howey* test alone. If JPM Coin is simply being used for instant transactions, it seems clear that those who use it are not being "led to expect profits solely from the efforts of . . . [a] third party."[188] From this standpoint, it seems as though the following is true: the *Zaslavskiy* cryptocurrencies may have been deemed securities by way of their characterization as investment contracts; but, the closest association that JPM Coin should have to the securities regulatory scheme is that one of its key purposes will reportedly be "instant settlements" in "securities transactions."[189]

Some might submit that the distinguishing factor between the *Zaslavskiy* cryptocurrencies and JPM Coin is so simple that proposing that regulators might try to classify JPM Coin as an investment contract is simply setting up a strawman argument that can be easily struck down. The obvious distinction is that the *Zaslavskiy* cryptocurrencies involved an initial coin offering that was used to raise capital,[190] while JPM Coin presumably will not. In fact, it may seem that JPM Coin is so different from *Zaslavskiy*-like cryptocurrencies that JPM Coin can easily be viewed as a payment system, and as a result, there is no reason to grapple over whether it is a security. In this sense, JPM Coin would seem more like the Automated Clearing House

[186] *SEC Zaslavskiy Press Release*, *supra* note 171.

[187] Zaslavskiy Memorandum & Order, *supra* note 3, at *9 (internal citation omitted); *see supra* Part I (describing the *Howey* test as applied in the *Zaslavskiy* case).

[188] Zaslavskiy Memorandum & Order, *supra* note 3, at *9.

[189] Son, *supra* note 119.

[190] *SEC Zaslavskiy Press Release*, *supra* note 171.

(ACH) system, which clears and settles electronic fund transfers.[191] Or, it may seem more like the Society for Worldwide Interbank Financial Telecommunications (SWIFT), through which "advice or an instruction for a bank to transfer funds from one account to another" can be sent.[192] Therefore, one might observe that the *Zaslavskiy* cryptocurrencies fall neatly within the purview of securities regulation, while JPM Coin falls wholly without.[193] At first, this observation seems to be a useful tool to aid in the argument that federal regulators need no more guidance from Congress in order to proceed with regulating cryptocurrency. Proponents of this view might argue that Congress so clearly intended for *Zaslavskiy* cryptocurrencies—and *not* JPM Coin—to be subject to securities regulation, that looking to Congress for more explicit authorization regarding how to regulate cryptocurrency is wasting time on procedure for the sake of procedure.

One might further submit that it is plain to see that JPM Coin should not fall under the purview of securities regulations because it is much more like an actual form of currency or fiat money than it is a security. J.P. Morgan is not merely holding investors' money and promising return on their investments in cryptocurrency. Rather, as the bank describes, "[w]hen one client sends money to another over the blockchain, JPM Coins are transferred and instantaneously redeemed for the equivalent amount of U.S. dollars."[194] Thus, some might argue that when JPM Coin is placed before any judge, it will be easy for the judge to decide that it is definitively *not* a security.

But careful attention to Judge Dearie's memorandum and order in *Zaslavskiy* undermines this argument. There, the court acknowledged—and swiftly dismissed—the defendant's "glib[]" argument that investors did not invest money because they "exchange[d]" "one medium of currency for another."[195] Judge Dearie noted that the "Indictment alleges that investors gave up money—or other assets—in exchange for 'membership' in [the

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[191] Don Coker, *Banking Industry Standards and Practices for Funds Wire Transfers by Fed Wire, CHIPS, SWIFT, ACH, and EFT*, HGEXPERTS.COM, https://www.hgexperts.com/expert-witness-articles/banking-industry-standards-and-practices-for-funds-wire-transfers-by-fed-wire-chips-swift-ach-and-eft-20495 (last visited Oct. 2, 2019).

[192] *Id.* As a preliminary matter, these comparisons to cryptocurrency are not entirely warranted, as cryptocurrency differs from both the SWIFT and ACH systems because those systems are not traditionally based on blockchain technology. *See id.* (describing the SWIFT and ACH systems).

[193] *See* Terzo, *supra* note 133 ("Bitcoin, [SEC] Chairman Clayton said, has 'been determined by most people to not be a security.' Tokens used to finance projects, such as tokens that are issued in the fundraising process of an ICO, however, are different. 'There are none that I've seen that aren't securities,' said Clayton," [sic] adding: 'To the extent something is a security, we should regulate it as a security.'").

[194] *J.P. Morgan JPM Coin Announcement*, *supra* note 25.

[195] Zaslavskiy Memorandum & Order, *supra* note 3, at *11 (quoting defendant's motion to dismiss).

defendant's] ventures."[196] With this precedent on the record, it is uncertain whether judges will be apt to simply recognize a cryptocurrency as akin to a currency and dismiss its status as a potential security.

Importantly, to make either of the arguments in the last two paragraphs for classifying Zaslavskiy's cryptocurrency as a security—and J.P. Morgan's cryptocurrency as something else—defeats another potential non-textualist argument that this Note acknowledged when it first discussed "procedure for the sake of procedure."[197] That argument was that it would be a waste of time to ask Congress to add the word "cryptocurrency" to the definitions for securities in the Exchange Act and the Securities Act because it goes without saying that the definitions already provide the authority to regulate cryptocurrencies as securities.[198] Simply put, drawing a line between Zaslavskiy's cryptocurrencies and JPM Coin in order to distinguish what is a security and what is not acknowledges that the SEC does not have blanket authority to regulate cryptocurrencies. After all, both tokens are cryptocurrencies, and such a distinction would place one of them outside the purview of securities regulations.

In short, the SEC's role in cryptocurrency regulation post-*Zaslavskiy* could go either of two ways—but both are undesirable. The first possibility is that the SEC will not claim jurisdiction over all cryptocurrencies because it will concede that it does not have clear authority to do so. This would leave cryptocurrency innovators with the question of whether their specific cryptocurrency obliges them to follow the SEC's requirements, including those on registration. The second possibility is that the SEC will claim jurisdiction over all cryptocurrency. In this case, the Commission would be regulating cryptocurrencies that do not appropriately fit under its authority, including cryptocurrencies that do not involve ICOs.[199] Either way, innovation suffers.

If Congress were to authorize one agency or sub-agency to deal with cryptocurrency regulation, that regulatory body could appropriately deal with the full spectrum of cryptocurrencies—from those like JPM Coin, which look like fiat currency, to those like Zaslavskiy's cryptocurrencies, which looked much more like securities. With such a system in place,

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[196] *Id.*

[197] *See supra* Part III.

[198] *Id.*

[199] But, even distinguishing cryptocurrencies involving ICOs from other cryptocurrencies would not necessarily resolve the issue of determining the proper place for SEC regulation, as there is room for disagreement regarding whether all ICO-related cryptocurrencies are securities. *See* Diego Zuluaga, *Should Cryptocurrencies Be Regulated Like Securities?*, CATO INST. BRIEFING PAPER, June 25, 2018, at 3, https://object.cato.org/sites/cato.org/files/pubs/pdf/cmfa-briefing-paper-1-updated.pdf ("[*S*]*ome* ICOs may qualify as securities *under certain circumstances*." (emphasis added)); *see also* Clayton, *supra* note 4 ("A key question for all ICO market participants: 'Is the coin or token a security?' As securities law practitioners know well, the answer depends on the facts.").

Congress could direct the regulatory body to conduct analyses that properly address these two types of cryptocurrencies and those that fall in the gray area in between. It would not be out of the ordinary for Congress to direct such analyses.[200] In accord with this Note's argument describing cryptocurrency as a major question,[201] the role of Congress is important in avoiding piecemeal regulation because cryptocurrency raises "problems . . . which only committees of Congress can manage, for broad powers of investigation are needed."[202] Such problems would be best dealt with by Congress and an agency it specifically authorizes.

A full discussion of exactly which agency should house a potential cryptocurrency sub-agency is beyond the scope of this Note. However, the missions and characteristics of certain currently-existing federal agencies offer some guidance. First, while the SEC is not currently positioned to adequately address cryptocurrency, with clear congressional guidance, the SEC might ultimately be the best agency to house a cryptocurrency sub-agency. The SEC's mission is "to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation."[203] As such, the SEC could provide some expertise in the areas of: (a) cryptocurrencies that involve capital raising; and (b) the markets in which cryptocurrencies are exchanged. However, adequately equipping the SEC to deal with cryptocurrency would involve expanding its authority within the new sub-agency so that it can address and adapt to non-capital raising cryptocurrencies that currently exist or are yet to be developed.

The Federal Trade Commission might serve as an even better host to a new cryptocurrency sub-agency due to its more general mission. The FTC seeks to "[p]rotect[] consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity."[204] As the *Zaslavskiy* case demonstrates, there are

[200] *See, e.g.*, OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REGULATORY AFFAIRS, 2017 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 1 n.2 (2017), https://www.whitehouse.gov/wp-content/uploads/2017/12/draft_2017_cost_benefit_report.pdf ("Under the [Small Business Regulatory Enforcement Fairness Act of 1996], agencies submit a report to each House of Congress and GAO and make available 'a complete copy of the cost-benefit analysis of the rule, if any.'" (quoting 5 U.S.C. § 801(a)(1)(B)(i) (2012))).

[201] *See supra* Section III.A.

[202] Gottschalk v. Benson, 409 U.S. 63, 73 (1972); *see also* Harper, *supra* note 154 ("The crypto industry won't have a firm standard for what conduct is allowed and what's illegal until Congress passes new legislation or the SEC's theories are tested in court." (quoting Jake Chervinsky, an attorney at Kobre & Kim law firm)).

[203] *About the SEC*, U.S. SEC. & EXCHANGE COMM'N, https://www.sec.gov/about.shtml (last visited Oct. 2, 2019).

[204] *About the FTC*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc (last visited Oct. 2, 2019). *See also What to Know About Cryptocurrency*, FED. TRADE COMM'N CONSUMER INFO. (Oct. 2018),

certainly "deceptive" and "unfair" business practices to be addressed in the world of cryptocurrency.[205] But, as a broader concept, these issues presumably do not all involve the types of cryptocurrencies that look like securities. As such, the FTC might be better equipped than the SEC to deal with the broad range of fraud and abuse that can occur in the developing field of cryptocurrency. On the other hand, the FTC presents the question of whether the Federal Government will want to view all of those who purchase cryptocurrencies as simply "consumers" rather than "investors."

As this overview of the SEC and the FTC illustrates, there may not exist any perfect host for a new cryptocurrency sub-agency. As such, Congress may find it best to create a separate, freestanding commission to deal with cryptocurrency. But regardless of whether Congress decides to modify the authority of a currently-existing federal agency through the formation of a sub-agency or to create a new federal commission altogether, either option would be preferable to the current state of affairs. Appropriate, clear congressional guidance would lead to the formation of a body that is adequately equipped to deal with the full range of cryptocurrency innovations as they develop.

C. *The Disproportionate Effect of Uncertainty in Regulation on Smaller Cryptocurrency Innovators*

Many will argue that some cryptocurrency regulation—even if piecemeal—is better than no regulation. This Note does not dispute that point. For example, protecting Americans from fraudsters and investor scams, such as the fraud alleged in *Zaslavskiy*, is an important role of the Federal Government. That role should not be disregarded in a specific case simply because cryptocurrency is involved. Whether or not fraudsters should be prosecuted is not a close question. But, upon deeper inspection, the relevant questions become much closer. One close question is whether cryptocurrency fraudsters should be charged with securities fraud or under some other anti-fraud provision. Put another way, should the Federal Government be afforded an additional ground for federal jurisdiction through the anti-*securities* fraud statutory remedy? Or, as an alternative, should the Federal Government have to rely on other more general anti-fraud statutes or simply concede that some fraud fighting should be left to the States? An even closer question involves whether, setting aside this discussion of fraud altogether, cryptocurrencies should have to be registered as securities—and if so, which cryptocurrencies should have to be registered?

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https://www.consumer.ftc.gov/articles/what-know-about-cryptocurrency (providing information to consumers about cryptocurrency and cryptocurrency scams).

[205] See *supra* Part I for a discussion of *Zaslavskiy*.

The fact is that the answers to the questions noted above are not clear. Rather, due to the SEC's own lack of specification, it is "impossible to tell which" cryptocurrencies the SEC considers to be securities and which ones it does not.[206] A negative consequence of the lack of clarity regarding these questions is that action can be brought against individuals and cryptocurrency corporations for failing to register a cryptocurrency with the SEC, even though there was no clear notice that such a cryptocurrency should have been registered in the first place.[207] This lack of notice leads to injustice. Moreover, the development of cryptocurrency as an asset to our society can be stifled through this lack of clarity.[208] One corporation has already blamed the "ever changing regulatory landscape of the cryptocurrency space" as the reason that it shut down.[209]

But, importantly, all corporations are not affected equally by uncertainty in regulation. Smaller companies, like the aforementioned company that claimed that it shut down due to constantly changing regulations,[210] can withstand much less regulatory scrutiny and fewer penalties than larger corporations, like J.P. Morgan. In that connection, smaller cryptocurrency companies can afford to take on less risk than larger companies. With its vast resources, J.P. Morgan is much more likely to be able to "actively engage [its] regulators to explain its [cryptocurrency's] design and solicit their feedback and any necessary approvals,"[211] than a smaller company. Consequently, as regulatory uncertainty persists, smaller companies will be less likely to innovate and thereby take the chance that the SEC or some other agency will sanction them for an infraction as simple as failing to register their cryptocurrency as a security.

The idea that smaller corporations can be at a disadvantage in the area of innovation is not a novel one. In general, economists worry that smaller companies are not enjoying the rewards of innovation that larger companies

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[206] Michaels, *supra* note 1.

[207] *See, e.g.*, Solias v. Latium Network, Inc., No. 18-10255 (SDW) (SCM), 2018 WL 6445543, at *6 (D.N.J. Dec. 10, 2018) ("[T]his Court concludes that Plaintiff has sufficiently alleged that LATX tokens are investment contracts under the *Howey* test. Because the LATX were never registered with the Securities and Exchange Commission, Plaintiff may maintain a cause of action against Latium . . . ." (internal citations omitted)).

[208] *See* Zuluaga, *supra* note 199, at 1 ("Regulatory uncertainty is chilling innovation and increasing volatility in cryptocurrency markets."); *see also* Kaushal & Tyle, *supra* note 136 ("Disruptive technologies rarely fit neatly into existing regulatory considerations, but rigid regulatory frameworks have repeatedly stifled innovation. It's likely that innovations in the Blockchain will outpace policy, let's not slow it down."); Alex Sunnarborg, *The Incoming Wave of ICO Regulation (Yes, It's Coming)*, COINDESK (Nov. 2, 2018, 8:00 UTC), https://www.coindesk.com/the-incoming-wave-of-ico-regulation-yes-its-coming (last updated Nov. 3, 2018) ("Aside from the uncertain regulatory risk, an ICO is nearly a no-brainer for capital hungry entrepreneurs.").

[209] Michaels, *supra* note 1.

[210] *Id.*

[211] *J.P. Morgan JPM Coin Announcement*, *supra* note 25.

enjoy.[212] Unfortunately, "globalization and new technology [are] delivering outsize rewards to the titans of the global economy."[213] Even without the adverse effects of unclear regulations, innovations may already be too expensive for smaller companies to undertake.[214] This general hazard applies to the cryptocurrency landscape, where larger corporations can foot the bill for innovation, while smaller companies may have to wait for innovations to trickle down to them. But even if the "trickle down" were immediate, this dilemma creates a secondary issue because smaller corporations may not be interested in the innovations of larger corporations at all. For example, a small company may not have any use for a fiat-like currency like JPM Coin, but it may find great utility in an ICO. The reverse may also be true, as J.P. Morgan may have no interest in an ICO that a smaller company would utilize. The danger that results is that only innovations that benefit larger cryptocurrency corporations will be brought to fruition, while the innovations that might benefit smaller companies lag behind. Uncertainty in regulation only serves to exacerbate this inequality.

If cryptocurrency innovators were able to engage one regulator—in the form of a single cryptocurrency regulatory body—the problem of inequality between smaller and larger companies would be diminished. Rather than guessing as to which agencies will regulate their cryptocurrency, the companies could look to just one commission for regulatory guidance. Such an agency could give those companies confidence as they innovate. For example, the body could provide clear regulations depending on the type of cryptocurrency the company promotes. Additionally, while innovating, a cryptocurrency company could ask the regulator directly whether it would take action against the company for taking certain steps. Hypothetically, the regulator could then issue a "no-action letter" in order to indicate that the company would not be subject to enforcement. The SEC currently issues no-action letters in response to "individual[s] or entit[ies] who [are] not certain whether a particular product, service, or action would constitute a violation of federal securities law."[215] While these letters can give confidence to those concerned only about an *SEC* enforcement action, their usefulness is lessened when innovators do not know exactly which agencies will be regulating them. This is the case with cryptocurrency regulation. Smaller companies simply may not have the resources to reach out to multiple

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[212] Douglas et al., *supra* note 132.

[213] *Id.*

[214] *Id.* ("By developing the technology itself, [PricewaterhouseCoopers LLP] reaps all the productivity gains. Abacus Consulting has access to a similar tool, but it has to pay another software company to use it, reducing its productivity gain. Building the software 'wouldn't be viable for a small business like mine, as the costs would be too high for development and we wouldn't be able to offer the same security as larger providers can,' says Mr. Pritchard [a manager at Abacus Consultancy].").

[215] *No Action Letters*, U.S. SEC. & EXCHANGE COMM'N, https://www.sec.gov/fast-answers/answersnoactionhtm.html (last modified Mar. 23, 2017).

potential regulators and inquire as to their regulatory obligations. The consequent inability to move forward with confidence that an unforeseen sanction will not force a small company to shut down might lead that company to forgo certain avenues of innovation altogether.

There is a legitimate argument that the proposal in this Note will add an agency (or sub-agency) to the Federal Government that is capable of being controlled by the lobbyists of large corporations.[216] That argument would lead to the conclusion that the proposal would not resolve the issue of disproportionate impacts on large and small cryptocurrency companies because the large corporations would lobby for regulations that benefit them. This Note acknowledges this argument and does not dismiss it. However, when viewed alongside the alternatives—and the current state of affairs—an agency committed to getting comprehensive cryptocurrency regulation *right* is superior to a multitude of agencies that claim jurisdiction over the subject without sending clear messages to those they regulate. In fact, if there is any way that smaller cryptocurrency companies can have their voices heard, it would be through Congress or a single accessible regulator that has been directed by Congress to account for all of the players in the cryptocurrency economy. After all, it is Congress that can conduct "hearings which canvass the wide variety of views which those operating in this field entertain."[217] As this Note has argued, when cryptocurrency companies must engage multiple regulators that might have jurisdiction over them, the smallest companies with the least resources are hurt the most and heard the least.

A related counterargument to this Note's proposal states that if a goal of this proposal is to encourage innovation, then initiating a new regulatory body to regulate cryptocurrency is counterintuitive because it will lead to more regulation, which actually holds back innovation.[218] This, too, is a legitimate argument. However, what is worse for innovation than a "rigid regulatory framework[]"[219] is an amorphous, uncertain regulatory framework. Under the latter, companies and individuals are left with options that include (1) taking their chances and assuming massive risk as they guess which agencies might regulate them; (2) hedging against regulatory sanction by engaging as many government entities as possible; and (3) forgoing the risk of innovation altogether. Large cryptocurrency entities may have the

[216] *See* Tim Carney, *Big Business and Big Government*, CATO INST. (July 1, 2006), https://www.cato.org/policy-report/julyaugust-2006/big-business-big-government ("[F]or the past century and more big business has often relied on big government for support.").

[217] Gottschalk v. Benson, 409 U.S. 63, 73 (1972).

[218] *See* Kaushal & Tyle, *supra* note 136 ("Had we over-regulated the Internet early on, we would have missed out on many innovations that we can't imagine living without today. The same is true for the Blockchain. Disruptive technologies rarely fit neatly into existing regulatory considerations, but rigid regulatory frameworks have repeatedly stifled innovation. It's likely that innovations in the Blockchain will outpace policy, let's not slow it down.").

[219] *Id.*

resources to choose options (1) or (2), while smaller entities are much more likely to have to choose option (3). The Federal Government of the United States should strive for a better regulatory framework than this system, in which innovators must decide whether the uncertainty in regulation creates a risk too great to bear.

CONCLUSION

The SEC has been successful in convincing at least one judge at the federal district court level that cryptocurrencies can qualify as securities. Yet, Congress has not provided explicit guidance regarding how cryptocurrency should be classified, which agencies should regulate it, and what types of cryptocurrencies each agency should oversee. New uses for blockchain technology continue to be developed without firm guidance regarding whether these new cryptocurrencies need to be registered as securities. When the next use of blockchain technology is invented, it is unclear where it will fall on the continuum that contains at one end a supposed warrant for securities regulations (i.e. cryptocurrencies involving ICOs, such as Zaslavskiy's cryptocurrencies) and on the other end perhaps no warrant for SEC regulation at all (i.e. fiat-like cryptocurrencies, such as JPM Coin). It is also unclear whether the SEC will be able to charge whoever puts this new cryptocurrency into use with "violations of the . . . registration provisions of the federal securities laws"[220] if they have not registered the cryptocurrency with the Commission. This Note has argued that the SEC needs firmer statutory ground to stand on before it can subject anyone to such liability. This Note has further argued that a new federal agency or sub-agency that specifically deals with cryptocurrency would best address the complex issues that cryptocurrency regulation presents. Rather than allowing piecemeal regulation through agencies acting without clear congressional authorization, such a solution would provide a focused "one stop shop" for cryptocurrency innovators that is capable of adapting to meet the regulatory needs of cryptocurrency development.

[220] *SEC Zaslavskiy Press Release*, *supra* note 171.