

Token Continuity Framework: Designing Structural Protections for Token Holders Under Existing U.S. Securities Law

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Practitioner's Guide

What this Article is. This Article provides a structured analytical framework for lawyers and executives advising token issuers on how to design, implement, and document structural protections for token holders under existing U.S. securities law. It is organized around a practical 18-issue design taxonomy, a theater-identification protocol for distinguishing genuine structural constraint from cosmetic implementation, and a skeletal no-action letter template. An interactive version of the framework, allowing practitioners to analyze specific token structures against each of the 18 issues, is available at tcframework.com.

The central problem. Token-issuing ventures routinely raise capital while retaining equity ownership of the entities that control the protocol's intellectual property, governance, and revenue streams. The resulting dual equity/token structure replicates, without acknowledgment, a form of structural subordination long recognized in property and finance law—and does so without many of the protections that markets developed over decades to make such subordination workable. The same structural defect produces two separate harms: it directs economic value to equity rather than tokens, and it creates the endogenous risk profile that triggers securities law concern. This Article identifies both harms as manifestations of a single architectural problem, and proposes a single class of structural solutions.

The registration decision. The Token Continuity Framework is most directly useful to technologists and their advisors who are considering whether and how to structure token distributions that avoid or minimize securities law entanglements, whether by achieving non-security treatment from the outset, by satisfying the separation doctrine to exit investment contract status, or by qualifying for an available registration exemption. But the framework is also relevant to the threshold

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registration decision itself: whether to consider registering a token offering as a security or to pursue an alternative path.

For many issuers, that decision matrix will sharpen as the regulatory landscape evolves. The joint SEC/CFTC interpretive release of March 2026 established a separation doctrine enabling investment contract status to terminate upon issuer fulfillment of essential managerial promises. Chair Atkins has previewed formal registration exemptions under a proposed Regulation Crypto Assets rulemaking (a Startup Exemption for early-stage raises and a Fundraising Exemption for larger capital pools) alongside an Investment Contract Safe Harbor. If market structure legislation such as the Digital Asset Market Clarity Act is enacted, the path to registering tokens as securities may itself be clarified or liberalized. In that environment, an issuer and its counsel will face a complex cost-benefit analysis: the burden and ongoing compliance costs of registered securities status versus the structural investment required to achieve non-security treatment or exemption.

The purpose of the Token Continuity Framework is to elucidate issues relevant to that analysis. To the extent the framework is accepted by market participants, an issuer that has mapped its structure against the 18-issue translation table will have a better idea which structural protections need to be implemented, at each specific tier, and what the regulatory significance of each gap is. That mapping can inform the registration decision: an issuer at Tier 2 has already done most of the structural work required for a credible no-action request or exemption eligibility, while an issuer at Tier 1 or below faces a clearer picture of the additional investment required before an exemption pathway is viable. Conversely, if the costs of implementation at Tier 2 are prohibitive for a project, the framework makes explicit what the issuer is trading away which can inform entrepreneurs on whether registered securities status, with its compliance burden but defined legal clarity, may be the more efficient path. In either case, the framework aims to convert an impressionistic judgment into a structured analysis.

How to use this Article. A practitioner encountering a specific token structure can use the 18-issue translation table in Section V as a diagnostic checklist, assessing the structure issue by issue and identifying which tier each protection reaches. The theater-identification protocol in Section VI provides a second-pass review for distinguishing genuine constraint from cosmetic implementation. The skeletal no-action letter template in Section VIII provides a starting point for structure-specific SEC staff engagement. Practitioners who upload this Article to a large language model and provide a token structure's governance documents, IP arrangements, and compensation structures can obtain an issue-by-issue analysis against the framework within minutes. The interactive tool at tcframework.com provides the same functionality in a purpose-built interface.

A note on the regulatory moment. While the framework was developed against the backdrop of the March 2026 SEC/CFTC interpretive release, it does not depend on that release for its doctrinal foundations. The endogenous risk principle this Article advances is latent in existing investment contract doctrine and has been so for decades. In the author's view, the release makes the framework more legible as a matter of regulatory analysis. Practitioners should also note that the release is an interpretive rule, not a notice-and-comment rulemaking, and courts applying *Howey* are not bound by it. In the author's view, the structural analysis this Article provides stands independent of the release's regulatory durability.

Abstract

Crypto-centric ventures routinely raise early capital through token issuances while retaining equity ownership of the corporate entities that control the system's intellectual property, governance, and revenue streams. Prior scholarship has framed the resulting value diversion to equity as a problem of disclosure, misaligned incentives, or opportunistic behavior. This Article advances a different account, and a different solution.¹

Drawing on established principles of property and finance law, this Article argues that the dominant dual equity/token structure is economically equivalent to a leasehold interest without a recognition agreement: a deliberate bifurcation of ownership that structurally subordinates token holders because no affirmative legal protections have been implemented to constrain the senior party's discretion.² This is not a novel form of economic dependence. Franchisees, subordinated ABS tranche holders, technology licensees, and infrastructure concessionaires all operate in structurally subordinate positions where senior party control persists. In each market, law has developed enforceable mechanisms that constrain how that control can be exercised in ways that destroy the junior party's investment, converting endogenous discretionary risk into rule-bound structural risk.³ Token holders, by contrast, often receive none of these protections.

The Article makes three contributions. First, it identifies the precise mechanism by which value flows to equity rather than tokens: not fraud or misalignment, but four structural features that give the founding entity a ground owner's position without any of the obligations that ground lease doctrine imposes on ground owners. Second, it reframes the securities law question from a priority inquiry (do tokens resemble equity?) to a continuity inquiry (can token holders act before value is destroyed?), drawing on Dennis Corgill's endogenous risk account of investment contract doctrine⁴ and Stein's tiered framework for leasehold mortgagee protections.⁵ Third, it translates this framework into a practical design taxonomy (the Token Continuity Framework) organized as an 18-issue translation table across three protection tiers, and develops a skeletal no-action letter template for token structures implementing Tier 2 protections.

The Article further argues that the joint SEC/CFTC interpretive release issued March 17, 2026 materially strengthens the framework's fit with current agency thinking. The Release's asset taxonomy, issuer-promise-focused investment-contract analysis, and recognition that the association between a crypto asset and an investment contract can change over time together make the Token Continuity Framework more legible as a matter of regulatory analysis. They do not themselves establish a safe harbor. Rather, they support the narrower claim that structural protections reducing dependence on founding-entity discretion can improve both token-holder protection and the case for non-security treatment under existing doctrine.

¹David Kuhn, *Tokens Are Leases: Structural Subordination in Crypto's Dual Equity-Token Architecture*, X (Dec. 14, 2025), <https://x.com/gr8day4this/status/2000386970061766979> [hereinafter *Tokens Are Leases*]. The title is intentionally evocative: the Article argues that the economic reality of the dual equity/token structure is analogous to a subordinated leasehold interest, not that tokens are leases as a matter of positive law. The leasehold analogy describes the structural subordination of token holders relative to equity — the same economic position that ground lease doctrine evolved to address — not the legal character of the token instrument itself.

²See generally Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* 108–15 (Foundation Press 2017).

³See Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 13.6 (6th ed. 2014).

⁴Dennis S. Corgill, *Securities as Investments at Risk*, 67 *Tul. L. Rev.* 861 (1992).

⁵Joshua Stein, *A Practical Guide to Ground Leases* §§ 6.01–6.06 (ABA 2018).

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I. Introduction

I.A — The Persistent Problem

The question of how crypto tokens may be used in capital formation is substantially more structured than it was several years ago, but it is not fully settled. Through enforcement actions, judicial opinions, and, most recently, the joint interpretive release issued by the SEC and CFTC on March 17, 2026 (Release Nos. 33-11412; 34-105020) (the ‘Release’), U.S. regulators have moved beyond the initial novelty of token fundraising toward a more articulated framework for evaluating crypto assets and the transactions in which they are distributed or traded. The Release describes asset categories, focuses investment-contract analysis on promised or expected managerial efforts, and recognizes that the relationship between a crypto asset and an associated investment contract may evolve over time.⁶

Yet a persistent and largely unresolved problem remains: even when tokens are lawfully issued and widely adopted, they frequently fail to capture the economic value generated by the systems they finance.⁷ This phenomenon is common enough to be unremarkable. Across projects, market cycles, and jurisdictions, equity holders of token-issuing companies almost invariably capture a disproportionate share of the residual value of successful crypto systems, while token holders, often the earliest providers of risk capital, are left with attenuated or speculative upside. The founders of successful crypto protocols often become wealthy. Their early token holders frequently do not.

The standard explanations for this outcome, including founder opportunism, misaligned incentives, and regulatory uncertainty discouraging robust token rights, describe individual cases but do not explain the consistency of the pattern. Something structural is producing this result, and identifying that structural cause is the necessary precondition for designing a structural solution.

I.B — The Diagnosis

This Article advances the following diagnosis: the dual equity/token structure often recreates, in functionally important respects, a form of structural subordination analogous to arrangements long

⁶Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Securities Act Release No. 33-11412, Exchange Act Release No. 34-105020, 91 Fed. Reg. 13,714 (Mar. 23, 2026) (hereinafter “Release”). The Release establishes a five-category asset taxonomy (digital commodities, digital collectibles, digital tools, stablecoins, and digital securities), an issuer-promise-centric investment contract framework, and a separation doctrine enabling non-security crypto assets to exit investment contract status upon issuer fulfillment or abandonment of essential managerial efforts. The Release supersedes the Commission staff’s Framework for “Investment Contract” Analysis of Digital Assets (Apr. 3, 2019).

⁷See Kuhn, Tokens Are Leases, *supra* note 1 (arguing that value diversion from tokens to equity is predictable rather than accidental, arising from four structural features of the dual equity/token architecture; the leasehold analogy describes the economic subordination of token holders, not the legal character of the token).

recognized in property and finance law⁸ and yet it has done so without implementing the protections that leasehold markets developed over decades to make such subordination workable in practice.⁹

In a ground lease, the fee owner leases land to a tenant who develops and operates improvements. The fee owner retains the reversionary interest and termination rights. The leasehold tenant, along with any lender financing the leasehold, faces existential collateral risk: termination of the ground lease extinguishes the leasehold estate entirely. This risk is structural, not informational. Disclosure of the fee owner's termination rights does not mitigate them. What mitigates them is the package of protections that ground lease finance developed over decades: non-disturbance clauses, notice and cure rights, replacement-lease rights, anti-merger provisions, and survivability protections.¹⁰

Token holders often occupy an economically analogous position to a lender financing a leasehold interest, even if the legal form differs. The founding entity owns the intellectual property, controls governance, routes revenue, and retains the ability to modify token economics, sunset token functionality, or migrate value to a new system. Token holders provide capital and bear risk, but their interest is subordinated to the equity holders' residual control in every respect that matters. And unlike the leasehold mortgagee, who benefits from a century of legal development protecting its structurally subordinate position, the token holder seldom receives the analogous protections.

I.C — Why Existing Approaches Are Insufficient

Two existing approaches to the token design problem are insufficient. The first is disclosure-based regulation. Disclosure is necessary but not sufficient. As this Article demonstrates through a survey of four mature markets, the regulatory concern is not whether investors understand the risks they face. It is whether the risks they face are subject to the discretionary control of a counterparty.¹¹ A token holder who fully understands that the founding entity retains the power to redirect value, modify token economics, and render tokens obsolete is still exposed to precisely the form of endogenous risk that securities law is designed to address.

The second approach is decentralization-as-destination: the claim that tokens achieve non-security status through decentralization, meaning the elimination of any identifiable party's control over value drivers.¹² This claim is sometimes valid, but in many projects it is under-specified, overstated, or implemented only partially. More fundamentally, it addresses only the binary endpoints of the regulatory spectrum, leaving the vast middle territory of protocols with ongoing development, identifiable founding entities, and legitimate needs for centralized coordination without a principled framework. The Token Continuity Framework occupies that middle territory.

⁸ A clarification on terminology: this Article argues that token holders occupy an economic position analogous to a subordinated leasehold interest (the leasehold framing is an analogy to describe economic subordination, not a claim that tokens are leases as a matter of positive law, which they are not).

⁹See 1 Milton R. Friedman & Patrick A. Randolph, Jr., *Friedman on Leases* sec. 7:3 (6th ed. 2022).

¹⁰Id. The three tiers — minimum (anti-forfeiture), market (workout-and-transfer), and maximum (control-and-replacement) — provide the direct template for the Token Continuity Framework's three-tier taxonomy.

¹¹Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 15–18 (1991).

¹²Miles Jennings et al., *Control-Based Decentralization* (a16z Crypto, Mar. 13, 2025).

I.D — The Article's Contributions

This Article makes three principal contributions. The first is diagnostic precision: identifying the four structural features of the dual equity/token architecture that produce value diversion as an architectural inevitability rather than a behavioral choice. The second is theoretical reframing: replacing the priority frame (do tokens resemble equity?) with the continuity frame (can token holders act before value is destroyed?), a reframing that dissolves the false binary between "full rights" tokens and "no rights" tokens. The third is practical instrumentation: an 18-issue design taxonomy across three protection tiers, a no-action letter template, and a theater-identification protocol that enables lawyers to distinguish genuine structural constraint from cosmetic implementation.

These contributions are grounded in direct experience with both sides of the structural problem this Article identifies. The author practiced real estate finance law for nine years, where he regularly represented institutional capital providers and operators in major ground lease transactions, leasehold mortgages, mezzanine financings, preferred equity structures, and securitizations. It was in that practice that he first encountered Stein's ground lease treatise as a framework for understanding why leasehold mortgage protections do the work they do. Since then, he has led global legal, compliance and regulatory strategy as a lawyer and executive across finance and digital ecosystems. These roles have provided sustained firsthand exposure to the structural problems this Article identifies: the gap between a token's nominal design and its legal durability, the asymmetry between founding-entity discretion and token-holder protection, and the absence of a coherent comprehensive framework for lawyers advising issuers who want to do this correctly. The Token Continuity Framework is, in that sense, the protocol developed by the author to diagnose and solve material challenges he faces on a regular basis.

I.E — Scope and Structure

This Article proceeds as follows. Section II surveys four mature markets in which structurally subordinate interests routinely escape securities regulation because senior party discretion has been constrained by enforceable structure. Section III identifies the crypto anomaly and unifies the economic and regulatory harms as a single structural defect. Section IV analyzes the regulatory landscape under the Release and existing doctrine, including available pathways for practitioners to achieve regulatory clarity. Section V presents the Token Continuity Framework as an 18-issue design taxonomy. Section VI develops the theater-identification protocol. Section VII provides transaction-lifecycle implementation guidance. Section VIII develops the no-action letter template. Section IX concludes.

Two scope limitations are noted. This Article focuses on U.S. securities law and does not address other jurisdictions, though the structural analysis applies wherever a dual equity/token architecture is used to raise capital. This Article also focuses on application-layer tokens rather than native Layer 1 tokens, which present different decentralization profiles and different structural analyses.

II. Structural Subordination Without Securities Regulation: A Cross-Market Survey

II.A — The General Principle

The question securities law asks is not whether an investor is subordinated. Subordination is ubiquitous in capital markets. The question is whether the post-commitment risk borne by a subordinated investor remains subject to the discretionary control of a counterparty or has instead been disciplined by enforceable structure.

This distinction between endogenous risk and constrained risk is the organizing principle of Dennis Corgill's account of investment contract doctrine.¹³ Corgill shows that the *Howey* "efforts of others" prong, note jurisprudence under *Reves*,¹⁴ and related tests converge on a single inquiry: whether an investor's return depends on the future discretionary conduct of another party, or instead on a fixed structure that operates independently of any party's ongoing choices. Where discretionary third-party conduct remains materially important to investor return, securities-law concerns are at their strongest. Where that discretion has been sufficiently reduced, cabined, or rendered nonessential by ex-ante structure, the case for securities treatment is correspondingly weaker.

Crypto tokens are distinctive not because they introduce a novel form of economic dependence, but because they replicate this familiar architecture while omitting the structural protections that render subordinate interests durable and financeable elsewhere.

II.B — Real Estate Finance: The Canonical Example

The ground lease is the most useful analogue for present purposes because the protective package for structurally junior leasehold interests has been developed in exceptional detail in transactional practice and treatise literature.¹⁵

The economic structure is straightforward. A fee owner leases land to a tenant who develops and operates improvements. The fee owner retains the reversionary interest and termination rights. The leasehold mortgagee's entire collateral position is derivative of the fee owner's continuing decision to maintain the lease. This is a textbook endogenous risk problem. Disclosure of this risk does not solve it. What solves it is the package of protections Stein documents: non-disturbance clauses, notice and cure rights, replacement-lease rights, and anti-merger protections.¹⁶

Critically, none of these protections give the leasehold mortgagee ownership of the fee or any priority claim on the land. The fee owner retains full ownership and, within the constraints of the protection package, full control. What the protection package does is narrow the space of discretionary

¹³Corgill, *supra* note 4, at 864–68.

¹⁴*Reves v. Ernst & Young*, 494 U.S. 56, 63–64 (1990).

¹⁵Stein, *supra* note 5, §§ 6.01–6.06.

¹⁶*Id.* The three tiers — minimum (anti-forfeiture), market (workout-and-transfer), and maximum (control-and-replacement) — are the organizing framework of Stein's treatise and provide the direct template for the Token Continuity Framework's three-tier taxonomy.

action available to the fee owner in ways that specifically protect the leasehold mortgagee's collateral. Discretionary termination risk becomes rule-bound enforcement risk.¹⁷

II.C — Structured Finance: Payment Waterfalls and Servicer Constraints

A subordinated ABS tranche holder sits at the bottom of a payment waterfall. It bears first-loss risk on a pool of assets managed by a servicer it did not select. The servicer has broad authority to modify loans, foreclose on defaulted assets, and determine the timing and method of liquidation, all of which materially affect the subordinated tranche holder's recovery. Yet subordinated ABS tranches are not treated as investment contracts.¹⁸

The mechanism that makes this work is the contractual constraint on servicer discretion embedded in the pooling and servicing agreement. Servicing standards define the scope of permissible servicer conduct. More importantly, the PSA typically includes servicer replacement rights: if the servicer fails to meet its obligations, the trustee can remove and replace the servicer. This replacement right is the functional equivalent of the ground lease's replacement-lease right: it converts the worst-case scenario from total value destruction into a remediable event.

II.D — Intellectual Property Licensing: Section 365(n) and the Survivability Principle

Before Congress enacted the Intellectual Property Licenses in Bankruptcy Act of 1988, codified at 11 U.S.C. §365(n), a licensor's bankruptcy trustee could reject an IP license as an executory contract, meaning the licensee's entire business could be destroyed by a bankruptcy proceeding that had nothing to do with the licensee's own conduct.¹⁹

Section 365(n) solved this by giving licensees an election: if the licensor's trustee rejects the license, the licensee may elect to retain its rights under the license for the duration of the agreement.²⁰ The trustee cannot use the bankruptcy proceeding to strip the licensee of a license the parties had negotiated. A token-design analogue to §365(n) would seek to ensure that at least some token utility rights remain usable notwithstanding founding-entity insolvency, but whether that result is actually achieved depends on the surrounding contract, IP, bankruptcy, and secured-credit architecture.²¹

II.E — Franchise Law: Relationship Constraints and the Limits of Disclosure

¹⁷See Stein, *supra* note 5, at § 1.01 ("The leasehold mortgagee's fundamental problem is that its collateral can be destroyed by events or actors entirely outside the mortgage itself."). This framing — subordination as a continuity problem rather than a priority problem — is the central insight the Token Continuity Framework imports from ground lease doctrine.

¹⁸See generally Adam J. Levitin & Susan M. Wachter, *The Commercial Real Estate Bubble*, 3 *Harv. Bus. L. Rev.* 83 (2013) (discussing PSA-based servicer accountability in structured finance).

¹⁹11 U.S.C. § 365(n) (2018). The Intellectual Property Licenses in Bankruptcy Act of 1988 added this provision specifically to protect licensees against licensor bankruptcy. See S. Rep. No. 100-505, at 4–5 (1988).

²⁰11 U.S.C. § 365(n)(1)(B) (permitting licensee to retain rights under intellectual property license notwithstanding trustee's rejection of the license as an executory contract).

²¹See S. Rep. No. 100-505, at 4 (1988) ("The bill provides that when a licensor files for bankruptcy and the trustee rejects the license agreement as an executory contract, the licensee may elect to retain its rights under the agreement.").

A franchisee's investment is subordinated in every economically meaningful sense. The franchisor owns the brand, the system, the supply chain relationships, and the intellectual property. Yet franchise arrangements are not securities. The FTC regulates them through a disclosure-based regime, but this regime exists alongside, not instead of, the substantive relationship protections that most states impose.²² State franchise relationship laws typically require cause for termination, good-faith dealing in renewal negotiations, and reasonable territorial protections.

The securities law implication follows directly. Franchise law illustrates that regulators often pair disclosure with substantive relationship constraints when managing economically dependent relationships, rather than assuming disclosure alone is sufficient. Disclosure of the franchisor's retained powers matters, but it does not do the regulatory work by itself. This is precisely the point the author made in the companion essay, *From Disclosure to Design: Constraining Risk in Structurally Subordinate Tokens*: disclosure cannot substitute for structure.²³

II.F — The Pattern: Subordination Is Routine; Unprotected Subordination Is the Anomaly

The four examples above span real estate, financial markets, intellectual property, and commercial relationships. What they share is a common answer to the endogenous risk problem: in each case, law developed enforceable constraints on how senior party control could be exercised in ways that destroyed the junior party's investment.

The constraints share three structural features across all four domains. First, they are **enforceable**: backed by contract remedies, statutory rights, or both. Second, they are **legible ex ante**: verifiable by a prospective investor without relying on the senior party's representations. Third, they are **calibrated**: the scope of the constraint matches the specific discretionary risks of the relationship.²⁴

These three features (enforceable, legible, calibrated) are the template for the Token Continuity Framework. They are also the minimum conditions for any token structure to credibly claim that its holders' risk is constrained rather than endogenous. Crypto tokens are the anomaly: they have reproduced the architecture of subordination while omitting nearly every element of the structure that makes it work.

²²See FTC Franchise Rule, 16 C.F.R. pt. 436 (2007). State franchise relationship laws imposing good-faith obligations and termination-for-cause requirements include, inter alia, Cal. Corp. Code §§ 20000–20043; Ill. Franchise Disclosure Act, 815 Ill. Comp. Stat. 705/1–705/44.

²³ David Kuhn, *From Disclosure to Design: Constraining Risk in Structurally Subordinate Tokens*, X (Dec. 22, 2025), <https://x.com/gr8day4this/status/2003168590153822497> [hereinafter *From Disclosure to Design*].

²⁴Stein, *supra* note 5, at § 6.04 ("The most important difference among the three tiers is not whether a protection exists in name, but how usable it is under stress.").

III. The Crypto Anomaly: Replicating the Architecture Without the Protections

III.A — How the Dual Structure Emerged

The dual equity/token structure was not designed to subordinate token holders. It emerged from a specific historical moment: token issuers facing a regulatory dilemma about how to raise early-stage capital without triggering securities registration for instruments they believed would eventually function as utility tokens. The solution was to separate the early capital raise from the eventual token distribution. Equity retained control over development because development required centralized decision-making.

The problem is that, in many projects, ‘stepping back’ did not occur in a legally durable or practically constraining sense. Founding entities retained intellectual property ownership, governance authority, and revenue routing mechanisms long after token distribution. The result was a capital structure that combined the worst features of two different models: like equity, it left residual control with the founding entity; unlike equity, it gave token holders none of the governance rights, fiduciary duty protections, or liquidation preferences that equity law provides.

III.B — The Four Structural Features of Value Diversion

Four structural features cause value to predictably flow to equity rather than tokens.²⁵

The first is **intellectual property ownership**. The founding entity owns the protocol's IP: the codebase, the brand, the key technical innovations. Token holders have no property interest in this IP and no right to use it independently of the founding entity's continuing consent.

The second is **revenue routing control**. The founding entity controls how value generated by network activity is allocated. Governance mechanisms that give the founding entity a controlling vote, or that require supermajority thresholds the founding entity can veto, are not meaningful constraints.

The third is **centralized governance authority**. Protocol upgrades, fee structure changes, and tokenomics modifications are made through governance processes the founding entity dominates.²⁶ Founding entity token allocations, investor allocations, and team allocations collectively represent a controlling position in most governance votes for years after token distribution.

The fourth is **asymmetric optionality**. The founding entity retains the ability to change the game entirely: to pivot the business model, license the technology to a new entity, launch a competing protocol, or abandon the current token. Token holders typically have no equivalent optionality.

²⁵See generally Oliver E. Williamson, *The Economic Institutions of Capitalism* (1985).

²⁶See Kuhn, *Tokens Are Leases*, *supra* note 1 (documenting that founding entity token allocations, investor token allocations, and team token allocations collectively represent controlling governance positions in most dual equity/token structures for years after token distribution; the essay uses the leasehold analogy to describe the economic subordination of token holders, not to characterize tokens as leases as a matter of positive law).

III.C — One Defect, Two Symptoms

The companion essays diagnosed the dual equity/token structure from two different angles. *Tokens Are Leases* focused on the economic harm: value predictably flows to equity because the architecture structurally directs it there. *From Disclosure to Design* focused on the regulatory harm: token risk is endogenous in precisely the way that triggers securities law concern.²⁷

These are not two separate problems. They are the same structural defect viewed from two vantage points. The Token Continuity Framework addresses both simultaneously because the same structural feature, constrained discretion, solves both. When the founding entity's ability to redirect value, modify token economics, or render tokens obsolete is constrained by enforceable, legible, calibrated mechanisms, token holders gain economic protection and regulatory protection at the same time. The two symptoms are mitigated by the same class of structural constraints, even if neither problem is always resolved completely by structure alone.

III.D — Why Priority Analysis Misses the Point

The dominant frame in token design asks the priority question: where do token holders sit in the capital stack relative to equity? This frame generates two equally unworkable answers. The first, "below equity in all respects," is the current default, producing the harms documented above. The second, "give token holders equity-like priority rights," recreates the securities problem.²⁸

Both answers are wrong because the priority frame is wrong. It is borrowed from corporate finance, where the relevant entity is a legal person with defined assets, a defined governance structure, and defined obligations. A token-issuing protocol is not a corporation. Applying a priority framework to this structure produces category errors: token holders cannot have "equity-like" rights because there is no equity in the relevant sense.

The continuity frame asks the right questions: can token holders act before value is destroyed? Do they have the notice, the intervention rights, the governance standing, and the replacement options to protect their investment when the senior party acts in ways that impair it? Can the economic package they invested in survive the founding entity's exit, insolvency, or opportunism? These are the questions that leasehold finance answered: not by eliminating the fee owner's priority, but by engineering the junior stakeholder's ability to intervene, survive, and reconstitute through all failure modes.

III.E — The Synthesis: What "Decentralization" Is Actually For

There is a coherent version of the decentralization thesis: a protocol in which no identifiable party retains discretionary control over value drivers genuinely has no endogenous risk to constrain.

²⁷Id.; see also Kuhn, *From Disclosure to Design*, supra note 24 (arguing that disclosure of a founding entity's retained powers does not neutralize endogenous risk absent structural constraints on how that control may be exercised).

²⁸*United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852–53 (1975) (economic reality over form).

The Clarity Act's "nominal efforts" standard, and the SEC's analogous enforcement posture, reflect a real intuition.²⁹

The problem is that full decentralization is rare, difficult to achieve, and difficult to maintain. The cross-market survey shows that the relevant middle ground, consisting of protocols with ongoing development and identifiable founding entities, is not a regulatory anomaly but the normal condition of subordinated capital in mature markets. Decentralization is best understood not as the destination but as one mechanism for achieving the underlying goal of constrained discretion.³⁰ A fully decentralized protocol achieves constrained discretion by eliminating discretion altogether. A structured token may pursue a similar objective by constraining discretion through enforceable mechanisms while allowing limited forms of operational control to persist where genuinely needed for development and maintenance.

IV. The Regulatory Landscape Under the Release and Existing Doctrine

IV.A — The March 2026 Release: What It Did and Why It Matters

On March 17, 2026, the SEC and CFTC jointly issued Release Nos. 33-11412 and 34-105020 (the "Release"), providing the most comprehensive official guidance on the application of federal securities laws to crypto assets since the DAO Report of 2017. The Release describes five categories of crypto assets and addresses a range of recurring transaction types and analytical questions, including investment-contract analysis. It also displaces the practical centrality of the SEC staff's 2019 Framework by providing a more current and formal interpretive statement.

One important caveat applies to the Release's weight as regulatory authority. As an interpretive rule under the Administrative Procedure Act rather than a notice-and-comment rulemaking, the Release does not carry the force of law and is subject to independent judicial scrutiny under the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which overruled *Chevron* deference and directs courts to exercise independent judgment on questions of statutory interpretation. A court evaluating the Token Continuity Framework's structural analysis is not bound to adopt the Release's issuer-promise framework or separation doctrine; it will apply *Howey* and its progeny directly. The endogenous risk principle this Article advances does not depend on the Release's authority; it is latent in existing investment contract doctrine and has been so for decades. The Release confirms and operationalizes the principle; it does not create it. The Token Continuity Framework therefore stands on doctrinal ground that is independent of the Release's ultimate regulatory durability.

²⁹See SEC Framework for "Investment Contract" Analysis of Digital Assets (Apr. 3, 2019), <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [hereinafter 2019 Digital Assets Framework]. The Framework acknowledged that the investment contract analysis "can change over time" as a network becomes more decentralized.

³⁰Gabriel Shapiro, *Defining Decentralization for Law*, Medium (2023), <https://lex-node.medium.com/defining-decentralization-for-law-58ca54e18b2a>; see also Gabriel J. Shapiro, *Token Safe Harbor Proposal 3.0*, at 2 (2023) ("decentralization is best understood not as an endpoint, but as one mechanism among several for constraining endogenous risk"), <https://gabrielshapiro.substack.com/p/token-safe-harbor-proposal-30>.

The Release’s most consequential practical implication for token issuers, identified by practitioners as the central open question raised by the Interpretation, is the “attachment” doctrine: once an issuer has made representations or promises about essential managerial efforts, the associated investment contract attaches to the crypto asset itself, rendering all secondary market transactions in that asset securities transactions until separation is achieved. The corollary is that separation requires the issuer to have genuinely fulfilled, or publicly and unambiguously abandoned, those promises, with the measure of fulfillment determined by reference to how the issuer defined its commitments rather than by generalized market understandings. This framing makes the Token Continuity Framework’s structural approach particularly valuable: a founding entity that has constrained its discretionary powers through enforceable, legible, calibrated mechanisms has both reduced the endogenous risk profile of its tokens and improved its ability to satisfy the separation standard, because its structural commitments are independently verifiable rather than dependent solely on issuer representations. The no-action letter process and the emerging Regulation Crypto Assets pathways, discussed in Section VIII, provide the primary mechanisms through which issuers can obtain structure-specific regulatory guidance on whether a given set of structural protections is sufficient to support non-securities treatment or achieve clean separation.

IV.B — The Howey–Reves Analytical Foundation

The critical *Howey* inquiry for any token structure is the fourth prong: whether token holder returns depend on the entrepreneurial or managerial efforts of a third party in a material way.³¹ The "efforts of others" prong has never required that investors be entirely passive. What it requires is that the investor's profit expectation depend on *discretionary* value-creating conduct, not nominal, ministerial or mechanical functions. Nominal, ministerial or mechanical functions are rule-bound; their outputs are determined by the inputs and the defined procedure. Entrepreneurial and managerial functions are discretionary; their outputs depend on the choices of the person performing them. Corgill offers a useful explanatory lens for the Howey inquiry, especially the extent to which expected return depends on discretionary post-commitment conduct.

Three doctrinal developments now anchor the token investment contract analysis. First, the Release provides an asset taxonomy and a more explicit framework for evaluating when certain application-layer tokens may fall outside securities treatment, particularly where their value is tied to functional utility rather than to continuing issuer-promised managerial efforts.³² Second, the Release’s separation doctrine confirms that investment contract status is not permanent: once an issuer has fulfilled its essential managerial promises, or publicly abandoned them, the non-security crypto asset separates from the associated investment contract and subsequent transactions are deemed by the SEC to be outside the securities laws. The Token Continuity Framework posits that structural protections will strengthen an argument for separation by reducing continuing dependence on

³¹Howey, 328 U.S. at 301 ("The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.").

³²See SEC and CFTC, Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Release Nos. 33-11412; 34-105020 (Mar. 17, 2026).

founding-entity discretion, though they do not by themselves guarantee that conclusion. Third, the SEC's enforcement record has concentrated on token structures where founding entity discretion was most pronounced; the negative space of that record correlates with structures that had constrained some discretionary features.³³ Judicial treatment of decentralization arguments has focused on the practical reality of founding entity control rather than formal governance claims.³⁴

One counterargument deserves direct engagement. A sophisticated regulator or adversarial reviewer might contend that implementing robust structural constraints such as vote-weight caps, standstill rights, intervention triggers, and nondisturbance agreements itself creates a package of contractual entitlements that more closely resembles an investment contract than a bare token issued without any stipulations. The argument has surface appeal, but it mistakes the mechanism. *Howey's* economic reality test does not inquire whether an investor has rights; rather, it tests whether the investor's profit expectation depends on the discretionary entrepreneurial or managerial conduct of a third party. Structural constraints on founding-entity discretion move in the opposite direction: they reduce the extent to which token value depends on ongoing founder choices. As *Forman* makes clear, the economic reality test looks at what drives value, not at whether documentation exists. A token structured with Tier 2 or Tier 3 protections under the Token Continuity Framework materially constrains how the founding entity can modify token economics, route revenue through discretionary mechanisms or unilaterally eliminate token utility (e.g., pursuant to a protocol fork, founder exit, or insolvency of the founding entity). The endogenous risk profile of a token subject to Tier 2 or Tier 3 protections is materially reduced. It is incoherent to argue that the package of contractual entitlements that reduce the endogenous risk of a token manufactures new securities exposure. The cross-market survey confirms this: ABS subordinated tranche holders, IP licensees under Section 365(n), and franchisees all hold enforceable contractual entitlements, and none of those instruments are investment contracts. The entitlements reduce discretionary risk rather than creating profit expectations tied to managerial effort.

Practitioners seeking regulatory clarity for specific token structures have several pathways available under the current framework. No-action letters remain one mechanism for obtaining structure-specific SEC staff guidance, but they are not the only route. Chair Atkins previewed three additional pathways under a proposed "Regulation Crypto Assets" rulemaking: a Startup Exemption for early-stage raises, a Fundraising Exemption for larger capital pools, and an Investment Contract Safe Harbor enabling issuers to satisfy their managerial-efforts obligations and achieve separation. Legislative progress on the Digital Asset Market Clarity Act represents an additional pathway if enacted. And clarity may emerge more gradually through coordinated commercial practice, which is among the catalysts for this Article, as discussed in Section VIII below. The structural protections the Token Continuity Framework prescribes position a project to take advantage of any of these pathways as they materialize and mature.

³³See *SEC v. LBRY, Inc.*, 639 F. Supp. 3d 211 (D.N.H. 2022); *SEC v. Ripple Labs, Inc.*, No. 20-cv-10832 (S.D.N.Y. 2023) (discussing programmatic sales vs. institutional sales distinction).

³⁴*Id.* at 5–8 (identifying relevant factors including whether "an essential task or responsibility is performed by an Active Participant" and whether "the efforts of an AP are necessary for the network or digital asset to achieve or retain its intended purpose").

IV.C — Cross-Market Regulatory Precedents: Permission to Act

The FTC's franchise disclosure regime demonstrates that a federal agency can regulate disclosure obligations around economically dependent subordinated relationships without treating those relationships as securities.³⁵ The bank regulatory agencies' treatment of subordinated ABS tranches demonstrates that sophisticated federal regulators have developed detailed frameworks for evaluating structured credit risk without requiring *Howey* analysis.³⁶ Section 365(n) represents Congress's own determination that technology licensees deserve structural protection against senior party discretionary action through insolvency.³⁷

Together, these precedents give the SEC institutional permission: not legal permission (the SEC has broad investment contract jurisdiction) but the institutional permission that comes from knowing that analogous regulatory problems have been solved in analogous ways by other federal agencies and by Congress itself.

IV.D — The Endogenous Risk Standard as the Organizing Principle for Future Guidance

The endogenous risk standard asks a single question: does investor return depend on the future discretionary conduct of a counterparty, or on a fixed structure that operates independently of ongoing human judgment?³⁸ Applied to tokens, this standard generates a three-category analytical framework, one the Release now confirms at the level of official agency interpretation.

Tokens whose value depends primarily on the ongoing entrepreneurial and managerial efforts of an identifiable founding entity are investment contracts under *Howey*. This is the current default for most tokens. Tokens whose value depends principally on fixed protocol structure, whether through substantial decentralization or through sufficiently robust structural constraints on founding-entity discretion, have a materially stronger argument against investment-contract treatment.³⁹ Tokens that make decentralization claims without implementing structural constraints occupy a third category: their value remains endogenous regardless of governance labels.

The virtue of this framework for agency guidance purposes is that it is testable. Unlike vague decentralization standards that require holistic judgments, the endogenous risk standard asks specific questions about specific discretionary powers that the translation table in Section V answers issue by issue.

³⁵See FTC Franchise Rule, 16 C.F.R. pt. 436 (2007). State franchise relationship laws imposing good-faith obligations and termination-for-cause requirements include, inter alia, Cal. Corp. Code §§ 20000–20043; Ill. Franchise Disclosure Act, 815 Ill. Comp. Stat. 705/1–705/44.

³⁶See generally Adam J. Levitin & Susan M. Wachter, *The Commercial Real Estate Bubble*, 3 Harv. Bus. L. Rev. 83 (2013) (discussing PSA-based servicer accountability in structured finance).

³⁷11 U.S.C. § 365(n) (2018). See S. Rep. No. 100-505, at 4–5 (1988).

³⁸Corgill, *supra* note 4, at 895–902. Corgill's framework distinguishes between "investments at risk" — where investor return depends on discretionary post-commitment conduct — and instruments where risk is fixed ex ante by defined payment obligations or market structures.

³⁹2019 Digital Assets Framework, *supra* note 28, at 6 ("The more decentralized the network, the less likely that efforts of any single party will be a key determining factor in the enterprise's success.").

V. The Token Continuity Framework: A Practical Design Taxonomy

V.A — Continuity, Not Priority

Before presenting the taxonomy, a preliminary clarification is necessary. Most regulatory and transactional analysis of token structures imports a priority framework from corporate finance: where do token holders sit in the capital stack relative to equity? This framing is borrowed from the wrong domain.

Leasehold finance teaches a different lesson. A leasehold mortgagee is by definition junior in priority to the fee owner; that subordination is structural and permanent. The leasehold finance market did not respond by demanding priority equivalence. It responded by developing continuity rights: notice, cure, standstill, step-in, transfer, and replacement rights that ensure the junior stakeholder can act before value is destroyed, redirected, or stranded.⁴⁰

Stein's treatise makes this explicit. The three tiers of leasehold mortgagee protection are calibrated not to the mortgagee's position in the priority stack but to its ability to preserve collateral through the full range of failure modes.⁴¹ The tier labels adopted here reflect this calibration:

Tier 1 (Anti-Abandonment): the minimum package: prevents token utility from being unilaterally eliminated; establishes bare holder protection analogous to Stein's anti-forfeiture package.

Tier 2 (Governance-and-Migration): the market package, which makes token positions workable through founder transitions, financing events, and economic modifications; analogous to Stein's workout-and-transfer package.

Tier 3 (Continuity-and-Replacement): the maximum package: full preservation of the token economic package through all failure modes including founding entity insolvency, hostile M&A, and protocol forking; analogous to Stein's control-and-replacement package.

V.B — The 18-Issue Translation Table

The table on the following pages translates Stein's leasehold mortgagee framework, supplemented by one additional issue specific to crypto asset revenue routing, into token design equivalents across 18 issues across all three tiers. For each issue, the table identifies: the leasehold mortgagee protection at each tier; the token design equivalent; and the securities law significance under the endogenous risk standard.

⁴⁰Stein, *supra* note 5, at §§ 6.01–6.03 (describing minimum tier as “the bare financeability package” designed to prevent “immediate collateral destruction” rather than to achieve full lender protection).

⁴¹*Id.*

Table 1: The 18-Issue Token Continuity Framework Translation Table

The table below ranks design features by likely importance to courts, regulators, and practitioners evaluating continuing dependence on founding-entity discretion. It is intended as an analytical and design tool, not as a catalog of outcome-determinative legal rules.

4.1		NOTICE BEFORE ACTION [HIGH SECURITIES IMPACT]	
	Leasehold protection: Landlord must notify mortgagee before exercising any remedy for tenant default		Token equivalent: Mandatory on-chain notice period before any modification to token economics takes effect
T1	On-chain publication of proposed changes before implementation; notice period of ≥ 7 days		
T2	Standardized disclosure to all token holders; covers all material changes including governance, supply, and fee modifications		
T3	No modification takes effect until notice period expires and all intervention rights have been exercisable; notice voids any unauthorized modification		
Sec.	<i>Converts discretionary surprise into rule-bound process. Issuer retains power to act but loses ability to act unilaterally and instantaneously, the core feature of endogenous risk.</i>		
4.2		CURE RIGHTS [HIGH SECURITIES IMPACT]	
	Leasehold protection: Mortgagee can cure tenant defaults, with extra time where cure requires possession or transfer		Token equivalent: Token holders can reverse or veto modifications within a defined intervention window
T1	Token holders can veto economic modifications within a defined window; majority vote sufficient		
T2	Intervention rights covering both economic and protocol modifications; extended window for on-chain coordination		
T3	Full intervention toolkit including fork rights, migration paths, and service provider replacement		
Sec.	<i>Meaningful token-holder intervention rights can reduce the extent to which value depends solely or predominantly on issuer conduct. They are therefore highly relevant to any analysis of whether continuing managerial efforts remain material</i>		
4.3		REVENUE ROUTING AND BUY/BURN MECHANISMS [HIGH SECURITIES IMPACT]	
	Leasehold protection: Landlord cannot redirect income from the leasehold improvements to the fee estate; improvements income must flow through defined distribution channels		Token equivalent: Token buy/burn programs must be programmatic and non-discretionary; revenue routing from protocol fees cannot be subject to founding entity discretion
T1	Burn trigger, if any, is defined in smart contract code; founding entity has no discretionary authority to initiate, pause, or modify the burn; burn funding source is protocol fee revenue collected and routed automatically by the protocol, not from a discretionary treasury		
T2	Buy/burn parameters (trigger conditions, maximum spend, funding source, and burn address) are encoded on-chain and can be modified only by a governance vote subject to the founding entity vote-weight cap and the standard notice and standstill mechanics; any representation made to token purchasers about a buy/burn program is publicly disclosed as either fulfilled (program fully implemented as described) or superseded (prior representation replaced by current on-chain parameters); founding entity holds no discretionary authority over the selection of tokens to purchase, the timing of purchases, or the allocation of protocol revenue to the buy/burn pool		
T3	All revenue routing, including buy/burn funding, treasury allocations, and protocol fee distributions, is governed by on-chain rules with no founding entity discretionary override; any modification to revenue routing parameters requires a supermajority token holder vote with founding entity votes excluded from quorum; a publicly filed and independently verifiable representation schedule maps each prior buy/burn representation to its current fulfillment or separation status, updated on a defined cadence		
Sec.	<i>The most direct application of the Release's issuer-promise standard to a specific token design feature. A buy/ burn program that is promised to purchasers, operated at founding-entity discretion, and framed as a source of token appreciation materially strengthens the case for investment-contract treatment and may materially complicate any later argument for separation unless the program is genuinely completed, superseded, or abandoned in a way the market can verify. The upstream discretion problem: even a mechanically automated burn is contaminated if funded from a treasury or fee pool subject to founding entity discretionary control. The separation trap: a team cannot selectively de-emphasize a buy/ burn promise to claim separation while continuing to operate the program in modified form; the modification itself re-tethers the token.</i>		

4.4		STANDSTILL AGAINST REMEDIES [HIGH SECURITIES IMPACT]	
	Leasehold protection: Landlord cannot terminate until mortgagee notice and cure periods have fully run		Token equivalent: Founding entity cannot implement challenged modifications while governance challenge is pending
T1	Simple delay: modification cannot take effect while challenge is pending		
T2	Automatic standstill once governance challenge is filed; suspended until vote concludes		
T3	Standstill integrated with intervention, migration, and replacement mechanics so founding entity cannot race ahead of token holder exercise window		
Sec.	<i>Without standstill, notice rights are nominal. Standstill converts notice from disclosure into actual constraint.</i>		

4.5		RECOGNITION OF FINANCING [MEDIUM IMPACT]	
	Leasehold protection: Lease expressly permits leasehold mortgages; landlord executes recognition instruments		Token equivalent: Protocol permits token holders to finance, pledge, or transfer positions without founding entity consent
T1	Protocol permits transfer and pledge without restriction		
T2	Formal recognition regime confirming token transferability and financeability		
T3	Founding entity obligated to execute estoppels for token financiers; no veto over downstream token financing		
Sec.	<i>Secondary market liquidity and token financeability depend on this. Discretionary transfer restrictions are a control mechanism that increases endogenous risk.</i>		

4.6		RESTRICTIONS ON AMENDMENT [HIGH SECURITIES IMPACT]	
	Leasehold protection: Material amendments require mortgagee consent, especially on economics, default, and termination		Token equivalent: Material changes to token economics require governance vote; founding entity vote weight capped at minority
T1	Hard-coded limits on supply, fee structure, and treasury outflows that cannot be changed unilaterally		
T2	Governance vote required for economic modifications; founding entity vote weight capped; supermajority for fundamental changes		
T3	Any modification affecting token value, utility, or transferability requires token holder consent; founding entity bound by outcome regardless of equity position		
Sec.	<i>Anti-modification constraints are the primary mechanism for converting endogenous risk into rule-bound risk.</i>		

4.7		ANTI-SURRENDER / ANTI-SUNSET [HIGH SECURITIES IMPACT]	
	Leasehold protection: Voluntary surrender ineffective without mortgagee consent; attempted surrender void as against lender		Token equivalent: Token sunsetting or migration to new system ineffective without token holder supermajority approval
T1	Open-source code ensures technical ability to continue protocol independent of founding entity		
T2	Founding entity cannot unilaterally sunset token functionality; governance vote required with founding entity excluded from quorum		
T3	Attempted sunsetting void without supermajority approval; founding entity IP cannot be used to block continuation		
Sec.	<i>Addresses the most common value diversion mechanism: founding entity abandons current token, migrates value to new system. Without this, all other protections can be circumvented.</i>		

4.8	REPLACEMENT / NEW-LEASE RIGHT [HIGH SECURITIES IMPACT]	
	Leasehold protection: Landlord must grant new lease on same terms if original terminates; converts termination from collateral destruction into remediable event	Token equivalent: Token holders have enforceable fork and migration rights; founding entity cannot use IP to block protocol continuation
T1	Open-source licensing with no restrictions; technical fork is possible	
T2	Governance-controlled migration path with defined trigger conditions; founding entity cannot block fork through IP claims	
T3	Protocol-level fork and migration rights; founding entity IP automatically licensed to successor on same terms; long exercise windows with few excuses for refusal	
Sec.	<i>The single most important protection. Converts founding entity exit from total value destruction into a remediable event. Bears a strong functional resemblance to the survivability logic reflected in §365(n) and materially strengthens the argument that founding-entity exit need not imply continuing dependence on that entity.</i>	

4.9	FORECLOSURE AND TRANSFER RIGHTS [MEDIUM IMPACT]	
	Leasehold protection: Mortgagee may foreclose, take deed in lieu, hold REO, and transfer with objective standards	Token equivalent: Token holders may liquidate, transfer, or restructure positions without founding entity discretionary consent
T1	Token transferability without founding entity consent	
T2	Transfers including bulk transfers and pledges permitted subject to objective, non-discretionary standards	
T3	Broad flexibility to transfer to affiliates, nominees, and workout entities; no founding entity discretionary veto in any form	
Sec.	<i>Discretionary transfer restrictions imposed by founding entities are a value extraction mechanism that securities law is designed to address.</i>	

4.10	LIMITS ON CONSENT TO TRANSFER [STRUCTURAL]	
	Leasehold protection: Foreclosure-related and lender-directed transfers carved out from discretionary landlord consent	Token equivalent: Founding entity cannot use transfer restrictions to extract value or maintain artificial scarcity
T1	No founding entity approval required for token transfers	
T2	Any consent standards are objective and published in advance	
T3	All transfer restrictions are protocol-level and non-discretionary; founding entity retains no personal consent right	
Sec.	<i>Discretionary transfer approval rights are a control mechanism. Their presence makes token value depend on founding entity goodwill.</i>	

4.11	ANTI-MERGER PROTECTION [MEDIUM IMPACT]	
	Leasehold protection: Fee and leasehold in common ownership does not extinguish leasehold; no impairment without mortgagee consent	Token equivalent: Founding entity accumulation of large token position does not grant power to modify protocol unilaterally
T1	Governance rules cap founding entity effective vote weight regardless of token accumulation	
T2	Anti-concentration provisions prevent any single entity from acquiring controlling governance position	
T3	No merger of token holder and founding entity interests; accumulated positions do not increase protocol modification rights	
Sec.	<i>Prevents founding entity from using secondary market purchases to reconsolidate control that was nominally distributed.</i>	

4.12 EQUITY CAPITAL STRUCTURE AS THREAT [HIGH SECURITIES IMPACT]	
	<p>Leasehold protection: Later fee mortgages remain subordinate to lease; founding entity's own capital structure is a separate threat vector</p> <p>Token equivalent: Founding entity's equity financing, M&A, and insolvency events cannot impair token utility or economics</p>
T1	Token utility rights survive founding entity financing events; notice required before any pledge of protocol IP
T2	Founding entity lenders cannot foreclose on protocol IP without assuming token utility obligations; change of control triggers token holder intervention rights
T3	Full intercreditor-style protection: any financing secured by protocol assets must include token holder nondisturbance agreement
Sec.	<i>Most underappreciated threat vector. Founding entity debt financing, venture rounds, and M&A can all impair token value without any direct action against tokens.</i>

4.13 CASUALTY EQUIVALENTS [STRUCTURAL]	
	<p>Leasehold protection: Casualty does not terminate lease; proceeds directed into restoration regime with lender protections</p> <p>Token equivalent: Protocol exploits, hacks, or technical failures do not automatically terminate token utility</p>
T1	Defined incident response process; no automatic token deprecation on technical failure
T2	Governance-controlled recovery process; token holders participate in remediation vs. migration decisions
T3	Token holders have control over recovery decisions including use of insurance proceeds and migration timing
Sec.	<i>Structural rather than securities-law significance. Absence of recovery regime means technical failure produces total value destruction without recourse.</i>

4.14 CONDEMNATION EQUIVALENTS [STRUCTURAL]	
	<p>Leasehold protection: Taking does not divert all value to landlord; proceeds allocated with attention to leasehold estate</p> <p>Token equivalent: Regulatory action or forced migration does not divert all value to founding entity</p>
T1	Token holder rights survive regulatory actions affecting founding entity
T2	Regulatory-compelled migration preserves token holder economic position; founding entity cannot negotiate away token rights in settlements
T3	Token holders are parties to any regulatory resolution affecting token economics; founding entity cannot settle at token holder expense
Sec.	<i>Founding entity can resolve regulatory exposure by surrendering token functionality, effectively using token holders as settlement currency without this protection.</i>

4.15 LIABILITY INSULATION [STRUCTURAL]	
	<p>Leasehold protection: Mortgagee not personally liable merely by holding leasehold mortgage; liability only after actual possession</p> <p>Token equivalent: Token holding does not create operational liability for the network or founding entity obligations</p>
T1	Clear documentation that token holding creates no assumption of operational obligations
T2	Protocol documentation confirms token holders bear no personal liability for protocol operations
T3	Comprehensive exculpation from all operational, regulatory, and contractual obligations of founding entity
Sec.	<i>Unlimited liability exposure would chill participation and create concern about whether token holders constitute a de facto partnership.</i>

4.16	IMPROVEMENTS / PROTOCOL ASSETS [MEDIUM IMPACT]	
	Leasehold protection: Collateral package includes tenant's improvements; mortgageable interest confirmed; preserved through new-lease or successor structure	Token equivalent: Token utility attaches to protocol functionality; improvements remain part of token value package
T1	Clear documentation that token utility is tied to protocol functionality, not founding entity services	
T2	Protocol improvements remain part of the token utility package; founding entity cannot strip improvements on exit	
T3	Token utility package explicitly defined and protected; improvements automatically accrue to utility; exit cannot reduce defined package	
Sec.	<i>Founding entity can exit while retaining valuable improvements and leaving token holders with a degraded protocol without this protection.</i>	

4.17	PROJECT-LEVEL CONTINUITY [MEDIUM IMPACT]	
	Leasehold protection: Subleases, key contracts, and project rights transferable or preservable; strongest tier includes continuity of entire operating platform	Token equivalent: Key integrations, partnerships, oracle relationships, and operational contracts survive founding entity transition
T1	Core protocol functions documented and open-sourced	
T2	Key operational contracts assignable to successor operator; founding entity cannot terminate integrations to impair token value on exit	
T3	Entire operational platform (integrations, data feeds, partnerships, licenses) preserved through founding entity transitions	
Sec.	<i>Token value often depends on specific integrations that the founding entity controls. Founding entity can strand value by terminating these on exit without touching the protocol directly.</i>	

4.18	INFORMATION RIGHTS AND ESTOPPELS [STRUCTURAL]	
	Leasehold protection: Reliable delivery of defaults, notices, status confirmations, and estoppels; broad information architecture	Token equivalent: Token holders receive reliable, timely information about protocol status and material developments
T1	Basic on-chain transparency; public governance forum	
T2	Standardized reporting on founding entity activities, treasury status, and governance proceedings	
T3	Full information architecture: real-time treasury visibility, advance notice of founding entity corporate actions, mandatory disclosure of equity financing events	
Sec.	<i>Notice rights, cure rights, and governance intervention rights are useless without adequate information flow. Information rights are the enabling layer for all other protections.</i>	

The 18-issue taxonomy is complete, but six issues carry more the most load-bearing weight:

Issue 4.8 (Replacement/Fork Rights) is the master protection. Stein identifies the new-lease right as the protection that converts termination from collateral destruction into a remediable event.⁴² The token equivalent is enforceable fork and migration rights with automatic IP licensing to a successor, representing the single most important design choice in the framework. If fork rights exist and are unencumbered, the founding entity's power to destroy token value through abandonment is fundamentally constrained.

⁴²Stein, supra note 5, at § 6.04.

Issues 4.6 (Anti-Modification) and 4.7 (Anti-Sunset) must be designed together. Anti-modification constraints prevent economic rewrites; anti-sunset provisions prevent wholesale abandonment. Without both, a founding entity can comply with anti-modification rules while destroying token value by sunsetting the protocol; alternatively, it may comply with anti-sunset provisions while rendering tokens economically worthless through successive modifications.

Issue 4.12 (Equity Capital Structure) is the most underappreciated threat vector. Token design discourse has focused on direct founding entity actions. But the founding entity's own capital structure decisions, such as pledging protocol IP as collateral, executing M&A transactions, or entering bankruptcy, create existential risk without any direct action against tokens. The intercreditor-style nondisturbance agreement is the protection that is most completely absent from current market practice.

Issue 4.4 (Standstill) is what makes notice and cure rights real. A notice right without a corresponding standstill is a disclosure mechanism. The founding entity can provide advance notice of a modification and implement it before token holders can coordinate a response. Standstill converts notice into actual constraint.

Issue 4.18 (Information Rights) is the enabling layer for everything else. All intervention rights, governance rights, and replacement rights are conditional on token holders receiving adequate information in time to exercise them. Information rights are the plumbing that makes the rest of the system work.

V.D — Tier Selection Guidance

Tier selection requires matching the protection package to the project's specific risk profile, regulatory posture, and stage of decentralization.

Tier 1 is the floor, not an acceptable steady state. The anti-abandonment package establishes bare holder protection appropriate as a temporary posture for very early-stage protocols, with a public commitment to a transition timeline.

For many developing protocols, Tier 2 is the most commercially plausible regulatory-engagement posture. Properly implemented Tier 2 protections can materially improve the argument that token value is less dependent on founding-entity discretion, while preserving more operational flexibility than Tier 3. It is therefore a sensible candidate for no-action engagement, though not a presumptive basis for relief.

Tier 3 is appropriate for protocols claiming substantial decentralization, and for protocols whose tokens are used as collateral in DeFi lending markets, where the financeability rationale from Stein applies directly.⁴³

The tier is defined by the weakest link, not the average. A protocol with Tier 3 fork rights but Tier 1 anti-modification constraints is a Tier 1 protocol. Tier designation requires all 18 issues to be at the claimed tier level.

⁴³Id. (describing the strongest tier as a "control-and-replacement package" designed to minimize the chances that any future lender, participant, or rating-agency reviewer will reject the lease on substantive grounds).

VI. Why This Is Not Decentralization Theater

VI.A — The Theater Problem Defined

Every framework that offers regulatory benefit for structural design invites the response that sophisticated actors will paper over retained control with the framework's vocabulary while preserving the substance of what the framework was designed to constrain. This response is not cynical; it is the lesson of regulatory history. Any framework that rewards structure will attract structure that is cosmetic rather than real.

The distinction between real and theatrical structural constraint is the hardest analytical problem the framework faces. It requires the framework to identify, with specificity, what makes a structural protection real rather than nominal, in terms verifiable by lawyers, regulators, and courts rather than requiring trust in the founding entity's good faith. Each of the theater patterns identified below is, at its root, a failure of legal investiture: a constraint that operates as an architectural feature of the founding entity's voluntary conduct rather than as a legally binding obligation enforced through the legal system's own rules.

VI.B — The Three-Feature Test Applied

The three-feature test is the primary tool for distinguishing real structural constraint from theater. Each feature operates as an independent screen.

Enforceability means the constraint is backed by a remedy that operates independently of the founding entity's ongoing cooperation. A governance vote weight cap implemented on-chain and enforced by smart contract logic is enforceable. The same cap described in a whitepaper and implemented off-chain through a founding-entity-controlled multisig is not.⁴⁴ The distinction maps onto a general principle of code and law: technical constraints that are not formally invested with legal authority through the legal system's own rules, whether through legislation, contract, or other recognized private ordering instruments, remain soft law, capable of shaping behavior but lacking normative force. The enforceability inquiry asks, for each structural constraint in a token design, which side of that line the constraint falls on.

Legibility means the constraint can be verified by an observer without relying on the founding entity's representations. A governance vote weight cap implemented at the smart contract level is

⁴⁴ Carla L. Reyes, Andrea Tosato & Andrew Hinkes, *Code Is Not Law* (forthcoming 2026) (arguing, through H.L.A. Hart's theory of primary and secondary rules, that code acquires legally binding force only through investiture by the legal system's own secondary rules — either through legislative empowerment or through private ordering instruments such as contracts and governance documents — and that technical enforcement alone, absent such formal legal investiture, remains “soft law” lacking normative force). The enforceability distinction in the text maps directly onto this framework: on-chain smart contract logic constitutes private empowerment of code through governance instruments that the legal system is able to recognize and enforce; an off-chain multisig commitment by the founding entity, by contrast, is a soft-law architectural constraint that operates without the investiture required to make it legally binding. This distinction has direct consequences for the calibration inquiry: a structure whose key constraints depend on founding-entity voluntary compliance rather than legally invested code has not converted endogenous risk into rule-bound risk — it has merely described the risk in favorable terms.

legible: anyone can read the code and verify that no address can cast more than X% of total votes. The same cap implemented through a commitment to voluntarily refrain from voting is not legible: the founding entity's exercise of that commitment is not independently verifiable until after the fact.

Calibration means the constraint addresses the specific discretionary risks that make token value endogenous. A structure that implements robust constraints on low-impact issues while leaving high-impact discretionary powers unconstrained is not calibrated. The most common miscalibration is process constraints without substantive constraints: a timelock period ensures changes are announced in advance but does not limit the founding entity's ability to implement them. Process without substance is theater.

VI.C — Five Common Forms of Theater

Theater 1: The Governance Token Concentration Problem

A protocol nominally implements a vote weight cap, but the founding entity controls a sufficient combination of its own token allocation, investor allocations, and affiliated foundation allocations to effectively determine governance outcomes without formally exceeding the cap. The cap addresses formal token ownership while leaving unaddressed the informal coordination mechanisms through which the founding entity exercises practical governance control.

Genuine implementation requires calibration to actual governance power rather than formal token ownership, including aggregation of founding entity affiliate vote weight, implementation at the level of beneficial ownership rather than wallet address, and independent verification of the beneficial ownership determination.

Theater 2: The Upgradeable Contract Problem

A protocol implements on-chain governance with timelocks and vote weight caps, but the underlying smart contracts are upgradeable through a mechanism, typically a proxy contract with an admin key held by founding entity personnel, that bypasses governance entirely. A founding entity that encounters a governance vote it cannot win can simply upgrade the underlying contracts through the admin mechanism.

Genuine implementation requires elimination or governance-subordination of the admin mechanism. Every pathway to protocol modification, including administrative pathways, must pass through the same governance constraints. An admin key that can bypass governance without legal investiture of the governance constraints themselves is a soft-law architectural feature, not an enforceable legal constraint; the founding entity's ability to exercise it remains legally unimpeded regardless of what governance documentation states.⁴⁵

⁴⁵ Reyes, Tosato & Hinkes, *supra* note 45 (the investiture analysis applies equally to multi-sig administrative mechanisms: an off-chain commitment to refrain from exercising an admin key is a soft-law constraint that operates outside the legal system's secondary rules and thus lacks the normative force required to convert endogenous risk into rule-bound risk).

Theater 3: The Foundation Capture Problem

A protocol transfers IP to a nominally independent foundation, but the foundation's governance structure gives the founding entity effective control, through board composition, supermajority requirements requiring founding entity consent, or funding arrangements that make the foundation financially dependent. The IP transfer is legible but theatrical: the founding entity retains practical control over the entity to which the IP was transferred.

Genuine implementation requires genuine foundation independence: a majority of board seats held by individuals with no financial relationship with the founding entity, diversified funding sources, and governance rules that do not give the founding entity a blocking position.

Theater 4: The Nominal Timelock Problem

A protocol implements a timelock period that is too short for meaningful token holder coordination, or that applies only to certain categories of changes while leaving others subject to immediate implementation. A 24-hour timelock in a protocol with globally distributed token holders is not a meaningful intervention window.

Genuine implementation requires calibration to actual coordination requirements. A protocol with millions of token holders distributed across dozens of jurisdictions requires a materially longer period for major economic modifications, calibrated to holder dispersion, governance participation norms, and the operational significance of the proposed change. The timelock must cover all material modifications to token economics, not selected categories.

Theater 5: The Equity Compensation Disguise Problem

A protocol implements a nominally fixed founding entity compensation structure that includes features effectively linking founding entity returns to protocol growth: token grants at below-market prices exercisable at discretion, treasury allocation rights defined as a percentage of revenues, or service fee arrangements with uncapped escalation provisions.

Genuine implementation requires compensation structures that do not leave founding-entity returns meaningfully tethered to discretionary value extraction from protocol growth. Fixed or formulaic structures are the clearest examples, but the relevant question is whether compensation preserves the very economic dependence the framework claims to reduce.

Theater 6: The Communications-Control Problem.

A protocol may implement substantial formal constraints while continuing to describe the founding entity to the market as the driver of token value, future appreciation, or strategic growth. In that circumstance, the structure and the communications point in opposite directions. Genuine implementation therefore requires not only structural constraint, but communications discipline consistent with the claim that token value is no longer materially dependent on managerial efforts.

Theater 7: The Premature Separation Claim

The Release's separation doctrine enables a non-security crypto asset to exit investment contract status once the issuer has fulfilled its essential managerial promises, or publicly and

unambiguously abandoned them. A sophisticated issuer may attempt to exploit this doctrine by claiming separation before the underlying promises have been genuinely fulfilled: publishing a milestone completion announcement that overstates the state of development, asserting that open-source release of partially-functional code constitutes fulfillment, or issuing a pro forma “decentralization declaration” while retaining administrative keys, controlling treasury allocations, and dominating governance votes.

Genuine implementation requires that the separation claim be grounded in independently verifiable facts, not issuer representations. The three-feature test applies directly. A separation claim is *enforceable* only if the completed efforts are objectively verifiable on-chain or through public registration, not through the issuer’s own disclosure alone. It is *legible* only if an independent observer can confirm that the specific promises made, as the issuer defined them when the investment contract was created, not as the market might subsequently construe them, have in fact been completed. It is *calibrated* only if the completed promises are the specific essential managerial efforts that were the basis for purchasers’ profit expectations, not peripheral activities that leave the core discretionary control intact. A premature separation claim that fails this test is theater of the most dangerous kind: it purports to extinguish securities law obligations while the founding entity retains the discretionary control that caused those obligations to attach in the first place. The consequence is not merely continued securities liability; it is aggravated exposure, because the issuer has now represented to the market, and potentially to the SEC, that separation has been achieved when it has not.

VI.D — The "No Rights" Extreme Is Also Theater

Some practitioners argue that tokens should confer no legal or economic rights whatsoever, on the theory that the absence of rights eliminates the basis for securities classification. This argument fails because the *Howey* test is an economic reality test.⁴⁶ A token marketed on the basis of expected appreciation, deriving its price from the performance of an underlying protocol, and sold to investors who have no other plausible motivation for purchasing it is an investment contract regardless of what documentation says about the absence of rights.

More fundamentally, the "no rights" approach does not solve the endogenous risk problem; it merely recharacterizes it.⁴⁷ A token with no rights and no relationship to underlying economic activity is not a constrained investment; it is a speculation on secondary market price movements untethered from any external economic referent. The regulatory concern shifts from investment contract to a different category of attention entirely, and not a more comfortable one.

⁴⁶United Hous. Found., Inc. v. Forman, 421 U.S. 837, 849 (1975) (“[T]he application of these statutes [should] turn on the economic realities underlying a transaction, and not the name appended thereto.”).

⁴⁷ W.C. Bunting, A Better Legal Definition of Gambling, 86 Alb. L. Rev. 257, 261–68 (2022) (distinguishing between transactions that allocate pre-existing economic risk and transactions that “manufacture risk” ex nihilo, and arguing that the latter fall outside traditional investment frameworks).

VI.E — Why Theater Fails

The SEC's enforcement record suggests that Staff are sensitive to the gap between governance documentation and governance reality. Enforcement actions have specifically cited the discrepancy between public decentralization claims and actual founding entity control, treating that discrepancy as evidence of scienter in securities fraud claims rather than merely evidence of securities classification.⁴⁸

A project that implements theatrical structural constraints, describes them in a no-action letter request as genuine, and receives a favorable response has not achieved a safe harbor. It has created a record that, if the theatrical nature of the constraints is subsequently demonstrated, could support an aggravated enforcement posture.

VII. Implementation Guidance for Lawyers

The Token Continuity Framework is not merely token design, but a coordinated exercise in entity design, intellectual-property design, financing design, bankruptcy design, and disclosure and communications discipline.

VII.A — The Lawyer's Entry Points

Lawyers encounter token structures at four distinct stages of a project's lifecycle, and the Token Continuity Framework applies differently at each. The earlier the engagement, the more the lawyer functions as a designer. The later the engagement, the more the lawyer functions as a diagnostician.

VII.B — Pre-Formation: Designing the Architecture

Pre-formation engagement is the highest-leverage point. Structural decisions made before any capital is raised determine the project's regulatory posture for years. Remediation after the fact is always more expensive, often incomplete, and sometimes impossible without triggering the very regulatory concerns the remediation is designed to address.

Item 1: IP ownership decision. The single most important pre-formation decision is where protocol IP will be owned. Retaining IP in the founding entity's equity structure creates the foundational asymmetry the framework addresses. The alternatives, including transfer to an independent foundation, encumbrance with a binding successor license, or a hybrid structure, each have tradeoffs. The lawyer should advise that this decision cannot be deferred: IP created before the encumbrance is in place is held free and clear by the founding entity.

Item 2: Equity compensation structure. The founding team should be advised that profit-participating equity compensation is incompatible with the Tier 2 framework. The compensation structure should be designed as fixed or cost-plus before equity financing is arranged, since equity

⁴⁸See, e.g., SEC v. LBRY, Inc., 639 F. Supp. 3d 211 (D.N.H. 2022); SEC v. Ripple Labs, Inc., No. 20-cv-10832 (S.D.N.Y. 2023) (discussing discrepancy between public decentralization representations and actual founding entity control as evidence of scienter).

investors who understand this constraint before committing capital will price their investment accordingly.

Item 3: Governance architecture. The pre-formation engagement should produce a governance architecture document addressing, at minimum: the vote weight cap mechanism and founding entity affiliate aggregation; supermajority thresholds for economic modifications with founding entity exclusion from quorum on self-interested proposals; timelock periods for different categories of changes; and anti-sunset and anti-migration provisions. This document should be a binding governance charter, not a whitepaper description of intent.

Item 4: Survivability analysis. A preliminary §365(n) analysis should be completed before the IP ownership decision is finalized, because the survivability analysis may affect which structure is most appropriate. The analysis should also address Issue 4.11: whether equity investors will receive security interests in protocol IP, and what intercreditor protections token holders will receive against those interests.

Item 5: Regulatory posture documentation. The pre-formation engagement should produce a regulatory posture memorandum that identifies the intended tier, applies the three-feature test to each element as designed, identifies elements that fail enforceability, legibility, or calibration, and specifies additional steps required before a no-action request at the intended tier level.

VII.C — Pre-Issuance: Finalizing the Structure

Item 1: Structural verification against the translation table. Before any token distribution, conduct a complete issue-by-issue review against the 18-issue translation table. This review should be documented in a structural verification memorandum identifying which issues are addressed at the claimed tier level, which are addressed at a lower tier, which are not addressed at all, and the regulatory significance of each gap.

Item 2: Independent verification of key structural elements. Before token distribution, independent verification should be obtained for: on-chain governance implementation by a technical auditor; IP encumbrance through public registration and independent legal opinion; compensation structure by independent counsel reviewing the executed service agreement; and survivability through a complete §365(n) opinion from independent bankruptcy counsel.

Item 3: Offering mechanics review. The offering mechanics should be consistent with the structural posture. A Tier 2 structure should not be offered with mechanics suggesting an investment contract: no promises of future profits, no marketing based on expected price appreciation from founding entity development work.

Item 4: No-action decision. A Tier 2 structure satisfying the three-feature test across all 18 issues, independently verified, and offered through consistent mechanics may be a strong candidate for a no-action request. A structure with material gaps, particularly on Issues 4.2, 4.6, 4.7, 4.8, or 4.12, should address those gaps. If distributing without a prior no-action letter, the pre-issuance engagement should produce a complete record that would support a future request.

VII.D — Post-Issuance: Maintaining and Improving Regulatory Posture

Item 1: Annual structural review. Conduct an annual review applying the three-feature test to the structure as it actually operates, not as designed. Specifically address whether governance concentration has increased through secondary market accumulation by founding entity affiliates; whether admin key governance has changed hands; whether the compensation structure has been modified; and whether any IP encumbrance has been released or challenged.

Item 2: Material event monitoring. Certain events require prompt legal attention: any equity financing involving security interests in protocol IP; any M&A activity; any governance proposal modifying vote weight caps, timelock periods, or supermajority thresholds; compensation modification proposals; and any protocol upgrade affecting governance architecture. For each event, apply the Issue 4.12 analysis before the event occurs.

Item 3: Decentralization trajectory documentation. Document the trajectory systematically: governance participation metrics showing vote distribution; development contribution metrics showing proportion of improvements by contributors outside the founding entity; and operational metrics showing degree of automation or transfer to governance-controlled mechanisms. This is the factual foundation for any future claim of efforts that are not “managerial” or “entrepreneurial”.

VII.E — Distress and Transition: Protecting Token Holder Continuity

Item 1: Immediate survivability assessment. Upon any indication of founding entity financial distress, assess the current survivability posture. Confirm that the IP encumbrance is in place and publicly registered; that no equity financing has been extended or accelerated in ways triggering intercreditor protections; and that the continuity protocol previously developed remains operational. If survivability posture has degraded, remediate before any insolvency filing, since retroactive improvement is subject to preference and fraudulent transfer challenges.

Item 2: Governance activation. If the founding entity enters insolvency or ceases operations, the continuity protocol should be activated. Advise governance participants on the scope of their authority, the steps required to assume operational control, and the legal basis for continued IP use under §365(n) or automatic successor licensing provisions. The §365(n) election must be made within a defined period after the trustee's rejection notice; a governance community that does not receive timely legal advice will miss it.

Item 3: Acquisition review. If the founding entity receives an acquisition offer, immediately apply the Issue 4.12 analysis. A properly structured IP encumbrance means the acquirer takes IP subject to its terms, including automatic successor licensing provisions and token holder continuity obligations. Confirm this with independent counsel.

Item 4: Post-transition structural assessment. After a founding entity transition, conduct a complete structural assessment against the translation table. Produce a remediation plan identifying steps to restore the protocol's tier-level regulatory posture. Document improvements: a post-transition protocol is often operating at a higher effective tier than before, because the founding entity's departure removes the primary source of discretionary control.

VII.F — The Implementation Standard: Competence, Not Perfection

The standard this framework demands of lawyers is not that every client implement Tier 3. It is that every client know which tier their structure actually achieves, not which tier their whitepaper describes or which tier their founders aspire to, but which tier their implemented, verified, independently-confirmed structure satisfies under the three-feature test. That knowledge is the precondition for honest regulatory advice, for defensible regulatory requests for guidance, and for token holder communications that do not create their own securities law exposure through material misrepresentation.

VIII. Toward Clarity

VIII.A — Pathways

Practitioners and token issuers have at least three pathways through which to seek regulatory clarity on whether a given token structure, or transactions in a given token, satisfy the requirements for non-securities treatment or clean separation from an investment contract. These pathways are complementary, not mutually exclusive, and the structural work the Token Continuity Framework prescribes is relevant to each.

Pathway 1: No-Action Letters. The no-action letter process has historically been the primary mechanism by which SEC doctrine develops in novel areas before rulemaking catches up. The most relevant analogy is the development of the private placement market before Regulation D was codified in 1982.⁴⁹ For decades before Regulation D, the market operated on the basis of no-action letters that defined the contours of the Section 4(a)(2) exemption. Those letters, accumulated over time, constituted a body of practice that Regulation D eventually codified. The token market may be at a comparably formative stage. A well-constructed no-action request built around a Tier 2 Token Continuity Framework structure would present the SEC with a specific, legible structure and a concrete account of how managerial discretion has been reduced—anchored in the Release’s five-category taxonomy and separation doctrine—rather than an abstract decentralization claim. A favorable response would function as a template that the market would adopt and iterate on, exactly as no-action letters did in the private placement context. A candid assessment of current SEC appetite is warranted. Even after the Release, the Commission has been measured in its willingness to issue crypto-specific no-action letters, and the process of obtaining meaningful staff engagement requires strategic sequencing. Practitioners should consider informal engagement with the Division of Corporation Finance’s Office of Chief Counsel and the Strategic Hub for Innovation and Financial Technology (FinHub) before filing a formal request, allowing staff to raise preliminary concerns in a non-binding context. The timing of a no-action request relative to a token’s distribution schedule

⁴⁹See 17 C.F.R. § 230.506 (2023) (Regulation D, Rule 506, codifying the Section 4(a)(2) private offering exemption). The pre-Regulation D no-action practice spanned roughly 1935–1982; Regulation D codified the accumulated practice in 1982. See Securities Act Release No. 6389, 47 Fed. Reg. 11,251 (Mar. 16, 1982).

matters: a pre-distribution request carries substantially more weight and fewer complications than a retroactive request filed after broad distribution has already occurred.

Pathway 2: Regulation Crypto Assets Exemptions. Chair Atkins’s March 2026 remarks previewed three formal pathways under a proposed rulemaking titled “Regulation Crypto Assets.”⁵⁰ The first is a Startup Exemption: a time-limited registration exemption for early-stage projects, allowing raises up to \$5 million over up to four years, with disclosure obligations and EDGAR notice filings, available non-exclusively alongside existing Regulation D exemptions. The second is a Fundraising Exemption for more mature projects seeking larger capital raises, requiring more substantive financial disclosure in exchange for access to a larger capital pool. The third is an Investment Contract Safe Harbor enabling issuers to satisfy their essential managerial-efforts obligations and achieve clean separation—extinguishing investment contract status for all subsequent transactions in the token—by completing defined structural milestones that are independently verifiable. These pathways are not yet codified and will depend on both exemptive rulemaking and, potentially, passage of market structure legislation. But a project that builds a Tier 2 structure now and documents it rigorously should be positioned to step into any of these relevant future pathways without material disruption because the structural prerequisites of a credible Token Continuity Framework implementation should be the same features any well-designed exemption is designed to require.

Pathway 3: Legislation and Coordinated Commercial Practice. The Digital Asset Market Clarity Act, if enacted, would provide a statutory framework that could supersede the Release’s investment-contract analysis for qualifying tokens. As of this writing, the Senate Banking Committee is targeting a markup in the second half of April 2026 on the stablecoin provisions, with the broader market structure provisions representing a further sequential step. If the Clarity Act or a revised successor passes, projects with robust Token Continuity Framework protections should be well positioned to satisfy its “nominal efforts” or “functional maturity” standards (as applicable), because those standards should converge on the same endogenous risk inquiry the framework addresses.

Pathway 4: Commercial Practice. Regulatory clarity may also emerge over time through coordinated commercial practice—as issuers, advisors, and the SEC staff converge on accepted structural approaches through repeated interactions, favorable enforcement outcomes, and market adoption of common design standards. This path is the slowest and most uncertain, but it is how pre-Regulation D securities practice actually developed. However, a massive collective action problem stands in the way, as clarity from commercial practice requires industry advisors to follow a common analytical framework, which is among the reasons this Article advocates explicitly for advisors to adopt some iteration of the Token Continuity Framework as that common structure (and to share feedback so the framework may evolve alongside market positions and outcomes). The skeletal no-action letter

⁵⁰ Remarks of Chairman Paul S. Atkins, DC Blockchain Summit (Mar. 19, 2026) (previewing three proposed pathways under “Regulation Crypto Assets”: a Startup Exemption for raises up to \$5 million over four years with disclosure obligations and EDGAR notice requirements; a Fundraising Exemption for larger capital raises requiring more substantive financial disclosure; and an Investment Contract Safe Harbor enabling issuers to achieve clean separation upon satisfying defined structural milestones), available at <https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-dc-blockchain-summit-03192026>.

template in Section VIII.C provides the starting point for building that common framework if the market determines that no-action relief is the appropriate process for SEC staff engagement process.

VIII.B — Toward a No-Action Letter Template

A no-action letter request is a representation about a specific existing or proposed structure. The following prerequisites must be satisfied before filing; they are conditions of the request's credibility, not items to be completed after a favorable response.

IP separation or encumbrance. Protocol IP should have been transferred to an independent foundation or encumbered with a binding license that automatically extends to token holders and successors upon defined trigger events. A bare promise to license in the future is likely insufficient.

Governance implementation. The governance mechanisms described in the request should be implemented at the protocol level, not simply described in a whitepaper. On-chain governance is far stronger than off-chain systems requiring trust in founding entity representations.

Treasury separation. Founding entity treasury funds should be separated from protocol treasury funds, with defined and limited compensation mechanisms that are fixed or formulaic rather than profit-participating.

Survivability documentation. The §365(n)-equivalent legal analysis should be prepared and documented before filing, addressing whether token utility rights constitute protected IP licenses, whether the open-source license provides an independent survivability basis, and what governance mechanisms activate upon founding entity insolvency.

Independent verification. At least one element, ideally governance implementation and IP encumbrance, should be verifiable by an independent third party without relying on founding entity representations.

Communications hygiene. The request should address the issuer's historical and current statements about token value, utility, development, appreciation, and any buy/burn or treasury programs, and explain whether prior representations have been fulfilled, superseded, or abandoned. A structural argument is materially weakened if the issuer continues to market the token as dependent on the founding entity's future managerial efforts.

VIII.C — The Skeletal Template

Re: Request for No-Action Relief — [Protocol Name] Network Token

I. Introduction and Relief Requested

[Requestor] respectfully requests that the Staff of the Division of Corporation Finance advise that it will not recommend enforcement action under Section 5 of the Securities Act of 1933 or Section 10(b) of the Securities Exchange Act of 1934 in connection with the offer, sale, and distribution of [Token Name] tokens.

The request is grounded in the following principal argument: the [Token Name] token is not an investment contract under *SEC v. W.J. Howey Co.*,⁵¹ because the token holder's return does not

⁵¹SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

depend on the entrepreneurial or managerial efforts of any identifiable party in a material way. This conclusion rests not on a claim of full protocol decentralization, but on the structural constraints that have been implemented to limit the founding entity's discretionary control over token economics, protocol continuity, and value routing, converting endogenous risk into rule-bound, enforceable risk.

II. Description of the Protocol and Token Structure

[Project-specific section — to be completed with actual facts addressing: protocol function, token utility, founding entity identity and current role, governance structure, treasury structure, IP ownership, and token distribution.]

The following description focuses on the structural features most relevant to the *Howey* analysis:

A. Intellectual property and protocol continuity. The [Protocol Name] codebase is licensed under [open-source license], which permits any party to fork, deploy, and operate the protocol without founding entity consent. In addition, [Founding Entity] has executed a [Protocol IP License Agreement] pursuant to which the founding entity's proprietary improvements are automatically licensed on identical terms to any successor operator designated by token holder governance upon defined trigger events including founding entity insolvency, voluntary exit, or governance vote. [Legal opinion of independent counsel attached as Exhibit A.]

B. Governance structure and founding entity constraints. [Protocol Name] governance operates through [on-chain/hybrid] mechanisms with the following structural constraints: (i) founding entity effective governance vote weight capped at [X]%, regardless of token holdings accumulated through secondary market purchases; (ii) modifications to token economics require a [supermajority] governance vote, with founding entity votes excluded from quorum for proposals that would directly benefit founding entity equity interests; (iii) protocol upgrade proposals subject to a [X-day] notice period with automatic standstill pending any governance challenge; and (iv) founding entity may not unilaterally sunset, deprecate, or migrate token functionality without the same supermajority threshold.

C. Founding entity compensation structure. [Founding Entity] receives compensation through a [Service Agreement] pursuant to which it receives [fixed annual grant / cost-plus service fee], subject to a cap of [Y]% of annual treasury inflows. This compensation does not include participation in protocol revenue above the defined cap. The structure may be modified only by a [supermajority] governance vote with founding entity votes excluded from quorum.

D. Survivability through founding entity insolvency. Token utility rights survive [Founding Entity]'s insolvency on three independent bases: (i) the open-source license constitutes an intellectual property license within the meaning of 11 U.S.C. §365(n), permitting token holders to elect to retain rights upon trustee rejection; (ii) the Protocol IP License Agreement contains an express survivability provision that survives insolvency proceedings; and (iii) the governance mechanisms include a continuity protocol activating upon defined trigger events to maintain protocol operations. [§365(n) opinion of independent bankruptcy counsel attached as Exhibit B.]

III. Legal Analysis

A. The applicable standard: endogenous risk and the "efforts of others" prong. The critical *Howey* inquiry is whether token holder returns depend on the entrepreneurial or managerial efforts of [Founding Entity] in a material way. The Release, which supersedes the 2019 Digital Assets

Framework in its entirety, establishes that a non-security crypto asset becomes subject to an investment contract when the issuer offers it through representations or promises to undertake essential managerial efforts from which a purchaser would reasonably expect to derive profits, and further establishes a separation doctrine: investment contract status ends when the issuer fulfills or publicly abandons those promises. See Release, *supra* note 6, at secs. IV.A, IV.B.⁵² The private law survey summarized above^{53 54 55 56} confirms that the relevant inquiry is not whether dependence exists, but whether remaining dependence is adequately constrained by enforceable structure.

B. Application to [Token Name]. The structural constraints described above, taken together, satisfy the endogenous risk standard. Founding entity discretion over protocol continuity has been constrained by the IP encumbrance, converting founding entity exit from collateral destruction into a remediable event. Founding entity discretion over token economics has been constrained by the governance mechanisms, with timelocks and standstill provisions ensuring token holders can act before modifications take effect. Founding entity discretion over revenue routing has been constrained by the fixed compensation structure. Token utility survives founding entity insolvency on three independent legal bases.

C. The three-feature test. The structural constraints described satisfy all three elements of the applicable test: they are *enforceable* through on-chain implementation and contractual remedies that operate independently of founding entity cooperation; they are *legible ex ante* through blockchain verification and public registration; and they are *calibrated* to the specific discretionary risks identified in the Release, including protocol control, value routing, and continuity, without converting [Token Name] into an equity interest or giving token holders any claim on [Founding Entity]'s revenues or liquidation proceeds. Further, the structural constraints satisfy the Release's separation doctrine: [Founding Entity] has fulfilled, or has publicly disclosed a concrete and verifiable timeline for completing, the essential managerial promises on which the investment contract was based, such that purchasers could not reasonably expect those promises to remain connected to [Token Name].

IV. Conclusion

For the foregoing reasons, [Requestor] respectfully requests that the Staff advise that it will not recommend enforcement action in connection with the offer, sale, and distribution of [Token Name] tokens. [Requestor] is available to meet with Staff to discuss any aspect of this request and to provide such additional information as Staff may require.

⁵²See Release, *supra* note 32, at sec. III.A (“A non-security crypto asset becomes subject to an investment contract when an issuer offers it by inducing an investment of money in a common enterprise with representations or promises to undertake essential managerial efforts from which a purchaser would reasonably expect to derive profits.”). The Release confirms that this issuer-promise-centric framework, not a holistic assessment of protocol maturity, is the operative standard for investment contract analysis.

⁵³See Release, *supra* note 32, at sec. II.B (digital commodities); sec. III (cross-market survey of structurally subordinate interests).

⁵⁴See Stein, *supra* note 5, at §§ 6.01–6.06.

⁵⁵See 11 U.S.C. § 365(n) (2018).

⁵⁶See FTC Franchise Rule, 16 C.F.R. pt. 436 (2007).

VIII.D — Reading the Response

A favorable response to a Tier 2 request would provide meaningful evidence that the SEC staff are prepared, on those facts, to treat enforceable structural constraints on founding-entity discretion as relevant to the *Howey* analysis and potentially sufficient, in combination with other features, to support a non-security position. The market would adopt these constraint features and develop practices around implementing them.

An unfavorable response, if it explains the basis for the unfavorable position, is equally valuable. An unfavorable response identifying a specific structural gap, such as "the proposed IP encumbrance is insufficient because it does not bind the founding entity's secured lenders", which tells the market exactly what additional constraint is needed. Even a blanket unfavorable response clarifies the Staff's position in a way that allows informed decisions. The worst outcome is no response, or a response so hedged as to provide no useful signal.

VIII.E — Building on No-Action Guidance

A single favorable no-action letter does not create a regulatory safe harbor. What creates a safe harbor is a body of practice: multiple requests across multiple protocol types, producing multiple responses that collectively define the boundaries of acceptable structures. This requires that the requests be built on a common analytical framework so that the Staff's responses accumulate into coherent guidance rather than idiosyncratic fact-specific determinations.

The Token Continuity Framework is designed to serve as an example of a common analytical framework. Lawyers using the framework to advise different clients on different protocols will produce results that, while different in project-specific facts, share an analytical structure. This is how the pre-Regulation D no-action practice worked. The token market may similarly benefit from a common analytical framework capable of making cumulative no-action practice more coherent, even if staff responses remain highly fact-specific.

IX. Conclusion — Design as Doctrine

IX.A — The Article's Argument in Brief

This Article has argued that the dominant dual equity/token structure has reproduced, without acknowledgment, a form of leasehold subordination long recognized in property law, and that the resulting value diversion to equity and regulatory exposure as investment contracts are not two separate problems but one structural defect viewed from two angles. The defect is architectural. The cure is also architectural – requiring enforceable, legible, calibrated constraints on the founding entity's discretionary power, implemented through mechanisms drawn directly from the tiered framework that ground lease finance developed for precisely this problem.

The Token Continuity Framework translates the endogenous risk principle into an 18-issue design taxonomy, a theater-identification protocol and, if helpful as the law evolves, a no-action letter template. These instruments are designed for use in practice by lawyers advising token issuers, by

founders designing token structures, and by regulators evaluating specific claims of non-security status.

IX.B — The Release as Clarifying Event

The joint SEC/CFTC Release of March 17, 2026 is an important clarifying event for the arguments developed here. The Release does not adopt the Token Continuity Framework, but it makes the framework's central concerns, especially continuing managerial dependence and the possibility of later separation, more legible within current agency analysis. The Release's taxonomy supports the view that some application-layer tokens may fall outside securities treatment where their value is not meaningfully tied to continuing issuer-promised managerial efforts. In the author's view, its issuer-promise-centric investment contract analysis operationalizes what this Article calls the endogenous risk standard. Its recognition that the association between a crypto asset and an investment contract may later unwind overlaps in important respects with the continuity concerns this Article highlights.

The endogenous risk principle does not require statutory safe harbors beyond the Release. While additional legislative and/or agency clarity would certainly be helpful to apply the principles set forth in the Release in commercial practice, the viability of the Token Continuity Framework requires only that courts and regulators continue to apply the *Howey* "efforts of others" prong to economic substance rather than formal labels, which they have done consistently for eighty years. A token structure that genuinely constrains founding-entity discretion, reduces continuing dependence on managerial efforts, and aligns with the Release's discussion of separation has a materially stronger claim to non-security treatment under existing doctrine.

IX.C — Advisor Role

The framework this Article provides is not self-executing. It requires teams and their advisors to apply it honestly, rigorously, and with the theater-identification discipline that Section VI demands. An advisor who helps a client implement theatrical structural constraints and pursue a favorable no-action response to claim regulatory protection for a structure that retains the founding entity's full discretionary control without registration has not optimally served the team's long-term interests. Theater that survives initial scrutiny may fail under subsequent enforcement, often at the worst possible time and with the worst possible facts.

The three-feature test is the lawyer's professional standard, not just the article's analytical tool. Applying it consistently is the ordinary work of securities counsel in a novel area.

IX.D — The Broader Significance

The Token Continuity Framework matters beyond the specific context of token design. It demonstrates that the binary between "regulated securities" and "unregulated assets" that has dominated the crypto regulatory debate is a false binary imported from a context that does not map cleanly onto networked digital assets. The relevant securities question has never been whether an instrument superficially resembles equity or debt. It has always been whether the risk it creates is

endogenous to discretionary control or constrained by enforceable structure. That question has a spectrum of answers, and the law has the tools to evaluate that spectrum – tools developed across a century of private law experience with structurally subordinate interests in contexts far more varied than the crypto token market.

This Article argues that tokens are not a novel asset class requiring entirely new laws; rather, they are a new instance of a familiar architecture: capital committed to an enterprise in a structurally subordinate position, dependent on a senior party's continuing conduct for its economic value, and existing law already features design solutions to support that architecture. What it has lacked, until now, is a framework for applying that knowledge to the specific structural features of the dual equity/token architecture.

This Article offers one such framework. What remains is design, implementation, and careful regulatory testing.

Footnotes

Footnotes appear as numbered endnotes below, corresponding to superscript references in the text. The article employs Bluebook citation form throughout.

1. David Kuhn, *Tokens Are Leases: Structural Subordination in Crypto’s Dual Equity–Token Architecture*, X (Dec. 14, 2025), <https://x.com/gr8day4this/status/2000386970061766979> [hereinafter *Tokens Are Leases*]. The title is intentionally evocative: the Article argues that the economic reality of the dual equity/token structure is analogous to a subordinated leasehold interest, not that tokens are leases as a matter of positive law. The leasehold analogy describes the structural subordination of token holders relative to equity — the same economic position that ground lease doctrine evolved to address — not the legal character of the token instrument itself.
2. See generally Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* 108–15 (Foundation Press 2017).
3. See Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 13.6 (6th ed. 2014).
4. Dennis S. Corgill, *Securities as Investments at Risk*, 67 *Tul. L. Rev.* 861 (1992).
5. Joshua Stein, *A Practical Guide to Ground Leases* §§ 6.01–6.06 (ABA 2018).
6. Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Securities Act Release No. 33-11412, Exchange Act Release No. 34-105020, 91 Fed. Reg. 13,714 (Mar. 23, 2026) (hereinafter “Release”). The Release establishes a five-category asset taxonomy (digital commodities, digital collectibles, digital tools, stablecoins, and digital securities), an issuer-promise-centric investment contract framework, and a separation doctrine enabling non-security crypto assets to exit investment contract status upon issuer fulfillment or abandonment of essential managerial efforts. The Release supersedes the Commission staff’s Framework for “Investment Contract” Analysis of Digital Assets (Apr. 3, 2019).
7. See Kuhn, *Tokens Are Leases*, supra note 1 (arguing that value diversion from tokens to equity is predictable rather than accidental, arising from four structural features of the dual equity/token architecture; the leasehold analogy describes the economic subordination of token holders, not the legal character of the token).
8. A clarification on terminology: this Article argues that token holders occupy an economic position analogous to a subordinated leasehold interest (the leasehold framing is an analogy to describe economic subordination, not a claim that tokens are leases as a matter of positive law, which they are not).
9. See 1 Milton R. Friedman & Patrick A. Randolph, Jr., *Friedman on Leases* sec. 7:3 (6th ed. 2022).
10. *Id.* The three tiers — minimum (anti-forfeiture), market (workout-and-transfer), and maximum (control-and-replacement) — provide the direct template for the Token Continuity Framework’s three-tier taxonomy.
11. Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 15–18 (1991).
12. Miles Jennings et al., *Control-Based Decentralization* (a16z Crypto, Mar. 13, 2025).
13. Corgill, supra note 4, at 864–68.
14. *Reves v. Ernst & Young*, 494 U.S. 56, 63–64 (1990).
15. Stein, supra note 5, §§ 6.01–6.06.
16. *Id.* The three tiers — minimum (anti-forfeiture), market (workout-and-transfer), and maximum (control-and-replacement) — are the organizing framework of Stein’s treatise and provide the direct template for the Token Continuity Framework’s three-tier taxonomy.
17. See Stein, supra note 5, at § 1.01 (“The leasehold mortgagee’s fundamental problem is that its collateral can be destroyed by events or actors entirely outside the mortgage itself.”). This framing — subordination as a continuity problem rather than a priority problem — is the central insight the Token Continuity Framework imports from ground lease doctrine.
18. See generally Adam J. Levitin & Susan M. Wachter, *The Commercial Real Estate Bubble*, 3 *Harv. Bus. L. Rev.* 83 (2013) (discussing PSA-based servicer accountability in structured finance).

19. 11 U.S.C. § 365(n) (2018). The Intellectual Property Licenses in Bankruptcy Act of 1988 added this provision specifically to protect licensees against licensor bankruptcy. See S. Rep. No. 100-505, at 4–5 (1988).
20. 11 U.S.C. § 365(n)(1)(B) (permitting licensee to retain rights under intellectual property license notwithstanding trustee's rejection of the license as an executory contract).
21. See S. Rep. No. 100-505, at 4 (1988) ("The bill provides that when a licensor files for bankruptcy and the trustee rejects the license agreement as an executory contract, the licensee may elect to retain its rights under the agreement.").
22. See FTC Franchise Rule, 16 C.F.R. pt. 436 (2007). State franchise relationship laws imposing good-faith obligations and termination-for-cause requirements include, inter alia, Cal. Corp. Code §§ 20000–20043; Ill. Franchise Disclosure Act, 815 Ill. Comp. Stat. 705/1–705/44.
23. David Kuhn, *From Disclosure to Design: Constraining Risk in Structurally Subordinate Tokens*, X (Dec. 22, 2025), <https://x.com/gr8day4this/status/2003168590153822497> [hereinafter *From Disclosure to Design*].
24. Stein, *supra* note 5, at § 6.04 ("The most important difference among the three tiers is not whether a protection exists in name, but how usable it is under stress.").
25. See generally Oliver E. Williamson, *The Economic Institutions of Capitalism* (1985).
26. See Kuhn, *Tokens Are Leases*, *supra* note 1 (documenting that founding entity token allocations, investor token allocations, and team token allocations collectively represent controlling governance positions in most dual equity/token structures for years after token distribution; the essay uses the leasehold analogy to describe the economic subordination of token holders, not to characterize tokens as leases as a matter of positive law).
27. *Id.*; see also Kuhn, *From Disclosure to Design*, *supra* note 24 (arguing that disclosure of a founding entity's retained powers does not neutralize endogenous risk absent structural constraints on how that control may be exercised).
28. *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852–53 (1975) (economic reality over form).
29. See SEC Framework for "Investment Contract" Analysis of Digital Assets (Apr. 3, 2019), <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [hereinafter 2019 Digital Assets Framework]. The Framework acknowledged that the investment contract analysis "can change over time" as a network becomes more decentralized.
30. Gabriel Shapiro, *Defining Decentralization for Law*, Medium (2023), <https://lex-node.medium.com/defining-decentralization-for-law-58ca54e18b2a>; see also Gabriel J. Shapiro, *Token Safe Harbor Proposal 3.0*, at 2 (2023) ("decentralization is best understood not as an endpoint, but as one mechanism among several for constraining endogenous risk"), <https://gabrielshapiro.substack.com/p/token-safe-harbor-proposal-30>.
31. *Howey*, 328 U.S. at 301 ("The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.").
32. See SEC and CFTC, *Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets*, Release Nos. 33-11412; 34-105020 (Mar. 17, 2026).
33. See *SEC v. LBRY, Inc.*, 639 F. Supp. 3d 211 (D.N.H. 2022); *SEC v. Ripple Labs, Inc.*, No. 20-cv-10832 (S.D.N.Y. 2023) (discussing programmatic sales vs. institutional sales distinction).
34. *Id.* at 5–8 (identifying relevant factors including whether "an essential task or responsibility is performed by an Active Participant" and whether "the efforts of an AP are necessary for the network or digital asset to achieve or retain its intended purpose").
35. See 17 C.F.R. § 230.506 (2023) (Regulation D, Rule 506, codifying the Section 4(a)(2) private offering exemption). The pre-Regulation D no-action practice spanned roughly 1935–1982; Regulation D codified the accumulated practice in 1982. See Securities Act Release No. 6389, 47 Fed. Reg. 11,251 (Mar. 16, 1982).
36. See FTC Franchise Rule, 16 C.F.R. pt. 436 (2007). State franchise relationship laws imposing good-faith obligations and termination-for-cause requirements include, inter alia, Cal. Corp. Code §§ 20000–20043; Ill. Franchise Disclosure Act, 815 Ill. Comp. Stat. 705/1–705/44.
37. See generally Adam J. Levitin & Susan M. Wachter, *The Commercial Real Estate Bubble*, 3 Harv. Bus. L. Rev. 83 (2013) (discussing PSA-based servicer accountability in structured finance).
38. 11 U.S.C. § 365(n) (2018). See S. Rep. No. 100-505, at 4–5 (1988).

39. Corgill, *supra* note 4, at 895–902. Corgill's framework distinguishes between "investments at risk" — where investor return depends on discretionary post-commitment conduct — and instruments where risk is fixed *ex ante* by defined payment obligations or market structures.
40. 2019 Digital Assets Framework, *supra* note 28, at 6 ("The more decentralized the network, the less likely that efforts of any single party will be a key determining factor in the enterprise's success.").
41. Stein, *supra* note 5, at §§ 6.01–6.03 (describing minimum tier as "the bare financeability package" designed to prevent "immediate collateral destruction" rather than to achieve full lender protection).
42. *Id.*
43. Stein, *supra* note 5, at § 6.04.
44. *Id.* (describing the strongest tier as a "control-and-replacement package" designed to minimize the chances that any future lender, participant, or rating-agency reviewer will reject the lease on substantive grounds).
45. Carla L. Reyes, Andrea Tosato & Andrew Hinkes, *Code Is Not Law* (forthcoming 2026) (arguing, through H.L.A. Hart's theory of primary and secondary rules, that code acquires legally binding force only through investiture by the legal system's own secondary rules — either through legislative empowerment or through private ordering instruments such as contracts and governance documents — and that technical enforcement alone, absent such formal legal investiture, remains "soft law" lacking normative force). The enforceability distinction in the text maps directly onto this framework: on-chain smart contract logic constitutes private empowerment of code through governance instruments that the legal system is able to recognize and enforce; an off-chain multisig commitment by the founding entity, by contrast, is a soft-law architectural constraint that operates without the investiture required to make it legally binding. This distinction has direct consequences for the calibration inquiry: a structure whose key constraints depend on founding-entity voluntary compliance rather than legally invested code has not converted endogenous risk into rule-bound risk — it has merely described the risk in favorable terms.
46. Reyes, Tosato & Hinkes, *supra* note 45 (the investiture analysis applies equally to multi-sig administrative mechanisms: an off-chain commitment to refrain from exercising an admin key is a soft-law constraint that operates outside the legal system's secondary rules and thus lacks the normative force required to convert endogenous risk into rule-bound risk).
47. *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 849 (1975) ("[T]he application of these statutes [should] turn on the economic realities underlying a transaction, and not the name appended thereto.").
48. W.C. Bunting, *A Better Legal Definition of Gambling*, 86 *Alb. L. Rev.* 257, 261–68 (2022) (distinguishing between transactions that allocate pre-existing economic risk and transactions that "manufacture risk" *ex nihilo*, and arguing that the latter fall outside traditional investment frameworks).
49. See, e.g., *SEC v. LBRY, Inc.*, 639 F. Supp. 3d 211 (D.N.H. 2022); *SEC v. Ripple Labs, Inc.*, No. 20-cv-10832 (S.D.N.Y. 2023) (discussing discrepancy between public decentralization representations and actual founding entity control as evidence of scienter).
50. Remarks of Chairman Paul S. Atkins, DC Blockchain Summit (Mar. 19, 2026) (previewing three proposed pathways under "Regulation Crypto Assets": a Startup Exemption for raises up to \$5 million over four years with disclosure obligations and EDGAR notice requirements; a Fundraising Exemption for larger capital raises requiring more substantive financial disclosure; and an Investment Contract Safe Harbor enabling issuers to achieve clean separation upon satisfying defined structural milestones), available at <https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-dc-blockchain-summit-03192026>.
51. *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).
52. See Release, *supra* note 32, at sec. III.A ("A non-security crypto asset becomes subject to an investment contract when an issuer offers it by inducing an investment of money in a common enterprise with representations or promises to undertake essential managerial efforts from which a purchaser would reasonably expect to derive profits."). The Release confirms that this issuer-promise-centric framework, not a holistic assessment of protocol maturity, is the operative standard for investment contract analysis.
53. See Release, *supra* note 32, at sec. II.B (digital commodities); sec. III (cross-market survey of structurally subordinate interests).
54. See Stein, *supra* note 5, at §§ 6.01–6.06.

55. See 11 U.S.C. § 365(n) (2018).

56. See FTC Franchise Rule, 16 C.F.R. pt. 436 (2007).