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INTRODUCTION

A decade has passed since Bitcoin solved a fundamental problem plaguing virtual currencies:[1] How to ensure, without resort to financial intermediaries or other trusted central authorities, that a unit of digital currency can be spent only once.[2] In that

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1. The Commodity Futures Trading Commission (CFTC) typically uses the term "virtual currency" (or, somewhat less commonly, "digital currency") to describe the subset of digital assets to which it has laid jurisdictional claim, viewing "cryptocurrency" as "[o]ne prominent type of virtual currency." *See, e.g.*, Retail Commodity Transactions Involving Virtual Currency, 82 FED. REG. 60335 (proposed Dec. 20, 2017) (to be codified at 17 C.F.R. pt. 1) (internal citations omitted). The Commission has defined "virtual currency" as "any digital representation of value (a 'digital asset') that functions as a medium of exchange, and any other digital unit of account that is used as a form of a currency (i.e., transferred from one party to another as a medium of exchange); may be manifested through units, tokens, or coins, among other things; and may be distributed by way of digital 'smart contracts,' among other structures." *See* Retail Commodity Transactions Involving Certain Digital Assets [https://www.cftc.gov/media/3651/votingdraft032420/download] 9-11 (March 23, 2020). Because this Article focuses on the CFTC and the treatment of virtual currencies under the commodities laws, it adopts the Commission's terminology ("virtual currencies") to refer to digital assets generally, other than cases where a meaningful distinction requires another term. With respect to bitcoin specifically, this Article follows the convention of capitalizing references to the Bitcoin protocol or network and referring to the unit of currency with the lowercase "bitcoin." *See, e.g.*, *Some Bitcoin Words You Might Hear*, BITCOIN.ORG, [https://perma.cc/Z6D2-AAHS] (last visited Mar. 20, 2020).

2. The pseudonymous creator of Bitcoin, Satoshi Nakamoto, described the infamous double-spending problem as follows:

> The problem [with electronic payment systems] of course is the payee can't verify that one of the owners did not double-spend the coin. A common solution is to introduce a trusted central authority, or mint, that checks every transaction for double spending. . . . The problem with this solution is that the fate of the entire

time, Bitcoin has inspired countless follow-on projects. Some have attempted to improve the technology's potential use for digital cash, by, for example, increasing the number of transactions processed per second[3] or improving user privacy.[4] Others have strayed further from Bitcoin's original intent, building on blockchain—Bitcoin's central innovation—to enable distributed computing and so-called smart contracting,[5] decentralized lending,[6] governance,[7] data storage,[8] and digital collectibles,[9] among others.[10] At the same time, regulators and scholars have struggled to keep pace. A range of federal agencies has waded into the world of virtual currencies, often beginning by characterizing the assets as something recognizably within their authority (property, money, a commodity, a security, and so on). And much of the scholarly discourse has run along a parallel track, as scholars have wrestled with the basic question of how legally to classify these

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> money system depends on the company running the mint, with every transaction having to go through them, just like a bank. . . . [W]e propose a solution to the double-spending problem using a peer-to-peer distributed timestamp server to generate computational proof of the chronological order of transactions.

Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* 2, 1 (2008), [https://perma.cc/WMC9-6994].

3. *See, e.g.*, BITCOIN CASH, [https://perma.cc/UT8T-M3Z4] (last visited Mar. 20, 2020) ("Bitcoin Cash brings sound money to the world, fulfilling the original promise of Bitcoin as 'Peer-to-Peer Electronic Cash.'")

4. *See, e.g.*, KURT M. ALONSO, GETMONERO.ORG, ZERO TO MONERO: FIRST EDITION: A TECHNICAL GUIDE TO A PRIVATE DIGITAL CURRENCY; FOR BEGINNERS, AMATEURS, AND EXPERTS 1-2 (June 26, 2018, version 1.0.0), [https://perma.cc/YCB5-VNX6].

5. VITALIK BUTERIN, A NEXT-GENERATION SMART CONTRACT AND DECENTRALIZED APPLICATION PLATFORM 1 (Ethereum White Paper), [https://perma.cc/C7MT-JENS] (last visited Mar. 20, 2020).

6. *See, e.g.*, ROBERT LESHNER & GEOFFREY HAYES, COMPOUND: THE MONEY MARKET PROTOCOL 1-3 (Feb. 2019, version 1.0), [https://perma.cc/HV2L-ZNQ5].

7. *See* CHRISTOPH JENTZSCH, DECENTRALIZED AUTONOMOUS ORGANIZATION TO AUTOMATE GOVERNANCE 1 (Working Paper), [https://perma.cc/HW5D-WZH4] (last visited Mar. 20, 2020).

8. *See* PROTOCOL LABS, FILECOIN: A DECENTRALIZED STORAGE NETWORK (July 19, 2017) (Working Paper), [https://perma.cc/WYC3-8R9S].

9. *See* CRYPTOKITTIES, CRYPTOKITTIES: COLLECTIBLE AND BREEDABLE CATS EMPOWERED BY BLOCKCHAIN TECHNOLOGY, [https://perma.cc/GW38-K3WJ] (last visited Mar. 20, 2020).

10. *See* Kevin Werbach & Nicolas Cornell, *Contracts* Ex Machina, 67 DUKE L. J. 313, 325-26 (2017) (compiling additional potential use cases, including ridesharing, domain registration, crowdfunding, document ownership, prediction markets, voting, and wine provenance).

new assets.[11] In focusing, alongside government agencies, on questions of classification, however, the scholarship has neglected an important aspect of the advent of virtual currencies: the way in which a regulator's efforts to fit an utterly novel asset into a statutory definition so often not only define the asset but redefine the definition itself. The very uncertainty of a virtual currency's classification—both legal and metaphysical—enables regulators not only to claim jurisdiction over that asset but also to reshape and broaden that jurisdiction. Enthusiasts and entrepreneurs have proposed numerous use cases for blockchain and virtual currencies. Federal regulators, without saying as much, have put forward their own.

Because our basic understanding of the nature of virtual currencies is still developing, much of the regulatory and scholarly conversation sensibly has focused on defining virtual currencies, usually with reference to well understood legal categories. In the last half-decade, both scholars and regulators have begun the task of categorizing virtual currencies, aiming to situate them within existing laws and regulations.[12] Scholars, for their part, variously have explored whether virtual currencies, legally speaking and depending on context, are best considered property,[13] money,[14] commodities,[15] stock,[16] or securities.[17] Others have analyzed specific blockchain applications vis-à-vis governments and the law, asking whether smart contracts might replace legal contracts,[18]

11. *See* Stephen T. Middlebrook & Sarah Jane Hughes, *Regulating Cryptocurrencies in the United States: Current Issues and Future Directions*, 40 WM. MITCHELL L. REV. 813, 814-15 (2014).

12. *See, e.g.*, Katie Szilagyi, *A Bundle of Blockchains? Digitally Disrupting Property Law*, 48 CUMB. L. REV. 9, 10-11 (2018); Middlebrook & Hughes, *supra* note 11, at 814-15; Mitchell Prentis, *Digital Metal: Regulating Bitcoin as a Commodity*, 66 CASE W. RES. L. REV. 609, 611-12 (2015); Thomas Lee Hazen, *Tulips, Oranges, Worms, and Coins – Virtual, Digital, or Crypto Currency and the Securities Laws*, 20 N.C. J.L. & TECH. 493, 495-96 (2019); Carol R. Goforth, *U.S. Law: Crypto Is Money, Property, a Commodity, and a Security, All at the Same Time*, J. FIN. TRANSFORMATION (Forthcoming); Werbach & Cornell, *supra* note 10, at 319; PRIMAVERA DE FILIPPI & AARON WRIGHT, BLOCKCHAIN AND THE LAW: THE RULE OF CODE (2018).

13. *See, e.g.*, Szilagyi, *supra* note 12.

14. *See, e.g.*, Middlebrook & Hughes, *supra* note 11.

15. *See, e.g.*, Prentis, *supra* note 12, at 611-12.

16. *See, e.g.*, David J. Shakow, *The Tax Treatment of Tokens: What Does It Betoken?*, PENN LAW: FACULTY SCHOLARSHIP (Aug. 3, 2017), [https://perma.cc/8G47-92W2].

17. *See, e.g.*, Hazen, *supra* note 12.

18. *See, e.g.*, Werbach & Cornell, *supra* note 10, at 319.

whether governments might use blockchain technology as a means of regulation,[19] and even whether the technology might displace the law altogether in broad swaths of life.[20] Generally speaking, this dialogue centers on how people use or might use blockchain technology, and what that use means for the law's treatment of blockchain. A technology's legal classification frequently derives from its use,[21] and commentators have noted that regulatory scrutiny of blockchain technology has tracked the development of potential uses for the technology:[22] Bitcoin's use as digital money, for example, attracted early interest from the Treasury Department's Financial Crimes Enforcement Network[23] and the Internal Revenue Service,[24] and the later proliferation of virtual currencies used as capital raising instruments invited the attention of the U.S. Securities and Exchange Commission (SEC).[25] Federal agencies recognize elements of their traditional subject matter in particular uses of blockchain technology. Because classification—as a commodity, as a security, and so on—so often underlies jurisdiction, the question of classification is of more than academic interest. To legally classify a virtual currency is to determine who has authority over it, and federal agencies, as a threshold matter, assert their jurisdiction via classification.

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19. *See, e.g.*, DE FILIPPI & WRIGHT, *supra* note 12, at 8-9.

20. *Id.*

21. *See, e.g.*, U.S. DEP'T OF THE TREASURY, FIN. CRIMES ENF'T NETWORK, FIN-2019-G001, APPLICATION OF FINCEN'S REGULATIONS TO CERTAIN BUSINESS MODELS INVOLVING CONVERTIBLE VIRTUAL CURRENCIES 7 (2019) (a virtual currency's "label . . . is not dispositive of its regulatory treatment [and] . . . transactions denominated in [virtual currency] will be subject to FinCEN regulations regardless of . . . the type of technology utilized for the transmission of value."). *See also* SEC, FRAMEWORK FOR "INVESTMENT CONTRACT" ANALYSIS OF DIGITAL ASSETS 1 n.6 (2019), [https://perma.cc/R7AJ-VWAG] (noting that "under the Howey test, 'form [is] disregarded for substance and the emphasis [is] on economic reality.'").

22. Jerry Brito et. al., *Bitcoin Financial Regulation: Securities, Derivatives, Prediction Markets, and Gambling*, 16 COLUM. SCI. & TECH. L. REV. 144, 152-55 (2014).

23. *See* U.S. DEP'T OF THE TREASURY, FIN. CRIMES ENF'T NETWORK, FIN-2013-G001, APPLICATION OF FINCEN'S REGULATIONS TO PERSONS ADMINISTERING, EXCHANGING, OR USING VIRTUAL CURRENCIES (2013).

24. *See* I.R.S. Notice 2014-21, 2014-16 I.R.B. 938.

25. *See Investor Bulletin: Initial Coin Offerings*, SEC (July 25, 2017), [https://perma.cc/6KA4-WS3W]; *see also* Report of Investigation: The DAO, Exchange Act Release No. 81207, 117 SEC Docket 745 (July 25, 2017) [hereinafter DAO Report].

The CFTC was among the earliest federal agencies to assert authority over virtual currencies by classifying them, in its case, as commodities, and ever since has acted as one of the keenest virtual currency market police. The Commodity Exchange Act's (CEA) definition of "commodity"[26] is notably broad, and as early as 2014 the CFTC, noting that commodities underlie the agency's jurisdiction, had located virtual currencies within it.[27] On this basis, the CFTC took action against a number of virtual currency market participants, including an unregistered bitcoin option contract trading platform,[28] a bitcoin derivatives trading platform that engaged in wash trading and prearranged trades,[29] an unregistered leveraged bitcoin trading platform,[30] and the perpetrator of a virtual currency Ponzi scheme.[31] The CFTC also issued proposed guidance on the difference between derivative and spot markets in the virtual currency context,[32] a question central to the scope of its authority over virtual currency transactions,[33] as well as a "primer" on risks of and the CFTC's role in virtual currency markets[34] and a "backgrounder" on the process for self-certifying bitcoin

26. 7 U.S.C. § 1a(9) (2010).

27. *The Commodity Futures Trading Commission: Effective Enforcement and the Future of Derivatives Regulation: Hearing Before the Comm. on Agric., Nutrition and Forestry*, 113th Cong. 55 (2010) (testimony of Timothy Massad, Chairman, CFTC) [hereinafter Massad Testimony].

28. *See* In the Matter of: Coinflip, Inc., CFTC Docket No. 15-29, 2015 WL 5535736, at *1 (Sept. 17, 2015) [hereinafter *Coinflip*].

29. In the Matter of: TeraExchange LLC, CFTC No. 15–33, 2015 WL 5658082, at *1 (Sept. 24, 2015) [hereinafter *TeraExchange*].

30. In the Matter of: BFXNA INC. d/b/a BITFINEX, CFTC Docket No. 16-19, 2016 WL 3137612, at *1 (June 2, 2016) [hereinafter *Bitfinex*].

31. Complaint for Injunctive and Other Equitable Relief and for Civil Monetary Penalties Under the Commodity Exchange Fact and Commission Regulations at 1, Commodity Futures Trading Comm'n v. Gelfman Blueprint, Inc., No. 17-7181, 2018 WL 6320656 (S.D.N.Y. Oct. 15, 2018).

32. Retail Commodity Transactions Involving Virtual Currency, 82 Fed. Reg. 60,335 (proposed Dec. 20, 2017) (to be codified at 17 C.F.R. pt. 1). The CFTC issued Final Interpretive Guidance concerning retail commodity transactions in virtual currency in March of 2020. *See* CFTC, RETAIL COMMODITY TRANSACTIONS INVOLVING CERTAIN DIGITAL ASSETS (2020), [https://perma.cc/JSH7-XJDQ].

33. *See infra* Part III.

34. CFTC, A CFTC PRIMER ON VIRTUAL CURRENCIES (2017), [https://perma.cc/GTC4-JHGF]; *see also Customer Advisory: Understand the Risks of Virtual Currency Trading*, CFTC, [https://perma.cc/D6KX-8B8T] (last visited Mar. 3, 2020).

derivative products.[35] Elemental to each of these assertions of jurisdiction was the claim, often explicit but not fully developed or supported, that bitcoin and other virtual currencies are commodities under the CEA. Because the majority of these actions took the form of either settlement orders or statements by the CFTC, the agency did not have to provide support for its position. Only when defendants resisted the classification of specific virtual currencies as commodities, forcing the CFTC to make its case in court in *CFTC v. McDonnell*[36] and *CFTC v. My Big Coin Pay, Inc.*,[37] did the CFTC have to defend and elaborate on its claim.

This Article approaches these virtual currency classificatory debates from a different angle: focusing on the CFTC's activity in the virtual currency arena, it shows how the CFTC's efforts to fit virtual currencies within the CEA's definition of "commodity" serve not only to define virtual currencies (the focus of so much industry, scholarly, and regulatory discussion) but also to redefine the scope of the law, including new powers granted to the CFTC in the wake of the Great Recession. The CFTC primarily regulates futures and other derivatives.[38] It also has long had the authority to prosecute manipulation in the commodity spot markets.[39] Following the 2008 financial crisis, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) lowered the evidentiary burden for commodity manipulation cases and prohibited, in addition to manipulation, fraud in connection with a "contract of sale of any commodity in interstate commerce."[40] The power Dodd-Frank arguably conferred on the CFTC is extraordinary. Read to the extreme, the CFTC's authority to prosecute fraud is limitless.[41] To the extent that the CEA,

35. *CFTC Backgrounder on Self-Certified Contracts for Bitcoin Products*, CFTC, [https://perma.cc/T9RK-H79D] (last visited Mar. 4, 2020).

36. Commodity Futures Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213, 217 (E.D.N.Y. 2018).

37. Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492, 494 (D. Mass. 2018).

38. *See* Retail Commodity Transactions Involving Virtual Currency, 82 Fed. Reg. 60,335, 60,336 (proposed Dec. 20, 2017) (to be codified at 17 C.F.R. pt. 1).

39. *McDonnell*, 287 F. Supp. 3d at 217.

40. 17 C.F.R. § 180.1 (2011).

41. That the fraud must be perpetrated in connection with interstate commerce is a small limit in practice. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 559-60 (1995) (internal citations omitted) (noting Congress may regulate intrastate economic activity

as amended by Dodd-Frank, maintained any limits on this power, the CFTC has taken advantage of virtual currency's novelty and murky regulatory status to blur those limits. In particular, the CFTC has used virtual currency to assert an expansive vision of the definition of a commodity (the basis for the CFTC's jurisdiction in a given matter) and of its fraud power in the spot markets.

This Article unfolds in four parts. Part I explains how historically commodities regulation has primarily taken aim not at commodities themselves but at futures and other derivatives contracts that reference those commodities, usually out of fear of the ability of derivatives contracts to distort the spot markets for those same commodities. In the United States, while federal commodities regulation has always focused on futures contracts and other derivatives, the CFTC has also long enjoyed the authority to police manipulation in the underlying spot markets. In 2010, Dodd-Frank expanded the CFTC's spot market powers to include new anti-fraud authority and expanded anti-manipulation authority. Part II traces how bitcoin, the earliest and most prominent virtual currency, became a commodity under the CEA definition, and explains how that transformation elucidates the commodity definition itself. Utterly new commodities are relatively uncommon any longer, and virtual currencies themselves present an increasingly rare opportunity to test the edges of the CEA's commodity definition.

Part III examines the CFTC's efforts to expand its police powers in the commodity spot markets on two fronts: via the commodity definition and by decoupling its anti-fraud from its anti-manipulation authority. While the history and text of the CEA demonstrate that a connection to the CFTC's traditional purview—the futures markets—limits both the definition of a "commodity" and the CFTC's authority to police fraud in the underlying spot markets, the CFTC has effectively harnessed virtual currencies to push these areas of its authority to their limits. Virtual currency has played a prominent role in the CFTC's push, on the one hand, to bring literally every asset imaginable into the

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substantially affecting interstate commerce, including intrastate coal mining, extortionate credit transactions, restaurants using interstate supplies, hotels with interstate guests, and production and consumption of homegrown wheat).

commodity definition, and, on the other, to establish the CFTC's power to prosecute spot market fraud whether or not the fraud has a manipulative effect on commodity spot or futures contract prices. The regulatory and ontological uncertainty surrounding virtual currencies make them particularly susceptible to, and useful for, this so-called regulatory creep.[42]

Finally, Part IV shows how the CFTC's virtual currency successes have already begun to bear fruit in arenas beyond virtual currency, and reflects on virtual currency's seemingly unique susceptibility to and attractiveness for the expansion of regulatory powers. The authority-expanding theories the CFTC explored in the context of virtual currencies, and which the unique characteristics of virtual currencies helped establish, have already made their way to other areas of the CFTC's purview and likely will continue to have ramifications both for virtual currencies specifically and the CFTC's power generally. To be clear, this Article does not make the claim that the CFTC acts inappropriately when it advocates for broad readings of its powers. To the contrary, like other government agencies, the CFTC faces enormous pressures to maximize its jurisdictional reach and has an obligation to zealously pursue its mandate. Instead, this Article explores how the CFTC has capitalized on virtual currencies to push, and how virtual currencies help to delineate, the limits of the law.

I. FEDERAL COMMODITY REGULATION IN THE UNITED STATES

The relationship between commodity derivative and spot markets has often formed the basis of regulation, and has done so in the United States in two ways: First, Congress has granted commodities regulators authority primarily in the derivatives markets, typically due to the perceived influence of those markets over the

42. *See* William P. Albrecht, *Regulation of Exchange-Traded and OTC Derivatives: The Need for a Comparative Institution Report*, 21 J. CORP. L. 111, 122 (1995) ("One result of the incentives that regulators have to expand their domain, protect themselves from blame, and make their enforcement efforts easy is regulatory creep—the expansion of regulation into areas where, from an efficiency perspective, it is not needed."); Dan Awrey, *Regulating Financial Innovation: A More Principles-Based Proposal?*, 5 BROOK. J. CORP., FIN. & COM. L. 273, 295 (2011) ("The potential absence of sufficient certainty and predictability also raises the prospect of 'regulatory creep.'").

underlying spot markets; second, to the extent Congress has also granted the CFTC spot market powers, including longstanding anti-manipulation authority, it has done so to supplement the CFTC's regulatory oversight of the derivatives markets. Part I.A briefly explains the difference between spot markets and futures and other derivatives markets and the commonly understood influence of one on the other, and rehearses the more common justifications for the existence (and legal authorization) of derivatives markets, before providing a few historical examples of regulation premised on the perceived interrelationship between the two markets. Part I.B lays out a short history of the advent and development of federal commodities regulation in the United States, from the first federal commodities laws to the establishment of the CFTC, and culminating in Dodd-Frank's expansion of the CFTC's spot market powers.

A. The Interconnectedness of Spot and Futures Markets

The commodity markets, broadly speaking, take two forms: spot (or cash) markets and derivatives markets. In spot markets, market participants buy and sell physical commodities today, or "on the spot."[43] In derivatives markets, by contrast, parties place bets on a commodity's future value or behavior.[44] The contracts setting forth the terms of these bets are known as derivative contracts because their value is "derivative" on that anticipated value or behavior.[45] Futures contracts, an early and common form of

43. *Market*, BLACK'S LAW DICTIONARY (11th ed. 2019). The CFTC staff has defined "spot transactions" as those in which "delivery of the product and immediate payment for the products are expected on or within a few days of the trade date." CFTC No-Action Letter, CFTC LTR No. 98-73, 1998 WL 754623, *2 (Oct. 8, 1998). The Supreme Court has defined "spot transactions" as "agreements for purchase and sale of commodities that anticipate near-term delivery." Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465, 472 (1997).

44. Lynn A. Stout, *Derivatives and the Legal Origin of the 2008 Credit Crisis*, 1 HARV. BUS. L. REV. 1, 6 (2011).

45. *See* Colleen M. Baker, *Regulating the Invisible: The Case of Over-the-Counter Derivatives*, 85 NOTRE DAME L. REV. 1287, 1299 (2010) ("[D]erivatives are complex financial contracts in which one party pays another party if 'something' happens in the future. . . . '[A]nything that can be quantified and objectively verified can be the subject of a derivative.'") (internal citations omitted).

derivative, are agreements to buy or sell a commodity at a future point for a set price.[46]

Like other derivatives, futures contracts can be thought of as wagers.[47] Imagine oil is selling today for $50 a barrel. Imagine, too, an airline company that knows it will require oil to fuel its fleet in the coming year but believes the price of oil, and therefore the cost of operating its business, is set to rise. Imagine, finally, a speculator who disagrees with the airline's prediction, believing instead that the price of oil will fall in the coming year. The speculator might agree to sell the airline 100 barrels of oil one year from today for $50 a barrel. The speculator is betting that the price of oil will fall below $50 a barrel (if, in a year, a barrel of oil sells for $40, the speculator will sell each barrel to the airline for $10 more than the prevailing market price); the airline, on the other hand, is betting the price of oil will rise above $50 a barrel (if the price of oil ends up at $60 a barrel, the airline will buy its 100 barrels at a discount). When such contracts are standardized and traded on exchanges, they are known as futures contracts.[48] Of course, gambling is destructive—it redistributes existing value rather than creating it, and the associated transaction costs mean its value to society is net negative—and it increases the amount of risk faced by all participants in a system.[49] As with gambling, many have warned of the dangers posed by speculative trading in derivatives, including those who locate the origin of the 2008 financial crisis in such trading.[50] If futures and other derivatives trading poses such risks, why does the law permit it?

Economists and others who would justify the existence of derivatives markets, and in particular futures markets, typically

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46. Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 971 (4th Cir. 1993) ("A 'futures contract,' or "future,' never precisely defined by statute, nevertheless . . . . [I]s generally understood to be an executory, mutually binding agreement providing for the future delivery of a commodity on a date certain where the grade, quantity, and price at the time of delivery are fixed. To facilitate the development of a liquid market in these transactions, these contracts are standardized and transferrable.").

47. *See* Lynn A. Stout, *How Deregulating Derivatives Led to Disaster, and Why Re-Regulating Them Can Prevent Another*, CORNELL LAW: FACULTY SCHOLARSHIP 5 (Jan. 1, 2009), [https://perma.cc/43A5-H6PJ] ("[Derivatives] are simple bets on the future—nothing less, and nothing more.").

48. *Salomon Forex*, 8 F.3d at 971.

49. Stout, *supra* note 44, at 13-14.

50. *See, e.g.*, *id.*; Baker, *supra* note 45.

highlight two services these markets purportedly provide: hedging and price discovery.[51] Insurance, a familiar concept, helps elucidate the first service—hedging—as well as derivatives generally. Insurance is itself a type of derivative.[52] Fire insurance is a homeowner's bet that her house will burn down and the insurance company's bet that it will not.[53] The homeowner, exposed to the risk that her home will burn down, offsets—hedges against—that risk by entering into an insurance contract with the insurance company.[54] In this way, derivatives allow risk-averse parties to shift risk to others better situated or more willing to bear that risk, usually for a fee, just as the insurance company charges the homeowner a premium for taking on the risk of her home burning down.[55]

Commodities merchants have long used futures markets as insurance against the often-unpredictable fluctuations in the price of commodities.[56] Producing, processing, distributing, or otherwise dealing in commodities exposes a business to the risk that the price of a commodity the business requires will rise or that the business wishes to sell will fall.[57] To take a classic example, a corn farmer might wish to sell his crop today at today's prices, despite the fact that he will not harvest it for many months.[58] If, due to forces beyond the farmer's control or ken, corn prices have crashed by harvest time, the farmer will sell his crop at a reasonable price and keep his farm. If, on the other hand, at harvest the

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51. *See, e.g.*, Stout, *supra* note 44, at 7, 10; Timothy E. Lynch, *Coming Up Short: The United States' Second-Best Strategies for Corralling Purely Speculative Derivatives*, 36 CARDOZO L. REV. 545, 561 (2014) ("Derivatives markets are often praised for their ability to provide price discovery."). Indeed, the CEA itself justifies derivatives by referencing their hedging and price discovery functions. *See, e.g.*, 7 U.S.C. § 5 (2000) (stating that commodities derivatives transactions "provid[e] a means for managing and assuming price risks, discovering prices, or disseminating pricing information").

52. Andrew Verstein, *Insider Trading in Commodities Markets*, 102 VA. L. REV. 447, 455 (2016) ("To the rancher, the futures exchange provides insurance or a hedge."); Stout, *supra* note 44, at 7.

53. Stout, *supra* note 44, at 7.

54. *Id.*

55. Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 971 (4th Cir. 1993); *see also* Stout, *supra* note 44, at 7, 14.

56. Verstein, *supra* note 52, at 453-55.

57. Wayne D. Greenstone, *The CFTC and Government Reorganization: Preserving Regulatory Independence*, 33 BUS. LAW. 163, 173 (1977).

58. Baker, *supra* note 45, at 1299.

price of corn has risen, the farmer will have sold his corn at a price he can live with, and the money he will have left on the table is the cost of not losing the farm. Hedgers can also hedge more indirectly—the farmer might, for example, hedge against the possibility of drought destroying the value of his crop via a weather-based derivative.[59] The same is true of the pencil maker exposed to the fluctuating price of wood, the soda company that packages its product in aluminum cans, the oil-burning airline in the example above, or any other number of companies whose product is or incorporates a commodity.[60] The derivatives markets are often criticized for their use for economically destructive speculation,[61] but the exposure of these companies to the commodities markets means that *not* taking hedging positions in the derivatives markets is itself an economically dangerous speculative act.[62] The airline that makes no bets in the oil futures markets is, in effect, betting that the price of oil will fall, or go no higher. But what about the gambling speculator without a company or other productive stake in the commodities markets? To the extent pure speculators, as opposed to hedgers, enter into the hedging justification, the law permits their presence, in part, as providers of liquidity, acting as the counterparties to the positions taken by businesses and others seeking to hedge their risk.[63] Without speculators, the argument goes, the airline could not hedge its risk because there would be no one to take the airline's bet.

The second public good futures markets purportedly promote—price discovery—is "the process by which trading in a market incorporates new information and market participants' expectations into asset prices."[64] Price discovery does not uniquely

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59. *Id.*

60. *See, e.g.*, Greenstone, *supra* note 57, at 174 ("By taking a position in the futures market approximately equal and opposite from that taken in the cash market, the losses incurred in one market will be offset by gains in the other. The commercial firm is thus able to establish a price for a commodity, or the commodity component of a product, and fix its raw material costs. It no longer matters in which direction price moves, since any fluctuation has been neutralized by the equal and opposite transaction.").

61. *See, e.g.*, Stout, *supra* note 44, at 8-10.

62. Greenstone, *supra* note 57, at 176.

63. Lynch, *supra* note 51, at 561, 567.

64. Christopher L. Culp, *The Social Functions of Financial Derivatives*, *in* FINANCIAL DERIVATIVES: PRICING AND RISK MANAGEMENT 58 (Robert W. Kolb & James A. Overdahl eds., 2010).

occur in futures markets; all markets, including the spot markets underlying commodity derivatives markets, incorporate supply and demand information to determine the appropriate price for a given asset.[65] But many argue that futures markets, due to their higher volume and greater liquidity, assimilate more, better information faster and more accurately than physical commodity markets.[66] An example helps show why this might be the case. Trade in, say, oil is encumbered by shipping and storage costs—by the physicality of the commodity. If you want to own oil, you'll likely need to own barrels and tankers; to employ people to pilot and look after the tankers; you'll need to pay for a place to park your oil.[67] Because trade in oil futures is not similarly restrained and includes not only market participants who need oil but also speculators who don't, the thinking goes, oil futures trade faster and more frequently and are therefore better able to incorporate information affecting the price of oil. Moreover, because the futures markets take in, digest, analyze, and summarize all information presently available about a specific commodity to produce the anticipated (i.e., future) spot price of that commodity on a particular date in the future, futures markets discover and disseminate price information regarding not only futures prices but also the appropriate spot price.[68] In other words, in gathering the collective wisdom of the markets to foretell future prices, the futures markets also necessarily reveal the market's present view of a commodity's value today.[69]

The futures and spot markets are inextricable, and for this reason governments have often regulated one with a view to its

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65. Lynch, *supra* note 51, at 562-63.

66. *See id*. at 564; Stout, *supra* note 44, at 10, 30-31; Greenstone, *supra* note 57, at 172.

67. The recent unprecedented fall below zero of certain oil futures contracts caused by the COVID-19 pandemic underscores both the interrelation between futures and spot prices and the cost of having no place to put your oil when delivery comes due. *See* Catherine Ngai, et al., *Oil Plunges Below Zero for First Time in Unprecedented Wipeout*, BLOOMBERG, (April 19, 2020), [https://perma.cc/T7DL-YKGM].

68. Lynch, *supra* note 51, at 562-63; Greenstone, *supra* note 60.

69. Lynch, *supra* note 51, at 563; Greenstone, *supra* note 60, at 165. Detractors have suggested reasons for doubting both the hedging liquidity and price discovery justifications for derivatives markets, in particular in the case of speculative use of these markets and in over-the-counter markets. *See, e.g.*, Stout, *supra* note 44, at 30-31; Lynch, *supra* note 51, at 564-66.

effects on the other. Logically, the price of a commodity today tells you something about its likely price in the future, and vice versa. Businesses use futures markets not only to hedge their exposure to commodity price movements but also as a guide for a multitude of business decisions. The prices discovered by the futures markets provide businesses with a benchmark at which to buy, sell, and transfer commodities today.[70] They also allow businesses to plan how they will allocate their resources, "mak[ing] more informed consumption, production, investment, financing, contracting, and marketing decisions."[71] Futures prices act as "one of the major guideposts for the economy in allocating resources,"[72] leading many to view the futures markets as a "public good."[73] These benefits only exist because of the strong connection between the futures and spot markets.[74]

Not everyone holds so rosy a view of the futures markets, however, and as long as organized futures markets have existed, farmers, merchants, and governments have blamed them for distortions in the cash markets. Just as the theoretical benefits of the futures markets depend on the interrelationship between the futures and spot markets, futures market detractors focus on the ability of the futures markets to affect spot market prices, either viewing the futures markets as inherently distortionary or as ripe targets for manipulators looking to affect one market by manipulating another.[75] As a result, for as long as organized futures markets have existed, governments have attempted to rein in, or even harness, the distortions thought to emanate from them. In eighteenth century Japan, for example, the Tokugawa shogunate authorized the first government-sanctioned futures exchange, the

70. Greenstone, *supra* note 60, at 165-66.

71. Lynch, *supra* note 51, at 564.

72. Greenstone, *supra* note 60, at 173.

73. Lynch, *supra* note 51, at 564. *See also* Verstein, *supra* note 52 ("Price discovery and price signals are essential to a market society.").

74. Greenstone, *supra* note 60, at 165. The connection also enables common types of commodities manipulation. *See* Rosa M. Abrantes-Metz et al., *Revolution in Manipulation Law: The New CFTC Rules and the Urgent Need for Economic and Empirical Analyses*, 15 U. PA. J. BUS. L. 357, 366 (2013).

75. *See, e.g.*, Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 971 (4th Cir. 1993) ("Since the prices of futures are contingent on the vagaries of both the production of the commodity and the economics of the marketplace, they are particularly susceptible to manipulation and excessive speculation.").

Dojima Rice Exchange, because it believed that trading in rice futures would artificially inflate the value of the underlying rice.[76] In the late nineteenth century in the United States, fears about the effect of futures markets on commodity prices led to repeated attempts to outlaw futures trading altogether.[77] Virtual currency markets provide their own fascinating example: The CFTC reportedly used bitcoin futures to pop 2017's astonishing virtual currency spot market bubble.[78] According to then-CFTC Chairman J. Christopher Giancarlo, the CFTC approved bitcoin futures as a way of introducing skepticism into an exuberant bitcoin spot market, whose prices were at their all-time high.[79] Per Giancarlo, the plan worked, and the bitcoin bubble burst.[80]

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76. Mark D. West, *Private Ordering at the World's First Futures Exchange*, 98 MICH. L. REV. 2574, 2582-83 (2000). The shogunate hoped higher rice prices would curry favor with the military, who were paid in the commodity, and influential feudal lords, who used rice to repay certain loans. *Id*. Derivatives *contracts* long predated sanctioned derivatives *exchanges*, having existed since at least the time of Babylonia, where merchants made loans to traders contingent on the successful arrival of the caravan carrying their goods, charging a higher-than-usual interest rate to compensate for the risk that the caravan or goods were lost to the desert, marauders, or other dangers. LAURENT L. JACQUE, GLOBAL DERIVATIVES DEBACLES: FROM THEORY TO MALPRACTICE 4 (2010). The underlying spot markets are older still—indeed, the oldest in the world. Verstein, *supra* note 52, at 453.

77. Greenstone, *supra* note 60, at 178. *See also* Stout, *supra* note 44, at 11-14 (Eighteenth and nineteenth century American common law declined to enforce speculative derivative contracts, including because speculators in the derivatives markets might be tempted to manipulate the spot markets and because speculative derivates posed systemic risk to the commodity markets).

78. Brady Dale, *Trump Administration Popped 2017 Bitcoin Bubble, Ex-CFTC Chair Says*, COINDESK (Oct. 22, 2019) [https://perma.cc/F9MQ-D446].

79. *Id*.

80. *Id*. Giancarlo's story offers another example of a theoretical justification for the role of speculators in derivatives markets. Giancarlo's argument runs as follows: The bitcoin spot markets largely required participants to own bitcoin. *Id*.; *see also* Stout, *supra* note 44, at 7 ("Speculating in the . . . [commodity] "spot" markets . . . requires a speculator to actually buy and hold" the commodity.). Owning bitcoin, in turn, required a familiarity with the technology that Bitcoin adherents were more likely to possess, leading the spot market price to reveal not the market's view of bitcoin's value but instead Bitcoin evangelists' view of the value of bitcoin—which was exaggerated. Only when bitcoin derivatives allowed for Bitcoin skeptics to express their views (by betting against or "shorting" bitcoin) without having to own bitcoin or learn anything about the technology did the bubble built by the Bitcoin believers burst. Dale, *supra* note 77.

B. A Brief History of Futures Regulation in the United States

Federal commodities laws in the United States have traditionally taken aim at futures rather than spot markets, in particular manipulation of the futures markets and its potential to affect the underlying spot markets. In the early twentieth century, farmers and commodity dealers suspected that futures market speculation and manipulation were to blame for waning commodity prices and other market ills.[81] In response, Congress produced the Future Trading Act of 1921—promptly struck down as an improper use of the taxing power[82]—and then the Grain Futures Act of 1922.[83] As their names suggest, these early laws focused not on spot market transactions but on trading in futures and other derivatives. The Grain Futures Act was not given its current, somewhat misleading title—the Commodity Exchange Act—until 1936.[84]

Congress did not create the CFTC until many years later but, as with the earliest iterations of the federal commodities law, trouble in the *spot* markets led to the creation of an agency whose primary mission is the regulation of the U.S. *derivatives* markets. The CFTC owes its existence to anchovies—or, rather, a lack of anchovies.[85] The Peruvian anchoveta has a claim to being, in economic terms, the most important fish in the sea.[86] No wild fish is harvested in greater quantities,[87] and the fish is one of the world

81. Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 970 (4th Cir. 1993); Stout, *supra* note 44, at 17; John H. Stassen, *The Commodity Exchange Act in Perspective: A Short and Not-So-Reverent History of Futures Trading Legislation in the United States*, 39 WASH. & LEE L. REV. 825, 829 (1982).

82. Hill v. Wallace, 259 U.S. 44, 66-69 (1922).

83. In his opinion striking down the Future Trading Act, Chief Justice Taft suggested that the act might have passed constitutional muster had Congress had the "commerce clause in mind" rather than the taxing power. *Id*. at 68-69. Taking this cue, Congress tried again in the Grain Futures Act, this time successfully relying on the commerce clause. Stassen, *supra* note 81, at 830; Bd. of Trade v. Olsen, 262 U.S. 1, 31-32 (1923).

84. Commodity Exchange Act of 1936, 49 Stat. 1491. *See also* Stassen, *supra* note 81, at 832.

85. Stassen, *supra* note 81, at 833.

86. *Cf*. H. BRUCE FRANKLIN, THE MOST IMPORTANT FISH IN THE SEA: MENHADEN AND AMERICA 205-217 (2007) (making the case for bunker or the menhaden).

87. T. Iwamoto et al., ENGRAULIS RINGENS. THE IUCN RED LIST OF THREATENED SPECIES (2010), [https://perma.cc/Z6J4-5SCH].

economy's primary sources of feed for livestock.[88] When, in 1972, the anchoveta schools failed to turn up off the coast of Peru, ranchers and merchants had to draw on other sources to feed the world's livestock.[89] The anchovies had bad timing. They joined, in the words of the chairman of one of the oldest and most important futures exchanges in the world, an "extraordinary coincidence of global events which suddenly wiped out the last of dwindling grain surpluses and plunged the world into severe shortages of food."[90] Food prices soared, inviting congressional scrutiny.[91] Although the specter of futures market speculation and manipulation drove much of the congressional agenda, Congress did not ultimately find that the futures markets were to blame.[92] Nonetheless, the hubbub ended in the creation of the CFTC, providing one more example of the tendency of problems in the spot markets to result in greater regulation of the derivatives markets.[93]

In the years that followed, the federal commodities laws underwent several additional series of significant revisions to expand or limit the CFTC's jurisdiction over derivatives trading[94] before arriving at the current compilation of the federal commodities laws, an amended Commodity Exchange Act (CEA).[95] The CEA, like its predecessors and in spite of its name, concerns itself with regulation of the derivatives markets and has very little to say about commodities qua commodities.[96] To the extent that the CEA confers power over the commodities referenced by futures and derivatives contracts, it does so in service of the Act's regulation of the derivatives markets.[97] The link between spot market

88. Greenstone, *supra* note 60, at 180; *Small Business Problems Involved in the Marketing of Grain and Other Commodities: Hearings Before the Subcomm. on Spec. Small Bus. Problems of the Permanent Select Comm. on Small Bus.*, 93rd Cong. 135 (1973) (testimony of Frederick G. Uhlmann, Chairman of the Board of Trade of the City of Chicago) [hereinafter *Hearings*].

89. CHICAGO BOARD OF TRADE RECORDS PT. 1, THE SOYBEAN PHENOMENON 5-8 (1974).

90. *Hearings*, *supra* note 88, at 135.

91. Greenstone, *supra* note 57, at 177.

92. *Id.* at 177-79, 181.

93. *See id.* at 181, 185-86.

94. Stout, *supra* note 44, at 17-18.

95. *See id.*

96. Stassen, *supra* note 81, at 832.

97. The CEA's "purpose" is to "serve the public interest[]" of "providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information

prices and futures prices means that manipulation in the spot market can lead to outsized gains in the futures markets.[98] From the manipulator's perspective, who controls a commodity in the present controls the commodity's future, transforming the business of betting on the future from a gamble into a sure thing.[99] Anti-manipulation power in the spot markets has thus long been understood to be a supplement necessary to the effective regulation of the futures markets.[100]

Although the CFTC has had anti-manipulation power in the spot markets since its creation,[101] for many years the CFTC had little success prosecuting spot market manipulation cases. It's one thing for a statute to grant a power in the abstract. It's another thing entirely to successfully exercise that power in concrete cases. Manipulative activity is often indistinguishable from legitimate market behavior[102]—the defining difference is a showing of

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through trading in liquid, fair and financially secure [derivatives] trading facilities." Commodities Exchange Act (CEA), 7 U.S.C. § 5 (2000). The deterrence and prevention of fraud and price manipulation, which disrupt market integrity, serve to further this purpose. 7 U.S.C. § 5(b). *See also* Prime Int'l Trading v. BP P.L.C., 937 F.3d 94, 107 (2d Cir. 2019) (citing CEA's enumerated purpose); Greenstone, *supra* note 57, at 177 (internal citations omitted) ("The primary role of the Commodity Futures Trading Commission in this process is to protect the economic utility of the futures markets by ensuring the integrity of futures prices by making certain that price actually does reflect anticipated supply and demand."); Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 970 (4th Cir. 1993) ("Because the [CEA] was aimed at manipulation, speculation, and other abuses that could arise from the trading in futures contracts and options, as distinguished from the commodity itself, Congress never purported to regulate 'spot' transactions (transactions for the immediate sale and delivery of a commodity)."). *See also* CFTC v. Erskine, 512 F.3d 309, 321 (6th Cir. 2008) (quoting *Salomon*).

98. *See* Stout, *supra* note 44, at 28 ("[D]erivatives markets . . . [allow for bets] that are an order of magnitude larger than the spot market itself [including, for example,] . . . $10 trillion in derivative contracts on a $1 trillion market for mortgage bonds, just as a bookie can take in $100,000 in bets on a horserace with a $10,000 winner's purse."). For manipulative strategies available to exploit this aspect of relationship between the spot and futures markets, see Abrantes-Metz et. al., *supra* note 74, at 366-69.

99. *See* Stout, *supra* note 44, at 137.

100. *Cf.* 7 U.S.C. § 13(a)(2) (2010) (making it unlawful for "[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce"); 7 U.S.C. § 5. In the virtual currency context, see *CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets*, CFTC, 4 (Jan. 4, 2018), [https://perma.cc/9XNA-GHHC] (justifying heightened review of virtual currency derivatives in part by reference to enhanced ability to police underlying virtual currency spot markets for fraud and manipulation).

101. *See* 7 U.S.C. § 13.

102. *See, e.g.*, Robert C. Lower, *Disruptions of the Futures Market: A Comment on Dealing with Market Manipulation*, 8 YALE J. REG. 391, 392 (1991) ("[D]rawing a line between healthy economic behavior" and manipulation is difficult and imprecise.).

illicit intent[103]—and manipulation cases have proven difficult to prosecute. In fact, in the first 35 years of its existence, the CFTC only prevailed in a single litigated manipulation case.[104] When the 2008 financial crisis brought commodity derivatives regulation under congressional scrutiny, the CFTC itself emphasized these lackluster results as part of a plea for broader anti-manipulation powers.[105]

Congress granted the CFTC's request for enhanced spot market anti-manipulation authority in the Dodd-Frank Act.[106] Dodd-Frank section 753 amended CEA section 6(c) by importing the language of section 10(b) of the Securities Exchange Act of 1934 (Exchange Act).[107] Among other things, this language lowered the bar for establishing manipulation liability, which now requires mere reckless activity rather than specific intent.[108] No longer would the CFTC have to prove that a defendant specifically intended its activity to cause artificial prices. The language comes with baggage, however: decades of case law developed in the securities law context.[109] In addition to enhanced anti-manipulation authority, this case law smuggled in something else along with it: anti-*fraud* authority,[110] the bounds of which had yet (and have yet) to be determined in the commodities context. Once again, perceived trouble in the derivatives markets had spurred a legislative response, this time setting the stage for the CFTC to play an expansive role in the spot markets.

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103. Abrantes-Metz et. al., *supra* note 74, at 375-76. Courts employ a four-part test to find manipulation in violation of the CEA: (1) ability to influence price; (2) intent; (3) causation; and (4) artificial price. *See id*. at 392. Many common market activities meet every element but the second, and thus, the activities are lawful. *Id*. at 385-88.

104. *CFTC, USDA Farm Credit Nominations Hearing: Hearing Before the Comm. on Agric., Nutrition and Forestry*, 111th Cong. 13 (2009), (statement of Bart Chilton, Comm'r, CFTC). In this period the CFTC did, however, settle many manipulation claims. *Id*. at 52 (testimony of Bart Chilton, Comm'r, CFTC).

105. *See id*. at 50-54.

106. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 742, 124 Stat. 1376, 1732-34 (2010).

107. *See* Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41,398, 41,398-99 (July 14, 2011) (to be codified at 17 C.F.R. pt. 180).

108. *See* Abrantes-Metz et. al., *supra* note 74, at 393-94.

109. *See id*. at 394.

110. *See id*.

II. BITCOIN BILDUNGSROMAN: HOW BITCOIN BECAME A COMMODITY

Over the years, in addition to expanding and contracting the CFTC's jurisdiction, primarily in the derivatives markets but recently in the spot markets, Congress repeatedly amended the federal commodities laws to enlarge the definition of "commodity." Today's definition is extremely broad—broad enough to give the CFTC clear jurisdiction over bitcoin.[111] Nonetheless, the statutory definition has always been, and continues to be, narrower than the use of the term in common parlance.[112] The advent of Bitcoin helps to show that assets can become, and perhaps cease to be, statutory commodities. An SEC official's 2018 statement suggesting that "a digital asset offered as a security can [potentially], over time, become something other than a security,"[113] launched a thousand commentators' pens in the crypto-industry and academia.[114] By contrast, the CEA's expansive definition of "commodity," combined with the greater perceived potential for securities regulation to hamper virtual currency innovation,[115] has meant that scarcely any attention has been paid to the way in which a virtual currency can become a commodity. Instead, the discourse has treated a virtual currency's commodity status as

111. *Cf.* 7 U.S.C. § 1a(9) (2010).

112. *Compare* 7 U.S.C. § 1a(9), *with Commodity*, MERRIAM-WEBSTER, [https://perma.cc/4UQE-EDWF] (last visited Mar. 14, 2020) (defining "commodity" broadly to include "an economic good" or "something useful or valued").

113. William Hinman, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, Remarks at the Yahoo Finance All Markets Summit: Crypto, Digital Asset Transactions: When Howey Met Gary (Plastic) (June 14, 2018), [https://perma.cc/E24X-YZX4].

114. *See, e.g.*, Jerry Brito, *SEC Chairman Clayton Just Confirmed Commission Staff Analysis That Found Ethereum (and Cryptos Like It) Are Not Securities*, COIN CENTER (Mar. 12, 2019), [https://perma.cc/4KSJ-UC2B] (noting frequent inquiries regarding a digital asset's ability to evolve beyond security status and correspondence between congressman and SEC chairman regarding same); AM. BAR ASS'N, DIGITAL AND DIGITIZED ASSETS: FEDERAL AND STATE JURISDICTIONAL ISSUES (Mar. 2019) [hereinafter DIGITAL AND DIGITIZED ASSETS]; Hazen, *supra* note 12, at 510; Andrew Verstein, *Crypto Assets and Insider Trading Law's Domain*, 105 IOWA L. REV. 1, 19-20 (2019); James J. Park, *When Are Tokens Securities? Some Questions from the Perplexed*, LOWELL MILKEN INST. POL'Y REP. UCLA L. & ECON. RES. PAPER NO. 18-13 (2018).

115. *See, e.g.*, Joseph A. Hall, Howey, Ralston Purina *and the SEC's Digital Asset Framework*, 52 REV. SEC. & COMMODITIES REG. 137, 141 (2019) ("[L]abeling a digital asset a security for purposes of the federal securities laws is . . . effectively a death knell for the asset").

fixed, with scholars, litigants, courts, and the CFTC arguing either that a given virtual currency is or is not a commodity.[116] What the discussion has missed, and what bitcoin's atypicality helps us conceive, is that a given asset can enter, and potentially leave, the CEA's commodity definition. Indeed, bitcoin did: Bitcoin was not always a commodity. It had to become one.

This Part follows bitcoin's path to becoming a commodity and uses bitcoin's evolutionary journey to probe the CEA's definition of "commodity." Part II.A recounts how the CFTC first asserted and then established its jurisdiction over bitcoin and other virtual currencies. Consistent with its central jurisdictional grant, early CFTC actions focused on bitcoin derivatives, rather than bitcoin itself, but these actions were necessarily predicated on the claim, at times stated at others tacit, that bitcoin is a commodity. At the same time, the CFTC conflated bitcoin and other virtual currencies, setting the stage to extend (as explored in Part III below) its jurisdictional claim to other virtual currencies and the virtual currency spot markets as a whole. Part II.B examines the CEA's commodity definition through the lens of virtual currencies and shows how virtual currencies' novelty helpfully exposes interpretive difficulties lurking in the definition. Part II.C takes on the most salient of these interpretive issues, identifies a problematic but common reading of the definition caused, in part, by the seemingly inelegant drafting of the statute, and endorses a different reading that resolves the definition's potential ambiguity and redeems its wording.

A. Gaining Purchase: The CFTC's First Virtual Currency Foothold

The CFTC has claimed jurisdiction over bitcoin and other virtual currencies since at least 2014.[117] CFTC authority depends, in every case, on the existence of a commodity, whether that commodity underlies a derivative contract (in the derivatives markets)

116. *See, e.g.*, Hazen, *supra* note 12, at 502 n.35 ("[C]rypto currencies clearly fall within the definition of commodity"); Verstein, *supra* note 114, at 20 (any given virtual currency "highly likely" to be a commodity); Prentis, *supra* note 12, at 626 (arguing for bitcoin's classification as a commodity based on its use); Commodity Futures Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213, 217 (E.D.N.Y. 2018).

117. Massad Testimony, *supra* note 27.

or is the subject of fraud and manipulation (in the spot markets).[118] The CFTC began establishing this threshold with respect to virtual currencies in 2014, when it first pointed to bitcoin as a specific example of a virtual currency and asserted that virtual currencies meet the definition of "commodity" set forth in §1a(9) of the CEA.[119] In a series of uncontested administrative proceedings that followed, the CFTC shored up its claim to bitcoin markets, filing and settling actions in connection with the operation of an unregistered bitcoin option contracts trading facility,[120] wash trading,[121] and facilitating off-exchange leveraged commodity transactions,[122] all in violation of the CEA and CFTC regulations.

These proceedings laid the groundwork for a more expansive assertion of oversight authority by the CFTC: first, by solidifying bitcoin's status as a commodity (and thereby the CFTC's authority in the bitcoin spot as well as derivatives markets) and, second, by consistently equating bitcoin and "other virtual currencies."[123] To be sure, each action predominantly involved bitcoin derivatives, as opposed to other virtual currencies or spot market trading (in bitcoin or otherwise). But the CFTC has authority over bitcoin derivatives only if bitcoin is a commodity. And while bitcoin's

118. *See, e.g.*, PHILIP MCBRIDE JOHNSON & THOMAS LEE HAZEN, DERIVATIVES REGULATION 7 (2004) ("Since federal regulation of derivatives pivots on whether a commodity is involved, it is necessary first to define the term."); *see also* Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 972 (4th Cir. 1993) ("[T]he CEA uses the term 'commodity' in setting the jurisdiction of the CFTC"). *But see* Commodity Futures Trading Comm'n v. Hunter Wise Commodities, LLC, 749 F.3d 967, 974 (11th Cir. 2014) (distinguishing between CFTC's "statutory authority, its 'jurisdiction,'" and the subject matter jurisdiction of the federal courts).

119. Massad Testimony, *supra* note 27. At this point, the legal literature has given ample and able treatment to Bitcoin's background and underlying technology. For a layperson's introduction to the technology and a bird's eye view of the legal landscape, *see* PRIMAVERA DE FILIPPI & AARON WRIGHT, BLOCKCHAIN AND THE LAW: THE RULE OF CODE (2018).

120. *Coinflip*, *supra* note 28, at *1.

121. *TeraExchange*, *supra* note 29, at *1.

122. *Bitfinex*, *supra* note 30, at *1.

123. *See, e.g.*, Massad Testimony, *supra* note 27 ("While the CFTC does not have policies and procedures specific to virtual currencies like bitcoin, the agency's authority extends to futures and swaps contracts in any commodity."); *Coinflip*, *supra* note 28, at *2 ("Bitcoin and other virtual currencies are . . . properly defined as commodities."); *Bitfinex*, *supra* note 30, at *5.

commodity status is now indisputable,[124] for the first years of its existence it almost as clearly was not a commodity, as we will see. This did not prevent the CFTC, in the days before bitcoin's status had transformed, from making premature claims to the virtual currency. Nor has it prevented the CFTC, now that bitcoin's status as a commodity has solidified, from using this firm ground as a steppingstone to reach other virtual currencies and to probe the outer bounds of its oversight authority in the commodity spot markets. In a striking example of regulatory creep, elaborated on in Part III below, virtual currencies have become both the test case for the extent of this authority and a tool the CFTC uses to carve out a wider expanse of territory than Congress likely intended with the passage of §753 of Dodd-Frank.

The precedents established by regulator statements and settlement orders, though not carrying the force of a court decision, acclimate lawyers, courts, and market participants to the idea that first bitcoin and then all other virtual currencies are commodities, moving the baseline of the argument, and contribute to the slow creep of a regulator's expanding jurisdiction. They are also more easily produced and controlled than a court case. Indeed, one benefit of settling rather than litigating early cases, from a regulator's perspective, is the opportunity to make unsupported statements about the law, without opposition from the settling parties, that by the dint of time come to be the accepted view.[125] The CFTC's early settlement orders offer next to no analysis in support of the claim that bitcoin qualifies as a "commodity" under CEA §1a(9), much less other virtual currencies, instead asserting, in near-conclusory fashion, that "[t]he definition of a 'commodity' is broad."[126] Such precedent, tenuous as it may be, sets the baseline

124. David E. Aron and Matthew Jones, *The CFTC's Characterization of Virtual Currencies as Commodities: Implications under the Commodity Exchange Act and CFTC Regulations*, 38 No. 5 FUTURES & DERIVATIVES L. REP. NL 1 (May 2018).

125. *See, e.g.*, DIGITAL AND DIGITIZED ASSETS, *supra* note 114, at 72 (speculating that CFTC took unusual step of not imposing monetary penalty in *Coinflip* because case was aimed at "providing notice to the market of [CFTC's] assertion of enforcement authority over virtual currencies.").

126. *Coinflip*, *supra* note 28, at *2 (internal citations omitted); *Bitfinex*, *supra* note 30, at 5; *TeraExchange*, *supra* note 29, at *3 n.3 (respondent consented to the application of the CEA); Complaint at ¶ 12, Commodity Futures Trading Comm'n v. Gelfman Blueprint, Inc., No. 17-7181 (S.D.N.Y. Sept. 21, 2017).

of the argument in the CFTC's favor, begins immediately to affect the behavior of market participants, and accustoms entrepreneurs and attorneys alike to the possibility that bitcoin and all other virtual currencies are at risk of regulation by the CFTC.

B. Statutory Commodities: A Rose Is a Rose Is a Rose in which Contracts for Future Delivery Are Presently or in the Future Dealt in

CEA §1a(9)'s definition of a commodity is worth quoting in full—and merits more attention than one might typically give to block quotations of statutory text[127]—not the least for its Linnaean attempt to inventory the things of the world:

> The term "commodity" means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions (as provided by section 13-1 of this title) and motion picture box office receipts (or any index, measure, value, or data related to such receipts), and all services, rights, and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.[128]

The definition of a "commodity" is broad indeed.[129] Its strange and inconsistent specificity—Why enumerate varieties of fats and oils but not varieties of livestock? Is butter not a "livestock product"? Why except onions?[130]—calls out for political and

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127. *See, e.g.*, MARK HERRMANN, THE CURMUDGEON'S GUIDE TO PRACTICING LAW 7-8 (2006).

128. 7 U.S.C. § 1a(9) (2010).

129. *See supra* note 126 and accompanying text. It is also, however, narrower than the dictionary definition of commodity. Strange, then, that courts and commentators reach for the dictionary. *See, e.g.*, Commodity Futures Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213, 224 (E.D.N.Y. 2018); Prentis, *supra* note 12, at 626.

130. In the 1950s, Vince Kosuga, an onion farmer and commodities trader, cornered the onion market. Owning, effectively, all the onions in the United States, Kosuga got rich overcharging for the onions he could sell. Then he shorted the market before flooding it with his oversupply, profiting from his short positions as the onion market crashed. Keith Romer,

historical context, without which the definition seems arbitrary, even nonsensical.

The short explanation for the patchwork state of the definition is that it was sewn together over many years. The federal commodities laws began with a slender definition of the underlying commodities to be regulated. The laws' first constitutional iteration, the Grain Futures Act of 1922, limited federal jurisdiction to corn, wheat, oats, barley, rye, flax, and sorghum.[131] For the next fifty years, Congress engaged in the hopeless, endless task of cataloguing[132] the world's commodities, adding to the list whenever futures trading developed in a good it wished to regulate.[133] This ad hoc approach proved too tedious even for Congress, and in 1974, legislators took a new tack. Under the Commodity Futures Trading Commission Act of 1974, Congress created the CFTC and vested it with the authority to regulate futures markets overlying not only the already-enumerated commodities but also commodities falling into two broad catchalls: (1) "all other goods and articles" and (2) "all services, rights, and interests" for "which contracts for future delivery are presently or in the future dealt in."[134] The definition has been amended since, but not since 2010[135] and, it will be noted, not to name "virtual currency," "cryptocurrency," "digital assets," or any of the other various nomenclatures that might encompass bitcoin or the virtual

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The Great Onion Corner and the Futures Market, NPR (Oct. 22, 2015) [https://perma.cc/SPR8-JNBW]. Today, the CEA bans trading in onions futures and the spot price for onions is, as a result, extremely volatile. Mike Bird, *The World Cries Out for Onion Derivatives*, WALL ST. J. (June 13, 2019), [https://perma.cc/J5P8-SX4M]; Felix Salmon, *Trading in Fantasy*, N.Y. TIMES (May 9, 2010), [https://perma.cc/P6QR-X9JL].

131. Grain Futures Act of 1922, 42 Stat. 998.

132. *See* HERMAN MELVILLE, MOBY DICK; OR THE WHALE (2008) (ebook), [https://perma.cc/85CD-S8H9] ("It would be a hopeless, endless task to catalogue all these things. Let a handful suffice.").

133. *See* Commodity Exchange Act of 1936, 49 Stat. 1491 (adding cotton, rice, mill feeds, butter, eggs and Irish potatoes); Commodity Exchange Act of 1938, 52 Stat. 205 (adding wool tops); Commodity Exchange Act of 1940, 54 Stat. 1059 (adding fats and oils, cottonseed, cotton seed meal, peanuts, soybeans, and soybean meal); National Wool Act of 1954, Pub. L. No. 83-690, 68 Stat. 910, 913 (adding wool); Commodity Exchange Act of 1955, Pub. L. 84-174, 69 Stat. 375 (adding onions, later excised by the Onion Futures Act, Pub. L. 85-839, 72. Stat. 1013); Commodity Exchange Act of 1968, Pub. L. 90-258, 82 Stat. 26 (adding soybean meal, livestock, and livestock products).

134. JOHNSON & HAZEN, *supra* at note 118, at 8-9 (reading futures requirement to apply throughout).

135. *See supra* note 126 and accompanying text.

currency projects the followed it.[136] It's left to the catchalls, therefore, to capture virtual currencies.

Any attempt to apply the statute to a given virtual currency raises five interpretive questions:

First, which of the catchalls catches virtual currencies? That is, is a virtual currency (1) a good or article or (2) a service, right, or interest? The CFTC has at different times taken different positions on this issue,[137] and its resolution matters for the second interpretive question.

Namely, *second*, does what I will call the "futures requirement" apply to both catchalls, or only to "all services, rights, and interests"? If the commodity definition requires futures trading only in services, rights, or interests, and not in goods or articles, then a determination that virtual currencies are goods would lower the first hurdle to CFTC jurisdiction. Any "good," regardless of the existence of future contracts in it, would be a commodity.[138]

Third, to the extent the futures requirement applies to whichever catchall catches virtual currencies, what sort of futures count? Do unregulated international futures suffice, or must regulated domestic futures exist?[139]

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136. *See, e.g.*, Heath Tarbert et al., Leaders of CFTC, FinCEN, and SEC Issue Joint Statement on Activities Involving Digital Assets, SEC Public Statement, n.4 (Oct. 11, 2019), [https://perma.cc/Y8BT-Q3ST] ("Digital assets may be referred to in the industry by labels such as 'virtual assets,' 'crypto-assets,' 'digital tokens,' 'digital coins,' 'digital currencies,' 'cryptocurrencies,' and 'convertible virtual currencies.' Financial activities involving digital assets may also be referred to as 'initial coin offerings' or 'ICOs.'").

137. *Compare, e.g.*, *Coinflip*, *supra* note 28, at *2 (suggesting that bitcoin is captured by "all services, rights, and interests") *with* Brief of CFTC in Support of Preliminary Injunction and Other Relief, at *11, Commodity Futures Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213 (E.D.N.Y.), *adhered to on denial of reconsideration*, 321 F. Supp. 3d 366 (E.D.N.Y. 2018) (No. 18-CV-361) [hereinafter CFTC McDonnell Brief] (CFTC arguing that bitcoin and litecoin (a bitcoin clone) fall into *both* "rights and interests" *and* "all other goods and articles") *and* Plaintiff's Opposition to Defendant Crater and Relief Defendants' Motion to Dismiss the Amended Complaint at 7, Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc., No. 18-CV-10077-RWZ, at 7 (D. Mass. 2018) [hereinafter CFTC MBC Brief] (CFTC arguing that virtual currencies are "goods").

138. *Compare* CFTC MBC Brief, *supra* note 135, at 8 ("[T]he modifier . . . 'presently or in the future dealt in,' applies as a matter of syntax, punctuation, and grammar, only to 'services, rights, and interests.'") *with* DIGITAL AND DIGITIZED ASSETS, *supra* note 114, at 79 (suggesting "that Congress did not intend to give the CFTC authority over commodities that would have no connection to a futures market").

139. *Compare, e.g.*, Thomas A. Russo & Edwin L. Lyon, *The Exclusive Jurisdiction of the Commodity Futures Trading Commission*, 6 HOFSTRA L. REV. 57, 58 n.3 (1977) ("It

Fourth, to the extent the futures requirement applies, at what point must the futures exist? Must futures trading exist today? With reasonable likelihood in the near future? It is enough that the futures be merely conceivable?[140]

Finally, to the extent the futures requirement applies, do bitcoin futures satisfy the requirement for all virtual currencies? Or only for bitcoin, leaving other virtual currencies outside of the definition—and the CFTC's jurisdiction—until virtual currency-specific futures develop or, at a minimum, until they are shown to be sufficiently similar to bitcoin to justify finding bitcoin futures to satisfy the futures requirement in their case?

The novelty of virtual currencies—rare anymore in the commodity world—helps expose these definitional fault lines.[141] The following section will use virtual currencies to focus on the final two questions: When must futures exist (Today? In the future?) and should futures in one unenumerated commodity (bitcoin) meet the futures requirement for potential commodities with similar characteristics (other virtual currencies)?[142]

C. How Bitcoin Teaches Us to Interpret the Commodity Definition

No one can seriously argue today that bitcoin is not a commodity,[143] but we should not take its commodity status today as a

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is unclear whether this language pertains to contracts for future delivery domestically or worldwide.") *with* CFTC McDonnell Brief, *supra* note 137, at *11 n.13 ("Any futures contract, domestic or foreign, would be sufficient to bring virtual currencies within" the commodity definition.").

140. *Compare* United States v. Brooks, 681 F.3d 678, 695 n.11 (5th Cir. 2012) ("[I]t is at least open to question whether the CEA requires a commodity to be the subject of a currently existing futures market, or merely that it be such a good for which a futures market could come into being.") *with* CFTC McDonnell Brief, *supra* note 137, at *11 n.13 ("[A] virtual currency is a commodity even if no futures contract is traded; all the statute requires is that such a contract *could* 'in the future' be dealt in.") (emphasis added). *See also infra* notes 172-73, 180-81 and accompanying text.

141. *Cf.* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 502 (1999) ("By working through these examples of law interacting with cyberspace, we will throw into relief a set of general questions about law's regulation outside of cyberspace.").

142. For our purposes, I will assume that the futures requirement applies to both catchalls. There is room for argument on this point but applying the requirement to both catchalls is consistent with my view that, as a general matter, a connection to the futures markets acts as a limit on both the commodity definition and CFTC jurisdiction.

143. *See, e.g.*, Aron & Jones, supra note 124, at 1.

vindication of the CFTC's position that bitcoin was a commodity in 2014. With respect to bitcoin, the debut of CFTC-regulated bitcoin futures[144] mooted the interpretive difficulties identified above in connection with the CEA's commodity definition. Which catchall bitcoin falls under, whether the futures requirement applies to that catchall, what types of futures count, when those futures must exist—bitcoin futures trading on the Cboe Futures Exchange in Chicago made all these questions irrelevant for bitcoin. One important question remains, however: Why? The facile answer is that contracts for future delivery in bitcoin now "are presently . . . dealt in," making application of the statute to bitcoin as run-of-the-mill as application of the statute to natural gas.[145] That apparently straightforward conclusion would suggest, too, that the CFTC was right to claim bitcoin in 2014: If bitcoin futures are presently dealt in today, were they not "in the future dealt in" in 2014? But would that mean that hindsight creates commodities retroactively? Or that the commodity definition, the definition underlying regulation of the futures markets, asks market participants, the CFTC, and the courts to predict the future?

These questions arise from a misunderstanding of the text of the statute, including its application to bitcoin: Bitcoin is not a commodity because bitcoin futures "are presently . . . dealt in" but because bitcoin futures are "in the future dealt in."[146] This is because, from the point of view of the Congress that enacted the commodity definition in 1974, today is the future. The only contracts for future delivery "presently" dealt in, in the statute's terms, are futures that were trading when Congress passed those words into law. Because Congress wanted to regulate more than futures in existence in 1974, however, and wanted to do so without, as it had done in the past, passing a new amendment every time the market created new futures products, it also included language to cover futures contracts created after the 1974

144. CFTC Statement on Self-Certification of Bitcoin Products by CME, CFE and Cantor Exchange, CFTC No. 7654-17, 2017 WL 5952205 (Dec. 1, 2017). *See also* Colin Lloyd and James Michael Blakemore, *The Future Of Bitcoin Futures*, LAW360 (Dec. 13, 2017), [https://perma.cc/CG2D-CRQB].

145. *See infra* text accompanying notes 185-192.

146. 7 U.S.C. § 1a(9).

amendments. Congress, seeking to do away once and for all with an iterative approach to the commodity definition, amended the definition to capture any "thing" for which futures trading existed at that time ("presently") or for which futures trading developed "in the future."[147] The text speaks from the position of its enactment, and we are the 1974 act's future.

This reading helps redeem §1a(9)'s awkward wording.[148] A statute that granted the CFTC jurisdiction over commodities for which futures "are presently dealt in" would have left uncertain the CFTC's jurisdiction with respect to futures not yet envisioned in 1974. Not wanting to limit the Commission's jurisdiction to things for which futures trading existed when the statute was enacted, Congress added "in the future dealt in." This addition achieves Congress's goal of preventing the statute from being frozen in 1974 but creates the mirrored issue we've identified: If misread to treat the 1974 amendment's future (today) as the statute's "present[]," §1a(9) seems nonsensically to ask its interpreters to foresee future futures.

Fortunately, this potential ambiguity is resolved by recalling that the problem Congress was trying to solve was how to avoid adding a commodity to the definition each time new futures trading arose. If futures trading arises in the future, Congress decided in 1974, at that point the underlying thing will become a commodity, and without Congress having to say so each time. This understanding of the CEA is also consistent with the Act's focus on the derivatives markets and reinforces the understanding that the CFTC's jurisdiction in every instance requires a connection to those markets. Given that the definition of "commodity" requires existing contracts for future delivery, the Commission's authority always depends on the existence of a futures market, even when the CFTC is asserting its fraud and manipulation authority in the spot markets.[149]

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147. 7 U.S.C. § 1a(9).

148. *See, e.g.*, Russo, *supra* note 137, at 58 n.3 (On the breadth of the futures requirement, "[a] literal reading of the [statute] is not particularly helpful.").

149. *See, e.g.*, JOHNSON & HAZEN, *supra* note 118, at 9 ("A fair reading of the . . . definition suggests that, as for 'all goods and articles . . . and all services, rights and interests,' their status as statutory commodities does not emerge until they become the subject of futures trading. . . . [This] illustrates an important principle of commodities regulation: its interest is in a form of economic activity, rather than in the attributes or character of the

Finally, this understanding has a third benefit: It salvages §1a(9) from a reading that would render the statute absurd and the definition superfluous. Taken to an extreme, a reading of the commodity definition that asks its interpreter to predict potential futures removes any limit from the CFTC's jurisdiction. If the definition requires only that contracts for future delivery of a potential commodity might one day exist, that such contracts be merely conceivable, every "thing" will meet the commodity definition. But it cannot be that any "thing" for which a future futures market can be conceived is a commodity. If that were the case, there would be no point in defining "commodity" at all. Congress is of course free to enact broad definitions, but a definition without limits both serves no purpose and violates a basic principle of statutory construction: To read any limits out of §1a(9) would be to render it superfluous.[150]

III. REGULATION ABHORS A VACUUM: THE CFTC'S CREEPING EFFORTS TO EXPAND ITS ALREADY EXPANSIVE SPOT MARKET AUTHORITY

The CFTC has used virtual currency to erode two potential limits on the new spot market authority Congress granted to the Commission in Dodd-Frank. The first potential limit is the commodity definition explored above; the second is a reading of the CEA that would limit the CFTC's spot market anti-fraud powers to claims of fraud-based *manipulation*—that is, spot market fraud having a manipulative effect on the derivatives markets or, at a minimum, on spot market prices (which, given the interconnectedness of the spot and futures markets noted above, is effectively the same thing). Getting the commodity definition right is important not only because it underlies all of the CFTC's powers broadly but also because it specifically limits the CFTC's anti-fraud power in the commodity spot markets (as the alleged fraud must involve a statutory commodity). The commodity definition itself also helps reinforce the second potential limit. The CEA

underlying subject. The economic activity in question is futures and commodity options trading . . . .").

150. *Cf.* Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465, 472 (1997) (interpreting CEA in manner "consonant with the doctrine that legislative enactments should not be construed to render their provisions mere surplusage") (citations omitted).

incorporates the futures markets into the definition of "commodity" and thereby ought to restrict the CFTC's authority to actions that may affect futures (or other derivatives) markets—the CFTC's primary area of responsibility. Instead, however, in two early virtual currency cases, *CFTC v. McDonnell*[151] and *CFTC v. My Big Coin*,[152] the CFTC has used virtual currency to advance readings of the CEA that stand to remove any appreciable limits from the CFTC's anti-fraud authority in the spot markets.

Lest one dismiss as a strawman the extreme reading of the CEA's commodity definition that would find an asset to be a commodity so long as a futures contract in that asset is conceivable, Part III.A reviews a recent CFTC statement in which the Commission took just this position. The CFTC subsequently doubled down on the position in the virtual currency context by asserting jurisdiction over bitcoin (and other virtual currencies) before U.S. markets for bitcoin futures existed, including in federal court in *McDonnell*, where unfortunately the court did not have the opportunity to rule on the effect of the absence of such futures on the CFTC's jurisdiction. Part III.B shows a second way that the CFTC has used virtual currency to scrape away at the futures requirement: Whereas in *McDonnell* the CFTC successfully exerted jurisdiction over bitcoin despite the nonexistence of bitcoin futures, in *My Big Coin* the Commission successfully exerted jurisdiction over a purported virtual currency for which futures contracts did not exist, basing its claim on the existence of bitcoin futures. In other words, the CFTC has taken the position that an asset meets the futures requirement of the commodity definition *either* where futures contracts in the asset are merely conceivable *or* where futures exist in a sufficiently similar asset.[153] Finally, Part III.C shows how the CFTC used virtual currency to push aside the final candidate for a limit on its anti-fraud authority—the requirement that the fraud bear some connection to the derivatives markets. Such a limitation makes structural sense—the

151. Commodity Futures Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213, 228-29 (E.D.N.Y. 2018), adhered to on denial of reconsideration, 321 F. Supp. 3d 366, 367 (E.D.N.Y. 2018).

152. Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492, 496-97 (D. Mass. 2018).

153. *See also infra* notes 172-73, 180-81 and accompanying text.

CEA first gave the CFTC anti-fraud powers in the spot markets as a necessary supplement to its regulatory authority in the derivates markets—and prevents an absurd scenario in which the CFTC enjoys broad, garden variety anti=fraud power divorced from its core domain. Indeed, when it issued regulations implementing its post-Dodd-Frank spot market powers, the CFTC itself suggested it would abide by such a limit. *McDonnell* and *My Big Coin* proved otherwise. In *My Big Coin* in particular the CFTC traveled far afield from its primary expertise and core mandate, bringing an enforcement action in a case where no commodity may have existed at all.

A. Leaving a Lot to the Imagination: The CFTC's Expansive Interpretation of the Commodity Definition

The CFTC's espousal of the broad reading of CEA §1a(9)—under which a commodity is any asset for which futures contracts are merely conceivable—predates the Commission's assertion of authority over virtual currencies. In a 2010 "Statement of the Commission" approving futures and option contracts on motion picture box office revenues, the CFTC saw no limit to the phrase "in which contracts for future delivery are presently or in the future dealt in," interpreting it to mean "all futures trading that might now exist or *might develop* in the future."[154] In other words, the CFTC took the position that "Congress intended for the CFTC to regulate futures and options on 'all commodities, goods, articles, services, rights, and interests which are or *may be* the subject of futures contracts.'"[155] If you can imagine a futures contract on a thing falling into one of those enumerated categories, never mind whether such a contract does or will ever exist, then, in the

154. CFTC, Approval Letter on Media Derivatives, Inc., Contracts, at 2 (June 14, 2010) (emphasis added), [https://perma.cc/6ZZ3-X8V5] [hereinafter MDEX Statement]. The attentive reader will have noticed that the approval of futures contracts in box office receipts contradicts §1a(9)'s exception of such receipts. That exception was added by Dodd-Frank, two months after the MDEX decision, in response to pressure from, among others, the Motion Picture Association of America. Felix Salmon, *Trading in Fantasy*, N.Y. TIMES (May 10, 2010), [https://perma.cc/6HT9-2UJU]. That Congress outlawed box office *futures* in part by excepting box office receipts from the commodity definition, along with Congress's similar move in connection with onions, is one more signal of Congress's intention to limit commodities to things for which futures exist.

155. MDEX Statement, *supra* note 154 (emphasis added).

CFTC's view, the thing meets the statutory definition of "commodity."[156]

The MDEX Statement's reading only narrowly carried the day, however: Two of the CFTC's five commissioners dissented precisely on the grounds that Congress could not have intended the statutory definition of "commodity" to be boundless. For Commissioner Jill Sommers, "[w]hile the [CEA's] definition of 'commodity' is rather broad, it is not without limits."[157] Some things do not "fit neatly or cleanly within" the statutory definition because they are not, in fact, commodities, and where a thing's place in the statute is not clear, the CFTC has an obligation to carefully consider whether it has the power to regulate it.[158] And Commissioner Bart Chilton rejected as "circular" the argument that "because one can develop a futures contract, the [thing] underlying [the hypothetical contract] is a 'commodity.'"[159] "Using this analysis," he reasoned, "anything under the sun could be a commodity if you could, at some time in the future, have a futures contract on it."[160] Read this broadly, "the statute is meaningless."[161]

Yet the broad interpretation of §1a(9) is in the CFTC's institutional interest. To date the CFTC has sought to use the broad

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156. The human imagination is, of course, famously limitless. *See*, Lynch, *supra* note 51, at 551 ("[T]he set of metrics, values, or events which can [underly a derivative contract] . . . are infinite."). Examples of exotic derivatives include those which reference the price of greenhouse gas emission permits, the value of mortgage-backed securities, unemployment rates, election results, the occurrence of terrorist attacks, and the discovery of aliens. *Id*. at 551-52. Among the examples of futures contracts that can be imagined, but which the CFTC is nonetheless unlikely ever to authorize, are contracts on the likelihood of the death of public figures and of "UFOs hitting the White House." Commissioner Bart Chilton Dissent from Approval of Media Derivatives Exchange's Opening Weekend Motion Picture Revenue Futures and Binary Option Contract, Comm. Fut. L. Rep. (CCH) ¶ 31, 593, 2010 WL 11242505 (June 14, 2010) [hereinafter, Chilton Dissent]. The world of virtual currency provides its own example of derivatives contracts the CFTC is unlikely ever to approve—assassination contracts on a virtual currency-based prediction market called Augur—that reportedly have drawn the CFTC's attention. Matthew Leising, *As Crypto Meets Prediction Markets, Regulators Take Notice*, BLOOMBERG (July 26, 2018), [https://perma.cc/6FB9-ACEZ].

157. Dissent of Commissioner Jill E. Sommers from Approval of Media Derivatives Exchange's Opening Weekend Motion Picture Revenue Futures and Binary Option Contracts, Comm. Fut. L. Rep. (CCH) ¶ 31,594, 2010 WL 11242506 (June 14, 2010) [hereinafter, Sommers Dissent]. *See also* Chilton Dissent, *supra* note 156.

158. Sommers Dissent, *supra* note 157; *see also* Chilton Dissent, *supra* note 156.

159. Chilton Dissent, *supra* note 156.

160. *Id*.

161. *Id*.

interpretation to sweep virtual currency in under its authority, and to use virtual currency to bolster the broad interpretation. An expanded commodity definition spells expanded jurisdiction for the Commission and further justification for its existence and funding.[162] A definition that encompasses strange, new, high-profile assets attracts attention to the agency and emphasizes the definition's purported breadth; it helps protect an agency from blame if things go wrong in—and makes for easy enforcement against unsophisticated, unsympathetic fraudsters taking advantage of—an ebullient new market. By declaring future-less virtual currencies to be commodities, as the CFTC first did in 2014 when federally regulated bitcoin futures existed only in the imagination,[163] the CFTC further normalized the view that commodities are commodities regardless of the existence of a futures market. It also set the stage for conspicuous enforcement actions based on the broad view of the definition: U.S. bitcoin futures had only existed for a month when, in a much reported on case, *CFTC v. McDonnell*,[164] the CFTC brought an enforcement action alleging bitcoin-related violations of the CEA between January 2017 and January 2018.[165]

The *McDonnell* defendant broadly contested the CFTC's jurisdiction over virtual currencies[166] but missed an opportunity to put before a federal court the more difficult question of the limits of the definition of commodity that we have been discussing. Not only does a maximalist reading of §1a(9), as noted above, make for easier enforcement, but enforcement against unsophisticated

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162. *See* William P. Albrecht, *Regulation of Exchange-Traded and OTC Derivatives: The Need for a Comparative Institution Approach*, 21 J. CORP. L. 111, 121-22 (1995) (noting regulators' incentives to please Congress by, among other things, expanding their domain).

163. Massad Testimony, *supra* note 27. Note that Chairman Massad pointed to bitcoin derivatives, in existence at the time, as one area of the CFTC's authority. The derivatives in question, however, were not "contracts for future delivery," as required by the plain language of §1a(9), but bitcoin swaps and options. 7 U.S.C. §1a(9) (2010); *see also CFTC Backgrounder*, *supra* note 100; *TeraExchange*, *supra* note 29, at *1-2. Note, too, that the CFTC has suggested that "contracts for future delivery" in bitcoin dealt in on foreign boards of exchange suffice for purposes of the definition. *See* CFTC McDonnel Brief, *supra* note 137, at 12.

164. Commodity Futures Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213, 222 (E.D.N.Y 2018).

165. Complaint at 2, Commodity Futures Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213 (E.D.N.Y. 2018) (No. 18-CV-0361).

166. *See McDonnell*, 287 F. Supp. 3d at 217.

fraudsters can also make it easier to obtain court orders supporting a maximalist reading—in particular where defendants opt to proceed pro se. The occasional tendency of enforcement actions to pit a government litigator against a pro se defendant is, in this sense, in the regulator's interest, though it means courts are less likely to hear the best arguments on both sides of an issue.[167] In the case of *McDonnell*, while federally regulated futures existed when the CFTC filed the case, for nearly all of the period in which the CFTC alleged misconduct they did not.[168] The court should have been asked to consider the point at which bitcoin became a "commodity" under the CEA—whether due to bitcoin futures available abroad[169] or by finding that bitcoin futures were "in the future dealt in" at some point in 2017. It might have made a difference: The district court relied in part on the quite recent existence of futures trading in bitcoin to conclude that bitcoin met the statutory definition of a commodity, despite the fact that those futures had been certified only a little over a month before the CFTC filed its complaint.[170] As it stands, bitcoin's novelty, its suspect status, and the unrepresented, unsophisticated, and unsympathetic defendant the CFTC chose to pursue in *McDonnell* all helped the CFTC succeed in bringing an action advancing its position in MDEX that an asset is a commodity so long as its futures can be imagined.

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167. *See, e.g.*, Memorandum, Findings of Fact, Conclusions of Law, and Directions for Final Judgment and Injunction at 6, Commodity Futures Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213 (E.D.N.Y 2018) (No. 18-CV-361) ("The litigation has been particularly difficult to administrate because McDonnell has appeared pro se despite various attempts of the court to explain why he needs counsel. He has appeared in court intermittently."); Complaint at 1, Commodity Futures Trading Comm'n v. Gelfman Blueprint, Inc., 2017 WL 4228737 (S.D.N.Y. 2017) (No. 17-7181) (pro se defendant in CFTC suit alleging bitcoin Ponzi scheme not involving futures contracts). *Cf.* James Blakemore, *Counsel's Control over the Presentation of Mitigating Evidence During Capital Sentencing*, 111 MICH. L. REV. 1337, 1357-59 (2013) (discussing, in the criminal context, the paramount importance of involvement of counsel).

168. *See McDonnell*, 287 F. Supp. 3d at 222; Complaint at 1, *McDonnell* 287 F. Supp. 3d 213 (No. 18-CV-0361).

169. *See* CFTC McDonnell Brief, *supra* note 137, at 12 n.13 (suggesting "contracts for future delivery" in bitcoin dealt in on foreign boards of exchange suffice for purposes of the definition).

170. *See McDonnell*, 287 F. Supp. 3d at 222, 227-28. (noting CFTC-regulated bitcoin futures and the principle that existence of futures market underlies CFTC jurisdiction).

B. My Big Coin Has No Futures: Why Bitcoin's Should Not Be Enough

Virtual currency's usefulness to the CFTC as a way to stretch—and even erase—the boundaries of the commodity definition did not end with bitcoin. Bitcoin was not born a commodity. It became one, sometime between its 2008 genesis and the December 2017 certification of the first federally regulated bitcoin futures.[171] Tracing how it did so helps trace the outside bounds of the CFTC's authority. As a completely new form of asset in which futures trading had not had the opportunity to develop, bitcoin gave the CFTC the chance to promote the idea that its jurisdiction is based in all things, not solely things underlying futures contracts. Now that bitcoin's status as a commodity is clear,[172] it is no longer, in that sense, useful to the CFTC. But bitcoin, of course, is far from alone. Thousands of other virtual currencies exist, the majority of which do not underlie U.S.-regulated futures contracts, and new virtual currencies with exotic features could be created at any moment.[173] As an alternative to its argument that CEA §1a(9) does not require futures trading to find a commodity, the CFTC has taken the position that bitcoin futures are enough to bring all other virtual currencies within the definition. In this way, the CFTC has begun to use virtual currencies in a different way to say the same thing it said in bitcoin's case: The commodity definition's futures requirement—at least for virtual currencies going forward—is no requirement at all.

The CFTC has claimed virtual currencies as commodities for as long as it has claimed bitcoin, issuing statements and obtaining rulings that conflated, with inadequate support, bitcoin's regulatory status with that of other virtual currencies. From the beginning, the agency saw bitcoin as a specific example of a general category—virtual currencies—within its purview.[174] But, as we

171. Lee Reiners, *Bitcoin Futures: From Self-Certification to Systematic Risk*, 23 N.C. BANKING INST. 61 (2019).

172. *See, e.g.*, Aron & Jones, *supra* note 124.

173. Nathan Reiff, *The 10 Most Important Cryptocurrencies Other Than Bitcoin*, INVESTOPEDIA (Jan. 8, 2020), [https://perma.cc/S8GX-A2EG] (including ether, XRP, litecoin, tether, and Monero). *See also* CoinMarketCap, coinmarketcap.com (listing more than 2,500 individual cryptocurrencies).

174. Massad Testimony, *supra* note 27. *See also* Justin S. Wales, Richard J. Ovelmen, *Bitcoin Is Speech: Notes Toward Developing the Conceptual Contours of Its*

have seen, that self-serving interpretation of the law was not self-evidently correct, not least because the CFTC claimed bitcoin and other virtual currencies long before federally regulated futures contracts existed for those assets.[175] In its first settled enforcement actions, the CFTC stated that bitcoin's commodity status and that of other virtual commodities were one and the same.[176] And in *McDonnell*, the CFTC obtained a ruling that not only bitcoin, but all virtual currencies are commodities subject to the CEA.[177] The *McDonnell* court should not have purported to go so far. Only the commodity status of bitcoin and litecoin, a bitcoin clone, were squarely before the court.[178] Moreover, just as the *McDonnell* court did not reckon with the absence of U.S.-regulated bitcoin futures during most of the time over which the CFTC sought to impose its authority, despite ostensibly basing CFTC jurisdiction on the existence of a futures market in bitcoin,[179] the court also did not have opportunity to consider what effect the lack of futures contracts for other virtual currencies might have on their commodity status.[180] Said differently, if futures contracts for one of the thousands of other virtual currencies do not exist, is the virtual currency nevertheless, consistent with the CFTC's

Protection Under the First Amendment, 74 U. Miami L. Rev. 204, 266 (2019) (noting a general tendency among regulators not "to draw distinctions among different types of cryptocurrencies").

175. Notably, in October 2019, CFTC Chairman Heath P. Tarbert claimed the virtual currency ether, arguably the second most important virtual currency after bitcoin, as a commodity, despite the current lack of ether futures. According to Chairman Tarbert, ether is a commodity because it is not a security (implying that anything that is not a security is a commodity) and because it is a commodity, the CFTC will soon greenlight ether-based futures contracts. Press Release, CFTC, Chairman Tarbert Comments on Cryptocurrency Regulation at Yahoo! Finance All Markets Summit (Oct. 10, 2019), [https://perma.cc/3TN8-RTV3]. This analysis puts the cart before the horse. Futures trading is not permitted to debut because something is a commodity; instead, futures trading, as a statutory matter, creates the commodity. Unless bitcoin futures are shown to meet the statutory definition of "commodity" with respect to ether, the absence of ether futures contracts suggests that ether is not a commodity and will not become one unless and until trading in ether-based futures begins.

176. *Coinflip*, *supra* note 28, at *2 ("Bitcoin and other virtual currencies are . . . properly defined as commodities."); *Bitfinex*, *supra* note 30, at * 5.

177. Commodity Futures Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213, 227-28 (E.D.N.Y. 2018).

178. *See id*. at 232.

179. *See id*. at 227-29.

180. *See generally id*.

stated position, a "commodity" under §1a(9), and subject to the CFTC's oversight, thanks to bitcoin futures?

CFTC v. My Big Coin Pay, Inc. asked a federal court to decide this very question: Did the virtual currency in question, a virtual currency called My Big Coin (MBC), come within the commodity definition by virtue of the existence of bitcoin futures and despite the lack of futures traded in MBC?[181] In *My Big Coin*, the CFTC alleged that the defendants had used false statements to induce customers to buy MBC and had invented and artificially changed the price of MBC to make it appear that MBC was being actively traded.[182] In response, the defendants pointed to the lack of MBC-specific futures to argue that MBC did not meet the statutory definition of commodity and that, as a result, the CFTC's authority did not reach their alleged conduct.[183] The CFTC replied that contracts for future delivery of virtual currencies existed—bitcoin futures—and that therefore the specific virtual currency MBC was a commodity.[184]

The court sided with the CFTC, giving CEA §1a(9) a dubious reading that threatens to render the commodity definition a nullity.[185] On the theory that the statute defines commodities by category rather than "by type, grade, quality, brand, producer, manufacturer, or form," the court reasoned that Congress intended the futures requirement to apply to general categories like "livestock."[186] In other words, if futures traded in one form of livestock but not another—swine, say, but not cattle—cattle would nonetheless qualify as a commodity on the basis of swine futures. With respect to MBC, the theory goes, futures contracts existed for the category "virtual currencies" by virtue of bitcoin futures and, as a specific example of a virtual currency, MBC qualified as a commodity as a result. This textual reading, however, proves both too little and too much. Too little, because the statute does not always speak categorically (surely "butter" and

181. Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492, 495-96 (D. Mass. 2018).

182. *Id.* at 494.

183. *Id.* at 496.

184. *Id.* at 496-97.

185. *See id.* at 496-98.

186. *My Big Coin Pay, Inc.*, 334 F. Supp. 3d, at 496-97.

"eggs" are "livestock products," yet the statute lists all three). Too much, because "virtual currencies," unlike "livestock," do not appear in the statute. Virtual currencies, as we have seen, must therefore fall under a catchall category like "goods." And, taking goods as an example, for reasons elaborated above, it cannot be that a futures contract in one good makes all goods commodities.[187] Instead, the statute means what it says: Only goods in which futures contracts are dealt are commodities; other goods are not.

The problem then becomes one of choosing a level of generality for the class of assets underlying the contracts for future delivery necessary to the commodity definition. "Goods" plainly is too broad a category. The *My Big Coin* court's chosen analogy (the best the "scant caselaw on this issue" had to offer) was natural gas.[188] In support of its holding that "virtual currency" is an appropriate category under §1a(9), the *My Big Coin* court cited cases holding natural gas to be a sufficiently narrow category for the definition.[189] Natural gas is an asset, like virtual currencies, not enumerated in §1a(9), and the cases cited by the court considered whether futures contracts in natural gas delivered at one location sufficed to bring natural gas delivered at another location within §1a(9)'s commodity definition.[190] But the outcome in those cases is as obvious there as it is unpersuasive here. As noted in the natural gas cases,[191] natural gas delivered at one location is fungible with natural gas delivered at another, and §1a(9) requires only that contracts for future delivery exist, not that they exist

187. *See id*.

188. *Id*. at 497.

189. *Id*. at 497-98.

190. *Id*. at 497 (internal citations omitted); United States v. Futch, 278 F. App'x 387, 395 (5th Cir. 2008); United States v. Valencia, No. Civ.A. H-03-024, 2003 WL 23174749, at *8 (S.D. Tex. Aug. 25, 2003), *vacated in part on other grounds*, No. CRIM.A. H-03-024, 2003 WL 23675402 (S.D. Tex. Nov. 13, 2003), *rev'd on other grounds*, 394 F.3d 352 (5th Cir. 2004).

191. United States v. Brooks, 681 F.3d 678, 695 (5th Cir. 2012) ("[I]t would be peculiar that natural gas . . . ceases to be a commodity once it moves onto some other locale. . . . [T]he actual nature of the 'good' does not change."); *Futch*, 278 F. App'x at 395 (finding "frivolous" the argument that natural gas is not a commodity when delivered to a location other than that specified in natural gas futures contracts, as the contractual specification of delivery "does not in any way limit the type of commodity in question, natural gas."); *Valencia*, 2003 WL 23174749, at *3, *8 ("All agree that natural gas is essentially fungible.").

everywhere the commodity is to be delivered. The level of generality makes sense—natural gas futures are natural gas futures, wherever the underlying gas is delivered—whereas a higher level of generality—extractive resources, say—would be less convincing. That is, the courts in the natural gas cases would more likely have rejected an argument that gold futures, or even oil futures, would have pulled natural gas into the commodity definition on the basis that all such assets are pulled from the ground. Nonetheless, the *My Big Coin* court found the analogy persuasive.

Virtual currencies are new and complex enough that they are still not well understood, making the appropriate level of generality difficult to determine. But there's no clear reason to think that bitcoin's categorization should bear decisively on that of other virtual currencies. Bitcoin itself is unlike any asset that came before it.[192] And while other virtual currencies may share some characteristics with bitcoin, typically in particular some aspects of their underlying technology, it has yet to be shown that their similarities warrant treating futures in bitcoin effectively as futures in all virtual currencies. Virtual currencies number in the thousands, have diverse designs and uses, and generally are not fungible among themselves.[193] If fungibility is the test, virtual currencies fail it. Fungibility aside, the variety among virtual currencies is at least as great as among extractive resources.[194] At a minimum, consistent with Congress's purpose in drafting §1a(9) in the manner it did, courts should ask whether a potential commodity has the potential to substantially influence the price of contracts for future delivery that are presently dealt in. This standard, it is worth noting, would have required the same

192. *See* Katie Szilagyi, s*upra* note 12, at 16 ("Bitcoins are something new: they have no physical analogues."). *See also* CFTC, Advisory with Respect to Virtual Currency Derivative Product listing, CFTC Staff Advisory No. 18-14 (May 21, 2018), [https://perma.cc/6R2W-Y6GE]
("Virtual currencies are unlike any commodity that the CFTC has dealt with in the past.").

193. *See* Goforth, *supra* note 12, at 1 (noting existence of "more than 2000 different active coins and tokens[,]. . . some . . . clearly . . . designed to serve [as] . . . currencies . . . , many . . . with additional functionality in mind."); *see also* Shakow, *supra* note 16, at 1, 6("[T]he rights and powers represented by these tokens are not uniform. As a result, there is no single answer as to how tokens should be treated for tax purposes."). *But see* Hazen, *supra* note 12, at 9 n.35 ("[C]rypto currencies clearly fall within the definition of commodity.").

194. *See supra* text accompanying notes 191-92.

outcome in the natural gas cases (that is, that natural gas is a commodity regardless of the place of delivery specified in the existing natural gas futures contracts), and in at least one of those cases the defendant was explicitly attempting to influence the futures markets through false reporting in the spot market.[195] It may be the case that virtual currencies generally also have this potential with respect to bitcoin futures,[196] but the point is that the variances among virtual currencies suggest that courts should consider the potential commodity status of each individual virtual currency. As we will see below, MBC is especially unlikely to have passed such a test.[197]

In *My Big Coin*, in addition to holding a fraudster accountable, the CFTC landed an additional blow to the limits of the commodity definition, adding another yard to the agency's creeping expansionist project. *My Big Coin* identified no principles for determining the appropriate level of generality, going forward, of a futures contract for a new class of assets to meet the commodity definition.[198] The holding contributes to the erosion of §1a(9) by leaving the door open for ever broader category claims, all but inviting the CFTC or private litigants to argue that every new "good" or "service" is automatically a commodity because contracts for future delivery trade in other goods and services. With bitcoin, as we have seen, the CFTC has long claimed—and in enforcement actions acted on the claim—that contracts for future delivery need only be conceivable for jurisdiction to lie; no futures need actually exist. In arguing that all virtual currencies,

195. *Brooks*, 681 F.3d at 684-85 (defendants violated CEA by attempting to manipulate natural gas spot market prices in order to affect prices of natural gas futures); *see also Futch*, 278 F. App'x at 390 (defendant attempted to manipulate natural gas spot market prices that also affect the price of natural gas futures contracts); *Valencia*, 2003 WL 23675402, at *3 (futures contracts prices established with reference to "point of departure" spot market index prices). To be clear, this standard would not require that the manipulative activity actually manipulate futures prices, only that it could. The manipulation of spot market prices is sufficient to violate the CEA and was so even before Dodd-Frank. 7 U.S.C. § 13(a)(2) (2010); 7 U.S.C. § 5 (2000).

196. *See, e.g.*, Carol Gaszcz, *Bitcoin Exhibits the Highest Correlation with Other Cryptocurrencies – Report*, THE BLOCK (March 21, 2019), [https://perma.cc/WUQ4-M8NC] (reporting correlation among prices of bitcoin and other virtual currencies and bitcoin's status as "the bellwether of the industry").

197. *See infra* text accompanying notes 218-220.

198. *See* Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc. et. al., 334 F. Supp.3d 492, 496 (D. Mass. 2018).

whatever their design, purpose, and function, are commodities merely by virtue of the existence of futures in bitcoin, the CFTC makes the same argument in a new form: When it comes to new assets like virtual currencies, the futures requirement is no requirement at all.

C. Virtual Currency and the CFTC's Case for Stand-Alone Anti-fraud Power

In addition to helping to blur limits in the commodity definition, virtual currencies have proven useful to the CFTC's efforts to expand its domain in the spot markets in another way. Specifically, *McDonnell* and *My Big Coin* gave the agency the opportunity to advance an expansive view of the Commission's power, following Dodd-Frank, to bring spot market fraud cases unconnected to its traditional realm of oversight, the futures and derivatives markets. Dodd-Frank's legislative history demonstrates that Congress had a narrower intent: to expand the CFTC's power to police and deter *manipulation*, including fraud-based manipulation, in the commodity spot markets.[199] Nonetheless, the language Congress copy and pasted from the Exchange Act is arguably broader than that intent and the CFTC and, more recently, several courts have read it to empower the prosecution of stand-alone fraud in addition to manipulation.[200] Fears that importing the SEC's §10(b) powers might unintentionally expand the CFTC's powers in unforeseen ways in fact had scuttled previous explorations of the idea, but intervening years and a financial crisis shunted those concerns aside.[201]

Whatever Congress's intent, when, in Dodd-Frank, Congress incorporated the language of §10(b) of the Exchange Act into the CEA in the form of CEA §6(c)(1), it opened the door for the CFTC to explore not only its new anti-manipulation powers but any others the language might arguably confer. CEA §6(c)(1)'s language, appearing under the title "Prohibition regarding manipulation and false information," is nearly identical to that

199. 156 CONG. REC. S5870, 5906, 5924 (daily ed. July 15, 2010).

200. *See, e.g.*, *My Big Coin Pay, Inc.*, 344 F.Supp. 3d at 499 ("[I]solated statements in the legislative history . . . suggest[ing] Congress was, perhaps, principally concerned with combating manipulation . . . are insufficient to overcome the broad language in the statute.").

201. *See* Verstein, *supra* note 52, at 463-64.

of Exchange Act §10(b) (titled "Manipulative and deceptive devices"):

CEA §6(c)(1):	IT SHALL BE UNLAWFUL FOR ANY PERSON, DIRECTLY OR INDIRECTLY, TO USE OR EMPLOY . . . IN CONNECTION WITH any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery . . . ANY MANIPULATIVE OR DECEPTIVE DEVICE OR CONTRIVANCE.[202]
Exchange Act §10(b):	IT SHALL BE UNLAWFUL FOR ANY PERSON, DIRECTLY OR INDIRECTLY . . . [T]O USE OR EMPLOY, IN CONNECTION WITH the purchase or sale of any security . . . or any securities-based swap agreement ANY MANIPULATIVE OR DECEPTIVE DEVICE OR CONTRIVANCE.[203]

Building on the statutory language "deceptive device," the SEC's rule implementing §10(b)—SEC Rule 10b-5—includes language addressing fraud.[204] When the CFTC promulgated regulations implementing its own new anti-manipulation authority, it walked through the door Congress had opened and modeled CFTC Rule 180.1 on SEC Rule 10b-5 and the wealth of case law interpreting it.[205] In adopting the rule, the CFTC noted that the U.S. "Supreme Court has interpreted [Exchange Act §10(b) to have been] . . . 'designed as a catchall clause to prevent fraudulent practices.'"[206] The CFTC saw no reason to interpret CEA §6(c)(1) differently. Presumptively aware of the Supreme Court's views, the thinking goes, Congress, by mimicking the language of the Exchange Act, must not have intended to limit the CFTC's authority to manipulative acts.[207]

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202. 7 U.S.C. § 9(1) (2010).

203. 15 U.S.C. § 78j (2010).

204. 17 C.F.R. § 240.10b5-1(a) (2020).

205. 17 C.F.R. § 180.1(a) (2020).

206. Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices; Prohibition on Price Manipulation, 76 Fed. Reg. 41,398, 41,399 (July 14, 2011) (to be codified at 17 C.F.R. pt. 180).

207. 76 Fed. Reg. at 41,399 n.10 (citing Morissette v. United States, 342 U.S. 246, 263 (1952)) ("noting that where Congress borrows terms of art it 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word.'").

The Exchange Act limits the SEC's anti-fraud authority in ways that the CEA does not similarly limit the CFTC's anti-fraud authority, and what limits potentially do exist the CFTC has set about undermining. The SEC can only prosecute fraud perpetrated in connection with a transaction in securities.[208] The CFTC similarly can only prosecute fraud perpetrated in connection with a commodity transaction, but, as we have seen, the CFTC has succeeded, thanks in large part to virtual currency, in stretching the already taut commodity definition so thin that it can arguably be draped over any "thing."[209] The final candidate for a meaningful limit on the CFTC's otherwise boundless power to prosecute fraud is the potential that the CFTC's anti-fraud authority is limited to fraud-based manipulation. This limitation makes structural and historical sense: The interplay between manipulation in the derivatives and cash markets is the traditional rationale for the CFTC's spot market enforcement powers, and the historical realm of the CFTC's authority is the futures and derivatives markets.[210] Fraud-based manipulation was also, for example, the manipulation prosecuted in the natural gas cases mentioned above.[211] Moreover, a contrary interpretation, at the extreme, would threaten to grant the CFTC "fraud jurisdiction over virtually every commodity sale imaginable, including everyday grocery purchases"[212]—a ludicrous result for a relatively small agency whose expertise and mandate centers on the vast and incredibly complex derivatives markets.

The CFTC itself, when it promulgated Rule 180.1 interpreting these new powers, recognized that some limit on them was appropriate:

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208. *See, e.g.*, Marine Bank v. Weaver, 455 U.S. 551, 556 (1982) ("[W]e are satisfied that Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud."). *See also*, Stassen, *supra* note 81 at 833 ("Even the SEC envied the CFTC" for the expansive definition of commodity.).

209. *See* Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc., 344 F.Supp. 3d 492, 496 (D. Mass. 2018); *see also supra* text accompanying note 198.

210. *See supra* text accompanying notes 38-40.

211. United States v. Brooks, 681 F.3d 678, 687 (5th Cir. 2012) (defendants reported false information regarding spot prices to manipulate index prices); *see also* United States v. Futch, 278 F. App'x 387, 390 (5th Cir. 2008); United States v. Valencia, No. Civ.A. H-03-024, 2003 WL 23174749, at *1 (S.D. Tex. Aug. 25, 2003).

212. *See* Defendant-Appellees Answering Brief at 2, Commodity Futures Trading Comm'n v. Monex Credit Co., 931 F.3d 966 (9th Cir. 2019) (No. 18-55815).

> [A]lthough CEA section 6(c)(1) and final Rule 180.1 give the Commission broad enforcement authority to prohibit fraud and manipulation in connection with a contract of sale for any commodity in interstate commerce, the Commission expects to exercise its authority under 6(c)(1) to cover transactions related to the futures or swaps markets, or prices of commodities in interstate commerce, or where the fraud or manipulation has the potential to affect cash commodity, futures, or swaps markets or participants in these markets. This application of the final Rule respects the jurisdiction that Congress conferred upon the Commission and fulfills its core mission and the purposes of the Act to protect market participants and promote market integrity.[213]

The CFTC understood its new powers as a supplement to its traditional authority. It would prosecute activity that threatened to disrupt derivatives markets or to affect the spot market price of a commodity. That is, the CFTC "expected" to honor congressional intent and the overall structure of the CEA by limiting its enforcement activity to manipulation or fraud related to futures or swaps markets or that has the potential, bearing in mind the interrelatedness of prices in the spot and derivative markets, to affect prices in the commodity markets.[214]

The CFTC did not meet its own expectations. As we have seen, in *McDonnell* and *My Big Coin*, the CFTC resisted one potential limit to its fraud power—the commodity definition—by advancing attenuated readings of the futures requirement in §1a(9)'s commodity definition. In *McDonnell*, the CFTC successfully exercised jurisdiction over bitcoin-related activity before the advent of contracts for future delivery of bitcoin in the

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213. Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41,398, 41,399 (July 14, 2011) (to be codified at 17 C.F.R. pt. 180).

214. As the CFTC suggests, these limitations track the CEA's findings and purpose. *See* 7 U.S.C. § 5 (2000). Manipulation, it is worth noting, is a grave concern in the virtual currencies markets. *See, e.g.*, Hazen, *supra* note 12, at 521-22 ("Virtual and crypto currencies are particularly ripe for manipulation."); *see also*, John M. Griffin & Amin Shams, *Is Bitcoin Really Un-Tethered?*, SSRN (Oct. 28, 2019), [https://perma.cc/24UV-5FBP] (finding support for the view that "price manipulation can cause substantial distortive effects in cryptocurrencies" and that virtual currency market prices "reflect much more than standard supply/demand and fundamental news").

United States[215] and, in *My Big Coin*, the CFTC undermined the futures requirement from a different angle, convincing a court that futures contracts in individual assets (bitcoin) satisfy the futures requirement for broad categories of assets (virtual currencies).[216] In those same cases, the CFTC also secured rulings adopting the Commission's evolved position that the CEA permits the CFTC to bring fraud cases absent any claim that the alleged fraud affected futures, swaps, or other prices.[217] First, in *McDonnell*, following a federal court's holding that CEA § 6(c)(1) only prohibits fraud connected to market manipulation,[218] the defendant asked the court to reconsider its motion to dismiss.[219] On reconsideration, the court upheld its order denying the motion and adopted the CFTC's position that § 6(c)(1) empowers the CFTC to prosecute fraud absent any claims of manipulation.[220]

Second, *My Big Coin* provides a particularly stark example of the distance the CFTC has traveled from its original position. Above we observed that, at the time of the *My Big Coin* decision, no contracts for future delivery of MBC existed.[221] The CFTC, logically then, did not allege that the fraud in question affected nonexistent MBC futures. Nor did it allege, more broadly, an effect on the bitcoin derivatives market or the spot market price of virtual currencies generally. The CFTC alleged simply that the defendants were defrauding buyers of MBC, whom they convinced to purchase MBC with misrepresentations regarding its uses and value.[222] The CFTC's concern in *My Big Coin* was not with the derivatives markets, or the integrity of or prices in the spot markets, so much as it was with protecting market participants bilked of their hard-earned money in the sale of a purported

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215. Commodity Futures Trading Comm'n v. McDonnell, 287 F.Supp. 3d 213, 217 (E.D.N.Y. 2018).

216. Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc., 334 F.Supp. 3d 492, 497 (D. Mass. 2018).

217. *Id*. at 498; *McDonnell,* 287 F.Supp. 3d at 229.

218. Commodity Futures Trading Comm'n v. Monex Credit Co., 311 F. Supp. 3d 1173, 1185-89 (C.D. Cal. 2018), *rev'd and remanded*, Commodity Futures Trading Comm'n v. Monex Credit Co., 931 F.3d 966 (9th Cir. 2019).

219. *McDonnell*, 321 F. Supp. 3d at 366-67.

220. *Id*. at 367-68.

221. *See* discussion *supra* Section III.B.; *see My Big Coin Pay, Inc*., 334 F.Supp.3d at 496-97.

222. *My Big Coin Pay, Inc*., 334 F.Supp. 3d at 494.

commodity. But the Commission's jurisdictional assertion appears to have gone farther afield than the already-contestable policing of stand-alone fraud: From the pleadings it is not clear that MBC itself existed.[223] In other words, not only was there no allegation that the defendants' fraud affected derivatives or spot markets, or that MBC was arguably not a statutory commodity; MBC also might not have been a commodity in the lay sense—a thing—at all.

In *McDonnell* and *My Big Coin*, the CFTC used virtual currency fraud as a testing ground for new theories about the breadth of the Commission's post-Dodd-Frank anti-fraud authority. Both cases batted away the limit that Congress and the CFTC itself expected to check the CFTC's fraud power—a broader effect on the markets that make up the CFTC's domain—but *My Big Coin* took that limit-breaching to an extreme. In *My Big Coin*, the federal derivatives watchdog seems to have prosecuted a fantasy, an invented product with no tangible connection to any of the markets the CFTC oversees or, for that matter, any existence in reality. To be sure, the fantasy was also a fraud, and defrauded investors deserve protection and recompense. But it's not clear how the prosecution of a fantasy with no connection to derivatives or spot markets "respects" congressional intent, furthers the CFTC's mission, or appropriately deploys its expertise. To make an absurd but telling comparison, would anyone worry that the fraudulent sale of horses with false horns as "unicorns" might affect the futures or spot prices of livestock? Would anyone believe that the CFTC might appropriately prosecute such sales? As described, that scenario in fact has more to tie it to the CFTC's area of authority than did MBC: it at least involves real horses.

IV. A VIRTUAL CURRENCY USE CASE

The powers the CFTC argued for in the virtual currency context have implications beyond virtual currency. From broad public assertions of jurisdiction over virtual currencies, to

223. *See, e.g.*, Amended Complaint at 8, Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc., 334 F.Supp. 3d 492 (D. Mass. 2018) (No. 1:18-cv-10077-RWZ) (listing among defendants' alleged misrepresentations defendants' claim that MBC "was a fully-functioning virtual currency that could be used to buy goods and services, and that was actively trading").

administrative actions exercising that jurisdiction over settling respondents, to successes in federal court, the CFTC lay and stepped from one steppingstone to another not merely to claim authority over virtual currencies, though those precedents of course further that goal. The CFTC was also establishing increasingly authoritative interpretations of the CEA's definition of "commodity," as well as its anti-fraud powers, for use in actions beyond the sphere of virtual currency. No doubt the CFTC was concerned with tackling fraud, and no doubt virtual currency's prominence in the news in recent years lent some cachet to the agency's actions, but these prominent and less challenging cases gave the CFTC a chance to work out its arguments and lay steppingstones deeper in the pond to reach bigger—and more sophisticated, wealthier, better lawyered—fish. Virtual currencies' intriguing novelty and complexity have made them a pliant tool for testing and expanding agency powers.

Section IV.A looks beyond the CFTC's early virtual currency actions to a non-virtual currency case in which the CFTC has built on the expansive theory of stand-alone fraud authority it tested and developed in the virtual currency arena. *McDonnell* and *My Big Coin* set the stage for a major win for the CFTC in the Ninth Circuit, which has helped to solidify the broad claims the agency made in those cases. Section IV.B concludes by widening the lens to reflect on an irony peculiar to virtual currencies: Virtual currencies, which arose in conscious contradistinction to the traditional financial system and aimed to evade government scrutiny and regulation, have so far ended up consistently augmenting the powers of U.S. regulators. The CFTC's use of virtual currency to put forward broad interpretations of its powers is not unique to the Commission; instead, it is an emerging trend in the story of bitcoin and virtual currencies generally.

A. Beyond Bitcoin: How the CFTC Has Begun to Build on the Expansive View of Its Anti-fraud Power Advanced in Virtual Currency Cases

Whether or not *McDonnell* and *My Big Coin* were appropriate cases from jurisdictional and resource-allocation perspectives for CFTC enforcement attention, from an institutional perspective they were of significant benefit. First, the CFTC secured wins

that, for their association with virtual currency, garnered press attention and that the CFTC could use to promote the agency.[224] Second, and more importantly in the long term, in the slow accretion characteristic of the common law, *McDonnell* and *My Big Coin* laid down the first layers of the foundation of the CFTC's new anti-fraud authority, unbound from both a meaningfully limited commodity definition and, significantly, from any connection to price manipulation.

In the short time since, the CFTC has already begun to build on this foundation. In July 2019, in *CFTC v. Monex Credit Co.*,[225] the Court of Appeals for the Ninth Circuit became the first U.S. Court of Appeals to squarely rule on the authority of the CFTC to bring spot market fraud cases absent any claim of price manipulation. As in *McDonnell* and *My Big Coin*, the CFTC did not allege that the purported fraud had the potential to impact prices in either the spot or derivatives markets. *Monex* differed from *McDonnell* and *My Big Coin* in that it involved not virtual currencies but precious metals, but the legal issue—the breadth of the CFTC's anti-fraud power in the spot markets—was the same.[226] And the Monex defendants, like the *McDonnell* and *My Big Coin* defendants before them, argued that the CEA did not empower the CFTC to bring stand-alone fraud claims.[227] The CFTC lost in the district court and appealed, and *McDonnell* and *My Big Coin* were decided while the appeal was pending. On appeal, the CFTC was able to point to *McDonnell* and *My Big Coin* to argue that the district court's limitation on the Commission's jurisdiction was

224. In the Enforcement Division's 2018 Annual Report, for example, the CFTC cited *McDonnell* as one of two cases representing its "significant trial victories during the past year." CFTC, 2018 ANNUAL REPORT ON THE DIVISION OF ENFORCEMENT, [https://perma.cc/3WT4-QYXU]; *see also, e.g.*, Gabrial T. Rubin, *Cryptocurrencies, Trading Scams Draw Increased Federal Enforcement,* WALL ST. J. (Oct. 5, 2018), [https://perma.cc/GCS4-ZVLF].

225. *See* Commodity Futures Trading Comm'n v. Monex Credit Co., 931 F.3d 966, 976 (9th Cir. 2019).

226. *Compare id.* at 996 *with My Big Coin Pay, Inc.*, 334 F.Supp. 3d at 494, *and* Commodity Futures Trading Comm'n v. McDonnell, 321 F. Supp. 3d 366, 366-67 (E.D.N.Y. 2018).

227. *Compare Monex Credit Co.*, 931 F.3d. at 969 *with My Big Coin Pay, Inc.*, 334 F.Supp.3d at 494, *and McDonnell*, 321 F. Supp. 3d at 366-67.

both "incorrect and an outlier."[228] The Ninth Circuit reversed the district court's order and, in an unprecedented ruling, permitted the CFTC's expansive assertion of power in the commodity spot markets.[229] How persuasive the appeals court found the virtual currency rulings, if at all, the decision does not make clear. But, at a minimum, *McDonnell* and *My Big Coin* gave the CFTC the chance to work out its expansive jurisdictional theories and two precedents to build upon.

The debate before the Ninth Circuit pitted a plain reading of the statute against a series of subtler, complex arguments from the defendants. In the end, the appeals court gave CEA §6(c)(1) an alluringly simple reading. Section 6(c)(1) prohibits the use of a "manipulative or deceptive device" in connection with the sale of a commodity.[230] In the Ninth Circuit's view, to read this prohibition to require fraud to have a manipulative effect would be to hold "that 'or' really meant 'and.'"[231] The statute "means what it says," the court wrote, and the authorization to prosecute "manipulative or deceptive" conduct empowers the CFTC to prosecute fraudulent practices whether or not those practices are also manipulative.[232] The defendants' counterarguments ranged from textualist (plain meaning requires a reading of the statute as a whole; the broad reading nullifies other provisions of the CEA) to intent-based (the legislative history confirms that §6(c)(1) limits the CFTC's power to fraud that has the potential to manipulate),[233] and a full treatment of these arguments is beyond the scope of this Article. But most forcefully the defendants warned that severing the CFTC's fraud power from manipulative effect would grant the Commission far-ranging enforcement authority, including potentially over everyday milk and egg purchases.[234] So dramatic a recalibration of governmental powers, the defendants pointed out, typically requires a more explicit statement from

228. Reply Brief of Appellant at 2, Commodity Futures Trading Comm'n v. *Monex Credit Co*., 931 F.3d 966 (9th Cir. 2019) (No. 18-55815).

229. *Monex Credit Co*., 931 F.3d. at 977.

230. *Id*.

231. *Id*. at 975-76.

232. *Id*. at 976.

233. *See* Defendant-Appellees' Answering Brief at 32-63, Commodity Futures Trading Comm'n v. Monex Credit Co., 931 F.3d 966 (9th Cir. 2019) (No. 18-55815).

234. *See id*. at 2.

Congress; Congress does not "hide elephants in mouseholes."[235] And the Ninth Circuit did not shy away from these seemingly absurd implications. While the appeals court made clear it did not decide that issue—it limited its ruling to the sale of leveraged commodities—it also disagreed with the *Monex* defendants that inviting the CFTC into the checkout line clearly would "amount[] to an elephant in a mousehole."[236] After all, the court noted, "[b]y its terms, § 6(c)(1) applies broadly to commodities in interstate commerce." Perhaps the statute means what it says.[237]

By adopting the CFTC's view of its own powers, the *Monex* court significantly bolstered the CFTC's burgeoning position, alongside the SEC, as one of the primary federal policers of fraud in the virtual currency markets. The positions the CFTC advocated in the virtual currency context gave it ground to stand on in *Monex*; *Monex* gives the CFTC new ground, going forward, to stand on in future virtual currency cases. No doubt this reciprocal, leapfrog building of precedent will continue. The CFTC and its leadership have made clear their intention to prosecute fraud in connection with the offer and sale of virtual currencies.[238] Emboldened by a win at the appellate level, the CFTC is likely to continue to step in to supplement the SEC's anti-fraud enforcement actions in the virtual currency markets, even in cases that are unlikely to have any effect, manipulative or otherwise, on the virtual currency markets generally.

The ruling also paves the way for the CFTC to bring claims of crypto-commodity insider trading. Until recently, the federal commodity laws were widely understood not to provide for the prosecution of insider trading,[239] and this made intuitive sense to many given the differences between securities and commodities

235. *Monex Credit Co*., 931 F.3d. at 977.

236. *See id*.

237. *Id*.

238. CFTC & SEC, JOINT STATEMENT FROM CFTC AND SEC ENFORCEMENT DIRECTORS REGARDING VIRTUAL CURRENCY ENFORCEMENT ACTIONS (2018) [https://perma.cc/D979-XCBN]; Jay Clayton & J. Christopher Giancarlo, *Regulators Are Looking at Cryptocurrency: At the SEC and CFTC, We Take Our Responsibility Seriously*., WALL ST. J. (Jan. 24, 2018), [https://perma.cc/K4YW-SBJY].

239. Verstein, *supra* note 52, at 463.

markets.[240] Recall, however, that Congress modeled CEA §6(c)(1) on Exchange Act §10(b), under which the SEC prosecutes not only fraud but also insider trading.[241] When the CFTC promulgated CFTC Rule 180.1, it had its eye on this aspect of the amended law, stating in its comments to the final rule that "trading on the basis of material nonpublic information in breach of a pre-existing duty . . . , or . . . trading on the basis of material nonpublic information that was obtained through fraud or deception, may be in violation of final Rule 180.1."[242] In September 2018, the CFTC also announced that it had established an insider trading "task force" and brought an insider trading case under CEA §6(c)(1) and CFTC Rule 180.1.[243] Private litigants, though not the CFTC, have already attempted to bring a virtual currency insider trading case under CEA §6(c)(1) and CFTC Rule 180.1.[244] *Monex*'s holding is a prerequisite for both types of cases going forward.

B. Digital Metal's Irony

Early claims that virtual currency was so innovative that it lay outside all existing laws and regulations have proven to be exactly wrong. Bitcoin, like Dodd-Frank, grew from the ashes of the 2008 financial crisis.[245] The architects of both Bitcoin and

240. *See, e.g.*, Matt Levine, *It's Hard to Be an Insider in Oil*, BLOOMBERG, (Oct. 24, 2018), [https://perma.cc/7HGJ-NGHD] ("Nobody has a fiduciary duty to oil. Oil has no insiders.").

241. *See, e.g.*, United States v. O'Hagan, 521 U.S. 642, 651-53 (1997) (trading securities on the basis of material, nonpublic information obtained in violation of a duty "qualifies as a 'deceptive device' under § 10(b)").

242. Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41,398, 41,4003 (July 14, 2011) (to be codified at 17 C.F.R. pt. 180).

243. Press Release, CFTC, CFTC Charges Block Trade Broker with Insider Trading (Sept. 28, 2018), [https://perma.cc/7833-DR9N].

244. *See* Berk v. Coinbase, Inc., No. 18-CV-01364-VC, 2018 WL 5292244, at *2 (N.D. Cal. Oct. 23, 2018) (dismissing insider trading claim on grounds that putative plaintiffs' spot market commodity transactions, absent transactions in futures contracts, is insufficient to confer private right of action under the CEA).

245. PAUL VIGNA & MICHAEL J. CASEY, THE AGE OF CRYPTOCURRENCY 13 (2015) ("Cryptocurrency's rapid development is in some ways a quirk of history: launched in the throes of the 2008 financial crisis, bitcoin offered an alternative to a system—the existing financial system—that was blowing itself up. . . . Within a few years, an entire counterculture movement formed around cryptocurrencies, and it has continued to revolve around them.").

Dodd-Frank meant to build a bulwark against future crises but did so using distinct tools and according to radically different philosophies. Dodd-Frank's drafters sought to avert future crises by way of regulation aimed at the supposed causes of the Great Recession.[246] Bitcoin and its progeny ostensibly rejected government intervention as part of the problem.[247] Dodd-Frank sought to restructure the financial system from within; Bitcoin sought to create a new one to replace it. In the decade since the financial crisis, virtual currency, celebrated as innovation existing outside the mainstream financial system and beyond the power of government regulation, has begun to be domesticated by both.[248] Not only have regulators rejected claims that virtual currency lies beyond the law's domain. They have also used virtual currency to stretch its borders. The great irony is that bitcoin and other virtual currencies, rather than resisting or escaping the traditional financial system and its regulation, are being used to expand regulators' powers.

This is true beyond the CFTC. In the securities context, for example, SEC Commissioner Hester Peirce has expressed anxiety that the SEC's approach to digital asset regulation to date has exhibited the tendency to stretch the borders of the SEC's domain. By issuing no-action letters to companies that, absent the black mark of virtual currency, no one would have thought might be issuing securities, the SEC, Commissioner Peirce worries, might be "broadening the perceived reach of our securities laws," rather

246. Underregulated derivatives markets, in particular derivates speculation outside of organized exchanges, were a primary cause of the crisis. Stout, *supra* note 44, *passim*. Dodd-Frank took aim at these causes specifically, *id*. at 4, but also granted the CFTC less-focused, broad new anti-manipulation powers. Abrantes-Metz et al., *supra* note 74, at 391-94.

247. DE FILIPPI & WRIGHT, *supra* note 12, at 205-06; VIGNA & CASEY, *supra* note 245, at 13. Satoshi Nakamoto, bitcoin's pseudonymous progenitor, infamously timestamped the first block in the bitcoin blockchain with a January 2009 headline: "Chancellor on Brink of Second Bailout for Banks." *Id*. at 62-63. Bitcoin began with a dig at the global financial system that seemed, at the moment of the timestamp, to be crumbling. *See id*. at 63.

248. *See, e.g.*, VIGNA & CASEY, *supra* note 245, at 27. This evolution recapitulates the early regulatory evolution of the internet. *See* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 505 (1999) ("Many believe that cyberspace simply cannot be regulated. Behavior in cyberspace, this meme insists, is beyond government's reach. The anonymity and multi-jurisdictionality of cyberspace makes control by government in cyberspace impossible. The nature of the space makes behavior there unregulable.").

than sketching their limits.[249] And it has been argued that the SEC's treatment of digital assets is expanding the definition of an investment contract, away from the nuanced *Howey* test and toward a "maximalist" approach that would find a security "wherever investors who cannot fend for themselves need information and protection."[250] We have seen some of the ways in which the CFTC is similarly laying jurisdictional claim to virtual currency even as the assets' awkward fit enables the CFTC to push out the boundaries of that jurisdiction. The CFTC has effectively taken what one commentator memorably called "a sector created by and for obsessively secretive cypherpunk libertarian cranks"[251] and transformed it into a tool for expanding the reach of the federal government.

Something about virtual currency is bewitching.[252] It's novelty and inscrutability are a Rorschach test. Anti-government types see it as an escape from a financial system beholden to incumbent banks and captured regulators. Regulators see in its irregular and shifting borders the substance of their regulation—a commodity, a security, money transmission. Virtual currency also garners media attention.[253] The pro se defendant in *McDonnell*, alive to this temptation, claimed that in settlement negotiations the CFTC warned him that "The judge should take an interest in this case because of recent cryptocurrency headlines."[254]

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249. Hester M. Peirce, Comm'r Sec. Exch. Comm'n, How We Howey (May 9, 2019), [https://perma.cc/4YRN-FL3H].

250. Hall, *supra* note 115, at 141. "And it is easy to find influential voices arguing that SEC regulation of the technology is both inappropriate and potentially destructive of legitimate commercial value." *Id*. at 138 (citing Token Taxonomy Act, H.R. 7356, 115th Cong. (2018)).

251. Max Read, *Facebook's New Competition: The U.S. Dollar*, N.Y. INTELLIGENCER (June 18, 2019), [https://perma.cc/92Y2-6MLB].

252. *See, e.g.*, Geoffrey F. Aronow, *Is the CFTC Becoming the National Fraud Police? The CFTC Goes All in on Policing Fraud in Virtual Currencies*, 38 No. 3 FUTURES & DERIVATIVES L. REP. NL 1, at 5-7 (referring to the "Siren Song of Virtual Currency" in connection with possibility that "the CFTC could be overstepping the bounds of its jurisdiction" in virtual currency cases).

253. When, for example, the CFTC released its annual enforcement report for the 2018 fiscal year, the Wall Street Journal's reporting led with the Commission's virtual currency efforts. Gabriel T. Rubin, *Cryptocurrencies, Trading Scams Draw Increased Federal Enforcement*, WALL ST. J. (Oct. 5, 2018), [https://perma.cc/U5YE-UCTC].

254. Declaration in Support of Motion to Dismiss at 1, Commodity Futures Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213, 224 (E.D.N.Y. 2018) (No. 18-CV-00361),

Headlines, in turn, attract voter and congressional attention, and such attention brings funding. Federal agencies have to justify their existence[255] and easy wins against pro se defendants in cases involving captivating subject matter are a quick contribution toward that goal.[256]

Of course, to be clear, none of this is to say the CFTC is somehow acting inappropriately or unexpectedly, or that the CFTC does not have an important role to play in the virtual currency markets. It's a bad law that expects a regulator to police itself, not a bad regulator. Clearly, the CFTC's anti-manipulation powers pre-Dodd-Frank were not up to the task. But if Dodd-Frank's amendments truly gave the CFTC the limitless fraud power it has been advocating for, the pendulum has swung too far in the opposite direction. The possibility of a federal agency's unfettered power over an area perfectly within the police power of the states[257]—run-of-the-mill fraud in connection with the sale of goods—starts to make bitcoin's "libertarian cranks" look like they have a point. More conservatively, overbroad enforcement powers can deter, or even lead to the mistaken prosecution of, legal activity,[258] which in a nascent technological industry can hamper innovation.[259] And the CFTC's resources arguably can be

adhered to on denial of reconsideration, 321 F. Supp. 3d 366 (E.D.N.Y. 2018), ECF No. 18-1 (No. 18-00361).

255. This is a two-edged sword. Claiming jurisdiction over an area makes an agency accountable for it. *See, e.g.*, *Aronow*, *supra* note 252, at 5-7 (noting "the political risk that, if a major fraud arises in an important commercial market, the Commission's overseers in Congress will hold it accountable for failing to root out misconduct occurring under its watch."). *But see* Hall, *supra* note 115, at 141 (noting risk that Congress will hold SEC accountable for failure to push the bounds of its enforcement authority).

256. *See, e.g.*, CFTC, 2018 ANNUAL REPORT ON THE DIVISION OF ENFORCEMENT 4, [https://perma.cc/4JNQ-E4G2] (devoting significant portion of annual report to virtual currency initiatives and victories). *See also CFTC Backgrounder*, *supra* note 100 (noting that "[t]he CFTC built into its 2018 Congressional budget request additional resources to strengthen its technological and econometric resources to support its ability to oversee virtual currency derivatives").

257. *Cf., e.g.*, Bond v. United States, 572 U.S. 844, 854 (2014) ("In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what we have often called a 'police power.'").

258. *See Mission, Vision, and Values*, CFTC, [https://perma.cc/H8T8-U6MB] (last visited Mar. 5, 2020).

259. *See, e.g.*, Hall, *supra* note 115, at 141 ("[L]abeling a digital asset a security for purposes of the federal securities laws is . . . effectively a death knell for the asset. . . .").

better used. With respect to an agency with fewer than 700 employees, specific expertise, and limited resources, the law should guard against the temptation to focus on blockchain buzzwords and easy, headline-grabbing wins against two-bit fraudsters, rather than on, say, the futures markets or the more than $400 trillion, systemically important swaps market the CFTC is charged with regulating.[260] Under the broad reading of the CFTC's anti-fraud authority, these resource-allocation decisions are left entirely up to the agency.

CONCLUSION

Just over a decade ago, a computer scientist (or scientists) calling himself (or herself or themselves) Satoshi Nakamoto released the Bitcoin protocol into the wild, ultimately attracting countless adherents around the world and sparking thousands of blockchain-based projects seeking to expand on aspects of Nakamoto's vision or technology or both. As virtual currency markets have grown and its uses have multiplied, regulators, courts, and academics have started to query how the law should treat virtual currencies, beginning with how it should classify them. The legal conversation's focus on classification has both produced and blurred the way in which the CFTC, alongside other government agencies, has capitalized on virtual currencies' legal and ontological uncertainty to chip away at restraints on its jurisdiction and build a foundation for broad interpretations of its power. In particular, settling defendants and unsophisticated, pro se defendants facing serious fraud allegations have lent themselves to rulings shoring up a reading of the CEA that would grant the CFTC potentially limitless power to police fraud. In its forays into the virtual currency space, the CFTC has successfully made the case that its authority no longer requires any connection to the derivatives markets: that a commodity is literally any "thing," regardless of whether futures contracts for that thing exist, and that any fraud committed in connection with the sale of that thing in interstate commerce, regardless of whether that fraud harms the commodity markets, falls within the CFTC's purview.

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260. *See* Abrantes-Metz et al., *supra* note 74, at 397-398; *Q+A: Swaps, the Ag Committee and a $400 Trillion Market*, REUTERS (Apr. 22, 2010).

This Article also uses virtual currencies to point the way forward toward fertile ground for future scholarship. Its method was to show how virtual currencies help expose unsettled questions of commodities law and how the CFTC has used virtual currencies to try to settle those questions with dubiously broad readings. Many of these questions remain unsettled. It remains to be seen whether virtual currencies represent rights or interests or are themselves goods, whether futures contracts dealt in on foreign boards of exchange satisfy the futures requirement, and how general a category of futures might satisfy the futures requirement for an asset not enumerated in the commodity definition. Future articles will need to explore the ramifications of the Ninth Circuit's holding that the CFTC has stand-alone anti-fraud authority in the commodity spot markets, whether the court rightly decided the case in the first place, and what other powers enjoyed by the SEC Dodd-Frank might have smuggled into the CEA. Finally, this Article leaves it to others to investigate the other ends to which the CFTC and other government actors are putting this strange new asset class.

The CEA's encounter with virtual currencies is not the first time the law has grappled with assets or circumstances that were unforeseeable at the time the law was drafted, and it won't be the last. Addressing unforeseen factual circumstances is one of the functions of the law. Novel assets provide regulators with an opportunity to push the limits of their powers, but they also provide courts and scholars with a new lens through which to view familiar statutes. As entrepreneurs continue to search for virtual currency's "killer app"—the use case that will demonstrate and ensure the innovation's success—virtual currency's novelty no doubt will continue to teach us new ways to read old laws.