

From Disclosure to Design: Constraining Endogenous Risk in Structurally Subordinate Tokens

Part II of II: The Token Continuity Framework Series

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ABSTRACT

Part I of this series argued that the dominant dual equity/token structure in crypto is economically equivalent to a ground lease: a deliberate bifurcation of ownership that structurally subordinates token holders unless affirmative legal protections are implemented. This Article accepts that structural account and asks the next question: what, exactly, is securities law trying to regulate, and how should token design respond? It argues that securities law is not primarily a disclosure regime but a regime concerned with control over the creation and allocation of economic risk after capital is committed. Where risk is endogenous to the issuer's continuing discretion, securities regulation applies regardless of what is disclosed. Applying this framework to tokens, the Article argues that the path to regulatory clarity runs not through disclosure or the elimination of rights, but through the structural constraint of discretionary risk—precisely the institutional move that leasehold mortgagee protection doctrine made in real estate finance. It proposes a tiered Token Continuity Framework drawing on that doctrine and situates the framework within the Digital Asset Market Clarity Act's emerging approach to token classification.

I. INTRODUCTION

In an earlier essay in this series, I argued that many crypto tokens are best understood not as equity analogues, but as structurally subordinate interests—closer to unprotected leaseholds than ownership stakes.¹ That framing resonated because it explained a familiar outcome—value flowing to equity rather than tokens—without relying on fraud narratives, disclosure failures, or technological exceptionalism. The problem is not misconduct. It is architecture.

This Article builds on that structural account. It asks a deeper and more consequential question: what, exactly, is securities law trying to regulate, and how should token design respond? The answer reframes the policy debate in a way that neither the disclosure school nor the decentralization school has fully articulated.

II. SECURITIES LAW AND CONTROL OVER RISK CREATION

Crypto policy debates often describe securities law as a disclosure regime. Disclosure matters, but that description is incomplete. At its core, securities law is concerned with who controls the creation and allocation of economic risk after capital is committed. This insight is developed most clearly in Dennis Corgill’s influential article, *Securities as Investments at Risk*, which shows that investment contract doctrine, note jurisprudence, and related tests converge on a single concern: whether risk is endogenous to the issuer’s future conduct rather than fixed ex ante.² Where risk is discretionary and endogenous to the issuer’s future conduct, securities regulation applies. Where risk is programmatically constrained or governed by settled market structures, it often does not.

This explains why equity interests are regulated even when risks are fully disclosed. Corporate managers retain residual discretion over value-relevant decisions: how assets are deployed, how governance evolves, whether dilution occurs, and whether an investment remains economically meaningful at all. Disclosure of that discretion does not eliminate the regulatory concern it creates.

By contrast, many non-equity instruments—commercial loans, asset-backed financings, and leases—escape securities treatment despite profit expectations. They do so not because investors are unconcerned with risk, but because the issuer’s ability to reshape that risk after the fact is constrained by legal structure. Disclosure does not solve the securities problem when discretion remains unconstrained.

III. TOKENS AND DISCRETIONARY RISK

Most crypto tokens today exhibit exactly the endogenous-risk feature that securities law is designed to address. Token holders typically lack enforceable claims on intellectual property, protocol continuity, governance outcomes, or revenue streams. Equity holders, foundations, or core developers often retain unilateral discretion to modify token economics, redirect value flows, dilute token supply, or abandon the token altogether.

These powers may be disclosed. They may even be widely understood. But they remain discretionary. From a securities law perspective, that means token risk is endogenous. Token value depends not solely on market forces, but on the continuing choices of a controlling group. Structural subordination—not deception—does the work.³

The regulatory problem is therefore not cured by better disclosure. An investor who fully understands that an issuer retains sweeping power to reshape token economics is still exposed to precisely the form of risk that securities law is designed to address. Understanding the risk is not the same as being protected from it.

IV. CONTROL-BASED DECENTRALIZATION AS A STARTING POINT

Recent policy discussions—most notably those influencing the Digital Asset Market Clarity Act—have centered on control-based decentralization as a way to distinguish tokens that should fall outside securities regulation.⁴ The intuition underlying this framework is sound. Where no identifiable party retains control over a system’s core value drivers, the classic concerns of

securities law recede. Importantly, this approach improves on earlier, more formalistic attempts to classify tokens based on labels or technical features.

At the same time, control-based decentralization can be generalized and strengthened by situating it within a broader institutional context. Control is not binary, and its regulatory relevance does not depend solely on whether it has been eliminated altogether. In many mature markets, subordinated interests coexist with ongoing control yet fall outside securities regulation because the creation of risk is constrained by enforceable structure rather than managerial discretion.

Seen this way, decentralization is best understood not as an endpoint, but as one mechanism among several for constraining endogenous risk. Full decentralization eliminates the regulatory concern by eliminating control. Structural constraint addresses the same concern by limiting how control can be exercised. Both paths lead to the same destination: risk that is rule-bound rather than discretionary.

V. HOW MARKETS CONSTRAIN RISK WITHOUT ELIMINATING CONTROL

Private law provides numerous examples of how markets accommodate structural subordination without requiring the elimination of control. Real estate finance is illustrative. Leasehold interests are inherently fragile. If a ground lease is terminated, the leasehold estate disappears entirely, wiping out both the tenant's equity and any third-party financing secured by the leasehold. Markets did not respond by denying that risk exists, nor by demanding fee ownership. Instead, they developed leasehold mortgagee protections: contractual and structural mechanisms that limit a landlord's ability to wipe out the leasehold interest after capital has been committed.⁵

These protections exist along a spectrum calibrated to lender risk tolerance:

Minimum protections — notice of default and cure rights, giving the leasehold lender an opportunity to step in before the ground owner acts.

Middle-market protections — non-disturbance agreements and step-in rights, preventing automatic extinguishment of the leasehold on default.

Maximum protections — replacement-lease rights, allowing the lender to obtain a new lease directly from the ground owner, preserving the collateral entirely.

None of these confer ownership, residual upside, or managerial control. Their function is narrower and more powerful: they convert discretionary termination risk into rule-bound enforcement risk. This institutional experience suggests a way to extend control-based decentralization beyond fully autonomous networks. Control can persist, yet securities-law concerns can diminish, when risk is structured ex ante through enforceable, market-recognized constraints.

VI. DISCLOSURE, DESIGN, AND THE LIMITS OF PROMISE-BASED FRAMEWORKS

Some industry proposals attempt to complement control-based decentralization with disclosure-centric safe harbors, arguing that tokens should avoid securities treatment so long as

issuers refrain from making promises of profit and provide transparency regarding risks. Disclosure plays an important role, but it cannot substitute for structure.

An issuer may fully disclose its ability to dilute tokens, redirect value, or render a token economically irrelevant, yet still retain unilateral power to do so. Understanding control-based decentralization as part of a larger design space helps clarify this limitation. Where decentralization removes discretionary power altogether, disclosure concerns recede. Where control remains, disclosure alone cannot neutralize endogenous risk unless accompanied by structural constraints that limit how that control can be exercised.⁶

VII. WHY “NO RIGHTS” IS NOT THE RIGHT OPTIMIZATION

A related line of argument suggests that tokens should confer no legal or economic rights at all, on the theory that the absence of rights avoids securities classification. This argument is understandable but mistaken. Eliminating rights does not necessarily eliminate regulatory concern; it may instead change the nature of the activity being regulated.

If a token provides no exposure to underlying economic activity—no claim, no governance participation, no structured relationship to enterprise performance—then price movements reflect pure market dynamics untethered from external economic risk. Legal scholarship addressing gambling regulation highlights this distinction by emphasizing risk creation rather than chance alone.⁷ Where transactions manufacture risk rather than allocate pre-existing economic risk, they fall outside traditional investment frameworks altogether and may attract a different category of regulatory concern.

The point is not that crypto tokens are gambling. It is that regulatory neutrality does not lie at the zero-rights extreme. Between discretionary enterprise risk and pure risk creation lies a well-developed domain of structured risk allocation. That is where token design should aim.

VIII. TOWARD A COHERENT POLICY FRAMEWORK

Once decentralization and disclosure are no longer treated as the only levers, a more coherent framework emerges across three categories of token project.

First, mature network tokens—where no identifiable party retains discretionary control over value drivers—appropriately fall outside securities regulation. The Digital Asset Market Clarity Act is directionally correct here.⁴

Second, consumer crypto applications—where teams retain control but risks are bounded and transparent—are better served by sandbox regimes than by full public-company compliance. The relevant question is not whether control exists but whether the form of control creates the kind of endogenous, discretionary risk that securities law is designed to address.

Third, and most importantly, the vast middle category—projects that issue tokens while retaining meaningful equity control over core infrastructure—requires a market-based token recognition framework. Tokens in this category are less likely to be securities when their risk is constrained *ex ante* through enforceable, market-recognized structures rather than managerial discretion. The Token Continuity Framework developed in this series provides a template for that constraint.

IX. THE TOKEN CONTINUITY FRAMEWORK

Drawing on leasehold mortgagee protection doctrine, the Token Continuity Framework proposes three tiers of structural protection calibrated to the degree of control retained by equity holders.

At the minimum tier, token holders or their designated representatives receive notice of material changes to token economics—including changes to supply, revenue routing, governance authority, or intellectual property licensing—and a cure period before those changes take effect. This tier imposes no obligation on issuers to refrain from change; it imposes only an obligation of process.

At the middle tier, issuers commit to non-disturbance: a structural undertaking not to take actions that would eliminate token utility or extinguish token economic relationships without providing transition mechanisms. This tier converts the issuer's discretion into a rule-bound obligation with defined exceptions and enforcement mechanisms.

At the maximum tier, issuers provide intellectual property continuity commitments: licensing arrangements that survive corporate restructuring, acquisition, or dissolution and that preserve the token's relationship to the underlying protocol regardless of changes in equity ownership. This tier addresses the most severe form of structural subordination—the complete extinguishment of the token's economic foundation through an equity-level transaction to which token holders are not parties.

None of these tiers confer equity-like rights. None guarantee token profitability. Their function is precisely that of leasehold mortgagee protections: to convert discretionary risk into rule-bound risk, making the token interest more legible, more stable, and more financeable.

X. CONCLUSION

The crypto industry's dominant choice—either decentralize completely or strip tokens of rights—is a false one. It forces policymakers into unstable outcomes and invites either over- or under-regulation.

The lesson from private law is direct: risk does not disappear when you disclose it. Risk is mitigated when you constrain it. Securities law regulates endogenous risk creation. Private law offers tested tools for constraining such risk without collapsing doctrinal boundaries. Importing those tools into token design is neither radical nor deregulatory. It is the ordinary work of law.

The Token Continuity Framework is elaborated in practitioner form in a companion white paper, *Token Continuity Framework: Designing Structural Protections for Token Holders Under Existing U.S. Securities Law*, where the tiered protection structure, 18-issue design taxonomy, theater-identification protocol, and no-action letter template are available for practitioner and policy use, as well as at tcframework.com.⁸

NOTES AND AUTHORITIES

1. David Kuhn, *Tokens Are Leases: Structural Subordination in Crypto's Dual Equity-Token Architecture* (Part I of II: The Token Continuity Framework Series) (Dec. 2025), available at SSRN, [https://ssrn.com/abstract=\[PART I SSRN ID\]](https://ssrn.com/abstract=[PART I SSRN ID]) (also available at tcframework.com).
2. Dennis S. Corgill, *Securities as Investments at Risk*, 67 Tul. L. Rev. 861 (1992).
3. Lukas Gruber & Ashley Kim, *The Bifurcation of Equity and Tokens in Cryptocurrency Markets* (2024).
4. Miles Jennings et al., *Control-Based Decentralization* (a16z Crypto, Mar. 13, 2025); Digital Asset Market Clarity Act of 2025, H.R. 3633, 119th Cong. (2025).
5. Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 13.6 (6th ed. 2014); Joshua Stein, *A Practical Guide to Ground Leases* (multi-part treatise).
6. Gabriel Shapiro, *Defining Decentralization for Law*, Medium (2023), <https://lex-node.medium.com/defining-decentralization-for-law-58ca54e18b2a>.
7. W.C. Bunting, *A Better Legal Definition of Gambling: With Applications to Synthetic Financial Instruments and Cryptocurrency*, 86 Alb. L. Rev. 257 (2022). This scholarship, which grounds the gambling/investment distinction in risk creation rather than chance alone, is directly relevant to the regulatory status of zero-rights tokens: a token that confers no structured relationship to underlying economic activity may create risk rather than transfer it, placing it outside traditional investment frameworks and potentially within a different regulatory category altogether.
8. The Token Continuity Framework is elaborated in practitioner form in David Kuhn, *Token Continuity Framework: Designing Structural Protections for Token Holders Under Existing U.S. Securities Law* (2026), available at SSRN, [https://ssrn.com/abstract=\[WHITE PAPER SSRN ID\]](https://ssrn.com/abstract=[WHITE PAPER SSRN ID]) (also available at tcframework.com), which provides an 18-issue design taxonomy across three protection tiers, a theater-identification protocol for distinguishing genuine structural constraint from cosmetic implementation, and a skeletal no-action letter template. The tiered protection structure and comparative leasehold analysis are also available for practitioner and policy use at tcframework.com. The framework does not constitute legal advice.

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APPENDIX: LEASEHOLD MORTGAGEE PROTECTIONS VS. TOKEN HOLDER REALITY

The following comparison is illustrative, not prescriptive. It does not propose mandatory token holder rights or equity-like protections. Its purpose is to show how mature markets address structural subordination through tiered, risk-based constraints on discretionary power and how similar logic could inform token recognition frameworks without recharacterizing tokens as equity or securities.

Nature of interest:

Leasehold: Subordinate leasehold estate under a fee owner.

Token: Subordinate economic interest under equity, foundation, or core developers.

Core risk:

Leasehold: Termination wipes out the leasehold estate.

Token: Discretionary changes can eliminate token utility or value.

Source of risk:

Leasehold: Landlord's enforcement discretion.

Token: Insider control over protocol, governance, and economics.

Baseline protection:

Leasehold: Notice of default and opportunity to cure.

Token: No notice before dilution or governance changes.

Continuity protection:

Leasehold: Non-disturbance prevents automatic wipeout.

Token: No continuity obligation.

Step-in rights:

Leasehold: Lender may assume or stabilize the leasehold.

Token: No stabilization mechanism.

Catastrophic risk mitigation:

Leasehold: Replacement-lease rights preserve the estate.

Token: No replacement or preservation concept.

Effect on control:

Leasehold: Owner retains ownership and control.

Token: Insiders retain full discretion.

Risk profile:

Leasehold: Discretionary risk becomes rule-bound.

Token: Risk remains endogenous.

Financeability:

Leasehold: Leasehold becomes financeable.

Token: Token value remains fragile.
