Public Investment as Constitutional Power and Accountability Challenge

Saule T. Omarova & Brian Richardson†

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INTRODUCTION

Almost ninety years ago, Congress passed a series of momentous statutes—including the Banking Act of 1935,[1] the Securities Exchange Act of 1934,[2] and the National Industrial Recovery Act of 1933[3] (NIRA)—that responded to a major economic crisis by structuring the system of regulation on which our modern financial system depends. Besides creating now-familiar regulatory agencies, Congress deliberately leveraged the power of other, more hybrid institutions, such as the Reconstruction Finance Corporation (RFC), to stabilize and, in so doing, remake the national economy. This New Deal apparatus of public oversight of, and participation in, economic markets grew out of a great national trauma: the speculative excesses of the Roaring Twenties, a spectacular stock market crash in 1929, and the Great Depression.

† Saule T. Omarova is the Earle Hepburn Professor of Law at the University of Pennsylvania, and Brian Richardson is Associate Professor of Law at Cornell University. We thank Aziz Huq, Adriana Robertson, and all participants in conferences and workshops at the University of Chicago and Cornell Law Schools.

1 Pub. L. No. 74-305, 49 Stat. 684 (codified as amended in scattered sections of 12 U.S.C.).

2 Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a et seq.).

3 Pub. L. No. 73-67, 48 Stat. 195, *invalidated in part by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

Today, we are living through the twenty-first century's version of the Roaring Twenties, with new speculative bubbles threatening to destabilize our complex financial markets. Of course, we now have a well-developed public apparatus to prevent the kind of systemic breakdowns that nearly destroyed the U.S. economy in the 1930s. Highly specialized and experienced regulatory agencies maintain this protective net on a national scale. We may have differing views of how well individual agencies fulfill their responsibilities, but it is undeniable that the sheer presence of the U.S. regulatory state fundamentally changes the context in which our economy works.

That public apparatus, however, is under a concerted legal attack. Both the scope of its regulatory reach and the principles of its operation are increasingly challenged on public law grounds.[4] In the fall of 2023, for example, the Supreme Court heard arguments on four constitutional propositions adopted by the Fifth Circuit that take aim at important parts of our system of financial regulation.[5] The central constitutional preoccupation of these recent cases is the idea of accountability. While the Court accepted only one of the Fifth Circuit's constitutional cavils, on the broadest view of the public law arguments made in these cases courts must scrutinize whether Congress's agency-governance and agency-financing choices have created a bureaucracy that is sufficiently accountable to the public.[6] In contrast to past skeptical

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4 *See* Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 17–31 (2017); Aaron L. Nielson, *Responses: Confessions of an "Anti-Administrativist"*, 131 HARV. L. REV. F. 1, 2 (2017) ("[T]oday's skepticism [of the administrative state] is not a 'passing craze.'" (quoting Metzger, *supra*, at 5)).

5 *See* Jarkesy v. SEC, 34 F.4th 446, 451, 459–61, 464 (5th Cir. 2022) (holding that Securities and Exchange Commission civil enforcement actions brought before administrative law judges violate the Seventh Amendment, and that Congress's delegation of discretion and limitation of the President's removal authority run afoul of the nondelegation doctrine and the separation of powers, respectively), *aff'd*, 144 S. Ct. 2117, 2127–34 (2024) (affirming the Fifth Circuit's Seventh Amendment analysis but declining to reach the nondelegation and removal arguments); Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau (*CFSA*), 51 F.4th 616, 638–40 (5th Cir. 2022) (holding that the Consumer Financial Protection Bureau's funding mechanism, which contemplates agency discretion to determine a "reasonably necessary" budget, 12 U.S.C. § 5497(a)(1), violates the Appropriations Clause, U.S. CONST. art. I, § 9, cl. 7), *rev'd*, 144 S. Ct. 1474 (2024).

6 The Fifth Circuit's treatment of the nondelegation and officer-removal questions in *Jarkesy*, and the appropriations argument in *CFSA*, all share a common focus on accountability. On this view, the problem with overly broad delegations is that "accountability evaporates if a person or entity other than Congress exercises legislative power." *Jarkesy*, 34 F.4th at 460. And the problem with removal restrictions is that the "President must have adequate power over officers' appointment and removal. Only then can the

moments, courts no longer defer to Congress's choice of means (e.g., independence, discretion, choice of personnel, and financing) in pursuing federal ends. Nor, it appears, will courts defer to agencies' putative expertise in filling in statutory gaps, or in deciding matters of great economic concern.[7]

How broadly does this new skepticism sweep? To some, the unfolding court drama is a reasonable judicial use of legal checks and balances for the purpose of reining in bureaucratic overreach by agencies that have grown unwieldy and dismissive of the private rights of the parties they regulate.[8] To others, the Court's recent turn is a disturbing pattern of overreach that is unilaterally reshaping institutions of U.S. government.[9]

Both perspectives, however, neglect a different, more complex and consequential problem. The federal government does not simply act upon the economy through regulation. It also collects taxes from private citizens, issues bonds widely held by private investors, awards money to public and private recipients, purchases privately produced products, contracts for privately delivered services, and partners with private entities to build or facilitate productive capabilities in certain economic markets—and it does these things at vast and market-making scales. The federal government, in other words, is not only a maker and enforcer of legal rules, but also a crucial economic actor in markets generally seen as spheres of private exchange. In myriad ways, these activities are indispensable to the smooth functioning of our complex economy. And the governance arrangements of the agencies that engage in these activities are intimately connected to their market-participating role.

Thus far, these activities have largely been left out of the constitutional debate about the limits of federal "interference" in the private sphere. A broad doctrinal settlement about the Commerce[10] and Spending Clause[11] powers, which also dates to the New Deal,

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People, to whom the President is directly accountable, vicariously exercise authority over high-ranking executive officials." *Id.* at 463 (citation omitted). Finally, modern funding mechanisms may not be permissible because more particular "appropriations are required to meet the Framers' salutary aims of separating and checking powers and preserving accountability to the people." *CFSA*, 51 F.4th at 640.

[7] *See infra* note 49 and accompanying text.

[8] *See, e.g.*, Nielson, *supra* note 4, at 9–11.

[9] *See, e.g.*, Metzger, *supra* note 4, at 19–28.

[10] U.S. CONST. art. I, § 8, cl. 3.

[11] U.S. CONST. art. I, § 8, cl. 1.

amply confers power on Congress to legislate about such things.[12] The focus of the heated legal battles to date has been on the more traditional *regulatory* schemes, such as the rulemaking initiatives of the Environmental Protection Agency (EPA) or the Securities and Exchange Commission (SEC).[13] But these battles also raise deeply unsettling questions about what might happen if, or when, courts start using their power to interpret constitutional provisions to incapacitate the federal government not only as a rule maker but also as a market participant. If courts embark on this project, will it culminate in judicial supervision of the basic structures of the modern economy?

To be sure, U.S. constitutional law expressly recognizes the distinctive nature of the state's market-participatory role. At the hazy outer bounds of the Commerce Clause—the Dormant Commerce Clause, for example—the Supreme Court has modified its doctrine for states acting as ordinary "market participants."[14] But no such distinction is usually necessary in federal constitutional law, because the government's capacity to act in markets in pursuance of constitutionally authorized ends is a well-settled truism of modern constitutional law.

Public investment is one such area that has a well-settled pedigree in our public law, but it must now be named and protected in the current skeptical moment. Public investment is an

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12 *Cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536–38 (2012) (summarizing the Court's "permissive" reading of the Commerce, Spending, and Necessary and Proper Clauses); United States v. Butler, 297 U.S. 1, 65 (1936). We do not focus on the Spending or Commerce Clause settlements, though both issues were hard fought during this period. In the case of the Tennessee Valley Authority (TVA), both issues were litigated along with the nondelegation doctrine. *See* Brief for the Respondent Administrator at 89–98, 144–70, Ala. Power Co. v. Ickes, 302 U.S. 464 (1938) (Nos. 84 & 85). As we explain, the Court accepted the constitutionality of the government's substantial interventions in these areas en passant: having settled the basic constitutionality of the New Deal program in more famous canonical cases about the Spending and Commerce Clauses, the vigorous constitutional fight over the agency arrangements of the TVA and the RFC was silently consigned to history. *See infra* Part II. But before this settlement, these constitutional battles were centerpieces of public law litigation to prevent governmental participation in the private economy—indeed, *Schechter Poultry*, perhaps the most famous and canonical nondelegation case, concerned the same statute that underpinned the TVA and RFC programs. *See infra* notes 82–83 and accompanying text.

13 *See, e.g.*, Sackett v. EPA, 143 S. Ct. 1322, 1341 (2023); *Jarkesy*, 144 S. Ct. at 2137–38. On the tendency of constitutional discourse to focus on the idea of government as a rule maker, to the exclusion of many other modes in which the government functions, see EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 1–12 (2005).

14 Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 339 (2008) (quotation marks omitted) (quoting Reeves, Inc. v. Stake, 447 U.S. 429, 436 (2008)).

inherently hybrid area of state action. It straddles the line between public administration and private markets, striving to fulfill democratically determined goals through the means of economic exchange. Acting as investors—and sometimes, acting only as investors—government entities can shape and guide private markets. By negotiating and transacting with businesses seeking capital, rather than by using traditional rulemaking and enforcement tools, agencies can often achieve their public goals faster and more effectively. Multiple Congresses have chosen this route, often using hybridized government corporations, to better effectuate national policy.[15] And when Congress decides that the state should participate in markets, it is interested in ensuring that its managers have the necessary discretion, competence, and powers to succeed in the market.

It is critical to examine the nature and functions of public investment as a unique form of public power now, as the United States faces unprecedented economic, environmental, and political challenges. The converging effects of global climate and health disasters, inequality, technological disruption, and increasing geopolitical rivalries demand a coordinated, large-scale policy response. This in turn requires coordinated, large-scale, long-term capital investment that cannot be provided privately. Thus, industrial policy became the centerpiece of the Biden administration's economic program.[16] In the Inflation Reduction Act of 2022[17] and the CHIPS and Science Act,[18] Congress allocated billions of dollars to fund an ambitious program of restoring the U.S. domestic manufacturing and technological base.[19]

The success of the emerging new U.S. industrial policy ultimately depends on how consistently and effectively it is implemented. Even the largest one-off disbursements are insufficient to fund a sustained effort to rebuild the economy on a new technological and social foundation. To have long-lasting impact, industrial

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15 *See, e.g.*, Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (codified at 39 U.S.C. § 101 et seq.) (creating the United States Postal Service); Employee Retirement Income Security Act of 1974, Pub. L. No 93-406, 88 Stat. 829 (codified at 29 U.S.C. § 1001 et seq.) (creating the Pension Benefit Guaranty Corporation).

16 *See Bidenomics Is Working: The President's Plan Grows the Economy from the Middle Out and Bottom Up—Not the Top Down*, THE WHITE HOUSE (June 28, 2023), https://perma.cc/NJU2-3MTZ.

17 Pub. L. No. 117-169, 136 Stat. 1818 (codified in scattered sections of 23, 26, 30, 42, and 43 U.S.C.).

18 Pub. L. No. 117-167, 136 Stat. 1366 (2022) (codified as amended in scattered sections of 15, 26, and 42 U.S.C.).

19 *See* Inflation Reduction Act §§ 21001(a)(1), 22001, 136 Stat. at 2015, 2018; CHIPS and Science Act § 102(a)(2), 136 Stat. at 1372.

policy goals and mechanisms must be firmly embedded in the ongoing process of generating and allocating the nation's capital. Establishing structural linkages and institutional nodes for reproducing these commitments and mechanisms is a critical element of making industrial policy stick.[20]

To date, however, there has been no appreciable progress in that direction. The United States has no federal institution with a mandate to finance and implement a comprehensive developmental strategy over the long run. Public-investment choices remain largely invisible, wrapped inside fiscal policy and public budget management. To a large extent, this is a legacy of an ideology of free-market supremacy that faded from reasonable legal and economic discourse but achieved prominence in our politics. Overcoming this entrenched legacy is a complex undertaking. The current judicial assault on the administrative state can potentially make it even more complicated.

In this context, the project of creating an effective institution of public investment, able to carry out an effective long-term industrial policy, raises two closely related but conceptually separate challenges. First, it requires a skillful and creative use of institutional design techniques to craft an entity capable of adequately managing the dynamics of today's sophisticated financial markets. Second, it requires a clear understanding of the constitutional basis for the federal government's authority to carry out investment activities. Because so many recent skeptical developments in courts' supervision of the administrative state turn on a set of intuitions about the importance of the accountability of agencies to the public, the second inquiry must be informed by the first.

This Essay addresses both issues in an integrated manner. Overcoming traditional disciplinary boundaries, we offer a way of thinking about public-investment institutions as creatures of both public law and private markets. Placing public investment—a distinct public function—in the context of constitutional debates on the legitimate reach of the administrative state, we focus the search for legitimate institutional structure on the interaction between the entity's *efficacy* as a market actor and the concept of public *accountability*. This tension, as well as synergy, is where the fundamental hybridity of public-investment institutions is most visible.

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[20] *See* Saule T. Omarova, *Finance as a Tool of Industrial Policy: A Taxonomy of Institutional Options*, *in* INDUSTRIAL POLICY 2025: BRINGING THE STATE BACK IN (AGAIN) 29, 36–37 (Roosevelt Inst. ed., 2024) [hereinafter Omarova, *Industrial Policy*].

We begin by examining the U.S. historical experience with creating powerful public-investment institutions. The two principal examples are the New Deal era's RFC and the Tennessee Valley Authority (TVA). We argue that this institutional experiment resulted in a constitutional settlement that carved out a distinct legal space for public investment. In subsequent decades, this constitutional settlement gradually faded from public memory, as the government contracted its investment activities. Congress—still exercising its robust powers under the New Deal settlement—legislated to increase the accountability of public-investment initiatives, but it also curtailed them. This retrenchment, however, reflected ideological and policy drift rather than the abandonment of the underlying constitutional settlement.

Recovering this forgotten public-investment settlement is especially important today, as the U.S. government expands its arsenal of potential investment strategies in pursuit of developmental goals. While most public investment currently flows through traditional fiscal policy channels, as congressionally authorized grants and loans disbursed by federal agencies, this is not the sole, or the most effective, method of achieving economic policy objectives.[21] A well-established mode of public investment involves various public entities "derisking" private investment by absorbing privately unpalatable financial risks in a more targeted and direct manner. Typical examples include public market actors purchasing private companies' debt on favorable terms or taking first-loss tranches in projects cofinanced with private investors. To move beyond pure derisking, the government can also charter stand-alone public-investment institutions to finance industrial policy objectives, even in competition with private market incumbents.[22]

These institutional choices reveal the complex, nonlinear meaning of democratic accountability in the context of public investment. An agency's public-investment decisions are utterly different from its rulemaking and enforcement decisions. Accordingly, what may be an accountable choice for one kind of action may well be irresponsible for the other. The most salient

[21] *See id.* at 30–35 (examining various institutional forms for organizing public investment).

[22] *See* SAULE OMAROVA, BERGGRUEN INST., THE NATIONAL INVESTMENT AUTHORITY: AN INSTITUTIONAL BLUEPRINT 17–19 (2022) [hereinafter OMAROVA, NATIONAL INVESTMENT AUTHORITY] (outlining a proposal to create a National Investment Authority as a full-service public-investment institution).

principal-agent concerns, expressed partially by the recent nondelegation and major questions doctrine cases, will differ depending on the chosen investment mode. The government agency that offers cheap loans to entice private industry to build a dam is undertaking a different task than the agency that builds and operates the dam itself; it is different from an agency that licenses and sets rates for dam operators; and it is different from the agency that buys or guarantees dam-building firms' securities. What will make each agency accountable to the American people and loyal to Congress's policy goals will vary. It is impossible to predict with confidence whether any of the constitutional theories about agency government advanced by courts in recent years will be brought to bear on public investment, or whether the contours of public investment will instead remain the object of policy debate and disciplined by the politics of Congress. We are concerned that it is becoming increasingly easy to articulate a major questions, nondelegation, antideference, or unitary-governance-oriented constitutional attack on public investment. If successful, such an attack could have disastrous consequences. We argue that only by considering the unique objectives and tools of public investment as a legitimate sovereign activity can we design workable mechanisms of democratic accountability for public-investment institutions. We hope that our observations shed light on the broader debate about the optimal implementation mechanisms for the nation's reemerging industrial policy.

I. THE POWER OF PUBLIC INVESTMENT: CONCEPTUAL FRAMEWORK

Public investment is a hybrid government activity in which a public entity participates directly in private markets to pursue public ends. For purposes of our analysis, we define "public investment" as programmatic deployment of public money to finance economic activities and projects consistent with specific industrial policy goals. It is distinct from regulation insofar as it involves operating directly inside financial markets through traditional market means, including through chartering hybrid public-private institutions. It is also distinct from high-level monetary policy insofar as it entails a more selective allocation of capital to specific economic sectors and projects. The goal of public investment is not merely to move public funds from the government's accounts into the hands of nongovernmental market participants, as in typical procurement decisions, but to leverage the public's

financial resources to shape the composition and trajectory of the nation's economy.[23]

Because federal public-investment programs are often of great magnitude and affect large incumbent economic actors, they have many times been the subject of intense constitutional controversy.[24] The sites of controversy over public investment are about our constitutional structure. After all, our federal government is one of limited powers, enumerated by the U.S. Constitution and divided among three branches of government. The Constitution is also thought to embody a set of principles—uncontroversial in the abstract but vexed in application—that bear on structural constitutional law disputes: these principles include federalism, the distribution of power between federal and state governments, and the separation of powers between the three branches.

In practice, however, the government conducts a much broader range of sovereign activities than those enumerated in the Constitution. Because every governmental activity must be traced to an enumerated grant of power, and because some of those activities must be justified by implication, much of the work of modern government is sanctioned by authoritative interpretations. Inevitably, as the government's to-do list became more complex, the interpretive connections between the Constitution's enumerated grants of power and real-life applications have become more elaborate. With this growing interpretive complexity, the governance tools that Congress uses to manage the execution of its laws have also multiplied.

To say that much modern governmental activity depends on complex interpretations of the Constitution, and that such interpretations presuppose ambiguity in the text, is not to say that the Constitution is immaterial. The nature and the purpose of the government's activity are crucially important to understanding which constitutional arguments become plausible over time and which remain too "off the wall" to license government action.[25]

Some governmental activities are plainly within the exclusive domain of the federal government, and their constitutional justification is trivial. When Congress and the President pursue

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[23] Of course, the government can, and often does, use its power as a buyer of goods and services to shape or support certain markets. That, however, is not the defining rationale for, or the primary driver of, procurement as a government function.

[24] *See infra* Part II.

[25] Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/.

national defense or foreign affairs, for example, the government provides critical public goods and services that could not be provided privately. Thus, the Department of Defense plans, produces, procures, owns, and manages a wide range of assets, technologies, and infrastructure—all of which are plainly legitimate efforts to provide for a common defense. Yet other governmental activities are hybrid, in the sense that both public and private actors could provide them. As these activities inevitably trench on the concerns of private actors who can bring their grievances to federal court, they typically face demands for a constitutional accounting.[26]

Historically, constitutional fights over hybrid public-investment activities have raised two related questions: whether these programs fall within the federal government's powers and whether their usual mode of administration offends separation-of-powers norms like accountability.

Consider the public power to guarantee private financial exchanges and money creation—what has been called "the finance franchise."[27] Though these activities are distinct from public investment, the constitutional battles over Congress's power to charter a national bank foreshadowed multiple subsequent episodes of constitutional litigation.[28] It was in connection with the constitutionality of chartering the Second Bank of the United States that the Supreme Court explained that "there is no phrase in the [Constitution] which . . . excludes incidental or implied

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[26] For example, recent challenges to the Federal Reserve (or the Fed) are consistent with a long arc of struggle over the legitimacy of the federal government's activities that are neither entirely sovereign nor entirely private—and, in that sense, hybrid. The Fed fulfills fully sovereign functions—safeguarding monetary policy and stability—via private and direct participation in financial markets. This inherent hybridity of the central bank's mode of operation explains why the Fed does not fit neatly into the typical image of a federal agency, and why there is such a range of diverging views on its legitimacy. *Compare* Carola C. Binder & Christina P. Skinner, *The Legitimacy of the Federal Reserve*, 28 STAN. J.L. BUS. & FIN. 1, 10–26, 36 (2023) (collecting concerns about the Fed's legitimacy, contending that public self-restraint confers "de facto" legitimacy and that "if the Fed adopts new goals that require a stretched interpretation of its mandate, like mitigating climate change or inequality, such new policy action could erode the three conditions of its ongoing legitimacy"), *with* PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 155–56 (2016) (recounting criticism of the Fed as an undemocratic and illegitimate institution).

[27] Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1216–17 (2017).

[28] During the national bank controversy, a significant portion of the constitutional argument concerned whether Congress could *incorporate* a national bank. The Court famously insisted that too narrow of a construction of the Constitution's Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, would "almost annihilate[ ] th[e] useful and necessary right of the legislature to select its means." *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 419 (1819).

powers; and which requires that everything granted shall be expressly and minutely described."[29] In one of the most famous rulings in the constitutional canon,[30] Chief Justice John Marshall explained that the Constitution only marks "great outlines" but leaves to future generations the task of enacting "the minor ingredients" necessary to bring about the Constitution's great ends.[31] The "happiness and prosperity of the nation" hangs on the "due execution" of those great powers, and thus the Constitution must be read to provide "ample means for their execution."[32] The Constitution's flexibility in this regard, Chief Justice Marshall held, allowed the legislature to "adapt[ ] to the various crises of human affairs," and would allow the Constitution to "endure for ages to come."[33]

The struggle to charter a predecessor institution to a modern central bank is but one of many episodes of constitutional politics concerning the idea of public investment, in a broad sense.[34] Another watershed moment, discussed below, was public law litigation over the federal government's power to charter agencies that would participate in, and thus affect and even replace, distressed private markets during the Great Depression.[35]

The Supreme Court's acceptance of robust federal power to regulate interstate commerce during the New Deal is not usually remembered for its distinctive treatment of public investment. This period of the Court's jurisprudence is canonically understood to abandon the right to freedom of contract[36] and to expand

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29 *McCulloch*, 17 U.S. (4 Wheat.) at 406.

30 *See* SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR, REVA B. SIEGEL & CRISTINA M. RODRIGUEZ, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 11–72 (8th ed. 2022) (opening the casebook with a retelling of the constitutional fight over the chartering of the First and Second National Banks).

31 *McCulloch*, 17 U.S. (4 Wheat.) at 407.

32 *Id.* at 408.

33 *Id.* at 415 (emphasis omitted).

34 Literature on the two National Banks is voluminous, but a useful introduction to its canonical reception is LEVINSON ET AL., *supra* note 30, at 25–72. We do not suggest that the National Bank controversy and the debate over the modern Federal Reserve are analogues; we instead note that the tendency of the government to pursue wide-scale economic initiatives has often occasioned great constitutional controversy and canonical settlements about structural provisions of the Constitution.

35 *See infra* Part II.

36 *See, e.g.*, Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 446–47 (2011) (describing Justice Oliver Wendell Holmes's dissent in *Lochner v. New York*, 198 U.S. 45 (1905), as "opposition to the recalcitrance of the judicial conservatives who frustrated Progressive Era social legislation and a significant part of President Franklin Delano Roosevelt's economic recovery agenda"); David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 373–74 (2003) (describing *Lochner* as emblematic of an era "in which

Congress's power to regulate interstate commerce to include otherwise local activity. Thus, on the Supreme Court's telling, in the mid-1930s, the Court began to disregard its prior "philosophy" that construed "the due process" right "so broadly [ ] that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."[37] That "due process philosophy," the story goes, had been wielded to prevent state regulation that "fix[ed] prices, wages, and hours,"[38] and to foreclose statutes arbitrarily favoring some classes of workers over others.[39] During the New Deal period, by contrast, the Court "consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs . . . ."[40] Similarly, this period is often invoked for the idea that "even if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[41] These canonical descriptions of what changed during the New Deal reappear frequently, including in major opinions issued during the last two Supreme Court terms.[42]

What seems to go largely unremarked, however, is that during this period, the Court also decided a special line of cases that recognized an altogether different mode of sovereign participation in markets. The issue presented by these cases was not the regulation of small private businesses—the familiar "constitutional doctrine[s] . . . used to strike down laws fixing minimum wages and maximum hours in employment, laws fixing prices, and laws

the Supreme Court invalidated nearly two hundred social welfare and regulatory measures" on the basis of the right to freedom of contract).

37 Lincoln Fed. Lab. Union No. 19129 v. Nw. Iron & Metal Co., 335 U.S. 525, 536–37 (1949).

38 *Id.* at 536.

39 *See* Greene, *supra* note 36, at 420–21 (recovering the class-legislation dynamic of the *Lochner* canon).

40 *Lincoln Union*, 335 U.S. at 536 (describing the abandonment of freedom-of-contract cases, including *Lochner*).

41 Katzenbach v. McClung, 379 U.S. 294, 302 (1964) (quotation marks omitted) (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).

42 *See* Sackett v. EPA, 143 S. Ct. 1322, 1351 (2023) (Thomas, J., concurring) ("In the New Deal era, as is well known, this Court adopted a greatly expanded conception of Congress' commerce authority by permitting Congress to regulate any private intrastate activity that substantially affects interstate commerce, either by itself or when aggregated with many similar activities."); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 (2022) (describing the error of *Lochner* as "freewheeling judicial policymaking").

regulating business activities"[43]—or mine-run adjudication by a nascent administrative bureaucracy. Instead, the central issue was whether it was within the national legislative power to charter agencies to take a direct role in private economic exchange in service of public ends. The intense dispute over this core idea was fought using several doctrinal conceits—the nondelegation doctrine, the Commerce Clause, the Spending Clause, and others—but public investment was the thing on the docket.

As explained below, the constitutional contest over the administration of public investment was finally settled during the New Deal, though largely in silence and in the afterglow of seminal decisions about the breadth of the Commerce, Spending, and Due Process Clauses.[44] Notwithstanding a multipronged attack that included the use of a newly minted nondelegation doctrine to oppose the government's power to undertake public investment, the Court determined that creating hybrid agencies with broad discretion to pursue a federal public-investment program was within the powers held by Congress. The norms of accountability and efficiency were issues of intense concern throughout this period, but the crucial outcome was that the prerogative of making the right set of policy judgments about public investment was for Congress, not courts. The basic public-investment settlement of the New Deal moment was not just about policing intrusive governmental regulation of small concerns—quotas for poultry or wheat production, for example[45]—but also about recognizing the role of the government in the market qua market participant.

This original settlement continues to form the constitutional foundation for the U.S. government's performance of an increasingly critical role in managing and financing the nation's economy. For important public purposes, modern-day federal agencies routinely act in multiple markets in service of the national wellbeing.[46] Currently intensifying geopolitical competition and domestic economic demands further heighten the need for an

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[43] *Lincoln Union*, 335 U.S. at 535.

[44] *See infra* Part II.A–B.

[45] We advert here to two famous precedents that bookend the Court's "switch in time": *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935), which struck down a program on nondelegation grounds, and *Wickard*, 317 U.S. at 123–25, which permitted Congress to regulate activities with indirect but, when aggregated, substantial economic effect on interstate commerce.

[46] For example, the Fed's asset purchases are precisely the kind of hybrid public-investment activity that requires a nuanced approach to constitutional analysis. As noted below, late constitutional fights over the Fed, which borrow from administrative law debates, have difficulty squaring the public-private hybridity of its functions and how those functions can attend to the goals of accountability and efficacy. *See infra* note 172.

all-government, federal public-investment policy that is accountable, effective, and democratic.

Yet, despite the recent resurgence of interest in public investment as part of the reemerging industrial policy, the unique public law history of public investment—which once faced and overcame skepticism about its constitutional legitimacy—has not, to our knowledge, been the object of recent scholarly analysis. Many canonical receptions of this period, traceable not so much to the New Deal but rather to a mid-twentieth-century consensus about what was settled back then,[47] focus on the persistence (or not) of freedom of contract and the breadth (or not) of the federal power to regulate directly local economic concerns notwithstanding their attenuated nexus to interstate commerce.[48] These canonical receptions do not focus on the distinctive constitutional puzzle of how governments should ensure meaningful democratic accountability in public investment.

Today, the general permissibility of government intervention in markets is under renewed judicial scrutiny. While not yet reopening the first-order constitutional question—whether public investment falls within the Commerce or Spending Clause powers—courts are reopening crucial questions of institutional design. Using various doctrinal vessels, courts are increasingly revisiting how federal powers may be administered and how much discretion Congress has to set institutional design.[49] Although this renewed scrutiny is framed in terms of policing "accountability," its practical implications may be just as grave as an outright narrowing of the federal power to undertake publicly necessary investment.

Given what is at stake, it is vital that we develop an adequate understanding of public investment as a unique, highly

47 *See* Greene, *supra* note 36, at 421 (noting the tendency to treat the "repudiation of *Lochner*" as "a lodestar for how the Court should adjudicate rights within a post-New Deal, pluralist constitutional order").

48 *See id.* at 417–22.

49 *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984), and requiring courts to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority"); SEC v. Jarkesy, 144 S. Ct. 2117, 2131 (2024) (assessing the limitations of Congress's power to assign judicial authority); West Virginia v. EPA, 142 S. Ct. 2587, 2614–16 (2022) (invoking the major questions doctrine to invalidate an EPA emissions rule); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022) (invoking the major questions doctrine to invalidate an agency's COVID-19-related vaccination mandate because it concerned a "power[ ] of vast economic and political significance" (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (quotation marks omitted))).

specialized domain of governmental action. That need is particularly urgent because the campaign to defang the modern U.S. regulatory state sweeps dangerously broadly. Reminding ourselves of the constitutional settlement on the federal investment powers is necessary to prevent that campaign from causing potentially irreversible damage to U.S. economic and political well-being. Within that settlement, the focus must shift to how to structure a specific public-investment program or agency to ensure meaningful democratic accountability. That inquiry must be approached not as an occasion for judicial second-guessing of public investment writ large, but as a matter of fine-tuning the exercise of that power in line with our constitutional values and policy goals.

Here, too, we call for subtlety and pragmatism. The constitutional norm of democratic accountability is not a simple aphorism of political thought. Accountability is a context-specific issue of institutional design; it is not a blunt, all-purpose tool for disabling critically needed governmental functions. Finding the right balance between the judicially managed ideal of accountability and the legislatively managed power of public investment requires both a better understanding of the past constitutional struggles and a more realistic approach to accountability as a context-dependent puzzle of institutional design. We discuss each issue in turn.

II. Public Investment Institutions and the Modern Administrative State: Historical Experience

In the historically critical moment of the New Deal, Congress and courts committed to the proposition that among the most important functions of the federal government are the maintenance of stable capital markets and the elaboration of an effective industrial policy. During this time, the President and Congress took themselves to be wielding a distinctive set of great and independent federal powers to pursue an industrial policy that was both necessary and novel.

Congress's principal policy innovations were not the more familiar kinds of police-power regulations that we associate with modern administrative action. Congress instead set out to shore up the interstate economy and the national defense through industrial policy.[50] The crucial outcome of this period is that the regulation of the public goods of money and public investment, like

[50] *See, e.g.*, Tennessee Valley Authority Act, Pub. L. No. 73-17, 48 Stat. 58 (codified as amended at 16 U.S.C. § 831); Reconstruction Finance Corporation Act, ch. 8, 47 Stat. 5.

defense and foreign affairs, were taken to be "major questions" whose importance counseled in favor of more, rather than less, deference to Congress's bureaucratic design choices. The novel administrative arrangements made during this period have, until now, survived nearly a century of judicial scrutiny. In this Part, we examine the genesis of these tools of public investment and their constitutional settlement.

A. The Tennessee Valley Authority

If you were to attend a movie in the summer of 1939, there was a decent chance you would see a peculiar scene among the newsreels: two men in suits, one named David Lilienthal (who was a director of the TVA) and the other named Wendell Willkie (who led a utility holding company), exchanging a $78 million check for a bundle of deeds. And, if you had even a passing familiarity with the Supreme Court's work in the prior few years, you would have known why that scene was so momentous: the deeds conveyed title to retail transmission networks in the Tennessee Valley to the TVA. Willkie's sale to the new federal agency heralded the end of a two-decade-long constitutional battle about the emergence of a federal industrial policy to counter the Great Depression.[51] It also propelled Willkie to the top of the Republican presidential ticket, running against future President Franklin D. Roosevelt on a promise of undoing through politics what he could not foreclose in court.

Two decades before Lilienthal and Willkie's famous settlement, a convergence of economic crises, indictments and corruption scandals, and government investigations paved the way for a new federal policy of managing public utilities.[52] Our national politics included debates over whether the exceptional degree of separation between ownership and control that characterized public utility markets was too prone to abuse,[53] whether the federal government should pursue wholesale public energy generation, and

51 *See* THOMAS K. MCCRAW, TVA AND THE POWER FIGHT 1933–1939, at 136–38 (1971).

52 *See* PHILIP J. FUNIGIELLO, TOWARD A NATIONAL POWER POLICY: THE NEW DEAL AND THE ELECTRIC UTILITY INDUSTRY, 1933–1941, at 3–31 (1973) [hereinafter FUNIGIELLO, THE NEW DEAL] (describing the confluence of utility-related election scandals, the nationally important investigation of electricity titan Samuel Insull, the creation of a robust Federal Trade Commission (FTC) investigation into utility holding companies, and the economic shocks of the mid-1930s).

53 *See, e.g.*, WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET 97 (1927) (describing the "hoodwinking" of public utility shareholders "out of the franchise"). Notably, Professors Adolf Berle and Gardiner Means' canonical book, published at the height of the fight over

whether private utilities should be disciplined in the market by creating publicly owned "yardstick" utilities that were capitalized and managed by the government.[54]

With these regulatory questions came an enormously consequential constitutional contest about the lawfulness of federal industrial policy. Since the turn of the century, the emergence of important capital markets for private-utility holding companies had merged the interests of incumbent utilities, investment banks, and lawyers in opposing federal regulation of energy markets.[55] Now, all three constituencies fought against the creation of a federal industrial policy for energy as a national economic crisis took hold. The constitutional fight was over how to "reconcile the regulation of control by our Government of our public utilities, with the advantages which we properly associate with private ownership, individual initiative, and the profit motive."[56]

By way of familiar background, in the mid-1930s, the country was in the grip of the Great Depression and gross domestic product had dropped from $81 billion to $41.8 billion.[57] Congress responded by, among other things, authorizing the executive to undertake a new kind of industrial policy. Title II of NIRA authorized the President to create an agency that could disburse up to $3.3 billion for "a comprehensive program of public works."[58] And by 1936, the Public Works Administration (PWA) had authorized over 14,000 construction projects, involving "6,475,000 man-months of labor" at a cost of more than $3 billion in 1936 dollars.[59] Congress's enabling statute provided only that the administrator of the public-works program should "prepare a comprehensive program of public works, which shall include among

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the public utility corporate form, is especially concerned with this dynamic. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 75–76 (1932). Berle recommended the abolition of public-utility holding companies "as rapidly as possible without doing too great damage to the business structure." FUNIGIELLO, THE NEW DEAL, *supra* note 52, at 49 (quotation marks omitted) (quoting Letter from Adolph A. Berle, Jr. to Robert Healy (Nov. 30, 1934)).

54 The yardstick approach sought to create public firms to compete with, but not displace, private utility companies. *See Text of Governor Roosevelt's Speech at Portland, Oregon, on Public Utilities*, N.Y. TIMES, Sept. 22, 1932, at 16.

55 *See* FUNIGIELLO, THE NEW DEAL, *supra* note 52, at 1–32 (describing this history).

56 *Id.* at 5 (quoting Merle Thorpe, *As the Business World Wags*, 18 NATION'S BUS. 1, 14 (Sept. 1930)).

57 *See* Robert R. Nathan, *The National Income Produced, 1929–34*, 15 SURV. CURRENT BUS. 1, 17 (1935).

58 National Industrial Recovery Act §§ 202, 220, 48 Stat. at 201, 210; *see also* Emergency Relief Appropriation Act of 1935, ch. 48, 49 Stat. 115 (continuing the program).

59 Brief for the Respondent Administrator, *supra* note 12, at 154 (citing Herman B. Byer, *Employment Created by P. W. A. Construction*, 43 MONTHLY LAB. REV. 811, 838 (1936)).

other things" the construction of highways, conservation of natural resources, projects that "serve the interests of the general public," and housing.[60]

After the statute passed, long indices of proposed projects were drawn up by the PWA and presented to the President. According to its critics, thousands of such projects were authorized with the barest of deliberation: "At the end of the index appeared in pencil the letters, 'O. K. F.D.R.'"[61] The PWA grants required recipients to comply with reporting requirements, minimum wage rules, bidding requirements, and the requirement that "the maximum of human labor shall be used in lieu of machinery . . . ."[62] It was a vast undertaking, but one that focused less on public reason giving than modern administrative law would lead us to expect.[63]

With one singularly important exception, few recipients of the public works allotments objected to this enormous federal program. The principal objectors were incumbent public utilities, owned by private firms and operating under nonexclusive franchises in the regions to which the PWA's allotments were being sent.[64] The utilities' opposition stemmed from the fact that "among" the "other things"[65] appearing on President Roosevelt's list of public works were a series of preferential loans and grants to municipalities proposing to build their own energy distribution networks that intentionally duplicated private utilities' existing grids.

The duplication of energy distribution infrastructure was no accident. The municipalities' grids would be publicly owned, and they composed one part of a two-pronged strategy to create public power. The other prong was the chartering of a federal agency—the TVA—to build a network of hydroelectric power dams to supply the new grid.[66]

The power generation project started with the renovation of a hydroelectric dam built by the federal government in connection

60 National Industrial Recovery Act § 202, 48 Stat. at 201.

61 Brief for Petitioner at 6, Ala. Power Co. v. Ickes, 302 U.S. 464 (1938) (Nos. 84 & 85).

62 National Industrial Recovery Act § 205, 48 Stat. at 204–205.

63 *See* EDWARD STIGLITZ, THE REASONING STATE 91, 96–98 (2022).

64 On the persistent public policy puzzle of tailoring corporate governance arrangements to the utility industry, see generally Aneil Kovvali & Joshua C. Macey, *The Corporate Governance of Public Utilities*, 40 YALE J. ON REGUL. 569 (2023).

65 National Industrial Recovery Act § 202, 48 Stat. at 201.

66 *See generally* Tennessee Valley Authority Act, 48 Stat. 58 (chartering the authority); Act of Aug. 30, 1935, Pub. L. No. 74-412, 49 Stat. 1075 (granting additional corporate powers and authorizing power generation).

with World War I.[67] The federal power to build this first dam, on an interstate waterway, appeared unambiguous earlier in the century: it fell within either the federal power to provide for a common defense during World War I or the well-settled Commerce Clause powers to regulate navigable waterways and the channels of interstate commerce.[68] But the government's power to build a dam to generate and sell surplus power into the open market, especially where it involved building distribution infrastructure to displace private incumbents, was far more controversial.

Private utilities opposed the emerging public power effort by arguing that the new public utility would be an economic disaster. Private industry, they contended, had already built sufficient capacity to meet demand; demand was relatively stable and inelastic; and the capital-intensive nature of utility generation counseled caution about experimentation.[69] Indeed, the argument went, giving federally chartered electricity generators access to the U.S. Treasury and title to federal hydroelectric capacity amounted to a rubber yardstick: whatever rates were achieved with the Tennessee Valley experiment would be grossly subsidized by taxpayers. To use Willkie's memorable turn of phrase, the dam-building projects on the Tennessee River would "water[ ] five states and drain[ ] the nation."[70]

Fought on the one side by one of the country's largest private industries and on the other by a generation of soon-to-be-famous New Deal lawyers, litigation about a new federal industrial power policy drew in leading members of the Supreme Court bar,[71] and eventually comprised thirty-four suits against the TVA and ninety-two against the PWA.[72]

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[67] The first dam, originally called Muscle Shoals, was built to aid the war effort by producing power and fertilizer. MCCRAW, *supra* note 51, at 1–2. Because power and fertilizer are also valuable on the private market, what to do with the dam at the close of World War I became a politically contentious question. *See id.*

[68] *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824).

[69] *See* MCCRAW, *supra* note 51, at 74 (describing the demand-elasticity argument, and how the effects of federal entry disproved the claim).

[70] DAVID LEVERING LEWIS, THE IMPROBABLE WENDELL WILLKIE 72 (2018).

[71] The Edison Electric Institute commissioned an early report from former Solicitor General James Beck and attorney Newton Baker, which pronounced the TVA "palpably unconstitutional." *See Utility Shares Up on Favoring News*, N.Y. TIMES, Nov. 27, 1934, at 31. More leading lights of the Supreme Court bar joined the utilities' litigation. Former Solicitors General Robert Jackson and John Davis, and attorney Dean Acheson, all signed briefs in the lower courts. *See* MCCRAW, *supra* note 51, at 109–10; Brief for Petitioner, *supra* note 61, at 70.

[72] MCCRAW, *supra* note 51, at 109.

The first important test cases for the new industrial policy came in the form of shareholder derivative suits that sought to preclude private utilities from contracting with the nascent TVA.[73]

Remarkably, the shareholders achieved an early victory in federal court in a case whose name every constitutional lawyer knows, though for different reasons. A district judge agreed with a suit brought by a shareholder named George Ashwander and found that the TVA program did not bear a "substantial relation" to any enumerated Congressional power.[74] The judge thus prohibited all Alabama municipalities from accepting PWA allotments to build their own grids, and annulled a TVA contract because the federal government's production of power for sale on the open market was not within any enumerated constitutional power.[75] The Fifth Circuit reversed,[76] and the Supreme Court affirmed in a split opinion that is now famous for one of its concurrences.[77] Four Justices would have held that the shareholders lacked standing, and Justice Louis Brandeis famously explained that the Court should, where possible, avoid constitutional questions.[78]

Five members of the Court disagreed with the standing analysis and thought the shareholders could challenge the TVA's authority, but four of them agreed with Justice Brandeis that the TVA was constitutional. Indeed, Chief Justice Charles Evans Hughes upheld the first dam-building project under the Commerce and General Welfare Clauses after taking judicial notice of the fact that this first dam was first built in connection with World War I.[79] But Chief Justice Hughes was careful to "express no opinion . . . as to the status of any other dam or power development in the Tennessee Valley."[80]

The first TVA dam thus benefited from its association with the war powers and its connection to navigable waters. Whether

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[73] *See* Note, *The Constitutionality of the TVA as a Power Development Program*, 48 HARV. L. REV. 806, 806–07 (1935).

[74] Ashwander v. Tenn. Valley Auth., 9 F. Supp. 965, 966 (N.D. Ala. 1935).

[75] *See id.* at 967.

[76] Tenn. Valley Auth. v. Ashwander, 78 F.2d 578, 583 (5th Cir. 1935).

[77] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 340 (1936).

[78] *See id.* at 341, 346–48 (Brandeis, J., concurring) (noting that "[t]he Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision" and elaborating the seven *Ashwander* avoidance principles). There are many discussions of the *Ashwander* principles, though the decision is primarily remembered for Justice Brandeis's concurrence. *See* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 72–73.

[79] *See Ashwander*, 297 U.S. at 326–30.

[80] *Id.* at 340.

there was a federal power to create the rest of the TVA network, however, remained in suspense. The private utilities' lawyers were undeterred by the loss in *Ashwander* and had their own victory to celebrate. Having won an early injunction in *Ashwander*, the utilities had set back the TVA's construction projects by two years and were ensuring with each new injunction that there would be no demand ready to meet supply.[81] Through injunctions, the utilities' legal challenges could make their economic critique a reality.

The TVA's government lawyers were shocked by their modest victory in the *Ashwander* decision, having expected to meet a similar fate to other New Deal programs struck down by the same Court.[82] Indeed, just seven months before, the Supreme Court had struck down Title I of the NIRA, the very same statute that authorized the government's grid-building initiative. That case was the most famous nondelegation case of the early twentieth century, *A.L.A. Schechter Poultry Corp. v. United States*.[83] As we more fully explain below, the TVA's lawyers knew that Titles I and II of the statute had the same defects.

Indeed, three months after losing *Ashwander*, the utilities filed a new series of federal complaints against both the TVA dam-building project and the PWA's grid-building allotment program.[84] The utilities contended that the TVA power-production program exceeded Congress's enumerated powers to regulate interstate commerce and to legislate for the general welfare, and that the public works program ran afoul of a newly revived nondelegation doctrine announced in *Schechter Poultry*.[85]

The utilities' briefs were self-assured. After all, the Supreme Court had just struck down Title I of the statute that had authorized the public-works allotments that were building the TVA's grid.[86] The utilities argued, not inaccurately, that Title II was "even more sweeping in the power conferred [than Title I]. The President is given discretionary power to spend billions of dollars with no more definite guide to the end sought or the means to attain it than that he should engage in or finance 'public works projects.'"[87]

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81 *See* MCCRAW, *supra* note 51, at 115.
82 *See id.* at 114–15.
83 295 U.S. 495 (1935).
84 *See* MCCRAW, *supra* note 51, at 116–17.
85 Brief for Petitioner, *supra* note 61, at 16–18.
86 *See Schechter Poultry*, 295 U.S. at 542.
87 Brief for Petitioner, *supra* note 61, at 16.

A district judge quickly agreed with the utilities. Judge John Gore enjoined the construction of all dams and all new supply contracts, while another district judge enjoined the issuance of PWA loans to municipalities to build out the public distribution network.[88] The judiciary's interventions, by way of injunctive relief, meant that both the supply and demand for this signature experiment in New Deal industrial policy remained in peril. Even if the TVA could eventually procure a reversal of Judge Gore's injunction regarding Congress's power to build power generation facilities, the inability to connect to residential customers would prove its opponents right: the TVA was on a course to massively oversupply electricity if it could not connect to any municipal customers.

The TVA's supporters in Congress threatened to impeach Judge Gore.[89] One congressman argued that there had emerged "a 'Judicial Fascisti' in this country, . . . trying to govern us by injunction."[90] The TVA's lawyers undertook more effective measures and, in addition to pursuing an appeal, quietly drafted an amendment to the Judiciary Act of 1937[91] that required any injunction of a federal statute to be heard by a three-judge panel in the first instance.[92] After achieving an early vacatur and remand on appeal, the TVA case was the first to benefit from the amended Judiciary Act: the remand went back to a three-judge panel rather than to Judge Gore. In retrospect, as one historian has written, "the new [three-judge] law was a well-disguised court-packing measure."[93] Public investment thus gave us an early introduction to the capacity of the nationwide injunction to reverse, rather than merely to preserve, the status quo, and an introduction to the thorny question of whether Congress or the courts ought to intervene to prevent the practice.[94]

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[88] *See* Duke Power Co. v. Greenwood Cnty., 12 F. Supp. 70, 73 (W.D.S.C. 1935), *rev'd*, 81 F.2d 986 (4th Cir. 1936), *rev'd*, 299 U.S. 259 (1936).

[89] *Would Impeach Judge Gore*, BRISTOL HERALD COURIER, Jan. 16, 1937, at 4.

[90] MCCRAW, *supra* note 51, at 117.

[91] Pub. L. No. 75-754, 50 Stat. 751 (1937).

[92] *See* MCCRAW, *supra* note 51, at 118 (describing the TVA's drafting of § 3 of the Judiciary Act of 1937 and noting that the TVA's general counsel lobbied senators and the chair of the House Judiciary Committee to pass the amendment); *cf.* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 998 (2020) (describing the emergence of the three-judge rule in the 1937 Act but contending that Congress still left courts' "*substantive* equitable remedial powers untouched" (emphasis in original)).

[93] MCCRAW, *supra* note 51, at 119. On the salience of the "power cases" to the general court-packing plan, see Barry Cushman, *Court-Packing and Compromise*, 29 CONST. COMMENT. 1, 23–24 (2013).

[94] By the 1960s, long after the settlement we recount here, the three-judge rule appeared to be an inefficient anachronism that overburdened the Supreme Court's

At the Supreme Court, the utilities' nondelegation argument seemed fatal. Their brief sounded a steady drumbeat about the revived nondelegation doctrine and the obvious application of *Schechter Poultry* to the grid-building program. In the PWA case, they noted that "Title I of the NIRA was declared unconstitutional on [nondelegation] ground[s] in *Schechter Poultry Corp. v. United States*," and explained that whereas "Title I sought to delegate power of Congress derived from the Commerce Clause to the President[,] Title II seeks to delegate the power to promote the general welfare through the expenditure of federal funds."[95]

The private utilities' brief also canvassed unfortunate statements made by administrators of the new programs, who vaunted their own ingenuity in the absence of workable guidance from Congress. Quoting Secretary of the Interior Harold Ickes, the Public Works Administrator, the utilities argued that the statute left the Executive without any guidance at all, much less an intelligible principle to administer the vast new program. Secretary Ickes had declared that "long-range planning[ ] would have been of great help to us when we came to a consideration of our Public Works program, for there was nothing at all to be used as a guide and we had to start out cold."[96] Ickes also wrote that his agency "had nothing to go upon; no precedent, no set of rules upon which to model their plans."[97] It was, indeed, very difficult to find daylight between the PWA's statutory authorization and the doomed statute from *Schechter Poultry*: they were two equally terse and equally broad provisions of the very same Act of Congress.

Yet this time, a majority of the Supreme Court rejected the utilities' constitutional and nondelegation arguments. The position Justice Brandeis staked out in *Ashwander*—that the utilities lacked standing to make any of these constitutional arguments—now attracted five votes. Indeed, even though the suits were now brought directly by the private utilities, not their shareholders,

mandatory jurisdiction. *See* Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555, 563 (1960); S. REP. NO. 94-204, at 3 (1975), *reprinted in* 1976 U.S.C.C.A.N. 1988, 1990 (describing calls by Professor Charles Alan Wright, the American Law Institute, and Chief Justice Warren E. Burger to repeal the three-judge rule because the work overburdened the courts).

95 Brief for Petitioner, *supra* note 61, at 16, 34.

96 *Id.* at 37 (emphasis omitted) (quoting *National Planning Board of 1935: Hearing on S. 2825 Before the Comm. on Com.*, 74th Cong. 6 (1935) (statement of Harold L. Ickes, Secretary of the Interior)).

97 *Id.* at 37–38 (emphasis omitted) (quoting HAROLD L. ICKES, BACK TO WORK: THE STORY OF PWA 18 (1935)).

the Court held that the utilities could point to no "right to be immune from lawful municipal competition" from the TVA, and thus they had experienced no legal injury that gave them standing to sue.[98] The utilities lacked standing both to test whether Congress had exceeded its Spending and Commerce Clause powers and to challenge whether Congress's delegation was too broad. A follow-on suit, called *Tennessee Electric Power Co. v. Tennessee Valley Authority*,[99] contended that the TVA had violated the private utilities' franchises with the state, unlawfully conspired with the PWA to injure their business, and invaded principles of federalism.[100] All but two Justices rejected this argument, finding once more that the private utilities lacked standing because they had no legal right to be free from competition.[101] The constitutional and nondelegation questions were never answered.

In three major industrial-policy decisions—*Ashwander*, *Alabama Power*, and *TEPCO*—the Supreme Court put a complete end to the public utilities' effort to foreclose a federal industrial policy for energy as a matter of constitutional law. We do not wish to overstate the doctrinal consequences of these cases: with the modest exception of *Ashwander*'s idea of avoidance, none of these rates highly in the modern canon and none approaches the doctrinal importance of earlier switch-in-time cases about, for example, the scope of the Commerce Clause.[102] Yet they were of major importance in the political and economic context that brought these cases into being. That context accounts for the intensity with which the litigants prosecuted the fight and, perhaps, the

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[98] *See Ala. Power*, 302 U.S. at 479–80 (holding that the petitioners' claim is "*damnum absque injuria*" and declining to reach the *Schechter Poultry* nondelegation argument).

[99] 306 U.S. 118 (1939).

[100] *See id.* at 138, 143–44. The franchise argument was a plausible basis for standing, since the Court had held a decade before that exclusive state utility franchises constitute a property interest. *See* Frost v. Corp. Comm'n of Okla., 278 U.S. 515, 520–21 (1929). In rejecting the applicability of *Frost*, the *Alabama Power* Court noted as "fundamental" that "the competition . . . of the municipalities contemplated here is entirely lawful." *Ala. Power*, 302 U.S. at 485.

[101] *Tenn. Elec. Power Co.*, 118 U.S. at 147.

[102] Put a different way, the idea of public investment never faced a bespoke constitutional challenge that was distinctive to industrial policy: industrial policy was one site in which familiar battles over the scope of the federal administrative state were fought. But because of the magnitude of public investment—the "majorness" of the questions presented—constitutional litigation about whether public investment could be squared with the Commerce Clause and the nondelegation doctrine was of paramount importance to the success of the New Deal regulatory program. The constitutional litigation, and Willkie's infamous loss, were also of paramount salience to political fights about government participation in the market in the decades that followed.

subtlety of the Court's rejection of the utilities' constitutional challenges.

Thus it happened that a significantly weakened Willkie, who spoke for the utilities, met with Lilienthal, who spoke for the TVA, in the summer of 1939 to negotiate a surrender. Their negotiated settlement price—$78 million in 1939 dollars—was almost $30 million less than Willkie had asked, but it was much more than the utilities' securities would have commanded on the open market after the Court rejected their challenges.[103] To be sure, Willkie's loss in court became a potent political cudgel against industrial policy in the decades that followed, but the constitutional contest was decided.

No Supreme Court decision since the fight over federal power has questioned the constitutionality of the TVA, nor has any questioned two similar projects in the Pacific Northwest. Nor, more generally, has the Court doubted Congress's power to create and capitalize federal corporations to participate in private markets. The TVA, its supporters have contended, increased the production of power in the Tennessee Valley, boosted rural electrification, and stimulated a surge of new demand.[104] Today, its challenges involve raising capital for renewed infrastructure, the composition of its fuel sources, and other workaday problems of large modern public utilities.[105] The TVA's success or failure in achieving Congress's goals, its relative efficiency or inefficiency compared to private industry, and its alacrity in addressing climate change are ordinary questions of public policy, not higher-order questions of constitutional law.

The creation of agencies as large as the TVA, the PWA, or the RFC[106] to conduct industrial policy has, until recently, rarely been repeated, but the constitutionality of Congress's power to do so is long settled. Indeed, the constitutional contest over the federal government's capacity to legislate an industrial power policy was definitively "adjourn[ed]" by the advent of the Second World War.[107] Like the building of the Muscle Shoals dam in the early

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[103] *See* MCCRAW, *supra* note 51, at 134–36.

[104] *See id.* at 144–56.

[105] *See TVA Board Approves Additional $150 Million in Advanced Nuclear Funding*, TENN. VALLEY AUTH. (Aug. 22, 2024), https://www.tva.com/newsroom/press-releases/tva-board-approves-additional--150-million-in-advanced-nuclear-funding.

[106] *See infra* Part II.B.

[107] *See* MCCRAW, *supra* note 51, at 155; *see also* Philip J. Funigiello, *Kilowatts for Defense: The New Deal and the Coming of the Second World War*, 56 J. AM. HIST. 604, 606–08 (1969) (describing a new World War II consensus that the federal government

twentieth century, the capacity of Congress to conduct industrial policy for the war effort was beyond reproach. No group has since convinced the Supreme Court to reopen the constitutional questions that were foreclosed by both the TVA fight and the necessity of industrial policy for national defense.

B. The Reconstruction Finance Corporation

The widespread destruction of bank balance sheets during the Depression posed an enormous challenge to the federal government that transcended energy policy. In 1932, Congress chartered the RFC and, in the ensuing years, endowed it with remarkable financial powers. The RFC was to be managed by seven directors who were appointed by the President with advice and consent of the Senate,[108] it was to be capitalized by the U.S. Treasury,[109] and it was to work in concert with the Fed as a kind of discount lender to prop up the struggling banking, insurance, and railroad sectors.[110] Congress also authorized the RFC to purchase bonds from state and local governments,[111] thus permitting it to finance a vast array of "self-liquidating" infrastructure projects.[112]

Over its lifetime, the RFC wielded a virtually unlimited borrowing authority from the U.S. Treasury to disburse more than $40 billion to a broad array of enterprises.[113] Among other things,

should "prime the pump" by directly procuring large amounts of generating equipment and investing in generation expansion for private utilities). The TVA remains among the largest electric companies by megawatts; its directors remain presidential appointees that must be confirmed by the Senate; and though it was initially capitalized by the federal government, the TVA now finances itself by issuing debt on the open market, subject to a congressionally imposed statutory maximum. *See Factbox: Largest U.S. Electric Companies by Megawatts, Customers*, REUTERS (Apr. 29, 2014), https://www.reuters.com/article/amp/idUSBREA3S0P420140429; 16 U.S.C. §§ 831a(a)(1), 831n-4(a).

108 Reconstruction Finance Corporation Act § 3, 47 Stat. at 5 (repealed 1966).

109 *Id.* at § 2, 47 Stat. at 5.

110 *Id.* § 5, 47 Stat. at 6–8. Section 5 of the RFC's original statute authorized it to make loans to railroads that were approved by the Interstate Commerce Commission, but "only if the railroads were unable to obtain funds on reasonable terms through banking channels or from the general public." SEC'Y OF THE TREASURY, FINAL REPORT ON THE RECONSTRUCTION FINANCE CORPORATION 6 (1959).

111 JERRY MITCHELL, THE AMERICAN EXPERIMENT WITH GOVERNMENT CORPORATIONS 32 (1999).

112 *See* J. Franklin Ebersole, *One Year of the Reconstruction Finance Corporation*, 47 Q.J. ECON. 464, 473 (1933); *id.* at 468–69 (noting the initial objective of the RFC was "to provide loans which could not be obtained through regular banking channels owing to near panic among the banks" but that later, the RFC "provide[d] direct and positive stimulus to business revival through capital loans for new construction"); *see also* JAMES S. OLSON, SAVING CAPITALISM: THE RECONSTRUCTION FINANCE CORPORATION AND THE NEW DEAL, 1933–1940, at 131–48 (1988).

113 SEC'Y OF THE TREASURY, *supra* note 110, at v.

it traded in securities of private firms, purchased mortgages,[114] financed novel industrial policy initiatives through institutions like the Export-Import Bank,[115] and participated in the financing and production requirements of the war effort.[116] It was a full-blown public-investment institution.

Crucially, Congress allowed the RFC to purchase securities from Ickes's PWA. The maneuver "was apparently designed to increase the funds available to that Administrator, since he was authorized to use the funds so acquired in making further loans."[117] By the time of its winddown, the RFC had authorized the purchase of almost $700 million in PWA securities.[118] An agreement between the RFC and the PWA permitted the PWA to retain any profit derived from the sale of its securities, while remitting interest to the RFC. This facility alone contributed almost $50 million to the PWA budget.[119]

The RFC faced a similar barrage of constitutional challenges. The most notable of them, from the vantage point of public investment, is whether such hybrid agencies should be considered "public" or "private" for constitutional law purposes. The questions whether the government could elect to charter corporations to administer federal programs, and whether such corporations are still agencies of the government, were quickly settled in the affirmative by the Supreme Court.[120] After an Alabama bank defaulted on a loan from the RFC, the bank sought to avoid an effort to collect that debt in the Court of Claims on the ground that the corporation was not a true "agency" of the government.[121] The government took the view that the RFC "is an agency of the United

[114] The RFC initially capitalized Fannie Mae, which remains a critically important pillar of the U.S. national market for housing finance. *See id.* at 12–13; *see also* James Butkiewicz, *Reconstruction Finance Corporation*, ECON. HIST. ASS'N, https://perma.cc/TP6K-2HVB.

[115] *See* SEC'Y OF THE TREASURY, *supra* note 110, at 16–17.

[116] *Id.* at 1–3, 17–19.

[117] *Id.* at 9.

[118] *Id.* at 149.

[119] *Id.* at 150.

[120] The power of Congress to charter corporations is, of course, much older. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407–09 (1819) (affirming the incidental power to charter a bank); *see also* California v. Cent. Pac. R.R., 127 U.S. 1, 39 (1888) (upholding a statute chartering a railroad); Smith v. Kan. City Title & Tr. Co., 255 U.S. 180, 210–11 (1921) (holding that federally chartered banks are "federal agencies" that can be exempted from taxation, and noting "[t]hat Congress has seen fit, in making of these banks fiscal agencies and depositaries of public moneys, to grant to them banking powers of a limited character, in no wise detracts from the authority of Congress to use them for the governmental purposes named").

[121] *See* Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536, 537, 539 (1946).

States[,] . . . is wholly owned by the Government, its functions are governmental, and the Government guarantees the corporation's obligations."[122] It also contended that corporate instrumentalities whose purposes are commingled with public interests—such as national banks—are not departments of the government but rather "private corporations in which the Government has an interest."[123] In a tersely worded opinion, the Court rejected the challenge to the RFC's status as a government agency: "That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes."[124]

Since then, the Court has consistently reaffirmed the view that chartered corporations can be governmental instrumentalities, even when Congress intends to disclaim such associations.[125]

C. Legislating Accountability

After the TVA and RFC fights, the basic constitutional contest over the powers necessary to undertake public investment was settled and the policy contest shifted to Congress. As a prominent *Harvard Law Review* article from the New Deal period noted, "It seems pretty clear that the national government may use the corporate form as an administrative device for carrying out any power that it can exercise."[126] Because such corporations had acquired prominence in modern government, the article continued, it made the most sense to think of such corporations as ordinary agencies of government. "The law of government corporations is largely administrative law, that is to say, largely statutory law, administrative regulations, and those common-law rules that apply to American government generally."[127] The famous Brownlow Committee's report on administrative government also

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[122] Brief for the United States at 5, *Cherry Cotton Mills*, 327 U.S. 536 (No. 187).

[123] *Id.* at 11 n.5 (quoting U.S. Shipping Bd. Emergency Fleet Corp. v. W. Union Tel. Co., 275 U.S. 415, 426 (1928)).

[124] *Cherry Cotton Mills*, 327 U.S. at 539.

[125] *See, e.g.*, Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 397 (1995) (holding that an instrumentality created to fulfill a public function remains "part of the Government itself").

[126] Oliver Peter Field, *Government Corporations: A Proposal*, 48 HARV. L. REV. 775, 782 (1935).

[127] *Id.* at 783. Notably, the author proposed legislation to subject the corporations to uniform rules about accounting, reporting, and governance arrangements. *See id.* at 782–88. As we discuss below, Congress's final legislation was more robust than these earlier proposals.

broadly endorsed the use of government corporations.[128] The report praised the capacity of "self-sustaining business corporations" to enable "the Government to provide an economic service of national importance without entering directly into business itself, thereby obviating additional burdens on the Federal Treasury."[129] The constitutional questions about enumerated powers, delegated authority, and the use of corporate agencies were closed, and the public-investment moment began to merge with ordinary administrative law.

But political opposition to public-investment corporations and their involvement in private markets never abated. President Dwight Eisenhower, for example, saw the TVA as a manifestation of "creeping socialism."[130] Within a decade of the New Deal, skepticism about such arrangements had grown in Congress. In 1945, Congress passed the Government Corporation Control Act.[131] That statute imposed reporting and auditing requirements on all government corporations, required them to keep their accounts with the Treasury (unless the entity was a mixed-ownership Government corporation and "ha[d] no capital of the Government"), and disciplined the RFC experiment with manifold new conditions.[132]

The oversight Congress exercised over the finances of its chartered corporations was especially strong. One contemporary observer thought Congress had decided to keep these hybrid corporations on a tighter leash than typical agencies: "Congress admittedly exercised greater restraint [over government corporations] than in some of its other attempts to control administrative action . . . . [T]he pattern of control imposed means that, for good or ill, American experience with autonomous public corporations is substantially at an end."[133]

These statutes were amended several times to ensure government corporations are subject to modern budgeting rules and oversight by the Office of Management and Budget and the General

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[128] *See* MITCHELL, *supra* note 111, at 33.

[129] THE PRESIDENT'S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 39 (1937).

[130] The TVA reports these facts on its website as part of its description of its success and vulnerability. *See TVA Heritage Series: The Great Compromise*, TENN. VALLEY AUTH., https://www.tva.com/about-tva/our-history/tva-heritage/the-great-compromise.

[131] Pub. L. No. 79-248, 59 Stat. 597 (1945) (codified at 31 U.S.C. §§ 9101–9110).

[132] 31 U.S.C. §§ 9105, 9106, 9107(b)–(c)(2).

[133] C. Herman Pritchett, *The Government Corporation Control Act of 1945*, 40 AM. POL. SCI. REV. 495, 509 (1946); *see also Lebron*, 513 U.S. at 396 (noting that the Government Corporation Control Act "brought to an end the era of uncontrolled growth of Government corporations").

Accounting Office.[134] Today, most government corporations undertaking hybrid public-private activities retain multiple lines of accountability: their directors are often appointed by the President with the advice and consent of the Senate; their finances are folded into the U.S. Treasury and undergo frequent audits; and their capitalization structures are highly regulated by Congress.[135] These entities conduct a wide variety of activities across sectoral lines and remain indispensable elements of the U.S. political and economic landscape.[136]

To underscore the key insight of this short history of public investment: the governmental powers and administrative discretion necessary to undertake public investment were firmly settled as a matter of constitutional law, leaving the fight over how much public investment there should be, and how one should design public-investment agencies, to Congress. The TVA and the RFC presented early test cases, at a moment of maximal judicial scrutiny, of the capacity of Congress to engage in public investment through agencies and public-private entities. The multipronged constitutional fight against public investment lost at the Supreme Court, and the question whether government agencies should or could intrude upon private markets was left explicitly to political, not judicial, discretion. Congress's use of public-investment tools has since been a matter of ordinary politics, left to wax and wane with national political sentiment.

The legal outcome of the TVA and RFC litigation, indeed, was soon eclipsed by a change in national politics to favor free markets over governmental intrusion. The political fight over the precise shape and boundaries of free markets, unlike the legal fight over industrial policy that preceded it, came to be framed by now-familiar worries about mine-run regulation of relatively small commercial concerns. The fundamental constitutional issue—the permissibility of public investment—faded from view.

Nevertheless, the constitutional settlement legitimating public investment endures in the shadows. In the new millennium

[134] *See, e.g.*, Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 877 (codified as amended in scattered sections of the U.S. Code) (enumerating a list of "mixed" and "wholly-owned" government corporations, and requiring, among other things, each corporation to prepare a "business-type" budget for the President and Congress, requiring periodic audits by the Comptroller General, requiring accounts to be kept with the Treasury, and providing for congressional oversight of corporation budgets).

[135] *See generally* MITCHELL, *supra* note 111.

[136] *See* KEVIN R. KOSAR, CONG. RSCH. SERV., RL30365, FEDERAL GOVERNMENT CORPORATIONS: AN OVERVIEW 2–3 (2011); *see also* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 874 (2014).

punctuated by economic crises, it has not been uncommon for the federal bureaucracy, charged with maintaining the stability of the economy, to conduct large-scale transactions on the open market and to engage in distinctive deliberative and governance practices that have grown up in the century since the New Deal. *Whether* the government can perform the public-investment function and *how* it should do so are both questions that were settled in the New Deal moment in favor of Congress's choice of means.

As some, but not all, of that settlement is being revisited by today's federal judiciary, it is important to note the extent to which the choice of governance arrangements has historically been connected to the special purpose and the institutional form of public investment. We explore that connection between public investment and bureaucratic governance arrangements in what follows. To preview the central puzzle: today's assault on the more mundane features of the regulatory state threatens to swallow the public-investment settlement whole, while leaving unanswered the pressing question of how to engage in a program of public investment that is both efficient and accountable.

III. BALANCING DEMOCRATIC ACCOUNTABILITY AND OPERATIONAL EFFICACY

Because public investment is typically discussed as a part of fiscal policy, "public investment" and "public finance" are generally treated as synonyms. Today's public-investment activities, however, reach beyond mere fiscal means. This Essay uses a broader definition of public investment as programmatic deployment of public money to finance economic activities and projects consistent with specific industrial policy goals. Some of these forms of financing—such as federal grants administered by regulatory agencies pursuant to congressional mandates—are largely uncontroversial across public law paradigms.[137] Others can pose accountability challenges by virtue of blending public and private functions in more visible ways.

[137] *See, e.g.*, Jordan Weissmann, *You Don't Care About the Infrastructure Bill*, SLATE (July 29, 2021), https://perma.cc/EY69-DUGB. The Biden administration's signature legislation—the Bipartisan Infrastructure Law, the Inflation Reduction Act, and the CHIPS and Science Act—adopted this method to allocate nearly $2 trillion in federal funding to rebuild the nation's physical infrastructure and shore up its domestic industrial production. For more information, see *Investing in America*, THE WHITE HOUSE (last updated Dec. 20, 2024), https://perma.cc/55AN-F2Y4.

Recognizing these challenges and identifying key trade-offs associated with various investment strategies reveals the complex dynamics of public power in modern financial markets. Wielding that power responsibly and effectively requires a highly nuanced and context-specific understanding of democratic accountability in public-investment policy. Presently, however, the federal judiciary is moving in the opposite direction, revising the settlements we described at the outset of this Essay in pursuit of a different, more blinkered notion of accountability. Across administrative law contexts, the Supreme Court has advanced several novel doctrines in an effort to ensure that there is a "chain of dependence between those who govern and those who endow them with power."[138] In the Court's view, the fact that an agency action might involve the public-investment context does not counsel in favor of greater deference to Congress. On the contrary, as the Supreme Court recently wrote, it will "'typically greet' assertions of 'extravagant statutory power over the national economy' with 'skepticism.'"[139] Armed with this renewed rhetoric of accountability, courts have begun policing the independence,[140] delegation,[141] and adjudication choices Congress makes in creating administrative agencies, without much regard for the nature of these individual agencies' functions. Some judges have expressly faulted a "second wave" of New Deal legislation for leading courts to forget the importance of scrutinizing Congress's terms of delegation.[142] These developments have been cheered on by those who view the

[138] *See* Collins v. Yellen, 141 S. Ct. 1761, 1797 (2021) (Gorsuch, J., concurring in part).

[139] West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[140] *Compare* CONTI-BROWN, *supra* note 26, at 113–15 (arguing that reserve banks violate removal doctrine), *with* Appointment and Removal of Federal Reserve Bank Members of the Federal Open Market Committee, 43 Op. O.L.C., 2019 WL 11594453, at *1–2, *6–8 (Oct. 23, 2019) (concluding the relevant officers were "inferior," and thus subject to removal restrictions).

[141] *See* Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (arguing for a return to a more robust nondelegation doctrine, under which courts "ask: . . . [D]id Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands").

[142] *See id.* at 2138 ("After *Schechter Poultry* and *Panama Refining*, Congress responded by writing a second wave of New Deal legislation more '[c]arefully crafted' to avoid the kind of problems that sank these early statutes." (alteration in original) (quoting MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937, at 424 (2002))). Justice Gorsuch did not explain the *TEPCO* and *Ashwander* decisions, which involved nondelegation challenges to the *same* "first wave" statutes but were nevertheless upheld.

1930s settlements as an abandonment of the Constitution's mandatory design of electoral accountability.[143]

This assault on the legitimacy of administrative governance is a broad-ranging phenomenon, encompassing academic denouncements of the "modern administrative state" as the product of "the depravity of the 1930s"[144] and judicial decisions that directly undermine the long-settled constitutional bases on which federal agencies operate.[145]

Federal agencies overseeing financial markets have not been spared from this skepticism. Indeed, as we have noted,[146] the Supreme Court recently heard a case called *Securities & Exchange Commission v. Jarkesy*[147] that included a triplicate challenge to the SEC's authority. The Fifth Circuit had held that important features of the agency's enforcement decisions violate the nondelegation doctrine and the Seventh Amendment, and confer too much independence on the agency.[148] In deciding *Jarkesy*, the Supreme Court avoided the nondelegation question but decided that, when imposing civil penalties, the SEC must proceed before a jury in an Article III court.[149]

More recently, the Fifth Circuit held that the Consumer Financial Protection Bureau's (CFPB) funding from the Fed's interest account violates the Appropriations Clause.[150] While the Supreme Court reversed that decision,[151] a dissent contended that "[t]he Framers would be shocked, even horrified, by [the CFPB's funding] scheme."[152] Some members of the Fifth Circuit recently claimed that the structure of the Consumer Product Safety Commission is unconstitutional because "the President has unrestrictable power to remove principal officers" of any non-"traditional" agency that "wield[s] substantial executive

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143 *See, e.g.*, Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 830–31 (2018).

144 *Id.* at 821.

145 *See supra* text accompanying note 49.

146 *See supra* text accompanying note 5.

147 144 S. Ct. 2117 (2024).

148 Jarkesy v. SEC, 34 F.4th 446, 465 (5th Cir. 2022).

149 *Jarkesy*, 144 S. Ct. at 2127–28.

150 Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau, 51 F.4th 616, 638–40 (5th Cir. 2022), *rev'd*, 144 S. Ct. 1474 (2024).

151 Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1486 (2024).

152 *Id.* at 1495 (Alito, J., dissenting).

power."[153] These judges' definition of "traditional" agencies appears to exclude the Fed from removal-regulating scrutiny by the judiciary, but it would appear to sweep in any agencies that do not "predate the New Deal."[154]

And, of course, the Court recently held that *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[155] a case that had become a canonical shorthand for the principle of judicial deference to an agency's statutory interpretation, should be deprecated because it was "decided . . . by a bare quorum of six Justices, [and] triggered a marked departure from the traditional approach."[156] The Court explained that the "law of deference" heralded by the *Chevron* principle was "heedless" of Congress's statutory design for judicial review of agency action, and that the judiciary's embrace of deference to agency expertise had strayed too far from the Framers' vision of the judicial power.[157] As with any decision that rebukes a canonical principle without exploring all possible consequences, the future effects of the Court's rejection of *Chevron* are difficult to predict. The Court clearly explained its view that "delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise," and that courts should be relatively unencumbered by agency views when they resolve interpretive ambiguities in statutes.[158] The Court offered some comfort that "to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute."[159] But it is likely that the Court's new "law of deference," coupled with revived nondelegation and major

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153 Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 98 F.4th 646, 657 (5th Cir. 2024) (Oldham, J., dissenting).

154 *See id.* at 656–57 (citation omitted) (first citing *Our History*, FED. TRADE COMM'N, https://perma.cc/2UTF-7AA7; and then citing *Federal Reserve Act*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (last updated Mar. 10, 2017), https://perma.cc/LQ6T-8P3E):

> The Supreme Court has never explained what makes an agency traditional—perhaps because its recent removal jurisprudence has focused on the substantiality of an agency's power rather than its historical pedigree. But in evaluating the traditional-ness of an agency, one might reasonably start by comparing it with pioneering agencies like the Federal Trade Commission . . . and the Federal Reserve. The FTC and the Fed are "traditional" in the sense that they are longstanding; both predate the New Deal by decades.

155 467 U.S. 837 (1984).

156 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2264 (2024).

157 *Id.* at 2265–66 (alteration omitted) (quotation marks omitted) (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment)).

158 *Id.* at 2267.

159 *Id.*

questions doctrines, will disturb the equilibria that characterized the past many decades of administrative government.

Where does the emergence of this thoroughgoing skepticism of administrative law leave public investment? Importantly, none of the prominent judicial accounts of the necessity of reviving *Schechter Poultry* notice that the *Schechter Poultry* Court refused to strike down the public investment half of the NIRA just a few months later.[160] Perhaps recent skepticism about the administrative state would also not cross the implicit boundary between typical administrative law concerns and the uniquely complex demands of managing public investment.[161] Still, it is hard to remain confident that the judiciary's renewed solicitude for "accountability" in executive agency design would not reach the organs of public investment. When it does, moreover, it would likely fail to account for the operational complexities and delicate balancing involved in that undertaking.

Part of the conceptual puzzle here is the long-standing lack of recognition of these complexities in the broader policy and academic discourse. By outlining the basic contours of the federal government's power to undertake public investment and recognizing the institutional variety and dynamism of the modern-day government's investment activities, this Essay aims to start a pragmatic debate about how these activities ought to be governed in our democracy.

Even in broad outline, the constitutional history of public investment reveals that one of the oldest domains of regulatory activity—our public-investment policy—has been the site of many atypical forms of governance arrangements. To a great extent, this experimentalism was a response to the highly dynamic, and context-specific challenges encountered by the industrial policymakers at different times in the country's history. Far from suggesting a single rule of accountability or tendency to evade accountability, Congress has experimented with the rules of capitalization,

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[160] *See, e.g.*, *Gundy*, 139 S. Ct. at 2138 (Gorsuch, J., dissenting); Calabresi & Lawson, *supra* note 143, at 837 (contending that the NIRA was challenged as "an unconstitutional subdelegation of legislative power" in *Schechter Poultry* but overlooking that *TEPCO* upheld a virtually identical delegation in NIRA for industrial policy).

[161] *Cf. Consumers' Rsch.*, 98 F.4th at 657 (Oldham, J., dissenting) (suggesting that the Fed is "traditional" under *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020), and so less susceptible to judicial scrutiny of removal protections, "because the Fed's most important responsibility is administration of the money supply," which, "unlike law enforcement, . . . is not an executive function—so the Fed's independence does not offend the traditional principle that all executive power is vested in the President" (citation omitted)).

corporate mandate, and independence to meet the demands of managing a rapidly growing modern economy that is prone to periods of great instability.[162]

Multiple decision points in the process lead to varying structures. For instance, choosing the source of funding for a specific public-investment program is extremely important to its scope and ultimate effectiveness. Whether the funding comes from the ordinary appropriations process, from private borrowing by a separately established public entity, or through retaining the profits from such entity's portfolio assets determines how much risk the government can afford to take on, what kinds of projects it is able to finance, and which constituencies get a bigger say in its decisions.

These capitalization choices also have important governance and accountability implications. Financing public investment through the ordinary budget process is "accountable" in the most explicit and direct sense: each new authorization faces the enormous political and ideological constraints of the new voting Congress. That, however, creates an inherent time-consistency problem, making it more difficult to fund long-term, capital-heavy public-infrastructure projects entirely, or even principally, through congressional appropriations. Choosing to fund public investment through bond issuances alleviates the concern about the vulnerability of investment flows to unpredictable political cycles. But it also imposes a short-term profitability constraint upon the public investor and its portfolio companies. Relying on the public institution's retained earnings creates similar incentives to prioritize commercially profitable assets, which may not be optimal from the perspective of the government's broader industrial strategy. The predictable governance effect of choosing to finance industrial policy through pure market channels is that the relevant public-investment institution's day-to-day actions and business decisions are more likely to be shaped in various ways by the actions of their private market counterparties and financiers. It can make that institution a more deeply integrated market actor, but it also heightens the risk of mission drift.

Recognizing these risks elevates the significance of tailoring the concrete mechanisms of public oversight to the specific context in which the institution operates. The need for this bespoke tailoring approach to accountability is especially acute where policymakers entrust the government's investment function to

162 *See supra* Part II.C.

specialized public or public-private investment institutions. Questions of constitutional legitimacy are potentially most salient in the process of creating new institutional structures specifically for that purpose. It is therefore critical to approach democratic accountability as an integral part of the specific institution's design.

Operationalizing this dynamic concept of accountability entails determining which elements of institutional design are more—and which are less—effective in terms of strengthening the overall transparency and quality of governance of the relevant institution. The goal of this context-dependent determination is to identify governance mechanisms that would ensure an optimal balance between democratic constraints on an entity's decision-making and its ability to take autonomous market actions. Both are equally important for purposes of creating a successfully functioning public-investment institution.

Let's start with accountability constraints. This issue rarely arises in situations where the investment function is entrusted to some existing federal agency and is administered as a "normal" part of fiscal policy.[163] By contrast, extracting the investment function from the general fiscal policy toolkit elevates the importance of building discretion-limiting mechanisms into the design of the relevant institution.

The main advantage of acting through a separately chartered and capitalized investment arm is the ability to undertake a broader range of financial market activities in support of specific industrial policy objectives. But the governance model embedded in this option is inherently hybrid, as these entities' management structure tends to blend public accountability and private corporate governance tools.[164] Unlike traditional agencies conducting investment activities as fiscal policy agents, this type of a separately capitalized public-investment corporation must balance its public mandate to pursue macrolevel policy goals and its microlevel financial risk management. Therefore, such entity's statutory mandate must convey unambiguously the overarching purpose of its operations. The mandate's formulation should be sufficiently detailed to minimize the danger of misinterpretation yet not excessively formalistic. The statute needs to enumerate the institution's core functions, responsibilities and powers, and any normative and procedural conditions on the use of discretion

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[163] Examples of this public-investment mode include loans and grants disbursed by the U.S. Departments of Energy, Transportation, and Agriculture, and other agencies.

[164] *See* Omarova, *Industrial Policy*, *supra* note 20, at 35–37.

in their furtherance. In line with the familiar constitutional standards of congressional delegation, this would establish the baseline set of democratically imposed constraints on an entity's investment activities. The key, however, is to embed these constraints in the rich substantive milieu unique to the institution's role as an agent of public investment.

Another method of tethering a new investment institution to the democratic polity's will is through carefully designing its organizational structure and internal processes. Mandating function-focused organizational units within the entity's structure can help to prevent undesirable future shifts in its policy or operational priorities. The long-term drift-constraining impact of this seemingly mundane element of institutional design should not be underestimated. By creating administrative nodes charged with more concretely defined tasks, lawmakers harden the institution's commitment to policy values they deem critical to its overall mission. For example, including a statutory requirement that the institution have a professionally staffed department of applied research and technology signals the legislative intent to lead the market for financing publicly beneficial technological advances. Having a dedicated team focused on this aspect of the institution's investment mandate would make it a lot more difficult to abandon this commitment. Similarly, incorporating into the institution's structure a department of community outreach, explicitly tasked with maintaining continuous communication with the public at the local and national levels, would help to entrench the desired practices and create potentially durable new channels of external feedback.[165]

As these examples illustrate, institutional accountability is not a mechanical concept but a complex interplay of form and substance as well as preemptive restraint and policy-driven empowerment. On the empowerment side, this balancing exercise shifts attention to the task of insulating the entity's decision-making both from excessive interference by incumbent politicians and from capture by private interests.

Effective political insulation is an overarching design priority because of the public-investment institution's unique capital allocation capabilities, which invite abuse by political incumbents seeking short-term electoral gains. It is therefore necessary to

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[165] For an example of this approach to designing a public-investment institution, see OMAROVA, NATIONAL INVESTMENT AUTHORITY, *supra* note 22, at 27–28.

utilize the full range of bureaucratic mechanisms routinely associated with the notion of agency independence—but to do so with a focus on keeping public investment safe from politically driven distortion. As noted above, the choice of funding structure is one of the key factors in determining how independent the agency is in practice.[166] Thus, minimizing the entity's dependence on congressional appropriations becomes a means of protecting its fidelity to the statutory mandate. Similarly, appointment and removal of the institution's top personnel become not simply matters of applying standard principles of administrative or constitutional law but tools of insulating the institution's investment decisions from improper political interference. It may mean designing special preappointment procedures for more meaningful public vetting of the institution's leadership. It also militates strongly in favor of requiring cause for removing the entity's top officers. Their appointment terms should reflect the heightened significance of institutional continuity, market credibility, and capacity to make long-term investment commitments.[167]

The public-investment institution's efficacy as a financial market actor also depends on its ability to resist capture by private interests.[168] Acting not just as a passive source of grants and loans to private parties, but as their business partner and potential competitor, renders a public-investment entity vulnerable to improper influence by private market participants. This influence can be harder to detect and neutralize than the more familiar phenomenon of "regulatory capture."[169] Unlike traditional regulatory agencies, a public-investment body functions much like a private financial firm and works directly with private counterparties, forming deep ties within the industry and the broader economy. Its governance model is not fully public, and its incentives must be carefully balanced to prevent private financial interests from turning a public investor into a captive vehicle for

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166 *See supra* note 6 and accompanying text.

167 *See* OMAROVA, NATIONAL INVESTMENT AUTHORITY, *supra* note 22, at 24–25.

168 For classic expositions of the concept of capture, see MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION 141–48 (1965); and George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGM'T SCI. 3, 10–11 (1971).

169 *See* James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71, 79–80 (Daniel Carpenter & David A. Moss eds., 2014) (examining "cultural capture" of financial regulators); Saule T. Omarova, *Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation*, 37 J. CORP. L. 621, 629–32 (2012) [hereinafter Omarova, *Toward Tripartism*] (discussing the dynamics of regulatory capture in the financial sector).

absorbing privately lucrative financial risks. While no single governance mechanism can eliminate this danger, embedding multiple anticapture mechanisms into the institution's design is critical to ensuring its resilience.

Enhanced procedural transparency is particularly important in this respect. For instance, requiring periodic public reports and annual congressional testimonies by the institution's top brass would allow lawmakers and public interest advocates to assess the substantive outcomes and procedural integrity of its public-investment program. Regular audits of the institution's investment portfolio, conducted by the Government Accountability Office or by publicly established audit panels, would provide more granular information about how faithfully and efficiently the institution implements its policy mandate in practice.[170]

It is critical, however, not to disincentivize legitimate risk taking and thereby preclude pursuit of necessary but ambitious public-investment strategies. Freedom to undertake inherently risky financial activities, especially by making strategic equity investments in public infrastructure or emerging technologies, is indispensable to the success of public investment in today's world. The goal of institutional transparency is not to subject the public asset manager's business judgments to ex post second-guessing but to create durable institutional channels for an ongoing exchange and dialogue with the U.S. public, whose long-term interests that manager serves.

Accordingly, productive engagement demands more deliberately iterative and dynamic mechanisms of public feedback and communication built into the institution's governance. This may include establishing advisory councils to assist and serve as sounding boards for the public-investment entity on various technical and policy issues. Such advisory bodies are frequently set up to augment government agencies' expertise and resources, but they can also help to facilitate the flow of information between the public-investment entity and its multiple outside constituencies. Creating an independent public interest watchdog charged with monitoring and evaluating the implementation of public-investment programs would be particularly effective in this

[170] These audits should be tailored to the public-investment institution's unique profile and business model. Mechanically applying standard accounting concepts, suitable for a private business entity, to a public agency pursuing macrolevel economic goals would yield a distorted picture of the agency's performance and diminish its operational autonomy. One benefit of creating a special audit panel is to provide a platform for this tailoring exercise.

regard.[171] This body can provide a platform for the continuous public deliberation and assessment of the public-investment institution's efficacy and fidelity to its statutory mission.

As these examples illustrate, democratic accountability and operational efficacy are intimately linked. Many of the standard constraints on a public agency's activities can and should be used to empower that agency by insulating its investment decisions from corruption by various external forces, public or private. Defying bright line drawing, this fluidity reflects the fundamental hybridity of public investment. Recognizing and accommodating that hybrid quality is a prerequisite for designing a truly accountable and effective institution of public investment.[172]

CONCLUSION

This Essay examines the power of the U.S. government to engage in large-scale public investment and the accountability challenges associated with it. Despite the increasing salience of public investment as a tool of industrial policy, this subject has not been thoroughly addressed in legal scholarship or policy discourse. To fill this gap, we explore the origins and effects of the constitutional settlement, reached during the New Deal era, that affirmed the U.S. government's power to conduct large-scale public-investment programs through a variety of institutional and market means. Recovering this constitutional settlement is particularly urgent today, amid a sweeping legal assault on the modern administrative state and the heightened need for an effective national response to the economic and political challenges of the twenty-first century.

To address these challenges, we must focus on designing specific institutions of public investment in a way that ensures both their accountability to the U.S. public and their efficacy as market actors. As the Essay shows, multiple institutional design choices—

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[171] For a proposal to create a Public Interest Council modeled after a standing congressional commission and charged with providing input in the process of financial sector regulation, see Omarova, *Toward Tripartism*, *supra* note 169, at 659–69. For a proposal to incorporate such an entity in the design of a public-investment institution, see OMAROVA, NATIONAL INVESTMENT AUTHORITY, *supra* note 22, at 59–61.

[172] The Fed's organizational structure and governance offer an example of the embedded accountability model. Discussed mainly in terms of the Fed's independence, this model has long been a target of criticism and controversy. Because the Fed is not a public-investment institution of the type discussed in this Essay, we do not take a position in that debate. For our purpose, the Fed's experience is relevant as an illustration of the complexity and subtlety of balancing accountability and efficacy considerations in the context of a public entity with a market mandate.

including the composition and independence of management, the authorized forms of funding, and the corporate mandate—are levers that Congress can use both to execute national investment policies and to exercise control over their execution. It is here that policymakers need to focus their efforts to devise and implement a truly effective industrial policy for the United States. We hope that our Essay marks an important step toward that end.