



LAW AND JUSTICE

Regulatory Government Is Democratic Government

Conservatives want to thwart federal rule making, the way they shut down Biden's OSHA mandate for COVID. Here's one way to fight back.

by **James Goodwin**

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When the conservative movement [contrived](#) to pack the U.S. Supreme Court with right-wing ideologues, one of the goals was

to create a powerful ally in its [campaign](#) to dismantle the federal regulatory system, which we all [depend](#) on every day to safeguard our families, communities, and environment. With its recent [decision](#) in the emergency vaccine-or-test case, the Court's conservative supermajority gave its clearest signal yet that it will [advance](#) this campaign from the bench.

The unsigned majority opinion and the concurrence authored by Justice Neil Gorsuch, when read together, lay out a comprehensive blueprint for [defeating](#) regulation in the public interest. Significantly, the arguments they raise are firmly grounded in the long-standing conservative myth that the regulatory system lacks sufficient “democratic accountability.” Quoting the late Justice Antonin Scalia, the [concurrence](#) casts the stakes in stark terms, warning of “government by bureaucracy supplanting government by the people.”

If the conservative justices' frontal assault on our regulatory system were to succeed, the resulting harm would be incalculable. The vaccine-or-test standard alone would have [prevented](#) more than 6,500 deaths and 250,000 hospitalizations, according to the U.S. Department of Labor.

Less appreciated, though, the deconstruction of the regulatory system would also inflict serious harm on our system of democratic government. That's because, contrary to Scalia's glib canard, government by bureaucracy *is* [government](#) by the [people](#). Conservatives on and off the high court fundamentally misunderstand—and willfully misrepresent—federal agencies' role in responding to the public will and protecting the public interest.

Indeed, the regulatory system is quite literally [democracy in action](#), as it invites and empowers members of the public to work with their government to implement policies to keep our drinking water free of contaminants, ensure that the food on store shelves is safe to eat, prevent crooked banks from cheating customers, and much, much more. In fact, one of the defining attributes of the federal regulatory system, as the administrative law expert William Funk has [noted](#), is the myriad opportunities it offers for public participation throughout the policy implementation process, from agenda

setting to enforcement.

The best known of these opportunities is the [notice-and-comment process](#) under the [Administrative Procedure Act](#), which governs federal rule making. Other legally established avenues of civic engagement include [petitions to initiate rule makings](#), membership on [advisory committees](#), and [“citizen suits”](#) to enforce violations of rules.

Many agencies [go beyond](#) these legally required participatory opportunities in order to obtain public input to inform their actions, using such discretionary tools as [requests for information](#), [focus groups](#), and [public hearings](#).

Our regulatory system’s broad variety of participatory opportunities helps each of us find our own way to civic engagement. We can focus our energies on particular policy issues that we might find particularly compelling, such as climate change, student debt justice, or fair housing. And the manner in which we participate can vary according to our own skills, talents, and interests. We can, for instance, participate as a [community organizer](#) or a [citizen scientist](#), or simply by [telling stories](#) about our lived experiences.

The regulatory system, of course, has yet to live up to its democratic potential, and its public participation mechanisms do not adequately ensure that everybody’s voice is heard, particularly people in structurally marginalized communities. Corporate special interests overwhelmingly dominate the most [significant avenues](#) for public input, while working families and marginalized communities face [significant barriers](#) to participation.

More fundamentally, though, existing procedures are not designed to meet the public where it is at. By and large, agencies operate as [passive receptacles](#) of public input, a posture that effectively excludes many of those most directly impacted by regulatory actions.

The [Stop Corporate Capture Act](#), sponsored by Washington Representative

Pramila Jayapal, the current chair of the Congressional Progressive Caucus, would address some of these problems. If passed, it would provide the public with new legal tools to hold agencies more accountable when they fail to issue new safeguards authorized by law. It would also create an Office of the Public Advocate, which would help people participate in the rule-making process.

The regulatory system provides a crucial platform for Americans to collaborate in our ongoing project of self-government. If conservatives are so concerned with democratizing our regulatory system, then they should support the Stop Corporate Capture Act and take other steps to strengthen our regulatory system, not weaken it.

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