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Regulation as Social Justice

**A Crowdsourced Blueprint for
Building a Progressive
Regulatory System**

by James Goodwin

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Founded in 2002, the nonprofit Center for Progressive Reform connects a nationwide network of scholars with policymakers and allied public interest advocates. CPR pursues a vision of legal and regulatory policies that put health, safety, and environmental protection before private interests and corporate profit. With rigorous analysis, strategic engagement in public interest campaigns, and a commitment to social welfare, CPR supports thoughtful government action, ready public access to the courts, enhanced public participation, and freer access to information.

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Regulation as Social Justice

A Crowdsourced Blueprint for Building a Progressive Regulatory System

Introduction

On June 5, 2019, the Center for Progressive Reform hosted a first-of-its-kind, one-day [convening](#) that brought together a diverse group of more than 60 progressive activists and academics. Our purpose was to begin the process of developing a [progressive vision of the U.S. regulatory system](#) – one that is not only robust and responsive enough to meet the immediate challenge of protecting people and the environment against unacceptable risks, but that also is institutionally designed to promote the broader social goals of justice and equity.

Participants agreed that one of the important but often overlooked factors contributing to the nation’s most challenging social problems – growing economic inequality, racism, and the inability to come to grips with the climate crisis – is that our regulatory system is broken and ineffective. Consequently, to fulfill a progressive vision of society, advocates will need to pay special attention to [rebuilding and modernizing the regulatory system](#).

By protecting us all against a variety of health, safety, environmental, and consumer hazards, such a regulatory system would avert the kinds of harms that can amplify institutionalized injustice. Moreover, a stronger regulatory system that provides greater and more meaningful public participation opportunities would shift more political power to ordinary Americans, breaking up the near-monopoly of political power that corporate special interests now enjoy in the regulatory space.

We built the convening around a series of innovative “Idea Exchanges,” during which participants were invited to explore these ideas by drawing upon and sharing their unique expertise and experiences. These sessions consisted of structured small group discussions involving no more than eight participants, led by a facilitator, and including a dedicated scribe to carefully document the discussions. The first Idea Exchange session launched by asking participants “How do you see your advocacy work contributing to the goals of social justice and equity?” The second Idea Exchange session began with “What legal or other institutional changes would you make so that you are better able to promote social justice and equity as part of your advocacy work?” Following is a synthesis of the ideas prompted by these questions.

The Broken U.S. Regulatory System: The Progressive Community's Assessment

Progressive policy advocates identified four broad contributing factors that help explain the current weakened state of the U.S. regulatory system: weak and outdated laws; unnecessary implementation barriers facing agencies; excessive corporate influence; and obstacles to meaningful public participation.

Weak and Outdated Laws

The last few decades have seen Congress increasingly marked by a pattern of [asymmetrical polarization](#) in which conservative lawmakers have taken more extremist policy positions at the expense of serving the interests of their constituents, particularly the working poor and communities of color. These lawmakers bear the lion's share of the responsibility for Congress's ongoing failure to ensure that the federal government operates effectively and to address new and emerging threats to the public (e.g., [climate change](#))

through legislation. Despite the harms that result from this phenomenon, these members rarely face any political consequences for their inaction. In the absence of new legal tools, agencies instead resort to utilizing their existing authorities as best as they can, which often results in inadequate or incomplete protections.

These partisan dynamics have made the pursuit of compromise on legislation all but impossible. As a result, on the infrequent occasions that protective legislation is actually

passed, it has typically been watered down to the point that it is ineffectual and imposes no greater burden than affected industries are willing to tolerate (e.g., [toxic chemicals](#), [compounding pharmacies](#), etc.).

The working poor and communities of color are disproportionately harmed by weak and outdated laws. The members of these communities bear a disproportionate burden when these threats remain unaddressed through effective legislative action. These individuals also have little political power in Congress, as they are systematically excluded from meaningfully participating in the shaping of Congress's legislative agenda or in the development of the substance of individual bills.

Unnecessary Implementation Barriers

Even when protector agencies like the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), and the Occupational Safety

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and Health Administration (OSHA) do have sufficient legal tools to achieve their mission of protecting people and the environment, they must often overcome [significant obstacles](#) before those tools can be deployed. Frequently, these obstacles were created or are encouraged by corporate interests for the purpose of defeating or delaying regulatory action. Their continued existence, however, [translates](#) into concrete harms for ordinary Americans, especially the working poor and people of color who would otherwise enjoy the greatest benefits from strong regulatory protections.

'Hollowed Out' Agencies. The agencies charged with protecting the public have been consistently [starved](#) of necessary financial resources. Current tax policies coupled with the seemingly bottomless appetite for defense spending generate insufficient revenue to support even basic government functions. Broadly accepted “small government” ideology, when used as a rationale for starving protector agencies, strongly deters even modest efforts to increase agency budgets or the tax revenues to pay for them.

Relatedly, agencies also face a dire shortage of critical human resources. Large numbers of experienced expert staff are reaching retirement age or seeking employment opportunities outside of the federal government in response to deteriorating working conditions. This resulting “brain drain” will be especially [damaging](#) because shrinking budgets and formal hiring freezes have prevented agencies from attracting and cultivating new talent within their ranks to replace outgoing workers. Recent actions by the Trump administration have only reinforced this dynamic, with the institution of policies that have the effect, if not the intent, of making public service increasingly undesirable. These actions include [imposing contracts](#) that remove grievance procedures and telework options, instead of bargaining in good faith.

Systemic Delays. The number of procedural and analytical requirements and “veto gates” that agencies must navigate in order to implement their authorizing statutes has [grown inexorably](#) in recent decades. Similarly, for agencies that want to avoid carrying out their statutory mission, they may use these requirements as cover for slow-walking the implementation of new regulations. Administrative law, however, provides no real accountability measures for [inaction](#) or persistent delays.

Avenues of Interference. The three main inputs in regulatory policy formulation are science, economic impacts, and legal authority. Opponents of regulatory safeguards have devised strategies for manipulating each of these factors to delay new rules or advance their preferred policy outcomes:

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- **Politicized science.** Opponents of regulations have become adept at challenging agency science by demanding that regulatory decision-making meet [unnecessary and irrelevant standards](#). When this strategy has failed, these opponents have sought to [deny inconvenient scientific findings or censor them outright, including working to sideline career scientists](#). More recently, they have challenged the institution of science itself, baselessly calling into question its [objectivity and reliability](#).
- **Cost-benefit analysis.** Rather than provide an objective tool for understanding the economic impacts of proposed regulations, cost-benefit analysis was always intended as a vehicle for corporate interests to [attack common-sense safeguards](#). Its methodologies serve to distract attention from how regulations are necessary for protecting people and the environment against unacceptable harms by instead placing undue focus on industry profits. In this way, cost-benefit analysis empowers narrow industry interests at the expense of the public interest.
- **Judicial interference.** Bedrock administrative law doctrines such as [Chevron and Auer deference](#) and [nondelegation](#) have long stood as bulwarks to judicial activism by conservative judges looking to attack regulations they oppose on ideological grounds. The recent [takeover of the federal judiciary by conservative judges](#) ideologically hostile to federal regulation has placed these critical doctrines under threat of being reshaped or torn down altogether. Such changes would give these conservative judges nearly unfettered freedom to substitute their policy judgement for that of agency experts and demonstrated public needs and reject common-sense safeguards opposed by regulated industries.

Excessive Corporate Influence

At both the federal and state level, corporate special interests are able to exercise enormous influence over regulatory development and implementation. As a result, regulatory policies often benefit corporations at the expense of public welfare. In the worst cases, these policies produce a regressive wealth transfer that enables corporations to enjoy larger profits at the cost of harms to public harms and safety – costs that are disproportionately paid for by the working poor and communities of color. At the same time, this excessive corporate influence has the effect of drowning out the voices of ordinary Americans, especially those from marginalized communities, systematically precluding their meaningful participation in the regulatory system.

Congress. The U.S. Supreme Court's *Citizens United* decision exploded years of progress on campaign finance reform, establishing a [money-in-politics regime](#) in which corporations and the wealthiest Americans can use mammoth contributions to political candidates and political action committees (PACs) to buy the policies and legislation they want. This

excessive corporate influence helps reinforce the pattern of legislative inaction noted above. Anti-regulatory legislative tools such as [limitation riders](#) in annual appropriations bills and [Congressional Review Act \(CRA\)](#) resolutions of disapproval enable members of Congress to reward their donors by overriding regulations they oppose while largely evading public scrutiny.

Regulatory agencies. Corporate interests are able to use their superior financial resources to [dominate every step of the rulemaking process](#), effectively [drowning out the voices](#) of the people. Despite this dominance, opponents of regulatory safeguards have created institutions, such as the White House [Office of Information and Regulatory Affairs \(OIRA\)](#) and the [Small Business Administration's Office of Advocacy](#), that serve to amplify and reinforce industry's arguments against regulatory safeguards. A chronic lack of resources has contributed to undue corporate influence over agencies by forcing them to become [increasingly dependent on the industries](#) they are supposed to oversee for expertise on complex technical matters and even to outsource many oversight and compliance assurance activities to those industries as a cost-saving measure. The arrival of the Trump administration has seen corporate capture of agencies elevated even further, with former [industry officials](#) and [lobbyists](#) assuming leadership positions throughout agencies to an unprecedented degree.

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States. One way states seek to attract new businesses is by weakening regulatory standards, creating a ["race to the bottom"](#) dynamic that leaves their residents inadequately protected against unacceptable risks. Many [state economies are dominated by a few powerful industries](#), providing those businesses significant leverage to dictate regulatory standards.

Barriers to Meaningful Public Participation

At the same time that corporate influence over the regulatory system has increased, ordinary Americans are finding that the traditional avenues to participation are being systematically shut off or marginalized. The increasing costs to meaningful participation mean that the working poor and communities of color will be the first to be excluded from this process, all but ensuring that the results will not be sufficiently attentive to their concerns and perspectives.

Congress. The dominating influence of money in politics means that average constituents have no realistic chance of having their views heeded by their representatives in Congress when they conflict with the views of large contributors or key industries. Individuals can still exercise their

democratic power in the voting booth, but [gerrymandered](#) congressional districts and [systematic disenfranchisement](#), especially among the working poor and communities of color, have significantly diluted the voting power of those who desire real change.

Regulatory agencies. Meaningful participation in the rulemaking process can be [resource-intensive](#), forcing even the largest public interest advocacy organizations to forgo available participation opportunities and locking out individuals altogether. The substance of regulatory decision-making has become [increasingly technocratic](#), limiting meaningful participation to those with advanced training in law, economics, or science. And this disparity isn't equally distributed: The working poor and people of color tend to be more frequently excluded from the regulatory process than other Americans. It does not require a law degree to be poisoned by pollution, for example, but regulatory agencies are not geared to solicit, accept, or act on testimony about the *lived experience* of pollution's victims.

Courts. The Administrative Procedure Act, as well as a few environmental, consumer protection, and various other health and safety statutes, empower people to bring ["citizen suits"](#) to hold agencies accountable for fulfilling statutory mandates or to bring enforcement actions when regulated industries violate protective rules or standards. [Narrow standing](#)

[requirements](#) created by conservative federal judges have limited the ability of citizens to sustain such suits, blunting the power of these provisions. Litigation costs might also present a barrier to bringing certain kinds of citizen suits. While laws like the Equal Access to Justice Act can help defray these costs in certain cases, significant gaps in access to litigation costs remain. And helpful laws that do exist are [under attack by conservative lawmakers](#).

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State and federal [tort law](#), as administered by civil courts, offers a crucial backstop to weak or ineffective regulations or half-hearted enforcement. Acting at the behest of corporate interests, conservative judges, along with likeminded state and federal lawmakers, have successfully limited citizen access to the civil courts, including through the expansion of [forced arbitration](#). To further discourage civil lawsuits, they have resorted to such tactics as placing [arbitrary caps on available damages](#), thus reducing judgments to a small cost of doing business for scofflaw industries.

A Blueprint for Rebuilding a Progressive Regulatory System

Congress

Under our constitutional framework, the U.S. system of regulatory safeguards is a [product of congressional legislation](#). That means protector agencies cannot do their jobs well unless and [until Congress does its job well first](#). The U.S. Constitution also endows Congress with the responsibility of overseeing agency implementation of authorized public interest programs to ensure they are promoting the public welfare as effectively as possible. The influence of corporate money, however, has contaminated this aspect of Congress's work such that its [oversight function has devolved into politicized interference](#) aimed at preventing agencies from implementing broadly popular public safeguards. Achieving a progressive vision of the regulatory system will thus require fundamental reforms to Congress, as well.

Campaign finance reform. Congress is unlikely to pass legislation addressing new and emerging threats as long money as plays such an influential role in politics. In the absence of campaign finance reform, oversight will continue to be misused by members of Congress as a vehicle for rewarding corporate donors by attacking regulations they oppose, rather than as a legitimate tool for ensuring that the public interest is being served.

Policy development.

- Reversing the pattern of asymmetrical polarization that has come to define Congress will not be easy, thanks to the many structural forces that encourage and reinforce it. One important first step will be for all members of Congress – but especially conservatives – to cultivate and observe a new legislative culture in which bills are considered on the merits, rather than engaging in zero-sum-game politics that values short-term “wins” of blocking the opposing party’s legislative agenda ahead of working together to advance the common good. Several institutional changes would help ensure the viability of a more productive legislative culture, including campaign finance reform and measures to enhance Congress’s technical and policy capacity (such as [reviving the Office of Technology Assessment](#)).
- Authorizing committees should explore mechanisms for ensuring that environmental, consumer protection, and other health and safety statutes are designed to better account for their impacts on marginalized members of society, including the working poor and communities of color. These include ensuring that such legislation has an appropriate [place-based focus](#) and properly accounts for *cumulative impacts* on marginalized members of our society.

- Environmental, consumer protection, and other health and safety statutes must be designed to preserve state and local governments' authority to provide their citizens with protections that go beyond the "floor" established by federal regulations.

Budget process. The process by which Congress allocates tax dollars is fundamentally broken and must be overhauled so that we are better able to make necessary investments for improving our country, including by increasing resources for regulatory agencies.

Anti-regulatory gimmicks. Opponents of regulatory safeguards frequently employ anti-regulatory gimmicks like CRA resolutions of disapproval and limitations riders on appropriations bills to attack popular public safeguards as a means of rewarding their corporate donors. Such gimmicks also reinforce the hyperpartisanship that contributes to congressional dysfunction and undermine public esteem for Congress. While these devices

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in theory could be used to advance social justice, they are politically asymmetric, offering far more utility to opponents of regulatory safeguards. Because, on balance, progressive goals would be better served if these gimmicks no longer existed, Congress should take necessary steps to abolish them.

Regulatory Agencies

The heart of the regulatory system is the agencies themselves. A progressive regulatory system will require energetic and well-resourced agencies. It will also require the creation of a policymaking process that is institutionally designed to insulate agencies from undue corporate influence and that orients decision-making toward the promotion of social justice and equity as a guide star in agencies' pursuit of their respective statutory missions.

Capacity. Increased budgets will ensure that agencies have the financial resources they need to carry out their statutory missions in an effective and timely manner and for resisting *corporate capture* (i.e., so that they are not dependent on regulated industry for expertise and do not have to rely on outsourcing compliance and oversight activities to regulated industry). The president and Congress should explore needed personnel reforms that would enable agencies to attract and retain highly qualified legal, technical, and scientific experts to inform their work. These reforms should also give special attention to addressing the "brain drain" trend that many federal agencies are currently experiencing. The presence of strong labor unions and employee protections would also help safeguard grievance procedures and limit opportunities by political leadership to make changes that worsen federal civil service working conditions.

Policy development.

- Congress should enact new legislation to correct the asymmetry in administrative law that makes it easier to hold agencies accountable for action than for *inaction* – an asymmetry that systematically disadvantages regulatory beneficiaries. This legislation should seek to grant citizens enhanced and expanded rights to spur agency action on new regulations. Similarly, this legislation should grant citizens enhanced rights to hold agencies legally accountable for unnecessary delays in advancing rules that are already under development. Alternatively, federal courts should adopt a [less deferential approach](#) when evaluating agencies' rejections of citizen petitions for rulemakings.
- The president and Congress should take appropriate steps to [eliminate unnecessary procedural and analytical obstacles](#) that delay rulemakings and waste scarce agency resources without improving the quality of agency decision-making. These obstacles also enable corporate capture of agency decision-making. In particular, the president and Congress should consider eliminating or reforming the various requirements related to cost-benefit analysis and regulatory impact analysis, centralized review conducted by OIRA, and the many procedural and analytical requirements mandated by the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, the Unfunded Mandates Reform Act, and the Paperwork Reduction Act.
- The president, Congress, or agencies themselves should establish [new procedural mechanisms and institutions](#) for obtaining the perspectives of ordinary Americans, especially the working poor and communities of color, to inform their agenda-setting and regulatory decision-making. Rather than sitting back and waiting for responses that likely will never come, agencies should be under an affirmative duty to reach out to affected populations. New institutions should be created for the purpose of amplifying the voice of ordinary Americans in the rulemaking process. These institutions might include new kinds of task forces charged with explaining scientific and other policy-relevant data to the public in order to obtain better informed feedback or teams of local engagement staff who would work with community leaders to obtain a comprehensive understanding of a regulation's potential community-level impacts.
- The president, Congress, or agencies themselves should establish new procedural mechanisms and institutions for affirmatively learning about the harms faced by different communities – particularly those that are disproportionately populated by the working poor and people of color.

The president, Congress, or agencies themselves should establish new procedural mechanisms and institutions for obtaining the perspectives of ordinary Americans, especially the working poor and communities of color.

These efforts might include better use of targeted environmental monitoring, [supporting epidemiological research](#) and [citizen science](#) initiatives, and [tools for better accounting for the cumulative effects](#) of the different kinds of harms that those communities experience.

- The president, Congress, or agencies themselves should institute strong new [scientific integrity policies](#) that safeguard agency scientists against improper influence in their work, better insulate agency scientific research from politically driven policy development, and empower agency experts to communicate to the public directly about their work.
- The president, Congress, or agencies themselves should institute new [ethics reforms for agency leadership positions](#) to protect against conflicts of interest and abuses of authority by individuals who previously served as corporate officers or lobbyists in the industries they would be charged with overseeing. The president, Congress, or agencies themselves should likewise institute new [ethics reforms aimed at the other side of the “revolving door.”](#) These reforms would target abuses of authority or conflicts of interest among current agency officials who may become employed in the industry that the agency is charged with overseeing, or among former agency officials who have become so employed.

Enforcement.

- Increased budgets for agencies should include special attention to providing significantly [greater resources for enforcement activities](#). At the same time, there should be a [decreased reliance](#) on outsourcing enforcement and compliance oversight to third-party auditors and less use of industry “self-policing,” which serve to weaken accountability. To better leverage those additional resources, agencies should explore opportunities for greater coordination internally, as well as [externally with other agencies](#), using such methods as joint inspections, for example.
- Agencies should make greater use of their existing legal authorities to deploy [criminal enforcement](#) for regulatory violations, particularly against culpable individuals, including [responsible corporate officers](#). Congress should enact legislation granting agencies enhanced authority to employ criminal enforcement tools.
- Agencies should make greater use of their existing legal authorities to employ more non-traditional but effective enforcement tools such as [shaming and enhanced disclosures](#) by corporations of the harms their activities cause. Congress should enact legislation as necessary granting agencies enhanced authority to employ these and other kinds of non-traditional enforcement tools.

- Where applicable, federal agencies should conduct [more rigorous oversight of state enforcement activities](#). Consistent with their legal authorities, agencies should be more aggressive in withdrawing state enforcement powers or taking other corrective measures when state enforcement performance is demonstrably inadequate. Congress should enact legislation as necessary granting federal agencies enhanced authority to hold states accountable for their delegated enforcement activities.
- Congress should enact legislation that grants [expanded citizen suit opportunities](#) for holding corporations and individuals accountable for regulatory violations. Such legislation should also seek, to the extent legally feasible, to remove standing barriers, particularly those created by the courts, that block people affected by violations to bring suits requiring that the law be enforced.
- Congress should enact legislation that expands and enhances [protections for whistleblowers](#) who play a vital role in exposing regulatory violations.

Courts

The courts have long been recognized as the [“great equalizer”](#) – a venue where any ordinary American can hold the most powerful people or corporations

accountable for their misdeeds and the harms they cause. A progressive regulatory system will require courts to fulfill this role, complementing the protections that strong regulations provide while serving as a [backstop](#) when agencies are unwilling or unable to fulfill their statutory obligations. To achieve the kind of citizen-centered courts necessary for a progressive regulatory system, policymakers will need to eliminate existing barriers that prevent citizens from having full and meaningful access to bring their claims. This will include addressing non-constitutionally based standing requirements, as well as eliminating arbitrary constraints on achieving civil justice, such as [forced arbitration](#) and [damage caps](#).

At the same time, a progressive regulatory system will require judges who reject judicial activism by respecting the constraints on their role in mediating disputes over regulatory policies. Congress has never deputized federal judges to participate in the execution of legislation by authorizing them to substitute their policy judgment for that of the agencies, and for good reason. Judges by training and practice are generalists and do not wield the substantive expertise that agency decision-makers are able to bring to bear in policymaking. Doing so, moreover, contravenes the explicit instructions of Congress that agencies resolve matters of public policy. Accordingly, in a progressive regulatory system, federal judges must

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recognize the constitutional legitimacy of broad delegations of policymaking authority and respect the bedrock deference doctrines established in [Chevron](#) and [Auer](#). Nevertheless, the federal courts will remain one of the greatest near- and medium-term threats to a progressive regulatory system as the George W. Bush and Trump administrations have had [considerable success in seating judges](#) who are not just ideologically hostile to regulations in general but also willing to engage in judicial activism to strike down individual regulations that they oppose on policy or political grounds.

State Governments

In our federalist system of government, states are, at the very least, important partners in promoting the public welfare and, at the very best, [genuine innovators and pioneers](#) in delivering stronger protections and [advancing the goals of social justice](#) for their citizens. In practice, though, states have too often been a barrier to safeguarding people and the environment while serving as a vehicle for excessive corporate influence over the rulemaking process. A progressive regulatory system both promotes and respects the principles of federalism by demanding that states behave in a way more in line with the idealized vision of this division of responsibilities.

State Constitutions. A few state constitutions already contain provisions recognizing their [citizens' right to healthy environment](#). Citizens in other states can avail themselves of constitutional amendment procedures to include this provision in their own state constitutions. Such provisions would strengthen citizen efforts to fight any anti-regulatory policies that the state might attempt to pursue in the future.

Direct Democracy. Citizens should avail themselves of opportunities for statewide and local [ballot initiatives](#) to pursue progressive reforms of the state's regulatory system.

Policy Development. Public interest advocates in progressive states should pursue opportunities to work with state legislatures and governors to institute progressive reforms of the states' regulatory systems. These reforms might include creating [new mechanisms for engaging members of the public](#) – especially the working poor and people of color – in formulating policy agendas and developing new regulatory safeguards. State agencies in progressive states should also experiment with different approaches for incorporating a more *place-based focus* into their regulatory decision-making, including by giving special attention to the cumulative harms experienced by communities of color and low-income communities. These efforts can lead to a “bottom-up” approach in which state-level regulatory reforms in progressive states can help stimulate similar reforms at the federal level.